UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	**RESPONSE TO MOTION TO INTERVENE**
	)	
Atlantic County Utilities Authority	)	**Docket No. CAA-02-2015-1212**
	)	
Respondent.	)	**Honorable Helen Ferrara**
	)	**Presiding Officer**
In a proceeding under	)	
Section 113(d) of the Clean Air Act	)	

Comes now Complainant Director of the Division of Enforcement and Compliance Assistance ("DECA"), EPA Region 2, by and through her counsel, pursuant to Rules 22.16(b) and 22.11(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("CROP", 40 C.F.R. §§ 22.16(b) and 22.11(a)) and respectfully requests leave to oppose SCS's motion to intervene. In the alternative, Complainant reserves the right to oppose the current motion pending Movant's supplementation of the information provided in the current motion so that Complainant may evaluate better the issues involved.

Movant filed its motion to intervene with the Regional Hearing Clerk of EPA Region 2 on October 27, 2015 via United States Postal Service first-class mail.

Pursuant to the "Practice Manual of the Office of Administrative Law Judges" ("Practice Manual"), Complainant has 20 days from the date a motion is served to file its answer. *Practice Manual* at 18. Although Movant does not provide a Certificate of Service with its motion, the accompanying letter has a date of October 22, 2015. Service of the motion was made via certified mail return receipt requested dated October 22, 2015. Complainant's answer is therefore well within the 20 days allowed for an answer to a motion served via "first class mail or commercial delivery service, but not by overnight or same day delivery." 40 C.F.R. §§ 22.7 (c) and 22.16 (b).

Complainant bases her opposition to the motion on the following grounds:

PRELIMINARY STATEMENT

Complainant commenced an action for civil monetary penalties in an administrative Complaint and Notice of Opportunity for Hearing, CAA-02-2015-1212 (the "Complaint"), pursuant to the Clean Air Act ("Act" or "CAA"), 42. U.S.C. § 7401 *et seq.* at Section 113(d) of the Act, 42 U.S.C. § 7413(d), and in accordance with the CROP, 40 C.F.R. Part 22. The Complaint against Atlantic County Utilities Authority ("ACUA" or "Respondent") was served on September 30, 2015. ACUA operates a facility at 6700 Delilah Road, Egg Harbor Township, New Jersey ("Facility"), where it provides, among other things, municipal solid waste landfilling services.

The Complaint alleges ACUA violated 40 C.F.R. Part 60, Subpart WWW, the "Standards of Performance for Municipal Solid Waste Landfills" ("Landfill NSPS"), 40

C.F.R Part 63 Subpart AAAA and the "National Emission Standards for Hazardous Air Pollutants for Municipal Solid Waste Landfills," ("Landfill NESHAP"), which were promulgated pursuant to Sections 111, 112 and 114 of the Act, 42 U.S.C. §§ 7411-7412 and 7414, at ACUA's Facility. The Landfill NESHAP include maximum available control technology ("MACT") standards for landfills and will be referred to herein as "Landfill MACT." The Complaint also alleged that ACUA violated its operating permit issued by the State of New Jersey Department of Environmental Protection ("NJDEP") pursuant to Title V of the Act and in accordance with New Jersey Administrative Code ("N.J.A.C.") 7:27-22, which was developed pursuant to 40 C.F.R. Part 70 and promulgated under 42 U.S.C. §§ 7661-7661f. The allegations result from a compliance evaluation EPA conducted at the Facility on December 17-18, 2013 ("EPA Inspection").

Under Rule 22.11(a) of the CROP (40 C.F.R. § 22.11(a), a motion for leave to intervene must set forth the grounds for the proposed intervention, the position and interest of the movant, and the likely impact that intervention will have on the expeditious progress of the proceeding. The standard for review of such a motion under Rule 22.11(b) of the CROP (40 C.F.R. § 22.11(b)) is that the movant must demonstrate: 1) his presence in the proceeding would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties; 2) the movant will be adversely affected by a final order; and 3) the interests of the movant are not being adequately represented by the original parties. Under Rule 22.16(a)(4) of the CROP, 40 C.F.R. § 22.16(a)(4), motions must also be accompanied by any affidavit,

certificate, other evidence or legal memorandum relied upon. The Movant here has failed to set forth the elements required for relief, has failed to make the required demonstration to justify intervenor status in the current proceeding, and has failed to support its motion with the documents and evidence on which it relies. For these deficiencies, the motion should be denied.

I. FAILURE TO SET FORTH THE REQUIRED ELEMENTS

Rule 22.11(a) of the CROP, 40 C.F.R. § 22.11(a), requires that a motion to intervene set forth the grounds for the proposed intervention. Further, Rule 22.16(a)(1) of the CROP, 40 C.F.R. § 22.16(a)(1), requires that all motions shall state the grounds therefor with particularity. Movant fails to meet either of these requirements. In the current motion, Movant simply recites SCS's relationship with the Respondent and explains its interpretation of the events surrounding the EPA Inspection. The motion never reaches the grounds on which Movant should be granted leave to intervene. However, Complainant is intrigued by Movant's description of SCS's business as one providing, among other things, "operation" and maintenance services for "a broad range of solid waste and environmental control facilities" as well as "manag[ing] operations at hundreds of solid waste facilities throughout the country." *Letter Brief*, Page 1, Paragraph 1. Complainant requests more information on whether SCS "manages operations" at the ACUA Facility and for Movant to describe what "manages operations" entails in this instance. If Movant is an "operator" of the Facility with the

meaning of the Act and the Landfill NSPS, and the Landfill MACT, Complainant reserves her right to join Movant as a co-Respondent in the proceeding and will request leave to so join Movant.

Rule 22.11(a) of the CROP, 40 C.F.R. § 22.11(a), requires that a motion to intervene set forth the position and interest of the movant. The only issues in the current proceeding are the three counts of regulatory violations, identified in the Complaint, for which the Respondent in this matter is liable because it is an "owner and operator" of the Facility, a major source, under Titles I (Sections 111 and 112) and V of the Act and implementing regulations under 40 C.F.R. Parts 60 and 63. Here, Movant altogether fails to state its position and interest in the case. Movant has not identified SCS as an "owner" or "operator," as defined under the Act and the Landfill NSPS, of the Respondent's Facility or otherwise explained how the Act or 40 C.F.R. Parts 60 and/or 63 apply to it.

Furthermore, Complainant has been prejudiced by Movant's failure to state its position and interest in its motion. Because of this shortcoming, Complainant is left to guess, as she has had to do in this response, at Movant's position and interest in the proceeding, and therefore, is handicapped in her ability to defend against any assertion Movant may make, and has made in the current motion. Without a more definite statement of how the current proceeding affects its interest, Movant has failed to meet the requirement under 40 C.F.R. § 22.11(a) of the CROP, and its motion to intervene must be denied. However, Complainant reserves the right to join Movant to this

proceeding should new information surface that would demonstrate Movant is an "owner or operator" of the Facility in question, and thus subject to the Landfill NSPS and Landfill MACT.

Rule 22.11(a) of the CROP, 40 C.F.R. § 22.11(a), requires that a motion to intervene set forth the likely impact that intervention will have on the expeditious progress of the proceeding. Movant fails altogether to address this matter. On the other hand, Movant's intervention would delay the proceeding because it would burden the administration of the case by adding to the number of parties involved (e.g., for purposes of communication and scheduling) and would potentially complicate the issues of regulatory duty with contractual liability between ACUA and SCS.

II. FAILURE TO MEET THE STANDARD OF REVIEW

Rule 22.11(c)(1) of the CROP, 40 C.F.R. § 22.11(c)(1), requires a movant to demonstrate that his presence in the proceeding would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties. Movant here fails altogether to address this issue in its Motion to Intervene, but its presence in the proceeding would prolong adjudication, complicate the issues involved, and prejudice the interests of Complainant. Movant's participation in the proceeding would prolong adjudication and complicate the issues involved, because it would confuse the Respondent's liability for its regulatory violations with the business obligations, and contractual liability thereto, between Respondent and SCS. Moreover, Movant's

contractual interests with the Respondent, Complainant could only guess that they would constitute Movant's interest in the current proceeding, are in direct opposition to Complainant's and, therefore, would result in prejudice to Complainant.

Rule 22.11(c)(2) of the CROP, 40 C.F.R. § 22.11(c)(2), requires a demonstration that a movant's interests would be affected by the final order. Although the CROP is silent on the required showing of interest sufficient that, if affected by the final order, would justify intervention in a proceeding, federal Courts are clear that a movant for intervention must demonstrate a "significant protectable interest" to justify intervention. *Sierra Club v. US EPA*, 995 F2d. 1478, 1484 (9th Cir. 1993). An interest is significant and protectable where the interest is protected under some law, *California v. United States*, 50 F.3d 405, 409 (9th Cir. 1998), and movant will suffer practical impairment of its interest as a result of the pending litigation, *Emeryville v. Robinson*, 621 F.3d 1251, 1259 (9th Cir. 2010). "A movant's interest is plainly impaired if disposition of the action in which intervention is sought will prevent any future attempts by the applicant to pursue its interest." Moore's Federal Practice, Civil § 24.03 (3d ed. Supp. 2007).

Movant here has failed altogether to state its interest in the proceeding, but Complainant can only guess that if it did, Movant's only interest would be through its contractual business relationship with the Respondent. Although Movant's contractual interest may be said to be protected by law, the contract between the Respondent and Movant, and any terms therein, is not at issue in the current proceeding, which involves only the Respondent's legal responsibility under the Act, the Landfill NSPS and Landfill

MACT. Movant has not placed the terms of its contract with the Respondent at issue nor has Movant attached the contract, or described its terms in sufficient detail, to allow Complainant to determine whether the contract, or its terms, would constitute an interest that would justify Movant's intervention in the current proceeding.

Even if Movant's contractual obligation constitutes a protectable interest that would justify intervention, which it does not, Movant's interest would not be affected by the final order in the current proceeding. Movant's interest is related to the proceeding only insofar as it has a contractual obligation Respondent, and Movant's liability thereto, is not at issue in the current proceeding, which relates only to the Respondent's liability for violations of its regulatory obligations under the Act and 40 C.F.R. Parts 60 and 63. Regardless of the outcome here, Movant will have an opportunity to litigate its contractual liability in a separate proceeding. Therefore, Movant's interest will not be affected by the final order.

Rule 22.11(c)(3) of the CROP, 40 C.F.R. § 22.11(c)(3), requires a movant to demonstrate that his interests are not adequately represented by the original parties. Although the CROP is silent on the criteria for determining adequacy of representation, federal Courts reviewing such matters examine three factors: (1) whether the present parties will "undoubtedly make all of the intervenor's arguments;" (2) whether the present parties can and will make those arguments; and (3) whether the proposed intervenor "offers a necessary element to the proceedings that would be neglected." *Zurich American Insurance Company v. ACE American Insurance Company*, 2012 U.S.

Dist. LEXIS 126949 at 3 (quoting *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)). The most important issue is "how the interest compares with the interest of existing parties." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). Moreover, an interest would be inadequately represented in federal Courts if: "although the applicant's interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to the movant's interests; there is collusion between the representative party and the opposing party; or the representative party is not diligently prosecuting the suit." *United States v. Territory of the Virgin Island*, 748 F.3d 514, 520 (3rd Cir. 2014).

In the current motion, Movant has failed altogether to address whether its interest would be represented adequately by the existing parties. However, Movant's interests are adequately represented by the current parties, because the Respondent will undoubtedly make all of Movant's arguments. First, although Movant fails to state its interest in the case, any interest it would have relates to its ability to conduct surface monitoring, and its actual performance of such monitoring, of the landfill in accordance with the regulatory requirements, including those related to instrument specifications and methodology. Movant specifically states in its Motion that it is obligated contractually to the Respondent to conduct landfill surface emission monitoring in accordance with the Landfill NSPS. *Letter Brief*, Page 1, Paragraph 4. In this instance, the Respondent's interest in the proceeding and that of Movant's do not diverge at all -- they align exactly. Both Respondent and Movant have a shared interest in

demonstrating that the Facility's landfill surface monitoring obligations, including the instrument specifications and methodology required by 40 C.F.R. Parts 60 and 63, were met. The Respondent will undoubtedly argue that SCS's technician did not fail to present the EPA Inspectors with a monitoring instrument that met the requirements under 40 C.F.R. Part 60, that he was able to demonstrate that he was able to perform the calibration and other operations of the monitoring instrument as required. The Respondent has every reason to call upon all its relationships and resources to make these demonstrations because it would otherwise be liable to the Complainant for a penalty assessment.

Second, the present parties, specifically the Respondent, can and will make the same arguments Movant would make. The Respondent can make the same arguments Movant would make, the Respondent has the ability and authority to investigate, including questioning its own employees and contractors about their actions and conversations, the events surrounding the EPA Inspection. The Respondent will make the same arguments Movant would make, because the Respondent is ultimately responsible for demonstrating that it complied the Landfill NSPS and MACT as well as its Title V operating permit. If it fails to make every argument available to defend against the allegations made in the Complaint, the Respondent will be liable for a penalty. No collusion, nor danger of collusion, exists between Complainant and Respondent in the current proceeding, because Complainant and the Respondent have an arm's length relationship. Complainant is a regulatory agency that has issued a

penalty order to the Respondent.

Third, Movant does not offer anything necessary to the proceedings that would otherwise be neglected by the existing parties. To the contrary, the existing parties, especially the Respondent, have every incentive diligently to prosecute the case. Under 40 C.F.R. Parts 60 and 63, Respondent, as the owner and operator of the Facility, is responsible for conducting surface monitoring of landfill emissions, to have the monitoring equipment specified under the regulations, and to ensure proper operation of that equipment as required by the regulations. Respondent's duty to conduct the monitoring in accordance with 40 C.F.R. Parts 60 and 63 exists independently of whether it contracts with a third party or conducts the required monitoring on its own. If it fails to demonstrate compliance, the Respondent is liable for the penalties assessed. Compliance is determined by whether Respondent's actions, including the actions of any other party (such as a contractor) to which it delegates those responsibilities, meet the monitoring requirements, including those for instrument specifications and methods. Consequently, Respondent has an incentive to vigorously defend against the allegations in the Complaint. Movant's interest in the proceeding, Complainant would have to guess because Movant has not stated, may be to demonstrate that it provided surface monitoring services to "comply with NSPS regulations, 40 CFR 60.755 (sic)" in order to meet its contractual obligation to the Respondent. *Letter Brief*, Page 1, Paragraph 4. That interest, which perfectly aligns with Respondent's interest in demonstrating that it conducted, through its contractor, surface monitoring of landfill

emissions in compliance with the relevant requirement under 40 C.F.R. Parts 60 and 63, is already well represented in the proceeding. Movant cannot demonstrate that its interests, if any, in the proceeding are not adequately represented by existing parties; it, therefore, fails to meet the requirement under Rule 22.11(c)(3), 40 C.F.R. § 22.11(c)(3).

Under Rule 22.16(a)(4) of the CROP, 40 C.F.R. § 22.16(a)(4), motions must also be accompanied by "any affidavit, certificate, other evidence or legal memorandum relied upon." In the current motion, Movant has made a number of factual assertions, including, among other things: its business relationship with the Respondent in the proceeding; the specific provisions of SCS's contract with ACUA for performance of surface monitoring of the Facility; the content of discussions between SCS's employee and EPA Inspectors during the Inspection; direct observations of SCS's employee that contradict the EPA Inspector's account of the events surrounding the Inspection; that SCS's employee was trained to conduct the required monitoring; planning between EPA, ACUA, and SCS for scheduling of the Inspection; and the call, and its substance, that SCS's employee made to ThermoFisher for technical support regarding the allegedly malfunctioning TVA1000B unit. Movant however, failed to file any affidavits, certificate, other evidence or legal memorandum upon which Movant relied to establish the truth of those assertions. Therefore, Movant has failed to meet the requirement of Rule 22.16(a)(4) of the CROP, 40 C.F.R. § 22.16(a)(4), and the motion should be denied.

Finally, Movant has moved to intervene and to file a non-party brief in the current

proceeding. *Letter Brief*, Page 1, Paragraph 2. However, under Rule 22.11(c) of the CROP, upon successfully obtaining leave to intervene, the intervenor would become a full party to the proceeding. 40 C.F.R. § 22.2(c). Movant cannot have it both ways; it cannot achieve intervenor status and remain outside the fray of the proceeding as a non-party. The CROP has a provision under Rule 22.11(d) to allow entities with an interest in a proceeding to move for leave to submit an *amicus curiae* brief, and upon grant of leave to do so, the entity may submit a non-party brief in support of his position. Movant has this option if it feels it possesses information helpful to the Presiding Officer in deciding on the issues presented or to aide in the expeditious resolution of the proceeding. Movant has not taken this action. Movant's Motion to Intervene should be denied.

For the reasons outlined, Complainant respectfully requests leave to oppose the motion. In the alternative, Complainant requests leave to reserve opposition to the motion pending Movant's supplementation of the information provided in the current motion so that Complainant may evaluate better the issues involved.

Should the current motion be granted, Complainant respectfully requests that Movant's intervention in the current proceeding is limited to addressing issues related to the equipment used and the SCS technician's actions and statements made during the Inspection. Complainant also respectfully requests that Movant not be given leave to brief or conduct discovery on any other issue involved in the proceeding.

Dated: November 10, 2015

New York, New York

Respectfully submitted,

Anhthu Hoang
Assistant Regional Counsel
Counsel for Complainant

CERTIFICATE OF SERVICE

I certify that the foregoing **RESPONSE TO MOTION TO INTERVENE**, dated, November 10, 2015, was sent this day in the following manner to the addressees listed below:

Original and one copy
by Hand Delivery to:

Karen Maples
U.S. Environmental Protection Agency, Region 2
Regional Hearing Clerk
290 Broadway, 16th Floor
New York, NY 10007

Copy sent by Certified Mail and facsimile to:

Attorney for Respondent:

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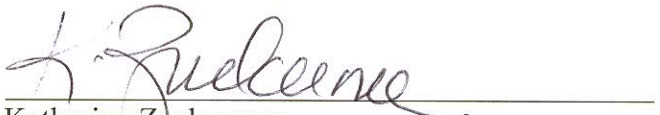
11260 Roger Bacon Dr., Suite 300
Reston, VA 20190

Presiding Officer:

The Honorable Helen Ferrara
U.S. Environmental Protection Agency, Region 2
Regional Judicial Officer
290 Broadway, 16th Floor
New York, NY 10007



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Dated: November 10, 2015