



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

July 12, 2019

OFFICE OF
AIR AND RADIATION

The Honorable Catherine McCabe
Commissioner
New Jersey Department of Environmental Protection
Post Office Box 402
Trenton, New Jersey 08625

Dear Commissioner McCabe:

On December 14, 2018, the U.S. Environmental Protection Agency (EPA) received a letter from Sandra T. Ayres, Esq. on behalf of Ocean County Landfill Corp. (OCLC) (the 2018 OCLC Letter). The 2018 OCLC Letter requests that EPA revisit and reverse the agency's determination in a May 11, 2009, letter (the 2009 EPA Letter¹) that the OCLC landfill and two landfill gas-to-energy (LFGTE) operations owned by Manchester Renewable Power Corp. (MRPC) and Ocean Energy Corp. (OEC) should be treated as a single source for Clean Air Act (CAA) permitting purposes. Specifically, this request relates to whether these operations should collectively be considered part of the same "major source" for the operating permit program under Title V of the CAA and/or part of the same "stationary source" for the New Source Review (NSR) preconstruction permit programs under Title I of the CAA; the corresponding term used in the rules issued by the New Jersey Department of Environmental Protection (NJDEP) is "facility." EPA commonly refers to these types of questions as "source determinations."

In this case, the permitting authority's source determination turns on whether the OCLC landfill and MRPC/OEC LFGTE operations are under common control. Under the federal rules governing these permitting programs, entities may be considered part of the same "major source" or "stationary source" if they (1) belong to the same major industrial grouping (2-digit Standard Industrial Classification (SIC) code); (2) are located on one or more contiguous or adjacent properties; and (3) are under the control of the same person (or persons under common control). See 42 U.S.C. § 7661(2) (Title V statutory definition); 40 CFR §§ 70.2 and 71.2 (Title V regulations); *id.* §§ 52.21(b)(5) and (6), 51.165(a)(1)(i) and (ii), and 51.166(b)(5) and (6) (NSR regulations). OCLC, MRPC, and OEC are all located on contiguous leaseholds owned by OCLC's parent company and all share the same 2-digit SIC code. Further, MRPC and OEC are wholly owned by a common parent company and there is no dispute that these two entities themselves are under common control and should be treated as part of the same source. Therefore, the key issue is whether OCLC's landfill and the collective MRPC/OEC LFGTE operations are under common control.

¹ Letter from Ronald J. Borsellino, Acting Director, Division of Environmental Planning and Protection, EPA Region 2, to Scott Salisbury, President, MRPC/LES and Lawrence C. Hesse, President, OCLC (May 11, 2009).

The 2018 OCLC Letter requests that EPA revisit and reverse the source determination presented in the 2009 EPA Letter in light of more recent EPA interpretations and policies related to common control. As further explained in Section II of this letter, although EPA would evaluate the facts differently today than it did in the 2009 EPA Letter, EPA still considers it reasonable to conclude that the OCLC landfill and MRPC/OEC LFGTE operations are a single source for permitting purposes.² Moreover, as a general matter, the guidance contained in EPA's recent documents concerning common control was intended to assist with future source determinations and was not intended to prompt permitting authorities to revisit prior permitting decisions. EPA does not believe it would be appropriate in most circumstances for permitting authorities to re-evaluate prior source determinations based solely on the change in EPA policy on which the 2018 OCLC Letter relies, especially where, as is the case with the OCLC request, relevant facts have not changed.

However, given the unique circumstances associated with the history of EPA's involvement in the ongoing Title V permitting process for OCLC and MRPC/OEC (summarized in Section I of this letter), EPA believes it would be helpful to inform NJDEP of EPA's current perspective on whether the OCLC landfill and MRPC/OEC LFGTE operations should be considered to be under common control. In particular, a key purpose of this letter is to clarify that NJDEP is not bound by the 2009 EPA Letter (or the reasoning contained therein),³ nor, for that matter, by the reasoning contained in Section II of this letter. As discussed further in this letter, NJDEP is currently in the process of issuing Title V permit(s) to the OCLC and MRPC/OEC operations. Consistent with EPA's longstanding practice and view, source determinations are fact-specific and should be made by permitting authorities on a case-by-case basis. When NJDEP issues permits pursuant to its EPA-approved rules, NJDEP has primary authority and responsibility, and retains discretion, to make permitting decisions (like the Title V source determination at issue here) based on the record in each case and a reasonable interpretation of its EPA-approved rules and in a manner consistent with the CAA.⁴ As NJDEP moves forward with its process to issue Title V permit(s) to OCLC and MRPC/OEC, it will of course be important that NJDEP provides a reasoned basis for its permitting decisions.⁵

² The EPA views articulated in this letter do not constitute a legislative rule or regulation subject to notice-and-comment rulemaking requirements, nor is this letter final agency action. This letter does not itself create any binding requirements on state and local permitting authorities, permit applicants, or the public, and the guidance it contains may not apply to a particular situation based upon the individual facts and circumstances.

³ See *Ocean County Landfill Corp. v. EPA*, 631 F.3d 652 (3d Cir. 2011) (holding that the 2009 EPA Letter was not a final agency action). As explained later in this letter, NJDEP appears to have relied on the 2009 EPA Letter as the basis for its treatment of OCLC and MRPC/OEC as a single source in two recent permit modifications. See 2018 OCLC RTC at 4; *infra* note 11 and accompanying text. The 2018 OCLC Letter even contends that "NJDEP understandably considers itself bound by the [2009 EPA Letter] to require" a combined Title V operating permit for OCLC and MRPC/OEC.

⁴ EPA retains oversight over part 70 permits issued by NJDEP. See, e.g., 40 C.F.R. §§ 70.8(c).

⁵ This is particularly important given that NJDEP's forthcoming Title V renewal permit action should resolve EPA's initial 2005 objection to the MRPC Title V permit, which, as discussed further below, was based in part on the fact that NJDEP had not provided a written rationale to support its initial source determination for OCLC and MRPC.

I. Background and Permitting History

Both the OCLC landfill and the MRPC/OEC LFGTE operations are located on contiguous leaseholds owned by OCLC's parent company (Atlantic Pier Company, or APC) in Manchester Township, Ocean County, New Jersey. OCLC owns and operates a municipal solid waste landfill. Gas generated by waste at the landfill is collected under vacuum and routed to either flares at the landfill or to the adjacent LFGTE operations owned and operated by MRPC/OEC. Landfill gas received by MRPC/OEC is treated and routed to landfill gas-fired engines as fuel to generate electricity for sale to MRPC/OEC's customers.

NJDEP originally permitted the OCLC landfill and MRPC/OEC engines as separate sources for Title V and NSR purposes. On November 2, 2005, EPA objected to the proposed MRPC⁶ Title V renewal permit in part on the basis that NJDEP had not provided a written justification for its determination that the MRPC engines and OCLC landfill were not under common control. Extensive discussions with NJDEP on this issue resulted in EPA's eventual issuance of the 2009 EPA Letter that "concluded the common control determination that [NJDEP] was required to render pursuant to EPA's objection on November 2, 2005" to the MRPC Title V permit. 2009 EPA Letter at 1. The 2009 EPA Letter expressed EPA's view that the OCLC and MRPC/OEC operations were under common control. In the letter, EPA also requested that NJDEP reopen and reissue the Title V permits for OCLC and MRPC/OEC to treat the operations as a single source. NJDEP initially agreed to implement the approach articulated in the 2009 EPA Letter. OCLC challenged the 2009 EPA Letter in the U.S. Court of Appeals for the Third Circuit. The court dismissed this case for lack of subject matter jurisdiction on the basis that EPA's 2009 EPA Letter was not a reviewable final agency action.⁷

However, in 2010, while the Third Circuit case was still pending, NJDEP endorsed an approach whereby EPA—not NJDEP—would issue the title V permit(s) for OCLC and MRPC/OEC under EPA's part 71 authority.⁸ EPA subsequently initiated part 71 proceedings for both OCLC and MRPC/OEC and released a draft permit for public comments on November 6, 2015; the draft permit treated the OCLC and MRPC/OEC operations as a single source.

In 2016, before EPA completed the part 71 permit action, NJDEP indicated its intent to move forward with issuing a Title V permit to the OCLC and MRPC/OEC as a single source under its part 70 authority. EPA agreed to suspend its part 71 permit action based on the understanding—communicated to EPA by NJDEP, OCLC and MRPC—that NJDEP would issue a Title V permit treating OCLC and MRPC/OEC as a single source.⁹ EPA understands that NJDEP still intends to

⁶ At the time of this objection, the OEC engines did not yet exist. Because of this, and the fact that the MRPC and OEC engines have historically been treated as part of the same source, some of the documents discussed in this letter referred solely to MRPC instead of MRPC/OEC.

⁷ See *Ocean County Landfill Corp.*, 631 F.3d 652.

⁸ EPA-issued Title V permits are often referred to as "part 71 permits" as opposed to state-issued "part 70 permits." Under certain circumstances, EPA has authority to directly issue Title V permits to sources. See, e.g., 42 U.S.C. § 7661d(c); 40 C.F.R. § 71.4(e).

⁹ See Letter from John Filippelli, Director, Clean Air and Sustainability Division, EPA Region 2, to Francis C. Steitz, Director, Division of Air Quality, NJDEP (October 11, 2016); Letter from Francis C. Steitz to John Filippelli (September 30, 2016); Letter from Martin L. Ryan, Vice President – Engineering, OCLC, to John Filippelli and

issue this Title V permit. In two recent 2018 permit modifications, NJDEP treated the two sets of operations as a single source.¹⁰ NJDEP apparently based this decision at least in part on the 2009 EPA Letter.¹¹ As part of the 2018 permit actions, NJDEP also stated that “a Title V operating permit will be issued [“for a joint facility” including OCLC and MRPC] at a later date.”¹²

II. EPA’s Current Views Regarding Common Control

If EPA were to examine the relationship between OCLC and MRPC/OEC today in order to determine whether their operations are under common control, we would approach the facts differently than we did in the 2009 EPA Letter. However, as explained further below, even under its current policy, EPA would consider it reasonable for NJDEP to determine that the OCLC landfill and MRPC/OEC LFGTE operations are under common control.

In EPA’s April 30, 2018, *Meadowbrook* Letter,¹³ EPA reevaluated its historical “multi-factor” approach to common control, revised its regulatory interpretation, and articulated a revised policy for assessing questions of “control” or “common control” in the context of source determinations. *See* *Meadowbrook* Letter at 4–7. EPA explained its intention to focus on “the power or authority of one entity to dictate decisions of the other that could affect the applicability of, or compliance with, relevant air pollution regulatory requirements.” *Meadowbrook* Letter at 6. Notably, EPA explained its view that control “includes only the power to dictate a particular outcome and does not include the mere ability to influence.” *Id.*¹⁴ EPA further explained its view that this inquiry should focus on “whether the control exerted by one entity would determine whether a permitting requirement applies or does not apply to the other entity, or whether the control exerted by one entity would determine whether the other entity complies or does not comply with an existing permitting requirement.” *Id.* at 8.

Francis C. Steitz (Sept. 16, 2016); Letter from Richard DiGia, President, MRPC, to John Filippelli and Francis C. Steitz (September 16, 2016). EPA also indicated that it would withdraw its draft part 71 permit upon NJDEP’s issuance of the part 70 permit. EPA does not consider the state to be bound by the statements made in these correspondences regarding the state’s pending source determination in the ongoing part 70 permitting process.

¹⁰ *See* OCLC Permit No. BOP160002 at 2, 15, 53 (Ref. # 38); MRPC Permit No. BOP170001 at 1–2, 24 (Ref. # 10), 45 (Ref. # 14); *see also* Response to Public Comments on OCLC Permit No. BOP160002 at 4 (June 20, 2018) (2018 OCLC RTC).

¹¹ *See* 2018 OCLC RTC at 4 (“However, in the May 11, 2009 letter to MRPC and OCLC, [EPA] determined that the OCLC Landfill and MRPC engines that produce electricity by burning landfill gas, [sic] are under common control. That means the emissions due to an increase in the landfill design capacity were evaluated jointly for both landfill and MRPC engines in accordance with the PSD rule.”).

¹² OCLC Permit No. BOP160002 at 2, 15 (Aug. 10, 2018) (OCLC Title V permit modification); *see* MRPC Permit No. BOP170001 at 2 (June 21, 2018) (MRPC/OEC Title V permit modification). EPA understands that NJDEP has not yet decided that the part 70 permit application received in February 2017 from the applicants is complete.

¹³ Letter from William L. Wehrum, Assistant Administrator, Office of Air and Radiation, EPA, to the Honorable Patrick McDonnell, Secretary, Pennsylvania Department of Environmental Protection (April 30, 2018), *available at* https://www.epa.gov/sites/production/files/2018-05/documents/meadowbrook_2018.pdf (*Meadowbrook* Letter).

¹⁴ *See also id.* at 7 (“While distinguishing control from the ability to merely influence will necessarily be a fact-specific inquiry, the key difference is that EPA interprets ‘control’ to exist at the point where one entity’s influence over another entity effectively removes the autonomy of the controlled entity to decide whether or how to pursue a particular course of action.”).

In the October 16, 2018, *Ameresco* Letter,¹⁵ EPA further clarified its approach for evaluating whether the “control” exerted by one entity over a specific aspect of the operations of another entity could result in the two entities being considered “persons under common control,” such that the entirety of the entities’ operations would be considered under common control. In sum, EPA expressed the view that the fact that two entities may each have some level of control over a discrete shared *activity* (or a small portion of otherwise separate operations) does not mean that the *entities* themselves are “persons under common control.” *See Ameresco* Letter at 5–6. On the other hand, EPA said that “where one entity . . . exerts enough control over a substantial portion of the other’s relevant operations,” permitting authorities could consider these entities “to be ‘persons under common control’ in certain situations.” *Id.* at 6.

EPA’s current framework for examining the common control question, as expressed in the *Meadowbrook* and *Ameresco* Letters, differs from the approach EPA followed in the 2009 EPA Letter, which described a “multi-factor” analysis that was consistent with EPA’s approach up to that point in time. Thus, EPA’s conclusion that OCLC and MRPC/OEC were under common control in its 2009 EPA Letter was based on facts that EPA no longer considers relevant in determining the existence of control or common control.

For example, in the 2009 EPA Letter—and on numerous other occasions between 1995 and 2018—EPA presumed the existence of common control in situations involving co-located operations where one company’s operation was located on another company’s property (here, the OCLC landfill and MRPC/OEC engines are located on land leased from OCLC’s parent company).¹⁶ This rebuttable presumption effectively transferred the burden to co-located entities to disprove common control. EPA initially justified this presumption with the following argument: “Typically, companies 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.” *Spratlin* Letter at 1. Although co-located companies often have agreements governing some aspects of their business dealings, the possibility that such agreements exist does not justify a presumption of common control. If such agreements do exist—as they do between OCLC, MRPC, OEC and affiliated companies—then specific portions of those agreements may give rise to control. However, any potential bases for control, regardless of their origin, should be evaluated according to the principles outlined in the *Meadowbrook* and *Ameresco* Letters. Thus, one should look to the specific terms of any such agreements to assess whether one company has the power or authority to dictate decisions of the other company in such a way that could affect the applicability of, or compliance with, relevant air pollution regulatory requirements. Such terms, or any control based on such terms, should not simply be presumed to exist based on the location of the operations.¹⁷

¹⁵ Letter from Anna Marie Wood, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards, EPA, to Ms. Gail Good, Director, Bureau of Air Management, Wisconsin Department of Natural Resources (October 16, 2018), available at https://www.epa.gov/sites/production/files/2018-10/documents/ameresco_jcl_letter.pdf (*Ameresco* Letter).

¹⁶ *See* 2009 EPA Letter at 3 (citing Letter from William A. Spratlin, Director, Air, RCRA, and Toxics Division, EPA Region 7, to Peter R. Hamlin, Chief, Air Quality Bureau, Iowa Department of Natural Resources (September 18, 1995) (*Spratlin* Letter)).

¹⁷ While the location of one entity next to another could be relevant to whether these two entities approximate a “common sense notion of a plant,” 45 FR 52676, 52694 (August 7, 1980), this consideration is already explicitly

Other facts discussed in the 2009 EPA Letter do not necessarily establish the type of control described in the *Meadowbrook* Letter. However, additional facts—which EPA considered in developing the 2009 EPA Letter but did not expressly identify—suggest that aspects of OCLC and MRPC/OEC’s business arrangements give rise to the type and extent of “control” EPA considers relevant under the framework described in the *Meadowbrook* and *Ameresco* Letters. Most notably, two lease agreements and a stock purchase agreement seem to provide the company that also controls OCLC with some level of control over MRPC/OEC’s acquisition of air permits and construction-related activities, in a manner that could have a direct bearing on the applicability of air permitting requirements to MRPC/OEC.

These agreements appear to give an affiliate of OCLC¹⁸ control over a variety of actions related to MRPC/OEC’s acquisition of air permits. These agreements include provisions specifying the contractor used to obtain MRPC’s permits, indicating that the OCLC affiliate will reimburse MRPC/OEC for costs associated with certain permits, and governing the transfer of MRPC/OEC’s permits to the OCLC affiliate upon termination or expiration of the agreements.¹⁹ In addition, similar provisions in two agreements state the following: “All permitting and approval activity of MRPC, including but not limited to, filing permits and agreements with regulatory agencies, shall be coordinated with and be subject to the prior approval of [OCLC affiliate], which approval shall not be unreasonably withheld.”²⁰ Another agreement explicitly refers to the OCLC affiliate’s approval of permits for “construct[ing] and install[ing] Improvements” at MRPC/OEC.²¹ The OCLC affiliate’s power to “reasonably” withhold approval of MRPC/OEC’s environmental permits and related construction activities appears to effectively give the OCLC affiliate the power to dictate the contents of MRPC/OEC’s permit applications, and accordingly MRPC/OEC’s choices on whether to construct or install certain air pollution equipment or controls. Naturally, it follows that the ability to dictate these decisions could result in impacts on the applicability of permitting requirements applicable to MRPC/OEC. Under EPA’s approach, articulated in the *Meadowbrook* and *Ameresco* Letters, these facts appear sufficient to establish the OCLC affiliate’s “control” over a substantial portion of MRPC/OEC’s air pollution-related decisions. It does not appear contested that OCLC and its affiliate are under control of the same corporation. Therefore, applying the analytical framework described in the *Meadowbrook* and *Ameresco* Letters to the available facts of the current case, it would be reasonable to conclude that the OCLC landfill and MRPC/OEC LFGTE operations are under common control. Because the other two source determination criteria are also met, it would be reasonable for NJDEP to treat the OCLC and MRPC/OEC operations as a single source for permitting purposes.

provided for in another distinct element of the regulatory framework for evaluating source determinations: the contiguous or adjacent prong. *See supra* page 1; *cf. Meadowbrook* Letter at 10 (explaining that considerations related to whether one entity is a “support facility” to another entity are accommodated by the major industrial grouping (2-digit SIC code) prong and should not be presumed to result in common control).

¹⁸ It does not appear contested that OCLC and its affiliate (APLC, Inc.) are under the control of the same person, as both are wholly-owned by a common parent company (APC). 2018 OCLC Letter, Exhibit B.

¹⁹ *See* APLC/MRPC Lease, Item 16 (June 30, 1995); APLC/OEC Lease, Item 16 (March 16, 2006).

²⁰ APLC/MRPC Lease, Item 16.E (June 30, 1995); *see* APLC/OEC Lease, Item 16 (March 16, 2006) (similar provision governing OEC lease).

²¹ APC/MRPC/OEC Stock Purchase and Development Agreement, Item 9.03 (March 16, 2006).

I appreciate the opportunity to be of service and trust the information provided is helpful. If you have any additional questions, please contact Juan Santiago in the Office of Air Quality Planning and Standards at (919) 541-1084 or santiago.juan@epa.gov.

Sincerely,



Anne L. Idsal
Assistant Administrator

cc: Sandra T. Ayres, Esq.
Richard M. DiGia
Lawrence C. Hesse
Peter D. Lopez, EPA Region 2
Francis C. Steitz, NJDEP