



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII  
726 MINNESOTA AVENUE  
KANSAS CITY, KANSAS 66101

SEP 18 1995

CON 10-22  
Prevention of  
Significant  
Deterioration  
CS

Peter R. Hamlin, Chief  
Air Quality Bureau  
Iowa Department of Natural Resources  
Henry A. Wallace Building  
900 East Grand  
Des Moines, IA 50319

Dear Mr. Hamlin:

Recently, several questions have been raised about whether new facilities that locate on the site of a present major stationary source should be considered part of the existing major source or as a separate entity. In particular, concerns center around the question of control as interpreted under the New Source Review program. According to EPA's definition of a stationary source, "a building, structure, facility, or installation means 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) ."

EPA's permit regulations do not provide a definition for control. Therefore, we rely on the common definition. Webster's Dictionary defines control as "to exercise restraining or directing influence over," "to have power over," "power of authority to guide or manage," and "the regulation of economic activity." Obviously, common ownership constitutes common control. However, common ownership is not the only evidence of control.

Typically, companies don't just locate on another's property and do whatever they want. Such relationships are usually governed by contractual, lease, or other agreements that establish how the facilities interact with one another. Therefore, we presume that one company locating on another's land establishes a "control" relationship. To overcome this presumption, the Region requires these "companion" facilities, on a case by case basis, to explain how they interact with each other. Some of the types of questions we ask include:

Do the facilities share common workforces, plant managers, security forces, corporate executive officers, or board of executives?



Do the facilities share equipment, other property, or pollution control equipment? What does the contract specify with regard to pollution control responsibilities of the contractee? Can the managing entity of one facility make decisions that affect pollution control at the other facility?

Do the facilities share common payroll activities, employee benefits, health plans, retirement funds, insurance coverage, or other administrative functions?

Do the facilities share intermediates, products, byproducts, or other manufacturing equipment? Can the new source purchase raw materials from and sell products or byproducts to other customers? What are the contractual arrangements for providing goods and services?

Who accepts the responsibility for compliance with air quality control requirements? What about for violations of the requirements?

What is the dependency of one facility on the other? If one shuts down, what are the limitations on the other to pursue outside business interests?

Does one operation support the operation of the other? what are the financial arrangements between the two entities?

The list of questions is not exhaustive; they only serve as a screening tool. If facilities can provide information showing that the new source has no ties to the existing source, or vice versa, then the new source is most likely a separate entity under its own control. However, if the facilities respond in the positive to one or more of the major indicators of control (e.g. management structures, plant managers, payroll, and other administrative functions), then the new company is likely under the control of the existing source, or under common control by both companies, and cannot be considered a separate entity for permitting purposes. Absent any major relationships, the new facility may still be considered to be under the control of the existing source if a significant number of the indicators point to common control.

If after asking the obvious control questions the permit authority has any remaining doubts, it may be necessary to look at contracts, lease agreements, and other relevant information. EPA's Dun and Bradstreet Retrieval System, available to anyone with mainframe access, is also useful for exploring any parent-subsidiary relationships and common corporate management

structures. Using these tools, we have found at least one case where a company set up an "unrelated" corporation in the middle of their property to split the property into multiple, distinct sites. After concluding that these "distinct" sites were in fact under the common control of the companion company's president, the split was later disallowed for permitting purposes.

The permit authority should be cautious of any short term or interim contracts that establish separate operating companies or separate operations on noncontacting parcels of land. While not likely, it is conceivable that such contracts could be used to shield the company's true intents. For example, a company may seek to avoid major new source review requirements in the short term, but merge later on to take advantage of the netting provisions. If the company's motives are unclear, but the permit authority elects to permit as two sources, we would encourage adding a condition to the permit requiring notification if the two sources merge operations. If the merger occurs within a short time frame, say two years, after permit issuance, the department may want to investigate such activities as circumvention of the major source permitting requirements and take the appropriate action.

If the affected sources are reluctant or refuse to provide documentation satisfactory to the permit authority, and the company's permit application is pending, then the permit authority may elect to find the permit application incomplete. If an application has not been submitted, then we recommend that the permit authority seek the necessary information under its statutory authorities.

Our approach to looking at control is based in part on regulatory background information, prior EPA guidance materials, common sense, and limited formal decisions on the matter. While no one single document answers the questions at hand, we encourage you and your staff to review the references listed in Table 1. Most are available on the New Source Review portion of the Technology Transfer Network Bulletin Board System.

We seriously urge you to consider the principles found in the various guidance documents and in this letter when evaluating requests to split properties for permitting purposes. We realize that in many cases it is easier not to second guess a company's motives. However, we also believe this administratively expedient approach can result in allowing circumvention of the permit requirements and ultimately jeopardize the goals and effectiveness of the permitting programs. This guidance has been reviewed by the Information Transfer and Program Integration Division, Office of Air Quality Planning and Standards, and

incorporates their suggestions and concerns. If you have any questions or need further advice, please contact our New Source Review team; Dan Rodriguez 913-551-7616, Ward Burns 913-551-7960, or Jon Knodel 913-551-7622.

Sincerely,

A handwritten signature in black ink that reads "William A. Spratlin". The signature is written in a cursive style with a large, prominent initial "W".

William A. Spratlin  
Director  
Air, RCRA, and Toxics Division

Enclosure

cc: Christine Spackman, IDNR  
Chuck Layman, KDHE  
Randy Raymond, MDNR  
Shelly Kaderly, NDEQ  
David Solomon, OAQPS  
Michele Dubow, OAQPS

Table 1. References on Common Control

"Definition of Source," March 16, 1979  
The preamble to the August 7, 1980 PSD regulations, 45 FR  
52693-52695  
"PSD Applicability Request (General Motors)," June 30, 1981  
  
"PSD Applicability Request, Valero Transmission Company,"  
November 3, 1986  
"PSD Applicability Determination for Multiple Owner/Operator  
Point Sources Within a Single Facility (Denver Airport)  
," August 11, 1989  
"Comments on Draft Permit for Conoco Coker and Sulfur  
Recovery Facility," March 22, 1990  
"Definition of Source for PSD Purposes," August 22, 1991  
"PSD Permit Remand, Reserve Coal Properties," July 6, 1992  
"Temporary and Contracted Activities at Stationary Sources,"  
John Seitz letter to Minnesota, November 16, 1994  
"Watts Bar Nuclear Plant Title V Applicability," Region 4,  
June 5, 1995  
"Site Specific Determination of Common Control for United  
Technologies Corporation," Region 4, July 20, 1995  
"Georgetown Cogeneration Project," Westy McDermid  
Memorandum, date unknown