

# **WHEN CAN CO-LOCATED FACILITIES BE CONSIDERED SEPARATE SOURCES FOR AIR COMPLIANCE PURPOSES – THE CONCEPT OF COMMON CONTROL**

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## **ABSTRACT**

This paper discusses the concept of common control as it relates to when two operations may be considered as one source for air quality regulatory purposes. This is a particularly important issue for many landfill gas-to-energy (LFGE) facilities located at landfills. When an LFGE facility is developed by a third party (i.e. other than the landfill owner) the concept of common control often determines whether the landfill and the LFGE facility will be considered as being the same source with respect to air permitting and compliance issues.

One of the reasons that common control can be such an issue for landfill and LFGE facility owners is that the definition of a “source” from an air permitting perspective is relatively general. This gives regulatory agencies substantial flexibility in making a determination as to what constitutes a source. Although a source determination involves several factors, the concept of common control is typically the most important factor in determining whether an LFGE facility should be aggregated with a landfill as one source. The definition of common control, like that of a source, is quite general. Common control decisions are often made on a case-by-case basis since no two projects are going to be exactly the same. Interpretations of how common control is decided are varied - from being relatively narrow to extremely broad. A review of the United States Environmental Protection Agency’s (EPA’s) determinations on the subject illustrates this point.

If an LFGE facility is being planned at a landfill, both owners (LFGE facility and landfill owner) should determine the important operational and ownership control issues at hand, research the regulatory authority’s prior precedents, and plan accordingly to avoid an unwanted common control determination if possible. Assuming that the LFGE facility and landfill are not owned by the same entity, there are steps that can be taken upfront to clarify points where common control might be assumed or confusing.

The solid waste industry believes that a common sense definition of source and common control should be adhered to which meets all regulatory requirements, but

that is not overly broad to the extent that almost any two facilities can be aggregated as being under common control where no true operational control exists between the two facilities.

## **INTRODUCTION**

Many municipal solid waste landfills are now “facilities” for purposes of air permitting and compliance that include not only waste disposal operations, but also a potential range of other operations. These other operations may include LFGE projects, waste processing or recycling operations, or hauling operations, just to name a few.

The variety of possible operations at a landfill can complicate matters with regard to the landfill’s new source review (NSR) or operating permit requirements if they are combined with the landfill’s operations as one source. Depending on the total emissions of the combined sources, future permitting including landfill expansions can become more difficult and costly. It might also make the landfill owner liable for unrelated operations over which they have little or no control. In limited cases, the reverse may be desired and an owner might want to artificially combine two sources so that emissions decreases from one source offset emissions increases in another so that they can be “netted” to avoid major source permitting limits.

These considerations are often even more critical when an LFGE facility is being considered because LFGE projects often involve criteria pollutant emissions that may trigger major source-level permitting requirements under non-attainment NSR or prevention of significant deterioration (PSD) if combined with landfill emissions. LFGE facilities are also often operated by third parties. Oftentimes the ownership and operating relationship between the owner of the landfill and owner of an LFGE facility is also complex, thereby complicating the entire process. Although it would seem intuitive that an LFGE facility and a landfill owned by separate companies would be permitted as separate sources; however the issue is not that simple.

EPA’s definition of a source with respect to air permitting includes three main criteria: the operations must be (1) be

co-located, (2) have a common Major Group Standard Industrial Classification, and (3) be under common control. This paper focuses on this third criterion; the concept of common control. This criterion was chosen since, among the three criteria defining a source, the concept of common control has yielded the widest variety of interpretations. With many landfills having already established LFGE facilities and with more looking to develop such facilities, the concept of common control will continue to be an issue in siting such facilities based upon the permitting and operating costs, and the potential impact on the larger landfill operation.

The first step in understanding this issue is to look more closely at the definition of a source and common control.

### **CONCEPT AND DEFINITION OF COMMON CONTROL**

Federal rules for the establishment of state air permitting requirements found in 40 CFR §51.165(a)(i) defines that a stationary source means “any building or structure, facility, or installation which emits or has the potential to emit a regulated NSR pollutant.” Under 40 CFR §51.165(a)(ii), additional clarity is provided by defining that a “building, structure, facility, or installation means all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same Major Group (i.e., which have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0065 and 003-005-00176-0, respectively).”

In the above site definition, the three criteria mentioned in the introduction as establishing that two operations constitute a single source are present: (1) co-location, (2) common Major Group SIC classification, and (3) common control. All three of these criteria must be satisfied for operations to be considered as one source. If any one is not met, then the operations are separate sources.

Determining whether two operations have the same Major Group designation within the Standard Industrial Classification (SIC) system, also referred to as the “primary activity” test, is often the easiest of the three criteria to evaluate. Municipal solid waste landfills fall under SIC code 4953. This number is part of Major Group 4900 (Electric, Gas & Sanitary Services), which includes SIC codes for power production, natural gas transmission and distribution, and co-generation facilities. These SIC codes essentially encompass the common types of LFGE

facilities. Even if an activity located at a landfill is not part of the same Major Group, EPA has determined that a same source designation can be made with respect to this criterion if the operation in question is co-located and can be considered a support facility to the landfill operation. As will be seen, the idea of interrelatedness and support facility is also a basis upon which the common control criterion can be claimed for two operations. In short, the SIC code criterion for LFGE facilities is typically resolved quickly as being in the same Major Grouping as the landfill.

The same source criterion for co-location is also typically simple for operations at landfills such as LFGE facilities since these operations are often located on leased property within the landfill’s permit boundary. However, there are examples of operations that may not be located on the landfill property that might be considered the same source. For example, if two landfills were owned by the same company or public entity, and only separated by a public road or right-of-way, they would likely be considered as one source even though they are not literally adjacent to one another. Determinations of co-location can be impacted by separation distance, ownership and control of the land between the operations, whether the separation is a public road or railroad, and whether the operations are under common control.

Although co-location can be complicated in some cases at landfills, most LFGE facilities will be co-located with the landfill facility on leased property. In the case of a direct-use LFGE project, the direct-use site is usually physically separate, in contrast with an on-site LFGE facility, and not on geographically contiguous property. For example, for a landfill that conveys gas to a brick kiln, the landfill and brick kiln would not be aggregated as one source since they are more clearly separate businesses, and since neither acts solely as a support facility to the other.

The third criterion, common control, can also be relatively easy to identify in some cases. For instance, if a landfill owner develops an LFGE project on the landfill property and operates it, then common control is undoubtedly established (same owner). However, if a third-party develops the LFGE operation, it can quickly become much more complicated depending on a wide range of project-specific issues.

### **COMMON CONTROL AND ITS POTENTIAL IMPACT TO LFGE PROJECTS**

Now that the definition of source has been discussed, before proceeding with examining the concept of common control in more detail, some of the negative consequences of having to combine operations due to a broad interpretation of common control are presented. It is important to understand these to fully evaluate the pros and

cons of common control.

One of the obvious consequences of being required to combine many operations into one source is that the potential emissions of the combined source will be higher than each would be separately. This is important since the overall potential-to-emit (PTE) of a combined source would be more likely to reach major source emissions limits with respect to NSR or PSD permitting. These permitting requirements would then potentially subject the entire source to a complex and costly permitting process. This could include requiring the source to undergo rigorous air dispersion modeling, purchase costly emissions offsets, meet stringent emissions control requirements, and participate in a public review process that may otherwise not be required.

NSR and PSD permitting requirements are not the only potential regulatory programs that could be triggered by a higher PTE due to aggregating multiple operations. Having a higher PTE can subject a source to a wide range of air-related state or local requirements based on emissions triggers, including Federal New Source Performance Standards (NSPS) or National Emissions Standards for Hazardous Air Pollutants (NESHAP) requirements. In summary, the combination of many operations would not only cause permitting difficulties, but could constrain future expansions or the addition of new operations. It can also subject the overall facility to a range of requirements that would not otherwise be necessary.

Another concern with aggregating different operations under one source that might not clearly be under common control involves compliance liability. At what point should two operations be combined into one source when the landfill owner has no practical control over the other operation? If this other operation began to experience compliance issues, what control would the landfill owner truly have over that operation to make changes?

For an example illustrating the impact of common control on LFGE projects, consider the case of an LFGE facility consisting of landfill gas-fired engines on leased landfill property that is owned and operated by a third-party developer. Assume that the facility is completely owned and operated by this third-party, but that a regulatory authority determines that the landfill and LFGE facility are one source due to a broad interpretation of the meaning of common control. This would essentially fold the LFGE facility in with the landfill as one source, thereby making the landfill owner partially liable for the LFGE facility's operations. Even if an agreement was put into place between the landfill and LFGE facility owner stating otherwise, the fact that the overall permit would be under the landfill owner's name would subject the landfill owner

to enhanced liability for an operation over which they, in practice, will have little or no day-to-day control over. Since many landfills with LFGE facilities are subject to Title V permitting requirements, the level of visibility and liability for compliance issues is very high. A lack of operational control along with high liability for compliance can create a very tenuous situation for any landfill owner.

In summary, when LFGE operations are aggregated with a landfill operation due to a broad common control interpretation, there can be a number of negative consequences including:

- Being more likely to trigger NSR and/or PSD permitting requirements;
- Potentially hindering future landfill projects by making permitting more stringent and expensive; and
- Creating interconnected compliance liabilities and responsibilities between each operation.

These negative consequences can impact the economics of LFGE projects to such an extent that landfill owners are forced to reconsider whether beneficial use of landfill gas is worth the downside costs and constraints. Some landfill owners will not allow LFGE projects at their sites if common control is established.

## **CRITERIA USED IN MAKING COMMON CONTROL DECISIONS FOR LFGE**

As mentioned previously, most LFGE facilities are co-located with a landfill and will have the same Major Grouping SIC code. Therefore the question of whether an LFGE source should be combined with the landfill source often turns on whether the LFGE facility is considered to be under the common control of the landfill.

A summary of several important EPA determinations on this issue will be discussed in the next section; however, a brief summary of the important concepts involving what exactly establishes common control is first presented here to provide a framework for evaluating the various determinations (which vary widely).

Direct common ownership is the most obvious basis for a common control determination. The ownership structure of the landfill and LFGE project, and how those entities are interrelated is probably the single most important consideration for a common control assessment. If the landfill and LFGE facility is owned or partially owned by the same entity, even a narrow view of common control would lead to a common control determination.

If two operations are not commonly controlled, it is generally agreed that they should have no ownership share in each other and should strictly limit sharing any

individuals with common operational control. The full range of business arrangements can be considered in a common control determination including shareholders in common, voting trusts, articles of incorporation, partnership agreements, or joint venture agreements.

The full range of agreements between the landfill and LFGE project can impact the determination of whether common control exists including, but not limited to the lease agreement, the operations and maintenance agreement, the gas sales agreement, marketing agreements, and the power sales agreement. Regulatory agencies will often require that these agreements be made available for review during the source determination process (although pertinent cost figures can be removed for confidentiality purposes).

Another area where control can be established includes whether an LFGE developer also operates the landfill gas collection system or exclusively destroys the landfill gas (i.e. the landfill owner does not control the LFGE facility or backup flare). Specifically, if a developer operates a gas system owned by the landfill, then common control can be assigned due to a contracted operations relationship. A more defensible position with respect to separate facilities would be a situation where the landfill owner also owned the gas system and operated it separately from the LFGE owner thereby only providing landfill gas to the LFGE facility. This is also where the landfill owner's ownership of the flare can be beneficial, since the LFGE facility would then not be needed as the only method to destroy the landfill gas for compliance purposes. The landfill owner's ownership of the flare also demonstrates the landfill's autonomy. It should be noted however, that based on some determinations this would still not suffice to rebut common control.

Although some ways to help limit the presumption of common ownership are mentioned below, depending on the breadth of definition applied, almost any two facilities that are interrelated in any way and co-located can be found to be under common control. This is true because, past the overt ownership concept discussed above, the broader view of common control taken by EPA in many cases introduces the concept of "indirect control" or control by virtue of one facility being integral to the output of another facility.

A variation of the indirect control theme involves whether the LFGE facility can use a fuel other than landfill gas, whether it will in practice, and the availability of such an alternate fuel. Here again, if a broad definition of common control is applied to two facilities, the simple fact that one facility will provide a fuel source to another can become a presumption of common control; even when the owners and operators are completely separate.

The next section briefly discusses some of the important common control determinations that have been made and how their evolution has gradually broadened the definition of common control.

## **EXAMPLE DETERMINATIONS ON COMMON CONTROL**

To gain more insight on how common control is determined, a review of various determinations made by EPA is interesting in that it shows a definite progression between the late 1970s and now as to how common control determinations are made. It also illustrates how one precedent can lead to an entirely new framing of an issue such as common control.

Based on the number of different local permitting authorities, and the fact that most of these authorities may ultimately rely on EPA, a search was made on EPA's website (Region 7 New Source Review Policy and Guidance Database) for source determinations mentioning common control over the last 30+ years. The search yielded dozens of such determinations and guidance documents going as far back as 1978. Determinations of particular interest to the authors were selected to be highlighted.

One of the earlier determinations from March 16, 1979 was actually a memorandum on the definition of source. In this early guidance, EPA indicates that common control decisions will be made on a case-by-case basis since the regulatory language is general. The memorandum also sets forth several ways that one company could have sufficient power over another company to exercise control. These include the ability to veto decisions of the other company, a common individual with a 10 percent voting interest, or a company that owns more than a 50 percent voting interest in another company. In another letter from July 17, 1980 discussing control issues in a partnership, the term control is defined using a United States Securities and Exchange Commission (SEC) definition that control is "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 or voting shares, by contract, or otherwise." Based on these and other early EPA determinations, it is clearly established that common control decisions are to be made on a case-by-case basis and that common control is framed mostly through business-related/corporate structure terms.

For most of the 1980s and early 1990s, common control interpretations did not particularly stray from these early indicators of what constitutes common control between two operations. These determinations mostly considered items such as whether the companies had direct voting interest or overt control between one another. Then in

1995 a letter with important implications on the concept of common control was issued which opened up an aggressive line of thought with regard to soft or indirect control.

On September 18, 1995, William A. Spratlin of EPA's Air, Resource Conservation and Recovery Act (RCRA), and Toxics Division in Region VIII provided a clarification letter to the Iowa Department of Natural Resources regarding whether new facilities that located at existing major facilities should be considered as being under common control. In this letter, which is often cited even now in common control determinations, EPA cites a dictionary definition of control that, like the earlier SEC definition, allows for wide interpretation and cites, among other things that control is the "power of authority to guide or manage." The letter indicates that obviously, common ownership constitutes common control, but that ownership is not the only evidence of control. It then puts forth the concept that, if one facility locates on another facility's property, that a control relationship is immediately established that must be rebutted. This puts the burden of proof on the parties trying to show that common control does not exist. A list of questions is provided as an example screening tool as to whether two companies are under common control. These questions are as general as "does one operation support the operation of the other" and "what is the dependency of one facility on the other." Since the letter says an affirmative answer to any of the questions would indicate common control, this letter represents an extremely aggressive and broad interpretation allowing almost any two facilities or operations to be considered as being under common control depending on the reviewer. The letter goes on to indicate that a contract review may be necessary and that a permit application can be considered incomplete if this is not provided. While it must be acknowledged that a contract review is a common sense request if two companies are somehow related, this letter seems to indicate that the contracts should be examined under every case. Unfortunately, this review is sometimes used to obtain contracts so that a hunt can be made for any provisions linking the two facilities so that a basis of common control can be made.

Another EPA letter dated February 11, 1998 to the Virginia Department of Environmental Quality directly addresses the issue of a landfill with a separately owned landfill gas collection and control system and LFGE facility. This letter, which directly cites arguments made in the 1995 letter noted above, aggregates the landfill with the LFGE facility even though it mentions that both owners are completely separate. The letter links the facilities through the idea that the third-party LFGE operator a) controls the landfill's emissions, b) that the owner of the landfill has a contract with the third party,

and c) that they are generally interdependent. As will be discussed, some of these arguments can be clarified by having a backup flare owned and controlled by the landfill and by keeping the collection system under the landfill's control. But here again is a letter that links facilities through very general concepts. The letter goes on to caution about dividing up permits on a site where compliance responsibilities must be divided (such as for NSPS gas system monitoring requirements). All in all, we again have a very broadly-worded precedent on how to determine whether two sources should be aggregated and potentially damaging guidance that could lead to unrelated sources being made liable for one another's operations.

The entire question of a site being under common control because it is a support facility is a concept brought up in many source determinations; especially after the 1995 letter. The question is, however, whether a landfill truly would be dependent on an LFGE facility? In most cases, although the LFGE facility may destroy some or all of the landfill gas, the landfill owner can typically combust the landfill gas through a backup flare (i.e. the dependency would not go both ways in this case). Also, the LFGE facility can generally combust more than just landfill gas. Even if the LFGE facility is located at the landfill so that a convenient fuel source would be available, it would typically not be supposed that the facility supports the landfill operation in such a direct way as to presume common control. Quite the contrary, an LFGE facility is usually sited at a landfill purely for its own profit.

Not all EPA determinations are negative; an August 25, 1999 letter from EPA to the Wisconsin Department of Natural Resources supports a separate source determination for a Madison Gas and Electric (MGE) generating facility consisting of six engines that is located at an Oscar Meyer plant. This letter does not mention whether the plant supplies any fuel to the MGE facility or how it might support the facility. Although the engines were designed to provide backup power generation for the plant, and are a support facility in that sense, EPA determined that they are not the same source since Oscar Meyer would truly control the MGE generating facility only to the extent that, in the event of a power outage, Oscar Meyer would be entitled to 100 percent of the power output. This letter also references a definition of control which focuses on "who has the power to manage pollutant-emitting activities...including the power to make or veto decisions to implement major emission-control measures or to influence production levels or decisions to implement major emissions-control measures..." So, unlike previous letters mentioned from the 1990s that place a very broad determination on what constitutes control, here an example is provided of a truly common sense acknowledgement of two facilities that, while they are interrelated, are only ceding any sort of real "control" solely for the purchase

contract provisions between the two entities.

Another more positive example of a common control determination from EPA is provided in a May 1, 2002 letter from EPA Region III to the Virginia Department of Environmental Quality. In this letter a separate source determination was made for the Maplewood Landfill and an INGENCO LFGE facility that used landfill gas, but was not able to operate solely on landfill gas. Here again, although many of the more troublesome prior common control concepts are mentioned, such as co-location creating an immediate presumption of common control, a separate source determination was ultimately made. There were several reasons provided for this determination as well as reasons why this determination differed from the aggregating of sources in the February 11, 1998 letter previously mentioned. Of particular note were the following reasons:

- INGENCO was responsible for all construction and capital improvements at their facility;
- Maplewood owned and operated the gas system including the backup flare;
- No indication of common ownership, employees, etc. was discovered;
- Neither facility was to have control over the other's compliance activities; and
- The landfill will not receive power from INGENCO and there are no arrangements for Maplewood to accept INGENCO's waste materials.

The letter emphasizes that this determination differed from the determination described in the February 1998 letter specifically due to the fact that, among other issues, Maplewood controls its gas system and flare, and does not need INGENCO to meet its NSPS obligations. Therefore, although interdependence is relative and exists to some degree for almost any two facilities located on the same property, common control should not be presumed simply because any sort of interdependence exists.

As another positive example, on the west coast, which has a very high number of LFGE facilities due to strict air pollution laws, EPA Region IX also commonly allows third-party LFGE facilities to be considered as separate sources from the co-located landfill. This EPA region reviewed and approved a Title V permit for the Tri-Cities Landfill, which is located on the Salt River Pima-Maricopa Indian Community (SRPMIC) in the Phoenix area. This landfill includes an LFGE facility that utilizes landfill gas from the Tri-Cities Landfill. In this landfill's Title V Permit statement of basis, EPA acknowledges that: "In addition, a portion of the collected landfill gas is piped to the Tri-Cities Energy Facility, a facility under separate ownership that is located on a contiguous property and has

a Part 71 permit issued by EPA Region IX." Here again, we have an LFGE facility that takes all of the landfill gas generated from the adjacent landfill, is located on the landfill property, and undoubtedly has some level of interrelatedness to the landfill itself, but that is clearly not under common control. There are over a dozen such determinations throughout California as well.

Based on experience within the landfill industry, the majority of LFGE facilities are generally permitted separately when owned and operated by a third party regardless of some of the very broad issues mentioned above that have been used to establish common control under some circumstances. However, there are clearly precedents on both sides of the issue and seemingly minor contractual nuances can make a big difference with respect to common control in some circumstances.

### **INDUSTRY POSITION ON COMMON CONTROL**

In order to promote LFGE projects and to avoid findings of common control where, depending on the interpretation, it may not exist, the solid waste industry's general position has consistently been that generally, third-party LFGE facilities are not sources under the common control of the landfill owner and should not be presumed to be simply because they are located on the landfill's property. Not only does a broad interpretation of common control limit such projects, but most such projects only meet the definition of common control under the broadest of interpretations.

A common sense concept of source is often cited in determining common control; however, broadening the definition to link almost any two facilities does not necessarily make common sense. For example, would a private company's LFGE facility be under common control when sited at a municipally-owned landfill? Certainly the City would be able to have *some* influence on the facility, but then again, the municipality where *any* source is located would have influence and likely provide some level of services – this doesn't make it necessarily the same source. By examining the case of a municipality or public entity owner, versus two private entities, the true subjectivity of many of the arguments used to group operations together as one source becomes clearer.

Certainly, the landfill industry does not advocate circumventing Clean Air Act rules or provisions, and does not endorse subdividing corporate structures or other artificial mechanisms to show separation between two operations that are truly under common control. However, if a third-party developer wishes to purchase landfill gas from a separately-owned landfill, considering the LFGE facility as being under common control to the landfill based on aggressive aggregating concepts and broad regulatory interpretations in and of themselves is

damaging on many levels. Although there are cases when the two parties may voluntarily enter into a common control situation, the industry's position is that this should not be a presumption, and that a common sense approach must be used to make the final determination.

#### **STEPS THAT CAN BE TAKEN WITH REGARD TO A COMMON CONTROL DETERMINATION**

Although a common control determination will ultimately be a determination made by the appropriate regulatory authority, there are some common sense steps that can be taken to assist in clearly showing separation between operations that should be considered based on prior precedents and an understanding of how your situation will be viewed.

Since most LFGE facilities will likely have similar SIC codes and be co-located with a landfill, the relationship between the landfill and LFGE owners can be the most critical factor in determining common control. This is especially true since contract documents are often examined by the regulatory authority as part of the common control determination process.

Although a contract or environmental attorney will ultimately be the best resource for determining the best contractual structure and terms, here are some ideas that should be considered when negotiating a contract between an LFGE facility and a landfill:

- Clearly and explicitly state in the contract that the landfill and LFGE facility owner are unrelated parties and do not share common ownership or control over each other's ownership decisions;
- Define separate permitting and liability responsibilities where possible and indicate that one owner is not responsible for environmental liability for the other in enforcement;
- If possible, avoid having the LFGE facility provide power to the landfill to avoid dependency issues;
- Carefully structure (limit if possible) any control the landfill might have over the LFGE facility's operation or that the LFGE facility would have over the landfill's operation and make sure any agreements reflect this fact;
- Allow the landfill owner to control any backup flare device so that the landfill does not depend on the LFGE facility to combust its landfill gas;
- If possible, include explicit provisions in the contract that the LFGE facility may operate on the property using gas from another landfill or other source;
- Have a well-defined lease area and location to further differentiate the LFGE facility from the

landfill.

- Have provisions for or demonstrate that the LFGE could use another fuel source if it became necessary; and
- Allow the landfill owner to control the landfill gas collection system, so that the LFGE owner is not deemed to be an integral part of the landfill's compliance activities.

All parties in an LFGE/landfill agreement should be aware of relevant precedents, good and bad, so that an informed discussion can be had with the regulatory authority. Since these decisions are often subjective, knowing what current determinations indicate and what the authority's stance has been in the past is critical. Also, be sure to be familiar with your regulatory authority's definition of source or any guidance documents that are available discussing the topic, as these will frame any discussions you have.

Lastly, be prepared to approach the permitting authority early in the process to discuss this issue and to present the reasons why you believe a common control designation might or might not apply. Usually a brief discussion with the permitting authority by phone can provide a good indication of whether they tend to aggressively aggregate sources or not. If certain contract provisions can be added early in the process to clarify that common control does not exist, the ultimate determination may be much easier. For example, if compliance responsibilities were a particular regulatory authority's concern, contract language better assigning compliance responsibilities could be emphasized. This would allow the permitting authority to have confidence that, if an enforcement action was required, liability could be easily assigned and parties easily identified with responsibility for corrective actions.

#### **HOW THE DETERMINATIONS AFFECT INDUSTRY (GOOD AND BAD)**

As we have discussed, a common control determination can be a very important consideration when a new operation, such as an LFGE facility, is being considered at a landfill. The criteria for determining common control have varied over time and between different agencies. In some cases, the concept is so broad that an argument for common control among almost any two loosely related facilities could be made. Since precedents are often cited as a basis for future decisions, only one or two unreasonable interpretations can be damaging to the landfill industry.

Although this paper cannot fully encompass such a complex topic, and since there are an almost unlimited number of scenarios that could be considered, each landfill owner and LFGE developer should remain informed on this important issue. Sufficient precedent exists for both narrow and broad interpretations of common control such

that being well informed is key to the planning process. Where a permitting authority may try to force a common control designation onto two facilities that is unreasonable, knowing the facts and past precedents may be an owner's best defense; and may save the entire project's viability.

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