June 2, 1995

MEMORANDUM

SUBJECT: EPA Reconsideration of Application of Collocation Rules to Unlisted Sources of Fugitive Emissions for Purposes of Title V Permitting

FROM: Lydia N. Wegman, Deputy Director /s/ *Steve Hitte for*
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TO: Regional Air Directors
Regions I - X

The purpose of this memorandum is to provide you with guidance regarding the collocation language of the part 70 "major source" definition as it relates to sources of fugitive emissions that have not been listed pursuant to section 302(j) of the Clean Air Act (Act). Rulemaking will be needed to incorporate the ideas in this memo, and the preamble will address transition period concerns.

As you may know, the American Mining Congress (AMC) and the American Forest and Paper Association (AFPA) petitioned for review of the part 70 rule, in part because the Agency's inter-pretation of the part 70 collocation language would have the effect of subjecting unlisted sources of fugitive emissions to the permit rule. While not conceding the merits of the peti- tioners' arguments, EPA sought and received from the U. S. Court of Appeals for the District of Columbia Circuit a voluntary remand to allow the Agency to reconsider its interpretation in the context of a new rulemaking.

In moving the Court for a remand, EPA stated that until it completes the rulemaking, the Agency's interpretation of the part 70 collocation language as set forth in previous rulemaking documents and guidance is not binding and therefore rescinded. The Agency further provided that it would issue guidance to EPA Regions and State permitting authorities

stating the same and explaining that States thus have discretion in interpreting the part 70 collocation language with regard to unlisted sources of fugitive emissions. This memorandum provides that guidance.

The part 70 rule defines "major source" as "any stationary source (or group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person . . .) belonging to a single industrial grouping" and that is a major source under section 112 or a major stationary source under section 302 or part D of title I of the Act (40 CFR §70.2). In accordance with section 502(a) of the Act, the rule requires specified categories of sources, including all "major sources," to obtain and comply with operating permits (40 CFR § 70.3(a)).

The Agency stated in the part 70 rulemaking that the Agency intended to apply the collocation language of the title V rule to unlisted sources of fugitive emissions in the same manner as it applies identical language to those sources in the regulations governing the New Source Review (NSR) program under title I of the Act. [1] Specifically, the Agency stated that for purposes of making major source determinations under title V, unlisted sources of fugitive emissions would be grouped with adjacent, commonly controlled sources where the fugitive emission source was within the same major industrial grouping as the collocated source or was a support facility for the collocated source. In short, the collocation language of the part 70 major source definition required aggregation of collocated sources regardless of whether a collocated source was an unlisted source of fugitive emissions.

The petitioners raised concerns with the Agency's interpretation of the collocation language of the part 70 rule

[1] The Agency set forth this interpretation in the preamble to the proposed rule, the response to comments document for the final rule, subsequent guidance documents, and the August 29, 1994 proposal to revise certain portions of the part 70 rule. [ADD CITES]

as it applied to unlisted sources of fugitive emissions. They contended that such sources are not to be regulated as "major sources" under title V unless and until EPA determines through rulemaking under section 302(j) that the benefits of such regu-lation would outweigh the costs. Section 302(j) defines major stationary source and major emitting facility as a facility that has the potential to emit 100 tons per year (tpy) or more of any air pollutant. It further provides that fugitive emissions be included in determining whether a source exceeds the 100 tpy major source threshold as determined by rule by the Agency. Petitioners argued that the Agency's interpretation of the collocation language would have the effect of subjecting unlisted fugitive emission sources to the permit rule without undertaking section 302(j) rulemaking.

The petitioners contended that the Agency's interpretation would have this effect in three ways. First, an unlisted source located next to a commonly controlled source having the same two-digit Standard Industrial Classification (SIC) code as the unlisted source would be aggregated with the collocated source. If the collocated source on its own were major for title V purposes, then the unlisted source would be subject to the permit rule as part of the aggregated major source.

Second, an unlisted fugitive emissions source could become part of a title V major source as a result of the support facility test the Agency stated it would apply in making major source determinations under title V as it does under NSR. Under the support facility test, if an unlisted source of fugitive emissions primarily supports an adjacent, commonly controlled source that is major for title V purposes, it would be aggregated with the collocated source even if it had a different two-digit SIC code. The petitioners further argued that requiring the aggregation of sources with different two-digit SIC codes was contrary to Congressional intent.

Third, the fugitive emissions from an unlisted source might be included in the major source threshold calculation as a result of the primary activity test which the Agency also applies in the NSR context. That test provides that the primary purpose of a source determines the source category to which the source belongs. If the source belongs to a source category that has been listed under section 302(j),

petitioners are concerned that all of the emissions of the source, including the fugitive emis-sions from the constituent unlisted source, would be counted in determining whether the source is major. Thus, if an unlisted fugitive emission source is part of a larger source that belongs to a listed source category, the unlisted source's fugitive emissions would count towards whether the encompassing source is major. If total emissions exceed the major source threshold, then the unlisted source would become subject to the permit rule along with the larger source of which it is part.

In adopting its interpretation of the part 70 collocation language as set forth in the title V rulemaking, the Agency explained that it was following the approach used in NSR to determine whether collocated sources should be aggregated for purposes of determining whether a major source is present. Adoption of the NSR approach was particularly appropriate, the Agency noted, in view of legislative history indicating that Congress intended the Agency to use that approach (56 *Federal Register* 21712, 21724 (1991)). However, after reviewing peti-tioners' arguments and the rulemaking record, the Agency believes it should review whether application of the NSR approach is appropriate for title V purposes.

It is important to point out, though, that EPA is not reconsidering or rescinding its interpretation of the collocation provisions of the NSR regulations with respect to unlisted sources of fugitive emissions. As indicated above, the NSR rules require an unlisted source of fugitive emissions be grouped with an adjacent, commonly controlled source in determining whether a major source is present if the unlisted source has the same two-digit SIC code as the collocated source or primarily supports the collocated source. The fugitive emissions of the unlisted source are not counted in determining whether the major source threshold is exceeded except as required by the primary activity test.

Industry previously sought and received rulemaking consideration of the issue of whether surface coal mines, an unlisted source of fugitive emissions, should be aggregated with adjacent, commonly controlled sources in determining whether a major stationary source is present for NSR purposes. (See 54 *Federal Register* 48870 (1989)). The Agency determined in a final action that such sources should be aggregated with

collocated sources if they share the same two-digit SIC code or primarily support the collocated source. The Agency explained that section 302(j) requires rulemaking only to determine whether a source's fugitive emissions should be counted in determining whether the source's total emissions exceed major stationary source thresholds. Section 302(j) does not require rulemaking to determine whether a source of fugitive emissions may be considered part of a single major stationary source made up of collocated, commonly controlled sources. No one sought judicial review of this aspect of the Agency's final rule.

It is also important to point out that the Agency's decision to reconsider its interpretation of the collocation language of the part 70 rule does not affect the title V requirement that sources permitted under NSR (either pursuant to part C or part D of title I of the Act) obtain title V permits. Section 502(a) specifies that part C or D permitted sources, among others, are subject to the title V permitting requirement. Sources having part C or D permits therefore must apply for and obtain title V permits regardless of whether they include unlisted sources of fugitive emissions, and the title V permit must cover, at a minimum, all portions of the adjacent, commonly controlled facility covered by the part C or D permit. As noted above, the Agency's reconsideration of the proper interpretation of the collocation provisions of the part 70 rule does not extend to the NSR rules, so there is and will be no basis for exempting unlisted sources of fugitive emissions that are permitted under parts C or D from the title V permitting requirement. Further, sources that are not now but later become subject to title V by virtue of receiving a part C or D permit will be required to obtain a part 70 permit regardless of whether they include an unlisted source of fugitive emissions as required by the NSR collocation provisions.

The Agency, in requesting a remand to reconsider its interpretation of the part 70 collocation language, did not rescind the collocation portion of the rule itself. The rule's collocation language remains in effect; only EPA's interpretation of it is no longer binding. States must thus apply that portion of the rule in developing and implementing their part 70 programs. Absent a binding EPA interpretation, however, States have discretion in interpreting what the rule's collocation language requires with respect to unlisted sources of fugitive emissions.

As noted earlier, EPA expects to address the issues described in this memorandum in a proposal regarding revisions of the part 70 rule that it anticipates issuing in the near future.

Please share this memorandum with your State air programs. Should there be questions, please call Steve Hitte at
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