



Deconstructing Clean Air Act Stationary Source Aggregation: EPA Issues New Interpretation of "Adjacency"

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When EPA or a state environmental agency determines that two or more facilities should be considered as one source of air pollution for purposes of Clean Air Act permitting, that action is called source aggregation. The factors to be considered in that determination and how it is made has been the source of controversy for years. For example, for a facility to be "adjacent," does it have to share a common property boundary or can it be nearby? EPA recently released for public comment a draft guidance memo addressing when multiple stationary sources are sufficiently "adjacent" to be deemed part of the same stationary source (the "Draft Guidance").

EPA employs a three-factor test to determine if two or more facilities should be aggregated. The three factors are whether the facilities: (1) have the same industrial grouping; (2) are located on one or contiguous or adjacent properties; and (3) are under common control of the same person(s). In our May issue, we summarized EPA's efforts to re-interpret the "common control" third factor in the context of the Meadowbrook Energy LLC's biogas processing facility in Pennsylvania. For all facilities except those in the oil and gas exploration sector, the Draft Guidance interprets the second factor: Whether sources are "adjacent" to one another.

The Draft Guidance focuses exclusively on the physical proximity of facilities. EPA departed from its prior approach that focused on functional interrelatedness of the operations. EPA explains that physical proximity includes properties that are touching as well as those that are otherwise in "reasonable proximity to one another," such as those separated by a right of way. *Id.* at 7. EPA does not specify a particular distance when defining properties in reasonable proximity to one another. Rather, EPA leaves it to the permitting authorities to make this factual determination.

EPA defends its new approach as consistent with the 1980 New Source Review Rule Preamble. EPA also suggests that its previous approach based on functional interrelatedness has resulted in "burdensome, fine-grained analyses." *Id.* at 7. EPA concludes that focusing only on physical proximity will foster administrative simplicity. EPA's draft is labeled for public review and comment, although EPA notes that its revised interpretation is not subject to notice and comment rulemaking requirements.

The practical impacts of this change in interpretation are in the hands of state permitting authorities. Although EPA has urged uniformity, ultimately the permitting authority will make the factual decisions on source aggregation. A source should ascertain the position of its permitting authority on this Guidance. If the source wishes to make an argument that it should not be aggregated with another facility nearby, it continues to be prudent to gather as much information as possible to support that position.

Finally, sources that are already aggregated are dissuaded by EPA in the Draft Guidance to seek a “redo” if the other two factors (common control and industrial grouping) continue to be met. However, new facilities seeking to be permitted should find it easier to apply the bright line physical proximity test, something that is likely to result in fewer source aggregations.

Draft Memorandum from William L. Wehrum, Assistant Administrator, to EPA Regional Air Division Directors (Sept. 4, 2018).

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