

Continuing litigation over source determinations in the oil and gas industry can be anticipated

On October 12, 2011, the Pennsylvania Department of Environmental Protection issued a document entitled, "Guidance for Performing Single Stationary Source Determinations for Oil and Gas Industries."¹ While DEP sought public comments concerning the guidance, the guidance took effect immediately. Guidance at 1.

On November 21, 2011, Region III of the U.S. Environmental Protection Agency (EPA) issued comments highly critical of the guidance, questioning its legality and suggesting that the guidance may be without legal effect (the "comments").² Comments at 1. EPA further warned that it will be reviewing and commenting on source determinations made by DEP to "assure" that they reflect reasoned decision making consistent with EPA-approved aggregation criteria and historical source determinations. Comments at 7.

Regardless of the legitimacy of EPA's comments (EPA guidance, upon which EPA comments are based, is being challenged in the courts), and at least until the issue is resolved judicially, citizens and environmental groups may seize upon EPA's comments to support pending and new litigation over source determinations.

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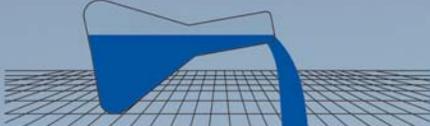
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A detailed administrative record, if it can be made, before the DEP and if necessary, the Pennsylvania Environmental Hearing Board (EHB), supporting the operator's preferred position on source determination both under DEP and EPA guidance would be useful and may be necessary to defend against and defeat such litigation.

Background

A. Legal authority for source aggregation

Source aggregation occurs when the emissions of multiple individual sources are combined for air-permitting purposes. If the combined emissions exceed the permit-triggering thresholds of the Prevention of Significant Deterioration (PSD), the New Source Review (NSR) non-attainment and Title V programs of the Clean Air Act as implemented in Pennsylvania, then the com-



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March 1 deadline for submitting air emissions data

Following up on a notice sent in December to 99 operators involved in unconventional natural gas development, the Department of Environmental Protection published a notice in the January 28 Pennsylvania Bulletin giving a March 1 deadline for the industry to submit air emissions data covering 2011.

Sources and activities at unconventional natural gas operations that the department has identified as subject to the emissions reporting requirements include compressor stations; dehydration units; drilling rigs; fugitives, such as connectors, flanges, pump lines, pump seals and valves; heaters; pneumatic controllers and pumps; stationary engines; tanks, pressurized vessels and impoundments; venting and blow down systems; well heads; and well completions. The source reports are due for activities at all unconventional natural gas wells and facilities that support the unconventional natural gas wells.

Operators are to provide information for emissions such as carbon monoxide, nitrogen oxides, particulates and sulfur dioxide.

The Pennsylvania Bulletin notice indicates that the department may grant an extension from the March 1 deadline for a reasonable cause.

DEP must provide a comprehensive inventory of air emissions to the U.S. Environmental Protection Agency by year's end. This inventory is updated every three years. This will be the first time emissions data for Marcellus production and processing operations are included in the inventory, which covers a wide variety of industries.

Source reports and annual emissions inventories will be due to the department by March 1 each year for operations during the preceding calendar year.

Questions about complying with the reporting requirements should be directed to Michael Rudawski with the Bureau of Air Quality's Air Information Section, 717-783-9241 or mrudawski@pa.gov. Additional information can be found at www.depweb.state.pa.us/portal/server.pt/community/air/6000.

bined source will be subject to the extra and more complex permitting requirements of those programs rather than the less complex requirements that would otherwise apply to the individual sources.

The legal authority for source aggregation for PSD purposes in Pennsylvania arises from the definition of "stationary source" in the federal PSD regulations. Under 40 C.F.R. §52.21(b)(5), "stationary source" is defined as any building, structure, facility or installation which emits or may emit a regulated NSR pollutant. 40 C.F.R. §52.21(b)(6) defines the terms "building," "structure," "facility" or "installation" as, "all of 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 (or persons under common control)..." (emphasis added) (the "source aggregation criteria" or "aggregation criteria").

Lastly, in the Preamble to the 1980 PSD regulations, EPA made pertinent comments concerning the Source Aggregation Criteria. EPA stated that to be considered a "source" for PSD purposes, "(1) it must carry out reasonably the purposes of PSD; (2) it must approximate a common sense notion of 'plant'; and (3) it must avoid aggregating pollutant-emitting activities that as

a group would not fit within the ordinary meaning of 'building,' 'structure,' 'facility,' or 'installation.'" See 45 Fed. Reg. 52676; 52694-52695 (August 7, 1980).

B. Guidance for source aggregation

As mentioned, both EPA and DEP have developed source aggregation guidance for the oil and gas industries. See Gina McCarthy Memorandum, to Regional Administrators, September 22, 2009 ("McCarthy Memorandum") at 1-2, *available at* www.epa.gov/region7/air/nsr/nsrmemos/oilgaswithdrawal.pdf; see Guidance at 1-7.

The purpose of source aggregation guidance is to guide permit reviewers in the application of the aggregation criteria. See Guidance at 1.

EPA and DEP guidance address two of the three aggregation criteria: the criteria as to whether the sources are part of the same industrial group and under common control in a similar manner. See McCarthy Memorandum at 1-2; see Guidance at 4-5, 7-8. However, DEP's approach to the criteria of whether the sources are located on contiguous or adjacent properties is somewhat different than EPA's.

Under EPA's guidance, sources may be considered "contiguous" or "adjacent" if they are interdependent. *Summit Petroleum Corp. v. EPA*, Nos. 09-4348, 10-4572 (6th Cir. filed Nov. 4, 2009, and Dec. 15, 2010). This approach permits the aggregation of sources located miles apart, such as gas wells and compressor stations, if the sources are deemed "interdependent." in obvious disregard of the plain meaning of the terms "contiguous" or "adjacent."

In contrast, DEP guidance states, "while interdependence may be considered when conducting a single source determination,



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the plain meaning of the terms “contiguous” and “adjacent” should be the dispositive factor when determining whether stationary sources are located on “contiguous” or “adjacent” properties.” Guidance at 6. In other words, DEP’s guidance makes proximity the dispositive factor at least for the oil and gas industries.

In reaching this conclusion, DEP relied in part on EPA’s own comments, discussed previously, from the preamble to the 1980 PSD regulations concerning the aggregation criteria. Guidance at 5-6. DEP also based this conclusion on the dictionary definitions of the terms “contiguous” or “adjacent” which are not defined in the regulations; the conclusions that characterizing a typical natural gas well field, which may involve multiple wells located at great distances from compressor stations and the compressor stations as a single source does not comport with the common sense notion of “plant” and is inconsistent with the plain meaning of the terms “contiguous” or “adjacent”; and DEP’s further determination that EPA guidance is not binding. Guidance at 5-6.

DEP guidance also adopts the quarter-mile rule of thumb that has been adopted in several other states. Under the rule of thumb, sources located within a quarter-mile of one another are considered “contiguous” or “adjacent,” while sources farther apart can be deemed “contiguous” or “adjacent” on a case-by-case basis.

Another significant difference between the DEP’s guidance and the EPA guidance is that DEP directs permit reviewers to consider the surface area on which the source is located as well as any area cleared for the source to be the property in determining whether sources are “contiguous” or “adjacent.” Guidance at 6.

Operators can anticipate continuing uncertainty and litigation

In its November 21, 2011, comments on DEP’s guidance, EPA alleges that DEP has misconstrued EPA’s comments from the preamble to the 1980 PSD regulations concerning the aggregation criteria and improperly used that interpretation to elevate those comments to the level of additional source aggregation criteria. Comments at 1-2. The problem with that approach, according to EPA, is that EPA’s comments from the preamble were not promulgated as regulatory criteria and DEP’s use of them, as such, allegedly violates the public’s right to notice and comment on rulemaking. Comments at 1-2. EPA makes similar comments with respect to the guidance’s adoption of the quarter-mile rule of thumb and the definition of property. See Comments at 4-5.

Notwithstanding their legitimacy (as mentioned, EPA guidance is being challenged in the courts), environmental groups and citizens may, as noted, seize upon EPA’s comments to support pending and new litigation over source determinations by the DEP, at least until the issue is resolved by the courts.

There are already two appeals pending before the EHB and one complaint before the U.S. District Court for the Middle District of Pennsylvania seeking to have air permitting decisions by DEP overturned on the basis that they essentially do not comply with EPA’s guidance. *Group Against Smog and Pollution v. Commonwealth of Pennsylvania, Department of Environmental Protection*, EHB Docket No. 2011-065-R, (Plaintiff seeks aggregation of 73 well sites with a compressor station) available at http://ehb.courtapps.com/public/document_shower_pub.php?csNameID=4267; *Clean Air Council v. DEP*, EHB Docket No. 2011-072-R (alleging that DEP acted arbitrarily when it issued an air permit without conducting a proper aggregation analysis for oil and gas operations) available at [!\[\]\(5361750c22c4e047a52f4eac1ec2d4cc_img.jpg\)

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lic/document_shower_pub.php?csNameID=4274; *Citizens for Pennsylvania's Future v. Ultra Resources, Inc.*, No. 11-CV-01360-JEJ (M.D. Pa. filed July 21, 2011) (plaintiff seeks aggregation of well sites located over 558 square mile area in Tioga and Potter Counties with 7 compressor stations) *complaint available at* www.frackinginsider.com/Citizens%20v.%20Ultra_aggregation.pdf.

As mentioned, a detailed administrative record made before the DEP and the EHB, supporting the operator's preferred position on source determination under both DEP and EPA guidance could provide a strong defense to such litigation and may be necessary to such defense. For example, if the argument is that multiple wells located at long distances from a compressor station to which they are connected and with which they are under common control should be aggregated, a detailed administrative record demonstrating that the wells and compressor station should not be aggregated because they are too distant, and because there is no legal, factual or engineering reason that compels gas from a particular well to be directed to a particular compressor station would be very useful in helping to defeat such a challenge.

The question of the appropriate application of the source aggregation criteria is unsettled both in Pennsylvania and nationally. Continued monitoring of both pending and future source aggregation cases will therefore be necessary until the question is resolved. □

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mental compliance counseling. He has served as the chair of the environmental law section of the Allegheny County Bar Association.

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¹ The guidance is available from Virendra Trivedi, Environmental Engineer, Manager, New Source Review Section, Division of Permits, DEP (vtrivedit@pa.gov).

² The Comments are also available from Mr. Trivedi. See footnote 1.



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