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U.S. Environmental Protection Agency  
Docket ID No. EPA-HQ-OAR-2004-0014  
Submitted via the Federal eRulemaking Portal,  
<https://www.regulations.gov>

To Whom It May Concern:

The National Association of Clean Air Agencies (NACAA) appreciates this opportunity to comment on the U.S. Environmental Protection Agency's (EPA's) proposed rule, "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Reconsideration of Fugitive Emissions Rule," which was published in the *Federal Register* on October 14, 2022 (87 Fed. Reg. 62,322). NACAA is the national, nonpartisan, non-profit association of air pollution control agencies in 40 states, including 117 local air agencies, the District of Columbia and five territories. The air quality professionals in our member agencies have vast experience dedicated to improving air quality in the United States. These comments are based on that experience. The views expressed in these comments do not represent the positions of every state and local air pollution control agency in the country.

*Summary of Proposal*

This proposed rule is the culmination of EPA's reconsideration of the 2008 Fugitive Emissions Rule, which required only facilities in specifically listed industrial source categories to include fugitive emissions in the total emissions calculation when determining whether a physical or operational change is a "major modification" subject to New Source Review (NSR) permitting requirements. Prior to the 2008 rule, EPA required all major stationary sources to consider fugitive emissions as part of the emissions increase calculation. In 2009, EPA granted a petition for administrative reconsideration of the 2008 Fugitive Emissions Rule, and since that time, a series of administrative stays have prevented the rule from ever coming into effect.

Now, EPA proposes to fully repeal the 2008 rule by removing the stayed provisions of the regulatory amendments adopted in 2008 to affirm that *all* existing major stationary sources are required to include fugitive emissions in determining whether a physical or operational change constitutes a "major modification" under

the PSD or NNSR programs. In addition, the proposed rule would remove a regulatory provision established in 1980 that exempts certain stationary sources from substantive major NSR requirements if the only reason a change is considered a “major modification” is due to the inclusion of fugitive emissions.

### *NACAA Comments*

NACAA strongly supports the repeal of the 2008 Fugitive Emissions Rule, because eliminating fugitive emissions from NSR modification calculations for all but specifically listed source categories would almost certainly result in increases in air pollution that adversely affect public health and welfare. Fugitive emissions are generated by material processing and conveying activities, coating operations, dusty material storage piles, plant road dust, quarries and leaking valves and flanges at virtually all types of industrial source categories. They are a substantial contributor to air pollution that imposes significant health burdens on nearby neighborhoods.

If the provisions of the 2008 rule were to become effective (i.e., if the administrative stay were lifted), a subset of facilities that would otherwise have been required to count fugitive emissions toward modification thresholds would no longer reach NSR applicability levels and therefore avoid NSR modification requirements, including the installation of pollution control equipment. The resulting increases in uncontrolled emissions would interfere with our efforts to attain and maintain the National Ambient Air Quality Standards, exacerbate the impact on frontline communities and place undue burdens on other sectors of the economy.

NSR should be triggered by all emissions increases at major stationary sources that affect public health, not just emissions that are vented through stacks. NACAA agrees with the legal conclusion and rationale that EPA applied for 20 years prior to the 2008 rule and in the years since the rule was stayed: that for physical and operational changes at major sources, Congress perceived no qualitative distinction between stack and fugitive emissions and intended for modifications to be broadly construed to include *all* emissions in the calculation of increases. For the same reason, NACAA also supports the removal of the 1980 regulatory provision that would exempt certain sources from NSR requirements if a change was not considered to be a major modification but for the inclusion of fugitive emissions.

As we have expressed in previous comments, including our January 2021 transition recommendations to the Biden administration,<sup>1</sup> NACAA generally supports moving away from a policy of regulatory streamlining that reduces the applicability of permitting regulations. Instead, EPA should focus making permitting processes more efficient without weakening public health protections. The repeal of the Fugitive Emissions Rule adheres to this philosophy. Eliminating fugitive emissions exemptions will foreclose an opportunity for disputes and appeals of our permitting authorities’ fugitive emissions-related determinations to arise. Including fugitive

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<sup>1</sup> NACAA’s January 15, 2021, transition paper, “Improving Our Nation’s Clean Air Program: Recommendations from the National Association of Clean Air Agencies to President-Elect Biden’s and Vice President-Elect Harris’ Administration” is available online at <https://www.4cleanair.org/wp-content/uploads/NACAA2021PresidentialTransitionDocument-01152021.pdf>

emissions for all sources is less resource-intensive than making case-by-case determinations of whether or not to include fugitive emissions in emissions calculations.

NACAA agrees with EPA that these proposed rule changes should be considered minimum NSR program elements, because State Implementation Plans (SIPs) that retain exemptions for fugitive emissions would be less stringent than federal requirements. Sources undertaking modifications should be treated with parity across jurisdictions in this regard. EPA estimates that a “large number” of permitting authorities may be required to submit SIP revisions if the Reconsideration of Fugitive Emissions Rule is finalized. We urge EPA to provide, along with the final rule, guidance and analysis, potentially including a specific list, of state SIP provisions that EPA believes will need to be repealed. The process for repealing rules is time and resource-intensive, and some states will find the three-year timeframe for SIP submittals set forth in 40 C.F.R. § 51.166(a)(6)(i) to be challenging. We urge you to carefully consider comments from our member agencies on this issue.

This rulemaking also presents an opportune time for EPA to evaluate its use of the term “fugitive emissions” in other regulations and review and update related policies and guidance documents. The NSR program’s definition of fugitive emissions as “emissions which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening” is not identical to definitions of that term in other programs (e.g., in certain National Emission Standards for Hazardous Air Pollutants). It would be helpful to permitting agencies, companies and the general public if EPA were to use consistent definitions to avoid potential confusion.

In addition, technology changes over time mean that some emissions that were once considered “fugitive” under the NSR definition should no longer be considered fugitive today under the definition’s “reasonability” criterion. We encourage EPA to review its past NSR guidance related to fugitive emissions and determine if the guidance remains applicable today. NACAA members can offer specific examples and we would welcome the opportunity for further dialogue on this issue.

Thank you for your consideration of these comments. If you have any questions, please do not hesitate to contact either of us or Karen Mongoven of NACAA at [kmongoven@4cleanair.org](mailto:kmongoven@4cleanair.org).

Sincerely,



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