



MIDSTREAM'S GREATEST RESOURCE

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U.S. Environmental Protection Agency
EPA Docket Center
Mailcode 2822IT
Attention: Docket ID No. EPA-HQ-OAR-2013-0016
12000 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments on Source Determination for Certain Emission Units in the Oil and Natural Gas Sector; Proposed Rulemaking (Docket EPA-HQ-OAR-2013-0684)

Dear Docket Clerk:

The Gas Processors Association (“GPA”) appreciates this opportunity to submit comments on the proposed rulemaking “Source Determination for Certain Emission Units in the Oil and Natural Gas Sector,” 80 Fed. Reg. 56,579 (Sept. 18, 2015).

The **Gas Processors Association** (“GPA”) has served the U.S. energy industry since 1921 as an incorporated non-profit trade association. GPA is composed of 130 corporate members of all sizes that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as “midstream activities.” Such processing includes the removal of impurities from the raw gas stream produced at the wellhead, as well as the extraction for sale of natural gas liquid products (“NGLs”) such as ethane, propane, butane and natural gasoline. GPA members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. Our members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs.

Summary

At the outset, the Clean Air Act does not permit the aggregation of gas processing facilities with other emission points, such as field compression facilities, ancillary field equipment, or gas wells and various other emission points. The Clean Air Act’s statutory definition of a stationary source applies to a “building, structure, facility, or installation,” 42 U.S.C. § 7411(a)(3), regardless of whether these emission points are within ¼ mile of the gas processing facility or “functionally interrelated.” If, however, EPA proceeds with a rule allowing for the possible aggregation of these types of emission points, GPA believes that adopting a distance of no more than ¼ mile could be supported as a bright line to exclude

needless source determinations outside of that distance. While all sources beyond such a distance should not be aggregated EPA should allow permitting agencies to determine on a case-by-case basis whether aggregation within such a distance (*e.g.*, ¼ mile) would be appropriate under the Clean Air Act. GPA strongly opposes the functional interrelatedness test for aggregation purposes under any scenario as violating the text of the Clean Air Act, as subjective, arbitrary and capricious and unduly burdensome on both owners/operators and permitting agencies.

I. Congress Never Intended Permitting Agencies to Aggregate Gas Processing Facilities with Other Oil and Gas Emission Points Under the Clean Air Act

A “stationary source,” as defined under the Clean Air Act, “means any building, structure, facility, or installation which emits or may emit any air pollutant.” 42 U.S.C. § 7411(a)(3). This definition applies to the New Source Review/Prevention of Significant Deterioration (“NSR/ PSD”) and Title V programs as well as the New Source Performance Standards. *See Alabama Power v. Costle*, 636 F.2d 323, 395-396 (D.C. Cir. 1979). EPA incorporated this “building, structure, facility, or installation” phrase into its regulatory definition of “stationary source,” 40 C.F.R. § 52.21(b)(5), and its regulatory definition of a Title V “major source” includes “stationary sources” under, among other provisions, the PSD program.

In its 1980 PSD regulations, EPA created the “adjacent” factor to help define “building, structure, facility, or installation.” 40 C.F.R. § 52.21(b)(6). However, the heart of the proposed rulemaking is an amended definition of the term “building, structure, facility, or installation” to include “all of the pollutant-emitting activities ... that are “on one or more contiguous or adjacent properties” in a manner that either presumes that all emission points within ¼ mile of each other are part of a single “building, structure, facility, or installation,” or to include discrete facilities many miles away due to their “functional interrelatedness.” 80 Fed. Reg. 56,579, 56,592 (Sept. 18, 2015).

By defining a “stationary source” as a “building, structure, facility, or installation,” Congress never intended to string together gas processing plants with various field compression facilities, ancillary equipment, or one or more (potentially hundreds) of gas wells and related supporting equipment under the fiction that they are a single emission source. Gas fields tend to involve a complex checkerboard of dozens, hundreds, or thousands of disparate small emission points scattered widely over a large geographic area with multiple third parties owning surface parcels in between those points. The court in *Summit Petroleum Corp. v. USEPA*, 690 F.3d 733, 735-36 (6th Cir. 2012), described Summit’s relatively simple operation in Rosebush, Michigan as a gas sweetening plant connected by pipeline to approximately 100 sour gas production wells and related flares “located over an area of approximately forty-three square miles.” The wells and flares ranged from five hundred feet from the gas sweetening plant to eight miles away. *Id.* at 736. None of the wells shared a common boundary with the gas sweetening plant or with each other and third parties owned the properties in between. *Id.* The gas sweetening plant and gas wells spanned “three different townships with intervening

properties ... that include homes, businesses, farms, woodlands, streams, roads, etc.” *Summit Petroleum Corp. v. USEPA*, Case No. 09-4348, Dkt. No. 83, Brief of *Amicus Curiae* American Petroleum Institute in Support of the Petitions for Review (Apr. 14, 2011) at 16-17 (citing administrative record) (ellipsis in original).

It is simply impossible to reconcile a forty-three square mile parcel, spread over three different towns and incorporating homes, businesses, farms, woodlands, and streams as being a single “building, structure, facility, or installation” that Congress intended to regulate under the Clean Air Act. The words “building, structure, facility, or installation” conjure notions of self-contained industrial facilities with one or more roofed buildings and common fencelines, given the dictionary definitions of these words.

- Building: “a constructed edifice designed to stand more or less permanently, covering a space of land, usu[ally] covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure....”
- Structure: “something constructed or built ... *esp*: a building of imposing size: edifice”
- Facility: “something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end.”
- Installation: “land and improvements installed thereon devoted to military purposes....”

Webster’s Third New International Dictionary, Unabridged (1993) at 292, 812-813, 1171, 2267.

EPA’s Environmental Appeals Board has already affirmed such a conclusion in a similar context. In *In re Shell Offshore, Inc*, 13 E.A.D. 357 (EAB 2007), the Board denied a petition for review of two Outer Continental Shelf minor source air permits issued to drilling vessels where petitioners demanded that they be aggregated together as “adjacent” emission points constituting a stationary source. The Board held that “requiring aggregation of emissions producing activities spanning hundreds of miles interspersed with vast swaths of open water that is accessible to the public would distort the ordinary meaning of ‘building, structure, facility, or installation’ in a manner that EPA did not intend when it promulgated the definition.” *Id.* at 384. It found that aggregation is only proper where there is “a more substantial connectedness, proximity, or continuity that would correspond to a common understanding of building, structure, facility, installation, or plant.” *Id.* at 385. For onshore gas operations, there is little difference except that the “vast swaths of open water” are substituted for mountains, hills, shopping centers, homes, and forests.

EPA has not, and cannot, point to anything in the text of the Clean Air Act or its legislative history demonstrating that Congress actually intended disparate gas processing plants, various field compression facilities, ancillary equipment, and potentially hundreds of

gas wells and related supporting equipment to be aggregated so discordantly with the term “building, structure, facility, or installation.” Certainly, Congress provided much in the way of context to show what it intended to be regulated under the PSD and Title V program. In 42 U.S.C. § 7479(1), Congress’ definition of “major emitting facility” provides over two dozen examples of the types of “buildings, structures, facilities, or installations” that it had in mind, such as coal-fired power plants, petroleum refineries, lime plants, coke oven batteries, and carbon black plants. Every major emitting facility listed by Congress meets the definition of “building, structure, facility, or installation,” as well as EPA’s guidepost of the “common sense notion of a ‘plant.’” 45 Fed. Reg. 52,676, 52,695 (Aug. 7, 1980).

This context demonstrates that Congress never intended to combine discrete processing facilities with hundreds of gas wells spread out over large geographic distances with gas processing plants and treat them as a single “stationary source.” See *Alabama Power Co. v. Costle*, 636 F.2d 323, 396 (D.C. Cir. 1979) (referring to the list of sources in 42 U.S.C. § 7479(1) as a contextual limit in how EPA can define “source” under the PSD program). Indeed, EPA’s previous regulatory definition of “source” was vacated as exceeding its statutory authority where EPA sought to add the terms “equipment,” “or operation (or combination thereof)” to “building, structure, facility, or installation.” *Id.* There, the court held that “EPA cannot treat contiguous and commonly owned units as a single source unless they fit within the four permissible statutory terms.” *Id.* at 397. Aggregating field compression facilities or gas wells with non-contiguous gas processing plants similarly goes beyond the statutory definition of “stationary source” by attempting to regulate beyond the commonly understood limits of “building, structure, facility, or installation.”

II. If EPA Aggregates Oil and Gas Emission Points, Defining “Adjacent” as a Measure of Physical Proximity Is Necessary to Preserve the Meaning of, and Consistency with, the Clean Air Act and EPA’s PSD Regulations

Although GPA does not believe that the text of the Clean Air Act supports the aggregation of oil and gas operations even under EPA’s preferred ¼ mile alternative, defining the word “adjacent” to refer to physical proximity is the superior and more defensible of EPA’s proposed options given that EPA agrees it must be guided by defining a “building, structure, facility, or installation” in accordance with a “common sense notion of a plant.” 80 Fed. Reg. at 56,586. Defining adjacency by a certain distance could establish a bright line by which sources beyond that point are not aggregated. If multiple emission points are located within the certain distance from each other, aggregation should be based on case-specific source determination by the permitting agency to ensure that aggregation would be consistent with a “building, structure, facility, or installation” and the “common sense notion of a plant.”

Allowing for minor breaks in contiguity such as roads and railroad tracks should be the outer limits of EPA’s interpretation of “adjacent,” or else the interpretation begins to conflict with both the regulatory term “building, structure, facility, or installation” and the guiding principle of “common sense notion of a plant.” 45 Fed. Reg. at 52,695. While a person *may* perceive two separately fenced emission points separated by a minor distance to be part of the same “building, structure, facility, or installation,” that perception will break down with

increasing distance between the two. Where a person stands at one emission point and can no longer see other emission points due to distance or major obstructions (*e.g.*, forests, hills, houses), it would betray “common sense” to believe that those emission points were part of the same “building, structure, facility, or installation.” A definition of “adjacent” that relies solely on physical proximity (and a close proximity at that) is more in accordance with the dictionary definition of the term, and as a result, common sense, than alternative approaches.

A. If EPA Decides to Allow for the Aggregation of Oil and Gas Emission Points, It Should Establish a Distance No Further than the Proposed Quarter-Mile Radius in Defining a Bright Line for Excluding Potential Aggregation

Of the two options offered by the proposed rulemaking for defining “adjacent,” only the preferred option is potentially defensible and workable. All sources beyond the ¼ mile distances should not be subject to aggregation. Using a distance of no further than a ¼ mile as a bright line to exclude needless source determinations outside of that distance will provide certainty to both regulated industry and permitting agencies. For emission points within the ¼ mile boundary, permitting agencies should be free to perform a case-by-case source determination to evaluate whether aggregation would be consistent with a “common sense notion of a plant.” 45 Fed. Reg. at 52,695. This will allow permitting agencies to review data specific to the emission points at issue in order to determine, using its sound discretion, whether they can be justifiably aggregated as a single “building, structure, facility, or installation.”

Such an approach is justified by at least four reasons. First, the ¼ mile option provides an objective, reasonably based, and publicly known parameter that can aid regulated industry and permitting agencies in understanding whether or not a source determination is required, and thereby reduce uncertainty. Second, prohibiting the aggregation of emission points outside of a ¼ mile distance insures that any aggregated stationary source comes closer to the typical understanding of a “building, structure, facility, or installation,” the dictionary definition of “adjacent,” and a “common sense notion of a plant” than under EPA’s historic “functional interrelatedness” test. Third, it is consistent with the ¼ mile presumption for adjacency used by several major gas-producing states, such as Oklahoma, Pennsylvania, and Texas, to determine if a source determination is needed. Fourth, establishing a ¼ mile bright line rule would eliminate the need to undertake burdensome analyses of a multitude of disparate emission points outside of that boundary for potential “interrelatedness” (as discussed below in Section III.C). The ¼ mile bright line provides for a relatively clear and rational basis for permitting agencies and regulated industry to understand when a case-by-case source determination is needed, reducing the administrative burden on both owners/ operators and permitting agencies.

Ideally, in the case of natural gas processing plants, fractionation facilities, and compressor stations, only emission points that share a boundary or are immediately adjacent would be combined into a stationary source without including land owned by third parties or large geographical features, such as mountains or lakes. Natural gas processing plants, fractionation facilities, and compressor stations are discreet emission points themselves as they

have fencelines which define the boundaries of the facilities. To combine these discrete facilities with other emission points more than a very short distance away would be inconsistent with the common understanding of “building, structure, facility, or installation” and a “common sense notion of a plant.”

B. GPA Does Not Support Consideration of a Radius Larger than One-Quarter Mile as a Bright Line for Excluding Case-by-Case Source Determinations

GPA opposes the use of larger radii in defining “adjacent.” Increasing a radius beyond ¼ mile would increase the “adjacent” surface area exponentially (*i.e.*, $\text{area} = \pi r^2$). For example, increasing the proposed radius from ¼ mile to ½ mile would increase the surface area with potentially “adjacent” emission points from 5,471,136 square feet to 21,884,544 square feet. This is roughly quadruple the land surface area under a ¼ mile standard and a one mile radius would be sixteen times larger, encompassing about 2,010 acres. With each relatively small increase in radius, emission points within that land surface area withdraw farther and farther from the “common sense notion of a plant” and the “building, structure, facility, or installation” would be more likely to include forests, lakes, freeways, residential communities, commercial buildings, and many other things inconsistent with the Clean Air Act’s definition of “stationary source.” In addition, the evaluation of potential emission points in well developed oil and gas fields becomes exponentially more complicated in number and relationship. The larger the land surface area involved in a case-by-case source determination, the more permitting agencies will be bogged down in the type of complex, “highly subjective,” and “fine-grained analys[e]s” that EPA originally sought to avoid. 45 Fed. Reg. at 52,695.

C. GPA Does Not Support the Potential for “Daisy-Chaining” Emission Points

If EPA uses a geographic distance for aggregating emission points, such as ¼ mile, GPA opposes the potential for permitting agencies to “daisy-chain” emission points. Citing an interpretation by the Louisiana Department of Environmental Quality, EPA defined “daisy-chaining” as when “[a] series of emission units” are combined “when each individual unit is located within the specified ‘contiguous or adjacent’ distance from the next unit, but where the last unit is separated from the first unit by a much larger distance.” 80 Fed. Reg. at 56,587. It requested comment on whether any definition of “adjacent” should “make a similar distinction.” GPA supports the definition of “daisy-chaining” provided in the proposed rulemaking and opposes its use in aggregation source determination.

EPA previously interpreted the term “adjacent” to prohibit “daisy-chaining” in its 1980 regulations. There, EPA explained that it “has stated in the past and now confirms that it does not intend ‘source’ to encompass activities that would be many miles apart along a long-line operation. For instance, EPA would not treat all of the pumping stations along a multistate pipeline as one ‘source.’” 45 Fed. Reg. at 52,695. GPA supports the continued exclusion of such “daisy-chaining” from oil and gas source determinations, if EPA chooses to allow aggregation based on geographic proximity. Aggregating gas processing plants, various field compression facilities, ancillary equipment, and gas wells in such a manner would be inconsistent with both the Clean Air Act’s requirement that a stationary source be a “building,

structure, facility, or installation” and EPA’s guideline that a stationary source comport with the “common sense notion of a plant.”

GPA specifically requests that EPA include a prohibition against “daisy-chaining” in the text of the regulation instead of simply discussing the issue in the final rulemaking’s preamble. As shown above, the language in the 1980 rulemaking’s preamble explicitly disclaimed any interpretation of “source” that would aggregate “activities that would be many miles apart along a long-line operation,” 45 Fed. Reg. at 52,695, but then later ignored that interpretation in individual source determination letters. As discussed in more detail below (*see* Section III.A), EPA subsequently issued several source determinations aggregating activities as far as 44 miles apart based on pipeline connections. Given this failure to abide by prior preamble language, GPA believes that EPA can best avoid uncertainty and confusion in the future by including a prohibition against “daisy-chaining” in the text of the regulation.

D. EPA Should Use the Site’s Center Point to Establish a Geographic Distance

If EPA determines that it will use a ¼ mile distance to establish a bright-line rule for evaluating adjacency, GPA supports the approach used by Louisiana which measures ¼ mile from a site’s geographic center point in evaluating adjacency. *See* 80 Fed. Reg. at 56,587. Using a site’s geographic center point provides a clear and consistent starting point for regulated industry and permitting agencies in assessing whether a case-by-case source determination is necessary. Such an approach is also more consistent with the goals of the Clean Air Act as a site’s center point will contain (or at least be very near) to the actual emission point on the property. GPA believes that extending a radius ¼ mile from a site’s fence line or property boundary would be arbitrary and capricious as those boundaries could be a significant distance from the actual emission point itself. Beginning at fence lines or property boundaries (which are not always clear) could create aggregated stationary sources which have significant open space between emission points, contradicting the statutory requirement that stationary sources be a “building, structure, facility, or installation” and the “common sense notion of a plant.”

E. EPA Should Incorporate These Principles Into the Regulations Instead of Only the Final Rulemaking’s Preamble

For the reasons explained above, GPA opposes aggregation as it violates the text of the Clean Air Act. However, if EPA goes forward with aggregating emission points within ¼ mile, GPA believes that, in order to provide certainty to regulated industry and permitting agencies, it would be prudent to incorporate the major principles discussed above into the regulation itself instead of simply explaining them in the final rulemaking’s preamble. These major principles should include limiting potential aggregation to ¼ mile, prohibiting aggregation outside of this ¼ mile distance, reserving to permitting agencies the discretion to perform case-by-case source determinations for emission points within this ¼ mile distance, the prohibition on “daisy-chaining” emission points, and the use of a site’s center point in establishing the ¼ mile distance. GPA proposes the following regulatory language.

40 C.F.R. § 51.165

(a)(1)(ii)(B) For pollutant-emitting onshore activities belonging to SIC Major Group 13: Oil and Gas Extraction:

- (1) Activities that are located on the same surface site (as that term is used in 40 CFR 63.761) may be considered contiguous for purposes of paragraph (a)(1)(ii)(A) of this section.
- (2) Activities located on surface sites within ¼ mile of each other from center-point to center-point of the surface site may be considered adjacent, only where
 - (i) a surface site has the same meaning as in 40 CFR 63.761;
 - (ii) any physical separation between the surface sites interrupt otherwise contiguous surface sites and constitute incidental separation (i.e., the separation is caused by a road, river, railroad, or other right-of-way); and
 - (ii) the permitting agency concludes aggregating activities is appropriate after assessing adjacency on a case-by-case basis where such activities, when considered together, conform to a generally-understood, common-sense notion of a plant.
- (3) Activities are not contiguous or adjacent for purposes of paragraph (a)(1)(ii)(A) of this section if they are located on surface sites located more than ¼ mile apart.

III. GPA Opposes the Formal Adoption of the “Functional Interrelatedness” Test in Defining “Adjacent” Under the Regulations

GPA opposes Option 2 in the proposed rulemaking, which would officially adopt the functional interrelatedness test struck down in *Summit Petroleum*. As a matter of law, such a test is inconsistent with the Clean Air Act’s definition of “stationary source,” which only authorizes regulation of a “building, structure, facility, or installation.” 42 U.S.C. § 7411(a)(3). Further, it would conflict with EPA’s regulatory requirement that emission points be “contiguous or adjacent” and EPA’s professed legal guidepost that source determinations must accord with the “common sense notion of a plant.” 45 Fed. Reg. at 52,695. Practically speaking, the functional interrelatedness test has engendered significant uncertainty due to the subjective, arbitrary, and capricious nature of its multi-factored analyses and imposed extraordinary administrative burdens and delays for both the owner/ operator of the emission points at issue and the permitting agency. Lastly, the functional interrelatedness test’s penchant for aggregating emission points over large geographical areas creates the potential for significant jurisdictional disputes.

A. The Functional Interrelatedness Test is Inconsistent with the Clean Air Act, the Plain Meaning of “Adjacent” and “Common Sense”

EPA’s past reliance upon the “functional interrelatedness” test has produced arbitrary and capricious source determinations that have aggregated emission points which no reasonable person could conceivably understand to be parts of the same “building, structure, facility, or

installation” under the Clean Air Act. 42 U.S.C. § 7411(a)(3). For example, relying on the “functional interrelatedness” test, EPA has determined that the following emission points were part of the same “building, structure, facility, or installation”:

- A soda processing plant and a mine 44 miles apart, Letter from Richard Long, EPA Region VIII to Dennis Myers, Colorado Air Pollution Control Division (Apr. 20, 1999);
- A salt processing plant and a pump 21½ miles apart and separated by the Great Salt Lake, Letter from Richard Long, EPA Region VIII to Lynn R. Menlove, Utah Department of Environmental Quality (Aug. 8, 1997);
- A brewery and farm six miles apart, Memorandum from Robert G. Kellam, EPA to Richard R. Long, EPA Region VIII (Aug. 27, 1996);
- A steel mill and a coke plant 3.7 miles apart and separated by Lake Calumet, a landfill, and the Little Calumet River, Letter from Cheryl L. Newton, EPA Region V to Donald Sutton, Illinois EPA (Mar. 13, 1998); and
- A wood recycling center with a boiler three miles away, Pamela Blakley, EPA Region 5 to Don Smith, Minnesota Pollution Control Agency (Mar. 23, 2010).

Formally adopting the “functional interrelatedness” test as a definition of “adjacent” would present a clear conflict with the term “building, structure, facility, or installation” that statutorily limits EPA’s authority; an inconsistency akin to defining the word “blue” to include red and yellow. No “building, structure, facility, or installation” could, in the mind of any reasonable person, include two or more “adjacent” components separated by significant distances. As an illustration, EPA defines its “headquarters” as eight separate addresses: the William Jefferson Clinton North, South, East, and West buildings and the Ronald Reagan building in Washington, D.C., One Potomac Yard and Two Potomac Yard in Arlington, Virginia, and the Environmental Science Center in Fort Meade, Maryland.¹ No EPA employee would consider these eight buildings to be all part of the same “building, structure, facility, or installation” because they were “adjacent” to each other, even though they are all “functionally interrelated.”

For the same reasons, should EPA adopt the “functional interrelatedness” test, it would create significant confusion due to its incompatibility with the dictionary definition of “adjacent.” See *Summit Petroleum Corp. v. USEPA*, 690 F.3d 733, 742 (6th Cir. 2012) (discussing dictionary definition of “adjacent”). The proposed regulatory text for 40 C.F.R. § 52.21(b)(6) under Option 2 would define the word “adjacent” to include “pollutant-emitting activities [that] are separated by a distance of ¼ mile or more and there is an exclusive functional interrelatedness.” 80 Fed. Reg. at 56,592. As the court in *Summit Petroleum* held, the question of “the *purpose* for which two activities exist ... is immaterial to the concept of

¹ See <http://www2.epa.gov/aboutepa/visiting-epa-headquarters> (last visited Nov. 5, 2015).

adjacency....” 690 F.3d at 742. Nothing about the dictionary definition or etymology of the word “adjacent” comprehends notions of “functional interrelatedness.” *Id.* Attempting to graft the concept of “functional interrelatedness” into “building, structure, facility, or installation” and “adjacent” would produce an incongruous jumble of words that lack their ordinary meaning and would preclude a reasonable person from determining exactly how it operates. Certainly, one could not understand these concepts through EPA’s professed guidepost of the “common sense notion of a plant.” 80 Fed. Reg. at 56,586. “Common sense” is

good sound ordinary sense: good judgment or prudence in estimating or managing affairs esp. as free from emotional bias or intellectual subtlety or as not dependent on special or technical knowledge ... *among Cartesians*: something that is evidence by the natural light of reason and hence common to all men ... the intuitions that according to the school of Scottish philosophy are common to all mankind ... the unreflective opinions of ordinary men: the ideas and conceptions natural to a man untrained in technical philosophy.

Webster’s Third New International Dictionary, Unabridged (1993) at 459. Where two emission points, miles away from each other and separated by any manner of natural and anthropogenic features – ranging from treescapes to trailer parks – are deemed to be part of the same “building, structure, facility, or installation” because they are “adjacent,” there is no place for common sense. If EPA wishes to preserve this guidepost, it must ensure that the words used in defining the legal obligations of regulated industry actually operate in accordance with their normal meanings.

B. EPA’s Prior Use of the “Functional Interrelatedness” Test Caused Significant Uncertainty Due to its Arbitrary, Multi-Factored Analyses

Contrary to EPA’s assertion, 80 Fed. Reg. at 56,584, court challenges have not created uncertainty; the functional interrelatedness test itself caused significant uncertainty for both oil and gas owners/ operators and permitting agencies. As the Sixth Circuit held in the *Summit Petroleum* decision, the definition of “adjacent” is straightforward in that it involves two or more points that are close to each other, near, or adjoining. 690 F.3d at 742 (citing dictionary definitions). EPA’s longstanding practice was to discard these common meanings of the word “adjacent” in favor of the functional interrelatedness test. Uncertainty was the natural result of this practice given that it was “contrary to the plain meaning of the term ‘adjacent,’” *id.* at 735, and that no understanding of the word “adjacent” “invokes an assessment of the functional relationship between two activities.” *Id.* at 742. This left both oil and gas owners/ operators and permitting agencies with a poorly defined, *ad hoc* process requiring detailed, time-intensive examinations of the inner workings of entire gas fields with little understanding as to what “functional interrelatedness” actually means.

According to EPA, the functional interrelatedness test involved a complex, multi-factored balancing test (with different glosses and variations for different EPA Regions, given that the factors were never firmly established through notice and comment rulemaking). These factors included, but were not limited to,

- Was the location of one “facility chosen primarily because of its proximity to the existing facility to enable the operation of the two facilities to be integrated?”
- “Will materials be routinely transferred between the facilities? ... How often will this transfer take place and how much will be transferred?” Will one of the facilities receive materials from different sources as well?
- “Will the production process itself be split in any way between the facilities, *i.e.*, will one facility produce an intermediate product that requires further processing at the other facility?”
- “Will managers or other workers frequently shuttle back and forth to be involved actively in both facilities? Besides production line staff, this might include maintenance and repair crews, or security or administrative personnel.”
- “What is the dependency of one facility on the other? If one shuts down, what are the limitations on the other to pursue outside business interests?”
- “Does one operation support the operation of the other? What are the financial arrangements between the two entities?”
- “Do the facilities share intermediates, products, byproducts, or other manufacturing equipment? Can the new source purchase raw materials from and sell products or byproducts to other customers? What are the contractual arrangements for providing goods and services?”
- “Do the facilities share equipment, other property, or pollution control equipment? What does the contract specify with regard to the pollution control responsibilities of the contractee [sic]? Can the managing entity of one facility make decisions that affect pollution control at the other facility?”
- “Who accepts the responsibility for compliance with air quality control requirements? What about for violations of the requirements?”
- “Do the facilities share common workforces, plant managers, security forces, corporate executive officers or board executives?”
- “Do the facilities share common payroll activities, employee benefits, health plans, retirement funds, insurance coverage, or other administrative functions?”

Letter from Kathleen Henry, EPA Region III, to John Slade, Pennsylvania Department of Environmental Protection (undated) at 2-4. As the letter from Ms. Henry noted, this “list of

questions *is not exhaustive*; it serves only as a screening tool.” *Id.* at 4 (emphasis added).² This is an extraordinarily intrusive list of demands for information from companies regarding their operations, finances, management, and administrative support functions that simply has no bearing on whether two or more emission points are “adjacent.”

Compounding this problem, EPA rejected the use of prior source determinations to provide any real guidance to owners/ operators or permitting agencies in making case-by-case determinations. *See, e.g.*, Letter from JoAnn Heiman, EPA Region VII to James Pray (Dec. 6, 2004) (“EPA and the states retain the discretion to apply the regulations and to reach different conclusions where appropriate based on differing specific circumstances of particular cases.”). This unbounded approach was further sanctioned by a memorandum from then-Assistant Administrator Gina McCarthy to EPA Regional Administrators. *See* Memorandum from Gina McCarthy to Regional Administrators, Withdrawal of Source Determinations for Oil and Gas Industries (Sept. 22, 2009) at 2 (“no single determination can serve as an adequate justification for how to treat any other source determination for pollutant-emitting activities with different fact-specific circumstances.”); *see also In the Matter of Anadarko Petroleum Corp., Frederick Compressor Station*, Pet. No. VIII-2010-4, Order Denying Petition for Objection to Permit (Feb. 2, 2011) at 8 (“while the prior agency statements and determinations related to oil and gas activities and other similar sources may be instructive, they are not determinative....”). The effect of this policy is to allow the agency staff making the source determination (or the EPA regional staff providing a “recommendation” to state permitting agencies) to discard any prior source determinations that fail to support a pre-determined outcome. This is inherently arbitrary and capricious.

When EPA previously rejected the use of a “functional interrelationships” test in its 1980 rulemaking, its conclusion that such a test “would be highly subjective” and make “administration of the definition” of a stationary source “substantially more difficult, since any attempt to assess those interrelationships would have embroiled the Agency in numerous, fine-grained analyses” proved prophetic. 45 Fed. Reg. at 52,695. Its subsequent surreptitious adoption of the functional interrelatedness test created an *ad hoc*, ill-defined methodology, without any grounding in the text of the Clean Air Act or EPA’s own regulations, where permitting authorities would demand extensive factual information from owners/ operators regarding their operations, systems, contracts, finances, management, and administrative support functions and come to a subjective decision on how emission points were or were not “functionally interrelated.”³ The same fact patterns could lead to different outcomes due to the

² Note that, while some of these factors are characterized as being part of a “common control” inquiry, many of the factors overlap with the “adjacency” analysis or were used interchangeably by EPA Regional offices in other source determinations.

³ Contrary to the preamble’s purported history of EPA source determinations, EPA has never interpreted the word “adjacent” to mean “nearby ... another source.” 80 Fed. Reg. at 56,581. Instead, the Agency adopted the functional interrelatedness test through a series of source determinations that *rejected* the use of proximity in determining whether emission points were “adjacent” to one another. As the *Summit Petroleum* decision noted, “even a cursory overview demonstrates that the agency has rarely, if ever, considered physical proximity the *sine qua non*

absence of objective criteria on what it means to be “functionally interrelated” and the inability to use prior source determinations for guidance.

EPA’s proposed rulemaking does nothing to cure the uncertainty that governed source determinations prior to the *Summit Petroleum* decision. The multi-factored, fact-specific analysis previously used by EPA for the functional interrelatedness test fails to “provide explicit notice as to” how EPA construes a stationary source. *Alabama Power*, 636 F.2d at 397. Importantly, the proposed rulemaking never actually defines “functional interrelatedness.” Instead, it provides examples of how “[e]xclusive functional interrelatedness might be shown,” such as through a pipeline connection,⁴ “exclusive delivery of product from one group of equipment to the other via truck or train” or “whether one group of equipment would be able to operate if the other group of equipment was not operating.” 80 Fed. Reg. at 56,587. This hardly appears to be a set of established, definitive factors. GPA believes that, if the functional interrelatedness test is going to be used by permitting agencies, EPA must explicitly establish a small number of well-defined factors. A failure to do so will see EPA revert to its long-standing practice of relying on a multitude of amorphous and subjective factors that undercut EPA’s professed desire for bringing certainty to the source determination process.

C. The Functional Interrelatedness Test Imposes Undue Burdens and Delays on Owners/ Operators and Permitting Agencies

of two pollutant-emitting activities being ‘adjacent’ to one another.” *Summit Petroleum Corp. v. USEPA*, 690 F.3d 733, 744 (6th Cir. 2012). As noted above in Section 3.A. of these comments, EPA aggregated emission points as distant as 44 miles apart. As one source determination from EPA Region VIII summarized the Agency’s interpretation of “adjacent,” “[d]istance between the operations is not nearly as important in determining if the operations are part of the same source as the possible support that one operation provides for another.” Letter from Richard Long, EPA Region VIII to Lynn R. Menlove, Utah Department of Environmental Quality (Aug. 8, 1997); *see also* Letter from Winston A. Smith, EPA Region IV to Randy C. Poole, Mecklenburg County of Environmental Protection (May 19, 1999) at 6 (“In most of the EPA documents we reviewed, the key factor in deciding that separate facilities should be considered as one source was that the facilities were interdependent or linked in some sense.”). Thus, EPA’s claim that its “historic interpretation is that ‘adjacent’ means ‘nearby,’” 80 Fed. Reg. at 56,581, is factually incorrect and we request that EPA correct this history in its final rulemaking.

⁴ If a pipeline connection is all that is required to demonstrate functional interrelatedness, then EPA should say so explicitly as part of a definitive list of factors that permitting agencies should consider in determining the functional interrelatedness of emission points. GPA would appreciate the opportunity to comment on these factors, including the potential relevance of a pipeline connection to source determinations, given the nature of our members’ operations. As EPA is undoubtedly aware, processing plants, compressor stations, and gas wells *must* be connected by pipeline in order to transport gas. Thus, a clear listing of aggregation criteria under the functional interrelatedness test should be explicitly provided and subject to public notice and comment.

EPA's traditional freewheeling approach to source determinations imposes an extraordinary burden on both the owner/operator and the permitting agency. As recounted by the Sixth Circuit in the *Summit Petroleum* decision,

[f]rom Summit and [the Michigan Department of Environmental Quality]'s joint source determination request in January 2005 to the final iteration of the EPA's decision, nearly five years passed. The parties engaged in at least twenty-five conference calls and exchanged a small mountain of paper within this period. Certainly, the cost for Summit to produce the data and schematics requested by the EPA, and the cost for the EPA to distill and understand the same, were high in terms of both monetary and capital resources.

690 F.3d at 750-751 (internal quotations omitted).

The history of *In re: Frederick Compressor Station* tells a similar tale of how fact-intensive case-by-case determinations can consume owner/operator and agency time and resources. The Colorado Department of Public Health & Environment, Air Pollution Control Division ("CDHPE") renewed a Title V permit in January 2007 for the Frederick Compressor Station, located in the Wattenberg gas field. *In re: Frederick Compressor Station* at 4. An environmental group filed a petition for the EPA Administrator to object to the permit, arguing that CDHPE did not undertake an extensive review of natural gas wells and oil and gas field equipment in the same production field as the permitted compressor station, even though these emission points were not previously included in the Frederick Compressor Station's Title V permit. *Id.* The Administrator granted that petition on February 7, 2008, resulting in a remand to CDHPE. *Id.* The agency then created a Technical Review Document in April 2008 in an attempt to provide this assessment, prompting another petition to object in August 2008. *Id.* In October 2009, the EPA Administrator again granted the petition to object, finding that more record information on other emission points within the Wattenberg gas field was needed to support the CDHPE's source determination. *Id.* at 5. After gathering even more information – this time about the entire operations of the Wattenberg gas field – CDHPE submitted another response to EPA in July 2010, spawning a third petition to object. *Id.* Although this third petition to object was denied, it required CDHPE to work with the company to produce an extensive disquisition on the applicant's ownership interests and operations, the operations of at least *fifty other companies* operating in the Wattenberg gas field, state well spacing regulations, and how the Wattenberg gas field's gathering system interacts with the approximately 24,000 gas wells through a series of contractual agreements and complex ownership interests, including pipeline system maps and hydraulic evaluations. *Id.* at 8-11, 14. The EPA Administrator finally denied the petition to object *four years* after CDHPE issued the Frederick Compressor Station's Title V permit.

These multi-year odysseys would become routine in making a source determination in large, diversified gas fields. State permitting agencies are simply not equipped to handle the type of burden involved with the Summit Petroleum or Frederick Compressor Station source

determinations. Upon application by the owner/ operator of the potential “stationary source,” permitting authorities would need their staff engineers to review large and complex well systems and gas flow permutations from various connections to several different gas processing facilities, including intermittent connections that may not consistently flow to a particular gas processing facility. Then, the agency’s legal staff would be required to analyze exploration, production, gathering, and royalty contracts, as well as the surface and mineral right ownership interests to determine how the gas is owned, controlled, and generally “interrelated.” As shown in *Summit Petroleum* and *In re: Frederick Compressor Station*, this would likely not be accomplished through a single submission by the applicant, but would entail multiple supplemental submissions and meetings with agency personnel. Permitting agencies would have to either dramatically increase their staffing or cope with lengthy delays in processing source determinations and, if required, permit applications and permit renewals. This administrative burden will only be compounded by the need to frequently modify Title V and PSD permits when new wells are drilled, ownership or leasehold interests change, gas service contracts expire or are modified, or new equipment is added through the normal course of gas field development. *See* 40 C.F.R. §§ 122.62 (PSD permit modification requirements for state programs), 70.7(e) (Title V permit modification requirements).

It must also be noted that the administrative burdens and delays from permitting impact the natural gas processing sector differently than they impact many other sectors. First, the administrative burdens will fall disproportionately on just a handful of states. According to the U.S. Energy Information Administration, just nine states produced 89% of the country’s onshore natural gas in 2014.⁵ Second, natural gas is a commodity, subject to significant seasonal and annual swings in prices. Where prices increase, natural gas producers and processors must respond quickly to market signals. This need for market response would be frustrated where natural gas producers are forced to wait many months, or even years, for new or modified permits before they increase needed capacity.

D. The Functional Interrelatedness Test Could Cause Jurisdictional Disputes

In addition to uncertainty, administrative burden, and undue delay and expense, the functional interrelatedness test could also lead to inconsistent application and inter-agency disputes because some well fields cross jurisdictional boundaries. Nine of the top 100 gas well fields are located in more than one state, including the country’s largest field, the Marcellus Shale play (Pennsylvania and West Virginia), and the fifth largest, the San Juan Basin (Colorado and New Mexico). *See* EIA, *Top 100 Oil and Gas Fields* (March 2015) at Table 2, *available at* <http://www.eia.gov/naturalgas/crudeoilreserves/top100/pdf/top100.pdf> (Nov. 6, 2015). Many others cross tribal boundaries, setting up for disputes between tribes or EPA and state permitting agencies. The functional interrelatedness approach could require West Virginia to aggregate and permit a collection of gas wells crossing state lines into

⁵ Rankings: Natural Gas Marketed Production, 2014, *available at*, <http://www.eia.gov/state/rankings/?sid=US&CFID=9086971&CFTOKEN=8658dcac68d7e8c0-A0B3A8ED-5056-A727-59E138327AC14974&jsessionid=8430d6798c5b318c99d04e6018431f7f8040#/series/47> (last visited November 6, 2015).

Pennsylvania. Further, the case-by-case, fact-specific, multi-factor analysis required by EPA could lead to disagreements between permitting agencies. Just such a disagreement arose in the *Summit Petroleum* case, where the majority of the company's wells were on the Chippewa Tribe's Isabella Indian Reservation, making EPA Region V the permitting authority, while a minority were in the State of Michigan, with the Michigan Department of Environmental Quality also claiming jurisdiction over the wells and gas sweetening plant. *Summit Petroleum Corp. v. USEPA*, Case No. 09-4348, Dkt. No. 60, Petitioner Summit Petroleum Corporation's Motion for Stay Pending Review (Mar. 16, 2011) at 11 (Summit became "entangled in a dispute between EPA and MDEQ regarding which agency has jurisdiction" with both agencies demanding that Summit submit separate Title V permit applications for the same operations).

Even where a well field is wholly intrastate, the functional interrelatedness test could require aggregation of a gas processing facility in one air quality management district with compression facilities, other field equipment, or gas wells in a different air quality management district, given that physical proximity would no longer be relevant to defining a "building, structure, facility, or installation." At a time where gas development is still robust (unlike in the 1990s when EPA began developing its functional interrelatedness test through letters and memoranda), the functional interrelatedness test's lack of structure and substance will likely lead to unforeseen dilemmas.

IV. Current Regulations Adequately Control Gas Processing Equipment

The large scale aggregation of gas wells and processing facilities, would be unnecessary and wasteful as it would impose uncertainty, undue administrative burdens and excessive costs on owners/operators and permitting agencies with little to no environmental benefit. Whether or not they are permitted as minor or major sources, gas wells, processing facilities, compressor facilities, and related equipment are currently subject to multiple federal New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants. *See* 40 C.F.R., Part 60, Subpart K (storage vessels for petroleum liquids); Subpart KKK (equipment leaks from natural gas processing plants); Subpart LLL (sulfur dioxide emissions from onshore gas processing plants); Subpart IIII (stationary compression ignition internal combustion engines); Subpart JJJJ (stationary spark ignition internal combustion engines); Subpart KKKK (stationary combustion turbines); Subpart OOOO (crude oil and natural gas production, transmission and distribution); 40 C.F.R. Part 63, Subpart HH (hazardous air pollutants from oil and natural gas production facilities); Subpart ZZZZ (hazardous air pollutants from stationary reciprocating internal combustion engines). In addition to these standards being incorporated into state implementation plans, states often impose additional requirements on sources to improve air quality through general permits for minor sources, including additional requirements for areas that are non-attainment for National Ambient Air Quality Standards. *See, e.g.*, Regulation No. 7, 5 CCR §§ 1001-9.XII, XVI, XVIII (Colorado regulations for volatile organic compound emissions from oil and gas operations, stationary and portable engines, and natural gas-actuated pneumatic controllers associated with oil and gas operations in the 8-hour Ozone Control Area).

Together, existing federal and state standards already provide a robust scheme for air pollution control. Aggregating these minor sources, which are already heavily regulated, into major sources or major stationary sources will result in enormous administrative burdens and costs without any concomitant environmental benefit. The Technical Support Document created for the 2012 New Source Performance Standards revision revealed that there are few, if any, more stringent control technologies than those already in place. *See* Oil and Natural Gas Sector: Standards of Performance for Crude Oil and Natural Gas Production, Transmission, and Distribution, EPA-453/R-11-002 (July 2011) §§ 3.1 (evaluating best system of emission reduction for equipment leaks and sulfur dioxide from sweetening units); 5.4 (pneumatic controllers), 6.4 (compressors), 7.4 (storage vessels). This means that, if aggregated for NSR or PSD purposes, gas wells and processing units would have to undergo lengthy and expensive Best Available Control Technology reviews – which are subject to public notice and comment, require a response to comments, and are often the subject of lawsuits – for little to no reduction in emissions over the current New Source Performance Standards.

CONCLUSION

For all of the reasons provided above, the Clean Air Act does not provide EPA with the authority to aggregate oil and gas emission sources. If EPA disagrees and opts to aggregate “adjacent” emission points, it should adopt its preferred option and automatically exclude any sources beyond a ¼ mile distance and permit, at most, a case-by-case determination for sources within that area, in order to be faithful to the Clean Air Act’s definition of “stationary source.”

Respectfully submitted,

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