

Request for a contested case proceeding under ORS 183

Submitted by Oregon Toxics Alliance 12/4/09

Oregon Toxics Alliance (OTA) is an interested party to the applicability of a ruling by the Authority and hereby submits this petition to the Lane Regional Air Protection Agency to institute a contested case proceeding under ORS 183. The subject of this petition is Permit No. 206470, issued to Seneca Sustainable Energy, LLC (SSE) on October 9, 2009.

Oregon Toxics Alliance submits that Permit No. 206470 constitutes a rule or order issued by the Authority. We further submit that we have the right to petition the LRAPA Board for a contested case proceeding to determine the facts and the remedies regarding Permit No. 206470 in regards to meeting all the requirements of the Clean Air Act and the 1994 Executive Order 12898 on Environmental Justice, and to account adequately for public health concerns and operational faults raised during the public comment period. It is our position that Oregon Toxics Alliance, its members and residents in the neighborhoods located in West Eugene and Northwest Eugene will suffer irreparable injury from the issuance of the permit and the operation of the power plant.

Under ORS 183.415 persons affected by actions taken by state agencies have a right to be informed of their rights and remedies and are entitled to a public hearing.

The following relevant facts are now raised.

I. Major Source rules permitting two pollution sources under one aggregate permit:

Under LRAPA Rules Title 12, emissions must be aggregated and be regulated as a Major Source for an ACDP and Title V. A Major Source is defined as:

Except as provided in subsection B., [major source] means a source that emits, or has the potential to emit, any regulated air pollutant at a Significant Emission Rate. This includes emissions from insignificant activities. (Seneca Sustainable Energy, LLC (SSE) meets this criterion.)

Fundamentally, the Major Source definition in Title 12 lists the following criteria for permitting two pollution sources under one aggregate permit.

Addressing these criteria one at a time:

1. . . . any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties. (Seneca Sustainable Energy, LLC (SSE) and Seneca Sawmill meet this criterion as stated in the application)
2. . . . and are under common control of the same person (or persons under common control) (Seneca Sustainable Energy, LLC (SSE) and Seneca Sawmill meet this criterion as stated in the application)]
3. . . . belong to the same Major Group (i.e., all have the same two-digit code) as described in the Standard Industrial Classification Manual (U.S. Office of Management and Budget, 1987) *or support the major industrial group.*

This criterion is met because the Seneca Sawmill “support[s] the major industrial group” in light of the

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statement from SSE that 75% - 100% of boiler fuel will come directly from the adjacent mill as shavings, sawdust and hog fuel.

LRAPA maintains that the two facilities are independent and must be permitted as such, citing that each facility produces goods for a different consumer base (power in one case/milling byproducts in the other) and that this qualifies for two distinct operational codes. However, this is incongruous with statements provided by SSE. The two facilities will be connected by joint access to a fuel storage building and a traveling conveyor system that pulls fuel from the storage areas and dumps it into an outfeed conveyor which delivers fuel to the boiler infeed conveyor. The scenario in which Seneca no longer sells and distributes milling byproducts but rather incinerates them, and that this in fact reduces carbon emissions by lessening commercial traffic, has been the primary argument for the carbon neutrality of the facility. Furthermore, this argument is the basis for offering electricity to meet the requirements of Oregon's Renewable Energy Standard. If it is true that Seneca Sawmill plans to continue regular sales of milling byproducts to an off-site, distinct consumer base as LRAPA suggests, then the permit does not reflect accurate data about SSE's carbon and other pollution emissions.

To test the applicability of this criterion, the Authority must require a statement on the economic feasibility of running the SSE Co-generation plant using less than 50% of fuel from the Seneca Sawmill. Nor does the fact that SSE will sell its generated power on the grid negate the fact that the Co-generation facility is supported by the Sawmill. If it is true that milling byproducts will go directly to incineration, and that this will account for 75% of fuel or more, then LRAPA is incorrect in their determination of the sites as independent of one another. If SSE is not co-generation, then it should provide evidence that it plans to source its fuel from other providers and a cost analysis of whether the Co-generation plant is economically feasible without obtaining 75% of its fuel from the sawmill. OTA insists upon revisions in these areas, that the two facilities be included under a single aggregate permit, and that the current Permit No. 206470 be revoked until corrections are made to the emissions plans therein.

II. Condition 20 and 31: Determining HAP major source status:

On 9/4/09 Seneca Sawmill applied for and was granted a new HAP emission level that, according to LRAPA documents, will bring the HAP compounds generated at the total operation – sawmill and co-generation plant – below the limit of 25 tons/year from compound HAP sources and less than 10 tons/year from any single HAP source. The permit doesn't indicate how Seneca Sawmill will reduce their HAP emissions. Ostensibly, the reduction will come from reducing the need to burn fossil fuel to generate electricity by substituting steam supplied by the adjacent co-generation facility. If so, the reduction in HAP pollution from the Sawmill is dependent on the supporting relationship between the two facilities, and if not, LRAPA was arbitrary and capricious in granting the reduction limits. Furthermore, if the HAP reduction is dependent on the supporting relationship between the two co-owned facilities, this fact builds additional evidence to suggest that the two pollution permits must be aggregated into one pollution permit for Seneca Sawmill and SSE, and regulated as such. Granting the “federally enforceable permit conditions” for HAP reductions less than one month before issuing the permit for the SSE co-generation plant, *and after public comment on the issue of the aggregate permit*, gives the appearance that the reduction was granted to circumvent and trivialize the problem.

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The specific relief request is to rule that the source is a Major Source for HAP emissions.

III. Condition 2: BACT – Best Available Control Technology

OTA contends that LRAPA has not required a sufficiently thorough analysis of what would constitute BACT technology for the SSE Permit.

According to Condition 7 of the SSE permit, “The boiler is subject to the federal New Source Performance Standards (NSPS) for Stationary Boilers, 40 CFR 60, Subpart Db, *for particulate (only)* and shall comply with all applicable requirements. [40 CFR 60b(a)] ” (emphasis added, although the permit document includes the parenthesis)

Per **Section 14-160**, the LRAPA Board is asked to rule on whether LRAPA must provide a top-down analysis of technical, energy, environmental, health and economic impacts of all emission control technology for the purpose of determining which will provide the greatest level of emission control, or Best Available Control Technology. BACT is defined as the most effective technology that demonstrates that no emissions are in excess of any emission standards established under the New Source Review and National Emissions Standards. This analysis should be performed for criteria air pollutants, particularly NO_x and CO, not “*only*” particulate.

The BACT analysis is important for pollutants that have known adverse impacts on public health and air quality, particularly due to the location of the SSE facility close to a densely populated urban area.

Among numerous air pollutants that will be emitted from the SSE power plant, CO and NO_x call for BACT analysis and special emission control attention for several reasons:

1. Although neither CO or NO_x are considered greenhouse gases (GHG's), both are known to be precursors to GHG's. Carbon monoxide elevates the atmospheric concentrations of ozone and methane (a greenhouse gas with a global warming potential 25 times that of CO₂). Also, CO is eventually oxidized to CO₂ which is a GHG. NO_x are also involved in production of tropospheric ozone, which can act as a GHG, and is regarded as an air pollutant (WHO, EPA). NO_x react further with VOC to produce photochemical smog, a form of air pollution that is especially detrimental to people suffering from respiratory diseases. In addition, NO_x are the major precursors of acid rain.

The US EPA has declared that carbon dioxide is an air pollutant and will soon regulate carbon dioxide and other greenhouse gases. However, CO and NO_x are known precursors to GHG's, yet the Seneca Sustainable Energy facility is selling its energy under the Renewable Energy Standard and has called its operation “green” and “carbon neutral” energy production. The point is that the SSE should be held accountable for taking steps to reduce their contribution to carbon dioxide pollution and GHG formation.

2. Situated in the Willamette valley and surrounded by hills and mountains, Eugene is prone to an atmospheric phenomenon called thermal inversion. What this means is that during the occurrence

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of thermal inversion, atmosphere is capable of capturing and trapping air pollutants at higher concentrations, and in permanent suspension, which can cause respiratory problems.

LRAPA recognizes the significance of this problem in its literature; now it must account for these conditions in its permitting. According to the 2008 Annual LRAPA report:

“Many of the inland areas and mountain valleys experience periods of air stagnation. When this happens during winter months, cold air often becomes trapped near the valley floor with slightly warmer air aloft, creating temperature inversion conditions. The combination of cold, stagnant air and restricted ventilation causes air pollutants to become trapped near the ground. Wintertime temperature inversions contribute to high particulate levels, while summertime inversions contribute to increases in ozone levels, both causing the local air quality to deteriorate (page 8).”

3. LRAPA states that it determined that “best combustion practices” met the triggered BACT analysis for CO. However, a significantly higher reduction of NO_x and CO emissions than one proposed by SSE is a viable option. Air control technology called RSCR that reduces NO_x by 75%, and CO by at least 60% is available, and proven in practice. Instead, LRAPA’s construction permit approves the use of an older technology called SNCR that reduces NO_x by no more than 45% and is not effective in case of CO. Major arguments used by SSE and accepted by LRAPA are somewhat deceptive:

- RSCR requires additional fuel for the operation. SSE presumed the use of a fossil fuel, and reported associated CO₂ emissions. In fact, RSCR is fully optimized for the substitution of natural gas with carbon neutral bio-diesel.
- SSE claims that RSCR uses anhydrous ammonia as a reagent, which is a hazardous chemical and requires special attention for safe storage and handling. Instead, RSCR uses aqueous ammonia solution (19%), which has comparable health and safety properties to urea – a reagent used by SNCR.
- RSCR cost estimates provided indicate a faulty cost analysis on the part of SSE. For example, annual RSCR operating costs are less than \$500,000, instead of the \$1.7 million stated by Seneca. The total cost per megawatt of generated energy would amount to \$5 and \$6.5, not the \$10 claimed by the company. In addition, catalyst life is longer than stated by SSE.
- RSCR technology should be the best available control technology (BACT) for CO generated by a biomass plant situated within the urban growth boundary of a populated metropolitan area, especially in light of credible public testimony urging LRAPA to require air discharge control that will better protect local air quality and public health. LRAPA ignored this testimony and didn’t require the applicant to provide a factual, third-party analysis of the control technology options. SSE must be held responsible for providing accurate and up-to-date economic, environmental and energy analysis.

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- According to page 10 of the LRAPA 2008 Annual Report “In Lane County, three criteria pollutants have historically been of concern: particulate matter, ozone, and carbon monoxide.” Ozone is formed when NO_x reacts with other pollutants in the presence of sunlight. Thus, prevention and reductions of NO_x and ozone can be best achieved by using control equipment that significantly reduces NO_x emissions. Better control technology is available to reduce NO_x by 75%.
- The construction phase is the best time to work with a permittee to reduce air pollution and greenhouse gases to the greatest degree possible. It is most cost effective to require the air pollution equipment at the beginning of the process than later, when the facility will not have the flexibility to change emission control systems. This is particularly important in regards to PM_{2.5} and CO emissions.

The remedy we request is to require SSE to perform a third-party analysis of technical, energy, environmental, health and economic impacts of all emission control technology with accurate and updated information for the purpose of determining which will provide the greatest level of emission control, or Best Available Control Technology for CO and NO_x (ozone), as well as PM₁₀ and PM_{2.5}.

IV. Emission Limits, Sampling and Standards for Particulate Matter

OTA challenges the permit because the monitoring protocol and outcome for non-compliance for emissions of PM₁₀ or less, is unsatisfactorily defined, arbitrary and does not require sufficient data collection to achieve statistical significance. Furthermore, the permit is not clear about the ability of LRAPA to fully enforce the emission levels described in the permit: According to the permit (p. 10) “Emission factors listed in Conditions 16, 30.a Table 2, and the Attachment specified in 31.a *are not enforceable limits* unless otherwise specified in this permit.” (emphasis added) Thus, the permit doesn’t account for how LRAPA will ensure that Lane County does not exceed ambient levels of PM_{2.5}. Page 15 of LRAPA’s 2008 Annual Report indicates that Lane County is already close to exceeding the federal PM_{2.5} standard of 35 micrograms per cubic meter.

Condition 11 seems to not meet the applicable standard, as written:

11. Particulate matter less than 10 microns from the boiler shall not exceed 0.008 lb/MMBtu, except during a startup or shutdown. The permittee shall demonstrate compliance with this limit using the initial performance test required in Condition 32, and a source test to be conducted annually thereafter, and on the following test schedule. [LRAPA 42-0041-2 avoidance]

a. An annual test thereafter to demonstrate compliance with 0.008 lb/MMBtu limit and to determine process parameters affecting those emissions.

b. If an annual test performed under Condition 11 a exceeds 0.008 lb/MMBtu, then the permittee must conduct three (3) quarterly tests in accordance with Condition 32 at three (3) month intervals.

The permittee shall be in compliance with Condition 11.a. when:

(1) Final results of anyone of the subsequent three (3) quarterly tests is less than

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0.008 lb/MMBtu, however, all three (3) quarterly tests shall be completed, or

2) The results from the annual test performed under Condition 11 a averaged with the three (3) quarterly tests is less than 0.008 lb /MMBtu.

The permittee is not considered out of compliance with this condition unless the average of the four tests exceeds 0.008 lb /MMBtu. When the average of the four tests is greater than or equal to 0.008 lb /MMBtu then the permittee shall continue to conduct quarterly tests until there are four (4) consecutive tests where each is less than or equal to 0.008 lb /MMBtu. Testing shall then revert to annually as specified in Condition 11a.

The permit is deficient in the following particulars:

The permit's monitoring protocol is insufficient to guarantee air quality protections. For example, the permit only requires an annual test; if the test exceeds the limit of 0.008 lb/MMBtu, then SSE is required to conduct quarterly tests. It is considered a failure *only if the average* of the three quarterly tests are below the limits. In the fourth quarter, SSE could pollute over the limit, but it would not be held accountable for particulate emissions that create increased public exposure and a degradation of air quality. The permit is inadequate because it only requires more testing until a level is detected below or equal to the standard. Furthermore, if testing demonstrates that limits were exceeded, the permit's "remedy" is to conduct further testing. This is a recurring process, which provides no corrective action or remedy for air quality protections.

Malfunction needs to be specifically defined and addressed because a plant could be malfunctioning without reporting since the testing is only required on a sporadic basis. High monitoring points could be considered a malfunction, however, the permittee could avoid reporting the high point as a malfunction because it is allowed to average the reporting points. Also, the testing protocol does not define how the data will be collected to attain statistical significance. The sampling must be random and collected throughout the entire year at close time intervals on a daily and weekly basis. The number of samples required for analysis must be at least 30 to assure that a 95% confidence interval applies to reported values. Furthermore, the number of high points must be collected and identified for the purpose of determining patterns of potential malfunctions. The most accurate data collection is a continuous collection.

If the sampling and data analyses are not properly and scientifically defined, the emissions and other pollutant sources are not correctly monitored and may mislead to a false "under control" or "under the permit limits" status. Scientific data require scientific thoroughness, which is not apparent in the permit. If the data are reported without statistical significance, and no subsequent corrective action is required, how can this permit truly address control of PM and protection of public health?

Condition 16 - Start Up and Shut Down: OTA objects to the conditions of the permit, which allow PM emissions 30 times greater than the normal operating levels. Essentially, PM emissions of 0.24 lb/MMBtu are excessive. Condition 8 requires notification of more than ten start-ups and shut downs, but does not define the consequences of overages.

Condition 21 of the permit doesn't specify the location of monitoring equipment and the location of the

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opacity monitor. Placement of the monitoring equipment significantly affects the data measurements.

The requested relief is to review the emission limits, sampling protocol, standards for Particulate Matter in Permit No. 206470, define emission limits enforcement actions, and to make changes to address the comments in this document.

V. Environmental Justice and Public Health Protection

Per Section 14-160, the LRAPA Board is asked to rule on whether the Authority was unresponsive to community requests for attention to concerns that emissions from the plant will increase the environmental inequities already affecting racial minorities, low-income families and disabled residents in West Eugene. OTA submitted evidence to support this statement. LRAPA has not produced any credible documentation to the contrary. Nor has LRAPA's Director taken steps to correct inaccuracies in maps that LRAPA commissioned from LCOG for the purpose of refuting OTA's claims.

As stated above, it is our position that Oregon Toxics Alliance, its members and residents in the neighborhoods located in West Eugene and Northwest Eugene, will suffer irreparable injury from the issuance of the permit and the operation of the power plant.

We contend that LRAPA's decision does not comply with the requirements of Executive Order 12898.

In July 2009, OTA, Centro Latino American and the Oregon Chapter of the American Lung Association requested that EPA Region 10 facilitate an Alternative Dispute Resolution process to help resolve the related air quality and environmental justice issues. A letter was received from Ted Yackulic, EPA Assistant Regional Counsel, on 10/20/09 that confirms LRAPA's refusal to participate in the process. The letter to OTA from the EPA states:

“While we believe that facilitating the use of ADR in response to your request would likely have been valuable to all of the relevant stakeholders, we have concluded that ADR in this instance is not likely to be successful. . . . Our conclusion did not come easily and rests upon LRAPA's and Seneca Sustainable Energy's assertions that neither would participate in an ADR process related to the permit application. LRAPA articulated this position to the EPA during a meeting on September 14, 2009. This meeting was attended by representatives of EPA, LRAPA and the Oregon Department of Environmental Quality and initiated by LRAPA.”

The relief requested is to for LRAPA to honor its mission, which includes responsiveness to community concerns, and to enter into a stakeholder process to address environmental justice concerns expressed by many members of this community.

Air Toxics Monitoring. Although not specifically covered in Permit No. 206470, the issue of air toxics monitoring in West Eugene has been a primary and well articulated request at many of the public hearings and public input events leading up to the issuance of the SSE permit. Thus, OTA raises the issue again under this request for a contested case hearing. The petitioners acknowledge that the LRAPA Board voted to install an air toxics monitor in West Eugene at their 11/10/09 meeting.

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The public, particularly residents of West Eugene, and Oregon Toxics Alliance and Centro Latino Americano, request that, as LRAPA initiates plans to place an air toxics monitor in West Eugene for the purpose of collecting ambient air toxics data, that LRAPA staff continue to consult with community members and NGO's already on record regarding this request and devote ample staff time to secure funding for a permanent air toxics monitor. LRAPA staff should be required to report annually to the Board and to the public the necessary steps taken to pursue grant opportunities and the outcome of those pursuits.

VI. Improper use of Staff as a Hearings Official

On July 30, 2009, LRAPA held a public hearing for the purpose of taking public testimony and to develop the public record. Sandra Lopez, LRAPA's Permit Coordinator and staff person who ostensibly wrote the Seneca Permit No. 206470, served as the Hearings Official. It is the responsibility of the Hearings Official to be unbiased, to refrain from ex parte contact, to declare ex parte contact, and to declare any conflict of interest in the case. It is the duty of the officer presiding at the hearing to consider all issues properly before in the case and the correct apply the laws or rules to those facts. Ms. Lopez likely had contact with the applicant and has a conflict of interest because it was her assignment to write the air pollution permit. It is not clear what training or certification Ms. Lopez has received to serve as a Hearings Official. OTA contends that LRAPA's use of their own permit writer as the Hearings Official constitutes bias in the public process.

Conclusion and Statement of Specific Relief Requested

Oregon Toxics Alliance has raised objections to the construction of the Seneca Biomass Co-generation plant on the grounds that it is permitted improperly and that the pollution controls slated for use on the facility are insufficient to offset the negative impact it will have on the local environment and public health. We have stated clearly that emissions from the facility will diminish livability, pollute the environment through air and land deposits, and will serve to increase the environmental inequities already affecting racial minorities, low-income families and disabled residents in West Eugene. Oregon Toxics Alliance has presented solid evidence in support of these objections on numerous occasions.

Whereas these issues have not been resolved upon the issuance of Permit No. 206470, and as a preface to engaging in legal actions against LRAPA, therefore let this document serve as Oregon Toxics Alliance's request for this specific relief, that the LRAPA Board of Directors to rescind the agency's decision to grant Permit No. 206470 to Seneca Sustainable Energy, LLC., until a thorough review and resolution of each objection expressed herein.

Futhermore, this request is submitted on behalf of other state and local NGO's who have requested participation through the EPA's ADR request and Eugene residents who signed petitions requesting Alternative Dispute Resolution, air toxics monitoring, more effective air pollution controls and attention to anticipated public health impacts from the additional air pollution to the local airshed from SSE Co-generation plant (names provided upon request).

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