

# Source Aggregation/Clean Air Act: U.S. Environmental Protection Guidance Addressing Industries Other Than Oil and Gas



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The United States Environmental Protection Agency (“EPA”) issued a November 26th guidance document titled:

*Interpreting “Adjacent” for New Source Review in Title V Source Determinations in All Industries Other Than Oil and Gas (“Memorandum”)*

The *Memorandum* is transmitted from Acting Administrative Administrator Anne L. Idsal to the Regional Administrators.

The *Memorandum’s* purpose is described as communicating EPA’s:

... interpretation of regulations that determine the scope and extent of a “stationary source” from the major New Source Review (NSR) pre-construction programs under Title I of the Clean Air Act (CAA) and the scope and extent of a “major source” for the title V operating permit program.

EPA states that it generally refers to such a determination regarding the scope and extent of a stationary source as a “source determination.”

The *Memorandum* addresses an issue also referred to as “aggregation.” This involves a determination as to when operations in the vicinity of each other should be aggregated for Clean Air Act purposes. This can be a critical determination since sources falling within the scope of the phrase “located on adjacent properties” may be “aggregated” for purposes of determining whether a Clean Air Act Title V permit or New Source Review Determination must be obtained.

The issue has arisen with some frequency in addressing oil and natural gas production facilities. This *Memorandum* addresses the issue in the context of other industries.

The *Memorandum* states that it is EPA’s understanding that both the regulated community and permitting authorities continue to experience uncertainty regarding the meaning of the term “adjacent” in this Clean Air Act context. This is stated to result from both court decisions and case-specific letters from EPA. As a result, EPA is using the *Memorandum* to interpret “adjacent” for:

... all industrial categories except for oil and natural gas activities covered by Standard Industrial Classification (SIC) major group 13.

EPA acknowledges that it has previously provided guidance to state and local permitting authorities on this issue. However, the federal agency notes that it “looked beyond the physical proximity of the properties and took into consideration the functional relationship, or functional interrelatedness, that existed between those facilities to form our opinion.”

The *Memorandum* states that EPA is changing its position on this issue. This is premised on a review of:

- Recent court decisions
- Comments from stakeholders on the September 4, 2018 draft guidance memorandum

The agency’s position on the issue is now encompassed by what is described as the original interpretation expressed in the 1980 development of the Clean Air Act Prevention of Significant Deterioration (“PSD”) portion of the New Source Review program. This approach is described as focusing exclusively on proximity in determining adjacency.

The *Memorandum* includes sections addressing:

- Relevant Statutory and Regulatory Provisions
- Historical EPA Implementation of Statutory and Regulatory Definitions

One can assume that this revised interpretation will be challenged in various contexts (citizen suit enforcement, contrary interpretation by some states, etc.).

A copy of the *Memorandum* can be downloaded [here](#).