

# ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



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## Natural Gas Operator Prevails in Air Aggregation Case

In a highly-anticipated decision, the U.S. District Court for the Middle District of Pennsylvania has granted a motion for summary judgment in favor of a Pennsylvania natural gas operator in an air aggregation case filed by a citizen group. The decision was issued on February 23, 2015 in *Citizens for Pennsylvania's Future v. Ultra Resources, Inc.*, and is the latest development in the debate over single source determinations. The Court found in favor of the operator, agreeing with the permitting decision made by the Pennsylvania Department of Environmental Protection (DEP) that the compressor stations at issue were not located on adjacent properties. The Court disagreed with the Citizens for Pennsylvania's Future's (PennFuture) arguments that the compressor stations were interrelated and, therefore, should be aggregated as a single source. While the Court left some room for the consideration of functional relationships in making single source determinations, such a determination would need to have unique facts that are outside the normal oil and gas configurations contemplated by DEP.

In 2011, PennFuture filed suit in federal district court against Ultra Resources, Inc. (Ultra), alleging that Ultra violated the nonattainment new source review (NSR) air permitting requirements by constructing a major source of nitrogen oxides (NOx) without the appropriate NSR permit. PennFuture contended that Ultra's construction of eight compressor stations in Tioga and Potter counties without obtaining the appropriate NSR permit violated the Clean Air Act, despite the fact that Ultra obtained separate authorizations to use the General Plan Approval/General Operating Permit known as "GP-5" from DEP for each of its compressor stations. PennFuture viewed the compressor stations as functionally interrelated, operating in concert with a metering station as a single facility with potential NOx emissions exceeding the major source threshold of 100 tons per year, thus subjecting Ultra to heightened permitting requirements.

Ultra filed a motion for summary judgment in February 2014, arguing that the compressor stations did not meet the regulatory definition of a single facility. In relevant part, the definition requires that the sources be "located on one or more contiguous or adjacent properties" in order to aggregate them into a single facility. The central issue in the case was whether Ultra's sources are located on "adjacent" properties, a term not defined in applicable regulations. Ultra argued that the plain meaning of the term (i.e., physical and geographical proximity) is the controlling definition. PennFuture insisted that the definition of "adjacent" includes consideration of operational and functional interrelatedness or interdependence.

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In granting Ultra's motion for summary judgment, the Court concluded that there was no triable issue of fact under either theory of "adjacent" put forth by the parties. PennFuture and Ultra had stipulated to the locations of the compressor stations and the distances separating them. The Court noted that in order for NOx emissions to exceed 100 tons per year, emissions from two compressor stations located 4.43 miles apart and two others located 3.09 miles apart would need to be added together. According to the Court, these stations were not "sufficiently close to, or near enough, each other to be considered adjacent." With respect to interdependence, the Court found no record facts suggesting that Ultra's facilities were different from normal oil and gas configurations. The Court concluded that functional interrelatedness is not established "solely because independently functioning compressors ultimately deposit gas from the individual wells each separately services into a common pipeline for transmission in the market." Thus, on the specific facts of this case, the Court found that the compressor stations were not functionally interrelated.

The Court relied extensively on DEP's "Guidance for Performing Single Stationary Source Determinations for Oil and Gas Industries" and precedent established by the U.S. Court of Appeals for the Sixth Circuit in *Summit Petroleum Corp. v. USEPA* (6th Cir. Aug 7, 2012), a case which condemned the U.S. Environmental Protection Agency's use of a functional interrelationship test in making single source determinations. Indeed, the Court agreed with the Sixth Circuit in so far as "the plain meaning of 'contiguous' and 'adjacent' should control a determination of whether two or more facilities should be aggregated," but explicitly "decline[d] to hold that functional interrelatedness can never lead to, or contribute to, a finding of contiguousness or adjacency." Accordingly, the Court emphasized the permissibility of considering interrelatedness or interdependence on a case-by-case basis under DEP's existing guidance. At the same time, however, the Court cautioned that "to look beyond the plain meaning of the terms 'contiguous' and 'adjacent' when conducting a case-by-case determination, the case should present a unique factual scenario . . . [which is] unusual or outside of the normal oil and gas configurations and arrangements contemplated by [DEP]."

The aggregation of oil and natural gas sources continues to be a controversial issue that is critical to the proper air permitting of oil and gas production and midstream operations. The debate over this issue is likely to continue to impact air permitting for the oil and gas industry. If you have questions regarding this case and/or would like to discuss single source determinations in general, please contact Michael H. Winek at (412) 394-6538 or [mwinek@babstcalland.com](mailto:mwinek@babstcalland.com), or Meredith Odato Graham at (412) 773-8712 or [mgraham@babstcalland.com](mailto:mgraham@babstcalland.com).