No. 16-3420

In the United States Court of Appeals for the Second Circuit

FINGER LAKES ZERO WASTE COALITION, INC.,
PETITIONER,
Petitioner,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA MCCARTHY, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Petition For Review From
The Environmental Protection Agency
Case No. 8-3244-00040/00002

BRIEF OF PETITIONER

GARY A. ABRAHAM
LAW OFFICE OF GARY A. ABRAHAM
4939 Conlan Road
Great Valley, NY 14741
716-790-6141
Attorney for Petitioner

CORPORATE DISCLOSURE STATEMENT

Finger Lakes Zero Waste Coalition, Inc., has no parent companies, and there are no publicly held companies that have a 10 percent or greater ownership in Finger Lakes Zero Waste Coalition, Inc.

Finger Lakes Zero Waste Coalition, Inc., a corporation organized and existing under the laws of the State of New York, is a nonprofit organization dedicated to being the strongest and most effective possible advocate for the Finger Lakes region by working through a network of concerned citizens promoting reuse and recycling of materials that would otherwise require landfilling or incineration in order to protect the natural resources essential to healthy communities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page**

Federal Statutes

Federal Regulations

EPA Orders

EPA Guidance Documents and Policies

Other Authorities

JURISDICTIONAL STATEMENT

Finger Lakes Zero Waste Coalition, Inc. ("FLZWC") seeks review of a final order of the U.S. Environmental Protection Agency ("EPA") issued on September 8, 2016. Accordingly, this Court has jurisdiction pursuant to Clean Air Act ("CAA") § 307(b)(1), 42 U.S.C. § 7607(b)(1).

On October 7, 2016, Petitioner timely filed its petition for judicial review. *See* 42 U.S.C. §§ 7607(b)(1), 7661d(b)(2) (requiring filing within 60 days of notice of a final order in the Federal Register). *Cf.* 81 Fed. Reg. 62,123 (September 8, 2016), noticing an "Order Denying Petition Requesting That the Administrator Reopen Title V Operating Permit", EPA Permit number 8-3244-00040/000. The referenced administrative Order is attached to the Petition for Review.

STATEMENT OF THE ISSUES

1. Did the Petitioner demonstrate to EPA that the federal Clean Air Act operating permit at issue in this case is not in compliance with the Act, under Section 502(b)(2) of the Act, 42 U.S.C. §§ 7661d(b)(2)?

2. Did EPA act arbitrarily, capriciously, or unlawfully when it declined to apply its policy and precedents on "common control" to the facts surrounding the relationship between the Seneca Energy II landfill gas-to-energy facility and the Ontario County Landfill?

STATEMENT OF THE CASE

Petitioners seek an Order remanding a Clean Air Act ("CAA") operating permit to EPA to determine applicable pollution control requirements, based on Petitioner's demonstration to EPA that the Seneca Energy II Ontario County Landfill Gas-to-Energy Facility ("SE II Facility") and the companion Ontario County Landfill located in Seneca, Ontario County, New York are under "common control". *See* 42 U.S.C. §

7661d(b)(3). Based on Petitioner's demonstration, both facilities should be required to comply with certain "major source" requirements under the Act, through their respective Title V operating permits (also termed Part 70 permits) and through revisions to the permit records supporting the permits.[1]

[1] The SE II Title V Permit, (F-2) was issued by the New York State Department of Environmental Conservation ("DEC") pursuant to Title V of the CAA, CAA §§ 501-507, 42 U.S.C. §§ 7661-7661f, and New York Environmental Conservation Law (E.C.L.) Article 19 § 19-0301 et seq., E.C.L. Article 70 et seq. *See also* 40 C.F.R. Part 70. Citations to the Certified Index to the Administrative Record are made here by identifying the item number (*e.g.*, "F-2").

STATEMENT OF FACTS

A modified Title V permit[2] was required for SE II because in 2009 it proposed to increase emissions by adding three internal combustion ("IC") engines to eight IC engines operated at its facility, all dedicated to capturing and combusting Ontario County Landfill's landfill gas emissions to create electricity. B-7. At the time, the Ontario County Landfill was also planning an expansion anticipated to increase emissions of landfill gas. *Id.* (DEC

[2] According to EPA: "All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable state implementation plan (SIP). CAA §§ 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring. recordkeeping, reporting and other requirements to assure sources' compliance. 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to 'enable the source, States, the EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements.' *Id.* Thus, the title V operating permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and for assuring compliance with such requirements." EPA 2015 Order in this matter, A-1, at 2.

asking SE II whether its proposal to add three IC engines is "in anticipation of the landfill being expanded"). *See also* B-2, at 6, 9, 17-18.[3]

On July 7, 2010, DEC notified SE II that if its facility were deemed a single source in combination with the landfill, its potential emissions would exceed major source levels under one or both CAA programs known as the Prevention of Significant Deterioration ("PSD") or New Source Review ("NSR"). B-8.[4] On January 27, 2011, DEC notified SE II that EPA disagrees with SE II's conclusion "that the landfill and the Landfill Gas to Energy facilities are not in common control." B-9. On January 5, 2012, DEC notified SE II that the agency determined that its facility and the landfill are

---

[3] The landfill is owned by Ontario County and operated under a lease with the County by Casella Waste Systems of New York. A-1, at 12.

[4] "The NSR program is comprised of two core preconstruction permit programs for major sources. Part C of Title I of the CAA establishes the Prevention of Significant Deterioration (PSD) program, which applies to areas of the country, such as Seneca, New York, that are designated as attainment or unclassifiable for the national ambient air quality standards (NAAQS). CAA §§ 160-169, 42 U.S.C. §§ 7470-7479. Part D of Title I of the Act establishes the nonattainment NSR program, which applies to areas that are designated as nonattainment with the NAAQS." EPA 2015 Order in this matter, A-1, at 2.

not under common control, and "will continue to be treated as two separate facilities [*i.e.*, sources]." B-15.

On August 17, 2012, Petitioner filed timely comments with DEC contending that based on the facts surrounding the relationship between SE II and the landfill, the two facilities are under common control. B-2, at 1-2, 5. DEC rejected Petitioner's comments, (F-4, at 1), and issued the draft permit to SE II unchanged, based on the conclusion that the SE II Facility and Ontario County Landfill are not under common control. F-2, at 1.

On December 22, 2012 Petitioner timely filed an administrative petition with EPA seeking its objection to the permit, based on its comments to DEC. B-2 through B-23. *See* 42 U.S.C. § 7661d(b)(2). On June 29, 2015, EPA issued an Order granting the petition in part. B-1.[5] Specifically, EPA agreed with the Petitioner that (1) EPA should object to the SE II Facility Title V Permit because the permit does not consider the landfill and the SE

[5] Although EPA was required to respond in 60 days, (42 U.S.C. § 7661d(b)(2)), it waited more than two years to respond and eventually did so only after Petitioner filed suit. *See Finger Lakes Zero Waste Coalition, Inc. v. McCarthy*, No. 14-cv-6542 (W.D.N.Y.).

II Facility a single source; and (2) where the three criteria (of which common control is one) for aggregating facilities into a single source are met, and the combined emissions exceed PSD or minor NSR source limits, the facilities must obtain a PSD permit from EPA before commencing operation. *See* B-1, at 13-17.

DEC's record was provided in a "Permit Review Report" accompanying the draft SE II permit and in a "Responsiveness Summary" responding to public comments on the draft permit. *See* A-4. EPA's 2015 Order concludes that Petitioner demonstrated that DEC failed to provide an adequate rationale for its source determination. Specifically, EPA found that DEC's record does not support its common control determination and issued a directive to DEC to provide an acceptable rationale. B-1, at 16. The 2015 Order further directs DEC to explain how its analysis is consistent with DEC's guidance on common control questions, (*cf.* F-1), and any other applicable legal requirements, including EPA guidance and determinations upon which DEC relied. B-1, at 10.

Finally, the Order advises that once DEC analyzes EPA's precedents

and policy regarding common control issues, the SE II permit may need to be modified:

> In responding to this Order and identifying the case-specific factors salient to the DEC's source determination analysis, the EPA appreciates that the DEC may conclude that the two facilities should be treated as a single source for CAA purposes. In that event, in addition to revisions to the permit record(s), the title V permit(s) for the two facilities would need to be revised as well. Additionally, if upon further review the DEC determines that the Seneca Energy Facility and the landfill are under common control, it must also provide a record of whether their combined emissions qualify as a PSD major stationary source and a title V major source and for which pollutants. Further, if the DEC determines that the Seneca Energy Facility and the Ontario County Landfill are a single title V major source, it must revise the Seneca Energy Facility's Title V Permit accordingly. Finally, if the DEC determines that the Seneca Energy Facility and the Ontario County Landfill are a PSD major stationary source, it must revise the Seneca Energy Facility's Title V Permit to include any applicable PSD requirements.

B-1, at 16. Accordingly, EPA's 2015 Order objects to the Title V permit for the SE II Facility on Petitioner's claim. B-1, at 14.

On October 26, 2015, DEC responded to EPA's objection, (*see* 42

U.S.C. § 7661d(b)(3)), restating the rationale provided in its Responsiveness Summary, (F-6), discussed at length in FLZWC's December 22, 2012 petition to EPA.[6] *See* B-2, at 13-21. Accordingly, on February 8, 2016, FLZWC timely filed with EPA a second petition, incorporating by reference the lengthy demonstration provided in its initial petition showing that the SE II Facility and the landfill are under common control, and therefore the Title V permit is not in compliance with the CAA.[7]

On July 29, 2016, EPA issued an Order denying the February 8, 2016

---

[6] Thus EPA's 2016 Order is factually incorrect when stating: "The 2012 Petition, however, was filed before the NYSDEC had extensively addressed the common control relationship between the facilities in the 2015 NYSDEC Rationale." A-1, at 7. As indicated herein, DEC extensively addressed Petitioner's demonstration in its response to comments, issued on or about September 11, 2012. A-4. *See* B-2, at 2. Petitioner's 2012 petition to EPA was filed December 22, 2012. As contended here, there is no substantive difference between DEC's 2015 Rationale and its 2012 reponse to Petitioner's comments.

[7] Petitioner's intent to file a petition to object, (CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2)), is evident in its incorporation of its initial 2012 petition to EPA, attached as Exhibit D of the February 8, 2016 petition under consideration here. A-2, at 3.

petition. This action followed.

STANDARD OF REVIEW

In the absence of an independent standard of review, (s*ee* CAA § 307, 42 U.S.C. § 7607), the Court reviews the agency action complained of to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Petitioner complains that EPA failed to apply its well-established interpretation of "common control" warranting aggregation of emissions of multiple facilities in this case. Since the CAA does not define "common control", (*see* 42 U.S.C. §§ 7412(a)(1), 7661(2)), EPA's interpretation is entitled to deference.[8] Accordingly, the "arbitrary and capricious" standard

[8] In a 1980 NSR rulemaking, EPA rejected a simplified test of control based on some "specified voting share" and instead explained 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" and further explained that the EPA would "be guided by the general definition of control used by the Securities and Exchange Commission . . . [in which] control 'means 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. 59874,

of the APA governs. *Cf.* New York Public Interest Research Group v. Whitman, 321 F.3d 316, 324, 2003 U.S. App. LEXIS 3645, *19-20 (2nd Cir. 2003).

SUMMARY OF THE ARGUMENT

In 2015 EPA objected to the SE II Title V permit based on Petitioner's demonstration that the basis for DEC's common control determination is inadequate. A-1, at 16. However, in 2016 when Petitioner reasserted the same demonstration after DEC re-issued the permit unchanged, providing the same basis it had previously, EPA approved the permit and asserted Petitioner failed to provide any demonstration of inadequacy. EPA asserts in the 2016 Order that its objection in 2015 was merely to the procedural defect regarding how DEC explained the basis for its common control determination, and that EPA lacks authority to address the substance of the determination. However, there is no basis for EPA's distinction, since procedural defects in Title V permitting that violate the

---

59878 (September 11, 1980) (quoting 17 C.F.R. § 210.1-02(g)).

Clean Air Act require EPA to object to the Title V permit. Sierra Club v. Johnson, 456 F.3d 1269, 1279-1280, 2006 U.S. App. LEXIS 1380, *25-28 (11th Cir. 2006) ("When it comes to the Title V permitting process, EPA is not a board of pardons. Its duty is to enforce requirements, not to grant absolution to state agencies that have violated them."). In this case, the 2016 Order abandons EPA's "comprehensive oversight authority" over New York's federally approved state Title V permitting program. New York Public Interest Research Group v. Whitman, 321 F.3d at 329.n.5, 2003 U.S. App. LEXIS 3645, at *35.n.5.

EPA's 2016 Order criticizing Petitioner's "failure to address the state's reasoning" is irrational. B-1, at 8.n.27. EPA states that Petitioner's failure "constitutes an independent reason that the Petitioner has not met its demonstration burden". *Id.* However, Petitioner expressly restated its 2012 demonstration in its 2016 administrative petition to EPA. A-2, at 3. *Cf. also supra* note 7.

The incongruity of EPA's 2016 Order lies in its abandonment of any concern with the adequacy of DEC's explanation, in substance identical to

the explanation in DEC's 2012 Responsiveness Summary, (F-4), which prompted EPA's 2015 objection. In other words, while EPA found an objection to the substance of DEC's explanation was warranted in 2015, in 2016 it decided not to reach the substance of that explanation because, EPA says, the explanation has been properly provided in a procedural sense. The 2016 Order is arbitrary and capricious because, if allowed to stand, it authorizes (in New York) any explanation for a common control determination, since under DEC's common control guidance, New York permit writers "are not obligated to rely exclusively on any particular document". B-1, at 7.

The EPA 2016 Order is incoherent because it results in common control determinations in New York that adhere to no rules whatsoever. If a permittee wishes to avoid EPA's well-settled rules for analyzing common control issues, they need only site their facilities in New York. On the one hand, EPA states that "the state . . . is *required* to determine whether [co-located] facilities are 'under common control,' as that phrase is used in the CAA and reasonably interpreted by EPA." A-1, at 6 (emphases added).

However, on the other hand, EPA's interpretation, which adopts a rebuttable presumption applied to co-located facilities–because "it is rare for one facility to locate on another's property in the absence of a common control relationship", (*id.*, citing D-1)–"is not . . . binding on state . . . permitting authorities . . ." *Id.*, at 6-7. On its face, DEC is thus afforded unlimited discretion in determining common control, as DEC is subject to no rule or guidelines. Accordingly, EPA can never object to a DEC common control determination, so long as some rationale accompanies the determination, whatever its basis. *Cf.* 40 C.F.R. § 70.7(a)(5). This result is the opposite of "a measure of predictability regarding how the agency [*i.e.*, EPA] proceeds with analyzing common control for co-located facilities", which EPA says is the purpose of the rebuttable presumption for co-located facilities. A-1, at 6.

ARGUMENT

I. EPA IS COMPELLED TO OBJECT TO DEMONSTRABLY DEFICIENT TITLE V PERMITS

Under the Clean Air Act, (42 U.S.C. §§ 7412(a)(1), 7661(2)), EPA's regulations, (40 C.F.R. §§ 51.166(b)(5) and (6), 63.2, 70.2, 71.2), and consistent guidance and prior determinations by EPA,[9] facilities are considered a single stationary source of regulated air pollutants under PSD, NSR and Title V when the facilities belong to the same major industrial grouping under the Standard Industrial Classification ("SIC") code, are located on one or more adjacent or contiguous properties, and are under common control. Where these three criteria are met, emissions from separate sources of regulated pollutants must be treated as a single source of emissions to determine whether the source exceeds major source thresholds.

[9] *Cf.* B-19, D-1 through D-5, and EPA landfill and landfill gas-to-energy facility determinations identified to EPA by Petitioner, A-6, at 14-21. *See also* additional EPA administrative decisions cited herein and included in the Joint Appendix.

In this case it is not disputed that the SE II Facility and the Ontario County Landfill share the same SIC code industrial grouping and are adjacent or contiguous;[10] only the common control criterion is at issue.

Section 505(b)(2) of the CAA "compel[s] the EPA to determine whether a permitting authority is adequately administering or enforcing its permitting program, . . . [and] provide[s] a substantive standard by which this determination is to be made." New York Public Interest Research Group v. Whitman, 321 F.3d 316, 334, 2003 U.S. App. LEXIS 3645, *49 (2nd Cir. 2002). *See also* Wildearth Guardians v. EPA, 723 F.3d 1075 (10th Cir. 2013). Section 505(b)(2) does so by creating "the important distinction between the discretionary part of the statute (whether the petition demonstrates non-compliance) with the nondiscretionary part (if such a demonstration is made, objection must follow)." 321 F.3d at 333, 2003 U.S. App. LEXIS 3645, at *45. "[S]ince § 505(b)(2) specifies that 'the Administrator shall issue an objection' if a demonstration of

[10] In fact, the SE II Facility is located on top of the landfill.

non-compliance is made", (*id.*), the question is whether "noncompliance has been demonstrated" to EPA. 321 F.3d at 334, 2003 U.S. App. LEXIS 3645, at *49.

"Subsequent to receipt of [a Section 502(b)(2)] petition, the EPA perform[s] an independent and in-depth review of the . . . title V permit." Lovett Generating Station, Order, 2003 EPA CAA Title V LEXIS 3, at *2. "If EPA objects to a permit in response to a petition and the permit has been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue such a permit consistent with the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause." *Id.*, at *6.

EPA may rely on deficiencies in the permitting authority's "statement of basis" to object to the permit. DEC's Permit Review Report serves as the "statement of basis" required under 40 C.F.R. § 70.7(a)(5). *See* EPA, In the Matter of the Lovett Generating Station, Order Granting in Part and Denying in Part Petition for Objection to Permit, 2003 EPA CAA Title V LEXIS 3, *22.n.8 (February 19, 2003). "Since the statement of basis can serve a valuable purpose in directing EPA's attention to important elements

of the permit and since it is important that EPA perform reviews as quickly as possible, it is a required element of an approved program that EPA receive an adequate statement of basis with each proposed permit." *Id.*, at *23. According to EPA, "it is possible to achieve a sufficient understanding of this source using other available documents in the permit record including the permit application, the draft permit that includes a permit description, regulations cited in the permit application (which, in most instances, include the monitoring, reporting and recordkeeping requirements incorporated into the permit to address title V monitoring), other documents referenced but not included with the application, and DEC's Responsiveness Summary." *Id.*, at *24 (footnotes omitted). As EPA notes in the Lovett Generating Station Order, "[w]hile failure to include a statement of basis with the draft permit does not, in this case, constitute a reason to object to this permit, EPA can object to a permit on such grounds. . . . Nonetheless, DEC's permit issuance process now provides that a permit may not be issued in draft unless a permit review report has been prepared for the draft permit." *Id.*, at *25. *See also* In the Matter of Starrett City, Inc.,

Order Granting in Part and Denying in Part Petition for Objection to Permit, 2002 EPA CAA Title V LEXIS 55, *25-26 (December 16, 2002).

"The failure of a permitting authority to meet the procedural requirements of § 70.7(a)(5), however, does not necessarily demonstrate that the resulting title V permit is substantively flawed", unless "the petitioner has demonstrated that the permitting authority's failure resulted in, or may have resulted in, a deficiency in the content of the permit." In re Onyx Envtl. Servs., Order Partially Denying and Partially Granting Petition for Objection to Permit, 2006 EPA CAA Title V LEXIS 4, *38 (2006) (granting petition to object to permit for failure to provide statement of basis). *See also* In the Matter of Midwest Generation, LCC, Waukegan Generating Station, Order Partially Denying and Partially Granting Petition for Objection to Permit, 2005 EPA CAA Title V LEXIS 14, *19-23 (2005).

II. PETITIONER DEMONSTRATED COMMON CONTROL TO EPA

In its 2015 Order, EPA determined that Petitioners demonstrated that DEC's common control determination was not compliance with the CAA,

including the regulations and principles EPA established in previous common control determinations, especially those involving a gas-to-energy facility and a companion or co-located landfill. B-1, at 13-17. The 2015 Order states:

> EPA finds that the Petitioner demonstrated that the DEC did not provide an adequate record explaining its determination that the Seneca Energy Facility and the landfill are two separate sources. Specifically, the DEC did not provide an adequate record explaining its analysis on the common control element.

B-1, at 16. Petitioner's second administrative petition, filed in 2016, contends that the "Rationale" provided by DEC in response to the 2015 Order, (F-6), fails to reasonably support its analysis on the common control element. In its second petition to EPA, Petitioner restated its 2012 analysis of the common control factors and the documented facts relevant to the relationship between the operations of SE II and those of the landfill. In the second petition, Petitioner incorporated its 2012 petition by reference, summarized its 2012 analysis, and otherwise demonstrated that DEC's Rationale provided in response to EPA's 2015 Order was no different in

substance than the rationale it had provided in its 2012 response to Petitioner's public comments (provided as F-4), and which prompted Petitioner's first petition to EPA. In the 2016 Order, EPA denied the second petition based on its contention that Petitioner failed to make a demonstration that would require EPA to act. The reason for the different outcome, according to EPA, is that DEC simply did what it was directed to do in the 2015 Order, *viz.*, provide a "Rationale". EPA is not obligated, according to the 2016 Order, to inquire into the substance of DEC's "Rationale". EPA's decision to ignore the substance of DEC's analysis on the common control element–including by avoiding any written analysis of New York's response–is, it is submitted, arbitrary and capricious.

III. EPA's INTERPRETATION OF COMMON CONTROL SUPPORTS THE RELIEF REQUESTED

The Court's deference to EPA's interpretation of the "common control" criterion is not at issue here, since Petitioner agrees with EPA's interpretation. Petitioner specifically agrees that the statutory concept of "common control" is ambiguous and deference to EPA's interpretation of

the concept is due. Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-845, 104 S.Ct. 2778, 2782-2783 (1984). However, deference to EPA on this point does not resolve the question, whether EPA can abandon its interpretation in this case in deference to DEC. The Court still needs to be satisfied that EPA's decision to abandon its interpretation and defer to DEC is based on a "rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). *See* 5 U.S.C. § 706(2)(A). In this case, EPA's 2016 Order cannot be squared with its policy and precedents regarding common control determinations.

EPA, DEC, and petitioner agree that the "Spratlin Letter", (D-1), sets forth the framework for making such determinations. Tracking the factors[11]

[11] A "factor" in this context means a feature of the relationship between two facilities indicative of common control. *See* Letter from Ronald J. Borsellino, Acting Director, Division of Environmental Planning and Protection, U.S. EPA Region 2, to Scott Salisbury, President Manchester Renewable Power Corporation/LES and Lawrence C. Hesse, President, Ocean County Landfill Corporation, "Re: Common Control Determination for Ocean County Landfill and the Manchester Renewable Power Corp./LES," May 11, 2009, at 3.n.7 (downloaded on February 19,

demonstrating common control provided in the Spratlin Letter, Petitioner provided DEC with information demonstrating that (1) SE II and the landfill share a common workforce, (2) the two facilities share equipment or pollution control equipment, (3) the managers of both facilities have the ability to affect pollution control at the others' facilities, (4) the facilities share common activities, insurance coverage, and other administrative functions, (5) the contractual arrangements for providing goods and services result in a relationship of mutual dependence, (6) compliance with the landfill's air quality control requirements is ensured only by means of SE II's combustion of the gas, (7) the commercial dependency of one facility on the other is demonstrated by their contractual relationship, described under factor 5, and (8) as indicated by the financial arrangements between the two parties, one operation supports the operation of the other, as there is a 50-50 sharing of tax credits and royalties. A-3, at 2-6. In short, the SE II Facility is

---

2017, from EPA's *Title V Guidance & Policy Database* at <https://www.epa.gov/sites/production/files/2015-07/documents/ocl-mrpc.pdf>) ("Borsellino Letter").

physically dependent on landfill gas and is contractually dependent on the owner and operator of the landfill.[12] It cannot operate independently either legally or actually.

DEC's response to Petitioner's comments, (A-4), is evasive. To the common workforce factor (1), DEC responded, "There is no indication of common ownership . . ." To the sharing of pollution control equipment factor (2), DEC responded that the two facilities "do not share equipment or air pollution control equipment" and, "One entity cannot make decisions regarding the operation of the others air pollution control equipment." To

[12] The contracts governing the SE II-Ontario County Landfill relationship are included with B-17, and were provided to EPA with Petitioner's 2012 administrative petition. See B-17, "Gas Assignment Agreement", at 5 (SE II agreement not purchase or produce gas from any other source during the term of the agreement); *id.*, at 7 (providing that SE II employees have immediate access to the equipment inventory held at the landfill for purposes of repair and restoration of the landfill's gas collection system, and the right of entry onto the landfill to make repairs); *id.*, "Excess Gas Utilization Agreement", at 1 (providing that the landfill pays for the costs of required plumbing and equipment at SE II's facility). These factors are discussed in Petitioner's 2012 petition to EPA. B-2, at 7, 18-19. See also B-3, at 5-6 (discussion of contracted tax credits and royalties in Petitioner's 2012 comments to DEC).

the ability to affect pollution control factor (3), DEC responded, "Casella has the ability to flare any or all of the gas that the landfill generates," but did not address the contractual provision allowing SE II to control the flow of gas, and facts showing SE II had caused excess emissions at the landfill. *See* A-3, at 3. To the sharing of insurance and administration factor (4), DEC responded that sharing insurance does not indicate shared administration. To the contractual provision of goods and services factor (5), DEC responded that "SE's engines can also run on natural gas" and SE II has the "ability" to utilize "at least one natural gas pipeline within a reasonable distance of the energy plant" (two miles). DEC did not address the contractual provision requiring the landfill to provide "immediate access" to SE II personnel to the landfill "for purposes of repair and restoration of the [landfill gas] collection system". B-17, "Gas Assignment Agreement", at 7 (para. E). *See* A-2, at 2. To the important question regarding who accepts responsibility for compliance with air quality control requirements (factor 6), DEC responded that the landfill's backup flares

"can handle all of the landfill gas".[13] To the commercial dependency factor (7), DEC responded that if either facility shuts down, "the landfill can flare the gas or sell it to another end user" and SE II can connect to a natural gas pipeline. To the financial arrangements factor (8), DEC responded that sharing of tax credits (it does not acknowledge shared royalties) does not show an "established business relationship". A-4.

Note that under EPA's policy, "a positive answer to only one or more of the seven factors [identified in the Spratlin Letter, D-1] is enough to establish common control between two facilities." Kenny Letter, D-5, Attachment at 2. The common control factors identified by Petitioner have been applied by EPA to find common control in several gas-to-energy ("GTE") facility-landfill relationships.

For example, in the Ocean County Landfill-Manchester Renewable

---

[13] In its 2012 petition to EPA, Petitioner augmented the supporting information for this factor by demonstrating that the landfill had at the time the capacity to control only about half the gas it generates, and "[t]he landfill therefore needs SE to control its LFG". *See* A-6, at 17-18. This was in response to the above-referenced DEC assertion in its response to comments. B-4, at 5.

Power Corp. matter, EPA identified the following factors as supporting its conclusion that the landfill and GTE facility were under common control: the GTE facility's dependence on the landfill as its only fuel source; the fact that the GTE facility cannot sell or transfer gas it receives from the landfill to any other entity without the consent of the landfill's affiliate; the landfill parent company's retention of control over stock transferred or sold to the GTE facility; shared tax credits and other financial interests; and contractual agreements among the landfill, its affiliates and the GTE facility. Borsellino Letter, at 4.

Here, Petitioner identified the following factors: the GTE facility's dependence on the landfill as its only fuel source; the fact that the GTE facility cannot purchase or produce gas from any other source without the consent of the landfill;[14] shared tax credits and other financial interests; and the provisions of the contractual agreement between the landfill and the GTE facility. B-2, at 16. *Cf.* Borsellino Letter, at 4 (recognizing sharing of

[14] *Cf.* B-17, "Gas Assignment Agreement", at 5 (SE II "agrees not to purchase or produce Gas from any other source").

tax credits as a common control factor). Petitioner demonstrated to EPA that their contract requires SE II to provide Ontario County Landfill with excess gas SE II at a steady flow rate (up to 150 standard cubic feet per minute) *at no cost*, to power the landfill's administration building. *Id.*, (discussing B-17, "Excess Gas Utilization Agreement", at 1). Such fuel restrictions were a factor in support of common control in the PowerSecure matter. *See* D-3, at 3.

In the Al Turi landfill-Ameresco GTE facility matter, EPA identified the following factors: (1) "Ameresco purchases all of Al Turi's landfill gas and all of its energy needs from Al Turi . . . Thus, Ameresco controls the landfill gas emitted from Al Turi"; and "Ameresco can not operate without Al Turi's landfill gas, its main, and, in fact, only gas supplier"; (2) "the support factor" is met because "Al Turi receives a percentage of Ameresco's revenues realized by the sale of electricity or other products of the landfill gas generated at Ameresco. Thus, Al Turi's revenues are directly connected to Ameresco's revenues"; (3) "Ameresco converts the Al Turi landfill gas that it has treated and controlled to electricity. The control equipment

although located at Ameresco meets the needs of both facilities. Without the control equipment at Ameresco, Al Turi could not meet the requirements of the New York State Landfill Plan without putting in its own collection and control system. Thus, these two facilities also share control equipment."; (4) "Al Turi does not have a back-up system in place at its own facility to make it truly independent of Ameresco" because backup flares utilized in the event the GTE plant shuts down are owned by Ameresco and located on its facility. Kenny Letter, D-5, Attachment at 4-5.

Here, Petitioner identified the following factors: SE II purchases all of Ontario County's landfill gas and all of its energy needs from the landfill; the landfill receives 50 percent of the royalties realized by SE II from the sale of electricity or other products of the landfill gas generated at SE II; two facilities share control equipment. The last of these factors is particularly important because SE II clarified to DEC that "[t]he intention of permitting [SE II] as a single facility was to maintain a clear separation of permit compliance liability for compliance conditions specific to each of the separately managed and operated facilities." B-12. However, Petitioner

demonstrated to EPA that the landfill had the capacity to control only about half the gas it generates, and "[t]he landfill therefore needs SE to control its LFG [landfill gas]". A-6, at 17-18.

In the Houston County Landfill-PowerSecure-FEMC matter, EPA affirmed the Georgia Environmental Protection Division's determination because the facilities failed to overcome the presumption that the facilities were under common control. D-3. In support of the determination, EPA identified "the following factors from the landfill gas purchase and sales agreement between Houston County Landfill and FEMC":

> (a) FEMC, which purchases the landfill gas, is not permitted to sell, redirect, transport or market the landfill gas, or any portion thereof to any third party;
> (b) FEMC is only permitted to use the landfill gas for electricity generation at the processing site; and
> (c) The landfill gas purchase and sales agreement provides for specific performance; namely, that each party can require that the other party comply with the terms and conditions of the agreement as written.

D-3, at 3.

Here, Petitioner identified the same factors from the landfill gas

utilization agreement between SE II and the Ontario County Landfill. *See* A-3, at 3-6 (Petitioner's comments to DEC); A-6, at 16-17 (Petitioner's 2012 petition to EPA); A-2, at 3-4 (Petitioner's 2016 petition to EPA, identifying several common control factors established by the landfill gas utilization agreement). *Compare* DEC Responsiveness Summary, A-4, at 6-7. Indeed, SE II has no gas purchase and sales agreement as its agreement with the landfill provides that SE II receives landfill gas at no cost.[15]

In the Maplewood Landfill-INGENCO GTE facility matter, EPA found that a presumption of common control was overcome by a host of factors, including the following: (1) "INGENCO is obligated to pay for all of the gas that Maplewood provides, even if INGENCO does not use the

---

[15] *Cf.* B-17, "Gas Assignment Agreement", at 2 (para. A) ("Assignee [SE II] hereby accepts the exclusive assignment of all Assignor's rights in and to all Gas recovered from the Ontario Landfill to the extent needed by Assignee to operate the Electricity Project and all future expansions thereof (Assignee's Requirements)."). Under the agreement, although SE II may sell the gas, there are no terms for purchase or sale of gas between the landfill and SE II. This is arguably a stronger indicator of common control than the gas purchase and sales agreement in the Houston County Landfill-FEMC case.

gas" and "INGENCO must have fuel vendors other than Maplewood Landfill in order to operate the electricity generating plant". D-2, at 2. Thus, INGENCO was not subject to a contractual restriction on the utilization of landfill gas. (2) The landfill "currently receives its power through a local power utility and . . . neither facility is dependent on the other; if either Maplewood or INGENCO shuts down, the other facility can continue to operate at full capacity." This was compared to a case where common control was present, because the GTE facility "will be used exclusively to collect emissions from the landfill and to control those emissions through energy recovery." In contrast, INGENCO "can run exclusively on liquid fuels such as diesel." Because the purpose of the gas purchase agreement between the two facilities is "not to destroy nonmethane organic compounds ('NMOC')", insufficient interdependence was present to support a common control determination.

Here, Petitioner demonstrated that SE II had no alternative fuel source, the landfill lacks sufficient capacity in its backup flares to achieve compliance with its CAA requirements, and the purpose of the landfill gas

purchase agreement is to destroy NMOC emissions, *i.e.*, to provide compliance with the Landfills NSPS at 40 C.F.R. Part 60, Subpart WWW (§§ 60.750-59).

Note that SE II's "ability" to install transmission lines to an off site source of natural gas as an alternative fuel source, a factor relied on by DEC, (A-4, at 5), is irrelevant; the common control analysis is based on the nature of "the system . . . in use already" and "existing controls", not a possible but not-yet-existing control system. D-5, Attachment at 5.

Some of the EPA determinations discussed above were provided at the request of the state permitting agency, others were the result of EPA objections in response to CAA § 505(b)(2) petitions. This difference in the administrative posture of the cases had no effect on the common control analysis applied to the case by EPA.[16] We know of no case where, as here,

---

[16] The only difference we can discern is that when a state requests EPA's determination, EPA's response is a non-final response and leaves it to the state to make the determination. Thus, in EPA's PowerSecure letter to the state of Georgia, EPA stated that its response letter "is provided as guidance to assist the permitting authority in this applicability determination, is based on the information provided to us, and does not

EPA simply abandoned its oversight over the state permitting agency.

DEC emphasized the fact that SE II and the Ontario County Landfill are separately owned as a factor in determining whether a relationship of common control is present. However, where common ownership is not present, EPA's policy requires the permitting agency to look for information regarding "the existence of a contract, lease, or other type of agreement between the facilities, or through another means". Power Secure Letter, D-3, at 2 (citing Borsellino Letter). DEC looked to the SE II-Ontario County Landfill contract, but it disregarded the facts and factors identified in Petitioner's comment letter, restated in Petitioner's demonstration to EPA.

---

constitute a final agency action." D-3. However, when the request is made by petition under CAA Section 502(b), EPA's response is a final agency action. In either case, EPA conducts its own assessment of the facts and factors relevant to common control. For example, in its Maplewood-INGENCO decision, the agency took the position that the state must ultimately determine whether Maplewood and INGENCO are under common control for purposes of implementing [its] PSD and Title V programs. D-2. Nevertheless, EPA conducted it own assessment of the facilities' relationships in both cases.

IV. EPA's STANDARDS MUST BE APPLIED IN COMMON CONTROL DETERMINATIONS BY STATES AND EPA ALIKE

A particularly clear statement of EPA's standards and policy regarding how state permitting authorities should determine common control, albeit in oil and gas industry permitting, is provided in a 2011 Order granting a petition to object to a Title V permit. In this order EPA quotes a 2009 Memorandum from the Administrator to Regional Administrators as follows:

> Permitting authorities should . . . rely foremost on the three regulatory criteria for identifying emissions activities that belong to the same "building," "structure," "facility," or "installation." These are (1) whether the activities are under the control of the same person (or persons under common control); (2) whether the activities are located on one or more contiguous or adjacent properties; and (3) whether the activities belong to the same industrial grouping. 40 C.F.R. 52.21 (b)(6). In applying these criteria, permitting authorities should also remain mindful of the explanation we provided in the 1980 preamble. See 45 Fed. Reg. 52676, 52694-95 (August 7, 1980).

EPA, In the Matter of Williams Four Corners, LLC Sims Mesa CDP Compressor Station, Order Responding to Petitioners' Request that the Administrator Object to Issuance of a State Operating Permit, 2011 EPA CAA Title V LEXIS 10, *15-16 (July 29, 2011) (quoting Memorandum from Gina McCarthy, Assistant Administrator, to Regional Administrators, *Withdrawal of Source Determination for Oil and Gas Industries* (September 22, 2009)). The Williams Four Corners Order goes on to state:

> The McCarthy Memorandum also explained that prior source determinations in EPA's own permitting actions and EPA's guidance to other permitting authorities making such determinations collectively provide illustrations of the "kind of reasoned decision-making that is necessary to justify adequately a permitting authority's source determination decision" . . .

Id., at *16 (quoting the McCarthy Memorandum). As this statement indicates, EPA makes no distinction regarding the substantive standards and policy that must be applied when making common control determinations by a state permitting agency or itself.

However, in the case at bar, according to EPA, one set of rules

governs its own review of the underlying issue of common control, another governs NYSDEC's review of the same issue. The gloss EPA offers in its 2016 Order to justify this distinction is DEC's "substantial discretion". A-1, at 6. But the 2016 Order provides no basis for EPA's refusal to look into the substance of DEC's determination, or for otherwise declining to apply its precedents and policy on the same question.

III. CONCLUSION

It is hard to imagine what more Petitioner could have done to demonstrate to EPA that the Title V permit for SE II is not in compliance with the CAA common control criterion for major sources. 42 U.S.C. §§ 7412(a)(1), 7661(2). *Compare* MacClarence v. USEPA, 596 F.3d 1123, 1131-1132, 2010 U.S. App. LEXIS 4585, *21-27 (9th Cir. 2010) (finding failure to demonstrate under CAA § 502(b)(2) where petitioner did not challenge state permitting authority's reasoning in declining to aggregate sources). Accordingly, this Court should find EPA's 2016 Order declining

to consider Petition's demonstration is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

Dated: February 21, 2017

/s/ Gary A. Abraham
Law Office of Gary A. Abraham
4939 Conlan Rd.
Great Valley, New York 14741
(716) 790-6141
gabraham44@eznet.net
Counsel for Petitioner Finger Lakes Zero Waste Coalition, Inc.

Certification of Compliance with Type-Volume Limitation, Typeface Requirements and Type Style Requirements

This brief complies with the type-volume limitation of Fed. R. App. P. Rule 32(a)(7)(B) because this brief contains 7,182 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. Rule 32(a)(5) and the type style requirements of Fed. R. App. P. Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X13 in Times New Roman 14 point font.

/s/ Gary A. Abraham
Attorney for Petitioner Finger Lakes Zero Waste Coalition, Inc.

Dated: February 21, 2017

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and Local Rule 25.1(h), I hereby certify that on February 21, 2017, the foregoing Opening Brief for Petitioner Finger Lakes Zero Waste Coalition, Inc. was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Gary A. Abraham
Law Office of Gary A. Abraham
4939 Conlan Rd.
Great Valley, New York 14741
(716) 790-6141
gabraham44@eznet.net
Counsel for Petitioner Finger Lakes Zero Waste Coalition, Inc.

ADDENDUM TO BRIEF OF PETITIONER

Finger Lakes Zero Waste Coalition, Inc.

Letter from Ronald J. Borsellino, Acting Director, Division of Environmental Planning and Protection, U.S. EPA Region 2, to Scott Salisbury, President Manchester Renewable Power Corporation/LES and Lawrence C. Hesse, President, Ocean County Landfill Corporation, "Re: Common Control Determination for Ocean County Landfill and the Manchester Renewable Power Corp./LES," May 11, 2009 (downloaded on February 19, 2017 from EPA's *Title V Policy & Guidance Database* at <https://www.epa.gov/title-v-operating-permits/common-control-determination-ocean-county-landfill-and-manchester>).

Cf. Summit Petroleum Corporation v. EPA, 690 F.3d 733, 744-745, 2012 U.S. App. LEXIS 16345, *29-32 (6th Cir. 2012), rehearing denied, 2012 U.S. App. LEXIS 23988 (6th Cir., Oct. 29, 2012) (citing to EPA's *NSR Policy and Guidance Database* and EPA's *Title V Policy & Guidance Database*).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

MAY 21 2009

William O'Sullivan, Director
Division of Air Quality
New Jersey Department of Environmental Protection
P.O. Box 027
401 East State Street, 2nd floor
Trenton, NJ 08625-0027

Re: Common Control determination for Manchester Renewable Power Corp./LES, Facility ID No. 78901, Activity ID No. BOP990002, and Ocean County Landfill, Facility ID No. 78931, Activity ID No. BOP050001

Dear Mr. O'Sullivan:

This is to advise you that after careful consideration, the U.S. Environmental Protection Agency ("EPA") has determined that the operations permitted as Manchester Renewable Power Corp./LES ("MRPC") and Ocean County Landfill ("OCL") are under common control, and that they should be considered a single source for the purposes of permitting under the Prevention of Significant Deterioration, New Source Review, and title V programs of the Clean Air Act. We informed Ocean County Landfill Corporation and Manchester Renewable Power Corporation/LES of this determination and of the need to have a permit that conforms to this decision by letter dated May 11, 2009. I have attached a copy of that letter.

At this time it is necessary for the New Jersey Department of Environmental Protection to permit the source using one or two title V permits. To assist you in this regard I refer you to the title V permits for the Al Turi Landfill & GTE Facility as examples of how the 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.

In our objection on November 2, 2005, to the proposed title V permit renewal for MRPC, EPA made a finding, pursuant to the Clean Air Act at 505(b)(1) and 40 C.F.R. 70.8(c), that the MRPC title V permit must be reopened and revised or revoked to assure compliance with the applicable requirements. Since MRPC and OCL are a single source, this requirement now extends to the current title V permit for OCL.

The title V permit(s) for the single source must address all deficiencies identified in EPA's objection. Specifically, the proposed permit (1) was not accompanied by the written common control determination requested in EPA's comments on the draft permit;

(2) contained a Federal-only section identifying permit conditions that are not enforceable by the State (a situation inconsistent with the premises under which NJDEP received approval of its title V operating permits program); (3) contained an insufficient statement of basis; and (4) did not address all Federal requirements from both the "New Source Performance Standards for Municipal Solid Waste Landfills" and the "National Emission Standards for Hazardous Air Pollutants: Municipal Solid Waste Landfills" that apply to the landfill gas received by MRPC. EPA's common control determination resolves only the requirement of objection item 1. It is our understanding that many of the other objection issues have been resolved.

The 90-day period for resolving EPA's objection expired on February 1, 2006. Given the time elapsed since then, we trust that you will proceed as expeditiously as possible with permitting the MRPC and OCL operations as a single source. We are willing to work with you at the draft stage of the permitting and recommend that you share the draft permit or permits during this review.

If you or your staff have any questions, please contact Ray Werner, Chief, Air Programs Branch, or Steve Riva, Chief, Permitting Section, at (212) 637-4074.

Sincerely,

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

cc: John Preczewski, Assistant Director, Division of Air Quality, NJDEP
Frank Steitz, Chief, Bureau of Operating Permits, NJDEP

Attachment