



pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION



Office of Chief Counsel

OVERVIEW OF SINGLE SOURCE DETERMINATION

Office of Chief Counsel
July 22, 2015

Tom Wolf, Governor

John Quigley, Secretary

Background of Single Facility Determination

- The federal PSD regulations, which Pennsylvania incorporates by reference in their entirety, define "stationary source" to mean "any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant."
- Moreover, a "building," "structure," "facility," or "installation" is defined as all the pollutant-emitting activities which:
 - belong to the same industrial grouping;
 - are located on one or more contiguous or adjacent properties; and
 - are under the control of the same person.
- If two or more air contamination sources are determined to be a single source, the sources should be treated as a single air contamination source for PSD and Title V permitting purposes.
- However, if the three-pronged regulatory criteria for single source determinations are met, all sources should be aggregated irrespective of their separate status as "minor" or "major" air contamination sources.

Background of Single Facility Determination

- For non-attainment NSR purposes, Pennsylvania defines “facility” to mean
 - “an air contamination source or combination of air contamination sources located on one or more contiguous or adjacent properties
 - and which is owned and operated by the same person under common control.”
- If two or more air contamination sources are determined to be a single source with emissions, which collectively meet or exceed the major source thresholds and the two-part criteria under this definition, they should be treated as a single air contamination source for non-attainment NSR permitting purposes.
- However, the case-by-case single source determination would apply to all sources irrespective of their separate status as “minor” or “major” air contamination sources.

Background of Single Facility Determination

- Neither Pennsylvania nor federal regulations define the terms “contiguous” or “adjacent” or place any definitive restrictions on how distant two emission units can be and still be considered located on contiguous or adjacent properties for the purposes of a single source determination.

Background of Single Facility Determination

- A case-by-case determination is needed to determine if sources are considered contiguous or adjacent.
- The following items should be considered in the analysis:
 - (1) properties located within a quarter mile are considered contiguous or adjacent;
 - (2) sources within this quarter-mile distance should be aggregated so long as they meet the other two regulatory criteria (same industrial grouping and common control);
 - (3) emission units on two or more separate, but near-by, properties and separated by an intervening railroad, road, or some other obstacle may be considered contiguous or adjacent;
 - (4) facilities should not be “daisy-chained” together to establish a contiguous grouping; and
 - (5) properties located outside a quarter mile may be considered contiguous or adjacent on a case-by-case basis.

Pennsylvania Litigation

- *Clean Air Counsel v. MarkWest Liberty Midstream* (Pennsylvania EHB Docket No. 2011-072-R) (Washington County)
 - MarkWest midstream operator
 - Houston Gas Plant and 9+ compressor stations
 - Gathering, separation, fractionation, shipping

Pennsylvania Litigation

- Operations in WV and OH also.
- No wells
- Distances (Houston Plant to compressors: 1.5-11 miles)
- Ownership not in question
- CAC arguing functional interrelationship – gas from one station can't get to interconnect with another pipeline

Pennsylvania Litigation

- Facts changed to CAC's detriment while appeal pending
 - New two way pipeline to WV
 - New Options
- CAC withdrew appeal for letter from DEP stating that adjacency decisions will be memorialized in future review memos, and little else.

Pennsylvania Litigation

- *Group Against Smog and Pollution v. DEP and Laurel Mountain Midstream* (Pennsylvania EHB Docket No. 2011-065-R) (Fayette County)
 - Laurel Mountain Midstream is a midstream operator, owns and operates the Shamrock Compressor Station
 - GASP argued that the compressor stations and wells are a single source

Pennsylvania Litigation

- Ownership and Control and Adjacency
- Wells located 1.3 miles to 17 miles from Shamrock Station
- Also, even if single source, combined emissions less than major source threshold (Note: Only argue VOC)
- GASP just withdrew appeal, no settlement deal
- GASP lawyer credits regulatory change (e.g. new GP-5) for withdrawal.

Pennsylvania Litigation

- *Clean Air Counsel v. DEP and Sunoco*
(Pennsylvania EHB Docket No. 2012-165-L)
(Philadelphia/Delaware Counties)
 - Sunoco owned Philadelphia and Marcus Hook oil refineries
 - Eighteen miles apart
 - Separately permitted by DEP and Philadelphia, respectively, for decades

Pennsylvania Litigation

- During discussions about closure of refineries or their sale, single source status was reevaluated
- Despite distance, integrated operation of the two refineries lead to single source determination
- Not actively litigated
- Bad press for CAC
- Settled for letter clarifying that there is no “fourth” single source evaluation factor

Pennsylvania Litigation

- *Clean Air Counsel v. DEP and Angelina Gathering Company* (Pennsylvania EHB Docket No. 2012-141-R (Bradford County))
 - Clean Air Counsel asserted that a compressor station and gas wells (up to 9) should be considered a single source
 - Wells owned by a purportedly related company

Pennsylvania Litigation

- CAC seems anxious to litigate until it realized that even if the wells and compressor station are a single facility, it would not be a major facility
- Settled for letter from DEP counsel stating that North Central Region will identify wells and PTE for wells that are “contiguous or adjacent” to compressor station and under “common ownership or control” in the plan approval or GP review memo.

Pennsylvania Litigation

- *National Fuel Gas v. DEP* (Pennsylvania EHB Docket No. 2013-123-B) (McKean/Elk Counties)
 - Only active single source case before EHB
 - Appeal by company of DEP decision to treat Seneca Resources' Pad G Compressor Station and NFG's Mt. Jewet Interconnect Station as a single source

Pennsylvania Litigation

- DEP concedes different SIC codes
- Support relationship
 - Same property
 - Common ownership
 - Produce a “common product”
- Separated by less than 1.5 miles
- Combined emissions do not make facility a major source

SUMMARY AND CONCLUSIONS

- Several cases, no conclusive EHB decisions yet
- Single source litigation most likely in newly developing fields
- EHB view is unclear
- Justify decision in review memo; review with counsel .

Federal Litigation

- In *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, (6th Cir. 2012) the U.S. Court of Appeals for the Sixth Circuit vacated EPA's determination that a natural gas operation's plant and production wells constituted a single major source.
- EPA had determined that Summit Petroleum Corporation's plant and wells, which sit on various parcels in a 43-square-mile area, are "adjacent" to one another, in part, because they are functionally interrelated.

Federal Litigation

- However, the Court agreed with the company's contention that EPA's determination that the physical requirement of adjacency can be established through mere functional relatedness is unreasonable and contrary to the plain meaning of the term "adjacent."
- The Court vacated EPA's decision and remanded it back to the agency to determine whether Summit's facilities were sufficiently physically proximate to be considered "adjacent" within the ordinary, i.e., physical and geographical, meaning of that requirement.

Federal Litigation

- On December 21, 2012, in response to the *Summit Petroleum* decision, the EPA issued a memorandum (“Summit Directive”) informing EPA Regional Directors that “interrelatedness” would no longer be considered in determining “adjacency” for single source determinations conducted in the States of Michigan, Ohio, Kentucky and Tennessee.
- The 2012 memo also provided that outside the Sixth Circuit, EPA does not intend to “change its longstanding practice of considering interrelatedness in the EPA permitting actions in other jurisdictions.”

Federal Litigation

- In *Nat'l Env'tl. Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d 999, (D.C. Cir. 2014), the U.S. Court of Appeals for the District of Columbia Circuit vacated EPA's December 2012 memorandum directing regional air officials to apply varying air permitting requirements in different states.
- The Court said that the policy outlined in that memo violated the agency's regional consistency regulations, which are found at 40 C.F.R. Part 56.
- The Court also held that that EPA's Summit Directive "creates a standard that gives facilities located in the Sixth Circuit a competitive advantage."

Federal Litigation

- In *PennFuture v. Ultra Resources* (4:11-CV-1360), U.S. District Court for the Middle District of Pennsylvania upheld a PADEP determination not to aggregate eight compressor stations and associated natural gas wells.
- The specific question that the Court examined was whether the air contamination sources are "adjacent", making Ultra Resources' facilities ineligible for GP-5 permits and requiring the company to meet the more stringent emission permitting requirements under the New Source Review program.
- Ultra Resources urged the Court to look exclusively at the plain meaning of that term, while PennFuture asked the Court to look at the functional interdependency of those facilities when making its determination as to whether they are "adjacent."

Federal Litigation

- After examining *Summit Petroleum* and the Department's current guidance, the court found that the plain meaning of the term "adjacent" should control as to whether two or more facilities should be aggregated for single source purposes.
- Based on the number of separate and unconnected parcels of land on which the compressors are located and where some of these parcels are separated by several miles, the Court found that the properties at issue cannot reasonably be considered "adjacent" under either *Summit Petroleum* or the Department's Guidance.

Federal Litigation

- Despite the court's finding that the plain meaning of "adjacent" should control a determination of whether two or more facilities should be aggregated, the court declined to hold that functional interrelatedness can never lead to, or contribute to, a finding of adjacency.
- The Court noted that both the Department's Guidance and Pennsylvania Environmental Hearing Board ("EHB" or "Board") decisions have recognized that interdependence, and whether the sources meet "the common sense notion of a plant," may be factors in single source aggregation decisions in Pennsylvania.

Federal Litigation

- While *Summit Petroleum* emphasizes the importance of applying the plain meaning of the term "adjacent", the court views the willingness of the Department to permit consideration on a case-by-case basis of the interdependence of facilities when determining whether they should be aggregated as a single source to be a proper exercise of the authority granted to Pennsylvania under the Clean Air Act to adopt "more stringent, or at least as stringent" definitions of the terms defined by the EPA. See 40 C.F.R. 51.165(a)(1).



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Questions?



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Office of Chief Counsel

Robert “Bo” Reiley
Assistant Council, Regulatory Counsel
Office of Chief Counsel
rreiley@pa.gov
717.787.7060