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EPA TO APPLY THE "FUNCTIONALLY INTERRELATED" TEST FOR AGGREGATION OF EMISSION SOURCES IN AIR PERMITS FOR OIL AND GAS AND OTHER OPERATIONS OUTSIDE THE FEDERAL SIXTH CIRCUIT; SUIT FILED CHALLENGING THE EPA'S POSITION

"Major sources" of air emissions are subject to the stringent permitting requirements of Title V of the Clean Air Act and its state law counterparts. Title V defines a "major source" generally as any stationary facility or source that emits, or has the potential to emit, 100 tons per year of certain pollutants. Under the EPA (and corresponding state) regulations, multiple sources of air emissions can be aggregated (i.e., added together) and considered a single "stationary source" for "major source" air permitting purposes only if they: (1) are under common control; (2) "are located on one or more contiguous or adjacent properties;" and (3) belong to the same major industrial grouping (i.e., share a two-digit Standard Industrial Classification ("SIC") code). The EPA has frequently interpreted the word "adjacent" to require emissions from sources that are separated in a geographic sense to be aggregated if the sources are "functionally interrelated."

As reported in our [September 20, 2012](#), issue, however, the U.S. Sixth Circuit Court of Appeal rejected the EPA's "functionally interrelated" interpretation in *Summit Petroleum Corp. v. United States Environmental Protection Agency*, 690 F.3d 733 (Sixth Cir. Aug. 7, 2012), *rehearing denied* (Sixth Circuit Oct. 29, 2012). *Summit Petroleum* involved a natural gas producer ("Summit") that owns and operates a natural gas sweetening plant in Rosebush, Michigan. The plant "sweetens" the "sour" natural gas from approximately 100 sour gas production wells by removing hydrogen sulfide so that the gas can be used. Summit owns all of the production wells and the subsurface pipelines that connect each of the wells to the sweetening plant. The wells themselves are located within an area of approximately 43 square miles at varying distances—from 500 feet to 8 miles—from the plant. Summit does not own the property between the individual wells sites or the property between the well sites and the plant. None of the well sites share a common boundary, nor do any of the well sites share a common boundary with the plant. Flares work as part of the plant operations by burning off natural gas waste to relieve pressure on the natural gas equipment. The closest flare is approximately one half-mile from the plant, and the remaining flares are each over one mile away. The sweetening plant, gas production wells, and flares emit sulfur dioxides and nitrous oxides, which are air pollutants under Title V of the Clean Air Act. The plant alone emits, or has the potential to emit, just under 100 tons of these pollutants per year. Thus, the plant alone is not a "major source" under Title V. However, if the emissions from the plant and any one production well were to be combined, they would exceed the "major source" threshold of 100 tons per year.

The EPA argued in *Summit Petroleum* that, even though the plant and wells are geographically dispersed, they are "adjacent" within the meaning of the EPA regulations because they are "functionally interrelated" and "truly interdependent." The Sixth Circuit disagreed. It concluded that the EPA's interpretation that emission sources can be "adjacent" if they are functionally interrelated, irrespective of the physical distance that separates them, undermines the plain meaning of the text of the regulation which demands, by definition, that would-be aggregated sources have physical proximity. It remanded the case back to the EPA for a reassessment of whether the plant and wells are located on adjacent (i.e., physically proximate) properties.

The *Summit Petroleum* decision is only binding on the EPA in those states that are within the jurisdiction of the court that issued the decision, U.S. Sixth Circuit Court of Appeal (i.e., in Michigan, Ohio, Tennessee, and Kentucky). Not surprisingly, in a December 21, 2012, memo, the Director of the EPA's Office of Air Quality Planning and Standards



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advised the EPA's Regional Air Division Directors that in air permitting decisions in areas that are not under the jurisdiction of the Sixth Circuit (i.e., everywhere except Michigan, Ohio, Tennessee, and Kentucky), the EPA will continue to apply the "functionally interrelated" test for aggregation of emission sources. A copy of the EPA memo is available [here](#).

On February 19, 2013, the National Environmental Development Association's Clean Air Project filed suit in federal court seeking review of the guidance announced in the EPA's December 21, 2012, memo. *National Environmental Development Association's Clean Air Project v. EPA*, Docket No. 13-1035 (D.C. Circuit Court of Appeal). The grounds for the challenge to the EPA memo are not stated in the petition for review and are unclear at this early stage of the suit.

In summary, the *Summit Petroleum* decision may have a significant effect on "major source" determinations under Title V and corresponding state air permitting programs in the states that are within the jurisdiction of the Sixth Circuit, particularly with respect to oil and gas and other operations with widely-dispersed emission sources. Although the question remains as to how far apart emission sources can be and still be considered "adjacent" for purposes of aggregation, it is clear that *in those states* the EPA may no longer rely on the "functional relationship" test alone, without regard to the physical proximity when making "major source" determinations.

It is also clear, however, that in states outside the jurisdiction of the Sixth Circuit (i.e., everywhere except Michigan, Ohio, Tennessee, and Kentucky) the EPA intends to continue to apply the "functionally interrelated" test. As a result, "functional interrelatedness" will still need to be evaluated for its potential implications on air permitting requirements and project development in those states.

– [Boyd A. Bryan](#)

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

Marjorie A. McKeithen
Jones Walker LLP
201 St. Charles Avenue
New Orleans, LA 70170-5100
504.582.8420 tel
504.589.8420 fax
mmckeithen@joneswalker.com

Michael B. Donald
Jones Walker LLP
Suite 2450
1001 Fannin
Houston, TX 77002
713.437.1824 tel
713.437.1810 fax
mdonald@joneswalker.com

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