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SIXTH CIRCUIT FINDS EPA AGGREGATION APPROACH DOESN'T ADD UP

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Last month, in Summit Petroleum Corp. v. US EPA, a split panel of the United States Court of Appeals for the Sixth Circuit rejected an EPA determination that a group of natural gas sources constituted a single major source for purposes of Title V permitting where EPA based its determination, in part, upon its longstanding practice of evaluating the functional interrelationship of the sources. While the decision will certainly have a significant impact on the growing domestic oil and gas industry (and its vocal opponents), in-house counsel should note that the ruling could also affect any operation faced with the question as to whether the emissions from two or more sources may be aggregated to determine major source air permitting applicability.

Legal and Regulatory Background

The Clean Air Act subjects "major sources" to its preconstruction or Title V operating permit programs. EPA regulations developed following a 1979 D.C. Circuit decision provide that the emissions from multiple pollutant-emitting activities may be aggregated and treated as a single source under these programs if they: (1) are under common control; (2) belong to the same major industrial grouping; and (3) are located on one or more contiguous or adjacent properties. As part of its evaluations as to whether activities are located on "adjacent" properties, EPA has traditionally examined whether the operations at issue were "functionally interdependent" especially in the oil and gas context, where activities could be separated by miles but physically connected by pipelines. EPA's use of functional interdependence resulted in a long line a factually dependent, and arguably inconsistent, determinations about major source permitting applicability.

Factual Background

Summit Petroleum owned a natural gas "sweetening plant," approximately 100 natural gas production wells located across a 43 square mile area, and subsurface pipelines that ran across third party property and connected the wells to the plant. Emissions from the sweeting plant alone fell just below major source permitting thresholds, but the combined emissions from the plant and any single tripped the threshold. In 2005, Summit requested that EPA determine whether the plant qualified as a major source under the Title V program. Summit's request led to a five year back and forth—spanning two EPA interpretive memoranda on the issue—that ultimately resulted in an EPA determination that emissions from the Summit sources should be aggregated as a single source in part because the activities were functionally interdependent.

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EPA AGGREGATION APPROACH DOESN'T ADD UP (cont'd)

The Sixth Circuit Decision

On appeal, EPA argued that the term "adjacent" was ambiguous and therefore the court should defer to EPA's decision to consider functional interdependence as part of its major source evaluation. The majority disagreed and concluded, citing dictionary definitions and etymological analyses, that the term "adjacent" concerns physical and geographical issues, and does not involve "an assessment of the functional relationship between two activities." As support, the majority cited the Supreme Court decision in Rapanos v. U.S., which examined the question as to whether a wetland was adjacent to a navigable water of the United States in terms of physical distance. The majority also held that even if the term "adjacent" was ambiguous, EPA's use of functional interdependence was inconsistent with applicable regulatory history and its own guidance, and thus should be rejected.

Technically, the Summit opinion is binding only in the Sixth Circuit, and EPA may still appeal the decision by seeking an en banc hearing or petitioning the Supreme Court. To the extent the decision stands, however, the holding may be a useful tool for in-house counsel in any discussion about whether multiple emissions sources at separate locations should be aggregated for purposes of determining major source permitting applicability.