UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

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OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: Interpretation of "Ambient Air" In Situations Involving Leased Land Under the Regulations for Prevention of Significant Deterioration (PSD)

FROM: Stephen D. Page, Director
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TO: Regional Air Division Directors
Regions I-X

This memorandum responds to various inquiries about the Environmental Protection Agency's (EPA's) interpretation of the definitions of "ambient air" and "building, structure, facility, or installation" (as applied to air quality analyses under the Prevention of Significant Deterioration (PSD) program.[1] The inquiries pertain to the need by a PSD permit applicant to conduct a source impact analysis at particular locations.[2] Requests for this guidance on EPA's interpretation of the regulations generally have involved leasing arrangements where a source locates on land being leased to them by another source, and one source or the other must demonstrate compliance with ambient air standards. In some cases, the companies involved may be under some form of common ownership or control; in other cases, there is no apparent relation between the companies other than the leasing agreement. This memo and the supporting attachment describe EPA's interpretation of the applicable regulations under both scenarios.

The PSD source impact analysis involves the use of air quality dispersion models to predict the impact of a proposed PSD source's emissions (and other sources' emissions, where applicable) on pollutant concentrations in the ambient air. "Ambient air" is defined as "that portion of the atmosphere, external to buildings, to which the general public has access." The modeled prediction is used to determine whether the proposed source will cause or contribute to a violation of an ambient air standard, including any national ambient air quality standard (NAAQS) or PSD increment. A source is not required to model the impacts of its emissions at locations that are not

[1] The terms "ambient air" and "building, structure, facility, or installation" are defined at 40 CFR 50.1(e), and 40 CFR 52.21(b)(6), respectively.
[2] See 40 CFR 52.21(k) Source Impact Analysis.

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considered to be ambient air. *See*, In the Matter of Hibbing Taconite Company, 2 E.A.D. 838 (Adm'r 1989). Accordingly, this guidance addresses which locations a source may exclude from the source impact analysis for purposes of PSD.

As a threshold matter, in order to identify the boundary between a source and ambient air in a leased-land scenario, it is important to determine whether you are dealing with one source or two (or more) sources. The determination of whether there is a single source or separate sources is based on the definition of "building, structure, facility, or installation" in our regulations.

With respect to a particular source, EPA's practice has been to exempt only an area from ambient air when the source (1) owns or controls the land or property; and (2) precludes public access to the land or property using a fence or other effective physical barrier. In the case of a leasing situation where there are two separate sources, the above conditions should be applied separately to both the lessor and the lessee(s).

In summary form, EPA interprets the regulations as follows in each of the ambient air scenarios set forth below:

1. When, under the existing business relationship, two (or more) operating companies constitute a single source:
   - If there is a barrier preventing public access, the air over the entire property (including the leased portion) is not ambient air to either the property owner (lessor) or the lessee.
   - In the absence of a barrier preventing public access, the air is ambient air for both the lessor and the lessee.

2. When two (or more) companies operate separate sources on property owned by one company and leased in part to the other, and the lessor retains control over public access to the entire property and actually maintains a physical barrier around it to preclude public access:
   - The air over the entire property (including the leased portion) is not ambient air to the lessor.
   - The air over the non-leased portion of the property is ambient air to the lessee.
   - The air over the leased portion is ambient air to the lessee unless the lessee undertakes its own separate action to preclude public access.

3. When two (or more) companies operate separate sources on property owned by one company and leased in part to the other, and the lessor grants the lessee sole control over who may access the leased property (e.g., leased property with direct access via entrance on outer perimeter of lessor's land):
   - The air over the property retained for use by the lessor is not ambient air to the lessor if public access is precluded.
   - The air over the lessor property is ambient air to the lessee.
   - The air over the leased property is ambient air to the lessor.

- The air over the leased property is ambient air to the lessee unless the lessee acts to preclude public access to the leased property.

4. When the property owner agrees to allow a lessee to operate a business on the leased land that is open to the general public (such as a restaurant, retail store, or office building) the outdoor areas that are accessible to the public, such as parking areas and entrances would be ambient air to the lessor and the lessee.

A more complete description of the relevant issues concerning "ambient air" and "single source," which are important to the scenarios summarized above, is contained in the attachment to this memo.

Neither the memo nor the attachment should be regarded as a substitute for the applicable regulations, nor are they regulations in themselves. This memorandum does not announce any change in EPA's interpretation of the cited regulations, but rather summarizes prior interpretative statements and provides guidance to the Regions on how to apply EPA's interpretation of the regulations to the particular circumstances described.

Attachment

ATTACHMENT
Support Document

As a threshold matter, in order to identify the boundary between a source and ambient air in a leased-land scenario, it is important to determine whether you are dealing with one source or two (or more) sources. The determination of whether there is a single source or separate sources is based on the definition of "building, structure, facility, or installation" in sections 51.166(b)(6) and 52.21(b)(6) of the PSD regulations. This defined phrase is contained in the definition of "stationary source" in sections 51.166(b)(5) and 52.21(b)(5). The boundary between each stationary source and ambient air is then based on the definition of ambient air in section 50.1(e) of EPA's regulations. In scenarios where there is potentially a separate source within the boundaries of land owned by another source, the answer to the ambient air question is closely related to the question of whether there are one or two sources involved. In the following, we will address both the "single source" and "ambient air" questions together.

Under a business relationship involving two or more companies (one a lessor, the other a lessee) where the three criteria used to determine a single source scenario have been met, and a physical barrier is in place to preclude access to the general public, the air over the entire property may be excluded from ambient air by both the lessor and lessee for PSD purposes. However, as explained below, the situation may change as a result of possible future changes in the business relationship between the lessor and the lessee. We will address each of the potential scenarios below after outlining the general principles that EPA would apply under its interpretation of the regulations.

A. Single or Separate Source Analysis

According to EPA's definition, "a 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 or adjacent properties, and are under the control of the same person (or persons under common control). Thus, pollutant-emitting activities are generally considered part of a single stationary source when these activities are (1) part of the same industrial grouping (as determined by applicable SIC codes), (2) contiguous or adjacent, and (3) under common control. In several guidance documents, EPA has recognized that one or more of these criteria

can be satisfied when an emissions unit serves in a supporting role for a primary activity at a nearby location.

When two companies meet the first two criteria, i.e., within the same industrial grouping (operations are classified in the same major group), and properties are immediately contiguous and adjacent to each other, the principal question that needs to be answered is whether the issue of common control is affected by potentially changing business relationships. A case-by-case evaluation is usually required to determine if common control is present. Even where facilities have separate legal owners, EPA has found that common control may be established on the basis of a contract, which creates a support or dependency relationship through which one facility may have effective control over the other. See Letter from Richard R. Long, EPA Region 8 to Julie Wrend, Colorado Department of Public Health regarding "Single Source Determination for Coors/TriGen" (Nov. 12, 1998). We consider separately-owned sources to be under common control if one source is able to "exercise restraining or directing influence over," "have power over," "have power of authority to guide or manage," or "regulate economic activity over" the other by virtue of their contractual relationship. See Letter from William Spratlin, EPA Region 7 to Peter Hamlin, Iowa Department of Natural Resources re Common Control (September 18, 1995).

If one plant is purchasing supplies and services on the open market and accepts delivery from a number of different suppliers in minority proportions, then there would typically be no basis for a common control determination. Therefore, as long as traditional commodity transactions occur at arms length, the two companies would likely not be considered to be under common control for permitting purposes. On the other hand, if one source executes a contractual agreement with an adjacent or contiguous source to provide the bulk of its output, then it may be more difficult to demonstrate that the two entities are not under common control.

B. Ambient Air Analysis - Single Source

"Ambient air" is defined at 40 CFR 50.1(e) as "that portion of the atmosphere, external to buildings, to which the general public has access." EPA's longstanding interpretation has been that "exemption from ambient air is available only for the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence or other physical barrier." Letter from Administrator Douglas M. Costle, EPA to

Senator Jennings Randolph, Chairman, Environment and Public Works Committee (Dec. 19, 1980).

With respect to a particular source, EPA's practice has been to allow the source to exempt from the source impact analysis areas that are not considered to be ambient air. That is, an area may be excluded when the source - (1) owns or controls the land or property; and (2) precludes public access to the land or property using a fence or other effective physical barrier. Under the first condition described above, "control" of the land means that the source has certain rights to the use of the land/property, including the power to control public access to it. Under the second condition, a source must actually take the necessary steps to preclude[1] the general public from accessing the property by relying on some type of physical barrier (such as a fence, wall or a natural obstruction). Where the appropriate barrier does not exist to prevent access by the general public, the air over the property should be regarded as ambient air for PSD purposes.

An internal leasing arrangement between a lessor and another business entity is not relevant if the facilities are considered one source. In such cases, the ambient air for both would begin at the fence line of the lessor if it controls the land and precludes access to the property.

C. Ambient Air Analysis - Separate Sources

In the case of a leasing situation where there are two separate sources, the above conditions are applied separately to both the lessor and the lessee(s). Consistent with this concept, EPA has stated that, for a source operating on leased property (the lessee), "ambient air is considered to exclude only the atmosphere over that land leased and controlled by the source." See "SO_2 Guideline," EPA-450/2-89-019, page 2-6, (October 1989); Memorandum from G.T. Helms, OAQPS, to W.S. Baker, Air Branch Chief, Region II (July 27, 1987). This means that the lessee must, in addition to controlling the leased property, actually preclude public access to that property.

When the lessor retains control over public access to the entire property and actually maintains a physical barrier around it to preclude public access, our interpretation is that the air

[1] "Preclude" does not necessarily imply that public access is absolutely impossible, but rather that the likelihood of such access is small.

over the entire property, including the leased portion, is not ambient air to the lessor, because the two key conditions are being satisfied by the lessor with respect to the entire property in question. However, if the lessor grants the lessee sole control over who may access the leased property and the lessee is the one who maintains the physical barrier around it, then the air over the leased property should be treated as ambient air by the lessor. This is further explained below.

1. Leased parcel within lessor's property

Where the leased land is within the confines of the lessor's property (i.e. not on the outer boundary) and the lessor maintains the power to exclude the general public from the leased land, and does so through reliance on a physical barrier, then we do not consider the leased land to be ambient air with respect to the lessor. An example of this situation would be a case where a company leases land on its plant site to another company or a joint venture but (1) the first company, as the lessor, continues to control access onto the entire parcel of property through a gate staffed by its employees or agents; and (2) the terms of the lease agreement preclude the lessee from permitting the general public to enter the property (including the leased land). Under these conditions, ambient air is the portion of the atmosphere external to the property owned by the lessor. The entire property, including that portion leased to another source, is excluded from ambient air to the extent that the host source adequately precludes public access to such property.

With respect to the lessee, the air over the leased property is not ambient air if the lessee precludes the general public (including employees of, or invitees to, the lessor's property) from accessing the leased property through the use of a physical barrier separate from the one used by the lessor. If the lessee does not use a physical barrier (i.e. erect a fence) to preclude the general public from accessing the leased land, then even the leased land is ambient air with respect to the lessee.[2]

2. Leased parcel on outer boundary of lessor's land

[2] For example, EPA has said that "for sources operating on leased property, ambient air is considered to exclude only the atmosphere over that land leased and controlled by the source [lessee]." SO_2 Guideline (October 1989). Herein, "controlled" is taken to mean that the lessee adequately controls access to its leased portion.

Where the leased parcel is on the outer boundary of the lessor's land and the lessee (not the lessor) controls a separate gate or access point onto the leased land, EPA's interpretation is that the leased land is ambient air to the lessor for PSD purposes. Thus, under these circumstances, leased land is ambient air to the lessor because the lessor has granted the power to exclude public access to the lessee and the lessor does not preclude public access. The same would be true in a situation where the lessor permits a lessee to operate a business on the leased land that is open to the general public (such as a restaurant, retail store, or office building). The outdoor areas of these businesses that are accessible to the general public, such as parking lots and entrances would be ambient air to the lessor. Consistent with the analysis described earlier, these areas would also be ambient air to the lessee if the lessee does not maintain physical barriers to exclude the general public from the leased property.

3. *General public and business invitees*

An important component of the general principles described above is the concept of "general public." We consider this term generally to include anyone who is not employed by or under control of the lessor, but, more specifically, persons who do not require lessor's permission to be on the property. Based on the latter condition, the general public may not include mail carriers, equipment and product suppliers, maintenance and repair persons, as well as persons who are permitted to enter restricted land for the business benefit of the person who has the power to control access to the land. For example, contractors or delivery persons that are expressly granted access to a plant site by the lessor are not the general public, but instead are considered "business invitees."

Where part of the owned property is leased to another source, employees of the lessee source are considered business invitees of the lessor source as are those who seek visitation rights to the lessee. Both must have the lessor's permission to be on the property (e.g., attain approved access via a security gate). However, a business invitee of the lessor is not necessarily a business invitee of a lessee. Thus, EPA considers the business invitee of the lessor to be part of the general public with respect to the lessee, unless it is agreed that the lessee also invites that person onto the leased land for the benefit of the lessee's business.

The general public includes customers of a business to which access is typically not restricted during business hours. For example, the customer of a restaurant or other retail business is a member of the general public even if the proprietor restricts public access during non-business hours by locking the entrance to the property. Thus, if a business leasing land from a host source depends upon the patronage of such persons as described above during the normal course of business, then the lessor should consider accessible outdoor areas on the leased land to be ambient air. For example, EPA previously considered leased land occupied by an office building to be ambient air for the lessor.

The general public also includes persons who are frequently permitted to enter restricted-access land for a purpose that does not ordinarily benefit the "business." For example, EPA has treated athletic facilities within the restricted fence line of a source as ambient air when persons unconnected to the business were regularly granted access for sporting events (which do not necessarily benefit a business). However, EPA would not consider an area within a fence line to be ambient air based on de minimis levels of public access, such as where a source on rare occasions allows persons without a business connection to the source onto its land for a family or community-oriented event (i.e. a picnic or fair held once a year).

D. Examples Concerning "Ambient Air" Under Various Business Relationships

Where the operations of two companies--company A (the lessor) and company B (the lessee)--meet the three criteria necessary to be considered a single source, the lessor and lessee may exclude the entire property from ambient air for PSD purposes follows. For example, common control would be established if company A held a controlling interest in company B, e.g., company A owns 51 percent of company B. Since the activities are conducted on the property by a single source, the focus of the ambient air analysis is on whether the operator of that one source has ownership or control of the land and maintains a physical barrier around the property. Under the current scenario, company A has ownership and control over all the land involved, has erected a fence around its property to exclude the general public, and permits only employees and business invitees of either company A or company B to enter the property. Thus, the lessor (company A) and the lessee (company

B) may exclude the entire property owned by company A from ambient air for PSD purposes.

Under a scenario where company A and company B own interests in a joint venture (company C) located on company A's land and company A sells its interest in the joint venture to company B, the single source determination and the ambient air analysis could change. If company C is now owned entirely by company B due to the sale and there is no contractual relationship between company A and company C, this would be sufficient to break the "common control" prong of the single source test. Thus, if company C and company A now operate separate sources but company C continues to lease land from company A, we would conduct the ambient air analysis for separate source described above. For example, if company C occupies a leased parcel within the boundaries of company A's land, and company A will continue to have exclusive control over access to company A's land and the leased property occupied by company C, even if the common control prong is broken and company A and company C operate separate sources, company A may continue to exclude all the land inside company A's boundary (including the land leased to company C) from ambient air. However, company C would not be allowed to exclude all of Company A's land from ambient air. If company C maintains a physical barrier that excludes the employees and business invitees of company A from the leased parcel, then company C could exclude the leased parcel from ambient air but not the surrounding land owned by company A because company C does not control access to Company A's property. The employees and business invitees (not otherwise linked to company C) of company A are considered general public with respect to company C. The analysis presented in this paragraph assumed that company A's sale of its interest in company C, and the lack of any continued contractual relationship, makes the operations of these two companies into separate sources.

However, the common control prong may not be broken if (after the sale of the company A's joint venture interest to company B) company C and company A retain a close business relationship. For example, if company A and company C continue to maintain certain contractual relationships even after the sale of company A's interest to company B, the contractual relationships may cause the two companies to be regarded as one source. For instance, company C may continue to be obligated to provide feedstock to Company A. Alternately, company A may continue to provide company C a number of facility services integral to the operations of company C. Thus, there may be

sufficient information to conclude that company A and company C will be under common control by virtue of either an exclusive contract for service relationship or a support or dependency relationship that effectively gives one entity control over both company A and company C. Accordingly, a single source, comprised of company A and company C, may exclude the atmosphere over the entire fenced property from ambient air considerations for PSD purposes.

Under a different example, companies A and B may be negotiating the extent to which company A will continue to be involved in the operational aspects of company C's business after the sale of company A's interest to company B. At one facility, company C could continue to be operated by the employees of company A or its subsidiary. At the other facility, the employees of company A that formerly worked for the joint venture would become sole employees of company C. These relationships could affect the determination of whether these sources are separate sources or a single source. For example, if company C is operated by employees of company A, company A and company C may be regarded as a single source because the arrangement makes company C dependent upon company A for labor to operate the facility, such that company A effectively controls company C. If company C is operated by its own employees, this arrangement would not provide grounds to establish common control. With respect to the ambient air issue, these relationships by themselves are not directly relevant unless the common control test is broken and company A and company C operate separate sources. If company C's facility is operated by its own employees and the sources are otherwise separate, then company A's employees would be considered general public with respect to company C while on company A's property. However, if the sources are separate and company A's employees are permitted access to company C's leased land to provide a limited range of services to company C (not amounting to complete operation of the facility), the EPA would consider the employees of company A to be business invitees of company C and not part of the general public when on the land controlled by company C.

An agreement between company A and company C to be treated as a single source for purposes of "major source" consideration is typically not enough to consider the two sources as one. Whether or not the two facilities constitute a single source is determined based on a review of the facts under the three prong-test described above. An agreement between two entities to treat a source as a single source by itself is not material if

the facts indicate that the sources are separate sources. However, the parties may agree to structure their business arrangement in a particular way so that the facts show that the operations of company A and company C constitute a single source. Thus, assuming this is case, the single source status would be relevant to determining the boundary between the source and ambient air, as discussed above.

Finally, if company A and company C agree to "joint security control" over the area of Company C's leasehold and company A's site, this could be relevant if the two are separate sources, but not if the two companies operations are considered a single source. If there are two sources, this could be relevant if company A is granting company C the power to permit the general public to enter the property. If "joint security control" means that company A gives company C the power to allow any member of the general public onto company A's property, then EPA would consider A to have given up control over the owned property. However, if "joint security control" means that company C has a limited right to allow a business invitee of company C onto the property of company A for purposes of accessing company C's property, then company A would still retain control over the property and would not be authorizing company C to allow the general public onto the property. Under such a scenario, company C's business invitees are also business invitees of company A. Accordingly, the location of ambient air for each source would be determined using the analysis described above for separate sources.