TABLE 1 TO § 100.701—Continued

Date	Event	Sponsor	Location
July 4th	Ormond Beach Independence Day Celebration Fireworks.	City of Ormond Beach	All waters within a 500-yard radius around approximate position 29°17.2′N, 081°02.988′W.
July 4th	Patrick Air Force Base 4th of July Celebration and Fireworks.	Patrick Air Force Base	All waters within a 500-yard radius around approximate position 28°14′00″N, 080°37′00″W.
July 4th	Sanford's July 4th Celebration Fireworks.	City of Sanford	All waters within a 500-yard radius around the Monroe Harbor Marina.
July 4th	St. Augustine July 4th Fireworks Display.	City of St. Augustine	All waters within a 500-yard radius around approximate position 29°53′50.84″N, 081°18′30.87″W.
July—3rd Saturday	Halifax Rowing Association Summer Regatta.	Halifax Rowing Association	Halifax River, Daytona, S. of Memorial Bridge—East Side.
July—3rd week	BellSouth Greater Jacksonville Kingfish Tournament.	Jacksonville Marine Charities, Inc.	All waters of the St. Johns River, from lighted buoy 10 (LLNR 2190) in approximate position 30°24′22″N, 081°24′59″W to lighted buoy 25 (LLNR 7305).
August—2nd week	Townsend Hawkes Ocean Swim.	Jacksonville Beaches Kiwanis Club.	50 ft. offshore from Jacksonville Beach to Sea Turtle Inn, Atlantic Beach.
December 31st	Jacksonville New Year's Eve Fireworks.	City of Jacksonville Office of Special Events.	St. Johns River; west side of Main Street Bridge.
December 31st	St. Augustine Beach New Year's Eve Fireworks.	City of St. Augustine Beach.	All waters within a 500-yard radius approximate position 29°51′16″N, 081°15′49″W.
December—2nd Saturday	St. Johns River Christmas Boat Parade.	St. Johns River Christmas Boat Parade, Inc.	St. Johns River; Whitehair Bridge, Deland to Lake Beresford.
December—2nd Saturday	Christmas Boat Parade (Daytona Beach/ Halifax River).	Halifax River Yacht Club	Halifax River from Seabreeze Bridge to Halifax Harbor Marina.
December—2nd Saturday	Kissimmee Holiday Extravaganza Fireworks.	City of Kissimmee Parks and Recreation.	Kissimmee Lakefront Park; all waters within a 500-yard radius around approximate position 28°17′13″N, 081°24′13″W.

Dated: October 4, 2007.

D.W. Kunkel,

Rear Admiral, U.S. Coast Guard, Commander, Seventh Coast Guard District.

[FR Doc. E7–21714 Filed 11–9–07; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA–HQ–OAR–2004–0014, FRL–8494–4]

RIN 2060–AM91

Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Reconsideration of Inclusion of Fugitive Emissions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notice of reconsideration of final rule.

SUMMARY: On December 31, 2002, we (the EPA) issued our final New Source Review (NSR) Improvement Rule which, among other things, requires all sources to include ''fugitive emissions'' in assessing whether a proposed physical or operational change qualifies as a ''major modification'' that is subject to review under major NSR. On July 11, 2003, we received a petition for reconsideration on behalf of Newmont USA Limited, dba Newmont Mining Corporation (''Newmont'') arguing that the December 31, 2002 final rule failed to comply with the Clean Air Act (Act) requirement that EPA conduct a rulemaking to list source categories for which fugitive emissions must be included in computing a source's emissions to determine whether it is a ''major stationary source.'' In January 2004, we agreed to reconsider this issue. In this action, we are proposing to revise the provisions of the December 2002 final rules related to the treatment of fugitive emissions for purposes of determining whether a physical or operational change at an existing major source qualifies as a major modification. We request public comment on the proposed revisions. In this action, we are also providing guidelines for determining when and how emissions are to be considered fugitive for NSR and Title V permitting.

DATES: *Comments*. Comments must be received on or before January 14, 2008.

Public Hearing. If anyone contacts us requesting to speak at a public hearing on or before December 3, 2007, we will hold a public hearing approximately 30 days after publication in the **Federal Register**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2004–0014 by one of the following methods:

- *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-Docket@epa.gov*, attention Docket No. EPA–HQ–OAR–2004–0014.
- *Fax*: 202–566–9744.
- *Mail*: Attention Docket ID No. EPA–HQ–OAR–2004–0014, U.S. Environmental Protection Agency, EPA West (Air Docket), Mail code 2822T, 1200 Pennsylvania Avenue, Northwest, Washington, DC 20460. Please include a total of 2 copies.
- *Hand Delivery*: U.S. Environmental Protection Agency, EPA West (Air Docket), Room 3334, 1301 Constitution Avenue, Northwest, Washington, DC 20004, Attention Docket ID No. EPA–HQ–OAR–2004–0014. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2004–0014. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business

Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The *http://www.regulations.gov* Web site is an (anonymous access(system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA(s public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*. For additional instructions on submitting comments, go to section I.B of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, EPA West (Air Docket), Room 3334, 1301 Constitution Avenue, Northwest, Washington, DC, Attention Docket ID No. EPA–HQ–OAR–2004–0014. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Ms. Lynn Hutchinson, Air Quality Policy Division (C504–03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, *telephone number:* (919) 541–5795, *fax number*: (919) 541–4028, or electronic mail at *hutchinson.lynn@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected by this proposed action include sources in all industry groups. The majority of sources potentially affected are expected to be in the following groups.

Industry group	SIC [a]	NAICS [b]
Electric Services	491	221111, 221112, 221113, 221119, 221121, 221122
Petroleum Refining	291	324110
Industrial Inorganic Chemicals	281	325181, 325120, 325131, 325182, 211112, 325998, 331311, 325188
Industrial Organic Chemicals	286	325110, 325132, 325192, 325188, 325193, 325120, 325199
Miscellaneous Chemical Products	289	325520, 325920, 325910, 325182, 325510
Natural Gas Liquids	132	211112
Natural Gas Transport	492	486210, 221210
Pulp and Paper Mills	261	322110, 322121, 322122, 322130
Paper Mills	262	322121, 322122
Automobile Manufacturing	371	336111, 336112, 336211, 336992, 336322, 336312, 336330, 336340, 336350, 336399, 336212, 336213
Pharmaceuticals	283	325411, 325412, 325413, 325414
Mining	211, 212, 213	21
Agriculture, Fishing and Hunting	111, 112, 113, 115	11

[a] Standard Industrial Classification.
[b] North American Industry Classification System.

Entities potentially affected by the subject rule for this proposed action also include State, local, and tribal governments.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit information that you consider to be CBI electronically through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Also, send an additional copy clearly marked as above not only to the Air docket but to: Roberto Morales, c/o OAQPS Document Control Officer, (C339–03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, Attention Docket ID No. EPA–HQ–OAR–2004–0014.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

C. How can I find information about a possible public hearing?

Persons interested in presenting oral testimony should contact Ms. Pamela S. Long, New Source Review Group, Air Quality Policy Division (C504–03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone number (919) 541–0641, at least 2 days in advance of the public hearing. Persons interested in attending the public hearing should also contact Ms. Long to verify the time, date, and location of the hearing. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning these proposed changes.

D. How is this preamble organized?

The information presented in this preamble is organized as follows:

I. General Information
A. Does this action apply to me?
B. What should I consider as I prepare my comments for EPA?
C. How can I find information about a possible public hearing?
D. How is this preamble organized?
II. Background
A. What is major New Source Review?
B. What sources are subject to major NSR?
C. What are fugitive emissions, and how do they figure into major NSR applicability?
D. What is the basis for and history of EPA's treatment of fugitive emissions in major NSR applicability determinations?
E. Why is EPA reconsidering this aspect of the December 2002 NSR Improvement final rulemaking?
III. This Action
A. What are the results of EPA's reconsideration?
B. How is EPA proposing to revise the major NSR regulations?
C. What is the effect of this action on the minor NSR program?
D. What is the rationale for this action?
1. The Newmont petition
2. Proposed action
IV. When would these proposed changes take effect in the Federal PSD Program, and Must States revise their State Implementation Plans (SIPs) to incorporate this proposed action?
V. Guiding Principles for Determining Fugitive Emissions
VI. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Analysis
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
VII. Statutory Authority

II. Background

A. What is major New Source Review?

The major NSR program is mandated by parts C and D of title I of the Act. Major NSR is a preconstruction review and permitting program applicable to new or modified major stationary sources (major sources) of air pollutants regulated under the Act. In areas not meeting National Ambient Air Quality Standards (NAAQS) and in ozone transport regions (OTR), the program is implemented under the requirements of part D of title I of the Act. We call this program the ''nonattainment'' major NSR program. In areas meeting NAAQS (''attainment'' areas) or for which there is insufficient information to determine whether they meet the NAAQS (''unclassifiable'' areas), the NSR requirements under part C of title I of the Act apply. We call this program the Prevention of Significant Deterioration (PSD) program. Collectively, we also commonly refer to these programs as the major NSR program. These regulations are contained in 40 CFR 51.165, 51.166, 52.21, 52.24, and part 51, appendix S.

B. What sources are subject to major NSR?

Major NSR applies to (1) construction of new major sources, and (2) major modifications at existing major sources. In either case, the initial step in assessing applicability is to determine whether the source in question qualifies as a ''major source.'' A proposed or existing source qualifies as a major source if it ''emits or has the potential to emit'' a regulated NSR pollutant in an amount greater than the specified annual threshold. We define ''potential to emit'' (PTE) as the maximum capacity of a source to emit a pollutant under its physical and operational design, taking into account any physical or operational limitations on the source that are enforceable as a practical matter. (*See,* for example, § 52.21(b)(4) for the full definition of PTE.)

If a proposed new source's PTE is greater than the applicable major source threshold for one or more regulated NSR pollutants, it is subject to preconstruction review under major NSR. For the PSD program, the major source threshold is 100 tons per year (tpy) for sources in any of 28 categories listed in the regulations, and 250 tpy for any other type of source. (*See* §§ 51.166(b)(1) and 52.21(b)(1) for the full definition of ''major stationary source'' under PSD.) The major source threshold under nonattainment major NSR is generally 100 tpy, but is lower for some pollutants in nonattainment areas classified as serious, severe, or extreme. (*See* § 51.165(a)(1)(iv) for the full definition of ''major stationary source'' under nonattainment major NSR.) These same major source thresholds also apply to modifications at existing minor sources where the modification by itself has potential emissions in excess of the applicable threshold.

If an existing major source (i.e., an existing source with actual emissions and/or PTE greater than the applicable major source threshold) is planning a physical or operational change, the project is subject to major NSR if it is a ''major modification.'' A physical or operational change is a major modification if it meets both of the following two criteria: [1]

- The physical or operational change, taken by itself, would result in a significant increase in emissions of a regulated NSR pollutant; and
- The physical or operational change, taken together with other, contemporaneous emissions increases and decreases at the source, would result in a significant net emissions increase.

The level of emissions that is considered ''significant'' varies by pollutant and, in some cases, by a nonattainment area's classification. For example, an increase of 40 tpy is significant for sulfur dioxide, while 0.6 tpy of lead is considered a significant increase. (*See* §§ 51.166(b)(23) and 52.21(b)(23) for the full definition of ''significant'' under PSD and § 51.165(a)(1)(x) for the full definition under nonattainment major NSR.) In determining the increase in emissions from a physical or operational change, new emissions units are evaluated at their PTE, while existing and replacement units are generally evaluated by comparing their baseline actual emissions before the physical or operational change to their projected actual emissions after the change.

[1] On October 20, 2005, we proposed different major NSR applicability procedures for modifications at electric generating units. (*See* 70 FR 61081.) Our rulemaking effort for such units is ongoing.

C. What are fugitive emissions, and how do they figure into major NSR applicability?

For purposes of major NSR, we define ''fugitive emissions'' as emissions that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening. (*See,* for example, § 52.21(b)(20).) Examples of fugitive emissions include windblown dust from surface mines and volatile organic compounds (VOCs) emitted from leaking pipes and fittings at petroleum refineries.

Quantifiable fugitive emissions are included in a stationary source's PTE when determining whether the source is a major source only if it is in one of the source categories specifically listed in the major NSR regulations. This is consistent with section 302(j) of the Act, and is made clear in the definition of ''major stationary source'' that is found in the major NSR regulations. (*See*, for example, § 52.21(b)(1)(iii).)

Conversely, under the 2002 NSR rules, fugitive emissions to the extent quantifiable are included in determining whether a physical or operational change is a major modification (i.e., in calculating the resulting emissions increase and net emissions increase), regardless of the source's source category. This is the case because the definitions of the terms ''projected actual emissions'' and ''baseline actual emissions'' under the 2002 NSR rules, which are the definitions used to calculate emission increases at existing units, include quantifiable fugitive emissions. (*See* §§ 52.21(b)(41)(ii)(*b*) and 52.21(b)(48)(ii)(*a*).) In this action we propose to modify this aspect of the 2002 NSR rules. We propose to take a consistent approach as to the inclusion of fugitive emissions in threshold major source and modification determinations.

D. What is the basis for and history of EPA's treatment of fugitive emissions in major NSR applicability determinations?

Section 302(j) of the Act sets out the definition of ''major stationary source'' that, along with several other provisions of the Act, provides the basis for the definitions used in the major NSR regulations. The definition in section 302(j) specifies that fugitive emissions are included in major source determinations only for source categories that EPA specifies through rulemaking. As discussed below, EPA enacted regulations pursuant to section 302(j) that specify the source categories for which fugitive emissions are included in the major source determination and has listed these source categories in the ''major stationary source'' definitions. However, the Act is silent regarding the treatment of fugitive emissions for purposes of determining whether a physical or operational change is a major modification. Below we discuss the history of this issue leading up to this proposed action.

We first created the list of source categories for which fugitive emissions are included in major source determinations (the ''section 302(j) list'') in the final PSD and nonattainment major NSR rules issued in 1980 on remand from the DC Circuit. (*See* 45 FR 52676, August 7, 1980.) The court remanded our initial major NSR rules for a variety of reasons, including our failure to follow the requirements of section 302(j) in promulgating a partial exemption for fugitive dust. (*See Alabama Power* v. *Costle,* 636 F.2d 323, 369–370 (DC Cir. 1979).)

The promulgated section 302(j) list included the source categories listed in section 169(1) of the Act, which is the definition of ''major emitting facility'' for purposes of PSD. Under that definition, the major source threshold for the listed source categories is 100 tpy, rather than the 250 tpy threshold that applies to other categories of sources. In the preamble to the 1980 major NSR rules, we noted that the *Alabama Power* court stated that ''Congress' intention, in establishing the list of source categories in section 169(1) of the Act, was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air.'' (*See* 45 FR 52691.) In light of that intent, we determined that as a matter of policy, it would be appropriate to count all emissions—including fugitive emissions—in threshold calculations of applicability for those source categories. (Again, *see* 45 FR 52691.) In doing so, we indicated that our listing decisions would be based on whether sources in the category have the potential to degrade air quality significantly. We also indicated that we would consider information raised by commenters that showed that unreasonable socioeconomic impacts relative to the benefits would result from subjecting the sources to the relevant PSD or nonattainment programs.

In addition to the source categories listed in section 169(1), based on application of these criteria, we included on the section 302(j) list ''any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.'' We noted in the 1980 preamble that categories of sources are regulated under section 111 (New Source Performance Standards or NSPS) or 112 (National Emission Standards for Hazardous Air Pollutants or NESHAP) on the basis of a determination that their emissions seriously and adversely impact ambient air quality. We therefore determined that it was appropriate to include their fugitive emissions in the threshold calculations for purposes of major NSR applicability. We included the August 7, 1980 cutoff date because we believed that sources not regulated by an NSPS or NESHAP before the promulgation date of the major NSR rules could not have been afforded a meaningful opportunity to comment on the inclusion of their fugitive emissions in threshold applicability determinations for the source category.

In the preamble to the 1980 NSR rules, we explained that the *Alabama Power* court determined that the ''substantive preconstruction review and permitting requirements of section 165 'apply with equal force to fugitive emissions and emissions from industrial point sources,''' but went on to explain that this meant only that ''section 165 requires that fugitive emissions be taken into account in determinations of whether NAAQS or allowable increments will be violated * * * and that fugitive emissions be subjected to BACT requirements * * *.'' (*See* 45 FR 52691.) Thus, in the preamble to the 1980 rules, we analytically grouped fugitive emissions for purposes of the major source definition and major modifications under the rubric of ''threshold calculations.'' (*See* 45 FR 52690–91.)

However, the 1980 NSR regulations on their face require fugitive emissions to be included in threshold applicability determinations for any project, but then exempt from the relevant PSD or nonattainment requirements any project that (1) would be ''major'' only if fugitive emissions were included and (2) does not belong to one of the categories specifically listed pursuant to the section 302(j) rulemaking. (*See,* for example, §§ 52.21(b)(4) and (i)(4)(vii) as promulgated in 1980 at 45 FR 52736 and 52739, respectively. *See* also the discussion at 49 FR 43204, October 26, 1984.) Thus, in the 1980 rules, we included the section 302(j) list in a provision that exempted from PSD permitting requirements ''a particular major stationary source or major modification, if * * * [t]he source or modification would be a major stationary source or major modification

only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to [any of the categories in the section 302(j) list].'' (*See* §§ 52.21(i)(4), (i)(4)(vii), 45 FR 52738–52739.) A similar exclusion applied in the nonattainment major NSR context. (*See* § 51.18(j)(4), 45 FR 52746.) In our response to a petition for reconsideration of the 1980 rules submitted on behalf of the American Mining Congress, we continued this approach, stating that ''EPA * * * intended to establish that any source which would be 'major' only if fugitive emissions were taken into account is not to be considered 'major' for any PSD purpose, unless the source belongs to one of the categories on the list which now appears in [§]52.21(i)(4)(vii). Similarly, EPA intended to establish that any modification that would be 'major' only if fugitive emissions were taken into account is not to be considered 'major' for any PSD purpose, unless the source * * * belongs to one of the categories on that list.'' Further, we committed to amend the regulations to conform them to these intentions. (*See* letter from Douglas M. Costle, EPA Administrator, to Robert T. Connery, Holland & Hart, January 19, 1981.)

On October 26, 1984 (49 FR 43202) we affirmed the interpretation that we had stated in the 1980 NSR rulemaking. (*See* 49 FR 43208.) We also added NSR regulatory provisions that the fugitive emissions of a stationary source shall not be included in the threshold determination of whether it is a major stationary source unless the source belongs to one of the categories of sources identified by EPA in its section 302(j) rulemaking. (*See* 49 FR 43209–10.)

In a companion notice published on October 26, 1984 (49 FR 43211), we solicited public comment on an ''interpretive ruling'' regarding section 302(j) of the Act as it relates to the review of physical or operational changes involving fugitive emissions.[2] In this notice, we observed that in our 1980 NSR rulemaking and when proposing amendments in 1983, we had assumed that the rulemaking requirement in section 302(j) regarding source categories for which fugitive emissions should be considered applies to modification determinations as well as to threshold major source determinations. However, in this 1984 interpretive proposal, we stated that we believed our prior assumption in this regard was incorrect. We proposed to include fugitive emissions for sources in all source categories, to the extent quantifiable, when determining whether a physical or operational change meets the significance thresholds for a modification for purposes of major NSR. (*See* 49 FR 43213–14.)

On February 28, 1986 (*see* 51 FR 7090), we reopened the comment period to receive further comment on several of the issues addressed in our October 26, 1984 proposal. The comment period ended April 9, 1986. Comments for this proposal are captured in legacy docket A–84–33.

On November 28, 1989 (*see* 54 FR 48870), we finalized our 1984 interpretation and concluded that the section 302(j) limitation on including fugitive emissions applies to the threshold determination of whether a source is a major source, but not to the threshold determination of whether a physical or operational change constitutes a major modification. We pointed out that the language of section 302(j) explicitly attaches the rulemaking requirements only to existing or proposed major sources, and says nothing about major modifications to existing sources. We also noted that the PSD and nonattainment major NSR definitions of ''modification'' in section 169(2)(C) and section 171(4) of the Act, respectively, merely cross-reference section 111(a)(4) of the Act, which is the definition of ''modification'' in the NSPS provisions. Because section 111(a)(4) defines modification solely in terms of the total amount of pollution that a change at a source would produce, we believed that Congress intended to establish no qualitative distinction between stack and fugitive emissions. Moreover, we stated that the legislative history on section 302(j) does not refer directly to major modifications, although the conference report on the PSD construction and modification definitions in section 169(2)(C) does provide that Congress' general intent was ''to conform to usage in other parts of the Act'' [123 Cong. Rec. H 11957, col. 3 (daily ed.) (November 1, 1977)]. We reasoned that this passage referred not only to section 111(a)(4), but to usage of these terms in existing EPA regulations under the NSPS and NSR programs, which did not distinguish between fugitive and stack emissions. We concluded that an interpretation of section 302(j) to exempt fugitive emissions from modification calculations ran counter to EPA's longstanding practice, and that if Congress intended a legislative change as to major modifications, it would have said so explicitly. (*See* 54 FR 48882–83.) We further concluded that EPA's longstanding practice of considering the fugitive emissions of all sources, not just those on the section 302(j) list, when determining whether a major modification had occurred was reasonable. (*See* 54 FR 48883.) In addition, we related that our interpretation likely would not impose new regulatory burdens because fugitive emissions from physical or operational changes would still be excluded from applicability determinations unless the changes occurred at a major source. We reasoned that under the Act and EPA regulations, a modification is ''major'' and subject to review only if the source at which it would occur is also ''major.'' Hence, a modification to a source of predominantly fugitive emissions that does not belong to a currently listed category could not be subject to review, even if its fugitive emissions were taken into account, because the source would not be ''major.'' (*See* 49 FR 43213–14.) Based on this reasoning, our November 28, 1989 final action reaffirmed our October 1984 proposed interpretation that the list of fugitive emissions sources created pursuant to section 302(j) does not apply to major modifications and that fugitive emissions for sources in all source categories must be included when determining whether a physical or operational change meets the significance thresholds for purposes of major NSR.

In October 1990, we issued the draft ''New Source Review Workshop Manual,''[3] in which we stated that under the federal PSD regulations, fugitive emissions ''are included in the potential to emit (and increases in the same due to modification)'' if they occur at one of the source categories listed pursuant to section 302(j). (*See* page A.9 of the Manual, which may be found at *http://www.epa.gov/ttn/nsr/gen/wkshpman.pdf.*) This phrasing seemingly contradicts our November 1989 final interpretive ruling, although we did not intend to change our policy in this area.

In the NSR Improvement final rulemaking published December 31, 2002 (67 FR 80186), we promulgated final rules consistent with our November 1989 final interpretive ruling. There, we required the inclusion of fugitive emissions in calculating emissions increases for purposes of determining whether a particular

[2] This was an ''interpretive ruling'' in that we proposed to change our previous interpretation of the Act. To put the interpretive ruling into effect, we chose not to finalize the proposed revision to the major modification definition.

[3] The ''New Source Review Workshop Manual'' is in draft form and the Agency chose not to finalize this manual.

physical or operational change constitutes a major modification requiring a PSD or nonattainment major NSR permit. (*See*, for example, § 52.21(b)(41)(ii)(*b*), which includes fugitive emissions, to the extent quantifiable, in the definition of ''projected actual emissions'' and § 52.21(b)(48)(i)(*a*), which includes fugitive emissions, to the extent quantifiable, in the definition of ''baseline actual emissions.'')

E. Why is EPA reconsidering this aspect of the December 2002 NSR Improvement final rulemaking?

On July 11, 2003, we received a petition for reconsideration of the December 2002 NSR Improvement final rules from Newmont USA Ltd., dba Newmont Mining Corporation (Newmont). Newmont argued that we failed to comply with the requirements of section 302(j) of the Act in requiring fugitive emissions to be counted for purposes of determining whether a physical or operational change constitutes a major modification for sources in source categories not listed pursuant to section 302(j). Newmont also argued that we failed to provide notice and an opportunity for comment on this issue. The EPA Assistant Administrator for Air and Radiation granted Newmont's petition by letter in January 2004.

III. This Action

A. What are the results of EPA's reconsideration?

We are proposing to revise the provisions of the December 2002 NSR Improvement final rules related to the treatment of fugitive emissions for purposes of determining whether a physical or operational change at an existing major source qualifies as a major modification. We propose to reverse our existing policy and include fugitive emissions in determining whether a physical or operational change results in a major modification only for sources in the source categories that have been designated through rulemaking pursuant to section 302(j) of the Act. In other words, we propose to adopt the same approach to fugitive emissions currently used for determining whether a source is major, for determining whether a change is a major modification. We solicit comment on this proposed approach.

B. How is EPA proposing to revise the major NSR regulations?

To implement our new approach to fugitive emissions, in this action we propose to revise all four portions of the major NSR program regulations: § 51.165, § 51.166, § 52.21, and appendix S of part 51. This notice includes specific proposed revisions for §§ 51.165, 51.166, and 52.21. The proposed revisions are nearly identical for these regulations because they contain nearly identical provisions related to major modifications. We are not proposing specific revisions for appendix S in this action, but we propose to revise it with regulatory text consistent with the changes that we ultimately finalize for § 51.165.

For §§ 51.165, 51.166, and 52.21, we propose to modify a number of definitions. In addition, we propose a minor change in the provisions for plantwide applicability limitations (PALs) to preserve the existing treatment of fugitive emissions for PALs. We are proposing to modify the paragraph in each rule that explains how to calculate whether a significant emissions increase will occur as the result of a physical or operational change. We are proposing a minor revision in the provisions on monitoring and reporting for physical and operational changes that are found not to be major modifications. Finally, we are proposing to delete as unnecessary the paragraph that provides for a generalized exemption related to fugitive emissions and repeats the section 302(j) list. These proposed rule revisions are discussed in more detail below.

We are proposing revisions to the definitions of ''baseline actual emissions'' and ''projected actual emissions.'' As noted in the Newmont petition, these definitions (which figure in determining the increase associated with a physical or operational change) currently require that fugitive emissions be included, to the extent quantifiable, without regard to source category. Our proposed revisions will qualify this requirement so that fugitive emissions (to the extent quantifiable) must be included for an emissions unit that ''belongs to one of the source categories listed in [the section 302(j) list that appears in the definition of 'major stationary source'] or is located at a major stationary source that belongs to one of the listed source categories.'' For baseline actual emissions, this revision appears in § 51.165(a)(1)(xxxv)(A)(*1*), (B)(*1*), and (C); § 51.166(b)(47)(i)(*a*), (ii)(*a*), and (iii); and § 52.21(b)(48)(i)(*a*), (ii)(*a*), and (iii). For projected actual emissions, the revision appears in § 51.165(a)(1)(xxviii)(B)(*2*) and (*4*), § 51.166(b)(40)(ii)(*b*) and (*d*), and § 52.21(b)(41)(ii)(*b*) and (*d*). Note that the proposed language refers to emissions units that are in a source category on the section 302(j) list, as well as the listing status of the entire major stationary sources that belong to one of the listed source categories. This language addresses those situations where an emissions unit that is included in one of the listed source categories is located within a parent source whose primary activity is not on the list. If either the emissions unit or the parent source is in a source category on the section 302(j) list, the emission unit's fugitive emissions, to the extent quantifiable, must be included for purposes of determining whether a physical or operational change constitutes a modification. We propose similar language throughout this proposed rule. See section III.D below for additional discussion of the rationale for this proposed language.

We also propose to revise the definition of ''baseline actual emissions'' to maintain the current requirements for PALs. Plantwide applicability limitations are an alternative means of determining the applicability of major NSR to changes at an existing major stationary source. Instead of evaluating each physical or operational change individually, the source simply tracks total emissions from the source to be sure that they remain below the level of its PAL. Baseline actual emissions are used in setting the level of the PAL.

We continue to believe that it is appropriate to include fugitive emissions (to the extent quantifiable) in setting the level of the PAL and in tracking compliance with it, regardless of the source category. In the preamble to the December 2002 NSR Improvement rules, we explained that the benefit of PALs to the public and the environment is that PALs are designed ''to assure local communities that air emissions from your major stationary source will not exceed the facility-wide cap set forth in the permit unless you first meet the major NSR requirements.'' We further explained that a PAL ''provides a more complete perspective to the public because in setting a PAL, your reviewing authority accounts for all current processes and all emissions units together and reflects the long-term maximum amount of emissions it would allow from your source.'' (*See* 67 FR 80206.) We therefore do not believe we can exempt fugitive emissions from being included when setting a PAL. Consequently, we are proposing to revise the subparagraph of this definition that addresses PALs to ensure that fugitive emissions continue to be included for the purposes of PALs for all source categories. This proposed revision is found in

§§ 51.165(1)(a)(xxxv)(D), 51.166(b)(47)(iv), and 52.21(b)(48)(iv).

To reinforce our intentions for PALs, we are proposing a minor revision to the provisions for PALs to state clearly that a PAL is to include fugitive emissions, to the extent quantifiable, ''regardless of whether the emissions unit or major stationary source belongs to one of the source categories listed in [the section 302(j) list].'' This revision is found in §§ 51.165(f)(4)(i)(D), 51.166(w)(4)(i)(*d*), and 52.21(aa)(4)(i)(*d*).

We are proposing to revise the definition of ''major modification'' to mirror the existing definition of ''major stationary source.'' Specifically, we propose to add a subparagraph to this definition saying:

> Fugitive emissions shall not be included in determining for any of the purposes of this section whether a physical change in or change in the method of operation of a major stationary source is a major modification, unless the source belongs to one of the source categories listed in [the section 302(j) list that appears in the definition of ''major stationary source'']

This new language is proposed for §§ 51.165(a)(1)(v)(G), 51.166(b)(2)(v), and 52.21(b)(2)(v).

We are proposing to revise the definition of ''net emissions increase'' to preclude an unlisted major source from including contemporaneous increases and decreases in fugitive emissions in the ''netting analysis'' for a physical or operational change. We do not believe that an unlisted source (which does not include fugitive emissions in determining the increase in emissions from the current physical or operational change) should be able to use decreases in fugitive emissions to ''net out'' of major NSR. Rather, we believe that unlisted sources should treat fugitive emissions consistently for all purposes related to determining the applicability of major NSR to physical or operational changes. Accordingly, we propose to add the following language regarding ''creditable'' emissions increases and decreases at §§ 51.165(a)(1)(vi)(C)(*4*), 51.166(b)(3)(iii)(*d*), and 52.21(b)(3)(iii)(*c*):

> For an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that belongs to one of the source categories listed in [the section 302(j) list that appears in the definition of ''major stationary source''] or the major stationary source belongs to one of the listed source categories.

The final definition change we are proposing in this action is for ''fugitive emissions.'' For this term, we propose to add subparagraphs to summarize how fugitive emissions are to be addressed in each section and to refer the reader to the relevant provisions. We believe that the added subparagraphs will aid understanding of our intentions regarding fugitive emissions. These revisions are proposed for §§ 51.165(a)(1)(ix), 51.166(b)(20), and 52.21(b)(20).

The December 2002 NSR Improvement rulemaking added provisions to the major NSR regulations to clarify the two-step process for determining whether a physical or operational change is a major modification. Step 1 is the evaluation of the proposed change to determine whether it will cause a significant increase in emissions of a regulated NSR pollutant. If so, the source goes on to Step 2, which is a ''netting analysis'' to determine whether the change will result in a significant net emissions increase when taken together with any contemporaneous, creditable emissions increases or decreases that have occurred at the source. In this action we are proposing revisions to the provisions for Step 1 to clarify that fugitive emissions (to the extent quantifiable) are only included for listed emissions units and source categories. (Clarifications for Step 2 are handled in the proposed revisions to the definitions that are discussed above.) The proposed revision appears in §§ 51.165(a)(2)(ii)(B), 51.166(a)(7)(iv)(*b*), and 52.21(a)(2)(iv)(*b*).

The December 2002 NSR Improvement rulemaking also added provisions for monitoring and reporting the emissions that actually occur after a physical or operational change in cases where the change was determined, prior to construction, not to be a major modification. We are proposing minor revisions to these provisions to be explicit that fugitive emissions (to the extent quantifiable) need only be monitored and reported if the emissions unit or major stationary source in question is on the section 302(j) list. This revision provides for consistent treatment of fugitive emissions before and after the physical or operational change. The proposed revision affects §§ 51.165(a)(6)(iii) and (iv), 51.166(r)(6)(iii) and (iv), and 52.21(r)(6)(iii) and (iv).

Finally, we are proposing to delete a paragraph in each of the major NSR regulations that is no longer necessary. These were the original paragraphs placed in the rules to implement section 302(j) of the Act. However, after the definition of ''major stationary source'' was revised to include the section 302(j) list, and we finalized our policy (proposed to be reversed by this action) that fugitive emissions must be counted for all source categories in major modification determinations, these paragraphs tended to confuse the issue. With our proposal to make uniform the approach to fugitive emissions for major source and major modification determinations, these paragraphs have become completely unnecessary. Accordingly, in this action we propose to remove and reserve these paragraphs, §§ 51.165(a)(4), 51.166(i)(1)(ii), and 52.21(i)(vii).

C. What is the effect of this proposed action on the minor NSR program?

Major NSR programs are very similar across the United States, prescribed as they are by the Act and the implementing federal regulations. In contrast, State and local minor NSR programs are subject only to general requirements and, as a consequence, may vary significantly from area to area.[4] As a result, we do not know with certainty how such programs typically address fugitive emissions in minor NSR permitting. We request comment on this topic. How do existing State and local minor NSR programs address fugitive emissions? Do these programs clearly specify how fugitive emissions are to be considered for all aspects of the program (e.g., applicability, control technology requirements, impacts analysis, etc.)?

We believe that it is important for minor NSR programs to be clear regarding the treatment of fugitive emissions in all areas of the program. This will afford all sources consistent treatment and a ''level playing field.'' In addition, a common understanding of program requirements from the outset is important to avoid controversy and wasted resources during the permitting process. In light of the importance of clear requirements, we propose in this action that each implementation plan as a minimum element must be explicit in specifying how fugitive emissions are to be accounted for in all aspects of the minor NSR program.

We recently proposed minor NSR and nonattainment major NSR regulations for sources in those areas of Indian country where tribes do not have an EPA-approved implementation plan. (*See* 71 FR 48703.) We proposed in the minor NSR rule to require minor sources to include fugitive emissions to the extent quantifiable for applicability purposes for all sources, or include them only for source categories listed pursuant to section 302(j), or exclude them for all sources. In the final tribal minor NSR rule, we will adopt one of these proposed approaches. Since we

[4] There are currently no approved tribal minor NSR programs.

will be explicitly addressing fugitive emissions in the final minor NSR rule in Indian country, we will be acting consistently with the approach for minor NSR programs that we are proposing in this action.

We solicit comment on all aspects of our proposal regarding minor NSR. We also solicit comment on whether we should include rule language in 40 CFR 51.160 (for example, at § 51.160(e)) to require State, local, and tribal minor NSR programs to directly address fugitive emissions in minor NSR rules.

D. What is the rationale for this action?

1. The Newmont Petition

The thrust of Newmont's petition for reconsideration is twofold:

- The EPA did not comply with the requirements of section 302(j) of the Act when we included fugitive emissions in the definitions of ''baseline actual emissions'' and ''projected actual emissions'' for purposes of determining whether a change at a facility constitutes a ''major modification.''
- The EPA did not provide notice or an opportunity for comment on this approach, since these definitions were not proposed in the 1996 proposed major NSR revisions (*see* 61 FR 38250, July 23, 1996).

As we noted in the 1984 and 1989 **Federal Register** notices where we proposed and finalized the interpretive ruling that established our existing approach to fugitive emissions for major modifications, the language of the Act does not resolve the issue of whether the fugitive emissions provisions of section 302(j) were intended by Congress to apply to major modifications as well as major sources. On its face, section 302(j) mandates rulemaking only for determining whether a new source is to be considered a ''major stationary source,'' and does not explicitly address major modifications. Neither does the definition of ''modification'' in section 111(a)(4) address the issue. As discussed above, in our 1989 notice we also noted that interpreting section 302(j) to exempt fugitive emissions from modification calculations ran counter to our longstanding practice, and reasoned that if Congress meant the 302(j) rulemaking provision to cover major modifications, it would have said so. We believe this interpretation remains a permissible construction of the statute, and that since the time we finalized the interpretive ruling in 1989, we required that fugitive emissions be included in major modification determinations. For these reasons, we disagree with petition on both counts.

We now believe, however, that the absence of reference to ''major modification'' in section 302(j) simply does not dispose of the issue. For PSD at least, Congress only added major modifications to the program in ''technical and conforming amendments'' after enacting the 1977 Clean Air Act Amendments and even as to nonattainment major NSR, defined ''modification'' only by cross-reference. Similarly, the legislative history is scant; Congress simply adverted to its desire to ''conform [the PSD definition of construction] to usage in other parts of the Act.'' (*See* 123 Cong. Rec. 36331 (Nov. 1, 1977).) We cannot conclude from the statutory text or the legislative history what Congress explicitly intended on this point; the evidence is simply too ambiguous. Accordingly, we believe that we continue to have discretion under the second prong of *Chevron, USA* v. *NRDC,* 467 U.S. 837, 842–43 (1984), to adopt ''a permissible construction of the statute.''

2. Proposed Actions

We believe that Section 302(j) evinces, at a minimum, an intent by Congress to require a special look at fugitive emissions for purposes of calculating a source's emissions. The statute is silent or ambiguous on the applicability of section 302(j) to the question of whether a physical or operational change is a modification. That is, we do not believe that the Act precludes us from applying the section 302(j) restrictions on counting fugitive emissions to the methodology for determining whether a physical and operation change constitutes a major modification. Moreover, although no authoritative conference or committee report addresses the issue of how fugitive emissions should be covered, there are numerous examples in committee hearings on the bills that led up to the 1977 Amendments of industry testimony to the effect that in many cases fugitive emissions would not be susceptible to control or would be exceedingly costly to control, or would be infeasible to measure. *See e.g* Hearings on Clean Air Act Amendments of 1977, Subcomm. on Health and the Environment, House Comm. on Interstate and Foreign Commerce, March 11, 1977, H.R. Rep. No. 95–59 at 1327 (statement of Earl Mallick, American Iron and Steel Inst.) (high costs of controlling fugitive emissions); id., Part 2, March 18, 1975, H.R. Rept. No. 94–25 at 690 (testimony of Fred Tucker, National Steel Corp.) (impossible to comply with state implementation plan limits on fugitive emissions); Hearings on Implementation of the Clean Air Act—1975, Subcomm. on Environmental Pollution, Sen. Comm. on Public Works, Apr. 22, 1975, S. Rept. No. 94–H10, Pt. 1 at 757 (statement of David M. Anderson, Bethlehem Steel Corp. to effect that control of fugitive emissions would be enormously costly but would have ''a net negative environmental impact''); id., Pt. 2, App. A at 2026 (statement of Cast Metals Federation) (fugitive emissions control at nonferrous metals smelters extremely costly with adverse energy impacts and no improvement in air quality). But *see* id., App. B at 2232–33 (EPA written responses to Committee questions) (for some industries fugitive control can be critical to attainment of standards).

In light of this legislative history, it is reasonable to read section 302(j) of the Act as reflecting a decision by Congress that it simply did not know enough to make the critical decisions regarding the extent to which fugitive emissions should be included in threshold applicability determinations both for purpose of determining whether a source is a major source, and whether a physical or operational change constitutes a modification. Rather, we believe Congress assigned the resolution of these complex issues to EPA. As noted above, EPA's earliest, most nearly contemporaneous construction of the statute in the 1980 rules took it for granted that the treatment of fugitive emissions for purposes of modification calculations would be addressed identically with the same issue for major source determinations.

For policy and programmatic reasons, we now believe that it is better to adopt a uniform approach to these threshold determinations. Analyzing 302(j) functionally, we conclude that it is reasonable to interpret section 302(j) to require EPA to conduct rulemaking to identify source categories that should include their fugitive emissions for all threshold applicability purposes. The concerns appearing in the legislative history relating to fugitive emissions are the same when evaluating whether a project at an existing source is a modification as they are when evaluating whether a source is a major source. Our current, differentiated approach can lead to incongruous results. For example, at an existing source in a source category not on the section 302(j) list that is undergoing a physical or operational change, the fugitive emissions from the source would not be counted in determining whether the source is a major source (the first major NSR applicability criterion), yet the increase in fugitive emissions resulting from the change

would be counted to determine whether the project qualifies as a major modification (the second criterion). Furthermore, if an existing major source in a source category not listed under section 302(j) engages in a physical or operational change that creates a significant volume of fugitive emissions, consideration of its fugitive emissions when calculating whether the change constitutes a modification may be a crucial factor in the determination. Thus, we believe our assertion in the 1984 notice (*see* 49 FR 43213–14) that the interpretation that we proposed then ''likely would not impose new regulatory burdens'' was not correct; our interpretation proposed in 1984 and finalized in 1989 imposed a new regulatory burden on major sources in a source category not on the section 302(j) list, since their fugitive emissions would be counted in determining whether they had made a change constituting a modification.

In summary, the proposed rules that we are publishing in this action eliminate the existing requirement that fugitive emissions be counted in major modification determinations for all source categories, whether or not listed pursuant to section 302(j). We are proposing that only source categories that we list pursuant to section 302(j) would be required to count fugitive emissions when evaluating whether a project is a major modification. We solicit comment on all aspects of this proposed approach and our rationale for it.

IV. When would these proposed changes take effect in the Federal PSD Program, and Must States revise their State Implementation Plans (SIPs) to incorporate this proposed action?

We propose that these changes take effect in the Federal PSD permit program within 60 days from when we promulgate the final rule. This means that we would apply these rules in any area without a SIP-approved PSD Program for which we are the reviewing authority, or for which we delegated our authority to issues permits to a State, local or tribal reviewing authority.

We also propose to establish these proposed requirements as minimum program elements of the PSD and nonattainment NSR programs. Notwithstanding this requirement, it may not be necessary for a State or local authority to revise its SIP begin to implement these changes.[5] Some State or local authorities may be able to adopt these changes through a change in interpretation of existing language in the approved SIP without the need to revise the SIP.

For any State or local authority that can implement the changes without revising its approved SIP, we propose that the changes become effective when the reviewing authority publicly announces that it accepts these changes by interpretation. Although no SIP change may be necessary in certain areas that adopt these changes by interpretation, we encourage State and local authorities in such areas to make such SIP changes in the future to enhance the clarity of the existing rules.

For areas that would revise their SIPs to adopt these changes, the changes would not be effective in such areas until we approve the SIP revision. We propose to require that such State and local authorities submit revisions to SIPs to reflect requirements that are at least as stringent as the minimum program elements we adopt in a final rule within 3 years after the rule's promulgation date. We also propose that State and local authorities may maintain NSR program elements that have the effect of making their regulations more stringent than the final rules, but that a State and local authority submit an explanation for that conclusion to EPA by the SIP submission deadline.

We also propose to require that State, local, and subject tribal authorities explicitly specify in their implementation plans how the reviewing authority will treat fugitive emissions in all aspects of their minor NSR program. Section 110(a)(2)(C) of the Act provides us with authority to specify the inclusion of this minimum element in State, local, and tribal minor NSR programs. We further propose to require State, local, and subject tribal authorities to submit this information within 3 years from the promulgation date of the final rule.

We acknowledge that some States and localities may need to regulate additional fugitive emissions under the implementation plan for attainment purposes. We do not intend to preclude such regulation in either major or minor NSR where necessary to achieve the purposes of the Act. Our proposed action would not prohibit a reviewing authority from requiring control of fugitive emissions or modeling of quantifiable fugitive emissions, regardless of source category, where such measures might be considered necessary for compliance with a NAAQS or for other environmental protection purposes.

We solicit comment on this proposal for revising implementation plans and specifically on the ability of State, local, and tribal authorities to implement this approach through interpretation, without rulemaking.

V. Guiding Principles for Determining Fugitive Emissions

In our major NSR and Title V permit rules, ''fugitive emissions'' means ''those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.'' In practice, we interpret the phrase ''could not reasonably pass'' by determining whether such emissions can be reasonably collected or captured (e.g. enclosures or hoods). Under this interpretation, it is axiomatic that any emissions actually collected or captured by the source are non-fugitive emissions. The answer is less clear when the source is not currently collecting or capturing the emissions. In these circumstances, we make case-by-case determinations as to whether a source could reasonably collect or capture such emissions.

Our past determinations articulate a number of principles we use in making these case-by-case determinations, though none may express the entirety of our policy. Moreover, some EPA memoranda, when viewed in isolation, may appear to provide divergent positions. Accordingly, we rearticulate our guiding principles in making these case-by-case determinations, and expand the explanation of these principles to enhance the understanding of the regulated community. Specifically, EPA proposes to use the following guiding principles in determining whether emissions qualify as fugitive:

1. Determining which emissions could ''reasonably pass'' is a case-by-case decision based on whether or not the emissions can be reasonably collected or captured.

2. Because another similar facility collects, captures, or controls emissions does not mean that it is reasonable for others to do the same, but it is a factor in each consideration.

(a) If a source already collects or captures and discharges the emissions through a stack, chimney, vent or other functionally equivalent opening, then such emissions are non-fugitive at that source.

(b) If we establish a national emissions standard or regulation that requires some sources in the source category to collect or capture and control such emissions, then this weighs heavily towards a finding that the emissions are non-fugitive at other sources in this category; and,

[5] Currently, there are no tribal permitting agencies with an approved TIP to implement the major NSR permitting program.

(c) The more common collection or capture of such emissions is by other similar sources the more heavily this factor should weigh toward a finding that collection is reasonable.

3. The cost to collect or capture emissions is a factor when considering what is ''reasonable.''

(a) The combined costs to collect or capture and control emissions can be used as an alternative measure for the costs of emissions capture or collection alone in the case-by-case analysis;

(b) The surrounding air quality (e.g., nonattainment areas) is a consideration when deciding if costs (collection, capture, control) are reasonable, and,

(c) If it is not technically or economically feasible to control the emissions, then collection or capture of such emissions may not be reasonable.

We believe that the three overarching principles represent our existing policy on defining fugitive emissions. Moreover, we believe that these proposed expansions on these basic concepts represent a reasonable interpretation of our existing regulatory language to be applied to future fugitive emission determinations. Accordingly, we are not proposing specific changes to the existing regulatory language to accommodate this proposal. Nonetheless, we request comment on the specific ideas expressed in our expanded explanations, and on whether this approach should be implemented under the existing regulatory language, or whether regulatory changes to the specific definition of fugitive emissions are needed or desired to implement this proposal.

Our second principle relates to a concept we established in one of our initial guidance memorandums defining fugitive emissions. Specifically, we indicated that a consideration in the case-by-case analysis is whether emissions are ''ordinarily'' collected or captured by other sources in the source category. In subsequent memoranda, we interchanged the term ''ordinarily'' for ''commonly.''[6] In a more recent memorandum, we describe this element in terms of a presumption.[7] We view these presumptions as no more than suggesting a starting point for the case-by-case analysis.[8] These guiding principles recognize that our existing guidance does not establish a non-rebuttable presumption, and does not attempt to establish a specific methodology States must use in conducting the case-by-case analysis. However, the expanded principles explain how States should weigh collection or capture of emissions by other similar sources in that analysis.

In conducting this analysis, we expect that a reviewing authority could reach different conclusions depending on whether it conducts the analysis for a new or existing emissions unit. For example, costs and technical feasibility may outweigh the consideration that other sources in the source category are subject to a national emissions standard or regulation as outlined in criteria 2(b) above, and a reviewing authority could conclude that such emissions are fugitive for an existing source even when they would find that they are non-fugitive at a new source.

Although costs have always been a consideration in determining whether emissions are fugitive, we historically focused on the cost of collection or capture and not the cost of control. Notwithstanding our past practice, we believe that it is reasonable to consider the cost and economic feasibility of control in determining whether emissions can be reasonably captured or collected. For example, the cost of controlling emissions may be helpful in the analysis if cost data on collection, capture and control in the aggregate is more available or more easily calculated than cost data on collection or capture alone.

Thus, we propose that the *reviewing authority* may consider the reasonableness of the combined costs of capture or collection and control as an alternative to considering only the cost of collection or capture. Notably, however, we expect permitting authorities to find higher costs reasonable when considering combined costs as an alternative compared to what would be reasonable if considering capture or collection costs alone. We also believe that accounting for the differences in attainment status is appropriate, because permitting authorities tend to accept higher collection, capture, and control costs as reasonable in areas where air quality problems are more severe.

Finally, as technology improved, the technical feasibility to collect or capture virtually any source of emissions likewise evolved. For example, it is technically feasible to build a large capture device to collect virtually any type of process emissions. Yet, these captured emissions may contain air pollutants in such small concentrations that there is no technically or economically feasible method to control the emissions once captured. Yet, under a strict interpretation of whether emissions are ''reasonably collected,'' we could find that such emissions are non-fugitive because they are reasonably collectable. Nonetheless this would fail to provide meaning to the term ''fugitive emissions'' as intended by Congress.

As expressed by the *Alabama Power* court,

> In the general definitional section of the Act, section 302(j), Congress employed the term ''fugitive emissions'' to refer to one manner of emission of any air pollutant. As commonly understood, emissions, from an ''industrial point source'' include emissions emanating from a stack or from a chimney. By contrast, ''fugitive emissions'' are emissions from a facility that escape from other than from a point source.''[9]

In our proposed 1979 major NSR rule, we followed this common understanding of the term ''fugitive emissions.'' When we finalized our rule in 1980, we changed the definition of fugitive emissions from those emissions ''which do not reasonably pass'' through a stack or vent, to those that ''could not reasonably pass'' to avoid creating a disincentive for a source to collect and control emissions when technically and economically feasible. It was not our intent to interpret the term in a way that could eliminate the distinction between fugitive and non-fugitive emissions. Accordingly, we believe that when the only reason to collect or capture such emissions would be to control the emissions, and there is no technical or economically feasible means to control the emissions, then collecting the emissions is nonsensical, and thus, may not be reasonable.

Although this aspect of our principles may expand on how we historically considered costs in a case-by-case analysis, we believe that this interpretation remains fully consistent with Congress' intent in distinguishing fugitive emissions from non-fugitive emissions in the Act. The promulgated

[6] *Compare* Memo from Gerald A. Emison, Director, Office of Air Quality Planning and Standards to David P. Howekamp, Director, Air Management Division, Region IX, *Emissions from Landfills* (Oct. 6, 1987) (landfills are not ordinarily constructed with gas collection systems) *to* Memo from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Director, Air, Pesticides and Toxics Management Division, Region I and V, *et al., Classification of Emissions from Landfills for NSR Applicability Purposes* (Oct. 21, 1994) (* * * use of systems has become more common).

[7] *See e.g.* Memo from Thomas C. Curran, Director, Information Transfer and Program Integration Division, to Judith M. Katz, Director, Air Protection Division, *Interpretation of the Definition of Fugitive Emissions in Parts 70 and 71* (Feb. 10, 1999).

[8] Recent case law suggests that the Agencies posses a limited ability to establish presumptions through guidance. *See e.g.* General Elec. Co. v. EPA, 290 F.3d 377 (D.C. Cir. 2002) (document stating without qualification that a certain value may be used to satisfy regulation was substantive rule; created norm or safe harbor that private parties can rely on).

[9] *Alabama Power* v. *Costle*, 636 F.2d at 368.

302(j) list includes the source categories listed in section 169(1) of the Act, which is the definition of ''major emitting facility'' for purposes of PSD. In the preamble to the 1980 major NSR rules, we noted that the *Alabama Power* court stated that Congress' intention in establishing the list of source categories in section 169(1) of the Act was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air. 45 FR 52691. Thus, the purpose of the fugitive emissions inquiry is to determine which emissions should count for determining source size with a view towards requiring large sources to install pollution controls. If the emissions cannot be controlled, then it is reasonable to consider this factor in determining whether such emissions can be ''reasonably'' collected or captured.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action.'' This action is likely to raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* We are not promulgating any new paperwork requirements (e.g., monitoring, reporting, recordkeeping) as part of this proposed action. The OMB has previously approved the information collection requirements contained in the existing regulations (40 CFR parts 51 and 52) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and has assigned OMB control number 2060–0003, EPA ICR number 1230.17. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Avenue, NW., Washington, DC 20460 or by calling (202) 566–1672.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this proposed action on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

A Regulatory Flexibility Act Screening Analysis (RFASA) developed as part of a 1994 draft Regulatory Impact Analysis (RIA) and incorporated into the September 1995 ICR renewal analysis, showed that the changes to the NSR program due to the 1990 Clean Air Act amendments would not have an adverse impact on small entities. This analysis encompassed the entire universe of applicable major sources that were likely to also be small businesses (approximately 50 ''small business'' major sources). Because the administrative burden of the NSR program is the primary source of the NSR program's regulatory costs, the analysis estimated a negligible ''cost to sales'' (regulatory cost divided by the business category mean revenue) ratio for this source group. Currently, and as reported in the current ICR, there is no economic basis for a different conclusion.

We believe the proposed rule changes in this proposed rule will reduce the regulatory burden associated with the major NSR program for sources, including small businesses, that are not included in the section 302(j) list. The proposed rule will not affect sources, including small businesses, that are included in the section 302(j) list; regulatory requirements for these sources will be unchanged.

The proposed rule changes will improve the clarity of the requirements for unlisted major sources, and may prevent some physical or operational changes at such sources from qualifying as major modifications when they would have been major modifications under the currently existing rules. Thus, the effect of the proposed rule changes will be to improve the operational flexibility of unlisted major sources. We have therefore concluded that this proposed action will relieve regulatory burden for all affected small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan.

The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. The change in this rule is expected to result in a small, one-time increase in the burden imposed upon reviewing authorities in order for the revised rules to be included in the State's SIP (except in States that determine that they can implement the approach in this proposed action without a SIP revision). In addition, we believe the proposed rules changes will actually reduce the regulatory burden associated with the major NSR program by improving the operational flexibility of owners and operators (with an attendant decrease in the number of major modification applications that reviewing authorities must process). Thus, this proposed action is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments, for the same reasons stated above.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. In addition, we believe the proposed rule changes will actually reduce the regulatory burden associated with the major NSR program by improving the operational flexibility of owners and operators, with an attendant decrease in the number of major modification applications that reviewing authorities must process. Thus, Executive Order 13132 does not apply to this rule. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175.

These proposed changes will benefit reviewing authorities and the regulated community, including any major source owned by a tribal government or located in or near tribal land, by providing increased certainty as to when to count fugitive emissions within the NSR program. In addition, some physical or operational changes that would be considered major modifications under the existing rules may not be treated as such under the revised rules, providing greater operational flexibility to sources.

We anticipate that the changes in this proposed rule will result in a small decrease in the burden imposed upon reviewing authorities. These revisions will ultimately provide greater operational flexibility to permitted sources, which will in turn reduce the overall burden of the program on permitting authorities by reducing the number of required major NSR permits for major modifications. No tribal government currently has an approved tribal implementation plan (TIP) under the Act to implement the NSR program; therefore the Federal government is currently the NSR reviewing authority in Indian country. Thus, tribal governments should not experience added burden from this proposed rule, nor should their laws be affected with respect to implementation of this rule. Thus, Executive Order 13175 does not apply to this rule.

EPA specifically solicits additional comment on this proposed rule from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866; and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This proposed rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. We believe the proposed rule changes may actually reduce the regulatory burden associated with the major NSR program, and may therefore have a positive effect on the supply, distribution, or use of energy, by improving the operational flexibility of owners and operators.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical.

Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

VII. Statutory Authority

The statutory authority for this action is provided by sections 101, 107, 110, and 301 of the Act as amended (42 U.S.C. 7401, 7407, 7410, and 7601).

List of Subjects

40 CFR Part 51

Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Transportation, Volatile organic compounds, Fugitive emissions.

40 CFR Part 52

Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Transportation, Volatile organic compounds, Fugitive emissions.

Dated: November 5, 2007.

Stephen L. Johnson,

Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 51—[AMENDED]

1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q

Subpart I—[Amended]

2. Section 51.165 is amended as follows:

a. By adding paragraph (a)(1)(v)(G).

b. By removing the period at the end of paragraph (a)(1)(vi)(C)(*3*) and adding ''; and'' in its place.

c. By adding paragraph (a)(1)(vi)(C)(*4*).

d. By revising paragraph (a)(1)(ix).

e. By revising paragraphs (a)(1)(xxviii)(B)(*2*) and (a)(1)(xxviii)(B)(*4*).

f. By revising paragraphs (a)(1)(xxxv)(A)(*1*), (a)(1)(xxxv)(B)(*1*), (a)(1)(xxxv)(C), and (a)(1)(xxxv)(D).

g. By revising paragraph (a)(2)(ii)(B).

h. By removing and reserving paragraph (a)(4).

i. By revising paragraphs (a)(6)(iii) and (a)(6)(iv).

j. By revising paragraph (f)(4)(i)(D).

The revisions and additions read as follows:

§ 51.165 Permit requirements.

(a) * * *

(1) * * *

(v) * * *

(G) Fugitive emissions shall not be included in determining for any of the purposes of this section whether a physical change in or change in the method of operation of a major stationary source is a major modification, unless the source belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section.

(vi) * * *

(C) * * *

(*4*) For an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or the major stationary source belongs to one of the listed source categories.

* * * * *

(ix) *Fugitive emissions* means those emissions which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening. Fugitive emissions, to the extent quantifiable, are addressed as follows for the purposes of this section:

(A) In determining whether a stationary source or modification is major, fugitive emissions from an emissions unit are included only if the unit or stationary source belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section. (See paragraphs (a)(1)(iv)(C) and (a)(1)(v)(G) of this section.)

(B) For purposes of determining the net emissions increase associated with a project, an increase or decrease in fugitive emissions is creditable only if it occurs at an emissions unit that belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or the major stationary source belongs to one of the listed source categories. (See paragraph (a)(1)(vi)(C)(*4*) of this section.)

(C) For purposes of determining the projected actual emissions of an emissions unit after a project, fugitive emissions are included only if the emissions unit belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or is located at a major stationary source that belongs to one of the listed source categories. (See paragraph (a)(1)(xxviii)(B)(*2*) of this section.

(D) For purposes of determining the baseline actual emissions of an emissions unit, fugitive emissions are included only if the emissions unit belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or is located at a major stationary source that belongs to one of the listed source categories, except that, for a PAL, fugitive emissions shall be included regardless of the source category. (See paragraphs (a)(1)(xxx)(A)(*1*), (a)(1)(xxx)(B)(*1*), (a)(1)(xxx)(C), and (a)(1)(xxx)(D) of this section.)

(E) In calculating whether a project will cause a significant emissions increase, fugitive emissions are included only for those emissions units that belong to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section, or for all emissions units if the major stationary source belongs to one of the listed source categories. (See paragraph (a)(2)(ii)(B) of this section.)

(F) For purposes of monitoring and reporting emissions from a project after normal operations have been resumed, fugitive emissions are included only for those emissions units that belong to one

of the source categories listed in paragraph (a)(1)(iv)(C) of this section, or for all emissions units if the major stationary source belongs to one of the listed source categories. (See paragraphs (a)(6)(iii) and (iv) of this section.)

(G) For all other purposes of this section, fugitive emissions are treated in the same manner as other, non-fugitive emissions. This includes, but is not limited to, the treatment of fugitive emissions for offsets (see paragraph (a)(3) of this section) and for PALs (see paragraph (f)(4)(i)(D) of this section).

* * * * *

(xxviii) * * *

(B) * * *

(*2*) Shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable); and

* * * * *

(*4*) In lieu of using the method set out in paragraphs (a)(1)(xxviii)(B)(*1*) through (*3*) of this section, may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph (a)(1)(iii) of this section. For this purpose, if the emissions unit belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or is located at a major stationary source that belongs to one of the listed source categories, the unit's potential to emit shall include fugitive emissions (to the extent quantifiable).

* * * * *

(xxxv) * * *

(A) * * *

(*1*) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

* * * * *

(B) * * *

(*1*) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

* * * * *

(C) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit. In the latter case, fugitive emissions, to the extent quantifiable, shall be included only if the emissions unit belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or is located at a major stationary source that belongs to one of the listed source categories.

(D) For a PAL for a major stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in paragraph (a)(1)(xxxv)(A) of this section, for other existing emissions units in accordance with the procedures contained in paragraph (a)(1)(xxxv)(B) of this section, and for a new emissions unit in accordance with the procedures contained in paragraph (a)(1)(xxxv)(C) of this section, except that fugitive emissions (to the extent quantifiable) shall be included regardless of the source category.

* * * * *

(2) * * *

(ii) * * *

(B) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (*i.e.*, the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(ii)(C) through (F) of this section. For these calculations, fugitive emissions (to the extent quantifiable) are included only if the emissions unit belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or the major stationary source belongs to one of the listed source categories. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (*i.e.*, the second step in the process) is contained in the definition in paragraph (a)(1)(vi) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

* * * * *

(4) [Reserved]

* * * * *

(6) * * *

(iii) The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions units identified in paragraph (a)(6)(i)(B) of this section; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of 5 years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit of that regulated NSR pollutant at such emissions unit. For purposes of this paragraph (a)(6)(iii), fugitive emissions (to the extent quantifiable) shall be monitored if the emissions unit belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or the major stationary source belongs to one of the listed source categories.

(iv) If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the reviewing authority within 60 days after the end of each year during which records must be generated under paragraph (a)(6)(iii) of this section setting out the unit's annual emissions, as monitored pursuant to paragraph (a)(6)(iii) of this section, during the year that preceded submission of the report.

* * * * *

(f) * * *

(4) * * *

(i) * * *

(D) The PAL shall include fugitive emissions, to the extent quantifiable, from all emissions units that emit or have the potential to emit the PAL pollutant at the major stationary source, regardless of whether the emissions unit or major stationary source belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section.

* * * * *

3. Section 51.166 is amended as follows:

a. By revising paragraph (a)(7)(iv)(*b*).

b. By adding paragraph (b)(2)(v).

c. By removing the period at the end of paragraph (b)(3)(iii)(*c*) and adding ''; and'' in its place.

d. By adding paragraph (b)(3)(iii)(*d*).

e. By revising paragraph (b)(20).

f. By revising paragraphs (b)(40)(ii)(*b*) and (b)(40)(ii)(*d*).

g. By revising paragraphs (b)(47)(i)(*a*), (b)(47)(ii)(*a*), (b)(47)(iii), and (b)(47)(iv).

h. By removing and reserving paragraph (i)(1)(ii).

i. By revising paragraphs (r)(6)(iii) and (r)(6)(iv).

j. By revising paragraph (w)(4)(i)(*d*).

The revisions and additions read as follows:

§ 51.166 Prevention of significant deterioration of air quality.

(a) * * *

(7) * * *

(iv) * * *

(*b*) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (*i.e.*, the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(7)(iv)(*c*) through (*f*) of this section. For these calculations, fugitive emissions (to the extent quantifiable) are included only if the emissions unit belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or the major stationary source belongs to one of the listed source categories. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (*i.e.*, the second step in the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

* * * * *

(b) * * *

(2) * * *

(v) Fugitive emissions shall not be included in determining for any of the purposes of this section whether a physical change in or change in the method of operation of a major stationary source is a major modification, unless the source belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section.

(3) * * *

(iii) * * *

(*d*) For an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or the major stationary source belongs to one of the listed source categories.

* * * * *

(20) *Fugitive emissions* means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening. Fugitive emissions, to the extent quantifiable, are addressed as follows for the purposes of this section:

(i) In calculating whether a project will cause a significant emissions increase, fugitive emissions are included only for those emissions units that belong to one of the source categories listed in paragraph (b)(1)(iii) of this section, or for all emissions units if the major stationary source belongs to one of the listed source categories. (See paragraph (a)(7)(iv)(*b*) of this section.)

(ii) In determining whether a stationary source or modification is major, fugitive emissions from an emissions unit are included only if the unit or stationary source belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section. (See paragraphs (b)(1)(iii) and (b)(2)(v) of this section.)

(iii) For purposes of determining the net emissions increase associated with a project, an increase or decrease in fugitive emissions is creditable only if it occurs at an emissions unit that belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or the major stationary source belongs to one of the listed source categories. (See paragraph (b)(3)(iii)(*d*) of this section.)

(iv) For purposes of determining the projected actual emissions of an emissions unit after a project, fugitive emissions are included only if the emissions unit belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or is located at a major stationary source that belongs to one of the listed source categories. (See paragraph (b)(40)(ii)(*b*) and (*d*) of this section.

(v) For purposes of determining the baseline actual emissions of an emissions unit, fugitive emissions are included only if the emissions unit belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or is located at a major stationary source that belongs to one of the listed source categories, except that, for a PAL, fugitive emissions shall be included regardless of the source category. (See paragraphs (b)(47)(i)(*a*), (b)(47)(ii)(*a*), (b)(47)(iii), and (b)(47)(iv) of this section.)

(vi) For purposes of monitoring and reporting emissions from a project after normal operations have been resumed, fugitive emissions are included only for those emissions units that belong to one of the source categories listed in paragraph (b)(1)(iii) of this section, or for all emissions units if the major stationary source belongs to one of the listed source categories. (See paragraphs (r)(6)(iii) and (iv) of this section.)

(vii) For all other purposes of this section, fugitive emissions are treated in the same manner as other, non-fugitive emissions. This includes, but is not limited to, the treatment of fugitive emissions for the application of best available control technology (see paragraph (j) of this section), source impact analysis (see paragraph (k) of this section), additional impact analyses (see paragraph (o) of this section), and PALs (see paragraph (w)(4)(i)(*d*) of this section).

* * * * *

(40) * * *

(ii) * * *

(*b*) Shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable); and

* * * * *

(*d*) In lieu of using the method set out in paragraphs (b)(40)(ii)(*a*) through (*c*) of this section, may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph (b)(4) of this section. For this purpose, if the emissions unit belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or is located at a major stationary source that belongs to one of the listed source categories, the unit's potential to emit shall include fugitive emissions (to the extent quantifiable).

* * * * *

(47) * * *

(i) * * *

(*a*) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

* * * * *

(ii) * * *

(*a*) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

* * * * *

(iii) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit. In the latter case, fugitive emissions, to the extent quantifiable, shall be included only if the emissions unit belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or is located at a major stationary source that belongs to one of the listed source categories.

(iv) For a PAL for a major stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in paragraph (b)(47)(i) of this section, for other existing emissions units in accordance with the procedures contained in paragraph (b)(47)(ii) of this section, and for a new emissions unit in accordance with the procedures contained in paragraph (b)(47)(iii) of this section, except that fugitive emissions (to the extent quantifiable) shall be included regardless of the source category.

* * * * *

(i) * * *

(1) * * *

(ii) [Reserved]

* * * * *

(r) * * *

(6) * * *

(iii) The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions unit identified in paragraph (r)(6)(i)(*b*) of this section; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of 5 years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit of that regulated NSR pollutant at such emissions unit. For purposes of this paragraph (r)(6)(iii), fugitive emissions (to the extent quantifiable) shall be monitored if the emissions unit belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or the major stationary source belongs to one of the listed source categories.

(iv) If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the reviewing authority within 60 days after the end of each year during which records must be generated under paragraph (r)(6)(iii) of this section setting out the unit's annual emissions, as monitored pursuant to paragraph (r)(6)(iii) of this section, during the calendar year that preceded submission of the report.

* * * * *

(w) * * *

(4) * * *

(i) * * *

(*d*) The PAL shall include fugitive emissions, to the extent quantifiable, from all emissions units that emit or have the potential to emit the PAL pollutant at the major stationary source, regardless of whether the emissions unit or major stationary source belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section.

* * * * *

PART 52—[AMENDED]

4. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart A—[Amended]

5. Section 52.21 is amended as follows:

a. By revising paragraph (a)(2)(iv)(*b*).

b. By adding paragraph (b)(2)(v).

c. By removing the period at the end of paragraph (b)(3)(iii)(*b*) and adding ''; and'' in its place.

d. By adding paragraph (b)(3)(iii)(*c*).

e. By revising paragraph (b)(20).

f. By revising paragraphs (b)(41)(ii)(*b*) and (b)(41)(ii)(*d*).

g. By revising paragraphs (b)(48)(i)(*a*), (b)(48)(ii)(*a*), (b)(48)(iii), and (b)(48)(iv).

h. By removing and reserving paragraph (i)(1)(vii).

i. By revising paragraphs (r)(6)(iii) and (r)(6)(iv).

j. By revising paragraph (aa)(4)(i)(*d*).

The revisions and additions read as follows:

§ 52.21 Prevention of significant deterioration of air quality.

(a) * * *

(2) * * *

(iv) * * *

(*b*) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (*i.e.*, the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(iv)(*c*) through (*f*) of this section. For these calculations, fugitive emissions (to the extent quantifiable) are included only if the emissions unit belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or the major stationary source belongs to one of the listed source categories. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (*i.e.*, the second step in the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

* * * * *

(b) * * *

(2) * * *

(v) Fugitive emissions shall not be included in determining for any of the purposes of this section whether a physical change in or change in the method of operation of a major stationary source is a major modification, unless the source belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section.

(3) * * *

(iii) * * *

(*c*) For an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or the major stationary source belongs to one of the listed source categories.

* * * * *

(20) *Fugitive emissions* means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening. Fugitive emissions, to the extent quantifiable, are addressed as follows for the purposes of this section:

(i) In calculating whether a project will cause a significant emissions increase, fugitive emissions are included only for those emissions units that belong to one of the source categories listed in paragraph (b)(1)(iii) of this section, or for all emissions units if the major stationary source belongs to one of the listed source categories. (See paragraph (a)(2)(iv)(*b*) of this section.)

(ii) In determining whether a stationary source or modification is major, fugitive emissions from an emissions unit are included only if the unit or stationary source belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section. (See paragraphs (b)(1)(iii) and (b)(2)(v) of this section.)

(iii) For purposes of determining the net emissions increase associated with a project, an increase or decrease in fugitive emissions is creditable only if it occurs at an emissions unit that belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or the major stationary source belongs to one of the listed source categories. (See paragraph (b)(3)(iii)(*c*) of this section.)

(iv) For purposes of determining the projected actual emissions of an emissions unit after a project, fugitive emissions are included only if the emissions unit belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or is located at a major stationary source that belongs to one of the listed source categories. (See paragraph (b)(41)(ii)(*b*) and (*d*) of this section.

(v) For purposes of determining the baseline actual emissions of an

emissions unit, fugitive emissions are included only if the emissions unit belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or is located at a major stationary source that belongs to one of the listed source categories, except that, for a PAL, fugitive emissions shall be included regardless of the source category. (See paragraphs (b)(48)(i)(*a*), (b)(48)(ii)(*a*), (b)(48)(iii), and (b)(48)(iv) of this section.)

(vi) For purposes of monitoring and reporting emissions from a project after normal operations have been resumed, fugitive emissions are included only for those emissions units that belong to one of the source categories listed in paragraph (b)(1)(iii) of this section, or for all emissions units if the major stationary source belongs to one of the listed source categories. (See paragraphs (r)(6)(iii) and (iv) of this section.)

(vii) For all other purposes of this section, fugitive emissions are treated in the same manner as other, non-fugitive emissions. This includes, but is not limited to, the treatment of fugitive emissions for the application of best available control technology (see paragraph (j) of this section), source impact analysis (see paragraph (k) of this section), additional impact analyses (see paragraph (o) of this section), and PALs (see paragraph (aa)(4)(i)(*d*) of this section).

* * * * *

(41) * * *

(ii) * * *

(*b*) Shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable); and

* * * * *

(*d*) In lieu of using the method set out in paragraphs (b)(41)(ii)(*a*) through (*c*) of this section, may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph (b)(4) of this section. For this purpose, if the emissions unit belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or is located at a major stationary source that belongs to one of the listed source categories, the unit's potential to emit shall include fugitive emissions (to the extent quantifiable).

* * * * *

(48) * * *

(i) * * *

(*a*) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

* * * * *

(ii) * * *

(*a*) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or is located at a major stationary source that belongs to one of the listed source categories, shall include fugitive emissions (to the extent quantifiable).

* * * * *

(iii) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit. In the latter case, fugitive emissions, to the extent quantifiable, shall be included only if the emissions unit belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or is located at a major stationary source that belongs to one of the listed source categories.

(iv) For a PAL for a major stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in paragraph (b)(48)(i) of this section, for other existing emissions units in accordance with the procedures contained in paragraph (b)(48)(ii) of this section, and for a new emissions unit in accordance with the procedures contained in paragraph (b)(48)(iii) of this section, except that fugitive emissions (to the extent quantifiable) shall be included regardless of the source category.

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(i) * * *

(1) * * *

(vii) [Reserved]

* * * * *

(r) * * *

(6) * * *

(iii) The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions unit identified in paragraph (r)(6)(i)(*b*) of this section; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of 5 years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit of that regulated NSR pollutant at such emissions unit. For purposes of this paragraph (r)(6)(iii), fugitive emissions (to the extent quantifiable) shall be monitored if the emissions unit belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section or the major stationary source belongs to one of the listed source categories.

(iv) If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the Administrator within 60 days after the end of each year during which records must be generated under paragraph (r)(6)(iii) of this section setting out the unit's annual emissions, as monitored pursuant to paragraph (r)(6)(iii) of this section, during the calendar year that preceded submission of the report.

* * * * *

(aa) * * *

(4) * * *

(i) * * *

(*d*) The PAL shall include fugitive emissions, to the extent quantifiable, from all emissions units that emit or have the potential to emit the PAL pollutant at the major stationary source, regardless of whether the emissions unit or major stationary source belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section.

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[FR Doc. E7–22131 Filed 11–9–07; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 07–4312; MB Docket No. 07–220; RM–11403]

Radio Broadcasting Services; Ash Fork and Paulden, AZ

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document sets forth a proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's rules, 47 CFR 73.202(b). The Commission requests comment on a petition filed by Sierra H Broadcasting, Inc. (''Petitioner''). Petitioner proposes channel