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## Contemplating Aggregation In Pursuits of Conservation: Clean Air Council v. Commonwealth and the Project Aggregation Principle

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CONTEMPLATING AGGREGATION IN PURSUIT OF  
CONSERVATION: *CLEAN AIR COUNCIL V.*  
*COMMONWEALTH* AND THE PROJECT  
AGGREGATION PRINCIPLE

I. INTRODUCTION

In *Clean Air Council v. Commonwealth*,<sup>1</sup> the Pennsylvania Environmental Hearing Board (the Board) considered whether the Pennsylvania Department of Environmental Protection (the Department) erred in treating one of numerous projects in furtherance of a facility repurposing project as a separate and distinct project, when it should have been considered in the aggregate with other projects.<sup>2</sup> The concept of combining the environmental effects of numerous projects where they are sufficiently related is called project aggregation.<sup>3</sup> This determination directs whether the environmental impact of each project should be assessed on its own or should be aggregated with those of other ongoing projects.<sup>4</sup> Determining whether multiple projects should be treated separately or as one has shown to be complex, but in the instant case the Board ultimately found aggregation appropriate.<sup>5</sup>

The Board considered numerous factors in order to determine whether the environmental impact from each project should be considered a component of an overarching plan to repurpose the Marcus Hook facility.<sup>6</sup> In mandating the aggregation of each project's environmental impact, the Board's decision effectively ended businesses' ability to make use of "creative permitting" to circumvent pertinent environmental regulations.<sup>7</sup> This decision prioritizes environmental and air quality protection, as well as provides guidance for Environmental Hearing Boards and similar entities

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1. *Clean Air Council v. Commw. of Pa.*, No. 2016-073-L, 2019 WL 267762 (Pa. Env'tl. Hearing Bd. Jan. 9, 2019).

2. *See id.* at \*1 (introducing issue of present case).

3. *Clean Air Council*, 2019 WL 267762, at \*25 (introducing idea of project aggregation).

4. For a further discussion of the factors to be considered in contemplating aggregation, see *infra* notes 118-163 and accompanying text.

5. *Id.* at \*25, \*41 (concluding emissions from Project E should have been aggregated with emissions from earlier projects).

6. For a further discussion of the factors to be considered in contemplating aggregation, see *infra* notes 118-163 and accompanying text.

7. *See generally Clean Air Council*, 2019 WL 267762, at \*24 (criticizing practice of "creative permitting").

going forward.<sup>8</sup> There is not much guidance surrounding the proper method of assessing the environmental impact of new construction and modifications, particularly where numerous projects are carried out at the same site or for the same purpose.<sup>9</sup> The lack of a bright-line rule exacerbates confusion surrounding the principle, making it difficult to determine when components of a multi-part project should be assessed individually or viewed together in their entirety.<sup>10</sup>

This Note evaluates the principle of project aggregation and its application in the context of infrastructure construction and modification.<sup>11</sup> First, the facts of the case before the Board will be discussed, with a focus on the defining features of each project.<sup>12</sup> This Note will subsequently provide an overview of the law surrounding project aggregation, including the operation of the project aggregation principle in other contexts and a past decision of the Board.<sup>13</sup> This discussion will lead into the Board's analysis, highlighting factors the Board found persuasive in its decision to order aggregation.<sup>14</sup> This Note will then offer ideas for a clearer way to evaluate whether aggregation is appropriate, such as a rebuttable presumption that is consistent with legislative intent and conservationist efforts.<sup>15</sup> Finally, this Note will predict the significance and anticipated impact of the Board's decision.<sup>16</sup>

## II. FACTS

Sunoco Partners Marketing & Terminals, L.P. (Sunoco) owned a facility in Marcus Hook, Pennsylvania that operated as a crude oil

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8. For a further discussion of the potential impact of this decision, see *infra* notes 188-204 and accompanying text.

9. For a further discussion of various guidance surrounding the principle of project aggregation, see *infra* notes 73-109 and accompanying text.

10. For a further discussion of insight surrounding the principle, see *infra* notes 73-109 and accompanying text.

11. For a further discussion of the pertinent infrastructure construction and modification, see *infra* notes 17-39 and accompanying text.

12. For a further discussion of the facts of the case before the Board, see *infra* notes 17-59 and accompanying text.

13. For a further discussion of the landscape of the law surrounding project aggregation, see *infra* notes 60-109 and accompanying text.

14. For a further discussion of the Board's analysis and reasoning, see *infra* notes 110-63 and accompanying text.

15. For a further inquiry into the Board's analysis, see *infra* notes 164-187 and accompanying text.

16. For a further discussion of the potential impact of this decision, see *infra* notes 188-204 and accompanying text.

refinery until 2011.<sup>17</sup> In 2012, Sunoco began the process of converting the property into a fractionation facility.<sup>18</sup> The fractionation process involves “separating out the various component products” of a natural gas liquid (NGL).<sup>19</sup> The repurposed facility would house the actual process of fractionation, as well as receiving, storing, and disbursing the NGLs.<sup>20</sup>

For the entire overhaul of the Marcus Hook facility, there were six sub-projects: I, A, B, C, D, and E.<sup>21</sup> Sunoco’s plans also included a request for determination (RFD) 5236, which involved the installation of two new storage tanks, but the Department determined plan approval was not necessary.<sup>22</sup> Project I involved the installation of storage tanks for cryogenic propane and ethane, piping to receive and transport the liquids, and a new flare for emergency purposes.<sup>23</sup> This project would allow for the delivery and receipt of liquified propane and ethane through one of the existing pipelines, utilizing an existing cavern for storage but also requiring the introduction of additional piping.<sup>24</sup>

One month later, Sunoco submitted an application for Project A.<sup>25</sup> This project involved the installation of a deethanizer unit, numerous treatment systems, and required piping.<sup>26</sup> NGLs process through deethanizer units, which is a main part of the fractionation process.<sup>27</sup> Sunoco planned to support the deethanizer unit with steam from preexisting boilers, and its application incorporated

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17. *See Clean Air Council v. Commw. of Pa.*, No. 2016-073-L, 2019 WL 267762, at \*1 (Pa. Envtl. Hearing Bd. Jan. 9, 2019) (explaining facility’s prior use).

18. *See id.* at \*2-3 (revealing new purpose of facility). Sunoco’s repurposing project commenced with its application for Project I in November of 2012. *Id.* at \*3 (describing project).

19. *Id.* at \*1 (introducing fractionation process).

20. *See id.* (outlining new intended purpose of facility).

21. *Id.* at \*21 (introducing multiple phases of Sunoco’s project).

22. *Clean Air Council*, 2019 WL 267762, at \*19 (stating installation of two storage tanks was minor enough to not require its own project application or approval). Request For Determination (RFD) 5236 was also part of Sunoco’s overall repurposing plans. *Id.* (noting function of RFD 5236). RFD 5236 was insignificant enough, only involving the installation of two new storage tanks, that the Department determined project application and approval was not necessary. *See id.* (excluding RFD from the plan approval process). For the purposes of this Note, RFD 5236 will not be included as a sub-project. *Id.* (focusing on more significant projects).

23. *See id.* at \*3-6 (outlining project purposes).

24. *Id.* at \*4 (describing processes of projects).

25. *Id.* at \*5 (proposing new project).

26. *Id.* (identifying features of Project A).

27. *Clean Air Council*, 2019 WL 267762, at \*6 (noting relevance of deethanizer units to overall repurposing).

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“[a]ll the sources and associated emissions from . . . [Plan Approval 1]’” into the infrastructure and processes of Project A.<sup>28</sup>

Two weeks after Project A was approved, Sunoco submitted an application for Project B.<sup>29</sup> Project B entailed the installation of a loading area to send and receive truck deliveries of natural gasoline.<sup>30</sup> The project also involved the repurposing of an existing fractionation tower and storage tanks, where natural gas feedstock would be “fractionated and stored[ ] . . . prior to being off-loaded onto tanker trucks . . . .”<sup>31</sup> The Department considered whether Projects 1, A, and B should be combined into one common plan, but ultimately decided there were enough differences in the projects’ sources and processes to decline linking the projects or aggregating their emissions.<sup>32</sup>

Projects C and D followed shortly thereafter.<sup>33</sup> Project C offered a new cooling tower primarily to serve the deethanizer from Project A, but the tower was deliberately designed to be larger than necessary to allow for service of future projects.<sup>34</sup> Through Project D, Sunoco implemented a combination of new infrastructure and existing equipment to allow for increased flow of NGLs into the Marcus Hook facility.<sup>35</sup> The primary purpose of Project D was to increase the overall work capacity of the facility, particularly in connection with Project A.<sup>36</sup>

Finally, Project E was proposed in September 2015.<sup>37</sup> Project E involved the installation of new equipment as well as the modification and expansion of preexisting infrastructure.<sup>38</sup> Similar to Project D, this project was intended to increase and “max out” the facility’s work capacity.<sup>39</sup> This final project was the main issue in the present case.<sup>40</sup> These separate project proposals were submit-

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28. *Id.* at \*5 (explaining use of pre-existing structure).

29. *See id.* at \*7 (explaining Project B).

30. *Id.* (introducing primary component of Project B).

31. *Id.* at \*7-8 (noting pre-existing structure and detailing new modifications).

32. *Clean Air Council*, 2019 WL 267762, at \*9 (declining to aggregate projects where there are sufficient differences in sources).

33. *See id.* at \*10-14 (outlining Projects C and D).

34. *Id.* at \*10 (noting connection between Projects A and C).

35. *Id.* at \*12 (highlighting interrelated components of Project D).

36. *Id.* (explaining specific interdependence of Projects A and D). Additionally, “Project D was an expansion on Projects 1, A, and C.” *Id.* at \*21 (explaining significance of Project D).

37. *Clean Air Council*, 2019 WL 267762, at \*14 (introducing Project E).

38. *See generally id.* at \*14-17 (noting design of Project E).

39. *Id.* at \*15 (explaining purpose of Project E).

40. *See generally id.* at \*18-19 (highlighting Project E as main point of contention in this dispute).

ted over the course of forty months, beginning with the application for Project I in November of 2012, and ending with the Department's approval of Project E in April of 2016.<sup>41</sup>

The Department, therefore, analyzed each project individually to calculate potential emissions increases.<sup>42</sup> These calculations would have been relevant if the emissions increased above a specified threshold, as an increase can impose additional regulatory requirements in order to proceed with construction.<sup>43</sup> The two pertinent applicability determinations in this dispute were Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR).<sup>44</sup> These regulations exist at both state and federal levels and aim to limit emissions and prevent further air pollution.<sup>45</sup> The location of the new or modified source, along with whether it will emit a regulated pollutant, determines the applicability of these regulations.<sup>46</sup>

The Department conducted NSR and PSD determinations for each project.<sup>47</sup> Only Project B exceeded a program threshold, while the remainder of the projects were deemed to not trigger any further environmental requirements.<sup>48</sup> "Plan Approvals I through D were not appealed to the [Board]," with the only point of contention being the potential for emissions increases if Project E was aggregated with another project.<sup>49</sup> As the Clean Air Council

41. *See id.* at \*20 (emphasizing timeline of project proposals were submitted and approved). Often, project proposals were submitted before the preceding proposal had even been accepted. *Id.* (exemplifying nature and magnitude of projects).

42. *See Clean Air Council*, 2019 WL 267762, at \*25 (noting Department's analysis of each individual project).

43. *See generally id.* at \*25 (observing relevance of emissions increases).

44. *Id.* at \*24 (explaining when PSD and NSR are applicable).

45. *See id.* (featuring existence of relevant regulations at both state and federal levels).

46. *Id.* at \*25 (contemplating aggregation for purposes of determining PSD and NSR applicability).

47. *See Clean Air Council*, 2019 WL 267762, at \*2-19 (conducting applicability determinations for each project). Projects I, A, and D did not exceed thresholds for either program. *Id.* at \*4, 6, 14 (providing applicability determinations for Projects I, A, and D). Project B was determined to exceed only NSR standards. *Id.* at \*9 (providing applicability determination for Project B). Project C's emissions were aggregated with Project A's because the Department "linked" the two projects, but "[t]he Department concluded that the emission increases from the Plan Approval A work combined with the emissions from the Plan Approval C work would not have on their own triggered NSR . . .," so no further regulation was necessary. *Id.* at \*11, \*14 (providing applicability determination for Project C).

48. *See id.* at \*9 (concluding Project B exceeded NSR program thresholds).

49. *See id.* at \*14 (noting work for Projects I through D was not main point of contention in this appeal).

(Council) highlighted in its argument, however, this determination did not consider “whether aggregated Projects 1 through E would trigger PSD significance thresholds.”<sup>50</sup> As part of its determination, the Department concluded Project E should not be linked with Project 1, A, B, C, or D, and it was deemed a stand-alone project.<sup>51</sup> The Department reasoned there were substantial enough differences in the sources, processes, and purposes of each project so it was not appropriate to “link” Project E with any of the other ongoing projects.<sup>52</sup> The plans for each project were approved with no further action or assessment needed and Sunoco began to advance its repurposing project.<sup>53</sup>

In 2018, the Council, an interest group in Philadelphia, challenged the Department’s 2016 decision to treat Project E as separate and distinct from the other projects.<sup>54</sup> The Council argued it was erroneous for the Department to treat Project E as a stand-alone project when it should have been aggregated with the other projects.<sup>55</sup> The Council reasoned it was “merely one component of a much larger project involving the transformation of the Marcus Hook facility from a crude oil refinery into an NGL hub.”<sup>56</sup> In determining whether the emissions from each component project should have been calculated together, the Department first needed to delineate each sub-project to evaluate if it was able to stand on its own.<sup>57</sup> The Board determined the Department’s original conclusion that Project E was a stand-alone project was factually unsubstantiated, ultimately agreeing with the Council and reversing the Department’s determination.<sup>58</sup> When Sunoco’s overall plans for the overhaul of the Marcus Hook facility were viewed together, the Board found the projects to be interrelated, building and feeding

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50. *Id.* at \*19 (failing to consider whether aggregated emissions would reach PSD or NSR threshold).

51. *Clean Air Council*, 2019 WL 267762, at \*18-19 (determining Project E was separate from other projects mainly due to differences in sources).

52. *Id.* (choosing not to “link” Project E with prior projects).

53. *See id.* at \*23 (closing Department review process).

54. *See id.* at \*24 (explaining nature of appellant’s argument). The Clean Air Council also contended the Department erred in its categorization of emission sources – as new, modified existing, or unmodified existing – and that this error caused the Department’s emissions calculations to be too low, further allowing Sunoco to avoid PSD and NSR requirements. *Id.* (expounding on basis for appellant’s argument).

55. *Id.* (outlining Council’s main contention of Department’s error).

56. *Clean Air Council*, 2019 WL 267762, at \*24 (arguing projects were all part of larger project).

57. *Id.* at \*25 (requiring Department to decide whether seemingly distinct projects actually make up one major project).

58. *Id.* at \*27 (deciding in favor of Clean Air Council).

off one another, and determined Project E should have been linked with numerous others.<sup>59</sup>

### III. BACKGROUND

The Pennsylvania legislature passed the Air Pollution Control Act (the Act) in 1959 to “protect the air resources of the Commonwealth,” in the best interest of its citizens, wildlife, and environment.<sup>60</sup> The Act created the Department and gave it authority to administer and enforce the Act.<sup>61</sup> Furthermore, the Act created the Board, granting it the authority to review decisions of the Department.<sup>62</sup> PSD and NSR regulations exist at both the state and federal levels and aim to limit emissions and prevent further air pollution.<sup>63</sup> The Pennsylvania legislature mirrors federal PSD and NSR programs which were implemented “to ensure that new emissions do not cause air quality to deteriorate significantly.”<sup>64</sup>

When considering a modification project, the Department looks at each potential source of emissions and categorizes it as new, existing and modified, or existing and unmodified.<sup>65</sup> This distinction is important as each designation entails a different method for calculating emissions.<sup>66</sup> If the Department’s calculations show the new construction or modification will cause a significant increase in emissions, further action will be required and adjustments in the projects may be made in order to comply with these PSD and NSR requirements.<sup>67</sup> The question ultimately becomes whether emissions of a multi-part project should be evaluated in terms of each phase or in the aggregate as one large project.<sup>68</sup>

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59. See generally *Clean Air Council*, 2019 WL 267762, at \*27 (viewing sub-projects as one project).

60. Air Pollution Control Act, 35 P.S. § 4002 (Supp. 2000) (discussing Act’s purposes).

61. *Id.* § 4004 (defining authority of Department of Environmental Protection).

62. *Id.* § 4006 (describing power of Environmental Hearing Board).

63. See *Clean Air Council*, 2019 WL 267762, at \*27 (discussing adoption of various environmental programs). Though the Act is a Pennsylvania statute, there are federal environmental laws and regulations that apply and must also be taken into consideration, such as the Clean Air Act, which introduced the concept of project aggregation. *Id.* at \*1, \*2, \*41 n.1 (noting relevant federal considerations).

64. See *id.* at \*2, \*27 (highlighting Pennsylvania’s incorporation of PSD regulations); see also *id.* at \*41 n.1 (drawing connection between Pennsylvania NSR programs and federal NSR programs).

65. See *id.* at \*2 (differentiating calculations for various sources).

66. *Id.* (noting emissions calculation procedure for new construction or modification).

67. *Id.* at \*2-3 (explaining reason for source designation).

68. See *Clean Air Council*, 2019 WL 267762, at \*25 (explaining NSR threshold).



Prior Board decisions concluded where a project lacks clear boundaries, and it is not explicitly clear whether to treat projects as separate or as one, a number of factors should be considered.<sup>69</sup> The factors to be weighed and evaluated center around the degree of connection and interrelatedness.<sup>70</sup> Until a more concrete rule or standard is reached, closeness in time and space, project interdependence, a shared objective, and original conception of a single common plan will weigh in favor of the Department assessing emissions in the aggregate.<sup>71</sup> The Board will also consider legislative intent in enacting these regulations and will decide in a way that is consistent with the goals of the legislature's programs.<sup>72</sup>

#### A. Direction from the Legislature

Project aggregation applies when numerous repurposing and modification projects are sufficiently related so that the emissions calculations from each can be aggregated into one total for the entire project.<sup>73</sup> There has been significant debate surrounding how to apply project aggregation.<sup>74</sup> The Environmental Protection Agency (the EPA) has published guidance to give citizens and businesses a better idea of how to direct their activities around the project aggregation principle of the Clean Air Act, but the actual regulation has not changed.<sup>75</sup> The EPA's guidance also provides insight to bodies such as the Board and the Department who operate under a similar provision in their state.<sup>76</sup>

In administering the Clean Air Act, the EPA has typically required aggregation where multiple projects are only nominally separate and are implemented concurrently.<sup>77</sup> In January of 2009, in

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69. *Id.* at \*27 (noting room for discretion and error associated with lack of bright line rule).

70. For a further discussion of the factors to be considered in contemplating aggregation, see *infra* notes 118-163 and accompanying text.

71. See *Clean Air Council*, 2019 WL 267762, at \*27 (describing factors that weigh in favor of aggregation).

72. *Id.* (highlighting relevance of legislative intent).

73. See *id.* at \*25 (introducing concept of project aggregation).

74. See *id.* at \*37 (noting lack of clear instruction on application of aggregation).

75. See Walter Wright, *Project Aggregation/Clean Air Act: U.S. Environmental Protection Agency Concludes Reconsideration of 2009 Guidance*, JDSUPRA (Nov. 14, 2018), <http://www.jdsupra.com/legalnews/project-aggregation-clean-air-act-u-s-82592/> (explaining back and forth of eliminating aggregation principle).

76. See *generally id.* (providing guidance to other decision-making bodies).

77. David R. Wooley & Elizabeth M. Morss, *Clean Air Act Handbook: NSR issues-Other initiatives* (September 2019) (explaining traditional requirements for aggregation).

the Bush Administration's last few days, the EPA decided aggregation could not be required based solely on the timing of the projects.<sup>78</sup> It further adopted a rebuttable presumption that where projects occur three or more years apart, they are not substantially related and, thus, do not have to be aggregated.<sup>79</sup> In May of 2009, during former President Obama's first few months in office, the EPA withdrew its earlier decision and did not offer an updated interpretation.<sup>80</sup> The Trump administration recently adopted the January 2009 interpretation, including the rebuttable presumption that turns on timing.<sup>81</sup> Although many states, like Pennsylvania, mirror the EPA's approach in their own regulations, they are not required to because the EPA is issuing an interpretation, not a new rule or regulation.<sup>82</sup> The EPA has continuously sought to define the concept of project aggregation more clearly, but has been unable to do so.<sup>83</sup> There remains no clear rules or guidance as to how the principle should be applied, and there is scarce precedent on which the Board can rely.<sup>84</sup>

#### B. Direction from Other Courts

Though the Act, along with the Clean Air Act and the EPA, provides little insight into the application of the project aggregation principle, the principle exists in other contexts which may provide necessary guidance.<sup>85</sup> In order to provide an overview of the relevant law and appropriate application of project aggregation, the principle can be evaluated in the context of Housing and Urban Development.<sup>86</sup> Two cases in particular help demonstrate whether project aggregation is appropriate and how factors weigh in favor or against aggregation.<sup>87</sup>

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78. *See id.* (introducing difference in administrations' approaches).

79. *Id.* (outlining EPA's adopted rebuttable presumption)

80. *Id.* (noting subsequent administration's change in interpretation).

81. *Id.* (acknowledging most recent EPA's adoption of rebuttable presumption).

82. Clean Air Act Handbook, *supra* note 77 (noting states' discretion to follow EPA interpretation).

83. *See* Clean Air Council v. Commw. of Pa., No. 2016-073-L, 2019 WL 267762, at \*26 (Pa. Env'tl. Hearing Bd. Jan. 9, 2019) (pointing to lack of progress despite efforts to better define aggregation principle).

84. *Id.* (emphasizing lack of bright line rule to follow).

85. For a further discussion of project aggregation applied in other contexts, see *infra* notes 85-100 and accompanying text.

86. For a further discussion of appropriate application of project aggregation, see *infra* notes 85-93 and accompanying text.

87. For a further discussion of where project aggregation may not be appropriate, see *infra* notes 94-100 and accompanying text.

Residents of the Society Hill neighborhood of Philadelphia challenged the approval of an urban development plan in *Society Hill Towers Owners' Ass'n v. Rendell*.<sup>88</sup> The plan initially involved the construction of a festival park but later became plans for a hotel and parking garage.<sup>89</sup> Local residents challenged the plan approval on numerous grounds, including the Department's failure to assess the plan as multiple ongoing projects in furtherance of the overall development plan.<sup>90</sup> The residents contended the City was required to group activities in furtherance of the development plan into one overarching project, aggregating the environmental impact of each activity.<sup>91</sup> In the context of Housing and Urban Development, project aggregation requires projects "which are related on either a geographical or functional basis . . ." to be linked and viewed as one single project.<sup>92</sup> In this case, the plaintiffs prevailed, as the evidence demonstrated a connection between projects could not be severed without "destroying the proposed action's functionality."<sup>93</sup>

Local residents challenged the approval of a plan to update and expand the famous Congress Hall Hotel in *Lesser v. City of Cape May*.<sup>94</sup> The plaintiffs' relevant contention was that the City erred in bisecting the overall improvement plans into separate segments.<sup>95</sup> In doing this, the plaintiffs alleged the full environmental impact of the plans could not be appreciated.<sup>96</sup> Their contention rested on the principle of project aggregation.<sup>97</sup> The plaintiffs ultimately argued the plans should have been treated as one overarching project and the environmental effects should have been evaluated as a whole.<sup>98</sup> Though occurring at the same geographical location, the two segments served separate purposes and functioned independently of each other.<sup>99</sup> Due to this lack of interdependence, the

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88. See *Society Hill Towers Owners' Ass'n v. Rendell*, 20 F.Supp.2d 855, 860 (E.D. Pa. 1998) (highlighting relevant challenge to plan approval).

89. *Id.* at 861 (describing revised proposal).

90. *Id.* at 858 (outlining residents' challenges).

91. *Id.* at 869 (arguing for project aggregation).

92. *Id.* (quoting Housing and Urban Development regulations).

93. *Soc'y Hill Towers Owners' Ass'n*, 20 F.Supp.2d at 870 (quoting court's reasoning).

94. See *Lesser v. City of Cape May*, 110 F.Supp.2d 303, 305 (D.N.J. 2000) (outlining relevant challenge).

95. *Id.* at 306 (alleging erroneous bifurcation of repurposing plans).

96. *Id.* (rejecting division of project for environmental impact assessment).

97. *Id.* at 321 (explaining where aggregation is appropriate).

98. *Id.* (arguing aggregation was appropriate).

99. See *Lesser*, 110 F.Supp.2d at 323 (noting independence of projects phases).

court decided for the City, holding division of the overall project was permissible.<sup>100</sup>

### C. Prior Hearing Board Decisions

The Board faced an issue similar to the present case in *United Refining Co. v. Commonwealth*.<sup>101</sup> In that case, United Refining Company (United) engaged in the modification of a petroleum refinery, which it split into numerous phases.<sup>102</sup> The Department combined the separate projects, which United contended was erroneous.<sup>103</sup> United alleged it divided the project into phases for financial reasons and was not actively attempting to circumvent PSD or NSR requirements.<sup>104</sup> The inquiry into whether the phases should be aggregated, however, was unaffected by United's asserted justification for separating the projects.<sup>105</sup> Rather, the Board considered a number of factors to determine whether aggregation was proper.<sup>106</sup> The Board specifically noted the lack of a bright line rule, and stated:

Instead, the Department must independently consider such factors as the relationship of the various tasks measured in time and space, the tasks' operational, technical, and economic interdependence, whether the tasks are geared toward achieving a shared objective, whether the tasks were conceived originally as part of a common plan, and other relevant considerations.<sup>107</sup>

Analysis of these factors led the Board to determine that aggregation was appropriate, emphasizing the phases' shared objective and operational interdependence.<sup>108</sup> Thus, the Board held the De-

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100. *See id.* at 323 (emphasizing independent utility of phases).

101. *See* *United Refining Co. v. Commw. of Pa.*, No. 2007-100-L, 2008 WL 3833423 (Pa. Evtl. Hearing Bd. Aug. 7, 2008) (facing issue of project aggregation).

102. *Id.* at \*1 (identifying original purpose of facility).

103. *Id.* at \*6 (contending aggregation was erroneous).

104. *Id.* (justifying division for financial reasons).

105. For a further discussion on the dangers of allowing "creative permitting", see *infra* notes 195-198 and accompanying text.

106. *See* *United Refining Co.*, 2008 WL 3833423, at \*7-8 (outlining independent considerations for aggregation determination).

107. *Id.* at \*7 (quoting court's outlined factors).

108. *Id.* at \*8 (emphasizing shared objective and operational interdependence).

partment rightfully aggregated the separate phases of United's project.<sup>109</sup>

#### NARRATIVE ANALYSIS

The relevant inquiry regarding invocation of the project aggregation principle is whether multiple projects, which are related yet designated separate, should be considered a single project for NSR and PSD calculations.<sup>110</sup> In the present case, the Board affirmatively answered this inquiry.<sup>111</sup> Alternatively, if the Board had determined the projects were sufficiently unrelated, each project's environmental impact would have been viewed as independent of the others, with the only commonality being that the projects occurred at a single site.<sup>112</sup> Nevertheless, the Board applied the project aggregation principle, thus combining the emissions increases and environmental impact from each project into one comprehensive total.<sup>113</sup>

#### A. Legislative Intent

The Board in its analysis, as well as the Council in its challenge, contemplated legislative intent in enacting environmental regulations such as PSD and NSR standards and the project aggregation principle.<sup>114</sup> The crux of the Council's argument was that "creative permitting" improperly allowed Sunoco to define the boundaries of its own projects.<sup>115</sup> In giving deference to Sunoco's plans and judgment, the Department effectively allowed Sunoco to break down its project arbitrarily into multiple smaller projects.<sup>116</sup> If the Board were to affirm the Department's decision, businesses could bypass environmental regulation by fractioning massive projects into many smaller projects to not exceed PSD or NSR thresholds.<sup>117</sup>

109. *Id.* at \*10 (holding Department "did not err" in aggregating numerous projects).

110. *Clean Air Council v. Commw. of Pa.*, No. 2016-073-L, 2019 WL 267762, at \*25 (Pa. Emtl. Hearing Bd. Jan. 9, 2019) (noting crucial inquiry in determination).

111. *Id.* at \*27 (concluding there should have been aggregation).

112. *Id.* at \*25. (discussing relevance of one single facility).

113. *Id.* (explaining ramifications of aggregation).

114. *Id.* at \*27 (highlighting legislative intent of project aggregation principle).

115. *Clean Air Council*, 2019 WL 267762, at \*24 (accusing Sunoco of "creative permitting").

116. *See id.* (outlining dangers of "creative permitting").

117. *See id.* (highlighting risk of Department's deference to "creative permitting").

## B. Factors to be Considered

### 1. *Physical Proximity*

First, the Board considered the physical proximity of each project.<sup>118</sup> It is undisputed that each of Sunoco's proposed projects were centralized at one facility.<sup>119</sup> Though this factor is not dispositive, the Board referenced an aerial representation that clearly demonstrated the projects' contiguity.<sup>120</sup> The physical proximity did not surprise the Board given the interdependence of each part of the project.<sup>121</sup> The Board determined this factor weighed in favor of aggregation.<sup>122</sup>

### 2. *Temporal Proximity*

Next, the Board examined the temporal proximity of each project's proposal and planned execution.<sup>123</sup> Each plan was proposed, and subsequently approved, in a relatively short period of time.<sup>124</sup> Sunoco and the Department conceded that the projects were submitted for approval in quick succession.<sup>125</sup> Illustrating the rapid sequence of proposals and approvals, Sunoco's plan for Project D was submitted two months before the Department approved the preceding Project C.<sup>126</sup> The Board ultimately found this aggressive timeline weighed heavily in favor of aggregation.<sup>127</sup>

### 3. *Interdependence*

Next, the Board evaluated the interdependence of the projects.<sup>128</sup> Sunoco opposed the Council's attempt to "daisychain" projects, arguing there must be an independent link between Project E and each other project.<sup>129</sup> Its argument challenged the

118. *See id.* at \*28 (noting first factor Board considered).

119. *Id.* (referencing aerial depiction of Marcus Hook facility).

120. *Clean Air Council*, 2019 WL 267762, at \*28 (highlighting physical proximity of points of various projects).

121. *Id.* (noting interdependence of project proposals).

122. *Id.* (concluding that close proximity of projects demonstrates one project).

123. *Id.* (discussing temporal proximity of projects).

124. *Id.* (noting quick succession of project proposals).

125. *Clean Air Council*, 2019 WL 267762, at \*28 (conceding aggressive timeline). At times, Sunoco submitted plans for another project before the prior project had even been approved. *Id.*

126. *Id.* (providing example of aggressive timeline).

127. *Id.* (noting Board's emphasis on quick timeline).

128. *Id.* at \*28-31 (discussing interdependence of Sunoco's projects).

129. *Id.* at \*29 (outlining Sunoco's argument). An example of "daisychain-ing" projects occurs where the Department has acknowledged a connection between numerous projects, such as Projects I and A, and that connection can be

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Council's contention that Project E's connection to Project A, for example, could facilitate a connection between Project E and any projects with an acknowledged link to Project A.<sup>130</sup> The Board discarded this argument, considering the distinction between the mechanism of connection unimportant.<sup>131</sup> Sunoco conceded Projects 1 and C were part of one project.<sup>132</sup> In its initial evaluation, the Department acknowledged the connection between Projects 1, A, and C.<sup>133</sup> The Department, however, did not include Project D.<sup>134</sup> Project D used the docks of Project 1, as well as redesigned a component of Project 1.<sup>135</sup> It further utilized certain machinery from Project A, yet the Department did not aggregate this project with the others.<sup>136</sup> The Board explained this failure to link further projects missed the ultimate point that these projects were sufficiently interdependent, and it would be contrary to common sense to ignore these facilitated links.<sup>137</sup>

The main project at issue, Project E, was not aggregated with any other projects.<sup>138</sup> The Board drew attention to an acknowledged link, where Sunoco and the Department both agreed aggregation was appropriate for Projects A and C because Project C's cooling tower would service A's deethanizer.<sup>139</sup> Sunoco tried to distinguish this from Projects B and E's similar use of flares and a cooling tower, but the Board rejected its attempt, reasoning it was a

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used to facilitate further connections with other projects. *Id.* (describing where "daisy chaining" may occur). If there is an acknowledged link between Projects 1 and E, then A would also be considered linked with Project E due to its connection with Project 1. *Id.* (demonstrating how projects may be "daisy chained" together). Otherwise stated, anything that is linked with Project 1 is also linked with Project A due to their connection. *Id.* (explaining ultimate result of "daisy chaining"). This can be visualized as links in a chain, where all are ultimately connected, while Sunoco's argument, rejecting "daisy chaining," can be visualized as spokes on a wheel, placing Project E in the middle and requiring an independent connection between Project E and each other project. *Id.* (illustrating methods of connection).

130. *See Clean Air Council*, 2019 WL 267762, at \*29 (contending each project must be independently linked to Project E).

131. *See id.* at \*28 (disagreeing with Sunoco's argument).

132. *See id.* at \*29 (conceding some projects required aggregation).

133. *Id.* (acknowledging connection of some but not all projects).

134. *See Clean Air Council*, 2019 WL 267762, at \*29 (dismissing connection of all projects).

135. *Id.* (explaining purpose of Project D).

136. *Id.* (acknowledging connection despite no aggregation).

137. *Id.* (rejecting distinction between some related projects and some unrelated).

138. *Id.* at \*30 (outlining primary project at issue).

139. *Id.* (noting acknowledged aggregation).

meaningless distinction with the same ultimate effect.<sup>140</sup> Project E relied on the same equipment as the other projects, and the Board highlighted this factor as particularly influential.<sup>141</sup> Each project builds on one another, receiving support from the others.<sup>142</sup> The new intended purpose of the facility would not be attainable without each project.<sup>143</sup>

#### 4. *Common Plan and Shared Objective*

The Board next considered whether the projects shared a common plan and objective.<sup>144</sup> The common objective of the projects was to convert the Marcus Hook facility into a fractionation facility.<sup>145</sup> This overall repurposing was intended to equip the facility to receive NGLs, fractionate them into their component parts, and either to store them or ship them elsewhere.<sup>146</sup> Each project plays a pivotal role in the facility's ability to function as intended.<sup>147</sup> The Board further cited Sunoco's own communications as support, which had a common theme of increased capacity and future expansion, all supporting a finding of one common plan and objective.<sup>148</sup>

#### 5. *Other Relevant Factors*

Finally, the Board heard arguments from both parties of other factors they felt were relevant.<sup>149</sup> Sunoco argued it could have implemented Project E anywhere and that it did not have to be at the same location, but this argument was expressly contradicted by the factual record.<sup>150</sup> The Board drew attention to Sunoco's own brief, which conceded they would need to acquire new space and equipment in order to establish Project E despite already having the space and necessary equipment at Marcus Hook.<sup>151</sup> This acknowl-

140. *See Clean Air Council*, 2019 WL 267762, at \*29-30 (analogizing to other instances of appropriate aggregation).

141. *See id.* (holding reliance on same equipment weighs in favor of aggregation).

142. *Id.* at \*29 (noting interrelatedness of projects).

143. *Id.* (emphasizing dependency of each project on others).

144. *Id.* at \*31 (noting relevance of shared objective).

145. *See Clean Air Council*, 2019 WL 267762, at \*31 (emphasizing overall common objective).

146. *See id.* (reiterating planned objective).

147. *Id.* (highlighting each project's role in overall plan).

148. *Id.* at \*32-33 (planning for future expansion).

149. *Id.* at \*34 (allowing for other relevant considerations).

150. *See Clean Air Council*, 2019 WL 267762, at \*34 (holding Department's conclusion was erroneous).

151. *Id.* (referencing Sunoco's brief).



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edgement, especially regarding the necessary equipment already present at Marcus Hook, significantly undermined Sunoco's argument that it could carry out Project E elsewhere and supported the Board's finding of interdependence and a common plan.<sup>152</sup> Sunoco cited new customers as a reason for not aggregating the projects, which the Department had agreed with and relied upon in its initial determination.<sup>153</sup> The Board dismissed Sunoco's argument, as it failed to demonstrate how Project E would bring in new customers or why new customers should be a relevant consideration.<sup>154</sup>

### 6. Conclusion

Ultimately, Sunoco and the Department were unable to counter the strong evidence weighing in favor of a single project.<sup>155</sup> In the course of project proposal and approval, the Department deemed Project E to be a standalone project and did not link it with any other projects.<sup>156</sup> The Council contended this was the ultimate error.<sup>157</sup> The Board reviewed the Department's determination in order to evaluate whether it was reasonable and supported by the facts.<sup>158</sup> After considering the factors outlined, the Board was confident each separate project was part of the same overarching project and emissions should have been aggregated for NSR and PSD purposes.<sup>159</sup>

Although the projects were planned and proposed separately, the projects fell under the same overarching plan to repurpose the Marcus Hook facility.<sup>160</sup> The projects built off one another and were heavily interdependent.<sup>161</sup> The Board reversed and remanded the Department's decision, reasoning it was neither reasonable nor supported by the evidence.<sup>162</sup> The Board concluded it was erroneous to designate Project E as a stand-alone project when

152. *Id.* (noting persuasive value of interdependence).

153. *Id.* (arguing new customers proves separation of projects).

154. *Id.* at \*35 (rejecting customer expansion argument).

155. *See Clean Air Council*, 2019 WL 267762, at \*35 (discrediting argument advancing single project).

156. *Id.* at \*24 (noting Department's initial determination).

157. *Id.* at \*25 (alleging Department's erred in its decision).

158. *Id.* (noting standard of review).

159. *Id.* (deciding in favor of aggregation).

160. *Clean Air Council*, 2019 WL 267762, at \*25 (describing Sunoco's overarching purpose).

161. *Id.* at \*31 (emphasizing projects' common plan and shared objective supported Board's conclusion).

162. *Id.* at \*25, \*41 (concluding Department's decision was not supported and remanding for further consideration).

it was a part of the greater repurposing project and should have been assessed in the aggregate, rather than individually.<sup>163</sup>

#### IV. CRITICAL ANALYSIS

In the appeal before the Board, the Board had difficulty discerning the Department's rationale in concluding aggregation was inappropriate in its initial determination.<sup>164</sup> The Department's default position should be to adhere to the legislature's intent and err on the side of stronger environmental protection, especially facing the exigent issue of climate change.<sup>165</sup> In deciding the projects at the Marcus Hook facility should have been aggregated, the Board defeated Sunoco's attempt to engage in "creative permitting".<sup>166</sup>

When creative permitting is utilized and companies are able to define the boundaries of their own projects, construction can be structured in smaller segments to avoid environmental impact programs.<sup>167</sup> Allowing this to take place may defeat the overall purpose of these environmental impact programs, rendering any established thresholds and limitations obsolete.<sup>168</sup> These NSR and PSD programs were implemented to ensure progress towards cleaner air, but allowing companies to be strategic in their permitting and project proposals would defeat this objective, impeding the legislatures' efforts to improve overall air quality.<sup>169</sup> It is important for these considerations to remain at the forefront of the Department's determinations and the Board's analysis when contemplating project aggregation.<sup>170</sup>

"Although there has been talk for years about promulgating regulations to better define project aggregation, no such rules have been promulgated and survived."<sup>171</sup> Any rule or standard that is eventually implemented should contain breathing space, given the complexity of these cases and the lack of guidance surrounding the

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163. *Id.* at \*29-30 (concluding aggregation was appropriate).

164. *Id.* at \*30 (rejecting Department's conclusions).

165. For a further discussion of legislative intent, see *supra* notes 73-84 and accompanying text.

166. See *Clean Air Council*, 2019 WL 267762, at \*24 (discussing "creative permitting").

167. See *id.* (outlining dangers of "creative permitting").

168. See *id.* at \*27 (concluding Department's determination was inconsistent with legislative intent).

169. *Id.* (denouncing circumvention of environmental standards).

170. *Id.* (stating importance of considering legislative intent).

171. *Clean Air Council*, 2019 WL 267762, at \*26 (underscoring lack of clear definition).

principle.<sup>172</sup> Turning the *United Refining* factors into a rebuttable presumption may provide a test that is easy to apply yet flexible enough to keep up with the complex nature of many of these cases.<sup>173</sup>

The EPA has promoted the use of a rebuttable presumption that directs projects do not have to be aggregated where they are separated by three or more years.<sup>174</sup> The Board noted this proposed presumption, but declined to adopt it, further emphasizing the importance of respecting legislative intent in enacting these environmental programs.<sup>175</sup> In order to satisfy the Board's consideration of legislative intent, the rebuttable presumption can be reversed to more adequately serve conservationist efforts.<sup>176</sup> If reversed, so as to presume aggregation when certain factors are present, the presumption would be more consistent with legislative intent and more protective of air quality.<sup>177</sup>

Where several projects occur at a common site, share a common plan or objective, and are functionally interdependent, the Department should presume one overall project and apply the aggregation principle.<sup>178</sup> Although no single factor will be dispositive, if all three are present, there should be a strong presumption in favor of a single project with aggregated emissions.<sup>179</sup> As in the appeal before the Board, a common physical site is not often a major point of dispute.<sup>180</sup> The more contentious issues will be whether there is a common objective and whether the plans are functionally interdependent.<sup>181</sup> The Board should recognize one

172. See Julie R. Domike and Suzanne Beaudette Murray, *The Current Environment of Federal Regulatory Enforcement*, 6 ROCKY MTN. MIN. L. INST. 7 (Dec. 6-7, 2018) (noting changing discussion of project aggregation interpretation). These cases tend to be complex due to the different factors that may be present in some cases but not others and their varying levels of significance. See *Clean Air Council*, 2019 WL 267762, at \*27 (emphasizing wide variety of relevant factors). The Board noted “[n]o one factor is dispositive, and the list is not intended to be exclusive . . . .” *Id.* (indicating room for other considerations).

173. See *Clean Air Act Handbook*, *supra* note 77 (contemplating use of rebuttable presumption).

174. See *id.* (noting EPA's use of rebuttable presumption).

175. See *id.* (rejecting Trump Administration presumption).

176. See *generally id.* (proposing alternate presumption).

177. See *generally id.* (asserting potential advantage of alternate presumption).

178. For a further discussion of the various factors to be considered in contemplating aggregation, see *supra* notes 118-163 and accompanying text.

179. See *Clean Air Council v. Commw. of Pa.*, No. 2016-073-L, 2019 WL 267762, at \*28 (Pa. Env'tl. Hearing Bd. Jan. 9, 2019) (exploring issue of physical proximity).

180. *Id.* (noting lack of conflict over single facility).

181. For a further discussion of a common plan and interdependence, see *supra* notes 128-148 and accompanying text.

overarching plan when the sub-projects all serve a greater purpose, intertwining and even depending on one another.<sup>182</sup>

There are also ways to rebut the presumption.<sup>183</sup> One example is a lack of temporal proximity, similar to the EPA's current presumption.<sup>184</sup> The project proposals here were submitted and approved in quick succession, but that may not always be the case.<sup>185</sup> Aggregation may not be appropriate when there is a long period of time between projects being proposed or carried out.<sup>186</sup> In order to provide clearer guidance in the absence of regulation, implementing a rebuttable presumption would offer departments, hearing boards, and other similar bodies stronger direction surrounding how to conduct their analyses.<sup>187</sup>

## V. IMPACT

Until the language of the Act, or the federal EPA, provides a bright-line rule or further clarity on the principle, the Board has provided a variety of factors to consider in deciding whether aggregation is appropriate.<sup>188</sup> This decision builds on and outlines the *United Refining* factors and how they weigh in favor of or against aggregation.<sup>189</sup> The Board initially outlined the factors to be considered in *United Refining Co.*, but the present case was the first time it conducted an in-depth analysis and application of each factor.<sup>190</sup> *Clean Air Council* was also the first instance of the Board holding the “[Department] acted unlawfully by failing to aggregate . . . .”<sup>191</sup> Although the Board's holding is relatively narrow, this decision pro-

182. For a further discussion of common plan and interdependence, see *supra* notes 128-148 and accompanying text.

183. See generally *Clean Air Council*, 2019 WL 267762 (proposing rebuttable presumption).

184. See generally Lesser, *supra* note 94 (reasoning aggregation was not appropriate where one phase of project is far in future or entirely uncertain).

185. See generally *id.* (lacking aggressive timeline of project proposals).

186. See generally *id.* (noting importance of timeline).

187. For a further discussion of a modified rebuttable presumption, see *supra* notes 172-186 and accompanying text.

188. For a further discussion of the factors courts consider, see *supra* notes 118-163 and accompanying text.

189. For a further discussion of the factors courts consider, see *supra* notes 118-163 and accompanying text.

190. See generally *United Refining Co. v. Commw. of Pa.*, No. 2007-100-L, 2008 WL 3833423 (Pa. Env'tl. Hearing Bd. Aug. 7, 2008) (outlining factors for consideration in aggregation determination).

191. Jon Hurdle, *Judges say DEP unlawfully issued air-quality permits to Sunoco at Marcus Hook*, PA POST (Jan. 10, 2019), <https://papost.org/2019/01/10/judges-say-dep-unlawfully-issued-air-quality-permits-to-sunoco-at-marcus-hook/> (noting first time Board held Department acted unlawfully).

vides courts, hearing boards, and other similar bodies with useful guidance on how to apply the principle under similar circumstances.<sup>192</sup> The inclusion of “other relevant factors” also leaves room for flexibility, enabling these bodies to supplement the considerations as needed.<sup>193</sup>

This decision is significant in the face of rising climate change and air quality concerns, as it prioritizes environmental and air quality protection.<sup>194</sup> In contemplating new construction or modification, businesses have engaged in “creative permitting,” dividing projects however they would like and oftentimes receiving the level of deference the Department afforded Sunoco.<sup>195</sup> Following this decision, however, the Department and the Board will not blindly defer to the proposed breakdown of new construction or modifications.<sup>196</sup> “Too often, big industry players have avoided pollution controls by creating loopholes that jeopardize air quality protections’ . . . .”<sup>197</sup> If the Department and the Board always deferred to the proposed breakdown, they would enable this loophole for builders to entirely avoid environmental impact thresholds, defeating the purpose of those programs and impeding conservationist efforts.<sup>198</sup> The Board put an end to this idea of “creative permitting” in deciding the sub-projects at Marcus Hook should have been viewed as one, despite being designated as separate and distinct.<sup>199</sup>

“[T]hose developing large projects in phases should be aware . . . there are considerations necessary to planning and permitting”.<sup>200</sup> Businesses looking to build new or modify existing struc-

192. For a further discussion of the Board’s holding, see *supra* notes 155-163 and accompanying text.

193. For a further discussion of other relevant factors, see *supra* notes 149-154 and accompanying text.

194. For a further discussion of the relevant environmental programs, see *supra* notes 42-53 and accompanying text.

195. For a further discussion of Sunoco’s breakdown of projects, see *supra* notes 21-41 and accompanying text.

196. For a further discussion of the factors the Board will consider, see *supra* notes 118-163 and accompanying text.

197. Hurdle, *supra* note 191 (quoting Joe Minott on dangers of allowing loopholes). Joe Minott is the executive director and chief counsel for the Clean Air Council, which initiated the present case. *Id.* (introducing Clean Air Council representatives).

198. For a further discussion of the relevant environmental programs, see *supra* notes 42-53 and accompanying text.

199. For a further discussion of Sunoco’s breakdown of projects, see *supra* notes 21-41 and accompanying text.

200. Jennifer A. Smokelin, *Pennsylvania EHB aggregation decision and opinion – what this means for your business*, REED SMITH (Jan. 31, 2019), <https://www.reedsmith.com/en/perspectives/2019/01/pennsylvania-ehb-aggregation-decision> (noting relevant considerations for phased construction planning).

tures in Pennsylvania gain some clarity following this decision.<sup>201</sup> Businesses will be able to direct their activities and planning in order to be consistent with the decision.<sup>202</sup> While further clarification and guidance may still be desired, the Board was able to provide much-needed direction in the appropriate application of the project aggregation principle, providing insight as to what factors courts and hearing boards will consider persuasive in favor of aggregation.<sup>203</sup> Perhaps as a result of this decision, other bodies will reject the EPA's current rebuttable presumption and opt for one, as discussed here, that prioritizes conservationist efforts.<sup>204</sup>

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201. For a further discussion of the project proposal process, see *supra* notes 21-41 and accompanying text.

202. For a further discussion of the landscape of this area of law, see *supra* notes 60-109 and accompanying text.

203. For a further discussion of the factors courts will consider, see *supra* notes 118-163 and accompanying text.

204. For a further discussion of a modified rebuttable presumption, see *supra* notes 172-187 and accompanying text.