**MEMORANDUM**

**SUBJECT:** Interpreting "Adjacent" for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas

**FROM:** William L. Wehrum
Assistant Administrator

**TO:** Regional Air Division Directors, Regions 1-10

The purpose of this memorandum is to communicate the Environmental Protection Agency's (EPA's or the Agency's) interpretation and assist permitting authorities in determining the scope and extent of a "stationary source" for the major New Source Review (NSR) pre-construction permit programs under title I of the Clean Air Act (CAA) and the scope and extent of a "major source" for the title V operating permit program. EPA generally refers to such a determination regarding the scope of a stationary source as a "source determination." The agency understands that among both the regulated community and permitting authorities there continues to be uncertainty regarding the meaning of the term "adjacent," as that term is used in the relevant definitions in EPA's NSR and title V regulations. This uncertainty results in part from both court decisions and from EPA actions in response to those decisions. To promote clarity for regulated entities and permitting authorities, EPA is providing its interpretation of the term "adjacent," as used in this context in the NSR and title V regulations. This memorandum describes how EPA interprets "adjacent" for all industrial categories except for oil and natural gas activities covered by Standard Industrial Classification (SIC) major group 13. EPA has established a specific meaning of "adjacent" in a rulemaking for that source category.[1] In the interest of consistency and clarity, EPA urges those permitting authorities that administer EPA-approved NSR and title V programs also apply this interpretation in determining whether non-contiguous operations in these other source categories are "adjacent" and should be aggregated into a single source in cases where the operations are under common control and belong to a single SIC code. [2]

[1] *See* 81 FR 35622 (June 3, 2016). As described in this memorandum, the interpretation of "adjacent" set forth here differs somewhat from the approach taken in the oil and gas rulemaking (where facilities located within a quarter mile of each other, with shared equipment, are considered to be adjacent).

[2] Some air agencies issue PSD and title V permits under delegation of federal authority from EPA. *See*, *e.g.*, 40 CFR 52.21(u). Typically, as a condition of such delegation, the delegated air agency agrees to follow EPA permitting guidance. Thus, EPA expects these delegated air agencies to apply the interpretation described in this memorandum.

In previous instances where EPA has provided its views to state and local permitting authorities regarding whether two or more facilities were adjacent, the agency often looked beyond the physical proximity of the operations and took into consideration the functional relationship, or functional interrelatedness, that existed between those facilities to form our opinion.[3] After a review of these past actions and recent court decisions, EPA has determined that its original intent expressed in the 1980 development of the NSR program, where we focused exclusively on proximity when considering whether operations are adjacent, is the proper approach. This memorandum provides an interpretation of the NSR and title V regulations that better aligns with both the text of those regulations and their original intent.

This revised interpretation is not a regulation subject to notice-and-comment rulemaking requirements and this memorandum itself does not create any binding requirements on state and local permitting authorities, permit applicants, or the public.

## BACKGROUND

### Relevant Statutory and Regulatory Provisions

The NSR program generally requires a permit before beginning construction of a new or modified stationary source of air pollutant emissions. The CAA generally defines the term "stationary source" as "any source of an air pollutant" except those emissions resulting directly from certain mobile sources or engines.[4] For NSR, EPA regulations define "stationary source" as "any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant."[5] Those regulations, in turn, define the term "building, structure, facility, or installation" to mean "all of the pollutant-emitting activities which [1] belong to the same industrial grouping, [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)," with "same industrial grouping" referring to the same Major Group, two-digit SIC code.[6] Many state and local permitting authorities have EPA-approved NSR permitting regulations that contain identical or similar definitions.

Title V of the CAA requires that a "major source" obtain an operating permit, known as a title V permit.[7] The title V definition of major source refers to the definitions in other sections of the Act, including the definition of major source for hazardous air pollutants (CAA section 112, 42 U.S.C. § 7412), the general CAA definition of major stationary source (CAA section 302, 42

[3] *See*, *e.g.*, Letter from Richard R. Long, Director, Air and Radiation Program, Region 8, to Dennis Myers, Stationary Sources Program, Air Pollution Control Division, Colorado Department of Public Health and Environment (April 20, 1999) (1999 CO letter) (stating that whether two facilities are "adjacent" is based on the "common sense" notion of a source and the functional interrelationship of the facilities, and is not simply a matter of the physical distance between two facilities). Additional EPA source determination letters are available at *https://www.epa.gov/nsr/new-source-review-policy-and-guidance-document-index* and *https://wcms.epa.gov/title-v-operating-permits/title-v-operating-permit-policy-and-guidance-document-index*.

[4] CAA section 302(z), 42 U.S.C. § 7602(z). Mobile sources and engines are defined in CAA section 216, 42 U.S.C. § 7550.

[5] 40 CFR 52.21(b)(5); 40 CFR 51.165(a)(1)(i); 40 CFR 51.166(b)(5).

[6] 40 CFR 52.21(b)(6); 40 CFR 51.165(a)(1)(ii); 40 CFR 51.166(b)(6).

[7] CAA section 501(2), 42 U.S.C. § 7661(2); CAA section 502, 42 U.S.C. § 7661a.

U.S.C. § 7602), and the definition of major stationary source under the nonattainment NSR program. Each of these programs have different numerical emissions thresholds at which requirements apply, with these thresholds being the basis for the major source determination in the title V program. EPA's operating permit regulations define "major source" as "any stationary source (or group of stationary sources) that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping . . . ."[8] As in the NSR programs, EPA has defined "major industrial grouping" to refer to the Major Group, two-digit SIC code.[9] Many state and local permitting authorities have EPA-approved title V permitting regulations that have adopted similar definitions.

**EPA Implementation of Statutory and Regulatory Definitions**

Under the regulations described above, permitting authorities must assess three factors – same industrial grouping, location on contiguous or adjacent properties, and under common control – to determine whether or not operations should be considered a single source when determining applicability of the NSR and title V permitting requirements. With one exception,[10] EPA's regulations do not define "adjacent." In the original promulgation and later application of these three factors, EPA has been mindful of the direction provided by the U.S. Court of Appeals for the District of Columbia Circuit: that for permitting purposes, "source" should be understood to comport with the "common sense notion of a plant."[11] With this general consideration in mind, individual source determinations are made on a case-by-case basis by the relevant permitting authorities.

When EPA promulgated the Prevention of Significant Deterioration (PSD) regulations in 1980, we explained that the three-part test (same industrial grouping, location on contiguous or adjacent property, and under common control) would satisfy this direction from the *Alabama Power* court decision by reasonably comporting with the "common sense notion of a plant," and by avoiding the aggregation of pollutant-emitting activities that would not fit within the ordinary meaning of "building, structure, facility or installation."[12] In so doing, we considered but chose ***not*** to add a "functional interrelationship" factor or test to the criteria for defining a source, as at that time we believed that such a test would have "embroiled the agency in numerous, fine-grained analyses."[13] In the same rulemaking, EPA explicitly did not set a specific distance that would be

[8] *See* 40 CFR 70.2; 40 CFR 71.2.
[9] *Id.*
[10] *See*, *e.g.*, 40 CFR 52.21(b)(6)(ii) (definition of "building, structure, facility, or installation" applicable to onshore activities under SIC Major Group 13: Oil and Gas Exploration).
[11] *See* 45 FR 52676, 52694 (August 7, 1980) (citing *Alabama Power* Co. *v. Costle*, 636 F. 2d 323, 397 (D.C. Cir. 1979)). In the *Alabama Power* decision, the court said that EPA cannot treat contiguous and commonly owned units as a single source unless they "fit within the four statutory terms" (*i.e.*, the terms "building," "structure," "facility," and "installation"). The court further said that we should "provide for the aggregation, where appropriate, of industrial activities according to considerations such as proximity and ownership." *Id.* at 397.
[12] 45 FR at 52694.
[13] 45 FR at 52695. Instead, EPA decided to use the SIC code as the criterion for aggregating activities on the basis of their functional interrelationships, to maximize the predictability and to minimize the difficulty of administering the definition. *See id.*

considered too far apart for adjacency, stating such determinations must be made case-by-case.[14] However, the agency did explain that it did not intend that a single source include activities that were many miles apart, as may be the case, for instance, with multiple sources located along the same pipeline or transmission line.

EPA later promulgated the title V major source definition found at 40 CFR 70.2 (57 FR 32250 (July 21, 1992)) and 40 CFR 71.2 (61 FR 34202, 34210 (July 1, 1996)).[15] Not only were these title V definitions consistent with each other, but EPA was also clear that the language and application of the title V definitions were intended to be consistent with the language and application of the PSD definitions contained in section 40 CFR 52.21 (61 FR 34210 (July 1, 1996)).

A review of the NSR and title V regulatory history, guidance, and numerous case-specific source determinations makes clear that EPA has looked to common dictionary definitions when interpreting the terms "contiguous" and "adjacent."[16] Based on those dictionary definitions, EPA has interpreted "contiguous" to mean that the parcels of land associated with the operations in question are in physical contact with one another. EPA has considered operations to be "adjacent" when, while physically separate, they are "nearby" to one another.[17] At the same time, however, it is also clear that over the years, EPA has considered, and at times heavily weighed, whether operations share some functional interrelatedness in determining whether those operations, while separated by some physical distance, are close enough to be considered "adjacent." For example, in a 1981 memorandum regarding two General Motors operations, EPA concluded that operations a mile apart with a dedicated railroad line between them and a shared production line were "adjacent," emphasizing that they were "functionally equivalent" to a source.[18] In incorporating the idea of functional interrelatedness into the interpretation of adjacency, EPA has repeatedly explained that the guiding principle behind how near properties need to be in order to be considered adjacent is "the common sense notion of a plant," which involves a fact-specific analysis of the pollutant-emitting activities that comprise or support the primary product or activity of the operations.[19] EPA has also noted that operations that have historically been considered one source, and that for purposes of NSR netting analyses have themselves deemed their operations to be one

[14] In this regard, EPA noted that it was "unable to say precisely at this point how far apart activities must be in order to be treated separately." 45 FR at 52695.

[15] EPA's regulations at 40 CFR Part 70 govern state operating permit programs, and the regulations at 40 CFR Part 71 govern federal operating permit programs.

[16] While many of EPA's source determinations interpret the term "adjacent," some appear to interpret the collective phrase "contiguous or adjacent" without making a distinction between the two terms. *See, e.g.*, Letter from Douglas M. Skie, Chief, Air Programs Branch, Region 6, to Cathy Rhodes, Air Pollution Control Division, Colorado Department of Public Health and Environment (August 22, 1991) (stating "[a]djacent or contiguous facilities can mean facilities that are physically separated by some distance"). As explained below, this memorandum follows the approach taken by the majority of relevant guidance and interprets the meaning of the term "adjacent," rather than the phrase "contiguous or adjacent."

[17] *See, e.g.*, Letter from Richard R. Long, Director, Air Program, Region 8, to Lynn Menlove, New Source Review Section, Utah Division of Air Quality (May 21, 1998) (1998 UT letter) (quoting the Webster's New College Dictionary definition of "adjacent" as "1. Close to; nearby, or 2. Next to; adjoining.").

[18] Memorandum from Edward E. Reich, Director, Division of Stationary Source Enforcement, to Steve Rothblatt, Chief, Air Programs Branch Region 5, PSD Definition of Source (June 30, 1981).

[19] *See, e.g.*, 1998 UT letter (stating any evaluation must relate to the guiding principle of "a common sense notion" of a source, citing to the 1980 PSD rule preamble's use of that phrase).

source to offset emissions increases from one operation's modification or construction with emissions decreases from another operation's reduced activity, closure, installation of controls, or initiation of operational changes, should not be separated into two sources later on based on reconsideration of whether the operations are adjacent.[20]

In 2007, EPA issued a memorandum specific to the oil and gas industry that focused on close proximity as the most informative factor for determining whether operations were "adjacent."[21] The agency withdrew that memorandum in 2009.[22] The 2009 memorandum rejected the use of a separate approach for the oil and gas industry. Instead, under the 2009 memorandum, EPA returned to applying, for the oil and gas industry, the same test employed for all other industries for determining whether operations were adjacent. In so doing, EPA explained that "in some cases, 'proximity' may serve as the overwhelming factor" but that "such a conclusion can only be justified through reasoned decision making after examining whether other factors are relevant to the analysis."[23]

In *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012), the U.S. Court of Appeals for the Sixth Circuit overturned a title V source determination in the oil and gas industry by EPA that relied, in part, on functional interrelatedness in determining whether operations were "adjacent." In the decision, the Court said that EPA's use of interrelatedness in determining whether sources were "adjacent" was unreasonable and contrary to the plain meaning of the term as then used in EPA's regulations. In reaching that conclusion, the court relied in part on dictionary definitions of "adjacent,"[24] and concluded that dictionaries agree that entities are adjacent when they are "[c]lose to; lying near . . . [next] to, adjoining."[25] The majority found that the term "adjacent" was unambiguous, insofar as its plain meaning related only to physical proximity. Thus, the court found, "functional interrelatedness" was not a factor that EPA could take into account in making an "adjacency" determination.

In response to *Summit Petroleum*, EPA issued a memorandum explaining that the agency would follow the court's decision in those areas within the Sixth Circuit's jurisdiction but would continue to consider functional relatedness in NSR and title V source determinations for sources

[20] Letter from Cheryl L. Newton, Chief, Permits and Grants Section, Region 5, to Donald Sutton, Permits Section, Division of Air Pollution Control, Illinois Environmental Protection Agency (March 13, 1998).

[21] Memorandum from William L. Wehrum, Acting Assistant Administrator, to Regional Administrators 1-10, Source Determinations for Oil and Gas Industries (Jan. 12, 2007) (2007 Wehrum Memo). The memorandum also maintained that the "foremost principle" guiding source determinations was the "common sense notion of a plant." *Id*.

[22] Memorandum from Gina McCarthy, Assistant Administrator, to Regional Administrators 1-10, Withdrawal of Source Determinations for Oil and Gas Industries (September 22, 2009).

[23] *Id*. As noted above, EPA subsequently established a specific meaning for "adjacent" in a rulemaking for the oil and gas industry which considers facilities located within a quarter mile of each other, with shared equipment, to be adjacent. *See* 81 FR 35622 (June 3, 2016).

[24] The court also examined the etymology of the term and relevant caselaw.

[25] 690 F.3d at 742 (quoting American Heritage Dictionary of the English Language, available at *http://www.ahdictionary.com*). The court referenced two additional dictionary definitions as well, Meriam-Webster Dictionary, available at www.meriam-webster.com ("not distant: nearby <the city and *adjacent* suburbs>; having a common endpoint or border <*adjacent* lots> . . . ; immediately preceding or following), and Oxford Dictionaries, available at *http://www.oxforddictionaries.com* ("next to or adjoining something else; *adjacent rooms*; *the area adjacent to the fire station*").

in other areas.[26] However, the D.C. Circuit later struck down the memorandum on the grounds that establishing inconsistent permit criteria in different parts of the country conflicted with EPA regulations that promote uniform national regulatory policies.[27] The court found that EPA bound itself to consistency through its own regulations, but noted that EPA could also revise those regulations to account for regional variances created by a judicial decision or circuit splits.[28] The D.C. Circuit decision did not address the meaning of the term "adjacent" or the extent to which the language in the NSR and title V regulations (rather than the regional consistency regulations) required application of the reasoning of *Summit* across the country.

## DISCUSSION

As discussed below, for industries other than oil and gas, EPA interprets the term "adjacent" to mean physical proximity, and that the perceived "functional interrelatedness" of operations is not a relevant consideration. EPA believes that this interpretation is consistent both with the agency's original understanding of the term, as was explained in the 1980 PSD rule preamble, and with the reasoning of the court in the *Summit Petroleum* decision.[29]

EPA believes that focusing exclusively on physical proximity when considering whether or not operations are adjacent is a more objective and reasonable approach, and one that is more consistent with the dictionary meaning of "adjacent," the "common sense notion of a plant," and the original intent expressed in the early development of the NSR program. Dictionaries define "adjacent" as "close to; lying near," "next to," "not distant: nearby," or "having a common endpoint or border."[30] While these definitions may leave some uncertainty regarding what distance is "close" or "near" enough, unquestionably they all convey the idea of physical proximity. Another important consideration is the context in which the word is used in EPA's regulations. The relevant definitions use the phrase "contiguous or adjacent." While these words are sometimes considered synonyms, in that "adjacent" *can* mean "contiguous," it does not follow that two things *must* be "contiguous" in order to be reasonably considered "adjacent." We think our reasoning in the oil and gas rulemaking is also relevant for other industries, specifically that the use of both the

[26] Memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Regional Air Division Directors 1-10, Applicability of the Summit Decision to EPA Title V and NSR Source Determinations (December 21, 2012).

[27] *National Environmental Development Association's Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (discussing 40 CFR part 56).

[28] EPA has since revised those regional consistency regulations at 40 CFR part 56 to more clearly address the implications of adverse federal court decisions that result from challenges to locally or regionally applicable actions, and this revision was recently upheld by the D.C. Circuit. 81 FR 51102 (August 3, 2016); *National Environmental Development Association's Clean Air Project v. EPA*, 891 F.3d 1041 (D.C. Cir. 2018).

[29] EPA understands that it must apply the holding in *Summit Petroleum Corp. v. U.S. Environmental Protection Agency*, 690 F.3d 733 (6th Cir. 2012) within the jurisdiction of the Sixth Circuit when determining whether operations are adjacent under the title V regulations for industries other than oil and gas.

[30] *See* American Heritage Dictionary of the English language, available at *http://www.ahdictionary.com* (last visited May 8, 2018) ("1. Close to; lying near: *adjacent cities*. 2. Next to: adjoining: *adjacent garden plots*."); Oxford Dictionaries, available at *http://www.oxforddictionaries.com* (last visited May 8, 2018) ("Next to or adjoining something else; *adjacent rooms*; *the area adjacent to the station.*"); Merriam-Webster Dictionary, available at *http://www.merriam-webster.com* (last visited May 8, 2018) ("a. Not distant: Nearby; the city and adjacent suburbs. b. having a common endpoint or border; *adjacent lots*; *adjacent sides of a triangle*."). (Emphases added.)

words "contiguous" and "adjacent" in our regulations is reasonably interpreted as indicating that both operations located on property that is touching ("contiguous") and also operations located on property that is not contiguous but in proximity to each other meets the common sense notion of a plant.[31] For "adjacent" to be construed to mean exactly the same as ''contiguous'' would render the term "adjacent" superfluous. Thus, EPA thinks a reasonable reading that gives meaning to both terms is to interpret "adjacent" to include operations that are not physically touching, including those that are to some degree separated by a right of way or other type of property intervening between properties that are otherwise in reasonable proximity to one another. Further, the Sixth Circuit's reasoning in the *Summit Petroleum* decision, based in part on the dictionary definition of "adjacent," supports this interpretation.[32]

While EPA has at times previously considered "functional interrelatedness" in its evaluation of the term adjacent, after a review of these past actions and the *Summit Petroleum* decision, EPA now believes that is not an appropriate interpretation of the term "adjacent." Considering functional interrelatedness in the source determination process departs from the intent expressed in the 1980 PSD rule preamble.[33] Use of functional interrelatedness when determining adjacency has resulted in the burdensome, fine-grained analyses in source determinations and less clarity that EPA predicted in 1980 would occur, and which the agency wished to avoid. Furthermore, in contrast to the oil and gas industry, EPA does not think that the inclusion of a criterion similar to "shared equipment" between physically proximate operations is appropriate for all other industries because in EPA's judgment, concerns over potential over-aggregation beyond the "common sense notion of a plant," through the consideration of physical proximity alone, are unlikely to be present with respect to most (if not all) other industries.[34]

Therefore, in sum, for purposes of making source determinations for NSR and title V, where operations are not contiguous, EPA interprets the term "adjacent" to mean physical proximity. Operations that do not share a common boundary or border, or are otherwise not physically touching each other, will be deemed to be "adjacent" if the operations are nevertheless nearby. For those operations *not* in physical proximity to each other, the existence of some functional interrelationship, *e.g.,* through a pipeline, railway, or other dedicated conveyance, shall not be invoked to establish "adjacency." EPA is not here establishing a "bright line," or specifying a fixed distance, within which two or more operations will be deemed to be in physical proximity and, thus, "adjacent." Permitting authorities will still be responsible for making case-specific determinations, taking account of the facts and circumstances of each situation. EPA believes, however, that a determination that operations are "adjacent" can be made only where it is

[31] 81 FR at 35625.

[32] The reasoning of the 2007 Wehrum Memo is also generally consistent with our approach today, focusing on physical proximity with some allowance for separation between operations. While the 2007 Wehrum Memo concerned only the oil and gas industry, and EPA ultimately concluded that a different interpretation of "adjacent" was reasonable and appropriate for oil and gas sources due to the unique nature of that industry, EPA thinks that the focus of the 2007 Wehrum Memo on physical proximity is appropriate for industries other than oil and gas.

[33] As discussed above, EPA considered but rejected an approach that would have relied on functional interrelatedness as a regulatory criterion for source determinations, deciding instead to use the SIC code as the criterion that would account for operational relationships. EPA did not, in 1980, give any indication that some notion of "functional interrelatedness" should also be used for determining questions of adjacency. *See supra* n.12 and accompanying text.

[34] EPA explained in the 2016 oil and gas source determination rulemaking that it is not uncommon for oil and gas sources to be located within a quarter mile of each other without any operational ties. *See* 81 FR at 35626.

reasonable to conclude that the operations in question are truly in physical proximity to each other. That is, "proximity," which generally conveys the concept of side-by-side or neighboring (with allowance being made for some limited separation by, for example, a right of way), must exist, and the determination must ultimately comport with the "common sense notion of a plant."

To maintain owner/operators', permitting authorities', and the public's current understanding of existing sources and to foster administrative simplicity, EPA recommends that state and local permitting authorities apply this interpretation from this point forward when those authorities are for the first time assessing whether a given pair or set of operations are adjacent for purposes of title V and NSR source determinations. Similarly, where operations have previously been considered one source for the purposes of NSR netting analyses, EPA recommends such operations should continue to be considered one source as long as the common control and same industrial grouping code criteria continue to be met as well. States with approved NSR and title V permitting programs remain responsible for determining in the first instance whether in their discretion specific facilities are adjacent. They are not required to apply the interpretation set forth in this memorandum. Nonetheless, EPA believes that applying this interpretation will provide greater uniformity in permitting decisions.