



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7
901 N. 5th STREET
KANSAS CITY, KANSAS 66101

AIR PERMITTING AND
COMPLIANCE BRANCH

December 6, 2004

James Pray
Brown, Winick, Graves, Gross,
Baskerville and Schoenebaum, P.L.C.
666 Grand Avenue, Suite 2000
Des Moines, Iowa 50309-2510

Dear Mr. Pray:

During a recent visit in Des Moines, and in a subsequent letter dated October 15, 2004, you asked EPA Region 7 to carefully consider whether the “support facility” concept should be applied to country grain elevators that are located near value-added agricultural industries such as ethanol plants. The concern is that if a new ethanol plant locates too closely to an existing country grain elevator or series of elevators throughout the local grain supply network, the owners and operators of the grain cooperatives may inadvertently be drawn into the PSD (Prevention of Significant Deterioration) permitting program or may otherwise be co-located with the ethanol plant for permitting purposes. If PSD is triggered, you suggest that the result can be economically devastating for a country elevator because it may have to install hundreds of thousands of dollars of control equipment that would never otherwise be required.

As an alternative to a “support facility” finding, you asked EPA to consider a common sense approach that would factor in the historical relationship between elevators and their local farmers and the notion that grain and other ethanol feed stocks are commodities which can be bought, sold, and traded on the open market. Since corn and other commodity feed stocks are available anywhere there is a production network (e.g. farms, elevators, and transportation), you suggest that it is not necessary to tie an ethanol plant to any one or more of these entities, thus preserving the independence of the country elevator system.

While we understand the elegance of a simple, straightforward determination that independent country elevators should not universally be considered a support facility for a new ethanol plant locating nearby, such a general finding is not possible given the unique circumstances that may exist at each installation. The determination of whether two activities are within the scope of a single source is a case-by-case determination that depends on several criteria set forth in regulations and the facts of each situation.

The SIP-approved PSD regulations of the Iowa Department of Natural Resources adopt the EPA’s PSD regulation by reference [Iowa Administrative Code § 567-22.4(455B)]. Thus, even though Iowa operates a SIP-approved PSD program, the

regulations at 40 C.F.R. § 52.21 (as amended through March 12, 1996) are applicable to sources in attainment or unclassifiable areas in Iowa. The determination of the scope of a stationary source subject to the PSD program in Iowa is therefore governed by the definitions in sections 52.21(b)(5) and 52.21(b)(6). In accordance with these definitions, a stationary source is a building, structure, facility or installation, which is, in turn, defined as follows:

All of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same “Major Group” (i.e. which have the same first two digit code) as described in the Standard Industrial Classification Manual.

Thus, pollutant-emitting activities are generally considered part of a single stationary source when these activities are (1) part of the same industrial grouping (as determined by applicable SIC codes), (2) contiguous or adjacent, and (3) under common control. In several guidance documents, EPA has recognized that one or more of these criteria can be satisfied when an emissions unit is a “support facility” or serves in a supporting role for a primary activity at a nearby location.

One approach to separating sources is to find that they are neither adjacent or contiguous to each other. In the general scenario you present, it is unclear whether this is a typical circumstance or not. Generally, the closer two facilities are the more likely they may be considered contiguous or adjacent. In addition, the existence of a dedicated pipeline or transportation link for moving materials between two facilities may also be relevant to this determination.

Once two sources are found to be contiguous or adjacent by virtue of their proximity and interaction with one another, the focus may shift to the nature of that interaction and how they may control or support each other. This usually requires a case by case evaluation to determine if common control is present. Even where facilities have separate legal owners, EPA has found that common control may be established on the basis of a contract which creates a support or dependency relationship between the facilities.¹

In a related example, we would not typically connect a fuel oil supplier to an adjacent industrial site just because the company fires oil, another widely-traded commercial product, in its boilers. Instead, we would first determine whether “common control” exists between the two entities. As long as the oil supply vendor and industrial facility do not “exercise restraining or directing influence over,” “have power over,”

¹ Letter from Richard R. Long, EPA Region 8 to Julie Wrend, Colorado Department of Public Health regarding “Single Source Determination for Coors/TriGen” (Nov. 12, 1998)
<<http://www.epa.gov/Region7/programs/artd/title5/t5memos/coorstri.pdf>>

"have power of authority to guide or manage," or "regulate economic activity over" each other², based on the various factors described in previous EPA guidance, it is likely that the common control link would be broken and the two sources would not be considered a single source for permitting purposes.

Similarly, based on the general scenario you present, we agree that if an ethanol plant is purchasing grain on the open market and accepts delivery from a number of different suppliers in minority proportions, then there would typically be no basis for a common control determination. Therefore, as long as the traditional commodity transactions between the country elevators and the ethanol plant occur at arms length, the grain suppliers would likely not be considered to be under common control for permitting purposes. On the other hand, if a grandfathered grain elevator executes a contractual agreement with an adjacent or contiguous greenfield ethanol plant to provide the bulk of its output, then it may be more difficult to demonstrate that the two entities are not under common control.

If the facts of a case-by-case evaluation show the common control of two contiguous or adjacent plants, we would then turn our attention to whether the installations share a common standard industrial classification code. In most cases where they operate independently, the ethanol plants and grain suppliers are not likely to share a common standard industrial classification (SIC) code. Ethanol plants are typically found in Group 28 for chemical manufacturing. Grain handling is typically found in Groups 20 or 51 depending on the nature of the operation. However, a support facility may be considered to be a part of the same major group as the primary facility it supports even if the support facility would be classified in a separate group when operated independently.³ Thus, in the case of a grain elevator and an ethanol plant, the single source determination could hinge on a determination of whether one facility was a support facility for another.

EPA's August 25, 1999, "Oscar Meyer"⁴ determination, while not directly relevant to the circumstances you describe, looks at whether the placement of emergency backup generators by the local utility on the Oscar Meyer property constitutes a support facility. EPA notes that it

² Letter from William Spratlin, EPA Region 7 to Peter Hamlin, Iowa Department of Natural Resources re Common Control(September 18, 1995).

<<http://www.epa.gov/Region7/programs/artd/air/title5/t5memos/control.pdf>>

³ 45 Fed. Reg. 52695 (Aug. 7, 1980); Letter from Robert B. Miller, EPA Region 5 to William Baumann, Wisconsin Department of Natural Resources regarding Oscar Mayer and Madison Gas & Electric (Aug. 25, 1999) ["Oscar Meyer"]; Memorandum from John S. Seitz, EPA OAQPS entitled "Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permit Programs of the Clean Air Act" (Aug. 2, 1996)

<<http://www.epa.gov/Region7/programs/artd/air/nsr/nsrmemos/dodguide.pdf>>

⁴ Letter from Robert B. Miller, EPA Region 5 to William Baumann, Wisconsin Department of Natural Resources cited above.

... has provided a great deal of guidance to States and sources regarding support activities since 1980, in which the Agency has emphasized that determinations of this nature are very fact-specific. USEPA provided a detailed summary of the Agency's existing policy in a recent public draft of a proposed rulemaking. See Draft preamble to the Part 70 revisions (notice of availability published June 3, 1997, (62 FR 30289)). In short, where more than 50% of the output or services provided by one facility is dedicated to another facility that it supports, then a support facility relationship is presumed to exist. Even where this 50% test is not met, however, other factors may lead the permitting authority to make a support facility determination. Support facility determinations can depend upon a number of financial, functional, contractual, and/or other legal factors. These include, but are not limited to: (1) the degree to which the supporting activity receives materials or services from the primary activity (which indicates a mutually beneficial arrangement between the primary and secondary activities); (2) the degree to which the primary activity exerts control over the support activity's operations; (3) the nature of any contractual arrangements between the facilities; and (4) the reasons for the presence of the support activity on the same site as the primary activity (e.g., whether the support activity would exist at that site but for the primary activity). Where these criteria indicate a support relationship, permitting authorities may conclude that a support activity contributing more or less than 50% of its output may be classified as a support facility and aggregated with the facility it supports as part of a single source.

Finally, it is important to note that what an ethanol plant can do and what it actually does when making its grain purchase decisions may affect whether common control or a support facility relationship exists or not. For example, if an ethanol plant purchases grain from an array of local country grain elevators, such transactions appear to occur within the commodity scheme you suggest. However, if an ethanol plant has many supply choices but instead opts to enter into contracts to purchase only from the elevator next door, then such transactions may appear to be more like two sources acting as one.

In summary, because of the unique details that each installation presents it is not possible to pre-determine all the circumstances under which a grain supply elevator may be a single source by itself or an included part of a larger stationary source. Nor is it possible to grant a broad commodity-based exception when determining PSD source applicability. In that regard, we encourage you to work closely with your state and local air pollution control agencies to evaluate these site-specific factors. As a final note, even though we encourage SIP-approved PSD states like Iowa to follow EPA guidance to ensure consistency in implementation of the program, such guidance is not legally binding and does not substitute for the controlling regulations. EPA and the states retain the discretion to apply the regulations and to reach different conclusions where appropriate based on differing specific circumstances of particular cases. Further, the

methodology described above is not intended to imply that the three key criteria for a single source determination must be evaluated in any particular order. All three criteria must be satisfied at the same time in order for activities to be considered part of a single source.

We have coordinated this response with EPA's Office of Regional Counsel, Office of General Counsel, Office of Enforcement and Compliance Assurance, and Office of Air Quality, Planning & Standards. If you have any questions, please contact Jon Knodel at (913) 551-7622 or knodel.jon@epa.gov.

Sincerely,

/s/

JoAnn Heiman
Chief
Air Permitting and Compliance Branch

cc: Catherine Fitzsimmons, Iowa Department of Natural Resources
Dave Phelps, Iowa Department of Natural Resources