



November 21, 2011

Via Overnight Delivery & Electronic Mail

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Re: Proposed Guidance for Performing Single Stationary Source Determinations for Oil and Gas Industries -- Comments of America's Natural Gas Alliance

Ms. Ramamurthy:

America's Natural Gas Alliance (ANGA) appreciates this opportunity to comment on the Pennsylvania Department of Environmental Protection's ("PADEP") proposed guidance entitled *Guidance for Performing Single Stationary Source Determinations for Oil and Gas Industries* (270-0810-006) ("Proposed Guidance") that was circulated on October 12, 2011.

ANGA is an educational and advocacy organization dedicated to increasing appreciation for the environmental, economic, and national security benefits of North American natural gas. ANGA's 30 members include many leading, North American independent natural gas exploration and production companies, including many who operate in Pennsylvania. The collective natural gas output of ANGA's member companies comprises approximately 40 percent of the total annual U.S. natural gas supply.

The safe and environmentally-responsible development of our domestic stores of natural gas has been and, increasingly, will be, an important component of America's energy supply and economic health. Natural gas is a clean-burning, efficient, and cost-effective fuel that offers the potential both for significantly decreasing air pollution emissions and promoting America's energy independence.

ANGA understands that the PADEP intends to use this Guidance to enable its permit writers to conduct case-by-case single source determination analyses for the purpose of processing permit applications under the Title V, Prevention of Significant Deterioration ("PSD") and Nonattainment New Source Review ("NSR") programs. As leading developers of the North American shale plays, ANGA member companies are potentially subject to the PSD and NSR permitting programs in Pennsylvania, and are likely to be significantly affected by any Guidance. Similarly, we anticipate the Pennsylvania guidance may be used by other states that may be considering issuing separate guidance. ANGA generally supports efforts to provide a practical, common-sense approach to permitting issues, and

likewise supports efforts to increase certainty and consistency in the manner that the Proposed Guidance would provide.

Introduction

As the Proposed Guidance points out, Pennsylvania incorporates by reference the federal PSD regulations in their entirety. These regulations define stationary source to mean “any building, structure, facility or installation which emits or may emit a regulated NSR pollutant.” 40 C.F.R. § 52.21(b)(5). The U.S. Environmental Protection Agency (“EPA), as well as individual states, have struggled generally with the appropriate scope of the term “stationary source” -- for permitting purposes -- since at least 1980, when EPA promulgated the federal PSD regulations.

The terms “building,” “structure,” “facility” and “installation” are further defined to include “all of the pollutant-emitting activities” which (1) “belong to the same industrial grouping,” (2) “are located on one or more contiguous or adjacent properties,” and (3) “are under the control of the same person (or persons under common control).” 40 C.F.R. § 52.21(b)(6). If two or more sources meet the three-part test above, the sources are aggregated and treated as a single source for air permitting decisions.

Although EPA established this three criteria test for aggregation in the regulations, permitting authorities have nonetheless continued to have trouble delineating the extent to which certain sources should be “aggregated” for permitting purposes; this issue is magnified with respect to the oil and gas industry, given the unique set of physical characteristics involved in oil and gas exploration and development operations.

More recently, EPA issued a guidance memorandum governing the aggregation determination process for the oil and gas industries. See *Memorandum from Gina McCarthy, Withdrawal of Source Determinations for Oil and Gas Industries*, September 22, 2009 (“McCarthy Memo”). In that guidance document EPA re-affirms its intent to focus the permitting evaluation on the three regulatory criteria established in the applicable rules. Many state permitting authorities, including PADEP, continue to work to develop regulatory approaches that implement the permitting requirements consistent with their state laws, the Clean Air Act, and EPA guidance, including the McCarthy Memo. The Proposed Guidance represents PADEP’s most recent attempt to address issues such as whether sources are “contiguous or adjacent” and/or “under the control of the same person” as those phrases are used in EPA regulations, the McCarthy Memo, and PADEP’s regulations.

Contiguous or Adjacent

ANGA believes that the Proposed Guidance appropriately instructs PADEP permit writers to focus on the plain meaning of the terms “contiguous” or “adjacent,” and properly requires that a property be either abutting or close by another property in order to be found contiguous or adjacent. ANGA submits that the distance between locations is appropriately the predominant consideration for

source determinations in this industry, and that this reflects EPA's position as reflected in the McCarthy Memo where EPA acknowledged that, due to the unique nature and physical characteristics of oil and gas well operations, agencies may properly conclude that "in some cases, 'proximity' may serve as the overwhelming factor" in the agency's source determination. McCarthy Memo, at 2.

ANGA also agrees with PADEP that it makes sense to establish a reference point, or a "rule of thumb," regarding the distance beyond which sources are presumed to not be contiguous or adjacent. It is critical to establish a policy that eliminates the practice of improperly aggregating sources that do not fit within the ordinary meaning of the terms "building," "structure," "facility," or "installation" as those terms are used in the PSD and NSR permitting programs. Historically permitting authorities have broadened rather than narrowed the geographic distance deemed to satisfy the "contiguous or adjacent" criteria for aggregation, resulting in the so-called "daisy chaining" of two or more sources that are not adjacent nor in close proximity to one another for purposes of PSD and NSR permitting.

In the Proposed Guidance PADEP attempts address this issue by establishing a quarter of a mile rule of thumb as a general guideline for determining when separate sources can be considered contiguous or adjacent. ANGA believes that the establishment of a quarter-mile rule of thumb is consistent with the required focus on the plain meaning of these terms.

ANGA supports PADEP's efforts to develop guidance that recognizes that permitting authorities need to faithfully apply the applicable regulatory criteria, including the requirement that two sources must meet the literal meaning of the terms "contiguous or adjacent" to be considered for aggregation. ANGA also notes the clarity of Department of Environmental Protection Secretary Mike Krancer who stated in the press release for this document - "Over time, there was a tendency by some regulators to morph the meaning of 'contiguous' or 'adjacent' properties to mean only that operations on the properties be 'interdependent,'" Krancer said. "This view has been expressed in various federal Environmental Protection Agency (EPA) recommendation letters or policy statements in recent years after the court case on this topic in 1979 and after the EPA's adoption of the regulations on this topic in 1980. That interpretation is not supported by the court decision, the EPA or state regulations." Indeed, as the McCarthy Memo recognizes, each element of the three-part test must be met before sources can be aggregated, and permitting agencies cannot overlook the spatial or geographic separation of two sources just because the other two criteria may be satisfied.¹

Sources "Under the Control of the Same Person"

¹ As PADEP recognizes in the Proposed Guidance, the three-part test is, for purposes of the oil and gas industries, actually a two-part test. The third criteria -- sources in the same two-digit Standard Industrial Classification, is irrelevant, and the only remaining factors are whether the sources are "contiguous or adjacent" and "under common control." *Proposed Guidance*, at 4-5.

The second criteria involves an analysis as to whether two or more sources are “under the control of the same person.” *Proposed Guidance*, at 7. As PADEP is aware, ownership and common control issues throughout an oil and gas field are complicated. Gas and oil well fields are complex systems that can involve multiple exploration, production and gathering companies operating under a variety of circumstances and agreements. Ownership and control may vary from well to well, from well to compressor station, between compressor stations, and between compressor stations and gas plants or transmission operations.

With respect to the issue of whether two or more sources are determined to be “under the control of the same person,” ANGA agrees that the common control determination should be “guided by the general definition of control used by the Securities and Exchange Commission (“SEC”).” *Proposed Guidance*, at 7. The SEC defines “control” as “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise.” 17 C.F.R. § 240.12b-2.

ANGA suggests that applying this definition in the context of this permitting guidance requires that the analysis focus on the first two methods identified in the Proposed Guidance, namely (a) whether there is common ownership of the two sources through a corporate parent and/or subsidiary, or (b) whether there is common control of the two sources such that one corporation has decision-making authority over the operation of a second corporation through a contractual agreement or voting interest.

ANGA is concerned, however, that the Guidance Document also includes a discussion of a third factor -- “whether there is a contract for service relationship between the two companies or if a support/dependency relationship exists” – that can also be used to determine whether common control exists. *Guidance Document*, at 7. ANGA submits that, given the complex nature of oil and gas exploration and development operations, including the likely presence of several different parties at oil and gas fields, it would be inappropriate for the mere existence of a contract for service, or a support/dependency relationship between two companies, to, alone, form the basis for a finding of “common control.” While the existence of any such agreements or relationships between two sources can be considered on a case-by-case basis, it cannot be sufficient evidence to determine common control *only if* such agreements or relationships demonstrate, consistent with the second factor noted above, that one source has decision-making authority over the operation of another. In other words, in order for the existence of a contract for services or support/dependency relationship to demonstrate control, the terms of the contract or nature of the relationship must actually create control over decision-making authority.

While we believe that consideration of the third factor is only appropriate in the limited circumstances above, and without conceding that permit reviewers’ analysis of the third factor set forth in the Proposed Guidance is otherwise appropriate, ANGA is also concerned that by offering a series of hypothetical “questions” that permit reviewers may consider when applying the third factor, PADEP is

inappropriately placing too much emphasis on the mere existence of a contract for service or a support/dependency relationship between two sources.

In support of its position regarding the third factor, ANGA refers PADEP to the Oklahoma Department of Environmental Quality's guidance document for "Permitting Collocated Facilities," issued on July 12, 2005. See www.deq.state.ok.us/factsheets/air/PermittingCollocated.pdf. While the Oklahoma DEQ acknowledges the same "third factor" within the common control test as discussed in the Proposed Guidance (*Id.* at 3-4), the manner in which that factor is applied is instructive -- "whether there is a contract for service relationship between the two entities or if a support/dependency relationship exists between the two entities *such that* a common control relationship exists." *Id.* (emphasis added). The use of the phrase "such that" ensures that the third factor is not a stand-alone consideration, but rather, is only another factor to be considered within the context of evaluating whether a legitimate common control relationship exists based on the applicable regulatory criteria. Contractual and support relationships between sources are only relevant to a common control determination if they rise to the level of demonstrating actual control of, or potential to control, another source.

PADEP has recognized the above complexities and variables in the oil and gas sector related to its infrastructure and commercial framework. Requiring that permit reviewers include in their review an analysis of the third factor outside of the context of actual/potential to control will lead to the type of detailed, cumbersome and fine-grained analyses that EPA and others have expressly and consistently sought to avoid in the context of making source determinations.

ANGA urges that PADEP revise the Proposed Guidance to clarify that the primary focus of the common ownership and control analysis should be on the first two factors listed on page 7 of the Guidance Document, i.e., common ownership and common control, and that contracts for service or support/dependency relationships are only relevant if they rise to the level of creating decision-making authority for one source over another.

Conclusion

ANGA supports PADEP's effort to develop a guidance document to create consistency and predictability in the performance of single stationary source PSD and NSR permitting determinations for the oil and gas industries. Inconsistent interpretation and application of applicable federal and state regulations can create uncertainty that hinders efficient investment and planning decisions. The proposed Guidance Document, with the suggested revisions suggested above, will increase permitting efficiency by allowing operators to provide at the outset the information that PADEP will review as part of the permit process, reducing delays from additional information requests. Furthermore, the guidance will create consistency across the regions, ensuring permit requirements remain the same throughout

ANGA Comments on Proposed Guidance

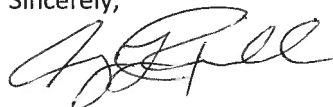
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Pennsylvania for oil and gas activities. Finally, it will also allow for more efficient and economical natural gas and oil exploration and development planning in the future.

ANGA appreciates the opportunity to provide these comments, and we look forward to working with the PADEP as it moves forward to finalize and implement the Proposed Guidance. Should you have any questions about these comments, please contact Amy Farrell or Peter Robertson at 202-789-2642.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Farrell', written in a cursive style.

Amy Farrell

VP, Regulatory Affairs