



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7**

11201 Renner Boulevard
Lenexa, Kansas 66219

FEB 01 2018

Mr. Kevin Stoner
Air Administrator
Air Quality Division
Nebraska Department of Environmental Quality
P.O. Box 98922
1200 N Street, Suite 400
Lincoln, Nebraska 68509-8922

RE: Pacific Aurora, LLC

Dear Mr. Stoner:

This letter is in response to your correspondence dated January 12, 2018, requesting a “stationary source applicability determination” by Region 7 of the U.S. Environmental Protection Agency with regard to facilities owned by Pacific Aurora, LLC (Pacific Aurora), in Aurora, Nebraska. The specific question raised in your letter is whether the two ethanol production facilities and grain operation owned by Pacific Aurora should be considered a single stationary source for purposes of certain Clean Air Act programs. The three facilities at issue include: Pacific Ethanol Aurora East, LLC; Pacific Ethanol Aurora West, LLC; and Pacific Aurora, LLC Grain Elevator. Your letter encloses a November 15, 2017, letter you sent to Pacific Aurora in which you said that “NDEQ has determined” that all three of these facilities are “one source for purposes of PSD and Title V air quality permitting programs.” However, the EPA also understands that Pacific Aurora has filed a Petition for Declaratory Order with the NDEQ regarding this matter. This petition requests that the Department and its Director issue a “declaratory order determining that Aurora West, Aurora East and the Elevator are independent sources for criteria pollutants under the PSD and Title V air quality permitting programs.” Based on this information, the EPA understands that NDEQ is still considering the question of whether these facilities should be considered one source and that NDEQ intends to make a final decision by February 9, 2018, pursuant to Nebraska procedures invoked by the Petition for Declaratory Order. It thus appears that your January 12 request is seeking EPA’s views on this matter to inform NDEQ’s final decision on the Petition.

In order to assist NDEQ with its consideration of the issue, the EPA Region 7 is responding to communicate its views on the matter you have raised, but this response is not and should not be considered to be a “stationary source applicability determination” or any other form of final action or order by the EPA. The EPA regulations do not contain, and you have not otherwise invoked, any procedures that require the EPA to issue a determination on this issue or otherwise adjudicate the Petition that is pending before NDEQ. The EPA is simply sharing its views on this matter to assist NDEQ, with those views being based on the information provided to us by NDEQ. It remains under the purview of NDEQ to make a decision on the Petition for Declaratory Order and otherwise issue source aggregation determinations under its EPA-approved programs and regulations.



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Background

In 1994, Nebraska Energy (now, Pacific Ethanol Aurora East) received a permit to construct an ethanol plant west of Aurora, Nebraska. In March 2007, NDEQ issued a permit to Aurora Cooperative Elevator Co, Inc., to construct a grain storage and handling facility just west and adjacent to the ethanol plant. Later in October 2007, Aventine Renewable Energy (now, Pacific Ethanol Aurora West) received a Prevention of Significant Deterioration permit to construct a large ethanol plant just west of the grain cooperative. The project was permitted as an expansion to the Nebraska Energy ethanol plant which was acquired by Aventine. At the time, NDEQ concluded that the two ethanol plants were a single source for major source permitting purposes. In July 2015, Pacific Ethanol, Inc., purchased the two ethanol plants from Aventine Renewable Energy. In December 2016, Pacific Ethanol, Inc., entered a joint venture with Aurora Cooperative Elevator, which was finalized and registered with the Nebraska Secretary of State in January 2017 as Pacific Aurora, LLC.¹ Pacific Aurora took ownership and control of the Pacific Ethanol Aurora East and West operations. In June 2017, Pacific Aurora notified NDEQ that it had also taken ownership of the Aurora Cooperative Elevator.

Following consolidation of the ethanol and grain operations, NDEQ's Air Division notified Pacific Aurora in October 2017, that it would need to apply for a Title V operating permit to incorporate the grain cooperative facilities into the existing Title V permit for the East and West ethanol operations. At that point, Pacific Aurora questioned the NDEQ Air Division's view that all three operations were now part of a single source and asked for additional clarification. Pacific Aurora and NDEQ staff met in late October 2017, and NDEQ staff asked Pacific Aurora to provide additional rationale as to why the plants should be considered as one or more stationary sources. Pacific Aurora provided its response in a letter dated November 7, 2017. In brief, Pacific Aurora conceded that while now under common control, NDEQ should not consider the operations to be a single-source because the grain operations and ethanol plants are classified by different SIC codes and that application of the support facility concept in lieu of SIC code is not authorized either by the approved Nebraska Administrative code or the EPA's underlying PSD rules. Pacific Aurora also argued, for the first time, that, only looking at the two facilities with the same SIC code, the two ethanol plants are not adjacent or contiguous under the PSD and Title V regulations because they do not physically abut each other. Pacific Aurora apparently believes this requirement is dictated by the Sixth Circuit's *Summit Petroleum* decision regarding a Clean Air Act source determination and the Supreme Court's *Rapanos* Clean Water Act decision. NDEQ's Air Division responded to Pacific Aurora's evaluation on November 15, 2017, laying out the three criteria used to determine whether multiple operations constitute a single major stationary source. The Air

¹ On page 6 of its December 31, 2016, Form 10-K filing with the U.S. Securities and Exchange Commission, Pacific Ethanol, Inc., described its acquisition of the Aurora Cooperative Elevator as follows.

"On December 12, 2016, we entered into a contribution agreement with ACEC (Aurora Cooperative Elevator Co., Inc.) under which (i) we agreed to contribute to Pacific Aurora LLC, or Pacific Aurora, 100% of the equity interests of our wholly-owned subsidiaries, Pacific Ethanol Aurora East, LLC and Pacific Ethanol Aurora West, LLC, which own our Aurora East and Aurora West Ethanol plants, respectively, to Pacific Aurora in exchange for approximately an 88% ownership interest in Pacific Aurora, and (ii) ACEC agreed to contribute to Pacific Aurora ACEC's grain elevator adjacent to the Aurora East and Aurora West properties and related grain handling assets, including the outer rail loop and the real property on which they are located, in exchange for approximately a 12% ownership interest in Pacific Aurora. On December 15, 2016, concurrently with the closing of the contribution transaction, we sold approximately a 14% ownership interest in Pacific Aurora to ACEC for \$30.0 million in cash, resulting in our ownership of approximately 74% of Pacific Aurora and ACEC's ownership of approximately 26% of Pacific Aurora. The transaction with ACEC was immediately accretive to our stockholders and we expect the arrangement to reduce operating costs by over \$5.0 million annually. In addition, the new arrangement fully integrates our Aurora, Nebraska plants and the grain facilities into a more functional and better performing single facility, enabling us to optimize grain procurement; more efficiently manage grain transfers; offer storage, drying and merchandising to local farmers; and proving us with additional growth opportunities."

Division reaffirmed its view that the Pacific Aurora Complex should be considered a single source for the PSD, Title V, and major source hazardous air pollutant programs. NDEQ's Air Administrator reasoned that the three operations are under common control based on common ownership, that the facilities are under the same industrial grouping based on the facilities' current operation of the grain elevator as a support facility², and that all three facilities are located both contiguous and adjacent to each other. Pacific Aurora continues to dispute this conclusion and submitted its Petition for Declaratory Order³ to NDEQ on December 14, 2017.

EPA Evaluation

Region 7's evaluation of this issue is based on our review of the documents forwarded by NDEQ in the January 12, 2018, correspondence. In addition, we reviewed correspondence from NDEQ's on-line Enterprise Content Management System to better understand the permitting history at the Aurora complex, and in particular how permit applicants and NDEQ have characterized source operations over time. Based on this review, the rationale articulated by the NDEQ Air Division to support its determination that the three operations at the Pacific Aurora Complex are a single source for PSD and Title V permitting purposes appears to be reasonable.

Under the EPA's PSD rules⁴ and those approved in Nebraska's federally-approved State Implementation Plan,⁵ a "stationary source" means *any building, structure, facility or installation which emits or may emit a regulated New Source Review pollutant. "Building, structure, facility or installation" is defined as all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same first two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00716-0, respectively).*"

As NDEQ's Air Division explained in its November 15, 2017, response, the operations at the Pacific Aurora Complex can be reasonably found to meet all three factors described above. Pacific Aurora acknowledges that the East and West ethanol plants, along with the grain cooperative, are now under their ownership and therefore are under common control. Nevertheless, Pacific Aurora takes the position that their operations fail the two remaining criteria, including whether the operations are contiguous or adjacent to each other and belong to the same two-digit SIC code. In evaluating this position, we first looked at Google imagery for the three operations.

² Pacific Aurora estimates 90% of the grain elevator's output is going to the ethanol plants.

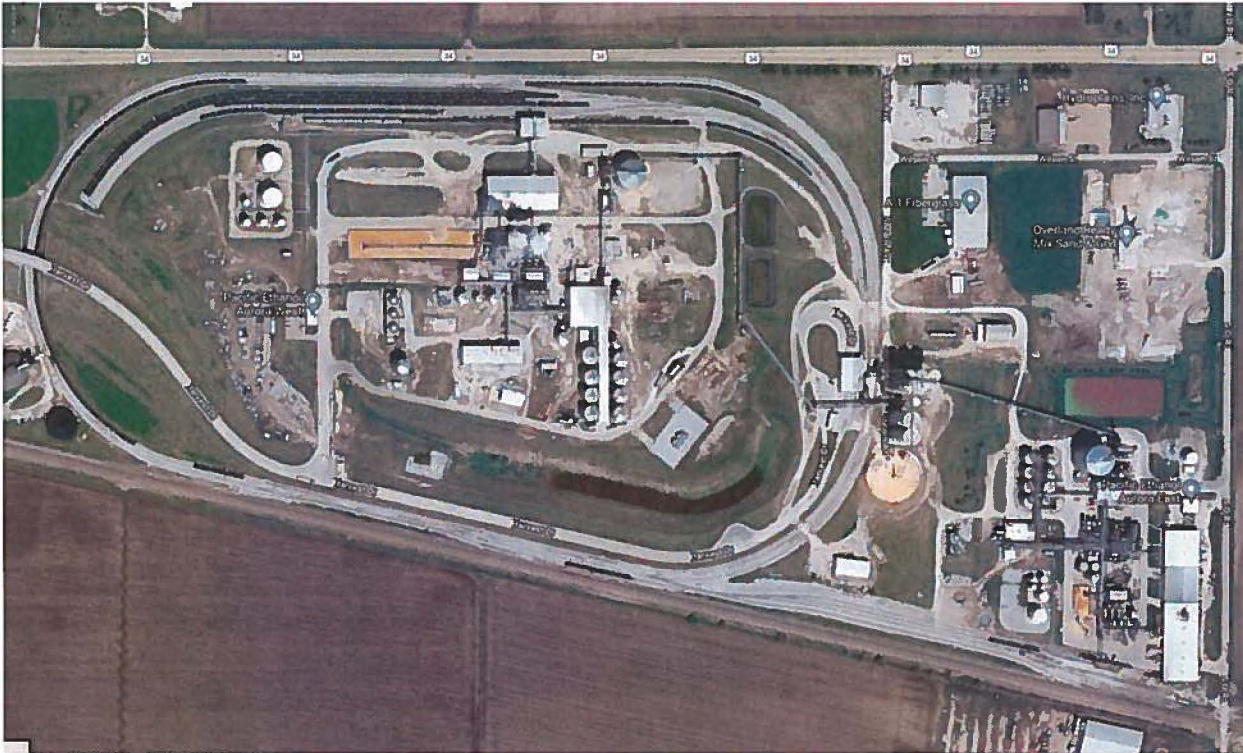
³ This petition further requests a "declaratory order determining that Aurora West, Aurora East, and the Elevator are a single source group under the HAP program." EPA is providing no views on this question in this letter.

⁴ Prevention of Significant Deterioration Rules, 40 CFR 52.21.

https://www.ecfr.gov/cgi-bin/text-idx?SID=ef1634e6b2f2f909c801b4f3f44b643e&mc=true&node=se40.3.52_121&rgn=div8

⁵ Federally-approved Nebraska Rules, Chapter 1, Definitions.

<https://www.epa.gov/sites/production/files/2017-08/documents/t129ch01.pdf>



In this case, all appear to be within close proximity of each other, bound by the highway to the north, rail to the south and cross streets to the east and west. The grain cooperative is located between the East and West ethanol plants, physically touching each, and has conveyors connecting to the ethanol plants. Information submitted by Pacific Aurora appears to indicate that all three sources are contiguous, and that the East and West properties do, in fact, also currently touch, because there is "...a small point of contact at the southwest boundary of the NELLC [Pacific Aurora Ethanol East] property."⁶ The proximity of the Pacific Aurora operations to each other appears to meet the contiguous or adjacent criteria as those criteria are reasonably understood. In this case, the Air Division's determination that the Pacific Aurora operations are contiguous or adjacent appears to have been made without relying on any functional inter-relatedness of the operations and is based on the close proximity of the three operations to each other. In light of this, it is unclear why Pacific Aurora finds the Sixth Circuit's Summit Petroleum decision to be relevant to its situation.

As to whether the NDEQ Air Division reasonably determined that the Pacific Aurora operations belong to the same two digit SIC code or not, the preamble to the 1980 PSD rule⁷ discussed the EPA's view on how to evaluate what SIC code applies to support facilities. The preamble to the rule, starting at 45 FR 52694, discusses a number of concerns raised by commenters during the public review and clarifications

⁶ Letter from Lyndon T. Jones, Site Manager, Pacific Aurora, LLC., to Kevin Stoner, Nebraska Department of Environmental Quality, November 7, 2017, page 6-7.

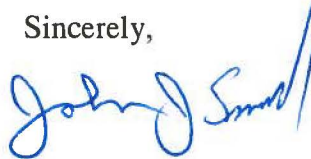
⁷ Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 FR 52676 (Aug. 7, 1980).

made by the EPA. In particular, the EPA notes that *“each source is to be classified according to its primary activity, which is determined by its principal product or group of products produced or distributed, or services rendered. Thus, one source classification encompasses both primary and support facilities, even when the latter includes units with a different two-digit SIC code. Support facilities are typically those which convey, store, or otherwise assist in the production of the principal product.”*⁸ In this case, the NDEQ Air Division appears to have reasonably concluded that the record indicates that the grain cooperative functions as the primary provider of corn to the ethanol plants. In recent conversations between NDEQ and Pacific Aurora, the company confirmed that 90% of its throughput from the grain handling facilities is corn provided to the adjacent Pacific Aurora ethanol operations. The remaining 10% of throughput is soybeans shipped off-site. The EPA’s view is based on the specific facts described above.

For the reasons described above, the NDEQ Air Division’s December 15, 2017, finding that the grain and ethanol operations at the Pacific Aurora Complex currently constitute a single stationary source for PSD and Title V permitting purposes appears to be reasonable.

As always, we appreciate the opportunity to provide a response. Please contact Patricia Scott at (913) 551-7312 if you have any questions or comments regarding this letter.

Sincerely,



 Becky Weber
Director
Air and Waste Management Division

⁸ 45 FR at 52695.