



December 4, 2015

Submitted via regulations.gov

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Washington, D.C. 20460

Re: Comment by Western Energy Alliance - Docket ID No. EPA-HQ-OAR-2013-0685; Proposed Rule for Source Determination for Certain Emission Units in the Oil and Natural Gas Sector; EPA-HQ-OAR-2013-0685

Dear Administrator McCarthy:

Western Energy Alliance appreciates the opportunity to comment on the Environmental Protection Agency's proposed Source Determination for Certain Emission Units in the Oil and Natural Gas Sector, Docket ID Number EPA-HQ-OAR-2013-0685, 80 Fed. Reg. 56579 (Sept. 18, 2015).

The Alliance represents over 450 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are independents, the majority of which are small businesses with an average of fifteen employees.

The following oil and natural gas trade associations also sign in support of these comments:

American Exploration and Production Council
Idaho Petroleum Council
Independent Petroleum Association of New Mexico
La Plata County Energy Council
Montana Petroleum Association
New Mexico Oil and Gas Association
Oklahoma Independent Petroleum Association
Utah Petroleum Association

EPA's proposal will have profound impacts on the associations' members and, more generally, energy development in the West. Given the prevalence of public lands in the West, EPA's proposed rule will have a disproportionate impact. In general, industry is subject to numerous setback requirements, such as those related to various types of equipment, occupied structures, water wells, floodplains, and overhead power lines. In

addition, western state oil and gas conservation commissions require operators to minimize surface disturbance to the maximum extent possible, such as by emphasizing consolidated development and facilities. Operators are encouraged to increase the number of wells per pad, cluster development, and reduce truck traffic. Multiple considerations go into location determinations.

These myriad considerations are multiplied when the federal mineral estate is involved, which covers 700 million acres, the vast majority of which is in the West and Alaska. Lease boundaries and complications arising from interlocking mineral ownership between private, state, tribal, Indian allottee, and federal mineral owners are complicating factors. When the federal mineral estate is involved, other factors include: proximity to wilderness areas, national parks, wildlife refuges, special recreation management areas, areas of environmental concern, wild and scenic rivers, and other protective land designations; raptor setbacks, sage-grouse breeding area buffers, and other species considerations; restrictions due to soil types, slope degree, and other factors related to the rugged western topography; interlocking surface ownership; historic trail setbacks and other archeological and cultural resources; and many other considerations unique to the West. Because all these additional factors are rarely present in other parts of the country, the proposed rule will have a greater impact on our member companies operating in the West.

Description of Exploration and Production of Oil and Natural Gas

EPA's proposal to clarify the term "adjacent" in the Clean Air Act definitions of "building, structure, facility or installation" as they pertain to the oil and natural gas sector arises from the avowedly "unique characteristics of this industry." Proposed Rule at 56586. The courts and EPA have long realized that the oil and natural gas sector would require special consideration. See Alabama Power Co. v. Costle, 636 F.2d 323, 397 (D.C. Cir. 1979) ("Alabama Power") (ordering EPA to examine source determination for pipelines); 45 Fed. Reg. 52676, 52695 (Aug. 7, 1980) ("1980 Preamble") (confirming that EPA would not consider "activities that would be many miles apart along a long-line operation" as a single "source").

Source determinations within the oil and gas industries are not always straightforward. [W]ell sites can be located hundreds of miles from the natural gas processing plant, and some oil and gas operations (e.g., a production field) can cover many square miles. Moreover, unlike many industries, land ownership and control are not easily distinguished in this industry, because subsurface and surface property rights are often owned and leased by different entities, and drilling and exploration activities are contracted to third parties. While it is not uncommon for a single company to gain the use of a large area of

December 4, 2015

Page 3 of 17

contiguous property through these lease and mineral rights agreements, *owners or operators of production field facilities typically control only the surface area necessary to operate the physical structures used in oil and gas production*, and not the land between well drill sites.

2007 William Wehrum Source Determination Memo at 2-3 (“Wehrum Memo”) (emphasis added).¹

The issue of *where* oil and natural gas buildings, structures, facilities and installations are located drives a need for EPA to regulate them differently.

It is ... helpful to better understand how emission sources in the oil and gas industry operate and why and where they are located with respect to each other, and how these factors can differ from those associated with emission sources in other regulated industrial sectors, such as power generation and manufacturing.

[Response of Colorado Department of Public Health and Environment, Air Pollution Control Division, to Order Granting Petition for Objection to Permit](#), Pet. No. VIII-2008-02, at 4 (E.P.A. July 10, 2010) (“CDPHE Frederick Compressor Station Response”).

Companies in the oil and natural gas sector, including the Alliance’s members, do not have exclusive control over where to locate various equipment and operational units. Technological and regulatory requirements restrict their ability to locate production and processing sites. Id. at 5. These companies do not locate exploration, production, gathering and processing operations to avoid air quality requirements or define an emission source in one manner versus another. Id. at 5-6.

Companies in the oil and natural gas sector can only place natural gas wells in areas where oil or natural gas reserves are present. Id. at 5. Second, government entities regulate the siting of these companies’ facilities by establishing spacing, pooling and other requirements. Id. at 6. Even after determining the possible presence of oil or natural gas

¹ EPA-HQ-OAR-2013-0685-0002. EPA withdrew the Wehrum Memo in 2009. See EPA-HQ-OAR-2013-0685-0003. However, when EPA did so, EPA did not reject the Wehrum Memo’s analysis of unique nature of oil and natural gas operations, or that the correct definition of “adjacent” meant a “nearby” alternative such as “across a highway” or “a city block.” The Wehrum Memo aimed to simplify application of the three-factor source-determination test for oil and natural gas operations. While EPA rejected that approach in 2009, EPA now tries to simplify its process for making source determinations in its Proposed Rule. Accordingly, the Wehrum Memo provides useful guidance despite the 2009 withdrawal.

December 4, 2015

Page 4 of 17

reserves, these companies must negotiate for the rights to use the surface and subsurface. Overall, between well-spacing requirements, surface-use issues and engineering considerations, these companies do not necessarily have discretion over where to locate oil and natural gas facilities. Id.

The fact that pipelines connect separate oil and natural gas operations cannot drive source determinations for this industry, even if such connections might be relevant to decisions for other industries. The physical nature of produced hydrocarbons, e.g., as opposed to produced coal or manufactured objects, further restricts these companies' ability to locate sites. For example, unlike other "products," natural gas will enter the ambient environment if not contained by tanks and pipelines. Generally, elaborate networks of pipelines connect the entire oil and natural gas production, gathering, processing and transportation system, effectively linking the wellhead to the ultimate end-users. Id. at 5. In the natural gas example, these companies must transport produced natural gas in pipelines from the time it reaches the wellhead to the ultimate end use. The companies must locate or negotiate for the location of gathering facilities and compressor stations in a way that enables them to move the produced natural gas through the pipelines, often using pressure differentials. In other words, principles of physics uniquely limit these companies' ability to locate production and processing sites. Id. at 6.

EPA has recognized that the separate buildings, structures, facilities and installations that collectively make up the oil and natural gas sector rarely sit on contiguous properties. Wehrum Memo at 2-3. For example, EPA has acknowledged that the sites where well pads and wells sit are frequently separate from "stand-alone sites where oil, condensate, produced water and gas from several wells may be separated, stored and treated." 76 Fed. Reg. 527378, 52744 (Aug. 23, 2011) (proposing NSPS OOOO). Accordingly, EPA has limited its consideration of an oil and natural gas "plant" to operations on contiguous properties. See id. at 52767, 52774 (defining oil and natural gas facilities for NESHAP risk-assessment purposes as the "HAP-emitting operations within a contiguous area" while acknowledging that doing so would overstate emissions given the industry-specific constraints in 42 U.S.C. § 7412). Undoubtedly, non-contiguous buildings, structures, facilities and installations in the oil and natural gas sector frequently connect to each other by pipeline. However, their lack of contiguity undermines any argument that they collectively make up a "plant." Wehrum Memo at 3.

EPA Should Remove "Adjacent" from the Regulations

EPA Can Remove "Adjacent" from the Regulations

EPA proposes to promulgate clarification of the word "adjacent" because its use of that word "has generated significant confusion and uncertainty" Proposed Rule at 56587. The confusion goes beyond EPA's use of the word "adjacent" to implement the Clean Air Act. See, e.g., Rapanos v. United States, 547 U.S. 715 (2006) (Scalia, J., plurality) (holding that only those wetlands with a continuous surface connection to bodies that are waters

Source Determination Comments

December 4, 2015

Page 5 of 17

of the United States in their own right are “adjacent” to such waters and within EPA’s Clean Water Act scope of authority); In re EPA, No. 15-3799, 2015 WL 5893814 (6th Cir. Oct. 9, 2015) (staying the Waters of the United States definition in part due to EPA’s inability to clarify the term “adjacent”).

When EPA added the word “adjacent” to its Clean Air Act major-source permitting regulations, the inclusion of that term had nothing to do with going beyond facility boundaries to aggregate pollutant-emitting activities on non-contiguous properties. 43 Fed. Reg. 26380, 26403-04 (June 19, 1978) (to be codified as 40 C.F.R. § 52.21(b)(4)). Instead, EPA included the phrase “contiguous or adjacent” to ensure that an owner or operator could not game the major-source permitting requirements by dividing different pollutant-emitting activities *within* a facility’s boundaries for separate permitting. Id.

Pursuant to comments on the November 3, 1977, proposal, the Administrator is revising the definition of source to mean any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and owned or operated by the same person or persons under common control. *This precludes a large plant from being separated into individual production lines for purposes of determining applicability of the PSD requirements.* This in turn resolves the issue raised in the proposal regarding PSD applicability to a facility which is constructed at the site of, but is different than, a source listed in the 28 categories [by Congress]. Such a facility would be part of the source under the above definition, and thus would be subject to PSD review as a modification to it.

Id. (emphasis added); accord Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 848 n.21 (1984) (acknowledging that EPA promulgated the “contiguous or adjacent” language to implement its “bubble concept” for aggregating and offsetting separate pollutant-emitting activities within a plant’s boundaries); 44 Fed. Reg. 3274, 3276 (Jan. 16, 1979) (same).

Accordingly, EPA’s current proposed rule offers a false choice. It seeks to define that word “adjacent” as “on surface sites that are located within ¼ mile of one another” E.g., Proposed Rule at 56591 (to be codified as 40 C.F.R. § 52.21(b)(6)(ii) (Option 1)). However, EPA never intended the word “adjacent” to reach beyond a site boundary. 43 Fed. Reg. at 26403; accord Alabama Power at 397-98 (upholding the “contiguous or adjacent” term and holding that Congress authorized EPA to aggregate separate buildings, structures, facilities and installations within a “plant” boundaries as a single source). Moreover, since 1980, Congress has at least twice looked at the definition of “source,” including specifically

December 4, 2015

Page 6 of 17

for oil and natural gas operations. In doing so, Congress has limited the scope of source determinations to site boundaries or, at most, the contiguous area. See 42 U.S.C. §§ 7412(n)(4) (for the NESHAP program, EPA *cannot* aggregate emissions from oil and natural gas exploration and production wells and equipment even if they are in a contiguous area or under common control) & 7661(2) (for the Title V program, EPA can only aggregate emissions from groups of stationary sources “located within a *contiguous area* and under common control” (emphasis added)). EPA should harmonize its major-source permitting program with Congress’s NESHAP and Title V programs by removing the word “adjacent.” EPA has misapplied that word for decades and created the confusion that it now seeks to resolve by additional regulatory language.

Instead, EPA can resolve the confusion that it has caused by removing the word “adjacent” from the Clean Air Act definitions of “building, structure, facility or installation.” EPA has authority to revise its major-source permitting regulations to remove the word “adjacent” altogether. Nat’l Env’tl. Dev. Association’s Clean Air Project v. EPA, 752 F.3d 999, 1010 (D.C. Cir. 2014) (“NEDA”). Without a doubt, EPA must consider physical proximity when determining a “source.” Alabama Power at 397-98. EPA can do that using the word “contiguous” alone. That word is not as susceptible to confusion as the word “adjacent.” See Summit Petroleum Corp. v. EPA, 690 F.3d 733, 738, 741 (6th Cir. 2012) (“Summit Petroleum”) (finding no difficulty defining “contiguous” as bordering while also finding that “adjacent” is unambiguous in its physical nature but unclear as to absolute distance); CDPHE Frederick Compressor Station Response at 15 (same, using dictionary definitions for both words). Therefore, EPA should correct decades of confusion and prevent future confusion by removing the word “adjacent” from the Clean Air Act definitions of “building, structure, facility or installation.”

EPA Should At Least Remove “Adjacent” from the Regulations for the Oil and Natural Gas Sector

In light of the unique nature of operations in the oil and natural gas sector, even if EPA does not remove the word “adjacent” from its major-source permitting regulations altogether, it can revise the Clean Air Act definitions of “building, structure, facility or installation” to avoid applying it to the oil and natural gas sector. See NEDA at 1010. Accordingly, as an alternative, the Alliance proposes the following revision to 40 C.F.R. § 52.21(b):

(6)(i) Building, structure, facility, or installation means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same “Major

Group” (i.e., which have the same first two digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101–0066 and 003–005–00716–0, respectively).

(ii) Notwithstanding the provisions of paragraph (b)(6)(i) of this section, building, structure, facility, or installation means, for onshore activities under SIC Major Group 13: Oil and Gas Extraction, all of the pollutant-emitting activities included in Major Group 13 that are located on one or more contiguous properties, and are under the control of the same person (or persons under common control).

EPA should similarly revise the other regulations at issue in the proposed rule.

Choice of Alternatives

EPA proposes two options for defining a source. In the first option (Option 1), EPA proposes to define the word “adjacent” such that “adjacency” will relate only to physical proximity. Specifically, if pollutant-emitting activities sit on the same “surface site” or on “surface sites” within ¼ mile of each other, then EPA proposes to consider the activities “adjacent” to each other. E.g., Proposed Rule at 56591 (proposed Option 1 text for 40 C.F.R. § 52.21(b)(6)(ii)).

In the second option (Option 2), EPA proposes to define the word “adjacent” such that “adjacency” will relate to either physical proximity or “functional interrelatedness.” Specifically, if pollutant-emitting activities at least ¼ mile apart but have “exclusive functional interrelatedness,” then EPA proposes to consider the activities “adjacent” to each other. In addition, if pollutant-emitting activities are less than ¼ mile apart, then EPA proposes to consider the activities “adjacent” to each other regardless of whether they are “functionally interrelated” or on the same “surface site.” E.g., Proposed Rule at 56591-92 (proposed Option 2 text for 40 C.F.R. § 52.21(b)(6)(ii)).

Rather than promulgate Option 1 or Option 2, EPA should remove the word “adjacent” from the Clean Air Act definitions of “building, structure, facility or installation.” However, as an alternative, the Alliance supports a revised version of Option 1. The Alliance will explain its required revisions in these comments.

The Alliance strongly opposes Option 2. Simply put, EPA cannot promulgate Option 2. EPA’s proposed language would define “adjacent” such that “adjacency” will not relate only to physical proximity.

EPA Cannot Define “Adjacent” in Terms of Functional Interrelatedness

Courts have instructed EPA that the Clean Air Act definitions of “building, structure, facility or installation” require EPA to define those words to provide for the aggregation, where appropriate, of industrial activities according to considerations such as proximity and ownership. Alabama Power at 397. That is because two pollutant-emitting activities cannot be a single source unless they fit a common-sense notion of a “plant.”

EPA defined “building, structure, facility, or installation” to *separately* consider proximity, ownership and relatedness. E.g., 1980 Preamble at 52736 (to be codified as 40 C.F.R. § 52.21(b)(6)). EPA wanted to prevent owners and operators from dividing pollutant-emitting sources *within a single plant* to avoid major-source permitting, so it explained that if two pollutant-emitting activities are located on one or more contiguous or adjacent properties, then they are proximate enough to be a “plant.” 1980 Preamble at 52693-95; 43 Fed. Reg. at 26403. For the same purpose, EPA explained that contiguous or adjacent pollutant-emitting activities under common control could be a “plant.” Id. In addition, EPA decided that if two pollutant-emitting activities fall within the same industrial grouping, then they are related enough to be a “plant.” 1980 Preamble at 52693-95.

When it promulgated the three-factor test for describing a “plant,” EPA rejected a functional interrelationship test. Id. at 52695. However, over the years, EPA has tried to take a second bite of the “functional interrelationship” apple. EPA has alleged that if two pollutant-emitting activities are sufficiently related, then they are “adjacent.” By doing that, EPA turned “relatedness” into two separate, but redundant, factors of a three-factor test.

Moreover, when EPA committed itself to making proximity a function of contiguousness and adjacency, it foreclosed its ability to consider two pollutant-emitting activities to be proximate based on their functional relationships. Generally, the courts have instructed EPA that the word “adjacent” unambiguously requires consideration of physical distance. Rapanos, 547 U.S. at 747-48 (Scalia, J., plurality). Specifically, in the context of the definition of “source” for Clean Air Act-permitting purposes, a federal appellate court has ruled that the word “adjacent” is unambiguous. Summit Petroleum at 741. EPA’s use of the word “adjacent” in its regulations “demands, by definition, that would-be aggregated facilities have physical proximity” Id. at 744.

Under Option 2, EPA is impermissibly trying to dodge the courts’ instructions. EPA cannot do that because prior rulings that (1) EPA must consider proximity and (2) the word “adjacent” unambiguously refers to physical distance follow from the terms of the Clean Air Act. They flow from the clear intent of Congress. Accordingly, the courts’ instructions leave no room for EPA’s discretion. Moreover, if EPA promulgates Option 2, then the courts will have to vacate the revised regulation. See Christensen v. Harris County, 529 U.S. 576, 588 (2000); NEDA at 1010.

EPA Can Clarify that “Adjacent” Means “Contiguous”

If EPA does not remove the word “adjacent” from its major-source permitting regulations altogether or specifically for the oil and natural gas sector, then, as an alternative, it can clarify its original intent. When EPA added the word “adjacent” to its Clean Air Act major-source permitting regulations, the inclusion of that term had nothing to do with going beyond facility boundaries to aggregate pollutant-emitting activities on non-contiguous properties. 43 Fed. Reg. at 26403-04. Since then, Congress has expressly determined that regulators should not aggregate emissions from oil and natural gas production facilities. 42 U.S.C. § 7412(n)(4)(A) (“Section 112(n)”; CDPHE Frederick Compressor Station Response at 23; Wehrum Memo at 4.

Congress’s reason echoes the description of oil and natural gas operations. Such facilities generally are not contiguous to each other. CDPHE Frederick Compressor Station Response at 23 (quoting 63 Fed. Reg. 6288, 6303 (Feb. 6, 1998)). They are not a “plant.” Accordingly, EPA promulgated a definition of “facility” for the oil and natural gas sector pursuant to Section 112(n) that stated, “pieces of production equipment or groupings of equipment located on different oil and gas leases, mineral fee tracts, lease tracts ... or separate surface sites, whether or not connected by a road, waterway, power line or pipeline, shall not be considered part of the same facility.” *Id.* (quoting 64 Fed. Reg. 32610, 32630 (June 17, 1999)).

Nevertheless, EPA “has established [a] history of supplementing the traditional definition of adjacency with the concept of activities’ functional relatedness” Summit Petroleum at 744. Despite EPA’s decades of error, the courts have been clear that EPA has the authority to cast its erroneous history aside in favor of a correct interpretation of the Clean Air Act. NEDA at 1010; Summit Petroleum at 745-46. EPA can do that in this rulemaking. It can clarify that “contiguous or adjacent” does not authorize EPA to reach beyond facility boundaries to aggregate emissions from non-contiguous pollutant-emitting activities. Accordingly, as an alternative, the Alliance proposes the following revision to 40 C.F.R. § 52.21(b):

(6)(i) Building, structure, facility, or installation means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same “Major Group” (i.e., which have the same first two digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S.

Government Printing Office stock numbers 4101–0066 and 003–005–00716–0, respectively.

(ii) For onshore activities under SIC Major Group 13: Oil and Gas Extraction, “contiguous or adjacent properties” means properties that (1) each have an affixed building, structure, facility or installation and (2) share a boundary.

EPA should similarly revise the other regulations at issue in the proposed rule.

Alternatively, EPA Should Promulgate Option 1 and a Distance of 44 Feet Or a Similar Distance as Suggested by Prior EPA Guidance

If EPA does not remove the word “adjacent” from its major-source permitting regulations altogether or specifically for the oil and natural gas sector, and does not clarify that “contiguous or adjacent” does not authorize EPA to reach beyond facility boundaries to aggregate emissions from non-contiguous pollutant-emitting activities, then, as an alternative, it should promulgate Option 1 and a distance of 44 feet or a similar distance reflecting the guidance in the Wehrum Memo.

In light of the unique nature of operations in the oil and natural gas sector, EPA has recommended that regulators should only aggregate commonly controlled pollutant-emitting activities if they are “physically adjacent, or if they are separated by no more than a short distance (e.g. across a highway, separated by a city block or some similar distance).” Wehrum Memo at 4-5. In the Wehrum Memo, EPA indicated that “adjacent” meant “contiguous.” Nevertheless, it proposed a “nearby” alternative of “across a highway” or “a city block.” In doing so, EPA fell short of providing a meaningful endpoint for “adjacent.” Nevertheless, it did provide *some* clarification that fit the unique nature of operations in the oil and natural gas sector.

EPA can find guidance from and seek to be consistent with the Bureau of Land Management and the Forest Service, which also regulate the oil and natural gas sector. The Bureau and Forest Service provide specific guidance to owners and operators regarding construction roads to access oil and natural gas properties. That guidance is useful. According to the Bureau, the generally applicable design standards for roads accessing oil and natural gas facilities suggest that such roads should be 12’ to 24’ wide, with turnouts adding 10’ to the width. United States Department of the Interior, Bureau of Land Management & United States Department of Agriculture, Forest Service, The Gold Book at 19-29 (4th ed., rev. 2007); BLM 9113–Roads Manual at 9 (Oct. 21, 2011) (together Bureau Guidance). If EPA assumes that a road and two turnouts separate two otherwise-contiguous properties, then that distance would be roughly 44 feet. Therefore, an application of the pragmatic Bureau Guidance suggests that two commonly owned pollutant-emitting activities in the oil and natural gas sector that are on properties within 44 feet of each other are sufficiently contiguous to be a “plant.” Two commonly owned

pollutant-emitting activities in the oil and natural gas sector that are on properties farther than 44 feet of each other are *not* sufficiently contiguous to be a “plant.”

EPA is aware that it is imposing substantial regulatory burdens on the oil and natural gas sector by promulgating a suite of regulatory requirements while the Bureau is doing the same. It has professed a desire to integrate its regulations with the Bureau’s to reduce the overall burden.

During development of these proposed requirements, we were mindful that some facilities that will be subject to the proposed EPA standards will also be subject to current or future requirements of the Department of Interior’s Bureau of Land Management (BLM) rules covering production of natural gas on Federal lands. We believe, to minimize confusion and unnecessary burden on the part of owners and operators, it is important that the EPA requirements not conflict with BLM requirements. As a result, EPA and BLM have maintained an ongoing dialogue during development of this action to identify opportunities for alignment and ways to minimize potential conflicting requirements and will continue to coordinate through the agencies’ respective proposals and final rulemakings.

80 Fed. Reg. 56593, 56595 (Sept. 18, 2015) (proposing NSPS OOOOa). EPA’s proposed clarification of the word “adjacent” will have a disparate impact on the same operators that will bear the greatest burden of the Bureau’s requirements. Accordingly, EPA should take this opportunity to clarify “adjacent” in a way that dovetails most closely with the Bureau Guidance.

If it fails to harmonize Option 1 with the Bureau Guidance, then EPA should nevertheless limit its threshold distance to the Wehrum Memo’s description of “a city block.” While the length of “a city block” without more clarity is itself ambiguous, that distance is roughly 330 feet – i.e., 1/16 mile.² Accordingly, as an alternative, the Alliance request EPA’s clarification that two commonly owned pollutant-emitting activities in the oil and natural gas sector that are on properties farther than 330’ of each other are not sufficiently contiguous to be a “plant.”

² Available at: <http://www.land4ever.com/block.htm> (last viewed Dec. 2, 2015).

EPA's Proposal Is Not Consistent with State Approaches

States have a long history of making source determinations for various types of source categories. Just a few states use a ¼-mile distance for such determinations. Those states implement the ¼-mile distance as a rebuttable presumption to narrow the size of the source, not to expand it. Several states do not assume that they must aggregate emissions from sources within close proximity of each other. They also do not substitute functional dependence or interrelatedness for proximity.

The states that set a specific distance as the outer bound of “adjacent” implement the proximity factor in conjunction with past practice and guidance that they have developed over decades. The states’ approaches vary 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.

Proposed Rule at 56589. However, EPA’s assertion is incorrect.

While the ¼-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. As a result, each state’s permitting program is unique. EPA should let the states continue to regulate free from baseless, across-the-board federal implementation of a one-size-fits-all threshold.

EPA’s Must Establish Any Distance as a Rebuttable Presumption

As discussed above, if EPA must set a distance threshold, then we urge EPA to promulgate the distance of 44 feet as the threshold. Moreover, the threshold should be a rebuttable

presumption. Given the unique nature of operations in the oil and natural gas sector, there will likely be commonly controlled pollutant-emitting activities within 44 feet of each other that are wholly unrelated. Wholly unrelated pollutant-emitting activities cannot be a “plant.” See Alabama Power at 397-98 (upholding the “contiguous or adjacent” term and holding that Congress authorized EPA to aggregate separate buildings, structures, facilities and installations within a “plant” boundaries as a single source). Accordingly, as an alternative, the Alliance proposes the following revision to 40 C.F.R. § 52.21(b):

(6)(i) Building, structure, facility, or installation means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same “Major Group” (i.e., which have the same first two digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00716-0, respectively).

(ii) Notwithstanding the provisions of paragraph (b)(6)(i) of this section, building, structure, facility, or installation means, for onshore activities under SIC Major Group 13: Oil and Gas Extraction, all of the pollutant-emitting activities included in Major Group 13 that are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall not be deemed to be located on contiguous or adjacent properties unless those activities are located on the same surface site, or on separate surface sites within 44 feet of one another. Activities located on separate surface sites within 44 feet of one another may only be deemed to be located on contiguous or adjacent properties if those activities are reasonably considered to be the activities of a single plant. Surface site has the meaning set forth in 40 CFR 63.761.

EPA should similarly revise the other regulations at issue in the proposed rule.

EPA Should Reject “Daisy-Chaining” of Pollutant-Emitting Activities

December 4, 2015

Page 14 of 17

EPA also requests input regarding whether it should explicitly reject “daisy-chaining” as a method to turn separate sources into a single source. Proposed Rule at 56587. As EPA points out, states have already rejected this practice. Louisiana Department of Environmental Quality, Interpretation of Contiguous for Oil & Gas Production Facilities; PADEP Guidance for Performing Single Stationary Source Determinations for Oil and Gas Industries, Doc. No. 270–0810–006 at 6-7 (Oct. 6, 2012) (Louisiana Guidance).

As states have addressed the question of adjacency, they have been mindful that the 1980 Preamble clearly indicated that EPA would not consider separate pollutant-emitting activities along long-line operations connected by a pipeline to be a single source. 1980 Preamble at 52695. If, for example, EPA adopts Option 1, then it should not use a centrally located pollutant-emitting activity to daisy-chain separate pollutant-emitting activities that are more than ¼ mile from each other. As a hypothetical, if Pollutant-Emitting Activity A is ¼ mile from Pollutant-Emitting Activity B, and Pollutant-Emitting Activity B is ¼ mile from Pollutant-Emitting Activity C, but Pollutant-Emitting Activities A and C are more than a ¼ mile apart, then EPA should not use a daisy-chain of all three Pollutant-Emitting Activities to determine that they are contiguous or adjacent. See Citizens for Pennsylvania’s Future v. Ultra Res., Inc., No. 4:11-CV-1360, 2015 WL 769757, at *11 (M.D. Pa. Feb. 23, 2015) (applying Pennsylvania’s guidance and rejecting a request to daisy-chain separate compressor stations).

EPA Should Measure “Adjacency” from the Geographic Center of Target Emissions

As described above, EPA should use this rulemaking opportunity to clarify that the term “contiguous or adjacent” does not allow aggregation of pollutant-emitting activities on non-contiguous properties. See NEDA at 1010; Summit Petroleum at 745-46; Alabama Power at 397-98; 43 Fed. Reg. at 26403-04. However, if EPA clarifies that “adjacent” means a certain distance, then EPA should follow the Louisiana Guidance. Accordingly, for purposes of establishing the area of inclusion, EPA should consider the target pollutant-emitting activity’s geographic center of emissions, excluding fugitives, to define the center of the area-of-inclusion radius. Accordingly, as an additional alternative, the Alliance proposes the following revision to 40 C.F.R. § 52.21(b):

(6)(i) Building, structure, facility, or installation means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same “Major Group” (i.e., which have the same first two digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S.

Government Printing Office stock numbers 4101–0066 and 003–005–00716–0, respectively.

(ii) Notwithstanding the provisions of paragraph (b)(6)(i) of this section, building, structure, facility, or installation means, for onshore activities under SIC Major Group 13: Oil and Gas Extraction, all of the pollutant-emitting activities included in Major Group 13 that are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall not be deemed to be located on contiguous or adjacent properties unless those activities are located on the same surface site, or on separate surface sites within 44 feet of one another. Activities located on separate surface sites within 44 feet of one another may only be deemed to be located on contiguous or adjacent properties if those activities are reasonably considered to be the activities of a single plant. Surface site has the meaning set forth in 40 CFR 63.761. The distance of 44 feet shall be as measured from the pollutant-emitting activity's geographic center of emissions, excluding fugitives.

EPA should similarly revise the other regulations at issue in the proposed rule.

A Bigger Radius Will Unjustifiably Create Problems

If EPA fails to take this opportunity to clarify that the term “contiguous or adjacent” does not allow aggregation pollutant-emitting activities’ emissions on non-contiguous properties, EPA will also create problems that it may not have considered. Foremost, by insisting on aggregating emissions beyond site boundaries, EPA would deter consolidation counter to industry best management practices, operational efficiency and public interest. For example, in locations along Colorado’s Front Range and in Wyoming, operators have reduced their footprints to minimize community and environmental impacts. As described above, operators choose their operations’ locations for many reasons other than avoiding major-source permitting. However, by blindly drawing a wide perimeter around pollutant-emitting activities, EPA could perversely discourage operators from reducing their footprints. Moreover, the perimeter around oil and natural gas production surface sites could frequently cross jurisdictional boundaries. Accordingly, EPA would unjustifiably force operators to face permitting uncertainty. EPA should take this opportunity to correct decades of EPA-generated confusion. It should not promulgate additional “clarification” language that will only exacerbate the confusion.

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. Here, EPA cannot meet that burden. In this proposal, EPA opined that the aggregation of oil and natural gas sources under Option 2 might not lead to material environmental improvements because NSPS, NESHAP and other applicable standards control the sector's air emissions. We agree, and point out that the same reasoning applies to Option 1. Accordingly, EPA cannot demonstrate sufficient public interest to justify retroactive application of Option 1 or Option 2. Moreover, EPA cannot impose a retroactive effect of Option 1 or Option 2 on state permitting.

EPA Must Define an Applicability Date

There is no language in the Proposed Rule regarding applicability. In the "Supplementary Information," EPA indicates that its revised regulatory text will apply to "new and modified oil and gas sector operations." Proposed Rule at 56,579. However, EPA fails to define what "new" means. EPA must define "new" as at least three years from the date EPA publishes the final rule in the *Federal Register*.

The proposed rule threatens to create major-source facilities that operators have otherwise planned for construction-permit purposes as minor sources. Operators typically create budgets and drilling schedules in various planning stages for one to two years into the future. These budgets and schedules do not take into account potential permit delays arising from the proposed rule. Because of this rulemaking, operators may need considerable time to prepare major-source construction-permit applications for new development. In addition, EPA will need time to process and issue such permits. EPA has not expressly given itself such time in the proposed rule. If EPA does not provide a time allowance for operators to prepare permit applications for new development and EPA to process and issue permits, then EPA will stymie new production in prolific oil and gas reservoirs for years.

EPA Failed to Evaluate the Economic Impact of Its Proposed Rule

As a last alternative to the Alliance's proposals in this comment, EPA should go back to "square one." EPA should not only re-propose a regulatory fix to the confusion that EPA has created, but also provide the regulated community an economic impact assessment respecting the proposed regulatory change as required by the Clean Air Act. 42 U.S.C. § 7617(a)-(b). EPA should not make the Alliance, its members or the rest of the oil and natural gas sector sue to enforce EPA's nondiscretionary duties.

December 4, 2015

Page 17 of 17

Conclusion

EPA's promulgation of the proposed rule as written will complicate and confuse the permitting process for the oil and natural gas industry, which has special requirements and limitations for surface development, without improving air quality. At the center of this problematic rule is the proposed definition of adjacent to mean either ¼ mile or "functionally interrelated." Both definitions amount to regulatory overreach by EPA by defining the word "adjacent" in a manner never intended by the Clean Air Act.

To rectify this confusion, the Alliance recommends that EPA should remove the word "adjacent" from its Clean Air Act major-source permitting regulations. If EPA elects not to remove the word "adjacent," then it should clarify that the word does not let EPA reach beyond contiguous property boundaries. Failing those alternatives, EPA should promulgate Option 1 with a revised distance of 44 feet or some similar distance. The Alliance strongly opposes the proposed Option 2, which would result in EPA impermissibly ignoring courts' unambiguous instructions.

Western Energy Alliance appreciates the opportunity to provide detailed, substantive comments to the proposed rule. Please feel free to contact me regarding any questions with our comments.

Sincerely,



Kathleen M. Sgamma
Vice President of Government & Public Affairs