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October 5, 2018

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Re: Interpreting “Adjacent” for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas

Honorable Assistant Administrator Wehrum:

The National Tribal Air Association (NTAA) is pleased to submit these comments requested to your September 4, 2018, Memorandum regarding *Interpreting “Adjacent” for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas*.

The NTAA is a member-based organization with 135 principal member Tribes. The organization’s mission is to advance air quality management policies and programs, consistent with the needs, interests, and unique legal status of Indian Tribes. As such, the NTAA uses its resources to support the efforts of all federally recognized Tribes in protecting and improving the air quality within their respective jurisdictions. Although the organization always seeks to represent consensus perspectives on any given issue, it is important to note that the views expressed by the NTAA may not be agreed upon by all Tribes. Further, it is also important to understand interactions with the organization do not substitute for government-to-government consultation, which can only be achieved through direct communication between the federal government and Indian Tribes.

On September 5, 2018, US Environmental Protection Agency (EPA) released a draft guidance that would change the interpretation of “adjacent” used as a factor in determining whether to combine nearby stationary sources for the Clean Air Act New Source Review (NSR) permitting and Title V Source Determinates in All Industries other than oil and gas.¹

In response to the draft guidance, NTAA finds that EPA’s new interpretive memo purports to provide clarity and consistency to the regulated community and state/local permitting authorities on the issue of determining whether “adjacent” sources should be considered as a single air pollution source under the CAA. However, EPA’s draft guidance falls short of this goal. EPA’s past practices on this topic are well established

¹Draft Guidance: Interpreting Adjacent for New Source and Title V Source Determinations in All Industries other than Oil and Gas. September 2018. http://www.epa.gov/sites/production/files/2018-09/documents/draft_adjacent_policy_memo_9_04_2018.pdf



and well understood. By changing the procedures and introducing new criteria to be used in making the single-source determination, the draft EPA guidance, in reality, will increase the uncertainty. Clarity and consistency would be better served by leaving the current EPA guidance in place.

Based on NTAA's review of the draft guidance, EPA is stressing that proximity or physical distance between neighboring sources is the only valid criteria for consideration in making a determination of whether or not multiple emission sources would be considered "adjacent." Nevertheless, the EPA draft guidance in its present form provides no clear direction in how to make such a determination regarding proximity other than to dismiss the historical concept of "functional interrelatedness" as one of the decision-making criteria. Consistent with past practices and historical precedent, EPA's draft guidance does appear to endorse the concept of "common sense notion of a plant" as an important element of the required analysis and we would agree that "common sense notion of a plant" is a relevant criterion for use in conjunction with "functional interrelatedness". However, when addressing "common sense notion of a plant," the various relationships between adjacent facilities must be evaluated to determine if they indeed operate as a single facility. It is inconsistent to maintain "common sense notion of a plant" as the primary basis for the single-source determination while at the same time dismissing "functional interrelatedness." "Functional interrelatedness" must be addressed in order to appropriately assess whether two adjacent facilities meet the criteria for "common sense notion of a plant." These concepts go hand-in-hand and should not be separated.

As a matter of practice, EPA's policy should be to err on the side of environmental protection when making single-source determinations where uncertainty exists. Aggregating adjacent sources into a single source for the purposes of the CAA could in some circumstances create one major source for regulation instead of two adjacent minor sources. In general, such a determination would have the effect of introducing better overall environmental protections, such as Best Available Control Technology, where such requirements would not otherwise exist if the adjacent sources were classified as non-major. EPA's draft memorandum, in conjunction with other similar EPA actions such as the recent interpretation on "common control," increases the potential for regulated sources to subvert the intentions of the CAA by deliberately structuring projects to avoid aggregation and thereby avoid emission controls that would otherwise be required under the CAA. EPA should not make it easier for regulated industries to avoid the application of emissions controls on new/modified sources. Overall, the guidance should clearly include "functional interrelatedness" of operations to determine facilities are "adjacent".

Although the EPA is proposing that it is adequate to rely on the existing rule language, this disregards many years of prior EPA guidance on how this should be interpreted. This change in the rule's interpretation will likely reduce the sources subject to Major Source review and it is reasonable to expect that it should be changed through updating the rule language.

There are a number of major and minor sources located near or in Tribes and Alaskan Native Villages communities. The EPA's interpretation of "adjacent" would apply to "stationary sources" categorized as Minor Sources and Major Sources that are located or near Tribes and Alaskan Native Villages. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) instructs EPA to consult with Tribes on guidance that may have an impact on Indian



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Country to ensure the federal government's trust responsibility to Tribes. The EPA must consult with Tribes on changes to the interpretation of "adjacent" for stationary sources for the CAA New Source Review (NSR) permitting and Title V Source Determinates.

By changing the interpretation of "adjacent", Tribal communities' ability to protect air quality and resources on Tribal land is undermined and threatens Tribal health, welfare, and economic security.

The NTAA is pleased to provide the aforementioned comments regarding the draft guidance on EPA's interpretation of "adjacent" in the context of CAA permitting. Thank you for your attention to these comments. If you should have any questions about these comments, please feel free to contact NTAA's Project Director, Andy Bessler at andy.bessler@nau.edu or 928-523-0526

On Behalf of the National Tribal Air Association's
Executive Committee,


Wilfred J. Nabahe
Chairman

National Tribal Air Association's Executive Committee

CC: Adjacency_Guidance@epa.gov