

Comments of the American Forest & Paper Association, the National Cotton Council, and the National Oilseed Processors Association on EPA’s Proposed Reconsideration of the Inclusion of Fugitive Emissions in New Source Review “Modification” Analysis, 72 Fed. Reg. 63850 (November 13, 2007), Docket ID No. HQ-OAR-2004-0014

I. Introduction and Summary

Clean Air Act (CAA) “new source review” (NSR) applies both when a major source of air pollution is built new and when it is “modified” so as to increase regulated emissions by a “significant” amount. “Fugitive” emissions are “those emissions that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.” See 40 CFR 52.21(b)(20). EPA has long grappled with the question how permitting authorities should consider fugitive emissions in determining whether NSR modification review has been triggered.

On November 13, 2007, EPA proposed **not** to require permitting authorities to consider fugitive emissions in such applicability determinations, unless the Agency had affirmatively decided by rulemaking that fugitive emissions from the source category at issue should be included. 72 Fed. Reg. 63850. This would reverse the position of the 2002 NSR Reform Rule, which provided for the automatic inclusion of fugitive emissions in these computations without inviting prior comment on the issue.

The American Forest and Paper Association (AF&PA), the National Cotton Council (NCC), and the National Oilseed Processors Association (NOPA) represent companies with a vital interest in this rulemaking. Collectively, these companies operate

hundreds of major sources subject to NSR. Many of these sources have fugitive emissions.

AF&PA, the trade association of the forest products industry, represents about 100 companies and related associations that engage in or represent the manufacture of pulp, paper, paperboard and wood products. The forest products industry accounts for more than seven percent of total U.S. manufacturing output and employs 1.5 million people.

NCC is the central trade association of the US cotton industry, representing producers, ginners, cottonseed merchants, cooperatives, warehousemen, and textile manufacturers in 17 cotton-producing states from the Carolinas to California. About 20 million bales of cotton and 6.6 million tons of cottonseed are produced annually, with a combined value of more than \$5 billion at the farm gate, by about 20,000 cotton growers farming 10-12 million acres and about 800 cotton gins.

NOPA is a national trade association comprised of 14 companies engaged in the production of vegetable meals and oils from oilseeds including soybeans. Our 14 member companies process more than 1.4 billion bushels of oilseeds annually at 64 plants located throughout the country, including 59 plants which process soybeans.

AF&PA, NCC, and NOPA agree with EPA's proposal. We believe that the CAA fully supports it, and that it would allow EPA to avoid the very expensive and counterproductive results that the automatic inclusion of fugitive emissions could trigger. To explain our position, we will first set out the background, and then consider the relevant legal and policy arguments. We conclude by addressing EPA's proposed standards for deciding when emissions are "fugitive."

II. Background

CAA NSR applies to every “major emitting facility” see CAA §165, or “major stationary source”, see CAA §172(c)(5). A facility or source is “major” if it emits or has the potential to emit more than specified threshold amounts.

CAA §302(j) provides that in determining whether a source or facility emits enough to be major, fugitive emissions shall be included in the computation “as determined by rule by the Administrator.”

EPA’s original NSR rules excluded sources of fugitive emissions from most NSR requirements, but did not rely on 302(j) to do it. The United States Court of Appeals for the District of Columbia Circuit disapproved this approach in *Alabama Power v. Costle*, 636 F.2d. 323, 369-70 (1979). The court said that §302(j) applied, and that it “gives EPA flexibility to provide industry-by-industry consideration and the appropriate tailoring of coverage” so as to avoid the impractical control requirements that could be triggered by the automatic inclusion of fugitives. *id.* at 369.

In 1980, EPA issued revised rules in response to the court opinion. These rules required permitting authorities to consider fugitive emissions in NSR applicability decisions for sources in 30 specified categories. EPA selected these source categories based on their air quality importance. However, since EPA agreed that social and economic impact should be a factor in listing decisions, the Agency invited and considered comments to show

that unreasonable socioeconomic impacts relative to the benefits would result from subjecting the sources [in one or more of these categories] to the relevant PSD or nonattainment programs.

72 Fed. Reg. 63853. See also 45 Fed. Reg. 52676, 52690 (August 7, 1980).

According to the current proposal, between 1980 and 1984 EPA simply assumed that fugitive emissions would not be considered in either major modification or major stationary source determinations unless a source fell within one of the 30 listed categories. 72 Fed. Reg. 63854.

However, in 1984 EPA proposed to change this rule for modifications only, and to include fugitive emissions in modification applicability decisions even if a source fell in an unlisted category. 49 Fed. Reg. 43211. (Oct. 26, 1984). In 1989 EPA said that it had made that position final, 54 Fed. Reg. 48870, 4882-84 (Nov. 28, 1989). However, EPA did not change the text of the governing regulations, which pretty clearly still restricted the requirement to consider fugitives to the thirty listed categories. See *In re Masonite*, PSD Appeal 94-1, 5 Environmental Administrative Decisions 552, 582 (1994).

In the 2002 NSR Reform Rule EPA changed the regulatory language itself to conform to the 1989 preamble statements issued thirteen years earlier. See 67 Fed. Reg. 80186, 80246-47 (December 31, 2002).

Owners and operators of fugitive emissions sources challenged the 2002 rule in court and petitioned EPA to reconsider it. In response, EPA issued the current proposal.

Our next two sections address the legal and policy arguments behind EPA's two different positions on considering fugitive emissions, and show that they decisively support the position EPA has taken in this proposal.

III. The Language of the Clean Air Act Supports Conducting a Focused Rulemaking before Considering Fugitives in NSR Modification Review

As noted above, CAA §302(j) requires EPA to conduct a rulemaking before considering fugitive emissions in NSR applicability determinations. The *Alabama Power* court said this provision was meant to allow EPA to consider, for each source category, the special difficulties of controlling fugitives, and the costs and benefits of those controls, before any final decision would be made regarding their inclusion..

From 1989 until now EPA officially maintained that this rulemaking requirement only applied to deciding whether an entire source was major, and not to modifications, though states and adjudicatory bodies often disagreed and followed the text of the regulations instead.

The CAA provides that NSR applies to any “major emitting facility” on which construction commenced after 1977. It then, in CAA §§ 169(2)(c) and 171(4), defines “construction” to mean “modification” as defined in CAA §111(a)(4). Section 111(a)(4) is part of the “new source performance standards” (NSPS) section. It states that a source is “modified” when it undergoes any change “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.”¹

EPA argued in 1984 and 1989 that since §111(a)(4) did not distinguish between fugitive emissions and non-fugitive emissions, it followed that Congress did not intend to require any such distinction in NSR modification review. Moreover, 1977 legislative history stated that Congress intended to conform modification review to “usage in other

¹ The *Alabama Power* court held that EPA could interpret this provision to mean that only “significant” emissions increases trigger NSR,. 636 F.2d. 357-361. EPA’s regulations rest on that interpretation.

parts of the Act”, see 54 Fed. Reg. 48882. Since in 1977 neither the NSPS nor the nascent NSR programs distinguished between fugitive and non-fugitive emissions, EPA argued that Congress endorsed an approach to “modifications” under the 1977 NSR provisions that did not distinguish between them either.

Though EPA no longer relies on this argument, the Agency continues to find it respectable. It is not, for three reasons.

First, Congress enacted the clear language of §302(j) for equally clear policy reasons, namely to direct EPA to consider costs and benefits before requiring the inclusion of fugitives in NSR applicability decisions. The argument just summarized rests on a chain of logic far too tenuous and obscure to overcome that clear mandate, particularly since no policy justification has ever been offered for treating entire sources and modifications differently.

Second, this purely textual argument has purely textual problems. A source that is “modified” is a special case of a source that is “constructed.” That is how the chain of references from §165 to §169(c)(2) works. But that means that “modification” is construction of a “source.” And §302(j) says that the fugitive emissions of “sources” cannot count toward NSR applicability unless EPA conducts a special rulemaking to include them.

Finally, EPA’s discussion of prior practice overlooks a key difference between the NSPS program and the NSR program.

Unlike NSR, which applies to every “source” over a certain emissions threshold, NSPS only applies to “affected facilities,” with boundaries that EPA defines by

regulation. Moreover, NSPS requirements are set by balancing cost against emissions reduction.

Accordingly, the NSPS program, by its very structure, requires EPA to consider whether emission controls would be practicable and cost-justified when applied to an “affected facility” of a certain configuration, and to change the definition of “affected facility” to avoid covering equipment or operations that cannot be cost-effectively controlled, including sources of fugitive emissions. In effect, the structure of the NSPS program requires EPA to conduct exactly the kind of detained inquiry into the costs and benefits of controlling fugitive emissions that §302(j) was added to the CAA to require. It follows that making modifications subject to §302(j), rather than exempting them, is the reading that most closely tracks EPA’s actual conduct of the NSPS program.²

We were pleased that EPA no longer relies on the arguments summarized above to support the automatic inclusion of fugitive emissions in applicability determinations for NSR modifications. For the reasons just summarized, we believe that the CAA itself requires a rulemaking focused on specific source categories to accomplish such inclusion.

IV. The Policies Behind §302(j) Support Applying It to Modifications

We cannot think of any logical reason why Congress would have wanted to apply the §302(j) rulemaking requirements to deciding whether a source is “major” in the first place, and not to deciding whether “modification” review is triggered. As EPA is well aware almost all NSR controversies in fact involve modifications.

² EPA’s 1989 *Federal Register* notice also refers to the fact that the pre-1977 NSR program did not make any distinction between fugitive and non-fugitive emissions. But that program was a nascent initiative with no detailed statutory foundation and no track record. It is inconceivable that Congress meant to endorse its just-issued requirements as “prior practice.”

EPA's 1989 preamble supports this view by arguing, paradoxically, that the automatic inclusion of fugitive emissions in modification review was justified because it would be unlikely to have any real impact. 54 Fed. Reg. 48882. That raises two questions, neither favorable to the "automatic inclusion" argument.

First, why would Congress have **required** EPA to adopt such a position, which, according to EPA, has neither significant costs nor significant benefits?

Second, wasn't this assertion by EPA in effect an attempt at §302(j) compliance "lite," since it claims that the costs of EPA's position are acceptable without doing the detailed work that would be necessary to support that position in an actual §302(j) rulemaking?

For these reasons, we were pleased that EPA in this proposal did not reaffirm its 1989 position, but rather acknowledged the real danger that automatic inclusion would lead to economically burdensome and impractical results without air quality benefit.

We particularly endorse EPA's statement that

The concerns appearing in the legislative history relating to fugitive emissions are the same when evaluating whether a project at an existing source is a modification as they are when evaluating whether a source is a major source. Our current, differentiated approach can lead to incongruous results.

72 Fed. Reg. 63857.

V. The Standards for Determining when Emissions are Fugitive

AF&PA, NCC, and NOPA agree with EPA that the decision whether emissions are fugitive should be made through a balancing test that considers the difficulty of capturing emissions, the cost of control, and air quality factors.

We further agree that this decision should be made on a case by case basis. For example, it is not uncommon to find that a given process unit is sometimes located inside a building and sometimes free-standing. The emissions from the unit might well be considered non-fugitive in the first case because they would be released into the building space which would probably in turn have a vent or stack. That should not mean, or even imply, that emissions from a free-standing unit should be considered non-fugitive. In other words, the fact that some units are located inside buildings does not suggest that would be reasonable to construct a building to house free-standing units. On the contrary, the location of some units inside buildings is almost always due to historical or site-specific factors and does not reflect any larger judgment.

AF&PA, NCC and NOPA also believe that EPA should provide guidance on when fugitive emissions are “quantifiable” and must therefore be included in applicability calculations. That guidance, at a minimum, should address two points.

- Quantifying fugitive emissions can often be very expensive. The decision whether the regulatory gains justify the expense of quantification should be subject to exactly the same cost-effectiveness test as other elements of the decision whether emissions are fugitive. Without such guidance the natural tendency of the regulatory system to require the inclusion of these emissions will operate unchecked.
- Cost-effectiveness cannot be the only test for deciding whether fugitive emissions can be quantified with acceptable precision. As we all know, EPA has been more than ready to take enforcement action against sources that get their NSR applicability calculations wrong. It is unacceptable to

subject sources to this risk when the quantification tools that they would have to use to make their applicability calculations are inaccurate or unproven. Accordingly, EPA should also make clear that fugitive emissions should not be included in applicability calculations unless the practically available quantification methods meet some minimum high standard of accuracy.

VI. Conclusion

For the reasons set out above, we support EPA's proposal and urge the Agency to issue a final rule as soon as possible. That final rule, in our view, would return the actual practice of NSR to the pattern that prevailed in practice between 1980 and 2002, and would avoid the disruptions caused in recent years by the rule change that EPA has now proposed to reverse.