UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

October 16, 2018

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

Ms. Gail Good, Director
Bureau of Air Management
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, Wisconsin 53707

Dear Ms. Good:

On July 13, 2018, the Wisconsin Department of Natural Resources (WDNR) transmitted a letter to the U.S. Environmental Protection Agency (EPA) requesting EPA's review of a source determination that WDNR is making for a landfill (Janesville City/Rock County Landfill, or "JCL") and a collocated energy company (Ameresco Janesville LLC, or "Ameresco"). In this letter, WDNR asked whether EPA agreed with WDNR's conclusion that "JCL will be under 'common control' with Ameresco and that the two entities should be considered a single stationary source for the purpose of determining major source status" under the Clean Air Act (CAA or Act) permitting programs that WDNR administers. EPA understands this request to address whether these two entities should 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.[1] EPA commonly refers to these types of questions as "source determinations." Given that Wisconsin's title V and NSR programs have been approved by EPA, WDNR has primary responsibility to make this determination based on its EPA-approved rules, and this letter does not constitute a source determination by EPA regarding JCL or Ameresco.[2] EPA hopes that the following discussion is helpful to WDNR as it makes its final permitting decision with respect to JCL and Ameresco.

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[1] Under the federal and state 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). WDNR's permitting regulations generally mirror EPA's regulations in relevant part. *See* Wisc. N.R. 407.02(4) (title V regulations); *id.* 406.02(1m) (NSR regulations). Here, JCL and Ameresco meet the first two criteria (they are located on the same property and share the same 2-digit SIC code), so the inquiry discussed in this letter solely involves whether JCL and Ameresco's operations are under the control of the same person (or persons under common control).

[2] The EPA views articulated in this letter do not constitute a legislative rule or regulation subject to notice-and-comment rulemaking requirements nor final agency action. Additionally, 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.

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I. Background

JCL owns and operates a municipal solid waste landfill in Janesville, Wisconsin. Ameresco owns and operates an electrical generating station located on JCL's property. There are three basic elements of JCL's and Ameresco's operations: landfill operations, including landfill gas (LFG) collection; LFG treatment; and LFG combustion. As part of its landfill operations, JCL collects landfill gas (LFG) via a gas collection system. Although JCL owns and operates a flare capable of destroying its LFG, JCL typically does not do so, but rather delivers its collected LFG to Ameresco via pipeline. Ameresco operates LFG treatment equipment, which filters, de-waters, and compresses the gas. Ameresco then combusts the gas in three LFG-fired internal combustion engines used to generate electricity. Beyond the LFG treatment operations, WDNR asserts in its July 2018 letter to EPA that "JCL and Ameresco will continue to remain separate in all other respects," including with respect to JCL's collection of landfill gas and operation and maintenance of its flare, and with respect to Ameresco's operation and maintenance of its internal combustion engine generators. Currently, JCL and Ameresco each have their own title V permits. The LFG collection and treatment operations are currently covered by JCL's permit, and are not covered by Ameresco's permit or otherwise attributed to Ameresco for permitting purposes.

In its letter to EPA, WDNR evaluated the relationship between JCL and Ameresco in light of its understanding of EPA's April 30, 2018, Meadowbrook Letter.[3] The Meadowbrook Letter clarified EPA's interpretation of "control" (with regard to the regulatory definition of a single "stationary source" to include "all of the pollutant-emitting activities which . . . are under the control of the same person (or persons under common control)") and explained EPA's policy regarding how to best apply this interpretation in source determinations. In the Meadowbrook Letter, EPA explained that assessments of control should 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. EPA explained that this inquiry asks, in relevant part, "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.

The questions presented by WDNR involve the intersection between EPA's and WDNR's title V and NSR permitting programs and EPA's New Source Performance Standards (NSPS) applicable to landfills under section 111 of the Act.[4] Both the subpart WWW NSPS (to which JCL

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[3] 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) ("Meadowbrook Letter").

[4] *See* 40 CFR §§ 60.750–.759 (subpart WWW NSPS, the new source landfill rule promulgated in 1996); *id.* §§ 60.760–.769 (subpart XXX NSPS, the new source landfill rule promulgated in 2016). Although this letter implicates the NSPS subpart WWW and XXX standards, similar issues could potentially arise related to other EPA standards applicable to certain landfills, including EPA's existing source emission guidelines promulgated under CAA § 111(d) (and state plans implementing these guidelines) as well as EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP) applicable to landfills. *See id.* §§ 60.30c–.36c (subpart Cc emission guidelines, the existing source landfill rule promulgated in 1996); *id.* §§ 60.30f–.41f (subpart Cf emission guidelines, the existing source landfill rule promulgated in 2016); *id.* §§ 63.1930–.1990 (subpart AAAA NESHAP, promulgated in 2003).

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is currently subject) as well as the subpart XXX NSPS (to which JCL will become subject following an imminent landfill expansion project) require certain landfills to capture and collect their LFG. These standards then provide landfills multiple compliance options, including the option to destroy LFG in a flare, or to route collected landfill gas to a treatment system for sale or beneficial use.[5] The subpart XXX standards include monitoring and recordkeeping requirements for landfills that select the gas treatment compliance option, including obligations related to the filtration, de-watering, and compression of the landfill gas; these requirements are not contained in the subpart WWW standards.[6] Importantly, these requirements apply to the owner or operator of the municipal solid waste landfill.[7]

WDNR's analysis is largely based on the subpart XXX NSPS standards that will become applicable to JCL following the landfill expansion project that JCL is currently proposing. Based on JCL's responsibility to comply with the subpart XXX monitoring and recordkeeping requirements associated with gas treatment, and given Ameresco's operation of the gas treatment system, WDNR stated "that JCL will be dependent on Ameresco for compliance with the monitoring and recordkeeping obligations in Subpart XXX, or that Ameresco will have power to dictate decisions that affect JCL's compliance with relevant air pollution regulatory requirements." Thus, based on the principles outlined in EPA's Meadowbrook Letter, WDNR indicated it would conclude that "JCL will be under 'common control' with Ameresco and that the two entities should be considered a single stationary source." WDNR asked whether EPA agreed with these conclusions.

II. Discussion

The questions posed by WDNR's letter implicate two main issues: first, whether Ameresco "controls" LFG treatment if one interprets the regulatory definition of "stationary source," and in particular the concept of "control" over pollutant-emitting activities, in accord with the principles expressed in the Meadowbrook Letter; and second, if so, whether this "control" results in JCL and Ameresco being "under common control," such that the entirety of JCL's and Ameresco's operations must be treated as a single stationary source for title V and NSR permitting purposes.

As an initial matter, based on the information provided by WDNR, it seems reasonable for WDNR to conclude that Ameresco has "control" over the LFG treatment operations if the state applies the framework recommended in the Meadowbrook Letter. Ameresco has the authority to dictate actions related to the operation and monitoring of the LFG treatment equipment. As such, Ameresco has the power to dictate whether JCL complies with the subpart XXX requirements governing the monitoring and recordkeeping of treatment operations. Thus, it appears that

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[5] *See* 40 CFR §§ 60.752(b)(2)(iii), .761, .762(b)(2)(iii).

[6] *See* 40 CFR §§ 60.766(g), .767(c)(7), .768(b)(5)(ii).

[7] The provisions cited above refer to obligations of the "owner or operator" of the municipal solid waste landfill. *See* 40 CFR § 60.2 (definition of "owner or operator"); *id.* § 60.670(a) (designation of affected source as the municipal solid waste landfill); *id.* § 60.761 (definition of municipal solid waste landfill). EPA has previously stated that the owner or operator of a landfill is responsible for compliance with the NSPS, and that an owner cannot contract away its liability by arranging via contract for another entity (*i.e.*, an operator) to perform activities which are also regulated under the landfill NSPS. *See* Letter from Donald Toensing, Chief, Air Permitting and Compliance Branch, EPA Region 7, to James E. Brick, Brick, Gentry, Bowers, Swartz, Stoltze, Schuling & Levis, P.C. (January 5, 1999).

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Ameresco has "the power or authority . . . to dictate decisions that could affect . . . compliance with relevant air pollution regulatory requirements," which would amount to "control" over this aspect of operations under the Meadowbrook framework.[8] This conclusion is likely not unique to the Meadowbrook framework; given Ameresco's day-to-day operational responsibility over gas treatment, WDNR could have reasonably concluded that Ameresco controls this activity under other approaches to assessing control. However, it also seems reasonable for WDNR to conclude that JCL will have control over LFG treatment, given JCL's future compliance responsibility under NSPS subpart XXX.[9] Historically, it appears that WDNR has considered LFG treatment to be part of the JCL landfill source[10] due to the structure of the landfill NSPS. In any case, it appears that both JCL and Ameresco have overlapping degrees of operational and/or compliance responsibility with requirements governing LFG treatment, and arguably, both JCL and Ameresco could be said to have some level of control over LFG treatment.

Regarding WDNR's overarching question, the fact that Ameresco could reasonably be determined to "control" LFG treatment does *not* necessarily mean (1) that Ameresco controls other activities at the landfill (or the landfill as a whole), (2) that JCL and Ameresco are "under common control" in a broader sense, or (3) that the entirety of the two entities' operations must be considered a single stationary source. If, as WDNR asserts in its July 13, 2018, letter, "Ameresco will have no power or authority over how JCL collects the LFG or operates and maintains [JCL's] flare, and JCL will have no power or authority over how Ameresco operates and maintains [Ameresco's] internal combustion generators," then this presents a situation where the two entities each exercise some level of control over a single, limited aspect of otherwise separate operations.[11] As discussed further below, in such a situation, it would be reasonable to conclude that the JCL landfill and Ameresco energy facility are two separate sources for title V and NSR permitting purposes.

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[8] Meadowbrook Letter at 6. As WDNR notes, this outcome is different than that which EPA recommended in the Meadowbrook Letter with respect to Meadowbrook and Keystone Sanitary Landfill (KSL). In the Meadowbrook Letter, EPA considered whether Meadowbrook had the power to dictate whether KSL complied with the more general subpart WWW standards, and concluded that it did not. EPA qualified this conclusion by stating, "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." Because the subpart WWW standards do not contain the subpart XXX requirements at issue here (*i.e.*, gas treatment monitoring and recordkeeping provisions), the Meadowbrook Letter did not directly address the question posed by WDNR.

[9] Given that the subpart XXX NSPS standards applicable to the owner/operator of the landfill (JCL) include requirements governing gas treatment, EPA expects that JCL *should* also retain some level of control over gas treatment if and when those standards become applicable to the source. In any case, as EPA has previously explained, JCL cannot contract away its role as owner of the landfill and related liability for compliance with the relevant NSPS standards (including requirements governing LFG treatment) for which EPA has, through rulemaking, specifically assigned it responsibility. *See supra* note 7. Similarly, JCL likely cannot contract away its legal control over aspects of operations for which it is responsible under the NSPS as the owner of the affected source. Thus, it seems reasonable to conclude that JCL retains at least some level of control over LFG treatment.

[10] *See* WDNR Operation Permit No. 54058190-P10, Term A.1.a.(4) (September 20, 2013) (term in JCL's current title V permit related to the operation of LFG treatment equipment, which cites 40 CFR § 60.752(b)(2)(iii)(C)).

[11] Determining the extent of activities controlled by multiple entities is inherently a context-specific analysis that permitting authorities should evaluate on a case-by-case basis.

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A. Distinguishing "Control" From "Persons Under Common Control"

In order to resolve these broader questions, it may be helpful to first clarify prior statements concerning "common control" in light of the relevant regulatory text. Under EPA's regulations governing source determinations, a "stationary source" is defined to encompass, in relevant part, "all of the pollutant-emitting activities which . . . are under the control of the same person (or persons under common control)."[12] EPA has often historically referred to the entirety of this inquiry as a determination of "common control." This informal, shorthand usage of the phrase "common control" may have created some confusion in light of how the terms "control" and "common control" (which are distinct in the regulatory text) are specifically used in the relevant regulations. The first part of the regulatory definition asks which activities are "under the control of the same person." The second part of the relevant regulatory text contemplates that multiple "persons under common control"—rather than a single person—might control an activity. Thus, the word "control" is used in two distinct ways: first, regarding whether a person "controls" a given *activity*, and second, regarding whether multiple persons are *themselves* "under common control."[13]

EPA's informal use of the phrase "common control" in prior EPA guidance[14] may have inadvertently blurred these distinct elements or suggested overbroad conclusions regarding when two entities should be considered "under common control." For example, one could have inferred that when multiple entities each exert a certain amount of "control" over a specific *activity* (first part of the regulatory text), then those *entities* themselves should also automatically be considered "persons under common control" (second part of the regulatory text). However, it would be inappropriate to automatically assume this, for the following reasons. First, as described above,

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[12] The term "stationary source" is defined as any "building, structure, facility, or installation which emits or may emit a regulated NSR pollutant." *E.g.*, 40 CFR § 52.21(b)(5). The definition of "Building, structure, facility, or installation" includes the specific language quoted in the text above. *E.g.*, *id.* § 52.21(b)(6). EPA's title V regulations, as well as WDNR's EPA-approved NSR and title V regulations, closely resemble this definition. *See id.* § 70.2 (defining "major source" for title V purposes); Wisc. NR 406.02(1m) (defining "facility" for NSR purposes); *id.* § 407.02(4) (defining "major source" for title V purposes). These regulations are consistent with, and help clarify, the more general text contained in relevant title V statutory provisions. *See* 42 U.S.C. § 7661(2) (including in the definition of "major source" the requirement that any group of stationary sources be "under common control"). The quoted phrases in the text above are used repeatedly throughout this letter; EPA will not repeat these citations.

[13] Put another way, the object of the word "control" differs between these two phrases in the regulatory text: the first focuses on control over a specific *activity*; the second focuses on control over an entire *person* or *entity* in a more general sense (*i.e.*, not limited to control over one particular activity that that person performs).

[14] For example, some parts of the Meadowbrook Letter specifically focused on "control" as used in the first part of the regulatory text. *See* Meadowbrook letter at 6–8, 11–12. In other instances, the term "common control" was used as a shorthand for the overall inquiry; this was not intended to specifically speak to the second part of the regulatory text. *See id.* at 3–6, 9–11. In discussing "control" in the Meadowbrook Letter, EPA also discussed a situation whereby one entity could "control" another *entity* by virtue of dictating *the other entity's actions* in a manner that has, for example, compliance consequences. However, the Meadowbrook Letter did *not* suggest that where one entity "controls" its *own* activities in a way that has compliance impacts on another entity (or where one entity "controls" an activity that another entity also "controls"), this necessarily means that the first entity "controls" the second entity itself, or that the two entities should be considered "persons under common control." Nor did the Meadowbrook Letter suggest that if one entity "controls" another entity's actions with respect to only a limited aspect of operations, both entities should necessarily be considered "persons under common control." Thus, the Meadowbrook Letter did not address the specific question presented here: how to treat otherwise distinct operations with a limited intersection of control.

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this assumption conflates two distinct aspects of the regulatory text, rendering this interpretation inconsistent with the regulatory text. Second, this distinction is important to preserve due to its practical implications. If multiple entities are not themselves "persons under common control," then only those activities that are "under the control of the same person" (*i.e.*, of *one* of the entities) would be considered part of the same source. However, if multiple entities were found to be "persons under common control," then *all* of the activities controlled by *any* of the entities would collectively be considered "under the control of . . . persons under common control," and, thus, would be part of the same source. Applying this assumption indiscriminately could therefore result in overbroad source determinations that aggregate wholly unrelated activities that may not accurately reflect "a common sense notion of a plant."[15]

For example, take two separately-owned manufacturing companies that operate independently with respect to all of their emissions-related activities, with the exception of a wastewater treatment plant over which they share control due to practical and economic convenience. In such a situation, it would stretch the plain meaning of "persons under common control," and the notion of a "common sense notion of a plant," to consider these two entities to be single source simply due to one piece of shared equipment. Such an overbroad reading could result in inequitable outcomes. The potential inequities associated with this situation mirror the concerns addressed in the Meadowbrook Letter: one entity could be unfairly held accountable for, or otherwise impacted by, the actions of another entity that were entirely beyond the first entity's control. *See* Meadowbrook Letter at 5, 7, 9.

Overall, the fact that one entity has some control over an *activity* that another entity also has some control over does not necessarily mean that the first entity also controls the second *entity*, such that the two entities are "under common control." Instead of assuming that shared control over a particular activity automatically equates to multiple entities being deemed "persons under common control," permitting authorities should independently make this latter determination. This will necessarily require a case-by-case evaluation based on the facts of a particular situation, subject to the permitting authority's exercise of reasonable discretion. In EPA's view, the phrase "persons under common control" suggests that the entities themselves are controlled from a central, unified position, such as through parent-subsidiary or other forms of corporate management relationships. Permitting authorities could also consider entities that are separate in the sense that they lack a formal organizational link of this type, but where one entity nevertheless exerts enough control over a substantial portion of the other's relevant operations, to be "persons under common control" in certain situations. However, where the overlap of control is limited to only a small portion of each entity's otherwise separate operations, EPA does not believe such entities should themselves be considered "persons under common control" simply by virtue of this limited nexus.

B. Evaluating Activities Under the Potential Control of Multiple Entities (That Are Not Under Common Control)

Where multiple entities are not themselves "persons under common control," EPA's and WDNR's regulations indicate that only those activities that are "under the control of the same

[15] 45 FR 52676, 52694–95 (August 7, 1980) (citing *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979)); *see also* 61 FR 34202, 34210 (July 1, 1996).

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person" should be considered part of the same source. Thus, activities solely controlled by one entity should not be considered part of the same source as activities solely controlled by another entity. However, EPA's regulations do not specifically address how to allocate activities that are arguably controlled, at least to some extent, by multiple otherwise separate entities. EPA believes it will be useful for WDNR and others to provide the following guidance.

There are two potential, alternative approaches to this situation: First, permitting authorities could determine that only one entity "controls" the shared activity. As a result, the shared activity would be treated as part of only that one entity's source, along with other activities controlled by that entity that are located on contiguous or adjacent properties and share the same major industrial grouping. Second, permitting authorities could determine that multiple entities "control" the shared activity. This approach would, somewhat absurdly, result in the shared activity being considered part of multiple separate sources (provided it was located on contiguous or adjacent properties and shared the same major industrial grouping with the other activities).[16] For the reasons discussed below, EPA considers the first approach to be the more appropriate one for permitting authorities to follow when making source determinations.

As an initial matter, neither the CAA nor EPA's regulations define "control" or specify how permitting authorities should determine which entity controls which activities.[17] Therefore, nothing in the Act or EPA's regulations precludes permitting authorities from determining that a single entity "controls" an activity in the regulatory sense, even where that activity may be subject to some level of control by other entities as well. Instead, the text of EPA's regulations supports the notion that, in the absence of "persons under common control," a *single person* should be determined to control each activity, rather than multiple not-commonly-controlled persons. *E.g.*, 40 CFR § 52.21(b)(6) ("under the control of the *same person* (or persons under common control)" (emphasis added)).

Moreover, the context of the Act and EPA's regulations support this approach. Under both the NSR program and the title V program (to a lesser extent), determining which air pollution-related requirements apply to a given activity is fundamentally based on how that activity is positioned relative to other activities within a single "stationary source" or "major source." This inherently requires the establishment of discrete, well-defined boundaries between sources. Although this can be a challenging task (as the facts here illustrate), EPA considers it a necessary

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[16] A simplified hypothetical may help clarify these options. There are two entities (Entities 1 and 2) and three pollution-emitting activities (activities A, B, and C). Only Entity 1 controls activity A. Both Entity 1 and 2 have some level of control over activity B. Only Entity 2 controls activity C. As discussed above, assuming Entities 1 and 2 are not themselves "persons under common control," it may not be appropriate to treat activities A, B, and C as a single source because activities A and C are not "under the control of the same person (or persons under common control)." The first approach would allocate control over activity B to only one of the entities (Entity 1) resulting in one source comprised of activities A and B, and a separate source comprised of activity C. The second approach would assign control over activity B to both entities, resulting in one source comprised of activities A and B, and another source comprised of activities B and C.

[17] The following discussion concerns the discretion available to permitting authorities to determine who controls an activity in the first instance. The same level of discretion is not available to determine which activities constitute a single source after such a determination of control has been made. Once control over a particular activity has been established, the relevant regulations dictate that all activities that are, *inter alia*, under the control of the same person (or persons under common control) must be considered part of the same major source or stationary source.

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one. The alternative—allowing a single activity to be considered part of multiple stationary sources—would lead to unworkable results inconsistent with basic elements of the NSR and title V programs and would not "carry out reasonably the purposes" of these programs.[18]

For example, in the context of determining the applicability of major source requirements under NSR or title V, if a shared activity were considered part of two separate stationary sources, both sources could be burdened by emissions increases associated with the shared activity or could take advantage of emission reductions from the shared activity. This type of double-counting emissions increases or decreases could thus artificially result in two sources (instead of one) either triggering or avoiding major NSR or title V requirements. As another example, for new sources or modifications subject to major NSR requirements, this double-counting of emissions increases or decreases could also seriously complicate and/or undermine source-specific PSD and nonattainment NSR ambient air quality modeling, as well as emissions inventories and attainment demonstrations in nonattainment areas. As a third example, if a shared activity were treated as part of two separate sources, the shared activity could potentially be subject to different or even conflicting requirements (*e.g.*, the requirement to install best available control technology at one source, but not the other), with each controlling entity motivated to comply with only one set of requirements applicable to the activity.

In order to avoid these unworkable outcomes, permitting authorities should ensure that each activity is ultimately allocated to a single source. Determining that only a single entity (or entities under common control) "controls" each activity would be a reasonable way to accomplish this. This approach is also consistent with how EPA has addressed similar issues concerning the major industrial grouping (SIC) code prong of the source determination framework, where EPA has historically recommended that permitting authorities assign a single SIC code to activities that support multiple different primary activities.[19]

Overall, permitting authorities may exercise reasonable discretion in determining which entity controls each relevant pollutant-emitting activity. As with determining whether multiple entities are "persons under common control," determining whether an entity "controls" a given activity will necessarily involve a case-by-case determination based on the specific facts of each situation. In making these decisions, permitting authorities should ensure that their source determinations ultimately reflect a "common sense notion of a plant" and that sources do not take advantage of this flexibility to circumvent major source requirements. The framework articulated in EPA's Meadowbrook Letter reflects EPA's suggested basis for making determinations of

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[18] 45 FR at 52694–95.

[19] Under longstanding EPA guidance regarding the major industrial grouping prong of the source determination framework, support facilities should be assigned the SIC code of the primary activity they support. 45 FR at 52695. Where an activity supports multiple different primary activities with different SIC codes, such a support facility could arguably be assigned multiple different SIC codes. This is analogous to the situation at hand, where an activity controlled to some extent by multiple entities could arguably be said to be "under the control of" multiple different entities. In the SIC code context, EPA has advised that the shared support activity should be assigned a single SIC code, and as a result, should be treated as part of a single source. *See id.* ("Where a single unit is used to support two otherwise distinct sets of activities, the unit is to be included within the source which relies most heavily on its support."); *see also* EPA, New Source Review Workshop Manual, DRAFT at A.4 (October 1990). In both the industrial grouping (SIC code) context and the control context, assigning a single SIC code or a single controlling entity to each activity avoids the unworkable situation where an activity could be considered part of two separate stationary sources.

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"control" in most instances. However, in instances where multiple entities with otherwise separate operations exert some level of control over an activity, it may be appropriate to consider additional information in order to determine which entity should be deemed to "control" that activity, such that the activity is attributed to the entity for permitting purposes. For example, where a federally-promulgated standard dictates that a specific entity is responsible for a specific activity, this may provide a reasonable basis for determining that this specific entity controls that activity. In this way, EPA's recommended approach provides the flexibility to harmonize CAA permitting programs with other CAA programs, such as the landfill NSPS standards implicated by this fact pattern.

III. Suggestions for WDNR Regarding JCL and Ameresco

Applying these principles to WDNR's questions regarding JCL and Ameresco's operations, WDNR could reasonably continue treating JCL and Ameresco as two separate sources if landfill operations, LFG collection, LFG flaring, and LFG combustion are not collectively "under the control of the same person (or persons under common control)." That is, provided the only area of overlap between these entities involves LFG treatment, WDNR may be able to conclude that JCL and Ameresco are not "persons under common control" solely due to the fact that LFG treatment is potentially under the control of both entities. Then, based on the reasoning explained in Section II.B above, WDNR may also be able to conclude that LFG treatment activities are only under JCL's "control"—not Ameresco's—for permitting purposes. As a result, WDNR could conclude that LFG treatment activities remain part of the stationary source associated with the landfill, separate from Ameresco's engines.

This allocation of LFG treatment activities solely to JCL for source determination purposes would be consistent with the structure of the subpart XXX NSPS. As discussed above, where LFG treatment is selected as a landfill's compliance option, the subpart XXX regulations impose requirements on the owner/operator of the landfill up through the point of LFG treatment,[20] but these standards do not extend to the ultimate use of the LFG (*e.g.*, electrical generating engines, which are covered by separate standards). Therefore, in the case of landfills with collocated LFG-to-energy operations, the structure of the subpart XXX NSPS and other relevant federal standards, and the identity of the parties responsible for compliance with those standards, may provide a reasonable framework for permitting authorities to determine which activities should be attributed to which stationary sources.

EPA's analysis and recommendations above are based on WDNR's representations that the operation of the landfill is under the sole control of JCL, and that LFG combustion is under the sole control of Ameresco. As WDNR makes its source determination for JCL and Ameresco, EPA recommends that WDNR fully consider all relevant facts regarding control over each activity under the Meadowbrook framework—including aspects of JCL's and Ameresco's relationship

[20] In fact, when EPA finalized the subpart XXX standards, it expressly indicated that obligations related to LFG treatment (specifically, the treatment system monitoring plan) would be included in the *landfill's* title V permit. 81 FR 59332, 59343, 59360 (August 29, 2016). JCL is undisputedly the owner/operator of the municipal solid waste landfill to which all obligations within the subpart XXX standards apply. *See supra* note 7. Nothing in this letter, nor in any permit decision taken by WDNR, should be taken to affect Ameresco's potential liability under the NSPS as a potential "operator" of the LFG treatment equipment or any other aspects of the landfill, as applicable.

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relevant to LFG collection and combustion—before determining whether the approach recommended above is relevant to the facts at hand in this case. Given that WDNR is the title V and NSR permitting authority for JCL and Ameresco, WDNR has the ultimate responsibility to make this determination based on the specific facts before it.

If you have any additional questions, please contact Scott Mathias of my office at (919) 541-5310 or *mathias.scott@epa.gov*.

Sincerely,

Anna Marie Wood
Director, Air Quality Policy Division

cc: Kristin Hart, WDNR
Ed Nam, Region 5 Air Division Director

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