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Sixth Circuit Vacates EPA Aggregation of Gas Facilities as Illogical

On August 7, 2012, the U.S. Court of Appeals for the 6th Circuit rejected a determination of the U.S. Environmental Protection Agency (EPA) pursuant to agency policy that functionally related gas facilities, including a sweetening plant and roughly 100 natural gas wells spread out over a 43-square-mile area, should be treated as a single "major" source for the purposes of regulation under the federal Clean Air Act (CAA).[1] Determining that the agency's finding was impermissible and illogical, the court vacated the EPA's determination and remanded it to the agency for reassessment. This case represents a major rejection of longstanding EPA interpretive policy and has the potential to relieve the regulated community, particularly oil and gas operations, of significant regulatory burden.

Background

The petitioner, Summit Petroleum Corporation, owned and operated a natural gas sweetening plant, flares and various sour gas production wells in Michigan, including the subsurface pipelines connecting each of the wells to the sweetening plant. These facilities were spread out over an area of 43 square miles, with some wells located as many as eight miles from the plant. None of the facilities were on physically adjacent properties, and Summit did not own any of the real property on which its facilities were located.

In 2005, Summit and the Michigan Department of Environmental Quality sought a determination from the EPA as to whether Summit's facilities should be treated as a single major source for the purposes of the Title V operating permit program under the CAA. Multiple facilities may be treated as a single major source if they are under common control, located on one or more contiguous or adjacent properties and belong to the same major industrial grouping.[2] Summit and the EPA agreed that the common control and industrial grouping factors had been met, but the adjacency factor was questionable.

After several years of correspondence and agency deliberation, the EPA ultimately determined in September 2009 that Summit's facilities were to be considered, in the aggregate, as a single major stationary source under the CAA. The EPA later explained that, with respect to adjacency, although the wells and sweetening plant were separated by large distances, the agency had never established a fixed distance beyond which facilities would not be considered "adjacent" and that the "degree of interdependence" between the Summit facilities and the fact that they "together produced a single product" suggested that the facilities were not "truly independent."

Sixth Circuit Opinion

The single issue on appeal was whether Summit's facilities were "adjacent" to one another. The 6th Circuit construed the term "adjacent" under the CAA definition for stationary source according to its plain meaning,[3] going on to explain that the definition of "adjacency," as well as case law, clearly implied physical proximity. The court found no such support for the EPA's assertion that adjacency included a functional or contextual relationship. According to the court, examining "the purpose for which two activities exist" is simply not relevant to whether they are adjacent. Having determined that the term adjacent was not ambiguous, the court concluded that it did not owe deference to the EPA's interpretation. As a result, the court rejected the EPA's reliance on what it called the functional interrelationship between Summit's natural gas facilities.

1 The case, *Summit Petroleum Corp. v. U.S. Environmental Protection Agency*, No. 09-4348, is available here.

2 40 C.F.R. § 71.2.

3 The dissenting opinion would have considered the word "adjacent" to be ambiguous, thus allowing EPA greater deference in its interpretation and application of that term.

Going Forward

At least with respect to future Title V permitting within the jurisdiction of the 6th Circuit (Ohio, Kentucky, Michigan and Tennessee), activities located on "physically contiguous or adjacent properties" may be aggregated only where they are *geographically* proximate. It is important to note that permitting authorities in several major natural gas producing states already apply a ¼ mile "rule-of-thumb" for geographic proximity of natural gas wells. *See* Texas Commission on Environmental Quality, *Definition of Site Guidance Document, APDG 61111* (Aug. 2010); Pennsylvania Department of Environmental Protection, *Guidance for Performing Single Stationary Source Determinations for Oil and Gas Industries* (Oct. 2011). To the extent the 6th Circuit's opinion is adopted in the other circuits, either by the courts or the permitting agencies, this decision represents a significant victory for the regulated community. As the EPA itself asserted, the concept of functional relatedness as it relates to adjacency is an agency interpretation of longstanding duration. Indeed, the EPA has determined on many occasions that pollutant-emitting activities are adjacent and must be aggregated where there is a functional relationship between them.[4]

Now, new facilities, including oil and gas operations, uncertain as to whether an operating permit is required can cite to 6th Circuit precedent requiring geographic proximity and a rejection of the functional interrelatedness test in determining whether aggregation with other sources of pollution is appropriate. While it will be too late for most facilities already aggregated into a single major source under Title V to challenge their initial permitting determinations, this case may provide the basis for modifying or reopening a Title V permit to reconsider a facility's major source status (or even seeking outright revocation), resulting in a potentially significant reduction in compliance costs and annual fees.

To discuss any questions you may have regarding this Alert, or how it may apply to your particular circumstances, please contact a member of Cozen O'Connor's Energy, Environmental & Public Utilities Practice.

4 *See Summit Petroleum Corp.*, No 09-4348, at 1617 (citing multiple EPA determinations).