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U.S. Environmental Protection Agency
EPA Docket Center
Docket Name: PSD and NSR – Major Source Determination for Oil and Gas Extraction Facilities
1200 Pennsylvania Ave., NW
Mail code 2821T
Washington, DC 20460

Attn: Docket ID No. EPA- HQ-OAR-2013-0685

RE: Comments on Source Determination for Certain Emission Units in the Oil and Natural Gas Sector, *80* Fed. Reg. *56,579* (September 18, 2015)

Dear Sir or Madame:

On behalf of the Texas Oil & Gas Association (TXOGA), I am submitting the following comments on EPA's *Source Determination for Certain Emission Units in the Oil and Natural Gas Sector*, 80 Fed. Reg. 56,579 (Sept. 18, 2015) (Proposed Rule).

Founded in 1919, TXOGA is the largest and oldest petroleum organization in Texas, representing more than 5,000 members. The membership of TXOGA accounts for over 90 percent of all crude oil and natural gas produced in Texas and is responsible for a preponderance of the State's refining capacity. TXOGA member companies produce a quarter of the nation's oil, a third of its natural gas and account for one-fourth of the U.S. refining capacity.

TXOGA first became involved in the rulemakings related to upstream and midstream oil and gas production in 2012 when EPA finalized Subpart OOOO's requirements and TXOGA petitioned for judicial review and also for reconsideration. Throughout the rulemakings that followed to implement the requested reconsideration, TXOGA has endeavored to provide meaningful technical, policy, and legal input to EPA's process. We hope to provide similarly helpful information to EPA in this rulemaking process.

In this rulemaking, EPA proposes "to clarify the term 'adjacent' in the regulatory definitions of: 'building, structure, facility or installation' 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 as applied to the oil and natural gas sector." 80 Fed. Reg. at 56,579. The Agency identifies two approaches for determining whether two or more properties are "adjacent." Under its preferred option ("option 1"), EPA would define "adjacent" in terms of proximity—specifically, surface sites within a quarter-mile of each other could be considered as a single source. Alternatively, under the second option ("option 2"), EPA would consider sources to be "adjacent" if they are proximate, *i.e.*, within a quarter-mile, or if they are "exclusively functionally interrelated." Though EPA has expressed a preference for option 1, the Agency seeks comment on both approaches. TXOGA does not support option 2's use of a functional interrelatedness test to aggregate sources that are not truly proximate from a physical distance perspective. TXOGA would support option 1, but only with appropriate modifications and clarifications as outlined below.

- **TXOGA Supports Using Proximity to Determine Adjacency.**[1]

TXOGA agrees that oil and gas sources located on properties not contiguous and located more than a quarter-mile apart must not be treated together as one source for air permitting for purposes of New Source Review (NSR) or the Title V operating permit program. The analysis should not stop there, however. Those sources within the quarter-mile threshold should only be aggregated if they are operationally dependent and in close proximity such that they fall within "the common sense notion of a plant." This additional qualifier is essential to ensuring that the source definition is consistent with case precedent under the Clean Air Act.

Under its ''currently preferred option,'' EPA proposes to use a quarter-mile distance presumption to require oil and gas sources under the same Standard Industrial Classification code and under the common control of the same operator to be aggregated for source determination purposes. TXOGA has a particular interest in how any action EPA undertakes here relates to the state statutes and regulations under which its members must operate. EPA notes that several states, including Texas and Louisiana, use the proximity of a quarter-mile to determine adjacency for Clean Air Act permitting. However, EPA's proposal is not considering the role of state permitting authorities in defining how permitting obligations should be imposed on the industries that operate within their states.' For example, the Texas legislature, in 2011, set out a quarter-mile rule with additional factors.[2] Texas, along with other states, has a long history

[1] The statute does not use the term "adjacent" but rather references "contiguous" property. While EPA added the word "adjacent," EPA's interpretation of that word must be consistent with the notion that Congress was seeking to determine the scope of a source based on proximity.

[2] The Texas Clean Air Act, Section 382.051964, states:

> Notwithstanding any other provision of this chapter, the commission may not aggregate a facility that belongs to a Standard Industrial Classification code identified by Section 382.051961(a) with another facility that belongs to a Standard Industrial Classification code identified by that section for purposes of consideration as an oil and gas site, a stationary source, or another single source in a permit by rule or a standard permit unless the facilities being aggregated:

of applying the quarter-mile presumption and narrowing it further to incorporate a common sense notion of a plant. This ensures the regulations do not aggregate sources in contravention of the "common sense notion of a plant."

- **The Source Determination Rule Should be Consistent with Section 112(n)(4) of the Clean Air Act.**

The Agency states that its approach "is similar to that in the NESHAP for this industry, Subpart HH," which limits the "source" for oil and natural gas activities to "the emitting activities at the surface site, and other emitting activities will be considered 'adjacent' if they are proximate." 80 Fed. Reg. at 56,586-87. EPA states its preference for this option on the basis that "a definition that centers on a surface site is familiar to the industry and the regulators." *Id.* at 56,587. TXOGA agrees that the surface site should be used and also recommends that the Agency adopt the same approach applied through Subpart HH to account for unique characteristics of the upstream oil and gas sector.

Congress recognized the importance of stationary source determinations for the oil and gas sector in Section 112(n)(4) of the Act, which provides:

> Notwithstanding the provisions of subsection (a) of this section, 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.

42 U.S.C. § 7412(n)(4)(A) (emphasis added). The statute specifically prohibits aggregation of any emissions from more than one well or station. EPA implemented this statutory provision against aggregation for oil and gas sources in Subpart HH of Part 63, recognizing that "it would not be reasonable to aggregate emissions from surface sites that are located on the same lease but are great distances apart."[3] Thus, under the statute and Subpart HH, no surface site can be aggregated with equipment at another surface site. This limitation is included in the definition of facility in Subpart HH:

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(1) are under the control of the same person or are under the control of persons under common control;
(2) belong to the same first two-digit major grouping of Standard Industrial Classification codes;
(3) are operationally dependent; and
(4) are located not more than one-quarter mile from a condensate tank, oil tank, produced water storage tank, or combustion facility that:
  (A) is under the control of the same person who controls the facilities being aggregated or is under the control of persons under common control;
  (B) belongs to the same first two-digit major grouping of Standard Industrial Classification codes as the facilities being aggregated; and
  (C) is operationally dependent on the facilities being aggregated.

(emphasis added).

[3] 64 Fed. Reg. 32,610, 32,618 (Jun. 17, 1999).

> For the purpose of a major source determination, facility (including a building, structure, or installation) means oil and natural gas production and processing equipment that is located within the boundaries of an individual surface site as defined in this section. Equipment that is part of a facility will typically be located within close proximity to other equipment located at the same facility.

40 C.F.R. § 63.761 (emphasis added).[4] Thus, Congress was concerned with the unique aspects of this industry in evaluating how emissions unit should be aggregated for applicability purposes under the Clean Air Act. It is critical that EPA recognize this intent in its approach to Part 60 by adopting the same approach to maintain consistency with 40 C.F.R. Part 63 subpart HH.

TXOGA raises this for several reasons, including the fact that EPA proposes to define "well site" in Subpart OOOOa to include remote and centralized tank batteries. We request that EPA clarify that, even if it finalizes a well-site definition that includes tank batteries that are more than a quarter-mile from a well (to which TXOGA objects for reasons outlined in our comments on Subpart OOOOa), wells and tank batteries located more than a quarter-mile apart are not to be aggregated for purposes of PSD and Title V permitting. As discussed above, the statute indicates that a well-site is a single surface site and this should not be changed in the context of PSD and Title V permitting. By including centralized batteries – that clearly serve more than one well – it is unclear at what point EPA would "cut off" the source. TXOGA strongly urges EPA to adopt our recommended changes to the well-site definition, to otherwise to ensure that proximity is the determinative factor in source determinations, and to ensure (as discussed immediately below) that the approach is limited to a common sense notion of a plant.

- **Any Approach to Source Aggregation Must Comport with the Common Sense Notion of a Plant.**

Within the construct of Option 1 or 2, any EPA approach must be consistent with the direction of the U.S. Court of Appeals for the D.C. Circuit in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1980), which recognized that Congress defined major source to comport with the common sense notion of a plant. As the U.S. Court of Appeals for the Sixth Circuit recognized, "this general principle is clearly meant to *constrain*, rather than enlarge, the EPA's definition of a single stationary source." *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 750 (6th Cir. 2012) (emphasis added). Otherwise, "with the concept of a 'common sense notion of a plant' construed as facilitating the aggregation of operationally related but physically distant activities, there is little foreseeable limit to the aggregation of emission points spread out literally across the country." *Id.*

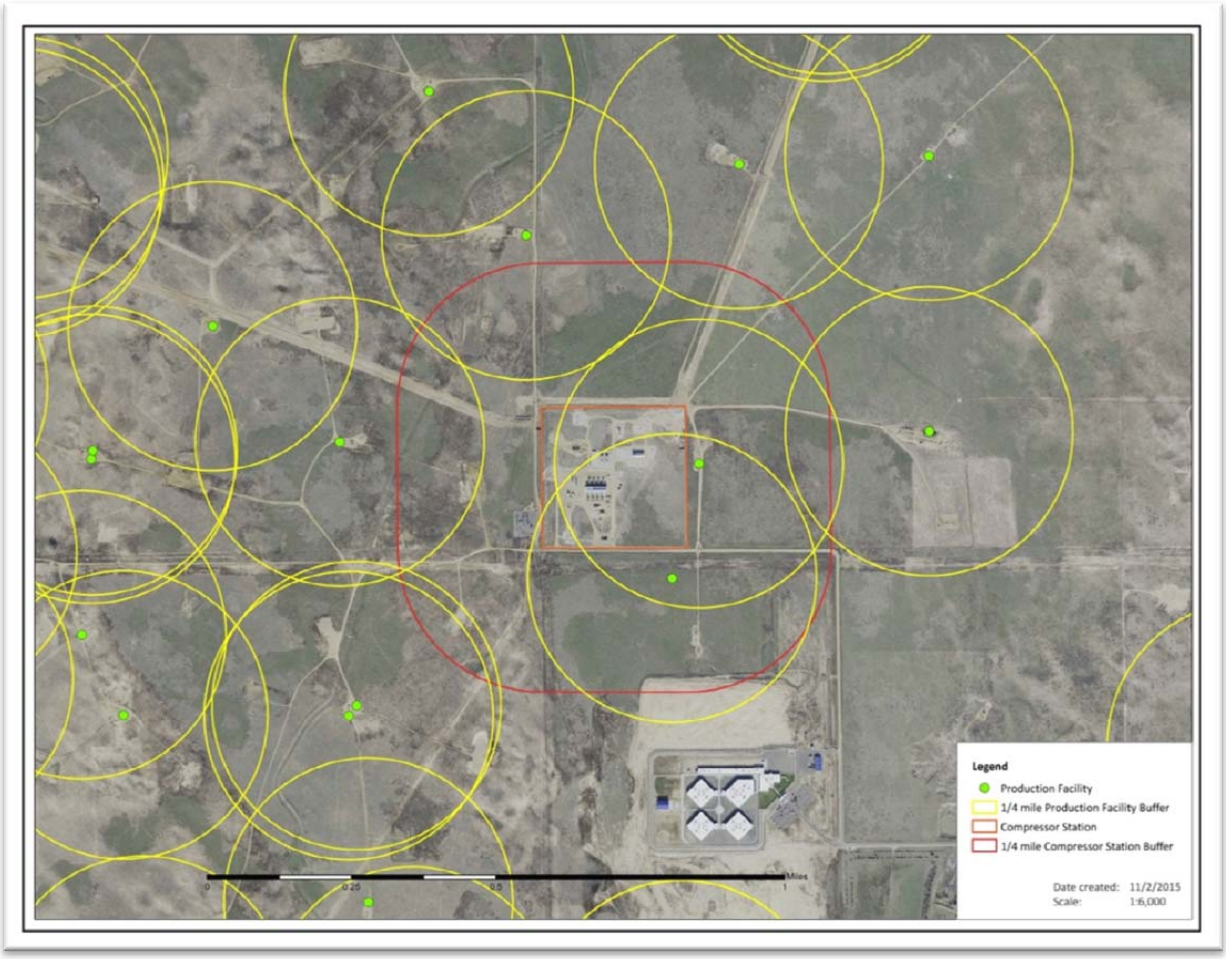
While TXOGA recognizes that EPA has stated it should be disregarded, the concept explicated in the *Wehrum* Memorandum that proximity is the "foremost principle" for source

[4] "Surface site" is defined as "any combination of one or more graded pad sites, gravel pad sites, foundations, platforms, or the immediate physical location upon which equipment is physically fixed." 40 C.F.R. § 63.761.

determinations is correct and is consistent with the precedent in *Alabama Power* and *Summit Petroleum*.[5]

Any revision of the definition of "stationary source" in the PSD and NNSR programs, and "major source" in the Title V program, must not require aggregating emission units in a manner that does not comport with the "common sense notion of a plant."

We are concerned with the potential consequences of a stand-alone quarter of a mile rule, as illustrated by the photographs below. In this photo, the center of each yellow circle is the well around which a quarter-mile border is established. The inner red outline represents the compressor station and the outer red outline represents a quarter-mile perimeter around the compressor station. If daisy-chaining is allowed, wells that are miles apart from one another could potentially be aggregated, which his inappropriate.



One way to help ensure the source definition remains consistent with a common sense notion of plant is to explicitly indicate that daisy-chaining of emissions units/operations is not permitted. Indeed, recognizing that the quarter-mile limitation could potentially result in "daisy-chaining" if blindly applied, EPA requests comment on whether the quarter-mile distance should be used to

[5] Mem. from William L. Wehrum, Acting Assistant Adm'r, to Reg'l Adm'rs I-X (Jan. 12, 2007) *available at* http://www2.epa.gov/sites/production/files/2015-07/documents/oilgas.pdf (Wehrum Memorandum) (emphasis added).

determine the boundary of the single source.[6] The Agency appropriately acknowledges states like Louisiana strongly discourage the ''daisy-chaining'' of sources which could all be within a quarter-mile of each other but only connected via one long pipeline or leased road. "Connection" of this sort is not, in and of itself, a basis to aggregate.[7] Still, the proposal does not take a specific position on whether a presumption against daisy-chaining would be part of the EPA final rule.

Any rule must be designed to ensure that sources are not "daisy-chained" together, which would result in some sites within the chain being more than a quarter-mile apart from others while within a quarter-mile of the nearest site. These will necessarily be complex determinations, particularly if there is no limitation based on the common sense notion of a plant. The nature of the oil and gas industry causes equipment to be particularly susceptible to the daisy chaining effect. Producers often have limited input as to location of emission points, and proximity does not necessarily mean that the sites meet the common sense notion of a plant.

Historically, EPA and the states have recognized that interconnections between two sources do not necessarily make all sources connected to those two also part of the same source. In fact, as EPA acknowledges in the proposal, its 1980 rulemaking made clear that the Agency "did not intend 'source' to include activities that are many miles apart along something like a pipeline or transmission line as a single source."[8] EPA must design the rule to avoid a change in interpretation of the rules such that creates ambiguity for states and regulated entities.

- **EPA Should Not Adopt a Definition of "Adjacent" that Includes Consideration of Whether Sources are "Functionally Interrelated."**

EPA should not finalize any version of Option 2.[9] TXOGA opposes EPA's reliance on functional dependence or functional interrelationships to combine sources. Adjacent does not mean functionally dependent, related, or interrelated. The *Summit Petroleum* court stated that adjacent relates to proximity, holding:

> Whether the distance between two facilities enables a given relationship to exist between them is immaterial to the concept of adjacency—it merely answers the question of whether a certain activity can or cannot occur between two locations that were, and will continue to be regardless of whether they host the activity, physically distant or physically adjacent.[10]

The statute and EPA actions from 1980 to 1996 are consistent with adjacent being a further connotation of "contiguous" and not meaning any more than proximate.

[6] 80 Fed. Reg. at 56,587.
[7] The test remains whether the operations reflect the common sense notion of a plant.
[8] 80 Fed. Reg. at 56,581.
[9] EPA opines that the aggregation of oil and gas sources under option 2 might not lead to material environmental improvements because the oil and gas industry air emissions are controlled by NSPS, NESHAP and other applicable standards. TXOGA notes that this conclusion would also apply to option 1.
[10] 690 F.3d at 743-43.

While EPA properly notes that netting is not available for minor sources, EPA should not rely on netting as a justification for adopting the "functional interrelatedness" test. EPA's concern about the benefits of netting is overstated for oil and gas sources, which rarely use netting to avoid major NSR. Therefore, there is no support in the case law or rule history nor in practical application to support Option 2.

- **If EPA Adopts an Approach that Expands the Scope of Sources Subject to PSD or Title V as Compared with Historical Source Determinations, The Final Rulemaking Should not Apply Retroactively.**

State permitting authorities, particularly those operating under approved programs, have long performed applicability analyses under PSD and Title V. Indeed, the case-by-case evaluation of what constitutes the source was endorsed as late as 2009 in the McCarthy Memorandum.[11] Whatever approach EPA adopts in this action, it must be applied only prospectively. Most oil and gas well development is not conducted as a single continuous project in a given area. Wells can be drilled sporadically over a period of many years. Initial minor source permitting evaluations occur on a well by well basis because of the sporadic nature of development and because one may not know where and when the next well will be drilled. Thus, at the time of permitting, it is perfectly appropriate and reasonable to permit a well as a minor source. At some point in time during the lifetime of development, a well site may be constructed that is considered adjacent by this rule to an existing well site, tank battery, or compressor station. A retrospective major source determination of an existing site aggregated with a new site could lead inappropriately to enforcement actions for having "constructed" a major source. Owners and operators have justifiably relied on prior determinations and general application of principles regarding source determinations. EPA must not impose a rule with retroactive effect or issue a rule that imposes regulatory obligations on sources in a retroactive manner.

Sources should be entitled to continue to rely on these determinations and not be subject to enforcement actions based on any new interpretation of the term "adjacent." Further, the Agency should honor existing source determinations absent a change that warrants revisiting the source determination. Furthermore, in Indian Country and other areas, where EPA is the permitting authority, the new rule should not apply in a retroactive manner to existing sources to impose any major NSR obligations that did not apply in the absence of the new rule.[12]

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[11] *See* Mem. from Gina McCarthy, Assistant Adm'r, to Reg'l Admr's Regions I-X (Sept. 22, 2009), *available at* http://www2.epa.gov/sites/production/files/2015-07/documents/oilgaswithdrawal.pdf.

[12] Importantly, under Section 502(b)(3) of the Clean Air Act, a source has 12 months from the time it becomes subject to Title V to submit a permit application. 42 U.S.C. § 7661a(b)(3); 40 C.F.R. § 70.5. To the extent sources will need to be reclassified, EPA must provide 12 months from the date the final rule is published for sources to apply for Title V permits. The Agency must afford sources with an opportunity to come into compliance with this new interpretation—a process that is necessarily complicated by the states' established interpretations and applications of the source determination rule.

Sincerely,

Shannon S. Broome
Counsel to the Texas Oil & Gas Association