



National Tribal Air Association's Fact Sheet on EPA's Interpreting "Adjacent" for New Source Review and Title V Source Determinants in All Industries Other than Oil and Gas

What Is the Draft Guidance on Interpreting "Adjacent" for Source Determinants?

On September 4, 2018, US Environmental Protection Agency (EPA) released a draft guidance that would change the interpretation of "adjacent" used as a factor in determining whether to combine nearby stationary sources for the Clean Air Act New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 The New Source Review is a Clean Air Act program that requires industrial facilities to install modern pollution control equipment when they are building or when making a change that increases emissions significantly.² The Title V Operating Permit program requires major sources of air pollutants and certain other sources to obtain an operating permit and operate in compliance and certify at least annually their compliance with permit requirements. Permitting authorities use the following three factors to determine whether to combine facility emissions for permitting purposes:

1. Belong to the same industrial grouping (i.e. major standard industrial classification code)
2. Located on one or more contiguous or adjacent properties
3. Under the control of the same person (or persons under common control)

In previous years, EPA considered operations to be "adjacent" when they are nearby to one another as well as operations sharing "functional interrelatedness" even while separated by physical distance. The draft guidance would narrow the definition of "adjacent" when determining whether to combine nearby stationary sources for these permitting programs to "physical proximity" and exclude "functional interrelatedness" of sources. This new interpretation would apply to state and local permitting authorities for Title V and NSR source determinations.

What Does this Mean for Air Quality and Air Management?

Combining adjacent sources into a single source for the purposes of the Clean Air Act could in some cases create one major source for regulation instead of two adjacent minor sources. EPA's draft memorandum increases the potential for regulated industries to subvert the Clean Air Act by deliberately structuring projects to avoid "major" source permits and thereby avoid emission controls that would otherwise be required under the Clean Air Act. Separating sources would classify them as minor sources and avoid major source NSR permits that require introducing strict but better overall environmental protections.

What Does this Mean for Tribes?

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

² <https://www.epa.gov/sites/production/files/2015-12/documents/nsrbasicsfactsheet103106.pdf>

There are a number of major and minor sources located near or in Tribes and Alaskan Native Villages. The EPA's interpretation of "adjacent" would apply to these "stationary sources" categorized as Minor Sources and Major Sources. In 2011, EPA finalized a Federal Implementation Plan (FIP) for air permits issued to sources on Tribal lands. A number of Tribes own and operate facilities covered under some of the source categories. Tribes were not consulted on the changes in the draft guidance through Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments). The EPA must consult with Tribes on changes to the interpretation of "adjacent" for stationary sources for the Clean Air Act New Source Review (NSR) permitting and Title V Source Determinates.

Additionally, the draft guidance fails to address the FIP or the Tribal Minor NSR rule.³ Permitting of industrial facilities near Indian Country could be impacted when reviewing combined stationary sources by federal, state and local permitting authorities. EPA and Tribes administer permits through the FIP, Tribal Implementation Plans (TIP), and/or delegation for most Major Sources and Minor Sources. 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.

Where Can I Find More Information?

Read the draft guidance here:

https://www.epa.gov/sites/production/files/2018-09/documents/draft_adjacent_policy_memo_9_04_2018.pdf

Access EPA's Fact Sheet on Review of New Sources and Modifications in Indian Country here:

<https://www.epa.gov/sites/production/files/2015-12/documents/20110613tribalnsrfs.pdf>

How Can I Submit Comments?

The NTAA is developing a Policy Response Kit for Tribes, including a template letter and this fact sheet. It will be posted on www.ntaatribalair.org under the Policy Response Kits tab.

The comment period will close on October 5, 2018.

Comments on the draft guidance should be submitted using the form provided on the EPA website. Go to <https://www.epa.gov/nsr/forms/interpreting-adjacent-source-determinations> and follow the instructions for submitting comments. If you have files you would like to submit as part of your comments, please direct them to the following email address: Adjacency_Guidance@epa.gov.

³ Review of New Sources and Modification in Indian Country—Amendments to the Federal Indian Country Minor New Source Review Rule. EPA-HQ-OAR-2003-0076. May 2014. <https://www.gpo.gov/fdsys/pkg/FR-2014-05-30/pdf/2014-11499.pdf>