Aggregation of Air Emissions:
What Does Adjacency Really Mean?

YVONNE E. HENNESSEY, ESQ.

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HISCOCK & BARCLAY LLP

Presentation Overview

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I. “Major Source”

“any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant”

“Major Source”

- CAA regulations define a “Major Source” as any stationary facility or source of air pollutants that directly emits, or has the potential to emit, 100 tpy of any air pollutant.

  - Nitrogen Oxides (NO_X)
  - Carbon Monoxide (CO)
  - Particulate Matter (PM)
  - Sulfur Dioxide (SO_2)
  - Lead (Pb)
  - Ozone (O_3) and Precursors (e.g., VOCs)

“Major Source”

- PSD, NSR, and Title V regulations apply to sources with the potential to emit pollutants in excess of the “major” source thresholds.

- To assess applicability, permitting authorities evaluate whether emissions from two or more pollutant-emitting activities should be aggregated into a single “major” stationary source.

“Major Source”

- The evaluation begins with the federal definition of “stationary source.” 40 CFR 51.166(b)(5); 40 CFR 52.21(b)(5)
- A stationary/major source is…

  “any *building, structure, facility, or installation* which emits or may emit a regulated NSR pollutant.”

- Pennsylvania: A “major emissions unit” is based on the thresholds of a “major facility.” “Major facility,” as defined in 25 Pa. Code § 121.1, is similar to the federal definition.
- New York: Similar definition for “major source” found at 6 NYCRR § 201-2.1(b)(21).
- West Virginia: Defines a “major stationary source” under 45 CSR § 14-2.43(a), similar to federal definition.

“Major Source”

“Building, structure, facility, or installation” is defined, in turn, 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) except the activities of any vessel.”

40 CFR 52.21(b)(6);
40 CFR 51.166(b)(6)

Aggregation Factors

- To determine if separate emission points belong to the same "building, structure, facility, or installation" (*i.e.* whether aggregation is required), permitting authorities generally rely on three criteria:

    1. Whether the activities belong to the same industrial grouping (SIC Code);
    2. Whether the activities are located on one or more contiguous or **adjacent** properties; and
    3. Whether the activities are under common control.

- No statutory or regulatory definition of "adjacent" exists at either the state or federal level.

“Adjacent”

- The Key Issue:
  - What does it mean to be adjacent?
    - Should adjacency be determined based on **geographic proximity** alone, or,
    - Should a strict **functional relationship or operational interdependence** test apply to determine whether sources should be considered “adjacent,” or
    - **Is there a middle ground**?
      - **Functional relationship or operational interdependence of** the sources as a factor to be analyzed in order to give context to geographic proximity

II. The Regulatory History of "Adjacency"

"Common sense notion of a plant"

-Alabama Power Co. v. Costle

Alabama Power v. Costle

636 F.2d 323 (D.C. Cir. 1979)

- 1979 Federal Circuit Decision.
- Litigation concerned challenges to the USEPA's final regulations implementing the 1977 CAA Amendments.
- Court found that the USEPA's definition of "stationary source" must not be broader than the CAA.
  - Definition can be broad enough to cover an entire plant.
  - Definition must comport with the "common sense notion of a plant."
  - USEPA must avoid aggregating sources that would not fit into the ordinary meaning of "building," "structure," "facility," or "installation."
- Court directed the USEPA to:
  - Develop a regulatory definition using considerations such as proximity and ownership.
  - Make rules predictable.

1980 Rulemaking

- USEPA confirmed that it does not intend a single source to encompass activities occurring many miles apart along a long line of operations.
  - e.g., USEPA would not aggregate all of the pumping stations along a multistate pipeline into one source.
- Declined to add a specific "functionality" criteria to the definition of a source because the USEPA believed "assessments of functional interrelationships would be highly subjective" and "embroil[] the Agency in fine-grained analys[es]."
- USEPA wanted to avoid a highly subjective test. BUT…

1980 PSD Rules

- USEPA unwilling to say precisely how far apart activities must be in order to be treated separately.
- No bright line distance test established to determine adjacency.
- USEPA opted for case-by-case determinations.

Adjacency: Beyond Geographic Proximity

- Early on, the USEPA rejected the idea of looking beyond geographic proximity to define adjacency.
- Despite this, following leadership changes, USEPA determinations over the years began aggregating sources that were miles apart and considered them as single sources for air permitting and regulatory purposes.
- During the 1990s, USEPA began giving greater weight to the **functional interrelatedness** of operations and less to the physical separation of facilities in making single source determinations.
  - Notably – Regulations were not changed during this time. This pattern emerged through individual letter determinations.

The Wehrum Memo

USEPA's 2007 guidance memo on "Source Determinations for Oil and Gas Industries."

- Purpose was to provide guidance to assist permitting authorities in making major stationary source determinations for the oil and gas industry.
- Relied on *Alabama Power* for boundaries on USEPA's discretion to interpret the component terms of "stationary source."
- Recognized that source determinations within the oil and gas industries are not always straightforward.
- Sought to simplify the analysis.

The Wehrum Memo

- Concluded that "[g]iven the diverse nature of the oil and gas activities, … proximity is the most informative factor in making source determinations for the oil and gas industries."
- Stated that interconnected sources could be considered separate minor sources for NSR and Title V purposes if the sites were located more than a **quarter mile** from each other.
  - "adjacent" = ¼ mile.
- Made geographic proximity, and not interrelatedness, the determining factor:

> "Unless unique factors (such as proximity or interdependence) indicate otherwise, permitting authorities can consider oil and gas exploration and production activity located on a single surface site to be an individual stationary source."

The McCarthy Memo

- In 2009, Gina McCarthy, the Assistant Administrator for USEPA's Office of Air and Radiation, issued the Withdrawal of Source Determinations for Oil and Gas Industries.
- Withdrew the Wehrum Memo:

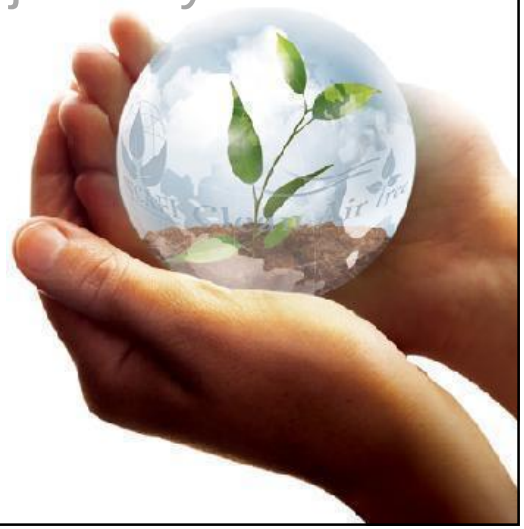
> "The [Wehrum] memorandum did not mandate application of a particular approach but instead was a non-binding policy statement that set forth a possible methodology for making source determinations in these industries."

The McCarthy Memo

- Rejected prior memo's emphasis on proximity:
  - "I find individual facts warrant a closer examination of all three criteria identified in those regulations to arrive at a reasoned decision, and therefore, the simplified approach provided in the [Wehrum] memorandum should not be relied on by permitting authorities as a sufficient endpoint in the decision-making process."
- Stated that aggregation determinations must be made on a case-by-case basis analyzing the 3 regulatory criteria.
- Indicated that activities located more than a short distance away could be aggregated and considered a single source if the specific facts warranted such a conclusion.
- Used **interrelatedness** as a means of determining adjacency.

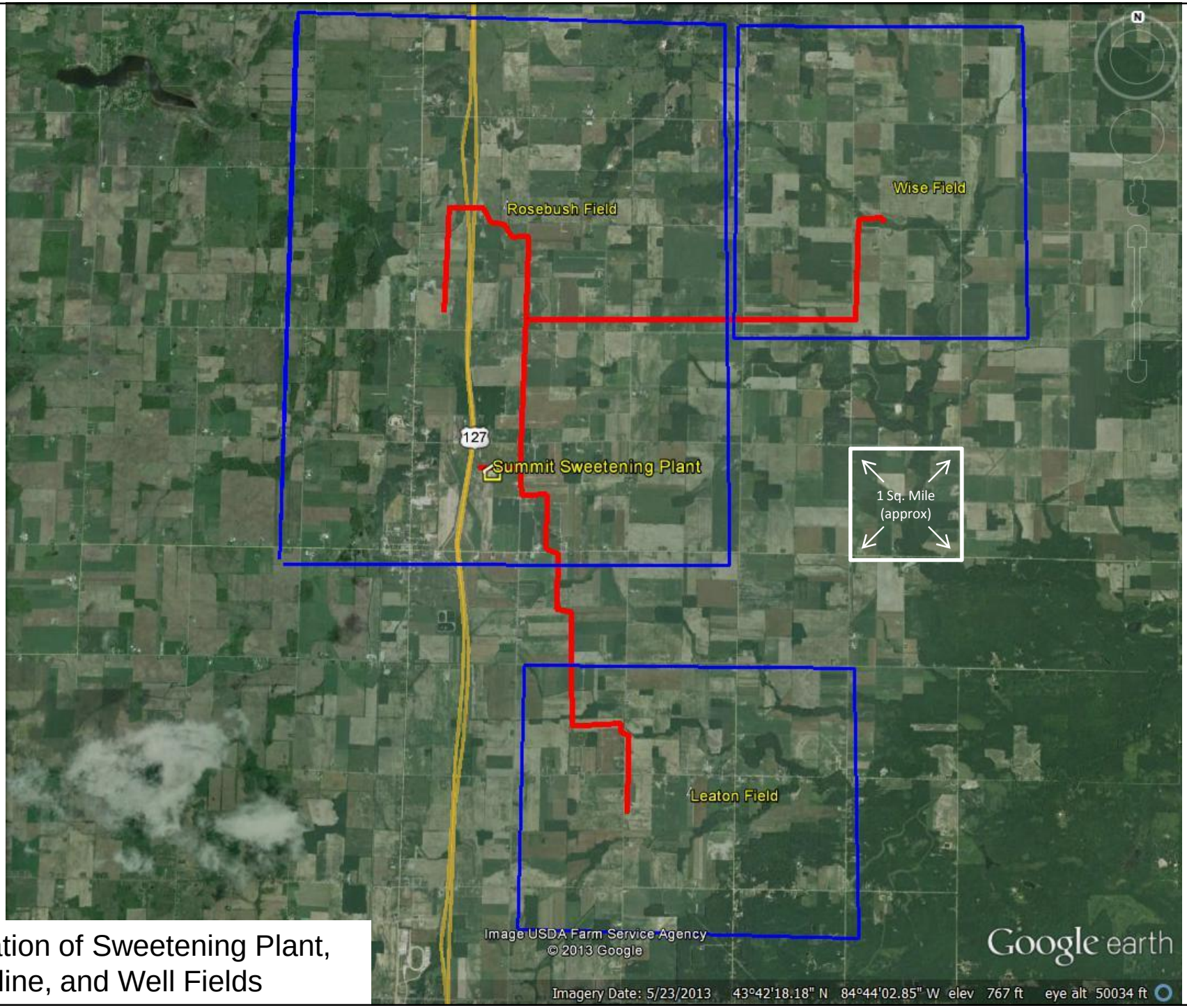
III. *Summit Petroleum Corporation v. EPA (2012)*

"Whether the distance between two facilities enables a given relationship to exists between them is immaterial to the concept of adjacency"



Summit

- Summit is a natural gas producer that owns and operates a sweetening plant. It also operates all of the wells and pipelines connecting the wells to the sweetening plant.
- The plant sweetens gas from approximately 100 production wells.
  - Wells spread over 43 square miles, located anywhere from 500 feet to 8 miles away from the sweetening plant.
- None of the wells share a common boundary with each other or the plant (not contiguous).
- Summit does not own the intervening property.
- Alone, the plant does not exceed “Major” source thresholds; but, if aggregated with one or more of the wells, the plant would exceed thresholds.



Location of Sweetening Plant, Pipeline, and Well Fields

Summit

- Based on a request from Summit and the Michigan Department of Environmental Quality, the USEPA determined that the sweetening plant and the wells should be aggregated because they were “truly interrelated” and, therefore, adjacent.
  - USEPA concluded that the plant, well site and flares were “adjacent” because of the interdependent nature of the activities.
- USEPA relied on the McCarthy Memo to support its determination that facilities were adjacent despite the lack of physical proximity.
- Summit appealed the USEPA’s decision, challenging the use of functional relatedness.

Summit

- The Sixth Circuit overruled the USEPA determination, holding that the USEPA cannot base adjacency on anything but geographical proximity. 690 F.3d 733 (6th Cir. 2012).
- 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;
    - USEPA's functional interrelatedness test was unreasonable; and
    - USEPA's own regulatory history does not support the use of a relatedness test.

Summit

- The Court looked to API's arguments and agreed that the USEPA's interrelatedness test was particularly ill-suited for the oil and gas industry … operations do not comport with the common sense notion of a plant.
  - Court also agreed that the "common sense notion of a plant" directive was meant to constrain, not enlarge, the USEPA's definition of a single stationary source.
- The Court remanded back to the USEPA, ordering USEPA to make its determination based on the requirement that the sources be aggregated only if they are located on physically contiguous or adjacent properties.
- Court did not determine how geographically close is sufficient for facilities to be considered a single source.
- One judge dissented.

Summit

"We are particularly struck by API's final observation—that the EPA's source determination in this case is an ironic showcase of the very fears that caused the agency not to adopt a functional relatedness test for source determinations in the first instance. From Summit and MDEQ's joint source determination request in January 2005 to the final iteration of the EPA's decision, nearly five years passed. The parties engaged in at least twenty-five conference calls and exchanged "a small mountain of paper" within this period. Certainly, the cost for Summit to produce the data and schematics requested by the EPA, and the cost for the EPA to distill and understand the same, were high in terms of both monetary and capital resources. As API points out, this process produced exactly the "fine-grained" and administratively burdensome result the EPA sought to avoid in its drafting of its Title V stationary source test, *see 45 Fed. Reg. at 52,695, and* is strong evidence that the EPA's interpretation of its own regulation was unreasonable."

USEPA's Response to *Summit*

- USEPA sought rehearing of the *Summit* Decision, which the Court denied on October 29, 2012.
- On December 21, 2012, the USEPA issued the Applicability of the *Summit* Decision to USEPA Title V and NSR Source Determination Memo (the "*Summit* Directive").
- Policy of Non-Acquiescence:
  - The memo stated that the USEPA will not follow *Summit* in jurisdictions outside of the Sixth Circuit.
    - In these jurisdictions (e.g., PA, WV, NY), the USEPA will continue to assess interrelatedness of sources when determining aggregation.
- The 6th Circuit includes: Ohio, Kentucky, Tennessee, and Michigan.

Challenge to USEPA's *Summit* Directive

- The National Environmental Development Association's ("NEDA") Clean Air Project challenged the *Summit* Directive in the United State Court of Appeals for the D.C. Circuit. *Nat'l Environmental Development Association's Clean Air Project v. Environmental Protection Agency, No. 13-1035.*
  - NEDA members include: ALCOA, Intel Corp, Proctor and Gamble, Georgia-Pacific, Koch Industries, BP America, Exxon Mobil, Occidental and Weyerhaeuser.
- NEDA argued that the USEPA violated the CAA and its own regulations by establishing inconsistent permit criteria for facilities depending on whether they were located inside or outside the Sixth Circuit.
- In opposition, the USEPA argued:
  - NEDA lacked standing to bring the challenge.
  - The *Summit* Directive was not final agency action under the CAA and, therefore, it could not be reviewed by the Court.
  - The challenge was not ripe because NEDA members' legal rights had not yet been adversely affected.
  - Under the CAA and the Administrative Procedure Act, USEPA was not required to adopt the Sixth Circuit's interpretation on a nationwide basis.

Challenge to USEPA's *Summit* Directive

- On May 30, 2014, the D. C. Circuit rejected and invalidated the *Summit Directive.*
- As to the threshold issues of whether the Court would entertain NEDA's petition, the Court found:
  - NEDA had standing because the *Summit* Directive created a standard that put facilities outside of the Sixth Circuit at a competitive disadvantage.
  - The *Summit* Directive was final agency action subject to judicial review because it set forth binding and enforceable agency policy regarding permit determinations.
  - The claim was ripe for review because the issue was purely one of law that would not benefit from further factual development.

Challenge to USEPA's *Summit* Directive

- As for the substance of NEDA's challenge, the Court agreed that the *Summit* Directive must be vacated.
- The Court found the *Summit* Directive to be "plainly contrary to EPA's own regulations, which require EPA to maintain national uniformity in measures implementing the CAA, and to 'identify[] and correct[]' regional inconsistencies by 'standardizing criteria, procedures, and policies.'"
- The Court also rejected USEPA's argument that, following the *Summit* decision, the Agency had no choice but to acquiesce across the country and follow the Sixth Circuit's directive nationwide.
  - USEPA could have appealed the *Summit* decision to the U.S. Supreme Court and it could have revised its own regulations – either those regulations concerning aggregation from multiple facilities or its regulations regarding uniformity – all of which it failed to do.
- Notably, the Court did not address whether the *Summit* decision was properly decided.

Challenge to USEPA's *Summit* Directive

- Next Steps:
  - The USEPA may seek rehearing in the D.C. Circuit.
  - The USEPA may petition for a writ of certiorari in the U.S. Supreme Court.
  - As the Court noted, the USEPA could:
    - Amend its CAA implementing regulations to replace the "adjacency" requirement with the functional interdependence test (likely triggering legal to be legally challenges and questionable whether such rulemaking would be upheld); or
    - Revise its regional consistency regulations to expressly allow for regional variances created by judicial decisions.

Challenge to USEPA's *Summit* Directive

- *NEDA's* Impact?
  - Pending further action by the USEPA, the *NEDA* decision will, at least temporarily, halt the USEPA's efforts to apply the functional interdependence test rather than the plain language approach to "adjacency" favored in *Summit.*
  - States implementing the relevant CAA permit programs are not directly affected by the *NEDA* decision.
  - The *NEDA* decision will impact the USEPA's ability to compel states to use its preferred interpretation of adjacency.

IV. How States in the Appalachian Basin are Addressing Aggregation

Pennsylvania

West Virginia

New York

PENNSYLVANIA

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PA Guidance

- PADEP "*Guidance For Performing Single Stationary Source Determination For Oil And Gas Industries.*"
  - Effective October 6, 2012.
  - Press release when issued:
    - "The court's opinion in *Summit Petroleum v. EPA*, which dealt with the aggregation of separate natural gas facilities in Michigan, made very clear that Pennsylvania's approach is the correct interpretation and application of the law."
    - "We in Pennsylvania have a lengthy and successful history of regulating the oil and gas industry, and we are ensuring that this state and this country realize the full promise of abundant, domestic, cheap, clean-burning natural gas extracted and brought to market in an environmentally sensitive manner."

PA Guidance

- Geographical proximity made the key factor in source determinations.
    - "The plain meaning of the terms 'contiguous' and 'adjacent' should be the dispositive factor" when determining whether stationary sources are located on contiguous or adjacent properties.
    - "Contiguous" – sharing an edge or boundary; touching; neighboring; adjacent; connecting without a break.
    - "Adjacent" – close to; lying near, next to; adjoining.

PA Guidance

- If sources are less than a ¼ mile away, they are presumed to be a single source (if they meet two other regulatory criteria).
- Single source determinations for properties located beyond this quarter-mile range will be considered on a case-by-case basis.
- "The application of the quartermile 'rule of thumb' takes the 'common sense approach' to aggregation issues and does not aggregate pollutant-emitting activities that, as a group, would not fit within the ordinary meaning of a 'structure, building, facility or installation.'"
- USEPA Region III provided negative comments on PADEP's Guidance.

Laurel Mtn. Midstream

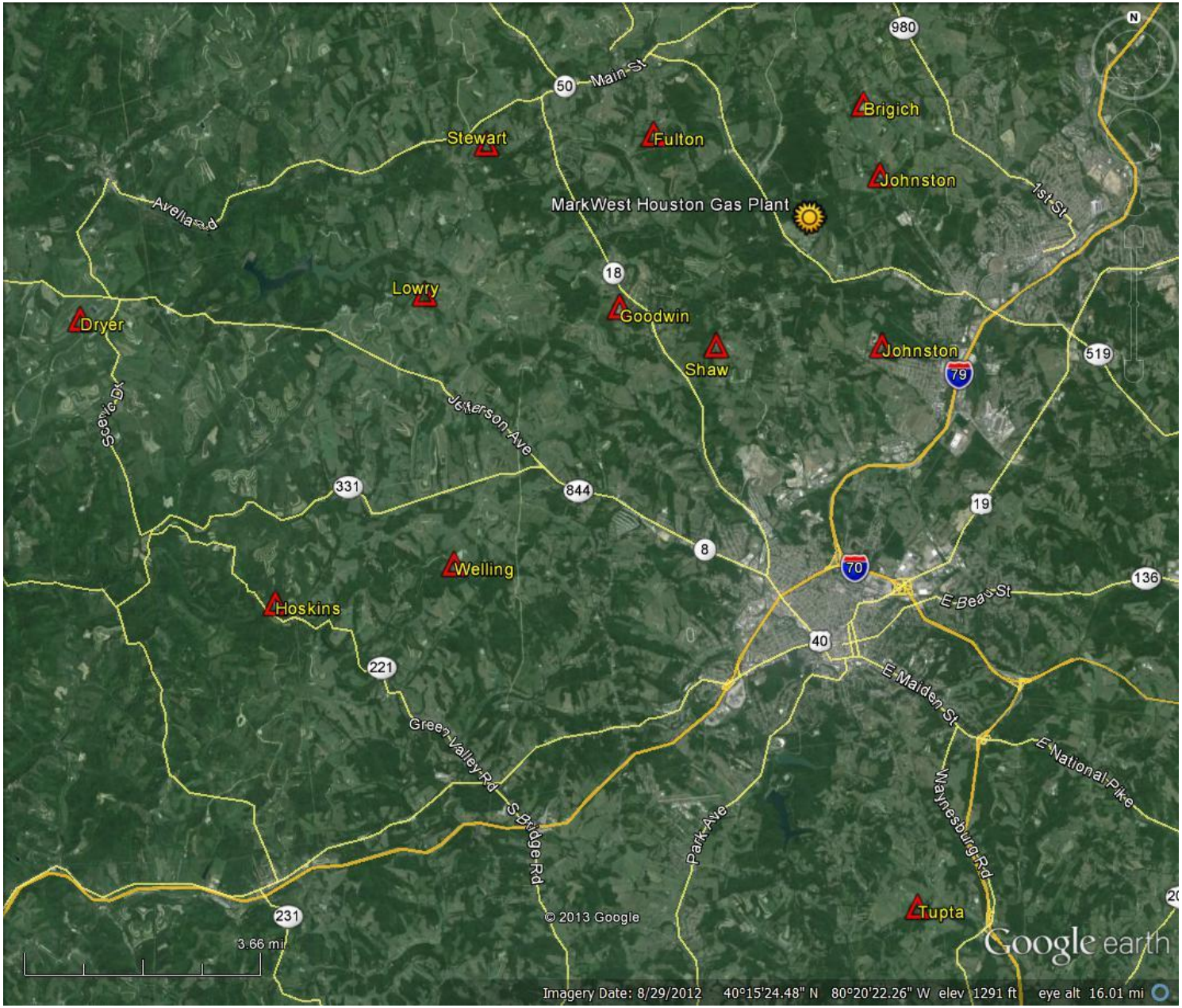
- *Group Against Smog and Pollution ("GASP") v. PADEP/ Laurel Mtn. Midstream* (EHB 2011-065).
  - PADEP determined that emissions from the Shamrock Compressor Station should not be aggregated with well pad emissions.
  - May 2011: GASP challenged PADEP's finding not to aggregate emissions.
    - Neither Laurel Mtn. nor its parent company owned or controlled the wells (common control prong not met).
  - August 2012: PA EHB denies summary judgment.
  - GASP withdrew its appeal in April 2013 citing, "Appellant has determined that further pursuing this appeal would no longer be productive."

MarkWest

Clean Air Council v. Commonwealth of Pennsylvania Department of Environmental Protection, EHB Docket No. 2011-072-R.

- PADEP determined that a processing plant and several compressor stations (located between 1.6 and 11 miles from the plant) were not a single source and declined to aggregate.
- CAC appealed PADEP's decision, arguing that emissions from the compressor stations and the processing plant should be aggregated.

Location of MarkWest Houston Gas Processing Plant
Relative to Compressor Stations



MarkWest

- MarkWest filed a motion to preclude evidence aimed at showing a functional relationship between MarkWest's gas processing plant and compressor stations.
  - The question presented was whether MarkWest's facilities could be considered "adjacent" based on their functional relationship to one another, or whether the inquiry is limited to geographical proximity.

- The EHB concluded that:
  - Evidence of the functional relationship of MarkWest's facilities could be presented by CAC, and
  - The EHB would determine at trial how much weight the functional relationship should be given in determining whether the compressor stations and the plant are "adjacent."

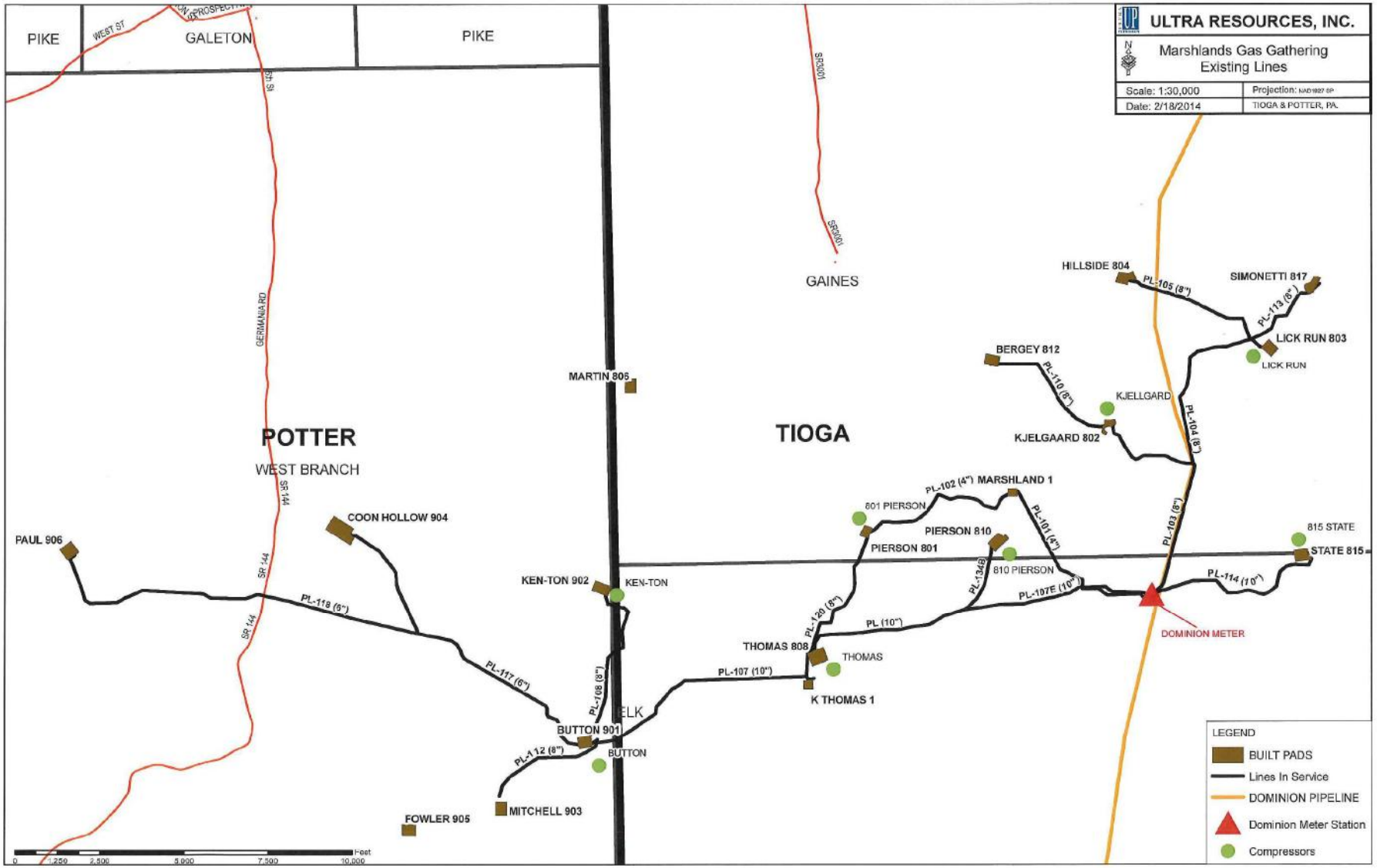
MarkWest

- September 2013: CAC and MarkWest settled, and the EHB closed the case.
  - CAC agreed not to appeal a plan or permit associated with the facility or the compressor stations.
  - MarkWest agreed not to appeal any prior determinations of the EHB.
- PADEP and CAC also entered into a separate settlement, wherein PADEP agreed to make aggregation decisions more transparent.

PennFuture v. Ultra Resources

- Federal case pending in U.S. District Court, M.D. Pa.
- PADEP not a party.
- Background:
  - Ultra Resources currently operates natural gas wells on 13 producing well pads with 8 compressor stations, connected by gathering lines in Potter and Tioga Counties.
  - Gas is piped to a Metering and Regulation Station before it enters the Dominion interstate transmission pipeline.
  - Between 2009 and 2011, PADEP approved the construction and operation of each compressor station and associated equipment under various General Permits.
    - Four compressor stations were operational in 2010; the remaining four became operational in 2011.
  - In authorizing each facility under GP-5, PADEP made the decision that each was a separate NOx emitting facility.
  - PennFuture did not appeal any of the permit approvals to the EHB.

Bulfer Exhibit A



PennFuture v. Ultra Resources

- July 2011 - PennFuture filed a Citizen Suit under Section 304 of the Clean Air Act against Ultra Resources.
  - Alleged violations of the CAA, the PA SIP, and the PA Nonattainment New Source Review regulations for failure to obtain an NSR permit to construct the compressor stations.
  - Contended that Ultra Resources' network of wells, pipelines, and compressor stations in its Marshlands Play (over 558 sq. miles) constitute a single NOx emitting source for air permitting purposes.
  - Argued that activities occuring several miles apart may be deemed "contiguous or adjacent" if they are operationally interdependent (relying on USEPA letter to John Slade, PADEP, dated Jan. 15, 1999).
  - Therefore, PennFuture asserted that NOx emissions from each compressor station should have been aggregated such that an NSR permit was required.

PennFuture v. Ultra Resources

- Sept. 2011-2012 – Court considered Ultra Resoruces' Motion to Dismiss for lack of subject matter jurisdiction and for the court to abstain.
  - Court denies motion to dismiss. Holds that although PennFuture had not exhausted its administrative remedies, the CAA did not contain an exhaustion requirement and expressly allows citizens' suits.
- Feb. 2014 – Ultra Resources filed motion for summary judgment arguing:
  - "Contiguous or adjacent" does not include "operational interdependence," citing *Summit,* PADEP guidance and plain language of the regulation.
  - Even if "operational interdependency" is used, the facilities do not meet the definition.
    - The fact that each compressor station ties into a metering and regulation station does not make them functionally related. Compression stations are not interdependent on one another.
    - The metering and regulation station is not an air contamination source; does not emit NOx.
  - Adopting PennFuture's definition would be contrary to public policy and interfere with a coherent PADEP policy on single source determinations.
    - Cause a "chilling effect" on construction of new and modified industrial facilities throughout the state, such that the regulated community will be left with no certainty on key environmental issues.
    - PADEP's proper permitting decisions and guidance would necessarily be overturned.

PennFuture v. Ultra Resources

- March 2014 – PennFuture opposed Ultra Resource's motion, arguing:
  - Disputed issues of fact exist.
  - *Summit* is distinguishable because Ultra Resources' Marshlands Play is 13 square miles less than the area occupied by the facilities in *Summit* where court remanded rather than finding distance too great for purposes of finding adjacency.
  - Functional interdependency is not an alternative to proximity, but an additional factor to consider.
  - The compressor stations are interrelated because they collectively function as a production unit delivering gas to Dominion's transmission pipeline through the metering and regulation station.
  - The *Summit* decision is "unworkable" and has been rejected by USEPA and the PA EHB.
    - A strict proximity approach does not eliminate consideration of other factors. Argued proximity just as subjective as adjacency.
    - Citing *MarkWest*, argued that the PA EHB rejected *Summit* because the PA EHB allowed evidence of functional interdependency.
    - Noted that USEPA refused to apply *Summit* outside the Sixth Circuit, arguing, therefore, Court not bound.

PennFuture v. Ultra Resources

- Apr. 21, 2014 – Oral argument held on summary judgment motion.
- May 2014 – Penn Future filed supplemental statement concerning disputed facts. Ultra Resources filed response.
  - Addressed locations of compressor stations and distances between them.
  - Ultra Resources minimized importance of accuracy regarding distances as case is not about location accuracy, but rather about how to apply the relevant law.
- June 2, 2014 – Ultra filed Notice of Supplemental Authority regarding the *NEDA* descision.
  - Short filing.
  - Attaches copy of decision and merely notes that the D.C. Circuit "vacated an EPA memo that attempted to limit the applicability of the Summit decision only to permitting actions in the Sixth Circuit, finding that such memo was contrary to EPA's regulation that requires national uniformity in implementing the Clean Air Act."

National Fuel Gas Midstream/Seneca Resources

NFG Midstream is wholly owned by National Fuel Gas Midstream Corp., which is a subsidiary of National Fuel Gas Co.; Seneca is a subsidiary of National Fuel Gas Co.

SRC Tionesta Station Facility

(EHB 2013-113-B)

- PADEP considered whether to aggregate emissions from 2 facilities:
  - SRC Tionesta Compressor Station, and
  - NFG Tionesta Interconnect Facility (dehydration unit and generator).
- June 2013 – PADEP concluded that the two facilities were a single source:
  - Existence of a support relationship found. Therefore, differences in SIC codes irrelevant.
  - Facilities located on “one property” (located 200-300 ft apart).
  - Support relationship and contractual / financial agreements established common control even though agreements did not meet the SEC’s definition of “control.”
  - Facilities functioned together to create a single common product meeting the “common sense notion of a plant.”

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SRC Tionesta Station Facility

(EHB 2013-113-B)

- July 2013 – SRC appealed to PA EHB.
  1. Sources do not have a support relationship as evidenced by differing SIC codes and facts regarding methods of operation.
  2. Two facilities do not "function together to create a single common product meeting the 'common sense notion of a plant'[.]"
  3. PADEP's determination that two facilities are under common control when they do not meet the SEC's definition of "common control" is arbitrary, capricious, an abuse of discretion, unreasonable, without legal authority, etc.
  4. Concerned over potential precedential impact on other aggregation determinations.
- August 2013 – NFG Midstream petitioned to intervene.
  - Same arguments as SRC. Also maintained that PADEP's improper determination and rationale could carry over into other source aggregation determinations.
- Sept. 2013 – PA EHB granted NFG Midstream petition to intervene.

National Fuel Gas Midstream/Seneca Resources

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NFG Midstream Mt. Jewett (EHB 2013-123)
SRC Mt. Jewett (EHB 2013-124)

- PADEP considered whether to aggregate emissions from 2 facilities:
  - SRC Mt. Jewett Pad G Station; and
  - NFG Midstream Mt. Jewett Interconnect Facility (dehydrator, storage tanks, emergency generator, heater).
- July 2013 – PADEP concluded that the two facilities were a single source:
  - Existence of a support relationship such that differences in SIC codes irrelevant.
  - Facilities were on "one property":
    - But in separate counties.
    - Boundaries of SRC compressor station and the pertinent ROWs for NFG Midstream Interconnect Facility separated by approx. 1.38 miles.
  - Support relationship and contractual / financial agreements established common control even though they did not meet the SEC's definition of "control."
  - Facilities functioned together to create a single common product meeting the "common sense notion of a plant."

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NFG Midstream Mt. Jewett (EHB 2013-123)
SRC Mt. Jewett (EHB 2013-124)

- Aug. 21, 2013 – Appeals filed separately by NFG and SRC:
  1. Sources do not have a support relationship as evidenced by differing SIC codes and facts regarding methods of operation.
  2. Improper to look only at "simple surface right ownership." Facilities dispersed over area encompassing many square miles.
  3. 1.38 mile distance exceeds PADEP's "rule of thumb" for determining adjacency.
  4. Because of nature of oil and gas operations, aggregation here defies "common sense notion of a plant."
  5. The facilities do not "function together to create a single common product meeting the 'common sense notion of a plant'[.]"
  6. PADEP's determination that the two facilities are under common control where they do not meet the SEC's definition of "common control" is arbitrary, capricious, an abuse of discretion, unreasonable, without legal authority, etc.
- May 1, 2014 – cases consolidated into one action (EHB 2013-123).

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NFG Midstream Bodine Compressor Station

(EHB 2013-206-B)

- PADEP considered whether to aggregate emissions from several sources at the proposed NFG Bodine Compressor Station and two existing SRC well pads.
- NFG Bodine Compressor Station to receive natural gas from 2 SRC well pads (Pad E and Pad M) that currently convey gas to a different compressor station (Hagerman Station) as well as natural gas from future well pads.
- Well Pad E –
  - Sraight line distance from compressor station approximately 0.24 miles.
  - Both sites located on same State Forest land.
  - No physical boundary between sites.
- All other sources (including Well Pad M and existing compressor station) more than 2 miles away.

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NFG Midstream Bodine Compressor Station
(EHB 2013-206-B)

- October 2013 – PADEP aggregated Bodine Compressor Station and Well Pad E. No other sources aggregated.
  - Existence of a support relationship because the gas would be conveyed, dehydrated, and metered by the Bodine Compressor Station.
    - Rejected argument that gas from Well Pad E could continue to be conveyed to separate compressor station given the stated intent for constructiing Bodine Compressor Station.
  - SIC code criterion typically met by natural gas midstream and production sites because activities belong to same 1987 SIC code, 13.
  - Although different SIC codes (1311 v. 4922), the support relationship overrode the difference.
  - Common control prong met because both SRC and NFG Midstream are owned by National Fuel Gas Company and contractual agreement existed between SRC and NFG Midstream for gas to be sent to Bodine Compressor Stations.
  - Facilities contiguous/adjacent due to close distance (0.24 miles), located on same State Forest land and lack of a physical boundary between sites.

National Fuel Gas Midstream/Seneca Resources

NFG Midstream is wholly owned by National Fuel Gas Midstream Corp., which is a subsidiary of National Fuel Gas Co.; Seneca is a subsidiary of National Fuel Gas Co.

NFG Midstream Bodine Compressor Station
(EHB 2013-206-B)

- Nov. 12, 2013 – NFG Midstream appealed:
  1. PADEP's support relationship finding arbitrary, capricious, an abuse of discretion, unreasonable, without legal authority, etc.
     - Cannot override SIC codes differences.
     - Factually improper since gas from Well Pad E could alternatively flow through a separate compressor station.
  2. Improper to rely on "simple surface right ownership" where surface ownership is a large state forest; defies "common sense notion of a plant."
  3. Facilities not under common control – contract was an arms length agreement and relationship with National Fuel not factually supported and contrary to PADEP determinations in other regions.
- Apr. 30, 2014 – PA EHB granted SRC petition to intervene.
- Decision pending.

WEST VIRGINIA

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West Virginia Guidance

- No separate aggregation guidance document.
- Aggregation "Discussion Guidance" found in Application Instructions and Forms for General Permit G70-A (Oct. 2013, rev, Feb. 2014) – 1 page out of 47 pages.
- "Case by case" determinations based on the relationship between the activities in question.
- Recites Three-Prong Test:
    1. ***Same Industrial Grouping*** (same two (2)-digit SIC code).
    2. ***Common control.***
    3. ***Contiguous or Adjacent Properties.*** *The sources are located on one or more "contiguous or adjacent" properties.*

West Virginia Guidance

Contiguous or Adjacent Properties:

- Recites dictionary definitions:
  - Contiguous – being in actual contact; touching along a boundary or at a point.
  - Adjacent – not distant; nearby; having common endpoint or border.
- "Contiguous" or "adjacent" are proximity based, but no defined distance.
- Determinations shall be made on a "case by case" basis.
- Focus on proximity and the "common sense notion of a plant."
- Avoid aggregating pollutant emitting activities that as a group would not fit within the ordinary meaning of "building," "structure," "facility," or "installation."

West Virginia Admin. Decisions

- **Appalachia Midstream Services** (August 2011)
  - West Virginia Division of Air Quality (WVDAQ) issued Appalachia Midstream separate permits authorizing the construction of two compressor stations in the Victory Field.
    - Located over 3 miles apart, connected by pipeline.
    - Over 25 wells pads in Victory Field, none contiguous with either compressor station.
  - WVDAQ concluded that each compressor station was a separate stationary source and neither was a major source Also, no aggregation with any wellpad.
  - Appeal to the West Virginia Air Quality Board (WVAQB) ensued.
  - WVAQB applied case-by-case determination. Found no evidence that the compressor stations together, or with the well pads, met the common sense notion of a plant.

West Virginia Admin. Decisions

- **Stone Energy Corporation – Mills Wetzel Well Pad 3 (WV DEP Engineering Eval., Dec. 2, 2013)**
  - WV DEP considered whether to aggregate emissions for well pad having 8 wells. Following a three-way separation, natural gas would be routed into a gathering line owned by others, for transportation to Stone Energy's Carbide Compressor Station.
  - Emissions from well pad, wells on site, and associated equipment aggregated (still not a "major" source).
    - Same SIC.
    - Common owner.
    - Located on a contiguous property.
  - No aggregation with other well pads because no gas from other wells would be routed to or away from the new well pad.
  - No aggregation with the receiving Carbide Compressor Station.
    - Same SIC code.
    - Completely separate ownership.
    - Located 2.1 miles from the new facility.

West Virginia Admin. Decisions

- **Williams Ohio Valley Midstream – Woodruff Dehy Station Dehydration Facility** (WVDEP Engineering Eval., Jan. 30, 2014).
  - WV DEP considered whether to aggregate emissions from a dehydration facility with local production gas wells.
  - Applied case by case evaluation.
  - Noted that aggregation determinations "are proximity based, and it is important to focus on this and whether or not it meets to common sense notion of a plant."
  - Looked to dictionary definitions of adjacent – "not distant" "nearby" "having a common endpoint or border."
  - Declined to aggregate:
    - Although located in close proximity to the wells, it was not necessary that the dehydration facility be located in the immediate vicinity of the production. Beacause facility could be moved, aggregation with production wells did not meet common sense notion of a plant.

West Virginia Admin. Decisions

- **Williams Ohio Valley Midstream – Pinecone Compressor Station** (WVDEP Engineering Eval., May 15, 2014).
  - WV DEP considered whether to aggregate emissions from Williams' compressor station with local production gas wells.
  - Applied case by case evaluation.
  - Declined to aggregate.
    - Same industrial grouping - SIC Code 13 (1389 for Oil and Gas Field Services and 1311 for Crude Petroleum and Natural Gas).
    - Lack of common control – Williams maintained no ownership stake in any production well that may send gas to compressor station.
    - Not contiguous or adjacent.
      - No other Williams facilities located within 0.5 miles of the Pinecone Compress Station.
      - Closest Williams facility was 2.4 miles away. Land between the sites not owned or managed by Williams.
      - "Operations separated by these distances did not meet the common sense notion of a plant."

NEW YORK

HISCOCK & BARCLAY LLP

New York

- New York does not have a formal written policy/guidance document to address aggregation of air emissions for oil and gas facilities.
- 2011 Revised Draft SGEIS includes the only NYSDEC policy statement on aggregation related to the oil and gas industry.
  - Still a work in progress. Industry and environmental NGOs have commented.
  - Final SGEIS likely will have changes based on public comments and the passage of time/evolution of issue in other jurisdictions.
- NOTE: New York has not always agreed with USEPA on source determinations unrelated to the oil and gas industry.

New York rdSGEIS

Appendix 18 of the rdSGEIS:

- Cites primarily to USEPA determinations and guidance as well as to a Colorado Order.
- Released prior to Sixth Circuit's *Summit* Decision.
- NYSDEC notes that no specific distance has been established to determine whether sources are "adjacent."

New York rdSGEIS

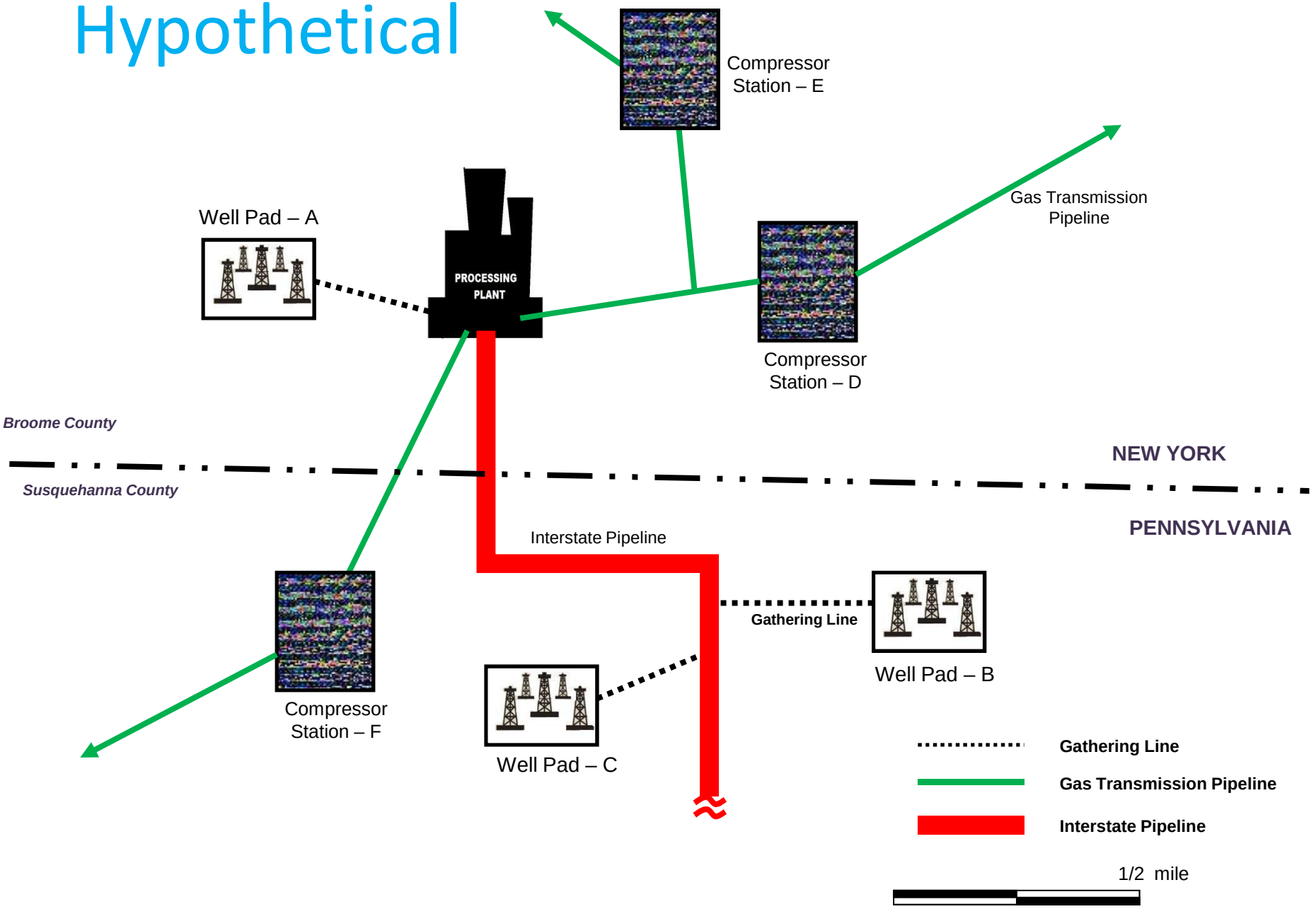
- Recognizes that:
  1. Interdependence is not part of the PSD or Title V definitions of "source," and
  2. "In the context of oil and gas infrastructure, [interdependence] may have reduced relevance to an agency determination" (quoting a Colorado Order granting a petition to object).
- States that "to be thorough," NYSDEC staff will evaluate the nature of the relationship between the facilities and the degree of interdependence between them to determine whether the non-contiguous emissions points should be aggregated (citing EPA's 2010 *Summit* determination).

New York rdSGEIS

- Interdependence requires that two activities rely on each other – not just that one activity relies on the other activity.
  - If activities operate independently and one activity does not act solely as a support operation for the other, the activities should not be deemed contiguous or adjacent.
- NYSDEC will use the following questions, and others, to inform its source determinations:
  - Whether materials will be routinely transferred back and forth between the facilities;
  - Whether the location of the facility was chosen because of proximity;
  - Whether workers will be shared; and
  - Whether the production process will be split.
- NYSDEC indicated that some of these questions may not be relevant for oil and gas industry determinations.

V. Hypothetical

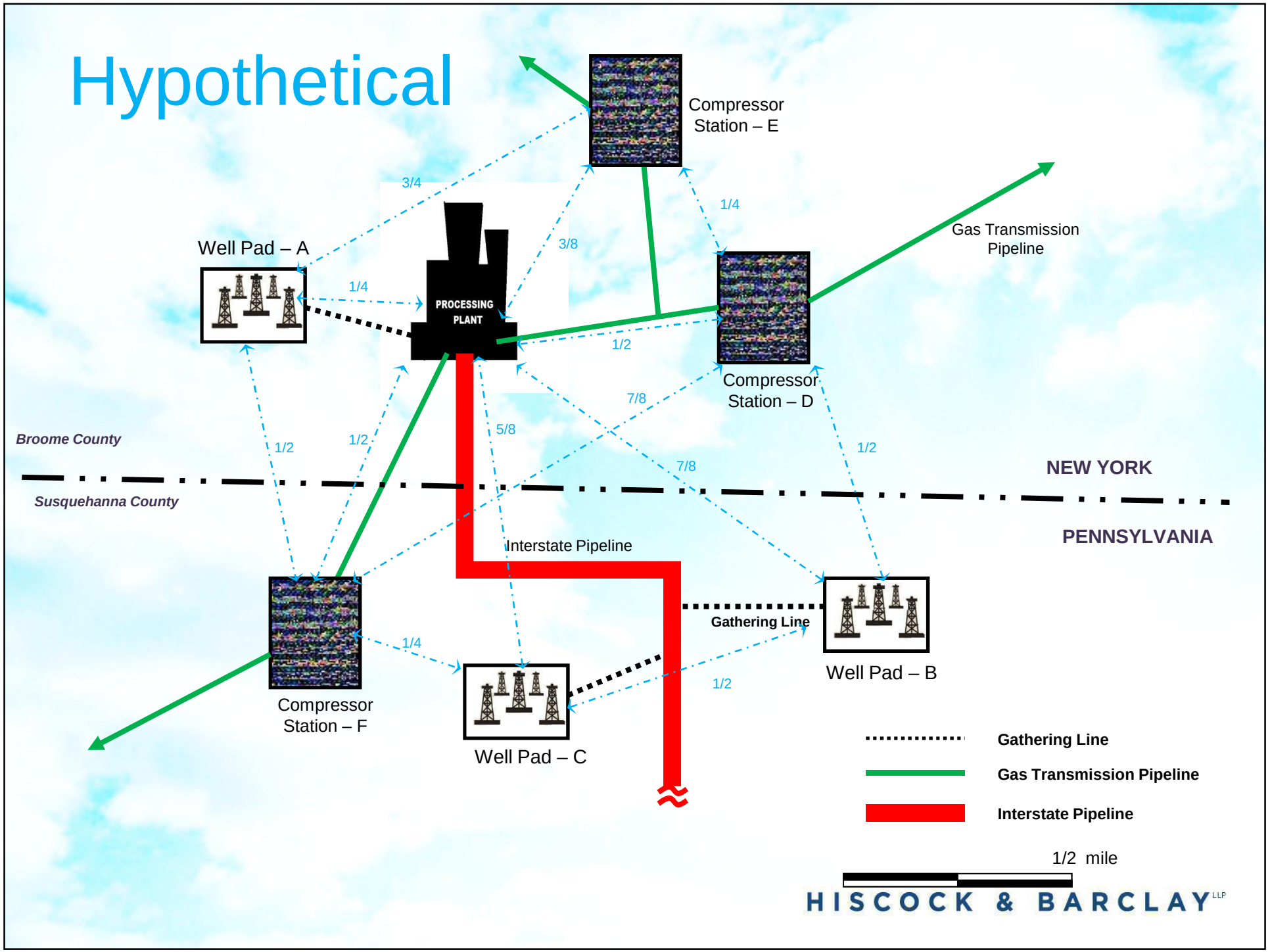
Hypothetical



Hypothetical

Component	Regulatory Agency		Distance from Processing Plant (miles)
	State	Federal	
Processing Plant	NYSDEC	EPA Region 2	--
Well Pad – A	NYSDEC	EPA Region 2	1/4
Well Pad – B	PA DEP	EPA Region 3	5/8
Well Pad – C	PA DEP	EPA Region 3	7/8
Compressor Station – D	NYSDEC	EPA Region 2	1/2
Compressor Station – E	NYSDEC	EPA Region 2	3/8
Compressor Station – F	PA DEP	EPA Region 3	1/2

Hypothetical



VI. Conclusion

Current State
of the Law

Current State of the Law

- **USEPA –** Currently constrained to follow *Summit* decision and remove consideration of functional relatedness from single source determinations. May petition for rehearing or appeal *NEDA* or commence new rulemaking.
- **Ohio** – Follows *Summit.*
- **Pennsylvania –** Quarter mile distance rule of thumb. If greater than ¼ mile, then case-by-case determination.
- **West Virginia –** No defined distance. Case-by-case determination.
- **New York –** No formal/adopted policy statement. Prior draft pronouncement will need to be considered in light of *Summit* and *NEDA* decisions.

VII. Questions

Contact Information

Yvonne E. Hennessey
Hiscock & Barclay, LLP
80 State Street
Albany, New York 12207
518.429.4293
yhennessey@hblaw.com

Energy Matters Blog:
http://hblaw.com/blog/energymatters/