

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2017

PHILADELPHIA, FRIDAY, JULY 7, 2017

VOL 256 • NO. 4

An **ALM** Publication

## ENVIRONMENTAL LAW

# Rule for Common-Control Determinations in Air Permitting Rejected

BY MICHAEL DILLON

*Special to the Legal*

On June 2, the Commonwealth Court weighed in on the long-simmering national debate surrounding questions of when two or more facilities must be regulated as a single source under the federal Clean Air Act (CAA) and state air pollution control statutes. The U.S. Environmental Protection Agency and state agencies have sought to aggregate facilities where certain factors support a finding that the facilities are operationally related, and especially where the level of emissions from the combined source would trigger heightened regulatory or permitting requirements. *National Fuel Gas Midstream v. Pennsylvania Department of Environmental Protection*, No. 116 CD 2016 (June 2, 2017), provides some clarity about the meaning of the term “common control,” one of the three factors for determining if facilities should be aggregated for air permitting purposes. The decision finds that regulated facilities should not be combined as a single source merely because they are each owned by a separate subsidiary of a shared corporate parent.

### SIGNIFICANCE OF SOURCE AGGREGATION

Under the CAA, “major” stationary sources of air pollution are required to obtain Title V permits, which impose



or 484-430-2335.

**MICHAEL DILLON** is an attorney at the environmental, energy, land use law and litigation firm *Manko, Gold, Katcher & Fox*, located just outside of Philadelphia. He can be reached at [mdillon@mankogold.com](mailto:mdillon@mankogold.com)

monitoring, recordkeeping and reporting requirements to ensure compliance with applicable air pollution control requirements. Major sources may also be subject to more stringent requirements under the EPA’s New Source Review program and would typically not be eligible to operate under general permits published by state air pollution control agencies.

Given the increased stringency that comes with being a major stationary source, facilities subject to air permitting requirements have an incentive to stay below major source thresholds when possible. In certain contexts, however, the EPA and the states that administer approved CAA programs have authority to treat separate facilities as a single source of air emissions. A decision to aggregate otherwise separate emissions sources can be highly significant because facilities that would not be considered “major” on their own might exceed the CAA’s emission thresholds when combined, thereby

subjecting the combined source to the more stringent major source requirements.

The CAA permits separate facilities to be treated as a single source of air pollution if the relevant facilities: (1) share the same industrial grouping (i.e., same SIC Code); (2) are located on one or more contiguous or adjacent properties; and (3) are under common control of the same person (or of persons under common control). If all three criteria are satisfied, the EPA or the approved state agency may aggregate the emissions of the multiple sources.

*The decision finds that regulated facilities should not be combined as a single source merely because they are each owned by a separate subsidiary of a shared corporate parent.*

### MEANING OF COMMON CONTROL

Determining if facilities are under common control is often the most complicated and contested aspect of the source aggregation analysis, because neither the CAA nor its implementing regulations define the phrase “common control.”

Through a 1980 interpretive rulemaking, the EPA rejected a blanket rule for deciding common control in favor of case-by-case determinations. In that same rulemaking, the EPA said that common-control inquiries should be guided by the general definition of “control” used by the Securities and Exchange Commission (SEC), which defines “control” to mean “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person (or organization or association) whether through the ownership of voting shares, contract, or otherwise.”

Thus, every common-control analysis will turn on the specific facts of a case. However, some indicia of common control might include related corporate ownership arrangements, contractual relationships, interdependency of the relevant facilities (e.g., neither facility would exist without the other), and support relationships between the relevant facilities (e.g., one facility relies on the other facility for regulatory compliance purposes).

## PADEP’S COMMON CONTROL ANALYSIS

In *National Fuel Gas*, the Pennsylvania Department of Environmental Protection (PADEP) determined that a natural gas well pad and nearby compressor station constituted a single source for purposes of air permitting. The well pad and compressor station were owned by separate subsidiary companies of the same corporate parent. Looking only at the shared corporate parenthood of the subsidiary companies, PADEP found that the well pad and compressor station were under common control within the meaning of the SEC definition and determined that the facilities must be combined for air permitting purpose, even though the well pad was itself exempt from air permitting requirements under PADEP guidance.

The well pad and compressor station owners appealed PADEP’s single-source determination to the Pennsylvania Environmental Hearing Board (EHB)

(EHB Docket No. 2013-206-B), which rejected PADEP’s mere reliance on corporate ownership to establish common control, and also criticized the SEC test as guiding policy for such determinations. Instead, the EHB found that it is “not the mere presence of a common ownership interest that demonstrates the necessary control,” but that there “must be sufficient information to demonstrate that the common owner has the power to influence” the relevant facilities. Determining that the corporate parent had the power to influence the operations of the well pad and compressor station through exercise of financial decision-making, the EHB found that the parent company had common control of both emissions sources.

## THE COURT’S RULING

The petitioners appealed the EHB’s ruling to the Commonwealth Court, which ruled that the EHB had erred in applying an “ability to influence standard” because such a standard is more lax than the SEC definition of control. According to the court, “the term ‘control’ is more than the power to merely influence; it involves the power to direct.”

The court’s analysis relies heavily on *United States v. Bestfoods*, 524 U.S. 51 (1998), the leading case on the scope of corporate liability under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Considering CERCLA’s statutory liability for facility owners and operators, the Supreme Court in *Bestfoods* ruled that a corporate parent may be responsible for a subsidiary’s liabilities on the basis of facility ownership only if there is a reason to pierce the corporate veil. Further, the corporate parent may be liable as a facility operator only if it had the ability to direct the operations of the subsidiary.

The *National Fuel Gas* court found that the CAA and the Pennsylvania Air Pollution Control Act are analogous to CERCLA in that they impose liability on owners and operators but are “otherwise

silent on the implications of corporate ownership on liability.” Thus, in the “absence of [] statutory direction, common law principles such as veil piercing are not abrogated.” Therefore, where common parenthood of separate subsidiary owners is the only basis for asserting that two or more facilities are under common control, PADEP must demonstrate either: (1) that the corporate veil should be pierced because the “entities are the alter ego of one another or their parent”; or (2) that the parent had direct involvement in the operation of the relevant facilities.

## POSSIBLE IMPACT OF THE COURT’S RULING

The court’s ruling makes clear that for regulated entities in Pennsylvania, the common control of otherwise separate facilities may not be established solely on the basis that each facility is owned by a separate subsidiary of a common corporate parent. Thus, to the extent PADEP attempts to rely exclusively on common ownership to establish common control of facilities that are owned by separate subsidiary companies, PADEP will need to show that the common parent controlled the day-to-day operations of the facilities at issue, or that corporate veil piercing is appropriate. This means that there is still no bright-line rule for deciding questions of common control and that the specific facts of each scenario will need to be evaluated before determining that aggregation is appropriate. •

---

MANKO | GOLD

KATCHER | FOX LLP

AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

---

Reprinted with permission from the July 7, 2017 edition of THE LEGAL INTELLIGENCER © 2017 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382, reprints@alm.com or visit www.almreprints.com. #201-07-17-02