DEVELOPMENTS AND TRENDS IN
CLEAN AIR ACT SOURCE “AGGREGATION”

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I. INTRODUCTION

The topic of Clean Air Act (“CAA”) source determinations has been a relatively hot and controversial one for the natural resources industries, and especially the oil and gas sector in recent years. The topic has been animated by high profile administrative and judicial challenges by environmental advocacy groups and permittees alike, several of which are still pending; a recent federal appellate court decision holding a long-standing internal EPA interpretation to be unlawful, and a sequence of divergent approaches for oil and gas air permitting in particular by EPA itself. This paper reviews developments in CAA source determinations against this backdrop, including a review of the statutory and regulatory basis for source determinations, and several significant recent challenges to single-source air permitting of natural resources activities and facilities that are separated by varying distances, but are connected by pipelines, conveyors, and/or roads. The paper also touches upon the separate, but related prohibition on circumvention of New Source Review (“NSR”) permitting requirements.

II. REGULATORY BASIS FOR SOURCE DETERMINATIONS

The Clean Air Act defines a stationary source of air pollutants in such a way that multiple activities and items of equipment may collectively be permitted at a single source. This frequently happens without dispute or controversy when the emission points are all within a common fence line at a single facility, although the consequence of permitting such sources together is to increase the “potential to emit” of the collective “source,” possibly triggering additional requirements for larger sources of air pollutants. This can also happen for sources at multiple different facilities or properties if certain criteria are satisfied. The single-source permitting of multiple facilities is commonly referred to as source aggregation or source determination.

The Clean Air Act regulates major sources of criteria pollutants and major sources of hazardous air pollutants (“HAPs”) more stringently than it regulates minor sources of those pollutants. It does so through the provisions of the New Source Review and Title V operating permit...
MEMORANDUM

SUBJECT: Applicability of the Summit Decision to EPA Title V and NSR Source Determinations

FROM: Stephen D. Page, Director, Office of Air Quality Planning and Standards

TO: Regional Air Division Directors, Regions 1-10

The purpose of this memo is to explain the applicability of the decision by the 6th Circuit Court of Appeals to vacate and remand a Title V applicability determination made by the EPA for Summit Petroleum’s oil and gas operations in Michigan.

In Summit, the EPA had decided that, under our existing source determination regulations, the oil and gas sweetening plant and related wells owned and operated by Summit Petroleum were a single stationary source for purposes of Title V operating permit program. As a single source, the aggregate emissions from these operations were high enough to trigger the requirement to obtain a Title V operating permit. Summit Petroleum then challenged that determination in the 6th Circuit, and the Court ultimately issued a decision that vacated and reversed our determination. Summit Petroleum Corp. v. EPA et al., Consolidated Case Nos. 09-4348 and 10-4572 (6th Cir. Aug. 7, 2012). The Court’s majority decision concluded that the term “adjacent,” as used in our regulations, was related only to physical proximity and, thus, found that our determination was improper, because we had considered the functional interrelatedness of the wells and sweetening plant in determining that they were “adjacent.” The EPA sought rehearing of the Court’s decision, but that request was denied.

The EPA has a longstanding practice of interpreting “adjacent” to include a consideration of the functional interrelatedness of two emission units, in addition to the physical distance between them, in making source determinations in both the Title V and new source review (NSR) programs. Because of the Court’s decision, however, the EPA may no longer consider interrelatedness in determining adjacency when making source determination decisions in its Title V or NSR permitting decisions in areas under the jurisdiction of the 6th Circuit, i.e., Michigan, Ohio, Tennessee, and Kentucky. The EPA is still assessing how to implement this decision in its permitting actions in the 6th Circuit.

Outside the 6th Circuit, at this time, the EPA does not intend to change its longstanding practice of considering interrelatedness in the EPA permitting actions in other jurisdictions. In permitting actions occurring outside of the 6th Circuit, the EPA will continue to make source determinations on a case-by-case basis using the three factor test in the NSR and Title V regulations at 40 CFR 52.21(b)(6) and 71.2, respectively, and consistent with more than three decades of the EPA applicability determinations and guidance letters regarding application of those criteria, which have considered both proximity and
interrelatedness in determining whether emission units are adjacent. The three factor test considers emission-producing activities to constitute a single source if they are:

- under common control of the same person (or persons under common control);
- located on one or more contiguous or adjacent properties; and
- in a single major industrial grouping (the same two-digit SIC code).

The EPA is assessing what additional actions may be necessary to respond to the Court’s decision.

Please share this information with potential permit applicants, as well as the state and local agencies in your Region. For any questions regarding this guidance, please contact Raj Rao at rao.raj@epa.gov.

cc: Regional Air Program Managers
APPENDIX 1
<table>
<thead>
<tr>
<th>Date</th>
<th>Document Type</th>
<th>Recipient/Plaintiff</th>
<th>Sender/Defendant</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>5/16/1980</td>
<td>Letter</td>
<td>Eller, Clyde B.</td>
<td>Reich, Edward E.</td>
<td>Letter to Clyde Eller, Director, Enforcement Division, Region 9, from Edward Reich, EPA Region 7, regarding the Wilmington Section and the Dominguez Section of Shell's Wilmington Refinery Complex; 1.8 miles, interconnected by 20 pipelines that transfer intermediary products back and forth. Managed as a single refinery</td>
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<td>9/18/1995</td>
<td>Letter</td>
<td>Hamlin, Peter R. Spratlin, William A. (Flournoy, Karen A.)</td>
<td></td>
<td>Letter from William A. Spratlin, EPA Region 7, to Peter Hamlin, Iowa Department of Natural Resources - explicitly provides that such &quot;screening questions&quot; are only applicable in situations where one entity locates on another entity's property</td>
</tr>
<tr>
<td>8/2/1996</td>
<td>Letter</td>
<td>See Addressees Seitz, John S.</td>
<td></td>
<td>Letter from John Seitz, Director, Office of Air Quality Planning Standards, re: Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permit Programs of the Clean Air Act (Act) ;</td>
</tr>
</tbody>
</table>
This memorandum and attachments provide guidance on implementing section 112 air toxics, title I (Part D) nonattainment new source review (nonattainment NSR), title I (Part C) prevention of significant deterioration (PSD), and title V operating permit programs with regard to "major source" determinations at Federal military installations.

Letter to Richard Long, Director, Air Program, EPA Region 8, from Robert Kellam, Acting Director, Information Transfer & Program Integration Division, OAAQS, re: analysis of the applicability of prevention of significant deterioration (PSD) to the Anheuser-Busch, Incorporated Brewery and Nutri-Turf, Incorporated Landfarm and Fort Collins, Colorado / 6 miles, Brewery must use landfarm to dispose of waste water so TOTAL dependency to operate, pipeline connects

Letter to Andrea Malinowski, Du Pont, from Maria Doa, Chief, Toxics Release Inventory Branch, EPA, re: interpretation of joint ventures and the EPCRA section 313 definition of a facility

Letter to Andy Ginsberg, Manager, Program Operations Section, Air Quality Division, Oregon Department of Environmental Quality, from Jon Cabreza, Permits Team Leader, Office of Air Quality, EPA Region 10, re: Title V permitting issue for the ESCO Corporation plants in Portland,
8/8/1997
Letter
Menlove, Lynn R.
Long, Richard R.
EPA letter
8.8.1997
Menlove
(8P2-A)
Letter to Lynn Menlove, Manager, New Source Review Section, Division of Air Quality, Utah Department of Environmental Quality, from Richard Long, Director, Air Program, EPA Region 8, re: Great Salt Lake Minerals / 21.5 miles, UT did not Agg

9/30/1997
Letter
Riva, Steven
Rodburg, Michael L.
Lowenstein letter
Riva
Letter to Steven Riva, Chief, Permitting Section, Air Programs Branch, EPA Region 2, from Michael Rodburg, Lowenstein, Sandler, Kohl, Fisher & Boylan, re: Request for Determination - DuPont and Dupont Dow Elastomers

11/25/1997
Letter
Rodburg, Michael L.
Riva, Steven C.
EPA letter
11.25.1997
Rodburg
Letter to Michael Rodburg, Lowenstein, Sandler, Kohl, Fisher & Boylan, from Steven Riva, Chief, Permitting Section, Air Programs Branch, EPA Region 2, re: Common Control Question - DuPont and Dupont Dow Elastomers

1/28/1998
Letter
Atkinson, Rick
Henry, Kathleen
EPA letter
1.28.1998
Atkinson
Letter to Rick Atkinson, Title V Coordinator, Office of Air Quality, Division of Environmental Protection, from Kathleen Henry, Chief, Permit Programs Section, EPA Region 3, re: Title V "Common Control" Determination

2/20/1998
SC DHEC letter
Joy, James A.
Neeley, R. Douglas
Letter from R. Douglas Neeley, EPA Region 4, to James Joy, South Carolina Department of Health and
Environmental Control - EPA will generally find that common control is established when one of the following is present: (1) Ownership of two entities by the same parent corporation or subsidiary of the parent corporation; (2) A contractual arrangement or voting interest giving one entity decision-making authority over the operations of a second entity; (3) A contract for service relationship between two entities, in which one sells all of its product to the other under a single purchaser contract; and (4) A support or dependency relationship between the two entities, such that one would not exist "but for" the other.

Letter to Donald Sutton, Manager, Permits Section, Division of Air Pollution Control, Illinois Environmental Protection Agency, from Cheryl L. Newton, Chief, Permits and Grants Section, EPA Region 5, re: integrated steel mill (application 93040047) at the Acme Steel Company located in Chicago and Riverdale, Illinois

Letter to Lynn Menlove, Manager, New Source Review Section, Utah Division of Air Quality, from Richard Long, Director, Air Program, EPA Region 8, re: response to request for guidance in defining adjacent with respect to source aggregation (Utility Trailer Manufacturing Company) / State did not Agg?

3/13/1998 Letter Sutton, Donald Newton, Cheryl L.

EPA letter 3.13.1998 - Sutton


EPA letter 5.21.1998 - Menlove (8P2-A)
<table>
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<th>To</th>
<th>From</th>
<th>Content</th>
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<td>11/12/1998</td>
<td>Letter</td>
<td>Wrend, Julie</td>
<td>Long, Richard R.</td>
<td>Letter to Julie Wrend, Legal Administrator, Air Pollution Control Division, Colorado Department of Public Health and Environment, from Richard R. Long, Director, Air Program, EPA Region 8, re: single source determination for Coors/TriGen / EPA concured with CO on Support Fac. And Common Control. 30 yr contract to sell 100% to Coors, Brewery VOCs sent to boiler for destruction.</td>
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<tr>
<td>4/20/1999</td>
<td>Letter</td>
<td>Myers, Dennis</td>
<td>Long, Richard R.</td>
<td>Letter to Dennis Myers, Construction Permit Unit Leader, Stationary Sources Program, Air Pollution Control Division, Colorado Department of Public Health and Environment, from Richard R. Long, EPA, Director, Air and Radiation Program, regarding American Soda Commercial Mine (Piceance facility) and processing plan (Parachute facility) / 44 mi pipeline; slurry pipe and spent brine return pipe (mutual), mine produces intermediate produce for processing at plant.</td>
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<td>5/19/1999</td>
<td>Letter</td>
<td>Poole, Randy C.</td>
<td>Smith, Winston A.</td>
<td>Letter to Randy Poole, Air Hygienist II, Mecklenburg County Department of Environmental Protection, from Winston A. Smith, Director, Air, Pesticides</td>
</tr>
</tbody>
</table>
and Toxics, Management Division, EPA Region 4, re: applicability of Title V permitting requirements to gasoline bulk terminals owned by Williams Energy Ventures, Inc. / 0.9 miles, served by common delivery pipelines; not connected by pipelines

Letter to Jack Vaughn, EnerVest San Juan Operating Co., from Reichard Long, Director, Air and Radiation Program, EPA Region 8, re: pipeline compressor stations / All units at each station are part of one source; no discussion of agg stations

Letter to William Baumann, Chief, Combustion and Forest Products Section, Wisconsin Department of Natural Resources, from Robert Miller, Permits and Grants Section, EPA Section 5, re: the Oscar Mayer Foods facility in Madison, Wisconsin / Are on same property, may be support facility, but not under common control

Letter from Richard Long, EPA Region 8, to Margie Perkins, Colorado Department of Public Health and Environment - EPA will generally find that common control is established when one of the following is present: (1) Ownership of two entities by the same parent corporation or subsidiary of the parent corporation; (2) A contractual arrangement or voting interest giving one entity decision-making authority over the operations of a second entity; (3) A contract for service relationship between two entities, in
which one sells all of its product to the other under a single purchaser contract; and (4) A support or dependency relationship between the two entities, such that one would not exist "but for" the other. 

Letter to Lee Ann Elsom, Environmental Coordinator, Citation Oil & Gas Corporation, from Richard R. Long, Director, Air and Radiation Program, EPA Region 8, re: Title V applicability to the Walker Hallow Unit / All units at each tank battery are part of one source; no discussion of agg batteries.

Letter to John Higgins, P.E., Director, Bureau of Application Review and Permitting, Division of Air Resources, from Steven C. Riva, Chief, Permitting Section, Air Programs Branch, EPA Region 2, re: St. Lawrence Cement's (SLC's) Proposed Greenport Project and its Relationship with its Existing Catskill Facility Located 6 Miles Aprt for the Purpose of New Source Review (NSR)/Prevention of Significan Deterioration of Air Quality (PSD) Applicability / 6 miles opposite sides of river, No dedicated conveyance, some functional relationships

Letter to John Kuterbach, Chief, Air Quality Management, Alaska Department of Environmental Conservation, from Douglas E. Hardesty, Manager, Federal and Delegated Air Programs, EPA Region 10, re: Permitting of Forest Oil's
12/6/2004  Letter  Pray, James  Heiman, Jo Ann
Kustatan Production
Facility and Osprey
Platform Pursuant to the
Alaska SIP / 2.8 miles,
products sent back and
forth, elec sent to
platform, exclusive and
mutual. Use R8 questions
from Utility Trailer
Letter to James Pray,
Brown, Winick, Graves,
Goss, Baskerville and
Schoenebaum, P.L.C.,
from JoAnn Heiman, Chief,
Air Permitting and
Compliance Branch, EPA
Region 7, regarding grain
elevators & ethanol
plants / Focused on control
and contractual
relationships

7/21/2005  Letter  Sutton, Don  Blakley, Pamela
EPA letter
7.21.2005 - Sutton (AR
-183)
Letter to Don Sutton,
Manager, Permit Section,
Illinois Environmental
Protection Agency, from
Pamela Blakley, Chief, Air
Permit Section, EPA,
regarding the Hartford
Working Group / Different
SIC, Lack common Control,
no support relationship,
Power from Premcor only

1/12/2007  Letter  Regional
Administrators
Wehrum, William
Administrators 1-X
L.
EPA letter
1.12.2007
(Wehrum)
Memorandum from William
Wehrum, U.S. EPA to
Regional
Administrators 1-X
regarding Source
Determinations for Oil and
Gas Industries / Closet
Proximity should drive

3/9/2009  Letter  Lenney, Robert  Riva, Steven C.
EPA letter
3.9.2009
Lenney
Letter to Robert Lenney,
Environmental Health and
Safety Modernization
Manager, Alcoa Massena
Modernization Project, re:
Request for a Single
Source Determination,
from Steven C. Riva,
Chief, Permitting Section,
Air Programs Branch, EPA
Region 2 / 3.4 miles, some
shared staff, 122 truck
loads between, increasing
synergies
4/16/2009  Letter  Bozzer, Gina  Blakley, Pamela

Letter from Pamela Blakley, U.S. EPA to Gina Bozzer, Zimmerman, Kuhn, Darling, Boyd, Taylor and Quandt, PLC for Summit Petroleum following up on Ms. Bozzer’s 1/18/2006 request for Title V major source determination on whether sour gas wells and the gas sweetening plant, owned and operated near Rosebush, Michigan by Summit Petroleum Corporation, constitute a single stationary source for purposes of Title V CAA.

9/8/2009  Letter  Bozzer, Gina  Blakley, Pamela

Letter from Pamela Blakley, U.S. EPA to Gina Bozzer, Zimmerman, Kuhn, Darling, Boyd, Taylor and Quandt, PLC for Summit Petroleum following up on a 6/17/2009 call determination that the sour gas wells and the sweetening plant constitute a single course for purposes of permitting under Title V CAA.
programs, as well as the CAA § 112 National Emission Standards for Hazardous Air Pollutants ("NESHAP") program (which also distinguishes between major sources and non-major, or "area" sources). Whether and when sources should be aggregated together to constitute a single source, becoming subject to more onerous major source requirements, is grounded in the definitions of "major" and "stationary source" in the statute and regulations for these programs. These definitions have been infrequently interpreted by the courts, but are regularly examined and applied by the states and EPA itself in a variety of permitting circumstances that help to clarify their application to the natural resources industries.

The PSD provisions of the Act have been held by reviewing courts to prohibit the construction or "modification" of a "major stationary source" of air pollution unless, among other things: (1) a permit has been issued for a proposed facility prior to its construction or modification; and (2) the proposed facility is subject to the best available control technology ("BACT") for each pollutant subject to regulation under the CAA. Failure to obtain a PSD permit prior to construction of a new source or modification of an existing source that triggers PSD can result in the imposition of significant civil penalties and/or injunctive relief, and subject the owner or operator to citizen suits.

The Act defines "stationary source" as "any building, structure, facility, or installation which emits or may emit a regulated air pollutant." The regulations further define the terms "building," "structure," "facility," or "installation" as including:

[A]ll 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) except the activities of any vessel.

A source is "major" for PSD program purposes if it has the potential to emit 250 tons per year ("tpy") of any regulated pollutant or 100 tpy if within one of 28 specifically-listed source categories identified by Congress as "major emitting facilities."

and nonattainment NSR. PSD applies in areas of the country that attain the National Ambient Air Quality Standards ("NAAQS") for one or more criteria pollutants, and nonattainment NSR applies in nonattainment areas to new sources of nonattainment pollutants. Although the programs have differing requirements, they both apply to "major stationary sources," and so the analysis presented in this paper applies equally to both programs. For ease of reference the remainder of this paper only discusses EPA’s PSD program. The PSD regulations are set forth at 40 C.F.R § 51.166 (authorized programs) and 40 C.F.R § 52.21 (delegated programs). This paper only refers to 40 C.F.R. § 51.166 hereafter.


40 C.F.R. § 51.166(b)(5).

ld. at § 51.166(b)(6).

CAA § 169(1), 42 U.S.C. § 7479(1). See also 40 C.F.R § 51.166(b).

11-2
Title V of the Act requires “major sources” of air pollutants to obtain a federally enforceable operating permit. “Major” for Title V purposes means “any stationary source (or group of stationary sources) that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control) belonging to a single major industrial grouping” that has the potential to emit 100 tpy of any regulated pollutant or is major under another CAA program (e.g., a major source of HAPs under CAA § 112). The main purpose of Title V is to compile into one document all CAA requirements applicable to a particular source. It also imposes additional monitoring, reporting, and recordkeeping requirements. As with PSD, failure to obtain a Title V Permit can result in significant liabilities.

III. ALABAMA POWER AND THE 1980 PREAMBLE

In 1978, EPA promulgated regulations defining stationary source for purposes of the PSD program as “any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control).” Industry challenged the new rules on multiple grounds, including the over breadth of this definition of stationary source. In Alabama Power, the D.C. Circuit rejected this interpretation, finding it to be an impermissible expansion of the CAA statutory definition of “stationary source.” The court found that Congress specifically defined the term “stationary source” to include only the four terms “structure,” “building,” “facility,” and “installation,” and not any combination of such sources. The court held that this general statutory definition, found in the Act’s provisions for the NSPS program, applies equally to the PSD program’s regulation of major “stationary sources,” and that EPA lacks the authority to define the term “stationary source” more broadly than did Congress.

Significantly, the Alabama Power court did indicate that it would be reasonable for EPA to define the terms “facility” and “installation” “broadly enough to encompass an entire plant.” The court also stated that EPA “should devise regulatory definitions of the terms “structure,” “building,” “facility,” and “installation” to provide for the aggregation, where appropriate, of industrial activities according to considerations like proximity and ownership. These

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9 CAA §§ 501-507, 42 U.S.C. §§ 7661-7661f. The Title V regulations are set forth at 40 C.F.R. Part 70 (state operating permit programs) and Part 71 (federal operating permit programs). We only refer to Part 70 hereinafter.
10 40 C.F.R. § 70.2.
11 Id. § 70.1.
12 See CAA § 504, 42 U.S.C. § 7661c.
13 CAA §§ 113 and 304.
14 43 Fed. Reg. 26383 (June 19, 1978). The analysis applies to both the PSD and later-adopted Title V programs.
16 Alabama Power, at 395. These four constituent elements are taken from CAA § 165, concerning the new source performance standards (“NSPS”) program created by the Act, but which were held to be a part of the definition of “stationary source” for PSD purposes in the court’s majority opinion.
17 Id.
18 Id. at 396.
pronouncements in *Alabama Power* would figure prominently in the EPA rulemaking that ensued.

EPA promulgated a new definition of “stationary source” for the PSD program in the wake of the *Alabama Power* decision that addressed the question of which pollutant-emitting activities may be aggregated to form a single source for air permitting purposes.¹⁹ In so doing, EPA openly acknowledged that the *Alabama Power* decision established several limits upon EPA’s ability to aggregate sources based on the definition to be promulgated: (1) it must carry out reasonably the purposes of PSD; (2) sources aggregated per the definition must approximate a common sense notion of “plant”; and (3) EPA must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of “building,” “structure,” “facility,” or “installation.”²⁰

EPA stressed in its preamble to the 1980 PSD regulations (hereafter the “1980 Preamble”) that the *Alabama Power* decision required the agency to “provide for the aggregation of pollutant-emitting activities according to considerations such as proximity and ownership,” only if such activities would reasonably “fit within the four permissible statutory terms” when aggregated.²¹ Accordingly, EPA’s 1980 PSD regulations defined “stationary source” as “any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant.”²² The regulations also defined the terms “building,” “structure,” “facility,” or “installation” to include:

> [A]ll 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) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same Major Group (i.e., which have the same two-digit code) as described in the Standard Industrial Classification Manual . . .²³

The definition of these four component terms of stationary source establish the three primary criteria for aggregating otherwise separate facilities for air permitting purposes, not only for NSR/PSD, but also for Title V purposes, as noted above.

EPA also made a number of pronouncements and clarifying statements in the 1980 Preamble, in the course of responding to comments on the revised definitions. Of particular note is that EPA specifically rejected a subjective “functionality test,” *i.e.*, considering how two or more separate facilities might interact or function relative to one another, preferring instead to employ the more objective factor of whether two pollutant-emitting activities are part of the same major industrial grouping within the Standard Industrial Classifications (“SIC”) Code developed by the Department of Commerce for macro-economic analysis.²⁴ The alternative of considering

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²¹ *Id.* at 52694.
²² 40 C.F.R. § 51.166(b)(5).
²³ *Id.* at § 51.166(b)(6).
²⁴ 45 Fed. Reg. at 52695.
functional interrelationships when making “stationary source” determinations was rejected as being too subjective and unpredictable, and likely to “embroil the Agency in numerous fine-grained analyses,” which EPA sought to avoid. EPA also made clear that in determining whether activities are “contiguous or adjacent,” the agency would focus on physical proximity. In so doing, EPA declined to determine “precisely at this point how far apart activities must be in order to be treated separately,” and also declined to except from the definitions of “building,” “structure,” “facility” and “installation” the facilities common to “long-line” operations, such as transmission pipelines, noting that they “are neither contiguous [n]or adjacent.” Instead, EPA decided the proximity determination would be made on a case-by-case basis.

IV. STATE PERMITTING AND EPA’S VARIOUS INTERPRETIVE LETTERS ON CAA SOURCE DETERMINATIONS

Authorized states implement the PSD and Title V programs of the CAA under their EPA-approved State Implementation Plans (“SIPs”). 42 U.S.C. § 7410. EPA also directly implements the CAA on behalf of federally-recognized Indian Tribes, and pursuant to Federal Implementation Plans where they are in effect. Since most states have delegated authority and approved SIPs to administer the CAA, state permitting authorities are most frequently dealing with the issue of source determination, and their own state regulations and SIP provisions will invariably contain definitions that are the same or very similar to the federal definitions noted above that give rise to the three-factor analysis.

States have addressed the issue of source determination in a number of ways. Some states have adopted their own guidance on source aggregation, some of it even specific to oil and gas sources. Other state and local permitting authorities simply respond to source determination and possible aggregation concerns as they arise, usually through EPA or stakeholder comment on draft Title V operating permits. Unless these state permitting authorities have expressly adopted requirements more stringent than the federal CAA pursuant to state statute, their analogous provisions are routinely interpreted and applied in the same manner as the federal definitions of “major” and “stationary source,” based on the PSD regulations, the 1980 Preamble, and Alabama Power. EPA’s regional offices also review and comment on major stationary source permits, and are asked from time to time to make regulatory interpretations about whether to aggregate stationary sources for PSD and/or Title V purposes. These EPA letters and other related guidance are examined more closely below.

25 Id. This quote is itself at odds with Alabama Power by considering how far apart “activities must be to be treated separately,” rather than how close together they must be in order to be aggregated. The difference reflects a bias that is not endorsed by Alabama Power, i.e., there is no presumption in favor of aggregation.

26 Id.

27 For example, much like the federal definition, Colorado law governing both PSD and Title V permitting defines a “stationary source” as “[a]ny building, structure, facility, equipment, or installation, . . . which is located on one or more contiguous or adjacent properties . . . .” CDPHE Regulation 3, Part A, I.B.59 (emphasis added).


30 This paper does not specifically address individual state policies.
Although EPA initially proposed the “contiguous or adjacent” requirement as part of its PSD regulations, subsequently defended this requirement in federal court, and ultimately convinced Congress to adopt the same requirement as part of the major source provisions of the Title V and CAA § 112 programs, EPA has issued a number of interpretative letters that appear to disregard the plain meaning of “contiguous or adjacent,” an essential component of the three-factor analysis required by the definition of stationary source and the court’s opinion in *Alabama Power*. EPA has done this in cases where it determines that facilities are “functionally interdependent,” *i.e.*, one source is a “support facility” for another source that engages in a “primary activity.”31 In so doing, EPA has attempted to explain that two facilities which it believes act together as one should be permitted as one facility for PSD and Title V purposes.

EPA’s regional offices are responsible for addressing requests about source determination from state permitting authorities and permittees in their regions, and for making federal source determinations for facilities within federal enclaves, like at military bases, and within Indian Country. In the 30 years since the PSD regulations were promulgated, EPA’s 10 regional air program offices have issued a number of interpretive letters dealing with source determination. Although many dealt with manufacturing and some with power generation facilities, a number of letters deal with mining facilities and oil and gas facilities. Such letters are still issued from time to time in response to state agency and permittee inquiries concerning source determination. Attached as Appendix 1 is a listing of many EPA interpretive letters assembled by the author’s firm in connection with numerous source determination challenges over the years, some of which concerned the permitting of oil and gas facilities. While this list is not exhaustive, and does not include other non-letter guidance, facility-specific federal source determinations and EPA orders, it is a potentially useful reference in addressing source determinations.

A review of EPA’s body of interpretive letters reveals that the agency appears to have strayed far from the pronouncements that it made in the 1980 Preamble regarding the three-factor analysis. In particular, EPA has frequently asserted that the “contiguous or adjacent” element of the required three factor analysis includes the consideration of the functional relationship between facilities being considered for source aggregation. A number of these letters pose numerous questions aimed at discerning the functional relationship between physically separate facilities. EPA has recommended the following questions be asked by permitting authorities in determining if two or more sources are “adjacent”:

- Was the location of the new facility chosen primarily because of its proximity to the existing facility, to enable the operation of the two facilities to be integrated? In other words, if the two facilities were sited much further apart, would that significantly affect the degree to which they may be dependent on each other?

- Will materials be routinely transferred between the facilities? Supporting evidence for this could include a physical link or transportation link between the facilities, such as a pipeline, railway, special-purpose or public road, channel or conduit.

31 45 Fed. Reg. at 52695.
• Will managers or other workers frequently shuttle back and forth to be involved actively in both facilities? Besides production line staff, this might include maintenance and repair crews, or security or administrative personnel.

• Will the production process itself be split in any way between the facilities, *i.e.*, will one facility produce an intermediate product that requires further processing at the other facility, with associated air pollutant emissions? For example, will components be assembled at one facility but painted at the other?32

These questions are geared toward the reasons why one source is placed in proximity to another source based on functionality, but do not address the question of whether they are “near or close” to one another *per se.*

V. THE WEHRUM AND McCARTHY MEMOS: HE SAID, SHE SAID

Although the required three-factor analysis for source determinations seems simple and straightforward, like many aspects of the Clean Air Act it has proven controversial, particularly with respect to oil and gas facilities. Such controversy has led to the issuance of two memoranda in recent years dealing specifically with CAA source determinations for the oil and gas industries, both authored by EPA Assistant Administrators for the Office of Air and Radiation (“OAR”). The first memo was issued on January 12, 2007, by then Assistant Administrator William Wehrum (hereafter the “Wehrum Memo”), and it essentially indicated that the three-factor analysis for oil and gas facilities should begin with consideration of the “surface site” occupied by oil and gas facilities, and further indicated that “adjacent” facilities would be those separated by no more than a short distance (e.g., across a highway, separated by a city block or some similar distance). This attempt to simplify and make more certain the CAA source determinations to be made with respect to oil and gas facilities was withdrawn by the current Assistant Administrator for OAR, Gina McCarthy, on September 22, 2009 (hereafter the “McCarthy Memo”). The McCarthy Memo signals a rejection of the Wehrum Memo’s primary focus on the “surface site” of oil and gas activities as the starting point for the required analysis. The two memos are in agreement that oil and gas source determinations must involve a case-by-case review of the three factors noted above.

In withdrawing the Wehrum Memo, the McCarthy Memo cited as its primary purpose “re-emphasizing the fundamental criteria for making source determinations as specified in our existing NSR regulations, explained in the preamble to our 1980 promulgation of those regulations and demonstrated through historical practice in making source determinations in these programs.” The McCarthy Memo criticizes the Wehrum Memo’s attempt to simplify

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32 EPA Region 8 letter, dated May 21, 1998, to Utah Division of Air Quality, regarding Response to Request for Guidance in Defining Adjacent with Respect to Source Aggregation (listed in Appendix 1).
33 “Source Determinations for Oil and Gas Industries,” memorandum from William L. Wehrum to Regional Administrators (January 12, 2007).
34 *Id.* at 4-5.
35 “Withdrawal of Source Determinations for Oil and Gas Industries,” memorandum from Gina McCarthy to Regional Administrators (September 22, 2009).
36 McCarthy Memo, at 1. Given that these largely opposing memoranda find agreement on this point, one could certainly argue that this statement by EPA may be entitled to deference, as further discussed, *infra* at 11.
these determinations by focusing on whether activities are “contiguous and [sic] adjacent,” and asserts that “individual facts warrant a closer examination of all three criteria identified in those regulations to arrive at a reasoned decision.” The McCarthy Memo goes on to opine that “source determinations within the oil and gas industries will continue to be complex, involving in some cases in-depth analyses of ownership and operational issues.” Interestingly, this latter strategy would appear to be at odds with EPA’s own 1980 Preamble determination that it would avoid becoming embroiled in “fine-grained analyses” such as the making of subjective determinations regarding functional interdependence of commonly controlled, contiguous or adjacent sources. Ultimately, the McCarthy Memo concludes that “the simplified approach provided in the [Wehrum] memorandum should not be relied on by permitting authorities as a sufficient endpoint in the decision-making process.” This statement is also inaccurate, in that it claims the “surface site” was a required endpoint in the analysis suggested by the Wehrum Memo; however, it was only suggested as a starting point for such analysis.

The McCarthy Memo also notes that the Agency’s various regulatory interpretation letters may be helpful “in providing guidance to other permitting authorities making such determinations,” but stresses that “while informative of the necessary analytical process, no single determination can serve as adequate justification for how to treat any other source determination . . . .” Indeed, the McCarthy Memo acknowledges that the Wehrum Memo “did not mandate a particular approach but instead was a non-binding policy statement that set forth a possible methodology . . . .” In any event, the authority underlying these memoranda and quoted in them from the Act, the 1980 Preamble, the PSD and Title V regulations and the Alabama Power decision remain unaffected by the Wehrum and McCarthy Memos. Finally, the McCarthy Memo also concurs with the withdrawn Wehrum Memo in holding that “whether or not a permitting authority should aggregate two or more pollutant-emitting activities . . .” remains a case-by-case decision in which permitting authorities retain discretion to consider the factors relevant to the specific circumstances of the permitted activities. In light of these statements, the Agency’s apparent return to the pre-Wehrum memo approach to making source determinations for the oil and gas industries is hardly a sea change, as suggested by some, and should clearly not result in significant differences from pre-2007 source determinations, especially for pre-existing facilities.

VI. JUDICIAL REVIEW OF AGGREGATION: MacCLARENCE AND SUMMIT

Since Alabama Power, there have been very few judicial opinions dealing with CAA source determinations for oil and gas. Of the cases brought, most have settled, but two decisions are noteworthy. One has had quite limited effect on subsequent source determinations due to its

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37 Id at 1.
38 Wehrum Memo, at 4.
39 Id. at 2.
40 Id. Of course, the same can be said for the McCarthy Memo, to the extent its own language may be interpreted as going beyond the scope of the PSD or Title V regulatory definitions in any material respect, such as in its reference to “re-emphasizing the fundamental criteria for making source determinations as . . . demonstrated through historical practice in making source determinations.”
41 Id.
narrow holding, and the other is likely to significantly alter source determinations for many years to come.

A. Bill MacClarence v. United States Environmental Protection Agency

On March 4, 2010, the United States Court of Appeals for the Ninth Circuit issued an opinion in Bill MacClarence v. United States Environmental Protection Agency, a case involving source aggregation issues for oil and natural gas facilities located on the North Slope of Alaska. BP Exploration (Alaska), Inc. (“BP”) partially owned and wholly operated the Prudhoe Bay Unit (“PBU”) on behalf of itself and four other owners. The PBU was composed of a number of different onshore facilities, including six production centers serving numerous well pads, a central power station, seawater treatment and injection plants, a crude oil topping unit, water and waste-water treatment plants, and residential, recreational, health and safety facilities, among others.

In November 1997, ARCO, BP’s predecessor, submitted a Title V application to the Alaska Department of Environmental Conservation (“ADEC”) for Gathering Center #1 (“GC1”), a facility that processes crude oil production fluids from approximately seven different producing onshore well pads for delivery to the Trans Alaska Pipeline System. On February 22, 2002, the ADEC published a draft Title V permit for public comment. The draft did not aggregate GC1 with any other BP sources located at the PBU, including the seven well pads. Bill MacClarence submitted comments on this draft stating that all of BP’s facilities at the PBU should be aggregated with GC1 in the renewal permit. EPA raised similar concerns about the lack of source aggregation in its comments to the ADEC. As a result, ADEC made a number of revisions to the draft permit based upon public comments and on input from EPA as well as BP, and then issued the final permit in October 2003.

The final permit did not aggregate all of BP facilities in the PBU, but did employ a “hub and spoke” aggregation model. Under this model, ADEC determined that GC1 and the well pads that supply it with crude oil constitute one source for air permitting purposes because they are functionally interdependent and fit within the common sense notion of a plant. ADEC, in the Statement of Basis for the Title V permit, explained:

Within this conceptual framework, ADEC determines the plant to be the well production pads that extract the raw materials (wellhead fluids) from the subsurface and deliver them to the factory (production center) for processing into finished product (crude oil for sales) and waste products (water and gas for underground disposal). Wellhead facilities and separation facilities cannot exist without each other and constitute a complete production plant.

43 Statement of Basis of the Terms and Conditions for Permit No. AQ0182TVP01, BP Exploration (Alaska) Inc, Gathering Center #1, Revision 2, p. 5.
In rejecting the aggregation of all BP sources in the PBU, ADEC discussed why it decided not to aggregate all of the production centers. The agency determined that each production center functions independently from the other production centers because, as an example, if one production center were shutdown for maintenance, the other production centers would continue to operate without adverse impact.\footnote{Id. at 6} In addition, the ADEC discussed if pipeline connections between operations alone are sufficient to trigger source aggregation, noting that it did not believe a pipeline connection alone should be a “deciding factor because in the oil and gas industry pipelines connect everything.”\footnote{Id. at 6.} ADEC further stated that if it only considers pipeline connections, that would result in one stationary source “from the North Slope oil fields all the way to the Valdez Marine Terminal,” which would be contrary to the “common sense notion of a plant.”\footnote{Id. at 6.}

When EPA did not object to the final Title V permit, MacClarence filed a petition with the EPA requesting that the Administrator object to the permit on the grounds that it violated the Clean Air Act by not aggregating all of BP’s pollutant-emitting facilities at the PBU into one stationary source. In his petition, MacClarence only made generalized statements that all of BP’s facilities in the PBU should be aggregated into one air permit without providing any additional support. The Administrator denied MacClarence’s petition on the basis that he failed to provide adequate information or legal analysis to support his claims and further failed to demonstrate that ADEC’s decision not to aggregate all of BP’s facilities at the PBU violated the Clean Air Act. In its April 20, 2007 Order, the Administrator stated that Clean Air Act § 502(b)(2) places the burden on MacClarence to “demonstrate[] to the Administrator that the permit is not in compliance” with the Clean Air Act and that the generalized statements and allegations put forth by MacClarence in his petition were insufficient to meet this burden.\footnote{Id. at 8.}

MacClarence appealed the Administrator’s denial of his petition to the Ninth Circuit Court of Appeals, who affirmed the denial. In its opinion, the Ninth Circuit did not reach the question of whether ADEC’s decision not to aggregate the emissions from all of BP’s PBU facilities violated the Clean Air Act. Instead, the Ninth Circuit focused on the Administrator’s decision that MacClarence had not met his burden under § 502(b)(2) to demonstrate that the final permit did not comply with the Clean Air Act. The Ninth Circuit determined that the term “demonstrate” in § 502(b)(2) was ambiguous and therefore the EPA Administrator’s interpretation of that term was entitled to \textit{Chevron} deference. The Ninth Circuit then held that because MacClarence’s petition, if successful, would have required the Administrator and the ADEC to take certain actions, it was “reasonable and persuasive” for the Administrator to require MacClarence to support his allegations with “legal reasoning, evidence and references.”\footnote{Id. at 3424.} As a result, the Administrator’s denial of MacClarence’s petition was not arbitrary and capricious.
B. *SUMMIT PETROLEUM CORP. v. EPA*

On August 12, 2012, the United States Court of Appeals for the Sixth Circuit, in a well-reasoned opinion and order, rejected as unlawful EPA’s consideration of “functional relationship” in determining whether certain oil and gas facilities were “adjacent” for purposes of air permitting. *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012). The court found that the plain meaning of the term “adjacent” connotes physical proximity; therefore, EPA’s interpretation of “adjacent” as encompassing considerations of the “functional relationship” between otherwise non-adjacent facilities was unreasonable and unsupported by the Clean Air Act and the plain language of EPA’s implementing regulations. The court remanded the case to EPA for source determination without use of functional relationship or interdependence as a factor.

Summit Petroleum (“Summit”) is a natural gas producer that owns and operates a natural gas sweetening plant that “sweetens” the “sour” gas from approximately one hundred sour gas production wells also owned by Summit. *Id.* at 735. The wells are located over an area of approximately 43 square miles and are located at distances from 500 feet to eight miles from the sweetening plant. *Id.* at 736. None of the wells share a common boundary with each other or the plant, and Summit does not own the intervening property. The plant and the majority of the wells are located within the territory of the Saginaw Chippewa Indian Tribe’s Isabella Reservation. Alone, the plant does not exceed major source emission thresholds under the Clean Air Act, but would exceed such thresholds if it were aggregated with emissions from any one or more of Summit’s wells at issue. *Id.*

In 2005, Summit and the Michigan Department of Environmental Quality requested that EPA make a single source determination for the sweetening plant and surrounding wells to determine the applicability of Title V major source permitting requirements. *Id.* at 737. Summit contended that facilities should not be aggregated because, among other things, the wells were “located at great distances from [the plant] on entirely different tracts, leases and surface sites” and, thus, were not contiguous or adjacent. *Id.* Because the facilities are under common ownership, part of the same industrial grouping (SIC major group code), and not on contiguous surface sites, the lone factor in determining whether the facilities constitute a single source was “adjacency.” *Id.* at 738.

In late 2009, after several years of back and forth discussions, EPA Region 5 finally issued its determination that Summit’s sweetening plant and surrounding wells were “adjacent” and therefore constituted a single stationary source and subject to Title V major source permitting requirements. *Id.* at 739. In making this determination, EPA relied primarily on what it termed the “functional interrelationship” between the wells and the sweetening plant—i.e., because the wells supply all their gas to the sweetening plant to produce a “single product,” the facilities function as a single unit and therefore “should not be considered separate emissions sources.” *Id.* at 738-740. Summit filed a petition for review with the Sixth Circuit challenging the EPA’s determination primarily on the grounds that EPA’s use of “functional interrelationship” in determining “adjacency” was improper and inconsistent with the Clean Air Act. *Id.* at 740.

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49 Because the plant and wells are located on tribal lands, EPA is the primary permitting authority in that matter.
Because the *Summit* court found the term “adjacent” to be unambiguous, it afforded no deference to EPA’s interpretation of the term. Instead, the court tested the agency’s interpretation of “adjacent” against the plain meaning of the term and found it to “undermine the plain meaning of the text, which demands, by definition, that would-be aggregated facilities have physical proximity.” *Id.* Accordingly, the court held that EPA’s consideration of “functional relationship” in determining adjacency is unreasonably inconsistent with the plain meaning of the regulation, and the court vacated EPA’s single source determination for Summit’s facilities, ordering the agency to reassess the aggregation issue on remand consistent with the plain meaning of the term “adjacent”—*i.e.*, physically proximate properties. *Id.*

The Sixth Circuit held further that, even if it were to find the term “adjacent” to be ambiguous, it would still hold EPA’s interpretation to include considerations of “functional relationship” to be unreasonable and inconsistent with EPA’s own regulatory history interpreting the term “stationary source.” *Id.* at 746-48. For example, the court found that the mere fact that EPA considered adding “functional relationship” as an additional factor to ownership and proximity, “belie[s] [the] contention that the factors of proximity and functional relatedness are one in the same.” *Id.* at 748. Indeed the court stated:

> If the adopted proximity requirement—articulated by the EPA as the requirement that activities be “located on contiguous or adjacent properties”—suggested a measure of the activities’ functional relatedness, there would have been no need to consider adopting this already-included test as a third prong in the EPA’s single source analysis. Clearly, at least at the time the EPA adopted its stationary source regulation, the EPA understood adjacency in geographical, rather than operational, terms. *Id.* Additionally, the court found that “EPA’s decision not to employ a functional relatedness test was categorical and unqualified” and “[t]his broad condemnation cuts heavily against the EPA’s argument that the use of any assessment of functional relatedness is reasonable (even in its own view).” *Id.*

Furthermore, the court gave no deference to the decades of EPA interpretive letters, prior source determinations and other informal guidance that considered “functional relationship” in the determination of adjacency. *Id.* at 744-46. The court concluded that EPA’s claims of longstanding agency consideration of “functional relationship” amounts to nothing more than a history of “entrenched executive error” and “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.” *Id.* at 746.

Since Summit was decided, EPA has issued a memorandum regarding its approach to source determinations within and outside the Sixth Circuit. That memo, a copy of which is attached as Appendix 2 to this paper, has drawn suit by industry representatives over the EPA’s apparent disregard for the holding in Summit that considering functional relationships is not permissible when determining the adjacency of multiple facilities. Operators with concerns about source determinations affecting their permitting requirements outside the Sixth Circuit will want to pay attention to how this very recent challenge unfolds.
VII.  A CLOSER LOOK AT SOURCE DETERMINATION FACTORS

A.  MAJOR SIC CODE GROUPING

Major SIC codes were used by EPA in the 1980 PSD regulations as a proxy for more subjective functional interdependence considerations. This approach to determining sources for CAA permitting was specifically embraced by EPA in the 1980 Preamble as preferable to making subjective judgments about functional interrelationships, as noted above.\textsuperscript{50} EPA explained its decision as follows:

In formulating a new definition of “source,” EPA accepted the suggestion of one commenter that the Agency use a standard industrial classification code for distinguishing between sets of activities on the basis of their functional interrelationships. While EPA sought to distinguish between activities on that basis, it also sought to maximize the predictability of aggregating activities and to minimize the difficulty of administering the definition. A classification code offers objectivity and relative simplicity.\textsuperscript{51}

EPA then went on to explain how SIC codes were to be applied, stating:

Each source is to be classified according to its primary activity, which is determined by its principal product or group of products produced or distributed, or services rendered. Thus, one [SIC] source classification encompasses both primary and support facilities, even when the latter includes units with a different two-digit SIC code. Support facilities are typically those which convey, store, or otherwise assist in the production of the principal product. Where a single unit is used to support two otherwise distinct sets of activities, the unit is to be included within the source which relies most heavily on its support.\textsuperscript{52}

This entire discussion of primary and support facilities in the 1980 Preamble is confined to how CAA permitting authorities are to evaluate the industrial grouping factor through the application of SIC codes. There is nothing in the 1980 Preamble providing that a support facility analysis should override or relate in any way to the separate requirement that sources be “contiguous or adjacent.”

B.  COMMON OWNERSHIP OR CONTROL

This factor appears more straightforward than proximity, but does not necessarily result in objective determinations, and is also subject to exceptions. Moreover, ownership and control of oil and gas facilities, especially at the wellhead in onshore production, is complex and can change frequently.

\textsuperscript{50}  Id.
\textsuperscript{51}  Id.
\textsuperscript{52}  Id. at 52695.
The act of exploring for, completing and operating oil and gas wells is highly regulated, primarily through state oil and gas conservation laws. These laws provide for well spacing orders and rules, as well as forced pooling and unitization of wells, all of which effectively dictate the proximity of one well to another. This legal regulatory constraint on the placement of wells places these sources of air pollutants into a unique context, and should therefore inform the regulator’s considerations of the proximity factor accordingly.

Evaluation of the oil and gas industry’s numerous minor sources is further complicated by “subsurface and surface property rights [that] are often owned and leased by multiple entities, and drilling and exploration activities are commonly contracted to third parties.” In the case of wells, these facilities need to be completed where the resource can be economically withdrawn, hence the remote and widely dispersed nature of these sources. More often than not (and particularly west of the Mississippi), the surface owner is not the mineral owner (there is a split estate), and each new well’s surface owner may be different, while the fee mineral owner(s) and lessee-operator(s) may also be different, and numerous. It is against this backdrop that one must view the question of whether individual wells, routinely permitted separately as minor sources since passage of the CAA, should be aggregated with other wells and/or with centralized downstream compressor stations, gas processing plants and other facilities if there is common ownership or control.

“Common control” is not defined in the CAA or EPA regulations, but EPA has indicated that in making collocation determinations, it is guided by the Securities and Exchange Commission’s general definition of control, under which “common control” means “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” 17 C.F.R. § 240.12b-2; 45 Fed. Reg. 59,874, 59,878 (Sept. 11, 1980). Common control determinations are to be made on a case-by-case basis and should focus on the “power of one business entity to affect the construction decisions or pollution control decisions of another business entity.” 45 Fed. Reg. at 59,878.

EPA has issued a number of interpretive letters regarding the scope of “common control.” While these letters are non-binding, and understanding that some of these letters appear to misapply the “support facility” test for determining a source’s industrial grouping (SIC major group code) noted above, some of these letters are revealing of EPA’s reasoning in making common control determinations. In general, it appears from these letters that EPA will find that common control is established when one of the following is present:

1. Ownership of two entities by the same parent corporation or subsidiary of the parent corporation;
2. A contractual arrangement or voting interest giving one entity decision-making authority over the operations of a second entity; or
3. A contract for service relationship between two entities, in which one sells all of its product to the other under a single purchaser contract.

Wehrum Memo at 2.
A fourth factor has also been identified in some interpretive letters, the existence of a support or dependency relationship between the two entities such that one would not exist “but for” the other, but this also appears to be a misapplication of the “support facility” analysis authorized in the preamble to the 1980 PSD regulations and specifically recognized as being limited to the industrial grouping factor in a more recent EPA order denying a petition to object to a renewal Title V operating permit for a compressor station in Colorado. 54

EPA’s approach to the factor of “common control” at military installations is notably different, and distinguishes between leased facilities which are not aggregated, and “contracted for services” related to primary military branch functions, which are aggregated. 55 And some commonly controlled, functionally interdependent sources are simply beyond the definition of major stationary source by virtue of Congressional and EPA dictate, such as “multi-state pipelines,” “long-line operations,” as well as HAP emissions from various oil and gas sources. 56

C. CONTIGUOUS OR ADJACENT

Being mindful that “the plain meaning of a regulation governs,” 57 and that the common meaning of “adjacent” is essentially “near or close,” the application of the proximity factor to oil and gas facilities should be fairly straightforward. That said, the terms “near” and “close” are less than precise, and are therefore susceptible to differing interpretations. And a decision to aggregate sources deemed “near or close” must not run afoul of the “common sense notion of a plant,” in any event.

In considering the proximity of various oil and gas facilities, one must also be mindful that oil and gas conservation concepts and rules, as well as the economics of drilling, completing and operating producing oil and gas wells, largely dictate how far apart producing oil and gas wells are located, as noted above. Oil and gas conservation laws and regulations were largely developed after experiencing the waste that can result from adherence to a pure “capture rule,” as was the case in the early days of the oil and gas industry. So the proximity of wells to one another is not necessarily a function of their interrelationship, but more a function of how far apart or close together wells should be in order to efficiently extract the resource and promote its development, while preventing waste. Indeed, spacing orders and rules are intended to prevent wells from being too “near or close” to one another.

The preamble to the PSD regulations specifically articulates both EPA’s inclusion of proximity as a factor in source determinations and how EPA explicitly rejected a subjective functionality test in the course of deciding to adopt major SIC code matching as the industrial grouping factor, as noted above. 58 Thus, any suggestion that functional interdependence should control or dominate an aggregation analysis in derogation of the proximity requirement, particularly within

54 See 45 Fed. Reg. at 52,695; Order Responding to Petitioners’ Request that the Administrator Object to Issuance of a State Operating Permit (“Jackson Order II”), Petition No. VIII-2010-4, at pp. 16-17 (concerning the Kerr-McGee Frederick permit challenges described below).
57 Wards Cove Packing Corp., n.41, supra.
58 45 Fed. Reg. at 52695.
the oil and gas industry, is wholly at odds with EPA’s interpretation issued contemporaneously with EPA’s regulatory definition of stationary source. EPA provided still further guidance that it had rejected a functionality test when it explained how it intended to evaluate “long-line” operations like oil and gas pipelines. In particular, EPA stated:

Many commenters urged EPA to clarify the extent to which the final definition of those terms encompasses the activities along a “long-line” operation, such as a pipeline or electrical power line. For example, some urged EPA to add to the definition the provision that the properties for such operations are neither continuous nor adjacent. To add such a provision is unnecessary. EPA has stated in the past and now confirms that it does not intend “source” to encompass activities that would be many miles apart along a long-line operation. For instance, EPA would not treat all of the pumping stations along a multistate pipeline as one "source." \(^{59}\)

Given that EPA explicitly chose not to implement a separate, subjective functionality test, EPA cannot have intended such a test to be incorporated into the “contiguous or adjacent” proximity test, and its apparent change of mind in a long sequence of interpretive letters cannot undo or change the proximity requirement, as held by the Sixth Circuit in Summit Petroleum. Accordingly, the “contiguous or adjacent” factor, when properly applied to oil and gas facilities that are not “near or close,” should not result in aggregation of individual facilities, even if they are under common ownership and control, within the same major SIC code grouping and have some functional interdependence with one another.

D. THE COMMON SENSE NOTION OF A PLANT

The question of whether wells should be aggregated with each other and/or compressor stations and other facilities that handle the gas from producing wells upstream has been raised with increasing frequency of late in petitions to EPA and comments on draft renewal operating permits for natural gas compressor stations. Those advocating for aggregation assert that wells in close proximity to compressor stations that are under common ownership and control should invariably be aggregated with compressor stations for Title V and PSD purposes. This could often result in the need for PSD permits for any appreciable number of wells that are aggregated with one or more compressor stations, even for stations and wells that are not new and have been subject to CAA minor source permits for many years. Apart from raising very significant feasibility and practicality issues associated with the administration of basin-wide permits for all production and compression activities under common ownership or control, this kind of assertion runs afoul of the limits on EPA authority to aggregate identified by the D.C. Circuit Court in Alabama Power.

In particular, the Alabama Power court noted that the four component parts of the definition of source could not be interpreted or applied by EPA in a manner so as to go beyond the “common sense notion of a plant.” The court went on to state that EPA must avoid aggregating pollutant

\(^{59}\) Id. (emphasis added).
emitting activities that as a group would not fit within the ordinary meaning of “building,” “structure,” “facility,” or “installation.” EPA responded to this in the 1980 Preamble, noting that the Alabama Power court was satisfied that EPA had “evidenced an intention to refrain from unreasonable literal applications of the definition [of stationary source] and instead to consider as a single source only common sense industrial groupings.”

In light of these longstanding authoritative pronouncements, in order for advocates of upstream oil and gas source aggregation to prevail, they must establish that aggregating widely dispersed and remotely located wells connected only by a flow line to downstream compressor stations and other gathering facilities meet the “contiguous or adjacent” requirement without regard to their functional relationships, and that doing so does not violate the “common sense notion of a plant.” In the vast majority of cases it is doubtful that these points can be established, since oil and gas wells are not typically contiguous or adjacent, and do not together with other widely dispersed wells and other downstream gas handling facilities constitute a single plant. Moreover, these disparate facilities fall into “functionally distinct groupings” such as production, gathering, treating and processing assets that have not typically been aggregated with one another and should not be now, since the operative definitions and legal standards have not changed in over 30 years.

In the oil and gas industries, the question of what facilities do constitute a plant when considered collectively will continue to be very important. The ability of operators to distinguish between production facilities and gathering facilities, for example, even if near or close to one another, will likely dictate whether sources from these separate segments of the industry can be aggregated in a manner consistent with the long-established definitions and applicable legal standards noted above.

VIII. RECENT AND PENDING JUDICIAL AND ADMINISTRATIVE CHALLENGES REGARDING ADJACENCY AND COMMON CONTROL

Even though source determinations are required to be made on a case-by-case basis, and therefore have little or no precedential effect, the following selected case summaries of recent and pending aggregation challenges are provided to illustrate the complexity of these determinations. It should be noted that a number of the decided cases pre-date the decision of the Sixth Circuit in Summit Petroleum, discussed above.

61 Of course, there are always exceptions, and in the rare case where an onshore well is located within the fence line of a compressor station and attended by the same personnel as the compressor sources, among many other factors, there may be a reasonable basis under the three-factor test to aggregate these otherwise functionally distinct activities which do not normally occur at the same plant, building, structure or facility.
62 Several of these case summaries are adapted and updated from a prior paper in which the author was a contributing co-author. See “Oil and Natural Gas Permitting Source Aggregation,” S. Blackketter Dwyer, S. Urvan, J. Jacus, D. Shandy and A. Blankenship, Energy & Mineral Law Foundation (October 2011).
A. APPALACHIA MIDSTREAM SERVICES—WEST VIRGINIA

This appeal was filed with the West Virginia Air Quality Board (the “Board”) on October 13, 2010 by William J. Hughes, represented by the Group Against Smog and Pollution (“GASP”).63 The subject of the appeal was two separate permits issued to Appalachia Midstream Services LLC (“AMS”) by the West Virginia Department of Environmental Protection, Division of Air Quality (“DAQ”) on September 9, 2010. The permits authorized the construction and operation of the Pleasants Compressor Station and the Miller Compressor Station in northern West Virginia. DAQ concluded that each of the two compressor stations constituted an individual stationary source and further determined that each was a non-major source.

GASP’s contention was that the two compressor stations, as well as emissions from a natural gas delivery point and natural gas well pad sites in the Victory Field, constituted a single stationary source for air permitting purposes because various units operated by AMS in the Victory Field were adjacent, interconnected, and interdependent. GASP argued that “interdependent” units could be considered contiguous or adjacent regardless of physical proximity, based upon its reading of certain EPA policy statements and interpretive letters. GASP also argued that the compressor stations and other various units within the Victory Field were under common control.

Upon hearing all of GASP’s evidence at the hearing, counsel for AMS moved for a directed verdict. Counsel for DAQ joined in the motion. The Board granted the motion on the basis that GASP had not set forth a case upon which relief could be granted and entered its final order on August 6, 2011.64

Specifically, the Board found that the plain meaning of the terms “contiguous” and “adjacent,” particularly in the context of the common sense notion of a plant, are appropriate considerations in the application of the aggregation test. The Board further held that there was no evidence presented that showed the compressor stations sit on contiguous or adjacent properties, that any of the well pads sit on properties contiguous or adjacent to either compressor station, or that any individual well pads in the Victory Field sit on properties contiguous or adjacent to each other. The Board also found that there was no evidence that showed the two compressor stations operate interdependently. In short, the Board found that none of the evidence offered by GASP was sufficient to establish that the compressor stations together, or the compressor stations and well pad sites together, met the common sense notion of a plant. No appeal for judicial review of the Board’s Order was sought by GASP.

B. KERR-MCGEE FREDERICK—COLORADO

Beginning in 2006, WildEarth Guardians (“WEG”)65 challenged the Title V renewal permit issued by the Colorado Department of Public Health and Environment (“CDPHE”) to Kerr-

63 William J. Hughes v. West Virginia Department of Environmental Quality and Appalachia Midstream Services LLC, Appeal No. 10-03AQB (Oct. 12, 2010).
64 William J. Hughes v. West Virginia Department of Environmental Quality and Appalachia Midstream Services LLC, Appeal No. 10-03-AQB (Aug. 6, 2011).
65 WildEarth Guardians (“WEG”), formerly known as Rocky Mountain Clean Air Action, is a not-for-profit environmental organization that focuses on “challenging fossil fuel extraction and use,” including oil and gas.
McGee Gathering LLC’s (“KMG” or “Kerr-McGee Gathering”) Frederick Compressor Station (“Frederick Station”) on several occasions.

In September 2006, WEG submitted comments on KMG’s renewal application for Frederick Station’s Title V operating permit.\(^{66}\) WEG asserted that the Frederick Station should be aggregated with nearby pollutant-emitting activities\(^{67}\) and emission sources supposedly owned and operated by Kerr-McGee, including wells, well-head emission sources, and other compressor stations. On that basis, WEG requested that CDPHE deny Frederick Station’s renewal application. CDPHE rejected WEG’s request, confirming that the agency “will issue permits in a manner consistent with how it has historically made single source determinations for oil and gas operations, which in this case would be to consider the listed facilities as separate sources for both Title V and PSD purposes.”

In response to CDPHE’s rejection of its petition, WEG petitioned EPA in late December 2006 to object to CDPHE’s expected issuance of the Title V permit for the Frederick Station (“WEG Petition I”).\(^{68}\) EPA granted WEG Petition I on February 7, 2008 (“EPA Order I”) without concluding that the Frederick Station should or could be aggregated with other emission sources owned or operated by Kerr-McGee. Instead, EPA Order I requested that CDPHE respond more thoroughly to WEG’s source aggregation argument and supplement the permit record, if necessary.

In April 2008, CDPHE revised and reissued the Technical Review Document that originally accompanied the January 2007 Title V permit renewal for the Frederick Station. The Addendum to the January 2007 Technical Review Document (“Addendum”)\(^{69}\) concluded that the Frederick Station and other KMG owned compressor stations are separate surface sites and the number of wells in the Wattenberg Field would cover an area in excess of 600 square miles, which supports their determination that the wells are not contiguous or adjacent, as required by the Clean Air Act for source aggregation purposes. CDPHE ruled once again that Title V renewal permit for the Frederick Station was properly limited to the compressor station itself.

WEG filed another petition in August 2008 pursuant to § 505(b)(2) of the Clean Air Act requesting that EPA object to the Addendum (“WEG Petition II”).\(^{70}\) KMG responded to the

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\(^{66}\) Letter regarding Draft Title V Permit, Kerr-McGee’s Frederick Compressor Station, Weld County, from Jeremy Nichols, Director, Rocky Mountain Clean Air Action, to Matt Burgett, Colorado Air Pollution Control Division (Sept. 14, 2006).

\(^{67}\) RMCAA asserted that such pollutant-emitting activities may include, but are not limited to tank batteries, condensers, dehydrators, condensate tanks, separators, flares, storage tanks, flashing and potentially other compressor engines. \(Id\) at 5.

\(^{68}\) Petition for Objection to Issuance of Operating Permit for Kerr-McGee Frederick Compressor Station, Rocky Mountain Clean Air Action, December 29, 2006. WEG asserted that the Title V permit failed to aggregate nearby emission sources and thereby failed to assure compliance with PSD requirements, which might necessitate a compliance schedule for the Frederick Station.

\(^{69}\) Addendum to the January 1, 2007 Technical Review Document for Renewal Operating Permit 95OPWE035 (formerly Kerr-McGee Gathering LLC)—Frederick Compressor Station, April 22, 2008.

\(^{70}\) Petition for Objection to Issuance of Operating Permit for Anadarko Petroleum Corporation’s Frederick Compressor Station, August 11, 2008.
Division’s questions regarding business and engineering practices, and provided a system map and flow diagram to aid the Division in once again addressing the source determination question.

On July 14, 2010, CDPHE submitted its response to the second EPA order. CDPHE concluded that no natural gas wells or associated pollutant emitting activities in the Wattenberg field, including those connected by pipeline to the Frederick Station, should be aggregated with the Frederick Station as a single air pollutant source. As such, CDPHE noted that the renewal operating permit as issued by APCD, with the supplementation to the record pursuant to the second order, was valid and would not be revised.

A significant part of CDPHE’s response to the second EPA order was devoted to reviewing the unique characteristics of the oil and gas industry. In evaluating the relevance of pipelines in the natural gas industry, the CDPHE’s response stated that:

The simple fact that a pipe connects two physically separate oil and gas facilities or emission units does not, by itself, imply that these two facilities or units should be considered to be part of the same emission source. While the interconnection of two facilities through a dedicated physical conveyance such as a rail spur, channel or pipeline historically has been a part of EPA’s determinations in some cases to consider two facilities to be part of the same emission source for air quality permitting purposes, it is not a primary or sole determining factor, especially considering the complex nature of the oil and gas industry. While a physically dedicated connection between two facilities (such as a pipeline) could be an overwhelming factor in a source determination in a different industry, in part because of uniqueness within that particular industry, it is not a distinguishing feature in the natural gas production and gathering sector of the oil and gas industry.

In addition to these statements, CDPHE noted that interdependency “is not an express element of the actual three part test” and “in the context of oil and gas infrastructure, it may have reduced relevance to an agency determination.” Since the record “demonstrates a lack of interdependency, to the extent that the element of the test is relevant, between the Frederick Station and nearby emission sources,” CDPHE concluded it once again that it was not appropriate to aggregate the Frederick Station with other sources in the Wattenberg field.

On October 18, 2010, EPA sent a letter to WEG stating that their “preliminary view is that Colorado has adequately responded to the Order’s direction to ‘provide an adequate basis in the permit record for its determination of the source for PSD and Title V purposes’ and that the particular source determination for the Kerr-McGee/Anadarko Station in the response is substantively consistent with federal regulations and appropriately considered the guidance provided . . . .”

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71 Response to Colorado Department of Public Health and Environment, Air Pollution Control Division, to order Granting Petition for Objection to Permit, July 14, 2010.
72 CDPHE Response, p. 41 (previously cited in this paper).

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On November 3, 2010, WEG submitted its third petition for objection to EPA (“WEG Petition III”). On February 2, 2011, EPA denied WEG Petition III. In doing so, EPA stated that WEG has not met its burden in proving that the permit is not in compliance with applicable requirements. Notably, the order was signed by Administrator Lisa Jackson.

On April 25, 2011, WEG appealed EPA’s denial of WEG Petition III to the Tenth Circuit Court of Appeals. KMG and CDPHE filed motions to intervene and were granted party status. That appeal was subsequently settled in connection with the settlement of the BP Florida River permit renewal by EPA Region 8, discussed below.

C. BP Florida River—Colorado

The Florida River Compression Facility of BP America Production Company (“BP”) is located near Durango, Colorado, on the Southern Ute Indian Reservation. Because this source is located within “Indian Country,” EPA has had direct CAA permitting authority for this facility since 2001. The Florida River compression facility has been operating since the 1980s, and was subject to a significant CAA permitting history prior to the publication of a draft renewal Title V (Part 71) permit by EPA Region 8 in 2008, which drew adverse comment from Rocky Mountain Clean Air Action, now known as WildEarth Guardians (“WEG”).

In its adverse comments on the draft renewal Title V permit, WEG argued that the operation should be aggregated with another BP-owned compression facility and with over a thousand BP-operated wells located across La Plata County, Colorado. More specifically, WEG argued in its May 2008 comments on the draft Florida River Title V permit for the first time that “EPA has not considered emissions from all interrelated pollutant emitting activities, namely BP’s coalbed methane wells and the Wolf Point Compressor Station.” WEG asserted that BP “operates more than 1000 coalbed methane wells in La Plata County” and those wells should be aggregated with Florida River because (i) “[t]he fact that BP’s producing coalbed methane wells are all located primarily within La Plata County strongly indicates these pollutant emitting activities are adjacent to the Florida River Compression Facility for PSD purposes,” and (ii) BP’s wells “have a functional interrelationship with the Florida River Compression Facility”—that is, without Florida River, BP’s wells “would cease to operate as there would be no means of compressing, processing, and transporting natural gas to market pipelines.”

Subsequent to WEG’s adverse comment, BP submitted additional information to EPA Region 8 concerning the compressor stations and wells which were the focus of WEG’s aggregation arguments. Such information included maps showing the densely intermingled Tribal, Federal, State, and private surface and mineral ownership patterns of the area; the complex pattern of surface and mineral ownership on the Southern Ute Indian Reservation near the Florida River

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73 Petition for Objection to Issuance of Operating Permit for Anadarko Petroleum Corporation’s Frederick Compressor Station, November 3, 2010.
75 Interestingly, the facility was the subject of a prior aggregation decision, not contested by BP or prompted by an environmental group, whereby two on-site turbines previously owned by a third party, but later acquired by BP, were added to the sources in the facility’s CAA permit.
76 See Response to Comments on the Florida River Compression Facility’s March 28, 2008 Draft Title V Permit to Operate (Oct. 18, 2010).
compression facility; exemplars of the more than 60 surface use agreements, pipeline agreements, and rights-of-way just in the area closest to Florida River; and a map of oil and gas lease boundaries near Florida River, among other items. These materials also demonstrated clearly that the BP-operated wells at issue are spread across a vast area, and that selection of those well locations was driven in part by surface owner preferences, as well as spacing orders. BP also included for EPA’s consideration a gas flow diagram showing the complex movement of gas across the Northern San Juan Basin, and which illustrated how BP has significant flexibility in determining where and how gas flows by virtue of the numerous points across the field where BP-gathered gas can be either offloaded to other companies’ pipelines and compressors or BP may accept gas from non-BP-operated wells and facilities.

EPA Region 8 issued a final renewal Title V permit for Florida River without aggregating its emissions with BP-operated wells or compressor stations in October, 2010. The response to comments issued by EPA Region 8 in support of its determination made a number of notable statements and findings. Region 8 rejected WEG’s request to aggregate Florida River and other facilities because, among other reasons (i) the fact that many BP wells are located across La Plata County does not mean they are “adjacent”; (ii) the location of BP’s wells is determined by a host of complex factors such as spacing, geology, engineering, topography, surface owner compatibility, not proximity or any other relationship to Florida River; (iii) the wells were drilled before and after Florida River was constructed; (iv) the “dynamic,” “complex and diverse gas movement among the facilities”; and (v) the “lack of unique interdependence among the facilities.”

Not surprisingly, WEG appealed the EPA’s permit renewal and source determination to the EPA Environmental Appeals Board (“EAB”) on two grounds. First, WEG argued that EPA’s determination was inaccurate and that the hundreds of BP wells and multiple compressor stations across La Plata County were “adjacent” for permitting purposes because they are connected by pipelines and functionally interdependent. WEG also argued that EPA should have reopened the comment period after BP had provided the agency with supplemental information on the aggregation question, after the close of the comment period, stating that “it does not appear” that Region 8 can rely on additional information in justifying a permit decision “without reopening the public comment period.”

These issues were the subject of briefs by EPA, WEG and BP as intervenor-appellee, arguing against and for an EAB decision to accept the case for further briefing and a decision on the merits. The American Petroleum Institute (“API”) also filed an amicus brief with the EAB. Before ruling on whether to accept the case for consideration on the merits, the parties agreed to participate in a pilot ADR program of the EAB which resulted in a settlement of the EAB appeal that did not affect the renewal permit issued by EPA.

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77 In essence, BP submitted evidence showing that the operations did not meet the common sense notion of a plant.
78 Id. at 12.
79 Id.
80 Id.
81 Id.
D. *CAC v. DEP and MARKWEST*

**MARKWEST HOUSTON GAS PLANT—PENNSYLVANIA**

On May 12, 2011, the Clean Air Council (“CAC”), an environmental group, appealed a final plan approval issued by the Pennsylvania Department of Environmental Protection (“DEP”) to MarkWest Liberty Midstream and Resources, LLC, (“MarkWest”) to expand its Houston Gas Plant located in Washington County, Pennsylvania, near Pittsburgh. CAC had commented adversely on the draft plan approval issued by DEP. The permit in question was the fourth plan approval (permit) sought by MarkWest for the Houston Gas Plant, and enabled the expansion of that facility to add a third gas processing train and a fractionator to the plant. In its technical review memo in support of the decision to issue a final plan approval, DEP engaged in a lengthy analysis and concluded it would not aggregate the Houston Gas Plant with any of the ten compressor stations operated by MarkWest in Washington County and located from 1.5 to 11 miles away because they were not “adjacent” and not sufficiently interdependent.

The matter is currently pending hearing, scheduled for September 2013, and dispositive motions have been filed and are being briefed. The Environmental Hearings Board will hold an *en banc* hearing on MarkWest’s Motion to Limit Issues in early April 2013. The Motion to Limit is based on the recent decision of the Sixth Circuit in *Summit Petroleum*, and seeks to preclude the consideration of functional relationships in determining the adjacency of facilities, as a matter of law.

E. *PENNFUTURE v. ULTRA RESOURCES—PENNSYLVANIA*

The plaintiff Citizens for Pennsylvania’s Future brought a CAA citizen’s suit against Ultra Resources in federal district court alleging that Ultra is in violation of the Clean Air Act even while operating under valid state-issued air permits for seven compressor stations. This case is unique in several respects. First, most aggregation cases involve a suit against the permitting authority challenging the issuance of the permit. In this case the environmental group is challenging an operator who has been issued and is operating under valid state permits. Second, the plaintiff is not alleging any violations with the operator’s permit conditions. Instead the plaintiff is alleging violations of the CAA simply by operating under and complying with state issued permits alleging that seven compressor stations should be permitted as one major source.

The plaintiff argues that Ultra’s operations throughout the Marshlands Play should be aggregated into a single permit. These operations extend through multiple counties and townships and encompass hundreds of square miles. The plaintiff argues that these dispersed activities violate the CAA by adversely affecting air quality in the area.

Ultra filed a motion to dismiss the plaintiff’s citizen suit on jurisdictional and abstention grounds, but the motion was denied and the matter is now proceeding with discovery pending trial. A trial date has not been set.

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83 *Citizens for Pennsylvania’s Future v. Ultra Resources, Inc.*, No. 4:11-cv-1360 (M.D. Pa.).
F. **GASP v. DEP AND LAUREL MOUNTAIN MIDSTREAM—PENNSYLVANIA**

On May 2, 2011, the Group Against Smog and Pollution\(^\text{84}\) filed an appeal with Pennsylvania’s Environmental Hearing Board (“EHB”) challenging the Department of Environmental Protection’s Plan Approval\(^\text{85}\) for Laurel Mountain Midstream Operating, LLC (“Laurel Mountain”).\(^\text{86}\) The Plan Approval issued by the DEP covers the installation and temporary operation of three new compressor engines, as well as three previously authorized compressor engines, one turbine, one dehydrator, and one produced water tank at Laurel Mountain’s Shamrock Compressor Station located in German Township, Fayette County, Pennsylvania.

GASP alleged that the DEP failed to perform an adequate source determination and should have aggregated emissions from 73 well sites with emissions from the Shamrock Compressor Station. GASP alleges that there is common control between the 73 well sites and the Shamrock Compressor Station because those well sites are owned by Atlas Energy, Inc., which also has an ownership in Laurel Mountain, and because the two entities have a contractual relationship. GASP also alleges that the 73 well sites are contiguous or adjacent because they are dependent on the Shamrock Compressor station. Specifically, GASP argues that unless the production wells surrounding the Shamrock Compressor Station also have separate pipeline connections to other compressor stations or directly to a natural gas transmission line, each production well has no means other than via the Shamrock Compressor Station to transport natural gas from the production well to market, and therefore the wells are entirely dependent on Shamrock.

GASP is seeking to have the Plan Approval either vacated and remanded or modified by the EHB, to include the emissions from the 73 well sites in the permit for Shamrock. The parties have completed discovery, filed dispositive motions, and recently filed motions in limine. The case is currently scheduled to go to hearing on March 19, 2013.

G. **CAC v. DEP (PES AND SUNOCO REFINERIES)—PENNSYLVANIA**

The Pennsylvania Department of Environmental Protection recently determined that two refineries in the metropolitan Philadelphia area were a single source based on the extensive functional relationships between them. The Clean Air Council has appealed that determination based on concerns involving the potential for PSD “netting” of emissions across the two facilities, which are separated by 17 miles. The facts in the Sunoco Marcus Hook and Philadelphia refineries matter are somewhat unique. First, Sunoco, not the permitting authority, initiated the source determination process for the two refineries. The company based its request on numerous asserted functional relationships between the facilities, citing earlier EPA letters and evaluating the required factors to support such a determination. For example, the request described how over 46,000 barrels of 11 types of petroleum products were currently or planned to be transported between the two refineries by dedicated pipelines, rail, or barge.

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\(^\text{84}\) GASP is a non-profit citizens group based in Pittsburgh, Pennsylvania. It describes itself as serving as a watchdog, educator, litigator, and policy-maker on many environmental issues, with a focus on air quality in southwestern Pennsylvania.

\(^\text{85}\) In Pennsylvania, a Plan Approval is a permit that authorizes construction, installation, or modification of any pollution source or facility.

As stated in Sunoco’s request, the driver for requesting aggregation was the operational and regulatory benefit of doing so. Combining the sources facilitated compliance with a 2005 settlement agreement with EPA on earlier Clean Air Act violations. It also allows the company to credit emission reductions at the Marcus Hook Refinery to the Philadelphia Refinery, or even create plant-wide emission limits to “net” emissions between the two refineries. The Clean Air Council appealed that determination to the Pennsylvania Environmental Hearings Board on September 24, 2012. The matter is in discovery, but no hearing has been set.

IX. THE SEPARATE BUT RELATED CONCEPT OF NSR CIRCUMVENTION

At least one of the current administrative challenges to air permitting for oil and gas facilities alleges that the construction of pipelines and process equipment (liquids separation equipment) constitutes a violation of the prohibition against circumvention of NSR requirements contained in that states’ regulations and SIP.87 This is a relatively novel addition to the spate of recent aggregation challenges to oil and gas facility air permitting generally based on source aggregation principles. To the author’s knowledge, no court or administrative body has ruled on whether separately permitted facilities can form the basis for a circumvention claim.

To avoid the more onerous requirements of “major source” permitting under the Clean Air Act’s New Source Review program, some sources may attempt to divide a single project that would otherwise alone exceed major source emission thresholds into smaller, phased or incremental projects that, on their own, do not exceed such thresholds and can be permitted under less stringent minor source permitting requirements. According to EPA, such phased and incremental construction circumvents the purpose of the New Source Review program and, if allowed, would “turn[] the statutory scheme on its head by using federally enforceable minor source permits in a manner inconsistent with the statute and with EPA’s intention.” 54 Fed. Reg. 27274, 27281 (June 28, 1989). Accordingly, in June 1989, EPA announced that it would take appropriate enforcement action to prevent such “circumvention of the preconstruction review requirements of the NSR program.” Id. at 27284 (June 28, 1989). Specifically, EPA stated that it will “take steps to prevent owners or operators from manipulating the NSR preconstruction review program by improperly obtaining minor status for a new source or modification.” Id. at 27281.

EPA provides two examples of what it considers to be unlawful circumvention of the New Source Review program:

1) A source attempts to expedite construction by securing minor source status through permits containing operational restrictions from which the source intends to free itself shortly after completion of construction and commencement of operation; and

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2) A source attempts to expedite construction by securing several minor source permits and avoiding major modification requirements. EPA explains the latter example constitutes circumvention of the New Source Review program because the applicant is attempting “to avoid PSD review by splitting a modification into two or more minor modifications.”

Many states have codified in their regulations specific provisions prohibiting such circumvention of NSR program requirements through phased or incremental construction, in order to obtain EPA approval of their SIPs. Pennsylvania’s provision is typical, and provides:

Regardless of the exemptions provided in this subchapter, an owner or other person may not circumvent this subchapter by causing or allowing a pattern of ownership or development, including the phasing, staging, delaying or engaging in incremental construction, over a geographic area of a facility which, except for the pattern of ownership or development, would otherwise require a permit or submission of a plan approval application.

Thus, the elements of a circumvention claim are: (1) a pattern of ownership or development (e.g., phased or incremental construction); (2) over a geographic area of a facility; (3) which, except for the pattern of ownership or development, would otherwise require a permit or plan approval. Any party asserting such circumvention has occurred must therefore satisfy all three elements to succeed on its claim.

The Pennsylvania Department of Environmental Protection adopted 25 Pa. Code § 127.216 in 1994 in response to a State Implementation Plan deficiency letter from EPA, in which EPA indicated that the Pennsylvania Code should contain a prohibition on circumvention of the New Source Review Program. As the text of 25 Pa. Code § 127.216 indicates, Pennsylvania developed a regulation in line with EPA’s circumvention policy, which is designed to prohibit the phased or incremental construction of multiple minor sources at a single facility to avoid major source applicability thresholds (i.e., New Source Review) for that one facility.

The circumvention claims raised in the MarkWest Liberty case attempt to merge source determination principles with the prohibition on circumvention, but in ways that do not appear to have support in the regulatory language of circumvention or EPA’s related enforcement policies, and for which there is no precedent in case law or administrative proceedings. The failings of such claims are multiple, beginning with the involvement of multiple, separately permitted and

89 EPA Memorandum, Sept. 18, 1989; see also EPA’s Draft New Source Review Workshop Manual (excerpt), Appendix C, p. 6 (Oct. 1990) (“[A] permit may be considered a sham permit if it is issued for a number of pollution-emitting modules that keep the source minor, but within a short period of time an application is submitted for additional modules which will make the total source major.”)
widely dispersed facilities, not a single facility like the examples given in EPA policies and in the language of applicable regulations. Moreover, the appellant in the *MarkWest Liberty* case does not allege that the construction of sources requiring air permits, *i.e.*, emitting units, constituted the “pattern of development” required for a claim of circumvention. Instead, the appellant has claimed that pipeline connections and separation equipment not requiring air permits for their construction or operation constituted the “pattern of development,” because they rendered permitted facilities connected by them less interdependent, and therefore less amenable to source aggregation. This also runs afoul of the requirements for such claims, since only construction of sources otherwise requiring a permit may constitute the pattern of development resulting in the impermissible circumvention of NSR program requirements.

It is the author’s view that because non-contiguous sources may not constitute a single “facility” for purposes of possible circumvention until “aggregated” to make them a single stationary source, circumvention claims may not proceed against multiple, separately permitted facilities. In other words, aggregation and circumvention are mutually exclusive theories of liability. This makes sense because to hold otherwise would lead to absurd results. For example, any source that, based on agency guidance or case law, designs its facilities to meet certain criteria that would make them less likely to be aggregated (which is entirely proper), could be subject to circumvention claims. Such a result would be contrary to New Source Review circumvention policy and would impose considerable litigation risks and burdens on owners and operators. In such circumstance, not only would an operator need to be wary of whether to aggregate physically separate sources in a single permit, it would also have to evaluate separate projects at separate facilities, occurring over a period of years, to consider whether NSR review might have been “circumvented” under such an expansive theory. This challenge would also present itself to permitting authorities. Such a theory of circumvention would create untenable and unworkable regulatory requirements, and would appear to have little or no basis in law or applicable EPA policy.

**X. CONCLUSION**

Source determinations for the natural resources industries, and the oil and gas sector in particular, are unduly complex, and inject great uncertainty into the permitting process. States that have adopted a one-quarter mile rule of thumb regarding what is deemed adjacent have greatly, but not entirely, reduced that uncertainty. Future challenges will further define the contours of common control and the common sense notion of a plant. In the meantime, permittees of oil and gas facilities would do well to think about proximity and common control before constructing their planned facilities, lest they become embroiled in lengthy and complex disputes regarding source aggregation.