**Texas Commission on Environmental Quality Comments on
Source Determination for Certain Emission Units in the Oil and Natural Gas Sector; Proposed Rule**

**Docket ID Number EPA-HQ-OAR-2013-0685**

The Texas Commission on Environmental Quality (TCEQ) provides the following comments on the U.S. Environmental Protection Agency’s (EPA) proposed rule referenced above. The proposed rule was published in the September 18, 2015, issue of the *Federal Register.*[[1]](#footnote-1)

**Background**

On September 18, 2015, EPA proposed to clarify the term “adjacent” in the definitions of “building, structure, facility or installation”[[2]](#footnote-2) used to determine the “stationary source” for purposes of the Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) programs and “major source” in the Title V program[[3]](#footnote-3) as applied to the oil and natural gas sector. EPA is proposing two options for determining whether two or more properties in the oil and natural gas sector are “adjacent.” EPA’s preferred option would define “adjacent” in terms of proximity; EPA’s second option would include the factor of proximity and add the concept of exclusive functional interrelatedness.

**TCEQ Comments**

I. *General Comments and Impact of Rule*

**The EPA should not finalize either option proposed in this source determination rule for Major New Source Review and Title V.**

EPA states that the goal of this proposal is to provide certainty to the oil and gas industry. However, both of EPA’s options raise numerous and significant implementation issues that will result in an overly broad aggregation policy and create additional uncertainty by: 1) unnecessarily bogging down the permit review process, 2) usurping state authority to review and regulate what would otherwise be minor sources, and 3) failing to take into account the realities of oil and gas operations and permitting challenges. Some of these challenges include an overly burdensome permitting process for the numerous new major sources without any environmental or health benefits, unnecessarily complicating the permitting process for minor sources, placing states in the position of revising state rules, their SIP, and permitting programs without any practical benefits, and creating daisy-chaining complexities.

EPA’s proposal recognizes several relevant laws and guidance documents including the Federal Clean Air Act (FCAA or Act) § 112(n)(4) which prohibits aggregation of any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station for purposes of NESHAP major source determinations.[[4]](#footnote-4) In this context, EPA discusses the focus on the “surface site” which is defined as “any combination of one or more graded pad sites, gravel pad sites, foundations, platforms, or theimmediate physical location upon which equipment is physically affixed” as a way to comply with the specific language of FCAA section 112(n) and to reduce the burden on owners and operators in making source determinations.[[5]](#footnote-5) EPA also discusses the 2007 Guidance document (the Wehrum memo) which built on the concept of using the surface site as the basis for making source determinations.[[6]](#footnote-6) Although then- EPA Assistant Administrator Gina McCarthy’s 2009 memo withdrew the Wehrum memo, it reinstated the fundamental criteria for making source determinations, but did not invalidate the use of the “surface site” for purposes of making source determinations.[[7]](#footnote-7)

In proposing these options, EPA fails to truly recognize the unique realities of oil and gas operations and permitting challenges that Congress acknowledged when it revised the FCAA in 1990, specifically, the prohibition on oil and gas aggregation for HAP.[[8]](#footnote-8) These existing regulatory requirements should guide EPA’s policy and rulemaking decisions and not be in contrast to them without sound legal and scientific bases. EPA has failed to include this analysis and, to the contrary, and, as explained in further detail in these comments, neither of EPA’s proposals will result in additional public health or environmental benefit.

**TCEQ does not support Option 1.**

EPA states that its preferred option, Option 1, relies solely only on proximity as the determinative factor for defining the term “adjacent” requiring aggregation of oil and gas sources that are within ¼ mile of each other.[[9]](#footnote-9) TCEQ does not support this option. EPA points to guidance developed independently by Texas, Pennsylvania, Oklahoma, and Louisiana as the basis for its preferred option. While Texas does have guidance for site aggregation for the Title V program, TCEQ does not support the establishment of a “bright-line” distance of one-quarter mile (or one-half mile) in rule within which to consider multiple sites as a single source. EPA misinterprets TCEQ’s guidance as establishing a bright-line within which all sites are deemed a single source. This guidance merely provides the flexibility necessary to aggregate sources where circumstances require. Setting a specific distance in rule takes that flexibility away. In addition, adopting in rule any specific distance between sources for purposes of aggregating the sources, without consideration of how those sources function together, is arbitrary and furthermore does not “approximate a common sense notion of ‘plant’” nor “fit within the ordinary meaning of ‘building,’ ‘structure,’ ‘facility,’ or ‘installation’.”[[10]](#footnote-10)

Moreover, Texas has a statute specifically addressing aggregation of oil and gas minor sources. Texas Health and Safety Code [THSC] section 382.051964 allows aggregation of oil and gas production facilities under permit by rule (PBR) or standard permit (SP) that meet four criteria. The facilities must be under common control, under the same first two-digit major grouping of Standard Industrial Classifications, less than one quarter mile from each other, and operationally dependent (discussed further below). This conjunctive approach ensures that only those sources that are operationally dependent are aggregated as one source, which is consistent with federal law, the common sense notion of “plant” and the plain meaning of the term “adjacent.” The new federal rule will deprive the states of the flexibility to develop and apply appropriate guidance and state law that best comports with the activities in their respective state. In light of this, Option 1 is unnecessary and overreaching.

**TCEQ does not support Option 2.**

EPA’s Option 2 would consider facilities beyond ¼ mile that are exclusively functionally interrelated as a basis for adjacency. As examples, EPA suggests that exclusive functional interrelatedness could include connection via pipeline, delivery via truck or train, and facts such as whether one group of equipment would be able to operate if the other group of equipment was not operating.[[11]](#footnote-11) TCEQ does not support such a broad and misplaced application of this concept.

In parts of the proposal, EPA uses the term “operationally dependent” interchangeably with functional relatedness. As a foundational issue, functional relatedness and operational dependence are not the same. Operational dependence or interdependence is separate and apart from EPA’s construction of exclusive functional interrelatedness. Operationally dependent or interdependent properties are “properties that are mutually dependent…[and] a mutually dependent property either supports or is supported by another property (or properties) and cannot function independently.”[[12]](#footnote-12) Operational dependence is the extent to which each activity relies on the other for its operations. For example, the inability of one facility to function without the other may establish a basis for operational dependence, where a contractual relationship to send products to another entity may not. Functional relatedness has more to do with the groupings of activities that are the basis for the standard classification codes than with adjacency.

While EPA states that it has previously declined to include “function” or a “functional interrelationship” test as a fourth criteria for defining a source because “any attempt to assess those interrelationships would have embroiled the Agency in numerous, fine-grained analyses,”[[13]](#footnote-13) it nevertheless recognizes that “(o)ver the years, the EPA has considered both the distance between two or more sources and whether they share an operational dependence or functional interrelatedness to determine whether they are ‘adjacent.’”[[14]](#footnote-14) EPA states that this concept of “interrelatedness” is consistent with longstanding guidance and practice and it is currently a factor in determinations by EPA and states through a case-by-case analysis of the existence of interdependent operations between sources.[[15]](#footnote-15) However, EPA is now proposing an option and seeking comment on the case-by-case guidance approach that would result in precisely the situation it sought to avoid by not codifying this concept over 25 years ago. Proposed Option 2 does not put definition to the term “exclusive functional interrelatedness.” And it provides no benefit or clarity to permitting authorities because it does not clearly define the term or the concept and thus it will not reduce case-by-case determinations on the question of contiguous and adjacent sources.

EPA suggests Option 2 could be further defined and limited to a ‘hub and spoke’ model, where “oil and gas produced from one or more wells has a dedicated flow to only one possible downstream point for further compression, processing or storage.”[[16]](#footnote-16) However, even this configuration could lead to the absurd result where several oil and gas wells located over an area of many square miles could be aggregated merely because the product is transported by pipeline, *or even rail or truck*, to one central point. Creating one major source covering up to hundreds of square miles stretches the concept of adjacency well beyond reason. This is the same approach that was rejected by the 6th Circuit Court of Appeals as unreasonable and contrary to the plain meaning of the term adjacent.[[17]](#footnote-17)

In addition to the concerns mentioned above, aggregating in this fashion would present challenges during compliance investigations. Evaluating compliance presents certain logistical issues and complications. Specifically, the current practice allows for a more thorough investigation and the tracking of violations with more precision. Instead of an investigator traveling large distances to complete a comprehensive investigation, the current scheme allows investigators to focus on one location in more depth.

**Neither option will result in any additional public health or environmental benefit.**

There is no public health benefit to adopting either option proposed in this rule. EPA states that one potential outcome of aggregating oil and gas sources is to create major sources resulting in better control of emissions through major source permitting. If EPA’s goal is to bring more small sources under federal permitting so that they can be better controlled, Texas’s experience is that these sources are already well-controlled and protective of public health. Thus, there is no benefit to the major source permitting process that includes a site specific impacts evaluation, air dispersion modeling, and an extensive public notice and participation process with the potential, in Texas, for a contested case hearing. In fact, by EPA’s own admission, the promulgation of the revised oil and gas methane NSPS “makes it less likely that major source permitting would result in substantial additional pollution control.”[[18]](#footnote-18)

Texas regulates small oil and gas sources through its minor source permitting program applying stringent control requirements appropriate for this source type. The vast majority of oil and gas sources are authorized under PBRs or SPs. The controls required under these authorizations are appropriate to the equipment at the facility or site and are developed to be protective of public health. For example, during development of the TCEQ’s Air Quality Standard Permit for Oil and Gas Handling and Production Facilities, TCEQ extensively reviewed emission sources and process equipment associated with oil and gas production and handling (including but not limited to flares, separators, condensers, treatment units, gas recovery processes, cooling towers, boilers, storage vessels, engines, and fugitive emission components) and applied appropriate controls based on a full BACT review.[[19]](#footnote-19) In addition, TCEQ conducted a protectiveness review based on modeling of emissions from the above-listed oil and gas facilities to ensure that the predicted impacts from facilities authorized by and complying with the standard permit will meet applicable regulatory limits for air quality, and also meet TCEQ Effects Screening Levels (ESLs).[[20]](#footnote-20) In addition, in 2013 TCEQ adopted a PBR for maintenance, startup, and shutdown emissions from oil and gas facilities.[[21]](#footnote-21) The PBR includes requirements and work practices to ensure that facilities are operated and maintained properly, thereby minimizing emissions.

Furthermore, oil and gas facilities must comply with many other applicable state and/or federal standard(s) including NSPS A, K, Ka, Kb, GG, KKK,LLLL, IIII, JJJJ, KKKK, LLLL, OOOO, and NESHAP H, V, HH, VV, HHH, YYYY and ZZZZ. Many of the sites authorized using PBRs and SPs already utilize flares, vapor recovery units (VRUs), and/or other collection/combustion devices to control and collect emissions to comply with the existing state and federal regulations. Therefore, aggregation of these sites would not result in lower emissions. For example, NSPS OOOO applies to most oil and gas sites constructed, modified, or reconstructed after August 23, 2011,[[22]](#footnote-22) and as such the sites may be required to control storage vessel emissions based on their potential to emit. Since these control requirements are on a per tank basis,[[23]](#footnote-23) EPA’s proposal would result in aggregation of these sites, but would not result in any increase in the number of facilities being controlled or any reduction in emissions. The practical result is that the aggregated sites would be subject to an unnecessary and more onerous, time consuming, and less predictable permitting process, stalling growth and production without any environmental or health benefit.

Given EPA’s admission that there will be no substantial additional pollution control by subjecting oil and gas sources to PSD permitting, it raises the possibility of other motivations for this proposed rule. For instance, by subjecting minor oil and gas sources to federal permitting requirements, these sources may also be subject to the control of GHG emissions as well. In the *UARG v. EPA[[24]](#footnote-24)* opinion that severely restrained EPA’s efforts to regulate GHG emissions through PSD and Title V under the GHG Tailoring Rule, the Supreme Court ruled that PSD can only apply to so-called “anyway” sources, i.e., those sources that triggered PSD controls for conventional pollutants.[[25]](#footnote-25) Therefore, this rulemaking is an overreach by EPA that unnecessarily subjects the oil and gas production industry to GHG regulation.

**Either proposal creates significant administrative and regulatory uncertainty.**

Either of EPA’s proposed approaches to aggregation would create the same problems that EPA sought to avoid when it developed the Tailoring Rule. As explained in the *UARG* decision, EPA’s rationale for developing the Tailoring rule was that it projected numerous small sources not previously regulated under the Act would be swept into the PSD program and Title V, including “smaller industrial sources,” “large office and residential buildings, hotels, large retail establishments, and similar facili­ties.”[[26]](#footnote-26) The Agency warned that this would constitute an “unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land,” yet still be “relatively ineffective at reducing greenhouse gas concentrations.”[[27]](#footnote-27) Although this source determination proposal would only be applicable to oil and gas sources, the vast number of small, minor sources that would be swept up by the proposed rule would be tantamount to the devastating administrative impact that the tailoring rule sought to avoid. Furthermore, “those steps [the Tailoring Rule] were necessary, [EPA] said, because the PSD program and Title V were designed to regulate ‘a relatively small number of large industrial sources,’ and requiring permits for all sources with greenhouse-gas emissions above the statutory thresholds would radically expand those programs, making them both unadministrable and ‘unrecognizable to the Congress that designed’ them.”[[28]](#footnote-28) In this way, EPA’s proposed source determination would make “unadministrable and unrecognizable”[[29]](#footnote-29) the regulation of small oil and gas sources in many states.

A broad aggregation policy such as the one proposed may be feasible in states where oil and gas activity is relatively new, sparse, or where a state (such as Texas) has longstanding aggregation guidance and processes in place. However, in states like Texas that have had oil and gas production for over one hundred years, currently have thousands of active oil and gas sources, and effective minor source programs to regulate them, EPA’s proposed approaches would create the calamitous administrative burdens that EPA foresaw for GHG regulation and thus drove their decision to adopt the tailoring rule.

As the Supreme Court rejected with regard to the tailoring rule in *UARG*, EPA should reject a definition of adjacent that requires aggregation and thus major source permitting of tens of thousands of small sources where they, on an individual basis, would not meet the statutory threshold for such permitting demands. Instead, EPA should allow states to utilize their existing processes and guidance to develop additional guidance and policies that best fit their state since oil and gas permitting is primarily a minor source process for which the states “have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements.”[[30]](#footnote-30) This position is supported by both the McCarthy and Wehrum memos stating that permitting authorities retain the discretion to make aggregation decisions.[[31]](#footnote-31)

**If EPA adopts either option, the probable result is a significant increase in the number of major source permits required under the PSD, NNSR and Title V programs.**

According to Texas Railroad Commission (TRRC) data, there are almost 300,000 producing oil and gas wells in the state of Texas.[[32]](#footnote-32) Considering the way oil and gas fields are developed in Texas (and across the nation for that matter) and the TRRC well spacing requirements for oil and gas production in the state, there are very few areas that would not be affected by either of EPA’s proposed adjacency definitions should any additional development occur. This will increase the TCEQ staff permit review workload, significantly lengthen the permitting process, and create uncertainty in the regulatory process. TCEQ currently authorizes the vast majority of oil and gas sources under PBRs and SPs. In fiscal year 2015 alone, the TCEQ Rule Registrations Section reviewed 8,982 oil and gas permits for rule compliance under PBR or SP. These registrations can be approved in a timely manner, sometimes in a matter of hours using current authorization mechanisms which minimize processing time and provide certainty to the regulated community. This, in turn, encourages the industry to authorize these operations and comply with the control requirements of the PBR or SP, rather than operating “in the dark” out of concern over the difficulty of obtaining a permit.

Should this process be altered due to the proposed aggregation language, the review of these newly aggregated minor sources could now take months or years depending on the complexity unnecessarily delaying the development of the natural resource without any added benefit to the protection of human health and the environment. There is also the potential for these newly aggregated minor sources to become major sources resulting in numerous issues creating uncertainty for both the permitting authority and the regulated community, as detailed in these comments. Additionally, the creation of additional major sources would mandate many more investigations to meet compliance monitoring strategy (CMS) commitments without providing additional funding. This would occur along with the increase in major sources that is already anticipated by the lower ozone standard.

The aggregation of sites under either option produces the possibility for permits to stretch across many miles thus further complicating the permitting process and adding to the regulatory uncertainty. Take for example Tarrant County, which currently has 1,198 registered oil and gas production sites authorized under PBR and Standard Permit. With only 897 square miles in the county there are approximately 1.3 sites per every square mile. Depending on the aggregation language that is finally adopted, there is the real possibility that aggregating sites meeting the three basic regulatory criteria[[33]](#footnote-33) will create one single site that stretches across the entire county or into neighboring counties. Modeling and performing an impacts review would be extremely difficult and quite time consuming across these large areas. Identifying ambient air and resolving cause or contribute questions would be complicated for large sites the stretch over multiple counties or into other states and would require the development of rules and policy creating an unpredictable regulatory environment for industry in making future business decisions. Additionally, as a practical matter, without a cutoff distance some sites could be larger than the useable distance of EPA’s preferred dispersion model, The American Meteorological Society/Environmental Protection Agency Regulatory Model (AERMOD). The EPA lists AERMOD as the preferred model in 40 CFR Part 51 Appendix W and it is required to be used for New Source Review and Prevention of Significant Deterioration programs.

Therefore, depending on EPA’s final rule, anywhere from a few additional Major Source or Title V permits (i.e., large, possibly multi-county sites) up to several hundred additional Major Source or Title V permits will be required for oil and gas operations in Tarrant County alone. However, those additional permits will provide little additional benefit compared to the resources needed to initially process, review, and maintain the permits.

Additionally, the proposed aggregation options may result in multi-state sites, not just multi-county sites. Multi-county and multi-state sites will require additional resources for updating tracking systems software, etc., providing little benefit compared to the resources needed to do so. Multi-state sites will create legal issues (e.g. adjacent or contiguous SIP-approved and delegated states) with the other states requiring additional resources for resolution, again with the uncertainty related to the development of rules and policy will little real benefit. If the jurisdictional issues cannot be resolved, multi-state sites may require construction authorizations and Title V permits from EPA, not from states.

Currently, Texas develops and maintains a detailed county-level Minor Source oil and gas emissions inventory that comprises the oil and gas sources that are below the Major Source threshold and Major Source oil and gas sources are required to annually report detailed emissions inventory data. Depending on the EPA’s final rule, hundreds if not thousands additional oil and gas sources would be required to annually report.  The potential large increase in the number of sources reporting would provide minimal additional benefit compared to the significant annual reporting burden for industry and the state resources to receive, track, review, and store the additional data.

Additional complications from EPA’s proposal will occur given the common industry practice of frequently buying and selling sites and facilities due to market conditions (from local to global), the capitalization of the operator, the maturity of the well and the oilfield, the expertise of the operator in production, and other practical business and economic realities. Historically, as these individual Minor Sources have not been required to be aggregated into a single site simply based on proximity, the process of documenting a change of ownership is accomplished quickly without the need to reevaluate the underlying authorization. In fiscal year 2015, the TCEQ Air Permits Division processed 2,236 ownership changes and of those 2,125 were for minor sources, 65 percent of which were documented oil and gas minor sources. However, if the proposed aggregation language is accepted without change, there is the scenario to consider where one piece of a large, aggregated site is sold to another company. This previously simple change can result in the need for a new Major Source permit, or an amendment to an existing Major Source permit, each involving a full federal review (revised impacts review, modeling, etc.) with no additional benefit to human health and the environment. Additionally, under either option, sources could move in and out of Major Source requirements simply due to, for example, unrelated facilities in close proximity, or the sale or purchase of adjacent wells. This result, in and of itself, may make environmental permitting the more dominant factor in decisions to sell or purchase oil and gas assets. Regardless, questions will arise regarding the level of emission controls, reporting, and recordkeeping required for the remaining sources, which will only require new applications, leave source determinations in a constant state of flux, and create an unreasonable and unnecessary level of regulatory uncertainty for industry. Again, a simple change that takes very little time to process now becomes one that can take up to a year if not more if the proposed aggregation requirements are adopted as proposed.

II. *Daisy-Chaining*

**If EPA adopts this rule, regardless of the approach EPA takes on adjacency, EPA should include a prohibition on daisy chaining.**

Without such a prohibition, this option could lead to situations where numerous sources within and beyond one-quarter mile apart could be linked together as one large source even though there is no functional relationship between all the sources collectively. If daisy-chaining is not prohibited, entirely independent facilities could be required to be authorized together as one source, in conflict with the 6th Circuit decision, the traditional notion of plant, and most importantly, the common sense meaning of the term adjacent. If EPA is determined to adopt some form of either option, TCEQ suggests that EPA adopt a distinction similar to that found in Louisiana’s guidance. TCEQ would also agree with Louisiana’s use of the geographic center of the site’s emissions for establishing the quarter mile distance used to determine the boundary of the single source.

III. *Focus on Oil and Gas Sector*

**It is inappropriate and arbitrary for EPA to adopt rules regarding source determinations exclusively for one industry sector.**

It is clear from the preamble that EPA is only undertaking this rulemaking because the 6th Circuit Court of Appeals applied a plain meaning of the term “adjacent” that thwarted EPA’s attempt to apply a more expansive interpretation of adjacency to oil and gas sources.[[34]](#footnote-34) EPA has not provided a sound basis for treating oil and gas sources differently than any other industry source. By focusing only on one sector without a valid reason for doing so, this action is arbitrary.

The policy reasons for this rule’s focus on the oil and gas sector are misguided. First, EPA claims that this industry sector should be looked at separately from all other sectors, “….because permitting decisions are difficult and time-consuming. Providing this guidance will promote a consistent regulatory treatment for this industry.”[[35]](#footnote-35) In Texas, the TCEQ has developed streamlined permitting mechanisms for minor sources and the oil and gas sector specifically that reduce review timeframes significantly. TCEQ does not agree that permitting decisions for this industry are more difficult and time consuming than any other industry sector. EPA states that one potential outcome of aggregating oil and gas sources is to create major sources, thus requiring more stringent BACT-based controls on emissions. Texas already authorizes oil and gas minor sources applying stringent control requirements for these types of sources. In addition, by EPA’s own admission, a better approach to controlling emissions from this sector is through the NSPS or NESHAP programs, and in ozone nonattainment areas, control techniques guidelines (CTGs).[[36]](#footnote-36) These programs do not rely on an expansive definition of a source for applicability, thus they will typically apply to minor sources.

*IV. Conclusion*

The EPA should not finalize this source determination rule for Major New Source Review and Title V. Because many of the sources that would be affected by this change in definition are minor sources, EPA should allow states to utilize their existing processes and guidance and develop additional guidance and policies that best fit their state. This approach would afford states the deference to which they are entitled to administer their minor source programs in accordance with their SIP-approved programs. Texas’ recommendation is for EPA to retain the existing definition and interpretation of adjacency, allow states to develop applicable minor source programs as provided under the FCAA as Texas has done, and further allow the states to develop and adopt appropriate major source guidance for PSD and NNSR programs and the Title V programs. This approach would be consistent with the plain meaning of the term and common sense notion of plant reaching back to the *Alabama Power* opinion, and take into account the physical, operational, and regulatory realities of oil and gas operations across the country.

1. Source Determination for Certain Emission Units in the Oil and Natural Gas Sector, 80 Fed. Reg. 56579 (September 18, 2015). [↑](#footnote-ref-1)
2. EPA Permit Requirements; Prevention of Significant Deterioration of Air Quality Rules, 40 C.F.R. §§51.165(a)(1)(ii), 51.166(b)(6), 52.21(b)(6) and Part 51, Appendix S. [↑](#footnote-ref-2)
3. EPA Federal Operating Permit Program Rule, 40 C.F.R §§70.2 and 71.2. [↑](#footnote-ref-3)
4. FCAA § 112(n)(4) Oil and gas wells; pipeline facilities states:(A) Notwithstanding the provisions of subsection (a),emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources, and in the case of any oil or gas exploration or production well (with its associated equipment), such emissions shall not be aggregated for any purpose under this section. (B) The Administrator shall not list oil and gas production wells (with its associated equipment) as an area source category under subsection (c), except that the Administrator may establish an area source category for oil and gas production wells located in any metropolitan statistical area or consolidated metropolitan statistical area with a population in excess of 1 million, if the Administrator determines that emissions of hazardous air pollutants from such wells present more than a negligible risk of adverse effects to public health.

Consistent with the Clean Air Act, TCEQ has adopted similar limitations within the definition of Major Source for purposes of Title V in 30 TAC §122.10 (14) (G) which states: “Emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not the units are in a contiguous area or under common control, to determine whether the units or stations are major sources under subparagraph (A) of this paragraph” referring to emission thresholds for major sources of HAP emissions. [↑](#footnote-ref-4)
5. 80 Fed. Reg. at 56583 (internal citation omitted); *see also* Wehrum, William “Source Determinations for Oil and Gas Industries,” January 12, 2007 at p. 4 (Wehrum memo). [↑](#footnote-ref-5)
6. Wehrum, William “Source Determinations for Oil and Gas Industries” January 12, 2007 at p. 4 (“This is because we have already determined that a surface site fits within a reasonable interpretation of the term stationary source in context of one regulatory program, and administratively, we think it reasonable for a permitting authority to at least consider whether the same boundaries are appropriate in administrating other regulatory programs.”) Last viewed at: <http://www2.epa.gov/sites/production/files/2015-07/documents/oilgas.pdf>. [↑](#footnote-ref-6)
7. McCarthy, Gina “Withdrawal of William Wehrum’s January 12, 2007 Issued Guidance memo “Source Determinations for Oil and Gas Industries” September 22, 2009 (McCarthy memo). Last viewed at <http://www2.epa.gov/sites/production/files/2015-07/documents/oilgaswithdrawal.pdf>. In the McCarthy memo, EPA reinstated the fundamental criterial for making source determinations for the oil and natural gas sector based on the use of the three factors contained in their regulations: same SIC code, common control, and location on contiguous or adjacent property. [↑](#footnote-ref-7)
8. *See* Wehrum memo at p. 2-3. [↑](#footnote-ref-8)
9. 80 Fed. Reg. at 56586-7 [↑](#footnote-ref-9)
10. Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans (PSD Rule), 45 Fed. Reg. 52676, 52695 (August 7, 1980). [↑](#footnote-ref-10)
11. 80 Fed. Reg. at 56587. [↑](#footnote-ref-11)
12. TCEQ Definition of Site Guidance Document, APDG 61111, August 2010, at p. 1 [↑](#footnote-ref-12)
13. 45 Fed. Reg. at 52695; and 80 Fed. Reg. at 56581; See Wehrum Memo at p. 3 (EPA “declined to add specific ‘functionality’ criteria to the definition of source because we believed that assessments of functional interrelationships would be highly subjective and embroil the Agency in fined grained analysis.”)(internal citation omitted). [↑](#footnote-ref-13)
14. 80 Fed. Reg. at 56581. EPA offers three examples of instances where it has opined on source determinations with the following language included in the preamble: “As is the case for most permitting-related decisions, these determinations were made on a case-by-case basis, considering the specific facts in each instance. In many of these cases and as explained in the examples below, we cited the principle of the ‘‘common sense notion of a plant’’ in making a determination regarding the scope of the source.” *Id* at 56581. “In each of these examples, the EPA based its opinion on an analysis of the specific facts in the individual case. We have not established a ‘‘bright-line’’ distance beyond which we would always consider operations to be separate sources. Neither have we established a distance within which we would always consider operations to be one source. We have also not established that certain operations must always (or never) be considered together for permitting purposes.” *Id* at 56582. [↑](#footnote-ref-14)
15. 80 Fed. Reg. at 56581 and 56587. [↑](#footnote-ref-15)
16. 80 Fed. Reg. at 56588. [↑](#footnote-ref-16)
17. *Summit Petroleum Corp. v. EPA*, 690 F3d 733, 744 (6th Cir. 2012) (“Here, we conclude that the EPA's interpretation of the requirement that activities be “located on contiguous or adjacent properties,” i.e., that activities can be adjacent so long as they are functionally related, irrespective of the distance that separates them, undermines the plain meaning of the text, which demands, by definition, that would-be aggregated facilities have physical proximity.”) [↑](#footnote-ref-17)
18. 80 Fed. Reg. at 56586. [↑](#footnote-ref-18)
19. 35 Tex. Reg. 6937 (August 13, 2010). [↑](#footnote-ref-19)
20. ESLs are constituent-specific guideline concentrations used in TCEQ’s effects evaluation of constituent concentrations in air. These guidelines are derived by the Toxicology Section and are based on a constituent’s potential to cause adverse health effects, odor nuisances, and effects on vegetation. Health-based screening levels are set at levels lower than levels reported to produce adverse health effects, and as such are set to protect the general public, including sensitive subgroups such as children, the elderly, or people with existing respiratory conditions. Adverse health or welfare effects are not expected to occur if the air concentration of a constituent is below its ESL. If an air concentration of a constituent is above the screening level, it is not necessarily indicative that an adverse effect will occur, but rather that further evaluation is warranted. Generally, maximum concentrations predicted to occur at a sensitive receptor which are at or below the ESL would not be expected to cause adverse effects. [↑](#footnote-ref-20)
21. 38 Tex. Reg. 1786 (March 15, 2013). [↑](#footnote-ref-21)
22. Oil and Gas: Emission Standards for New and Modified Source Performance Standards, 77 Fed. Reg. 49490 (August 16, 2012). [↑](#footnote-ref-22)
23. On August 12, 2015, EPA finalized amendments to the storage vessel requirements removing provisions concerning storage vessels connected or installed in parallel. 80 Fed. Reg. 48262. [↑](#footnote-ref-23)
24. *Utility Air Regulatory Group (UARG) v. EPA*, 134 S.Ct. 2427 (2014). [↑](#footnote-ref-24)
25. *UARG* at 2449. [↑](#footnote-ref-25)
26. *UARG* at 2436, quoting from EPA Advance Notice of Proposed Rulemaking, Regulating Greenhouse Gas Emissions Under the Clean Air Act, EPA–HQ–OAR–2008–0318, 73 Fed. Reg. 44354 (July 30, 2008) (“This advance notice of proposed rulemaking (ANPR) presents information relevant to, and solicits public comment on, how to respond to the U.S. Supreme Court’s decision in Massachusetts v. EPA.”) [↑](#footnote-ref-26)
27. *Id*, Comments from other Executive Branch agencies reprinted in the notice echoed those concerns. See, *e.g.* 73 Fed. Reg. 44360 (Depart­ments of Agriculture, Commerce, Transportation, and Energy noting EPA would “exercis[e] de facto zoning authority through control over thousands of what formerly were local or private decisions, impacting the construction of schools, hospitals, and commercial and residential development”); *id.,* at 44383 (Council of Economic Advisers and Office of Science and Technology Policy stating that “[s]mall manufacturing facilities, schools, and shopping centers” would be subject to “full major source permitting”); *id.,* at 44385 (Council on Environmental Quality noting “the prospect of essentially automatic and immediate regulation over a vast range of community and business activity”); *id.,* at 44391 (Small Business Administration finding it “difficult to overemphasize how potentially disruptive and burdensome such a new regulatory regime would be to small entities” such as “office buildings, retail establishments, hotels, . . . schools, prisons, and private hospitals”). [↑](#footnote-ref-27)
28. *UARG* at 2437 (internal citations omitted). [↑](#footnote-ref-28)
29. *UARG* at 2437 (internal quotations omitted). [↑](#footnote-ref-29)
30. *Texas v. U.S.E.P.A.*, 690 F.3d 670, 675 (5th Cir. 2012). [↑](#footnote-ref-30)
31. “Withdrawal of Source Determinations for Oil and Gas Industries,” Memorandum from Gina McCarthy, Assistant Administrator to Regional Administrators, September 22, 2009. (“I agree with the previous memorandum’s conclusion that whether or not a permitting authority should aggregate … remains a case-by-case decision in which permitting authorities retain the discretion to consider the factors relevant to the specific circumstances of the permitted activities.”) [↑](#footnote-ref-31)
32. Railroad Commission of Texas records indicate that as of September 2015, there are 193,117 regular producing oil wells and 104,515 regular producing gas wells for a total of 297,632 wells. [↑](#footnote-ref-32)
33. I.e. common control, same industrial grouping, and contiguous or adjacent properties. [↑](#footnote-ref-33)
34. *See* *Summit*, 690 F.3d 733. [↑](#footnote-ref-34)
35. 80 Fed. Reg. at 56585 [↑](#footnote-ref-35)
36. *Id* [↑](#footnote-ref-36)