pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION
SECRETARY

November 7, 2012

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Clean Air Council Supplement to Its Petition to the Administrator to Make a Finding that Pennsylvania is Failing to Implement Requirements in its State Implementation Plan; and to Apply Sanctions Relating to these Alleged Failures.

Dear Administrator Jackson:

This letter is in response to the Clean Air Council (CAC) supplement to its petition in the above matter, which was submitted to the U.S. Environmental Protection Agency (EPA) on August 28, 2012. The CAC once again alleges that the Pennsylvania Department of Environmental Protection (DEP) is failing to implement the Pennsylvania State Implementation Plan (SIP) and failing to adequately administer and enforce the Pennsylvania Title V permitting program as it relates to single source determinations. However, what CAC fails to mention is that Pennsylvania's approach to implementing its federally-approved programs is consistent with the federal judiciary's most recent pronouncement on the issue of single source determinations.

Rather than promptly withdrawing its February 16, 2012 Petition, in light of the August 7, 2012 *Summit Petroleum v. U.S. EPA* decision, 2012 U.S. App. LEXIS 16345, 42 ELR 20167, CAC supplements its original Petition by pointing to yet another single source decision it does not like in a different industrial sector, *i.e.*, the permit for the resurrected Philadelphia Oil Refinery. That decision was the product of joint efforts and mutual agreements of the federal, state and City air regulation authorities and saved about 1,000 direct jobs. As I commented publically at the time CAC sued to overturn the decisions:

> A year ago, we faced the death of this refinery and along with it, tens of thousands of local jobs; a way of life in the Delaware Valley; and a real threat to our nation's security in our own ability to refine oil on shore. Today, through Governor Corbett's leadership and bipartisan work between federal and state officials, as well as labor, management and the private sector investment firm, we found a solution which saved the refinery and protected the environment.
>
> Ultimately, overall emissions will be lower through, among other things, the use of lower sulfur Bakken Crude oil from North Dakota, which is extracted by horizontal drilling and hydraulic fracturing, and the facility's use of Pennsylvania natural gas for on-site power generation. It is shameful that this out-of-touch, extreme organization would for no reason jeopardize the livelihoods and way of life of so many people and also jeopardize America's ability to refine oil on our own shores.

Moreover, the CAC's suit was so outrageous it prompted a stern rebuke from Leo Gerard, the United Steelworkers International President. President Gerard had this to say:

> The compromise that allowed the Philadelphia refinery to be sold was a positive outcome after months of hard work by USW members, local, state and national leaders, and environmental officials. This agreement will mean nearly 1,000 good-paying jobs at the plant, as well as thousands more jobs created or saved in the community and along the supply chain.
>
> At a time when unemployment and other economic hardships are still a reality for so many families, we believe it is in the best interests of everyone involved to allow this agreement to go forward.
>
> In addition, this arrangement will, over the long term, mean cleaner overall emissions and cleaner air through the use of lower-sulfur crude oil and the use of natural gas for power generation.

Moreover, in a joint letter from Rob Wonderling, President and CEO of the Greater Philadelphia Chamber of Commerce and Pat Eiding, President of the Philadelphia Council AFL-CIO (copy enclosed) they urge the CAC to immediately drop its misguided and out of touch lawsuit against the Philadelphia Refinery. They say:

> Your lawsuit threatens to undermine the work of a broad bipartisan coalition of federal, state, and city governments along with private equity and union labor stakeholders that came together in an extraordinary common effort to preserve a refining presence while ensuring benefits to the environment.
>
> Not only were jobs saved thanks to the coalition of actions, but thousands of new jobs were created and the reputation of Philadelphia as an east-coast refining and energy hub was cemented. Indeed, the new owners of the Philadelphia Refinery are already contemplating several new clean energy projects that would displace less environmentally-friendly fuels. These projects would not only create new green jobs and benefit the local economy, but would also help preserve our country's energy security and reduce our reliance on foreign oil.
>
> In light of the many economic and environmental benefits, the coalition action is a win-win for the residents of Philadelphia and a meaningful reminder of what can be accomplished when stakeholders work together. Unfortunately, your lawsuit threatens to undo these benefits. . . .

All of this should give you a flavor for just how far out of touch and extreme CAC is and just how much credibility CAC has lost in its own backyard and nationally, even among its own traditional supporters. Beyond that, CAC dishonestly hides important facts from you and the public. CAC fails to even mention to you a federal court Circuit Court of Appeals decision that directly contradicts the merits of its Petition and is on all-fours support for the way DEP views single source determinations under the Clean Air Act for the natural gas sector. The case, and I am sure you are very well aware of it, is *Summit Petroleum v. EPA.*

Again, the CAC Petition is without merit and should not be granted.

***Summit Petroleum v. U.S. EPA* Analysis**

As you are well aware, the U.S. Court of Appeals for the Sixth Circuit rejected the EPA contrived functionality or interrelationship test to determine whether separate sources are adjacent for the purposes of making single source determinations in air quality permitting matters. While EPA asserted that the term "adjacent" is ambiguous because the agency never defined a specific physical distance by which the term is defined, the Court disagreed and applied the same legal reasoning as DEP does on this issue. The Court consulted the dictionary to ascertain the meaning of the word "adjacent" and concluded that two entities are adjacent when they are "close to; lying near; next to; or adjoining. 2012 U.S. App. LEXIS 16345 at *21. Because the word "adjacent" does not refer to an assessment of the functional relationship between two activities, a functional relationship that exists between two facilities is immaterial to the concept of adjacency.

As the Court noted, "EPA makes an impermissible and illogical stretch when it states that one must ask the purpose for which two activities exist in order to consider whether they are adjacent to one another." 2012 U.S. App. LEXIS 16345 at *24. In the end, the Court concluded that "the EPA's interpretation of the requirement that activities be 'located on contiguous or adjacent properties,' i.e., that activities can be adjacent so long as they are functionally related, irrespective of the distance that separates them, undermines the plain meaning of the text, which demands, by definition, that would-be aggregated facilities have physical proximity." *Id.* at *29.

However, the *Summit Petroleum* Court did not stop there. It also found that EPA's interpretation of "adjacency" that incorporates a functionality test is inconsistent with the regulatory history of the PSD program. EPA's three-part test for identifying emissions activities that belong to the same "building, structure, facility, or installation" was developed in response to *Alabama Power Co. v. Costle,* 636 F.2d 323 (D.C. Cir. 1979), which heard a challenge to EPA's previous PSD regulations. In the preamble to the post-*Alabama Power* 1980 final amendments to the current PSD rules, the functional relationship test was one of the additional criteria the EPA considered and rejected.

In reviewing this regulatory history the *Summit Petroleum* Court noted, EPA specifically found that assessing whether activities were sufficiently functionally related to constitute a single source "would be highly subjective" and would make "administration of the definition substantially more difficult, since any attempt to assess those interrelationships would have embroiled the Agency in numerous, fine-grained analyses." 2012 U.S. App. LEXIS 16345 at *38, (quoting 45 Fed. Reg. 52676, 52695 (Aug. 7, 1980)). Rather than incorporate the functionality test into the regulation, EPA incorporated the "industrial grouping" criterion into the regulation instead.

The Sixth Circuit was also not persuaded that EPA's interpretation should be entitled to deference merely because the agency had a longstanding policy – documented throughout the years in formal applicability determinations – of requiring an assessment of the interrelatedness of the activities. Instead, the Court chastised EPA by saying that "an agency may not insulate itself from correction merely because it has not been corrected soon enough, for a longstanding error is still an error." 2012 U.S. App. LEXIS 16345 at *33.

Finally, the Court found that EPA's functional relationship test is inconsistent with its own guidance memorandums. *Id.* at *41. The September 22, 2009 McCarthy Memorandum that addresses single source determinations within the context of natural gas operations promotes a

neutral and plain meaning application of the EPA's Title V program, directing permitting authorities to rely principally on the three regulatory criteria. Moreover, the McCarthy Memorandum acknowledges that proximity may well be the overwhelming and determinative factor at the end of any case-by-case analysis. In the end, the Court vacated EPA's decision aggregating Summit's sour gas wells and sweetening plant into a single major source under the Title V permitting program.

Pennsylvania's Approach to Making Single Source Determinations

As you know, on October 12, 2011, DEP developed "Guidance for Performing Single Stationary Source Determinations for Oil and Gas Industries" (Document Number 270-0810-006). This document provides that air quality permitting staff should rely on the three-part regulatory criteria under the PSD and Title V regulations to determine whether emissions from two or more facilities should be aggregated and treated as a single source for PSD and Title V air quality permitting purposes.[1] If it is determined that those facilities 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, they will be treated as a single facility for air quality permitting purposes in Pennsylvania.

Because neither Pennsylvania nor federal regulations define the terms "contiguous" or "adjacent," DEP permit writers are guided by the plain meaning of those terms. EPA guidance on this issue is instructive, but not dispositive. In any case, all single source determinations made within the context of the natural gas industry are made on a fact-specific case-by-case basis in Pennsylvania.

This approach, with which the CAC takes issue, was directly addressed and approved by the Court in *Summit Petroleum.* Neither the CAC nor EPA can point to any legal requirement that requires DEP to take functionality into account when determining whether sources are "adjacent" in making a single-source determination for the natural gas industry. Therefore, it is difficult, if not impossible, to assert that Pennsylvania is not implementing its program consistent with federal law.

CAC would have DEP ignore legally binding regulatory criteria and implement the Pennsylvania program under the guise of a discredited functional relational test. A regulatory program must first and foremost be guided by the regulatory language and not through guidance letters and policy statements that morph the meaning of "contiguous" or "adjacent" properties to mean that operations on the properties be "interdependent" or "functionally related." That interpretation is not supported by any court decision, the EPA or state regulations, or the PSD regulatory history.

The Sixth Circuit's decision greatly clarifies what has become an unnecessarily complicated and unpredictable issue for the oil and gas industry over the last several years. Although this case is not binding precedent in Pennsylvania, it confirms the common sense approach that DEP takes on this issue. Moreover, this decision also confirms the sound legal foundation upon which

---

[1] *See* 40 C.F.R. § 52.21(b)(6) and 40 C.F.R. § 71.2. *See also* 25 Pa. Code Chapter 127, Subchapters D (Prevention of Significant Deterioration of Air Quality), E (New Source Review) and G (Title V Operating Permits) of Pennsylvania's approved program. For the purposes of Subchapter E, Pennsylvania's federally approved definition of "facility" found at 25 Pa. Code, Section 121.1 (Definitions) does not include a requirement for sources to have the same SIC code to be part of the same facility.

DEP's implementation of its federally-approved programs rest. The *Summit Petroleum* case will undoubtedly act as guidance to other state permitting authorities across the country and will be a persuasive defense to oil and gas permitting challenges filed in other states.

DEP will continue to implement its program consistent with the language of the regulation and corresponding case law. However, every case has its unique set of facts and circumstances. As such, single-source determinations will continue to be applied on a case-by-case basis, depending upon the facts of each particular case.

Conclusion

As the decision in *Summit Petroleum* shows, DEP is implementing its federally-approved air quality permitting program consistent with the law. Consequently, the CAC Petition is without merit and should not be granted.

Should you have any questions on the issues raised in this letter, please contact Vince Brisini, Deputy Secretary for Waste, Air, Radiation, and Remediation, by e-mail at vbrisini@pa.gov or by telephone at 717.772.2725.

Sincerely,

Michael L. Krancer
Secretary

Enclosure

cc: Pennsylvania Congressional Delegation
Shawn Garvin, Regional Administrator, EPA Region 3
Leslie Gromis
Rob Wonderling
The Honorable Pat Meehan
Pat Eiding (Philadelphia AFL-CIO)
Gerard (International President United Steelworkers)
Jim Savage (United Steelworkers)
Tom Paese, Esquire
Mayor Michael Nutter
Phil Rinaldi

GREATER PHILADELPHIA
CHAMBER OF COMMERCE
Get involved. Get results.

October 31, 2012

Joseph O. Minott, Esq.,
Executive Director, Clean Air Council
135 South 19th Street | Suite 300 | Philadelphia PA, 19103

Re: Clean Air Council Opposition to Philadelphia Refinery Aggregation Decision

Dear Mr. Minott:

On behalf of the Greater Philadelphia Chamber of Commerce and the Philadelphia Council of the AFL-CIO, we are writing to express disappointment at your organization's recent lawsuit challenging the decisions taken by the Pennsylvania Department of Environmental Protection, the City of Philadelphia and the United States Environmental Protection Agency to save the Philadelphia Refinery and the many jobs that it provides to our community. Your lawsuit threatens to undermine the work of a broad bipartisan coalition of federal, state, and city governments along with private equity and union labor stakeholders that came together in an extraordinary common effort to preserve a refining presence while ensuring measurable benefits to the environment. Together, representing leaders throughout the region's business and labor communities, we strongly urge you to drop your lawsuit immediately.

The Philadelphia Refinery is a fixture in Philadelphia and has provided local residents with good, well-paying jobs for over a century. When Sunoco, Inc., announced its plans to exit the refining business last September, the Philadelphia area braced itself for the traumatic economic consequences from the impending loss of thousands of local jobs. Not only were these jobs saved thanks to the coalition actions, but thousands of new jobs were created and the reputation of Philadelphia as an east-coast refining and energy hub was cemented. Indeed, the new owners of the Philadelphia Refinery are already contemplating several new clean energy projects that would displace less environmentally-friendly fuels. These projects would not only create new green jobs and benefit the local economy, but would also help preserve our country's energy security and reduce our reliance on foreign oil.

In light of the many economic and environmental benefits, the coalition action is a win-win for the residents of Philadelphia and a meaningful reminder of what can be accomplished when stakeholders work together. Unfortunately, your lawsuit threatens to undo these benefits. We urge you to recognize the many benefits to our environment, the economy, and the citizens of Philadelphia and the rest of the Commonwealth and support increased economic opportunities and cleaner air in the Philadelphia area by dropping your lawsuit.

Sincerely,

Rob Wonderling
President & CEO
Greater Philadelphia Chamber of Commerce

Pat Eiding
President
Philadelphia Council AFL-CIO

Cc: Clean Air Council Board of Directors