



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

11/26/2019

MEMORANDUM

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

FROM: Anne L. Idsal
Acting Assistant Administrator

A handwritten signature in blue ink that reads "Anne L. Idsal".

TO: Regional Administrators, Regions 1-10

The purpose of this memorandum is to communicate the Environmental Protection Agency’s (EPA’s or the Agency’s) interpretation of regulations that determine 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.¹ EPA generally refers to such a determination regarding the scope and extent 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 court decisions and from case-specific letters from EPA over the past many years. 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 13.²

¹ References to “NSR” in this memorandum refer to both the Prevention of Significant Deterioration (PSD) program and the Nonattainment New Source Review program. This memorandum does not address definitions in other programs, such as the CAA section 112 hazardous air pollutant program.

² EPA has established a specific meaning of “adjacent” in a rulemaking for that source category. *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).

In previous instances where EPA has provided its views to state and local permitting authorities regarding whether two or more facilities were located on adjacent properties, the Agency often looked beyond the physical proximity of the properties 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, and after considering comments from stakeholders on a September 4, 2018, draft of this guidance memorandum, EPA has determined that the better approach is to apply the Agency's original interpretation expressed in the 1980 development of the Prevention of Significant Deterioration (PSD) portion of the NSR program, where we focused exclusively on proximity when considering whether properties are adjacent. This memorandum provides an interpretation of the NSR and title V regulations that better aligns with both the text of those regulations and our original interpretation of them.

In the interest of consistency and clarity, EPA encourages those permitting authorities that administer EPA-approved NSR and title V programs to also apply this interpretation in determining whether pollutant-emitting activities in these other source categories are located on "adjacent" properties and should be aggregated into a single source in cases where the activities are under common control and belong to the same industrial grouping.⁴ However, this revised interpretation is neither a regulation subject to notice-and-comment rulemaking requirements nor a final agency action. This memorandum itself does not amend the definition of "adjacent" in EPA regulations and does not create or change any legal requirements applicable to EPA, state, local, or tribal permitting authorities, permit applicants, or the public. The revised determination of "adjacent" does not itself determine whether any specific set of activities are located on contiguous or adjacent properties or should be treated as a single stationary source. Source determinations are made by permitting authorities on a case-by-case basis after consideration of the relevant administrative record. EPA-approved state, local, and tribal permitting authorities are not required to apply this interpretation and retain the discretion to determine when pollutant-emitting activities are located on contiguous or adjacent properties.

BACKGROUND

Relevant Statutory and Regulatory Provisions

The NSR program requires a permit before beginning construction of a new major stationary source of air pollutant emissions or a modification of such a source that significantly

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) (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://www.epa.gov/title-v-operating-permits/title-v-operating-permit-policy-and-guidance-document-index>.

⁴ Some air agencies that do not have EPA-approved permitting programs issue PSD and title V permits under a 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.

increases 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.⁵ For NSR, EPA regulations define “stationary source” as “any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant.”⁶ 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).” The phrase “same industrial grouping” refers to the same Major Group, two-digit SIC code.⁷ 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” and sources subject to specific CAA requirements obtain an operating permit, known as a title V permit.⁸ 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 U.S.C. § 7602), and the specific definitions of major stationary source that apply in some areas under the nonattainment NSR program.⁹ Each of these programs have different numerical emissions thresholds at which requirements apply. EPA’s operating permit regulations incorporate these thresholds in the definition of “major source” and define such a 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”¹⁰ As in the NSR programs, “major industrial grouping” refers to the Major Group, two-digit SIC code.¹¹ Many state, local, and tribal permitting authorities have EPA-approved title V permitting regulations that have adopted similar definitions.

Historical 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 pollutant-emitting activities should be considered a single source when determining applicability of NSR and title V permitting requirements. With one exception,¹² 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 in *Alabama Power Co. v. Costle*, 636 F. 2d 323 (D.C. Cir. 1979), that for permitting purposes, “source” should be understood to approximate

⁵ 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.

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

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

⁸ CAA section 502(a), 42 U.S.C. § 7661a(a).

⁹ CAA section 501(2), 42 U.S.C. § 7661(2); 40 CFR § 70.2.

¹⁰ 40 CFR 70.2; 40 CFR 71.2; *see* CAA section 501(2), 42 U.S.C. § 7661(2).

¹¹ 40 CFR 70.2; 40 CFR 71.2.

¹² *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).

the “common sense notion of a plant.”¹³ With this general consideration in mind, permitting authorities make individual source determinations on a case-by-case basis.

When EPA promulgated the PSD regulations in 1980, we explained that the three-part test (same industrial grouping, location on contiguous or adjacent properties, and under common control) would satisfy this direction from the *Alabama Power* court decision by reasonably approximating 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.”¹⁴ In so doing, we considered but chose *not* to add a “functional interrelationship” factor or test to the regulatory criteria for defining a source, because, at that time, we believed that such a test would have “embroiled the agency in numerous, fine-grained analyses.”¹⁵ In the same rulemaking, EPA intentionally did not set a specific distance that would be considered too far apart for adjacency, stating such determinations must be made case-by-case.¹⁶ 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)).¹⁷ 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.”¹⁸ Based on those dictionary definitions, EPA

¹³ See 45 FR 52676, 52695 (August 7, 1980) (citing *Alabama Power*, 636 F. 2d at 397). 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” included in section 111(a)(3) of the Act (“building,” “structure,” “facility,” and “installation”). The court further said that EPA should “provide for the aggregation, where appropriate, of industrial activities according to considerations such as proximity and ownership.” *Id.* at 397. For further discussion of EPA’s understanding of the *Alabama Power* decision in light of subsequent case law, see Source Determination for Certain Emission Units in the Oil and Natural Gas Sector Response to Comments, Docket No. EPA-HQ-OAR-2013-0685-0281 at 243–44 (May 2016).

¹⁴ 45 FR at 52694.

¹⁵ 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.*

¹⁶ 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.

¹⁷ EPA’s regulations at 40 CFR Part 70 govern state operating permit programs, and the regulations at 40 CFR Part 71 comprise the federal operating permit program.

¹⁸ 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

has interpreted “contiguous” to mean that the parcels of land associated with the pollutant-emitting activities in question are in physical contact with one another. EPA has considered properties to be “adjacent” when, while physically separate, they are “nearby” one another.¹⁹ At the same time, however, it is also clear that over the years, EPA has considered, and at times heavily weighed, whether pollutant-emitting activities share some functional interrelatedness in determining whether the properties where those pollutant-emitting activities reside, 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 pollutant-emitting activities 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.²⁰ In incorporating the idea of functional interrelatedness into the interpretation of “adjacent,” EPA has repeatedly explained that the guiding principle behind how close 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.²¹ EPA has also noted that pollutant-emitting activities that have historically been considered one source should not be separated into two sources at a later date based on reconsideration of whether the properties are adjacent.²² This is particularly so where, for purposes of NSR netting analyses, sources have themselves considered their activities to be one source to offset emissions increases from one activity’s modification or construction with emissions decreases from another activity’s reduced operation (or production), closure, installation of controls, or initiation of operational changes.

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 properties were “adjacent.”²³ In 2009, however, the Agency withdrew that memorandum.²⁴ 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 approach employed for all other industries for determining whether properties were adjacent. In so doing, EPA explained that “in some cases, ‘proximity’ may serve as the overwhelming factor” but that

approach taken by the majority of relevant guidance and interprets the meaning of the term “adjacent,” rather than the phrase “contiguous or adjacent.”

¹⁹ 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.”).

²⁰ 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).

²¹ 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).

²² 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).

²³ 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.*

²⁴ Memorandum from Gina McCarthy, Assistant Administrator, to Regional Administrators 1-10, Withdrawal of Source Determinations for Oil and Gas Industries (September 22, 2009).

“such a conclusion can only be justified through reasoned decision making after examining whether other factors are relevant to the analysis.”²⁵

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 properties 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,”²⁶ and concluded that dictionaries agree that entities are adjacent when they are “[c]lose to; lying near . . . [next] to, adjoining.”²⁷ The majority opinion 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 in 2012 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 interrelatedness in NSR and title V source determinations for sources in other areas.²⁸ However, the U.S. Court of Appeals for the D.C. Circuit later struck down the 2012 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.²⁹ The court found that EPA had 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 that applies in only one part of the country or differences in opinion between federal appellate courts (otherwise known as a “circuit split”).³⁰ 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 Petroleum* across the country.

DISCUSSION

²⁵ *Id.* As noted above, EPA subsequently established a specific meaning for “adjacent” in a rulemaking for the oil and gas industry which considers pollutant-emitting activities located within a quarter mile of each other, with shared equipment, to be adjacent. See 81 FR 35622 (June 3, 2016).

²⁶ The court also examined the etymology of the term and relevant caselaw.

²⁷ 690 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”).

²⁸ 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).

²⁹ *National Environmental Development Association’s Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (discussing 40 CFR part 56).

³⁰ 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 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).

For the reasons discussed below, for industries other than oil and gas, EPA interprets the term “adjacent” to entail physical proximity, and the perceived “functional interrelatedness” of pollutant-emitting activities is not a relevant consideration in this inquiry.³¹ This interpretation is consistent both with the Agency’s original understanding of the term, as was explained by EPA in the preamble to the 1980 rule for the PSD program, and with the reasoning of the court in the *Summit Petroleum* decision.³²

Focusing exclusively on physical proximity when considering whether pollutant-emitting activities are on adjacent properties is a more objective and reasonable approach, and one that is more consistent with the dictionary meaning of “adjacent” and the “common sense notion of a plant.” Dictionaries define “adjacent” as “close to; lying near,” “next to,” “not distant: nearby,” or “having a common endpoint or border.”³³ While these definitions may leave some uncertainty regarding what distance is “close” or “near” enough, they all unquestionably 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 words “contiguous” and “adjacent” in our regulations is reasonably interpreted as including both activities located on properties that are touching (“contiguous”) and also activities located on properties that are not contiguous but are in proximity to each other (“adjacent”).³⁴ 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 properties that are not physically touching—including those that are to some degree separated by a right of way or other type of similar intervening property—but that are otherwise in reasonable proximity to one another. The Sixth

³¹ This memorandum interprets the meaning of the term “adjacent,” rather than the regulatory phrase “contiguous or adjacent,” because the term “adjacent” has caused more confusion in practice than the word “contiguous.” As EPA has stated in the context of regulations promulgated under CAA section 112 authority, “‘contiguous’ is clear in its meaning of actually touching. [while] ‘adjacent’ is subject to broader interpretation, including that of being nearby but ‘not touching.’” 58 FR 42760, 42767 (Aug. 11, 1993). Notwithstanding this focus on the term “adjacent,” in EPA’s view, functional interrelatedness is not a relevant consideration in determining whether operations are either “contiguous” or “adjacent,” or accordingly to the “contiguous or adjacent properties” criterion as a whole.

³² EPA understands that it must apply the holding in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012) within the jurisdiction of the Sixth Circuit when determining whether properties are adjacent under the title V regulations for industries other than oil and gas. EPA recommends that permitting authorities within that jurisdiction also be mindful of this decision when interpreting their regulations.

³³ 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).

³⁴ 81 FR at 35625.

Circuit's reasoning in the *Summit Petroleum* decision, based in part on the dictionary definition of "adjacent," supports this interpretation.³⁵

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 the better interpretation of the term "adjacent" does not consider functional interrelatedness. Considering functional interrelatedness in the "adjacent" portion of the source determination process departs from the original interpretation EPA expressed in the 1980 PSD rule preamble.³⁶ Use of functional interrelatedness when determining adjacency has resulted in less clarity and the burdensome, fine-grained analyses in source determinations that EPA in 1980 predicted would occur, and which the Agency wished to avoid. Furthermore, in contrast to the oil and gas industry, EPA does not currently think that the inclusion of a criterion similar to "shared equipment" between physically proximate activities is appropriate for all other industries. EPA included this criterion in the 2016 oil and gas source determination rulemaking because oil and gas sources can be located within a quarter mile of each other without having any operational ties, which prompted concerns that sources might be over-aggregated in a manner inconsistent with the "common sense notion of a plant" if adjacency were determined based on physical proximity alone. *See* 81 FR at 35624, 26. In EPA's judgment, such concerns over potential over-aggregation through the consideration of physical proximity alone are unlikely to be present with respect to most (if not all) other industries.

Therefore, in sum, for purposes of making source determinations for NSR and title V, EPA interprets the term "adjacent" to entail physical proximity between properties. From this point forward, EPA will consider properties that do not share a common boundary or border, or are otherwise not physically touching each other, to be "adjacent" only if the properties are nevertheless nearby, side-by-side, or neighboring (with allowance being made for some limited separation by, for example, a right of way). This is inherently a case-specific inquiry where determining the appropriate distance at which two properties are proximate enough to reasonably be considered "adjacent" may vary depending on the nature of the industry involved. Therefore, EPA is not here establishing or recommending a "bright line," or specifying a fixed distance, within which two or more properties will be deemed (or presumed) by EPA to be in close enough physical proximity to be considered "adjacent." In each case, this determination should ultimately approximate the "common sense notion of a plant." Moreover, importantly, for those properties *not* in physical proximity to each other, EPA will not invoke the existence of some functional interrelationship to establish "adjacency."

³⁵ Additionally, 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 activities. 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.

³⁶ 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 major industrial grouping (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* note 15 and accompanying text.

State, local, and tribal permitting authorities with EPA-approved NSR and title V permitting programs remain responsible for determining in the first instance on a case-by-case basis whether specific facilities are located on adjacent properties.³⁷ EPA encourages these permitting authorities to focus exclusively on physical proximity, following the interpretation expressed in this memorandum. However, these permitting authorities are not required to apply the interpretation set forth in this memorandum and retain discretion in determining what information supports a conclusion that pollutant-emitting activities are “close” or “near” enough to be “adjacent” while approximating a “common sense notion of a plant” in a reasonable manner.³⁸ Notwithstanding this flexibility available to permitting authorities, EPA believes that applying an interpretation focusing exclusively on physical proximity will provide greater clarity and consistency in permitting decisions.

EPA encourages permitting authorities that choose to apply EPA’s current interpretation of “adjacent” to do so prospectively and not retroactively. Thus, EPA recommends that state, local, and tribal permitting authorities apply this interpretation from this point forward when those authorities are for the first time assessing the relevant facts and circumstances governing whether a given set of activities should be considered a single source for purposes of NSR and title V. In most situations, EPA expects that it would not be appropriate or necessary for permitting authorities to revisit prior source determinations based solely on a change in an EPA policy or interpretation.³⁹ Not only could this upset potential settled expectations, but it could result in an unmanageable strain on limited resources for permitting authorities (and, in some cases, EPA).⁴⁰ However, there may be circumstances where it could be appropriate (and not unduly burdensome) for a permitting authority to re-evaluate a prior source determination, such as where relevant facts change that impact whether the three criteria are met. If a permitting authority does revisit a prior source determination (e.g., based on changed facts), EPA recommends that such a re-evaluation apply prospectively to future permitting actions and not retroactively to permitting actions that have been completed. Therefore, in most circumstances, EPA does not think it would be appropriate to revisit or revise previously-issued final permit actions that were based on a

³⁷ As noted above, some air agencies that do not have EPA-approved permitting programs issue PSD and title V permits under a 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.

³⁸ EPA maintains that focusing exclusively on physical proximity is the better interpretation of “adjacent.” However, except where *Summit Petroleum* is binding (see *supra* note 32), EPA does not consider its interpretation to be the only reasonable interpretation of the relevant statutory and regulatory terms due to the ambiguity resulting from the need for—and lack of—context within the meaning of “adjacent.” Accordingly, EPA does not agree with the suggestion of some commenters that EPA’s prior interpretation was an unlawful interpretation or foreclosed by the Act.

³⁹ This is particularly true where EPA’s prior policies and the permitting authority’s prior decisions were not unreasonable or contrary to the Act.

⁴⁰ Additionally, in some cases, such a re-evaluation could raise potential concerns related to the appearance of circumvention of NSR requirements. EPA generally discourages re-evaluation where multiple pollutant-emitting activities previously relied on their classification as a single source to avoid additional requirements (e.g., by relying on source-wide emission reductions during a NSR netting analysis) and where these same activities later request to be treated as separate sources based only in this change in EPA’s interpretation, particularly where such a change would result in removal of requirements that would otherwise apply if the activities continued to be considered a single source.

reasonable application of regulatory requirements and then-existing policies to a given set of facts.⁴¹ Like other aspects of the memorandum, EPA's recommendations on this issue are not binding on permitting authorities.

Please share this memorandum with air agencies in your Region. For any questions regarding this memorandum, please contact Scott Mathias, Acting Director of the Air Quality Policy Division in the Office of Air Quality Planning and Standards at (919) 541-5310 or mathias.scott@epa.gov.

⁴¹ EPA's existing regulations and policies regarding any existing authority that permitting authorities have under their EPA-approved rules to modify or rescind previously-issued permits or permit terms are not affected by, and are beyond the scope of, this guidance.