ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

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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: Final rule.

SUMMARY: The EPA is finalizing revisions to the December 31, 2002 New Source Review (NSR) Improvement rules to change the requirements of the major NSR programs regarding the treatment of fugitive emissions. Specifically, this final rule requires that fugitive emissions be included 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 Clean Air Act (Act). Also, this action elaborates on guiding principles for determining fugitive emissions for purposes of NSR and title V permitting.

DATES: This final rule is effective January 20, 2009.

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SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected by this 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. How Is This Preamble Organized?

The information presented in this preamble is organized as follows:

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 appendix S to part 51.

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 source 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 review under 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.

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 they are emitted from 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 category that the emission source belongs to. 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 our November 13, 2007 (72 FR 63850, November 13, 2007) notice we proposed to modify this aspect of the current NSR rules to take a consistent approach as to the inclusion of fugitive emissions in threshold major source and major 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 final 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

[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.

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, August 7, 1980.) 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 major NSR applicability for those source categories. (Again, *see* 45 FR 52691, August 7, 1980.) 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 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, August 7, 1980.) 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, August 7, 1980.)

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(i)(4)(vii) as promulgated in 1980 at 45 FR 52739, August 7, 1980, 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, August 7, 1980.) A similar exclusion applied in the nonattainment major NSR context. (*See* § 51.18(j)(4), 45 FR 52746, August 7, 1980.) 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, October 26, 1984) we affirmed the interpretation that we had stated in the 1980 NSR rulemaking. (*See* 49 FR 43208, October 26, 1984.) 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, October 26, 1984.)

In a companion notice published on October 26, 1984 (49 FR 43211, October 26, 1984), 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, October 26, 1984.)

On February 28, 1986 (*see* 51 FR 7090, February 28, 1986), 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 on this proposal are captured in legacy docket A–84–33.

On November 28, 1989 (*see* 54 FR 48870, November 28, 1989), we finalized our 1984 interpretation and concluded that the section 302(j) limitation on including fugitive emissions applies to the threshold

[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.

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, November 28, 1989.) 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, November 28, 1989.) 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, October 26, 1984.) 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, December 31, 2002), we promulgated final rules consistent with our November 1989 final interpretive ruling. In that rulemaking, we required the inclusion of fugitive emissions in calculating emissions increases for purposes of determining whether a particular physical or operational change constitutes a major modification requiring a PSD or nonattainment major NSR permit for all major sources, regardless of source category. (*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 did EPA reconsider 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. What is included in this final action?

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

Based on our review and consideration of comments received on the issue regarding whether fugitive emissions are to be counted for purposes of determining whether a physical or operational change constitutes a major modification, we are revising the provisions of the December 2002 NSR Improvement final rules related to the treatment of fugitive emissions. We have decided 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 have decided to adopt the same approach to fugitive emissions for determining whether a change is a major modification as is currently used for determining whether a source is major.

B. What are EPA's revisions to major NSR regulations?

To implement our new approach to fugitive emissions, in this final action we are revising all four main portions of the major NSR program regulations: § 51.165, § 51.166, § 52.21, and appendix S to part 51. The revisions are nearly identical for these regulations because they contain nearly identical provisions related to major modifications. As indicated at proposal, we are including specific revisions for appendix S to part 51 in this action consistent with the changes that we proposed and are finalizing for § 51.165.

For §§ 51.165, 51.166, 52.21, and appendix S to part 51, we are modifying a number of definitions. In addition, we are finalizing the following:

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

(1) A minor change in the provisions for plantwide applicability limitations (PALs) to preserve the existing treatment of fugitive emissions for PALs.

(2) A modification to 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.

(3) A minor revision in the provisions on monitoring and reporting for physical and operational changes that are found not to be major modifications.

(4) Deletion of a now unnecessary paragraph that provides for a generalized exemption related to fugitive emissions and repeats the section 302(j) source category list.

We are also finalizing 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 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); § 52.21(b)(48)(i)(*a*), (ii)(*a*), and (iii); and, II.A.30(i)(*a*), (ii)(*a*), and (iii) of appendix S to part 51. 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*), § 52.21(b)(41)(ii)(*b*) and (*d*), and II.A.24(ii)(*b*) and (*d*) of appendix S to part 51.

Note that the final language refers to emissions units that are, themselves, in a source category on the section 302(j) list, as well as the 302(j) listing status of the entire major stationary source at which the emission unit is located. An emissions unit under NSR means any part of a stationary source that emits or has the potential to emit any regulated NSR pollutant. 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. This treatment of fugitives from emission units in making major modification determinations is thereby consistent with the treatment of fugitives from emissions units in making major source threshold determinations. We are also finalizing similar language throughout this rule. *See* section IV of this preamble below for additional discussion of the rationale for this language.

The following example illustrates how to consider fugitive emissions from an emission unit within a facility. A fossil-fueled boiler unit that exceeds 250 million British thermal units per hour heat input (MMBtu/hr), and thus meets the definition of a 302(j) listed source category by itself, may be located at an industrial facility whose primary activity is not represented by one of the source categories listed pursuant to section 302(j). In this case, threshold determinations for major modifications at the facility would need to consider fugitive emissions, to the extent quantifiable, from the boiler unit but not from other non-302(j) emissions units at the facility. Alternatively, if a boiler unit did not exceed the 250 MMBtu/hr heat input level, and thus did not meet the definition of a 302(j) listed source category by itself, but was located at a facility represented by a source category on the section 302(j) list due to the facility's primary activity classification, the boiler 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 are also finalizing our proposed 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 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, December 31, 2002.) We therefore do not believe we can exempt fugitive emissions from being included when setting a PAL. Consequently, we are revising 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 revision is found in §§ 51.165(a)(1)(xxxv)(D), 51.166(b)(47)(iv), 52.21(b)(48)(iv), and II.A.30(iv) of appendix S to part 51.

To reinforce our intentions for PALs, we are finalizing 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*), 52.21(aa)(4)(i)(*d*), and IV.K.4(i)(*d*) of appendix S to part 51.

We are also finalizing a revision to the definition of ''major modification'' to mirror the existing definition of ''major stationary source.'' Specifically, we are adding 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'' for the rule] of this section.

This new language is in §§ 51.165(a)(1)(v)(G), 51.166(b)(2)(v), 52.21(b)(2)(v), and II.A.5(vii) of appendix S to part 51.

This action also finalizes a revision to 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 are adding language at §§ 51.165(a)(1)(*vi*)(C)(*3*), 51.166(b)(3)(iii)(*d*), 52.21(b)(3)(iii)(*c*), and II.A.6(iii) of appendix S to part 51 that states that in order for an increase or decrease in fugitive emissions (to the extent quantifiable) to be considered ''creditable'' in netting analyses, it must occur at an emissions unit that belongs to one of the section 302(j) listed source categories or is located at a major stationary source that belongs to one of section 302(j) listed source categories.

The final definitional changes made in this action ensure consistent treatment of fugitives where fugitive emissions are referenced in other steps in the major NSR program. For this purpose, we are adding 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 made in §§ 51.165(a)(1)(ix), 51.166(b)(20), 52.21(b)(20), and II.A.9 of appendix S to part 51.

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. This action revises the provisions for Step 1 to clarify that fugitive emissions (to the extent quantifiable) are only included for section 302(j) listed emissions units and source categories. (Clarifications for Step 2 are handled in our revisions to the definitions that are discussed above.) This revision appears in §§ 51.165(a)(2)(ii)(B), 51.166(a)(7)(iv)(*b*), 52.21(a)(2)(iv)(*b*), and IV.I.1(ii) of appendix S to part 51.

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. This action makes 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. This revision affects §§ 51.165(a)(6)(iii) and (iv), 51.166(r)(6)(iii) and (iv), 52.21(r)(6)(iii) and (iv), and IV.J.3 and IV.J.4 of appendix S to part 51.

Finally, we are deleting a paragraph in each of the major NSR regulations that is no longer necessary. The paragraphs deleted 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 only the section 302(j) list, and we later adopted a policy (reversed now 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 this action, we provide a uniform approach to fugitive emissions for major source and major modification determinations, and these paragraphs have now become completely unnecessary. Accordingly, in this action we are removing and reserving the following paragraphs: §§ 51.165(a)(4), 51.166(i)(1)(ii), 52.21(i)(1)(vii), and II.F. of appendix S to part 51.

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

Major NSR programs are very similar across the United States, prescribed in significant detail 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 under §§ 51.160–164 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 requested comment on this topic.

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 regarding the treatment of fugitive emissions, this action requires 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 discuss this requirement more specifically in section V of this preamble.

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 48696.) 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. When we finalize the minor NSR rule for Indian country, we expect to address the treatment of fugitive emissions consistent with this final rule.

We solicited comment on all aspects of our proposal regarding minor NSR. We also solicited 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.

The comments received on the minor NSR program aspects of the proposed rule generally split into two groups: (1) Those that agreed with EPA that it is important for minor NSR programs to be clear regarding the treatment of fugitive emissions and that these requirements should be explicitly stated in a state's implementation plan, and (2) those who felt state and local permitting authorities should not be required to provide an explicit description of how they treat fugitive emissions in their minor NSR programs.

Several commenters from the second group questioned whether EPA can require state and local agencies to specify explicitly how they will treat fugitive emissions in all aspects of their minor NSR programs. They argued that states have latitude to customize their programs and that EPA does not have the authority to require states to include this clarification as a minimal element of their minor NSR program. These commenters were generally concerned that EPA, by requesting information on how fugitives were being treated in minor NSR programs, was trying to extend aspects of the proposed rule to minor NSR programs and thus extend their authority beyond major NSR program requirements.

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

We disagree with commenters that believe EPA is attempting, with this rule, to establish minimal state minor NSR requirements for fugitive emissions. The purpose of this rule is not to prescribe specific requirements or dictate how minor NSR programs should be constructed and operated to address fugitive emission sources. We fully recognize that states have considerable latitude to customize their minor NSR programs as long as they meet the basic purpose of ensuring that construction and modification of minor sources does not interfere with attainment and maintenance of the NAAQS.

We do believe, however, that it is important for minor NSR programs to be clear regarding the treatment of fugitive emissions in all areas of the program. We disagree with commenters that our requirement in this action for state, local, and subject tribal authorities to provide an explanation of how they treat fugitives in their implementation plans falls outside our authority. Section 110(a)(2)(C) of the Act and our responsibility to review implementation plans provides us with authority to specify the inclusion of this minimum element in state, local, and tribal minor NSR programs. We believe a common understanding of program requirements from the outset is important to reviewing program objectives and avoiding controversy and wasted resources during the permitting process.

IV. What is the rationale for this final action?

A. The Newmont Petition

The thrust of Newmont's petition for reconsideration is two-fold:

1. 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.''

2. 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 section 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 the petition on the two counts summarized above.

As stated in our proposal, we now believe, however, that the absence of reference to ''major modification'' in section 302(j) simply does not dispose of the issue to reconsider the inclusion of fugitive emissions in determining major modifications. 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, we believe 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.''

B. Policy and Legal Rationale

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 for NSR purposes. 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 for NSR purposes. Moreover, although no authoritative conference or committee report addresses the issue of how fugitive emissions should be addressed in NSR permitting, 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 SIP 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 purposes 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 stated in the proposal, for policy and programmatic reasons, we now believe that it is better to adopt a uniform approach to these threshold determinations as they relate to fugitive emissions. We feel that this final action is most consistent with EPA's earliest

and most nearly contemporaneous construction of the statute contained in the 1980 NSR rules, which required that sources count fugitive emissions when determining whether an emissions increase qualifies as a major modification only if the source belonged to a section 302(j) listed category. By returning to a procedure that removes differentiation in the treatment of fugitive emissions for major source and modification threshold determinations, we provide a more uniform approach that we believe more accurately represents the original intent of Congress in establishing the section 302(j) provisions and the resultant 1980 rules that followed.

In addition, with this final action we believe we now have addressed the additional regulatory burden that was not adequately recognized in the 1984 notice. (49 FR 43213–14, October 26, 1984.) We believe our assertion in the 1984 notice (*see* 49 FR 43213–14, October 26, 1984) 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 major modification and thus possibly subjecting those modifications to NSR review.

Some commenters supported EPA's proposed exclusion of fugitive emissions in threshold determinations for major modifications at non-section 302(j) listed sources under the PSD and nonattainment NSR programs. They believe that EPA's current policy of including these emissions in such determinations conflicts with EPA's historical policy of excluding fugitive emissions in applicability determinations for sources not included on the section 302(j) list and creates confusion in the permitting process by providing for differential treatment of fugitive emissions.

Many of those who commented that they support the proposed rule also argued that EPA's 1989 interpretive ruling, which includes fugitive emissions in applicability determinations for *all* sources, was based on a misreading of section 302(j) and that EPA adopted (in 2002 NSR Improvement final rules) the interpretive ruling policy into its regulations without notice or comment. They felt that we did not accurately describe our historical policy in the proposed rule by failing to state that our previous treatment of fugitives, as read under the 1989 interpretive ruling and as codified in the 2002 NSR Improvement final rules, were incorrect interpretations.

We disagree with commenters that there were inaccuracies in describing our past decisions and discretion to include fugitives in NSR rule interpretations and guidance materials. While we acknowledge that our position on inclusion of fugitive emissions for determining major modifications for all sources has changed over the years, we do not agree with commenters that any previous interpretations or rulings were not permissible constructions of the statute. We cannot conclude from the statutory text at 302(j) or the legislative history what Congress explicitly intended in regards to inclusion of fugitive emissions for calculating major modifications. As a result, we believe that we have used our 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.'' We have similarly exercised our discretion to do so with this final action.

Other commenters generally opposed EPA excluding fugitive emissions from non-section 302(j) listed sources in threshold determinations for major modifications under the NSR programs and believed that the proposed revisions to the NSR rules incorrectly implement section 302(j) provisions and are not consistent with past practice and guidance regarding the treatment of fugitive emissions. They argued that EPA's own past finding as to the Congressional intent regarding treatment of fugitive emissions under the NSR program (54 FR 48870, November 28, 1989) show that section 111(a)(4) of the Act ''defines modification solely in terms of the total amount of pollution that a change at a source would produce,'' thus leading the EPA to conclude that Congress intended to establish no qualitative distinction between stack and fugitive emissions (72 FR 63854, November 13, 2007). These commenters urged EPA to reverse the proposed action and to retain the current policy regarding treatment of fugitives as included in the 2002 NSR Improvement rules.

We disagree with comments that these revisions to the NSR rules incorrectly implement section 302(j) and that our construction of the statute included in the 2002 NSR Improvement rules should be considered the correct interpretation of the Section 302(j) provisions. We believe now that the absence of reference to ''major modification'' in section 302(j) simply does not dispose of the issue of whether there was Congressional intent to limit inclusion of fugitive emissions in threshold applicability determinations for major modifications to listed section 302(j) sources. 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.'' As such, 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.

We feel that this final action is most consistent with EPA's earliest, most nearly contemporaneous construction of the statute in the 1980 rules, which required that sources count fugitive emissions when determining whether an emissions increase qualifies as a major modification only if the source belonged to a section 302(j) listed category. By returning to a procedure that removes differentiation in the treatment of fugitive emissions for major source and modification threshold determinations, we provide a more uniform approach that we believe more accurately represents the original intent of Congress in establishing the section 302(j) provisions and the resultant 1980 rules that followed.

V. When will these changes take effect in the federal PSD Program, and will states be required to revise their State Implementation Plans (SIPs) to incorporate this final action?

We are requiring that these changes take effect in the Federal PSD permit program by February 17, 2009. This means that we will 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 on that date.

We are also requiring that the requirements of this final action be established as minimum program elements of the PSD and nonattainment NSR programs approved by EPA as part of SIPs. Notwithstanding this requirement, it may not be necessary for a state or local authority to revise its SIP to 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

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

language in the approved SIP without the need to revise their 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 need to revise their SIPs to adopt these changes, these changes would not be effective in such areas until we approve the SIP revision. We are requiring 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 this final rule within 3 years after the rule's promulgation date. We are also allowing state and local authorities to maintain NSR program elements that have the effect of meeting the minimum program elements of this rule, but that, in these cases, the state and local authority must submit an explanation for that conclusion to EPA by the SIP submission deadline.

We are also requiring state, local, and subject tribal authorities to 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. Therefore, we are requiring state, local, and subject tribal authorities to specify this in their implementation plan within 3 years from the promulgation date of this action.

We received comments in the proposal on establishing the requirements of this action as minimum program elements for SIP-approved PSD programs. One commenter stated that they believed EPA could not lawfully make the proposed requirements a minimum program element for SIP-approved PSD programs. Other commenters provided that section 116 of the Act stipulates that states are free to adopt air pollution control requirements that are more stringent than those required by the Act or EPA regulation and therefore should not be required to adopt any minimum program requirements in the proposal. One commenter stated that California state law specifically prevents the relaxation of NSR programs and that forcing California to adopt rule amendments that are less stringent would require California air pollution control districts to violate state law.

We disagree with commenters who believe we do not have authority to establish the revisions to the treatment of fugitive emissions under the major NSR program, as finalized in this action, as minimum program elements of the NSR programs. The basis for establishing minimum program elements is rooted in well established statutory authority and interpretations for implementing the federal NSR program. We interpret the requirements of section 110 of the Act to require states to meet a certain minimum set of requirements that we specify, consistent with the Act, before any SIP can be approved by the Administrator, while section 116 does not allow states to adopt or enforce any SIP requirements less stringent than any minimum program element we specify through rulemaking. Moreover, the minimum program elements we establish in the NSR programs in no way precludes the development of more stringent major NSR programs by California, or any other state or local agencies in areas covered by SIP-approved PSD Programs.

We also received comments on the impact of the proposed fugitive emission requirements on state and local air quality implementation plans. Several commenters opposed the EPA's proposal and reconsideration on the treatment of fugitives primarily because they believe it would impede their efforts to achieve attainment of health standards for ozone and $PM_{2.5}$ and their ability to prevent significant deterioration in attainment areas. Some of these commenters argued that the proposal makes NSR applicability less stringent by exempting fugitive emissions from major modification applicability determinations which would result in an increase in fugitive emissions from non-listed sources when determining whether NAAQS or allowable increments will be violated.

We agree with commenters that this action could result in some sources (those not on the section 302(j) list) not having to go through NSR review for major modifications; however, we disagree that this action will provide a blanket exemption to fugitive emissions from non-section 302(j) sources. This action does not prohibit in any way a reviewing authority from requiring control of fugitive emissions by emission standards or limitations 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 fully recognize that some states and localities may need to regulate additional fugitive emissions under their 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. This rule only affects the treatment of fugitives in threshold applicability tests to determine what constitutes a major modification. If a source is determined to be either a major source or major modification due to its non-fugitive emissions, then all applicable pollutant emissions at the source, including fugitive, are subject to subsequent NSR review steps (*e.g.*, BACT/LAER review, air quality impacts) according to NSR program requirements.

This action in no way prevents reviewing authorities from controlling fugitive emissions through their SIP rules (*e.g.*, minor source NSR program), through any other requirements under the Act (*e.g.*, MACT standards), or state and local permitting programs that would control these emissions. We also specifically include, and reemphasize in this action (see section VI of this preamble), consideration to surrounding air quality (*e.g.*, nonattainment areas) as a criteria in determining if it is reasonable to collect, capture, and control fugitive emissions.

We also believe by returning to the original 1980 NSR rule construction regarding fugitives, we have kept intact the air quality goals of the statute. 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, August 7, 1980.) 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. 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 believe that the section 302(j) listing continues to address the air quality impacts from major emitting facilities and that this action preserves the intended air quality improvement strategies under the major NSR program.

VI. What are the 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 will 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

(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 and control 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.

As we stated at proposal, we believe that these three overarching principles represent our existing policy on defining fugitive emissions. Moreover, we believe that these elaborations on these basic principles represent a reasonable interpretation of our existing regulatory language to be applied to future fugitive emissions determinations. Accordingly, we do not propose specific changes to the existing regulatory language to accommodate this final action.

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.

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 are more available or more easily calculated than cost data on collection or capture alone.

Thus, with this action, we are allowing 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

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[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 possess a limited ability to establish presumptions through guidance. *See e.g. General Elec. Co.* v. *EPA,* 290 F.3d 377 (DC 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).

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 section 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, August 7, 1980). 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.

We received several comments on our proposed elaborated guidelines for determining fugitive emissions. Several commenters supported EPA's guiding principles for determining fugitive emissions and for the inclusion of control costs as one of the case-by-case criteria that could be used for determining fugitive emissions. Two commenters, however, disagreed with the addition of ''cost of control'' to ''cost of capture or collection'' as one of the cost criteria that reviewing authorities may consider in determining whether emissions could reasonably pass through a stack, chimney, vent, or other functionally equivalent opening. One of these commenters stated that the presumption of the elaborated guidance in the proposed rule is that if it is not technically or economically feasible to control the emissions—regardless of the technical or economic feasibility of capture—then it is not reasonable to capture them and they are therefore fugitive. The same commenter also felt that this new cost criterion could require permitting authorities to do additional upfront cost analyses prior to permit application, thereby increasing demand on limited resources.

Another commenter supported the use of costs for either capture or collection and control or just for capture and collection, and also supports allowing permitting authorities to account for attainment status when considering the cost of collection, capture and control as higher costs may be found acceptable in ''dirtier'' areas.

We disagree with the comments that guidance should not allow the reviewing authority to consider the cost of control. We believe that in some cases it is beneficial 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 are more available or more easily calculated than cost data on collection or capture alone.

Further, this guidance provides 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. This elaboration on guidance does not place a regulatory requirement on the reviewing authority to take any specific approach to considering cost in determining fugitive emissions. Therefore, this alternative clearly identifies the cost factor, among many other case-specific factors, as an interpretive tool that a reviewing authority may use in determining whether fugitive emission can be reasonably collected or captured.

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

VII. 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'' because it 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 any new information collection burden. We are not promulgating any new paperwork requirements (*e.g.*, monitoring, reporting, recordkeeping) as part of this proposed action. However, 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. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Analysis

The Regulatory Flexibility Analysis (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 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; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final 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 changes in this final action 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 requirements of this final action will not affect sources, including small businesses, that are included in the section 302(j) list; regulatory requirements for these sources will be unchanged.

These 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 these final changes will be to improve the operational flexibility of unlisted major sources. We have therefore concluded that this final action will relieve regulatory burden for all affected small entities.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. The changes required by this final action are 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 these 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). Therefore, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of the UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As discussed above, this final rule does not impose any new requirements on small governments.

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 final 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 these final 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 solicited comment on the proposed rule from state and local officials.

In response to the proposed rule, two commenters stated that the workload for them will increase significantly if permitting authorities are required to undertake the task of segregating fugitive emissions from NSR applicability calculations. They asserted that they anticipate disputes and appeals of their determinations on fugitive emissions. They argued that including all emissions for all sources is less resource-intensive for permitting authorities than making case-by-case determinations of whether to include fugitive emissions.

While 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), we disagree with comments that the burden will increase significantly for permitting authorities. Calculations and identification of fugitive emissions are prepared by the permit applicants and submitted for review and approval by the permitting authorities. We believe the proposed rule changes could 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.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). 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 action.

Although Executive Order 13175 does not apply to this action, EPA solicited comments from tribal officials in developing this action. A summary of the concerns raised during that solicitation and EPA's response to those concerns is provided below.

Two tribal authorities commented that there was not adequate consultation with the tribes on the proposed rule and how it corresponds with the proposed Tribal Minor Source NSR Permitting Rule. Also, they believe that the statement in the preamble of the proposed rule soliciting tribal input does not reach the type of outreach and consultation that is needed and required. Because they view the consultation as inadequate, the commenters believe that EPA's statement that the proposed rule will not put undue burden onto tribes because the EPA is the reviewing authority in tribal territories is presumptuous and not reflective of the consultation process.

We disagree with the commenters that adequate consultation with the tribes on the proposed rule did not take place. EPA specifically solicited additional comment on this proposed rule from tribal officials. While 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 rule does not have tribal implications. No tribal government currently has an approved TIP under the Act to implement the NSR program; therefore the federal government is currently the NSR reviewing authority in Indian country. In addition, this rule has no tribal implications on title V rules (part 71 and part 70) because only one tribe has a delegated part 71 program and no tribe has a part 70 program (the delegated program uses the guidance as proposed by EPA). Also, because this rule only provides interpretive guidance relative to the fugitive source definition of those rules, no permitting authorities would likely need to update their title V program or rules to implement this federal rule. 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.

Regarding the Tribal Minor Source NSR Permitting Rule, 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, August 21, 2006.) 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 and we expect to address the treatment of fugitive emissions consistent with this final rule. The question of how the requirements of E.O. 13175 have been met for the tribal minor NSR permitting rule will be addressed when that rule is finalized.

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

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 18355, 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 changes set out in this final action 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 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 (for example, 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 action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898—Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This final action, in conjunction with other existing programs, would not relax the control measures on sources regulated by the rule and therefore would not cause emissions increases from these sources.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective January 20, 2009.

VIII. Judicial Review

Under section 307(b)(1) of the Act, judicial review of today's final action is available by filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by February 17, 2009. Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. Under section 307(b)(2) of the Act, the requirements of this final action may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

IX. 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, Fugitive emissions, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Transportation, Volatile organic compounds.

40 CFR Part 52

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

Dated: December 10, 2008.

Stephen L. Johnson,

Administrator.

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is 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 adding paragraph (a)(1)(vi)(C)(*3*).

■ c. By revising paragraph (a)(1)(ix).

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

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

■ f. By revising paragraph (a)(2)(ii)(B).

■ g. By removing and reserving paragraph (a)(4).

■ h. By revising paragraphs (a)(6)(iii) and (a)(6)(iv).

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

§ 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) * * *

(*3*) As it pertains to an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or it occurs at an emissions unit that is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not creditable for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category.

* * * * *

(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 emissions unit is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or the emissions unit is located at a stationary source that belongs to one of the source categories listed in paragraph (a)(1)(iv)(C) of this section. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (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 is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not creditable for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (See paragraph (a)(1)(vi)(C)(*3*) 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 is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (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 is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emission unit 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. With the exception of PALs, fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (See paragraphs (a)(1)(xxxv)(A)(*1*), (a)(1)(xxxv)(B)(*1*), (a)(1)(xxxv)(C), and (a)(1)(xxxv)(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 are part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (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 are part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. (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 is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or for an emissions unit that 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 is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emissions unit 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 is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or for an emissions unit that 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 is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or for an emissions unit that 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 is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emissions unit 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 is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (a)(1)(iv)(C) of this section and that are not, by themselves, part of a listed source category. 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 of 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 is part of one of the source categories listed in paragraph (a)(1)(iv)(C) of this section or if the emissions unit is located at a major stationary source that 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*).

§ 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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. 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 of 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*) As it pertains to an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or it occurs at an emission unit that is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category.

* * * * *

(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 are part of one of the source categories listed in paragraph (b)(1)(iii) of this section, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (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 emissions unit is part of one of the stationary source categories listed in paragraph (b)(1)(iii) of this section or the emissions unit is located at a stationary source that belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit 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. With the exception of PALs, fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed 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 are part of one of the source categories listed in paragraph (b)(1)(iii) of this section, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or for an emissions unit that 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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit 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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or for an emissions unit that 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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or for an emissions unit that 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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit 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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit is located at a major stationary source that 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.

* * * * *

Appendix S to Part 51—[Amended]

■ 4. Appendix S to Part 51 is amended as follows:

■ a. By adding paragraph II.A.5(vii).

■ b. By revising paragraph II.A.6(iii).

■ c. By revising paragraph II.A.9.

■ d. By revising paragraphs II.A.24(ii)(*b*) and II.A.24(ii)(*d*).

■ e. By revising paragraphs II.A.30(i)(*a*), II.A.30(ii)(*a*), II.A.30(iii), and II.A.30(iv).

■ f. By removing and reserving paragraph II.F.

■ g. By revising paragraph IV.I.1(ii).
■ h. By revising paragraphs IV.J.3. and IV.J.4.
■ i. By revising paragraph IV.K.4(i)(*d*).

Appendix S to Part 51—Emission Offset Interpretative Ruling

* * * * *

II. * * *
A. * * *
5. * * *

(vii) Fugitive emissions shall not be included in determining for any of the purposes of this Ruling 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 II.A.4(iii) of this Ruling.

6. * * *

(iii) An increase or decrease in actual emissions is creditable only if:

(*a*) The reviewing authority has not relied on it in issuing a permit for the source under this Ruling, which permit is in effect when the increase in actual emissions from the particular change occurs; and

(*b*) As it pertains to an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or it occurs at an emissions unit that is located at a major stationary source that belongs to one of the listed source categories.

* * * * *

9. *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 Ruling:

(i) In determining whether a stationary source or modification is major, fugitive emissions from an emissions unit are included only if the emissions unit is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or the emissions unit is located at a stationary source that belongs to one of the source categories listed in paragraph II.A.4(iii) of this Ruling. (See paragraphs II.A.4(iii) and II.A.5(vii) of this Ruling.)

(ii) 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 is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph II.A.4(iii) of this Ruling and that are not, by themselves, part of a listed source category. (See paragraph II.A.6(iii) of this Ruling.)

(iii) For purposes of determining the projected actual emissions of an emissions unit after a project, fugitive emissions are included only if the emissions unit is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph II.A.4(iii) of this Ruling and that are not, by themselves, part of a listed source category. (See paragraph II.A.24(ii)(*b*) of this Ruling.)

(iv) For purposes of determining the baseline actual emissions of an emissions unit, fugitive emissions are included only if the emissions unit is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or if the emission unit 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. With the exception of PALs, fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph II.A.4(iii) of this Ruling and that are not, by themselves, part of a listed source category. (See paragraphs II.A.30(i)(*a*), II.A.30(ii)(*a*), II.A.30(iii), and II.A.30(iv) of this Ruling.)

(v) In calculating whether a project will cause a significant emissions increase, fugitive emissions are included only for those emissions units that are part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph II.A.4(iii) of this Ruling and that are not, by themselves, part of a listed source category. (See paragraph IV.I.1(ii) of this Ruling.)

(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 are part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph II.A.4(iii) of this Ruling and that are not, by themselves, part of a listed source category. (See paragraphs IV.J.3 and IV.J.4 of this Ruling.)

(vii) For all other purposes of this Ruling, 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 IV.C of this Ruling) and for PALs (see paragraph IV.K.4(i)(*d*) of this Ruling).

* * * * *

24. * * *

(ii) * * *

(*b*) Shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or for an emissions unit that 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 II.A.24(ii)(*a*) through (*c*) of this Ruling, may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph II.A.3 of this Ruling. For this purpose, if the emissions unit is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or if the emissions unit 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).

* * * * *

30. * * *

(i) * * *

(*a*) The average rate shall include emissions associated with startups, shutdowns, and malfunctions; and, for an emissions unit that is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or for an emissions unit that 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 is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or for an emissions unit that 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 is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or if the emissions unit 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 II.A.30(i) of this Ruling, for other existing emissions units in accordance with the procedures contained in paragraph II.A.30(ii) of this Ruling, and for a new emissions unit in accordance with the procedures contained in paragraph II.A.30(iii) of this Ruling, except that fugitive emissions (to the extent

quantifiable) shall be included regardless of the source category.

* * * * *

F. [Reserved]

* * * * *

IV. * * *

I. * * *

1. * * *

(ii) 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 II.I.1(iii) through (v) of this Ruling. For these calculations, fugitive emissions (to the extent quantifiable) are included only if the emissions unit is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or if the emissions unit is located at a major stationary source that 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 of the process) is contained in the definition in paragraph II.A.6 of this Ruling. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

* * * * *

J. * * *

3. 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 IV.J.1(ii) of this Ruling; 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 IV.J.3, fugitive emissions (to the extent quantifiable) shall be monitored if the emissions unit is part of one of the source categories listed in paragraph II.A.4(iii) of this Ruling or if the emissions unit is located at a major stationary source that belongs to one of the listed source categories.

4. 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 IV.J.3 of this Ruling setting out the unit's annual emissions, as monitored pursuant to paragraph IV.J.3 of this Ruling, during the year that preceded submission of the report.

* * * * *

K. * * *

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 II.A.4(iii) of this Ruling.

* * * * *

PART 52—[AMENDED]

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

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

Subpart A—[Amended]

■ 6. 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*).

§ 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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. 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 of 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*) As it pertains to an increase or decrease in fugitive emissions (to the extent quantifiable), it occurs at an emissions unit that is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or it occurs at an emission unit that is located at a major stationary source that 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 are part of one of the source categories listed in paragraph (b)(1)(iii) of this section, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (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 emissions unit is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit is located at a stationary source that belongs to one of the source categories listed in paragraph (b)(1)(iii) of this section. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph

(b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emission increases or decreases are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit is located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit 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. With the exception of PALs, fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed 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 are part of one of the source categories listed in paragraph (b)(1)(iii) of this section, or for any emissions units that are located at a major stationary source that belongs to one of the listed source categories. Fugitive emissions are not included for those emissions units located at a facility whose primary activity is not represented by one of the source categories listed in paragraph (b)(1)(iii) of this section and that are not, by themselves, part of a listed source category. (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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or for an emissions unit that 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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emission unit 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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or for an emissions unit that 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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or for an emissions unit that 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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit 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.

* * * * *

(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 is part of one of the source categories listed in paragraph (b)(1)(iii) of this section or if the emissions unit is located at a major stationary source that 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.

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(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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