

Seminar 3: A Look at Aggregation Issues

July 19, 2011

Presented by:

Tom Bianca, P.E. – AECOM

tom.bianca@aecom.com

Lou Naugle, Esquire – Reed Smith LLP

lnaugle@reedsmith.com

Harley Trice, Esquire – Reed Smith LLP

htrice@reedsmith.com

Seminar 3: A Look at Aggregation Issues

July 19, 2011

Marcellus Shale Clean Air Permits

Presented by:

Lou Naugle, Esquire
Harley Trice, Esquire

ReedSmith

Tom Bianca, P.E.
Manager, Air Quality Engineering

AECOM

A Look At Aggregation Issues

- I. Introduction**
- II. EPA Guidance & Cases**
- III. State Cases**
- IV. Pitfalls**

I. Introduction to Aggregation

■ *What is “aggregation”?*

- Aggregation is the process of determining whether emissions from multiple locations should be aggregated into a single source for air permitting purposes.



Marcellus Shale Clean Air Permits

Development of Aggregation Approach Under Clean Air Act

Louis Naugle, Reed Smith

- Original EPA PSD definition of “source”:
“any structure, building, facility, equipment, installation or operation or combination thereof which is located on one or more continuous or adjacent properties and which is owned or controlled by the same person or persons under common control”.
- EPA PSD regulations challenged in *Alabama Power v. Costle* (636 F2nd 323 – DC Circuit, 1979).
- *Alabama Power* court found EPA PSD definition too broad.

ReedSmith AECOM

Marcellus Shale Clean Air Permits

Development of Aggregation Approach Under Clean Air Act

Louis Naugle, Reed Smith (cont.)

- Court said EPA must use existing Clean Air Act definition of “stationary source”:
 - Defined as “any **building**, **structure**, **facility** or **installation** which emits or may emit any air pollutant”.
- *Alabama Power* court said EPA had discretion to reasonably interpret these four terms in “stationary source” definition and agreed that “source” could include contiguity and common ownership criteria

ReedSmith AECOM

Marcellus Shale Clean Air Permits

Development of Aggregation Approach Under Clean Air Act

Louis Naugle, Reed Smith (cont.)

- After *Alabama Power*, 1980 Amendments to PSD Regulations
- EPA PSD definition of “stationary source”
 - “building, structure, facility or installation which emits or may emit a regulated NSR pollutant” [40 C.F.R. 52.21(b)(5)]
- A “building, structure, facility or installation” means all of the pollutant-emitting activities that:
 - are **under common control** of the same person (or persons under common control);
 - **belong to the same industrial grouping** (activities will be considered as part of the same industrial grouping if they use same 2-digit major SIC code identification); and
 - are located on one or more **contiguous or adjacent properties**. [40 C.F.R. § 52.21(b)(6)]
- All **three** elements must be demonstrated to support source aggregation determination.

ReedSmith AECOM

Marcellus Shale Clean Air Permits

Development of Aggregation Approach Under Clean Air Act

Louis Naugle, Reed Smith (cont.)

- In the preamble to the 1980 PSD regulations, EPA explained that interpretations of the PSD definition of “source”
 - Must carry out reasonably the purposes of PSD.
 - Must approximate a common-sense notion of “plant.”
 - Must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of “building,” “structure,” “facility,” or “installation.”
- Note: The three-part test in EPA’s PSD regulations must be applied consistent with the EPA preamble statements in response to the *Alabama Power* decision.

ReedSmith AECOM

Marcellus Shale Clean Air Permits

Pennsylvania Air Pollution Control Act

Louis Naugle, Reed Smith

- PA Air Pollution Control Act defines “air contamination source” as
 - “any place, facility or equipment, stationary or mobile, at, from or by reason of which there is emitted into the outdoor atmosphere any air contaminant. (35 P.S. § 4003)”
- DEP has adopted EPA PSD regulations by reference (25 Pa. Code Chapter 127, Subchapter D)
- Non-attainment NSR and state-only permit program define “facility” as
 - “an air contamination source or combination of air contamination sources located on one or more contiguous or adjacent properties and which is owned and operated by the same person under common control” (25 Pa. Code § 121.1)
- DEP applies same aggregation analysis under PSD, NNSR programs.

ReedSmith AECOM

Marcellus Shale Clean Air Permits

Pennsylvania Air Pollution Control Act

Louis Naugle, Reed Smith (cont.)

- DEP interim guidance for performing single stationary source determinations, 40 Pa. B. 7429 (December 25, 2010).
- Interim guidance rescinded, 41 Pa. B. 1066 (February 26, 2011).
- DEP evaluation of source aggregation conducted on a case-by-case basis.
 - Consistent with EPA “McCarthy Memo” (September 29, 2009)

ReedSmith AECOM

II. EPA Guidance & Cases

Harley Trice, Reed Smith

EPA Guidance

- **2007 EPA Memorandum (Wehrum):** Source Determinations for Oil and Gas Industries
 - Non-binding policy statement
 - Possible methodology
 - Proximate distance as primary basis for adjacent
- **2009 EPA Memorandum (McCarthy):** Withdrawal of Source Determinations for Oil and Gas Industries
 - Simplified approach (proximity) is not sufficient
 - Restored EPA's previous methodology based on regulations and guidance
 - Case-by-case analysis using all three prongs

ReedSmith AECOM

Marcellus Shale Clean Air Permits

EPA Guidance & Cases

Harley Trice, Reed Smith (cont.)

EPA Cases

- **EPA Region 5 (Michigan) – *Summit Petroleum***
 - October 18, 2010 determination
 - Summit's sour gas wells, sweetening plant and associated flares constitute **single source** for Title V permitting
 - Whether activities separated from plant by considerable distance and intervening properties in three well fields (one was eight miles away) were adjacent
 - **Adjacent** because connected by pipelines dedicated to this sweetening plant
 - ✓ Gas couldn't flow elsewhere
 - ✓ Truly interdependent
 - **Status: Appealed** by Summit to 6th Circuit Court of Appeals (Case No. 10-4572)



ReedSmith AECOM

Marcellus Shale Clean Air Permits

EPA Guidance & Cases

Harley Trice, Reed Smith (cont.)

EPA Cases



- **Administrator** (EPA Region 8) (Colorado) – **Anadarko Petroleum**
 - February 2, 2011 Order denying petition of WildEarth Guardians for review of Colorado agency's permit not aggregating wells with a compressor station
 - Prior EPA policy statements and determinations instructive but not conclusive
 - Colorado correctly made **case-by-case fact specific findings**:
 - ✓ Sources under common control,
 - ✓ Same industrial grouping, and
 - ✓ Not adjacent because not proximate, and no unique or dedicated interdependent relationship because Frederick Compressor Station could receive gas from **other** wells
 - Facilities not aggregated
 - **Status: Appealed** to 10th Circuit Court of Appeals April 25, 2011 (11-9527)

ReedSmith AECOM

Marcellus Shale Clean Air Permits

EPA Guidance & Cases

Harley Trice, Reed Smith (cont.)

EPA Cases



- **EPA Region 8** (Colorado, Indian Country) – **Florida River** (BP America)
 - EPA permit issued October 18, 2010 didn't aggregate Florida River Compressor Station with wells and second station because not "adjacent" (one well 18 miles away)
 - Petitioner, WildEarth Guardians, relied on prior EPA determinations, including Summit, to argue for aggregation
 - EPA's response to petition argues facilities not adjacent, since "no dedicated interrelatedness"
 - ✓ Wells flow in multiple directions, including to unowned facilities, and
 - ✓ Unlike Summit where there was "no evidence gas from wells could flow to sweetening plants owned by others"
 - **Status:** Case is **pending** before EPA's Environmental Appeals Board (CAA 10-04) (ADR)

ReedSmith AECOM

Marcellus Shale Clean Air Permits

III. Review of State Aggregation Cases

Louis Naugle, Reed Smith

West Virginia

- *Hughes v. John Benedict, W.Va. Director, Division of Air Quality and Appalachia Midstream Services, LLC*
 - Challenge to W.Va. DEQ issuance of permits to two compressor stations. Plaintiff argued:
 - ✓ Emissions from individual wells in well field should be aggregated with compressor station emissions (two separate compressor stations located eight road miles apart; 25 gas wells spanning 30 square miles)
 - ✓ Existence of pipeline carrying condensate to one station for processing demonstrated interdependence of compressor stations
 - ✓ Natural gas from two compressor stations flowed to a central delivery location for transmission to a third-party gathering line.
 - W.Va. Air Quality Board granted oral motion to dismiss at close of plaintiff's case
 - ✓ Found no persuasive evidence that the sources met the "contiguous or adjacent" test



ReedSmith AECOM

Marcellus Shale Clean Air Permits

Review of State Aggregation Cases

Louis Naugle, Reed Smith (cont.)

Pennsylvania



- *Group Against Smog and Pollution v. DEP and Laurel Mountain Midstream Operations LLC*, EHB Docket No. 2011-065-R
 - Appeal of DEP issuance of plan approval for the construction of three new natural gas-fired compressor engines, one turbine, one dehydrator, one water tank and three previously authorized compressor engines at Laurel Mountain's Shamrock Compressor Station
 - Appeal filed May 2, 2011
 - Appeal raises "common control" and "adjacent or contiguous" challenges
 - Argues 73 well sites should have been aggregated with compressor station emissions
 - ✓ Wells are dependent on compressor station
 - Alleges owner of the well sites has an ownership interest in Laurel Mountain
 - ✓ Owner's contractual relations with Laurel Mountain
 - ✓ Shared work force, dependency of the wells on the compressor station

ReedSmith AECOM

Marcellus Shale Clean Air Permits

Review of State Aggregation Cases

Louis Naugle, Reed Smith (cont.)



Pennsylvania (cont.)

- *Clean Air Council v PaDEP and MarkWest Liberty Midstream & Resources LLC*, EHB Docket No. 2011-072-R
 - Appeal of DEP issuance of Plan Approval to construct a fractionator tower and hot oil heater at Houston processing plant
 - Appeal filed May 13, 2011
 - Reed Smith representing MarkWest
 - Appeal focuses on the “adjacent or contiguous” element
 - ✓ Argues that emissions from nine existing and permitted MarkWest compressor stations should be aggregated with Houston plant – contends stations are “functionally interdependent”
 - ✓ Argues DEP should also have considered emissions from a 10th compressor station for which plan approval was pending
 - ✓ Argues DEP improperly considered ongoing construction of a pipeline that would allow gas from compressor stations to flow to processing plants other than Houston, or to third-party lines (improper circumvention of NSR)

ReedSmith AECOM

IV. Pitfalls of Aggregation

Tom Bianca, AECOM



Case-by-Case Basis

- Information Request Letters
- Marcellus Activity Increasing

Marcellus Shale Clean Air Permits

Pitfalls of Aggregation

Tom Bianca, AECOM (cont.)

New Source Review

- Ozone Transport Region
- Lowest Achievable Emission Rate (“LAER”)

ReedSmith AECOM

Marcellus Shale Clean Air Permits

Pitfalls of Aggregation

Tom Bianca, AECOM (cont.)



- When has the EPA found aggregation to be appropriate?



- When has the EPA found aggregation to be inappropriate?

ReedSmith AECOM

Marcellus Shale Clean Air Permits

Easy from Here?.....Not!



ReedSmith AECOM

Marcellus Shale Clean Air Permits

Contact Information

Tom Bianca, P.E., Manager – AECOM

tom.bianca@aecom.com

Lou Naugle, Partner – Reed Smith LLP

lnaugle@reedsmith.com

Harley Trice, Partner – Reed Smith LLP

htrice@reedsmith.com

ReedSmith AECOM

Speaker Profiles

Tom Bianca, P.E., Manager, Air Quality Engineering – AECOM

Tom Bianca manages AECOM's Air Quality Group in the Mechanicsburg, Pennsylvania office. He has more than 26 years of analytical and environmental engineering experience, specializing in air pollution control services. He has state agency and private industry experience, and has been responsible for air-quality-related projects, including permitting, Prevention of Significant Deterioration (PSD), Best Available Control Technology (BACT), New Source Performance Standards (NSPS), engineering and design, process optimization, facility location determinations, planning and evaluating continuous emission monitoring systems (CEMS), parametric emission monitoring systems (PEMS), Greenhouse Gas (GHG) emissions, and stack testing programs. He has extensive experience in air permitting, source testing, sampling, and analytical development for specific source applications. He also possesses extensive experience in landfill gas management and migration, and has overseen the development of software for air quality applications.

Lou Naugle, Esquire, Partner – Reed Smith LLP

Lou has been active in the area of environmental law since 1975, and leads the firm's Environmental practice as part of the Global Regulatory Enforcement Group. His practice includes both litigation and environmental counseling, and due diligence. He has been involved in litigation with PADEP over interpretations of the exemption list, and has counseled oil and gas clients on air permitting, mercury spill remediation, and water discharge enforcement issues in state and federal administrative proceedings. He is currently involved in the defense of an appeal filed by the Clean Air Council over DEP's determination not to aggregate emissions from compressor station sources in the issuance of a plan approval for the addition of sources at a gas processing plant.

Harley Trice, Esquire, Partner – Reed Smith LLP

Harley has been practicing environmental law since 1970. In addition to representing clients in a variety of state and federal permitting, enforcement and administrative actions relating to air and water pollution, including MACT and NESHAPS proceedings, Harley has been involved in revisions to federal and state environmental laws and regulations, particularly a revision to the Pennsylvania SIP for a VOC source. He has represented clients in various municipal, industrial, infectious and hazardous waste matters, including siting, permitting, and closure of treatment, storage and disposal facilities. Harley has participated in administrative penalty proceedings under the Toxic Substances Control Act and Superfund, and in enforcement and cost-recovery actions under federal and state Superfund laws. He represented the creditors committee in the recent ASARCO bankruptcy involving \$6.5 billion in federal and state environmental claims relating to mining and smelting activities.