UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

DEC 21 2012

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: Applicability of the Summit Decision to EPA Title V and NSR Source Determinations

FROM: Stephen D. Page, Director
Office of Air Quality Planning and Standards

TO: Regional Air Division Directors, Regions 1-10

The purpose of this memo is to explain the applicability of the decision by the 6th Circuit Court of Appeals to vacate and remand a title V applicability determination made by the EPA for Summit Petroleum's oil and gas operations in Michigan.

In Summit, the EPA had decided that, under our existing source determination regulations, the oil and gas sweetening plant and related wells owned and operated by Summit Petroleum were a single stationary source for purposes of the Clear Air Act title V operating permit program. As a single source, the aggregate emissions from these operations were high enough to trigger the requirement to obtain a title V operating permit. Summit Petroleum then challenged that determination in the 6th Circuit, and the Court ultimately issued a decision that vacated and reversed our determination. *Summit Petroleum Corp. v. EPA et al.*, Consolidated Case Nos. 09-4348 and 10-4572 (6th Cir. Aug. 7, 2012). The Court's majority decision concluded that the term "adjacent", as used in our regulations, was related only to physical proximity and, thus, found that our determination was improper, because we had considered the functional interrelatedness of the wells and sweetening plant in determining that they were "adjacent." The EPA sought rehearing of the Court's decision, but that request was denied.

The EPA has a longstanding practice of interpreting "adjacent" to include a consideration of the functional interrelatedness of two emission units, in addition to the physical distance between them, in making source determinations in both the title V and new source review (NSR) programs. Because of the Court's decision, however, the EPA may no longer consider interrelatedness in determining adjacency when making source determination decisions in its title V or NSR permitting decisions in areas under the jurisdiction of the 6th Circuit, i.e., Michigan, Ohio, Tennessee and Kentucky. The EPA is still assessing how to implement this decision in its permitting actions in the 6th Circuit.

Outside the 6th Circuit, at this time, the EPA does not intend to change its longstanding practice of considering interrelatedness in the EPA permitting actions in other jurisdictions. In permitting actions occurring outside of the 6th Circuit, the EPA will continue to make source determinations on a case-by-case basis using the three factor test in the NSR and title V regulations at 40 CFR 52.21(b)(6) and 71.2, respectively, and consistent with more than three decades of the EPA applicability determinations and guidance letters regarding application of those criteria, which have considered both proximity and

interrelatedness in determining whether emission units are adjacent. The three factor test considers emission-producing activities to constitute a single source if they are:

- under common control of the same person (or persons under common control);
- located on one or more contiguous or adjacent properties; and
- in a single major industrial grouping (the same two-digit SIC code).

The EPA is assessing what additional actions may be necessary to respond to the Court's decision.

Please share this information with potential permit applicants, as well as the state and local agencies in your Region. For any questions regarding this guidance, please contact Raj Rao at rao.raj@epa.gov.

cc: Regional Air Program Managers