

WASHINGTON LEGAL FOUNDATION

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January 8, 2013

Via First Class U.S. Mail

Hon. Lisa Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios building
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, D.C. 20460

RE: October 24, 2012 Petition to Add the Oil and Gas Extraction Industry, Standard Industrial Classification Code 13, to the List of Facilities Required to Report under the Toxics Release Inventory

Dear Administrator Jackson,

On behalf of the Washington Legal Foundation (WLF), I am writing in response to the October 24, 2012 petition filed by the Environmental Integrity Project, *et al.*, which asked the EPA to subject the oil-and-gas extraction industry to toxic release inventory (TRI) reporting under the Emergency Planning and Community Right-to-Know Act (EPCRA). Evidently unsatisfied with the industry's own voluntary reporting efforts, a number of environmental activists now desire to add oil-and-gas extractors (those identified by Standard Industrial Code 13) to the list of entities that must annually report the release of some 682 chemicals.

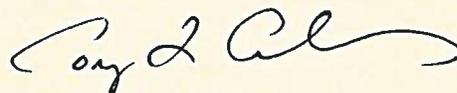
Of course, the TRI program typically requires reporting of releases only if the facility manufactures or processes more than 25,000 pounds or uses more than 10,000 pounds of a listed chemical. Recognizing this limitation, along with the fact that most oil-and-gas extracting facilities do not trigger this reporting threshold, the petitioners call on EPA to interpret the law so as to allow EPA to aggregate multiple wells and supporting infrastructure as one "facility," which includes all buildings, equipment, structures, and other units located on a single site or on contiguous adjacent sites that are owned or controlled by the same person.

At the same time, EPA's recent precedent has held that whether two noncontiguous sites are "adjacent" turns less on whether the sites are proximate as it does on whether they are "interdependent." See, e.g., *Order Denying Petition for Objection to Permit*, Permit No. 95OPWE035, Petition No. VIII-2010-4, at 11 (Feb. 2, 2011). As a result, EPA has issued applicability determinations aggregating sources that are over 40 miles apart. Such aggregation based on nothing more than "interdependence" is highly problematic and has created an unnecessarily complicated and unpredictable issue for the oil-and-gas industry in recent years. See Gina McCarthy, Assistant Administrator, Office of Air and Radiation, "Withdrawal of Source Determinations for Oil and Gas Industries" (September 22, 2009).

This novel approach to regulating contiguous sites is not only unreasonable and contrary to the plain meaning of the term "adjacent," it also runs afoul of at least one federal circuit—the U.S. Court of Appeals for the Sixth Circuit. Specifically, in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012), the Sixth Circuit rejected EPA's determination that Summit Petroleum's natural gas operations near Rosebush, Michigan—which include a natural gas sweetening plant, pipelines, wells and occasional flares spread out over a 43-square mile area—should be permitted as a single, major source. In doing so, the court rejected the very "interdependence" approach to adjacent sites that is urged by the petitioners. Citing to *Webster's* dictionary, the appeals court concluded that the plain meaning of the term "adjacent" is unambiguous: "[T]wo entities are adjacent when they are '[c]lose to; lying near . . . [n]ext to, adjoining.'" To date, no court has held otherwise.

Not only is the approach urged by the petitioners likely to create widespread public confusion, it also invites unnecessary federal intrusion into an area that the states and the industry are already busy addressing. For this reason alone, the petition should be rejected. For more information on the legal issues surrounding source aggregation, I urge you to read the attached WLF publication: Richard Alonso & Sandra Y. Snyder, *Source "Aggregation": Federal Appeals Court Reverses 30 Years of Faulty EPA Precedent*, WLF LEGAL BACKGROUNDER (November 16, 2012).

Sincerely,



Cory L. Andrews
Senior Litigation Counsel
Washington Legal Foundation