

U.S. Environmental Protection Agency
Region 2
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May 11, 2009

Scott Salisbury, President
Manchester Renewable Power Corporation/LES
29261 Wall Street
Wixom, WI 48393

Lawrence C. Hesse, President
Ocean County Landfill Corporation
25 First Avenue
Atlantic Highlands, NJ 07716

Re: Common Control Determination for Ocean County Landfill and the Manchester
Renewable Power Corp./LES

Dear Mr. Salisbury and Mr. Hesse:

This letter is to inform you that the U. S. Environmental Protection Agency (EPA) has concluded the common control determination that the New Jersey Department of Environmental Protection (NJDEP) was required to render pursuant to EPA's objection on November 2, 2005, to the proposed title V renewal permit for Manchester Renewable Power Corp./LES, Facility ID No. 78901, Activity ID No. BOP990002. Initially, the New Jersey Attorney General's Office requested assistance from EPA in making the determination. Subsequently, NJDEP agreed to implement EPA's determination.

EPA has examined the numerous documents provided which span the years 1985 through 2006, as well as the additional information and analysis submitted in July 2008¹. EPA concludes that while ownership of the facilities has changed during the course of the determination process, the common control status has not. The facts as they exist today support EPA's finding of common control for the facilities identified in NJDEP title V permits as Ocean County Landfill (OCL) and Manchester Renewable Power Corp./LES (MRPC), with the permittees identified, respectively, as Ocean County Landfill Corp. (OCLC) and Manchester Renewable Power Corp./LES (MRPC/LES). EPA has sufficient information to find that the landfill and companion gas-to-energy (GTE) operations are under common control for EPA permitting purposes, and does now make that finding and determination.

¹ Letter from Sandra T. Ayres, Scarinci & Hollenbeck, LLC, attorneys representing the President of OCLC, to Walter E. Mugdan, Director, Division of Environmental Planning and Protection, U.S. EPA Region 2, dated July 9, 2008; Letter from Scott Salisbury, President, Manchester Renewable Power Corporation, to W. Mugdan (EPA), dated July 14, 2008; and Letter from W. Mugdan (EPA), to Lawrence C. Hesse, Ocean County Landfill Corporation, dated April 10, 2008.

Common Control Determination

OCL and MRPC are, respectively, a landfill and companion GTE facility in New Jersey that have been issued separate title V permits and treated as separate sources. Since their locations are contiguous or adjacent, and they share the same two-digit (major group) standard industrial classification (SIC) code, a finding of common control would result in treatment of OCL and MRPC as a single source for Clean Air Act permitting purposes.²

Agreements provided to the New Jersey Attorney General's Office prior to July 2008 were examined for common control relationships between Atlantic Pier Company, Inc. (APC), GASCO (a gas collection and delivery company), OCLC, Atlantic Pier Leasing Company, Inc. (APLC), and Ocean Energy Corp. (OEC).³ These agreements reflected common ownership because they indicated APC owned the landfill and owned part of the GTE facility (i.e., the OEC engines at MRPC). This common ownership demonstrated that the landfill and companion GTE operations were under "common control."

OCLC indicated in the July 2008 information it submitted that APC is the parent of OCLC, APLC, and GASCO, such that a control relationship is acknowledged,⁴ and provided an agreement showing that all stocks and thus ownership of OEC had moved from APC to MRPC. Although common ownership of OCLC and OEC by APC ended with MRPC's purchase of all of OEC's stock, common control can be established in the absence of common ownership. Thus, EPA looked beyond ownership to see if common control exists between OCLC and MRPC.

² For facilities to be a single source of criteria pollutants under the Prevention of Significant Deterioration (PSD), nonattainment New Source Review (NSR), and title V programs of the Clean Air Act (CAA or the Act), the following three criteria must be satisfied: (1) the facilities are located on one or more contiguous or adjacent properties; (2) they share the same two-digit (major group) SIC code (or one facility is considered a support facility to the other); and (3) they are under common control. (See 40 C.F.R. Sections 70.2, 71.2, 63.2, 51.165(a)(1)(i) and (ii), and 51.166(b)(5) and (6).) Note: The two-digit SIC code (or support facility test) is not used in aggregating hazardous air pollutant emissions under Section 112 of the Act or under the Section 112 major source definition in title V, rather, these emissions are aggregated without regard to the two-digit SIC code or the support facility test. This distinction is based on the Clean Air Act. See e.g., Section 112 of the Act and National Mining Assoc. v. EPA, 59 F.3d 1351, 1356 (D.C. Cir. 1995).

³ The MRPC GTE operation encompasses a set of engines referred to as "MRPC" and another set of engines referred to as "OEC." In April 2005, OEC submitted a PSD application to NJDEP for the "OEC" engines. On March 16, 2006, MRPC/LES bought OEC. On August 5, 2006, NJDEP issued a PSD/Significant Modification of the MRPC title V permit to MRPC/LES for the new (OEC) engines.

⁴ More specifically, charts included in the OCLC response provide organizational trees for the OCL and the MRPC families of companies. One chart shows that APC is the parent company of OCLC and APLC, and is the majority shareholder (owning 90% of the voting shares) in GASCO, LLC. This information demonstrates direct ownership by APC of OCLC, APLC, and GASCO. The other chart shows that MRPC is the parent company of OEC. (In addition, the July 2008 information stated that MRPC was originally formed by APC/APLC and all stock was conveyed to Michigan Cogeneration Systems, Inc./LES on June 30, 1995.)

A common control relationship is presumed when one operator locates on another's property. Rebuttal of the presumption of common control is the burden of the source. Common control determinations are made on a case-by-case basis guided by precedent, and are not based on weight-of-evidence or preponderance-of-evidence tests. Once a presumption of common control has been established, it can be rebutted if the facilities in question provide information that allows for the presumption to be rebutted. If the presumption is not rebutted, the facilities in question are determined to be under common control.⁵

Common control is presumed in the case of OCL and MRPC because one entity has located on another's property. Specifically, both OCL, which APC owns through OCLC, and MRPC are located on property owned by APC. Because MRPC chose to locate on property owned by APC a common control relationship between OCL and MRPC is presumed.⁶

On November 26, 2007, OCLC submitted information in an attempt to rebut the presumption of common control. As described above and detailed below, the composite information received regarding this determination confirmed the common control relationship between the landfill and companion GTE operations.

In addition to the presumption of common control, the following factors support EPA's determination of common control between OCL and MRPC:⁷

⁵ See, e.g., Letter from William A. Spratlin, Director, Air, RCRA, and Toxics Division, U.S. EPA Region 7, to Peter R. Hamlin, Chief, Air Quality Bureau, Iowa Dept. of Natural Resources, dated September 18, 1995 (Spratlin Letter); Letter from Judith M. Katz, Director, Air Protection Division, U.S. EPA Region 3, to Gary E. Graham, Environmental Engineer, Commonwealth of Virginia Department of Environmental Quality, "Re: Common Control for Maplewood Landfill, also known as Amelia Landfill, and Industrial Power Generating Corporation," dated May 1, 2002; Letter from Jane M. Kenny, Regional Administrator, U.S. EPA Region 2, to Erin M. Crotty, Commissioner, New York State Department of Environmental Conservation, "Re: EPA's Review of Proposed Permit for Al Turi Landfill, Permit ID: 3-3330-00002/00039, Mod 1," dated July 8, 2004.

⁶ As stated on page 1 of the Spratlin Letter:

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. Therefore, we presume that one company locating on another's land establishes a "control" relationship. To overcome this presumption, the Region requires these "companion" facilities, on a case by case basis, to explain how they interact with each other.

⁷ The term "factor" in this letter refers to features of the relationships between OCL and MRPC that EPA finds indicative of a common control relationship.

- (a) although APC transferred and/or sold all of OEC's common shares to MRPC, APC retained control over the stocks by disallowing MRPC to transfer and/or encumber any of the stocks without APC approval. Furthermore, APC has the right to demand that MRPC reconvey to APC all of the outstanding equity in OEC upon breach of contract or expiration of certain agreements;
- (b) the dependence of MRPC on OCL as its only source of fuel;⁸
- (c) MRPC and OEC are not permitted to sell or transfer gas to any other entity without the prior written consent of GASCO, indicating GASCO's (and APC's) control over MRPC and OEC; and
- (d) the financial interest that each collocated entity has in the other beyond payment for the landfill gas, e.g., tax credits that MRPC shares with APC.

Note that this list of examples reflecting the common control relationship between the landfill and the GTE operations is not exhaustive, nor is it intended to be. It is intended only to provide further evidence of common control.

EPA has taken into consideration the many types of agreements (site leases, gas leases, power purchase agreements, development agreements, a stock purchase agreement, a gas flare service agreement, and a grant), as well as the large number of agreements existing relative to OCL and MRPC, and finds that they further demonstrate the control relationships that exist between the landfill and the companion GTE operations.

In conclusion, EPA has determined that the information examined regarding the relationships between these entities does not rebut the presumption of common control. EPA finds that OCL and MRPC are under common control and renders this determination as final.

This finding of common control and the previously established facts that OCL and MRPC are collocated and share the same major group SIC code provide that OCL and MRPC are to be treated as a single source for the purpose of permitting under the PSD, NSR, and title V programs of the Clean Air Act.

The existing title V permits for OCL and MRPC must be reopened and reissued to both companies as a single source. This may be accomplished using one or two title V permits. The two title V permits for the Al Turi Landfill & GTE Facility are an example of how title V permitting was handled in another case, with both companies named on both permits. The permits are available on the Internet at http://www.dec.ny.gov/dardata/boss/afs/issued_atv.html.

The determination of common control is limited to the facilities' treatment for purposes of determining major source status and applicability of regulatory requirements. Even when both companies are named as permittees on a single source permit or permits, the joint

⁸ Specific performance requirements in two gas sales agreements (i.e., the GASCO/MRPC and GASCO/OEC agreements) require all gas delivered by GASCO to be purchased by MRPC/OEC and all output from OCL to be sent to MRPC/OEC.

and several liability under the Clean Air Act allows EPA to take enforcement action against whomever EPA finds responsible.

EPA has directed NJDEP to proceed with permit modifications, as required, to reflect the single source status of Ocean County Landfill and Manchester Renewable Power Corp./LES operations.

If you need further information concerning this determination, you may contact me at (212) 637-3724, or Steven Riva at (212) 637-4074.

Yours truly,

/s/

Ronald J. Borsellino, Acting Director
Division of Environmental Planning and Protection

cc: NJDEP

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