

March 8, 1994

MEMORANDUM

SUBJECT: Consideration of Fugitive Emissions  
in Major Source Determinations

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TO: Director, Air, Pesticides and Toxics  
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This memorandum summarizes the Environmental Protection Agency's (EPA's) policy regarding the consideration of fugitive emissions for the purpose of determining whether a source is major under the Clean Air Act (Act). As explained below, EPA will revisit, in a future revision to the part 70 regulations ("Operating Permit Programs"), the requirement to consider fugitives from sources subject to national emission standard for hazardous air pollutants (NESHAP) and new source performance standards (NSPS) promulgated after August 7, 1980, when determining whether a source is major under section 302(j) of the Act. For the present time, State operating permits programs that do not require consideration of fugitives for these sources will be eligible for interim approval. States must require consideration of fugitives for purposes of determining whether a source is major under section 112, but need not require consideration of fugitives for purposes of the new major source definitions in part D of title I of the Act.

## I. Background: Statutory and Regulatory Provisions Affected

### A. Section 302(j) and Section 169(1)

The Act's primary definition of "major stationary source" and "major emitting facility" is found in section 302(j) in the general definitions portion of the Act. It reads:

Except as otherwise provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, 100 tons per year (tpy) 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).

The section 302(j) definition was added to the Act in 1977. Another definition of "major emitting facility" was added in 1977 in section 169(1). It sets a higher 250 tpy threshold for certain source categories for purposes of part C preconstruction review.

### B. Lower Threshold Definitions Added by the 1990 Amendments to the Act

The 1990 Amendments added nine new definitions of "major source" or "major stationary source." Seven of these definitions appear in part D of title I and expand the set of "major stationary sources" of volatile organic compounds, particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM-10), and CO for nonattainment areas by lowering the tonnage threshold below the 100 tpy specified in section 302(j).<sup>1</sup>

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<sup>1</sup>These are, specifically: §182(c), "Serious Areas" for ozone nonattainment; §182(d), "Severe Areas" for ozone nonattainment; §182(e), "Extreme Areas" for ozone nonattainment; §182(b)(1)(A)(ii)(I), new source review in "moderate areas" for ozone nonattainment; §187(c), "Serious Areas" for carbon monoxide nonattainment; §184(b)(2), interstate ozone control; §189(b)(3), "Serious Areas" for PM-10 nonattainment.

The other two new definitions are found in section 112(a)(1) and title V.<sup>2</sup> Section 112 provides a definition of "major source" similar to the definition of "major stationary source" and "major emitting facility" in part D of title I only tailored to the new hazardous air pollutants (HAP) provisions. The title V definition incorporates by reference all of the other "major source" and "major stationary source" definitions.

### C. "Major Source" Definitions in Part 70

The definition of "major source" in section 70.2 of the permits rule divides into three parts, corresponding to the section 112 definition, the section 302(j) definition, and the lower tpy thresholds in the title I nonattainment provisions, respectively. The second definition, corresponding to section 302(j), requires the counting of fugitive emissions only for certain listed source categories. The other two part 70 definitions are silent on the issue of when fugitive emissions must be considered.

The section 302(j) definition lists 27 categories of sources for which fugitive emissions must be considered in determining whether a source is major for purposes of section 302(j). The twenty-seventh category requires that fugitive emissions be considered for:

All other stationary source categories regulated by a standard promulgated under section 111 or 112 of the Act, but only with respect to those air pollutants that have been regulated for that category.

For present purposes, this should be contrasted with the corresponding provisions in the prevention of significant deterioration (PSD) and new source review (NSR) regulations (see, e.g., 40 CFR §51.165(a)(1)(iv)(C)), which refer to:

Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

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<sup>2</sup>Section 501(a)(1) provides: The term "major source" means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is either of the following: (a) a major source as defined in section 112, and (b) a major stationary source as defined in section 302 or part D of title I.

Regarding the first and third parts of the part 70 "major source" definition, the question of when fugitive emissions must be considered for applicability purposes was addressed directly in the response to comments document for the part 70 rulemaking. Section 3.5 of the response document states that the Act requires fugitives to be considered for purposes of determining whether a source is major under any of the part D or the section 112 definitions.

## II. Summary of EPA Policy

In response to questions raised following promulgation of part 70, EPA has reconsidered the treatment of fugitives for purposes of making major source determinations. The EPA's decisions regarding the relevant provisions is summarized below in three parts.

### A. Sources Subject to NSPS or NESHAP Standards Promulgated after August 7, 1980

The designation in the part 70 rules of sources subject to NSPS and NESHAP promulgated after August 7, 1980 as sources for which fugitives must be counted for purposes of major source determinations did not follow the procedural steps necessary for a proper rulemaking under section 302(j). As a result, EPA believes it would be inappropriate for the Agency to require States to count fugitives from these sources in making section 302(j) major source determinations. In the absence of a legally-sound Federal requirement, a State may choose to exercise its own legal authority to require that fugitives from sources subject to the post-1980 standards be considered in determining major source status under section 302(j). However, a State need not require that fugitives from these sources be so counted in order to obtain interim approval of its title V program.

The EPA intends to revisit this aspect of the rule in a revision to part 70 to occur sometime in 1994. The EPA believes that it may, in the mean time, grant interim approval to programs that do not require fugitives to be considered in determining the status of sources subject to post-1980 NSPS and NESHAP standards. However, until the rule is revised with respect to sources subject to the post-1980 standards, EPA may not grant full approval to a State program that does not include the post-1980 standards. Programs adhering to the language in the current rule will be eligible for full approval provided, as is the case for any element of part 70, the State has provided adequate legal authority for that element of its program.

Note that the policy articulated in section C below regarding the section 112 major source definition operates

independently of a State's decision to list the post-1980 NESHAP standards for purposes of determining whether a source is major under the section 302(j) definition. Therefore, in determining whether a source is major for section 112 purposes, a source must

consider fugitive emissions of HAP listed pursuant to section 112(b) regardless of whether the source is in a category designated through rulemaking under section 302(j).

B. Definitions of "Major Stationary Source" in Part D of Title I

The EPA has revised its interpretation of the Act from that stated in the response to comments document. The EPA now believes the Act does not require fugitives to be considered for purposes of determining major source status in these nonattainment areas, except as provided pursuant to rulemaking under section 302(j). State programs that follow this revised interpretation will be eligible for full approval, as will programs that follow the more inclusive policy articulated in the response to comments document, provided the more inclusive program is supported by adequate State law authority.

The legal rationale for this position is that nothing in the statute or the legislative history of the Part D definitions indicates an intent to depart from the section 302(j) requirement that rulemaking be done before fugitives are included for applicability purposes in nonattainment areas. To the contrary, the explicit reference in most of these Part D definitions back to section 302(j), and the fact that these provisions address a broad universe of sources emitting a particular pollutant or class of pollutants, suggests that the section 302(j) rulemaking requirement carries over to these definitions. It is therefore permissible to read the Act not to require the consideration of fugitive emissions for these purposes.

C. Definition of "Major Source" in Section 111

The EPA continues to believe the Act requires that fugitive emissions, to the extent quantifiable, must be considered in determining major source status for all section 112 purposes. This policy applies to a source of any of the section 112(b) listed pollutants whether or not the source in question is in a category listed pursuant to section 112(c). The EPA expects States to comply with this policy in their operating permits program submittals.

The section 112 "major source" definition is distinguishable legally from the Part D definitions in some important respects. Section 112 uses the term "major source" as opposed to "major stationary source," and legislative history indicates an intent to treat this definition as distinct from the section 302(j) "major stationary source" definition. Moreover, section 112 establishes a new regulatory program wherein Congress has narrowed the regulatory concern to specific pollutants at

specific source categories to be determined by EPA. All of this suggests that the section 302(j) rulemaking requirement does not apply in the context of section 112, and that fugitive emissions must therefore be included for purposes of determining whether a source is major under section 112.

#### D. Collocation of Sources

Questions have also been raised regarding the treatment of fugitive emissions where sources in categories listed pursuant to section 302(j) are collocated with sources that are not in any of the listed categories. The EPA intends to follow the policies established in implementation of the PSD and NSR programs. Only the fugitive emissions from the listed source are required to be counted for purposes of determining major source status. Where there is a collocated source that is not on the source category list and where the nonlisted source is the primary activity at the site, fugitive emissions would not need to be counted from the collocated, nonlisted source. The EPA will issue case examples to help clarify application of this principle in the near future.

For further information, please contact Kirt Cox, Operating Permits Policy Section, at (919) 541-5399, or Adan Schwartz, Office of General Counsel, at (202) 260-7632.

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