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EPA Will Continue to Apply the “Functional Interdependence” Test for Air Quality Source Determinations Outside the Sixth Circuit

EPA Issues Single Source Determination Guidance in the Wake of *Summit Petroleum Corp. v. EPA*, Refusing to Adhere to *Summit* Outside the Sixth Circuit

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Introduction

On December 21, 2012, the U.S. Environmental Protection Agency (“EPA”) issued a new guidance memorandum (the “Page Memorandum”)¹ on single source determinations for the oil and gas industry under the Clean Air Act (“CAA”), indicating that it will not adhere to the Sixth Circuit’s August 2012 decision in *Summit Petroleum Corp. v. EPA*² outside the Sixth Circuit’s jurisdiction. In a prior [alert](#), the authors described the *Summit* decision and its significance in light of EPA’s ever-evolving interpretation of what constitutes a single “source” of emissions under the CAA. *Summit* rejected EPA’s current position that “functional interdependence” should be a consideration in determining whether to combine the air emissions of two or more physically distant facilities. In rejecting EPA’s “functional interdependence” test, the Sixth Circuit directed EPA to limit its evaluation of “adjacency” to whether activities are located on physically proximate properties in accordance with the “ordinary, i.e., physical and geographical, meaning of that requirement.”

Despite the Sixth Circuit’s decision in *Summit*, the Page Memorandum indicates that, outside the Sixth Circuit, EPA will continue to interpret “adjacent” to include the “functional interrelatedness” of two emission units when making single source determinations under the Title V, prevention of significant deterioration (“PSD”) and new source review (“NSR”) permit programs. The position articulated by EPA in the Page Memorandum undoubtedly will lead to additional disputes with industry regarding source determination decisions outside the Sixth Circuit.

Background

Generally, the CAA subjects only “major sources” of air emissions to the stringent requirements of the PSD, NSR, and Title V programs.³ Whether a source qualifies as “major” is based upon the quantity of pollutants that a source emits or has the potential to emit (the specific threshold can differ depending on the pollutant, the regulatory program, attainment status of the area, and type of facility at issue). Most individual facilities related to oil and gas development emit pollutants in quantities

¹ Memorandum from Stephen D. Page, Director, EPA Office of Air Quality Planning and Standards, to Regional Air Division Directors, re: Applicability of the Summit Decision to EPA Title V and NSR Source Determinations (Dec. 21, 2012).

² 690 F.3d 733 (6th Cir. 2012).

³ See CAA §§ 165(a), 169(1), 42 U.S.C. §§ 7475, 7479(1); CAA § 172(c)(5), 42 U.S.C. § 7502(c)(5); CAA § 502(a), 42 U.S.C. § 7661a(a).

EPA Will Continue to Apply the “Functional Interdependence” Test for Air Quality Source Determinations Outside the Sixth Circuit

well below the major source thresholds, but if the emissions from multiple distant, related facilities are combined, the overall “source” would often trigger the onerous major source requirements.

EPA’s regulations provide three criteria that must each be satisfied for the emissions from multiple pollutant emitting activities to be combined:

1. The sources must belong to the same industrial grouping, which is determined with reference to whether they have the *same primary SIC code*;
2. The sources must be located on one or more *contiguous or adjacent properties*; and
3. The sources must be under *common control* of the same person or corporate entity.⁴

With regard to the second prong, EPA has advanced the interpretative position that “functional interrelatedness” should be considered in determining adjacency since September 2009, when it issued the “McCarthy Memorandum,”⁵ and sporadically prior to its January 2007 issuance of the “Wehrum Memorandum.”⁶ From January 2007 to September 2009, the Wehrum Memorandum directed the EPA regions to focus on physical proximity in determining adjacency, and concluded that it was generally inappropriate to combine geographically distant oil and gas activities as a single source. The McCarthy Memorandum expressly withdrew the Wehrum Memorandum, and instead emphasized the importance of the three regulatory criteria, as demonstrated through EPA’s historical case-by-case determinations. In practice, EPA once again began considering the functional interrelatedness of facilities in determining adjacency upon issuance of the McCarthy Memorandum.

In *Summit* the Sixth Circuit squarely rejected EPA’s position that interrelatedness should be considered in determining adjacency. Until last month’s issuance of the Page Memorandum, however, it remained unclear how EPA would react to the Sixth Circuit’s decision. EPA had the option of (1) rejecting *Summit* outside the Sixth Circuit, or (2) adopting a new nationwide interpretive policy heeding the Sixth Circuit’s guidance, which would have provided a uniform application of the CAA. Additionally, the *Summit* decision left substantial room for EPA to decide how to determine whether activities are located on physically proximate properties in accordance with the “ordinary, i.e., physical and geographical, meaning of that requirement.”

The Page Memorandum

The Page Memorandum is less than two pages long and indicates that EPA will take one of two approaches depending on whether the permit sought is within the jurisdiction of the Sixth Circuit:

- EPA Will Adhere to *Summit* in the Sixth Circuit: EPA will no longer consider interrelatedness in determining adjacency in Title V and NSR Source Determinations in Michigan, Ohio, Kentucky and Tennessee. This is the absolute minimum required of EPA to comply with the binding decision in *Summit*. However, the Page Memorandum does not indicate how the *Summit* decision will be implemented, stating “EPA is still assessing how to implement [*Summit*] in its permitting actions in the [Sixth] Circuit.” The Page Memorandum also indicates that “EPA is assessing what additional actions may be necessary to respond to the Court’s decision.” Thus, it remains unclear how close two facilities must be in order for EPA

⁴ See, e.g., 40 C.F.R. § 51.166(b)(6).

⁵ Memorandum from Gina McCarthy, EPA Assistant Administrator, to Regional Administrators, re: Withdrawal of Source Determinations for Oil and Gas Industries (Sept. 22, 2009).

⁶ Memorandum from William L. Wehrum, EPA Acting Assistant Administrator, to Regional Administrators, re: Source Determinations for the Oil and Gas Industries (Jan. 12, 2007).

EPA Will Continue to Apply the “Functional Interdependence” Test for Air Quality Source Determinations Outside the Sixth Circuit

to treat them as a single source, and what other considerations (if any) EPA might take into account in making such a determination.

- **Jurisdictions Outside the Sixth Circuit:** EPA will **not** “change its longstanding practice of considering interrelatedness in the EPA permitting actions in other jurisdictions.” With this statement, the Page Memorandum forcefully endorses the functional interrelatedness test than previously provided in the McCarthy Memorandum. Thus, outside the Sixth Circuit, EPA will continue to apply the approach that was squarely rejected in *Summit*.

Conclusion

Moving forward, industry should closely monitor agency and court actions involving single source determinations, both within and outside the Sixth Circuit. Several such actions are currently pending, including the remand to EPA in *Summit*. Given EPA’s differing application of its own regulations within and outside the Sixth Circuit, there is now a possibility that a split among the Circuit Courts of Appeals will develop, which could eventually lead to final resolution by the United States Supreme Court.

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