

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: October 13, 2017

Mr. Terry W. Posey Jr.
Thompson Hine
10050 Innovation Drive
Suite 400
Miamisburg, OH 45342

Re: Case No. 17-4074, *Energy Dev, Inc., et al v. EPA, et al*
Originating Case No. : EPA-1

Dear Counsel,

This case has been docketed as number **17-4074** with the caption that is enclosed on a separate page. Please check the caption for accuracy and notify the Clerk's Office if any corrections should be made.

Before preparing any documents to be filed, counsel are strongly encouraged to read the Sixth Circuit Rules at www.ca6.uscourts.gov. If you have not established a PACER account and registered with this court as an ECF filer, you should do so immediately.

The following forms should be downloaded from the web site and filed with the Clerk's office by **October 27, 2017**. If payment did not accompany the petition for review, the \$500 filing fee should also be paid by this date.

Petitioner: Appearance of Counsel
Disclosure of Corporate Affiliations
Application for Admission to 6th Circuit Bar (if applicable)
Respondent: Appearance of Counsel

More specific instructions are printed on each form. These deadlines are important - if the initial forms are not timely filed and necessary fees paid, the case will be dismissed for want of

prosecution. If you have questions after reviewing the forms and the rules, please contact the Clerk's office for assistance.

Sincerely yours,

s/Bryant L. Crutcher
Case Manager
Direct Dial No. 513-564-7013

Enclosure

OFFICIAL COURT OF APPEALS CAPTION FOR 17-4074

ENERGY DEVELOPMENTS, INC.; BIO ENERGY (TENNESSEE II), LLC

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; SCOTT
PRUITT, Administrator, United States Environmental Protection Agency

Respondents.

Dated: October 12, 2017

Respectfully submitted,

/s/Terry W. Posey, Jr.
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*Attorneys for Petitioners, Energy
Developments, Inc. and Bio Energy
(Tennessee II), LLC*

CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 15(c) and 25, and 40 C.F.R. § 23.12(a),

I hereby certify that on this date I caused a copy of the foregoing Petition for Review to be delivered via certified mail, return receipt requested to the following:

Correspondence Control Unit
Office of General Counsel (2311)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Scott Pruitt
EPA Headquarters (1101A)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

/s/Terry M. Posey, Jr.

Terry M. Posey, Jr. (0078292)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
NATIONAL VEHICLE AND FUEL EMISSIONS LABORATORY
2565 PLYMOUTH ROAD
ANN ARBOR, MICHIGAN 48105-2498

OFFICE OF
AIR AND RADIATION

Mr. Chris Eastgate
Chief Executive Officer
Energy Developments, Inc.
3322 West End Avenue, Suite 115
Nashville, TN 37206

AUG 14 2017

Dear Mr. Eastgate:

In November 2015, ESG Biofuels (JC), LLC (“ESG”) submitted a registration application and a third party engineering review, conducted by Eco Engineers to the EPA, seeking registration as a renewable fuel producer under the Renewable Fuel Standard Program (“RFS”). In December 2016, ESG sold the Iris Glen facility to Energy Developments, Inc. (“EDI”). ESG continues to own the pipeline between the Iris Glen facility and the Mt Home Energy Center (the “Energy Center”). In January 2017, EcoEngineers submitted a request to the EPA to transfer ESG’s registration application and engineering review (“ER”) to EDI. In addition, there has been substantial interaction between the EPA staff and ESG or EDI to gather facts relevant to EPA’s analysis of the registration application.^{1 2 3} This letter describes the EPA’s analysis of all information provided by ESG and EDI, and describes the basis for the EPA’s denial of the registration application.

As described in the EDI registration materials (and supplemental information submitted after series of follow-up meetings), raw biogas from the Johnson City Iris Glen landfill is collected and treated by EDI to remove certain contaminants. It is then injected into the ESG-owned “dedicated” pipeline, for delivery to the Mt Home Energy Center. ER at vii. The biogas is physically co-mingled with natural gas in a short section of piping at the Mt Home Energy Center, and it is fed forward from that pipe for utilization in the Energy Center processes including boilers and electric power generation. ER Attachment C-4, Process Description. The pipe where the gases co-mingle has three connections two feeding gas into the connection (the ESG Biofuels pipeline and the Atmos Commercial Distribution System Pipeline) and one

¹ “ESG’s Registration as a Renewable Fuel Producer” memorandum, prepared by Sutherland Asbill & Brennan, LLP, dated November 21, 2016, and “RFS Requirements for Use of Biogas as a Transportation Fuel as Applied to ESG Biofuels (JC) LLC’ Registration” presentation, prepared by Sutherland Asbill & Brennan, LLP, for ESG Biofuels (JC), LLC, dated November 21, 2016.

² On July 6, EPA, EDI and Sutherland (attorney representing EDI) met to discuss outstanding issues and questions on the registration. EPA and EDI/Sutherland had several subsequent emails exchanges as follow-ups to the questions raised during the meeting. In these email exchanges EDI/Sutherland provided additional documentation (pipeline quality specifications, connection agreement contracts for ESG pipeline, documentation relating to Tennessee regulation of the ESG pipeline, addendum to the Engineering review with updated certificate of analysis, etc.).

delivering the commingled gas into the Energy Center. In addition, the Atmos Commercial Distribution System Pipeline is connected to a commercial pipeline system and, ultimately connects to CNG and LNG facilities serving the transportation sector. ER at 16.

The EPA regulations in Pathway Q of Table 1 to 40 CFR 80.1426(f)(1), identify CNG/LNG derived from landfill biogas as a cellulosic biofuel for which RINs may be generated, provided that regulatory requirements are satisfied. The regulatory definitions of renewable CNG and LNG, each specify that the gas from which they are derived must be of “pipeline quality.” 40 CFR 80.1401. The EPA regulations also specify two alternative means by which the gas from which renewable CNG/LNG is derived may be distributed for use as transportation fuel. Section 80.1426(f)(10)(ii) of the regulations applies in a situation involving distribution only by a “closed, private, non-commercial system.” CNG/LNG derived from such gas is considered renewable fuel for which RINs may be generated if: (A) it is produced from renewable biomass and has an approved D code (representing an approved production pathway), (B) the RIN generator has entered into a written contract for the sale or use of a specific quantity of the CNG/LNG to be used as transportation fuel, or obtained affidavits from all parties selling or using the CNG/LNG as transportation fuel, and (C) the CNG/LNG is used as transportation fuel and for no other purposes. Under this simple distribution method, it is expected that the party receiving landfill gas either uses it for transportation purposes, or sells it for that purpose.

Alternatively, section 80.1426(f)(11)(ii) recognizes that biogas for use in making renewable CNG/LNG may be introduced into a “commercial distribution system.” Similar requirements apply as in the case of distribution through a closed, private, non-commercial system, but in addition: (1) the biogas/CNG/LNG that is ultimately withdrawn from the commercial distribution system for use as transportation fuel must be withdrawn in a manner and at a time consistent with the transport of the biogas/CNG/LNG between the injection and withdrawal points, (2) the volume and heat content of biogas/CNG/LNG injected into a pipeline and the volume withdrawn to make a transportation fuel are measured by continuous metering, (3) the amount of fuel sold for use as transportation fuel corresponds to the amount of fuel derived from biogas that was placed into the commercial distribution system, and (4) no other party relied upon the volume of biogas/CNG/LNG for the creation of RINs. In the preamble to the 2010 rule establishing this regulatory provision, the EPA sometimes refers to a “commercial” pipeline as a “fungible” pipeline. The intent is to describe a pipeline into which there are multiple inputs such that it would be impossible or impracticable to discern the origin of gas removed from the pipeline. With respect to such fungible commercial pipelines, the preamble to the rule indicates that it is not critical to track the individual molecules of biogas to a transportation use; instead the displacement of fossil fuel for transportation purposes can be seen as occurring within the fungible natural gas pipeline. When biogas is injected into such a fungible pipeline, it is generally sufficient if there is a verifiable contractual pathway for a volume of withdrawn gas used for transportation purposes that is equal to the volume of injected biogas. See 75 FR 14670, 14712 (March 26, 2010).

Based on the information submitted, it is apparent that the ESG pipeline is a closed, private, non-commercial pipeline of the type described in 80.1426(f)(10)(ii). No other party uses the pipeline, and it is dedicated to the transfer of gas derived from the Iris Glen landfill to the Energy Center, where it is used. When the gas arrives at the Energy Center, it is co-mingled with natural gas from the Atmos pipeline, but after this comingling occurs in a short section of pipe, it is “fed

forward” into the Energy Center for use in boilers or in an engine for electric power generation. Thus the CNG/LNG is not used for transportation purposes, as required by 80.1426(f)(10)(ii)(C), and it cannot be considered renewable fuel as defined in Clean Air Act Section 211(o)(1)(J).⁴ Although it appears that the Atmos pipeline could be considered part of a commercial distribution system, the biogas produced by EDI is not injected into that pipeline. Therefore, any transportation use of gas withdrawn from the commercial pipeline system of which the Atmos pipeline is a part, cannot be attributed to the biogas produced by EDI and injected into the closed, private, ESG pipeline for delivery and use at the Energy Center. Although EDI has asserted, with some supporting information, that the ESG pipeline is registered as an “intrastate transmission” pipeline in Tennessee, is considered by State regulators to be a “utility,” and could lawfully acquire additional customers (besides EDI) for the transport of natural gas, we do not believe that such facts are determinative under the EPA regulations in distinguishing between a closed pipeline and a commercial distribution system. In fact, the EDI biogas is the only gas transported on the ESG pipeline, and by EDI’s admission it is transported only to the Energy Center for non-transportation purposes. It is never injected into the Atmos or downstream pipelines where it could intermingle with other gases. The EPA declines to interpret its regulations in a manner that would allow such biogas, that is clearly and admittedly used for non-transportation purposes, to qualify as renewable fuel under the RFS program.

Even if EDI were injecting biogas-derived fuel into the commercial distribution system of which the Atmos pipeline is a part, (which the EPA does not believe it is the case), the EDI gas would not meet the regulatory requirement that the gas be of “pipeline quality.” The EPA issued guidance on its interpretation of this requirement in September 2016 (“Guidance on Biogas Quality and RIN Generation when Biogas is Injected into a Commercial Pipeline for use in Producing Renewable CNG or LNG under the Renewable Fuel Standard Program”). The EPA guidance describes the EPA’s interpretation that biogas is of “pipeline quality” under the regulations if it meets the specifications of the commercial pipeline into which it is injected. Based on an updated certificate of analysis, dated April 6, 2017⁵, EDI states that the biogas after it is scrubbed at the EDI processing plant is 861 BTUs per cubic foot, and that this range will satisfy the ESG pipeline specifications of 750 BTUs per cubic foot.⁶ Although EDI may be able to meet the ESG pipeline specifications, it does not meet the specification for the Atmos pipeline⁷. According to publicly available information, the Atmos pipeline has a quality

⁴The EPA does not interpret its regulations in a manner that would allow a mere physical connection between the ESG and Atmos pipelines to convert the private ESG pipeline into a commercial pipeline. Such an interpretation would allow the qualification of biogas as a renewable fuel even in instances, such as those presented in the EDI application, where the biogas in question is demonstrably used for non-transportation purposes. In addition, the EPA does not agree with arguments advanced by ESG that any pipeline engaged in commerce must be considered a commercial pipeline for purposes of EPA regulations. It is apparent that the “closed, private non-commercial pipelines” referenced in 80.1426(f)(10)(ii) are engaged in commerce, since the regulations envision the possibility of contracts demonstrating the sale of biogas transported through such pipelines for transportation purposes.

⁵ On July 14, 2017, EDI submitted an addendum to the Engineering Review with an updated certificate of analysis for biogas from the Iris Glen Landfill based on changes made by EDI

⁶ July 26, 2016 email from Mike Nasiako to Madison Le.

⁷ In an email from Sutherland on behalf of EDI on July 11, 2017, they respond to the EPA’s request for information on gas quality specifications for the Atmos pipeline by stating that the Atmos distribution interconnection agreement between East Tennessee Natural Gas Pipeline (ETNG) and Atmos is not publicly available. EDI instead, submitted the ETNG gas specification as an apparent proxy. However, the EDI biogas injected into the ESG pipeline also does not meet the ETNG pipeline quality specification that states the natural gas shall have a total heating value of not

specification of not less than 950 Btu's per cubic foot. See Atmos Pipeline Interconnect Agreement (for Tennessee and other States), Appendix D, available at <https://www.atmosenergy.com/partners/pipeline-interconnects-and-gas-supply>. Because EDI's gas does not meet the Atmos specifications, it could not be considered to be of "pipeline quality" sufficient to qualify as renewable fuel even if it were injected into the Atmos pipeline.

For the reasons discussed above, the EPA cannot approve EDI's registration application under the RFS program.

If you have any questions concerning this determination, please contact Madison Le of my staff at 202-564-5754 or le.madison@epa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Byron Bunker", written over the word "Sincerely,".

Byron Bunker, Director
Compliance Division
Office of Transportation and Air Quality

less than 967 British thermal units (Btus) per cubic foot and not greater than 1,110 Btus per cubic foot (measured on a dry basis).