

# SANTA BARBARA COUNTY BOARD AGENDA LETTER



Clerk of the Board of Supervisors  
105 E. Anapamu Street, Suite 407  
Santa Barbara, CA 93101  
(805) 568-2240

**Agenda Number:**  
**Prepared on:** 9/14/04  
**Department Name:** Public Works  
**Department No.:**  
**Agenda Date:** 9/28/04  
**Placement:** Departmental  
**Estimate Time:** 20 minutes  
**Continued Item:** NO  
**If Yes, date from:**

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**TO:** Board of Supervisors

**FROM:** Phillip M. Demery, Public Works Director  
x3010

**STAFF CONTACT:** David C. McDermott, Sr. Deputy County Counsel x2979  
Mark A. Schleich, Public Works Deputy Director x3603

**SUBJECT:** Assignment of Lease Agreement Between the County and NEO Tajiguas LLC

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## **Recommendation(s):**

That the Board of Supervisors:

1. Receive and review the Due Diligence Memo prepared by the County Auditor-Controller's office on the proposed assignment and;
2. Authorize the Public Works Director, or his or her designee, to execute the "Estoppel Certificate by the County of Santa Barbara" (Attachment 1), and;
3. Approve the assignment of the "Landfill Gas Lease and Operating Agreement Between NEO Tajiguas LLC and The County of Santa Barbara" ("Lease").

## **Alignment with Board Strategic Plan:**

The recommendations are primarily aligned with Goal No. 2 to ensure the public's health and safety and to provide essential infrastructure.

## **Executive Summary and Discussion:**

### I. HISTORY OF LEASE BETWEEN NEOT AND THE COUNTY

NEO Tajiguas LLC ("NEOT") and the County entered into the Lease agreement in 1998. NEOT is a limited liability subsidiary company of NEO Corporation. The Lease essentially states that in exchange for NEOT's right to extract landfill methane gas (LFG) from the Tajiguas Landfill, and to convert such LFG to electrical energy for sale, NEOT was required to install and then subsequently, operate and maintain a LFG extraction system with an initial capital value of approximately one million dollars for the term of the Lease. The intent

of originally entering into the Lease was to efficiently allow the County to meet its federal requirements to contain and manage the LFG that was created by its landfill operations. NEOT has been operating the Tajiguas Landfill LFG extraction system pursuant to the Lease since 1998.

In May 2003, NRG Energy, Inc., parent company of NEO Corporation filed for relief in the bankruptcy courts of the United States. NEO Corporation was not included in the Chapter 11 bankruptcy filing, nor was its subsidiary, NEOT. However, NEO Corporation determined after the bankruptcy filing to sell some of its assets, including the LFG project assets owned by NEOT. Accordingly, NEOT has been actively pursuing and negotiating the sale and/or assignment of these LFG projects with various other landfill owners.

The result of this activity is that the sale/or assignment of several of these LFG projects, including the Tajiguas Lease is now pending. NEOT has entered into Purchase and Sales Agreements with Algonquin Power/Cambrian Energy Genco LLC, and Across America LFG LLC (the “Buyer Group”). Under terms of these pending Agreements, the Buyer Group would acquire membership interests from NEOT in the limited liability companies that own and operate both the electric power generating and LFG collection system assets of the Tajiguas LFG project.

The terms of the Lease require your Board to consent in writing to any assignment of the Lease, “which written consent shall not unreasonably be withheld,” (Section 32).

The Public Works Department, Resource Recovery and Waste Management Division (RRWMD) staff (formerly the Solid Waste and Utilities Division), with assistance from County Counsel, Auditor-Controller, and RRWMD’s consultant (from CH2M HILL, Mr. Peter Woodfill) have been working diligently and cooperatively with NEOT to facilitate the proposed assignment to insure that any new Buyer Group is able to provide the level of service and cooperation necessary to carry out the terms and conditions of the Lease.

## II. ESTOPPEL CERTIFICATE

As a condition of the assignment of the Lease, one of the member companies in the proposed Buyer Group (Across America LFG, LLC), is requiring the County to execute an “Estoppel Certificate”, as shown in Attachment 1. In essence, the Estoppel Certificate states that there are no outstanding issues between NEOT and the County. Importantly, it also states that the County consents to assignment of the Lease.

However, prior to RRWMD staff being able to recommend that your Board consent to the assignment through execution of the Estoppel, several outstanding issues between NEOT and the County did need to be resolved. Some issues were minor in nature, while others were quite significant. Accordingly, NEOT and RRWMD staff negotiated resolution of these issues and documented them in the Memorandum of Understanding (MOU).

## III. MEMORANDUM OF UNDERSTANDING

The MOU is shown as Exhibit A to the Estoppel Certificate. As stated in the MOU: “The purpose of the MOU is to clarify, restate, and re-affirm those certain obligations, duties, and responsibilities of NEOT with respect to the Lease.” This MOU addresses such issues as deferred maintenance, flare integrity, collection system operations and maintenance, finances, and the furnishing by NEOT to the County certain documents,

plans and information. Additionally, the MOU will be used in the future to clarify certain ambiguous terms and conditions of the original lease.

This MOU has been made a part of the Estoppel Certificate as a condition of the approval of assignment. In this way, the new assignees will be acquiring the Lease subject also to the terms and conditions of the MOU.

#### IV. DUE DILIGENCE REPORT

The Internal Audit Division of the County performed a review of the proposed transfer of the Lease. The Auditor's met with County personnel, discussed the proposed assignment with a representative of the new Buyer Group, reviewed the Lease, and inspected the facilities at the Tajiguas Landfill site. They also recomputed the compensation due the County by comparing them to actual receipts. For further details please see the attached Due Diligence Memo from the Auditor-Controller (Attachment 2).

#### V. CONCLUSION and RECOMMENDATIONS

Based on the results of the due diligence investigation of the acquiring member companies and their related entities, and the extensive efforts of NEOT staff, RRWMD staff and their consultant (CH2M HILL), County Counsel, and the Auditor-Controller, we conclude that the proposed new Buyer Group is able to provide the level of service and cooperation necessary to carry out the terms and conditions of the Lease. Therefore, we recommend that your Board authorize the Director of Public Works, or his or her designee to execute the Estoppel Certificate, and concurrently approve the proposed assignment of the Lease.

#### **Mandates and Service Levels:**

This project will not change the level of service.

#### **Fiscal and Facilities Impacts:**

This project will not have any fiscal and facilities impact on the County. NEOT has paid the County in excess of \$490,000 under the terms of the Lease as of August 2004. New Buyer Group will continue to provide compensation to the County in accordance with the existing Lease.

#### **Special Instructions:**

Please send copies of the minute order to David McDermott in the County Counsel's office and to Imelda Cragin and Georgia Navarro in the Public Works Department, Resource Recovery and Waste Management Division (formally known as the Solid Waste and Utilities Division).

#### **Concurrence:**

County Counsel  
Auditor-Controller

ATTACHMENT 1  
To  
Assignment of Lease Agreement  
Between the County and NEO Tajiguas LLC  
Board Letter  
Dated 9/28/04

ATTACHMENT 2  
To  
Assignment of Lease Agreement  
Between the County and NEO Tajiguas LLC  
Board Letter  
Dated 9/28/04

## MEMORANDUM OF UNDERSTANDING

A Landfill Gas Lease and Operating Agreement (Lease) executed in 1998 provides the necessary guidelines for operating the landfill gas (LFG) utilization project located at the County of Santa Barbara's Tajiguas Landfill, between the County of Santa Barbara (County) and NEO Tajiguas LLC (NEOT). The Lease specifies certain duties and obligations that NEOT must undertake through out the duration of the agreement. The purpose of this memorandum of understanding (MOU) is to clarify, restate, and re-affirm those certain obligations, duties, and responsibilities of NEOT with respect to the Lease. In the event of a conflict, the provisions of the Lease shall prevail over the provisions of this MOU.

1. **DEFERRED MAINTENANCE:** The Lease requires NEOT to conduct operation and maintenance (O&M) for the LFG collection system at the landfill throughout the duration of the Lease. In the County's opinion, NEOT has not conducted O&M activities in a manner that is in full compliance with the Lease. Accordingly, NEOT has agreed to engage an outside consultant, approved by the County to provide immediate additional engineering and O&M support for the project. Specifically, the consultant is to perform field investigations and prepare a report that identifies current LFG system repairs and maintenance items that need to be performed. The report will outline recommendations for near term system layout and operations, as well as estimate the approximate cost to undertake and complete these repairs. Upon finalization of this report and subsequent acceptance by the County, NEOT agrees to immediately undertake and complete the full scope of the recommendations as shown in the report within a time frame mutually agreed to, or within ninety (90) calendar days following the date this MOU is executed, whichever is sooner.
2. **LFG FLARE INTEGRITY ISSUES:** The Lease requires NEOT to conduct operation and maintenance (O&M) for the LFG Flare Facility at the landfill throughout the duration of the Lease. In the County's opinion, the flare was damaged during the course of normal operations and desires that additional investigations be performed. Under NEOT's direction, some repairs have been made. According to NEOT, the Flare can operate without the risk of additional damage occurring. However, in the County's opinion, there are still visible indications of damage and/or impact on certain external portions of the Flare. Accordingly, NEOT has agreed to engage an appropriate outside party that is expert in LFG Flare technology and operations. This party will then independently conduct an assessment of the LFG Flare Facility for such issues as the state of structural integrity in the flare barrel; operating condition of burners/nozzles; and the ability of the current Flare Facility to operate in a manner that is consistent with applicable safety and regulatory standards. The expert's assessment will provide recommendations for correction of identified damage as well as estimate the approximate cost to undertake and complete any required repairs or modifications. Upon finalization of this assessment and subsequent acceptance by the County, NEOT agrees to undertake and complete the full scope of the recommendations, as shown in the assessment, in as expeditious manner as possible, or within ninety (90) calendar days following the date this MOU is executed, whichever is sooner.
3. **LFG COLLECTION SYSTEM O&M:** NEOT has the obligation to conduct the O&M of the collection system in accordance with Exhibit C of the Lease. NEOT has the right to fulfill this

obligation by utilizing and directing outside resources/services (supplied by appropriate third party subcontractors/consultants) in the performance of certain O&M related activities. As a result of recent discussions, NEOT has agreed to utilize the County as the "Preferred Supplier" of these additional outside resources/services required to adequately fulfill their O&M obligations under the Lease. This "Preferred" status is intended to allow the County the "First Right of Refusal" to supply NEOT these resources/services but does not create any new or additional obligation of the County to supply them to NEOT. NEOT continues to have the right to utilize other subcontractors other than the County in applicable situations. These resources/services will be provided by the County to NEOT on an as needed, as available, and as agreed upon, "Time and Materials" basis, in accordance with the following specific conditions, all applicable general terms in the Lease and a mutually acceptable "Schedule of Charges". Both the County and NEOT agree that the applicable "Schedule of Charges" will be developed and finalized no later than thirty (30) calendar days following the date this MOU is executed. The specific conditions mentioned above are:

- NEOT gives the COUNTY pre-approval to expend at it's sole discretion up to Five Thousand dollars (\$5000.00) per event, for charges associated with any efforts conducted for an emergency repair that may be required to resolve, restore, repair or replace the LFG collection system to satisfactory operating conditions. This pre-approval assumes that NEOT is not available for the direct supervision of repairs or cannot be reached under the emergency contact provisions in the O&M manual.
- NEOT and the County agree to immediately initiate and thereafter hold regularly scheduled project meetings at the landfill on a frequency of not less than once a month. One of the primary purposes of this meeting will be to mutually identify and schedule required LFG collection system O&M tasks/activities that need to be implemented.
- Upon final agreement during the routine project meeting by both NEOT and the County of the scope and schedule of any of these required O&M tasks/activities, a duly authorized representative of NEOT shall on a verbal basis, authorize the County to immediately proceed with implementation of these tasks/activities up to Ten Thousand dollars (\$10,000.00) per event.
- For all tasks/activities that are anticipated to incur charges in excess of Ten Thousand dollars (\$10,000) per event, a duly authorized representative of NEOT shall be required to provide written authorization to the County prior to the County commencing the work.
- At or before the first regularly scheduled project meeting described above, NEOT shall designate in writing one primary and one backup contact person as the only representatives of NEOT that are duly authorized to give notice to the County to proceed with any O&M task/ activities as discussed above.

**4. FINANCIAL ISSUES:** The County has not received yearly confirmation of financial data, revenues received or invoices paid to the County, statements from NEO's CFO as required per the Lease. Additionally, the revenues received and invoices paid by NEO to the County have been inconsistent, and in many cases lacking the required backup calculations/ supporting documentation. In the County 's opinion it does not have a sufficient basis for auditing or verifying that amounts due the County have been properly paid by NEO. Accordingly, NEOT has

agreed to perform an internal review of the project payments to the County from the inception of the project. The review will commence immediately and will be completed no later than thirty (30) days from the date this MOU is executed. Section 14 A 3. of the agreement calls for NEOT to install up to forty thousand dollars (\$40, 000) for the installation of Additional Landfill Gas Wells at the Landfill during the term of the agreement. The County and NEOT both agree that this provision has been satisfied in full and is not applicable going forward through the remainder of the term of the Lease.

**5. MISCELLANEOUS REQUIRED DELIVERABLES:** In accordance with the Lease, NEOT has clear obligations to supply the County with a variety of documents, plans, and information that generally support the efficient oversight and implementation of the Lease. NEOT has failed to provide some of these items in the recent past and the County has recently asked to have the following items provided.

- LFG System Current As-Built Drawings
- A Revised O&M Manual within 30 days of receipt of the County's comments.
- Backup Calculations for Recent Project Revenue Statements
- LFG Wellfield Data upon completion of well field tuning and adjustments.
- To work with the County Attorneys office to gain a fully authorized and executable confidentiality agreement from So. Cal. Edison, so that the County can receive a copy of the Power Purchase Agreement (PPA) currently in force for the project with SCE.

The undersigned accept this MOU in it's entirety and agree to implement all the terms, obligations and duties that are shown in a timely manner. Additionally, the undersigned agree to review and ascertain progress made towards resolution of the issues described in this MOU on at least a monthly basis, and to then formally document (e-mails, letters, or meeting notes) the confirmation and acceptance of the final resolution of the issues as they are completed.

ACCEPTED BY:

NEO T AJIGUAS LLC

COUNTY OF SANTA BARBARA

\_\_\_\_\_  
Jerald Peterson  
Vice-President of Operations

\_\_\_\_\_  
Mark A. Schleich  
Deputy Director  
Resource Recovery and Waste Management  
Division

DATE: \_\_\_\_\_

DATE: \_\_\_\_\_



**ESTOPPEL CERTIFICATE**  
**BY**  
**THE COUNTY OF SANTA BARBARA, CALIFORNIA**

The undersigned (the "County"), being the lessor under the Lease (as defined in Paragraph 1 below), understands that NEO Tajiguas, LLC, a Delaware limited liability company ("NEOT"), will undergo a change in ownership by the admission of a new member, Across America LFG, LLC, a Delaware limited liability company ("Buyer"), and, as a condition precedent to such transaction, Buyer is requiring this Certificate. The County therefore hereby certifies to NEOT, Buyer and their respective successors and assigns as to the following:

1. The County is a lessor under that certain Landfill Gas Lease and Operating Agreement with NEOT dated as of March 10, 1998 (such lease being hereinafter referred to as the "Lease"). Except for the Memorandum of Understanding dated as of September 1, 2004 duly executed by the County and NEOT (hereinafter referred to as the "MOU"), a copy of which is attached hereto as Exhibit A, there have been no amendments, modifications or revisions to the Lease and there are no agreements of any kind between the County and NEOT regarding the premises and subject matter described in the Lease other than the Lease.

2. The Lease has been properly executed by the County and is in full force and effect.

3. To the best knowledge of the County, the County is not in default under the Lease and no event has occurred which, with the giving of notice or passage of time, or both, could result in a default under the Lease by the County.

4. To the best knowledge of the County, NEOT is not in default under the Lease and no specific event has occurred which, with the giving of notice or passage of time, or both, could result in a default under the Lease by NEOT. However, this declaration is expressly conditioned upon the fulfillment of the terms as shown in the MOU, and a anticipation by the County of NEOT's intention to expeditiously implement good faith efforts to fully comply with all the provisions of the Lease.

5. All rents and other sums and charges which both the County and NEOT have previously identified and agreed are due and payable by NEOT under the Lease through the date hereof have been paid in full. However, in accordance with the MOU, NEOT has agreed to review and determine whether any additional rents, other sums and charges are currently owed by NEOT to the County. Therefore, this declaration is expressly conditioned upon NEOT's completion of that determination, and the receipt by the County of the full amounts of any rents, other sums and charges that may be shown to be outstanding.

~~DRAFT FOR DISCUSSION~~

6. The milestones in Section 25 of the Lease were met without the exercise of the rights of the County to terminate the Lease.

7. The County has given no formal notice pursuant to the Lease of any gas emission problem requiring action by NEOT or its predecessors, nor is the County aware of such problems that currently require issuance of such formal notice. However, the County has previously notified NEOT on several occasions of concerns and issues regarding NEOT's understanding and fulfillment of responsibilities under the Lease for properly performing landfill gas collection system operations and maintenance activities in a manner which would normally preclude gas emission problems.

8. The County consents to that certain Sublease dated June 30, 1998 by and between NEOT and MM Tajiguas Energy LLC, a Delaware limited liability company, a copy of which is attached hereto as Exhibit B

9. The County consents to the change of ownership in NEO Tajiguas described in the introductory paragraph of this Certificate.

10. The County understands that NEOT, Buyer and their successors and assigns will rely on this Certificate in connection with the proposed transaction described in the introductory paragraph of this Certificate and in connection with the ongoing operation of the project.

Capitalized terms which are used but not defined in this Certificate shall have the meaning ascribed to them in the Lease.

Dated: \_\_\_\_\_

**County of Santa Barbara,  
California**

By: \_\_\_\_\_

Its: \_\_\_\_\_

~~DRAFT FOR DISCUSSION~~

Exhibit A

**Memorandum of Understanding**

~~DRAFT FOR DISCUSSION~~

**Exhibit B**

**Sublease**