New York State Department of Environmental Conservation
Office of General Counsel, 14th Floor
625 Broadway, Albany, New York 12233-1500
Phone: (518) 402-9185 • **Fax:** (518) 402-9018
Website: www.dec.ny.gov

SEP 0 9 2011

Joe Martens
Commissioner

Mr. Scott M. Turner, Esq.
Nixon Peabody LLC
1300 Clinton Square
Rochester, New York 14604-1792

RE: In the Matter of the Petition of Seneca Meadows, Inc. for a Declaratory Ruling

Dear Mr. Turner:

Enclosed please find Declaratory Ruling No. 19-19 in response to the Petition for Declaratory Ruling (Petition) filed on behalf of Seneca Meadows, Inc. (SMI), the owner and operator of Seneca Meadows Landfill located in Waterloo, New York. The Petition was filed on January 13, 2011, pursuant to State Administrative Procedures Act (SAPA) Section 204, as implemented by the Department through 6 NYCRR Part 619. The Petition seeks a declaratory ruling with respect to: 1) what constitutes "under common control" as that term is used in 6 NYCRR Part 201-2.1(b)(21); and 2) whether SMI's Landfill and a companion landfill gas-to-energy (LFGTE) facility, owned and operated by Seneca Energy II, LLC (SE), are "under common control." Deputy Commissioner and General Counsel Steven C. Russo has delegated responsibility to me, as Deputy Counsel, to respond to this request for a Declaratory Ruling due to the involvement of his former law firm in representation of a subsidiary of SE.

For the reasons set forth in the ruling, I have determined that it is appropriate to issue a Declaratory Ruling as to what constitutes "under common control," but decline to rule on whether SMI's landfill and SE's power plant are "under common control." The latter question raises issues that will be the subject of thorough review by the Department pursuant to the permit application which was recently filed by SE. While I am exercising my discretion pursuant to 6 NYCRR § 619.3 in declining to issue a declaratory ruling as to that question, I strongly encourage the Petitioner and SE to continue to work with Department staff in developing a draft permit that complies with all applicable requirements.

If you have any questions on the ruling, please contact Khai Gibbs, Esq. of my office at (518) 402-9512.

Sincerely,

Alison H. Crocker
Deputy Counsel

Enclosure

c: K. Gibbs
J. Snyder
D. Shaw
J. Nasca
S. Flint
T. Marriott

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Petition of
Seneca Meadow, Inc.
for a Declaratory Ruling

DECLARATORY RULING
DEC NO. 19-19

INTRODUCTION

Seneca Meadows, Inc. (SMI), through its representative Nixon Peabody LLC (Scott M. Turner, Esq.), petitions the Department, pursuant to Section 204 of the State Administrative Procedure Act (SAPA) as implemented by the Department under 6 NYCRR Part 619, for a declaratory ruling with respect to: 1) what constitutes "under common control" as that term is used in 6 NYCRR Part 201-2.1(b)(21); and 2) whether Seneca Meadows Landfill, a facility owned and operated by SMI, and a gas-to-energy (GTE) facility, owned and operated by Seneca Energy II, LLC (SE), are "under common control."

Pursuant to § 204(1) of SAPA, "[o]n petition of any person, any agency may issue a declaratory ruling with respect to (i) the applicability to any person, property, or state of facts of any rule or statute enforceable by it, or (ii) whether any action by it should be taken pursuant to a rule." A declaratory ruling is binding upon the agency unless it is altered or set aside by a court. An agency may not retroactively change a valid declaratory ruling, but nothing in SAPA prevents an agency from prospectively changing any declaratory ruling. The Department implements SAPA § 204 through 6 NYCRR Part 619.

For purposes of this declaratory ruling only, the Department will assume that the facts alleged in the petition are true. The Department may take official notice of any fact not subject to reasonable dispute if it is either generally known or can be accurately and readily verified. 6 NYCRR § 619.2(b). The Department will engage in no fact finding for purposes of this declaratory ruling and the binding effect of the ruling is limited by the assumed fact predicate. *See* Power Authority of the State of New York v. New York State Department of Environmental Conservation, 58 NY2d 427, 434, 461 NYS2d 769, 772 (1983). The Department will not assume the truth of statements which are legal conclusions.

For reasons set forth below, I find as follows: (1) Petitioner's request that the Department clarify what constitutes "under common control" as that term is used in 6 NYCRR § 201-2.1(b)(21) is *granted*; and (2) Petitioner's request that the Department determine whether SMI's Landfill and SE's GTE facility are "under common control" must be declined. Rather, such determination will be made during the Department's review of SE's pending permit application.

PROCEDURAL BACKGROUND

The Department received SMI's Petition on January 13, 2011. By letter dated February 14, 2011, I notified Petitioner that the Petition was incomplete and that the Department was exercising its discretion to seek additional information to supplement the Petition pursuant to 6 NYCRR §§ 619.1(c) and (d). I also notified Petitioner that I was exercising my discretion to solicit public comments on the Petition pursuant to 6 NYCRR § 619.1(e)(1). Notice of receipt of the Petition and a solicitation for public comment was placed in the Environmental Notice Bulletin (ENB) on February 23, 2011. Public comment on the Petition was accepted through March 16, 2011. On March 2, 2011, Petitioner provided additional information to supplement its Petition. A second notice and solicitation for public comment was placed in the ENB on March 30, 2011. Public comments were accepted through April 6, 2011. On April 19, 2011, Petitioner responded to the public comments pursuant to 6 NYCRR § 619.1(e)(2). On May 25, 2011, Petitioner provided additional information to supplement the Petition. Comment on the petition was solicited from the U.S. Environmental Protection (EPA) Region 2 office, but none was provided in the record.

STATEMENT OF FACTS

Petitioner Seneca Meadows, Inc. owns and operates Seneca Meadows Landfill located at 1786 Salcman Road, Seneca Falls, New York 13165-006. SMI's landfill is currently permitted as a non-hazardous solid waste landfill under 6 NYCRR Part 360.[1] and as a Title V facility under 6 NYCRR Part 201-6.[2] SMI also owns and operates a landfill gas (LFG) collection system which is designed to capture gas from the landfill. SMI may either burn the LFG with flares for

[1] Solid Waste Management Permit ID: 8-4532-00023/00001.
[2] Air Title V Facility Permit ID: 8-4532-00023/00041

air pollution control or provide the LFG to an end user. SMI also owns and maintains the production system, which is the conveyance system that delivers LFG to an end user.[3]

Petitioner states that a significant portion of SMI's LFG is sold to SE, which uses the gas to fuel its electric power plant.[4] SE's power plant is located across the street from the landfill, on a defined parcel leased from SMI. SE's power plant is permitted separately from SMI, as a Title V facility under 6 NYCRR Part 201-6.[5] According to the Petition, SMI's and SE's business relationship is supplemented by a Gas Sale Agreement (GSA) and Lease.[6]

According to Petitioner, SE plays no role with respect to the SMI's LFG collection system, production system, or the flares.[7] Although SE's power plant can also run on natural gas, SE is not currently connected to any other fuel source. Petitioner states that there are three natural gas pipelines within the vicinity of SE's power plant but there is currently no business reason that would justify the expense of connecting to any of the pipelines.[8] Petitioner states since SMI is contractually committed to supply fuel for SE's power plant, there is no plausible business reason to contractually require connection to another fuel source.[9]

Petitioner states that there is no common ownership between SMI and SE, including parent or subsidiary corporations.[10] Petitioner also stated that SMI and SE do not share personnel, including common workforces, plant managers, security forces, corporate executive officers or board executives.[11]

Petitioner states that SE previously submitted a Title V permit application to the United States Environmental Protection Agency (EPA) and the Department on April 13, 2009, but later withdrew that application.[12] Petitioner states that since the authority to implement NSR is now fully vested in the Department, the Department has full authority to make common control determinations for major facilities in the State and requests that the Department utilize that

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3 Petition, Exhibit F
4 Petition, p.1
5 Air Title V Facility Permit ID: 8-4532-00075/00001
6 Petition, Exhibit F
7 Petition, p.2
8 Petition, p.5
9 *Id.*
10 Supplement to the Petition, dated March 2, 2011, SMI's Response to DEC's 2/14/11 Request for information, p.1 (Supp. Response)
11 Petition, p.7
12 Supp. Response, p.3

authority to "reaffirm its prior determination that SMI's landfill and SE's power plant are not under common control..."[13]

Additionally, Petitioner states that EPA never responded to or challenged the Department's previous common source determinations, including the Department's May 13, 2008 response letter to EPA finding that the two facilities were separate sources.[14] Petitioner also states that EPA, having an opportunity to object during its 45-day review period, never objected on common control grounds to SMI and SE's Title V permits prior to their issuance by the Department on March 23, 2002 and October 27, 2008, respectively.[15]

At the time the Petition was submitted, Petitioner stated that SE intends to add four new internal combustion landfill gas engines (LFGEs) to its power plant and will shortly file a new permit application with the Department in order to install the new engines under 6 NYCRR Part 231-6, Non-Attainment New Source Review (NNSR) and 6 NYCRR Part 231-8, Prevention of Significant Deterioration (PSD), inasmuch as operation of the new engines would result in a NSR major modification for nitrogen oxides (NOx) and for carbon monoxide (CO).[16] SE's permit application was subsequently received by the Department on July 27, 2011.

APPLICABLE LAW

Pursuant to the CAA, permit issuing authorities are required to review Title V permit applications to determine, *inter alia*, whether two or more nominally separate facilities should be permitted as a single source of emissions.[17] The purpose of a source determination is to ensure that all emissions from a single source are taken into account when determining what applicable requirements and permit conditions should apply to the source.[18] Source determination criteria are derived from the applicable statutory and regulatory definitions of "major source" and its variants.[19]

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13 Petition, p.3-4; and Exhibit A

14 Petition, p.3; and Exhibit A

15 Supp. Response, cover letter

16 Petition, p.2

17 *See generally*, CAA § 501, *et seq.* [42 USC 7661, *et seq.*] and CAA § 165, *et seq.* [42 USC 7475, *et seq.*]

18 Permit issuing authorities may issue separate permits to each of the facilities so long as the permits reflect the aggregated emissions.

19 *See*, CAA § 501(2) [42 USC 7661] and 40 CFR §§ 70.2, 71.2, 63.2, and 51.165(a)(1)(i) and (ii) [includes "major emitting facility," "major source," or "major stationary source"]; *see also*, 40 CFR § 51.166(b) (5) and (6) [defined under the definitions of "stationary source" and "building, structure, facility or installation"]; and CAA 173(a)(3) [42 USC 7504] and 40 CFR § 52.21; *but compare*, CAA § 112 [42 USC 7412] and National

CAA § 501(2) [42 USC 7661] provides,

> The term *major source* means any stationary source (or any group of stationary sources located within a contiguous area and under common control)

40 CFR § 70.2 provides,

> *Major source* means any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping.
>
> For the purposes of defining major source, a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources on contiguous or adjacent properties belong to the same Major Group (i.e., all have the same two-digit code) as described in the Standard Industrial Classification Manual, 1987.

In New York, source determination criteria are similarly derived from the definition of "major stationary source" under the Environmental Conservation Law (ECL) and "major stationary source, major source, and major facility" under the Department's implementing regulations.

ECL §§ 19-0107(19) provides,

> *Major stationary source* means any stationary source or any group of stationary sources located within a contiguous area and under common control and belonging to a single major industrial grouping.

6 NYCRR § 201-2.1(b)(21) provides,

> *Major stationary source or major source or major facility.* Any stationary source or any group of stationary sources, any source or any group of sources, or any facility or any group of facilities, that are located on one or more contiguous or adjacent properties and are under common control, belonging to a single major industrial grouping.

Mining Assoc. v. EPA, 59 F3d 1351, 1356 (DC Cir, 1995) [Two-digit SIC code (or the support facility test) is not used in aggregating hazardous air pollutant emissions under CAA Section 112, rather, these emissions are aggregated without regard to the two-digit SIC code or the support facility test]

DISCUSSION

In considering the questions presented by Petitioner, I have carefully reviewed and taken into consideration numerous documents, including: the Petition and its attachments; public comments received on the Petition; Petitioner's response to public comments; supplemental information provided by the Petitioner; the applicable statutory and regulatory text; the Petitioner's Title V permit; and numerous EPA documents related to source determinations.

I have determined in this case that it is appropriate to address Petitioner's first question and issue a declaratory ruling as to what constitutes "under common control." That discussion is set forth below. However, I am declining to rule on whether SMI's landfill and SE's power plant are "under common control." The latter question raises issues that are more appropriately the subject of review by the Department pursuant to the permit application that was recently filed by SE. *See* 6 NYCRR § 619.3(b).

The question of whether all emission sources at a site are under the applicant's ownership or control must be addressed at the time of permit application in order to satisfy the certification requirement found in 6 NYCRR § 231-6.3(a). While I am exercising the discretion that has been delegated to me in accord with 6 NYCRR § 619.3 in declining to issue a declaratory ruling on Petitioner's second question, I strongly encourage the Petitioner and SE to continue to work with Department staff in developing a draft permit that complies with all applicable requirements.

What Constitutes "Under Common Control"

As stated above, the CAA requires permit issuing authorities to review Title V permit applications to determine, *inter alia*, whether two or more nominally separate facilities should be permitted as a single source of emissions.[20] In doing so, the permitting authority makes a determination based upon the three source determination criteria found within the statutory and regulatory definitions of "major source." Hence, in accordance with ECL §§ 19-0107(19) and (20) and 6 NYCRR § 201-2.1(b)(21), the Department reviews the following three criteria to make source determinations:

(1) whether the activities are under the control of the same person, or persons under common control;

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[20] *See generally*, CAA § 501, *et seq.* [42 USC 7661, *et seq.*] and CAA § 165, *et seq.* [42 USC 7475, *et seq.*]

(2) whether the activities are located on one or more contiguous or adjacent properties; and
(3) whether the activities belong to the same industrial grouping, or use the same 2 digit Standard Industrial Classification (SIC) code.

If all three criteria are answered in the affirmative, nominally separate sources should be treated as a single source for purposes of NSR, PSD and Title V permitting purposes.

The question presented in the Petition, what constitutes "under common control," relates to the first criterion. Based on the Department's review of the relevant statutes, implementing regulations, and the historical framework regarding the issue of "common control," there is no exclusive simplifying test or finite combination of factors that will allow the Department to specifically define what constitutes "under common control" or broadly apply such a definition across every fact scenario and circumstance. Rather, the Department will continue to apply a case-by-case approach in its source determinations, taking into account past precedent and applicable criteria found in numerous guidance documents and determination letters developed over the past 30 years. The following is a summary of notable EPA informal guidance documents and determination letters which Department staff may consider when making common source determinations.

EPA's 1980 Case-Specific Approach and SEC Definition

In enacting the CAA and its amendments, Congress did not explicitly define the term "common control" in the definition of "major source," and it is not defined in EPA's Title V implementing regulations. However, EPA stated in one of its 1980 formal rules that permitting authorities should make source determinations on a fact-specific, case-by-case basis, and be guided by the definition of "control" as used by the Securities and Exchange Commission (SEC) under 17 CFR § 240.12b-2. [21]

17 CFR § 240.12b-2 provides,

> The term "control" (including the terms "controlling," "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

[21] *See,* EPA Final Rule, "Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Emission Offset Interpretative Ruling," 45 Fed. Reg. 59874 (September 11, 1980).

EPA also stated that permitting agencies should not use a "voting share test or other simplifying test" to determine whether control exists. Over the past 30 years, permitting authorities have continued to use EPA's 1980 guidance and review permit applications on a case-by-case basis in order to determine what constitutes "common control."

The 1995 "Spratlin Letter" - Questions and Presumption for Co-Located Facilities

In a 1995 letter from EPA's William Spratlin to Peter Hamlin of the Iowa Department of Natural Resources (Spratlin Letter),[22] EPA provided guidance on how to determine whether facilities located on the site of a major stationary source should be considered part of the existing major source or separate for purposes of addressing the "common control" criterion found within the definition of "stationary source." The letter largely follows EPA's 1980 case-by-case approach to common source evaluations but does not reference the SEC definition of control.[23]

The Spratlin Letter states that common ownership constitutes common control, but advises that common ownership is not the only evidence of control. The letter provides a list of questions that permitting agencies should consider when making a common control determination. The Letter emphasizes that the list in non-exhaustive, and should be used only as "a screening tool" by permitting agencies.

The Spratlin Letter sets forth the following common control review questions:

> Do the facilities share common workforces, plant managers, security forces, corporate executive officers, or board of executives?
>
> Do the facilities share equipment, other property, or pollution control equipment? What does the contract specify with regard to pollution control responsibilities of the contractee? Can the managing entity of one facility make decisions that affect pollution control at the other facility?
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> Do the facilities share common payroll activities, employee benefits, health plans, retirement funds, insurance coverage, or other administrative functions?
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> Do the facilities share intermediates, products, by products, or other manufacturing equipment? Can the new source purchase raw materials from and

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[22] Petition, Exhibit E, EPA Region 7 Air, RCRA and Toxics Division Director William Spratlin to Peter Hamlin, Iowa Department of Natural Resources, and other State and Local Air Directors (Sept. 18, 1995) (Spratlin Letter).

[23] *Id.*, "EPA's permit regulations do not provide a definition for control." Citing Webster's Dictionary, the Spratlin Letter defines "control" to mean "to exercise restraining or directing influence over," "to have power over," "power of authority to guide or manage," and "the regulation of economic activity."

sell products or byproducts to other customers? What are the contractual arrangements for providing goods and services?

Who accepts the responsibility for compliance with air quality control requirements? What about for violations of the requirements?

What is the dependency of one facility on the other? If one shuts down, what are the limitations on the other to pursue outside business interests?

Does one operation support the operation of the other? What are the financial arrangements between the two entities?

EPA states that permitting agencies should look beyond the list to determine whether a common control relationship exists, such as a review of any parent and subsidiaries.[24] The letter also warns permitting authorities to be cautious of indicators that a company may be seeking to circumvent major source permitting requirements and ultimately jeopardizing the goals and effectiveness of the permitting program.[25]

Additionally, the Spratlin Letter creates a presumption in which common control may be presumed by the permitting agency where one company locates on another's land. EPA reasons that companies typically don't just locate on another's property and do whatever they want. Such relationships are usually governed by contractual, lease, or other agreements that establish how the facilities interact with one another. This presumption may be overcome if the company can explain, on a case-by-case basis, how it interacts with the companion facility using the list of questions provided.[26]

EPA's Four-Factor Approach

EPA has also utilized a four-factor approach for source determinations. According to EPA, the four-factor approach was compiled from regulation, guidance and individual determinations,[27] including guidance from the Spratlin Letter. Under EPA's four-factor approach, common control may be evaluated by looking at the following four factors:

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24 *Id.*, at pp.1-2

25 *Id.*, at p.3 [arguably, a facility's ability to exert control over the pollution control activities of another may be central to the issue of whether that facility is attempting to avoid air permitting and pollution control requirements]

26 *Id.*

27 *See,* November 25, 1997 letter from EPA Region 2 Air Programs Branch Permitting Chief, Steven Riva to Attorney Michael Rodburg, of Lowenstein, Sandler, Kohl, Fisher & Boylan, representing E.I. du Pont de Nemours & Company (EI Dupont) [utilizing four-factor test to find two facilities were under "common control where the owners of the facilities were joint venturers"]

(1) whether control can be established through ownership of two entities by the same parent corporation or a subsidiary of the parent corporation;[28]

(2) whether control has been established by a contractual arrangement giving one entity decision-making authority over the operations of the second entity; [29]

(3) whether there is a contract for service relationship between the two entities in which one sells all of its products to the other under a single purchase or contract;[30] and

(4) whether there is a support or dependency relationship between the two entities such that one would not exist "but for" the others.[31]

The "Werner Letter"- Guidance for NY Landfills and LFGTE Facilities

In 2006, the Department received informal guidance from EPA for the specific purpose of making source determinations for landfills and companion LFGTE facilities in the State.[32] The "Werner Letter" referenced EPA's 1980 case-by-case approach and the SEC definition.[33] The letter sets forth guidance on reviewing all three source determination criteria. Specifically, when reviewing the "common control" criterion, EPA states:

> ...we first look to see if common ownership exists. If common ownership exists, then common control is immediately established. If common ownership does not exist, then we look at various factors that establish such an inter-relationship and/or support relationship between the two corporations, such that common control can be demonstrated between the two. Use the ... list of questions and qualifications [from the Spratlin Letter] ... This is not a comprehensive list for exploring the relationship between the two facilities. It may be necessary to look at contracts, lease agreements, and other relevant information.[34]

In its March 13, 2008 response to EPA, the Department found that only one facility, the Al Turi Landfill and LFGTE facility, met the "common control" criteria set out in the Werner Letter.[35] It was determined that Al Turi Landfill (Al Turi) and Al Turi LFGTE (Ameresco) were

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28 *See*, 45 Fed. Reg. 59874, 59878 (1980).

29 *Id.*

30 *See*, John S. Seitz Memorandum, "*Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permit Programs of the Clean Air Act (Act)*" (Aug. 2, 1996) (Seitz Memo) [review of common control at military installations is similar to industrial and commercial sites, on a case-specific basis, examining the operations and interactions at the site]

31 *See*, Spratlin Letter

32 Letter from EPA Region 2 Air Program Chief Raymond Werner to NYSDEC's Air Program Director David Shaw (July 18, 2006) (Werner Letter)

33 *Id.*, at pp. 3-4

34 *Id.*, at pp. 4-5

35 Petition, Exhibit A, Letter from NYSDEC's Director of Air Resources David J. Shaw to EPA Region 2's Raymond Werner (March 13, 2008)

"under common control" based on the following findings: (1) Al Turi did not have physical possession of the flares, only an option to buy flares if no longer being used by the LFGTE facility, and therefore had no independent pollution controls; (2) Ameresco was contractually obligated to purchase all of its fuel from Al Turi, and therefore dependent upon Al Turi for its operations and resulting revenue; and (3) the SIC code and adjacency criterion were present.

As stated by Petitioner, the Department also determined at that time that SMI's Landfill and SE's LFGTE facility were not "under common control" since they were independently controlled, and are currently treated as separate sources under their respective Title V permits.

Other EPA Determination Letters

In addition to several determination letters referenced above, "common control" evaluations are contained in various other informal EPA determination letters. The following are summaries from some of these letters.

TriGen and Coors Brewery (EPA Region 8) – single source

In a November 12, 1998 letter, EPA determined that TriGen and Coors Brewery were a single source based on the following findings: (1) the brewery depended on TriGen for its electrical power and pollution control, making TriGen a support facility and classified under the same SIC Code as brewery; (2) TriGen was located on the brewery site which created a presumption of common control; (3) although Coors divested ownership of the power plant, it did not divest control over its operation or output.

Front Range and PSCo facilities (EPA Region 8) - single source

In an October 1, 1999 letter, EPA determined that Front Range power generating facility and Public Service Company of Colorado (PSCo) were a single source based on the following findings: (1) Front Range had no other function than to supply power to PSCo; (2) PSCo determined the start-up, shut down and levels of electricity generation at Front Range; (3) Front Range depended on PSCo for its fuel, and purchase and delivery of it product; and (4) there was an ownership interest in Front Range facility by PSCo's parent company. PSCo subsequently challenged EPA's determination, but the court

dismissed the case finding that EPA's opinion letter did not constitute a final action for purposes of an administrative appeal.[36]

Maplewood Landfill and INGENCO (EPA Region 3) - independent sources

In a May 1, 2002 letter, EPA determined that Maplewood Landfill and Industrial Power Generating Corporation (INGENCO) were independent sources based on the following findings: (1) INGENCO was responsible for all capital improvements to create the power plant on the leased property; (2) Maplewood owns and operates the landfill gas collection system and its own back-up flares; (3) If the landfill gas is not used or resold by INGENCO, the gas will be flared at the Maplewood facility; (4) INGENCO will control the valve that shunts the landfill gas to the electricity generating engines or to Maplewood's flare; and (5) INGENCO does not get all of its fuel supply from Maplewood (uses up to 70% of LFG, the remainder must be from outside vendors).

EPA also considered the Spratlin questions and found: lack of co-financial interests; no shared decision-makers, employees or administrative functions; no shared intermediates, products, byproducts, manufacturing equipment, or property other than the leased property; neither facility was dependent on the other; and if either Maplewood or INGENCO shuts down, the other facility can continue to operate at full capacity.[37]

Ocean County Landfill and MRPC GTE Facility (EPA Region 2) - single source

In a May 11, 2009 letter, EPA determined that Ocean County Landfill (OCL) and Manchester Renewable Power Corp.'s GTE facility (MRPC) were a single source based on the following findings: (1) there was common ownership since a parent corporation owned both the landfill and part of the GTE facility; (2) although rebutted, there was a presumption of "common control" where MRPC was located on property owned by the OCL; and (3) they shared the same SIC code. Other factors indicating "common control" include: (a) one entity's control over the other's stocks; (b) MRPC's dependence on OCL as its only source of fuel; (c) restrictions and control over the sale or transfer of the

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[36] Public Service Company of Colorado. v. EPA, 225 F3d 1144, 2000 US App LEXIS 22180 (Ct of App, 10th Cir, Aug. 29, 2000) [EPA's opinion letters finding that the facilities were a single source did not constitute a final action for purposes of an administrative appeal]

[37] Since Maplewood owns and controls its gas collection system and will continue to maintain its own flare, it does not need INGENCO to destroy the landfill gas as required by 40 CFR 60, subpart WWW (Standards of Performance for Municipal Solid Waste Landfills). If this were not the case, EPA stated that it could take enforcement action against the landfill.

gas; and (d) certain financial interests that each entity had in the other, such as shared tax credits. Like the PSCo matter above, EPA's determination was challenged in court but was dismissed for lack of jurisdiction because EPA's letter was not a final action.[38]

CONCLUSION

The determination of whether two or more facilities are "under common control" will continue to be made on a case-by-case basis. This determination should be made at the time a prospective permittee applies for a permit to ensure that all emissions from a single source are taken into account when determining what applicable requirements and permit conditions should apply to the source and included in its permit. In utilizing the case-by-case approach, Department staff may be guided by EPA's informal guidance documents and determination letters, but are not obligated to rely exclusively on any particular document, simplifying test, or factor or presumption therein.

For practical reasons, Department staff should first look to see whether there is common ownership between the facilities, including a review of any parents and subsidiaries. If common ownership exists, then "common control" is established. If no common ownership exists, then staff should review the facts and circumstances specific to the permit application at hand, and apply the various review criteria developed over the years. Since SE has recently submitted its permit application to the Department, Petitioner should work with SE and Department staff to ensure that the permit incorporates all applicable requirements.

Dated: September 9, 2011

Alison H. Crocker
Deputy Counsel

[38] Ocean County Landfill Corp. v EPA, 631 F3d 652, 2011 US App LEXIS 2025 (Ct of App, 3rd Cir, Feb. 2, 2011) [EPA's common control determination was not a final action. NJDEP had not yet provided the parties or EPA with notice and an opportunity to comment on a draft permit. EPA will have an opportunity to object formally to the draft permit, and, if NJDEP declines to address EPA's objection, to take over the permitting process from the state]