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

COMMENTS

of

WASHINGTON LEGAL FOUNDATION

to the

ENVIRONMENTAL PROTECTION AGENCY

Concerning

SOURCE DETERMINATION FOR CERTAIN EMISSION UNITS IN THE OIL AND NATURAL GAS SECTOR

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED AT 80 FED. REG. 56579 (September 18, 2015)

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U.S. Environmental Protection Agency
EPA Docket Center
Docket ID No. EPA-HQ-OAR-2013-0685
WJC West Building, Room 3334
1301 Constitutional Ave., NW
Washington, DC 20004

Re: Comments Concerning Proposed Rule on Source Determination for Certain Emission Units in the Oil and Natural Gas Sector
Docket ID No. EPA-HQ-OAR-2013-0685
80 Fed. Reg. 56579 (September 18, 2015)

Dear Sir or Madam:

Pursuant to the public notice published at 80 Fed. Reg. 56579 (September 18, 2015), Washington Legal Foundation (WLF) appreciates the opportunity to submit these comments to the Environmental Protection Agency (EPA) on the agency's proposed rule for making source determinations for certain emission units in the oil and natural gas sector (the Rule).

WLF believes that how EPA defines "adjacent" in regulating source emissions will have enormous consequences for how the agency differentiates minor from major sources when permitting under the Clean Air Act (CAA). WLF is concerned that the Rule, by design, makes it much more likely that oil and gas operations will run afoul of federal air permitting requirements. The Rule proposes standards for aggregating air emissions from oil and gas equipment separated by many miles and that may not even be located at the same facility. By aggregating emissions from such disparate sources, the Rule substantially increases the likelihood that the newly constituted "source" will exceed federal permitting thresholds. This regulatory fiction will necessarily impose additional monitoring and reporting requirements, and thus greater costs, on the oil and gas sector. The increased energy costs triggered by the proposed Rule will have a negative effect on the American economy in the form of higher energy prices. Among other things, such higher energy prices will adversely impact U.S. families, especially lower-income, middle-income, and fixed-income families.

I. Interests of WLF

Washington Legal Foundation is a public-interest law firm and policy center based in Washington, D.C., with supporters throughout the United States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF regularly appears before state and federal courts and administrative agencies to urge adoption of environmental policies that strike a proper balance between environmental safety and economic well-being. *See, e.g., Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014) (challenging EPA's Clean Air Act "tailoring rule"); *Mingo Logan Coal Co. v. EPA*, 134 S. Ct. 1540 (2014) (challenging EPA's unilateral revocation of a discharge permit under § 404 of the Clean Water Act); *Am. Farm Bureau Found. v. EPA*, 792 F. 3d 281 (3rd Cir. 2015) (challenging EPA's TMDL for the Chesapeake Bay watershed).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, frequently produces and distributes articles on a wide array of legal issues related to EPA regulation. *See, e.g.*, Mark Latham, Victor E. Schwartz, & Christopher E. Appel, *Is EPA Ignoring Clean Air Act Mandate to Analyze Impact of Regulations on Jobs?*, WLF LEGAL BACKGROUNDER (June 6, 2014); Richard Alonso & Sandra Y. Snyder, *Source "Aggregation": Federal Appeals Court Reverses 30 Years of Faulty EPA Precedent*, WLF LEGAL BACKGROUNDER (November 16, 2012); George J. Mannina, Jr., *EPA Seeks to Overturn Supreme Court Decisions Limiting Water Act Jurisdiction*, WLF LEGAL BACKGROUNDER (May 20, 2011).

II. The Proposed Rule

The Rule proposes to clarify the term "adjacent" in the definitions of (1) "building, structure, facility, or installation" as used to determine the "stationary source" for purposes of the CAA's Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) programs and (2) "major source" under the CAA's Title V permitting program as applied to the oil and gas sector. EPA proposes two options for determining whether two or more properties in the oil and gas sector are "adjacent" for purposes of defining "stationary" sources in the PSD and NNSR programs and "major" sources in the Title V program.

The first proposed option is to define "adjacent" in terms of physical proximity by aggregating all sources within ¼ mile of a "target" facility. Under this option, EPA would consider facilities "adjacent" if two or more sources share the same two-digit SIC code

(Major Group 13, "Oil and Gas Extraction"), are under common control, and are either contiguous *or* within ¼ mile of each other.

The second proposed option is to define "adjacent" in terms of "functional interrelatedness." The Rule is alarmingly vague as to how functional interrelatedness will be determined under this option. In an attempt to clarify this amorphous concept, EPA suggests that functional interrelatedness "might be shown" by (1) a physical connection, such as a pipeline between equipment; (2) the delivery of product from one group of equipment to another; or (3) the "interdependency" of operations. Regardless of how functional interrelatedness is ultimately determined, the second option proposed by the Rule makes clear that emissions will be considered adjacent if (1) they are separated by a distance of less than ¼ mile, *or* (2) they are separated by a distance of ¼ mile *or more* and are functionally interrelated.

III. EPA Should Eliminate "Functional Interrelatedness" as a Factor for Determining Whether Sources Are Adjacent

EPA requires a single air permit for emission sources that are "contiguous and adjacent." Unfortunately, what constitutes "adjacent" has been a matter of great confusion over the years. The pivotal question posed by EPA's proposed Rule is whether the word adjacent should enjoy its ordinary and plain meaning, *i.e.*, nearby or proximate, or whether it should include consideration of an amorphous concept EPA has invented called "functional interrelatedness." One will search in vain for any mention of functional interrelatedness in either the CAA's statutory text or EPA's regulations implementing it. Aggregation of sources based on nothing more that "interrelatedness" is not only controversial, but it is also highly problematic. By allowing regulators to define emissions more than ¼ mile apart as somehow "adjacent," EPA's proposed functional interrelatedness test would inject widespread uncertainty into the CAA's air-permitting regimes for oil and gas operations.

The Rule also leaves unanswered whether EPA intends to rely on functional interrelatedness as a basis for "daisy-chaining" sources in the agency's aggregation analysis. According to EPA, "[a] series of emission units are daisy-chained when each individual unit is located within the specified 'contiguous or adjacent' distance from the next unit, but where the last unit is separated from the first unit by a much larger distance."[1] Daisy-chaining would improperly extend the geographic reach of a single

[1] *See* 80 Fed. Reg. 56587 (2015).

"source" based upon considerations wholly unrelated to air quality, such as compressor-pipeline configurations and supporting infrastructure.

Notably, the proposed Rule flies in the face of EPA's earlier pronouncements explicitly rejecting any consideration of function in source determinations. Historically, EPA aggregated separate emissions sources based on physical proximity alone; the shorter the distance, the more likely that separate emissions sources would be considered adjacent and thus aggregated under a single permit. As EPA has previously recognized:

> To have merely added function to the proposed definition as another abstract factor would have reduced the predictability of aggregating activities under the test definition dramatically, since any assessment of functional interrelatedness would be highly subjective … [and] … any attempt to assess those interrelationships would have embroiled the agency in numerous fine-grained analyses.[2]

Notwithstanding the agency's earlier disavowal of function as an appropriate consideration for source determinations, EPA has since used functional interrelatedness—as adopted by guidance documents and interpretative memos—to determine that emissions several miles apart were "adjacent" and therefore derived from a single source. For example, EPA has determined that an Anheuser-Busch brewery in Colorado was "contiguous or adjacent" to a turf farm located over six miles away.[3] Similarly, EPA has determined that Great Salt Lake Minerals's processing facility was "contiguous or adjacent" to a pump station located over 21 miles away, separated by the Great Salt Lake, and connected by pipeline.[4] EPA has even determined that an American Soda commercial mine was "contiguous or adjacent" to a processing plant located over 40 miles away and connected by a pipeline.[5]

As these examples indicate, EPA has evidently concluded that physical proximity is of very little relevance in determining whether emission sources are adjacent under the

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[2] 45 Fed. Reg. 52676, 52695 (1980).

[3] *See* Letter from Robert G. Kellam, EPA Office of Air Quality Planning & Standards, to Richard Long, EPA Region VIII (Aug. 27, 1996).

[4] *See* Letter from Richard R. Long, Director, EPA Region VIII Air & Radiation Program, to Lynn Menlove, Manager, New Source Review Section, Utah Div. of Air Quality (May 21, 1998).

[5] *See* Letter from Richard R. Long, Director, EPA Region VIII Air & Radiation Program, to Dennis Myers, Colorado Air Pollution Control Div. (Apr. 20, 1999).

CAA. Yet common sense rejects any suggestion that the above emissions sources, situated so many miles apart from one other, are "adjacent" in any meaningful sense of the word. It is simply unreasonable to aggregate well-site activities and other production field activities—occurring over vast geographic distances—with a downstream plant into a single major stationary source. These case-by-case determinations are problematic because of the nature of oil-and-gas exploration and gathering equipment, which are frequently located on small "wet pads" or "gathering stations" situated over large areas that do not geographically abut one another and that may even be owned and controlled by two or more separate entities.

Indeed, the mere presence of pipelines connecting separate oil and gas operations is not particularly useful to a source aggregation determination. This is especially true in the natural gas context, where the entire production, gathering, processing, and transportation process is interconnected through an elaborate national network of pipes extending from the wellheads to the ultimate end-users and includes countless local gathering and processing facilities. Thus, the simple fact that a pipe connects two physically separate facilities or emissions units does not, by itself, suggest that these two facilities or units should in any way be considered part of the same emissions source.

The separation of surface property rights and subsurface mineral rights further complicates the question of what is adjacent, since oil and gas companies typically control only the surface area necessary for wells and related equipment. Well sites can be located hundreds of miles from a connected natural gas processing plant. Indeed, many oil and gas operations, such as production fields, can cover many square miles. Aggregating such geographically disparate activities defies the very notion of contiguous or adjacent. Even in cases where large but distinct tracts of property may be contiguous or adjacent when viewed as a whole, the limited portions of those properties physically associated with a pollutant-emitting activity often are not nearby, connected, or in any way proximate to one other.

The agency's novel approach to defining adjacent sources is not only unreasonable and contrary to the plain meaning of the term "adjacent," but it has also run afoul of the law. As the agency is well aware, in 2012, the U.S. Court of Appeals for the Sixth Circuit reversed EPA's determination that a natural gas plant and over 100 associated gas wells in a roughly 40-square-mile area near Rosebush, Michigan constituted a single "source" under Title V.[6] In *Summit Petroleum Corp. v. EPA*, the appeals court held that EPA could not base its determination to aggregate physically

[6] *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012).

distant sources solely on their "functional interrelationship" to one another because the relevant regulation required considerations of only adjacency. Citing to *Merriam-Webster*'s dictionary, the Sixth Circuit concluded that the plain meaning of the term "adjacent" is unambiguous: "two entities are adjacent when they are '[c]lose to; lying … [n]ext to, adjoining."[7] The court thus rejected as an "impermissible stretch" EPA's contention that the term's inherent ambiguity enabled the agency to look behind the functional purpose of any given activity's existence. Unpersuaded that EPA's interpretation should be entitled to deference merely because the agency had a longstanding practice of evaluating function when determining adjacency, the court reminded EPA that "[a]n agency may not insulate itself from correction merely because it has not been corrected soon enough, for a longstanding error is still an error."[8]

In response to the Sixth Circuit's ruling, EPA issued the "*Summit* directive," which announced that the agency would not follow the Sixth Circuit's ruling in those states outside the Sixth Circuit's jurisdiction. In yet another significant loss for EPA, when affected stakeholders challenged that directive on the basis that EPA was obliged to create uniform regulatory criteria throughout the country, the D.C. Circuit agreed and vacated the *Summit* directive.[9] The appeals court found that, by creating region-specific criteria for enforcement of the CAA, the *Summit* directive violated EPA's own "regional consistency" regulations, "which require[s] EPA to maintain national uniformity in measures implementing the [CAA], and to 'identify[] and correct[]' regional inconsistencies by 'standardizing criteria, procedures, and policies.'"[10] In effect, the D.C. Circuit put EPA on notice that it must implement the CAA and regulate emissions as a single national agency.

In the wake of two clear defeats in the federal appeals courts, EPA now seeks by formal rulemaking to add "functional interrelatedness" to the list of permissible considerations for determining whether sources are adjacent. At the same time, EPA proposes no specific distance limit that would cabin its use of functional interrelatedness. Rather, EPA would presume that disparate oil and gas equipment is adjacent if it is proximate or functionally related. Under this proposal, isolated surface sites could be aggregated with one another into one massive site subject to onerous permitting obligations.

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[7] *Id.* at 742.

[8] *Id*. at 746.

[9] *Nat'l Envtl. Dev. Ass'n Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014).

[10] *Id*. at 1003.

Conclusion

WLF respectfully urges EPA to abandon the use of functional interrelatedness in determining whether emission sources are adjacent. By aggregating emissions from such disparate sources, the Rule substantially increases the likelihood that those emissions will exceed federal permitting thresholds. Given the unique geographic attributes of oil-and-gas activities, proximity is the most useful factor in making such determinations. WLF encourages EPA to abandon its failed experiment with functional interrelatedness once and for all and adhere instead to a strict ¼-mile limit when determining that any two or more sources are adjacent.

Respectfully submitted,

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