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

April 30, 2018

OFFICE OF
AIR AND RADIATION

The Honorable Patrick McDonnell
Secretary of the Pennsylvania Department
of Environmental Protection
Rachel Carson Office Building
Post Box 2063
Harrisburg, Pennsylvania 17105

Dear Mr. McDonnell:

On February 14, 2018, the Pennsylvania Department of Environmental Protection (PADEP) requested that the U.S. Environmental Protection Agency review a document submitted on behalf of Meadowbrook Energy LLC (Meadowbrook) concerning whether emissions from a biogas processing facility under development by Meadowbrook should be aggregated with an existing landfill owned by Keystone Sanitary Landfill, Inc. (KSL) for Clean Air Act (CAA) permitting purposes.

EPA understands this request to relate to the question of whether these two entities should be considered part of the same "major source" under the operating permit program under title V of the CAA, and/or part of the same "stationary source" for the New Source Review (NSR) pre-construction permit programs under title I of the CAA.[1] EPA commonly refers to these types of questions as "source determinations." Under the federal rules governing these permitting programs, entities may be considered part of the same "stationary source" or "major source"[2] if they (1) belong to the same industrial grouping; (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).[3] Meadowbrook's analysis, as supplemented by additional analysis dated March 16, 2018, primarily asserts that the Meadowbrook and KSL facilities are not under "common control."

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[1] Although it appears that Meadowbrook's analysis only directly implicates title V permitting, the discussion in this letter and the Attachment is relevant to NSR permitting actions as well. In the NSR regulations, the definitions of "stationary source" use the term "building, structure, facility, or installation," which is separately defined.

[2] References to "major source" in this letter or Attachment are intended to refer only to the portions of the title V definitions of "major source" that relate to which activities should be considered part of the same "major source."

[3] *See* 42 U.S.C. § 7661(2) (title V statutory definition); 40 C.F.R. §§ 70.2 & 71.2 (title V regulations); 40 C.F.R. §§ 52.21(b)(5) & (6), 51.165(a)(1)(i) & (ii), and 51.166(b)(5) & (6) (NSR regulations). PADEP's permitting regulations either incorporate EPA's prevention of significant deterioration (PSD) regulations or contain similar provisions. *See, e.g.*, 25 Pa. Code 127.83 (PSD regulations incorporating EPA's regulations in 40 C.F.R. § 52.21);

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As described more fully in the Attachment below, EPA has long recognized that common control determinations should be made on a case-by-case basis. In making such determinations, and in offering its views to other permitting authorities, EPA has previously interpreted the term "common control" in a manner that may support viewing the Meadowbrook and KSL facilities as a single "stationary source" or "major source" by virtue of the support or dependency relationships between the two entities that might be viewed as providing each entity with some degree of influence over the operations of the other.

However, the potential for that interpretation to produce inconsistent and impractical outcomes in this and other cases has caused EPA to re-evaluate and revise its interpretation of the term "common control" in the title V and NSR regulations. For the reasons discussed further in the Attachment, the agency believes clarity and consistency can be restored to source determinations if the assessment of "control" for title V and NSR permitting purposes focuses 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. Under this revised interpretation, EPA agrees with Meadowbrook that PADEP may conclude that the Meadowbrook and KSL facilities are not under common control and thus not a single "stationary source" or "major source" for title V or NSR purposes. However, given that Pennsylvania's title V and NSR programs have been approved by EPA, PADEP has primary responsibility to make source determinations involving the Meadowbrook and/or KSL facilities based on its EPA-approved rules. EPA believes that the following Attachment, in explaining EPA's revised interpretation and other factors that EPA recommends considering when determining if there is "common control," should be helpful to PADEP as it makes its final permitting decision with respect to Meadowbrook.

If you have any additional questions, please contact Anna Marie Wood in the Office of Air Quality Planning and Standards at (919) 541-3604 or *wood.anna@epa.gov*.

Sincerely,

William L. Wehrum
Assistant Administrator

Attachment

cc: Krishnan Ramamurthy, Director of Air Quality, PADEP
Mark Wejkszner, Air Quality Program Manager, PADEP, Region 2

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see also 25 Pa. Code 121.1 (general air quality definition of "facility"); 25 Pa. Code 127.204(a) (nonattainment NSR regulations discussing aggregation).

Letter: William L. Wehrum, Assistant Administrator, Office of Air and Radiation, U.S. Environmental Protection Agency, to the Honorable Patrick McDonnell, Secretary, Pennsylvania Department of Environmental Protection (April 30, 2018)

Attachment

I. Meadowbrook and KSL Background

Meadowbrook Energy LLC (Meadowbrook) has indicated that it plans to construct a biogas processing facility that will convert landfill gas (LFG) and other potential biogas feedstocks into pipeline-quality natural gas for injection into the interstate natural gas pipeline system, to be used as a transportation fuel. Meadowbrook has entered into an agreement with Keystone Sanitary Landfill, Inc. (KSL),[4] whereby KSL will deliver LFG to Meadowbrook via a pipeline running between the two facilities. This pipeline will be owned by KSL up to a demarcation point, at which point the remainder of the pipeline will be separately owned by Meadowbrook.

Meadowbrook explains that KSL controls its own landfill gas collection activities and delivers untreated landfill gas to the demarcation point. After the demarcation point, Meadowbrook conducts all processing of the gas necessary to create the renewable natural gas product that it injects into the pipeline for market sale. Meadowbrook represents that the two entities have no cross-ownership or direct control over operations at the other facility. In other words, each entity has no ability to control, operate, close, or restrict the use of the other's facility.[5] Meadowbrook characterizes the relationship between the two facilities as arms-length arrangements between independent commercial entities. Meadowbrook therefore believes that Meadowbrook and KSL should not be considered under "common control," and thus their facilities should not be considered a single source.

More specifically, Meadowbrook maintains that KSL is not dependent on Meadowbrook for compliance with any portion of the requirements associated with the control of the emission of KSL's LFG. Meadowbrook indicates that KSL will retain full responsibility for compliance with all air pollutant control obligations (*e.g.*, New Source Performance Standards (NSPS) Subpart WWW requirements for LFG) until the LFG is delivered to the demarcation point (*i.e.*, until the gas is delivered to Meadowbrook). If Meadowbrook cannot accept LFG, shutoff valves in the pipeline between LFG and Meadowbrook will redirect all of the LFG to KSL's flares for

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[4] Meadowbrook indicates that this agreement is subject to future revisions. The information provided to PADEP by Meadowbrook in its initial draft analysis and its updated March 16, 2018, analysis apparently reflects the mutual understandings of Meadowbrook and KSL as of the date of these analyses.

[5] Meadowbrook acknowledges that Meadowbrook will provide either labor (likely through a third-party) or financing associated with modifying or optimizing KSL's landfill gas collection system in order to set up the pipeline between Meadowbrook and KSL. However, Meadowbrook claims that KSL would direct any Meadowbrook personnel, or third-party personnel provided by Meadowbrook, in these efforts, and that Meadowbrook would not have any rights to direct or control the operation of the LFG collection system. Additionally, Meadowbrook indicates that it is currently considering the possibility of interconnecting with KSL's leachate, condensate, and wastewater treatment systems to dispose of certain Meadowbrook products at market prices.

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destruction. KSL is required to construct and maintain sufficient flare capacity to destroy 100% of KSL's LFG, and Meadowbrook states this flare capacity exists and is currently permitted.[6] Thus, Meadowbrook concludes that even the closure of the Meadowbrook facility would not have environmental consequences to KSL's operations, nor would it affect the ability of KSL to comply with environmental regulatory requirements related to its LFG.

Meadowbrook also maintains that it is not dependent on KSL for its supply of LFG. Meadowbrook acknowledges that it has the right to purchase, and expects to purchase, all of the LFG produced by KSL to serve as a feedstock, and that Meadowbrook will rely on KSL for its first supply of LFG to produce a natural gas product for commerce. However, Meadowbrook represents that it is only required to accept as much LFG as Meadowbrook can process. Meadowbrook also indicates that its processing capacity exceeds KSL's LFG production, and that Meadowbrook is actively seeking additional suppliers of LFG and other types of biogas in order to serve as a regional refining and processing facility. Moreover, Meadowbrook claims that even if KSL were to shut down, and even if this resulted in the eventual shutdown of Meadowbrook itself, this shutdown would have no environmental consequences. Based on this, Meadowbrook asserts that it retains sole responsibility for environmental regulatory requirements (related to LFG, or otherwise) arising after the demarcation point, and that its air emissions are in no way influenced by KSL's landfill operations.

Meadowbrook emphasizes the separate compliance responsibilities of each entity, and the fact that neither entity would be able to operate the other's facility to ensure that the other's facility complies with relevant environmental requirements. First, Meadowbrook briefly discusses its own practical difficulties in having to assure its customers or potential suppliers that it is not liable for KSL's operations. Additionally, Meadowbrook highlights practical difficulties with aggregating the two entities for permitting purposes: specifically, difficulties with including Meadowbrook's operations within KSL's existing title V permit for title V compliance certification purposes. Meadowbrook notes that, if Meadowbrook's operations were incorporated into KSL's existing title V permit, KSL's responsible official would be required to certify the accuracy of such a permit modification application with respect to Meadowbrook's operations, as well as certify Meadowbrook's compliance with relevant requirements. *See* 25 Pa. Code §§ 127.402(d), 127.205(2).[7] Meadowbrook argues that the responsible official at KSL would have no way to accurately certify permit applications pertaining to Meadowbrook's facility, nor could KSL's responsible official certify Meadowbrook's compliance, because KSL has no information about or access to proprietary equipment or operations at the Meadowbrook facility. Thus, Meadowbrook argues that it would be unrealistic to expect that KSL could effectively discharge KSL's title V compliance certification requirements (with the potential for criminal liability) if the two sources were aggregated.

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[6] Meadowbrook acknowledges that KSL's title V permit will likely be modified to add an option to divert LFG to Meadowbrook, but claims that this will not affect KSL's ability to maintain title V compliance (presumably, compliance with subpart WWW requirements) through use of its existing LFG collection system and flares.

[7] Meadowbrook also references KSL's obligation to certify ongoing compliance and suggests that KSL could be held liable for Meadowbrook's operations. *See* 25 Pa. Code §§ 127.511(c)(1), 127.411(a)(1).

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II. Background on EPA Interpretations of Common Control

When determining which pollutant-emitting activities should be considered part of the same "major source" under the title V operating permit program, and/or part of the same "stationary source" under the New Source Review (NSR) program, permitting authorities should assess the three factors contained in EPA's title V and NSR regulations—same industrial grouping, location on contiguous or adjacent property, and common control—on a case-by-case basis. In the title V regulations, these criteria are reflected in the definition of "major source." 40 C.F.R. §§ 70.2 & 71.2. The NSR regulations define a "stationary source" as a "building, structure, facility, or installation" and then provide a separate definition for that phrase which reflects these three criteria. 40 C.F.R. §§ 52.21(b)(5) & (6), 51.165(a)(1)(i) & (ii), and 51.166(b)(5) & (6).

In the original promulgation of these three factors in the NSR program regulations, EPA was mindful of a decision from the U.S. Court of Appeals for the District of Columbia Circuit holding that the "source" for NSR permitting purposes should comport with the "common sense notion of a plant." 45 Fed. Reg. 52676, 52694 (Aug. 7, 1980) (citing *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979)). When EPA first established the current three-part test in the Prevention of Significant Deterioration (PSD) NSR rules adopted in 1980, the agency explained that this test would comply with *Alabama Power* by reasonably carrying out the purposes of the PSD program, approximating a "common sense notion of a plant," and avoiding the aggregation of pollutant-emitting activities that would not fit within the ordinary meaning of "building," "structure," "facility," or "installation." 45 Fed. Reg. at 52694–95. When EPA subsequently promulgated the title V definitions for Part 71 using the same three criteria, the agency said that it intended these provisions to be consistent with the language and application of the PSD definitions. 61 Fed. Reg. 34202, 34210 (July 1, 1996).

Neither the Clean Air Act (CAA), EPA's regulations, nor Pennsylvania Department of Environmental Protection's (PADEP's) regulations define "common control." Acknowledging that "[c]ontrol can be a difficult factual determination, involving the power of one business entity to affect the construction decisions or pollution control decisions of another business entity," EPA has long recognized that common control determinations should be made on a case-by-case basis. 45 Fed. Reg. 59874, 59878 (September 11, 1980).

In an early action implementing the Nonattainment NSR program, EPA explained that it would be guided by a definition of control established by the Securities and Exchange Commission (SEC), which states the following: "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person (or organization or association) whether through the ownership of voting shares, contract, or otherwise." 45 Fed. Reg. at 59878 (*quoting* 17 C.F.R. § 210.1-02(g)).[8] In a 1996 memorandum concerning source determinations on Federal military installations, EPA further explained:

[8] EPA has also pointed to a definition of "control" found in Webster's Dictionary, including "to exercise restraining or directing influence over," "to have power over," "power or authority to guide or manage," and "the regulation of economic activity." 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) (the Spratlin Letter).

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> In general, the controlling entity is the highest authority that exercises restraining or directing influence over a source's economic or other relevant, pollutant-emitting activities. In considering interactions among facilities, what must be determined is who has the power of authority to guide, manage, or regulate the pollutant-emitting activities of those facilities, including "the power to make or veto decisions to implement major emission-control measures" or to influence production levels or compliance with environmental regulations.[9]

In other guidance documents and letters, EPA has identified a number of factors that should be considered when assessing whether two entities are under common control, including but not limited to shared workforces, shared management, shared administrative functions, shared equipment, shared intermediates or byproducts, shared pollution control responsibilities, and support/dependency relationships.[10] In the discussion that follows, we will refer to this as the "multi-factor" approach of evaluating common control.

Regarding the support/dependency relationship factor, in several case-specific source determinations, EPA relied upon the presence of support or dependency relationships between two or more entities that resulted in one entity either directing or influencing the operations of another entity.[11] These situations often involved a primary facility that was wholly or partially dependent on a supporting facility for a critical aspect of its operations, such as the supply of raw materials. These relationships were often characterized by mutually beneficial contractual arrangements, including output contracts (where one entity was obligated to purchase all, or a portion, of another entity's output) and requirement contracts (where one entity was obligated to produce all, or a portion, of a product that another entity requires). As a result of these relationships, in certain cases EPA has found common control due to only the influence that these economically or operationally interconnected entities exert (or have the ability to exert) on one another (*e.g.*, the ability to influence production levels).

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[9] Memorandum from John S. Seitz, Director, OAQPS, to EPA Regional Offices, Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permit Programs of the Clean Air Act, 9–10 (August 2, 1996) (the Seitz Memorandum) (citation omitted). Although this memorandum specifically concerned military installations, many of the statements contained therein are illustrative of EPA's past common control interpretations and policies more broadly.

[10] *See, e.g.*, Spratlin Letter at 1–2. Other EPA guidance and correspondence regarding common control can be found at: *https://www.epa.gov/title-v-operating-permits/title-v-operating-permit-policy-and-guidance-document-index* and *https://www.epa.gov/nsr/new-source-review-policy-and-guidance-document-index*.

[11] *See, e.g.*, Letter from Kathleen Cox, Associate Director, Office of Permits & Air Toxics, EPA Region 3 to Troy D. Breathwaite, Air Permits Manager, Virginia Department of Environmental Quality, Re: GPC/SPSA-Suffolk/BASF (January 10, 2012); Letter from Gregg M. Worley, Chief, Air Permits Section, EPA Region 4, to James Capp, Chief, Air Protection Branch, Georgia Department of Natural Resources, Re: PowerSecure/FEMC/Houston County Landfill (December 16, 2011); Letter from Richard R. Long, Director, Air Program, EPA Region 8, to Julie Wrend, Legal Administrator, Air Pollution Control Division, Colorado Department of Public Health and Environment, Re: TriGen/Coors (November 12, 1998); *see also* Seitz Memorandum at 10–13 (discussing control via leases and contract-for-service relationships where a supporting entity is integral to or contributes to the operations of another entity).

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III. Need for Revision to EPA's Approach to Common Control Assessments

These latter precedents might be construed to suggest that EPA and PADEP should consider Meadowbrook and KSL to be under common control because of two elements of the relationship between these entities, both related to the support/dependency concept. First, the fact that KSL plans to dispose of its LFG by sending it to Meadowbrook via pipeline indicates that KSL will, in most circumstances, effectively rely on Meadowbrook as the mechanism by which it controls its LFG emissions in order to comply with Subpart WWW NSPS requirements applicable to the landfill. Second, the fact that KSL is expected to supply Meadowbrook with a potentially large proportion of the LFG that Meadowbrook processes implies that KSL could influence production levels at Meadowbrook, and thus, to some extent, Meadowbrook's emissions resulting from processing KSL's LFG. If Meadowbrook and KSL were determined to be under common control based on these facts, they would then be treated as a single source for title V and NSR purposes.[12]

On the other hand, the reasoning of other EPA source determinations involving similar facts could be followed to support the contrary conclusion that Meadowbrook and KSL are not under common control. Using the multi-factor approach to evaluating common control, one could weigh more heavily the fact that neither facility is entirely dependent on the other for operation.[13] KSL can control its LFG emissions via flaring without Meadowbrook, and Meadowbrook plans to receive gas from other entities. Additionally, Meadowbrook and KSL do not share workforces, management, administrative functions, equipment, or pollution control responsibilities. Under the multi-factor approach, these considerations suggest a lack of control.

Thus, during EPA's review of Meadowbrook's request, it became clear that the large number of different factual considerations implicated by prior EPA common control determinations, in addition to the agency's historically broad view of the types of relationships that can establish control (*e.g.*, support/dependency), has resulted in the potential for inconsistent outcomes in source determinations and an overall lack of clarity and certainty for sources and permitting authorities. Additionally, this particular scenario demonstrates practical difficulties that could result from considering these operations to be a single source, including the potential for inequitable outcomes.[14] Moreover, it was not obvious that treating Meadowbrook and KSL as a single source would reflect a "common sense notion of a plant." The potential for inconsistent outcomes under EPA's broad-ranging prior interpretations, as well as these other concerns regarding the facts at hand, have prompted EPA to reevaluate and narrow the agency's interpretation of "common control." The next section explains EPA's narrowed interpretation

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[12] In its March 16, 2018, submission, Meadowbrook states that its facility will be located on a property contiguous to the KSL landfill, and that the two operations will share the same two-digit SIC code. Although Meadowbrook suggests that "shared two-digit SIC codes are unlikely to contribute any meaningful information to any aggregation analysis," this is nonetheless a criterion currently included in EPA's source determination rules.

[13] *See* Letter from Judith M. Katz, Director, Air Protection Division, EPA Region 3, to Gary E. Graham, Environmental Engineer, Commonwealth of Virginia Department of Environmental Quality, Re: Maplewood/INGENCO (May 1, 2002) (Maplewood/INGENCO letter).

[14] In particular, the agency's prior approach could lead to the impractical and potentially inequitable result of holding otherwise separate business entities responsible for each other's actions, even if they do not have the power or authority to dictate such actions.

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and other considerations EPA currently views as most relevant to determining common control. The last section applies these principles in an examination of whether the Meadowbrook and KSL facilities are under common control.

IV. Refining EPA's Interpretation and Policy Concerning "Common Control"

Consistent with EPA's longstanding practice and view, determinations of common control are fact-specific and should continue to be made by permitting authorities on a case-by-case basis. However, after re-evaluating the concept of common control, EPA believes it should realign its approach to common control determinations in order to better reflect a "common sense notion of a plant," and to minimize the potential for entities to be held responsible for decisions of other entities over which they have no power or authority. For the reasons discussed further below, the agency believes clarity and consistency can be restored to source determinations if the assessment of "control" for title V and NSR permitting purposes focuses 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.*

This document reflects EPA's interpretation of "control" in the context of EPA's title V and NSR regulations and EPA's policy regarding how to best apply this interpretation in source determinations. However, states with EPA-approved title V and NSR permitting programs retain the discretion to determine whether specific entities are under common control.[15]

A. Control means the power or authority to dictate decisions.

For purposes of source determinations, EPA considers "control" to be best understood to encompass the power or authority to dictate the outcome of decisions of another entity. This concept includes only the power to dictate a particular outcome and does not include the mere ability to influence. Thus, control exists when one entity has the power or authority to restrict another entity's choices and effectively dictate a specific outcome, such that the controlled entity lacks autonomy to choose a different course of action. This power and authority could be exercised through various mechanisms, including common ownership or managerial authority (the chain of command within a corporate structure, including parent/subsidiary relationships), contractual obligations (*e.g.*, where a contract gives one entity the authority to direct specific activities of another entity), and other forms of control where, although not specifically delineated by corporate structure or contract, one entity nonetheless has the ability to effectively direct the specific actions of another entity. Thus, control can be established: (1) when one entity has the power to command the actions of another entity (*e.g.*, Entity A expressly directs Entity B to "do X"); or (2) when one entity's actions effectively dictate the actions of another entity (*e.g.*, Entity A's actions force Entity B to do X, and Entity B cannot do anything other than X). The

[15] What follows is a discussion of those factors that EPA advises states to consider (and *not* to consider) when determining whether two entities are under common control. The general direction provided here by EPA should not be understood as controlling the outcome of any particular situation, which must be judged based on its individual facts and circumstances. This document is not a rule or regulation, and the statements herein are not binding on state or local permitting authorities. This discussion reflects a change in how EPA interprets the term "common control" in it regulations but does not change or substitute for any law, regulation, or other legally binding requirement.

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second scenario that can establish control should not be confused with the broader concept, as historically articulated, embracing the "ability to influence." 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.[16] Ultimately, the focus is not on *how* control is established (through ownership, contract, or otherwise), but on *whether* control is established—that is, whether one entity can expressly or effectively force another entity to take a specific course of action, which the other entity cannot avoid through its own independent decision-making.

This narrower interpretation of the meaning of "control" in most respects traces back to, and is consistent with, definitions of "control" on which EPA previously relied that emphasized the "power to direct,"[17] as well as a common sense understanding of "control." However, this interpretation differs from definitions that EPA has cited more recently, as well as EPA's prior interpretation of those definitions, which extended "control" to include the ability to influence.[18] For the following reasons, EPA is no longer following these broader definitions and interpretations. Certainly, business relationships and external market forces can constrain the ability of an entity to make decisions with complete autonomy, and it is indeed rare that an entity is fully insulated from such external influences. However, the fact that an entity is influenced, affected, or somewhat constrained by contractual relationships that it negotiated at arm's length, or by external market forces, does not necessarily mean that one entity is actually controlled or governed by these influences in making a given decision. After consideration of the inconsistent, impractical, and inequitable outcomes that could have resulted in this case under the previous interpretation that extended control to include the ability to influence, EPA has concluded that a narrower interpretation is better. A narrower interpretation avoids the potential for entities to be held responsible for actions over which they have no power or authority, but which instead they could merely have some influence over due to of market conditions or a business relationship that was negotiated on the open market or otherwise at arm's length. Thus, EPA will from this point forward interpret the term "control" in its title V and NSR regulations to require more than the ability to merely influence.

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[16] For example, where Entity A is required to accept and process 100% of a raw material or intermediate produced by Entity B, decisions that Entity B makes with respect to the amount of raw material produced will likely affect Entity A's production levels, which could affect Entity A's emissions. However, provided that Entity A has the ability to independently decide how it operates its pollution-generating and pollution-controlling equipment, and to independently decide whether it expands its operations or not, this level of influence would not amount to "control."

[17] The common thread between definitions of "control" that EPA has relied upon is the "power to direct." *See, e.g.*, 17 C.F.R. § 210.1-02(g) (SEC definition of control, "*power to direct* or *cause the direction of* the management and policies of a person") (emphasis added); Spratlin Letter (citing Webster's definition of control, including "*to have power over*") (emphasis added).

[18] *See, e.g.*, Spratlin Letter (Webster's definition of control, including "power or authority to guide or manage," "restraining or directing influence over"); Seitz Memorandum at 9 ("restraining or directing influence"); *see also id.* at 10–13.

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B. Focus should be on control over decisions that affect the applicability of, or compliance with, relevant air pollution regulatory requirements.

To promote clarity, consistency, and more practical outcomes in source determinations, EPA intends to focus on control (power or authority) over operations relevant to air pollution, and specifically control over such operations that could affect the applicability of, or compliance with, permitting requirements. EPA intends to examine 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. Thus, if "control" represents the power or authority of one entity to dictate a specific outcome at another entity (as described above), EPA considers the most relevant outcome to be the applicability of, or compliance with, air permitting requirements.

EPA considers this to be a reasonable policy, and a better approach, when determining common control in light of the applicable regulatory context. To start with, EPA's regulations reference air pollution-emitting activities when defining what constitutes a single source.[19] Definitions should not be read in isolation, however. Source determinations are made in the context of the NSR and title V permitting programs and their respective requirements pertaining to the control and monitoring of air pollution emissions. It logically follows, therefore, that the type of "control" most relevant to this inquiry is control over air pollution-emitting activities that trigger permitting requirements and affect compliance with those requirements. EPA therefore considers it appropriate to focus this inquiry on control over air pollution-emitting activities that could affect the applicability of, or compliance with, title V and NSR requirements.[20] If the authority one entity has over another cannot actually affect the applicability of, or compliance with, relevant permitting requirements, then the entities cannot control what permit requirements are applicable to each other, or whether another entity complies with its respective requirements. Effectively, this means that each entity has autonomy with respect to its own permitting obligations. It is more logical for such entities to be treated as separate sources, rather than being artificially grouped together for permitting purposes. EPA expects that any benefit that might be thought to be gained from the aggregation of entities that are effectively autonomous for permitting purposes would not "carry out reasonably the purposes" of the title V or NSR program. *See* 45 Fed. Reg. at 525694–95.[21]

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[19] *See, e.g.*, 40 C.F.R. § 52.21(b)(6) (defining "building, structure, facility, or installation" as "all of the *pollutant-emitting activities*" that are under common control, among other criteria (emphasis added)); 40 C.F.R. § 70.2 (clarifying that for the definition of "major source," considerations of major industrial group (SIC code) should focus on "all of the *pollutant emitting activities* at such source or group of sources" (emphasis added)); *id.* (defining "stationary source" as "any building, structure, facility, or installation *that emits or may emit* any regulated air pollutant or any pollutant listed under section 112(b) of the [CAA]") (emphasis added); 40 C.F.R. 52.21(b)(5) (similar definition of "stationary source" for NSR).

[20] EPA has previously articulated the importance of similar considerations, including "the power to make or veto decisions to implement major emission-control measures," and the power to influence "compliance with environmental regulations." Seitz Memorandum at 10 (citations omitted).

[21] First, although a more expansive reading of control could result in more sources being subject to title V, the purpose of the title V program is *not* to indiscriminately maximize the number of sources required to obtain operating permits—such as by requiring small sources that would otherwise not be subject to title V to obtain a

Moreover, aggregating entities that cannot control decisions affecting applicability or compliance with permitting and other requirements would create practical difficulties and inequities. For title V purposes, it may be impossible for the responsible official of one entity to accurately certify the completeness of a permit application for a permit modification (*e.g.*, to incorporate requirements that are applicable to a new unit) that is entirely within the control of another entity, or to certify that the other entity has complied with existing permit requirements, as required by title V. *See* 40 C.F.R. § 70.5(a)(2), (c)(9)(i), (d). Similar problematic scenarios can arise under the NSR program as well. For instance, in order to determine whether a proposed physical or operational change would result in a "significant net emissions increase" and thus constitute a "major modification" at the source, an entity is required to identify and take account of all creditable emissions increases and decreases that had occurred source-wide during the relevant 5-year "contemporaneous" period. *See*, *e.g.*, 40 C.F.R. § 52.21(b)(3)(i)(*b*). It is not clear how it would even be possible for one entity to identify the creditable emissions increases and decreases that had occurred at that portion of the source under the control of another entity, much less determine whether NSR would be triggered by the proposed change.

More broadly, for both title V and NSR, an entity could face liability for the actions of another entity that were entirely outside the first entity's control if both entities were treated as part of the same source. This result would clearly be inequitable. Put simply, an entity that cannot "direct" or "cause the direction of" a specific decision or action by another entity does not have "control" and should not be subject to the consequences of that decision.[22] Focusing on control over decisions that could affect applicability or compliance with air quality permitting obligations avoids this potentially impractical and inequitable result while reasonably carrying out the purposes of the title V and NSR permitting programs.

In practice, evaluating common control will necessarily be a fact-specific inquiry. However, EPA believes the most relevant considerations should be whether entities have the power to direct the actions of other entities to the extent that they affect the applicability of and compliance with permitting requirements: *e.g.*, the power to direct the construction or modification of equipment that will result in emissions of air pollution; the manner in which such emission units operate; the installation or operation of pollution control equipment; and

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permit simply because of their business relationships with a title V source. Second, the purpose of the NSR program is not to maximize the number of sources subject to PSD requirements (*e.g.*, BACT) by aggregating multiple entities until their combined emissions exceed major source thresholds. That said, it would also not be appropriate to rely on EPA's current approach to artificially separate a source into multiple sources in order to evade major source status or otherwise circumvent title V or NSR requirements. Third, the purposes of the NSR program would not be fulfilled by allowing entities to intentionally (or unintentionally) over-aggregate, in order to share the benefits of emissions reductions (*e.g.*, accounting for emission reductions in determining a significant net emissions increase) at sources that do not have any control over each other's permitting obligations. EPA's current approach is intended to avoid these outcomes that are incongruent with the purposes of the title V and NSR programs by aggregating only those activities that accurately reflect a "common sense notion of a plant" from a permitting standpoint.

[22] For example, if Entity A has no ability to dictate the relevant decisions of Entity B that would subject Entity B to new regulatory requirements or that would affect Entity B's compliance with existing requirements, it would be inequitable to subject Entity A to such new requirements or hold Entity A responsible for Entity B's compliance with existing requirements. Only if Entity A has the ability to dictate an action by Entity B that could result in permitting-related liability for either entity, should Entity A be held responsible for Entity B's action (by virtue of being considered the same source).

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monitoring, testing, recordkeeping, and reporting obligations. On the other hand, common control considerations should not focus on the power to direct aspects of an entity's operations that are wholly unrelated to air pollution permitting requirements. If one entity has power or authority over some aspect of another entity's operations that would have no impact on pollutant-emitting activities of the stationary source subject to permitting requirements, EPA does not consider that fact to be relevant to determining whether the two entities should be considered a single source for air quality permitting purposes (*e.g.*, one entity providing security for both its facility and for an adjacent facility belonging to another entity).

Overall, focusing on the power to direct decisions over air pollution-related activities that could affect permitting obligations (*i.e.*, applicability or compliance) is reasonable, and a better approach to determining whether there is common control in the context of title V and NSR permitting. EPA expects that this approach will produce more consistent and sensible outcomes. Accordingly, EPA will generally view common control to exist in situations where entities lack the power or authority to make independent decisions that could affect the applicability of, or compliance with, relevant regulatory requirements concerning air pollution.

C. Dependency relationships should not be presumed to result in common control.

It is important, in evaluating whether common control might be said to exist due to the existence of a dependency relationship between entities, not to confuse this evaluation with the altogether separate issue of whether one entity is a "support facility" for another entity. Questions arising out of the consideration of the latter issue are directly accommodated within a distinct element of the source determination framework: the industrial grouping (2-digit SIC code) prong.[23] EPA has previously stated that "a support facility analysis is only relevant under the SIC-code determination." *In the Matter of Anadarko Petroleum Corp., Frederic Compressor Station*, Order on Petition no. VIII-2010-4 at 16 (February 2, 2011). This important distinction aside, a dependency relationship should not be presumed to result in common control. While mutually beneficial arrangements that give rise to dependency relationships could give one facility influence over the operations of another, entities can be economically or operationally interconnected or mutually dependent through contracts or other business arrangements without having the power or authority to direct the relevant activities of each other. To the extent that the same underlying facts should be weighed in evaluating common control, these considerations should generally be evaluated as outlined above to determine whether one entity has the power or authority to dictate the decisions of another entity (and not simply to determine whether a dependency relationship exists).

[23] As EPA has explained, both primary and support facilities are to be assigned the same 2-digit SIC code. 45 Fed. Reg. at 52695; *see also* 1987 SIC Code Manual at 16–17 ("Each operating establishment is assigned an industry code on the basis of its primary activity . . . . Auxiliary establishments are assigned four-digit industry codes on the basis of the primary activity of the operating establishments they serve."). In the PSD rulemaking process conducted from 1979 to 1980, EPA decided to accommodate considerations of support or functional interrelatedness as part of the major industrial grouping (2-digit SIC code) prong, as opposed to establishing this as an independent component of the source determination analysis. *See* 45 Fed. Reg. 52676, 52695 (August 7, 1980). In so doing, EPA did not indicate that support or functional interrelatedness considerations should be made in the context of other discrete elements of the source determination framework (*i.e.*, the common control or adjacency prongs).

A number of practical considerations support this separation. First, the fact that economic conditions are such that one entity depends on another facility does not necessarily mean that it has the power or authority to direct the decisions of, or that its decisions are directed by, that other facility on which it depends. Second, the fact that one facility would not profitably exist *but for* the existence of another entity does not necessarily mean that, at some point after beginning operation, the entities will have the power or authority to dictate the outcome of decisions regarding relevant air-pollution related aspects of each other's operations. These situations should be evaluated in light of the principles discussed above, and inquiries concerning common control should not be sidestepped by presuming control based on the presence of a dependency relationship.

V. Evaluation of Meadowbrook and KSL Under Revised Interpretation and Policy for Common Control

Applying the interpretation of "common control" and the policy of focusing on air permitting requirements described above, based on the information provided by Meadowbrook,[24] EPA would not view the Meadowbrook and KSL facilities to be under common control. First, regarding control over KSL's landfill, it does not appear that Meadowbrook has power or authority to dictate decisions over any aspect of KSL's operations that could affect the applicability of, or compliance with, permitting requirements. Specifically, Meadowbrook does not have the power or authority to determine whether KSL complies with regulatory requirements associated with its LFG (*i.e.*, the Subpart WWW NSPS) that are applicable requirements within KSL's title V permit. Of course, Meadowbrook can indirectly affect KSL's operations by declining to take delivery of all of KSL's LFG at the demarcation point (or by ceasing operations). This means that Meadowbrook's actions (accepting or not accepting the LFG) would effectively dictate whether KSL does or does not destroy its LFG via its flares. Because Meadowbrook can effectively dictate this outcome at KSL, this could arguably be considered a form of control over this aspect of KSL's operations. However, this limited amount of control would not be over operations that EPA finds most relevant. Importantly, Meadowbrook will not affect KSL's ability to comply with its regulatory obligations since KSL retains the ability to redirect its LFG to flares operated exclusively by KSL and Meadowbrook has no power or authority over how KSL operates such flares.[25] Because Meadowbrook therefore has no power or authority over KSL's operations of the sort that EPA deems most relevant, *i.e.*, KSL's ability to comply with relevant permitting requirements, EPA's view is that

[24] EPA notes that some of the analysis initially provided by Meadowbrook and supplemented in its March 16, 2018, analysis is based on an agreement between Meadowbrook and KSL that is subject to revision. EPA's analysis below is based on the representations provided by Meadowbrook, and should not be interpreted as a complete evaluation of all facts that may be relevant to the question of common control. PADEP, as the permitting authority, is responsible for making a source determination based on all relevant facts, which may extend to current factual considerations that were not included in Meadowbrook's analysis, or to facts that eventually differ from those that Meadowbrook predicted at the time of its March 16, 2018, submittal.

[25] This situation is no different from a landfill that utilizes flares as a control device and naturally has no other options to dispose of its LFG (*e.g.*, no ability to send the LFG to a treatment facility or energy generating facility). In either case, even if the landfill has only one general option to dispose of its gas (flaring), it would nonetheless likely retain complete control over whether and how it does so (including whether it complies with relevant regulatory requirements when doing so).

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Meadowbrook does not control KSL simply because KSL will ordinarily rely on Meadowbrook as a means of disposing of its LFG.[26] There is no indication that Meadowbrook has any power or authority over other activities occurring at KSL.[27]

Second, regarding control over Meadowbrook's operations, although KSL supplies Meadowbrook with a potentially large percentage of the feedstock (LFG) that Meadowbrook processes into a product for market (pipeline-quality renewable natural gas), it does not appear that this arrangement gives KSL power or authority over Meadowbrook's operations. Operations at KSL could ultimately affect the amount of LFG available to Meadowbrook, and thus, could indirectly affect the air emissions that ultimately occur at Meadowbrook in the course of processing the LFG. But it does not appear that Meadowbrook is contractually obligated to purchase the full output of KSL (although this may typically be the case).[28] Moreover, Meadowbrook indicated that it is actively pursuing other suppliers of feedstock, such that KSL will likely not be the only supplier of LFG (or other gas feedstock) to KSL. Thus, KSL does not have the power or authority to determine the amount of gas received (and therefore processed) by Meadowbrook. To the extent that decisions by KSL could indirectly impact air emissions at Meadowbrook, there is no indication that this would give KSL power or authority over any of Meadowbrook's air pollution-related operations, much less affect any permitting obligations applicable to Meadowbrook. At most, this amounts to influence, not control. Therefore, it would be appropriate to conclude that KSL does not control Meadowbrook in the sense relevant for determining whether the two entities' facilities constitute a single source. KSL simply supplies a feedstock product to Meadowbrook through an arm's length contract. KSL has no power or authority to direct other aspects of Meadowbrook's operations, including the means by which Meadowbrook generates and controls emissions.

Although Meadowbrook and KSL have at least influence over each other's operations, neither has "control" (as this term is interpreted above) over decisions that could affect air permitting obligations of the other. Rather, this appears to be, as Meadowbrook claimed, a mutually beneficial arms-length arrangement between two wholly-separate business entities. Therefore, EPA does not recommend that Meadowbrook and KSL be considered to be part of the same stationary source or major source on the basis of common control. However, as the permitting authority, PADEP retains the ultimate discretion to make source determinations based on its EPA-approved title V and NSR rules.

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[26] This conclusion is premised on Meadowbrook's representation that KSL's permit would not be modified in such a manner that Meadowbrook would have the power or authority to dictate whether KSL complies with its permit terms.

[27] Although Meadowbrook may supply funding or other resources to KSL for purposes of optimizing KSL's landfill gas recovery system, Meadowbrook's representations suggest that KSL would nonetheless retain complete control over this optimization process, and that Meadowbrook would not control any aspect of the LFG collection process. Additionally, the limited information presented by Meadowbrook regarding its potential future use of KSL's leachate, condensate, and wastewater treatment systems at market prices does not indicate that this would result in Meadowbrook's control over this aspect of KSL's operations. However, this arrangement may warrant further evaluation as Meadowbrook and KSL finalize their plans.

[28] As noted above, Meadowbrook indicated that it is only required to accept as much LFG as Meadowbrook can process.

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