



Interpreting “Adjacent” for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas (Draft Guidance, 2018)

Originating Entity

Environmental Protection Agency (EPA) [5]

Last Action

Public comment period closed.

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SciPol Summary

In a draft guidance **memo** [4] issued in September, the EPA narrowed its interpretation of the term “adjacent” when determining whether a group of smaller stationary sources should be considered one stationary source for the purposes of the Clean Air Act’s (CAA’s) **New Source Review** [6] (NSR) and **Title V** [7] permit programs. This determination, referred to as a “source determination,” impacts whether the group constitutes a single “major stationary source” for the purposes of NSR or reaches the “major source” threshold over which Title V permits are required.

The September draft guidance memo narrowed the definition of “adjacent” to include only sources that are physically proximate, and exclude sources that are functionally interrelated yet spread apart. This change will mean fewer sources are large enough to be subject to Clean Air Act regulation, potentially leading to an increase in air pollution.

Under longstanding regulations **implementing the NSR** [8] and **implementing Title V** [9], to decide whether a group of sources is a single source for NSR and Title V purposes, EPA (and state permitting

authorities with which it works) consider whether the sources:

- belong to the same industrial group;
- are located on one or more contiguous or adjacent properties; and
- are under common control of the same entity.

“Adjacent” is not defined by either implementing regulation, leaving its interpretation up to EPA source determinations and guidance memoranda. In the past, EPA has incorporated “functional interrelatedness” into its adjacency analysis, which means that some sources that are not strictly contiguous are considered adjacent and therefore a single source if they are sufficiently functionally interrelated. **For example** [10], in a 1981 source determination, EPA regarded two GM operations a mile apart with a dedicated rail between them as “adjacent.”

This shifted in 2007, towards the end of the second Bush Administration, when EPA issued a **guidance memorandum** [11] specific to the oil and gas industry, indicating that the adjacency analysis would focus on close physical proximity, and not functional interrelatedness. A veteran regulator **commented** [12] that this move “weakened New Source Review to such an extent that many sources that ordinarily would have qualified would have been exempted.”

The Obama EPA **withdrew this memorandum in 2009** [12], reverting to the prior approach, though this was **struck down by the Sixth Circuit** [13] in 2012, which declined to defer to EPA’s longstanding approach.

The new draft guidance—drafted by the same political appointee who wrote the 2007 memorandum—reinstates the reasoning of the 2007 memorandum, and expands its application to all sources subject to NSR and Title V regulation. Acknowledging EPA’s shift in interpretation of its own regulations, it states: “While EPA has at times previously considered ‘functional interrelatedness’ in its evaluation of the term adjacent, after a review of these past actions and [the 2012 6th Circuit] decision, EPA now believes that is not an appropriate interpretation of the term ‘adjacent.’”

During the comment period, which closed on October 5, 2018, **multiple industry groups came out in support of the draft guidance** [14]. Environmental groups **counter** [15] that “The EPA is opening the door to essentially more gamesmanship that will produce more pollution.”

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[4] <https://www.epa.gov/sites/production/files/2018->

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[5] <https://scipol.org/source/environmental-protection-agency-epa>

[6] <https://www.epa.gov/nsr>

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