

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA-HQ-OAR-2004-0014: FRL-9113-1]

RIN 2060-AP73

**Prevention of Significant Deterioration (PSD) and Nonattainment
New Source Review (NSR): Reconsideration of Inclusion of
Fugitive Emissions; Proposal for Additional Stay**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to put in place an additional 18-month stay to the existing stay of the inclusion of fugitive emissions requirements in the federal Prevention of Significant Deterioration (PSD) program published in the Federal Register on December 19, 2008, in the final rule entitled, "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Reconsideration of Fugitive Emissions" ("Fugitive Emissions Rule"). The Fugitive Emissions Rule under the federal PSD program requires that fugitive emissions be included in determining whether a physical or operation change results in a major modification only for sources in industries that have been designated through rulemaking under section 302(j) of the Clean Air Act (Act or CAA).

The existing stay is in effect for three months; that is, from December 31, 2009, until March 31, 2010. This action

proposes to put in place an additional stay for 18 months, which we believe will allow for sufficient time for EPA to propose, take public comment on, and issue a final action concerning the inclusion of fugitive emissions in the federal PSD program.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

Public Hearing. If anyone contacts EPA requesting the opportunity to speak at a public hearing concerning the proposed regulation by **[INSERT DATE 10 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, we will hold a public hearing on **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. If a hearing is held, the record for the hearing will remain open until **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID No.

EPA-HQ-OAR-2004-0014, by one of the following methods:

- <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- E-mail: a-and-r-docket@epa.gov.
- Fax: (202) 566-1741.
- Mail: Air and Radiation Docket, Environmental Protection Agency, Mail code 6102T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460.
- Hand Delivery: EPA Docket Center, Public Reading Room, EPA

West, Room 3334, 1301 Constitution Ave., NW, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to the applicable docket. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov Web Site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and

cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Public Hearing. If a public hearing is held, it will be held at the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, DC 20004.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., 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 form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC, 20460. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1742, and the telephone number for the Air Docket is (202) 566-1744.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Wheeler, Air Quality Policy Division, (C504-03), U.S. Environmental Protection Agency, Research Triangle Park, NC, 27711; telephone

number (919) 541-9771; fax number (919) 541-5509; or e-mail address: wheeler.carrie@epa.gov.

To request a public hearing or information pertaining to a public hearing on this document, contact Ms. Pamela Long, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-03), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541-0641; fax number (919) 541-5509; e-mail address: long.pam@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected by this action include sources in all industry groups. The majority of sources potentially affected are expected to be in the following groups.

Industry Group	SIC ^a	NAICS ^b
Electric Services	491	221111, 221112, 221113, 221119, 221121, 221122
Petroleum Refining	291	324110
Industrial Inorganic Chemicals	281	325181, 325120, 325131, 325182, 211112, 325998, 331311, 325188
Industrial Organic Chemicals	286	325110, 325132, 325192, 325188, 325193, 325120, 325199
Miscellaneous Chemical	289	325520, 325920, 325910,

Products		325182, 325510
Natural Gas Liquids	132	211112
Natural Gas Transport	492	486210, 221210
Pulp and Paper Mills	261	322110, 322121, 322122, 322130
Paper Mills	262	322121, 322122
Automobile Manufacturing	371	336111, 336112, 336211, 336992, 336322, 336312, 336330, 336340, 336350, 336399, 336212, 336213
Pharmaceuticals	283	325411, 325412, 325413, 325414
Mining	211, 212, 213	21
Agriculture, Fishing and Hunting	111, 112, 113, 115	11

^a Standard Industrial Classification

^b North American Industry Classification System.

Entities potentially affected by the subject rule for this proposed action also include state, local, and tribal governments.

B. What should I consider as I prepare my comments for EPA?

1. Submitting CBI. Do not submit information containing CBI to EPA through www.regulations.gov or e-mail. Send or deliver information identified as CBI only to the following address: Mr. Roberto Morales, OAQPS Document Control Officer (C404-02), U.S. EPA, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711,

Attention: Docket ID EPA-HQ-OAR-2004-0014. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments. When submitting your comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).
- Follow directions – The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this proposed rule will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this final rule will be posted in the regulations and standards section of our NSR home page located at <http://www.epa.gov/nsr>.

D. How can I find information about a possible Public Hearing?

To request a public hearing or information pertaining to a public hearing on this document, contact Ms. Pamela Long, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504-03), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541-0641; fax number (919) 541-5509; e-mail address: long.pam@epa.gov.

E. How is this preamble organized?

I. General Information

- A. Does this action apply to me?
- B. What should I consider as I prepare my comments for EPA?
- C. Where can I get a copy of this document and other related information?
- D. How can I find information about a possible Public Hearing?
- E. How is this preamble organized?

II. This Action

III. Statutory and Executive Order Reviews

- A. Executive Order 12866: Regulatory Planning and Review
- B. Paperwork Reduction Act
- C. Regulatory Flexibility Act
- D. Unfunded Mandates Reform Act
- E. Executive Order 13132: Federalism
- F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
- G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
- H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
- I. National Technology Transfer and Advancement Act
- J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
- K. Determination Under Section 307(d)

IV. Statutory Authority

II. This Action

On December 19, 2008, the EPA ("we") issued a final rule revising our requirements of the major NSR programs regarding the treatment of fugitive emissions ("Fugitive Emissions Rule"). 73 FR 77882. The final rule required fugitive emissions to be included in determining whether a physical or operational change results in a major modification only for sources in industries that have been designated through rulemaking under section 302(j) of the Act. The final rule amended all portions of the

major NSR program regulations: permit requirements, the PSD program, and the emission offset interpretive ruling.

On February 17, 2009, the Natural Resources Defense Council (NRDC) submitted a petition for reconsideration of the December 2008 final rule as provided for in CAA 307(d)(7)(B).¹

On April 24, 2009, we responded to the February 17, 2009, petition by letter indicating that we were convening a reconsideration proceeding for the inclusion of fugitive emissions challenged in the petition and granting a 3-month administrative stay of the rule contained in the federal PSD program at 40 CFR Parts 51 and 52. The letter also indicated that we would publish a notice of proposed rulemaking "in the near future" to address the specific issues for which we are granting reconsideration.²

The administrative stay of the Fugitive Emissions Rule became effective on September 30, 2009. See 74 FR 50115, FR Doc. E9-23503. As noted above, our authority under section 307(d)(7)(B) to stay a rule or portion thereof solely under the Administrator's discretion is limited to 3 months. When we have issued similar administrative stays in the past, it has often been our practice to also propose an additional stay through a rulemaking process to ensure that there is no gap between the end of the stay and the completion of the final action. An interim final determination was made to provide an additional

¹ John Walke, NRDC, EPA-HQ-OAR-2004-0014-0060.

² Lisa Jackson, US EPA, EPA-HQ-OAR-2004-0014-0062.

stay for 3 months. This additional stay became effective on December 31, 2009. See 74 FR 65692. In this case, we believe that an additional stay for 18 months would provide adequate time for EPA to propose, take comment on, and issue a final action on issues that are associated with the inclusion of fugitive emissions provisions. Therefore, we propose to put in place an additional stay of the fugitive emissions provisions contained in the federal PSD program at 40 CFR parts 51 and 52 indefinitely. As alternatives, we also solicit comment on different time periods for the extension of the stay: (1) for 12 months, until **[INSERT DATE 12 MONTHS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**; or (2) for 24 months, until **[INSERT DATE 24 MONTHS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Note that we are not taking comment at this time on any substantive issues concerning any of the provisions subject to the reconsideration. This notice simply proposes to put in place an additional stay, so comments should be limited to the issue of whether and how long to add to the existing administrative stay. A separate Federal Register notice published in the near future will specifically solicit comment on issues related to the reconsideration of the inclusion of fugitive emissions contained in the December 2008 final rule for which the Administrator granted reconsideration.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4,

1993), this action is a "significant regulatory action" because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Burden is defined at 5 CFR 1320.3(b). This action only proposes to put in place an additional stay for 18 months.

However, the Office of Management and Budget has previously approved the information collection requirements contained in the existing regulations under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., and has assigned OMB control number 2060-0003. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant

economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) a small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any new requirements on small entities. We have determined that small businesses will not incur any adverse impacts because EPA is taking this action to propose an additional stay to the regulations at 40 CFR parts 51 and 52 concerning the inclusion of fugitive emissions. No costs are associated with this amendment.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on

issues related to such impacts.

D. Unfunded Mandates Reform Act

This action does not contain a federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for state, local, and tribal governments, in the aggregate, or the private sector in any one year. This action only proposes to put in place an additional stay of the regulations at 40 CFR parts 51 and 52 concerning the inclusion of fugitive emissions. Thus, this rule is not subject to the requirements of sections 202 or 205 of the Unfunded Mandates Reform Act (UMRA).

This proposed rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

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, as specified in EO 13132. This action only proposes to put in place an additional stay of the regulations at 40 CFR parts 51 and 52 concerning the inclusion of fugitive emissions. Thus, EO 13132 does not apply to this

rule.

In the spirit of EO 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicits comment on this proposed rule from state and local officials.

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

This action does not have tribal implications, as specified in EO 13175 (65 FR 67249, November 9, 2000). This action will not impose any new obligations or enforceable duties on tribal governments. Thus, EO 13175 does not apply to this action.

EPA specifically solicits additional comment on this proposed action from tribal officials.

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

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because this proposal only proposes to put in place an additional stay of the regulations at 40 CFR parts 51 and 52 concerning the inclusion of fugitive emissions. However, EPA solicits comments on whether the proposal would result in an adverse environmental

effect that would have a disproportionate effect on children.

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

This action is not a "significant energy action" as defined in EO 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This proposal only proposes to put in place an additional stay of the regulations at 40 CFR parts 51 and 52 concerning the inclusion of fugitive emissions.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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

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

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low income populations because it only seeks to put in place an additional stay of the regulations at 40 CFR parts 51 and 52 concerning the inclusion of fugitive emissions.

K. Determination Under Section 307(d)

Pursuant to sections 307(d)(1)(J) and 307(d)(1)(V) of the CAA, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to "such other actions as the Administrator may determine."

IV. Statutory Authority

The statutory authority for this action is provided by section 301(a) of the CAA as amended (42 U.S.C. 7601(a)). This notice is also subject to section 307(d) of the CAA (42 U.S.C. 7407(d)).

List of Subjects

40 CFR Part 51

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

40 CFR Part 52

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

Dated: February 4, 2010.

Lisa P. Jackson,
Administrator.