**BEFORE THE ADMINISTRATOR**
**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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| **In the Matter of the Chattahoochee Energy Facility** | ) | |
| **Title V Operating Permit** | ) | |
| **4911-149-0006-V-03-0** | ) | |
| | ) | **Petition No: _____** |
| **Issued by the Georgia Environmental Protection Division** | ) | |

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**PETITION TO HAVE THE ADMINISTRATOR OBJECT TO THE TITLE V PERMIT FOR THE CHATTAHOOCHEE ENERGY FACILITY**

## I. INTRODUCTION AND SUMMARY OF ARGUMENT

On April 10, 2007, the Georgia Environmental Protection Division ("EPD") issued Title V Permit No. 4911-149-0006-V-03-0 (hereafter termed the "Permit") to Oglethorpe Power Corporation ("Oglethorpe Power") for operation of the Chattahoochee Energy Facility (the "CEF"). The Permit had an effective date of April 10, 2007.[1] The Permit was issued for the operation of the CEF's combined cycle, natural gas only-fired power block, which contains two combustion turbines, two supplementary-fired heat recovery steam generators and one steam turbine (all of which are denoted in this petition as the CEF or "Block 8").

In Condition 1.1 of the Permit, regarding the Site Determination, EPD stated that three power plants - the CEF, the Wansley Steam-Electric Generating Plant ("Plant Wansley") and another separate and independently owned, operated and permitted combined cycle power block ("Block 9") - that are located next to each other "comprise the same Title V site." See Condition 1.1 of the Permit attached as Exhibit A. This determination is unlawful and forms the basis of this petition.

[1] An administrative petition challenging the issuance of the Permit on identical grounds has been filed with EPD by Oglethorpe Power, effectively staying the effectiveness of the permit until that adjudication has been concluded.

Plant Wansley basically contains two sets of emissions units or sources. The first set – Units 1, 2 and 5A – are two coal-fired units and one oil-fired combustion turbine, respectively that are co-owned by four electric utilities – Georgia Power Company ("Georgia Power"), Oglethorpe Power, the Municipal Electric Authority of Georgia ("MEAG") and the City of Dalton ("Dalton"). The second set – denoted here as Blocks 6 and 7 – are two combined cycle natural gas only-fired power blocks that are owned by one utility – Southern Power Company ("Southern Power") – and operated by another – Georgia Power. Block 8 (the CEF) is a separate, independent power block that is owned, operated and separately permitted by Oglethorpe Power. Block 9 is a separate combined cycle natural gas only-fired power block that is owned, operated and separately permitted by MEAG. The ownership and operational make-up of these power plants is shown below:

**TABLE I**

| Permitted Facility | Operator | Owner |
|---|---|---|
| Plant Wansley<br>(AFS No. 149-00001)<br>Units 1, 2, and 5A | Georgia Power | Georgia Power (53.5%)<br>Oglethorpe Power (30%)<br>MEAG (15.1%)<br>City of Dalton (1.4%) |
| Includes Blocks 6 & 7 | Georgia Power | Southern Power (100%) |
| Chattahoochee Energy Facility (Block 8)<br>(AFS No. 149-00006) | Oglethorpe Power | Oglethorpe Power (100%) |
| MEAG Unit 9<br>(Block 9)<br>(AFS No. 149-00007) | MEAG | MEAG (100%) |

The Permit is a renewal permit for the CEF. Like all Title V permits, it contains a Site Determination in Condition 1.1, where the permitting authority (here EPD) sets forth the extent of the Title V major source, some or all of which is to be regulated by the issued permit. In this Permit, EPD states that the Title V major source[2] includes all three of the power plants – Plant Wansley, Block 8 and Block 9 – listed in Table I.

EPD's statement in Condition 1.1 of the Permit is incorrect. It is a fundamental premise of Clean Air Act ("CAA") stationary source law that for multiple emission units to be aggregated together such that they become one major source, those units must be under the "common control" of one legal entity. Here, no one utility, no one legal entity, has control – by any of the tests used by EPA – over all of the emission units located at the three power plants in Table I. Oglethorpe Power, for example, has no control over Blocks 6, 7 or 9. If any of those sources were to become subject to enforcement action

[2] The actual language in the Permit states that all three of these power plants comprise the same "Title V site."

for noncompliance with the CAA, Oglethorpe Power could, by virtue of EPD's site determination for the Permit, become potentially liable for that noncompliance. However, in such case, Oglethorpe Power would be powerless to take any steps that might be needed to address such noncompliance. It can not be a legally correct outcome for an entity that has no ability to control any action at a specific stationary source to become responsible – to EPD, to EPA or to the public – for the CAA compliance of that source.

This petition seeks relief from this flawed site determination. Oglethorpe Power respectfully requests that EPA object to the issuance of the Permit, on the grounds that the site determination embedded within Condition 1.1 is unlawful, and that EPA instruct EPD to modify the Permit and re-issue it accordingly.[3]

## II. FACTS

### A. Permitting History of Blocks 6 & 7, the CEF (Block 8) and Block 9

Georgia Power submitted the original construction and operating permit application for all four combined cycle blocks (6 – 9) in the fall of 1999, as a modification to the original Plant Wansley. The original Plant Wansley was constructed in the early-mid 1970's and had been issued a Title V operating permit. In July 2000, EPD issued the final Title V permit amendment, including the construction permitting requirements for the power blocks, to Georgia Power.

At the time Georgia Power applied for the construction and operating permit for the four blocks, Georgia Power, Oglethorpe Power, MEAG and Dalton were negotiating a Memorandum of Understanding ("MOU") regarding the ownership and operating structure for the combined cycle blocks. Based on the negotiations at the time of the application, it appeared that Oglethorpe Power and MEAG would own a minority share in the four new units and Georgia Power would operate them, similar to the arrangement at the then-existing Plant Wansley. Dalton was not to participate in the project, in terms of being an owner/operator at any of the blocks. EPD recognized this proposed arrangement in the narrative to the July 2000 Title V permit amendment.

In early 2000, Georgia Power, Oglethorpe Power, MEAG and Dalton reached agreement on an alternative approach, whereby Georgia Power would construct, own and operate two combined-cycle blocks, Oglethorpe Power would construct own and operate one combined cycle block, and MEAG would have a majority ownership share in the remaining block. In May 2000, the four parties executed a MOU governing the development of the four new generating power blocks. Upon executing the MOU, the parties began negotiating the terms and conditions of the ownership agreements, property transfers and related contracts.

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[3] This is the second petition to be filed with EPA questioning EPD's site determination for these units. On February 14, 2007, Georgia Power petitioned EPA, seeking its objection to the recently issued renewal Title V permit for Plant Wansley, arguing against EPD's determination that found common control of the four power blocks.

Consistent with the MOU, on November 30, 2000, Oglethorpe Power submitted a permit application to construct and operate Block 8 – the CEF, and on December 7, 2000, Georgia Power submitted an application to amend its Title V permit for Plant Wansley, by removing Block 8. EPD issued a new, separate Title V permit to Oglethorpe Power for the CEF on January 15, 2002 and at the same time issued an amendment to the Georgia Power Title V permit, removing Block 8 from that permit. In the permit narratives accompanying the proposed and final permits, EPD noted that "[a]t the time of issuance, Oglethorpe Power Corporation held a minority share in the overall project of the four power blocks. The current business arrangement is for Oglethorpe Power Corporation (OPC) to be responsible for the construction and operation of Power Block Number 8 and associated ancillary equipment."

By June 2001, MEAG had determined that it would construct, own and operate 100% of the remaining block, and with the consent of the parties, asked EPD to transfer the permit for Block 9 to MEAG. MEAG followed up with an application in August 2001. In November 2001, Georgia Power, Oglethorpe Power, MEAG and Dalton executed the final ownership agreements governing the combined cycle blocks. That agreement established separate ownership of the combined cycle blocks under construction or to be constructed at this location with Georgia Power constructing, owning and operating Blocks 6 and 7, Oglethorpe Power constructing, owning and operating Block 8 and MEAG constructing, owning and operating Block 9. At the same time, the parties executed agreements to transfer title to the property for the combined cycle units to the respective unit owners. Finally, in February 2002, EPD issued a new Title V permit to MEAG for Wansley - Unit 9 and at the same time amended Georgia Power's Title V permit for Plant Wansley, removing Block 9.

All of these negotiations and permitting actions transpired during the initial construction of the units. Construction of Block 8 was not begun until it was determined that only Oglethorpe Power would own and operate the block and was issued a permit for its construction and operation. Georgia Power's Blocks 6 and 7 began commercial operation in June 2002. Oglethorpe Power's CEF began commercial operation in February 2003, while Block 9 began commercial operation in June 2004.

Thus, while the parties originally contemplated that the combined cycle blocks would be jointly owned and operated, they ultimately decided, for various business reasons, that they would be independently owned and operated as described above. The parties' original assignment of ownership and operating responsibility should not now determine whether the blocks comprise one source under the CAA. This is especially true where the ownership/operating responsibilities of Blocks 8 and 9 were set prior to the beginning of construction and issuance of permits to Oglethorpe Power and MEAG. Current facts continue to show that the three power block groups – *i.e.* Blocks 6 & 7, Block 8 and Block 9 – do not operate under the common control of any entity. Thus, they can not be aggregated as one source under the CAA.

Notwithstanding these facts, when it proposed the renewal permit for the CEF, EPD included the following condition:

> ***1.1 Site Determination***
>
> *The Wansley Steam-Electric Generating Plant (AFS No. 149-00001), the Chattahoochee Energy Facility (AFS No. 149-00006), and the Municipal Electric Authority of Georgia-Wansley Unit 9 (AFS No. 149-00007) comprise the same Title V site.*

*See* Exhibit B. Oglethorpe Power submitted timely comments to the proposed permit. *See* Exhibit C. Extensive comments were made to Condition 1.1, arguing that the CEF was not under common control, because only Oglethorpe Power controls it. The following revision was suggested to Condition 1.1:

> ***1.1 Site Determination***
>
> ~~*The Wansley Steam-Electric Generating Plant (AFS No. 149-00001), the Chattahoochee Energy Facility (AFS No. 149-00006), and the Municipal Electric Authority of Georgia-Wansley Unit 9 (AFS No. 149-00007) comprise the same Title V site.*~~ *The Chattahoochee Energy Facility (Unit IDs CT8A, DB8A, CT8B and DB8B) is permitted as a single Title V source.*

In its response to comments, EPD refused to make the requested change. *See* Exhibit D. Thereafter, the Division issued the Permit with Condition 1.1 unchanged.

**B. Ownership and Operation**

As listed in Table I, the owners and operators of the units are as follows:

- Units 1, 2 and CT5A are jointly owned by Georgia Power, Oglethorpe Power, MEAG and Dalton and are operated only by Georgia Power. These are the only jointly owned units at this location;
- Blocks 6 and 7 are owned entirely by Southern Power, an affiliate of Georgia Power and are operated only by Georgia Power;
- The CEF is owned solely by Oglethorpe Power and is operated by an unrelated third party under contract only with Oglethorpe Power; and
- Block 9 is owned entirely by MEAG and is operated by an unrelated third party under contract only with MEAG.

The only owners/operators listed above that are related are Georgia Power and Southern Power, which are sister corporations, both subsidiaries of the Southern Company. No others are related.

### C. Contractual Arrangements

The business relationship between the four co-owners of the original Plant Wansley (Units 1, 2 & 5A) was created in contract, with each separate undivided ownership interest in the land and improvements independently financed by each separate utility. No joint venture, partnership, corporation or any other type of corporate entity was created that functions either as an owner or operator of these units. Georgia Power operates the original Plant Wansley under separate operating and maintenance agreements with Oglethorpe Power, MEAG and Dalton.

All of the combined cycle facilities at the location (Blocks 6&7, the CEF and Block 9) are independent generating facilities. The property for each is separately owned, and each block is independently dispatched by its respective owner. Each block provides its own station service, has its own switchyard (collector bus) and possesses the other infrastructure needed for independent operation.

The only infrastructure common to all of the combined cycle power blocks is the pre-existing water intake, wastewater discharge and reservoir infrastructure (all of which also serve the original Plant Wansley units), a water distribution system, a 115kV emergency power feed, the roads which provide ingress and egress to the plants, and the natural gas pipeline and conditioning system. The pipeline includes separate branches that serve each block. Each block has its own gas meter.

None of these three groups of power blocks relies on any other block for any significant services to operate or deliver power. The only services shared by the combined cycle unit owners are security and shared infrastructure maintenance.[4] These services are shared as a matter of convenience, not necessity.

In summary, the facts show that none of the power block groups (Blocks 6 & 7, Block 8 or Block 9) are controlled by any one owner/operator. Although the units share – merely for the sake of convenience - *de minimis* common facilities and services, those slight relationships do not equate to control by any entity of more than one power block group.

## III. ARGUMENT

### A. The Petition Is Timely

In accordance with 40 C.F.R. § 70.8(d), this Petition is timely because it has been submitted to EPA within 60 days of the expiration of the Administrator's 45-day review of the Permit. According to information provided by EPA at http://www.epa.gov/region4/air/permits/TitleVProposedPermits/Georgia.htm , the 60-day deadline for the filing of a petition on the Permit is July 11, 2007.

[4] This would include maintenance of the shared roads, the water intake structure, reservoir and distribution system and the natural gas pipeline and natural gas conditioning station.

### B. Oglethorpe Power Raised This Issue With Specificity During The Public Comment Period

As shown in its comments at Exhibit C and in EPD's response to comments in Exhibit D, Oglethorpe Power specifically raised the site determination at issue here during EPD's public notice and comment period for the proposed permit for the CEF. Accordingly, this issue was appropriately raised with specificity during the comment period as required by 40 C.F.R. § 70.8(d).

### C. EPD's Site Determination For The CEF Is Contrary To Established Law And Guidance

EPD's site determination – that all of the emission units at Plant Wansley, the CEF and Block 9 comprise one Title V site – is contrary to applicable law and established EPA guidance. Pursuant to EPD's Title V and Prevention of Significant Deterioration ("PSD") programs, which are the relevant regulations, a three-part test is used for the site or source determination. To be aggregated, the sources must:

- Be located on contiguous properties;
- Belong to a single major industrial grouping; and
- Be under the common control of the same person (or persons under common control).

All of the sources or emission units at the three power plants listed in Table I are contiguous and have the same two-digit Standard Industrial Classification ("SIC") Code. With respect to the third prong of the test, EPA has identified several key factors – ownership interests, agreements that convey decision-making authority, contracts for service and support/dependency relationships – that are used to determine whether control exists sufficient for source aggregation. Applying these factors to the present case, the obvious conclusion is that the facilities in Table I can not be treated as just one "Title V site" or, more appropriately stated, one Title V "major source" or PSD "stationary source." Instead, there are multiple major sources at this location, and EPD's determination that all of the units in Table I can be aggregated as just one source is incorrect.

#### 1. Source Aggregation Under Title V and PSD

The concept of common control as a means to aggregate sources is found in a number of federal regulatory programs, including Title V and PSD. Pursuant to EPD's regulations, under its Title V program, a "Major source" is:

> *Any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping.*

GA Rule 391-3-1-.03(10)(a)4. Georgia's rule mirrors the federal provision. *See* 40 CFR § 70.2. Similarly, under Georgia's (and EPA's) PSD provisions, and referring to the definitions for "Stationary source" and "Building, structure, facility or installation,"[5] the same three-part test for determining whether sources should be aggregated to determine the major source applies.

### 2. Prior EPA Determinations Show That EPD's Site Determination is Incorrect

The site determination for the CEF is controlled by Title V and PSD regulations. Pursuant to those CAA regulatory programs, and assuming that two parts (contiguousness and same SIC code) of the three-part test for source aggregation are satisfied, the issue becomes whether the sources in question are:

> *[ U]nder common control of the same person (or persons under common control)).*

*Id.* Various EPA applicability determinations examining common control under PSD and Title V reveal several distinct factors for determining whether common control exists at a source, as follows:

- **Ownership**

  First, common control can be established through (corporate or property) ownership (e.g., the same parent company or subsidiaries of the same parent company own the sources under examination or both facilities are to be located on land owned by the existing facility);

- **Agreement**

  Second, common control can be established if one entity has "decision-making" authority over the operations of a second entity, through either a contractual agreement or a voting interest;

- **Contract for Service Relationship**

  Third, common control can be established if a "contract for service" relationship exists between the two companies; or

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[5] *Stationary source* means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the . . . [CAA]. 40 CFR § 52.21(b)(5).

*Building, structure, facility or installation* means all of the pollutant-emitting activities which belong to the same industrial grouping, are operated 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 first two-digit code) as described in the *Standard Industrial Classification ("SIC") Manual, 1972*, as amended by the 1977 supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively). 40 CFR § 52.21(b)(6). Both provisions are incorporated by reference into EPD's regulations by virtue of GA Rule 391-3-1-.02(7)(a)2.

- **Support/Dependency Relationship**

  Finally, common control can be established where a sufficient support/dependency relationship exists between the facilities.[6]

This petition examines each approach. As a general principle for determining common control, EPA typically refers to the general definition of "control" used by the Securities and Exchange Commission ("SEC").[7] The SEC defines control as:

> *The possession, direct or indirect, of the powers to direct or cause the direction of the management and policies of a person (or organization or association) whether through the ownership of voting shares, contract or otherwise.*

45 Fed. Reg. 59878. The current facts show that no owner/operator "controls" – as the SEC would define that term - more than one of the power block groups listed in Table I.

### i. There Are No Common Ownership Interests Among The Owners Of Blocks 6&7, Block 8 and Block 9

This factor examines control via corporate relations. Numerous EPA applicability determinations have addressed control by corporate ownership. For example, a 1980 applicability determination involved two facilities: (1) an existing USS Novamont plant owned by U.S. Chemical, a wholly-owned subsidiary of U.S. Steel; and (2) a proposed TEX-USS polyethylene plant, to be owned by TEX-USS, a partnership of Texaco and U.S. Steel, in which each corporation would have an "equal say in the management of the partnership."[8] The proposed TEX-USS plant was to be located on property contiguous to the USS Novamont facility. In examining whether the proposed polyethylene plant should be considered a modification of the existing USS Novamont plant or a new source for purposes of PSD, EPA found very persuasive the fact that U.S. Steel (whose wholly-owned subsidiary owned the Novamont plant) had an equal say in the management of the partnership that would own the new facility. Using the SEC definition of control, EPA reasoned that since U.S. Steel had equal power with Texaco to decide how the project should be run, it had the power to "veto any proposal by Texaco." EPA concluded that U.S. Steel had the power to "cause the direction of the management" of the partnership owning the proposed source and, thus, control over such source. The new source was ruled to be a modification of the existing facility.

Here, none of the three sets of power blocks owners/operators are related to each other. No power block group is jointly owned. There is no mechanism for any set of block owners/operators to assert SEC-defined control, *i.e.*, to "exercise restraining or directing influence over," "to have power over," to have "power of authority to guide or

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[6] *See* Letter to Mr. Michael L. Rodburg, Lowenstein, Sandler, Kohl, Fisher & Boylan from Steven C. Riva, Chief, Permitting Section, Air Programs Branch, U.S. EPA Region 2 (November 25, 1997).

[7] *See* 45 Fed. Reg. 59878 (September 11, 1980) (stating that determinations of control will be made on a case-by-case basis and that EPA will be guided by the general definition of control used by the SEC).

[8] EPA Memorandum from Director, Division of Stationary Source Enforcement to Allyn Davis, Director, Air and Hazardous Materials Division, U.S. EPA Region 6 (July 17, 1980).

manage" or to regulate the "economic activity" over another owner/operator.[9] Accordingly, this factor does not even remotely apply to the CEF or the other power blocks.

### ii. No Power Block Owner Exercises Any "Decision Making" Authority Over Another Owner

This factor examines direct control by contract. An example of the second approach is a 1979 PSD applicability determination, where EPA considered whether International Paper Company's paper mill and Arizona Chemical Company's plant, both located on property owned by International Paper, constituted a single source or two separate sources.[10] EPA concluded that if International Paper had a 50% voting interest in the Arizona Chemical Company, it could be considered "in control" for PSD purposes.[11]

Here, this factor also clearly does not apply. There are no agreements between the power block owners that convey any operational control over another's block. The present facts are distinctly different from those situations where one company gains control over an adjacent facility owned by another, by virtue of the contractual arrangements between the two entities.[12] Although there are some "resources" that are shared among the owners – like security personnel, water and natural gas supplies and wastewater discharge – none of those services or equipment give any party – including Georgia Power – the right or ability to control another's power block.

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[9] *See* Letter from Matt Haber, Chief Permits Office to Ms. Jennifer Schlosstein (November 27, 1996) (referring to the definition of control in a Title V source determination).

[10] U.S. EPA memorandum to Diana Dutton, Director, Enforcement Division, U.S. EPA Region 6 from Director, Division of Stationary Source Enforcement (March 16, 1979).

[11] *See also* Letter to Ron Methier, Chief, Air Protection Branch of the Georgia Environmental Protection Division from Jewell Harper, Chief, Air Enforcement Branch of Air, Pesticides and Toxics Management Division, U.S. EPA Region 4 (July 20, 1995) (The fact that United Technologies can indirectly exercise 50% voting power in Precision Components through another company in which it has 100% control indicates that United Technologies and Precision Components should be considered under common control. The power of United Technologies to make or veto decisions regarding the implementation of major emission control measures and to influence production levels of the two facilities is considered most important in the issue of common control.); Letter to JamesA. Joy, Chief, Bureau of Air Quality Control, South Carolina Department of Health and Environmental Control from Douglas Neeley, Chief, Air and Radiation Technology Branch, U.S. EPA Region 4 (February 20, 1998) (the "Westvaco Determination") (co-generation facility is under the common control of Westvaco, which owns an adjoining unbleached kraft pulp and paper mill, a chemical manufacturing facility and a research and development facility, since the contractual relationship forming the joint venture which owns the co-generation facility furnishes common control to Westvaco); Letter to Cathy Rhodes, Air Pollution Control Division, State of Colorado from Douglas Skie, Chief, Air Programs Branch, U.S. EPA Region 6 (August 22, 1991) (common control found where one entity owned at least 50% of both projects).

[12] *See, e.g.*, Letter to Cathy Rhodes, Colorado Air Pollution Control Division from Douglas M. Skie, Chief Region VI Air Programs Branch (August 22, 1991) (amount of control or ownership is 50% or more in each project, clearly indicating common control of both projects); *see also*, EPA Memorandum re: PSD Applicability (July 17, 1980) (having equal power to decide how project should be run results in control over the plant).

### iii. There Are No Service Or Support/Dependency Relationships Among The Block Owners That Support Common Control

The third and fourth approaches often intertwine. Under the third approach, EPA examines whether a contract for service relationship between two entities exists, in which one sells its entire product to the other under a single purchaser contract.[13] If so, then one entity may be considered to control the operations of the dependent facility through the terms of the supply contract (*e.g.*, where the contract bestows the right to control production levels, the implementation and maintenance of emission control measures and the obligation to comply with all applicable environmental regulations). *See* Memorandum From John Seitz, Director, Office of Air Quality Planning and Standards to EPA Regions re: Major Source Determinations for Military Installations Under the Air Toxics, New Source Review and Title V Operating Permit Progress of the Clean Air Act, pp. 11 & 12 Attachment Guidance (August 2, 1996) (the "Seitz Guidance"), where EPA reasoned that the elements relevant to the determination of whether a contract for service relationship exists between sources includes whether one contracting party can control the performance of the other, by controlling such things as the level of production, the requirement to implement and maintain emission control measures and the obligation to comply with all applicable environmental regulations.

Under the fourth test, EPA also considers whether there is a support/dependency relationship between the two entities, such that one facility supports the operations of the other, or would not exist, "but for" the other.[14] Again, the idea is that both sources are controlled by the same entity, since the subservient source is integral to the other source's operations, or would not exist, "but-for" the presence of the other.

In the KN Power Determination, EPA addressed whether a proposed power generating facility to be constructed by Front Range Energy Associates ("Front Range") and an existing generating facility owned by Public Service Company of Colorado ("PSCo") constituted a single PSD source. The two facilities belonged to the same SIC code and were located on adjacent properties. The issue was whether the two plants were under the control of the same person. Front Range had a power supply agreement with PSCo to provide all net generation from its facility available at any time to PSCo; no other party was entitled to any of the generation from the Front Range facility. PSCo

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[13] *See, e.g.* Letter to James Salvaggio, Director of Air Quality, Pennsylvania Department of Environmental Protection from Judith Katz, Director, Air Protection Division, U.S. EPA Region 3 (undated) (common control relationship exists between NE HUB and United Salt, where United Salt will be in close proximity to NE HUB, on land owned by NE HUB's parent company, with dedicated pipelines connecting the two facilities, where NE HUB will incur all costs associated with the permitting and construction of United Salt and where agreement between them will establish a relationship that will last for ten to twenty years and will require United Salt to reimburse NE HUB's construction investment, so as to ultimately become the landowner of the new facility); Letter to Margie Perkins, Director, Air Pollution Control Division, Colorado Department of Public Health and Environment from Kerrigan G. Clough, Assistant Regional Administrator, U.S. EPA Region 8 (September 13, 2000) (the "Coors/TriGen Determination").

[14] *See* Letter to Ms. Julie Wrend, Colorado Department of Public Health and Environment from Richard Long, Director, Air Program, EPA Region 8 (November 12, 1998); the Coors/TriGen Determination; the Westvaco Determination; Letter to Ms. Margie Perkins, Director of Air Pollution Control Division, Colorado Department of Public Health and Environment from Richard Long, Director of Air and Radiation Program, EPA Region 8 (October 1, 1999) (the "KN Power Determination").

agreed to pay Front Range an amount for such generation sufficient to guarantee a profit, even if the facility "sits idle and is never used." Front Range Determination at 2. Further, PSCo had the "sole right" under the agreement to determine startup, shutdown and operational levels at the Front Range plant. PSCo was to supply fuel to the Front Range project, free of charge to Front Range. Front Range relied on PSCo's existing gas pipelines and electrical transmission lines, for fuel and to deliver power. Given this, EPA concluded that PSCo controlled the essential function of the Front Range facility via the agreement between the two – the generation of electrical power – and thus would be in a position to exercise the requisite SEC level of control over the Front Range plant needed to establish common control. EPA also reasoned that by virtue of its agreement bestowing control, PSCo had the power to control the very activities regulated by the CAA - Front Range's "pollutant emitting activities." Evidence of common corporate ownership was also found.

In the Coors/TriGen Determination, EPA considered whether the TriGen Power Plant located at the Coors brewery in Golden, Colorado should be considered part of the brewery, rather than a separate source. The TriGen Power Plant was located on the Coors site, on property owned by Coors, adjacent to the brewery. Originally, Coors owned and operated the power plant, but had recently sold the plant to TriGen. TriGen was to operate the plant under a thirty year contract that required it to supply 100% of the power needs of the brewery. Although agreements between the two companies allowed TriGen to sell any additional electricity generated to outside users, TriGen had no other customers at the time of the determination. Under a settlement agreement between Coors and the Colorado Air Pollution Control Division, VOC emissions from the brewery were ducted to the TriGen Power Plant and destroyed in its boilers. TriGen was not a subsidiary of Coors, so no common corporate ownership between the two companies was found. However, EPA reasoned that the contract between Coors and TriGen created a support/dependency relationship, since TriGen's power plant supported the Coors brewery by providing no less than 100% of the power needs of the brewery. With no other customers at present, EPA considered the TriGen Power Plant to be a "wholly dedicated support facility" for the brewery. Not only did the brewery depend on the TriGen facility for electrical power, but also for pollution control of VOC emissions from its brewery operations. In addition, because the power plant was located on property owned by Coors, a presumption of common control was created. Finally, even though the two facilities standing alone would have different SIC codes, EPA found that the contract between the two made the TriGen Power Plant a support facility for purposes of determining its major industrial grouping under the SIC code system. Therefore, EPA concluded that the power plant would be properly classified under the same SIC code as the brewery, which is the primary economic activity on the site. EPA found the power plant and brewery to constitute one PSD source.

Neither of these situations represent the present case. None of the power block groups supply power to each other. All have totally separate emission controls. Each is located on land owned solely by only one entity – the equipment owner. No contract gives another block owner the right to any output from a separate block, or the right to control the operations of another block. These determinations show the substantial control and dependency a separate source must have on another for them to be aggregated. The units in question here are far different. All power block groups are

independent power plants, with each having the unfettered ability to be operating while the others are, for example, under forced outages. The different block groups do not rely on each other for any type of control or support and their ownership and operational structure belie the notion that aggregation under the CAA is appropriate or justified.

In another determination - the Oscar Mayer Determination - EPA was asked by Wisconsin for advice regarding a request by Madison Gas & Electric ("MGE") to construct six back-up generators on Oscar Mayer-owned property. The generators were to serve two purposes: (1) to provide back-up electrical generating capacity to an Oscar Mayer foods facility; and (2) to provide surplus electricity to the MGE system. Since the generators proposed by MGE would be contiguous to the Oscar Mayer facility, EPA reasoned they would constitute one source if they belonged to the same industrial grouping and were under common control. To answer those two questions, EPA considered whether the MGE generators would be a separate facility to the Oscar Mayer plant. EPA stated that where more than 50% of the output of services provided by one facility is dedicated to another facility it supports, a "support facility relationship" is presumed to exist. Even where this 50% test it not met, however, other factors may indicate, according to EPA, the existence of a support facility. Those factors include, but are not limited to:

- the degree to which the supporting activity receives materials or services from the primary activity (which indicates a mutually beneficial arrangement between the primary and secondary activities);
- the degree to which the primary activity exerts control over the support activities operations;
- the nature of any contractual arrangements between the two facilities; and
- the reasons for the presence of the support facility on the same site as the primary activity (e.g., whether the support activity would exist at that site but-for the primary activity).

Where these criteria indicate a support relationship, EPA states that permitting authorities may conclude that a support activity contributing more or less than 50% of its output may be classified as a support facility and aggregated with the facility it supports to comprise part of a single source.

Applying these factors to the Oscar Mayer determination, EPA noted that at first blush it appeared that the generators at issue would clearly serve as a support facility to the Oscar Mayer plant. Although it was unlikely that 50% of the generators' output would go to Oscar Mayer, EPA observed that the generators would not be at this location, but for the presence of Oscar Mayer and its potential need for back-up power in the event of an electric outage. In addition, the contract between Oscar Mayer and MGE provided that when Oscar Mayer needed back-up power due to an outage, the generators would automatically send power to Oscar Mayer, regardless of whether MGE also needed the power from the generators for other purposes. However, EPA also noted that a common control determination must focus on who has the power to manage the pollutant-emitting activities at the facility at issue, including the power to make or veto decisions to implement major emission control measures or to influence production levels or compliance with environmental regulations. Here, EPA noted that Oscar Mayer

controlled the operation of the generators only to the extent that, in the event of an outage, Oscar Mayer would be entitled to 100% of the output from such generators until normal power distribution was restored. According to its contract with MGE, if an outage occurred and Oscar Meyer was receiving no electricity from the main power grid, the back-up generating system would automatically come online to supply electricity to Oscar Mayer. However, Oscar Mayer had no ownership interest in the generators and there was nothing in its contract with the owner of the generators, MGE, that indicated that Oscar Meyer would have any power to manage the generators' pollutant-emitting activities or to make any decisions relating to emission control or compliance of the generators with environmental regulations.

EPA also noted that the Seitz Guidance indicates that where, as here, a contract provides that less than 100% of the output of a potential support facility will go to the primary activity, the permitting authority should consider the following factors when addressing the aggregation question:

- How integral the contracted activity is to the primary entity's operations;
- The percentage of output that goes to the primary entity;
- Whether the activity must be onsite to perform its service or produce its product;
- Whether the activity would remain onsite if the primary entity no longer received the output; and
- The terms of the contract between the primary and secondary entities.

Although in the event of an outage, the back-up power from the generators would be crucial to Oscar Mayer's continued operations, it was unlikely that the power provided during such outages would exceed 10% of the total output of such generators. In addition, although the generators probably would not be on the Oscar Mayer facility property, but for the presence of Oscar Mayer, they did not need to be on the Oscar Mayer site in order to fulfill their intended dual purposes. They could be located elsewhere and serve the same purpose or purposes. Ultimately, EPA noted that although Wisconsin had to make its own determination, if EPA were making this determination, it would find that the Oscar Mayer facility and the six generators to be located on the Oscar Mayer property were not under common control and would not be considered one stationary source for purposes of PSD permitting.

Here, there is no "contract for service" relationship between any of the three groups of power blocks. No goods or services are sold between them. Further, there is no contractual mechanism for any power block group to "control the relevant aspects" of another block, *e.g.*, the level of its electricity production, the requirement to implement and maintain applicable emission control measures or the duty to comply with all applicable environmental regulations.[15] It can not be said that any of the units at this location would not exist, "but for" the presence of any other unit. The power blocks were built in this location solely as a matter of convenience; there were numerous sites where

[15] *See* Seitz Guidance, pp. 11 & 12 (elements relevant to the determination of whether contract for service relationship exists between sources includes whether one contracting party can control the performance of the other, by controlling such things as the level of production, the requirement to implement and maintain emission control measures and the obligation to comply with all applicable environmental regulations).

they could have been placed. More to the point, some could have been built here and others elsewhere. Like Oscar Meyer, no block owner/operator has the right, through contract or otherwise, to manage the pollutant-emitting activities – here essentially the generation of electricity – of another block group.

Although the block owners have the right to use the water in the reservoir for operations, that right is subordinate to the rights of the original Plant Wansley co-owners and is not a mechanism by which Georgia Power or any other entity can control the operations of another block. Other avenues could have been taken to secure a source of water for the power blocks; resorting to the reservoir was a matter of convenience.[16] Moreover, EPA has already rejected a similar argument by the Sierra Club that the shared water infrastructure at this location creates common control. Order Denying Petition for Objection of Permit, In the Matter of Oglethorpe Power Company Wansley Combined Cycle Energy Facility, Roopville, Georgia, Electric Power Generation Petition IV-2002-1, November 15, 2002; *see* 67 Fed. Reg. 79610 (Dec. 30, 2002)]. That decision was upheld by the Eleventh Circuit Court of Appeals in *Sierra Club v. Leavitt*, 368 F.3d 1300, 1308 n.13 (11th Cir. 2004).

For all of these reasons, none of the four factors EPA uses to determine common control lead to the conclusion that the three power block groups – Blocks 6 & 7, Block 8 and Block 9 – are under the common control of any owner/operator and thus are one major source.

### 3. The Proximity Of The Power Block Groups Creates No Common Control

When analyzing the control of facilities, a common situation arises where one facility is actually located on the property of another facility (note that here, no power block is located on another's real property). In that type of situation, EPA presumes that one facility locating on the land of another establishes the requisite control relationship sufficient for a finding of control, leading to source aggregation. To overcome this presumption and disaggregate such sources, EPA requires the companion facilities, on a case-by-case basis, to explain how they interact with each other. Some of the questions asked in that analysis include:

- Do the facilities share common work forces, plant managers, security forces, corporate executive officers or boards of executives?
- Do the facilities share equipment, other property or pollution control equipment? What does the contract specify with regard to pollution control responsibilities of the contractee? Can the managing entity of one facility makes decisions that affect pollution control at the other facility?
- Do the facilities share common payroll activities, employee benefits, health plans, retirement funds, insurance coverage, or other administrative functions?
- Do the facilities share intermediates, products, byproducts or other manufacturing equipment? Can a new source purchase raw materials from and sell or buy

[16] Westvaco Determination (facility not under common control with another facility, where operations not dependent except by convenience).

products to other customers? What are the contractual arrangements for providing goods and services?

- Who accepts the responsibility for compliance with environmental control requirements? Who would be liable for violations of such requirements?
- What is the dependency of one facility on the other? If one shuts down, what are the limitations on the other to pursue "outside business interests?"
- Does one operation support the operation of the other? What are the financial arrangements between the two entities?

Letter from William A. Spratlin, Director, Air, RCRA and Toxic Division, Region VII to Peter R. Hamlin, Chief, Air Quality Bureau, Iowa Department of Natural Resources (September 18, 1995) (the "Spratlin Analysis").

In the determinations that apply the Spratlin Analysis, EPA notes that the list is to serve as a screening tool that helps it (and often the state) determine the extent of ties the new source has to an existing source, and ultimately whether the new source is a separate source not under common control. Although here no source is located on the property of another (because each power block owner owns the land and equipment), so that no presumption of common control exists, the Spratlin Analysis reinforces the utter lack of common control between the power block groups.

Here, the three power block groups share no work forces, payroll activities, employee benefits, health plans, retirement funds or insurance coverage. Although security forces are shared, that is done as a matter of convenience, since all of the emission units in Table I are located within the same outer fence that surrounded the original Plant Wansley. Common security is not, of course, a sufficient indicator of control. Other than some discrete shared pieces, for water and gas supply and for drainage, done only as a matter of convenience and incapable of conveying any indicia of control, no equipment is shared between the power block groups. Each block group has its own separate pollution control equipment, and there is no mechanism whereby any block owner can control the operations or emissions from another block. The blocks share no products, by-products or intermediates with any other unit. The CEF and Block 9 have their own Title V operating permits, and each respective permittee – Oglethorpe for Block 8 and MEAG for Block 9 – retains exclusive responsibility for compliance with all applicable CAA requirements at its corresponding power block.

Georgia Power holds the National Pollutant Discharge Elimination System ("NPDES") permit, including a general stormwater permit, for all three power plants listed in Table I, so that all wastewater discharged by the blocks is permitted through those permits. This, however, is also done primarily as a matter of convenience, since the Blocks 6 & 7, CEF and Block 9 properties are surrounded by the original Plant Wansley property. Creating a separate discharge system for these units would have been inconvenient and unnecessary, especially as compared to simply allowing Georgia Power, the permittee for Plant Wansley, to continue acting in that role for the wastewater from the power blocks. The NPDES permits provide no mechanism for any entity – including Georgia Power – to control another's power block.

### 4. Other Source Aggregation Law Refutes EPD's Site Determination

Prior source determinations under other EPA regulatory programs support Oglethorpe Power's position that the emission units in Table I can not be considered as only one major source. Several years ago, the issue of whether a Toxic Release Inventory ("TRI") report under the Emergency Planning and Community Right-to-Know Act ("EPCRA") § 313 and 40 C.F.R. Part 372 was required for the CEF arose. The answer turned on whether the CEF should be aggregated with the other sources at the site for purposes of TRI reporting. Due to the case-specific nature of source aggregation, Oglethorpe Power decided to seek an applicability determination from EPA, which administers the TRI reporting system, as to whether TRI reporting was required for the CEF.

Section 372.22 of the TRI regulations requires that a facility satisfying the "covered facility" definition in §372.22 report pursuant to the provisions of §372.30.[17] Under §372.22, a facility that meets all of the following criteria for the calendar year is considered to be a covered facility:

- The facility has 10 or more full-time employees;
- The primary SIC Code for the facility, with the necessary qualifiers, is included in the list covered by EPCRA §313 reporting;
- The facility manufactures, processes or otherwise uses EPCRA §313 chemicals; and
- The facility exceeds any applicable reporting thresholds under EPCRA §313 for the applicable chemicals.

With respect to SIC Code 4911, which is just one of the SIC Codes listed in §372.22, application of the TRI reporting requirements is "limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce... ."[18]

The CEF does not combust coal or oil to generate electricity – the combustion turbines and duct burners are all fired only by natural gas. Therefore, §372.22 does not on its face encompass the CEF. Because the Electric Utility Guidance suggests that there are cases where non-coal or non-oil combustion operations may nevertheless be subject to TRI,[19] Oglethorpe Power sought an applicability determination. Included with that request was a discussion and analysis of existing law regarding the aggregation of establishments for purposes of applying TRI requirements.

Under TRI, the CEF and Plant Wansley must be part of the same covered facility for the thresholds in TRI to be exceeded by the CEF. Part 372 defines a "facility" as:

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[17] Section 372.30 in turn requires that covered facilities report each chemical listed in §372.65 manufactured, processed or otherwise used above threshold quantities.

[18] 40 CFR §372.22, *see also* EPCRA Section 313 Industry Guidance for Electric Generating Facilities, EPA 745-B-00-004 (February 2000)(hereafter the "Electric Utility Guidance").

[19] *See* Electric Utility Guidance p. 2-6.

> *Facility* means all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with such person).

40 CFR § 372.3. Based on this test, Oglethorpe Power demonstrated to EPA that the CEF is not part of the same "facility" that contains Plant Wansley, because the CEF and Plant Wansley are not "owned" by the same person, are not "operated" by the same person, and are not "owned or operated by ... any person which controls, is controlled by, or [is] under common control with such person." EPA agreed with this assessment and concluded that the CEF was not subject to TRI.

Because there is no common control among the three groups of power blocks, EPA should reach a similar conclusion here– that there is no one major source – under Title V and PSD.

### 5. EPD's Own Guidance Contradicts The Site Determination

EPD's determination regarding the extent of the Title V "site" in the Permit is inconsistent with the Division's internal "Site Determination Guidance" document. As noted in Oglethorpe Power's comments to EPD on the proposed renewal permit, *see* Exhibit C, application of the guidance score sheet to the facts results in a score of less than 100, indicating that there is no common control among the power block groups. Thus, the power blocks should not, under EPD's own internal guidelines, be considered as one Title V major source (or PSD stationary source).

## D. EPA Should Object to The Permit And Instruct EPD To Revise It and The Associated Narrative Accordingly

Oglethorpe Power requests that EPA object to the Permit as currently drafted, instructing that the Site Determination in Condition 1.1 be modified to correctly reflect applicable law. Accordingly, Oglethorpe Power requests that EPA instruct that Condition 1.1 of the Permit be revised as follows:

> The Wansley Steam-Electric Generating Plant (AFS No. 149-00001), the Chattahoochee Energy Facility (AFS No. 149-00006), and the Municipal Electric Authority of Georgia-Wansley Unit 9 (AFS No. 149-00007) ~~comprise the same Title V site~~ are located on contiguous property and have the same two-digit SIC code but have been issued separate Title V operating permits, because power Blocks 6 and 7 (that part of AFS No. 149-00001 consisting of Emission Units CT6A, DB6A, CT6B, DB6B, CT7A, DB7A, CT7B & DB7B), the Chattahoochee Energy Facility (AFS No. 149-00006, consisting of Emission Units CT8A, DB8A, CT8B & DB8B) and the Municipal Electric Authority of Georgia-Wansley Unit 9

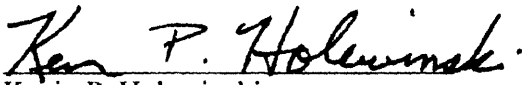
(AFS No. 149-00007, consisting of Emission Units CT9A, DB9A, CT9B and DB9B) are not under common control.[20]

Oglethorpe Power also requests that EPA instruct EPD to withdraw the Permit narrative and amend its response to comments to be consistent with the Permit revision sought above.

## IV. CONCLUSION

For all the reasons set forth above, pursuant to 40 C.F.R. § 70.8(d), it was improper for EPD to conclude that all of the emission units in Table I comprise the same "Title V site." Thus, Oglethorpe Power requests that EPA object to the Permit and associated narrative and instruct EPD to correct the Permit and response to comments accordingly.

Filed this 11th day of July, 2007.



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[20] Suggested additions are shown by underline and deletions by ~~strikethrough~~. The language requested here is identical to that sought in the petition filed with EPD. It differs slightly from that requested in the comments to the proposed permit. There, Oglethorpe Power requested that EPD make a site determination that the CEF is permitted as a "single Title V major source," implicitly recognizing that the current site determination in the proposed permit was incorrect. Given the concern of the Plant Wansley co-owners with this same site determination being reflected in all three Title V permits for the three plants in Table I, it was decided that the request should be slightly revised to be more definitive.

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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| **In the Matter of the Chattahoochee Energy Facility Title V Operating Permit 4911-149-0006-V-03-0** | ) | **Petition No. _____** |
| **Issued by the Georgia Environmental Protection Division** | ) | |

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing OGLETHORPE POWER CORPORATION'S PETITION TO HAVE THE ADMINISTRATOR OBJECT TO THE TITLE V PERMIT FOR THE CHATTAHOOCHEE ENERGY FACILITY was served on the following parties by hand delivery:

J. I. Palmer, Jr.
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Carol A. Couch
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This 11th day of July, 2007.

Kevin P. Holewinski

ATL-2278671v4