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EPA Revises Policy on "Common Control" in Source Determinations Under the Federal Clean Air Act

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In a letter, dated April 30, 2018, to the Pennsylvania Department of Environmental Protection (PDEP), the United States Environmental Protection Agency (EPA or Agency) announced its new policy on determining "common control" for source determinations in federal Clean Air Act (CAA) permitting cases. Letter from William L. Wehrum, Assistant Administrator, EPA, to Patrick McDonnell, Secretary, PDEP (April 30, 2018) (the Wehrum Letter). Under EPA rules, permitting authorities should assess three factors enumerated in EPA's Title V and New Source Review regulations to determine which pollutant-emitting activities should be considered part of the same stationary source. See 40 CFR §§ 70.2 & 71.2. The three factors include: (1) whether the activities are part of the same industrial grouping (e.g., within the same Standard Industrial Classification (SIC)); (2) whether the activities are located on contiguous or adjacent property; and (3) whether the activities are under common control. *Id.*; Wehrum Letter Attachment at 3. In previous EPA guidance documents and letters, the Agency has identified a number of factors that should be considered on a case-by-case basis when assessing whether two entities are under common control, including but not limited to shared work forces, shared management, shared administrative functions, shared equipment, shared intermediates or byproducts, shared pollution control responsibilities, and support/dependency relationships. See, e.g., 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 (Sept. 18, 1995) (the Spratlin Letter). The Wehrum Letter noted that the multi-factor assessment for common control can lead to inconsistent and impractical outcomes and cause the Agency to re-evaluate and revise its interpretation of the term "common control." Wehrum Letter at 2.

The Wehrum Letter was issued in response to a letter from PDEP requesting the Agency's comments on a case involving a proposed biogas processing facility and whether it should be aggregated with an existing landfill for air quality permitting purposes. Wehrum Letter Attachment at 1. The proposed biogas processing facility would 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. *Id.* The owner of the landfill and the owner of the biogas facility are unaffiliated, but EPA has traditionally relied on the presence of a support or dependency relationship between two entities to support a finding that common control exists. *Id.* Under preexisting guidance, EPA may have found common control to exist because the landfill would rely on the biogas facility to dispose its LFG, and the biogas facility would rely on the landfill to provide a large portion of the LFG that the facility processes. *Id.* at 5. *Id.* at 2-4. The Wehrum Letter explained that after reevaluating the concept of common control, the Agency believed that it should realign its approach to such 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. Wehrum Letter Attachment at 6. The Agency determined that for Title V and NSR permitting purposes, assessment of "control" should now 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. *Id.* EPA further explained that control requires more than the ability to merely *influence* decisions regarding compliance with relevant air pollution regulatory requirements. *Id.* Control is established only when an entity has the power to direct decisions over air pollution-related activities and where other entities lack the power or authority to make independent decisions that could

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affect the applicability of, or compliance with, relevant regulatory requirements concerning air pollution. *Id.* at 10. Based at least in part on EPA's new policy, the Agency determined that there was no common control of the proposed biogas facility and landfill in that case. Wehrum Letter at 2.

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