The United States Court of Appeals for the Sixth Circuit in its August 7, 2012, decision in *Summit Petroleum Corporation v. EPA*, *et al*, Case Nos. 09-4348/10-4572 vacated and remanded this single source determination.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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OCT 18 2010

REPLY TO THE ATTENTION OF
A-18J

BY CERTIFIED MAIL and ELECTRONIC MAIL

Mr. Scott Huber
Summit Petroleum Corporation
P.O. Box 365
Mount Pleasant, Michigan 48804

Dear Mr. Huber:

This letter supplements the U.S. Environmental Protection Agency's September 8, 2009, letter to Gina Bozzer, Zimmerman, Kuhn, Darling, Boyd, regarding Summit Petroleum Corporation's (Summit) operations in Mount Pleasant, Michigan. In a February 23, 2010, letter from Cheryl Newton, Director, Region 5 Air and Radiation Division, to you, EPA granted your request for an administrative stay of the date by which Summit was to have submitted an application for an operating permit under Title V of the Clean Air Act (CAA). Pursuant to this administrative stay, EPA gave Summit the opportunity to submit additional information and certifications for EPA's consideration. EPA is now in receipt of the additional information, certifications, and maps which Summit provided under cover letter of April 29, 2010, pursuant to 40 C.F.R. §§ 71.3(e)(1) and 71.5(d). Our letter today reiterates EPA's September 8, 2009, determination, pursuant to 40 C.F.R. § 71.3(a)(1), that Summit's sour gas wells, sweetening plant, and associated flares constitute a single source for purposes of permitting under Title V of the CAA.

Analysis

The Federal Operating Permits Program is set out at 40 C.F.R. Part 71. EPA's regulations provide that, for purposes of the Title V/Part 71 program, a stationary source "means any building, structure, facility, or installation that emits or may emit any regulated air pollutant or any pollutant listed under section 112(b) of the Act."[1] EPA's regulations state:

> Major source means any stationary source (or any 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 . . . . For the purposes of defining 'major source,' a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources on contiguous or adjacent properties

[1] 40 C.F.R. § 71.2 (2009).

> belong to the same Major Group (i.e., all have the same two-digit code) as described in the Standard Industrial Classification manual, 1987.[2]

Major sources are further defined as belonging to one of three categories. One of these categories is defined as:

> A major stationary source of air pollutants or any group of stationary sources as defined in section 302 of the [Clean Air] Act, that directly emits, or has the potential to emit, 100 tpy [i.e., tons per year] or more of any air pollutant. . . .[3]

In making its determination that Summit's sour gas wells, sweetening plant, and associated flares constitute a single source for purposes of permitting under Title V of the CAA, EPA followed the guidance provided in the September 22, 2009, memorandum entitled "Withdrawal of Source Determinations for Oil and Gas Industries," from Gina McCarthy, U.S. EPA's Assistant Administrator of the Office of Air and Radiation, to Regional Administrators ("McCarthy Memorandum").[4] The McCarthy Memorandum recognizes the complex operational issues surrounding the operation of some oil and gas industries and emphasizes a case-by-case, fact-specific approach to making aggregation determinations for purposes of New Source Review (NSR) and Title V permitting programs. The McCarthy Memorandum notes that:

> Permitting authorities should therefore rely foremost on three regulatory criteria for identifying emissions activities that belong to the same 'building,' 'structure,' 'facility,' or 'installation.' These are (1) whether the activities are under the control of the same person (or person under common control); (2) whether the activities are located on one or more contiguous or adjacent properties; and (3) whether the activities belong to the same industrial grouping. 40 C.F.R. 52.21(b)(6).[5]

Consistent with this Memorandum and other applicable Agency guidance, EPA has made the following analysis in support of its determination.

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[2] 40 C.F.R. § 71.2 (2009).

[3] 40 C.F.R. § 71.2 (2009).

[4] The McCarthy Memorandum specifically withdrew a January 12, 2007, memorandum from William Wehrum, entitled "Source Determinations for Oil and Gas Industries" (Wehrum Memorandum) **(*Summit Petroleum Corp. v. U.S. Envt'l Protection Agency and Lisa Jackson*, Case No. 09-4348 (6th Cir.), U.S. Administrative Record Document [hereafter Document] 28)** The purpose of the Wehrum Memorandum was to set out a "non-binding policy statement that set forth a possible methodology for making source determinations" for the oil and gas industry that made proximate distance the primary basis on which to determine whether to aggregate multiple emissions sources into a single source for permitting purposes. Memorandum from Gina McCarthy, EPA Assistant Administrator, to Regional Administrators, Sept. 22, 2009, at 1 (henceforth, "McCarthy Memorandum"); available at *http://www.epa.gov/region7/air/nsr/nsrmemos/oilgaswithdrawal.pdf*. The McCarthy Memorandum found 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," and restored the Agency's previous methodology for making source determinations based on existing New Source Review regulations and guidance. McCarthy Memorandum at 1.

[5] McCarthy Memorandum at 2.

1. The activities are under the control of the same person (or person under common control).

EPA's regulations do not specify how control is defined, but EPA's practice has been to rely on a fact-specific inquiry, and which includes a presumption that common ownership constitutes common control.[6] The Agency looks at other factors as appropriate.[7] Summit has stated that it "operates a gas sweetening plant located at 4725 N. Isabella Road, Rosebush, Michigan. Summit Petroleum also owns and operates approximately 100 sour gas production wells that supply gas to the gas sweetening plant."[8] Additionally, in attachments to an April 18, 2008, letter from Ms. Bozzer to Pamela Blakley, Summit provided a list of emissions from wells, flares, and pumping equipment associated with the Rosebush gas sweetening plant.[9] Ms. Bozzer's April 29, 2010, letter provides further information, described in two maps and two spreadsheets (NOx Potential to Emit Summary, and SO2 Potential to Emit Summary) which detail Summit's current emissions sources, including sour gas wells, flares, and natural gas engines. The April 29, 2010, letter "reflects current PTE information and location of relevant emissions units for Summit."[10]

In an April 26, 2007, letter from Pamela Blakley to Gina Bozzer, EPA stated that "the gas production wells and the gas sweetening plant are controlled and operated by the same company, Summit Petroleum,"[11] and Summit has not since disputed this statement. Accordingly, EPA has determined that the additional clarification provided by Summit in its letter of April 29, 2010, does not change EPA's previous determination that all of the emissions sources listed in Summit's submissions of January 18, 2005, April 18, 2008, and April 29, 2010, are owned and operated by, and thus are under the common control of, Summit.

2. The activities are located on one or more contiguous or adjacent properties.

The second part of EPA's inquiry into whether it is appropriate to aggregate multiple emission points into a single source for permitting purposes turns on whether the activities are

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[6] Letter from William Spratlin, U.S. EPA, to Peter Hamlin, Iowa Department of Natural Resources, September 18, 1995, at 1 (Document 4).

[7] See Memorandum from John Seitz, U.S. EPA, to Addressees, "Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permit Programs of the Clean Air Act," August 2, 1996, at 3 (Document 5) (emphasizing the fact-specific nature of common control determinations). See also Letter from Richard Long, U.S. EPA, to Julie Wrend, Colorado Department of Public Health and Environment, November 12, 1998, at 2 (Document 11) (". . . EPA has established several mechanisms by which sources and permitting authorities can determine whether there may be 'common control' over a group of stationary sources. First, common control can be established through ownership of multiple sources by the same parent corporation or by a parent and a subsidiary of the parent corporation. Second, common control can be established if an entity such as a corporation has the power to direct the management and policies of a second entity, thus controlling its operations, through a contractual agreement or a voting interest.")

[8] Letter from Chris Hare, MDEQ; Scott Huber, Summit Petroleum; and Gina Bozzer to Pamela Blakely, U.S. EPA, January 18, 200[6], at 1 (Document 20). See also Laura Cossa, U.S. EPA, Conversation Record from telephone call with Chris Hare, MDEQ, April 4, 2006 (Document 23) (citing common ownership of Summit's emissions sources).

[9] Letter from Gina Bozzer to Pamela Blakley, April 18, 2008, at Tables 1 and 2 (Document 30) ("Potential to Emit Summary, Rosebush Field, Summit Petroleum").

[10] Letter from Gina Bozzer to Pamela Blakley, April 29, 2010, at 3.

[11] Letter from Pamela Blakley to Gina Bozzer, April 26, 2007, at 2 (Document 29).

located on one or more contiguous or adjacent properties.[12] EPA has never established "a specific distance between pollutant emitting activities" for determining whether two non-contiguous facilities are "adjacent," but EPA has historically interpreted the term to include concepts other than the physical distance between two facilities.[13] In fact, EPA has repeatedly included an evaluation of the nature of the relationship between the facilities and the degree of interdependence between them in determining whether multiple non-contiguous emissions points should be considered a single source.[14]

In the initial promulgation of the 3-part major source definition, EPA explained that we could not "say precisely . . . how far apart activities must be in order to be treated separately" and directed that such determinations be made on a case-by-case basis.[15] Since that time, analyses conducted by EPA and state permitting authorities have continued to take the position that a fact-specific inquiry is necessary to establish whether emissions sources should be grouped together.[16] EPA expects that this inquiry will be based on a "case-by-case," "highly fact-specific" basis, where "no single determination can serve as an adequate justification for how to treat any other source determination for pollutant-emitting activities with different fact-specific circumstances."[17] As noted above, EPA has historically recognized that emissions units need not be on properties that are physically touching in order to be to be aggregated,[18] and the McCarthy

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[12] See 40 C.F.R. § 71.2 (2009).

[13] Memo from Robert G. Kellam, EPA OAQPS, to Richard R. Long, Director of EPA Region 8 Air Program, August 27, 1996, at 3 (explaining that the contiguous and adjacent analysis must be "determined on a case-by-case basis, based on the relationship between the facilities").

[14] See guidance cited in n.13, *supra*, and n. 18, *infra*. See also letter from Letter from Pamela Blakely, U.S. EPA, to Don Sutton, Illinois EPA, March 14, 2006 at 2 (using the "common sense notion of a plant" as the guiding principle in determining that 4 facilities operated by one company but located up to 8 miles apart were a single title V source because "the activities occurring at these sites all assist in supporting" the main manufacturing operation of the company).

[15] 45 Fed. Reg. 52,676, 52,695 (August 7, 1980). While this language is taken from the preamble to the final rule promulgating the major source definition for the NSR permitting program, EPA was clear in promulgating the Title V major source definition found at 40 C.F.R. section 71.2, that the language and application of the Title V definition was to be consistent with the NSR program. See 61 Fed. Reg. 34,202, 34,210 (July 1, 1996).

[16] See e.g., Inter-office Communication from Jim Geier, et al, to Stationary Sources Program Staff and Local Agencies, "Glycol Dehydration Units – permit issues," January 4, 1995, at 2 (Document 3):

> The Division will review oil and gas facilities under the operating permit rules to determine if a permit is needed for criteria pollutants. As is the case for construction permits, emissions units on the same or contiguous properties will be added together to determine if the source is major. Sources owned or controlled by the same company that are located on widely separated, non-contiguous property will need to be assessed on a case-by-case basis to determine if an operating permit is needed.

See also Letter from Richard Long, U.S. EPA, to Lynn Menlove, Utah Division of Air Quality, "Response to Request for Guidance in Defining Adjacent with Respect to Source Aggregation," May 21, 1998 at 1 (Document 10) ("the distance associated with 'adjacent' must be considered on a case-by-case basis").

[17] McCarthy Memorandum at 2.

[18] See Letter from JoAnn Heiman, U.S. EPA, to James Pray, Brown, Winick, Graves, Gross, Baskerville and Schoenebaum, PLC, December 6, 2004 at 2 ("Generally, the closer two facilities are the more likely they may be considered contiguous or adjacent. In addition, the existence of a dedicated pipeline or transportation link . . . may also be relevant to this determination."); Letter from Kathleen Henry, U.S. EPA, to John Slade, Pennsylvania DEP, January 15, 1999 at 1 ("determining whether facilities are contiguous or adjacent depends not only on the physical distance between them but [also] on the type of nexus (relationship) between the facilities."); Letter from Richard

Memorandum is consistent with that guidance in recognizing that while proximity of disparate emissions units is important, it is not necessarily the deciding factor in making an aggregation determination.[19]

Summit provided information to EPA in January 2006, which included the following statement:

> Summit Petroleum Corporation operates a gas sweetening plant located at 4725 N. Isabella Road, Rosebush, Michigan. Summit Petroleum also owns and operates approximately 100 sour gas production wells that supply the gas to the gas sweetening plant. The closest production well is approximately 500 feet from the gas sweetening plant and the farthest production well is slightly over eight miles from the gas sweetening plant. . . .[I]f the potential emissions from the sour gas production wells are included with the gas sweetening plant emissions, the aggregated sources combined may be considered a single major source for criteria pollutants, namely nitrogen oxides and sulfur dioxides. . . .[20]

Summit has stated that "two of the well sites are within a quarter-mile radius of the sweetening plant," and that the others are "separated from the sweetening plant by a considerable distance and intervening properties."[21] Summit further notes that the closest flare is approximately 3,000

Long, U.S. EPA, to Lynn Menlove, Utah Division of Air Quality, "Response to Request for Guidance in Defining Adjacent with Respect to Source Aggregation," May 21, 1998 at 2 (Document 10) ("a determination of 'adjacent' should include an evaluation of whether the distance between two facilities is sufficiently small enough that it enables them to operate as a single 'source.'").

[19] EPA has not adopted a "quarter mile" presumption of adjacency, such as Summit argues in its April 29, 2010 letter from Gina Bozzer to Pamela Blakley.

[20] Letter from Chris Hare, et al., to Pamela Blakley, January 18, 200[6] at 1 (Document 20). Summit also provided information demonstrating that the aggregated emissions units would constitute a major source. A January 2006 summary table entitled "Potential to Emit Summary, Rosebush Field, Summit Petroleum," showed potential emissions from the hydrogen sulfide combustion facility (gas sweetening plant) of 98 tpy of SO2, and an additional 52 tpy of SO2 from 17 field flares. The table also showed six categories of natural gas engines and other emissions units with combined NOx emissions in excess of 200 tpy. Letter from Chris Hare, et al., to Pamela Blakley, January 18, 200[6], at Tables 1 and 2 (Document 20) ("Potential to Emit Summary, Rosebush Field, Summit Petroleum"). Supplemental information submitted by Summit in April 2010 stated that the gas sweetening plant is supplied by sour gas from the Wise, Leaton, and Rosebush fields. Summit confirmed that its gas sweetening plant has a potential to emit 98 tpy of SO2 and also stated that it had the potential to emit 78.3 tpy of NOx. Additionally, Summit stated that each of its 16 sour gas flares have a potential to emit 3.1 tpy of SO2. Summit also stated that it has 84 pumpjack engines in its oil fields, with 39 of these having associated equipment with the potential to emit between 0.25 and 0.31 tpy NOx. The 98 tpy of SO2 from the sweetening plant combined with the 3.1 tpy SO2 from the nearest sour gas flare, alone, exceeds the 100 tpy threshold for Title V applicability. Letter from Gina Bozzer to Pamela Blakley, April 29, 2010, at 1.

[21] Letter from Gina Bozzer to Pamela Blakley, April 29, 2010, at 2. EPA notes that Summit appears to have made an error in its representation of distances relating to the maps it submitted. The legend for Maps 1 and 2 give a scale of 1 inch to 1,000 feet, but Summit's April 29, 2010, letter states that the maps have a scale of 1 inch to 2,000 feet. Letter from Gina Bozzer to Pamela Blakley, April 29, 2010, at 1. Based on information previously submitted by Summit and the scale on the maps themselves, it appears that the correct scale of the maps is 1 inch to 1,000 feet. Contrary to Summit's assertion in its April 18, 2008 letter stating that "there are no sour-gas wells located within the one-mile radius of the Plant," Letter from Gina Bozzer to Pamela Blakley, April 18, 2008, at 3 (Document 30), it appears that there are a dozen or more sour gas wells within a one-mile radius of the sweetening plant.

feet from the sweetening plant, with others located a mile or more away.[22] Summit argues that because the gas wells and associated flares are separated from the sweetening plant "by a considerable distance and intervening properties," these emissions sources "are neither 'contiguous' nor 'adjacent' and they do not fit the 'common sense notion' of a plant."[23]

According to a schematic provided by Summit of its sweetening plant operations, the natural gas wells from Summit's three fields are connected to the gas sweetening plant through a "collection system."[24] Further, flares are spread throughout the 3 well fields between the wells and the collection system.[25] Finally, the sweet gas wells "are plumbed to the collection system to retrieve the natural gas for sales and fuel."[26] The natural gas wells and flares that are connected to the sweetening plant together produce a single product: "gas sales."[27]

Summit has not presented any evidence to show that the "far flung well sites" from the three fields do not provide product to the sweetening plant or that they do or can provide product to any other processing plants. Nor does Summit provide any information showing that the well sites themselves are owned by any other entity than Summit. In fact, the information provided by Summit shows that the sour gas wells are truly interdependent on the sweetening plant – the wells provide all their sour gas to the sweetening plant, the sour gas cannot flow anywhere else, and Summit owns and operates the sweetening plant and well sites.[28]

Accordingly, on the basis of the information Summit has submitted through April 2010, EPA concludes that these emissions sources are adjacent given the particular facts Summit has presented about the interdependent nature of its natural gas production facilities, Summit's sour gas flares, natural gas wells and associated equipment, and the sweetening plant. Accordingly, they should not be considered separate emissions sources.[29]

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[22] Letter from Gina Bozzer to Pamela Blakley, April 29, 2010, at 2.

[23] Letter from Gina Bozzer to Pamela Blakley, April 29, 2010, at 2.

[24] Letter from Gina Bozzer to Pamela Blakley, April 18, 2008, at 2 (Document 30) (stating that Figure 1, an attachment to the letter, consists of "a map of the infrastructure (collection system) that gathers sour gas from three (3) fields, all located within Isabella County, Michigan. The three fields are designated as the Wise Oil Field, the Rosebush Oil Field, and the Leaton Oil Field."). See also Letter from Gina Bozzer to Pamela Blakley, April 18, 2008, at Figure 1 (Document 30).

[25] Letter from Gina Bozzer to Pamela Blakley, April 29, 2010, at 3.

[26] Letter from Gina Bozzer to Pamela Blakley, April 18, 2008, at 3 (Document 30). See also Letter from Gina Bozzer to Pamela Blakley, April 18, 2008, at Figure 3 (Document 30) ("Rosebush Plant Flow Diagram").

[27] Letter from Gina Bozzer to Pamela Blakley, April 18, 2008, at Figure 3 (Document 30) ("Rosebush Plant Flow Diagram").

[28] See Letter from Gina Bozzer to Pamela Blakley, January 18, 200[6], at 1 (Document 20).

[29] We note that a state permitting authority has reached a similar conclusion interpreting identical language. The routing of the gas to Summit's sweetening plant is similar to the routing of crude oil, water and hydrocarbon gases to the production center discussed in the October 22, 2003 Statement of Basis for a Title V permit issued to BP Exploration (Alaska) Inc., in which the Alaska Department of Environmental Conservation (ADEC) considered adjacency of a processing plant and production wells, which fed directly to that plant under the common sense notion of a plant. In the Statement of Basis, ADEC explained that, "[d]ue to the nature of the oil and gas extraction business, stationary sources must be scattered across the resource area . . . . The hub and spoke production model develops naturally from the logistics of the business." In that analysis, ADEC found that, because the wells and the central production center could not exist without each other, they constituted a single production plant. Alaska Department of Environmental Conservation, Statement of Basis of Terms and Conditions for Permit No. AQ1068TVP02: BP Exploration (Alaska) Inc., Grind and Inject Facility, Oct. 22, 2003, at 5. *See also* EPA Region 10, *Permitting of Forest Oil's Kustatan Production Facility and Osprey Platform Pursuant to the Alaska SIP*,

3. **The activities belong to the same industrial grouping.**

The third factor which EPA analyzes in making a determination as to whether to aggregate emissions sources into a single source for permitting is whether the activities belong to the same industrial grouping.[30]

Crude petroleum and natural gas production "up to the point of shipment for the producing property," is covered by SIC Code 1311. Michigan Department of Natural Resources and Environment (MDNRE, previously Michigan Department of Environmental Quality), had assigned SIC 1311 to "Summit Petroleum's sweetening plant and production sites."[31] In an April 26, 2007, letter from Pamela Blakley to Scott Huber, Summit Petroleum, stated, "[i]nformation we have obtained from MDEQ indicates that Summit Petroleum's plant and wells belong to the same single major industrial grouping (SIC 1311)."[32] In a conference call held between EPA and Summit officials on June 17, 2009, the parties "agreed that the emission units are under common control and belong to a single major industrial grouping code."[33] Summit has not disputed that its production facilities and sweetening plant share the same SIC code.

Conclusion

EPA examined the information that Summit provided in April 2008, preliminarily concluding "[i]n this case, the production wells supply the gas to the gas sweetening plant located within the same oil field; therefore we believe that the sites do meet the common sense notion of a plant."[34] Nothing in the supplemental information Summit provided in April 2010, alters EPA's original conclusion of September 8, 2009, that the operations of Summit's sweetening plant, flares, wells and associated equipment located in the Wise, Rosebush, and Leaton fields are linked together by common ownership, share industrial classification, and are adjacent given the common purpose of producing saleable, sweet natural gas, and thus should be considered a single source. Consistent with the McCarthy Memorandum and EPA's other existing guidance on stationary source determinations, this decision has been made on a case-by-case basis considering the facts specific to this permitting scenario. Thus, neither the final determination nor the specific facts considered are binding on other source determinations for pollutant-emitting activities with different fact specific circumstances.

Accordingly, Summit must obtain a permit from EPA under 40 C.F.R. Part 71. As required by the requirements of 40 C.F.R. § 71.5(1)(i), please submit a complete permit

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August 21, 2001 (finding that two emissions points involved in shoal production and separated by almost 3 miles should be considered one source, in part, because their operations were "exclusively dependent" on one another).

[30] See 40 C.F.R. § 52.21(b)(6) (2009); 45 Fed. Reg. 52,676, 52,694-95 (Aug. 7, 1980).

[31] Email from Mark Reed, MDNRE, to Laura Cossa, U.S. EPA, March 1, 2007 (Document 47). See also Laura Cossa, U.S. EPA, Conversation Record from telephone call with Mark Reed, April 20, 2006 (Document 24); Laura Cossa, U.S. EPA, Conversation Record from telephone call with Mark Reed, March 1, 2007 (Document 27); Summit Petroleum Facility Registry System Facility Detail Report, undated, (Document 40).

[32] Letter from Pamela Blakley to Scott Huber, April 26, 2007, at 2 (Document 28). See also Letter from Pamela Blakley to Gina Bozzer, April 26, 2007, at 2 (Document 29).

[33] Email from Laura Cossa to J. Scott Huber and others, "Conference Call Summary," June 17, 2009 (Document 59).

[34] Letter from Pamela Blakley to Gina Bozzer, April 16, 2009, at 3 (Document 34).

application to Region 5 no later than April 15, 2011. This deadline reinstates the 6 ½ months that remained at the time of the February 23, 2010, stay in the original 1-year period which EPA provided in the September 8, 2009, letter for you to submit your Title V application.

Thank you for the opportunity to work together on these issues. If you have any further questions please feel free to contact me.

Sincerely,

Cheryl L. Newton
Director
Air and Radiation Division

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