likelihood that plans that do not use 4044 rates provided by this proposed rule would eventually be unable to pay full benefits at current accrual rates. Plans would also see administrative savings in the form of reduced arbitration and litigation costs because some arbitrations and litigation would be avoided entirely, and others would be less complex because they would not include disputes over interest assumptions. As discussed in the Regulatory Impact Analysis, these savings could be as much as $82,500 to $222,000 for reduced arbitration costs and $1 million in reduced litigation costs for a plan when an arbitration or litigation is avoided. This proposed rule would not have negative impacts or costs on small plans because plans could choose whether to use interest assumptions prescribed by the regulation. PBGC expects the administrative costs, if any, associated with the proposed rule would be de minimis. Accordingly, as provided in section 605 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), sections 603 and 604 do not apply.

Though this proposed rule would directly regulate plans, as discussed in the Regulatory Impact Analysis, it would indirectly impact employers, including small employers. This is because, for plans that switch assumptions, it would tend to increase the amount of withdrawal liability assessed by plans and withdrawing employers would pay the increases if they were to withdraw. The statutory process for allocating unfunded vested benefits to a withdrawing employer takes into account the employer's contribution history; employers with a history of higher contributions are allocated a larger share of UVBs while employers with a history of lower contributions are allocated a smaller share. Because small employers have small contribution levels, they would see smaller dollar increases in withdrawal liability than employers with large contribution levels. In addition, as discussed, if plans adopt the prescribed assumptions, employers in those plans may be less likely to withdraw. This effect, in combination with the higher withdrawal liability payments for employers who do withdraw, could contribute to the long-term solvency of multiemployer plans. Extended plan solvency would help ensure that participants and beneficiaries would receive promised benefits, which would enhance their income security and benefit the communities, including small businesses within those communities, in which they live.

PBGC considered declining to prescribe assumptions under section 4213, an alternative that would have less impact on small employers, but as discussed in the Regulatory Impact Analysis, doing so would contribute to plan underfunding. PBGC also considered issuing a proposed rule that would only authorize the use of 4044 rates, an alternative that would have resulted in higher withdrawal liability under section 4213(a)(2) of ERISA in comparison to the proposed rule, and thereby a larger impact on small employers who participate in plans that adopt that approach (but would likely have a smaller adoption rate than the section 4213(a)(2) assumptions in the proposed rule).

List of Subjects in 29 CFR 4213

Employee benefit plans, Pension insurance, Pensions.

■ For the reasons set forth in the preamble, PBGC proposes to amend 29 CFR chapter XL by adding part 4213 to read as follows:

PART 4213—ACTUARIAL ASSUMPTIONS

Sec.
4213.1 Purpose and organization.
4213.2 Definitions.
4213.11 Section 4213(a)(2) assumptions.

Authority: 29 U.S.C. 1302(b)(3), 1393.

§ 4213.1 Purpose and organization.

This part sets forth actuarial assumptions and methods under section 4213(a)(2) of ERISA as an alternative to the assumptions and methods under section 4213(a)(1) of ERISA for determining withdrawal liability.

§ 4213.2 Definitions.

For the purposes of this part:

Single effective interest rate means for a given interest assumption, the single rate of interest which, if used to determine the present value of the plan's liabilities, would result in an amount equal to the present value of the plan's liabilities determined using the given assumption, holding all other assumptions and methods constant.

§ 4213.11 Section 4213(a)(2) assumptions.

(a) In general. Withdrawal liability may be determined using actuarial assumptions and methods that satisfy the requirements of this section. Such actuarial assumptions and methods need not satisfy any other requirement under title IV of ERISA.

(b) Interest assumption (1) General rule. To satisfy the requirements of this section, the single effective interest rate for the interest assumption used to determine the present value of the plan's liabilities must be the rate in paragraph (b)(2) of this section, the rate in paragraph (b)(3) of this section, or a rate between those two rates.

(2) The rate in this paragraph (b)(2) is the single effective interest rate for the interest assumption prescribed in § 4044.52 of this chapter for the date as of which withdrawal liability is determined.

(3) The rate in this paragraph (b)(3) is the single effective interest rate for the interest assumption under section 304(b)(6) of ERISA for the plan year within which the date in paragraph (b)(2) of this section falls.

(c) Other assumptions. The assumptions and methods (other than the interest assumption) satisfy the requirements of this section if—

(1) Each is reasonable (taking into account the experience of the plan and reasonable expectations), and

(2) In combination, they offer the actuary's best estimate of anticipated experience under the plan.

Signed in Washington, DC.

Gordon Hartogensis,

Director, Pension Benefit Guaranty Corporation.

[FR Doc. 2022–22304 Filed 10–13–22; 8:45 am]

BILLING CODE 7709–02–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA–HQ–OAR–2004–0014; FRL–4940.2–03–OAR]

RIN 2060–AQ47

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to repeal regulatory amendments promulgated through a final rule adopted in 2008 under the Clean Air Act (CAA or Act) that addressed the consideration of ''fugitive'' emissions of air pollutants from stationary sources when determining the applicability of certain permitting requirements under the Act. Those amendments have been stayed as a result of the reconsideration process. To bring closure to the reconsideration proceeding, the EPA is proposing to fully repeal the 2008 rule by removing

the stayed provisions of the regulatory amendments adopted in 2008. The EPA is also proposing to remove a related exemption for modifications that would be considered major solely due to the inclusion of fugitive emissions. As a result of the proposed changes, all existing major stationary sources would be required to include fugitive emissions in determining whether a physical or operational change constitutes a ''major modification,'' requiring a permit under the Prevention of Significant Deterioration (PSD) or Nonattainment New Source Review (NNSR) programs.

DATES:

Comments: Comments must be received on or before December 13, 2022.

Public hearing: If anyone contacts EPA requesting a public hearing by October 19, 2022, the EPA will hold a virtual public hearing. See **SUPPLEMENTARY INFORMATION** for information on requesting and registering for a public hearing.

ADDRESSES:

Comments: You may send comments, identified by Docket ID No. EPA–HQ–OAR–2004–0014, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2004–0014 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2004–0014.

Instructions: All submissions received must include the Docket ID No. EPA–HQ–OAR–2004–0014 for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: For information about this proposed rule, contact Mr. Matthew Spangler, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–05), Environmental Protection Agency, Research Triangle Park, NC; telephone number: (919) 541–0327; email address: *spangler.matthew@epa.gov.*

SUPPLEMENTARY INFORMATION: The information presented in this document is organized as follows:

I. General Information

A. Entities Potentially Affected by This Action

Entities potentially affected by this action include sources that do not belong to a source category listed in 40 Code of Federal Regulations (CFR) 52.21(b)(1)(iii) (and other identical provisions in other sections of the CFR). Entities potentially affected by this proposed action also include state and local air pollution control agencies responsible for permitting sources pursuant to the New Source Review (NSR) program.

B. Obtaining a Copy of This Document and Other Related Information

The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2004–0014. All documents in the dockets are listed in *https://www.regulations.gov/.* Although listed, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. Publicly available docket materials are available either in the docket for this action, Docket ID No. EPA–HQ–OAR–2004–0014, or electronically at *https://www.regulations.gov/.*

In addition to being available in the docket, an electronic copy of this **Federal Register** document will be posted at *https://www.epa.gov/nsr.*

C. Preparing Comments for the EPA

Instructions. Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2004–0014, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be CBI or other information whose disclosure is restricted by statute. This type of information should be submitted by mail as discussed below.

Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* For further information and updates on EPA Docket

Center services, please visit us online at *https://www.epa.gov/dockets.*

Submitting CBI. Do not submit information containing CBI to the EPA through *https://www.regulations.gov/* or email. Clearly mark the part or all the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, mark the outside of the digital storage media as CBI and then identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2004–0014. Note that written comments containing CBI and submitted by mail may be delayed and no hand deliveries will be accepted.

D. Participation in Virtual Public Hearing

To request a virtual public hearing, contact Ms. Pamela Long at (919) 541–0641 or by email at *long.pam@epa.gov.* If requested, the virtual hearing will be held on October 31, 2022. The hearing will convene at 9:00 a.m. Eastern Time (ET) and will conclude at 3:00 p.m. ET. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce further details at *https://www.epa.gov/nsr.*

Upon publication of this document in the **Federal Register**, the EPA will begin pre-registering speakers for the hearing, if a hearing is requested. To register to speak at the virtual hearing, please use the online registration form available at *https://www.epa.gov/nsr* or contact Ms. Pamela Long at (919) 541–0641 or by email at *long.pam@epa.gov.* The last day to pre-register to speak at the hearing will be October 26, 2022. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers in approximate order at: *https://www.epa.gov/nsr.*

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Each commenter will have 3 minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) by emailing it to *long.pam@epa.gov.* The EPA also recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at *https://www.epa.gov/nsr.* While the EPA expects the hearing to go forward as set forth above, please monitor our website or contact Ms. Pamela Long at (919) 541–0641 or by email at *long.pam@epa.gov* to determine if there are any updates. The EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of a translator or special accommodations such as audio description, please pre-register for the hearing with Ms. Pamela Long and describe your needs by October 21, 2022. The EPA may not be able to arrange accommodations without advanced notice.

II. Background

A. New Source Review Program

The NSR program was designed to protect public health and welfare from the effects of air pollution and to preserve and/or improve air quality throughout the nation. *See* 42 U.S.C. 7470(1), (2), (4). The NSR program requires certain stationary sources of air pollution to obtain air pollution permits prior to beginning construction. Construction of new sources with emissions above statutory thresholds, and modifications of existing sources emitting above those thresholds, that increase emissions of ''regulated NSR pollutants'' by more than amounts specified in the EPA's NSR regulations are subject to ''major source'' NSR requirements. New construction or modifications of smaller emitting sources and modifications of existing major sources that do not increase emissions by more than the thresholds in the major NSR regulations may be subject to minor NSR requirements or excluded from NSR altogether.

The major source NSR program includes two distinct programs that each have unique requirements for new or modified sources. The applicability of these two programs depends on whether the area where the source is located is exceeding the National Ambient Air Quality Standards (NAAQS). The PSD program, based on requirements in Part C of title I of the CAA, applies to pollutants for which the area is not exceeding the NAAQS (areas designated as attainment or unclassifiable) and to regulated NSR pollutants for which there are no NAAQS. The NNSR program, based on Part D of title I of the CAA, applies to pollutants for which the area is not meeting the NAAQS (areas designated as nonattainment).

To implement the requirements of the CAA for these programs, most states have EPA-approved State Implementation Plans (SIPs) containing PSD and NNSR preconstruction permitting programs that meet the minimum requirements reflected in the EPA's major NSR program regulations at 40 CFR 51.166 and 51.165. Upon EPA approval of a SIP, the state or local air agency becomes the permitting authority for major NSR permits for sources within its boundaries and issues permits under state law. Currently, state and local air agencies issue the vast majority of major NSR permits each year. When a state or local air agency does not have an approved NSR program, federal regulations apply and either the EPA issues the major NSR permits or a state or local air agency issues the major NSR permits on behalf of the EPA by way of a delegation agreement. For sources located in Indian Country, 18 U.S.C. 1151, the EPA is the permitting authority for major NSR.

The permitting program for construction of new non-major sources and minor modifications to major sources is known as the minor NSR program. CAA section 110(a)(2)(C) requires states to develop a program to regulate the construction and modification of any stationary source ''as necessary to assure that [NAAQS] are achieved.'' 42 U.S.C. 7410(a)(2)(C). The CAA and the EPA's regulations are less prescriptive regarding minimum requirements for minor NSR, so air agencies generally have more flexibility in designing minor NSR programs in their EPA-approved SIPs. Minor NSR

permits are almost exclusively issued by state and local air agencies, although the EPA issues minor NSR permits in many areas of Indian Country.

The applicability of the PSD, NNSR, and/or minor NSR programs to a stationary source must be determined in advance of construction and is a pollutant-specific determination. Thus, a stationary source may be subject to the PSD program for certain pollutants, NNSR for some pollutants, and minor NSR for others.

B. Applicability of the Major NSR Program

Major NSR applies to (1) construction of new major sources and (2) major modifications of existing major sources. In either case, the initial step in assessing applicability is to determine whether the new or modified source in question qualifies as a ''major stationary source.'' A new or existing source qualifies as a major stationary source if it ''emits or has the potential to emit'' a regulated NSR pollutant in an amount greater than the specified annual thresholds. For the PSD program, the major source threshold is 100 tons per year (tpy) for sources in certain source categories listed in the regulations, and 250 tpy for any other type of source. *See* 40 CFR 51.166(b)(1)(i)(*a*) and 52.21(b)(1)(i)(*a*). The major source threshold for NNSR is generally 100 tpy for all source categories but is lower for some pollutants in nonattainment areas classified as Serious, Severe, or Extreme. *See* 40 CFR 51.165(a)(1)(iv).

If a proposed *new* source's actual or potential emissions of a regulated NSR pollutant [1] are at or above the applicable major source threshold, it is subject to preconstruction review under major NSR for that pollutant.[2] Furthermore, under PSD, the proposed new source would also be subject to major NSR review for any other regulated NSR pollutant that it emits at or above the pollutant's ''significant'' emissions rate as defined in 40 CFR 51.166(b)(23) and 52.21(b)(23).

An *existing* major stationary source can be subject to major NSR when a proposed physical change or a change in the method of operation qualifies as a ''major modification.'' [3] A major modification occurs when a physical or operational change (*i.e.,* a construction project) would result in (1) a significant emissions increase of a regulated NSR pollutant, considering emissions increases and decreases from the project alone, and (2) a significant net emissions increase of a regulated NSR pollutant, considering the project as well as other contemporaneous emissions increases and decreases at the source. *See, e.g.,* 40 CFR 52.21(b)(2)(i) and (b)(52). As noted in the previous paragraph, the NSR regulations define the annual emissions rate considered ''significant'' for each regulated NSR pollutant. *See* 40 CFR 51.165(a)(1)(x), 51.166(b)(23), and 52.21(b)(23). In determining the increase in emissions from a physical or operational change, new emissions units are evaluated at their potential emissions, 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. *See, e.g.,* 40 CFR 52.21(a)(2)(iv)(*c–f*), (b)(7), and (b)(33).

C. Treatment of ''Fugitive Emissions'' in the Major NSR Program

For purposes of major NSR, ''fugitive emissions'' are defined as ''emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.'' *E.g.,* 40 CFR 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. Section VII of this preamble further discusses the definition of ''fugitive emissions.''

For certain types of sources, fugitive emissions are treated differently from non-fugitive emissions in determining whether major NSR applies to a source. Fugitive emissions may be relevant to determining whether a source triggers major NSR in two distinct contexts.

First, for purposes of determining whether a new or existing source is a ''major stationary source,'' [4] quantifiable fugitive emissions are included in calculating a source's emissions only if the source belongs to one of the source categories specifically listed in the major NSR regulations. *See, e.g.,* 40 CFR 52.21(b)(1)(iii).[5] Thus, fugitive emissions from sources not belonging to a listed category are generally not included in determining whether a source is a major stationary source. The treatment of fugitive emissions in determining whether a new or existing source is a major source is well-established and is not impacted by this proposed action.

Second, the inclusion of fugitive emissions may impact whether a physical or operational change at a major stationary source results in a ''major modification.'' This proposed action addresses the treatment of fugitive emissions in this second context. As discussed further in Sections III and IV of this preamble, the EPA proposes to affirm its longstanding position that all existing major sources (regardless of source category) must include fugitive emissions when determining if a modification is major. A summary of the relevant history of the treatment of fugitive emissions in the context of modifications is presented in Section II.D of this preamble; additional discussion of the legal and policy considerations underlying this history is included in Section IV.A of this preamble.

[1] 40 CFR 52.21(b)(50) defines the term ''regulated NSR pollutant'' for purposes of PSD. The term generally includes pollutants for which a NAAQS has been promulgated and other pollutants subject to regulation under the CAA. This ''regulated NSR pollutant'' definition, however, excludes the Hazardous Air Pollutants regulated under section 112 of the CAA. For purposes of NNSR, ''regulated NSR pollutant'' is defined at 40 CFR 51.165(a)(1)(xxxvii).

[2] Physical changes at an existing non-major source can also establish a ''major stationary source'' if the physical change by itself would exceed the applicable major stationary source threshold. *E.g.,* 40 CFR 52.21(b)(1)(i)(*c*).

[3] Notably, modifications to existing non-major sources cannot be considered major modifications. However, as described in footnote 2, a physical change at an existing minor source that itself exceeds the major source thresholds would establish a major stationary source.

[4] The relevant statutory provisions use the terms ''major stationary source'' and ''major emitting facility'' interchangeably. *See* 42 U.S.C. 7479(1), 7602(j). The EPA uses the shorthand phrase ''major source'' to refer to this concept, and any reference to a ''major source'' in this preamble refers to the concept of ''major stationary source'' under NSR.

[5] A single stationary source may be comprised of multiple different pollutant-emitting activities. *See, e.g.,* 40 CFR 52.21(b)(5) and (6) (requiring the aggregation of all pollutant-emitting activities that belong to the same major industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)). Although these activities might be assigned different source categories if viewed in isolation, EPA's longstanding approach is to examine the source as a whole and assign it to a single source category based on its ''primary activity.'' *See, e.g.,* 54 FR 48870, 48881 (November 28, 1989). Under this approach, if the source's primary activity is determined to be one of the listed source categories, then fugitive emissions from *all* pollutant-emitting activities that are part of that stationary source are considered in determining whether the source as a whole exceeds the relevant major source threshold. *See, e.g.,* 54 FR 48882; Letter from Cheryl Newton, EPA Region 5, to Janet McCabe, Indiana Department of Environmental Management (March 6, 2003) (*Newton Letter*). Even if the primary activity of a source does not fit within a listed source category, fugitive emissions should be quantified from emission units within the source that do belong to a listed category (*e.g.,* a boiler of sufficient size, or a coal cleaning plant); this is sometimes referred to as a ''nested'' or ''embedded'' source. *See, e.g., Newton Letter.* In this case, fugitive emissions from the ''nested'' portion of the source belonging to a listed source category *would* be included in determining whether (1) the ''nested'' portion of the source exceeded the relevant major source threshold (generally 100 tons per year), and whether (2) the source as a whole exceeded the relevant major source threshold (generally 250 tons per year for PSD).

Once a source is subject to the major NSR program, fugitive emissions are generally treated the same as stack emissions in determining which substantive requirements apply to the source.[6] Specifically, for PSD, once a new source is determined to be ''major'' (*i.e.,* over the 100 or 250 tpy threshold) for a particular pollutant, all emissions (including fugitive emissions) are included in all subsequent analysis, including PSD applicability for other individual pollutants (*i.e.,* comparing emissions to the significant emission rates), Best Available Control Technology (BACT) analyses, and air quality impact analyses. *E.g.,* 40 CFR 52.21(j)(2); *see also* 54 FR 48871 n.2. Similarly, once a modification is determined to be major with respect to at least one regulated NSR pollutant (and provided an exemption discussed in Section II.D of this preamble does not apply), fugitive emissions are included in all subsequent analyses. *E.g.,* 40 CFR 52.21(j)(3); *see also* 54 FR 48871 n.2; *In re Masonite Corp.,* 5 EAD 551, 582–83 (EAB 1994).

D. Fugitive Emissions in Major Modification Determinations

Following the 1977 CAA Amendments, the EPA's initial 1978 regulations implementing the major NSR program required that fugitive emissions from sources in all source categories be included in the first instance in calculating whether a new source or modification of an existing source was major.[7] However, in its 1979 *Alabama Power* decision that reviewed the 1978 regulations,[8] the D.C. Circuit held that CAA section 302(j) requires a rulemaking to identify the sources that must include fugitive emissions in determining whether a source is a ''major emitting facility'' (*i.e.,* ''major stationary source''). In response, in 1980 the EPA promulgated a list of source categories, along with a provision exempting sources not belonging to one of those listed source categories from substantive major NSR requirements if the source *or modification* would be considered ''major'' solely due to the inclusion of fugitive emissions. 45 FR 52676 (August 7, 1980) (promulgating, *e.g.,* 40 CFR 52.21(i)(4)(vii), which was later recodified at 40 CFR 52.21(i)(1)(vii) in 2002).[9]

In 1984, the EPA finalized revisions to the NSR regulations that were intended to better implement CAA section 302(j), the statutory provision on which the 1980 exemption was based. In the context of major source determinations, the EPA revised the definition of ''major source'' such that sources in non-listed source categories need not include fugitive emissions in the first instance in determining whether their emissions exceed major source thresholds. 49 FR 43202 (October 26, 1984). This reflected a more straightforward approach for major source determinations than the one established in the 1980 exemption.[10]

The EPA declined at that time to finalize a similar revision for major modifications. Instead, in a companion document to the 1984 final rule, the EPA proposed an ''interpretive ruling'' reevaluating and reversing the EPA's prior assumption that fugitive emissions should be treated the same in major source and major modification contexts. 49 FR 43211 (October 26, 1984). For major modification determinations, the EPA proposed to include quantifiable fugitive emissions from sources in *all* source categories when determining whether a physical or operational change meets the significance thresholds for a major modification. This was based on the EPA's interpretation that CAA section 302(j) does not apply in the major modification context, and that CAA section 111(a)(4), which defines ''modification,'' requires consideration of all types of emissions (as discussed further in Section IV.A of this preamble). Along with this interpretation, the EPA proposed to remove the 1980 exemption, which was no longer needed in the major source context after the 1984 revisions and which conflicted with the agency's proposed interpretation in the major modification context. In 1986, the EPA again solicited comment on the 1984 ''interpretive ruling.'' 51 FR 7090 (February 28, 1986).

The EPA ultimately ''retain[ed]'' and ''reaffirm[ed]'' the EPA's 1984 interpretive ruling in a 1989 action finalizing certain other rule revisions. 54 FR 48870 (November 28, 1989).[11] This interpretation—that all sources must include fugitive emissions in the major modification context—remained the EPA's position until 2008.[12] The EPA inadvertently failed to remove the 1980 exemption in the 1989 rule, creating an apparent conflict between the EPA's interpretation and the legacy regulatory text.

In 2002, the EPA finalized major revisions to its NSR regulations. 67 FR 80186 (December 31, 2002) (''NSR Reform Rule''). Among many other changes, and consistent with the 1989 interpretive ruling, this 2002 rule explicitly required the inclusion of fugitive emissions in calculating emissions increases for purposes of determining whether a physical or operational change constitutes a major modification for all major sources, regardless of source category.[13]

[6] *See generally Alabama Power* v. *Costle,* 636 F.2d 323, 369 (D.C. Cir. 1979) (''The terms of section 165, which detail the preconstruction review and permit requirements for each new or modified 'major emitting facility' apply with equal force to fugitive emissions and emissions from industrial point sources . . . . EPA is correct that a major emitting facility is subject to the requirements of section 165 for each pollutant it emits irrespective of the manner in which it is emitted.'').

[7] *See, e.g.,* 43 FR 26380, 26403–04 (June 19, 1978); *see also* 48 FR 38742, 38743 (August 25, 1983) (discussing history of the EPA's treatment of fugitive emissions in the 1978 rule and related rules); 49 FR 43202 (October 26, 1984) (same). These initial regulations excluded ''fugitive dust'' from air quality impact assessments, but this exclusion was vacated by the D.C. Circuit court. *See Alabama Power,* 636 F.2d at 370.

[8] *Alabama Power,* 636 F.2d 323.

[9] The 1980 rule also added this exemption to EPA's NSR regulations in 40 CFR 51.18 (later recodified in 40 CFR 51.165), 40 CFR 51.24 (later recodified in 40 CFR 51.166), and 40 CFR part 51 appendix S. Collectively, these four nearly identical provisions are referred to as the ''1980 exemption.'' For an illustration of how the 1980 exemption has functioned in the major modification context, see *In re Masonite Corp.,* 5 EAD 551, 581–83 (EAB 1994).

[10] Under the 1980 exemption, all sources were still required to include fugitive emissions in the first instance when calculating whether a new source or modification would be major. As a result, a non-listed source or modification could theoretically be classified as a major source but nonetheless exempt from substantive major NSR requirements if the terms of the exemption were met. In 1981, the EPA granted a petition for reconsideration of this aspect of the 1980 rules and clarified that the regulations were not intended to function this way. Instead, the intent was that any source in a non-listed category that would be ''major'' only if fugitive emissions were taken into account should not be considered ''major.'' *See* Letter from Douglas M. Costle, Administrator, EPA, to Robert T. Connery (January 19, 1981). The EPA's 1984 amendments to the ''major source'' definition codified this intent by excluding fugitive emissions from the major source calculation in the first instance. *See* 49 FR 43202 at 43204 and 43208–09 (October 26, 1984).

[11] Subsequent EPA rules have referred to this 1989 rule as ''finalizing'' the EPA's 1984 interpretive ruling. *E.g.,* 73 FR 77884 (December 19, 2008).

[12] In October 1990, the EPA released a draft New Source Review Workshop Manual, in which the agency stated that 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). DRAFT NSR Workshop Manual at A.9 (1990). This phrasing seemingly contradicted the 1989 interpretive ruling, although the EPA later acknowledged that this language was not intended to change the EPA's policy in this area. 73 FR 77885 (December 19, 2008). A 1994 EPA Environmental Appeals Board decision, *In re. Masonite Corp.,* considered the existing regulatory text addressing the treatment of fugitive emissions in major modification determinations but did not evaluate or disturb the 1989 interpretation. *See* 5 EAD at 581–83.

[13] *See, e.g.,* 40 CFR 52.21(b)(41)(ii)(b) and 52.21(b)(48)(i)(a) (definitions of ''projected actual emissions'' and ''baseline actual emissions,'' both of which include fugitive emissions to the extent quantifiable).

Notwithstanding this affirmation and codification of the agency's longstanding position, the EPA again inadvertently left the 1980 exemption in the CFR.[14]

In 2003, the EPA received a petition from Newmont USA Ltd., dba Newmont Mining Corporation, requesting that the EPA reconsider the treatment of fugitive emissions in the provisions adopted in the 2002 NSR Reform Rule.[15] After granting the petition for reconsideration in 2004,[16] the EPA proposed in 2007 and finalized in 2008 a rule titled ''Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Reconsideration of Inclusion of Fugitive Emissions'' (the Fugitive Emissions Rule). 72 FR 63850 (November 13, 2007); 73 FR 77882 (December 19, 2008). The Fugitive Emissions Rule, which became effective on January 20, 2009, reversed the EPA's position as set forth in the 1984 and 1989 interpretive rulings concerning the treatment of fugitive emissions for major modification purposes. Under the Fugitive Emissions Rule, only sources in listed source categories designated through rulemaking pursuant to section 302(j) of the Act needed to include fugitive emissions in determining whether a change is a major modification. Thus, the Fugitive Emissions Rule adopted the same approach for considering fugitive emissions when determining whether a change is a major modification as has been used since 1984 for determining whether a source is a major stationary source. Because the 2008 Fugitive Emissions Rule rendered the 1980 exemption obsolete in the major modification context, the EPA also removed the 1980 exemption in the 2008 rule.

E. Petition for Reconsideration and Administrative Stays of the Fugitive Emissions Rule

On February 17, 2009, the Natural Resources Defense Council (NRDC) submitted a petition for reconsideration of the 2008 Fugitive Emissions Rule under CAA 307(d)(7)(B).[17] On April 24, 2009, the EPA responded by letter indicating that the EPA was convening a reconsideration proceeding and granting a 3-month administrative stay of the rule.[18]

The initial 3-month administrative stay of the Fugitive Emissions Rule became effective on September 30, 2009. 74 FR 50115 (September 30, 2009). An interim final rule extending the stay for an additional 3 months became effective on December 31, 2009. 74 FR 65692 (December 11, 2009). An additional 18-month stay became effective on April 1, 2010. 75 FR 16012 (March 31, 2010). In each of these stay actions (beginning on September 30, 2009), the EPA not only stayed the CFR paragraphs added or changed by the Fugitive Emissions Rule, but also amended the CFR to temporarily reinstate the 1980 exemption (which had been removed by the 2008 rule).

These initial administrative stays were intended to ''effectuate this stay of the December 19, 2008, rule [by] reinstating previous provisions on a temporary basis.'' 74 FR 50115. However, in several cases, paragraphs of the affected regulations were stayed in their entirety, unintentionally staying existing regulatory provisions unrelated to those that were revised by the Fugitive Emissions Rule. To correct this error, on March 30, 2011, the EPA published an ''interim rule'' to more precisely effectuate the stay of the Fugitive Emissions Rule itself (*i.e.,* to stay only those portions of the NSR regulations that were added or revised by the 2008 rule, without staying other unrelated portions of the NSR regulations). 76 FR 17548 (March 30, 2011). In order to do this, the interim rule revised 47 paragraphs of the regulatory text that were changed by the Fugitive Emissions Rule, reverting these paragraphs to the regulatory text that existed prior to the Fugitive Emissions Rule.[19] And, as with the 2009 and 2010 actions, in the 2011 action, the EPA again added the 1980 exemption back to the four relevant sections of the CFR. The interim rule also extended the stay of seven other provisions indefinitely until the EPA completed its reconsideration of the Fugitive Emissions Rule.[20]

In summary, due to the EPA's stay actions described in this section, the Fugitive Emissions Rule only briefly took effect between January 20, 2009, and September 30, 2009. Since 2009, the regulations that predated the 2008 Fugitive Emissions Rule have been the operative regulations governing the treatment of fugitive emissions in the major modification context.

III. Proposed Action

A. Results of the EPA's Reconsideration

This proposed rule seeks to close out the reconsideration process initiated in 2009 in a manner that better aligns with the structure and purpose of the NSR program and that minimizes confusion for all stakeholders. After reevaluating the legal and policy bases of the Fugitive Emissions Rule, the EPA no longer considers that rule's treatment of fugitive emissions in the context of major modifications to be appropriate. Instead, for the reasons described further in Sections IV and V of this preamble, the EPA is proposing to reaffirm the EPA's longstanding interpretation of CAA sections 302(j) and 111(a)(4). Specifically, the EPA proposes to reaffirm its interpretation that the language in CAA section 302(j) regarding fugitive emissions applies only in the major source context, and not in the major modification context. The EPA proposes to interpret CAA section 111(a)(4) to require that all sources consider increases in all types of emissions (including fugitive emissions) in determining whether a proposed change would constitute a major modification. Accordingly, the EPA is proposing to repeal the 2008 Fugitive Emissions Rule by removing the portions of the 2008 rule that remain in the agency's NSR regulations.

Additionally, in light of the statutory interpretation presented in Section IV.C of this preamble, the EPA is proposing to remove the ''major solely due to the inclusion of fugitive emissions'' exemption first promulgated in 1980 and reinstated in 2009. As described in Section II.D of this preamble, this 1980 exemption was inadvertently left in the EPA's regulations from 1989 to 2008 despite the fact that the agency had interpreted the statute in that period (as EPA proposes now) to provide no such exemption in the context of

[14] Although the 1980 exemption was renumbered from 40 CFR 52.21(i)(4)(vii) to 40 CFR 52.21(i)(1)(vii) in the 2002 NSR Reform Rule, its content was not altered. As a result, the 1980 exemption—which speaks in terms of calculating *potential* emissions increases—does not align with the other changes effectuated in the 2002 rule, which focus on calculating or projecting *actual* emissions increases in determining whether a project is a major modification.

[15] Newmont Mining Corporation, EPA–HQ–OAR–2004–0014–0005.

[16] Jeffrey R. Holmstead, EPA, EPA–HQ–OAR–2004–0014–0014.

[17] John Walke, NRDC, EPA–HQ–OAR–2004–0014–0060.

[18] Lisa Jackson, EPA, EPA–HQ–OAR–2004–0014–0062.

[19] For a complete list of these provisions, *see* 76 FR 17551.

[20] Although the 2011 interim rule was effective immediately, the EPA also provided a public comment period. 76 FR 17551. This solicitation of comments pertained to the procedural action undertaken in the 2011 interim rule—measures to stay the effectiveness of the 2008 Fugitive Emissions Rule—and did not extend to the substance of the EPA's reconsideration of the 2008 Fugitive Emissions Rule. Nonetheless, several comments on the 2011 interim rule addressed substantive topics related to the EPA's reconsideration. The current proposed rule generally addresses those substantive comments as well as substantive comments provided during earlier regulatory actions. Commenters are welcome to submit or re-submit any comments relevant to the content of this proposed rule.

modifications. This inconsistency, along with other issues related to the 1980 exemption, has created significant uncertainty about the EPA's treatment of fugitive emissions in the major modification context.

B. Proposed Revisions to Regulations

The Fugitive Emissions Rule revised similar regulatory text in all four sections of the CFR associated with the major NSR program, including 40 CFR 51.165, 51.166, 52.21, and appendix S to part 51. This proposed action would revise the text in each of these four sections in order to fully repeal the 2008 rule.

As discussed in Section II.E of this preamble, the EPA's March 2011 interim rule revised 47 paragraphs of the regulatory text that had been changed by the Fugitive Emissions Rule, reverting these paragraphs back to the text that existed prior to the Fugitive Emissions Rule. These paragraphs need not be revised further in this action in order to repeal the Fugitive Emissions Rule. To the extent necessary, the EPA proposes in this action to affirm those changes to the regulatory text effectuated in the March 2011 interim rule and lift the ''interim'' label from those aspects of the 2011 rule.

Seven additional paragraphs that were added (instead of revised) by the Fugitive Emissions Rule were stayed in the EPA's 2009, 2010, and 2011 actions, but still exist within the EPA's NSR regulations. 40 CFR 51.165(a)(1)(v)(G), 51.165(a)(1)(vi)(C)(*3*), 51.166(b)(2)(v), 51.166(b)(3)(iii)(*d*), part 51 appx. S II.A.5(vii), 52.21(b)(2)(v), 52.21(b)(3)(iii)(*c*). These provisions are accompanied by a notation in the CFR (at the end of each CFR section) that these provisions are stayed and have no current legal effect. For these paragraphs, the EPA is proposing to concurrently lift the existing stay and remove these provisions from the regulations (the only way to remove these provisions is to lift the stay). In so doing, the EPA intends to permanently restore the relevant regulatory text that existed before the Fugitive Emissions Rule was promulgated.

Four paragraphs embodying the 1980 exemption were removed by the Fugitive Emissions Rule, but were reinstated in the EPA's 2009, 2010, and 2011 actions in order to effectuate a stay of the Fugitive Emissions Rule. 40 CFR 51.165(a)(4), 51.166(i)(1)(ii), 52.21(i)(1)(vii), and part 51 appx. S II.F. In light of the interpretation advanced in Section IV.C of this preamble—that all sources must account for fugitive emissions in determining whether a modification is major—the EPA is also proposing to remove these provisions embodying the 1980 exemption.

Given the number and complexity of the regulatory provisions impacted by the Fugitive Emissions Rule and the current proposal, the EPA specifically seeks comment on whether the proposed changes to the regulatory text, in addition to those changes previously made in 2011, will fully effectuate the repeal of the Fugitive Emissions Rule and conform the EPA's regulations to the interpretation described in Section IV.C of this preamble.

IV. Interpretation of CAA Sections 302(j) and 111(a)(4)

The plain language of CAA sections 302(j) and 111(a)(4), as well as the legislative history and case law involving these provisions, supports requiring that all existing major sources include fugitive emissions when determining whether a modification at the source requires a major NSR permit. This view is consistent with the approach the EPA has applied in the NSR program for most of the past 4 decades, but the EPA has inadvertently fostered uncertainty on this subject through its rulemaking actions and omissions. To end this uncertainty and better align the regulations with the structure and purpose of the NSR program, the EPA proposes to affirm the longstanding interpretation that fugitive emissions must be counted from all existing major sources when determining whether a modification is major. As discussed in Section V of this preamble, this approach properly accommodates the relevant policy considerations associated with balancing the potential air quality benefits that could result from this action with the potential impacts on a limited subset of sources.

A. Previous EPA Interpretations

When the EPA established the foundation for the current NSR program in response to the 1977 CAA Amendments, the EPA required all quantifiable emissions (including fugitive emissions) to be considered in determining whether sources are subject to major NSR. 43 FR 26388, 26395 (June 19, 1978) (''[T]he regulations do not exclude fugitive dust from the determination of potential emissions.'').[21] However, in recognition of concerns from the surface coal mining industry, the EPA's 1978 regulations excluded ''fugitive dust'' from air quality impact assessments for new and modified sources. *See, e.g.,* 40 CFR 52.21(k)(5) (1978); 43 FR 26395.

In its 1979 *Alabama Power* decision, the U.S. Court of Appeals for the D.C. Circuit considered various challenges to the 1978 NSR regulations, including those related to the treatment of fugitive emissions. In relevant part, the D.C. Circuit stated that it had ''reason to doubt whether EPA possesses the statutory authority to promulgate the [fugitive dust] exception in this manner.'' *Id.* at 370.[22] Although the court did not specifically resolve the matter, it nonetheless vacated and remanded the 1978 fugitive dust exemption ''[i]n light of [the court's] interpretation of section 302(j), and in accordance with [the court's] discussion as to the limits of EPA general exemption authority.''

The D.C. Circuit's discussion of CAA section 302(j) was particularly noteworthy. CAA section 302(j) defines ''major stationary source'' and ''major emitting facility'' as ''any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).'' 42 U.S.C. 7602(j). The D.C. Circuit held that CAA ''section 302(j) specifically attaches a rulemaking requirement for the inclusion of fugitive emissions in the threshold calculation'' of determining whether a source is a ''major emitting facility.'' 636 F.2d at 369.[23]

In response to the *Alabama Power* decision, in its 1980 revisions to the NSR regulations, the EPA removed the 1978 partial exclusion for fugitive dust. In order to implement the CAA section 302(j) rulemaking requirement, the EPA also listed, by rule, a number of source categories for which fugitive emissions were to be considered in threshold determinations. *See* 45 FR 52676 (August 7, 1980) (promulgating, *e.g.,* 40

[21] As the EPA later explained, prior to 1980, the ''EPA considered *all* reasonably quantifiable emissions of a pollutant—including both point emissions (*e.g.,* from a stack or chimney) and fugitive emissions—on the ground[s] that the emissions deteriorate air quality regardless of how they emanate.'' 45 FR 52690 (August 7, 1980).

[22] In suggesting this, the court referred to another section of its opinion, where the court identified ''principles pertinent to an agency's authority to adopt general exemptions to statutory requirements.'' *Id.* at 357; *see id.* at 357–361.

[23] The D.C. Circuit found that the general definition of ''major stationary source'' or ''major emitting facility'' in CAA section 302(j) was not expressly modified by the PSD-specific definition of ''major emitting facility'' in CAA section 169(1) (which is silent with respect to fugitive emissions), and accordingly that CAA section 302(j)'s rulemaking requirement for fugitive emissions controlled with respect to the PSD program. 636 F.2d at 370.

CFR 52.21(i)(4)(vii), which was later recodified at 40 CFR 52.21(i)(1)(vii) in 2002). Specifically, although the 1980 regulations required all sources to include fugitive emissions in the first instance when determining whether a new source or modification was considered major, the 1980 rule provided an exemption from substantive major NSR requirements for sources that did not belong to a listed source category if the source or modification would be considered ''major'' solely due to the inclusion of fugitive emissions. This 1980 exemption did not differentiate between ''major source'' and ''major modification'' inquiries. However, the EPA did not discuss this lack of differentiation, nor did the EPA suggest that this result was required by CAA section 302(j) or the *Alabama Power* decision.[24]

When the EPA revised the NSR regulations in 1984 to better implement the CAA section 302(j) rulemaking requirement, it finalized regulatory text within the definition of ''major source'' that more directly excluded fugitive emissions from major source calculations for sources not in the listed source categories. 49 FR 43202 (October 26, 1984). However, the EPA decided not to finalize similar revisions with respect to major modifications. Instead, in a companion document accompanying the 1984 rule, the EPA for the first time took a closer look at the applicability of section 302(j) and the *Alabama Power* decision in the context of major modifications. The EPA explained that in its 1980 and 1983 regulatory actions, the ''EPA *assumed* that the rulemaking requirement in section 302(j) applies to modifications as well as to sources.'' 49 FR 43213 (October 26, 1984) (emphasis added).[25] The EPA further explained that the litigants and commenters on those 1980 and 1983 actions similarly ''carried that assumption into their communications, without evidencing any examination of it.'' *Id.* After examining the assumption for the first time in 1984, the EPA ''concluded that it appears to be incorrect.'' *Id.* Accordingly, the EPA proposed an ''interpretive rule'' outlining its interpretation that CAA section 302(j) did *not* apply in the major modification context, and that all sources (not just those in a listed source category) should include fugitive emissions in the major modification context. The 1984 proposed interpretive rule, summarized in the following paragraphs, explained the basis for the decision in considerable detail. *See* 49 FR 43213.

First, the EPA explained that the plain language of the Act strongly suggests that Congress did not intend the rulemaking requirement in section 302(j) to apply to modifications. The EPA noted that CAA section 302(j) on its face defines major source and does not speak to modifications of those sources. By contrast, the EPA noted that the definition of ''modification'' in CAA section 111(a)(4) (which is incorporated by the statutory provisions for major NSR[26]) appears to require the inclusion of fugitive emissions in threshold applicability determinations for modifications. CAA section 111(a)(4) provides that ''the term 'modification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emissions of any air pollutant not previously emitted.'' 42 U.S.C. 7411(a)(4). The EPA indicated that, in defining ''modification'' solely in terms of the total amount of pollution that a source change would produce, section 111(a)(4) suggests that Congress intended to establish here no qualitative distinction between different types of emissions (*e.g.,* fugitive or non-fugitive). Thus, the EPA concluded that Congress intended to require the inclusion of fugitive emissions for modifications without any intermediate rulemaking step. 49 FR 43213.

Next, the EPA's 1984 interpretive rule examined the legislative history surrounding these statutory provisions. With respect to CAA section 302(j), the EPA noted that the passages in the relevant House and conference reports that focus on CAA section 302(j) (as well as CAA section 302(j) itself) refer only to major sources, and not to modifications of these sources. 49 FR 43213 (citing H.R. Report No. 95–294, 95th Cong., 1st Sess. 4, 9, 144 (1977); H.S. Rep. No. 95–564, 95th Cong., 1st Sess. 172 (1977)). With respect to the reference to ''modification'' in the PSD provisions of the Act, the EPA indicated that the conference committee said that it ''[i]mplements conference agreement to cover 'modification' as well as 'construction' by defining 'construction' in Part C to conform to usage in other parts of the Act.'' *Id.* (quoting 123 Cong. Rec. H. 11957. col. 3 (daily ed.) (November 1, 1977)). The EPA posited that the phrase ''usage in other parts of the Act,'' most likely refers not only to CAA section 111(a)(4), but also to the EPA regulations implementing section 111 that were in effect at the time. *Id.* The EPA explained that those regulations (as well as CAA section 111(a)(4) itself) on their face require the inclusion of fugitive emissions in CAA section 111 applicability determinations, inasmuch as they concern themselves only with the quantity of the emissions in question. *Id.* (citing 40 CFR 60.14(a) (1977)). Moreover, the EPA explained that prior to the enactment of CAA section 302(j) in 1977, both the EPA and states made no distinction between fugitive and non-fugitive emissions in threshold applicability determinations. *Id.* (citing 40 CFR 51.18, 52.21(d)(1) (1977); 41 FR 55528 (December 21, 1976)). Given that CAA section 302(j) ran against longstanding practice throughout the agency's implementation of the CAA, the EPA suggested that if Congress had intended a change as to modifications, it probably would have said so explicitly, yet Congress said nothing. *Id.*

The 1984 interpretive rule also addressed practical issues related to the inclusion or exclusion of fugitive emissions in major modification determinations and concluded that including fugitive emissions in this context would be consistent with Congress's purposes, including the potential relief from the burdens of NSR afforded by the CAA section 302(j) rulemaking requirement. Given that the EPA's regulations did not require unlisted sources with predominantly fugitive emissions (*e.g.,* surface coal mines) to count fugitive emissions towards major source thresholds, the EPA noted that it is unlikely that those sources would be considered major sources in the first instance. And, because only modifications to an existing major source can be considered major modifications, the EPA concluded that it would be unlikely for sources of predominantly fugitive emissions to be subject to major NSR due to a

[24] The EPA's 1980 preamble discussion spoke generally of ''threshold determinations'' or ''threshold calculations'' but did not specifically evaluate whether or how both the major source and major modification inquiries were implicated by CAA section 302(j) and the *Alabama Power* decision. Where the EPA did speak more specifically to one of these inquiries, it spoke only to ''major emitting facility'' (*i.e.,* ''major source'') determinations under CAA sections 169(1) and 302(j). *See, e.g.,* 45 FR 52690.

[25] Put another way, the EPA's 1980 interpretation ''took it for granted'' that fugitive emissions would be treated the same for major source and major modification determinations. 72 FR 63857 (November 13, 2007).

[26] CAA section 169(2)(C), 42 U.S.C. 7479(2)(C), which governs the PSD program, states: ''The term 'construction' when used in connection with any source or facility, includes the modification (as defined in section 111(a) of this title) of any source or facility.'' CAA section 171(4), 42 U.S.C. 7501(4), which governs the NNSR program, states: ''The terms 'modification' and 'modified' mean the same as the term 'modification' as used in section 111(a)(4) of this title.''

modification, even under the EPA's proposed interpretation. 49 FR 43214.

When the EPA ''affirmed'' the 1984 interpretive rule in a related 1989 rulemaking, it did so based on the justifications presented in 1984, with some additional discussion based on comments received from stakeholders. *See* 54 FR 48882 (November 28, 1989). Specifically, commenters argued: (1) that congressional silence on the subject indicated a lack of guidance (rather than support for the EPA's position) and (2) because new sources and modifications are generally treated the same in most respects under the Act, there is no basis to treat them differently under CAA section 302(j). The EPA was not persuaded by these comments. The EPA concluded that its interpretation was both reasonable and proper, warranting deference under *Chevron, U.S.A. Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837 (1984). Additionally, the EPA reiterated and elaborated on its view that the agency's interpretation should have little general impact on sources of predominantly fugitive emissions like surface coal mines. This remained the EPA's interpretation of CAA sections 302(j) and 111(a)(4) until the Fugitive Emissions Rule was proposed in 2007 and finalized in 2008.[27]

The Fugitive Emissions Rule represented a significant shift in the EPA's treatment of fugitive emissions. This 2008 rule was the first time the EPA had, after focused deliberation, applied the CAA section 302(j) rulemaking requirement to major modifications, such that only sources in categories listed by rule would need to account for fugitive emissions when determining whether a project constituted a major modification.

To justify this changed interpretation, the EPA argued that the lack of any reference in CAA section 302(j) to ''major modification,'' in addition to a scant legislative history, created ambiguity and room for the EPA to extend CAA section 302(j) to the context of major modifications.[28] *See* 73 FR 77888 (December 19, 2008). The EPA stated that it could not conclude from the statutory text or legislative history what Congress specifically intended on this point.[29] Accordingly, the EPA suggested that Congress simply did not know enough to make the critical decisions regarding the treatment of fugitive emissions in the major source and major modification contexts, instead assigning resolution of these complex issues to the EPA. The EPA additionally posited that CAA ''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.'' 73 FR 77888.[30]

The EPA then explained the policy and programmatic reasons supporting its shift in approach. First, the EPA stated that its new position was most consistent with its earliest and most nearly contemporaneous construction of the statute in the 1980 NSR rules. The EPA argued that providing a more uniform approach—*i.e.,* treating fugitive emissions the same in both major source and major modification contexts—more accurately reflected the original intent of Congress in establishing CAA section 302(j) and the resulting EPA rules that followed. Second, the EPA said that the revised position better addressed an additional regulatory burden that had not been adequately recognized in the past. Specifically, the EPA asserted that the EPA's policies discussed in 1984 and 1989 would have imposed a new burden on major sources in unlisted source categories, ''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.'' 73 FR 77889.

[27] None of the EPA documents or actions that followed the 1989 interpretive ruling (*e.g.,* the EPA's 1990 DRAFT NSR workshop manual, the 1995 *Masonite* EAB decision, or the 2002 NSR Reform Rule) addressed the substance of the interpretations presented in 1989. As noted in the preamble to the 2008 rule, potentially conflicting statements in the 1990 DRAFT NSR workshop manual were not intended to reflect a change in position from the 1989 interpretive rule. *See* 73 FR 77885 (December 19, 2008). The 1995 *Masonite* EAB decision considered how the 1980 exemption (which, as noted in Section II.D of this preamble, was inadvertently not removed from the EPA's regulations in 1989) functioned in practice, and did not evaluate the EPA's 1989 interpretive rule or the statutory bases underlying the agency's 1989 interpretation. *See* 5 EAD at 581–83. The 2002 NSR Reform Rule explicitly codified the position expressed in the 1989 interpretive rule, without further discussion of the EPA's interpretation of the relevant statutory provisions.

[28] Notably, even as the EPA reversed its prior interpretation of CAA 302(j), it nonetheless maintained that the EPA's historical interpretation finalized in 1989 remained a reasonable construction of the statute.

[29] The EPA indicated that no authoritative conference or committee report addressed the issue of how fugitive emission should be addressed in NSR permitting. The EPA nonetheless addressed portions of the legislative history reflecting industry testimony detailing concerns with the feasibility of controlling or measuring fugitive emissions.

[30] The EPA's rationale in the Fugitive Emissions Rule focused on CAA section 302(j) and largely did not address CAA section 111(a)(4). After summarizing the EPA's prior interpretation (and public comments) relating to the CAA section 111(a)(4) definition of ''modification,'' the EPA simply asserted that this statutory provision does not ''address the issue'' without further discussion. 73 FR 77888.

B. NRDC's Petition for Reconsideration

NRDC's 2009 petition for reconsideration argued that the Fugitive Emissions Rule was unlawful and urged the EPA to return to its prior interpretation concerning fugitive emissions. NRDC's petition focused largely on the definition of ''modification'' in CAA section 111(a)(4). Citing CAA section 111(a)(4) and the D.C. Circuit's 2005 *New York* v. *EPA* decision (*New York I*),[31] NRDC emphasized that the definition of modification focuses exclusively on increases in ''actual'' emissions. NRDC asserted that the EPA's prior interpretations echoed this focus and did not differentiate between stack emissions and fugitive emissions, instead focusing on the total amount of pollution that a change at a source would produce. Citing the D.C. Circuit's 2006 *New York* v. *EPA* decision (*New York II*),[32] NRDC further asserted that the coverage of CAA section 111(a)(4) is broad—including *any* physical change that increases emissions—and subject only to narrow *de minimis* exceptions.

NRDC claimed that, in promulgating the Fugitive Emissions Rule, the EPA failed to address the definition of modification in CAA section 111(a)(4), explain its reversal of its interpretation of this statutory provision, or respond to comments concerning this provision. Moreover, NRDC claimed that the Fugitive Emissions Rule created an impermissible exemption to the definition of ''modification'' because the EPA did not (and could not) claim (1) that the exemption was supported by the *de minimis* doctrine, (2) that increased fugitive emissions do not qualify as ''the amount of any air pollutant emitted by such source'' under CAA section 111(a)(4), or (3) that exempt fugitive emissions increases do not fall within the meaning of ''any physical change'' or ''any'' change in the method of operation under CAA section 111(a)(4).[33] As noted previously, on April 24, 2009, the EPA responded by letter indicating that the EPA was convening a reconsideration proceeding.

C. Proposed Interpretation of CAA Sections 302(j) and 111(a)(4)

After reconsidering the 2008 Fugitive Emissions Rule, the EPA proposes to return to the position first articulated in 1984, adopted in a final action in 1989,

[31] 413 F.3d 3, 40 (D.C. Cir. 2005).

[32] 443 F.3d 880, 885 (D.C. Cir. 2006).

[33] The NRDC petition also raised other arguments, including a discussion of the legislative history of CAA section 302(j) and other concerns related to the implementation of the Fugitive Emissions Rule by state and local air agencies.

and which remained the EPA's interpretation until revisited in 2008. Given CAA section 302(j)'s silence with respect to modifications, in conjunction with the definition of ''modification'' in CAA section 111(a)(4), the EPA does not believe the CAA section 302(j) rulemaking requirement applies to major modification determinations. Moreover, the EPA does not consider it appropriate to allow existing major sources in non-listed source categories to omit increases and decreases in fugitive emissions when evaluating whether a physical or operational change constitutes a major modification. All major sources should include both stack and fugitive emissions in the major modification context.

The EPA considers this a prudent change in position. The EPA's treatment of fugitive emissions in modifications has a complicated history, particularly during the early years of the NSR program following the 1977 CAA Amendments. However, the interpretation advanced now most closely aligns with the interpretation of CAA section 302(j) originally proposed in 1984 and adopted in 1989. This interpretation was more thoughtful and fully developed than the one the EPA had followed from 1980 until 1984,[34] and has reflected the EPA's position for the majority of the NSR program's existence.[35] More importantly, the legal and policy reasoning advanced in the 1984 and 1989 actions (summarized in Section IV.A of this preamble), in light of more recent case law (*New York I* and *II*), reflects a more complete depiction of the relevant statutory authorities than the reasoning articulated in the 2008 Fugitive Emissions Rule. The EPA also believes this approach fully accommodates congressional intent and the practical and policy considerations surrounding this issue. Therefore, for the reasons detailed later in this preamble, the EPA is well-justified in returning to its longest-standing view concerning the treatment of fugitive emissions in the major modification context.

CAA section 302(j), as interpreted by the *Alabama Power* court, restricts the EPA's consideration of fugitive emissions in certain situations, requiring a rulemaking before the EPA can consider such emissions towards major stationary source thresholds. In extending this rulemaking requirement to major modifications, the 2008 rule focused largely on the fact that both CAA section 302(j) and the accompanying legislative history were silent with respect to the treatment of fugitive emissions for major modification purposes. The EPA concluded that CAA section 302(j) indicates congressional intent ''to require a special look at fugitive emissions for purposes of calculating a source's emissions for NSR purposes.'' 73 FR 77888 (December 19, 2008). This conclusion, while true to an extent, reflected an overbroad understanding of the ''special look'' required by CAA section 302(j), which is not specific to NSR[36] and only explicitly addresses one aspect of the expansive NSR program (major source determinations).[37] Notwithstanding this ''special look,'' the EPA did *not* in 2008 interpret CAA section 302(j) as *requiring* the EPA to conduct rulemaking to identify source categories prior to including fugitive emissions in the major modification context. Instead, the EPA determined that the congressional silence gave the agency the discretion to ''apply'' the CAA section 302(j) methodology to major modifications.[38] Moreover, in the final Fugitive Emissions Rule in 2008, the EPA acknowledged that its prior interpretation remained a permissible construction of the Act (as the agency had previously asserted in 1989). 73 FR 77888; *see* 54 FR 48883 (November 28, 1989).

Moreover, the EPA's 2008 conclusion that Congress ''simply did not know enough to make the critical decisions regarding the extent to which fugitive emissions should be included in threshold applicability determinations'' for both major source and major modification determinations is undermined by the fact that Congress chose to explicitly provide special treatment of fugitive emissions in the relevant definition of major source, while declining to do so in the relevant definition of major modification. As the EPA first explained in 1984, because the special treatment of fugitive emissions in CAA section 302(j) ''ran against the grain of longstanding practice[, i]f Congress had intended a change as to modifications, it probably would have said so explicitly, yet it said nothing.'' 49 FR 43213 (October 26, 1984).

On its face, CAA section 302(j) only applies to determining what constitutes a ''major stationary source.'' CAA section 302(j) does not merely reference this concept, but literally *defines* this specific term (along with the interchangeable term, ''major emitting facility''), and this term alone. Nothing in the definition of ''major stationary source'' in CAA section 302(j)—or its usage elsewhere in the NSR-relevant statutory provisions[39]—suggests that its restriction on counting fugitive emissions was intended to be extended to other, distinct definitions or inquiries, such as the operative definition of ''modification'' in CAA section 111(a)(4). Rather than expand this principle to other contexts, the silence in CAA section 302(j) with

[34] As noted in the EPA's 1984 action (and acknowledged in the Fugitive Emissions Rule itself), the EPA's interpretations prior to 1984 ''assumed'' and ''took for granted'' that fugitive emissions should be treated the same for major source and major modification decisions, without evaluating whether CAA section 302(j) or the D.C. Circuit's *Alabama Power* decision lent themselves to this result. *See* 49 FR 43213 (October 26, 1984); 72 FR 63857 (November 13, 2007). Thus, the EPA's claim in 2008 that the Fugitive Emissions Rule was ''most consistent with EPA's earliest and most nearly contemporaneous construction of the statute'' was not entirely accurate. 73 FR 77888 (December 19, 2008). By the EPA's 2008 logic, one could just as easily describe the EPA's 1978 approach—which considered fugitive emissions from all sources for both major source and major modification purposes—as the ''most nearly contemporaneous construction of the statute.'' However, both the EPA's 1978 and 1980–1983 approaches similarly neglected to fully consider of the specific text of CAA sections 302(j) and 111(a)(4).

[35] The EPA's alternate interpretation—proposed in 2007 and finalized in the 2008 Fugitive Emissions Rule—was effective for only a short period of time between the Fugitive Emissions Rule's effective date of January 20, 2009, and when the first stay of the rule became effective on September 30, 2009.

[36] For example, the definition of ''major stationary source'' in CAA section 302(j) is also implicated by the title V operating permits program. *See, e.g.,* 42 U.S.C. 7661(2)(B).

[37] Most aspects of the NSR program treat fugitive and non-fugitive emissions similarly. *See supra* note 6 and accompanying text.

[38] *Compare* 73 FR 77889 (December 19, 2008) (final rule, described in text) *with* 72 FR 63857 (November 13, 2007) (proposed rule, which had proposed to ''conclude that it is reasonable to interpret section 302(j) to *require* EPA to conduct rulemaking to identify source categories that should include their fugitive emissions for all threshold applicability purposes.'' (emphasis added)).

[39] The definitions of ''major stationary source'' (or ''major emitting facility'') in CAA section 302(j) and ''modification'' in CAA section 111(a)(4) are related in that both are implicated by the statutory provisions governing NSR applicability. For example, CAA section 165 states that the ''construction'' of a ''major emitting facility'' triggers PSD, and ''construction'' is defined by CAA section 169 to include both new construction as well as modifications, as defined in section 111(a). 42 U.S.C. 7475(a), 7479(2)(C). However, the fact that PSD can be triggered either by the construction of a new major source or by the modification of a major source does not mean that the restrictions in defining what constitutes a major source also apply to determining whether a modification has occurred to such a major source. The distinction between these two concepts is apparent throughout the EPA's NSR regulations, which apply different rules to new major sources and modified major sources. And, while the definition of ''major source'' and the restrictions in CAA section 302(j) continue to be relevant to major modifications to a certain extent—since only existing major sources can undergo a major modification—this preliminary inquiry into whether an existing source is a major source is distinct from the inquiry of whether a change at such a source amounts to a major modification.

respect to anything other than ''major source'' inquiries suggests Congress's intent to confine the fugitive emissions rulemaking requirement to major source determinations. The EPA's authority to apply a similar treatment in another, different context depends on the operative statutory provisions governing that context.[40] As discussed in the following paragraphs, in the context of determining whether a major modification has occurred, the EPA does not interpret CAA section 111(a)(4) as providing a basis for restricting consideration of fugitive emissions in such a manner.

The EPA's 1984 and 1989 interpretations of the definition of ''modification'' in CAA section 111(a)(4) formed a central tenet of the agency's prior position that *all* emissions—both stack and fugitive—must be accounted for in the modification context. CAA section 111(a)(4) provides that ''the term 'modification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emissions of any air pollutant not previously emitted.'' 42 U.S.C. 7411(a)(4).[41] As first stated in 1984, the EPA proposes to reaffirm in this rule that, in defining ''modification'' solely in terms of the total *amount* of pollution that a change would produce, Congress did not make a distinction between different types of emissions—stack or fugitive—in the context of modifications under the major NSR program. CAA section 111(a)(4)'s discussion of ''any'' physical or operational change, and its focus on increases in ''any air pollutant,'' further support this position. This is consistent with the EPA's historical interpretation of CAA section 111(a)(4) in other relevant contexts, namely the NSPS program. *See, e.g.,* 49 FR 43213 (October 26, 1984).

This interpretation is also consistent with case law discussing the boundaries on the EPA's authority to establish exemptions to major NSR. As early as 1979, the *Alabama Power* court expressed skepticism of the EPA's authority to promulgate its initial 1978 exemption for fugitive dust—remanding that provision and providing extensive discussion of the limits on EPA's general exemption authority. 636 F.2d at 370; *see id.* at 357–61. More recently, as noted in NRDC's petition for reconsideration, the D.C. Circuit's *New York I* and *New York II* decisions further explored the EPA's limited ability to establish exemptions to the definition of ''modification'' in the context of major NSR. In *New York I,* the court ''conclude[d] that the CAA unambiguously defines 'increases' in terms of actual emissions,'' explaining that the phrase '' 'the *amount* of any air pollutant *emitted* by [the] source' [in CAA section 111(a)(4)] plainly refers to actual emissions.'' 413 F.3d at 40. In *New York II,* the court stated the following: ''Because Congress used the word 'any,' EPA must apply NSR whenever a source conducts an emission-increasing activity that fits within one of the ordinary meanings of 'physical change.' '' 443 F.3d at 885. Additionally, in vacating an exclusion from NSR applicability, the court concluded, ''only physical changes that do not result in emission increases are excused from NSR.'' *Id.* at 887. Thus, allowing certain sources to omit fugitive emissions in determining whether a change is a major modification would run counter to the D.C. Circuit's direction that modifications must account for all actual emissions increases from ''any'' physical change (*i.e.,* not just changes that increase non-fugitive emissions), subject only to *de minimis* exceptions.

In summary, for purposes of major NSR, the EPA proposes to affirm that CAA section 302(j) requires rulemaking before considering a source's fugitive emissions only in the major source context, and not in the major modification context. The EPA proposes to restore its longest-standing interpretation that CAA section 111(a)(4) requires that all major sources consider increases in all types of emissions (including fugitive emissions) in determining whether a proposed change would constitute a major modification.

The EPA has considered the legal issues underlying the treatment of fugitive emissions in major modifications in multiple actions over the past 4 decades. During these prior actions, the EPA has also received and considered a substantial amount of feedback from stakeholders, upon which the conclusions in this proposal are based. However, the EPA solicits comment concerning the interpretation of CAA sections 302(j) and 111(a)(4) described in this section, in light of the authorities and considerations discussed in this Section. The EPA seeks comment on whether this interpretation supports repealing the 2008 Fugitive Emissions Rule, as well as removing the similar ''major solely due to the inclusion of fugitive emissions'' exemption first established in 1980.

V. Policy Considerations and Impact on Regulated Entities

Through this proposal, the EPA seeks to realign its NSR regulations to better reflect the purpose of the NSR program and to end the regulatory uncertainty that has surrounded the EPA's treatment of fugitive emissions in the major modification context over the past four decades. The EPA expects any impacts of this proposed action on a limited subset of the regulated community to be manageable.

A. Purposes of NSR

The NSR program was designed to protect public health and welfare from the effects of air pollution and to preserve and/or improve air quality throughout the nation. *See* 42 U.S.C. 7470(1), (2), (4). As the EPA has recognized since the early days of the NSR program, emissions deteriorate air quality regardless of how they emanate—whether stack or fugitive. 45 FR 52690 (August 7, 1980). Fugitive emissions in particular are more likely to have localized impacts on the air quality of communities located near these sources of pollution. The EPA welcomes comments from affected communities and other stakeholders on this topic and the broader air quality impacts of this rule.

Allowing large, existing sources of pollution to ignore increases in fugitive emissions when determining whether a project is a major modification, as the EPA did in its 2008 Fugitive Emissions Rule, could reduce the likelihood that projects would be subject to careful evaluation through the major NSR permitting process, notwithstanding significant increases in actual air pollution. This would undermine an important tool that the EPA and state and local air agencies use to preserve and improve air quality. Thus, the EPA's proposal seeks to preserve the ability to evaluate all increases of air pollution at existing major sources, regardless of origin, consistent with the purposes of NSR.

[40] Notably, the D.C. Circuit has emphasized the limited reach of CAA section 302(j) with respect to other areas of the CAA, such as the EPA's regulation of hazardous air pollutants under CAA section 112. *See NMA* v. *EPA,* 59 F.3d 1351, 1360–61 (D.C. Cir. 1995).

[41] The Fugitive Emissions Rule did not engage with this definition; instead, the EPA asserted simply that CAA section 111(a)(4) does not ''address the issue.'' Given that Congress was clearly able to provide special consideration for fugitive emissions in CAA section 302(j), the fact that CAA section 111(a)(4) does not specifically address fugitive emissions actually undercuts, rather than supports, the argument that fugitive emissions should be treated in a special way for purposes of determining whether a change is a major modification.

B. Increasing Clarity

By removing outdated and conflicting provisions from the CFR and aligning the regulatory text with the EPA's stated interpretation, the agency seeks to restore clarity, certainty, and consistency to the regulations. The proposed approach reflects a more straightforward, simplified test for determining whether a change at an existing source is a major modification. Collectively, the EPA expects these changes to assist existing major sources to better understand the requirements that might be applicable to planned modifications, and to streamline the permitting process.

First, the proposed rule would eliminate uncertainty caused by the EPA's stay of the 2008 rule and the revisions to the regulatory text made in 2011 to effectuate the stay. Viewing the current text of the CFR, it is difficult to understand the proper treatment of fugitive emissions. The CFR is currently a patchwork of regulations that includes some of the paragraphs promulgated by the 2008 rule (which are stayed, although this may not be readily apparent from the paragraphs themselves)[42] alongside reinstated paragraphs that predated, and conflict with, the stayed paragraphs from the 2008 rule. The proposed changes to remove the remaining stayed portions of the 2008 rule would restore much-needed clarity to the CFR.

Second, the proposed changes would eliminate uncertainty caused by inconsistencies between the EPA's longstanding interpretation of CAA sections 302(j) and 111(a)(4) and the 1980 exemption. As discussed in Section IV.A of this preamble, from 1989 through 2008, the EPA interpreted CAA sections 302(j) and 114(a)(4) to require all existing major sources to include fugitive emissions when determining whether a modification is major. Nonetheless, since 1980 (excepting a brief period in 2009), the NSR regulations have included an exemption allowing certain types of sources to avoid substantive major NSR requirements if a modification would be considered major solely due to the inclusion of fugitive emissions. The EPA's failure to remove this 1980 exemption in 1989 (and in subsequent actions) in light of the agency's interpretation has led to significant confusion for both permitting authorities and the regulated community. Additional confusion has resulted from the imprecise drafting of the 1980 exemption[43] and the fact that this regulatory text reflects outdated applicability procedures.[44] The EPA expects that removing the 1980 exemption to align the regulations with the EPA's longstanding interpretation (which the EPA proposes to affirm in the current action) will further eliminate uncertainty.

The proposed changes provide a more straightforward method for accounting emissions increases and decreases in the context of modifications, which could potentially reduce the administrative burden for certain sources affected by these changes and for permitting authorities processing permit applications. Specifically, if the 2008 rule is repealed and the 1980 exemption is removed, major sources in non-listed categories would no longer have to distinguish between fugitive and non-fugitive emissions in determining whether a future modification is major. Removing this potentially complicated and contentious analytical step from the permitting process would provide greater certainty for sources contemplating modifications and ease the administrative burden for both sources and permitting authorities.[45]

C. Previous Policy Considerations

After reevaluating the policy and programmatic reasons that motivated the 2008 Fugitive Emissions Rule, the EPA no longer views these considerations as warranting the same approach. First, in the 2008 rule, the EPA suggested—without explanation—that it is better to adopt a uniform approach to major source and major modification determinations (that is, to allow the same sources to exclude fugitive emissions from both types of determinations). 73 FR 77888 (December 19, 2008). Upon reflection, the EPA sees little benefit in pursuing this type of ''uniformity'' for uniformity's sake. Most elements of the NSR program make no distinction between stack and fugitive emissions; the ability for non-listed sources to exclude fugitive emissions in initially determining whether they constitute a major source is the unique exception. At a certain point in the NSR applicability evaluation process, *all* sources (including those in non-listed categories) must account for *all* emissions (including fugitive emissions) in determining which substantive requirements apply.[46] Thus, ''uniformity'' in the treatment of fugitive emissions is ultimately illusory. The more pertinent issue is whether the EPA's approach to determining what constitutes a ''major modification'' should align more closely with the preliminary determination of whether a non-listed source is a ''major source'' (where fugitive emissions are excluded), or with consequent determinations concerning the application of substantive major NSR requirements to a major source or modification (where fugitive emissions are included). For the reasons presented in this section, the EPA believes the latter reflects better policy.[47]

The EPA also said in 2008 that its prior approaches had not adequately recognized the regulatory burden associated with requiring all sources to consider fugitive emissions in the major modification context. For support, the EPA explained: ''our interpretation proposed in 1984 and finalized in 1989 imposed a new regulatory burden on major sources in a source category 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.'' 73 FR 77889 (December 19, 2008). While this was a concise summary of the potential effect of the EPA's pre-2008 interpretations (and the one proposed in the current action), this statement did not address or contradict the EPA's more extensive consideration and discussion of the same issue in the interpretive rule proposed in 1984 and finalized in 1989. In these prior documents, the EPA explained that few sources would likely be impacted by the interpretation. *See* 54 FR 48882 (November 28, 1989). The following subsection addresses these potential impacts.

[42] The CFR notations indicating that these provisions are stayed are located at the end of each CFR section, relatively far from the stayed paragraphs themselves.

[43] *See supra* note 10 and accompanying text.

[44] *See supra* note 14 and accompanying text.

[45] These changes would not impact previously issued permits, and would only apply to permits issued after the finalization of this rule or the approval of a SIP reflecting similar changes, depending on the permitting authority.

[46] *See supra* note 6 and accompanying text. Notably, the 2008 Fugitive Emissions Rule itself further codified this principle. *See, e.g.,* 40 CFR 52.21(b)(20)(vii) (2009) (''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).'').

[47] The proposed approach also establishes ''uniformity'' in that all existing major sources are treated the same in the modification context, regardless of source type.

D. Impacts on Regulated Entities

After reevaluating currently available information, the EPA expects that the proposed interpretation, and the resulting revocation of the 2008 Fugitive Emissions Rule and removal of the 1980 exemption will have a limited practical impact and result in limited increased burden for regulated entities, for the following reasons. First, revoking the 2008 Fugitive Emissions Rule should have almost no appreciable impact on the status quo, given that the 2008 rule has been stayed (in some form) since September 2009 (less than a year after becoming effective).

Second, removing the 1980 exemption from the regulations should also have a limited impact. To the EPA's knowledge, the exemption has generally not been relied on by sources, and the population of sources that could invoke the exemption is limited. The changes proposed in this rule would only impact sources that do not belong to a listed source category (as listed sources have to include fugitive emissions for major modification purposes under any scenario). More importantly, it would only impact those non-listed sources that are already considered existing major stationary sources (as major modifications can only occur at existing major sources).[48] Given that non-listed sources do not count fugitive emissions towards major source thresholds, the EPA understands the universe of such sources to be relatively small, particularly for sources of predominantly fugitive emissions that might be most concerned with the EPA's proposed changes. As explained in the EPA's 1989 interpretive rule, the EPA expects that major NSR applicability for sources of predominantly fugitive emissions would, in most situations, be attributable to other existing EPA regulations and policies—such as those defining the scope of a stationary source—and not to the EPA's interpretation of CAA section 302(j) with respect to modifications. *See* 54 FR 48883 (November 28, 1989); *see also* 51 FR 7092 (February 28, 1986). Non-listed sources with large quantities of non-fugitive (stack) emissions are more likely to be considered major sources, and thus could be impacted by this rule. However, the likelihood that such a source (with large amounts of non-fugitive emissions) would undertake a modification that would be major solely due to consideration of the source's fugitive emissions seems remote. In any case, as described in the following paragraphs, the EPA expects that any entities that are affected are likely well-positioned to handle the additional obligations of major NSR review.

The policy considerations that may have motivated Congress to enact CAA section 302(j), and which motivated the EPA's listing of certain source categories but not others in its definition of ''major source,'' are already effectively accomplished by allowing sources in non-listed categories to exclude fugitive emissions when determining whether they constitute a ''major source.'' As discussed in Section IV of this preamble, the sparse legislative history does not express a clear purpose for the treatment of fugitive emissions in CAA section 302(j). However, as the *Alabama Power* court suggested, CAA section 302(j) ''may well define a legislative response to the policy considerations presented by the regulation of sources where the predominant emissions are fugitive in origin, particularly fugitive dust.'' 636 F.2d at 369. The court also noted that the provision ''gives EPA flexibility to provide industry-by-industry consideration and appropriate tailoring of coverage.'' *Id.* The EPA believes that the industry-specific coverage afforded by allowing sources in non-listed source categories to omit fugitive emissions in determining whether they are a ''major source'' is sufficient coverage for NSR purposes. As noted in the preceding paragraph, by omitting fugitive emissions in determining whether a non-listed source is a major source, this significantly reduces the possibility that such a source of predominantly fugitive emissions would be considered major, accordingly limiting the possibility that future modifications at such a source would trigger major source NSR.

To the extent that any sources are impacted by this rule, such sources will, by definition, be existing major stationary sources. In the specific context at issue here, these sources are likely to be large, relatively well-resourced operations, given that their emissions will necessarily generally exceed 250 tons per year for at least one pollutant *even before considering fugitive emissions.* Thus, although these major sources do not belong to a listed source category, they nonetheless represent the type of ''facilities, which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which . . . are primarily responsible for emissions of the deleterious pollutants that befoul our nation's air.'' [49] If these facilities were constructed anew, they would be subject to the major NSR program (and, presumably, many if not most of these sources have already been through the major NSR permitting process). These sources should be familiar with the NSR program and able to manage any additional obligations imposed by this proposed regulatory change.

Accordingly, in light of these policy considerations and the legal constraints discussed in Section IV.C of this preamble, the EPA does not consider it necessary or prudent to extend a second, additional exemption to these existing major sources that are contemplating modifications, as the EPA did in the Fugitive Emissions Rule. Doing so would unnecessarily render future modifications less likely to trigger major NSR review, even in cases where a modification would significantly increase actual air pollution, frustrating the ultimate goals of the major NSR program (as discussed in Section V.A of this preamble). Overall, the EPA believes the interpretation and regulatory approach proposed in the current action strikes the appropriate balance to protect air quality while ensuring ''that economic growth will occur in a manner consistent with the preservation of existing clean air resources.'' 42 U.S.C. 7470(3).

The EPA's proposed conclusions regarding the limited potential impact of this action are based on the agency's experience over the past 4 decades as well as feedback received from stakeholders on prior actions. However, the EPA solicits additional comments from stakeholders on the practical impact of the proposed action, including the scope of overall programmatic impacts (*e.g.,* how many sources might be affected). Specifically, the EPA seeks information on the types and numbers of existing major sources that do not belong to a listed source category and that have predominantly fugitive emissions, or which might otherwise be affected by this rule. As

[48] Although physical changes to existing non-major sources could trigger major NSR if the physical change itself exceeded major source thresholds, this would not be considered a ''major modification,'' but rather, a new ''major source.'' *See, e.g.,* 40 CFR 52.21(b)(1)(i)(*c*). Thus, consideration of fugitive emissions in this context would be governed by the EPA's long-standing regulations governing the treatment of fugitive emissions in major source determinations, and non-listed sources would not count fugitive emissions towards the threshold.

[49] *Alabama Power,* 636 F.2d at 353 (explaining Congress's intention in establishing the definition of ''major emitting facility'' and ''major stationary source'' for PSD purposes in CAA section 169(1)). As the court stated, ''the Act does not give the agency a free hand authority to grant broad exemptions. Though the costs of compliance with section 165 [PSD] requirements are substantial, they can reasonably be borne by facilities that actually emit, or would actually emit when operating at full capacity, the large tonnage thresholds [for major stationary sources] specified in section 169(1).'' *Id.* at 354.

noted in the previous paragraphs, the EPA expects the number of such sources to be relatively small, but the EPA would welcome more quantitative information on this topic. Relatedly, the EPA solicits information about specific real-world or hypothetical examples of situations where a particular type of source might be affected by the proposed changes (*e.g.,* how the changes might impact a regulated entity's behavior in considering whether to undertake a modification).

VI. SIP Minimum Program Elements

If the EPA affirms the interpretation of CAA sections 302(j) and 111(a)(4) discussed in Section IV.C of this preamble—*i.e.,* that all existing major sources must account for fugitive emissions in determining whether a modification is major—the EPA proposes that the changes to the EPA regulations reflected in this rule would also be minimum program elements for SIPs. If this rule is finalized as proposed, it is likely that any SIPs containing an exemption for fugitive emissions in the major modification context will be less stringent than the minimum program elements specified in the EPA's regulations and would therefore need to be revised. The scope of necessary SIP revisions would be a case-specific inquiry and would depend on the nature of any final changes to the EPA's regulations as well as the nature of existing SIP provisions. Based on a preliminary review of existing EPA-approved SIPs, the EPA observes that very few state or local agencies have EPA-approved SIP provisions based on, or incorporating, the 2008 Fugitive Emissions Rule. This makes sense considering that the EPA stayed and amended the 2008 rule shortly after it became effective, leaving a relatively small window of time for states to adopt revisions based on the 2008 rule. However, the EPA understands that significantly more SIPs contain provisions based on, or incorporating, the 1980 exemption (as recodified in the 2002 NSR Reform Rule). Accordingly, if the EPA finalizes a rule that not only repeals the 2008 rule, but also removes the 1980 exemption from the EPA's regulations, a larger number of permitting authorities may be required to submit SIP revisions. If the EPA determines that conforming SIP revisions are necessary, states would be required to submit SIP revisions no later than three years after the final rule amending the EPA's regulations publishes in the **Federal Register**. 40 CFR 51.166(a)(6)(i). The EPA is soliciting comment on the need to establish the proposed changes as minimum program elements and the consequent potential for SIP revisions.

VII. Definition of ''Fugitive Emissions''

Fugitive emissions, for purposes of both the NSR and title V permitting programs, are defined as ''emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.'' *E.g.,* 40 CFR 52.21(b)(20), 70.2. The 2008 Fugitive Emissions Rule did not change this regulatory definition, but the preamble to that rule did include a discussion of ''guiding principles'' based on the EPA's interpretation of this regulatory definition. *See* 73 FR 77891 (December 19, 2008). Most of the principles articulated in the 2008 preamble simply restated or summarized prior EPA letters and memoranda expressing the EPA's interpretations and policies on the issue.[50] The EPA continues to follow its interpretations and policies concerning the definition of ''fugitive emissions'' that predated the 2008 rule, including those that were restated and summarized in the 2008 rule preamble. These positions were not affected by the 2008 rule or the stays of the 2008 rule. The EPA is providing the following summary of these interpretations and policies in order to provide clarity and certainty about how EPA intends to approach these issues.

Determining whether certain emissions are fugitive or non-fugitive at a particular source is inherently a fact-specific inquiry. All emissions which do actually pass through a stack, chimney, vent, or other functionally equivalent opening at a facility are non-fugitive. If emissions do not currently pass through such an opening, then one must evaluate whether such emissions could reasonably pass.[51] The EPA interprets the phrase ''reasonably pass'' by determining whether emissions could reasonably be collected or captured and discharged through a stack, chimney, vent, or functionally equivalent opening. Various criteria guide this case-by-case analysis, and no single criterion should be considered determinative. Relevant considerations include whether and to what extent similar facilities collect or capture similar emissions (including how common this practice is, and whether the EPA has established a national emissions standard or regulation that requires some sources in the source category to collect or capture the emissions) and the technical and economic feasibility (*e.g.,* cost) of collecting or capturing the emissions.

In addition to outlining these longstanding interpretations and policies, the preamble to the 2008 Fugitive Emissions Rule also expanded some of the factors that permitting authorities may consider when assessing whether certain emissions are fugitive or non-fugitive. Notably, the EPA said for the first time in the 2008 preamble that permitting authorities could consider the cost of *controlling* emissions when determining whether such emissions ''could not reasonably pass'' and accordingly whether such emissions should be considered fugitive or non-fugitive. The EPA understands that the stay of the 2008 rule left a question of whether EPA continued to support considering the cost of control in identifying whether emissions are fugitive. The EPA intended the initial 2009 stay (and all subsequent stays) of the 2008 Fugitive Emissions Rule to apply to the entire rulemaking effort, including the discussion of the definition of ''fugitive emissions'' contained within the rule's preamble. Thus, the EPA statements regarding the cost of control were also stayed and were not applied by EPA thereafter. Likewise, these statements regarding cost of control do not reflect the EPA's current thinking and should not be relied upon by states or sources in making permitting decisions. Instead, the EPA continues to apply the longstanding interpretations and policies that predated the 2008 rule, as summarized in the preceding paragraphs.

Although the EPA does not propose in this action to revise its longstanding approach for evaluating this issue, the EPA welcomes public comment on how to interpret and apply the definition of ''fugitive emissions'' in the NSR and

[50] For examples of these prior guidance documents, please see the EPA's online NSR and title V guidance databases, each of which include a topic page containing guidance related specifically to fugitive emissions: *https://www.epa.gov/nsr/new-source-review-policy-and-guidance-document-index* and *https://www.epa.gov/title-v-operating-permits/title-v-operating-permit-policy-and-guidance-document-index.*

[51] When the EPA finalized the definition of ''fugitive emissions'' in the 1980 PSD rulemaking to include the words ''reasonably pass,'' the agency explained that it did so in order to narrow the proposed definition of fugitive emissions to exclude not only those emissions that currently do pass through a stack, chimney, vent, or functionally equivalent opening, but also to those that do not currently pass but which could reasonably be made to pass through such an opening. The EPA explained: ''This change will ensure that sources will not discharge as fugitive emissions those emissions which would ordinarily be collected and discharged through stacks or other functionally equivalent openings, and will eliminate disincentives for the construction of ductwork and stacks for the collection of emissions.'' 45 FR 52693 (August 7, 1980).

title V regulations. To the extent that the EPA seeks to provide additional guidance on applying the definition of ''fugitive emissions'' in the future, any such guidance may be provided alongside, or separate from, any final action in this rulemaking concerning the treatment of fugitive emissions for major modifications. In the meantime, the EPA will continue to be responsive to case-specific inquiries from permitting authorities and regulated entities requesting the EPA's views on whether certain emissions should be considered fugitive or non-fugitive.

VIII. Environmental Justice Considerations

The proposed changes are not expected to have any effect or increased burden on communities with environmental justice concerns. Although the impact of this proposal is expected to be limited, requiring all existing major sources to include fugitive emissions in determining whether a change constitutes a major modification could potentially result in more projects subject to major NSR and installing pollution controls, improving the air quality for all communities, particularly those located near major sources with a large proportion of fugitive emissions.

IX. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Pursuant to E.O. 12866, the EPA has assessed the potential costs and benefits of this regulatory action. EPA believes the rule will have a limited practical impact and result in limited increased burden for regulated entities, as discussed in Section V.D. Any changes made in response to OMB recommendations have been documented in the docket.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2060–0003 for the PSD and NNSR permit programs. The burden associated with obtaining an NSR permit for a major stationary source undergoing a major modification is already accounted for under the approved information collection requests. A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. In general, major stationary sources undergoing major modifications are not small entities, as discussed in Section V of this preamble. State and local air agencies that could be affected by this rule do not qualify as small entities under the RFA.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded federal mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action imposes no enforceable duty on any state, local or tribal governments or the private sector. Nonetheless, if this rule is finalized as proposed, it is possible that some state and local air agencies will need to submit a small, one-time revision to their SIP. However, the rule could ultimately reduce regulatory impacts for these state and local agencies (and potentially affected sources) because they would no longer have to expend resources differentiating between fugitive and non-fugitive emissions when assessing whether a project constitutes a major modification.

E. Executive Order 13132: Federalism

This action 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.

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

This action does not have tribal implications as specified in Executive Order 13175. The EPA is currently the reviewing authority for PSD and NNSR permits issued in tribal lands and, as such, the revisions being proposed will not impose direct burdens on tribal authorities. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. Industries directly involved in energy production (*e.g.,* fossil fuel-fired power plants) will not be affected by this rule because they belong to a listed source category, and this rule only pertains to sources in non-listed source categories. As discussed in Section V of this preamble, the EPA considers it unlikely that this rule would affect other industries involved in energy supply that do not belong to a listed source category (*e.g.,* surface coal mining).

I. National Technology Transfer and Advancement Act (NTTA)

This rulemaking does not involve technical standards.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The basis for this decision is contained in Section VIII of this preamble.

X. Statutory Authority

The statutory authority for this action is provided by 42 U.S.C. 7401 *et seq.*

List of Subjects

40 CFR Part 51

Environmental protection, Administrative practice and procedure,

Air pollution control, Carbon monoxide, Fees, Intergovernmental relations, Lead, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Sulfur oxides, Transportation, Volatile organic compounds.

40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control, Ammonia, Carbon monoxide, Greenhouse gases, Intergovernmental relations, Lead, Nitrogen dioxide, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Sulfur dioxide, Sulfur oxides, Volatile organic compounds.

Michael S. Regan,

Administrator.

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

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

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

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

§ 51.165 [Amended]

■ 2. Amend § 51.165 by:
■ a. Lifting the stay on paragraphs (a)(1)(v)(G) and (a)(1)(vi)(C)(*3*);
■ b. Removing paragraphs (a)(1)(v)(G) and (a)(1)(vi)(C)(*3*); and
■ c. Removing and reserving paragraph (a)(4).

§ 51.166 [Amended]

■ 3. Amend § 51.166 by:
■ a. Lifting the stay on paragraphs (b)(2)(v) and (b)(3)(iii)(*d*);
■ b. Removing paragraphs (b)(2)(v) and (b)(3)(iii)(*d*); and
■ c. Removing and reserving paragraph (i)(1)(ii).

Appendix S to Part 51 [Amended]

■ 4. Amend appendix S to part 51 by:
■ a. Lifting the stay on paragraph II.A.5(vii);
■ b. Removing paragraph II.A.5(vii); and
■ c. Removing and reserving paragraph II.F.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

§ 52.21 [Amended]

■ 6. Amend § 52.21 by:
■ a. Lifting the stay on paragraphs (b)(2)(v) and (b)(3)(iii)(*c*);
■ b. Removing paragraphs (b)(2)(v) and (b)(3)(iii)(*c*); and
■ c. Removing and reserving paragraph (i)(1)(vii).

[FR Doc. 2022–22259 Filed 10–13–22; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2022–0503; FRL–9936–01–R9]

Air Plan Approval; California; Innovative Clean Transit Regulation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a revision to the California State Implementation Plan (SIP) concerning particulate matter (PM) and oxides of nitrogen (NO_X) emissions from public transit buses. We are proposing to approve State rules that regulate these emission sources under the Clean Air Act (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

DATES: Comments must be received on or before November 14, 2022.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2022–0503 at *https://www.regulations.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Jeffrey Buss, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 947–4152 or by email at *buss.jeffrey@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to the EPA.

Table of Contents

I. The State's Submission

A. What rules did the State submit?

On December 14, 2018, the California Air Resources Board (CARB) adopted a set of rules referred to as the Innovative Clean Transit (ICT) regulation. On August 13, 2019, the California Office of Administrative Law (OAL) approved the ICT regulation, effective October 1, 2019. On February 13, 2020, CARB submitted the ICT regulation to the EPA as a revision to the California SIP.[1] Table 1 lists the specific sections of Title 13, Division 3, Chapter 1, Article 4.3 of the California Code of Regulations (CCR) that comprise the ICT regulation.

[1] CARB submitted the ICT Regulation electronically to the EPA on February 13, 2020 as an attachment to a letter dated February 12, 2020.