EPA to KDHE Applicability Determination Letter
Control Number 1000049
EPA letter dated 17Sep2010
Disclaimer: I am not an attorney, nor am I providing legal advice.
Roger Nikolai Kotschegarow note: please don't conflate the term "co-location" with the NSPS term "Affected Facility." Co-location is a permitting term used for Title V and PSD permitting purposes. Per 40CFR60.2, "Affected Facility means, with reference to a stationary source, any apparatus to which a standard is applicable." Hence, NSPS emission control standards and/or work practices apply to Affected Facility(ies)... not to the entire co-located source!

Rick Brunetti, Director
Bureau of Air
Kansas Department of Health and Environment
1000 SW Jackson, Suite 310 Topeka, KS 66612-1366
Dear Mr. Brunetti:

This letter is in response to your letter dated May 18, 2010, requesting a determination on whether the two grain elevators owned by DeBruce Grain Inc. (DeBruce), in Abilene, Kansas should be permitted and regulated as one facility or as two under the Clean Air Act (CAA). Your letter states the Kansas Department of Health and Environment's (KDHE) conclusion that these facilities "are operated such that they are one source for the purposes of permitting and NSPS [New Source Performance Standard] Subpart DD compliance" (page 4). Based on EPA's review of the relevant regulations and guidance, as applied to the facts contained in the recent correspondence between DeBruce and KDHE, we agree that KDHE may reasonably exercise your discretionary permitting authority to treat the two DeBruce facilities as one for permitting purposes, but not with respect to NSPS Subpart DD, as further explained below.

Background

Your letter (at page 2) describes the subject facilities as two grain elevator operations operating at two different locations approximately 2.1 miles apart in Abilene, Kansas. Both are owned by DeBruce. One facility is at NW Eighth Street ("Eighth St. facility"), and the other is at 513 West First Street ("First St. facility"). According to DeBruce, neither of these facilities, on its own, has a maximum grain storage capacity greater than 2.5 million bushels. Letter from David R. Tripp, Attorney for DeBruce, to Mark A. Smith, EPA, July 2, 2010 ("Tripp Letter"), at 2.

Your letter (at page 4) also indicates that the specific purpose of the Eighth St. facility is to provide overflow storage for the First St. facilityl and therefore this facility is unable to function independently of the First Street facility. DeBruce also appears to acknowledge that these two facilities do not function independently. In responding to an inquiry from KDHE dated June 19, 2008, DeBruce indicated that in 2006 and 2007, the vast majority of grain processed by DeBruce occurred at the First St. facility. DeBruce only used the Eighth St. facility
1 The May 18, 2010 letter inadvertently reversed the references to the First and Eighth St. facilities. KDHE and EPA staff discussed this error during a meeting on July 22, 20 I 0, and KDHE sent EPA a draft of an amended applicability determination request letter on July 28, 2010 that corrected this error. The reference here is to the amended letter.
to store any overflow. In fact, in 2006 and 2007, most if not all of the grain processed at the Eighth St. facility was transferred to the First St. location by truck. Furthermore, DeBruce also indicated that its managers, laborers and maintenance personnel will "frequently shuttle back and forth between the two locations." Letter from Lloyd Autrey, Corporate Safety Director, DeBruce Grain, to KDHE (received by KDHE on July 7, 2008) ("Autrey Letter").

NSR/PSD and Title V Permitting Applicability

Because the State of Kansas' PSD and Title V programs have been approved by EPA, ultimately it is the State's responsibility to make source aggregation determinations within the requirements of the Clean Air Act and the approved Kansas permitting program. In this case, EPA is providing guidance on permitting applicability at the State's request. Based on EPA's review of the recent correspondence between KDHE and DeBruce, as discussed above, we concur with KDHE's proposed finding that the subject facilities could constitute a single stationary source for the purposes of permitting applicability.

As you know, in the past EPA has issued guidance on determining the geographic extent of a single stationary source. Most of this guidance has come in the context of New Source Review (Prevention of Significant Deterioration) (NSR/PSD) or Title V permitting. The Federal regulations that govern NSR define "stationary sources" as "any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant." The term "building, structure, facility, or installation" in turn is defined 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) ...." 40 CFR § 52.21 (b) (5), (b) (6). The Kansas regulations relating to NSR/PSD, which EPA has approved as part of the Kansas State Implementation Plan, adopt the same definitions at KAR 28-19200(j) and (iii).

Similarly, the Federal regulations for Title V permitting apply to "major sources" and other "Part 70" sources as defined in 40 C.F.R. § 70.3(a)2 "Major sources" are defined as "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 and that are [one of three types of sources listed in the definition]." In addition, for the purposes of defining a "major source," "a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources on contiguous or adjacent properties belong to the same Major Group ... as described in the Standard Industrial Classification Manual, 1987." 40 CFR § 70.2. Again, the Kansas regulations related to Title V permitting, which EPA has approved, adopt the same definition at KAR 28-19-200(kk).

As these definitions suggest, there are three criteria for identifying emissions activities that are part of the same stationary source: 1) whether the activities are under "common control";

2 In promulgating the title V major source definition, EPA was clear that the language and application of the definition was to be consistent with the PSD definition contained in 40 CFR § 52.21. 61 Fed. Reg. 34202, 34210 (July 1, 1996).

2) whether the activities are located on one or more contiguous or adjacent properties; and 3) whether the activities belong to the same industrial grouping. DeBruce acknowledges that its two facilities belong in the same industrial grouping and that they are both under common control; therefore, DeBruce contends that the second factor -the issue of contiguousness and adjacency -is the only issue in question. See Tripp Letter, at 4-5. Thus, this letter will only address that issue.

EPA has consistently made it clear that there is no "bright line" or numerical standard for determining how far apart activities may be and still be considered "contiguous" or "adjacent." See, e.g., 45 Fed. Reg. 52676, 52695 (August 7, 1980) (EPA "is unable to say precisely at this point how far apart activities must be in order to be treated separately"). Although the physical distance is a factor to be considered, these decisions are made on a "case-by-case" basis and depend on the "common sense notion of a source" and the functional interrelationship of the facilities. See, e.g., Letter from Pamela Blakely, Chief, Air Permits Section, EPA Region 5, to Don Smith, Manager, Air Quality Permits Section, Minnesota Pollution Control Agency, March 23,2010, at 3 (in the PSD permitting context); Letter from Joan Cabreza, Permits Team Leader, Office of Air Quality, EPA Region 10, to Andy Ginsberg, Manager, Program Operations Section, Air Quality Division, Oregon Department of Environmental Quality, August 7,1997) ("Cabreza Letter"), at 2-3 (in the Title V permitting context).

In this case, the Eighth St. facility appears to serve as a support facility for the First St. facility. DeBruce stated that grain is transferred from the First St. facility to the Eighth St. facility by truck for storage, to prevent the First St. facility from filling up. This grain is then either shipped back to the First St. facility for shipment out on shuttle trains, or loaded on trucks to be sent directly to grain purchasers. Autrey Letter. In 2007, 18.5 million bushels of grain were processed through the grain elevator at the First St. facility, while only 3.4 million bushels were processed through the grain elevator at the Eighth St. facility. Although all of these 3.4 million bushels were moved to the First St. facility for off-site shipment by rail or by truck, by comparison only 45,000 bushels of grain processed at the First St. facility were shipped to the Eighth St. facility for off-site shipment. In addition, the synergistic relationship of the two facilities is further demonstrated by the fact that DeBruce managers, laborers and maintenance personnel frequently shuttle back and forth between the two locations.

Based on the functional interdependence of the two DeBruce facilities, EPA concludes that under the totality of the circumstances the two facilities can reasonably be considered one source for purposes of a NSR/PSD and Title V permitting applicability determination. This case-specific determination is based only on the above information provided to EPA. EPA believes this determination is consistent with those it has made in the past in other similar applicability determinations. See, e.g., Letter from Steven C. Riva, Chief, Permitting Section, Air Programs Branch, EPA Region 2, to Robert Lenney, Environmental Health and Safety Modernization Manager, Alcoa Massena Modernization Project, March 9, 2009 (two Alcoa facilities separated by 3.4 miles were considered by EPA to be contiguous for PSD purposes because their operations involved "considerable trucking of materials" between the two facilities and sharing of Alcoa personnel); Cabreza Letter (two plants which both produced metal castings were considered to be one facility for Title V purposes because all of the final coating, packaging and shipping of the

castings occurred at the Main Plant; EPA held that the two plants functioned together in a manner that met the common sense notion of a plant).

NSPS Subpart DD Applicability

An applicability determination for the DeBruce facilities with respect to NSPS Subpart DD (Standards of Performance for Grain Elevators) should be a separate analysis because the Federal regulations that govern NSR and Title V are different from those that govern NSPS. As background, NSPS provisions generally apply to any "stationary source" which contains an "affected facility." An "affected facility" is any "apparatus to which a standard is available." 40 CFR § 60.2. A "stationary source" in turn is "any building, structure, facility, or installation which emits or may emit any air pollutant." Id. Unlike in the NSR/PSD or Title V permitting regulations outlined above, the NSPS regulations do not define the terms "stationary source" or "building, structure, facility, or installation" to include sources or groups of sources that are on "contiguous or adjacent properties" that are under the "common control" of the same person or persons. Thus, we believe that any EPA guidance documents governing co-location issues in the permitting context are not relevant in the NSPS context. Furthermore, our research indicates that EPA has not issued any prior guidance in the NSPS context regarding the geographic extent of a single "affected facility" or "stationary source."[3]

Instead, we believe that the proper determination of NSPS applicability should focus on an analysis of the actual language of the appropriate subpart. In this case, NSPS subpart DD applies to "each affected facility at any grain terminal elevator or any grain storage elevator."[4] 40 CFR § 60.300 (a). A "grain terminal elevator" is "any grain elevator which has a permanent storage capacity of more than 88,100 m3 (ca. 2.5 million U.S. bushels)." Id. § 60.301 (c). Some of these terms are further defined in Subpart DD. A "grain elevator" is defined as "any plant or installation at which grain is unloaded, handled, cleaned, dried, stored, or loaded," and "permanent storage capacity" is defined as "grain storage capacity which is inside a building, bin, or silo." Id. § 60.301 (b), (d).

It is undisputed that both of DeBruce's facilities are "grain elevators" since they are "buildings, bins or silos" inside which grain will be "unloaded, handled, cleaned, dried, stored or loaded." However, as DeBruce indicates in its July 2, 2010 letter on page 2, neither of these facilities, on its own, has a maximum grain storage capacity greater than 2.5 million bushels; thus, neither facility qualifies as a "grain terminal elevator." Therefore, provided that the 2.5

3 EPA is mindful that in the Star Enterprise decision, the Third Circuit Court of Appeals held that NSPS Subpart J (pertaining to Petroleum Refineries) did not apply to two stationary gas turbines located in an electrical power plant complex, even though this complex was located adjacent to a petroleum refinery and the power plant had a contractual agreement to provide steam and electricity to the refinery. In the opinion, the court based its decision on the specific Subpart J definition of "affected facility," as it applied to the facts of the case, rather than on the concepts of contiguousness, adjacency, or common control. See Star Enterprise v. EPA, 235 Fed. 139 (3rd Cir. 2000).

4 A "grain storage elevator") is defined as "any grain elevator located at any wheat flour mill, wet corn mill, dry com mill (human consumption), rice mill, or soybean oil extraction plant which has a permanent storage capacity of 35,200 m3 (ca. 1 million bushels)." 40 CFR § 60.301 (1). Based on the information EPA has regarding DeBruce's two facilities, this definition does not appear to be applicable to this situation.

million bushel storage capacity threshold is not exceeded at either facility, EPA concludes that Subpart DD does not apply to either of the DeBruce facilities.

Conclusion

In sum, based on the specific facts outlined above, we have concluded that KDHE may reasonably use its discretionary permitting authority to find that the two subject facilities could be treated as one source for the purpose of permitting. However, we also conclude that neither of the DeBruce facilities is subject to NSPS Subpart DD provided that neither exceeds the 2.5 million bushel storage capacity threshold.

EPA notes that this letter does not address any other Federal or State statutory or regulatory authorities that may apply to this situation. For example, this determination does not address (a) Kansas Administrative Regulations (KAR) 28-19-13, pertaining to interference with enjoyment of life and property; or (b) KAR 28-19-650, pertaining to opacity.

Finally, EPA also notes that DeBruce should consult with the U.S. Department of Agriculture and the Occupational Safety and Health Administration for guidance on issues relevant to DeBruce's flat grain storage, including but not limited to, proper grain storage and worker safety.

This letter was written with input from Region 7's Air Permitting and Compliance Branch and Office of Regional Counsel, EPA's Office of Air Quality Planning and Standards, Office of General Counsel, and Office of Enforcement and Compliance Assurance. Should you have any questions or require further assistance on this matter, please contact Patricia Scott, at (913) 551-7312, or myself at (913) 551-7876.

R N Kotschegarow 27Jan2022

Sincerely,
Mark A. Smith, Chief Air Permitting and Compliance Branch Air and Waste Management Division

Cc: David R. Tripp, Esq.