

Proposed Fugitive Emissions Amendments Bring Clarity to Major Source Permitting Requirements

Publications

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On October 14, 2022, the United States Environmental Protection Agency (USEPA) published proposed revisions to the Clean Air Act's New Source Review (NSR) permitting regulations. The proposal seeks to repeal specific 2008 Clean Air Act (Act) amendments and require all existing major stationary sources to include fugitive emissions when determining whether a change at the source constitutes a major modification subject to NSR permitting requirements.

The USEPA's NSR program requires certain stationary sources to obtain air pollution permits prior to construction. The goal of the program is to ensure that air quality does not worsen in areas where the air is considered unhealthy (known as "non-attainment areas") or is not significantly degraded in areas where the air is considered clean ("attainment areas").

A new source construction or modification of an existing source that increases emissions of regulated NSR pollutants above NSR regulation thresholds is subject to NSR "major source" requirements. How stringent these requirements are depends on whether the facility falls in an attainment or non-attainment area and what NSR permitting program applies. A major source in an attainment area is subject to the Prevention of Significant Deterioration (PSD) program and may be required to perform air quality and impact analysis, as well as install Best Available Control Technology. A major source in a non-attainment area is subject to the Nonattainment NSR program and may be required to perform emission offsets and meet Lowest Achievable Emission Rates. Both programs require opportunities for public involvement.

"Fugitive emissions" are emissions that cannot reasonably pass through a stack, chimney, vent, or similar opening (e.g. windblown dust from surface mines or volatile organic compounds emitting from leaking pipes). Whether a source must consider fugitive emissions for modification purposes has had an inconsistent history dating back to 1978, when the USEPA first established the foundations for the NSR program. Under the recent 2008 permitting amendments, only facilities in certain industrial source categories were required to include fugitive emissions when determining

whether a change was a major modification. These source categories include petroleum refineries, large fossil fuel-fired steam electric plants, and Portland cement plants, among others. Sources in other industrial source categories, therefore, did not have to count fugitive emissions towards the major modification thresholds.

Section 111(a)(4) of the Act defines “modification” as “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 emission of any air pollutant not previously emitted.” The current USEPA proposal interprets Section 111(a)(4) of the Act “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.” The USEPA contends that its proposal will “affirm its longstanding position that all existing major sources (regardless of source category) must include fugitive emissions when determining if a modification is major.”

While the 2008 amendments only applied fugitive emission calculations to certain sources, a petition for reconsideration and multiple administrative stays of applicable provisions of those amendments mean the USEPA has effectively been instituting the current proposal since 2009. The proposed revisions will release the stay on specified 2008 provisions and then repeal them, a move that the USEPA states will “bring closure to the reconsideration proceeding” and “have a limited practical impact” on regulated entities given the ongoing stay.

The USEPA did not receive any requests for a public hearing prior to the October 19, 2022 request cutoff date. However, interested parties can still submit comments on the proposal through December 13, 2022. The USEPA specifically seeks “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).” We will continue to monitor permitting developments on the Corporate Environmental Lawyer.

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