

TYPES NOT MAPPED YET September 10, 2018 | TTR not mapped yet | Eric E. Boyd

EPA announces ‘adjacent’ under Clean Air Act now limited to physical proximity

On September 5, the U.S. Environmental Protection Agency (“EPA” or “Agency”) announced its new interpretation of the term “adjacent” for purposes of permitting sources under the Clean Air Act (“CAA” or “Act”). The new interpretation, along with other new permitting guidance issued by the EPA over the last nine months, will impact the number of sources required to comply with the more stringent permitting requirements for major sources under the Act.

Background

Under the CAA, the term “source” is defined in EPA’s regulations in three contexts: Title V permitting, non-attainment new source review (“NSR”) permitting, and prevention of significant deterioration (“PSD”) permitting. In each case, the term “source” is defined as “any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant.” See 40 C.F.R. §§ 51.165(a)(1), 52.21(b)(5) and 40 C.F.R. § 70.2. The phrase “building, structure, facility, or installation” is defined as all pollutant-emitting activities that: (1) belong to the same industrial grouping; and (2) are located on one or more contiguous or adjacent properties; and (3) are under the control of the same person. Id. All three criteria must be met to conclude that a single source designation is appropriate.

Grouping operations together as one source is a two-edged sword for facilities. On one hand, de-grouping facilities means that such sources are less likely to be considered “major” for PSD, NSR, or Title V permitting purposes. On the other hand, de-grouped sources cannot rely on internal “netting” to avoid the major source requirements of NSR and PSD when modifying.

When the EPA initially adopted the three-part source test, it explained it could not “say precisely how far apart activities must be in order to be treated separately” and such determinations would be made on a “case-by-case” basis. 45 Fed. Reg. 52676, 52695 (August 7, 1980). For many years, the EPA argued “functional interrelatedness,” and not just physical proximity, should be considered when determining whether two facilities are “adjacent.” This approach led to decisions where operations separated by many miles were considered a single source.

In *Summit Petroleum Corp. v. Environmental Protection Agency*, 690 F.3d 733 (6th Cir. 2012), the Sixth Circuit rejected the long-standing EPA approach of using functional interrelatedness when determining whether two facilities are adjacent. Summit Petroleum determined an oil and gas sweetening plant and related wells were a single source for Title V purposes, even though some of the wells were around 8 miles from the plant. The Sixth Circuit found the term “adjacent” was unambiguous and the plain meaning of the term meant physical proximity only and not functional interrelatedness. The Court, therefore, vacated and remanded the EPA’s determination that the sweetening plant and the wells were a single source.

The EPA, however, took steps so Summit Petroleum’s impact would be limited to sources in the Sixth Circuit only. On December 21, 2012, the EPA issued the “Summit Directive,” explaining it would not “change its longstanding practice of considering interrelatedness in the EPA permitting actions in other jurisdictions.” In *National Environmental Development Association’s Clean Air Project v. Environmental Protection Agency*, 752 F.3d 999 (D.C. Cir. 2014), the DC Circuit held that the EPA’s failure to comply with its own “Regional Consistency” regulations with respect to the Summit Directive was arbitrary and capricious, vacating the Summit Directive. The EPA later revised its Regional Consistency regulation, allowing a regional office to diverge from national policy in geographic areas covered by adverse court decisions. 81 Fed. Reg. 51102 (August 3, 2016). Although the DC Circuit considered a challenge from industry groups to that action, the DC Circuit rejected the challenge in June. Until now, therefore, the Summit Petroleum approach—determining whether two sources are adjacent—should be considered one source applied only in the Sixth Circuit.

EPA's new interpretation of 'adjacent'

The EPA's new interpretation of the term "adjacent" is straightforward. The EPA says, "[F]or 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." The EPA distinguished the term "adjacent" from the term "contiguous" by explaining, "Operations that do not share a common boundary or border, or are not otherwise physically touching each other, will be deemed "adjacent" if the operations are nevertheless nearby." Although the EPA did not establish a bright-line distance for determining adjacency (as it did in the Source Determination Rule), the EPA explained that,

a determination that operations are "adjacent" can be made only where it is 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."

The EPA said that its new interpretation was supported by the plain meaning of "adjacent", the original intent of the regulations, and the decision in *Alabama Power Co. v. Costle*, 636 F. 2d 323, 397 (D.C. Cir. 1979).

The EPA made clear that its new interpretation of "adjacent" is to be applied "from this point forward": 1) when the EPA administers the permitting programs; and 2) in states with delegated programs. Prior permitting decisions under the old "functional interrelatedness" approach would not be affected by the new interpretation. The EPA noted that states with EPA-approved permitting programs are not required to apply the new interpretation, but nevertheless urged such states to apply the new interpretation "[i]n the interest of consistency and clarity." Whether a state has an approved or delegated permitting program can be found [here](#).

Other recent EPA changes in interpretation

The new guidance on the meaning of the term "adjacent" is one of a string of changes in interpretation of CAA permitting requirements the Agency has announced in recent months. On December 7, 2017, the EPA issued a memo entitled, "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability." We issued an [alert](#) about that memo last December. In addition, the EPA issued:

- A Federal Register Notice on February 8, 2018 announcing it was changing its "once-in, always-in" guidance with respect to major source determinations relating to hazardous air pollutant standards;
- A memo to Regional Administrators on March 13, 2018 "to communicate the EPA's interpretation that its current NSR regulations provide that emissions decreases as well as increases are to be considered at Step 1 of the NSR applicability process, provided they are part of a single project" and;
- A letter to a state permitting agency on April 30, 2018 announcing a move away from the traditional multi-factor approach to the control prong of the three-prong source test, towards an approach focusing on the power or authority of one entity to dictate decisions of the other regarding the applicability of or compliance with relevant air pollution regulatory requirements.

The EPA's recent changes are generally viewed by industry sources as favorable adjustments that will simplify, speed up, and clarify permitting under the CAA.

Next steps

The EPA's new guidance on the meaning of the term "adjacent" has not been promulgated through notice and comment rulemaking. In fact, the EPA stated in its announcement, "[t]he revised guidance may be considered in final permitting decisions by EPA and other agencies, but the guidance itself will not be an agency final action and will not legally bind permitting authorities or the public." This means the EPA expects any challenges to the "adjacent" guidance will come when the guidance is used in permitting decisions, not when the guidance is finalized. Like some of the other recent changes to the permitting programs that the EPA has announced; however, challenges to the new interpretation of "adjacent" by states and environmental groups are likely when it is final.

Importantly, comments regarding the draft guidance may nevertheless be submitted in two ways. First, the announcement of the new guidance contains a comment form. Second, comments and related material may also be sent via e-mail to Adjacency_Guidance@epa.gov. The EPA is accepting comments on its new interpretation of "adjacent" through October 5, 2018.

If you have questions regarding this article or the CAA generally, please contact [Eric Boyd](#) in [Thompson Coburn's environmental practice area](#).



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