



## Daily News

## Pennsylvania 'Aggregation' Guidance Sets First-Time Boundary Definition

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New draft guidance by Pennsylvania's Department of Environmental Protection (DEP) floats a first-time regulatory definition of a quarter mile for the boundary for determining when nearby oil and gas emissions must be "aggregated," or grouped together, for permitting purposes and subject to strict Clean Air Act pollution controls.

EPA does not have a specific distance test, instead determining aggregation based on three factors including whether facilities are "contiguous or adjacent." Environmentalists argue that DEP's proposal is too restrictive and contrary to EPA's factors for considering aggregation. An EPA Region III spokeswoman says the agency is aware of the DEP guidance and may file comments, but declined to say whether EPA will oppose the quarter-mile definition.

However, industry sources say [the new guidance](#) is providing a welcome marker for establishing a first-time definitive point where sources must be aggregated that is informally the practice in many states. They add that a quarter-mile boundary provides clarity to EPA's three factors for determining aggregation, which also includes whether sources belong to the same industrial grouping and whether they are under "common control."

EPA has generally deflected requests to tighten its aggregation requirements, avoiding the issue in a proposed new source performance standard for the oil and gas sector. EPA has also generally rejected activists' petitions urging the agency to object to permits that fail to aggregate, with several of those rejections facing lawsuits.

However, EPA did agree to object to a New Mexico-issued Title V permit Aug. 24 after determining that a gas facility did not verify that a compressor station and related equipment were under common control.

The agency spokeswoman stressed that EPA is committed to ensuring that state oil and gas regulations comply with the Clean Air Act and all other federal requirements, but declined to comment on DEP's plan.

The aggregation test is crucial because it determines whether facilities must obtain major or minor source Clean Air Act permits, with minor source permits generally imposing far less expensive and less onerous pollution controls.

DEP's proposed quarter-mile marker would mean that sources located less than that distance apart would automatically be considered contiguous or adjacent properties for prevention of significant deterioration, new source review and Title V permit applicability determinations, the Oct. 12 draft guidance says. "Properties located beyond this quarter-mile range may only be considered contiguous or adjacent on a case-by-case basis," the guidance says.

The Pennsylvania DEP draft guidance replaces an earlier draft that the state's new GOP administration rescinded in February. The earlier version was issued under the administration of former Gov. Ed Rendell (D). The new guide, written by the administration of Gov. Tom Corbett (R), has been described by some environmentalists as "a giveaway to industry" at a time when gas drilling on the Marcellus shale is booming in the state.

Pennsylvania is accepting comment on the draft guidance through Nov. 21. In a statement, DEP Secretary Mike Krancer said, "Natural gas holds great promises as a clean-burning fuel that could greatly reduce air emissions associated with electricity production and transportation. It has been recognized that the use of natural gas can have very beneficial impacts on air quality. . . . [The guidance] takes a practical, common-sense and legally required approach to air aggregation issues. DEP's state air quality program already regulates this industry."

## Aggregation Test

The state also notes that the original aggregation test stems from a 1979 federal court decision and federal regulations that flowed from that case. "Over time, there was a tendency by some regulators to morph the meaning of 'contiguous' or 'adjacent' properties to mean only that operations on the properties be 'interdependent,'" Krancer said. "This view has been expressed in various federal [EPA] recommendation letters

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or policy statements in recent years. . . . That interpretation is not supported by the court decision, the EPA or state regulations."

The state also cites a similar approach that was recently affirmed by the West Virginia Air Quality Board, which in an Aug. 6 ruling in *William J. Hughes v. John Benedict, Director, Division of Air Quality, West Virginia Department of Environmental Protection* upheld a permit that did not require aggregation of facilities.

Industry sources hailed that ruling as a possible precedent against using aggregation that could hinder environmentalists' pending legal and administrative challenges on the issue, including cases before federal district and appeals courts, other state administrative bodies and EPA's Environmental Appeals Board.

Pennsylvania says other states -- including Texas, Oklahoma and Louisiana -- are already informally using the quarter-mile distance as the marker for permits. DEP notes it will begin using the guidance immediately while it considers public comments, using it as the test for issuing future oil and gas permits.

Environmentalists however attack the guidance, with one activist saying it represents a complete turnaround compared to the Rendell administration's guidance. "Pennsylvania did want to try to genuinely assess where aggregation was appropriate. . . . Then they had an election, and the proposal was scuttled. And now we are left with this proposal that is the complete opposite. And they are trying to nail down a quarter-mile bright line . . . I think they will have a hard time getting EPA to buy into it. . . . I would characterize it as an industry giveaway," the source says.

State environmental groups are also reacting harshly, with the Pennsylvania-based Clean Air Council arguing in a statement that the guidance "departs from federal law and numerous [EPA] determinations by looking primarily at the distance between oil and natural gas operations when making source determinations."

A source with the group says the state is seeking to flout EPA's criteria as "not dispositive and even suggest it is not really that important. I have never seen a state come up with a document like this before. . . . I can't believe that EPA would not want to intervene in some way, but they haven't shared that with me."

But a Pennsylvania industry attorney defends the guidance and says laying down the quarter-mile distance as one that determines whether a facility is a single source is "probably feasible." Still, the source notes, "That means that if you are farther than a quarter-mile apart, you are back to case-by-case decisionmaking. My guess is if you're a quarter-mile plus 10 yards . . . you could be treated as if you were gaming the system."

The source concedes the new guidance is more favorable to the oil and gas industry in Pennsylvania than the Rendell administration's version. "On the spectrum of what this could say, this is less restrictive. Fewer things are going to be aggregated than what might have happened. It is not disastrous. . . . [and] probably accurately reflects what the practice is right now anyway," the source says.

#### Activists' Litigation

In a related matter, Pennsylvania environmentalists are pursuing a novel first-time citizen suit on the aggregation issue in federal district court. The company defendant in that suit is pushing for dismissal, filing an [Oct. 24 motion](#) citing the new draft guidance in support of dismissal of *Citizens For Pennsylvania's Future v. Ultra Resources, Inc.*

The company argues that the state's draft aggregation guidance makes the case moot because it "underscores the state's efforts to establish a coherent policy on this issue of substantial public concern," and that the case is barred under a 1943 Supreme Court ruling in *Burford, et al. v. Sun Oil Co., et al.*, which held that under appropriate circumstances, "a sound respect for the independence of state action requires the federal equity court to stay its hand."

The filing adds, "A decision by this court as to whether the emissions sources at issue in this case are located on contiguous or adjacent properties and, therefore, whether the sources should be aggregated into a single stationary source would clearly be disruptive of the [Pennsylvania DEP's] efforts to establish a coherent policy on the issue."

A PennFuture source says the group has no comment on the new filing. The group [filed its claim](#) in July. -- Dawn Reeves ( [dreeves@iwnews.com](mailto:dreeves@iwnews.com) )

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