



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

FEB 12 2020

Brett A Sago
Director, HSE Legal Services
Eastman Chemical Company
P.O. Box 511
Kingsport, Tennessee 37662-5075

Dear Mr. Sago:

On August 12, 2019, the U.S. Environmental Protection Agency (EPA) received your letter requesting that EPA reconsider two prior EPA source determination letters and reverse EPA's prior opinion that the operations of three companies (Eastman Chemical Resins, Inc., Arkema Inc., and Solenis LLC) should be considered a single source for Clean Air Act (CAA) permitting purposes (the 2019 Eastman Request).

Specifically, your request relates to whether these operations should collectively be considered part of the same "major source" for the operating permit program under Title V of the CAA and/or part of the same "stationary source" for the New Source Review (NSR) preconstruction permit programs under Title I of the CAA. EPA commonly refers to these types of questions as "source determinations." Under the federal rules governing these permitting programs, entities are considered part of the same "major source" or "stationary source" if they (1) belong to the same industrial grouping (2-digit "Major Group" Standard Industrial Classification (SIC) code); (2) are located on one or more contiguous or adjacent properties; and (3) are under the control of the same person (or persons under common control).¹ The Virginia Department of Environmental Quality (VADEQ)—the permitting authority for these facilities—has EPA-approved regulations mirroring EPA's.²

EPA understands that the Eastman, Arkema, and Solenis operations all share the same major group SIC code and are located on contiguous properties (the "Franklin Site") in Courtland, Southampton County, Virginia. Thus, determining whether these operations constitute a single source has historically depended on whether the activities are under common control. Previously, in response to a 2004 request from VADEQ for EPA's opinion, EPA provided a letter finding "an element of common control among the three companies" and concluding that the three operations "should be considered one facility for applicability purposes of the [CAA] requirements."³ After additional factual developments VADEQ believed relevant to the common

¹ See 42 U.S.C. § 7661(2) (Title V statutory definition); 40 CFR §§ 70.2 and 71.2 (Title V regulations); *id.* §§ 52.21(b)(5) and (6), 51.165(a)(1)(i) and (ii), and 51.166(b)(5) and (6) (NSR regulations).

² See 9VAC5-80-60 (Title V); 9VAC5-80-1615 (PSD); 9VAC5-80-2010 (NNSR).

³ Letter from David J. Campbell, EPA Region III, to Tamera Thompson, VADEQ (September 30, 2004).

control inquiry, and in response to a 2009 request from VADEQ for EPA’s opinion, EPA provided a second letter affirming its conclusion that, notwithstanding the changed circumstances, “there is sufficient common control” to determine that the three operations are a single source for permitting purposes.”⁴ In subsequent permitting actions, VADEQ has treated the three operations as a single source (although it issued each operation a separate title V permit out of administrative convenience).

Eastman now requests that EPA reconsider and reverse its opinion that Eastman, Arkema, and Solenis are under common control. Eastman notes that in EPA’s April 30, 2018 *Meadowbrook Letter*,⁵ EPA announced a revised policy and interpretation concerning common control in the context of NSR and title V source determinations. As Eastman observes, EPA’s approach articulated in *Meadowbrook* differs from the approach applied in EPA’s 2004 and 2009 letters concerning the three companies at issue here. Eastman presents its analysis of the relevant facts in light of EPA’s new *Meadowbrook* framework, and concludes: “Applying EPA’s revised interpretation of common control, the three facilities located at the Franklin Site are not under common control and should not be considered one facility for applicability purposes of the CAA requirements.” 2009 Eastman Request at 3. Accordingly, Eastman requests that EPA reverse its prior opinion “[b]ased on EPA’s recent *Meadowbrook* determination and its revised interpretation of the term ‘common control.’” *Id.* at 6.

EPA recognizes that the *Meadowbrook Letter* did not directly address the extent to which EPA was recommending that permitting authorities apply EPA’s new source determination policies and interpretations prospectively rather than retroactively. However, more recent EPA letters and guidance memoranda have explained EPA’s position on this issue. For example, in the July 12, 2019 *Ocean County Landfill Letter*, EPA explained:

[A]s a general matter, the guidance contained in EPA’s recent documents concerning common control was intended to assist with future source determinations and was not intended to prompt permitting authorities to revisit prior permitting decisions. EPA does not believe it would be appropriate in most circumstances for permitting authorities to re-evaluate prior source determinations based solely on the change in EPA policy on which the 2018 OCLC Letter relies,

⁴ Letter from Kathleen Anderson, EPA Region III, to Jane Workman, VADEQ (November 19, 2009).

⁵ See Letter from William L. Wehrum, Assistant Administrator, EPA Office of Air and Radiation, to the Honorable Patrick McDonnell, Secretary, Pennsylvania Department of Environmental Protection (April 30, 2018), available at https://www.epa.gov/sites/production/files/2018-05/documents/meadowbrook_2018.pdf. Additionally, although not discussed in the 2019 Eastman Request, other recent EPA letters further clarify EPA’s current policies and interpretations concerning common control. See Letter from Anna Marie Wood, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards, EPA, to Gail Good, Director, Bureau of Air Management, Wisconsin Department of Natural Resources (October 16, 2018), available at https://www.epa.gov/sites/production/files/2018-10/documents/ameresco_jcl_letter.pdf; Letter from Anne L. Idsal, Acting Assistant Administrator, EPA Office of Air and Radiation, to the Honorable Catherine McCabe, Commissioner, New Jersey Department of Environmental Protection (July 12, 2019) (*Ocean County Landfill Letter*), available at https://www.epa.gov/sites/production/files/2019-08/documents/ocean_county_landfill2019.pdf; Letter from Carl Daly, Acting Director, Air and Radiation Division, EPA Region VIII, to Danny Powers, Air Quality Program Manager, Southern Ute Indian Tribe (July 23, 2019), available at <https://www.epa.gov/sites/production/files/2019-10/documents/jaques2019.pdf>.

especially where, as is the case with the OCLC request, relevant facts have not changed.⁶

Similarly, in EPA’s recent guidance on the interpretation of “adjacent,” EPA explained:

EPA encourages permitting authorities that choose to apply EPA’s current interpretation of “adjacent” to do so prospectively and not retroactively. Thus, EPA recommends that state, local, and tribal permitting authorities apply this interpretation from this point forward when those authorities are for the first time assessing the relevant facts and circumstances governing whether a given set of activities should be considered a single source for purposes of NSR and title V. In most situations, EPA expects that it would not be appropriate or necessary for permitting authorities to revisit prior source determinations based solely on a change in an EPA policy or interpretation. Not only could this upset potential settled expectations, but it could result in an unmanageable strain on limited resources for permitting authorities (and, in some cases, EPA). However, there may be circumstances where it could be appropriate (and not unduly burdensome) for a permitting authority to re-evaluate a prior source determination, such as where relevant facts change that impact whether the three criteria are met. If a permitting authority does revisit a prior source determination (e.g., based on changed facts), EPA recommends that such a re-evaluation apply prospectively to future permitting actions and not retroactively to permitting actions that have been completed. Therefore, in most circumstances, EPA does not think it would be appropriate to revisit or revise previously-issued final permit actions that were based on a reasonable application of regulatory requirements and then-existing policies to a given set of facts. Like other aspects of the memorandum, EPA’s recommendations on this issue are not binding on permitting authorities.⁷

This discussion applies equally well to EPA’s changed policy and interpretation of common control.

Although EPA’s current interpretation and policy utilizes a different approach when evaluating for the first time whether certain facts establish common control, VADEQ need not re-evaluate its determination on the single source status of Eastman, Arkema, and Solenis solely based on a change in EPA’s guidance concerning common control.

Here, Eastman has not presented—and EPA is not aware of—any changed facts that would warrant a re-evaluation of the single source status of the Eastman, Arkema, and Solenis operations. Given this, and that VADEQ has not presently requested assistance from EPA, EPA declines to reexamine the relevant facts under EPA’s new guidance at this time or provide an

⁶ *Ocean County Landfill Letter* at 2.

⁷ Memorandum from Anne L. Idsal, Acting Assistant Administrator, EPA Office of Air and Radiation, to EPA Regional Administrators, Interpreting “Adjacent” for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas at 9–10 (November 26, 2019) (footnotes omitted), *available at* https://www.epa.gov/sites/production/files/2019-11/documents/adjacent_guidance.pdf. *See also id.* at 9 n.39 (“This is particularly true where EPA’s prior policies and the permitting authority’s prior decisions were not unreasonable or contrary to the Act.”).

updated recommendation to VADEQ regarding whether these operations are under common control. VADEQ is the EPA-approved permitting authority for Eastman, Arkema, and Solenis. Just as VADEQ was not required to follow EPA's prior non-binding advisory letters, VADEQ need not re-evaluate its prior permitting decisions (or the source determination upon which these decisions were based) solely due to a change in EPA policies or interpretations.

If you have any additional questions, please contact Mary Cate Opila of my staff at (215) 215-2041.

Sincerely,

/s/

Cristina Fernandez, Director
Air and Radiation Division

cc: Laura Corl, VADEQ
Tamera Thompson, VADEQ