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The *Summit* Source Aggregation Decision Now Applies Nationwide—But for How Long?

By Bob Greenslade*

The United States Court of Appeals for the District of Columbia Circuit recently extended to the entire country a Sixth Circuit decision on the aggregation of emissions sources. The author of this article discusses these rulings.

INTRODUCTION

Recently, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") effectively extended to the entire country a Sixth Circuit decision on the aggregation of emissions sources, *Summit Petroleum Corp. v. U.S. EPA*.[1] As a result, the EPA can no longer use "functional interrelationships" to determine that industrial operations are "adjacent" and therefore should be considered a single source for purposes of New Source Review ("NSR") and Title V permitting under the Clean Air Act ("CAA").

The D.C. Circuit's opinion will very likely play an important role in pending and upcoming permitting and enforcement matters. However, the shift in aggregation requirements may be short-lived because:

(1) the opinion was based on an EPA regulation that the court construed as requiring the agency to apply consistent CAA policies on a nationwide basis; and

(2) nothing prevents the agency from revising that regulation.

BACKGROUND

The U.S. Environmental Protection Agency ("EPA") in 1980 promulgated Prevention of Significant Deterioration ("PSD") permitting program definitions concerning the scope of a "stationary source" under the CAA.[2] These definitions are also critical to other NSR permitting programs and the Title V operating permits program. A stationary source is, effectively:

> [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

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[1] The D.C. Circuit opinion is *National Environmental Development Association's Clean Air Project v. U.S. EPA*, No. 13-1035 (D.C. Cir. 2014) (hereinafter *NEDACAP v. EPA*). The Sixth Circuit opinion is *Summit Petroleum Corp. v. U.S. EPA*, 690 F.3d 733 (6th Cir. 2012).

[2] 45 Fed. Reg. 52,676, 52,679, 52,695 (Aug. 7, 1980).

> control). 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*[ ].[3]

The use of a standard industrial classification ("SIC") code was supposed to be an objective stand-in for functional interrelationships and was supposed to prevent the agency from engaging in "highly subjective" and "fine-grained analyses" when making single source determinations.[4]

This aspiration proved to be short-lived, as the EPA has continued to use functional interrelationships to aggregate emissions. Through guidance, the agency transformed the source determination process into the often subjective and arbitrary exercise the agency had meant to avoid. In particular, the EPA eventually decided that the term "adjacent" in the definition must be interpreted based on functional interrelationships. As a result, operations located many miles away were often deemed "adjacent."

SUMMIT PETROLEUM CORP. V. U.S. EPA

In April 2012, the EPA's long-standing reliance on functional interrelationships suffered a significant setback when the Sixth Circuit Court of Appeals reversed EPA's determination[5] that, due to functional dependence, a number of gas wells dispersed over 43 square miles were "adjacent" to a Summit Petroleum Corp. natural gas plant in Michigan.[6]

The Sixth Circuit overturned the EPA's determination, noting that "adjacent" implies physical proximity and that the EPA's use of functional interrelationships defied the plain and ordinary meaning of the term. The court also rejected an argument that longstanding interpretations deserve deference, stating that "a longstanding error is still an error." Finally, the court held that the EPA's interpretation was inconsistent with the 1980 PSD regulations.

The Sixth Circuit denied the EPA's petition for rehearing, and the agency did not petition the Supreme Court for certiorari. Instead, in December 2012, the EPA issued a memorandum stating that the agency would only apply *Summit* to those states within the Sixth Circuit's jurisdiction (*i.e.*, Michigan, Ohio, Tennessee, and Kentucky).[7]

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[3] This is the definition for "building, structure, facility, or installation" and is provided because the definition of "stationary source" includes this term and is effectively governed by its meaning. 45 Fed. Reg. 52,676, 52,731 (Aug. 7, 1980).

[4] Because Summit's facility is located on the Saginaw Chippewa Indian Tribe's Isabella Reservation, the EPA was the permitting authority.

[5] 45 Fed. Reg. 52,676, 52,695 (Aug. 7, 1980).

[6] *Summit Petroleum Corp. v. U.S. EPA*, No. 09-4348 and 10-4572 (Aug. 7, 2012).

[7] U.S. EPA, Memorandum from Stephen D. Page, Applicability of the Summit Decision to EPA

NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S CLEAN AIR PROJECT V. U.S. EPA

National Environmental Development Association's Clean Air Project v. U.S. EPA ("*NEDACAP*") was a challenge to the EPA's decision not to apply *Summit* on a nationwide basis. The petitioner, an industry association, argued that EPA regulations at 40 CFR § 56.3 require the agency to maintain national uniformity in measures implementing the CAA. In particular, the provisions state that it is EPA policy to "assure fair and uniform application by all Regional Offices" and to "provide mechanisms for identifying and correcting inconsistencies by standardizing criteria, procedures, and policies."

The D.C. Circuit agreed that these "consistency regulations" prohibit the EPA from applying one set of aggregation standards, based on *Summit*, in the Sixth Circuit and another set of standards elsewhere in the country. In reaching its decision, the court disposed of a standing defense, holding that the EPA's *Summit* policy has binding legal effect and has therefore caused injury. The court also held that the policy was subject to challenge as a final agency action.

Finally, the court rejected the EPA's argument that the "consistency regulations" are no more than policy statements. The EPA had argued that the regulations were necessarily policy because it would be nonsensical for the EPA to pass binding provisions mandating that the EPA adopt the interpretation of whichever Circuit Court first addresses a legal matter.

In response, the D.C. Circuit noted that applying *Summit* to all regions of the country was not the EPA's only option. The court explained that the EPA could have revised its regulations to require aggregation when facilities are functionally interrelated, rather than "adjacent." The EPA could also have appealed the decision, but did not. "And, finally, EPA might also revise its uniformity regulations to account for regional variances created by a judicial decision or circuit splits."

ANALYSIS AND COMMENTS

The definition of "stationary source" is critical in air permitting because only the emissions aggregated as part of a single stationary source are compared to the trigger thresholds for the various permitting programs. Thus, an expansive concept of stationary source makes it easier to trigger more stringent permitting requirements.

By providing a relatively simple method of determining boundaries, the 1980 PSD rule promised certainty. However, the EPA quickly backed away from bright-line applications of the stationary source definitions, straining the meaning of words like "adjacent" to reach desired outcomes. One can hope that *Summit*, and the nationwide extension of *Summit* by *NEDACAP*, may force the EPA back to bright-line principles when it comes to aggregation issues.

Title V and NSR Source Determinations (Dec. 21, 2012), *available at* http://www.epa.gov/nsr/documents/SummitDecision.pdf.

However, the more likely outcome is that nationwide application of *Summit* will be short-lived, with *NEDACAP* itself providing the EPA with the roadmap for returning *Summit* to single-Circuit applicability. Specifically, the D.C. Circuit based its decision on the EPA's stated "consistency regulations," and then communicated that the EPA can revise those regulations to account for regional variances. More likely than not, the EPA will take the court up on that offer.