MEMORANDUM

TO: Regional Directors

FROM: John M. Daniel, Jr., P.E., DEE
Director, Technical Services

SUBJECT: Memo Number 98-1002. Common Control Determinations for Title V Permit Applicability

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Background and Purpose

In preparing to administer the Title V federal operating permits program, the Department is faced with at least two kinds of situations involving the question of common control and requiring interpretation of the Regulations and other applicable rules. One of these is where the ownership or control of neighboring facilities possibly subject to permitting is not at all clear because one facility is built on land belonging to the other. This situation, as described further in this Memo, may be called the common control question. Another type of situation is a landlord-tenant relationship in which facility ownership is clear but permitting responsibility is not certain on its face. These and other types of situations can lead to time-consuming and potentially inconsistent determinations of Title V applicability at a time when we hope to make a smooth and fast start on the Title V permitting program.

This Guidance Memorandum is intended to provide means of addressing both the common control question and the landlord-

tenant question. It is our aim to enable regional staff to make applicability determinations which are reasonably predictable and consistent, and thereby useful to other staff and to the source population as well. In situations where one or more entities are able to avoid Title V permitting by virtue of these determinations, we want that avoidance to be not only a matter of record but also self-evident, once enunciated, based on the Regulations and on the guidance in this Memo. Similarly, we want the opposite situations, where "common control" is found and the two entities joined for permitting, to be an equally reasonable proposition.

I. The Common Control Question

A. Introduction. The common control question arises when one company or facility owner constructs or operates a facility situated on land belonging to another company. Applicable requirements typically place the responsibility for compliance upon the owner or manager of a source or facility. A company owning or managing two facilities may want them regarded as separate so as to avoid Title V major status for one or both of them; or it may want to take advantage of netting through a merger of facilities ownership or control. Consequently, it is important to be able to make sound and predictable determinations of the presence or absence of common control. These determinations begin with the definition of "stationary source" in the Title V rules.[1]

B. "Stationary source." To paraphrase the definition, a stationary source is pollutant-emitting activities meeting three criteria: (1) they belong to the same industrial grouping;[2] (2) they are located on one or more contiguous or adjacent properties; and (3) they are under control of the same person, or persons under common control (as with a business entity). We should point out here that the industrial grouping, or SIC code, is irrelevant in defining major sources of hazardous air pollutants;[3] in such cases the SIC code is not necessary to create the presumption of common control.

C. Analytical Approach to Common Control. The question of common control is important if it is the remaining criterion to be met in a given situation. We may assume, for purposes of discussion, that the facilities have SIC codes in common. In cases where one company operates or builds a facility on the land

[1] See 9 VAC 5-80-60.C. in Rule 8-5, in the Regulations for the Control and Abatement of Air Pollution.

[2] First two digits of the four-digit "Standard Industrial Classification" or SIC code.

[3] EPA guidance letter to Minnesota Air Quality Division, dated November 16, 1994, page 1. Cited hereinafter as "EPA guidance letter to Minnesota."

of another, one may presume that a control relationship exists, and the analysis is then aimed at rebutting the presumption. Most of the burden in this regard falls on the source, which -- at least in regard to permit applicability questions -- stands to gain from a successful rebuttal, i.e., from a determination that there is no common control of the two facilities.

Overcoming the presumption of common control involves an explanation of the interaction between the facilities and/or owners. This may be accomplished through analysis of a number of questions; the following list is <u>not</u> exhaustive. For our purposes, the questions relating to control of emission units or air pollution controls are pre-eminent in the analysis.

1. Do the companies share a common work force (or elements thereof), plant manager, security forces, executive officers, or board of directors?

2. Do the companies share equipment or property, particularly air pollution control equipment?

3. Who has responsibility for compliance with air pollution control requirements? Who takes the blame for any violations? Do the companies have contracts governing air pollution control responsibilities? If so, what do those contracts say?

4. Can the manager of one plant affect the air pollution control efforts or equipment of the other plant?

Note on question 4: This might be done not only through decisions on the purchase or use of air pollution control equipment, but also by the nature of output and supply contracts or other relationships between the facilities. In addition to production rates, a plant's emissions are affected by production timing and required methods, either of which may be amenable to control by one plant manager for the other plant.

5. What is the nature of the dependency relationship between the two facilities? What happens to one if the other shuts down?

In the event doubts remain about the relationship after these questions have been addressed, it may be possible to look at contracts, lease agreements, and other information which reveal or disprove the existence of common control. In addition, permit engineers should be alert to the possible existence of interim or short-term contracts establishing separate companies or operations on parcels of land that are <u>not</u> contiguous. These could be used to hide the true intention of the companies involved.[4]

[4] EPA Region VII guidance letter to the Iowa Department of Natural Resources, Air Quality Bureau, dated September 18, 1995, on the subject of common control. The

6. An additional factor for consideration is the extent to which one company owns the other, or whether one facility is owned by two or more others. In these instances (other factors being equal or irrelevant), it is likely that the majority owner, or owner with the controlling interest,[5] is the one exercising common control.[6] It is worth noting that a joint venture of two companies may give one a controlling interest in the other even if the share of power or assets is equal, and notwithstanding the avoidance of common control by way of the foregoing support-and-dependency analysis.[7] This factor, if present, may significantly reduce the analysis required to make a common control determination.

D. Suggestions for Addressing Common Control Concerns

A facility owner may have something to gain from hiding the fact of common control. One company may try to escape Title V major status, or for that matter other major status, by claiming that it is not controlled by, or does not control, a neighboring company. For the most part, however, the ownership pattern is incidental to permitting requirements. Normally, we need not prove intent to split a major source for purposes of permit avoidance; but there will be times when we have to look into the matter to resolve applicability questions arising under the Regulations. The suggestions which follow might be helpful in such investigations.[8]

1. Where a company has applied for a permit and it is unclear whether a common control situation exists between it and another company, the application could be considered incomplete until information is supplied that resolves the matter. (This does not mean holding up completeness notification in cases where we have the facts and understand the relationship, but do not have policies in place to handle the question.)

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questions listed here are attributable to pages 1-3 of that letter. Cited hereinafter as "EPA guidance letter to Iowa."

[5] A controlling interest may not be the same as a majority interest. In interpreting "common control," we seek to identify the controlling interest.

[6] EPA Telecourse, "Determining Title V Major Source Applicability," May 1, 1996 (course T-003-96), Slide Set 1, page 3.

[7] EPA Region II guidance letter to Dupont's attorneys, November 25, 1997, page 2. See the discussion in *Case 7*.

[8] EPA guidance letter to Iowa, page 3.

2. In issuing separate permits to one or more companies in this situation, include a permit term requiring the permittee to notify the Department in the event of a merger with the other company.

3. If the merger in suggestion #2 takes place a within a short time, such as two years, after the permit is issued, investigate the possibility of circumvention and take appropriate action.[9]

4. The company may have split without escaping any applicable requirements. In determining whether this is the case, consider not only currently applicable requirements, but also proposed or scheduled ones, such as MACTs. If the company split without escaping any applicable requirements or avoiding future applicable requirements, there is no further common control inquiry to be made.

II. The Landlord-tenant question.

The landlord-tenant question arises when one facility owner, the landlord, rents space in its facilities to another company, the tenant, which uses the space to operate the same or similar equipment as is used by the landlord. One of the two parties must be assigned responsibility for the permit application, and for the certifications of accuracy of information and compliance with applicable requirements that go with it.

The common control analysis and the definition of "stationary source" are relevant to the landlord-tenant applicability question. A tenant, doing some of the landlord's work (same SIC code) on the landlord's property as a contractor, is subject to the control of the landlord, as reflected in the contract governing the activity. Moreover, there are no provisions in the rules implementing Title V which exclude contracted or temporary operations in defining major sources; so temporary and contracted activities are to be included as part of the source with which they operate or which they support.[10] Hence it is the landlord in these cases who should apply for the Title V permit -- not because

[9] For Title V permits, enforcement action would be based on 9 VAC 5-80-260.A.2.a. (knowingly making material misstatements in the application or amendments, which gives rise to permit revocation or termination). For other permits, the basis would be the circumvention provisions in the rules relating to stationary sources (9 VAC 5-80-10.P (9 VAC 5-80-1100 F*)), PSD major sources (5-80-1960 (9 VAC 5-80-1605 F*)), non-attainment major sources (5-80-30.K (9 VAC 5-80-2000 G*)), and state operating permits (5-80-40.M (9 VAC 5-80-920*)). Penalties for violation of these provisions are available pursuant to *Virginia Code* ∋ 10.1-1320.

*Current regulation citation as of January 25, 2010.

[10] EPA guidance letter to Minnesota, pages 1-2.

it is the landlord, but because of the common SIC code, common area, and some degree of common control.

There are at least two variations on the landlord-tenant relationship described above. One is an ordinary landlord-tenant relationship, where a landlord leases space to tenants for activities of their own, unrelated to the activities of the landlord. Another is temporary facilities.

A. Landlord-tenant relationship. In an ordinary landlord-tenant relationship where the SIC codes differ, the landlord is generally not responsible for obtaining permits covering activities by the tenants.[11] However, there may be cases where a degree of control can be shown, and the permit engineer should be alert to these possibilities. **Section I** above is intended to assist in analyzing each situation; the determination must be made case by case. If the SIC codes are the same, there may be additional reason to look for signs of common control.

In general, leased activities at military bases are not under common control, while contracted activities are.[12]

B. Temporary facilities. We know that it is possible to obtain Title V permits for temporary facilities under the Regulations.[13] In such cases, the owner of the temporary facilities is the permittee. Where the facilities are rented out to another source to aid in its operations, they are likely to fall within the EPA guidance previously cited, and be permitted as part of that other source.[14] Common control between the temporary facilities and the place where they are employed temporarily would overcome this presumption.

A variation is the case in which the portable facility owner employs emission controls or emissions units not found at the landlord's facility. This circumstance makes common control less likely and strengthens the argument in favor of assigning permitting responsibility to the portable facility owner. Again, the landlord-tenant relationship, in itself, does not confer common control on either party.

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[11] EPA Region II letter to New Jersey Department of Environmental Protection, dated April 5, 1995, "Situation 4." The guidance given here is consistent with EPA's August 2, 1996 guidance memo entitled "Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permit Programs of the Clean Air Act," hereinafter "EPA Military Installations Guidance Memo."

[12] EPA Military Installations Guidance Memo, page 3.

[13] See 9 VAC 5-80-130.

[14] EPA guidance letter to Minnesota, pages 1-2.

III. Examples and Analysis.

A. "Real-life" Examples.

The following examples are taken from situations actually faced by our regional offices at the time of this revision (October 1997). It will be apparent that some of these cases do not present questions of common control.

Case 1. Three bulk petroleum terminals named A, B, and C, each subject to Title V and to the Maximum Achievable Control Technology (MACT) requirements for gas distribution, share a common air pollution control device. Should they have (a) duplicate permits, (b) a common permit, or (c) separately written permits?

Resolution of Case 1. The owner of the facility has responsibility for compliance with MACT requirements relative to either the floating roofs on the tanks or the nozzles and other equipment by which tank contents are transferred. So if Source A owns the control equipment for Facilities A, B, and C, then A has MACT responsibility for all of it and must apply for the Title V permit and include MACT requirements in its application.

Each source, however, is responsible for its own emissions. Accordingly, individual permits should be written for each of the three terminals, making the distinction that A controls the air pollution control device, while B and C do other things but do not control the device. In this case, only the permit for A would include MACT requirements. A violation attributable to B or C would not be related to A's MACT requirements.

Case 2. A county owns and operates a landfill, which has a gas collection system and flares to control part of the gas. The rest of the gas is sent to a co-generation source, co-located at the landfill, which is dependent on the landfill gas for its fuel. The co-generation source received a permit to construct and operate. The regional office intends to move the co-generation source's equipment to the control of the county landfill for purposes of Title V permitting, and to hold the county responsible for the emissions control of the co-generation source. Both the county and the co-generation source must get permits and pay fees.

Resolution of Case 2. The dependency relationship, with the landfill as supplier of the fuel used by the co-generation source, does not establish that this is one source, because the SIC codes are different. However, if the landfill controls the co-generation source's equipment, which is regarded as air pollution control equipment, then the landfill gains the co-generation SIC code and in fact gains common control. One permit will suffice unless the co-generation source has other equipment which the landfill does not control.

Case 3. As with Case 2 above, a county owns a landfill. This time the controls are proposed, not already in place. Contractor A will install and operate the gas collection system, while Contractor B installs engines and flares. The regional office anticipates issuing three permits with a common registration number.

Resolution of Case 3. It is not clear whether the three permits would be identical, or they would spell out distinct duties for the county or owner, Contractor A, and Contractor B. However, we need not evaluate this in order to resolve the inquiry. In keeping with the guidance above, it would seem that the common control lies with the county and not with either contractor; thus the owner should get the permit.[15]

Case 4. The regional office combined the registrations for boilers and a document incinerator belonging to a common owner, and will require the owner to submit a single Title V application.

Resolution of Case 4. This approach is in accordance with normal practice as contemplated under the Title V rules. Here there is one owner and two or more emission units, possibly with separate SIC codes. The common owner gets to apply for the permit.

Case 5. A naval base owns radionuclides and complies with the National Emission Standards for Hazardous Air Pollutants (NESHAPs) rules regarding their handling. The handling includes use at a shipyard doing contract work for the naval base. The shipyard is separately permitted from the naval base and not otherwise subject to the NESHAPs; it is also located separately. Which entity should include the radionuclides in its emission inventory and/or its Title V application?

Resolution of Case 5. The shipyard should include the radionuclides in its Title V application, because they are regulated air pollutants[16] which must be included.[17] Because it is not co-located with the naval base, the shipyard is a separate source in its own right which must be evaluated for major status under Title V. This makes sense, inasmuch as the shipyard may have contracts with a number of bases.

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[15] This conclusion is consistent with the EPA guidance on military bases, to the effect that leased facilities are not under common control, while contracted activities are. See the landlord-tenant discussion above (part **II.A.** of this Memo).

[16] By virtue of their regulation by a NESHAP promulgated pursuant to э 112 of the federal Clean Air Act. See 40 CFR Part 61, sub-part I, э 61.100 et seq.

[17] See 9 VAC 5-80-90.D.1., which requires a Title V application to include emissions-related information on "all pollutants for which the source is major and all regulated air pollutants."

The naval base may also be subject to regulation for radionuclides under Title V, depending on its emissions. In that case, the naval base should include radionuclides in its Title V application.

Case 6. Two facilities, A and B, occupy adjoining lands and are both owned by Company A. They share a SIC code. Company A wants them to be considered as separate facilities. If they were, one facility would be eligible for a state operating permit as a synthetic minor, and the other would be eligible for a real minor new source review permit or state operating permit. Company A claims that the facilities are separately managed and wants us to treat Facilities A and B as separate applicants. However, major decisions for both facilities are made by Company A. Should DEQ allow the facilities to be treated as separate?

Resolution of Case 6. No. The case for Facilities A and B being a single stationary source is compelling. The two facilities undertake the same type of industrial activity (same SIC code); they are on adjacent properties; and they are commonly owned and, from the facts presented, commonly controlled. These factors, under the definition, give rise to a presumption of common control.

If Company A wishes to rebut the presumption, the DEQ Regional Office should work with the DEQ Central Office to resolve the matter. DEQ must ask the Office of the Attorney General (OAG) for assistance whenever an inquiry is to be made into the corporate structure of a company or companies with intertwined ownership or control. The factors mentioned in part **I.C.** of this Memo (above) are, to a great extent, legal questions and may be difficult to penetrate without the aid of the Office of the Attorney General.

Case 7. Two companies, A and B, set up a third, limited-liability company, C. A and B each own 50% of C, and C is composed of two entities which are wholly-owned subsidiaries of A and B. C has its own directors, shareholders, capital structure, management, operations, business purposes and customers, contractual arrangements, and legal existence. Half of the directors of C are appointed by A, and half by B. C occupies a site adjacent to the site of A. (B's facilities are elsewhere.)[18] May A and C apply separately for Title V permits or must they apply together?

Resolution of Case 7. A and C are under common control, notwithstanding the separateness suggested by the factors listed above, because A is half of a joint venture, the object of which

[18] See September 30, 1997 letter from Dupont's attorney to EPA Region II, pages 1-7 (letter is attached to January 28, 1998 letter from EPA Region III to DEQ).

is the operation of C. A and B have a common interest in C, and the fact that A has 50% ownership of C supports the proposition that A can exert control over the decisions of C.[19] Effectively, the half ownership, and half of the control, of C by A "trumps" any argument by A that C is a separate and distinct entity by virtue of its support and dependency analysis.

B. Hypothetical examples.

The examples which follow, like the foregoing examples, are not to be regarded as exhausting all possibilities. These examples are made up to illustrate common control and related concepts.

Case A. Companies A and B own adjacent Facilities A and B, but Company B takes over Company A six months after completing the construction of Facility B. What is the permit application responsibility of each company?

Resolution of Case A. In this variation, it is clear that the adjacent facilities have become a single stationary source, subject to common control. Therefore, Company B must apply for a Title V permit. If permits are already in hand, Company B must apply for an administrative permit amendment, under which the two permits will be merged.

Case B. Company A owns three adjacent plants having potential to emit a combined total of 240 tons of pollutants as follows:

Plant #1 - 30 tons of HAPs, none of which is VOC

Plant #2 - 90 tons of VOC

Plant #3 - 120 tons of VOC.

Company A sells a half interest in Plant #3 to Company B. Company A then sells a half interest in Plant #1 to Company C. What is the permit application responsibility of each company?

Resolution of Case B. Company A has responsibility for the Title V permit application, since it owns and controls the three plants in the first place. If, on the other hand, the Title V applicability analysis were to be applied after the exchanges described, the controlling interest, or a common plant manager, would have responsibility for the emissions and the permitting for all three plants. Notice that there is no attempt here to pro-rate emissions for purposes of a common control determination; such efforts would produce unnecessary difficulty and confusion, inasmuch as emissions shares might change from time to time.

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[19] See November 25, 1997 letter from EPA Region II to Dupont's attorney, pages 2-3 (letter is attached as in footnote 18).

Case C. Company A owns a manufacturing facility on the west side of a country road that goes north and south. It owns a distribution facility on the east side of the road that ships the products of the manufacturing plant. The manufacturing plant has emissions units of several varieties; so does the distribution plant, although its mix of emission units is different. How many applications must Company A file for Title V permits?

Resolution of Case C. One. This facility meets the criteria for stationary source, in all respects except possibly the SIC codes. The properties can be regarded as contiguous, considering that the only separation is a road. They are commonly owned and controlled. Moreover, the manufacturing plant is a support facility for the distribution plant in that it provides what is needed to keep the distribution plant functioning (or vice-versa, since the distribution plant keeps the manufacturing plant going by shipping its products).

Case D. Same facts as Case C, except that the distribution facility is on the west side of Roanoke and the manufacturing plant is on the east side. How many applications must be filed?

Resolution of Case D. Two. The facilities' separation is sufficient to fail the "contiguous or adjacent properties" criterion.

Case E. Company A owns Facility A, a Title V major source. Company B owns a portable Facility B, not Title V in its own right, that is used at Facility A according to a rental agreement, for part of the time. The rest of the time, Facility B is used at places other than Facility A. What is the permit application responsibility of each company?

Resolution of Case E. Company A should include Company B's activities at Facility A in Company A's permit application. This may require a detailed contract between A, as the landlord, and B, as the contractor or tenant, relative to matters such as these:

work practices
times of use, and duration (estimated worst case)
materials and equipment used
operating conditions
maximum emissions
record-keeping responsibilities
control technology
reporting responsibilities

Case F. Company A owns Facility A, a Title V major source with a number of emission units, Units 1 through 10. Unit 10 is portable and is hired out to Company B, a Title V major source, for use at Company B's facility. Unit 10 is hired out to other companies as well. Some of these are Title V sources and some are

not. Unit 10 has its own emission controls which are different from those at companies where it is contracted. What are the permitting responsibilities with respect to Unit 10?

Resolution of Case F. Unit 10 should be permitted as part of Company A's application and treated as a temporary source. The Department, in writing the permit, should ensure that Unit 10 meets all applicable requirements at every location in Virginia where it is used under the permit and that Company A notifies the Department at least 15 days before Unit 10 is moved from place to place.[20] In the event Unit 10 is moved out of state, we can not specify that it meet applicable requirements there, because our jurisdiction does not extend out of state; but we can require notice of movements. Notice that when the unit is used at Company B, the unique emission controls may be subject to different applicable requirements than those written in Company B's permit, because the controls are different and because Company B may have pre-existing applicable requirements that are different in any case. If, on the other hand, Company B seeks a permit applicability determination when it is using Company A's Unit 10, then Company B should be required to include Unit 10, and the applicable requirements pertaining to it, in its application. This is in keeping with the EPA guidance mentioned previously.[21]

[20] 9 VAC 5-80-130.C.1., -C.2.

[21] EPA guidance to Minnesota, page 1.