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# EPA Promulgates Final Rule for Source Determination for Oil and Gas Operations

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In the June 3, 2016 *Federal Register*, ***EPA*** published a final rule that will be used to define the scope of a stationary source consisting of oil and gas operations for the purposes of the New Source Review and *Title V Operating Permit Programs*. Specifically, the final rule will define the term "adjacent," which is used to determine the scope of an oil and gas operation stationary source.

The determination of what constitutes a stationary source for New Source Review and Title V Operating Permit Programs requires all activities to belong to the same industrial grouping, to be under the control of the same person (or persons under common control), and be located on one or more contiguous or adjacent properties. Under the final rule, EPA is defining the term "adjacent" for the purposes of the oil and gas extraction sector to mean the pollutant emitting activities are located on the same surface site or they are located on surface sites that are within 1/4 mile of one another (measured from the center of each site) and they share equipment. Shared equipment includes, but is not limited to, storage tanks, phase separators or emission control devices. With respect to the concept of "shared equipment," EPA noted it was intended to establish that the two sites have a relationship that meets the common sense notion of a single plant.

While the proposed rule would have defined the term "adjacent" even more broadly and would have included facilities at greater distances that had a functional interrelatedness or operational dependence, the final rule still departs from a common sense notion of when sites are adjacent. Many commenters on the proposed rule cited the United States Court of Appeals for the Sixth Circuit's decision in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012) for the proposition that a plain English dictionary definition of adjacent should be used to determine whether facilities are part of the same source. In *Summit Petroleum*, the Sixth Circuit found that EPA could not interpret the term "adjacent" to mean all equipment within a specified radius on the basis that EPA's interpretation would "permit the agency, under the guise of interpreting the regulation, to create de facto a new regulation."

EPA disagreed with those commenters and explained that EPA retained authority despite the *Summit Petroleum* decision, to define the term "adjacent" by a rulemaking. EPA contends that such a specialized definition can be established by a rulemaking, even if it could not be established through a regulatory interpretation that was inconsistent with the plain meaning of the term.

Regardless of whether EPA can define a term in a rulemaking to vary from the plain meaning of the term, it still needs to ensure the definition is consistent with the CAA. The question that remains is whether the definition of “adjacent” as adopted by EPA is consistent with the concept of a source or plant site as envisioned under the Act. See *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979).

Multiple states, including Kentucky, Ohio and West Virginia, have filed suit in the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) challenging the rule. *West Virginia v. EPA*, Case No. 16-1264.



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