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EPA Docket Center
Docket Name: PSD and NSR – Major Source Determination for Oil and Gas Extraction Facilities
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Mail code 2821T
Washington, DC 20460

Attn: Docket ID No. EPA- HQ-OAR-2013-0685

RE: Comments on Source Determination for Certain Emission Units in the Oil and Natural Gas Sector, 80 FR 56579, September 18, 2015.

Founded in 1951, the Colorado Petroleum Association (CPA) is a statewide non-profit Colorado trade association comprised of member companies involved in every segment of Colorado's oil and gas industry, including exploration and production, refining, transportation, supplier chain, pipeline and contractors.

The Colorado Oil & Gas Association (COGA) is a nationally recognized trade association that promotes the beneficial, efficient, responsible, and environmentally sound development, production, and use of Colorado's oil and natural gas resources. With over 300 members, COGA provides a positive, proactive voice for the oil and gas industry in Colorado and aggressively promotes the expansion of Rocky Mountain natural gas markets, supply, and transportation infrastructure.

CPA and COGA ask EPA to consider these comments on the proposal for Source Determination for Certain Emission Units in the Oil and Natural Gas Sector.

EPA proposes two approaches for defining adjacent for oil and gas sources: (1) adjacent means within a quarter mile and (2) adjacent means within a quarter mile or there is an exclusive functional interrelatedness between the sources. EPA expressed a preference for option 1 and seeks comment on both.

SUMMARY

CPA and COGA do not support option 2, may support option 1 with appropriate limitations based on proximity and common sense notion of a plant, but prefers EPA consider one of two other options other than those proposed.

1. A rule which codifies the relevant court decisions that stipulate contiguous and adjacent relate to proximity not functional interrelatedness.
2. No rule and EPA allows the relevant court decisions to stand on their own merit for interpretation and guidance by stakeholders and permitting agencies.

CPA and COGA are concerned that option 1 sets a distance threshold to define adjacent that will still result in aggregating sources that should not be treated as one source. EPA must revise option 1 to better align with how states have used the distance rule of thumb as a rebuttable presumption. We see no support in the statute, case law, or any practical utility of using functional interrelationships to aggregate sources where the sources are not in close proximity to each other. In addition to the comments on EPA's two options, we urge EPA to acknowledge that the status quo is not reflected by EPA's "longstanding policy" of applying functional relationship to define adjacent but is reflected by the relevant court decisions and numerous state determinations that rely on proximity to determine contiguous or adjacent. We urge EPA to recognize that a rule that would change the status quo would apply only prospectively. In light of the fact that states have developed and relied upon state rules, guidance and practice for making determinations, EPA should refrain from unnecessarily imposing EPA's untested distance threshold on states that choose to follow their own well-developed permitting approach.

I. CPA and COGA Urge EPA to Revise Option 1 to Align Better with State Approaches and Comply with Court Decisions

A. CPA and COGA support EPA on option 1 only to the extent that EPA would not aggregate any oil and gas sources that are located more than a quarter mile apart. We urge EPA to align the option more closely with NESHAP subpart HH and section 112(n)(4).

In the preamble, (80 FR 56586) EPA describes the first option as follows:

> "Under the first, and currently preferred, option for which the EPA is taking comment, the EPA proposes to define ''adjacent'' such that the source is similar to that in the NESHAP for this industry, Subpart HH, National Emissions Standards for Hazardous Air Pollutants From Oil and Natural Gas Production Facilities (40 CFR 63.760). Under this option, the ''source'' for oil and natural gas sector activities is presumed to be limited to the emitting activities at the surface site, and other emitting activities will be considered ''adjacent'' if they are proximate. Thus, under this first option, two or more surface sites must be considered as a single source if they share the same SIC code, are under common control, and are contiguous or are located within a short distance of one

> another. We prefer this option because we believe that a definition that centers on a surface site is familiar to the industry and the regulators because of the current NESHAP requirements, so it will streamline permitting. We also believe that a definition focused on a surface site most closely represents the common sense notion of a plant for this industry category. Surface sites that are not in close proximity to one another may be on a separate lease which may not align with the common sense notion of a single plant. In addition, we believe that this definition is consistent with Congress' intent, at least as they expressed it with regard to HAPs, as discussed previously.

The definition of facility under subpart HH includes the following:

> For the purpose of a major source determination, facility (including a building, structure, or installation) means oil and natural gas production and processing equipment that is located within the boundaries of an individual surface site as defined in this section. Equipment that is part of a facility will typically be located within close proximity to other equipment located at the same facility.

We agree that oil and gas sources located on properties that are not contiguous must not be treated together as one source for air permitting under New Source Review, the title V operating permit program or the hazardous air pollutant program. However, EPA's proposal to define adjacent to mean within a quarter mile is not consistent with 40 C.F.R. Part 63 subpart HH. Subpart HH is intended to implement the statutory prohibition against aggregation for oil and gas sources in Clean Air Act section 112(n)(4). Under HH and under the statute, no surface site can be aggregated with equipment at another surface site. The statute specifically prohibits aggregation of any emissions from more than one well or station.

> 112(n)(4) OIL AND GAS WELLS; PIPELINE FACILITIES.— (A) Notwithstanding the provisions of subsection (a), emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources, and in the case of any oil or gas exploration or production well (with its associated equipment), such emissions shall not be aggregated for any purpose under this section.

Nonetheless, we do agree that equipment more than one quarter mile apart do not have to be considered for aggregation since they would obviously not be within close proximity to be contiguous. Inside a quarter mile, a proximity determination for contiguous may still be appropriate on rare occasions for oil and gas sources if there is a question on the common sense notion of a plant or vice versa.

B. EPA must not presume that all sources within a quarter mile must be aggregated.

EPA requested comments regarding whether to specify a distance that would define multiple surface sites as a single source. Specifically, "In addition, we request comment on whether it is appropriate to establish a specific distance within which to consider multiple surface sites as a single source, and if so, what that distance should be." (80 FR 56587). If EPA were to issue a rule that aligned with HH and section 112(n)(4), EPA would not aggregate multiple surface sites.

Although we agree with EPA that sources beyond a quarter mile should not be treated as contiguous or adjacent under any of the Clean Air Act programs, we do not believe that EPA should set any bright line distance that would determine that all sources must be aggregated. The *Alabama Power* court decision mandates that EPA ensure that the definition of source would only aggregate sources that would meet the "common sense notion of a plant." For oil and gas sources, even a quarter mile aggregation threshold could result in sources being aggregated that would run afoul of the "common sense notion of plant."

EPA stated once in the proposal preamble that the specific distance might be a presumption. ("We request comment on whether there are circumstances in which an owner/operator would prefer to combine surface sites or other operations that are beyond the presumptive distance, e.g., 1⁄4 mile, and seek a PSD or NNSR permit." 80 FR 56587) But the regulatory language does not indicate that the quarter mile distance would be a rebuttable presumption. EPA's rule should allow a source to rebut the presumption that all units within the specified distance fit within the "common sense notion of a plant."

Since EPA's option 1 is intended to align with the Subpart HH, EPA implies that the terms "close proximity" within the definition of facility under HH means within a quarter mile. We disagree with EPA's proposal that all equipment located within a quarter mile must be aggregated under any of the Clean Air Act programs. We disagree that everything within a quarter mile are within close proximity. Furthermore, EPA should not assume that sources within close proximity, whether defined by a quarter mile or any other distance, are part of the same facility or the same source under the Clean Air Act.

As mentioned to close the previous section, for sources within the quarter mile threshold, sources should only be aggregated if they are in close proximity to fall within "the common sense notion of a plant." The New Mexico Single Source Determination Guidance, dated May 7, 2010, emphasizes close proximity and common sense notion of a plant. The guidance states that excessive distance defies the common sense notion of plant. The guidance, however, does not dictate a specific distance that might qualify as adjacent. The nature of oil and gas operations are unique such that sources constructed within a quarter mile might have no operational ties or relationship and thus, would not meet the common sense notion of plant.

Under its ''currently preferred option,'' EPA would use a quarter mile distance to require oil and gas sources under the common control of the same operator to be aggregated for air permitting purposes. EPA notes that several states, including Texas and Louisiana, use proximity of a quarter mile to determine adjacency for Clean Air Act permitting. However, the EPA fails to acknowledge that Texas's Clean Air Act includes an additional prong: sources within a quarter mile must also be ''operationally

dependent.'' This was mandated by the Texas legislature in 2011, five years before EPA's final rule on source determination will be issued.

C. EPA's Proposal Is Not Consistent with State Approaches

Texas and other states have a long history, beyond the five years reflected by Texas legislative action, of applying the quarter mile distance as a rebuttable presumption to narrow the size of the source, not to expand it. Several states do not assume that sources within close proximity must be aggregated together nor do the states substitute functional dependence or interrelatedness for proximity.

States have experience considering numerous and varied factors to determine what is appropriate to permit as one facility. An example of the factors that states must consider in permitting oil and gas facilities in light of the unique nature of oil and gas operations and the complex factors involved in siting wells is demonstrated by EPA's own recitation of the complex factors related to the BP Florida River facility.

> [T]he fact that many of BP's NSJB wells are located in La Plata County does not mean they are "adjacent." La Plata County covers 1,692 square miles, or nearly 1.1 million acres. All BP owned and operated wells that happen to be co-located within such a large area cannot reasonably be said to be "adjacent" to one another simply because they are located in the same county. In this case, while the WEG comments make general statements about the interrelatedness of the various BP emission units, they do not identify anything in the record showing that the co-location in same field affects the degree to which the various emission points may be dependent on each other. In fact, the placement of oil and gas well sites, compressor stations, and gas plants in this area is driven by several complex factors, including the spacing area established by relevant jurisdictional authorities: the Colorado Oil and Gas Commission (COGCC); the Bureau of Land Management (BLM); and the Southern Ute Tribe. Factors such as company-specific assessments of optimal geology, engineering, topography, access, power, and surface owner compatibility also play a significant role. In addition, we note that the well sites located closest to Florida River were drilled or constructed at various times over the past 25 years - many well sites existed before Florida River was constructed and some were constructed after Florida River was constructed. The locations of the older well sites were driven in part by surface owner preferences and in part by local jurisdiction spacing orders. The locations of the newest well sites were based on COGCC 80~acre spacing orders (agreed to by the BLM and the Southern Ute Tribe), and other factors, including BP's La Plata County MOU, which requires new wells to use existing infrastructure in order to reduce surface disturbances. Accordingly, any assertion of "adjacency" based simply on the fact that Florida River, Wolf Point, and the various well sites are located in the same county or the same field fails to take these important spatial, temporal, and regulatory attributes into account.

Colorado went through a similar exercise with the Anadarko Kerr-McGee Fredrick Station permit analysis. States rely on their own experience with permitting under the state's own program. In

addition, rather than repeatedly undertaking the comprehensive analysis that EPA undertook for BP Florida River, some states have developed practical approaches for defining source for oil and gas operations. For example, Wyoming's oil and gas permitting guidance distinguishes between single well sites and Pad sites that serve multiple wells with common equipment. North Dakota's guidance (Page 10 of Bakken Pool Oil and Gas Production Facilities Air Pollution Control Permitting & Compliance Guidance, North Dakota Department of Health Division of Air Quality, Effective Date May 2, 2011) states:

> When multiple wells are drilled from a single pad, it may be necessary to aggregate all emission sources at the multiple well production facility and additional permitting requirements may apply (Title V, PSD, etc.).

Of course, the specific approaches described above reflect just one component of the state air permitting program that applies to oil and gas sources and are implemented in conjunction with past practice and guidance that the state developed over decades of permitting experience. Additional examples of state approaches are numerous and varied and are available to EPA. EPA has not evaluated the impact that this proposal could have on state decisions. Instead EPA states:

> This proposed action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The requirement to obtain permits for new major sources is imposed by the CAA. This proposed rule, if made final, would interpret those requirements as they apply to the oil and natural gas sector. Thus, Executive Order 13132 does not apply to these proposed regulation revisions. In the spirit of Executive Order 13132 and consistent with the EPA policy to promote communications between the EPA and state and local governments, the EPA specifically solicits comments on this proposed action from state and local officials. (80 FR 56589)

While the quarter mile radius in option 1 has some historical utility based on a few state rules or guidance, there is no historical federal legal precedent for its use. The Clean Air Act gives states a reasonable amount of discretion to develop and implement their permitting programs, and as a result each state's permitting program is unique. While this radius has some practical utility for individual states based on the design of their permitting program (including the consideration of other factors to narrow the scope of the source), there is no legal basis for across the board federal implementation of the distance threshold by itself, though we support it to set the outer limit of the proximity test. Instead of defining adjacent to mean anything other than in close proximity, EPA should focus on clarifying the historical meaning of contiguous and adjacent in terms of proximity to ensure that sources meet the common sense notion of a plant. If the rule has this clarity, which also reinforces the *Summit, Alabama Power,* and *NEDA* decisions, EPA will not need to specify a radius. Not stipulating a radius would also relieve EPA from the need to address the daisy-chain issue.

D. EPA's Rule Must Ensure that Sources Are Not Sequentially Linked Together or "Daisy-chained"

Even under option 1, EPA must design the rule to ensure that sources are not "daisy-chained" together. Daisy chaining results in some sites within the chain being more than a ¼ mile apart from others while within a ¼ mile of its nearest site. It is clear in EPA's 1980 rule that EPA did not intend sources along a pipeline, road or railway to be treated together as one source simply because they were connected by that line. EPA and states recognize that interconnections between two sources do not make all sources connected to those two also part of the same source. EPA must design the rule to ensure that EPA is not changing the federal rules so as to create ambiguity for states and regulated entities.

The EPA does acknowledge that states like Louisiana strongly discourage the ''daisy-chaining'' of sources which could all be within a quarter mile of each other but only connected via one long pipeline. Still, the EPA does not take a specific position on whether a presumption against daisy-chaining would be part of the EPA final rule.

II. CPA and COGA oppose EPA Option 2 and opposes aggregation of any oil and gas sources that are located further than a quarter mile apart. CPA and COGA oppose any use of functional dependence or relationships to substitute for, or serve as the definition of, "contiguous or adjacent."

A. EPA's Proposal Does Not Define Exclusive Functional Interrelatedness

EPA has not defined "exclusive functional interrelatedness" with sufficient clarity to allow the regulated community to adequately comment or to understand how the factor would apply or could impact operations. Any rule that uses "exclusive functional interrelatedness" will create substantial uncertainty and will cause immediate harm to sources located in Indian country and in states delegated under EPA's PSD rules.

B. EPA should not use functional dependence or functional interrelationship to define adjacent, contiguous, or to substitute for proximity for oil and gas sources.

EPA must not finalize any version of option 2. CPA and COGA oppose EPA use of functional dependence or functional interrelationships to define adjacent. Adjacent means proximity; it does not mean functionally dependent, related or interrelated. The *Summit* court stated that adjacent relates to proximity. The statute and EPA actions from 1980 to 1996 are consistent with adjacent being a further connotation of "contiguous" and not meaning any more than proximate.

C. Consistent with EPA Long-Standing Practice, Functional Relationships or Dependence Should Only Narrow the Scope of the Source

EPA's history from August 1980 to 1996, as well as a few determinations since 1996, indicates that in light of the difficulty of making a determination of the distance which might mean adjacent, EPA used functional relationships to narrow the scope of the source. Several states also follow this approach.

Where the three regulatory factors are found to be met, including some relative adjacency, functional dependence provided additional support for aggregation. If there is no functional dependence, in many cases the sources are not aggregated even where there might be some relative adjacency.

In the preamble to the August 1980 PSD rules, EPA discussed "functional interrelationship" in explaining why EPA decided to add the industrial classification as a factor to use in conjunction with control and proximity. Nowhere in the 1980 preamble did EPA explain or describe the proximity factor (contiguous or adjacent) as related to function. Instead, EPA addressed comments about its proposal to consider only control and proximity. EPA used the word "proximity" throughout the discussion. (45 FR 52694-52695) After considering whether to add function, EPA rejected adding function and chose instead to add the standard industrial classification code to ensure that the definition would not inappropriately aggregate facilities that should not be aggregated. EPA said using the SIC code is to distinguish "between sets of activities on the basis of their functional interrelationships." To ensure that use of the SIC code would not result in inappropriate segregation of facilities, EPA also provided that "support facilities" to be included with the primary facility regardless of the SIC code if they convey, store, or otherwise assist in production of the principal product. Historically, the functional relatedness analysis was only for determining whether a facility was a "support facility." Despite EPA's claims to have a "longstanding" practice of defining adjacent to include functionally related facilities, EPA's history shows that functional relationship was more often, and properly, used for support facility. More than 15 years after EPA's clear rulemaking, EPA's practice evolved (in error) to define adjacent to mean functionally interdependent.

From August 1980 through 1996, EPA headquarters did not define adjacent other than in relation to distance between sources. In a few of the cases where EPA identified a dedicated rail or pipeline or road between sources, the sources were still less than a mile apart and were seeking aggregation in order to take advantage of netting emission reductions. A June 1981 determination is a good example of EPA's early attempts to keep the meaning of "adjacency" as "proximity" when EPA describe a "unique set up" of the facilities to permit EPA to consider them adjacent. In that case, the sources were less than a mile apart. EPA did not mandate aggregation of the facilities but allowed it so the facilities could avoid major NSR by netting emission reductions.

The first determination or guidance from EPA headquarters that expressed adjacent as meaning anything more than proximity was in August 1996. Unfortunately, it is EPA's initial efforts to provide flexibility for netting to major sources that contributed to the inappropriate policy stretch beyond the meaning of adjacent. EPA's record in the *Summit* determination as well as numerous other references in later determinations indicates that the earliest use of "functional dependence" or interrelatedness to determine "adjacent" was in this August 1996 determination. The determinations referenced in the 1996 memo, also referenced by later determinations, do not set functional dependence as a criteria for adjacent. Instead the referenced determinations find that a source is adjacent based on the short distance between sources. The connection via pipeline or rail was a supporting factor, showing that the facilities actually operate together and thus meet the common sense notion of a plant. Except for one determination that pre-dates the 1980 PSD rule, EPA determinations had not aggregated sources at distances greater than one mile apart until EPA's significant departure from practice in 1996.

IV. EPA's Rule Must Align with the Statute: Contiguous Is In the Statute; Adjacent Is Not.

The definitions of major source in sections 112 (Clean Air Act section for hazardous air pollutants) and 501 (operating permits program in the Clean Air Act) were included in the 1990 Clean Air Act Amendments; it was Congress' last expression of the definition of major source. The statute uses "contiguous" in §§112 and 501 and in the nonattainment NSR program (Part D). The statute does not include the term "adjacent" in the definition of major source in any part of the Act. Only EPA's 1980 NSR rule and, beginning in 1995, the Title V rules in parts 70 and 71 include adjacent in the definition. In 40 C.F.R. part 70 and 71 (EPA's operating permit regulations), EPA added adjacent based on EPA's "historical" interpretation that contiguous means contiguous or adjacent. EPA did not discuss this in the proposed or final part 70 or 71 rule preambles. (56 FR 21724) Instead, EPA explained this interpretation in a part 63 (hazardous air pollutant program) guidance.

Clean Air Act §501 defines major source as any stationary source or group of sources within a contiguous area. (EPA fails to mention §501 in this proposal) EPA cannot use "adjacent" to mean anything other than contiguous. EPA's 1980 rules are superseded by the 1990 amendments to the extent that EPA interprets contiguous and adjacent to mean anything more than proximity for title V or 40 C.F.R. part 63 (MACT rules for hazardous air pollutants). Nothing in the statute permits EPA to add factors beyond contiguous. Although EPA might define "contiguous" to include adjacent, to then define "adjacent" to mean "functionally interrelated" is a stretch outside of the meaning of the Clean Air Act. EPA's discretion must not only meet the *Alabama Power* test but also, as the definition applies for title V, it must also stay within the meaning of major source as described in CAA §501. EPA guidance for part 63 reveals that EPA once considered "adjacent" to be a component of "contiguous," not an extension far beyond contiguous.

> October 1, 2004 letter from JoAnn Heiman, Region 7:
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> > The definition of "major source" in Section 63.2 states:
> >
> > > "Major source means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants, unless the Administrator establishes a lesser quantity, or in the case of radionuclides, different criteria from those specified in this sentence."
> >
> > This definition does not include the term adjacent. In addition, in a response to a public comment in the Background Information Document (EPA-453/R-02-002) for the April 5, 2002 amendments to the Part 63 General Provisions (66 FR 16582), the Agency stated that we do not consider the term "adjacent" to apply to Part 63. However it is clear that the Agency did intend the term "contiguous" to be interpreted broadly.

Part 63 General Provisions Preamble:

> First, the use of the term "adjacent" is consistent with the language of the statute. The common dictionary definition of "contiguous" consists, in part, of "nearby, neighboring, adjacent." On this basis, the EPA has historically interpreted "contiguous property" to mean the same as "contiguous or adjacent property" in the development of numerous regulations to implement the Act. Under this approach, the physical relationship of emission units to production processes is irrelevant if the units are adjacent geographically and under common ownership or control.

To remain consistent with the statute, and to avoid adding complexity and confusion to air permitting for oil and gas sources, EPA's definition of source for oil and gas sources for all three programs (NSR, title V, and section 112) must be the same and must use only control and contiguous to define source. The industrial category factor available under the NSR rules is of little relevance for this source category that falls under one category. The statute does not provide EPA broad authority to expand the definition of source to include functional dependence or relatedness.

CPA and COGA suggest using the language below as an alternative to EPA's proposal.

"Contiguous or adjacent properties" mean surface areas with an affixed building, structure, facility or installation including permanently graded or cleared areas for such building, structure, facility or installation, that share an edge/boundary, physically touch, and are adjoining or physically abutting.

V. Emissions Netting Does Not Justify EPA's Expansion of the Definition of Source for All Sources

Neither the statute nor reasonableness justifies EPA's expanded definition of source designed over the years to allow some major sources to net emission reductions. EPA's concern about the benefits of netting is overstated for oil and gas sources. Oil and gas sources rarely use netting to avoid major NSR because oil and gas sources are not commonly major sources. The types of sources that have benefitted from netting benefits due to the broader definition of source are complex manufacturing facilities. Although EPA's new definition increases the number of major oil and gas sources, the benefits of netting for the new major sources do not outweigh the burden of major source requirements. Because EPA chooses to limit this rulemaking to oil and gas sources, EPA should not take into consideration the netting benefits that are advantageous to complex manufacturing facilities.

VI. EPA Need Not Issue a Rule to Define Adjacent; EPA Should Issue a Rule That Complies with All Court Decisions

A. This rule is not needed. Neither the *Summit* decision nor the *NEDA* decision require EPA to issue the rule. EPA can choose national application of the *Summit* decision.

EPA can follow the *Summit* decision for oil and gas sources. The *Summit* court ruled that adjacent must mean geographic proximity and that EPA could not apply a functional interrelatedness test in determining adjacency under the current rule. However, EPA is also bound by the statute and the

Alabama Power decision. Option 2 is plainly inconsistent with the statute and the *Alabama Power* court decision and cannot be finalized. Similarly, option 1 assumes functional interrelatedness by grouping all sources within a quarter mile radius without using a more precise contiguous or proximity analysis. Even option 1 could violate the *Alabama Power* court mandate that source reflect common sense notion of a plant.

The *NEDA* court ruled that EPA could not mandate that states and EPA regions outside of the 6th Circuit disregard the *Summit* decision because EPA was bound by the Clean Air Act and regulations to ensure regional consistency in permitting guidance. State permitting authorities have been able to proceed with permitting decisions that are consistent with the *Summit* decision. However, EPA has delayed issuing permits in Indian country pending the outcome of this rulemaking despite the clarity provided by the *Summit* decision. As described above, a rule that defines adjacent to mean "functional interrelatedness" will create confusion and uncertainty as EPA and states make new determinations based on business relationships. If EPA, instead, chose to respect the *Summit* decision, EPA need not issue a revised rule. EPA would take action by issuing guidance that aligns with the *Summit* decision for EPA Regions that are reviewing permits for Indian country sources. EPA would proceed with the permitting in Indian Country and cite to the *Summit* decision to support EPA's determination about sources in Indian country.

B. To the extent EPA is compelled to revise rules to include a definition of "adjacent" for oil and gas sources, EPA should only revise 40 C.F.R. 52.21. EPA should not revise 40 C.F.R. 51.165 or 51.166.

EPA might feel compelled to define "adjacent" to provide more clarity for EPA decisions where EPA has jurisdiction for permitting. However, EPA should respect state discretion, as it has under the long-standing policy recommending case-by-case determinations. The Clean Air Act obligation for ensuring regional consistency does not extend to give EPA authority to undermine state determinations where EPA has long held that such determinations are case-specific and best determined on a case-by-case basis. The *NEDA* decision rejected EPA mandating its functional relatedness approach in some states but respecting the *Summit* decision in others. We urge EPA to not mandate that any states follow EPA's new definition and that EPA use an approach that aligns better with the historical practice of states. EPA's final rulemaking should only be issued to fill the gap and uncertainty that was created by the policy changes and court decisions related to EPA permit decisions, i.e., permit decisions in Indian country and in PSD delegated states.

EPA should make it clear that states are not obligated to revise state rules to match EPA's rule revision. EPA's long standing policy on source determinations and "contiguous or adjacent" is that the determination is made on a case-by-case basis. EPA must allow states to continue to use discretion to determine proximity. Regional inconsistency was created when EPA imposed functional interrelatedness to define adjacent. States usually made reasonable decisions to develop and follow rules that define source. States have been following rules and guidance developed based on decades of experience and based on their own state laws. Texas is one specific example of a state with legislation that mandates the definition of source for oil and gas sources, and Texas has applied this definition for nearly five years. The Clean Air Act does not require that state programs align precisely with EPA's program. The definition of adjacent should not be treated as a minimum requirement of a permitting program, especially since EPA's own determinations demonstrate a variety of outcomes, and EPA's long-standing policy and practice is that such determinations are case-by-case. Therefore, even if EPA establishes a presumptive distance for adjacent for EPA permit decisions, states should retain discretion to make

different determinations in state rules and on a case-by-case basis. States that choose to narrow the scope of a source by using the additional factor of operational dependence to ensure consistency with "common sense notion of a plant" should be allowed to continue to do so.

CPA and COGA suggest using the language below as an alternative to EPA's proposal.

> "Contiguous or adjacent properties" mean surface areas with an affixed building, structure, facility or installation including permanently graded or cleared areas for such building, structure, facility or installation, that share an edge/boundary, physically touch, and are adjoining or physically abutting.

C. EPA's rule must not have any retroactive effect on existing sources.

Consistent with legal doctrines regarding due process, EPA must not impose a new rule that has retroactive effect or issue a rule that imposes regulatory obligations on sources in a retroactive manner. Due process requires EPA to justify any retroactive effect of a rule to be in the public interest. In this proposal, EPA opined that the aggregation of oil and gas sources under option 2 might not lead to material environmental improvements because the oil and gas industry air emissions are controlled by NSPS, NESHAP and other applicable standards. We agree with this opinion and point out it also applies to option 1 as well. Thus, EPA has already indicated that even the future application of a new aggregation approach might have immaterial environmental benefits. Thus, EPA has not determined that aggregation of sources under option 2 or option 1 as proposed, would be in the public's interest. Thus, a final rule adopting option 1 as proposed or option 2 or any version of option 2 must not apply retroactively to existing sources. Also, to the extent that the approach in option 1 changes how states permit oil and gas sources, the final rule should not have any retroactive effect in those states. Furthermore, in Indian Country and other areas, where EPA is the permitting authority, the new rule should not apply in a retroactive manner to existing sources to impose any major NSR obligations that did not apply in the absence of the new rule.

CPA and COGA are willing to meet with EPA to further discuss these comments or additional issues EPA might identify in relation to this proposal.

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