MEMORANDUM

DATE: October 28, 2016

TO: **BAQ Engineering Services Division**

FROM: Christopher D. Hardee, P.E., Manager, Sandhills and Pulp & Paper Section

THROUGH: Elizabeth Basil, Director, Engineering Services Division

SUBJECT: **Guidance for Collocation/Single Source Determinations**

The purpose of this guidance is to provide assistance when determining whether two or more facilities should be collocated or considered a single source for the purposes of Prevention of Significant Deterioration/Nonattainment New Source Review[1] (PSD/NSR), Title V[2] (Part 70), and Title III[3] (Part 63).

The information contained herein is gathered from regulations, federal register notices, previous determinations, other guidance documents, and court cases. It is intended to be a guide and not an exhaustive list of all possible scenarios. These determinations are made on a case-by-case basis regarding the existing situation at specific facilities.

1.0 Definitions

PSD/NSR, Title V, and Title III each use similar terms to define a "stationary source" or "major source." These are the definitions used when making the determination whether two or more facilities should be collocated or considered a single source.

PSD/NSR:

> "*Stationary source*" means any *building, structure, facility, or installation* which emits or may emit a regulated NSR pollutant.
>
> "*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**

[1] SC Regulation 61-62.5, Standard 7 - Prevention of Significant Deterioration & 7.1 - Nonattainment New Source Review
[2] SC Regulation 61-62.70 - Title V Operating Permit Program
[3] SC Regulation 61-62.63 - National Emission Standards for Hazardous Air Pollutants for Source Categories

> **or adjacent properties**, and are under the **control of the same person** (or persons under common control)…

Title V:

> "Major source" means any stationary source (or any group of stationary sources that are located on one or more **contiguous or adjacent properties**, and are under **common control** of the same person (or persons under common control)) belonging to a **single major industrial grouping**…

Title III:

> *Major source* means any stationary source or group of stationary sources located within a **contiguous area** and under **common control**…

There are a few important items to note about the definitions themselves and how they are implemented:

1. All factors listed in a definition have to be positive for two or more facilities to be considered collocated or a single source.

2. Unlike the other two programs, Title III does not require sources to belong to the same industrial grouping.

3. PSD/NSR and Title V have the same criteria for collocation, so a source collocated for one is also collocated for the other.

4. The Title III major source definition is also listed in part of the Title V major source definition so a source major for Title III must obtain a Title V operating permit. The definitions are similar and only Title III is shown here to avoid confusion.

5. South Carolina's Nonattainment New Source Review regulation does not contain definitions of major source. It references and uses the Standard 7 definitions.

The emphasized terms in the definitions form the criteria used to make a determination. These terms have not been specifically defined by the EPA.

2.0 Contiguous or Adjacent Properties

The dictionary definitions of contiguous and adjacent are:

Contiguous[4]:

1. Sharing an edge or boundary; touching.
2. Neighboring; adjacent.

Adjacent[5]:

1. Close to; lying near.
2. Next to; adjoining.

2.1 Contiguous

Facilities are contiguous if they share a common property boundary or endpoint; except that they may be separated by a road, railroad, waterway, right-of-way, or the like, and still be considered contiguous.

2.2 Adjacent

Facilities are adjacent if they are not touching but are within close proximity. The distance which is considered "close proximity" has never been defined by the EPA. Until the Summit Decision and the National Environmental Development Association's challenge of the EPA's Summit Directive, the EPA advised and used the concept of interrelatedness or a nexus between sources to determine whether they should be considered in close proximity. The stronger the interrelatedness or nexus, the further apart two or more sources could be and still be considered adjacent by the EPA. This approach had previously been used by the Department based on the EPA's guidance and will be found in older determinations.

The court cases mentioned above found the interrelatedness or nexus approach to be in error. Specifically, they found that "adjacent" relates only to physical proximity. The cases and their history are provided at the end of this memorandum.

Using the "common sense notion"[6] of a source for single source determinations, the Department is applying a quarter mile "rule-of-thumb." Properties located a quarter mile or less apart will be considered adjacent for Title V, PSD/NSR, and Title III. Properties more than a quarter mile apart will not be considered adjacent. The distance is measured from the closest property boundaries.

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[4] contiguous. 2015. *American Heritage Dictionary of the English Language*. Retrieved March 18, 2015, from https://www.ahdictionary.com

[5] adjacent. 2015. *American Heritage Dictionary of the English Language*. Retrieved March 18, 2015, from https://www.ahdictionary.com

[6] 45 Fed. Reg. 52695 (August 7, 1980)

3.0 Common Control

The "control" referenced in the regulation is control over the emission activities. This control does not have to be direct physical access, such as the ability to turn a process on or off. Control can be expressed via a company's board of directors deciding to build facilities or undertake certain projects. The EPA chose to be "guided by the general definition of control used by the Security and Exchange Commission (SEC)."[7] The SEC defines:

> The term "control" (including the terms "controlling," "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person [or organization], whether through the ***ownership*** of voting securities, by ***contract***, or ***otherwise***.[8]

From this definition, control can be broken down into three types: ownership, contractual requirements, and dependence.

3.1 Common Ownership

Common ownership (i.e., same parent company) is normally the easiest to identify and clearest sign of common control. When reviewing two facilities for common ownership, they should be evaluated up to the highest point in a company's management structure. This can include comparing board of director members for the two facilities.

Example: Two facilities have separate boards of directors; however, a review of the membership shows that both boards have a majority of the members in common with similar voting interest. This can indicate common ownership.

3.2 Contractual Requirements

Contractual requirements or voting interest could establish common control by giving one facility decision-making authority over a second facility.

Example: Two facilities are located on contiguous and adjacent properties. One is a production facility and the other is an electrical cogeneration facility that is a joint venture between the production facility owner and an electric utility. Common control between the facilities is present as the production facility owner can exert control over the cogeneration facility via the contractual relationships forming the joint venture.

[7] 45 Fed. Reg. 59878 (September 11, 1980)
[8] 17 CFR 240.12b-2

Landlord-Tenant Relationships

In most instances, landlord-tenant relationships are not considered a sign of common control.

Example: An airport or industrial park leases space to various individual facilities. If these facilities operate without any direct or indirect control of landlord, they would not be considered to be under common control of the landlord.

3.3 Dependence

Dependence of one facility on another for continued operation can establish common control. This would normally appear as a contract-for-service where one facility provides service solely for a second facility.

Example: Two separately owned facilities are located on contiguous and adjacent properties. Facility 1 provides steam, electricity, and waste treatment services to Facility 2. In return, Facility 2 provides one hundred percent of its production to Facility 1. In the event of the loss of any service from Facility 1, Facility 2 is shut down until the service is restored. This dependence shows common control.

3.4 Questions

Below is a nonexclusive list of the questions that can be asked of the facilities to help determine whether common control exists:

1. To what extent, if any, do the facilities share or have commonality or overlap of the following (please describe):

People		
Workforce	Managers	Security Forces
Corporate Executive Officers	Board of Directors	
Functions		
Payroll Activity	Employee Benefits	Health Plans
Retirement Funds	Insurance Coverage	Other Admin Functions
Sources/Activities		
Equipment	Property	Pollution Control Equipment
Raw Materials	Intermediates	Products
Byproducts		

2. Can the managing entity of one facility make decisions that affect the pollution control at another facility?

3. What contracts, financial arrangements, or responsibilities exist between the facilities?

4. Who is responsible for compliance or violations with air quality control requirements?

5. What encumbrances are there for a facility to purchase or sell materials or products to other businesses?

6. What is the dependence of one facility on the other? If one shuts down, what are the limitations on the other facility?

4.0 Single Major Industrial Grouping

4.1 SIC Codes

PSD/NSR and Title V definitions further specify when sources may be considered as belonging to the same industrial grouping.

PSD/NSR:

> Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (that is, which have the same first two digit code) as described in the Standard Industrial Classification Manual…

Title V:

> For the purposes of defining "major source," a stationary source … shall be considered part of a single industrial grouping if all of the pollutant emitting activities … belong to the same Major Group (that is, all have the same two-digit code) as described in the Standard Industrial Classification Manual, latest revision.

To determine if two or more facilities are in the same industrial grouping, accurate Standard Industrial Classifications[9] (SIC) are required. The construction, operating permit renewal, and Title V operating permit application forms require primary and secondary SIC Codes; however, the forms are sometimes filled out by individuals that may not know a facility's correct SIC code. SIC codes are determined by the principle project or group of products produced or distributed or services rendered by the facility. Read the SIC manual's definition for the SIC code listed in the forms and see whether the facility's operations as described by

[9] US Occupational Safety and Health Administration, Standard Industrial Classification Manual (1987) (available at https://www.osha.gov/pls/imis/sic_manual.html).

the facility, meet that definition. If they do not or if there is uncertainty, ask for additional information or talk to your manager.

4.2 Support Facilities

Facilities that do not have the same SIC major group, may still be considered part of the same industrial grouping if the second facility is considered a "support facility." "Support facilities are typically those which convey, store, or otherwise assist in the production of the principle product."[10]

Example: A steam generating facility is located next to a production facility. Although not restricted from supplying steam to other customers, 100% of the facility's steam goes to the production facility and has done so for many years. The steam generating facility is considered a support facility for the production facility.

Although similar to contractual relationships examined to determine common control, a support facility determination is only relevant in determining single industrial groupings.[11] Therefore, it is possible for a facility to be positive for one criteria and not the other.

5.0 Permit Issuance

Two or more facilities that are considered a single source under these regulations may be issued a single permit covering all emission units. However, it can be advantageous to issue each source a separate permit with separate permit numbers. Separate permits can be clearer and easier to follow, especially for sources that are large facilities by themselves. Collocated sources can be issued separate permits as long as the separate permits, collectively, contain all applicable requirements.

As the facilities are considered single sources, if issued separate permits, both permits must be of the same type.

Example: Facility A and Facility B are collocated. Each facility is minor for Title V by individually; however, their aggregate emissions are major. The facilities could limit their aggregate emissions to less than Title V thresholds and be issued either a single conditional major permit to cover both facilities or two separate conditional major permits. If they chose to not limit aggregate emissions, they could obtain a single Title V permit or two separate Title V permits.

If issuing separate permits, you must remember to include any conditions that require information from both sources or affect units at both sources in each permit. Examples

[10] 45 Fed. Reg. 52695 (August 7, 1980)
[11] *Anadarko Petroleum Corp., Frederick Compressor Station*, 2011 US EPA, Petition # VIII-2010-4 (Order Responding to Petitioners' Request that the Administrator Object to Issuance of a State Operating Permit)

would be federally enforceable limits to avoid major source Maximum Achievable Control Technology or PSD netting recordkeeping.

6.0 Collocation Determinations

Collocation determinations may change based on major changes at the facilities (e.g., part of a facility is sold - loss of common control). A facility may elect to request the Department reevaluate its determination based on major changes. The request must include all information needed to make a determination. This includes a detailed permitting history. The permit history should include, but is not limited to, a delineation of sources and emissions, any prior netting analyses, and any avoidance limits. Facilities will retain any limits, conditions, or requirements applied in a previous PSD/NSR construction permit from a Best Available Control Technology/Lowest Achievable Emission Rate ("BACT/LAER") determination.

7.0 Additional Contiguous and Adjacent Information

This section provides further information on recent changes to the application of term adjacent.

The 6th Circuit Court of Appeals vacated and remanded the Environmental Protection Agency's single source determination for Summit Petroleum's oil and gas operations in Michigan ("Summit Decision").[12] The EPA had concluded that Summit's sweetening plant, well sites (ranging from 500ft to 8 miles away), and flares were "adjacent" because of the interdependent nature of the activities. The court held that the EPA could only base its determination of adjacency on geographical proximity.

The Court considered the dictionary definition and plain meaning of "adjacent" and determined that:

- "Adjacent" is unambiguous;
- "Adjacent" requires proximity;
- Case law supported the idea that adjacency relates only to physical proximity;
- The EPA's functional interrelatedness test was unreasonable; and
- The EPA's own regulatory history does not support the use of a relatedness test.

On December 21, 2012, the EPA issued a memorandum directing the regional administrators to only apply the Summit Decision in the 6th Circuit's jurisdiction and to continue using

[12] *Summit Petroleum Corp. v. EPA et al.,* Consolidated Case Nos. 09-4348 and 10-4572 (6th Cir. Aug. 7, 2012).

interrelatedness everywhere else ("Summit Directive").[13] The National Environmental Development Association's Clear Air Project challenged the Summit Directive in the U.S. Court of Appeals for the D.C. Circuit.[14] On May 30, 2014, the D.C. Circuit rejected and invalidated the memo as it created a competitive disadvantage outside of the 6th Circuit's jurisdiction.

[13] Memo. from Stephen D. Page, Director Air Quality Planning and Standards to Regional Air Division Directors, *Applicability of the Summit Decision to EPA Title V and NSR Source Determinations* (Dec. 21, 2012)
[14] *Nat'l Environmental Development Association's Clean Air Project v. Environmental Protection Agency*, No. 13-1035 (D.C. Cir. May 30, 2014)

Record of Revisions	
DATE	**Description of Change**
April 14, 1997	Original memorandum.
April 6, 2015	Memorandum rewritten and updated.
October 28, 2016	Logo and formatting updated. No changes to content.