

# ADMINISTRATIVE WATCH

ADDRESSING ENVIRONMENTAL, ENERGY AND NATURAL RESOURCE ISSUES



## Federal Court Rejects USEPA's Attempt to Limit *Summit* Ruling to Sixth Circuit

The U.S. Court of Appeals for the District of Columbia Circuit has vacated a USEPA memorandum aimed at limiting the reach of *Summit Petroleum Corp. v. USEPA*, (6th Cir. Aug 7, 2012), a case which condemned USEPA's use of a functional interrelationship test in making single source determinations for air permitting. In *Summit*, the Sixth Circuit Court found that the regulatory term "adjacent" unambiguously relates only to physical proximity, and that USEPA's contrary interpretation, which evaluated the functional interrelatedness of emission sources to determine whether they were adjacent, was inconsistent with both the plain meaning of the federal Clean Air Act (CAA) regulations and their history.

Following the *Summit* ruling, in December 2012, the USEPA Office of Air Quality Planning and Standards issued a memorandum (known as the "*Summit* Directive" or "Directive") to all Regional Air Division Directors and Air Program Managers advising that, in the Sixth Circuit states of Michigan, Ohio, Tennessee and Kentucky, USEPA permitting officials "may no longer consider interrelatedness in determining adjacency when making source determination decisions." With respect to regions of the country beyond the Sixth Circuit, however, the *Summit* Directive specified that agency officials would continue to consider functional interrelatedness in making source determinations.

A petition for review of the *Summit* Directive was filed shortly thereafter with the D.C. Circuit Court by a non-profit trade association representing resource extraction and manufacturing companies. The National Environmental Development Association's Clean Air Project (NEDA/CAP) argued that the Directive violated CAA and regulatory provisions requiring national uniformity when administering CAA programs. NEDA/CAP also argued that the Directive resulted in a competitive disadvantage for member companies located outside of the Sixth Circuit, where USEPA would continue to rely on vague notions of functional interrelatedness to aggregate emission sources and thus require major source permitting. In response, USEPA argued that NEDA/CAP's injury was purely speculative and that the Directive was not a final agency action ripe for judicial review.

On May 30, 2014, the D.C. Circuit Court issued an opinion which granted NEDA/CAP's petition for review, rejected USEPA's procedural arguments, and vacated the *Summit* Directive. On the merits, the Court held that the *Summit* Directive is "plainly contrary" to USEPA's own regulations requiring the agency to ensure national uniformity and regional consistency in measures implementing the CAA. (The Court did not resolve whether the CAA itself requires such uniformity.) Furthermore, the Court agreed with NEDA/CAP that its members' facilities located

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beyond the Sixth Circuit were disadvantaged by the Directive, which the Court deemed a final agency action because it provided “firm guidance to enforcement officials about how to handle permitting decisions” and “compel[led] agency officials to apply different permitting standards in different regions of the country.”

It remains to be seen how USEPA will respond to the recent D.C. Circuit Court decision. The Court itself suggested that USEPA could “revise its regulations for aggregating emissions from multiple facilities, so as to require aggregation when facilities are functionally interrelated, rather than ‘adjacent’.” The Court also acknowledged that USEPA could “revise its uniformity regulations to account for regional variances created by a judicial decision or circuit splits.” Unless and until USEPA adopts such regulatory amendments, or successfully appeals the D.C. Circuit Court decision, it appears that USEPA must now follow the *Summit* decision nationwide. At this point in time, it is unclear how state permitting agencies will respond to this development.

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