



**Emily Schilling**

Partner  
801.799.5753  
Salt Lake City  
ecschilling@hollandhart.com

## EPA Proposes Reversal on Fugitives in Major Source Permitting

**Insight — 11/10/2022**

On October 7, 2022, EPA proposed revisions to its permitting regulations under the Fugitive Emissions Rule (FER) that would, for the first time, require all existing major sources that undergo a physical or operational change to not only estimate fugitive emissions, but to count them towards major new source review permitting thresholds. For the mining and mineral processing industry, where fugitive dust predominates, inclusion of fugitive emissions in assessing whether a major modification will occur is a policy shift with sweeping consequences. Comments are due on February 14, 2023.

Under the current major source permitting program, when a major source undergoes a physical or operational change, it must first assess whether project emissions exceed significance thresholds, which differ according to pollutant. The current rules require that certain listed source categories incorporate fugitive emissions in their calculations, and only a handful of those sources are in the mining and processing industry (e.g. lime plants, taconite ore, and Portland cement). Under EPA's proposed FER, however, all sources would be required to consider fugitive emissions in determining whether a project triggers major modification permitting. Including fugitives from mining is particularly problematic because the particulate matter thresholds for triggering a major modification are low—15 tpy for PM10, 10 tpy for PM2.5, and 25 tpy for total PM. In some cases, fugitive emissions alone would exceed these thresholds. But as part of the proposed regulatory changes, EPA also is proposing removal of an exemption from major NSR permitting if the only reason its change is considered a "major modification" is due to the inclusion of fugitive emissions. In other words, even if the only reason a project exceeds the significance thresholds is because of the inclusion of fugitive emissions, the project still triggers major new source review permitting.

In practical terms, requiring all sources to consider fugitives when assessing whether a project exceeds significant emission rates will result in numerous projects that do not currently trigger major source review exceeding the thresholds. The implications of triggering major source, as opposed to minor source, permitting are substantial. Permit applications for major modifications require more stringent control technology, 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.

---

*This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.*