October 5, 2018

William L. Wehrum, Assistant Administrator Air and Radiation
Office of Air and Radiation, U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Attention: Informal Docket for EPA's Draft Guidance "Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas" *Submitted via web-based portal (https://www.epa.gov/nsr/forms/interpreting-adjacent-source-determinations) and as an attachment to: Adjacency_Guidance@epa.gov*

Re: Comments on Environmental Protection Agency's ("EPA's") Draft Guidance on Source Determinations (September 4, 2018)

Dear Assistant Administrator Wehrum,

The Associations included on the attached List of Associations (collectively "the Associations") respectfully submit the attached comments on the Environmental Protection Agency's (EPA's) draft guidance, "Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas." ("draft guidance").[1] We support EPA's efforts to restore the major NSR regulations and other air regulations to their proper scope, and greatly appreciate the opportunity to provide comment on the draft guidance before EPA issues a final version. We believe upfront engagement can improve the final product.

As explained further in our comments, EPA should expand or modify certain areas of the draft guidance to improve the clarity and usefulness of the final guidance. In summary, we recommend that the final guidance:

- Address the entirety of the phrase "contiguous and adjacent properties," rather than just the component term "adjacent";
- Recognize that EPA's interpretation applies for purposes of Section 112 Maximum Achievable Control Technology (MACT) stationary source determinations;
- Use the term "pollutant-emitting activities," rather than "operations";
- Focus on proximate "properties," not "operations";
- Consider using distance ranges as parameters for explaining the level of rationale needed to aggregate properties;

[1] Draft Memorandum from William L. Wehrum, Assistant Administrator to Regional Air Division Directors (Sept. 4, 2018)

- Recognize that "contiguous and adjacent properties" unambiguously refers to proximity and that states have no discretion to interpret such language differently in their approved State Implementation Plans ("SIPs").
- Encourage permitting authorities to provide stationary sources with fair notice and reasonable time periods to comply when they disagree with a stationary source's determination; and,
- Recognize that reliance interests support leaving existing stationary source determinations undisturbed unless an owner or operator requests that the permitting authority re-evaluate a prior decision.

We appreciate the opportunity to comment on this draft guidance before EPA issues it in final form. If you have any questions regarding the content of these comments, please contact Ted Steichen (SteichenT@api.org, 202-682-8568) at the American Petroleum Institute for the Associations.

Signed,

American Chemistry Council (ACC)
American Coke and Coal Chemicals Institute (ACCCI)
American Forest & Paper Association (AF&PA)
American Fuel & Petrochemical Manufacturers (AFPM)
American Petroleum Institute (API)
Council of Industrial Boiler Owners (CIBO)
National Mining Association (NMA)
Portland Cement Association (PCA)
The Fertilizer Institute (TFI)
Tile Council of North America (TCNA)

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List of Associations

American Chemistry Council (ACC)
ACC represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®; common sense advocacy designed to address major public policy issues; and health and environmental research and product testing. The business of chemistry is a $768 billion enterprise and a key element of the nation's economy. It is among the largest exporters in the nation, accounting for fourteen percent of all U.S. goods exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure.

American Coke and Coal Chemicals Institute (ACCCI)
ACCCI was formed in 1944 by companies interested in establishing a forum to discuss and act upon issues of common concern to the metallurgical coke and coal chemicals industry. Today, ACCCI represents over 95 percent of the metallurgical coke produced in the U.S. and Canada, including both merchant coke producers and integrated steel companies with coke production capacity, and 100 percent of companies producing coal chemicals in the U.S. and Canada. Nearly 150 representatives from about 45 companies contribute their knowledge and expertise to enhance the effectiveness of the Institute's programs.

American Forest & Paper Association (AF&PA)
AF&PA serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative — *Better Practices, Better Planet 2020*. The forest products industry accounts for approximately four percent of the total U.S. manufacturing GDP, manufactures over $200 billion in products annually and employs approximately 950,000 men and women. The industry meets a payroll of approximately $50 billion annually and is among the top 10 manufacturing sector employers in 45 states.

American Fuel & Petrochemical Manufacturers (AFPM)
AFPM is a national trade association whose members comprise virtually all U.S. refining and petrochemical manufacturing capacity. AFPM's member companies produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the chemical building blocks that are used to make millions of products that make modern life possible.

American Petroleum Institute (API)
API is the only national trade association representing all facets of the oil and natural gas industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API's more than 600 members include large integrated companies, as well as exploration and

production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation's energy and are backed by a growing grassroots movement of more than 40 million Americans.

Council of Industrial Boiler Owners (CIBO)
CIBO represents the interests of America's non-utility energy products and users. It is the organization of choice for advocacy and accurate information to achieve safe and cost-effective solutions for industrial energy, technology and environmental issues.

National Mining Association (NMA)
NMA is the only national trade organization that represents the interests of mining before Congress, the administration, federal agencies, the judiciary and the media—providing a clear voice for U.S. mining. NMA's mission is to build support for public policies that will help America fully and responsibly utilize its coal and mineral resources. Headquartered in Washington, D.C., NMA has a membership of more than 300 corporations and organizations involved in various aspects of mining. NMA provides a forum for these diverse industry segments to be informed, heard and represented.

Portland Cement Association (PCA)
PCA is the leading voice for the U.S. cement manufacturing industry. Our members are responsible for more than 92 percent of the portland cement production capacity in the United States, and serve nearly every Congressional district. PCA conducts market development, engineering, research, education, technical assistance, and public affairs programs on behalf of its member companies. Our mission focuses on improving and expanding the quality and uses of cement and concrete, raising the quality of construction, and contributing to a better environment.

The Fertilizer Institute (TFI)
TFI is the leading voice of the fertilizer industry, acting as an advocate for fair regulation and legislation, a consistent source for trusted information and data, a networking agent, and an outlet to publicize industry initiatives in safety and environmental stewardship. Our Mission is to represent, promote and protect the fertilizer industry through strategic initiatives.

Tile Council of North America (TCNA)
TCNA is a not-for-profit trade association representing over 99 percent of the ceramic tile manufacturing capacity in the United States. In 2017, TCNA member companies shipped $1.4 billion of domestically-made tile. TCNA's 220 members include manufacturers of ceramic tile, tile installation materials, tile equipment, raw materials, and other tile-related products.

The Associations' Comments on EPA's Draft Guidance "Interpreting 'Adjacent' for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas"

October 5, 2018

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1.0 Introduction

The Associations appreciate and generally support EPA's efforts to remove the uncertainty related to the term "adjacent" for purposes of source determinations, which arose from past, problematic EPA applicability determinations, court decisions, and EPA's actions relative to its obligations for regional consistency. We agree that EPA expressly rejected inclusion of the concept of "functional interrelatedness" when it adopted three criteria, including "are located on one or more contiguous or adjacent properties" ("the second criterion"), to define stationary sources in its 1980 final rule.[2] As the Sixth Circuit articulated in *Summit Petroleum,*[3] EPA's past consideration of functional interrelationship, "…is in practice completely inconsistent with the wording of [EPA's] own regulation," as the term "adjacent" unambiguously connotes physical proximity. "EPA makes an impermissible and illogical stretch when it states that one must ask the purpose for which two activities exist in order to consider whether they are adjacent to one another."[4] Accordingly, EPA cannot reasonably interpret its regulations and the phrase "contiguous or adjacent properties" to include a test of functional interrelationship. Because, however, prior EPA applicability determinations, guidance and statements unlawfully strayed from this unambiguous meaning, we agree that EPA's draft guidance, when issued in final form, would serve as constructive notice of the proper interpretation of the major New Source Review ("major NSR") and Title V regulations, and, as discussed further below, the Section 112 regulations as well.

2.0 Legal and Regulatory Background

A. The Clean Air Act (CAA) does not mandate that a stationary source encompass the largest possible collection of pollutant-emitting activities.

In the Background section of the draft guidance, EPA largely captures the regulatory requirements and implementation history related to the term "major source," as applied in the major NSR and Title V programs, and those facts are not repeated here. Notably, however, while the guidance includes important references from *Alabama Power*, it omits the relevant history in the *Alabama Power* decision that centered on EPA's attempt to expand the Section 111 definition of "stationary source" for the purposes of major NSR.[5] EPA's 1978 rule promulgated a definition of "source" that included not only Section 111's reference to "building, structure, facility or installation," but also added "equipment," "operation" and any combination of the terms.[6]

[2] *See* 45 *Fed. Reg.* 52676, 52695 (Aug. 7, 1980).
[3] *See Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012).
[4] *Id.*
[5] *See Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1979).
[6] *See* 43 *Fed. Reg.* 26380, 26403 (June 19, 1978).

In *Alabama Power*, the Court rejected EPA's attempt to expand the statutory definition of "stationary source" by grouping multiple stationary source components together, and noted that Section 111's definition of "stationary source" is of "limited scope." Within that limited scope, EPA cannot "treat contiguous and commonly owned units as a single source unless they fit within the four permissible statutory terms [building, structure, facility or installation]."[7]

To be clear, *Alabama Power* supports the proposition that EPA retains discretion to define the component terms of "stationary source" as something akin to an affected facility for NSPS or as large as a source category listed in CAA Section 169(1).[8] There is no mandate that a stationary source encompass the largest possible entity for purposes of regulation; to the extent that EPA aggregates pollutant-emitting activity together to form a stationary source, that aggregation need only be reasonably delineated to "carry out the expressed purposes of the Act."[9] This verity, along with "a common sense notion of a plant," must serve as the guiding principles for major source determinations.

B. "Contiguous and adjacent properties" means "physical proximity" under controlling law.

It is appropriate for EPA to issue a memorandum to reaffirm that the second criterion of the "building, structure, facility, or installation" definition (i.e., "are located on one or more contiguous or adjacent properties) means proximity and not functional interrelatedness. EPA made an express determination in the 1980 legislative rule not to include functional interrelatedness as a criterion to define the component terms of the stationary source definition, and no statements or actions since that time have altered the meaning of the regulation. While EPA subsequently issued guidance memoranda and applicability determinations that purported to require consideration of functional interrelatedness, those post-hoc interpretations are patently at odds with EPA's 1980 regulatory text, and therefore, could not establish a new interpretation of that regulatory text.[10]

Because EPA's rule has not changed, EPA is free to reaffirm the meaning of its regulation through issuance of a memorandum and need not undertake any action with respect to the federal regulations to begin properly implementing its requirements. EPA's final memorandum should affirm that proximity is the only factor holding the force and effect of law in interpreting "contiguous and adjacent properties" for purpose of making stationary source determinations.

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[7] *Id.*
[8] *See* 42 U.S.C. § 7479.
[9] *Id.*
[10] The Associations also support issuance of broader guidance to address EPA's over-reaching of concepts such as "support-facility" within the SIC code criterion.

3.0 Scope of the Final Guidance

A. The final guidance should address "contiguous or adjacent properties" and not just the component term "adjacent."

In the draft guidance, EPA states, "[b]ased on those dictionary definitions, EPA has interpreted 'contiguous' to mean that parcels of land associated with the operations in question are in physical contact with one another." The title of the draft memorandum and footnote 17, however, in referring only to "adjacent," conveys the thought that EPA does not intend this memorandum to reaffirm any particular interpretation of "contiguous." EPA rationalizes that each term must be given independent meaning so as not to "render the term 'adjacent' superfluous."[11]

This position contrasts with the position EPA took in promulgating the "major source" definition for purposes of the CAA Section 112 Maximum Achievable Control Technology ("MACT") program. There, EPA determined that "Congress intended the term 'contiguous area,' as used to define major source in section 112, to have the same meaning as the term 'contiguous or adjacent property' as it is used in section § 70.2 of the promulgated part 70 permit program regulation,"[12] and that, "[t]he dictionary definition of 'contiguous' consists, in part, of 'nearby, neighboring, adjacent.' On this basis, the EPA has historically interpreted 'contiguous property' to mean the same as 'contiguous or adjacent property'…"[13] Under CAA Section 112, EPA made clear that "contiguous area" would mean that emissions units "are adjacent geographically."[14]

Accordingly, it would not be inconsistent here for EPA to reaffirm a collective meaning of the phrase "contiguous or adjacent properties" rather than focusing the guidance only on "adjacent." Such an approach is also consistent with the doctrine of *noscitur a sociis* where the meaning of a word can be derived from its association with other words. Indeed, the Associations prefer such an approach to prevent future re-interpretations of "contiguous" that may reintroduce functional interrelationships or other inappropriate concepts into the meaning of "contiguous or adjacent properties."[15]

B. The final guidance should affirm application of "proximity" for the MACT Program.

The draft guidance purports to only address the term "adjacent" relative to the major NSR and Title V programs, but this inappropriately increases the level of uncertainty related to major stationary source determinations under the Part 63 MACT standards. As noted above, in the cited preamble language, EPA expressly proposed to adopt the part 70 approach of "contiguous or

[11] *See* draft guidance at 7.
[12] *See* 58 *Fed. Reg.* 42760, 42767 (Aug. 11, 1993).
[13] *Id.*
[14] *Id.*
[15] To settle the matter, EPA should also affirm that its separate treatment of the embedded phrase "adjacent" for purposes of the oil and gas industry also provides the industry-specific interpretation of the phrase "contiguous or adjacent property" for purposes of that industry.

adjacent properties" for purposes of the Part 63 MACT standards.[16] Yet, in the proposal, EPA relied on its flawed interpretation of "contiguous or adjacent property"[17] which considered functional interrelationships when it stated that "'adjacent' depends not only on physical distance, but on related issues arising from the type of nexus existing between facilities."[18]

As a legal matter, EPA has not established a legislative rule encompassing an interpretation of "contiguous area" that expressly includes functional interrelationships for purposes of the MACT standard program.[19] EPA, however, affirmed its intent to interpret "contiguous area" as "contiguous or adjacent properties" when it disagreed with commenters who asserted that equating the terms went beyond the statutory definition.

In fact, the DC Circuit acknowledged these preamble statements in *National Mining Assoc. v. EPA*. "The preambles to the proposed and final rules…explain in greater detail how EPA plans to identify major sources."[20] Moreover, similar to the Prevention of Significant Deterioration provisions in CAA Section 169 which draw upon the definition of "stationary source" in CAA Section 111(a), the provisions in CAA Section 112(a)(3) expressly cross reference that definition. In view of these preamble statements and the common statutory links to "stationary source," EPA would be remiss if it did not affirm that the only lawful interpretation for purposes of major NSR and Title V of the phrase "contiguous or adjacent properties" is also the only lawful interpretation of "contiguous area" under Part 63 and that, in all cases, the terms refers to "proximate" or "adjacent geographically" properties.

C. The final guidance should refer to "properties" and not "operations."

Throughout the draft guidance EPA makes statements like, "…whether or not operations are adjacent…" and "… to interpret 'adjacent' to include operations that are not physically touching."[21] These statements misrepresent the second criterion in two important ways. First, the language deviates from the common practice and definition of "building, structure, facility, or installation" by substituting the term "operations" for "pollutant-emitting activities." Second, the proper inquiry under the regulatory text for the second criterion is whether two properties are proximate not whether the pollutant-emitting activities located on the properties are proximate.

Merriam-Webster Dictionary's definition of "operations" includes such things as "a method or manner of functioning," "a small business or establishment," and "a single step performed by a computer."[22] The term "operations" is too broad and inconsistent with the concept that only "pollutant-emitting activities" are part of a stationary source. In the final guidance, EPA should

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[16] The Associations recognize that, because the Section 112 definition does not include the third criterion (SIC code), the major source identified for Section 112 purposes may be broader than the major source identified for major NSR.
[17] The Associations assume there is no significance to EPA's reference to "property" rather than "properties."
[18] *See* 58 *Fed. Reg.* at 42767.
[19] EPA neither affirmed nor rejected its proposed interpretation in the final rule, and the proposed rule was too ambiguous in its reference to "nexus" to provide an authoritative interpretation.
[20] *See National Mining Assoc., et al. v. EPA*, 59 F.3d 1351 (D.C. Cir 1995).
[21] *See d*raft guidance at 6 and 7.
[22] *See* definition of "operation," Merriam-Webster Dictionary (available at https://www.merriam-webster.com/dictionary/operation) (last visited Sept. 20, 2018).

return to using the phrase "pollutant-emitting activities" and eliminate use of the term "operations" or otherwise define "operations" for purposes of the final guidance to mean "pollutant-emitting activities."

Second, the final guidance should refer to proximate properties. As a practical matter, the Associations recognize that the nearness of the pollutant-emitting activities can inform whether two properties are proximate for CAA purposes, because the physical configuration influences whether, collectively, the pollutant-emitting activities "comport with the common-sense notion of a plant." A pollutant-emitting activity located in the center of a 3000 acre property is justifiably not "nearby" another property located at a distance of, for example, 0.15 miles when, collectively, those pollutant-emitting activities could not satisfy the common-sense notion of a plant. Nonetheless, because EPA intends the final guidance as a reaffirmation of the regulatory text, the Associations request that EPA refer to "properties" rather than "operations" or "pollutant-emitting activities" in the final guidance.

D. The Associations agrees that "properties" is the "land associated with the [pollutant-emitting activities] in question.

The Associations agree that the term "properties" referenced in the second criterion is the "land associated with the [pollutant-emitting activities] in question." This properly limits the scope of the relevant land for purposes of the comparison.

4.0 Reliance on Physical or Geographical Proximity

A. Applicability of a specific CAA program should never form the basis of a "contiguous or adjacent properties" decision.

The Associations agree that the interpretation of "contiguous or adjacent properties" should "focus[ ] exclusively on physical proximity" when evaluating whether the pollutant-emitting activities belong to a single stationary source.[23] Owners and operators, in cooperation with permitting authorities, should have discretion to define the specific distance for a given set of facts by following the principles that the nearby properties contain pollutant-emitting activities that, when considered in the aggregate, "carries out the expressed purposes of the Act," and "comports with a common-sense notion of a plant."

For example, EPA stated that the "dominant purpose of PSD review is to maintain air quality within the applicable increments."[24] Thus, when an owner or operator of pollutant-emitting activities that are located on two separate properties proposes to manage emissions from those activities to prevent a significant adverse air quality impact on increments or the NAAQS in the local area, then such properties reasonably satisfy the concept of geographically nearby.

[23] *See* draft guidance at 6.
[24] *See* 45 *Fed. Reg.* at 52693.

Triggering compliance with one or more regulatory programs, however, should never form the basis of a "contiguous or adjacent property" decision. The CAA contains no express purpose of reducing as many emissions as possible through application of a specific regulatory program. Numerous CAA regulatory authorities provide states and EPA the tools to holistically and properly manage air quality. A desire to trigger the applicability of any specific regulatory program should not form the basis of a proximity decision, and EPA's final guidance should acknowledge this.

B. Any distance-related guidance should relate to the degree of supporting rationale needed for a case-by-case decision and not establish a presumption toward aggregation.

The Associations are not opposed to EPA's decision to decline to set a "bright-line" or specific distance threshold for "contiguous or adjacent properties." We also agree that "nearby" generally denotes a "side-by-side or neighboring" geographical position. If EPA opts to identify specific distances in the final guidance, it should not adopt a "bright line" distance that assumes pollutant-emitting activities should be aggregated. A presumptive distance should not serve as an unequivocal dividing line, nor should it establish a value that presumes pollutant-emitting activities should be aggregated within a set distance.

As previously stated, the CAA does not mandate that EPA include the largest possible conglomeration of pollutant-emitting activities within a stationary source just because one possible rationale exists to do so. Instead, EPA could offer owners or operators a range of distances that would differentiate the level of supporting rationale anticipated for justifying a "contiguous or adjacent properties" decision.

For example, at distances between 0.4 km (0.25 miles) to 1.0 km (0.62 miles) from the geographical center of a property, owners or operators could treat properties either as "contiguous or adjacent" or as not "contiguous or adjacent," as the owner or operator deems appropriate, without requiring further explanation. This range of separation is distant enough, in most cases, to justify a finding that two properties are not nearby.[25] Yet, when the owner or operator agrees to treat the two properties as adjacent to each other, a decision to treat the properties as geographically proximate neither defies common sense nor rational decision-making.

At a closer distance (e.g. 0.3 km), a finding that two activities are not located on "contiguous or adjacent properties" requires some level of explanation based on the case-specific facts. For example, an owner or operator could document that the land between the properties is under separate ownership or control, and not merely a right-of-way, or that the two pollutant-emitting activities historically have not been treated as located on "contiguous or adjacent properties." The Associations believe that the historical treatment of pollutant-emitting activities provides a suitable rationale to find that pollutant-emitting activities are not located on "contiguous or adjacent properties." If, under EPA's overly-inclusive approach, the activities qualify as

[25] As EPA explained in the draft guidance, EPA, for purposes of the oil and gas industry, and some states for purposes of all industry categories, apply a presumption that properties outside a ¼ mile distance are not "contiguous or adjacent properties" and, at shorter distance, use a case-by-case review to make a determination.

separate sources, no cause exists to question that determination under the proper, proximity-based approach.

At a distance greater than 1.0 km, finding that two properties are "contiguous or adjacent properties" also requires some level of explanation. Again, the Associations believe that an owner or operator may rely on historical treatment of the properties. Even under the unlawful, functionally-interrelated approach, permitting authorities sought to define a "common sense notion of a plant" and if an owner or operator does not wish to reopen that decision, no basis exists to disturb that prior finding.

Another suitable rationale for finding that two properties are "contiguous or adjacent," for example, may relate to the purposes of the Title V program. EPA identified "Facilitat[ing] Use of Market-Based Incentives" as an explicit purpose of the CAA in crafting its Title V regulations.[26] Accordingly, when an owner or operator proffers that two pollutant-emitting activities located at a distance greater than 1.0 km (but not at so great a distance as to defy the concept of "nearby") are located on "contiguous or adjacent property" because the closeness of the activities can facilitate use of market-based approaches or better manage pollution impacts from the pollutant-emitting activities, such a rationale could satisfy the level of explanation needed to make that finding, because it defines proximity in relation to carrying out the purposes of the CAA.

These examples, of course, are not intended to be all inclusive or definitive, but merely to illustrate how providing a range of distances could simplify case-by-case decisions and provide more certainty to all stakeholders. The Associations recommend that EPA include, in the final guidance, examples of the type of rationales that can justify a decision that two pollutant-emitting activities are located on or are not located on "contiguous or adjacent properties" to improve the usefulness of the guidance. For example, EPA could revisit prior applicability determinations and explain how such decisions might have been decided without consideration of functional interrelationship.

5.0 State Implementation Plan-Approved Programs and Part 70 Programs

The draft guidance states,

> To maintain owner/operators', permitting authorities', and the public's current understanding of existing sources and to foster administrative simplicity, EPA recommends that state and local permitting authorities apply this interpretation from this point forward when those authorities are for the first time assessing whether a given pair or set of operations are adjacent for purposes of Title V and NSR source determinations.[27]

[26] *See* 56 *Fed. Reg.* 21712, 21714 (May 10, 1991) as cross-referenced in the final part 70 regulations. "These principles, which were discussed extensively in the proposal…The EPA intends that these principles be appropriately incorporated into all aspects of the program development and implementation…" 57 *Fed.Reg.* 322502, 32252 (July 21, 1992).

[27] *See* draft guidance at 8.

The Associations disagree both with the suggestion that state and local permitting authorities need not follow the meaning of the phrase "contiguous or adjacent properties," and that states should only look at applying this meaning for new stationary source determinations.

A. Because the rule text is unambiguous, EPA must require permitting authorities to follow a "proximity" interpretation.

The Associations recognize and support the need to provide states, as primary implementers of CAA requirements, broad discretion to carry out and interpret their air pollution regulations. "[A]ir pollution control at its source is the primary responsibility of States and local governments."[28] That authority, however, is not so broad as to assign unambiguous terms a wholly separate meaning from the plain language of the regulations without rulemaking.

As the Sixth Circuit chronicles in *Summit Petroleum Corp*, numerous court decisions considered the extent to which the term "adjacent' is ambiguous. In all cases, the courts concluded that "adjacent" is unambiguous in referring to something "purely physical and geographical."[29] And, while SIPs are born of state law, the rules become federal law when EPA approves the rule into the SIP. "Thus the SIP became *federal* law, not *state* law, once EPA approved it, and could not be changed unless and until EPA approved any change."[30]

As federal law, the rules of statutory construction apply for interpreting federal regulations, and, as a first principle, the plain meaning of the regulation governs, except when applying such a meaning would lead to absurd or unreasonable results.[31] Because the term "adjacent" unambiguously refers to geographic proximity, EPA has no latitude to interpret SIP rules that follow EPA's model regulatory language in using "contiguous and adjacent properties" to include such considerations as functional interrelationships, because the language is unambiguous in referring only to proximity. While the scope of "adjacent" "…is in *some* respects ambiguous… that ambiguity, however, does not conceivably extend to…" such an interpretation of the regulatory language.[32] And, because the language is unambiguous with respect to proximity, an alternative interpretation of the SIP regulations are not entitled to even an *Auer* level of deference.[33]

While a clearly expressed administrative intent can overcome a plain meaning interpretation, here, EPA concedes, in 1980, it codified a legislative rule that included a contemporaneous interpretation of "contiguous and adjacent properties" that relied solely on the concept of

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[28] *See* 42 U.S.C 7401.
[29] *See* 690 F.3d at 747.
[30] *See Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007). *Also See* e.g. *Trs. for Alaska v. Fink,* 17 F.3d 1209, 1210 (9th Cir. 1994) and *Union Elec. Co. v. EPA*, 515 F.2d 206, 211 (8th Cir.1975), *aff'd*, 427 U.S. 246, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976)).
[31] *See e.g. Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv.*, 307 F.3d 1214, 1219 (9th Cir.2002)("the plain meaning of a regulation governs); *U.S. v. Wilson, 112 S.Ct. 351,1354(1932)* and *U.S. v. Amer. Trucking Ass'n, Inc.,* 310 U.S. 534,543-44 (1940).
[32] *See Rapanos et al. v. U.S.* 547 U.S. 715,752 (2006)(finding that "waters of the United States" could not extend to storm drains and dry ditches.)
[33] *See Auer v. Robbins, 519 U.S. 452 (1997)*.

proximity. In codifying part 70, EPA also stated its intent to follow the major NSR approach for defining a stationary source.[34] To provide an alternative meaning to plain, unambiguous language in approved SIPs, EPA and the state must have provided notice of such an interpretation when EPA approved the SIP and Title V programs.[35]

> Although "clearly expressed ... intent" of regulators therefore could overcome the plain meaning of a regulation,… we conclude that the notice requirements of the APA, 5 U.S.C. §§ 552(a)(1), 553(b) requires that some indication of the regulatory intent that overcomes plain language must be referenced in the published notices that accompanied the rulemaking process.[36] (*citation deleted*)

Here, the regulatory text of "contiguous and adjacent properties" is unambiguous with respect to referring to proximity, and EPA established that interpretation contemporaneously with the legislative rule. To deviate from this interpretation, a State must have expressed an intent to do so at the time EPA approved its SIP or Part 70 program.

With respect to major NSR regulations, EPA's own regulatory procedures for approving SIPs further solidifies the principle that contemporaneously established rule interpretations govern. "(1) All such plans shall use the specific definitions. Deviations from the following wording will be approved only if the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definition below:…"[37] At the time EPA approved SIPs, "proximity" was the only legislatively established meaning for the phrase "contiguous and adjacent properties." The Associations are unaware of any SIP submission or Part 70 approval notice that identified or justified an alternative interpretation.[38]

If an alternative interpretation properly exists for a SIP or Part 70 program, then EPA should identify this SIP in the final guidance. Absent such a distinction, the final guidance should affirm that "proximity" is the controlling interpretation for SIPs and Part 70 (and Section 112) using identical language to EPA's rule, and that, in considering whether "properties" are "contiguous or adjacent," there is no reasonable interpretation of the phrase that would focus the determination on "functional interrelationships" of pollutant-emitting activities rather than the properties. The Associations agree, however, that States retain some discretion to interpret proximity, and, in this respect, to the extent the final guidance suggests any methodology for determining whether properties are proximate, those statements represent non-binding guidance.

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[34] "The definitions of major sources in part D of title I have language similar to the Title V language…It is the approach followed today by EPA as a result of the Alabama Power litigation…aggregation by SIC code should be done in a manner consistent with established NSR procedures." *See* 56 *Fed.Reg.*at 21724.

[35] The Associations do not assert that this principle necessarily applies in all circumstances, but it applies to this case because EPA clearly established its interpretation of "contiguous or adjacent" contemporaneously with codifying the 1980 rule.

[36] *See Safe Air for Everyone,* 488 F. 3d at 1097-1098.

[37] *See* 40 CFR § 52.166(a)(1).

[38] Indeed, such a demonstration would be technically complex because a larger stationary source boundary is not necessarily more stringent in any given circumstances.

B. Fair-notice and a reasonable time to comply are required under a case-by-case decision-making framework.

The Associations agree that "contiguous and adjacent properties" disputes are best resolved on a case-by-case basis given each factual circumstance. Nonetheless, we disagree with any connotation that source determinations generally necessitate a case-by-case decision involving the permitting authority for each case. Such an approach is administratively unmanageable.

Owners and operators have made, and continue to make, reasoned evaluations of the stationary source implications of their pollutant-emitting activities based on a good-faith effort to apply the regulations to their factual circumstances, without necessarily consulting a permitting authority in each case. Because "nearby" is arguably subjective, it is not without expectation that, in some cases, a permitting authority may disagree with an owner or operator's assessment.

Additionally, in the past, permitting authorities have used various tools to leverage owners and operators to accept, without question, a permitting authority's revised assessments of major source status. For example, permitting authorities have provided notice of a revised major source decision for the first time by declaring a Title V permit renewal application incomplete because the application did not include information on additional pollutant-emitting activities, which historically were not part of the major source or Title V permit. This action presents significant consequences for the major source, because it could jeopardize the major source's eligibility for the permit application shield. And, it could also cause the owner or operator to incur significant costs to prepare an entirely new portion of an application, whether or not the source agrees with the permitting authority's assessment.

The final guidance should make clear that owners and operators must be provided fair notice of a permitting authority's interpretation and that such tools as a notice of violation or permit application completeness finding are not the appropriate tools to provide such notice. In addition, such determinations must apply prospectively only by providing owners and operators a reasonable period to bring the stationary source into compliance with newly applicable requirements.

C. Reliance interests support leaving prior determinations undisturbed, but only if accepted by the owner or operator.

The Associations agree that both EPA and other permitting authorities have long-applied an unlawful consideration of functional interrelationships in determining the scope of a stationary source for various air regulatory programs. Revisiting each and every one of these determinations could increase the administrative burden associated with issuing or revising permits, and adversely affect permit issuance rates.

To the extent an owner or operator remains satisfied or, at least, complacent with how pollutant-emitting activities are classified for stationary source purposes, no cause exists to revisit these determinations. An owner or operator's reliance interests support a policy of leaving these past determinations undisturbed, regardless of the methodology used in the decision.

Nevertheless, a long "entrenched executive error" is no cause to perpetuate the continuation of the practice.[39] Accordingly, when an individual owner or operator requests reconsideration of a previous single-source or multiple-source determination that rested on a foundation of functional interrelationships or other unlawful consideration, the final guidance should require that permitting authorities address these requests to properly carry out the states' obligations under the SIPs.[40] We agree, however, that, to the extent that any given pollutant-emitting activity is reclassified, any implications related to that reclassification should not apply retrospectively against the source as this would violate the fair notice doctrine.

The Associations disagree with EPA's position that "where operations have previously been considered one source for the purposes of NSR netting analyses, EPA recommends such operations should continue to be considered one source…"[41] There is no basis in law or policy for disallowing a proper classification of whether pollutant-emitting activities are on "contiguous or adjacent property." A future re-classification of pollutant-emitting activities changes nothing about the prior NSR project.[42] Assuming proper netting occurred when the activities were classified as a single source, no emissions increase occurred from the project, and any emissions reduction requirement would continue in the future, unless modified through a proper administrative procedure. The final guidance should not include this netting-based recommendation.

Moreover, to the extent that an owner or operator assumed liability for compliance with requirements for synthetic minor limitations, major NSR, Title V and other CAA requirements that would not have applied if a permitting authority made the stationary source determinations on a proper basis, the final guidance should acknowledge that these requirements may be rescinded through an appropriate administrative process.

[39] *See Rapanos* 547 U.S. at 752.

[40] The ability for owners or operators to request that the permitting authority re-evaluate past stationary source determinations is all the more relevant and appropriate with EPA's recent acknowledgement that its prior, overly-broad application of the first criterion, "common-control," lead to "inconsistent and impractical outcomes." *See* Letter from William L. Wehrum, Assistant Administrator U.S. Environmental Protection Agency to Hon. Patrick McDonnell, Secretary of PA Dept. of Environmental Protection (Apr. 30, 2018).

[41] *See* draft guidance at 8.

[42] The Associations agree that some agreement on the distribution of contemporaneous increases and decreases between the stationary sources for potential purposes of future netting is appropriate.