No. 09-2937

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OCEAN COUNTY LANDFILL CORP.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 2

Respondent.

Petition for Review of an EPA Letter

BRIEF OF RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 2

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, 701-706:

REGULATIONS

FEDERAL REGISTER

JURISDICTION

As EPA argued in its Motion to Dismiss, which was filed on September 25th, 2009, and remains pending, the Court lacks subject matter jurisdiction over this Petition and it should therefore be dismissed. Petitioner invokes Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), as the source of this Court's jurisdiction. However, the Court lacks jurisdiction because the Petition does not challenge final agency action subject to review under Section 307(b)(1). See Motion to Dismiss (Sept. 25, 2009); Argument Section I, infra. Rather, it challenges a letter, dated May 11, 2009 (the "May 11 letter"), from an EPA official to officers of Ocean County Landfill Corporation ("OCLC") and Manchester Renewable Power Corp./LES ("MRPC"). The May 11 letter is not final agency action, but only an interim step in a permitting process that is ongoing.

ISSUES PRESENTED FOR REVIEW

1. Does the Court lack subject-matter jurisdiction because the challenged EPA letter – which is merely an intermediate step in an ongoing permit process – is not final agency action subject to review under the CAA?

2. Does EPA have the statutory authority to determine that a facility is "under common control" with another facility for permitting purposes when it is located on property owned by the other facility's parent, is dependent on that facility as its sole source of fuel, and has multiple contractual and other ties with that facility?

3. Is the common control determination arbitrary, capricious, or otherwise unlawful because EPA relied on factors such as fuel dependence, contractual relationships, control of stock, and shared tax credits, or because EPA presumed common control based on the fact that the Landfill and the GTE Facility are collocated and therefore required Petitioner to submit information to explain the relationship between the Landfill and the GTE Facility?

4. Did EPA's issuance of the May 11 letter violate Petitioner's due process rights, notwithstanding Petitioner's numerous opportunities to provide comments both in writing and in person?

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases currently pending before this or any other court. However, as discussed at various points throughout this brief, there is a related permitting process underway in regard to Petitioner, the outcome of which will be subject to challenge in state or federal court.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Clean Air Act and the Title V Permit Program

The goal of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C.

§ 7401(b)(1). In 1990, Congress enacted Title V of the CAA, 42 U.S.C. §§ 7661-7661f, setting forth requirements for the establishment and implementation of state and federal operating permit programs covering stationary sources of air pollution. Under these programs, all CAA requirements applicable to a particular source are set forth in a comprehensive Title V permit, serving as "a source-specific bible for Clean Air Act compliance." Virginia v. EPA, 80 F.3d 869, 873 (4th Cir. 1996). Title V permits generally do not impose new substantive air quality control requirements; rather, Title V permits incorporate, *inter alia*, emission limitations, standards, and monitoring requirements necessary to assure compliance with other CAA programs and provisions. See 42 U.S.C. §§ 7661a(a), 7661c(a).

Congress designed the Title V permit program to be administered and enforced primarily by state and local air permitting authorities, subject to EPA oversight. See 42 U.S.C. § 7661a(d)(1). Accordingly, each state must develop and submit to EPA a permit program to meet the requirements of Title V and the applicable regulations. Id.; 42 U.S.C. § 7661a(b). 40 C.F.R. pt. 70, promulgated pursuant to Title V, sets forth minimum requirements for *state* Title V permit programs and the procedures by which the Administrator will approve and oversee implementation of the state Title V permit programs. 40 C.F.R. pt. 71 sets forth a comprehensive *federal* permit program consistent with the requirements of Title V, and defines the procedures pursuant to which EPA will issue Title V permits in

lieu of a state where the state lacks Title V program approval or where certain other circumstances exist (see 40 C.F.R. § 71.4). EPA has granted most states approval to administer their own Title V permit programs, including New Jersey. See 40 C.F.R. pt. 70, App. A.

Once a state has been granted approval to administer the Title V permit program, the state permitting authorities must submit any proposed Title V permits to EPA for review. 42 U.S.C. § 7661d(a); 40 C.F.R. § 70.8(a). EPA must object to proposed permits it determines are not in compliance with applicable statutory or regulatory requirements. 42 U.S.C. § 7661d(b)(1); 40 C.F.R. § 70.8(c). Furthermore, if EPA "finds that cause exists to terminate, modify, or revoke and reissue a permit," it notifies the state permitting authority, and the state permitting authority must then submit "a proposed determination of termination, modification, or revocation and reissuance, as appropriate." 42 U.S.C. § 7661d(e); 40 C.F.R. § 70.7(g). EPA may then review that proposed determination and, if necessary, object to that determination. 42 U.S.C. § 7661d(e). If the permitting authority fails to submit the required proposed determination or resolve an EPA objection, the Administrator herself may terminate, modify, revoke, or reissue the permit. 42 U.S.C. § 7661d(e); 40 C.F.R. § 70.7(g)(5). However, the statute expressly states that judicial review is not available "until the Administrator takes final action to issue or deny a permit." 42 U.S.C. § 7661d(c).

B. Common Control

The question of whether two or more facilities are under "common control" arises in the context of determining when multiple facilities should be considered effectively one single source of pollutants for certain permitting purposes. See, e.g., 42 U.S.C. § 7661(2); 40 C.F.R. §§ 70.2, 71.2. The purpose of the inquiry is to ensure that emissions from all parts of that single source are taken into account when determining what the applicable requirements and conditions for the operation of that source should be. The practical effect of a common control determination is that emissions from the facilities "under common control" will be considered and permitted in the aggregate, although separate permits may still be issued to each.

Title V provides that a group of stationary sources[1] can be collectively considered a single "major source" if (a) they fit the definition of "major source" provided in section 112 of the Act (42 U.S.C. § 7412), the definition of "major stationary source" provided in section 302 of the Act (42 U.S.C. § 7602), *or* the definition of "major stationary source" provided in part D of title I of the Act (42 U.S.C. §§ 7501-7515), *and* (b) they are "located within a contiguous area and *under common control*." 42 U.S.C. § 7661(2) (emphasis added). EPA similarly

[1] Section 302 of the CAA, 42 U.S.C. § 7602, broadly defines "stationary source" as "any source of an air pollutant," with certain exceptions not relevant here.

defines "major source" in its Title V implementing regulations, also requiring that, in addition to meeting one of the three CAA definitions of "major source" or "major stationary source,"[2] a "group of stationary sources" must be "located on one or more contiguous or adjacent properties" and "under common control of the same person (or persons under common control)" to be considered a single major source. 40 C.F.R. §§ 70.2, 71.2. Neither Title V nor any other CAA provision defines "common control," nor do EPA's regulations implementing Title V.

Elsewhere in its regulations, EPA has defined "control (including the term[] . . . common control . . . .)" as "the power to direct or cause the direction of the management and policies of a person or organization, whether by the ownership of stock, voting rights, by contract, or otherwise." 40 C.F.R. § 66.3(f). This definition is provided in the context of identifying when penalties may be imposed on a source that does not meet a deadline to make an upgrade. See id.

The term "common control" was also discussed at length in a September 18, 1995, letter from William A. Spratlin, Director of EPA Region 7's, Air, RCRA,

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[2] The definitions of "major stationary source" corresponding to section 302 (42 U.S.C. § 7602) and Title I, part D (42 U.S.C. §§ 7501-7515) require facilities to be (a) located on one or more contiguous or adjacent properties, (b) "under common control," and (c) share the same two-digit (major group) SIC code (or for one facility to be considered a support facility to the other (see 45 Fed. Reg. 52,676, 52,695 (Aug. 7, 1980)), while the definition of "major source" corresponding to CAA section 112 (42 U.S.C. § 7412) does not include this last requirement. Compare 40 C.F.R. §§ 70.2, 71.2 with 40 C.F.R. § 63.2; see National Mining Ass'n v. EPA, 59 F.3d 1351, 1356 (D.C. Cir. 1995).

and Toxics Division, to Peter R. Hamlin, Chief, Air Quality Bureau, Iowa Department of Natural Resources (the "Spratlin letter") (JA 658). The Spratlin letter identified questions that a permitting authority should ask the facilities in question and factors it should consider in determining whether facilities are under common control for purposes of the CAA. Although the Spratlin letter is non-binding guidance, EPA has consistently followed the analytical approach set forth in that letter, including in situations that also involved a collocated landfill and gas-to-energy facility.[3]

C. Judicial Review under the CAA

Section 307 of the CAA, 42 U.S.C. § 7607, provides for judicial review of certain EPA decisions or activities. Specifically, section 307 gives the federal courts of appeals exclusive jurisdiction to review specific actions, including, *inter alia*: promulgation of national ambient air quality standards; promulgation of emissions standards; promulgation of nationally applicable regulations; and the Administrator's approval or promulgation of certain orders.

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[3] See, e.g., Letter from Judith M. Katz, Director, Air Protection Division, U.S. EPA Region 3, to Gary E. Graham, Environmental Engineer, Virginia Department of Environmental Quality, "Re: Common Control for Maplewood Landfill, also known as Amelia Landfill, and Industrial Power Generator Corporation," dated May 1, 2002 (JA 654); Letter from Jane M. Kenny, Regional Administrator, U.S. EPA Region 2, to Erin M. Crotty, Commissioner, New York State Department of Environmental Conservation, "Re: EPA's Review of Proposed Permit for Al Turi Landfill, Permit ID: 3-3330-00002/00039, Mod 1," dated July 8, 2004 (JA 640).

42 U.S.C. § 7607(b)(1). Beyond the list of specific EPA actions subject to judicial review, section 307 also provides that review may be had of other "final action" of the Administrator under the Act. Id. While petitions for review of nationally-applied regulations and other types of final action "based on a determination of nationwide scope or effect" can be brought only in the Court of Appeals for the District of Columbia Circuit, petitions for review of final action that is "locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit." Id.

II. OCLC AND MRPC

Ocean County Landfill (the "Landfill") is a municipal solid waste landfill. JA 574. Adjacent to the Landfill is a landfill gas-to-energy facility (the "GTE Facility"), consisting of two gas-to-energy operations owned by Manchester Renewable Power Corp./LES ("MRPC"). JA 574-75; JA 43.[4] Ocean County Landfill Corporation ("OCLC") owns the Landfill and is designated as the permittee in the Title V permit governing the Landfill. JA 574. MRPC owns the GTE Facility and is the Title V permittee for that facility. JA 388. The Landfill and GTE Facility are adjacent to each other in Ocean County, New Jersey, and

[4] One of the two operations is owned directly by MRPC, while the other is owned by Ocean Energy Holdings, LLC (previously Ocean Energy Corp.), which is in turn owned by MRPC. JA 52. Each of the two operations consists of six engines.

both are located on land owned by OCLC's parent company, Atlantic Pier Company ("APC"). JA 575.

In addition to the fact that they are collocated on property owned by OCLC's parent APC, there are many other ties – both historical and current – between the Landfill and the GTE Facility.

MRPC was formed in 1992 by OCLC's parent APC, which later conveyed the stock to Michigan Cogeneration Systems Inc., which trades as "LES." JA 49, 54. Also, Ocean Energy Holdings LLC (previously Ocean Energy Corp. and thus referred to herein as "OEC"), historically a subsidiary of OCLC's parent company APC (JA 48) and currently a subsidiary of MRPC (JA 51), owns and operates one of the two operations that comprise MRPC's GTE Facility. See JA 45, 49, 54, 574. The primary component of each operation is a set of six engines, which generate the electricity that MRPC sells.[5] On March 16, 2006 – while the common

[5] Petitioner claims that, in the May 11 letter, "USEPA mistakenly states that APC once owned 'the OEC engines at MRPC.'" Br. at 8. EPA believes that Petitioner has taken the statement in the May 11 letter out of context and that EPA's statement is correct. In any event, while OEC may have been sold to MRPC before the OEC engines were purchased, there is no question that APC once owned OEC (JA 131), and that OEC was formed to own and operate a part of the GTE Facility (JA 131 (stating, in the agreement whereby APC sold the OEC stock to MRPC, that "OEC . . . was formed to engage in the production, transmission, distribution, and sale of electrical energy produced from landfill gas;" that "OEC plans to own and operate a small power production facility . . . for the generation of electric power using landfill gas"), 140 (providing that MRPC must complete the purchase of the six new engines for the GTE facility)). Moreover, the May 11

control analysis was in progress – APC sold its then-subsidiary OEC to MRPC. JA 131; see also JA 44 (letter from S. Ayres to EPA Region 2 official stating that MRPC had purchased the OEC stock, and that OEC was now "Ocean Energy Holdings, LLC"). However, APC retained at least some control of OEC through its stock transfer agreement with MRPC, which prohibited MRPC from transferring or encumbering the stock without APC's approval, and gave APC the right to demand that MRPC return the stock in the event of a breach of contract or the expiration of certain agreements. JA 138.

Furthermore, there are 16 different contractual agreements that govern the relationships between and among the OCLC-related family of companies (which includes OCLC, OCLC's parent APC, GASCO and Atlantic Pier Leasing Corp ("APLC") (JA 51)) and the MRPC-related family of companies (which currently includes, *inter alia*, MRPC, Landfill Energy Systems LLC, and Ocean Energy Holdings LLC (previously OEC) (JA 52)). The 16 agreements between and among OCLC-related companies and MRPC-related companies include six site leases or modifications thereto (JA 77, 93, 106, 303, 314, & 330), one stock purchase and development agreement (JA 131 (concerning the sale of OEC by APC to MRPC)),

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letter clearly explained that, because MRPC had demonstrated that "common ownership of OCLC and OEC by APC ended with MRPC's purchase of all of OEC's stock," EPA did not rely on APC's ownership of any part of the GTE Facility in making its determination. JA 2.

three agreements concerning the gas collection system at the Landfill and the delivery of the Landfill's gas to the gas-to-energy operations (JA 267, 286, & 325), two gas sales agreements (JA 337, 350), two power purchase agreements (JA 194, 202), one gas flare service agreement (JA 155), and one grant agreement (JA 579). Of these sixteen agreements, six are directly between an OCLC-related company and an MRPC-related company.[6] Furthermore, various of these agreements require MRPC or its subsidiary OEC to have the approval of OCLC's parent APC or one of its affiliates (*e.g.*, APLC or GASCO) for certain acts. For example, the site lease between APLC and MRPC provides that MRPC must have the approval of APLC to seek environmental permits necessary to do business, must use a certain contractor to obtain those permits, and must transfer the permits to APLC when the agreement ends. JA 97.

Also, the MRPC GTE Facility is dependent on the Landfill as its only source of fuel. Only gas from the Landfill is used at the GTE Facility (JA 58, 82, 674), which must purchase *all* gas delivered to it from the Landfill by OCLC's affiliate GASCO (JA 339, 355), and may not sell or transfer any of the gas delivered to any

[6] See JA 77 (site lease between OCLC's affiliate APLC and OEC), 93 (site lease between MPRC and OCLC's affiliate APLC), 131 (stock purchase and development agreement entered into by MRPC, OCLC's parent APC, and OEC (sold by APC to MRPC)), 155 (gas flare agreement directly between OCLC and MRPC), 337 (gas sales agreement between OEC and OCLC's affiliate GASCO), & 350 (gas sales agreement between MRPC and OCLC's affiliate GASCO).

other person without GASCO's consent (JA 339, 355). The gas sales agreements containing these requirements are subject to "specific performance," which means that MRPC would be required to accept gas from the Landfill even if the quality of the gas did not meet MRPC's specifications for use at the GTE Facility, and cannot instead opt to pay money damages for any breach. JA 348, 365. The site lease between MRPC and OCLC's affiliate APLC is also subject to specific performance, as is the site lease between APLC and MRPC's subsidiary OEC (formerly owned by OCLC's parent APC). JA 89, 100.

Finally, there are financial ties between MRPC and OCLC even beyond those created by the agreements governing the sale of gas by the Landfill to the GTE Facility. MRPC shares tax credits with APC (OCLC's parent). JA 139. Also, MRPC must reimburse OCLC's affiliate GASCO for certain taxes related to the gas from the Landfill. JA 361. And at one point in time, Michigan Cogeneration Systems Inc (MRPC's parent) received 30% of GASCO's federal tax credits, and was made a minority member of GASCO for that purpose. JA 48.

Despite all of these historical, contractual, and financial ties, as well as the dependence of the GTE Facility on the Landfill, the two facilities were originally

permitted separately. Although the terms of the separate Title V permits originally granted to each have now ended, those permits remain in effect to this day.[7]

III. NEW JERSEY, EPA, AND THE TITLE V PERMIT PROCESS

MRPC was issued a Title V operating permit for the GTE facility by the New Jersey Department of Environmental Protection ("NJDEP") on June 9, 1999. JA 388. The original term of that permit ended in 2004 and, during the renewal process, MRPC requested various revisions. JA 412-18. Accordingly, NJDEP proceeded to draft a revised renewal permit for the GTE Facility.

On May 24, 2005, NJDEP issued a draft Title V renewal permit for public comment. When reviewing the draft permit, EPA noticed that there was an appearance of a common control relationship between the Landfill and the GTE Facility because the draft permit stated that only gas received from the Landfill could be used as fuel for the engines at the GTE Facility, with no allowance for supplementation with an alternative fuel. JA 408. Accordingly, as part of its formal comments on the draft Title V permit submitted on June 28, 2005, EPA stated that there was an appearance of a common control relationship between the two facilities, and that therefore a written common control determination was

[7] This is possible due to an application shield, which allows a facility to continue to operate where it has submitted a complete permit renewal application that is both timely and determined to be or deemed complete. 40 C.F.R. § 70.7(c)(1)(ii). In fact, NJDEP issued a significant modification to MRPC's Title V permit in October 2006, after the original term of that permit had already ended.

needed. JA 369-70, 372. On July 18, 2005, NJDEP sent a letter to the New Jersey Attorney General requesting a written common control determination. JA 378.

In November of 2005, EPA formally objected to the draft Title V operating permit for MRPC pursuant to 42 U.S.C. § 7661d(b)(1), citing multiple concerns, including the need for a written common control determination. Regarding the common control issue, EPA further explained: "With the common control issue unresolved, we cannot ascertain the correct facility-wide potential to emit . . . and, thus, whether or not the proposed permit addresses all applicable Federal requirements." JA 378. New Jersey, in response, requested assistance from EPA in making the common control determination. Accordingly, during 2005, 2006, and 2007, EPA assisted New Jersey in undertaking the common control analysis.[8]

The process undertaken by EPA and NJDEP in order to determine whether the Landfill and the GTE Facility should, in fact, be considered to be under common control included many opportunities for both MRPC and OCLC to present their views and provide information. In a conference call on October 30, 2007, with counsel for OCLC, EPA Region 2's Office of Regional Counsel

[8] While this analysis was ongoing, EPA sent a letter to NJDEP requesting that the State generally re-examine its permitting of gas-to-energy operations that are permitted separately from the landfills that generate the gas that fuels them. See Letter from Raymond Werner to William O'Sullivan (July 18, 2006) (Record Item No. 31). A similar letter was sent to the New York State Department of Environmental Conservation, asking New York to generally re-examine its permitting of landfills and gas-to-energy facilities.

discussed various common control factors and how they might relate to the Landfill. On November 26, 2007, OCLC submitted a "Position Paper" to EPA regarding the common control determination. JA 573-78. OCLC stated that it was providing this paper in response to "questions and concerns advanced by USEPA Region II" and requested "a meeting at your convenience to discuss the situation." JA 573. Pursuant to that request, on January 11, 2008, attorneys representing OCLC met with members of EPA's Office of General Counsel in Washington, D.C., with representatives of EPA Region 2, and representatives of EPA's Office of Air Quality Planning and Standards, who participated by teleconference. JA 37. As discussed during that meeting, EPA followed up with a letter, dated April 10, 2008, which gave OCLC an opportunity to submit additional information and to provide certain additional documents. JA 37-42. The April 10 letter provided 45 days for any response (JA 42); however, EPA received and granted requests to extend the date for submission of additional materials (see JA 44). OCLC and MRPC ultimately submitted separate responses to the April 10 letter in July of 2008. See JA 43-52 (OCLC's responses); JA 53-55 (MRPC's responses). Included in OCLC's response were family trees for the OCLC-related family of companies and the MRPC-related family of companies. JA 51, 52.

This lengthy common control analysis, which proceeded on the basis of all of the information received from OCLC and MRPC, ultimately resulted in a letter,

dated May 11, 2009, from an EPA Region 2 official to officers of OCLC and MRPC, explaining that EPA had concluded that the two facilities were, in fact, under common control for certain permitting purposes. JA 8-12.

IV. EPA's MAY 11 LETTER

The May 11 letter challenged by OCLC is addressed to officers of OCLC and MRPC from Ronald J. Borsellino, Acting Director of EPA Region 2 Division of Environmental Planning and Protection. JA 8. The letter states that "the New Jersey Attorney General's Office requested assistance from EPA" in determining whether Ocean County Landfill and MRPC's GTE facility are under common control. Id. The letter explains that EPA "examined the numerous documents provided" and concluded that there is "sufficient information to find that the landfill and companion gas-to energy (GTE) operations are under common control for EPA permitting purposes." Id. It also states that EPA "renders this determination as final" (JA 11) and that NJDEP had "agreed to implement EPA's determination" (JA 8).

The rest of the May 11 letter summarizes the basis for the common control determination. It explains that "a common control relationship is presumed when one operator locates on another's property." JA 10. Because the GTE facility and the Landfill are both located on property owned by OCLC's parent APC, the presumption applied. Id. But EPA also explained that "common control

determinations are made on a case-by-case basis guided by precedent, and are not based on weight-of-evidence or preponderance-of-evidence tests," and so the presumption "can be rebutted if the facilities in question provide information that allows for the presumption to be rebutted." JA 10. However, the information submitted by Petitioner only "confirmed the common control relationship." Id.

Specifically, 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 MRPC cannot sell or transfer gas it receives from the landfill to any other entity without the consent of OCLC's affiliate GASCO; OCLC's parent APC's retention of control over the stock of a company that it transferred or sold to MRPC; shared tax credits and other financial interests; and the numerous contractual agreements between and among the parents and affiliates of the landfill and the GTE facility. JA 11. However, EPA also made clear that it had *not* relied on OCLC's parent APC's prior ownership of OEC, which now owns one of the two operations that make up the GTE Facility, given that (three years into the common control analysis and two years after the transaction in question had taken place) OCLC had provided EPA with information showing that MRPC now owns OEC. See JA 9, 44, 46. Rather, EPA "looked beyond ownership to see if common control exists between OCLC and MRPC." JA 9.

The May 11 letter explains that, because they are under common control, the Landfill and the GTE Facility should be treated as a single source for CAA permitting purposes. JA 11. This is because, in addition to being under common control, the two facilities' "locations are contiguous or adjacent and they share the same two-digit (major group) standard industrial classification (SIC) code"[9] (JA 9), which are the other prerequisites for treating multiple facilities as a single source. However, it also notes that separate permits may still be issued to the two facilities in question, and "the determination of common control is limited to the facilities' treatment for determining major source status and applicability of regulatory requirements." JA 11.

The letter concludes: "EPA has directed NJDEP to proceed with permit modifications, as required, to reflect the single source status of Ocean County Landfill and Manchester Renewable Power Corp./LES operations." JA 12. NJDEP has not, thus far, taken such action in regard to OCLC's Title V permit. If NJDEP declines to modify and issue the MRPC and OCLC permits in accordance with EPA's common control determination, EPA will have to decide whether it intends to take on the permits itself pursuant to its authority under CAA sections 505(c) & (e), 42 U.S.C. §§ 7661d(c) & (e), and 40 C.F.R. pt. 71. When a draft

[9] SIC codes classify a business or facility according to its primary kind of activity, such as chemical manufacturing or electricity generation.

permit is issued by the permitting authority, the Landfill, the GTE Facility, and the public will all have the opportunity to comment on the draft permit, to petition the Administrator to object to any permit proposed by NJDEP, and to challenge the final permit in federal court. 42 U.S.C. § 7661d(b) & (c).

V. OCLC's CHALLENGE TO THE MAY 11 LETTER

On July 2, 2009, OCLC filed a petition with this Court challenging "the common control determination made and directive requiring the re-opening of its Title V Permit issued by the United States Environmental Protection Agency, Region 2, as set forth in the agency's May 11, 2009 letter." JA 1.

OCLC also sent letters to EPA asking it to reconsider and "stay" the common control determination. See Resp. to Mot. to Dismiss, Exs. K, L. EPA denied those requests on October 6, 2009. See JA 23. EPA reiterated that the common control determination was based, *inter alia*, on "a thorough and extensive review of the numerous documents provided by OCLC and MRPC," and explained that OCLC's letters seeking reconsideration and a "stay" did not contain "any information that would alter [EPA's] determination." JA 23-24. EPA also noted that "[o]nce the draft modified permit(s) is issued, the Clean Air Act provides OCLC and/or MRPC the opportunity to provide additional information . . . during the public comment period," as well as the opportunity to "petition the Administrator" to object to the issuance of the permit(s). JA 24.

STANDARD OF REVIEW

This Court's review is governed by the deferential standard set forth in the Administrative Procedure Act, under which agency action is valid unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard "is a narrow one," under which the Court is not "to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). An agency need only have "considered the relevant factors and articulated a rational connection between the facts found and the choice made." Southwestern Pennsylvania Growth Alliance v. Browner, 121 F.3d 106, 111 (3d Cir. 1997) (quoting Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 105 (1983)).

Judicial deference also extends to EPA's interpretation of a statute it administers. United States v. Mead Corp., 533 U.S. 218, 226-27 (2001); Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-45 (1984). In reviewing an agency's statutory interpretation, the Court must first decide "whether Congress has directly spoken to the precise question at issue." Chevron, 467 U.S. at 842. Where "Congress has explicitly left a gap" to be filled, the agency's regulation is "given controlling weight unless . . . arbitrary, capricious, or manifestly contrary to the statute." Id. at 843-44. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question . . . is whether the agency's answer is based on a

permissible construction of the statute." Id. at 843. EPA's interpretation "governs" so long as it is "reasonable" – even if it is "not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1505 (2009) (citing Chevron, 467 U.S. at 843-44).

EPA's interpretation of its own regulations is entitled to even more deference. Both the Supreme Court and this Court have long recognized that an agency's interpretation of its own regulations is to be given "controlling" weight unless "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997) (internal quotation and citation omitted); Beatty v. Danri Corp. & Triangle Enters., 49 F.3d 993, 997 (3d Cir. 1995); Rodriguez v. Reading Housing Auth., 8 F.3d 961, 964-65 (3d Cir. 1993). Thus, insofar as this case concerns EPA's interpretation and application of its own regulatory terms "control" and "common control," EPA's interpretation and application of those terms must be given considerable deference.

SUMMARY OF ARGUMENT

Petitioner challenges a common control analysis undertaken by EPA as part of the Title V permitting process. This challenge is premature and without merit.

The Court should not even reach the merits of Petitioner's challenge to the May 11 letter because the common control determination challenged by Petitioner

– made in the context of an ongoing permit process – is not "final action" subject to review. Rather, it is merely one step in the Title V permit process, and only when that process concludes and a final Title V permit is issued or denied, or EPA denies a petition to object to a permit, is judicial review available.

However, if this Court does reach the merits, it should uphold the May 11 letter as being well within EPA's authority under the CAA. Petitioner first contends that EPA's decision here is *ultra vires* because it is premised on an overly broad construction of the term "common control." Br. at 14. However, the issue is not whether EPA acted outside the authority granted to it under the Act (i.e., whether EPA acted *ultra vires*), but rather the much more pedestrian issue of whether EPA's construction and application of the term "common control" reflected in the decision here is reasonable under the Act and EPA's regulations. As will be explained herein, EPA's interpretation of the statutory term "common control" as broader than direct ownership or operation of one facility by another is entirely reasonable; in fact, it is Petitioner's construction of "common control" as limited to common ownership or operation that is inconsistent with the statutory text and illogical. Accordingly, under applicable judicial guidance, deference to the Agency's reasoning and policy choices is warranted.

The Court should also uphold the May 11 letter as consistent with EPA's regulatory use of the term "common control" as well as its long-standing

interpretation of that term, set forth in a guidance letter relied on by EPA in making this and many prior common control determinations. Indeed, the common control determination at issue here is entirely consistent with other common control determinations made by EPA since the publication of the guidance letter. Furthermore, the fact that EPA begins its analysis with a presumption that a common control relationship exists where one company locates on another company's property, or on property owned by the parent of another company, is eminently reasonable, particularly given that EPA has explained its rationale for that presumption and how a facility can rebut it. Utilizing such a presumption does not, as Petitioner suggests, require notice-and-comment rulemaking.

Finally, Petitioner's suggestion that its due process rights were violated is patently absurd. Petitioner was afforded ample opportunity to participate in the process when EPA was analyzing the common control issue, far beyond "notice and a fair opportunity to be heard." Br. at 29. Nor is the process yet complete; Petitioner will have significant additional opportunities to be heard on this issue, including the opportunity to challenge the final permit decision. The fact the EPA eventually declined to continue the common control analysis indefinitely until it reached the result desired by Petitioner is not a due process violation.

ARGUMENT

I. THE COURT LACKS JURISDICTION.

The Court should not reach the merits of Petitioner's challenge to the May 11 letter, but rather should dismiss for lack of subject-matter jurisdiction. As EPA explained in its pending Motion to Dismiss[10] and Reply[11] in support thereof, both of which EPA incorporates by reference, the May 11 letter does not constitute "final action" subject to review under section 307(b) of the CAA, 42 U.S.C. § 7607(b). Rather, it is merely one step in a still-pending permitting process, the results and practical implications of which are as yet unknown.[12]

As discussed in EPA's Motion to Dismiss (Mot. to Dismiss at 9-17), the May 11 letter is not final action subject to review because it does not mark the "consummation" of an agency decision-making process, and it is not an action by

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[10] Filed Sept. 25, 2009, No. 00319830362.

[11] Filed October 23, 2009, No. 00319870785.

[12] As in its Response to the Motion to Dismiss, OCLC hangs its hat on the fact that EPA used the word "final" in the May 11 letter. See Br. at 1, 8. But as EPA previously explained, that does not mean the letter is "final agency action" within the meaning of CAA section 307(b). Rather EPA sought to make it clear to Petitioner – which, despite having numerous opportunities to provide information and correspond, speak, and meet with permitting officials, sought to prolong the discussion concerning the issue – that the issue would not be subject to further debate before proceeding with the permitting process. EPA's use of the word "final" cannot be considered determinative of jurisdiction where there are specific criteria for finality set forth in relevant case law, and where Congress has specifically identified which steps in the permitting process are subject to review.

which "rights or obligations have been determined" or from which "legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78.

Here, rather than marking the "consummation" of the agency decision-making process, the May 11 letter informs the recipients about one step taken in a permitting process that will not be final in any respect until the permit is eventually issued or denied. That action, which subsumes the common control decision, will mark the "consummation" of the agency process, and will thus be rightfully subject to review – not this one step stemming from EPA's objection to the proposed MRPC permit. See Territorial Court of U.S. Virgin Islands v. EPA, No. 01-3670, 54 Fed. Appx. 339, 341 (3d Cir. 2002) (an "interlocutory" action is not subject to review); 42 U.S.C. § 7661d(c) ("No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection."); 5 U.S.C. § 704 ("A preliminary, procedural or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.").

And while Petitioner argues that the May 11 letter determines rights and obligations and has legal consequences because it allegedly makes Petitioner responsible for the emissions of a separate entity, see Br. at 1-2, only the end result of the permit process could have the effect that Petitioner would attribute to this preliminary step. Indeed, OCLC itself describes the "result" of the May 11 letter

as the fact that "there is a joint/combined Title V permitting proceeding pending before NJDEP." Br. at 12. But it is not yet known what the final permit or permits issued to OCLC and MRPC as a result of that process will look like, what they will contain, or even which agency will ultimately issue or deny them, NJDEP or EPA. A "preliminary step" in a process that "may lead to final action" but "has no legal effect" until it actually does result in final action is not subject to judicial review. Territorial Court, 54 Fed. Appx. at 341; see DRG Funding Corp. v. HUD, 76 F.3d 1212, 1214 (D.C. Cir. 1996) (agency order is not final where it "only affects . . . rights adversely on the contingency of future administrative action") (citation omitted).

As discussed in EPA's Motion to Dismiss (Mot. to Dismiss at 12-13), the Tenth Circuit considered a similar petition for review, and concluded that it did not challenge final action and so should be dismissed. Public Serv. Co. of Colorado v. EPA ("PSCO"), 225 F.3d 1144 (10th Cir. 2000). As here, the petitioners in PSCO challenged a common control determination made by EPA at the request of the state permitting authority. 225 F.3d at 1145-46. But the court held that the EPA letters conveying the determination did not constitute final agency action because they "in no way mark the consummation of [the agency's] decision-making process, which cannot occur before [the agency] has acted on the permit

application." Id. at 1147.[13] Multiple other courts have also rejected similar petitions challenging EPA letters conveying a decision that forms part of, but is not the end result of, the permitting process. See, e.g., City of San Diego v. Whitman, 242 F.3d 1097, 1101-02 (9th Cir. 2001); Appalachian Energy Group v. EPA, 33 F.3d 319, 322 (4th Cir. 1994); American Paper Inst. v. EPA, 882 F.2d 287, 289 (7th Cir. 1989).[14]

Given that the permit process currently pending in regard to OCLC will eventually result in a new Title V permit issued by either NJDEP or EPA, which will then be subject to objection and judicial review (if necessary) under CAA section 505(b), 42 U.S.C. § 7661d(b), the Court should dismiss this premature challenge to the common control decision. Allowing Petitioner to challenge that decision now would indeed lead to "piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been

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[13] Petitioner has attempted to distinguish PSCO by arguing that the EPA letter at issue in that case did not "direct the State permitting agency to enforce such a determination" but rather allowed the state to decline to take action pursuant to EPA's common control determination. Resp. to Mot. to Dismiss at 15. But here, NJDEP plainly also retains such authority, as it has not yet adopted EPA's conclusion or incorporated it into a draft permit. But in any event, the PSCO court stated: "Even if the [state] accedes to the EPA's opinion . . . and denies the minor source permit, the opinion letters still would not constitute the consummation of EPA's decision-making process." 225 F.3d at 1148.

[14] For a fuller discussion of these and other cases where courts faced with similar challenges concluded the challenged agency activity was not final action subject to review, see EPA's Motion to Dismiss at 11-12.

unnecessary." FTC v. Standard Oil Co., 449 U.S. 232, 242 (1980). Accordingly, this petition should be dismissed for lack of jurisdiction.

Finally, as explained in EPA's Motion to Dismiss (Mot. at 17-18), even if the Court believes that it has jurisdiction, it should nevertheless conclude that the issue presented is not ripe for review at this time and dismiss. Delaying review until a permit issues would cause no hardship to Petitioner, as it remains covered by the terms of its original permit until a new permit is issued, and the common control determination requires no immediate change in its operations. Also, judicial intervention at this time could interfere and possibly conflict with the permitting process currently underway. In fact, the result of the permitting process could moot all or part of Petitioner's challenge to the May 11 letter: for example, even assuming the permit ultimately issued reflects the common control determination, it might contain conditions and requirements that, as a practical matter, assuage Petitioner's concerns regarding the impact of the determination. Finally, the Court would benefit from further factual development of the issue presented here; once the new Title V permit is issued, with actual emissions limitations and other requirements, the Court will be in a better position to assess the implications of the common control determination. Therefore, even if the Court decided that the action challenged is final, it should still decline to hear this case now. See Star Enter. v. EPA, 235 F.3d 139, 146 n.10 (3d Cir. 2000).

II. EPA's ISSUANCE OF THE MAY 11 LETTER WAS WELL WITHIN ITS AUTHORITY, AND ITS CONSTRUCTION OF "COMMON CONTROL" IS CONSISTENT WITH THE CAA.

Petitioner claims that, in the May 11 letter, EPA made an "*ultra vires* determination" that the Landfill and the GTE Facility are under common control. Br. at 12, 14. Petitioner is wrong for two reasons.

First, the issue presented here is not properly framed as whether or not EPA acted within its authority under the statute. There can be no doubt that Title V of the CAA provides EPA with an express oversight role in Title V permit decisions. See, e.g., 42 U.S.C. § 7661d(b) (requiring EPA to object to state-proposed permits not in compliance with the CAA). Thus, EPA clearly acted within the bounds of its authority in reviewing the state's draft permit for consistency with the "common control" language in the Act and implementing regulations. Properly understood, therefore, Petitioner's claim is not that EPA acted in an *ultra vires* manner in providing New Jersey with a decision as to whether the Landfill and the GTE facility are under "common control," but rather that EPA's substantive decision reflected an unreasonable construction and application of the pertinent statutory and regulatory terms. As explained above, EPA is entitled to considerable deference on these issues, and Petitioner can only prevail if it can demonstrate that the statute or applicable regulations unambiguously preclude EPA's approach. Petitioner cannot make such a showing here.

Second, the heart of Petitioner's claim that EPA's common control determination is *ultra vires* is its argument that, under the CAA, only an owner or operator can be considered to "control" a facility, and thus there can only be "common control" where one entity directly owns or operates two facilities. See Br. at 14 (stating that the common control determination is unsupported because "there is no common owner or operator of the emissions units at the OCLC Landfill and those at the MRPC facilities"); 21("If only the owner or operator can be held accountable and liable for an emission unit's performance . . . then a common controller, if any, may only be one or the other"); 22 ("In making such an *ultra vires* determination, USEPA is unlawfully compelling a non-owner and non-operator . . . to assume new CAA obligations and liabilities"). This argument is flawed, as it not only lacks any basis in the text of Title V, but also is inconsistent with other CAA provisions.

To support its argument that "common control" requires common ownership or common operation, Petitioner cites no definition of common control (and indeed, none is provided in the CAA). It instead argues – citing no authority – that "in common parlance," the word "control . . . means an actual power over the subject matter." Br. at 18. But even Petitioner's own proposed definition of common control – as requiring "actual power over the subject matter" (id.) – is broader than direct ownership or operation.

In an attempt to reconcile its assertion that common control requires common ownership or operation with the CAA, Petitioner points to the definition of the term "owner or operator" set forth at several places in the CAA: "any person who owns, leases, operates, controls, or supervises a stationary source." 42 U.S.C. §§ 7411(a)(5), 7412(a)(9). To begin, this definition is not set forth in Title V, but rather in the context of other CAA programs and requirements. Accordingly, although it can generally be assumed that Congress did not intend to act inconsistently with other parts of the CAA when it promulgated Title V, such a definition is of limited relevance when interpreting a different term set forth in the context of a different program that, for whatever reason, does not explicitly include or incorporate the definition in question. But in any event, the definition of "owner or operator" on which Petitioner relies – while admittedly somewhat circular – indicates the exact opposite of what Petitioner would have it mean.

By defining the phrase "owner or operator" as a person who "owns," "operates," "supervises," *or* "controls" a stationary source, Congress has indicated (albeit in the context of different CAA programs) that "control" means something *different* than just ownership, operation, or supervision. And by defining "owner or operator" as encompassing not just persons who "own" or "operate" a source, but also those who have "control" over it, Congress has also indicated that, at least for certain statutory purposes, "owner or operator" has a meaning that is *broader*

than direct and explicit ownership or operation – the limits Petitioner seeks to place on this statutory phrase-of-art.

The case law Petitioner cites (Br. at 19-20) does not indicate otherwise. In United States v. Dell'Aquilla, 150 F.3d 329 (3d Cir. 1998), this Court held that a developer and construction company qualified as "owners or operators" under the CAA. In doing so, the Court specifically noted that "it is now axiomatic that a non-owner can still be liable as an 'operator,'" and also that "our determination of whether one is an operator or owner under the CAA must be conducted in a manner consistent with the broad reach of the statute." Id. at 333. The Court concluded, based on a fact-specific analysis of the parties' actions in regard to the property in question, that the developer and the construction company qualified as "operators" because they exercised "control and supervision" over the property in question. Id. at 333-34. Thus, Dell'Aquilla only confirms that "control" is a concept under the CAA that is separate and distinct from actual ownership or operation, even under the statutory phrase of art "owner or operator," while also reminding us that these statutory terms are to be interpreted consistent with the "broad reach of the statute." Id.

The other case cited by Petitioner (Br. at 20), United States v. Pearson, 274 F.3d 1225 (9th Cir. 2001), concerned the liability of an individual who supervised the removal of asbestos under the *criminal* provisions of the CAA, specifically

challenging certain jury instructions. The Ninth Circuit relied on its previous holding that "substantial control" is the proper criterion for determining whether a defendant is a "supervisor" under the CAA, rejecting the defendant's argument that more "authority" or "dominion" should be required. Id. at 1230-31 (citing United States v. Walsh, 8 F.3d 659, 662-63 (9th Cir. 1993)). The court explained that "a defendant need not possess ultimate, maximal, or preeminent control over the actual asbestos abatement work practices" to qualify as a "supervisor." Id. at 1231. Thus, yet again, the case does not answer the question of what "control" is for purposes of the definition of "owner or operator" provided in 42 U.S.C. §§ 7411(a)(5) & 7412(a)(9), or how to define "under common control" as that phrase is used in 42 U.S.C. § 7661(2). And given that Pearson concerned criminal charges, and that its analysis of the term "supervisor" was specific to the context of whether an individual with that job title had sufficient authority at the job site to merit criminal liability, it is of little relevance here.

Petitioner also attempts to support its argument that common control only exists where there is common ownership or operation in another, slightly different way: by arguing that, throughout the CAA, Congress has made it clear that "only the owner or operator of an emissions unit" can be held responsible for compliance with CAA requirements, including those incorporated in Title V permits (*e.g.*, New

Source Review and Prevention of Significant Deterioration requirements). Br. at 19. This argument is flawed in several ways.

First, as noted above, the CAA specifically defines the statutory phrase "owner or operator" as encompassing persons who own, operate, supervise, *or* control a source. 42 U.S.C. §§ 7411(a)(5), 7412(a)(9). Thus, insofar as an entity found to "control" another may be held responsible for ensuring that the two entities collectively comply with certain emissions limitations and requirements set forth in Title V permits, this is not inconsistent with the fact that the CAA generally requires the "owner or operator" of a stationary source to comply with applicable CAA requirements and emissions limitations.

Second, Petitioner's argument is also directly at odds with another CAA provision that it relies on (Br. at 18): CAA section 120, which provides a defense to CAA penalties where a failure to make a required upgrade is "beyond the control of the owner or operator of such source *or* of any entity controlling, controlled by, *or under common control with the owner or operator* of such source." 42 U.S.C. § 7420(a)(2)(B)(iv) (emphasis added). While, like the definition of "owner or operator" Petitioner relies on, this language also does not apply in the Title V context, it yet again indicates that "control" and "common control" are distinct from ownership and operation and, at least in regard to certain CAA requirements, can be separate sources of potential responsibility or liability.

Finally, Petitioner confuses two different issues in arguing that the CAA only contemplates responsibility and liability for owners and operators, and therefore "common control" must be interpreted as existing only where there is common ownership or operation. The question of whether a facility will be grouped with other facilities as a single source for the purpose of determining what requirements apply (the issue that EPA addressed in the May 11 letter) is separate and distinct from the question of whether a person who owns or operates one of the facilities may be held liable for CAA violations at the other facility that is under common control. The latter is simply not at issue in this case. As the May 11 letter states, a separate permit may be issued to each facility under common control, and the effect of the common control determination "is limited to the facilities' treatment for determining major source status and applicability of regulatory requirements." JA 11.

In summary, Petitioner's argument that common control requires common ownership or operation is not only without basis in Title V, it is in fact inconsistent with the other parts of the Act cited by Petitioner where Congress specifically distinguished "ownership" and "operation" from "supervision" and "control," identifying each of those terms as a separate and distinct ground for responsibility (albeit in the context of other programs). See 42 U.S.C. §§ 7411(a)(5), 7412(a)(9), 7420(a)(2)(B)(iv). If EPA could not group stationary sources together for emission

control purposes where they technically have different "owners" and "operators," facilities could unilaterally direct what emissions limitations and requirements would apply to them – and thereby frustrate the purpose of the CAA – by simply breaking themselves into smaller pieces and placing those pieces under different ownership and operation (as APC did when it sold OEC to MRPC). Therefore, EPA acted well within the bounds of its discretion to fill the "gap" left when Congress provided that sources "under common control" may be grouped together for Title V permitting purposes but did not define that term. Accordingly, EPA's interpretation of "common control" as not limited to common ownership or operation is permissible and entitled to deference. Chevron, 467 U.S. at 843-44.

III. THE MAY 11 LETTER IS NOT ARBITRARY, CAPRICIOUS, OR OTHERWISE UNLAWFUL.

In addition to arguing that the common control determination set forth in the May 11 letter is *ultra vires* because only direct ownership or operation can be considered to give rise to a common control relationship, Petitioner also argues that the determination is arbitrary, capricious, and otherwise unlawful, specifically citing to EPA's reliance on various "features"[15] that Petitioner considers irrelevant or erroneous; EPA's use of a rebuttable presumption of common control where the

[15] While "features" is used in a footnote of the May 11 letter to explain what the term "factor" means (JA 10), both the May 11 letter and the Spratlin letter generally use the term "factor" when identifying information relevant to the common control determination. Therefore, EPA will use the latter term here.

facilities in question are all located on land owned by one of them; and allegedly "contradictory positions" taken by EPA in other documents and in the context of other common control determinations. See Br. at 25-27. But Petitioner's complaints about the common control analysis and its outcome fail to demonstrate that the common control determination was not based upon "relevant factors" or failed to articulate a "rational connection between the facts found and the choice made." Southwestern Pennsylvania Growth Alliance, 121 F.3d at 111 (internal quotation omitted).

A. EPA's reliance on certain factors as evidence of common control is not arbitrary or capricious, but rather is a reasonable interpretation of EPA's regulations and consistent with EPA's long-standing guidance on the issue.

At the heart of Petitioner's argument that the common control determination is arbitrary and capricious is its assertion that "USEPA failed to consider only relevant facts; that is, only those facts needed to ascertain that the OCLC and MRPC emission units are independently owned and operated, and neither the OCLC-related companies nor the MRPC-related companies are common operators." Br. at 25. In other words, Petitioner claims that the determination is arbitrary and capricious because EPA did not look solely at the facts that Petitioner wanted it to look at – those showing no direct ownership or operation of one facility by another.

As discussed above, Petitioner's assertion that the CAA limits the facts EPA can consider in making a common control determination to the issue of whether there is common ownership or operation has no grounding in the statutory text, and in fact is inconsistent with it. But even going beyond this fundamental flaw, Petitioner's argument fails because EPA's reliance on certain facts in making its common control analysis is reasonable and consistent with EPA's regulatory use of the phrase "common control," as well as with EPA's interpretation of that term in a guidance document (the 1995 Spratlin letter).

1. EPA's analysis is reasonable and entitled to deference because it is consistent with its regulatory use of the phrase "common control."

While the regulations specifically implementing the Title V permit program do not contain a definition of "common control," EPA has defined "common control" in implementing a related CAA provision, and the determination set forth in the May 11 letter is consistent with that regulatory definition.

Addressing when penalties may or may not be assessed for failure to meet a deadline to make an emissions control upgrade, EPA defined "control" and "under common control" as "the power to direct or cause the direction of the management and policies of a person or organization, whether by the ownership of stock, voting rights, by contract, or otherwise." 40 C.F.R. § 66.3(f). Thus, EPA's regulatory definition of "common control" in a related provision goes beyond direct

ownership and operation, and indicates that it is appropriate to consider factors such as contractual relationships and control over stock. Indeed, the regulation indicates that many other factors could be considered as well by including the phrase "or otherwise" at the end of the list of ways an entity could have the power to direct, or cause the direction of, another entity's management or policies. Id.

The May 11 letter is consistent with this regulatory definition of common control. In the letter, EPA explains that its determination of common control is based on, *inter alia*, certain contractual relationships between the MRPC family of companies and the OCLC family of companies and OCLC's parent APC's retention of control over the stock of OEC after selling the stock to MRPC. These are facts specifically identified as relevant in the regulatory definition of "common control" provided in EPA's CAA implementing regulations (albeit outside the Title V context). See 40 C.F.R. § 66.3(f).

Moreover, the May 11 letter is also consistent with the regulatory definition of common control used by the Securities and Exchange Commission, which, similar to the EPA's regulatory definition, defines "control (including . . . 'under common control with')" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 240.12b-2. EPA has cited this definition when providing guidance to other

permitting agencies regarding how to determine whether multiple facilities should be considered to be "under common control." See JA 632-33.

In making the determination set forth in the May 11 letter, EPA was in part interpreting and applying its own Title V regulatory term "common control," and its interpretation of that term was consistent with the definition EPA has articulated in regulations implementing other CAA provisions, as well as the definition utilized by other agencies in other regulatory contexts. Therefore, EPA's common control determination is to be accorded the highest degree of deference. See Auer, 519 U.S. at 461; Beatty, 49 F.3d at 997.

2. EPA's analysis is reasonable and entitled to deference because it is consistent with its long-standing guidance on "common control."

EPA's reliance on certain facts as supporting a determination of common control is also consistent with the Agency's longstanding approach to these issues, which is reflected in the 1995 Spratlin letter. See JA 658-61. Indeed, the May 11 letter specifically identifies the Spratlin letter as a primary source of guidance for EPA's common control determination. See JA 10 nn.5-6. The Spratlin letter was (and is) available to Petitioner and any other interested parties through EPA's website (at http://www.epa.gov/region7/air/title5/t5indexbydate.htm), and there is no question that Petitioner is familiar with it, as it cited the Spratlin letter extensively in the "Position Paper" it provided to EPA in 2007. JA 576-77.

In the Spratlin letter, EPA explained that, because the term "common control" is not defined in the statute, EPA relies on common dictionary definitions of "control": "to exercise restraining or directing influence over," "to have power over," "power of authority to guide or manage" and "the regulation of economic activity." JA 658. EPA further explains: "Obviously, common ownership constitutes common control. However, common ownership is not the only evidence of control." Id. EPA then identifies a number of "questions" that are relevant to the common control determination, including:

- "Do the facilities share intermediates, products, byproducts, or other manufacturing equipment? Can the new source purchase raw materials from and sell products or byproducts to other customers? What are the contractual arrangements for providing goods and services?" JA 659.
- "What is the dependency of one facility on the other?" Id.
- "Does one operation support the operation of the other? What are the financial arrangements between the two entities?" Id.

Beyond these "obvious control questions," the Spratlin letter instructs the permitting authority that "it may be necessary to look at contracts, lease agreements, and other relevant information." JA 659.

The factors and relevant documents identified as relevant to a common control determination in the Spratlin letter are exactly the types of factors and

documents that EPA relied on in making the common control determination at issue here. The first factor listed in the May 11 letter as supporting the common control determination is OCLC's parent APC's retention of control over the stock of OEC after it was transferred to MRPC (JA 11); this responds directly to the question posed in the Spratlin letter regarding "financial arrangements between the two entities" (JA 659). The second factor listed is "the dependence of MRPC on OCL as its only source of fuel" (JA 11); this responds directly to the questions of "the dependency of one facility on another" and of whether the facilities share products or byproducts (JA 659). The third factor listed is the restrictions placed on MRPC's ability to resell or transfer landfill gas without the permission of OCLC's affiliate GASCO. JA 11. This is directly responsive to two questions posed in the Spratlin letter: "Can the new source purchase raw materials from and sell products or byproducts to other customers?" and "What are the contractual arrangements for providing goods and services?" JA 659. The fourth factor identified by EPA as supporting the common control determination is the financial interests the two entities have in each other, such as shared tax credits (JA 11); this is also relevant to the question of the "financial arrangements" between the two entities (JA 659). Finally, the May 11 letter also states that EPA has considered the "many types" and "large numbers of agreements existing relative to [the Landfill] and MRPC, and finds that they further demonstrate the control

relationships that exist between the landfill and the companion GTE operations." JA 11. This is consistent with the direction in the Spratlin letter to "look at contracts, lease agreements, and other relevant information" as necessary. JA 659. Thus, the factors and information relied on by EPA as showing a common control relationship between the Landfill and the GTE Facility are entirely consistent with the factors and information that EPA has long considered in making these determinations, as set forth in the Spratlin letter.

While non-binding guidance documents such as the Spratlin letter are generally not entitled to "dispositive" weight, they at least "warrant respect." Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487-88 (2004) (citing Christensen v. Harris County, 529 U.S. 576, 587 (2000), and Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385 (2003)). Furthermore, guidance documents that "interpret[] the agenc[y's] own regulatory scheme" are entitled to a "measure of deference," and "deference" is also due to an agency's "reasonable decision to continue [a] prior practice" articulated in such guidance documents. Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 129 S. Ct. 2458, 2473, 2477 (2009). Therefore, EPA's

reliance on the factors and documents identified in the Spratlin letter as relevant to the common control analysis[16] is entitled not only to respect, but to deference.

B. EPA's presumption of common control where two facilities are collocated is reasonable and does not violate the APA.

1. It is reasonable for EPA to presume common control where two facilities are located on land owned by the parent of one.

EPA's "presumption" of common control where two facilities are collocated on land owned by one of them (or, as in this case, the parent of one of them) is eminently reasonable. As EPA explained in the Spratlin letter:

> Typically, companies don't just locate on another's property and do whatever they want. Such relationships are usually governed by contractual, lease, or other agreements that establish how the facilities interact with one another. Therefore, we presume that one company locating on another's land establishes a "control" relationship. To

[16] In addition to challenging EPA's reliance on the factors identified by the Spratlin letter, Petitioner also quarrels with EPA's assessment of the facts before it, arguing that the May 11 letter is "laced with mischaracterizations." Br. at 25. However, what Petitioner really takes issue with is not the facts relied on by EPA, but the terms EPA used to describe those facts, such as "control," "financial interest," and "dependent." Id. EPA believes that it is reasonable to use the word "control" in regard to stock where it is admitted that MRPC has "agreed not to encumber or sell the [OEC] stock for the term of all contracts and agreed to an option buy-back provision" (Br. at 25); that it is reasonable to characterize shared tax credits as a "financial interest"; and that it is reasonable to call two companies "dependent" on a third for their fuel where they receive fuel for their operations solely from that entity (JA 82, 674, 58), cannot resell any fuel without that entity's permission (JA 339, 355), and cannot opt to overcome this dependency by breaching the supply agreement and paying money damages (JA 348, 365). But ultimately, these characterizations – and Petitioner's quarrel with them – are irrelevant to the issue of whether the facts can reasonably be considered to add up to "common control."

> overcome this presumption, the Region requires these "companion" facilities, on a case by case basis, to explain how they interact with each other.

JA 658. As discussed above, the letter then goes on to identify the specific questions that should be asked of such facilities. JA 659. The Spratlin letter explains that this presumption responds to the concern that, otherwise, EPA would be allowing facilities to "circumvent[] . . . permit requirements" by "splitting [their] property into multiple, distinct sites" solely "for permitting purposes," and thereby to "ultimately jeopardize the goals and effectiveness of the permitting programs." JA 660. In fact, EPA specifically notes in the Spratlin letter that it had already encountered at least one case where a company had done exactly what it feared – "set up an 'unrelated' corporation in the middle of their property to split the property into multiple, distinct sites." JA 660.

This well-reasoned analysis regarding the importance of collocation to the common control analysis plainly meets the minimal rationality standard. EPA has articulated the rationale behind its "presumption," and has also identified the multiple questions it would ask facilities to which such a presumption applied in order to allow them to "explain how they interact" and thereby show that there is not, in fact, a common control relationship between them. JA 658. The Spratlin letter advocates a thorough, well-considered common control analysis, based on specific factual inquiries, and even states: "If facilities can provide information

showing that the new source has no ties to the existing source, or vice versa, then the new source is most likely a separate entity under its own control." JA 659.

Thus, while EPA does begin its analysis with a presumption of common control in certain circumstances, that presumption is grounded in both logic and experience, and EPA identifies exactly what sort of information can be provided to show that there is not, in fact, a common control relationship. Accordingly, the presumption described in the Spratlin letter is an eminently reasonable interpretation of the statutory and regulatory term "common control" and EPA's regulation defining common control. As an agency guidance document, the Spratlin letter is entitled to respect (see Alaska Dep't of Envtl. Conservation, 540 U.S. at 487-88) and, because it interprets EPA's regulatory scheme, it is entitled to deference (see Coeur Alaska, 129 S. Ct. at 2473).

2. EPA's presumption does not violate the APA.

Petitioner's suggestion that such a presumption cannot be utilized by EPA unless it goes through notice and comment rulemaking is misguided. An agency is not compelled to employ substantive rulemaking in every instance in which it seeks to identify how a statute or regulation will apply to a specific set of facts. See SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947) ("[n]ot every principle essential to the effective administration of a statute can or should be cast

immediately into the mold of a general rule. . . . the agency must retain power to deal with the problems on a case-to-case basis").

Accordingly, the APA requires notice and comment for new substantive rules, but not an administrative officer's interpretation of a statute or the rules implementing it. See 5 U.S.C. § 553(b)(3)(A); Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995). Only where, in attempting to interpret a provision, the agency "adopt[s] a new position" that is "inconsistent with" the governing statutory or regulatory provision is notice and comment required. 514 U.S. at 100. Notice and comment rulemaking is also not required for policy statements that "announc[e] motivating factors the agency will consider . . . in determining the resolution of a substantive question of regulation." Professionals & Patients for Customized Care v. Shalala, 56 F.3d 592, 601 (5th Cir. 1995) (citation omitted).

Here, the presumption that Petitioner complains of is set forth in a non-binding letter from an administrative official intended to counsel persons outside the Agency as to what factors should be considered when interpreting the statutory and regulatory term "common control." JA 658-60. The official explains that, because the CAA and EPA's permitting regulations do not define "common control," EPA looks to the definition of "control" provided by the dictionary, and then also identifies factors that, on a case-by-case basis, might indicate or establish "control" in accordance with that definition (the first being a facility's choice to

locate on another facility's property (JA 658), which is an obvious indication that there may be some kind of "control" relationship between the two facilities). The Spratlin letter itself is non-binding and does not create legal obligations. Instead, it simply advises the reader as to how EPA interprets the term "common control" (i.e., in accordance with the dictionary definition) and then summarizes and provides notice of the types of factors the Agency believes are therefore appropriate to consider in making case-specific "common control" determinations. Thus, the Spratlin letter is both a quintessential interpretative document and an agency policy statement, and thus expressly exempted from the notice and comment requirements applicable to substantive rules under the APA. See 5 U.S.C. § 553(b)(3)(A).

Petitioner has cited no authority that indicates otherwise. Petitioner cites to various APA provisions (Br. at 28), but the provisions cited are irrelevant. Some of them address the procedures and burden of proof at statutorily-mandated "hearings" (see 5 U.S.C. §§ 556(d), 553, & 554), but no "hearing" is mandated by the CAA for the common control determination at issue here. Other APA provisions cited by Petitioner address what process is required before "withdrawal, suspension, revocation, or annulment of a license" (see 5 U.S.C. § 558(c)), but EPA did not withdraw, suspend, revoke, or annul Petitioner's permit in the May 11 letter; although its term has ended, Petitioner's original Title V permit remains in

effect during the ongoing permit process. The case cited by Petitioner (Br. at 28 (citing Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 493-94 (2004)), is similarly irrelevant to this issue. The portion of the case cited by Petitioner addresses the burdens of production and persuasion in (a) federal or state suits to challenge EPA stop-construction orders and (b) EPA-initiated civil actions to challenge state "best available control technology" determinations. 540 U.S. at 493-94. The Court's discussion is specific to that factual context, and certainly has no relevance where there is no underlying federal or state court action. See id. Thus, Petitioner fails to provide any authority to support its suggestion that EPA has violated the APA by interpreting its own regulations as allowing for a rebuttable presumption of common control in certain limited circumstances (as described by the Spratlin letter).

C. EPA's conclusion that the Landfill and the GTE Facility Are under common control is consistent with other EPA documents and common control determinations.

Finally, Petitioner's argument that the May 11 letter is inconsistent with other EPA documents and prior common control determinations is inaccurate.

First, as discussed above, the common control analysis and determination set forth in the May 11 letter is completely consistent with the outline for common control analyses that EPA provided in the Spratlin letter. And even assuming, *arguendo*, that the Spratlin letter was not completely consistent with every other

guidance document issued by EPA, it would still be entitled to respect. See Federal Express Corp. v. Holowecki, 552 U.S. 389, 399-400 (2008) (noting that "[s]ome degree of inconsistent treatment is unavoidable," and so a guidance document still merits respect even where implementation has been "uneven").

Second, Petitioner is simply mistaken in claiming that two other EPA documents are at odds with the Spratlin letter and the determination made here. The August 2, 1996 guidance memo from John Seitz (see Br. at 27) addresses the unique nature of military installations and how that impacts the common control analysis. As noted in that document, military installations encompass a much wider variety of functions and facilities (*e.g.*, housing, schools, churches, airports, gas stations, hospitals) than most other industrial sources. Accordingly, although the Seitz memo contains some analysis that applies to all industrial sources, the core factual situation addressed by that memo is not analogous. Moreover, even when discussing the unique nature of military installations, the Seitz memo still recognizes that "[common control] determinations for military installations should be made on a case-specific basis after examining the operations and interactions at those sites," and that "there may be situations in which . . . it is appropriate to consider a military installation a single source."

The April 5, 1995 letter cited by Petitioner (Br. at 26) is also not inconsistent with the common control determination at issue here. To begin, the April 1995

letter simply is not something EPA has relied on; rather, it was almost immediately superseded by the Spratlin letter, which was issued just five months later and is a key guidance document upon which EPA has relied in making common control determinations over the past fourteen-plus years. Moreover, the April 1995 letter does not deal with case-specific facts, but rather posits various hypothetical situations, none of which is identical to the situation addressed here.[17]

Third, Petitioner is correct that EPA concluded that the Maplewood Landfill in Virginia was not under common control with a collocated power-generating facility. Br. at 27. But EPA so concluded because a number of key facts in the Maplewood determination were different from the facts here, including: liquid fuel – not landfill gas – was the primary source of fuel for the generating facility at the time the determination was made; the landfill and the generating facility were able to operate without each other; while the generating facility was obligated to buy gas from the landfill, it could sell the landfill gas to third parties or return it to be destroyed at the landfill as it wished; tax credits were not shared; and there were

[17] Petitioner argues that the April 1995 letter indicates that "a lessee is not under common control with a landlord" and "a land development company that leases property to an industrial company is not responsible for Title V permitting with respect to that company's activities." Br. at 26. But the May 11 letter is not inconsistent with those positions; rather, the May 11 letter relies on the fact that two lessees (OCLC and MRPC) have located their facilities on property owned by the same landlord (OCLC's parent APC), and the existence of multiple other facts confirming the common control relationship between those facilities.

clear divisions of responsibility in regard to obtaining and maintaining permits (whereas here, MRPC is contractually required to transfer all permits to OCLC's affiliate APLC upon its request or the termination or expiration of its site lease (JA 97)). See JA 654-57.

Finally, Petitioner overlooks another, more relevant, common control determination made by EPA in regard to a landfill and GTE facility collocated in New York, which is consistent with the determination at issue here. Specifically, EPA concluded that the Al Turi Landfill and its companion GTE facility are under common control because, *inter alia*, the facilities are interdependent; the GTE facility is obligated to purchase whatever quantity of landfill gas the landfill chooses to send it and, at the time of the determination, was in fact receiving 100% of its fuel from Al Turi; and the landfill's income is connected to the GTE facility's revenues in the form of royalties (similar to the way OCLC's parent APC receives income in the form of tax credits earned from the GTE Facility's production of electricity from the landfill gas and shared with MRPC (JA 139)). See JA 643-46. Moreover, even though the GTE facility is permitted to supplement its fuel supply, it was not in fact supplementing or blending landfill gas with another fuel. JA 645. EPA specifically relied on the Spratlin letter in making the Al Turi determination, and also explained that "even though two facilities may not have common officers, plant managers, or workforces, they may still be under

common control." JA 644. Thus, the common control determination set forth in the May 11 letter, and the interpretation of the statutory and regulatory term "common control" on which it is based, are consistent with EPA's prior determination that the Al Turi landfill and its companion GTE facility are under common control and the interpretation of "common control" on which that determination was based.

IV. THE MAY 11 LETTER DOES NOT VIOLATE PETITIONER'S DUE PROCESS RIGHTS.

Finally, Petitioner's suggestion that EPA has somehow violated its due process rights is absurd. Petitioner argues that it had the right to "prior notice and a fair opportunity to be heard" before EPA reached its conclusion. Br. at 29. Even assuming that that standard applies where EPA is analyzing an issue that represents but one step in a complex permitting process,[18] there is no question that EPA well exceeded that standard here.

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[18] The APA provides that "notice" and an opportunity for "interested persons to participate" are required in regard to substantive rulemaking, 5 U.S.C. § 553(b) & (c), but the May 11 letter is not substantive rulemaking. See Section III(B)(2), supra. But even where those minimal procedural requirements apply, the Supreme Court has made clear that it is a "basic tenet of administrative law" that agencies have the authority to "fashion their own rules of procedure." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 543-44 (1978). Furthermore, even when EPA actually terminates, modifies, or reissues a permit (which has not yet happened here), the permittee is entitled to nothing more specific than "notice" and "fair and reasonable procedures." 42 U.S.C. § 7661d(e).

EPA gave Petitioner multiple opportunities to submit information showing a lack of common control (see JA 37-52, 573-78, 635-39), even granting Petitioner additional time to provide information when Petitioner requested it (see JA 44 (thanking EPA for its "patience in allowing the time necessary to compile and prepare the enclosed responses")). EPA revised its analysis when, long after the issue was raised, Petitioner submitted information showing that it had made changes in its corporate structure (*i.e.*, APC's sale of OEC to MRPC). See JA 9 & n.3, 44, 46. EPA held a call with counsel for Petitioner to explain what factors were relevant to the common control analysis and how they might apply to the Landfill and the GTE Facility. EPA also granted Petitioner's request for a meeting about the issue at EPA headquarters in Washington, D.C. – a meeting in which officials from EPA's Office of General Counsel, Region 2, and the Office of Air Quality Planning and Standards all participated. JA 37. These many opportunities for Petitioner to participate in the common control analysis plainly constitute "a fair opportunity to be heard." Br. at 29.[19]

Petitioner complains that, while it submitted information and made arguments to EPA, it nevertheless did not receive sufficient process because it was

[19] Moreover, as discussed above, the process is far from over. During the course of the Title V permitting process, Petitioner will have the opportunity to raise these issues in comments, to petition the Administrator to object to any permit proposed by NJDEP (and, if EPA declines to object, challenge that decision in court), and to challenge any final permit in court. See 42 U.S.C. § 7661d(b) & (c).

"shooting in the dark" – *i.e.*, it did not know what factors EPA would rely on or consider until it received the May 11 letter. Br. at 29. But, in its requests for information, EPA specifically asked Petitioner about the factors it ultimately relied on. JA 38-40 (asking, *inter alia*, whether MRPC could operate the GTE Facility "without gas supplied by Ocean County Landfill;" whether "there are restrictions or agreements that prevent MRPC . . . from using fuel other than landfill gas;" what the circumstances and terms of MRPC's purchase of OEC were; and for copies of various agreements between MRPC-related and OCLC-related companies). And in its "Position Paper on Common Control," Petitioner stated:

> We are aware that USEPA officials often look for guidance in making common control determinations to the September 18, 1995 letter authored by William A. Spratlin . . . .

JA 576. Petitioner noted that the Spratlin letter "suggests interrelationships to be considered in the search for common control." JA 577. Petitioner argued, however, that "the analysis in [the Spratlin letter] does not support a finding of common control" in regard to the Landfill and the GTE Facility. JA 576. Thus, not only was Petitioner aware that EPA relied on the Spratlin letter and the factors listed therein in making common control determinations, it based its own arguments against common control on that document and those factors. Accordingly, Petitioner cannot now claim that it was "shooting in the dark" when it made its arguments to EPA, and its due process argument must fail.

CONCLUSION

This Court should dismiss this petition for review for lack of jurisdiction because, as discussed in section I above, it does not challenge final agency action. If it reaches the merits, the Court should deny the petition for the reasons set forth in sections II-IV above.

Respectfully submitted,

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Dated: April 30, 2010

CERTIFICATION OF COMPLIANCE WITH L.A.R. 31.1(c)

Pursuant to L.A.R. 31.1(c), I hereby certify:

1. that the text of the electronic brief and the text of the hard copies of the brief delivered to the Court for filing are identical; and
2. that Microsoft Forefront Client Security has been run on the electronic version of the brief and no virus was detected.

Amanda Shafer Berman

April 30, 2010

CERTIFICATION OF COMPLIANCE WITH FRAP 32(a)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify:

1. that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 13,908 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
2. that this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) & (6) because this brief has been prepared in Microsoft Office Word 2007 in Times New Roman 14 pt. font.

Amanda Shafer Berman

April 30, 2010

United States Court of Appeals for the Third Circuit
No. 09-2937

OCEAN COUNTY LANDFILL CORP.,

Petitioner,

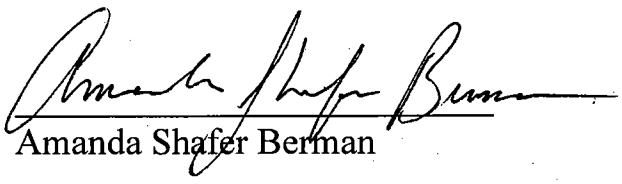
v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 2,

Respondent.

CERTIFICATE OF SERVICE

I, AMANDA SHAFER BERMAN, do hereby certify that I served the foregoing Brief of Respondent United States Environmental Protection Agency, Region 2, on counsel of record for Petitioner Ocean County Landfill Corp., SANDRA T. AYRES, by electronically filing the foregoing with the Clerk of the Third Circuit Court of Appeals through the CM/ECF system. I also certify that I sent the original and nine copies of the Brief to the Clerk's office, in addition to serving one hard copy of the brief on counsel of record for Petitioner Ocean County Landfill Corp., SANDRA T. AYRES, Scarinci Hollenbeck, 1100 Valley Brook Avenue, Lyndhurst, N.J. 07071.



Amanda Shafer Berman

Dated: April 30, 2010