

ESSENTIAL MINERALS ASSOCIATION

February 14, 2023

VIA REGULATIONS.GOV

Michael Regan
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: EMA Comments on Prevention of Significant Deterioration and Nonattainment New Source Review: Reconsideration of Fugitive Emissions Rule (Docket ID No. EPA-HQ-OAR-2004-0014)

Dear Administrator Regan:

The Essential Minerals Association (EMA) writes to provide comments to the Environmental Protection Agency (“EPA” or “the Agency”) in response to the Agency’s proposed rule¹ relating to the reconsideration of the 2008 Fugitive Emissions Rule² (“the Proposed Rule”) which would modify how fugitive emissions are considered when determining the applicability of certain permitting requirements under the Clean Air Act (“CAA” or “the Act”).³

Introduction

The Essential Minerals Association (EMA) is the representative voice of companies that extract and process a vital and beneficial group of raw minerals that are the essential ingredients for many of the products used in everyday life. Our companies and the people they employ are proud of their industry and the socially responsible methods they use to deliver these beneficial resources.

The minerals produced by EMA’s members are vital to the manufacturing processes for many, if not all, of the products we use every day. They are used in the production of food supply chain elements (agricultural feed, human baking products, and water purification needs), batteries, protective masks, dialysis machines, semiconductors, solar panels, glass, ceramics, paper, plastics, rubber, detergents, insulation, pharmaceuticals, cosmetics, foundry cores and molds used for metal castings, paints, filtration, metallurgical applications, refractory products, and specialty fillers. Every sector of industry relies on a variety of essential minerals to generate

¹ 87 FR 62322

² 73 FR 77882

³ 42 U.S.C. Section 7401

their end products, making a robust and stable supply chain critical for the continued growth and success of our economy as well as our national security.

The mining industry operates under a complex system of environmental regulations drafted and enacted by local, state, tribal, and federal governments. Such regulations are a necessary part of doing business in the United States. The regulatory framework in this country ensures that businesses, such as mine operators, work under the explicit expectation that the environmental impacts will be as minimal as possible. These expectations are established during the permitting process and continue over the lifetime of the project through the enforcement of the germane statutes and regulations. Through the permitting process for mines, operators make a good-faith commitment to limiting impacts and mitigating those that are unavoidable, prior to even breaking ground. These activities, along with other necessary steps during this process, cost millions of dollars before production can even begin.

Adherence to air quality standards is one of the many aspects of environmental stewardship that EMA's members take seriously, and our members work diligently every day to comply with air regulations. However, the Proposed Rule is neither reasonable nor appropriate. It possesses significant legal and substantive flaws that greatly expand the EPA's authority beyond that permitted by the CAA and relevant court precedents without any discernable health or environmental benefit. The Proposed Rule would also burden EMA members with significant – and in many cases, unbearable – additional costs to comply with permitting requirements. Based on these facts and the reasons outlined in more detail below, the EMA requests that the EPA withdraw the Proposed Rule immediately.

The Proposed Rule is Legally Flawed

The Proposed Rule contains several flaws regarding to the EPA's authority to regulate fugitive emissions under the CAA. First, EPA lacks a reasonable foundation for its assertion that the plain language of the Act requires divergent treatment of fugitive emissions in major modifications of existing facilities compared to that of newly constructed sources. While the regulatory history of fugitive emissions has been a long, circuitous, and at times contradictory, EPA rules have consistently interpreted CAA Sections 302(j)⁴ as excluding fugitive emissions from major modification determinations for all but six of the past forty-two years. It was not until the NSR Reform Rule in 2002 that EPA unilaterally revised its definitions to require the inclusion of fugitive emissions for threshold Prevention of Significant Deterioration (PSD) modification determinations.⁵ EPA then reconsidered its position culminating in the 2008 Fugitive Emissions Rule that restored EPA's prior policy.⁶ EPA's current Proposed Rule mischaracterizes this history.

Since enactment of the 1977 amendments to the CAA, EPA has singled out fugitive emissions—specifically fugitive dust—for special treatment under the major New Source Review (NSR) program. In 1978, EPA promulgated the initial major NSR regulations.⁷ During

⁴ 42 U.S.C. Section 7602(j)

⁵ 67 Fed. Reg. 80,186 (December 31, 2002) (“NSR Reform Rule”)

⁶ 73 Fed. Reg. 77,882

⁷ 43 Fed. Reg. 26,380 (June 19, 1978); 43 Fed. Reg. 26388 (June 19, 1978)

the comment period, EPA received comments “that surface mines should receive some relief from strict consideration of ambient particulate concentrations associated with surface mining activities” based upon the fact “that a large majority of the associated particulate matter is nonrespirable; that mining activity occurs in areas with limited population; that the particulate matter arises at ground level and falls out within very short distances; that visibility is not affected because the light scattering which hinders visibility is caused by smaller particles; and that even after the application of Best Available Control Technology (BACT), short-term particulate standards for National Ambient Air Quality Standards (NAAQS) and PSD increments might not be met.”⁸ “In view of these comments and other studies,” EPA “decided to exclude from any air quality impact assessment of a source or modification any fugitive dust that would emanate from it.”⁹ The fugitive dust exemption was then challenged in the D.C. Circuit.

As the D.C. Circuit held in *Alabama Power*, Section 302(j) of the Act requires EPA to exclude fugitive emissions from threshold applicability determinations absent a category-specific rulemaking.¹⁰ In *Alabama Power*, the D.C. Circuit held that CAA “section 302(j) specifically attaches a rulemaking requirement for the inclusion of fugitive emissions in the threshold calculation” of determining whether a source is a “major emitting facility,” thereby giving “EPA flexibility to provide industry-by-industry consideration and the appropriate tailoring of coverage.”¹¹ While the D.C. Circuit vacated the exemption for sources of fugitive dust promulgated in 1978, the court noted that ultimately “the statutory scheme provides EPA with a mechanism for accomplishing its objectives of partially exempting fugitive dust emitted by major emitting facilities from the requirements of section 165 by appropriate rulemaking pursuant to section 111.”¹²

In response to the court’s holding in *Alabama Power*, EPA issued a final rule in 1980 that listed certain source categories for which fugitive emissions were to be considered in threshold major source *and major modification* determinations.¹³ The 1980 rule also provided an exemption (the “1980 exemption”) from substantive major NSR requirements for sources that did not belong to a listed source category if the source or modification would be considered “major” solely due to the inclusion of fugitive emissions.¹⁴ As the text of the 1980 regulations make clear, EPA intended to exclude fugitive emissions from the threshold applicability determinations for both major sources *and major modifications*.

The CAA explicitly extends the obligations of Section 302(j) to modifications. The EPA is therefore bound to exclude fugitive emissions from major modification determinations. Section 302(j) of the Act also provides that “[e]xcept as otherwise expressly 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, one hundred tons per year 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*)”¹⁵(emphasis added). A “major

⁸ 43 Fed. Reg. at 26,395

⁹ *Ibid*

¹⁰ *Alabama Power Co. v. Costle*, 636 F.2d 323, 369 (D.C. Cir. 1979)

¹¹ *Ibid*

¹² *Ibid* at 370

¹³ 45 Fed. Reg. 52,676 (Aug. 7, 1980)

¹⁴ *Ibid.* promulgating 40 C.F.R. § 52.21(i)(4)(vii), which was later recodified at 40 CFR § 52.21(i)(1)(vii) in 2002

¹⁵ 42 U.S.C. Section 7602(j)

emitting facility” is not, as EPA implies, limited to new construction of such a facility. Section 165 of the Act provides that PSD permit review is triggered by construction of “major emitting facilities.”¹⁶ Construction is then defined to include both new sources and modifications.¹⁷ The CAA’s New Source Review provisions also treat new sources and modifications the same in the context of enforcement. For example, Section 167 of the Act discusses EPA enforcement authority “to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part,” and Section 304 allows a citizen suit against any person who constructs any new or modified major emitting facility without a permit under part C. Thus, under the PSD provisions of the Act, the term “major emitting facility” is used to refer both to new sources and to modifications thereof, contrary to EPA’s conclusion in the Proposed Rule. EPA’s blanket inclusion of fugitive emissions in the Proposed Rule’s determination of whether a project is a major modification, regardless of industry type, runs counter to the purpose of Section 302(j), which is to avoid such blanket determinations without an industry-specific rulemaking.

Second, EPA’s reliance on CAA section 111(a)(4) is also flawed. The Agency believes that the phrases “any air pollutant” and “any change” in the 111(a)(4) definition support EPA’s position that “Congress did not make a distinction between different types of emissions – stack or fugitive—in the context of modification under the major NSR program.”¹⁸ Section 111(a)(4) says nothing at all about fugitive emissions and cannot be applied literally without revising a major portion of the PSD rules. Applied literally, 111(a)(4) would trigger PSD for any change at a facility that increases emissions by any amount. This conflicts with extensive PSD provisions that specify the significant levels of increased emissions that trigger PSD for modifications, and how to calculate such increased emissions. In saying nothing about fugitive emissions, 111(a)(4) is similar to the CAA provisions that require PSD permits for construction of major facilities. CAA Sections 165(a) and 169(1) require that major emitting facilities, with the potential to emit more than specific levels, must obtain PSD permits – but they do not say anything about whether and when fugitive emissions must be counted in calculating whether a facility is a major source.

The EPA claims that a pair of D.C. Circuit cases, *New York I*¹⁹ and *II*²⁰, support the Agency’s interpretation of CAA section 111(a)(4) as requiring that fugitive emissions must be included in determining whether a modification is subject to NSR. However, the D.C. Circuit’s narrow holdings in these cases are unrelated to the question of fugitive emissions at issue in the Proposed Rule. In these cases, the D.C. Circuit analyzed the proper methodology for calculating emissions increases as well as the types of physical changes that constitute modifications. These cases do not concern the types of emissions that must be included in major modification determinations. Thus, EPA’s reliance on this caselaw to support its incorrect and restrictive interpretation of Section 111(a)(4) is misguided. Indeed, exemptions for fugitive emissions from major NSR are consistent with *New York I* and *II*.

¹⁶ 42 U.S.C. Section 7475(a)

¹⁷ 42 U.S.C. Section 7479

¹⁸ 87 FR 62,332

¹⁹ *New York v. United States EPA*, 413 F.3d 3 (D.C. Cir. 2005)

²⁰ *New York v. EPA*, 443 F.3d 880, 883 (D.C. Cir. 2006)

New York I addressed the methods for measuring the “increase” in emissions that results from a modification. In the Proposed Rule, EPA emphasizes the D.C. Circuit’s holding that “the CAA unambiguously defines ‘increases’ in terms of actual emissions.”²¹ From this simple limitation on methodology, EPA extrapolates that the CAA prohibits NSR exemptions for fugitive emissions.²² However, this holding concerned only whether a regulatory exception could be based on a modified source’s “potential” emissions rather than its “actual” emissions.²³ This holding limits the available methods for calculating emissions subject to NSR but has no impact on whether fugitive emissions must be included in major modification determinations. Additionally, while *New York I* rejected NSR exemptions for specific types of modifications (“Pollution Control Projects” and “Clean Unit status” sources), the D.C. Circuit did not identify any statutory provisions that prohibit exemptions for types of emissions.²⁴ EPA incorrectly conflates the D.C. Circuit’s rejection of exceptions for specific types of modifications as broadly prohibiting any exceptions for fugitive emissions.

New York II concerned a similarly narrow issue unrelated to the fugitive emissions. In *New York II*, the D.C. Circuit considered the “Equipment Replacement Provision” that exempted the replacement of components from the definition of “modification” notwithstanding a resulting increase in emissions. The D.C. Circuit found that this exception violated the CAA because Section 111(a)(4) defined “modification” as including “any physical change.” As EPA highlights in the Proposed Rule, the Court held that “only physical changes that do not result in emission increases are excused from NSR.” Again, this narrow holding does not concern whether the CAA accommodates exemptions for fugitive emissions. *New York II* clarifies only what types of physical changes constitute modifications, not the types of emissions that must be counted. Yet EPA characterizes this narrow holding as a comprehensive restriction on any exemptions to major NSR. Thus, EPA’s reliance on unrelated holdings from *New York I* and *II* as justification for its narrow interpretation of Section 111(a)(4) is not supported by the caselaw. Indeed, the 1980 exemption for fugitive emissions pursuant to the 302(j) rulemaking requirement is consistent with this caselaw.

EPA is Not Reaffirming a “Longstanding” Position on Fugitive Emissions

EPA argues the Proposed Rule is returning the Agency to a previously longstanding position, but this ignores decades prior to 2002 during which EPA applied exactly the opposite standard. As explained above, EPA rules have consistently interpreted CAA Sections 302(j) and 111(a)(4) as excluding fugitive emissions from major modification determinations for all but six of the past forty-two years. It was not until the NSR Reform Rule in 2002 that EPA unilaterally revised its definitions to require the inclusion of fugitive emissions for threshold PSD modification determinations.²⁵ Shortly thereafter, EPA reconsidered its position culminating in the 2008 Fugitive Emissions Rule that restored EPA’s prior policy.²⁶ The Proposed Rule mischaracterizes this history.

²¹ 87 FR 62,332 (quoting 413 F.3d at 39)

²² *Ibid*

²³ *New York I* at 40

²⁴ *Ibid* 38-42

²⁵ 67 FR 80186 (December 31, 2002) (“NSR Reform Rule”)

²⁶ 73 FR 77882

In particular, EPA rules have consistently retained the 1980 exemption for sources that would be considered to have undergone a major modification solely due to the inclusion of fugitive emissions. However, EPA now claims this exemption was “inadvertently” left in the regulations for decades.²⁷ But this claim is a mischaracterization of the regulatory history. The continued applicability of the 1980 exemption for 28 years – when the 2008 Fugitive Emissions Rule rendered it obsolete – was not a mere inadvertence. EPA even acknowledges in the Proposed Rule that it decided against removal of the language during this period despite conducting three rulemakings that directly addressed this issue in 1984, 1989, and 2002. The 1980 exemption did not lay hidden in the Code of Federal Regulations during this time.

Indeed, in a 1994 decision, the Environmental Appeals Board thoroughly explained the application of the 1980 exemption and remanded consideration of fugitive emissions by Region IX in the context of PSD review.²⁸ Thus, EPA’s characterization of its repeated decisions not to remove the 1980 exemption from the federal regulations as a simple oversight is incorrect. If the Agency wished to revoke the 1980 exemption, the Administrative Procedure Act (“APA”) required EPA to complete notice and comment procedures before the interpretive ruling became effective. The *Alabama Power* decision also specifically stated that “It is well-established that an agency may not escape the notice and comment requires... by labeling a major substantive legal addition to a rule a mere interpretation.”²⁹ Accordingly, the Agency must provide a reasoned explanation for such a change, but has failed to do so in the Proposed Rule.

EPA’s Proposed Rule Would Improperly Change the Treatment of Fugitive Emissions

EPA improperly raises a change in the treatment of fugitive emissions – specifically the consideration of the costs of *controlling* emissions when determining whether certain emissions should be considered fugitive or non-fugitive. As EPA notes “[d]etermining whether certain emissions are fugitive or non-fugitive at a particular source is inherently a fact-specific inquiry.”³⁰ If emissions do not currently pass through a stack, chimney, vent, or other functionally equivalent opening, a source must evaluate whether such emissions “could reasonably be collected or captured.”³¹ While this is a case-by-case determination, EPA’s 2008 Fugitive Emissions Rule laid out certain “guiding principles” for the Agency to use in determining whether emissions qualify as fugitive.³² Among those principles was that “[t]he cost to collect or capture *and control* emissions is a factor when considering what is “reasonable.” (emphasis added). In the 2008 rulemaking, EPA clarified that it was “reasonable to consider the cost and economic feasibility of control in determining whether emissions can be reasonably captured or collected,” (emphasis added). As an example, EPA stated that “the cost of controlling emissions may be helpful in the analysis if cost data on collection, capture, and control in the aggregate are more available or more easily calculated than cost data on collection or capture alone.” Therefore, “the reviewing authority may consider the reasonableness of the

²⁷ 87 FR 62326

²⁸ *In re Masonite Corp.*, 5 E.A.D. 551, 586.

²⁹ *See Appalachian Power v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000)

³⁰ 87 FR 62335

³¹ *Ibid*

³² 73 FR 77891

combined costs of capture or collection and control as an alternative to considering only the cost of collection or capture.”³³

However, in the Proposed Rule, EPA now asserts that “EPA intended the initial 2009 stay (and all subsequent stays) of the 2008 Fugitive Emissions Rule to apply to the entire rulemaking effort, including the discussion of the definition of ‘fugitive emissions’ contained within the rule’s preamble...thus, the EPA statements regarding the cost of control were also stayed and were not applied by EPA thereafter.”³⁴ Once again, the Agency is attempting to rewrite history as EPA’s stays did nothing to rescind the statements in the preamble to the 2008 Fugitive Emissions Rule. The Agency now proposes to inappropriately rescind the statements in the 2008 Fugitive Emissions Rule regarding the cost of controls, even though cost is a critical factor considered in determining whether an emission can reasonably be vented to a stack.

As justification for this change, EPA only claims that “these statements regarding cost of control do not reflect the EPA’s current thinking and should not be relied upon by states or sources in making permitting decisions.”³⁵ This is hardly sufficient justification for the false assertions contained in the Proposed Rule, particularly given the Agency’s long, successful history of using precisely the opposite approach, as well as the considerable impact of this change on EMA members.

The Proposed Rule Will Impose Costly and Challenging Regulatory Burdens on the Mining Industry

Fugitive emissions from mining operations consist of dominantly large, relatively heavy “coarse” particles that are generated by numerous surface activities. By virtue of the size of surface operations and the types of associated activities—movement of material by heavy machinery, truck traffic on dirt roads, storage of materials of various sizes prior to processing – mines and processing facilities produce large amount of fugitive emissions. The D.C. Circuit acknowledged in *Alabama Power* that while these fugitive emissions would subject mining operations to the NSR program, sources would be “incapable of meeting the strict limitations on the emission of particulate matter (PM) set by the PSD provisions.”³⁶ That reality remains unchanged to this day.

By their very nature, fugitive PM emissions cannot be accurately measured, remain very difficult to estimate, and are difficult to control. For example, the emissions factors in EPA’s AP-42 standards for paved and unpaved roads are used to estimate fugitive dust generated by traffic are not specific to industrial applications and are appropriate only in a very narrow range of source conditions (i.e., silt loading, mean vehicle weight, and mean vehicle speed). To be accurate, silt loading must be measured for the roads, which is both labor-intensive and often unsafe or impractical. EPA default values can be used but can result in an order-of-magnitude uncertainty. Quantification of emissions using these emissions factors are a rough estimate at best with low quality ratings in most real-world industrial applications.

³³ Ibid

³⁴ 87 FR 62335

³⁵ Ibid

³⁶ 636 F.2d 323,369

Given the lack of demonstrated health effects from the coarse PM associated with emissions from mining operations, it is especially concerning that the Proposed Rule would impose disproportionate impacts on mining operations without any demonstrable health benefits. EPA has long acknowledged the weak causal relationship between coarse, crustal PM and adverse health outcomes. This is especially true given the geographic differences in PM and the nature of most mining operations, particularly those located in the arid and rural western United States. The impacts from the Proposed Rule would be exacerbated if EPA made further reductions to PM standards which would also have significant economic impacts on EMA members and the communities in which they operate. Our members already meet requirements to control coarse PM through a variety of technology and management requirements, and little more can be done to comply with a more stringent coarse PM NAAQS other than to scale back or shut down operations.

The EPA claims that the Proposed Rule will have very limited and manageable effects to a very small number of regulated entities. This patently false argument seems largely based on the belief that those affected by the rule would be limited to small number of facilities primarily focused in the surface coal mining sector. The Agency also claims that entities that would be regulated under the Proposed Rule "...represent the type of 'facilities, which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which . . . are primarily responsible for emissions of the deleterious pollutants that befoul our nation's air."³⁷ This is also false. EMA members in the mineral mining sector are neither the predominant causes of air pollution, nor are they of a sufficient size or financial capability to bear the cost of compliance with the Proposed Rule.

In practical terms, requiring all sources to consider fugitive emissions when assessing whether a project exceeds significant emission rates will result in numerous projects that do not currently trigger major NSR permitting now exceeding the thresholds. The implications of triggering major source permitting for facilities are substantial. Permit applications for major modifications require more stringent control technology (especially in nonattainment areas), an air quality analysis, an additional impacts analysis, and increased public and EPA involvement in permitting the project. These additional requirements can be burdensome, increase costs, and require greater lead time before a facility can make its intended operational or physical changes. Given the additional proposed rules recently put forth by EPA to lower the annual PM_{2.5} NAAQS and the potential reclassification of many areas of the western United States as nonattainment, there is an increased likelihood that minor operational or physical changes at mining operations could trigger Nonattainment New Source Review permitting and its more stringent requirements such as Lowest Attainable Emissions Rate and offsets.

The Proposed Rule would negatively impact numerous EMA members – none of whom mine or process coal – that are small businesses responsible for producing low-profit margin minerals that are vital to nearly every facet of modern life. Many EMA members have mining facilities that include networks of haul roads, stockpiles, and other fugitive PM emissions sources. Our members already undertake efforts to control those emissions through watering

³⁷ 87 FR 62334

and/or treatment of roads, speed limits for trucks using haul roads, temporary vegetation, regular watering or tarping of stockpiles, and other means to prevent fugitive emissions.

While these measures are in compliance with existing EPA air quality requirements, as discussed above, it would be impossible for our members to control those emissions sufficiently to prevent the Proposed Rule from categorizing them as major sources should these PM emissions be included in those calculations. Many EMA members would thus be subjected to NSR permitting regimes to obtain additional permits for future modifications or expansions. For example, the Proposed Rule change could hinder mines from expanding, adding a new product line that requires separate shipping truck traffic, or even rerouting traffic in response to unsafe road conditions. The financial, time, and logistical costs of such permits would be untenable.

EMA members are not financially able to bear the regulatory costs of the rule and are incapable of practically meeting such a standard given the nature of surface mining operations. The Proposed Rule would impose significant procedural, logistical, and financial burdens on the mineral sector that would make it difficult, if not impossible, for many EMA members to continue operating.

Conclusion

The Proposed Rule is legally flawed, distorts the EPA's historic regulation of fugitive emissions, would reflect a major departure from the EPA's historic treatment of fugitive emissions, and will have serious impacts on mining and mineral processing operations without any demonstrable public health or environmental benefit. This would in turn have serious negative impacts on virtually every sector of the U.S. economy by endangering essential domestic mineral supply chains. Therefore, the EMA requests that the EPA withdraw this rule and return to the regulatory regime which has operated successfully since for decades.

Please contact me if we can be of further assistance in this matter.

Chris Greissing
President
Essential Minerals Association
chrisgreissing@essentialminerals.org