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VIA EMAIL
Cheryl Suttman
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Dear Ms. Suttman

Please accept the enclosed comments regarding the Ohio EPA Division of Air Pollution Control's proposed changes to the model general permit for oil and gas well site production operations on behalf of the Group Against Smog and Pollution (GASP).

If you have any questions or require any additional information please feel free to contact me. Thank you for providing this opportunity to comment.

Sincerely,

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I. Ohio EPA has misinterpreted the *Summit* court's opinion regarding the meaning of "adjacent."

USEPA has approved Ohio's Prevention of Significant Deterioration (PSD), Nonattainment New Source Review (NNSR), and Title V air permitting programs.[1] In order to receive and retain EPA approval, state PSD, NNSR, and Title V programs must be at least as stringent as their federal counterparts.[2] Further, the Ohio Air Pollution Control Statute (APCS) states that, "[the APCS], all rules adopted under it, and all permits, variances, and orders issued under it shall be construed, to the extent reasonably possible, to be consistent with the federal Clean Air Act and to promote the purposes of this chapter."[3]

Thus Ohio EPA's definition of source for purposes of PSD, NNSR, and Title V permitting must be at least as stringent as the federal definition. The federal PSD and NNSR regulations define "stationary source" as "any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant."[4] These regulations define "building, structure, facility, or installation" as "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) . . . ."[5] While federal Title V rules do not define "building, structure, facility, or installation," the definition of "stationary source" is to be interpreted consistently with the definition in the PSD program.[6] Ohio statutory and regulatory definitions mirror the federal definitions.[7]

In most cases, the regulatory definition of "building, structure, facility, or installation" provides sufficient guidance for an air permitting authority to make a proper source determination. However, in cases where related pollutant-emitting activities are geographically separated (as is often true of oil and gas well sites and associated equipment) the regulatory definition alone is insufficient. The definition does not indicate how close pollutant-emitting activities must be to one another to be "adjacent." Source determinations made by USEPA regional offices over the last thirty years concerning whether facilities are "contiguous or adjacent" generally focus on proximity, functional relationship, and the existence of a physical connection, such as a pipeline, between facilities.[8]

In August 2012, the 6th Circuit Court of Appeals held USEPA's interpretation of the regulatory term "adjacent" was unreasonable and contrary to law.[9] Without question the Summit decision significantly reduces the scope of the term "adjacent" for purposes of NNSR, PSD, and

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[1] 68 Fed. Reg. 1366; 66 Fed. Reg. 51570; 60 Fed. Reg. 42045.
[2] *See* 40 C.F.R. §§ 51.166(a)(7)(iv), 51.165(a)(1), and 70.1(c), respectively; *see also*, *Mirant Potomac River, LLC v. U.S. Envtl. Prot. Agency*, 577 F. 3d 223, 227 (4th Cir. 2009).
[3] Ohio Rev. Code 3704.02(B).
[4] 40 C.F.R. §§ 52.21(b)(5), 51.165(a)(1)(i).
[5] 40 C.F.R. §§ 52.21(b)(6), 51.165(a)(1)(ii).
[6] 61 Fed. Reg. 34,202, 34,210 (July 1, 1996), *see also* MacClarence v. U.S. EPA, 596 F.3d 1123, 1127 (9th Cir. 2010).
[7] Ohio Rev. Code 3704.01(J); OAC Rule 3745-15-01(Q) & (X).
[8] Gina McCarthy, *Withdrawal of Source Determinations for Oil and Gas Industries*, Sept. 22, 2009, *available at* http://www.epa.gov/Region7/air/nsr/nsrmemos/oilgaswithdrawal.pdf.
[9] *Summit Petroleum Corp. v. USEPA*, 690 F.3d 733, 735 (6th Cir. 2012).

Title V permitting in the 6th circuit; however, Ohio EPA appears to have misinterpreted the decision and has articulated a more restrictive definition of adjacency that is inconsistent with the *Summit* decision; less stringent than the federal PSD, NNSR, and Title V definition of source; and thus contrary to both state and federal law.[10]

In a March 18, 2013 presentation, Ohio EPA included the following statements characterizing the *Summit* decision:

> "if two properties are not next to each other, then not adjacent and can't be part of the same stationary source . . . . Typically means most well sites are not to be grouped with each other because they are not adjacent . . . .We will need property lines/owners."[11]

Ohio EPA's statements appear to suggest that air contamination sites or properties must be abutting (i.e. touching or sharing a physical border) in order to establish adjacency. This is not the holding of the *Summit* court, in fact, it is contrary to the *Summit* opinion. *Summit* held that USEPA could not consider functional relationships in determining adjacency and that the term "adjacent" referred only to physical proximity.[12] The *Summit* court did *not* include a requirement that sites or properties abut or adjoin one another to be deemed adjacent; rather, the court held that:

> "Summit [Petroleum] . . . argues that the EPA's determination that the physical requirement of adjacency can be established through mere functional relatedness is unreasonable and contrary to the plain meaning of the term 'adjacent.' We agree."[13]

To determine the "plain meaning" of the term adjacent, the *Summit* court cited numerous dictionary definitions of the term. Roughly half of the definitions the court cited indicated *nearness* was sufficient to establish adjacency and that objects need not be touching or physically connected to be adjacent. For example, definitions of adjacent the court listed include "[c]lose to; lying near[,] not distant[,] nearby."[14]

Further, the *Summit* court noted that the air emission units at issue in the appeal were separated by many miles and that the Permittee did not own the property between the emission units:

> "The wells themselves are located over an area of approximately forty-three square miles at varying distances from the plant — from five hundred feet to eight miles away — and Summit does not own the

[10] Specifically, 42 U.S.C. § 7509(a); 40 C.F.R. §§ 51.166(a)(7)(iv), 51.165(a)(1), and 70.1(c); and Ohio Rev. Code 3704.02(B).
[11] Ohio EPA, Proposed Changes to the Oil and Gas Air Pollution General Permit (Mar. 18, 2013) at Slides 13-14, *available at:* http://wwwapp.epa.ohio.gov/eBusinessCenter/Agency/DAPC/permitting/Proposed%20GP%20Changes02.pptx.
[12] *Summit Petroleum Corp. v. USEPA*, 690 F.3d 733, 744 (6th Cir. 2012).
[13] *Id. at*, 735.
[14] *Id*. at 742 (internal citations omitted).

> property between the individual well sites or the property between the wells and the plant."[15]

Thus if the *Summit* majority believed the term "adjacent" required sites or properties to be abutting or located immediately next to one another, the court would have directed USEPA to treat the various emission units at issue as separate, non-Title V sources on remand. Instead, the court directed USEPA "to determine whether Summit's sweetening plant and sour gas wells are sufficiently physically proximate to be considered 'adjacent' within the ordinary, i.e., physical and geographical, meaning of that requirement."[16] Thus the *Summit* majority's conception of the "ordinary meaning" of adjacent must allow for the possibility that sites or properties that are not abutting or immediately next to one another would be considered "adjacent." This is also consistent with the *Summit* dissent's observation that "aside from essentially holding that functional interrelatedness is an impermissible factor to consider, the majority does not find that any other aspect of the EPA's aggregation determination was flawed . . . . On remand, then, the EPA is free to reach the same conclusion that Summit's operations should be aggregated as a major source for Title V permitting purposes."[17]

Ohio EPA's misreading of *Summit* may be the result of the manner in which the *Summit* majority opinion quotes the U.S. Supreme Court's *Rapanos* decision.[18] The *Summit* decision cites a portion of *Rapanos* discussing the meaning of the term adjacent: "the [*Rapanos*] Court noted that "[h]owever ambiguous the term may be in the abstract, `adjacent'... is not ambiguous between `physically abutting' and merely `nearby.'"[19] The *Summit* court cites this language to support its assertion that adjacent "relates only to physical proximity,"[20] *not* to suggest that sources must be physically abutting.

In fact, the basis for *Rapanos* court's determination that "adjacent" and "abutting" should be read synonymously is entirely irrelevant to *Summit*. The *Rapanos* discussion of the meaning of "adjacent" dealt not the Clean Air Act definition or even the general meaning of the term, but with the Supreme Court's specific intended meaning when it used the term in its prior *Riverside Bayview* decision—a Clean Water Act case concerning the army corps' authority to regulate wetlands "adjacent" to navigable waters.[21] In fact, the full *Rapanos* text that *Summit* selectively quotes, makes quite clear that the *Rapanos* court's interpretation of "adjacent" is limited to the term as it was used in the *Riverside Bayview* decision:

> "In expounding the term 'adjacent' <u>as used in *Riverside Bayview*</u>, we are explaining our own prior use of that word to interpret the definitional phrase 'the waters of the United States.' However ambiguous the term

[15] *Id*. at 735-736
[16] *Id*.
[17] *Id*. at 757.
[18] *Rapanos v. United States*, 547 U.S. 715 (2006).
[19] *Id*. at 744.
[20] *Id*. at 743. (The heading of this section of the Summit opinion reads "Case law supports the idea that adjacency relates only to physical proximity).
[21] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

> may be in the abstract, as we have explained earlier, "adjacent" as used in *Riverside Bayview* is not ambiguous between 'physically abutting' and merely 'nearby.'"[22]

It is only after citing *Rapanos* to support its contention that adjacent "relates to physical proximity" that the *Summit* majority proceeds to address the plain meaning of the term adjacent in the following section of the opinion, titled: "The EPA's interpretation of the term 'adjacent,' to which no deference is owed, runs contrary to its plain meaning."[23] In articulating the plain meaning of adjacent, it is crucial to note that the *Summit* court further modifies the *Rapanos* quote. The "physically abutting" language is removed and replaced. The modified quote reads, "however ambiguous the term may be in the abstract, 'adjacent' . . . is not ambiguous between '[physically proximite]' [sic] and merely '[functionally related].'"[24]

USEPA's interpretation of the *Summit* court's definition of adjacent is consistent with this modified version of the *Rapanos* quote. In a December 2012 memo, USEPA states, "The [*Summit*] Court's majority decision concluded that the term 'adjacent', as used in our regulations, was related only to physical proximity and, thus, found that our determination was improper, because we had considered the functional interrelatedness of the wells and sweetening plant in determining that they were 'adjacent.'"[25]

Finally, Ohio EPA's contention that sites or properties must abut or adjoin to be considered adjacent is at odds with both the federal regulations and Ohio law, both of which refer to "*contiguous or* adjacent properties."[26] It is a basic principle of statutory interpretation that language "should be read to avoid rendering superfluous any parts thereof."[27] USEPA and Ohio's use of two terms: "contiguous" and "adjacent" suggest two distinct meanings were intended—nearness and physical contact. Interpreting the "contiguous or adjacent" element of the definition of source to only be satisfied if sites or properties are abutting would render one of these terms superfluous.

Thus, the term "adjacent," as defined by the *Summit* court, (1) refers solely to physical proximity, (2) is not limited to sites or properties that abut, and (3) does not include consideration of functional relationships. Ohio EPA's current interpretation is contrary to *Summit*; 42 U.S.C. § 7509(a); 40 C.F.R. §§ 51.166(a)(7)(iv), 51.165(a)(1), and 70.1(c); and Ohio Rev. Code 3704.02(B). Ohio EPA must revise its interpretation of adjacent to accurately reflect the *Summit* decision.

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[22] *Rapanos* 547 U.S. 748 (emphasis added). (In quoting this portion of the *Rapanos* decision the *Summit* court omitted the "as used in *Riverside Bayview*" language. *Summit* 690 F.3d at 744.)
[23] *Id*. at 744.
[24] *Id.*
[25] USEPA, Applicability of the Summit Decision to Source Determinations (Dec. 21, 2012) at 6, *available at:* http://www.epa.gov/region07/air/nsr/nsrmemos/inter2012.pdf.
[26] 40 C.F.R. §§ 52.21(b)(6), 52.165(a)(1)(ii), Ohio Rev. Code 3704.01(J)
[27] Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991).

II. Modern catalyst-equipped engines are capable of meeting significantly more stringent emission rates than those required by NSPS subpart JJJJ. Commenters suggest Ohio EPA incorporate lower engine emission rates into the model general permit.

Model general permits 12.1 and 12.2 require stationary engines to meet the NSPS JJJJ emission rates for NOx, CO, and VOC. However, modern catalyst-equipped engines are capable of meeting significantly lower emission rates than JJJJ requires.[28] In fact, Ohio EPA has issued permits-to-install establishing engine emission rates more stringent than JJJJ.[29] Pennsylvania DEP recently incorporated engine emission rates significantly more stringent than subpart JJJJ requirements into its General Permit for natural gas compressor stations.[30] We suggest Ohio EPA incorporate comparable engine emission rates into its model general permit for well sites. Reduction of engine emissions of the ozone precursors NOx and VOC is particularly important given Ohio's ozone nonattainment problems and Ohio's proximity to the ozone transport region.

[28] *See e.g.*, PADEP, Technical Support Document for GP-5 (Jan. 31, 2013) at 15-30, *available at:* http://www.dep.state.pa.us/dep/deputate/airwaste/aq/permits/gp/Technical_Support_Document_GP-5_1-31-2013-final.pdf.

[29] *See e.g.*. Ohio EPA, Permit to Install, Utica Gas Services, L.L.C.- Augusta Compressor Facility (Dec. 10, 2012) Section C.4, *available at:* http://wwwapp.epa.ohio.gov/dapc/permits_issued/661105.pdf.

[30] *See e.g.*, PADEP, General Permit 5 (Feb. 1, 2013) at 13-16, *available at:* http://www.dep.state.pa.us/dep/deputate/airwaste/aq/permits/gp/GP-5_2-25-2013.pdf.