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ENVIRONMENTAL LAW

# Aggregating Air Emissions From Multiple Locations

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*Special to the Legal*

It may seem overly technical to dwell on the exact meaning of the term industrial facility. A facility is readily conceived as one or more structures within a designated area surrounded by a fence or other clearly demarcated border. Industrial activities include manufacturing or similar operations performed by the facility's operator within the facility's boundaries. This conceptualization provides a workable understanding that is adequate for most purposes.

At times, however, related industrial operations may not be confined to a single location. Separation of activities may result from various factors, including among others the availability or cost of land, the need for available infrastructure to support certain portions of a manufacturing operation, proximity to resources or customers or the dependence of activities on particular geological features. Natural gas exploration and production are examples of interrelated activities that occur at multiple spatially separated locations often connected by pipelines to common compressor stations or industrial plants.

Determining whether structures physically separated from each other should be considered a single facility takes on importance when applying environmental requirements that establish facilitywide thresholds. For example, certain federal Clean Air Act and corresponding Pennsylvania Air Pollution Control Act requirements apply to any "stationary source," which is defined as "any building, structure, facility or installation which emits or may emit any air pollutant." If a stationary source (i.e., the entire facility) directly emits or has the potential to emit more than the threshold amount of a pollutant as specified in the applicable regulations, the source is a "major source." Permits to construct (plan approvals) and permits to operate (Title V permits) issued to major sources may contain requirements that are more stringent or procedurally burdensome than approvals issued to "minor sources." Where the quantity of emissions from activities at a particular location falls under the regulatory threshold, the operator has an interest in avoiding the aggregation of these emissions with any other emissions sufficient to trigger requirements applicable to major sources.

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Two recent decisions have evaluated whether, for air permitting purposes, emissions from natural gas wells should be aggregated with emissions from a compressor station or processing plant connected to the wells by pipelines. In *Group Against Smog and Pollution v. Pennsylvania Department of Environmental Protection*, EHB Docket No. 2011-065-R (August 14, 2012), the Pennsylvania Environmental Hearing Board addressed a challenge to an air quality plan approval that the Pennsylvania Department of Environment Protection issued to Laurel Mountain Midstream Operating (LMMO) for the installation of gas-fired compressor engines and a turbine at its Shamrock compressor station. GASP contended that the state DEP should have aggregated emissions from the 21 natural gas wells with emissions from the compressor station connected to the gas wells. In other words, GASP contended that the DEP should have considered the gas wells and compressor station to be a single stationary source for purposes of construction permitting under the air program.

To evaluate GASP's contention, the board applied the three criteria established by the Environmental Protection Agency and incorporated into Pennsylvania's regulations for determining whether the pollutant-emitting activities constitute a single source: They must belong to the same Standard Industrial Classification (SIC) Major Group, be located on contiguous or adjacent properties and be under control of the same person.

Turning first to the SIC criterion, the board concluded that the compressor station and natural gas wells fall under the same SIC Major Group, Group 13. The board rejected LMMO's contention that its own use of the North American Industry Classification System in lieu of the SIC precluded application of the criterion. The board emphasized that the DEP uses the SIC Major Group system, and had properly classified LMMO as falling within SIC Major Group 13.

With respect to the "common control" criterion, the board looked to the definition utilized by both the Securities and Exchange Commission and the EPA: "The possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting shares, by contract or otherwise." Acknowledging that LMMO owned only the compressor station and not the natural gas wells, GASP argued that the service contract between LMMO and the gas well operators demonstrated common control. GASP also emphasized that one of the operators was a member of LMMO's management committee whose vote was required for certain management decisions. LMMO countered that the well operator held only a 49 percent ownership interest in LMMO and that the other operating member of LMMO directed its activities.

The board declined to grant summary judgment to either party on the issue of common control. The board agreed with GASP that the relationship between the well operator and LMMO was "more than merely a commercial relationship," but declined to determine whether it amounted to common control without a fully developed evidentiary record.

The parties likewise vigorously contested the third criterion in the regulations, whether the compressor station and gas wells were "contiguous or adjacent." LMMO noted that the gas wells were located a quarter-mile to almost five miles or more from the compressor station. Citing dictionary definitions, LMMO argued that at these distances, the facilities were not in contact (contiguous) nor did they have a common endpoint or border (adjacent). GASP responded that not only physical distance, but also the physical connections and operational relationships between the gas wells and the compressor station, should be considered.

The board denied the motion for summary judgment on this issue. The DEP's guidance document, "Guidance for Performing Single Stationary Source Determinations for Oil and Gas Industries," effective October 12, 2011, classifies properties located a quarter-mile or less apart as contiguous or adjacent, and advocates a case-by-case review of properties located further apart. The guidance notes: "While interdependence may be considered when conducting a single-source determination, the plain meaning of the terms 'contiguous' and 'adjacent' should be the dispositive factor." The board concluded that a full evidentiary record was necessary to make a case-by-case determination. The board also noted that in *Summit Petroleum v. EPA*, Nos. 09-4348, 10-4572 (6th Cir. August 7, 2012), the U.S. Court of Appeals for the Sixth Circuit overturned the EPA's reliance on functional relationships to classify activities conducted on separate properties as "adjacent" under the stationary-source test. Although the board noted that it was not bound by the Sixth Circuit's decision, it found the reasoning persuasive.

## THE *SUMMIT* DECISION

In *Summit*, the Sixth Circuit examined whether various natural gas production wells connected by pipelines to a common facility constituted a single stationary source under the Title V program. All of the relevant natural gas wells were owned by Summit and situated within a 43-mile area. Pipelines connected the wells to a natural gas sweetening plant also owned by Summit. A sweetening plant removes hydrogen sulfide from the gas before the gas is conveyed to the user. The EPA concluded that, notwithstanding the large area involved, the relationship between the natural gas wells and the sweetening plant warranted aggregating their emissions for Title V purposes. Because the common control and shared industrial grouping criteria of the EPA regulations defining when pollution-emitting activities should be aggregated were satisfied, Summit's appeal focused on whether the facilities were contiguous or adjacent.

In a divided decision, the Sixth Circuit concluded that the word "adjacent" as used in the EPA's regulations is unambiguous and means physical proximity. The court's review of several dictionary definitions of "adjacent," including "not distant," supported that conclusion. Likewise, the etymology of the term adjacent implies that distance in space or time is critical to its meaning. In contrast, the purpose of the activities or their functional relationship is not referenced in the definitions. The Sixth Circuit also noted that the Supreme Court viewed a wetland as adjacent to navigable waters and tributaries only if it physically abutted or adjoined such waters. See *Rapanos v. United States*, 547 U.S. 715 (2006).

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Because the *Summit* court found the term "adjacent" to be unambiguous, it refused to defer to the EPA's view that functionally interrelated but distant facilities could be considered as a single stationary source. The EPA asserted that it has a long history of considering the functional relationship of sources when determining whether they are proximate. In addition, a 2007 memorandum from EPA acting assistant administrator William L. Wehrum interpreting the EPA's regulations as allowing aggregation of oil and gas emissions where the stationary sources are "located in proximity of each other" was withdrawn in 2009 by assistant regional administrator Gina McCarthy. McCarthy emphasized the need for a case-by-case analysis. She noted that physical proximity is only one factor to consider in making a source determination for purposes of the New Source Review and Title V permitting programs, although in some cases it may be the overwhelming factor.

The court rejected the EPA's arguments. The court noted that the unambiguous language in the EPA regulations could not be overcome by the agency's long-standing practice. In the court's words, "a long-standing error is still an error." The court also concluded that even if the regulation were ambiguous, the regulatory history of the EPA's Title V plan contradicted the EPA's interpretation. In the course of its rulemaking process, the EPA rejected as too subjective a proposed criterion focused on the functional relationship of activities, instead employing the SIC Code as a more workable criterion. Even the McCarthy memorandum upon which the EPA relied did not set forth a functional relationship test. Without some geographical constraint, a facility connected by interstate pipelines might "spread out literally across the country." This would defy the common sense notion of what a facility is.

In a dissenting opinion, Judge Karen Nelson Moore found the term "adjacent" to be ambiguous. She would defer to the EPA's decision to consider functional interrelatedness in deciding whether the distance between the facilities was close enough to characterize them as adjacent. In her view, the court majority had ignored the purpose of the Clean Air Act in controlling emissions. The EPA, the expert agency with regulatory authority, was best qualified to decide whether activities should be subject to regulation. Moore noted that a test focusing solely on physical proximity would allow companies to avoid Title V permitting by spreading activities among different parcels.

Both the *Summit* majority and dissent made valid points. Underlying the majority opinion is the principle that the language of the regulations controls when a facility is subject to rigorous permitting requirements. When planning where to locate its operations, a company is entitled to rely on regulations defining a facility based upon the physical distance between activities. On the other hand, air emissions from separate sources can combine to create the same impact as emissions from a single source. For that reason, among others, certain environmental statutes require examination of cumulative impacts. Because the physical proximity of emission sources may not determine whether the emissions may adversely affect human health, the *Summit* and *GASP* decisions illustrate the need for revised regulations more closely targeted to the harms that they were designed to prevent. •