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**NOV 02 2012**

DEQ Hearings Coordinator

DOCKET NO. 0101-12-04

BEFORE THE BOARD OF ENVIRONMENTAL QUALITY

STATE OF IDAHO

HIDDEN HOLLOW ENERGY LLC,

Petitioner,

vs.

IDAHO DEPARTMENT OF  
ENVIRONMENTAL QUALITY,

Respondent.

Permit Nos. P-2009.0001, T1-2011.0128

**PETITION TO INITIATE CONTESTED  
CASE**

**ATTENTION: HEARING COORDINATOR**

**I. INTRODUCTION**

1. Hidden Hollow Energy LLC (“HHE” or the “Petitioner”), by and through its counsel of record, Moffatt, Thomas, Barrett, Rock & Fields, Chartered, hereby formally petitions the Idaho Board of Environmental Quality (the “Board”) for a contested case

proceeding involving the above-referenced permits pursuant to Idaho Code Section 39-107(5), Rules 001.03, 100, and 211 of IDAPA 58.01.23, and Rule 003 of IDAPA 58.01.01.

2. In summary, and as this Petition will explain in more detail, HHE owns and operates a landfill gas-to-energy (“LGTE”) facility located within the Ada County “Hidden Hollow” Landfill (the “Landfill”).

3. HHE’s LGTE facility processes Landfill gas provided by Ada County in order to produce electricity for the consumer power grid.

4. Landfill gas not processed by HHE is routed to and combusted by two flares owned and operated by Ada County.

5. While HHE and Ada County’s flares combust Landfill gas from the same source (the Landfill itself), the Idaho Department of Environmental Quality (“DEQ”) has adopted disparate requirements in the air permits it has issued to HHE and Ada County.

6. More specifically, in Permit Nos. P-2009.0001 and T1-2011.0128 issued by DEQ to Ada County (the “Ada County Permits”), DEQ limits the allowable concentration of hydrogen sulfide (“H<sub>2</sub>S”) within the Landfill gas combusted in the Ada County flares to 600 ppm, and does not require the installation of a H<sub>2</sub>S removal system.

7. By contrast, and despite the fact that HHE processes Landfill gas from the same source that is combusted by the Ada County flares and that, as owner and operator of the Landfill and Landfill gas collection system, Ada County has more control over the quality of the Landfill gas than does HHE, on June 19, 2012, DEQ issued Permit No. P-2009.0098 to HHE (the “HHE Permit”), which limits the concentration of H<sub>2</sub>S within Landfill gas processed by HHE to 180 ppmv, and which requires installation of a H<sub>2</sub>S removal system.

8. HHE files this Petition regarding the Ada County Permits in order to ensure consistent regulation and treatment of HHE and the Ada County flares, given that they utilize Landfill gas from the same source, that Ada County has more control over the quality of the Landfill gas processed by HHE, and that HHE has filed a similar petition in Docket No. 0101-12-02, the results of which could affect the Ada County Permit.

## II. PRELIMINARY MATTERS

9. Copies of all pleadings and other correspondence in this matter should be served upon counsel for HHE as follows:

Dylan B. Lawrence  
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.  
101 S. Capitol Boulevard, 10th Floor  
Post Office Box 829  
Boise, Idaho 83701-0829  
Telephone: (208) 345-2000  
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## III. IDENTITY OF THE PARTIES

10. HHE is a Delaware limited liability company, duly registered to conduct business in the state of Idaho. HHE's address is Hidden Hollow Energy LLC, One North Lexington Avenue, Suite 620, White Plains, New York 10601.

11. Pursuant to Article IV, Section 20, of the Idaho Constitution and Idaho Code Section 39-104(1), DEQ is an executive department and administrative agency of the state of Idaho, with its principal offices located at 1410 N. Hilton, Boise, Idaho 83706-1255. DEQ, through its Director and subject to the oversight of the Board, is responsible for the general supervision of the promotion and protection of the environment within the state of Idaho, including the issuance of air emissions permits. IDAHO CODE §§ 39-104 – 39-106.

12. While not currently officially a party at this stage of the proceedings, Ada County is a duly organized county pursuant to Article XVIII of the Idaho Constitution and Title 31 of the Idaho Code. Ada County's address is: Board of Ada County Commissioners, Ada County Courthouse, 200 West Front Street, Room 3255, Boise, Idaho 83702. Ada County owns and operates a solid waste disposal facility, commonly known as the Hidden Hollow Landfill, at 10300 North Seaman's Gulch Road, Boise, Idaho 83714. This is the Landfill that is the subject of this Petition.

#### IV. JURISDICTION AND STANDING

13. Petitioner brings this action pursuant to Idaho Code Section 39-107(5) and the Rules of Administrative Procedure before the Board of Environmental Quality, IDAPA 58.01.23, *et seq.* ("DEQ Rules of Procedure"). The Board has jurisdiction of contested cases involving actions or inactions by the DEQ pursuant to DEQ Rules of Procedure 001.03, 100, and 211 of IDAPA 58.01.23, and Rule 003 of IDAPA 58.01.01.

14. DEQ issued Permit No. P-2009.0001 on September 28, 2012, and issued Permit No. T1-2011.0128 on October 19, 2012. Therefore, pursuant to Rule 100 of IDAPA 58.01.23, this Petition is timely.

15. Idaho Code Section 39-107(5) provides:

Any person aggrieved by an action or inaction of the department shall be afforded an opportunity for a fair hearing upon request therefor in writing pursuant to chapter 52, title 67, Idaho Code, and the rules promulgated thereunder.

16. DEQ's rules governing contested case appeals define an "aggrieved person" as follows:

Any person or entity with legal standing to challenge an action or inaction of the Department, including but not limited to permit

holders and applicants for permits challenging Department permitting actions.

IDAPA 58.01.23.010.01.

17. As explained more fully below, HHE has standing to initiate this contested case due to the substantial relationship between the respective operations and air permits of HHE and Ada County.

18. HHE has owned and operated its LGTE facility at the Landfill since 2008, when it acquired the facility from G2 Energy Hidden Hollow, LLC (“G2”).

19. Under the ownership and operation of both G2 and HHE, the LGTE facility has been converting Landfill gas to energy since approximately 2006.

20. HHE operates the LGTE facility at the Landfill pursuant to that certain “Amended and Restated Landfill Gas Franchise Agreement,” dated February 22, 2011 (the “Franchise Agreement”), which incorporates as Annex B that certain “Amended Facility Site License Agreement [and] Amended Right of Way and Operating License Agreement,” dated February 22, 2011, which incorporates by reference that certain “Facility Site License Agreement [and] Right of Way and Operating License Agreement,” between Ada County and G2 dated September 27, 2005 (the “License Agreement”).

21. Pursuant to the Franchise Agreement and the License Agreement, Ada County authorizes HHE to occupy a small tract of land within the 2,700-acre Landfill property for the operation of HHE’s LGTE facility.

22. Pursuant to the Franchise Agreement, Ada County is obligated to deliver Landfill gas produced by the Landfill and collected by its Landfill gas collection system to HHE’s LGTE facility through September 30, 2031.

23. Pursuant to the License Agreement, HHE sells the power generated by its LGTE facility to Idaho Power pursuant to that certain "Firm Energy Sales Agreement," dated October 11, 2005, between Idaho Power and HHE's predecessor-in-interest which was approved by the Idaho Public Utilities Commission on December 6, 2005, pursuant to its Order No. 29928.

24. The source of the Landfill gas combusted by HHE's LGTE facility or, alternatively, by Ada County's flares, is the same. In other words, all gas combusted either by HHE's LGTE facility or by the Ada County flares originates from the Landfill and is collected and supplied by Ada County's Landfill gas collection system.

25. As the owner and operator of the Landfill, Ada County controls the waste streams that are disposed in the Landfill.

26. Therefore, as between Ada County and HHE, Ada County has more control over the quality of the Landfill gas that it provides to HHE.

27. However, DEQ has required HHE to install a H<sub>2</sub>S removal system that will achieve a 180 ppmv H<sub>2</sub>S concentration in the Landfill gas processed by HHE, while it has not required Ada County to remove H<sub>2</sub>S from the Landfill gas at all.

28. Requiring HHE to install a H<sub>2</sub>S removal system to treat Ada County's Landfill gas from the 600 ppm concentration in the Ada County Permits to the 180 ppmv concentration required by the HHE Permit threatens the economic viability of HHE's LGTE facility.

29. In addition, the fact that HHE's LGTE facility and Ada County's flares combust Landfill gas from the same source that is subject to such disparate H<sub>2</sub>S limitations, and that Ada County provides the Landfill gas to HHE pursuant to contract, establishes that HHE has a real and substantial interest in the Ada County Permits.

30. Moreover, HHE has filed a Petition to Initiate [a] Contested Case (Docket No. 0101-12-02) involving the HHE Permit.

31. One of the issues HHE has raised in that proceeding is DEQ's prior "Facility Decision" of August 12, 2011, in which DEQ concluded that HHE's LGTE facility and the Ada County flares are separate sources of air emission for air dispersion modeling purposes.

32. The Ada County Permits, like the HHE Permit, are based upon the Facility Decision.

33. Therefore, the resolution of HHE's petition in Docket No. 0101-12-02 could affect the Ada County Permits.

34. Based on the foregoing, HHE has standing to file this Petition.

## **V. FACTUAL AND LEGAL ALLEGATIONS**

### **A. General Allegations**

35. Pursuant to the series of contractual agreements previously described herein, Ada County provides Landfill gas to HHE for combustion and processing in HHE's LGTE facility, which is located within the Ada County Landfill.

36. HHE uses two existing engines to combust the Landfill gas through its LGTE facility. Prior to combustion, the LGTE process also includes dewatering, compression, cooling, and filtration of the Landfill gas.

37. Landfill gas that is not processed by HHE is combusted by Ada County using its two enclosed flares, which are located approximately 23 meters from the emissions stacks associated with HHE's LGTE facility.

38. Although the source of the Landfill gas combusted by HHE's LGTE facility and Ada County's flares is the same, the DEQ has applied different H<sub>2</sub>S limitations to the Landfill gas combusted by Ada County and HHE.

39. More specifically, Conditions 7 and 4.3 of the Ada County Permits limit the concentration of H<sub>2</sub>S in Landfill gas combusted by Ada County's flares to 600 ppm.

40. By contrast, the HHE Permit limits the concentration of H<sub>2</sub>S in Landfill gas combusted by HHE's engines to 180 ppmv. *See* HHE Permit Condition 7.

41. Without HHE's LGTE facility, Landfill gas that would have been converted to energy by HHE is instead combusted by Ada County's flares, where it is subject to the higher 600 ppm concentration limit.

42. Utilizing Landfill gas to produce energy through HHE's LGTE facility is better for the environment than simply burning the gas in Ada County's flares with no end use, because HHE's LGTE facility produces power for the consumer power grid that would otherwise have to be produced by other means, while the Ada County flares do not.

43. In addition, HHE's emissions stacks exhibit better dispersion characteristics and therefore produce less pollution at the boundary of the Ada County Landfill than do Ada County's flares.

**B. Count One: Failure To Require H<sub>2</sub>S Removal**

44. The Ada County Permits do not require Ada County to install a H<sub>2</sub>S removal system.

45. By contrast, Condition 13 of the HHE Permit requires HHE to install a H<sub>2</sub>S removal system in order to achieve the 180 ppmv H<sub>2</sub>S concentration limit in Landfill gas processed by HHE.

46. Because HHE and Ada County's flares utilize Landfill gas from the same source, and because Ada County has more control over the quality of the Landfill gas than does HHE, it is arbitrary and capricious for DEQ to impose such disparate H<sub>2</sub>S treatment requirements upon Ada County and HHE.

47. Therefore, Ada County should be required to install a H<sub>2</sub>S removal system.

**C. Count Two: The Ada County Permit Is Based Upon DEQ's Prior Separate Source Determination**

48. In adopting the disparate H<sub>2</sub>S limitation and treatment requirements, DEQ relied upon and applied various regulatory guidance letters and memoranda authored by the U.S. Environmental Protection Agency ("EPA"), including, but not limited to, that certain "Memorandum" dated June 22, 2007, from Stephen D. Page to EPA's Regional Air Division Directors.

49. Based in part upon the EPA memoranda, DEQ determined that, for modeling purposes, the "ambient air" associated with Ada County's flares is different than the "ambient air" associated with the HHE LGTE facility, pursuant to the definition of "ambient air" in IDAPA 58.01.01.006.10.

50. More specifically, DEQ determined that for Ada County's flares, there is no "ambient air" within the boundaries of the entire Ada County Landfill. Instead, according to DEQ, the ambient air for the Ada County flares is external to, and begins at, the boundaries of the Landfill.

51. By contrast, for HHE's facility, DEQ determined that the ambient air includes the entire Landfill site, except for the small parcel occupied by the HHE LGTE facility.

52. The disparity between the 180 ppm H<sub>2</sub>S limitation as applied to HHE and the 600 ppm H<sub>2</sub>S limitation as applied to Ada County is a result of DEQ's application of differing "ambient air" boundaries to HHE and the Ada County flares and of DEQ's prior "Facility Decision" of August 12, 2011, which concluded that HHE's LGTE facility and the Ada County flares are separate sources of emissions for air modeling purposes.

53. DEQ's application of differing ambient air boundaries to HHE and the Ada County flares violates the definition of "ambient air" in IDAPA 58.01.01.006.10.

54. In addition, DEQ's Facility Decision is based upon a misapplication of EPA's guidance memoranda.

55. HHE has filed a Petition to Initiate [a] Contested Case as to the HHE Permit (Docket No. 0101-12-02), which raises many of these same issues.

56. By filing this Petition, HHE seeks to ensure that there is consistent regulation and treatment of Ada County's flares and HHE's LGTE facility, and that the Ada County Permits properly reflect and incorporate the results of Docket No. 0101-12-02.

## **VI. RESERVATION OF RIGHTS**

57. This matter involves complex issues of fact and law. Pursuant to Rule 211 of IDAPA 58.01.23, HHE has identified the aspects and conditions of the Permit that it seeks to challenge, and the factual and legal bases underlying those challenges. As discovery and further research and investigation are conducted, HHE reserves the right to amend, supplement, and refine the bases of its challenge.

## **VII. PRAYER FOR RELIEF**

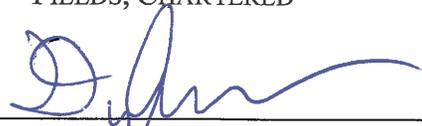
WHEREFORE, HHE respectfully requests that the Board issue an order:

1. Requiring Ada County to install a H<sub>2</sub>S removal system.

2. Remanding this matter to DEQ to ensure that the Ada County Permit is consistent with and properly incorporates the results of Docket No. 0101-12-02, involving the HHE Permit.

RESPECTFULLY SUBMITTED this 2nd day of November, 2012.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By   
Dylan B. Lawrence – Of the Firm  
Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 2nd day of November, 2012, I caused a true and correct copy of the foregoing **PETITION TO INITIATE CONTESTED CASE** to be served by the method indicated below, and addressed to the following:

Hearing Coordinator  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
1410 N. Hilton  
Boise, ID 83706-1255

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile

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QUALITY  
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