When Can Separate Facilities be Considered the Same Air Emissions Source Under the Clean Air Act?

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Manufacturers and processors considering the startup or acquisition of a facility near an already existing facility under their common or related control need to be aware of federal laws that may result in the EPA considering the new facility and existing facility to be the same air emissions source for purposes of implementing various Clean Air Act programs such as Prevention of Significant Deterioration (PSD), nonattainment New Source Review (NSR), and title V operating permit programs. If the EPA considers the facilities to be the same source, potential and actual emissions from each facility will be aggregated for the purposes of determining the applicable requirements, with the result that more stringent requirements will apply to both facilities. For example, for purposes of Title V permitting, the result can be that two facilities that by themselves would each be considered a minor source may exceed the major source status if the facilities' potential to emit figures are aggregated, thus requiring both facilities to meet major source requirements.

EPA makes determinations on whether two or more facilities are part of the same source for purposes of implementing the Clean Air Act on a case-by-case basis, based on a number of factors. Therefore, it is important to know how the factors are applied when establishing that the facilities should be considered separate facilities. The purpose of this article is to briefly outline the general rules applicable to determining whether multiple facilities should be considered the same air emissions source, as well as factors EPA will evaluate when making source determinations.

Generally, to be considered the same source for purposes of implementing the Clean Air Act, three criteria must be satisfied: (1) the facilities are located on one or more contiguous or adjacent properties; (2) they share the same two-digit (major group) SIC code (or one facility is considered a support facility to the other); and (3) they are under common control. The SIC Code requirement is self-explanatory, but the "contiguous or adjacent" and "common control" requirements are less clear. Following is a summary of the factors that EPA considers when evaluating these criteria, as outlined in past EPA determinations and guidance:

Missing Technical Papers

If you have any information on these missing papers, please contact the PMA Office at info@pmahome.org. Thanks!

Year	Paper #	Paper Name
1983	93A	Rim for the 100 Lb. Part
1997	239	Optimizing High Hardness Elastomer Properties Through Isocyanate Blending

Contiguous or adjacent. The term "contiguous" is defined as "touching; in contact" or "in close proximity without actually touching; near," while the term "adjacent" is defined as "near or close; next or contiguous." (both definitions from The Random House Dictionary of the English Language, College Edition). Therefore, it is clear that facilities need not share a common property boundary to be considered contiguous or adjacent. In fact, EPA has made it clear in past determinations that distance between facilities is less important than the functional inter-relationship between the facilities when determining whether they are contiguous or adjacent. For example, EPA has considered facilities that were over 20 miles apart as the same source given the presence of a dedicated channel between them and the functional inter-relationship between the facilities. Pollutant-emitting activities that comprise or support the primary product or activity of another company or operation will likely be considered part of the same stationary source. Following are some factors that EPA has used in past "contiguous or adjacent" source determinations to evaluate whether two facilities should be considered part of the same source:

Was the location of the new facility chosen primarily because of its proximity to the existing facility, to enable the operation of the two facilities to be integrated? In other words, if the two facilities were sited much further apart, would that significantly affect the degree to which they may be dependent on each other?

Will materials be routinely transferred between the facilities? Supporting evidence for this could include a physical link or transportation link between the facilities, such as a pipeline, railway, special-purpose or public road, channel or conduit.

Will managers or other workers frequently shuttle back and forth to be involved actively in both facilities? Besides production line staff, this might include maintenance and repair crews, or security or administrative personnel.

Will the production process itself be split in any way between the facilities, i.e., will one facility produce an intermediate product that requires further processing at the other facility, with associated air pollutant emissions? For example, will components be assembled at one facility but painted at the other?

Common control. EPA has established several factual inquiries it will evaluate in determining whether two facilities are under "common control." First, common control can be established through ownership (i.e., same parent company or a subsidiary of the parent company). Second, common control can be established if an entity

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such as a corporation has decision-making authority over the operations of a second entity through a contractual agreement or a voting interest. Finally, if common control is not established through either of these mechanisms, EPA will look at whether there is a contract for service relationship between the two companies or if a support/dependency relationship exists between the two companies in order to determine whether a common control relationship exists.

Note that all three of the criteria – adjacent or contiguous, common control and SIC code – must be met before two facilities will be considered the same source. The determination of whether two facilities will be treated as one air emissions source is done on a case-by-case basis, and depends heavily on the factual circumstances. Therefore, it is important for companies considering expansion through startup or acquisition of another facility to understand the analysis that EPA will evaluate in making the separate or combined air emission source determination so that the appropriate legal strategy can be developed to establish that the facilities should be considered separate sources.

Regulatory Ramblings

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Board at its meeting of November 17, 2009, and the amendments will go into effect upon publication in the Pennsylvania Bulletin as final rulemaking. The proposed rulemaking includes a new NPDES permit fee structure that is designed to cover the cost to the Commonwealth for the administration of the NPDES program. The existing $500 application fee, payable every 5 years would be replaced by a sliding scale of application fees and annual fees based primarily on the size of the point source discharge. The proposed fee structure is projected to produce $5 million annually, which is the Commonwealth's share of the total estimated annual cost of running the program, compared to the $0.75 million that is collected per year under the existing fee structure. Also, certain treatment requirements have been added or reorganized to standardize the Department's approach to discharges of treated sewage and industrial wastewater.

The proposed rulemaking also includes new provisions designed to keep the program current with changes at the Federal level. Some of these provisions are needed to ensure continued Federal approval of Pennsylvania's program by the Environmental Protection Agency (EPA). Approval of the final regulation by the EPA is required. These new provisions include requirements related to:

- Stormwater Phase II Final Rule requirements (MS4s and small construction activities)
- Cooling water intake structures – 316(b)
- NPDES provisions for applications of pesticides
- The DEP says that the new provisions generally are designed to achieve the Federal requirements without any more stringent requirements.

MORE FROM MAINE

Maine Adopts Regulations on Chemical Safety

Maine is one of the biggest advocates of improving chemical safety in consumer products. In addition to publishing the "List of Chemicals of High Concern" in 2009, Maine has now taken one step further in protecting its consumers through the regulation of chemicals in children's products. On February 18, 2010, the Board of Environmental Protection (BEP) adopted the department's proposed Chapter 880 Regulation of Chemical Use in Children's Products. This regulation states that the BEP may designate a chemical for regulatory inspection as authorized under Title 38, chapter 16-D, §§1691-1699-B, of the Maine Revised Statues Annotated. In 2008, the Public Law Chapter 643, "An Act to Protect Children's Health and the Environment from Toxic Chemicals in Toys and Children's Products" was adopted by the Legislature. The goal of this rule was to reduce the exposure of children and other susceptible populations to chemicals of high concern by substituting safer alternative when possible. In 2010, Chapter 880 was designed to further implement Chapter 643 by creating a process in which the department will identify priority chemicals for regulatory scrutiny, and by collecting details from manufactures on the use of these priority chemicals that are used in children's products. The regulatory system that is commonly followed includes a five step process: 1. Identification of chemicals of high concern 2. Identification of priority chemicals 3. Collection and review of data on the use of priority chemicals in children's products 4. Collection and review of data on the viability of safer alternatives 5. Substitution of safer alternatives The Board has also provisionally adopted Chapter 881-Fees; Chemical Use in Children's Products. This rule is designed to establish fees that may be charged by the Department of Environmental Protection to cover costs sustained in administering the provisions of Title 38 chapter 16-D, §§1691-1699-B of the Maine Revised Statutes Annotated. This rule must be approved by the Legislature before returning to the BEP for final adoption. For more information on safer chemicals in children's products, please visit the Maine Department of Environmental Protection website: http://www.maine.gov/dep/index.shtml