

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-HQ-OAR-2003-0062: FRL-9113-2]

RIN 2060-AP75

Implementation of the New Source Review (NSR) Program for  
Particulate Matter Less Than 2.5 Micrometers (PM<sub>2.5</sub>); Notice of  
Proposed Rulemaking to Repeal Grandfathering Provision and End  
the PM<sub>10</sub> Surrogate Policy

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** In this action, in response to a petition for reconsideration, EPA is proposing two actions that would end EPA's 1997 policy that allows sources and permitting authorities to use a demonstration of compliance with the prevention of significant deterioration (PSD) requirements for particulate matter less than 10 micrometers (PM<sub>10</sub>) as a surrogate for meeting the PSD requirements for particulate matter less than 2.5 micrometers (PM<sub>2.5</sub>). First, in accordance with the Administrator's commitment to the petitioners in a letter dated April 24, 2009, the EPA is proposing to repeal the "grandfathering" provision for PM<sub>2.5</sub> contained in the federal PSD program. Second, EPA is proposing to end early the PM<sub>10</sub> Surrogate Policy applicable in states that have an approved PSD program in their State Implementation Plan ("SIP-approved

states”).

**DATES:** Comments. 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],** EPA 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-2003-0062, 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](mailto:a-and-r-docket@epa.gov).

- Mail: Air and Radiation Docket, Environmental Protection Agency, Mail code 6102T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460. Please include a total of two copies.

- 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](http://www.regulations.gov) or e-mail. The [www.regulations.gov](http://www.regulations.gov) website 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](http://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.

Docket: All documents in the docket are listed in the [www.regulations.gov](http://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](http://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.

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.

**FOR FURTHER INFORMATION CONTACT:** Mr. Dan deRoeck, Air Quality Policy Division, (C504-03), U.S. Environmental Protection Agency, Research Triangle Park, NC, 27711; telephone number (919) 541-5593; fax number (919) 541-5509; or e-mail address: [deroeck.dan@epa.gov](mailto:deroeck.dan@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](mailto:long.pam@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

A. Does this action apply to me?

Entities affected by this proposed action include: (1) those proposed new and modified major stationary sources subject to the federal PSD program that submitted a complete application for a PSD permit before the July 15, 2008, effective date of the PM<sub>2.5</sub> New Source Review (NSR) Implementation Rule, but have not yet received a final and effective permit authorizing the source to commence construction, and (2) those proposed new and modified major stationary sources, subject to a PSD program in SIP-approved states, that have not yet received a final and effective permit authorizing the source to commence construction.

EPA estimates that about twenty-one proposed new sources or modifications would be affected by the proposed repeal of the grandfathering provision. At least two projects known to have been grandfathered have already received final permits to construct (that are effective) prior to EPA taking action to

stay the provision, but EPA is not proposing that this repeal would apply retroactively to such permits.

The entities potentially affected by a proposal to end early the use of the PM<sub>10</sub> Surrogate Policy in SIP-approved states include proposed new and modified major stationary sources in all industry groups. The majority of sources potentially affected are expected to be in the following groups:

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Industry group	NAICS <sup>a</sup>
Electric services	221111, 221112, 221113, 221119, 221121, 221122
Petroleum refining	32411
Industrial inorganic chemicals	325181, 32512, 325131, 325182, 211112, 325998, 331311, 325188
Industrial organic chemicals	32511, 325132, 325192, 325188, 325193, 32512, 325199
Miscellaneous chemical products	32552, 32592, 32591, 325182, 32551
Natural gas liquids	211112
Natural gas transport	48621, 22121
Pulp and paper mills	32211, 322121, 322122, 32213
Paper mills	322121, 322122
Automobile manufacturing	336111, 336112, 336712, 336211, 336992, 336322, 336312, 33633, 33634, 33635, 336399, 336212, 336213
Pharmaceuticals	325411, 325412, 325413, 325414

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<sup>a</sup> North American Industry Classification System.

Entities affected by this proposal also include state and local reviewing authorities, and Indian country, where affected new and modified major stationary sources would locate.

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-2003-0062. 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 proposed 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](mailto: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?

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  - 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
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## **II. Background**

### A. Prevention of Significant Deterioration (PSD) Program

The NSR provisions of the Clean Air Act (Act) are a combination of air quality planning and air pollution control technology program requirements for new and modified major stationary sources of air pollution. Section 109 of the Act requires EPA to promulgate primary national ambient air quality standards (NAAQS or standards) to protect public health and secondary NAAQS to protect public welfare. Once we<sup>1</sup> have set these standards, states must develop, adopt, and submit to us for approval SIPs that contain emission limitations and other

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<sup>1</sup> In this proposal, the terms "we," "us," and "our," refer to the EPA.

control measures to attain and maintain the NAAQS and to meet the other requirements of section 110(a) of the Act.

Part C of title I of the Act contains the requirements for a component of the major NSR program known as the PSD program. The PSD program sets forth procedures for the preconstruction review and permitting of new and modified major stationary sources of air pollution locating in areas meeting the NAAQS ("attainment" areas) and areas for which there is insufficient information to classify an area as either attainment or nonattainment ("unclassifiable" areas). In most states, EPA has approved a PSD permit program that is part of the applicable SIP. The federal PSD program at 40 CFR 52.21 applies in states that lack a SIP-approved PSD permit program, and in Indian country.<sup>2</sup> The applicability of the PSD program to a new major stationary source or major modification must be determined in advance of construction and is a pollutant-specific determination. Once a major new source or major modification is determined to be subject to the PSD program (i.e., a PSD source), among other requirements, it must undertake a series of analyses for each NSR regulated pollutant subject to review to

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<sup>2</sup> We have delegated our authority to some states that lack an approved PSD program in their SIPs but have requested the authority to implement the federal PSD program. The EPA remains the reviewing authority in non-delegated states lacking SIP-approved programs and in Indian country.

demonstrate that it will use the best available control technology (BACT) and will not cause or contribute to a violation of any NAAQS or increment. In cases where the source's emissions of any NSR regulated pollutant may adversely affect an area specially classified as "Class I," additional review must be conducted to protect the Class I area's increments and special attributes referred to as "air quality related values."

Under certain circumstances, EPA has previously allowed proposed new major sources and major modifications that have submitted a complete PSD permit application before the effective date of an amendment to the PSD regulations, but have not yet received a final and effective PSD permit, to continue relying on information already in the application rather than immediately having to amend applications to demonstrate compliance with the new PSD requirements. In such a way, these proposed sources and modifications were "grandfathered" or exempted from the new PSD requirements that would otherwise have applied to them.

For example, the federal PSD regulations at 40 CFR 52.21(i)(1)(x) provide that the owners or operators of proposed sources or modifications that submitted a complete permit application before July 31, 1987, but did not yet receive the PSD permit, are not required to meet the requirements for PM<sub>10</sub>,

but could instead satisfy the requirements for total suspended particulate matter that were previously in effect.

In addition, EPA has allowed some grandfathering for permit applications submitted before the effective date of an amendment to the PSD regulations establishing new maximum allowable increases in pollutant concentrations (also known as PSD increments). The federal PSD regulations at 40 CFR 52.21(i)(10) provide that proposed sources or modifications that submitted a complete permit application before the effective date of the increment in the applicable implementation plan are not required to meet the increment requirements for particulate matter less than 10 microns, but could instead satisfy the increment requirements for total suspended particulate matter that were previously in effect. Also, 40 CFR 52.21(b)(i)(9) provides that sources or modifications that submitted a complete permit application before the provisions embodying the maximum allowable increase for nitrogen oxides (the NO<sub>2</sub> increments) took effect, but did not yet receive a final and effective PSD permit, are not required to demonstrate compliance with the new increment requirements to be eligible to receive the permit.

When the reviewing authority reaches a preliminary decision to authorize construction of a proposed major new source or major modification, the authority must provide notice of the preliminary decision and an opportunity for comment by the

general public, industry, and other persons that may be affected by the emissions of the proposed major source or major modification. After considering these comments, the reviewing authority may issue a final determination on the construction permit in accordance with the PSD regulations. However, under EPA regulations at 40 CFR part 124 and similar state regulations, an administrative appeal of a permitting determination may prevent the permit from becoming final and effective until the appeal is resolved.

#### B. Fine Particulate Matter and the NAAQS for PM<sub>2.5</sub>

Fine particles in the atmosphere are made up of a complex mixture of components. Common constituents include sulfate (SO<sub>4</sub>); nitrate (NO<sub>3</sub>); ammonium; elemental carbon; a great variety of organic compounds; and inorganic material (including metals, dust, sea salt, and other trace elements) generally referred to as "crustal" material, although it may contain material from other sources. Airborne particulate matter with a nominal aerodynamic diameter of 2.5 micrometers or less (a micrometer is one-millionth of a meter, and 2.5 micrometers is less than one-seventh the average width of a human hair) is considered to be "fine particles," and is also known as PM<sub>2.5</sub>. "Primary" particles are emitted directly into the air as a solid or liquid particle (e.g., elemental carbon from diesel engines or fire activities, or condensable organic particles from gasoline

engines). "Secondary" particles (e.g., SO<sub>4</sub> and NO<sub>3</sub>) form in the atmosphere as a result of various chemical reactions.

The health effects associated with exposure to PM<sub>2.5</sub> are significant. Epidemiological studies have shown a significant correlation between elevated PM<sub>2.5</sub> levels and premature mortality. Other important effects associated with PM<sub>2.5</sub> exposure include aggravation of respiratory and cardiovascular disease (as indicated by increased hospital admissions, emergency room visits, absences from school or work, and restricted activity days), lung disease, decreased lung function, asthma attacks, and certain cardiovascular problems. Individuals particularly sensitive to PM<sub>2.5</sub> exposure include older adults, people with heart and lung disease, and children.

On July 18, 1997, we revised the NAAQS for PM to add new standards for fine particles, using PM<sub>2.5</sub> as the indicator. We established health-based (primary) annual and 24-hour standards for PM<sub>2.5</sub>. See 62 FR 38652. We set an annual standard at a level of 15 micrograms per cubic meter (µg/m<sup>3</sup>) and a 24-hour standard at a level of 65 µg/m<sup>3</sup>. At the time we established the primary standards in 1997, we also established welfare-based (secondary) standards identical to the primary standards. The secondary standards are designed to protect against major environmental effects of PM<sub>2.5</sub> such as visibility impairment, soiling, and materials damage.

On October 17, 2006, we revised the primary and secondary NAAQS for PM<sub>2.5</sub> and PM<sub>10</sub>. In that rulemaking, we reduced the 24-hour NAAQS for PM<sub>2.5</sub> to 35 µg/m<sup>3</sup> and retained the existing annual PM<sub>2.5</sub> NAAQS of 15 µg/m<sup>3</sup>. In addition, we retained PM<sub>10</sub> as the indicator for coarse PM, retained the existing PM<sub>10</sub> 24-hour NAAQS of 150 µg/m<sup>3</sup>, and revoked the annual PM<sub>10</sub> NAAQS (which had previously been set at 50 µg/m<sup>3</sup>). See 71 FR 61236.

C. How is the PSD program for PM<sub>2.5</sub> implemented?

After we promulgated the NAAQS for PM<sub>2.5</sub> in 1997, we issued a guidance document entitled "Interim Implementation for the New Source Review Requirements for PM<sub>2.5</sub>" (John S. Seitz, EPA, October 23, 1997).<sup>3</sup> That guidance was designed to help states implement the Act requirements for PSD pertaining to the new PM<sub>2.5</sub> NAAQS and PM<sub>2.5</sub> as a regulated pollutant in light of known technical difficulties to addressing PM<sub>2.5</sub>. Specifically, section 165(a)(1) of the Act provides that no new or modified major source may be constructed without a PSD permit that meets all of the section 165(a) requirements with respect to the regulated pollutant. Moreover, section 165(a)(3) provides that the emissions from any such source may not cause or contribute to a violation of any NAAQS. Also, section 165(a)(4) requires

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<sup>3</sup> Available in the docket for this rulemaking, ID No. EPA-HQ-OAR-2003-0062, and at <http://www.epa.gov/region07/programs/artd/air/nsr/nsrmemos/pm25.pdf>.

BACT for each pollutant subject to PSD regulation. The 1997 guidance states that sources are allowed to use implementation of a PM<sub>10</sub> program as a surrogate for meeting PM<sub>2.5</sub> NSR requirements until certain difficulties concerning PM<sub>2.5</sub> are resolved, including the lack of necessary tools to calculate the emissions of PM<sub>2.5</sub> and related precursors, the lack of adequate modeling techniques to project ambient impacts, and the lack of PM<sub>2.5</sub> monitoring sites.

On May 16, 2008, EPA published a final rule containing requirements for state and Tribal plans to implement the Act's preconstruction review provisions for the 1997 PM<sub>2.5</sub> NAAQS in both attainment and nonattainment areas. 73 FR 28321. The rule, with two exceptions, requires that major stationary sources seeking permits must begin directly satisfying the PM<sub>2.5</sub> requirements as of the effective date of the new rule, rather than relying on the 1997 PM<sub>10</sub> Surrogate Policy. First, in PM<sub>2.5</sub> attainment (or unclassifiable) areas, the new PSD requirements under 40 CFR 51.166 set forth the PM<sub>2.5</sub> requirements for states with SIP-approved programs to include in their state PSD programs; similar requirements were added to 40 CFR 52.21—the federal PSD program—for EPA (or, where applicable, delegated state agencies) to use for implementing the new PM<sub>2.5</sub> requirements in states lacking approved PSD programs in their SIPs.

Second, in PM<sub>2.5</sub> nonattainment areas, new requirements were added to 40 CFR 51.165 to enable states to address the PM<sub>2.5</sub> NAAQS as part of a nonattainment NSR program. During the period of time allowed for states to amend their existing nonattainment NSR programs to address the new PM<sub>2.5</sub> requirements, states are allowed to rely on the procedures under 40 CFR part 51 appendix S ("The Interpretative Rule") to issue permits to new or modified major stationary sources proposing to locate in a PM<sub>2.5</sub> nonattainment area. In the preamble to the May 2008 final rule, EPA indicated that, in any state that was unable to apply the PM<sub>2.5</sub> requirements of appendix S, EPA would act as the reviewing authority for the relevant PM<sub>2.5</sub> portions of the nonattainment NSR permit. See 73 FR at 28342.

As mentioned, there were two exceptions to the imposition of new PM<sub>2.5</sub> requirements to replace the use of the 1997 PM<sub>10</sub> Surrogate Policy for issuing construction permits. The May 2008 final rule included a grandfathering provision for PM<sub>2.5</sub> in the federal PSD program at 40 CFR 52.21. This grandfathering provision applied to sources that had applied for, but had not yet received, a final and effective PSD permit before the July 15, 2008 effective date of the May 2008 final rule. The relevant grandfathering provision is described in greater detail in section III.A of this preamble. This grandfathering provision had not been proposed for comment in the November 1,

2005 notice of proposed rulemaking. Instead, the November 2005 proposal provided that the revised PM<sub>2.5</sub> requirements when final would take effect immediately in states where the federal PSD program applies. 70 FR 65986, November 1, 2005 at 66043.

For states with SIP-approved PSD programs, the preamble to the May 2008 final rule stated that SIP-approved states may continue to implement a PM<sub>10</sub> program as a surrogate to meet the PSD program requirements for PM<sub>2.5</sub> pursuant to the 1997 [PM<sub>10</sub> Surrogate Policy]" for up to three years (until May 2011) or until the individual revised state PSD programs for PM<sub>2.5</sub> are approved by EPA, whichever comes first. See 73 FR 28341.

#### D. Case Law Relevant to the Use of the PM<sub>10</sub> Surrogate Policy

When EPA issued the PM<sub>10</sub> Surrogate Policy in 1997, we stated that meeting the NSR program requirements for PM<sub>10</sub> may be used as a surrogate for meeting the NSR program requirements for PM<sub>2.5</sub> until certain technical difficulties concerning PM<sub>2.5</sub> are resolved. At that time, we did not identify criteria to be applied before the policy could be used for satisfying the PM<sub>2.5</sub> requirements. However, courts have issued a number of opinions that should be read as establishing guidelines for the use of an analysis based on PM<sub>10</sub> as a surrogate for meeting the PSD requirements for PM<sub>2.5</sub>. Applicants and state permitting authorities seeking to rely on the PM<sub>10</sub> Surrogate Policy should consider these opinions in determining whether PM<sub>10</sub> serves as an

adequate surrogate for meeting the PM<sub>2.5</sub> requirements in the case of the specific permit application at issue.

First, courts have held that a surrogate may be used only after it has been shown to be reasonable to do so. See, e.g., Sierra Club v. EPA, 353 F.3d 976, 982-984 (D.C. Cir. 2004) (stating general principle that EPA may use a surrogate if it is "reasonable" to do so and applying analysis from National Lime Assoc. v. EPA, 233 F.3d 625, 637 (D.C. Cir. 2000) that is applicable to determining whether use of a surrogate is reasonable in setting emissions limitations for hazardous air pollutants under §112 of the Act); Mossville Environmental Action Now v. EPA, 370 F. 3d 1232, 1242-43 (D.C. Cir. 2004) (EPA must explain the correlation between the surrogate and the represented pollutant that provides the basis for the surrogacy.); Bluewater Network v. EPA, 370 F. 3d 1, 18 (D.C. Cir. 2004) ("The Agency reasonably determined that regulating [hydrocarbons] would control PM pollution both because HC itself contributes to such pollution, and because HC provides a good proxy for regulating fine PM emissions."). Though these court opinions all addressed when it was reasonable to use a surrogate in contexts different from the use of the PM<sub>10</sub> Surrogate Policy, EPA believes that the overarching legal principle from these decisions is that a surrogate may be used only after it has been shown to be reasonable (such as where the surrogate is a

reasonable proxy for the pollutant or has a predictable correlation to the pollutant) and that this principle applies where an applicant or permitting authority seeks to rely upon the PM<sub>10</sub> Surrogate Policy in lieu of a PM<sub>2.5</sub> analysis to obtain a PSD permit.

Second, with respect to PM surrogacy in particular, there are specific issues raised in the case law that bear on whether PM<sub>10</sub> can be considered a reasonable surrogate for PM<sub>2.5</sub>. The D.C. Circuit concluded that PM<sub>10</sub> was an arbitrary surrogate for a PM pollutant that is one fraction of PM<sub>10</sub> where the use of PM<sub>10</sub> as a surrogate for that fraction is "inherently confounded" by the presence of the other fraction of PM<sub>10</sub>. ATA v. EPA, 175 F.3d 1027, 1054 (D.C. Cir. 1999) (PM<sub>10</sub> is an arbitrary indicator for coarse PM (PM<sub>10-2.5</sub>) because the amount of coarse PM within PM<sub>10</sub> will depend arbitrarily on the amount of fine PM (PM<sub>2.5</sub>)). In another case, however, the D.C. Circuit held that the facts and circumstances in that instance provided a reasonable rationale for using PM<sub>10</sub> as a surrogate for a fraction of PM<sub>10</sub>. American Farm Bureau v. EPA, 559 F.3d 512, 534-35 (D.C. Cir. 2009) (where the record demonstrated that (1) PM<sub>2.5</sub> tends to be higher in urban areas than in rural areas, and (2) evidence of health effects from coarse PM in urban areas is stronger, EPA reasoned that setting a single PM<sub>10</sub> standard for both urban and rural areas would tend to require lower coarse PM concentrations in

urban areas. The court considered the reasoning from the ATA case and accepted that the presence of PM<sub>2.5</sub> in PM<sub>10</sub> will cause the amount of coarse PM in PM<sub>10</sub> to vary, but on the specific facts before it held that such variation was not arbitrary.) EPA believes that these cases demonstrate the need for permit applicants and permitting authorities to determine whether PM<sub>10</sub> is a reasonable surrogate for PM<sub>2.5</sub> under the facts and circumstances of the specific permit at issue, and not proceed on a general presumption that PM<sub>10</sub> is always a good surrogate for PM<sub>2.5</sub>.

Thus, based on this case law, rather than simply assuming that using the 1997 PM<sub>10</sub> Surrogate Policy is always an adequate alternative for satisfying the PM<sub>2.5</sub> PSD requirements, permit applicants and permitting authorities seeking to apply the 1997 PM<sub>10</sub> Surrogate Policy must ensure that the record for each permit supports using PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub> under the circumstances.

Finally, this case law suggests that any person attempting to show that PM<sub>10</sub> is a reasonable surrogate for PM<sub>2.5</sub> would need to address the differences between PM<sub>10</sub> and PM<sub>2.5</sub>. For example, emission controls used to capture coarse particles in some cases may be less effective in controlling PM<sub>2.5</sub>. 72 FR 20,586, 20,617 (April 25, 2007). As a further example, the particles that make up PM<sub>2.5</sub> may be transported over long distances while coarse

particles normally travel shorter distances. 70 FR 65,984, 65,997-98 (November 1, 2005). Under the principles in the case law, any source or permitting authority seeking to use the PM<sub>10</sub> Surrogate Policy properly would need to consider the differences between PM<sub>10</sub> and PM<sub>2.5</sub> and demonstrate that PM<sub>10</sub> is nonetheless an adequate surrogate for PM<sub>2.5</sub>.<sup>4</sup>

### **III. Transition to the PM<sub>2.5</sub> Requirements for States Lacking EPA-Approved PSD Programs**

#### A. What is the existing grandfathering provision for PM<sub>2.5</sub>?

As described in section II.C of this preamble, new and modified major stationary sources applying for permits under the federal PSD program after the July 15, 2008 effective date of the May 2008 final rule must directly satisfy the requirements for PM<sub>2.5</sub> rather than rely on the PM<sub>10</sub> Surrogate Policy to satisfy those requirements. However, until the EPA recently stayed the provision for three months, the grandfathering provision contained in the federal PSD program at 40 CFR 52.21(i)(1)(xi) allowed sources that had not yet received final and effective permits, but had submitted a complete PSD permit application before the effective date of the final rule for PM<sub>2.5</sub>, to

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<sup>4</sup> Additional discussion about the relevant case law and EPA's position on the use of PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub> for PSD permitting is contained in an Administrative Order issued on August 12, 2009 responding to petitioners' concerns about the use of the PM<sub>10</sub> Surrogate Policy in a PSD permit issued to Louisville Gas and Electric Company.

continue having their application reviewed on the basis of the PM<sub>10</sub> Surrogate Policy.

In the preamble to the final rule, EPA indicated that it believed that the PM<sub>2.5</sub> grandfathering provision was consistent with the existing provision under 40 CFR 52.21(i)(1)(x) whereby EPA grandfathered new and modified major stationary sources with permit applications based on PM from the then-new PM<sub>10</sub> increment requirements established in 1987. Thus, applicants would not be expected to perform new analyses to establish compliance with the BACT and air quality requirements for PM<sub>2.5</sub> in cases where they had submitted their complete applications on the basis of the PM<sub>10</sub> Surrogate Policy before the effective date of the new regulations.

At the time the grandfathering provision for PM<sub>2.5</sub> was put into effect, we estimate that less than twenty proposed new or modified major stationary sources were covered. Of these, at least two projects subsequently received final and effective PSD permits after the July 15, 2008 effective date of the final rule.

B. Petitioners' 2008 Challenge to the Grandfathering Provision for PM<sub>2.5</sub>

On July 15, 2008, the Natural Resources Defense Council and the Sierra Club jointly submitted a petition to the Administrator seeking reconsideration of four provisions of the

May 16, 2008 final rule, including the grandfathering provision for PM<sub>2.5</sub> under the federal PSD program. In the petition, the petitioners argued that "EPA unlawfully failed to present this grandfathering provision and accompanying rationale to the public for comment." July 15 Petition at 6. Thus, petitioners argued, EPA had not given interested parties any notice of and the opportunity to comment on the grandfathering provision that EPA adopted in 40 CFR 52.21(i)(1)(xi) in the final rule. Moreover, with regard to the grandfathering provision itself, the petitioners questioned EPA's authority to waive statutory requirements by establishing such a provision and argued that "Congress specifically addressed the issue of grandfathering in section 168(b) and again allowed for the grandfathering of only those sources on which 'construction has commenced' before enactment of the 1997 Clean Air Act Amendments." July 15 Petition at 7. Finally, petitioners argued that the technical difficulties with respect to PM<sub>2.5</sub> monitoring, emissions estimation and modeling that led to the adoption of the 1997 PM<sub>10</sub> Surrogate Policy no longer exist, and that those sources not falling within the grandfathering provision must conduct the required analyses for PM<sub>2.5</sub> directly without relying on the PM<sub>10</sub> Surrogate Policy, and so there was no justification for the grandfathering provision. July 15 Petition at 8. In sum, petitioners asserted that the grandfathering provision in

§52.21(i)(1)(xi) was illegal and arbitrary, and requested that EPA stay the provision.

On January 14, 2009, EPA responded in a letter to the petitioners that the Agency was denying all aspects of the petition for reconsideration.

C. Petitioners' 2009 Petition Seeking Reconsideration and a Stay of the Grandfathering Provision for PM<sub>2.5</sub>

On February 10, 2009, the same petitioners submitted a second petition similar to the first to EPA. The second petition made the same arguments that were presented in the July 15, 2008 petition seeking reconsideration and an administrative stay and sought reconsideration of both the May 2008 final rule and the January 2009 denial of petitioners' first petition for reconsideration. In response to the February 2009 petition, on April 24, 2009, the Administrator reversed the Agency's earlier decision and agreed to reconsider each of the four challenged provisions. In addition, the Administrator indicated that the Agency intended to propose repealing the grandfathering provision "on the grounds that it was adopted without prior public notice and is no longer substantially justified in light of the resolution of the technical issues with respect to PM<sub>2.5</sub> monitoring, emissions estimation, and air quality modeling that led to the PM<sub>10</sub> Surrogate Policy in 1997." Finally, the Administrator announced that she was administratively staying

the grandfathering provision for three months under the authority of section 307(d)(7)(B) of the Act. That three-month administrative stay became effective on June 1, 2009 -- the date the notice announcing the stay was published in the Federal Register -- and ended on September 1, 2009. (74 FR 26098). In order to allow additional time necessary to finalize this rulemaking, EPA proposed and promulgated a second stay that will keep the grandfathering provision stayed until June 22, 2010. See 74 FR 48153, September 22, 2009.

D. Why is EPA proposing to repeal the grandfathering provision for PM<sub>2.5</sub>?

In this notice, consistent with the Administrator's April 24, 2009 letter to the petitioners, we are proposing to repeal the grandfathering provision in the federal PSD program at 40 CFR 52.21(i)(1)(xi). As described above, the November 1, 2005, proposal provided that the revised PM<sub>2.5</sub> requirements would take effect immediately in states where the federal PSD program applies (see 70 FR 66043), and did not propose or seek comment on the continued application of the PM<sub>10</sub> Surrogate Policy to sources that submitted an application before the effective date of the new rule but had not yet received a final and effective PSD permit. On review of the reconsideration petition, we agree with the petitioners that it was not appropriate to adopt the grandfathering provision without providing for public notice and

comment on the concept of allowing certain sources covered by the federal PSD program to continue to use the PM<sub>10</sub> Surrogate Policy after the effective date of the final rule. Moreover, we find that there is sufficient justification to propose repealing the grandfathering provision. The impact of a repeal will be to require sources that submitted a permit application before the effective date (July 15, 2008) of the May 16, 2008, final rule to satisfy the PSD requirements for PM<sub>2.5</sub> without reliance on the PM<sub>10</sub> Surrogate Policy. However, EPA does not propose to interpret this proposed repeal to have any effect on permits that became final and effective before the stay of section 52.21(i)(1)(xi) by the Administrator.

Our proposal to repeal the grandfather provision rests primarily on the fact that the PM<sub>2.5</sub> implementation issues that led to the adoption of the PM<sub>10</sub> Surrogate Policy in 1997 have been largely resolved to a degree sufficient for the owners and operators of sources and permitting authorities to conduct meaningful permit-related PM<sub>2.5</sub> analyses. For example, adequate procedures for the collection of ambient PM<sub>2.5</sub> are now well established throughout the country and provide data useful for the purpose of PSD permitting. Also, air quality modeling of direct PM<sub>2.5</sub> emissions can be accomplished using an EPA-approved model to predict ambient PM<sub>2.5</sub> impacts caused by new and modified sources of PM<sub>2.5</sub> emissions. Emissions factors for calculating

PM<sub>2.5</sub> emissions from various source categories and equipment are available, as are national inventories of PM<sub>2.5</sub> emissions.

While direct analysis of PM<sub>2.5</sub> impacts may now be conducted, not all technical difficulties have been resolved. For example, EPA has not approved any models that can reliably predict the localized ambient PM<sub>2.5</sub> impacts of precursors (e.g., SO<sub>2</sub> and NO<sub>x</sub>) emitted from individual stationary sources. Some regional-scale photochemical transport models have been modified to provide the capability to track the transport and formation of primary and secondarily-formed PM<sub>2.5</sub> from either single or multiple sources. The EPA is currently evaluating whether such source apportionment implementations in photochemical models are an appropriate option to estimate downwind transport and formation of PM<sub>2.5</sub> from individual sources.

However, for the present, regional-scale models available for considering chemical transformations associated with the impacts of PM<sub>2.5</sub> and its precursors are designed to account for impacts of multiple sources over relatively wide distances, and have not been approved by EPA for localized permitting purposes. This limitation results in underestimating the ambient impact of a single source that is emitting PM<sub>2.5</sub> precursors in addition to direct PM<sub>2.5</sub> emissions. However, this limitation does not preclude a permit applicant from determining whether the direct emissions of PM<sub>2.5</sub> from the proposed source or modification will

cause or contribute to a violation of the NAAQS for PM<sub>2.5</sub>, and is not a valid basis for using a PM<sub>10</sub> analysis as a surrogate to satisfy the PM<sub>2.5</sub> requirements.

E. What are the effects of repealing the grandfathering provision for PM<sub>2.5</sub>?

If EPA adopts a final rule to repeal the grandfathering provision, any PSD permit applications covered by the grandfathering provision that have not yet been approved and issued a final and effective PSD permit will not be able to rely on the PM<sub>10</sub> Surrogate Policy to satisfy the PM<sub>2.5</sub> requirements. Such applications will need to be evaluated for PM<sub>2.5</sub> to ensure that the applicable administrative record for the permit application is sufficient to demonstrate compliance with the PSD requirements for PM<sub>2.5</sub>, including analyses necessary to (a) demonstrate that the emissions increase from the proposed new or modified major stationary source will not cause or contribute to a violation of the PM<sub>2.5</sub> NAAQS, as required by §165(a)(3) of the Act, and (b) establish a BACT emissions limitation for PM<sub>2.5</sub> in the permit, as required by §165(a)(4) of the Act. For any permit that previously was relying on a PM<sub>10</sub> surrogate analysis, additional information is likely to be required to fulfill these requirements.

The EPA is aware of twenty-seven sources that had submitted PSD permit applications under the federal PSD program prior to

July 15, 2008 -- the effective date of the PM<sub>2.5</sub> NSR Implementation Rule -- but did not receive their permits by that date. Thus, these applications were eligible to be grandfathered to use the PM<sub>10</sub> Surrogate Policy to satisfy the PM<sub>2.5</sub> requirements. For at least six of these applications, the permit was either issued or denied, or the project was cancelled, prior to June 1, 2009, when the administrative stay became effective. For most of the remaining twenty-one applications, the sources have already directly addressed, or are planning to directly address, the applicable PM<sub>2.5</sub> requirements in order to obtain a permit. At least two of the sources are reportedly planning to take enforceable emissions limitations on their PM<sub>2.5</sub> emissions in order to avoid the PSD requirements for PM<sub>2.5</sub> altogether.

Should the additional information that these sources acquire and analyze for PM<sub>2.5</sub> result in the need to tighten the conditions pertaining to the control of PM<sub>2.5</sub> emissions in any of the yet-issued permits, then direct environmental benefits would result. In any event, ending the use of the PM<sub>10</sub> Surrogate Policy will provide desired certainty to the PM<sub>2.5</sub> permitting process by ensuring that all permit applicants show that their source does not cause or contribute to a violation of the PM<sub>2.5</sub> NAAQS and otherwise meets all of the requirements for PM<sub>2.5</sub>, and not use PM<sub>10</sub> surrogacy as means of avoiding a real analysis

demonstrating that the PM<sub>2.5</sub> requirements are met. We believe this certainty would outweigh any burdens caused by any delay to the permit applicants that would be affected. Nevertheless, we are herein soliciting comments concerning any such burdens that may be incurred by the affected sources to help us evaluate this proposed repeal of the grandfathering provision for PM<sub>2.5</sub>.

A repeal of the grandfathering provision in a subsequent final rule would not impact any PSD permits that became final and effective in reliance on the PM<sub>10</sub> Surrogate Policy under the policy itself or the grandfathering provision that incorporated that policy by reference before the stay of that provision.

#### **IV. Ending the PM<sub>10</sub> Surrogate Policy in SIP-approved States**

##### **A. What is the current status of the PM<sub>10</sub> Surrogate Policy in SIP-approved states?**

As described in section II.C of this preamble, the preamble to the May 2008 final NSR rule for PM<sub>2.5</sub> stated that SIP-approved states may continue to implement a PM<sub>10</sub> program as a surrogate to meet the PSD program requirements for PM<sub>2.5</sub> pursuant to the 1997 PM<sub>10</sub> Surrogate Policy. This continued use of the PM<sub>10</sub> Surrogate Policy was a transition measure, provided for SIP-approved states in conjunction with the three-year period provided under 40 CFR 51.166(a)(6)(i) to adopt and submit SIP revisions following the May 2008 rule. See 73 FR 28340-28341.

Although the PM<sub>10</sub> Surrogate Policy is in effect, in light of

the various relevant court decisions discussed above, it is prudent to conclude that the policy should not be read as allowing the automatic use of a PM<sub>10</sub> analysis as a surrogate for satisfying PM<sub>2.5</sub> requirements. Moreover, the PM<sub>10</sub> Surrogate Policy contains limits within the policy itself. As stated in the 1997 Seitz Memorandum, the PM<sub>10</sub> Surrogate Policy provided that, in view of significant technical difficulties that existed in 1997, EPA believed that PM<sub>10</sub> may properly be used as a surrogate for PM<sub>2.5</sub> in meeting NSR requirements "until these difficulties are resolved." Seitz Memorandum at 1. In the May 2008 final rule, EPA noted that "these difficulties have largely been resolved." See 73 FR at 28340 (col. 2-3). Thus, in addition to the case law demonstration discussed previously, a source or permitting authority seeking to rely on the PM<sub>10</sub> Surrogate Policy should identify any technical difficulties that exist to justify the application of the policy in each specific case.

B. Petitioners' 2009 Petition Seeking Reconsideration of the Continued Use of the PM<sub>10</sub> Surrogate Policy during the Three-year Transition Period

In their February 10, 2009, petition for reconsideration, the Natural Resources Defense Council and the Sierra Club argued, among other things, that the continued use of the PM<sub>10</sub> Surrogate Policy had the effect of waiving for up to three years

the requirement to assure compliance with the PM<sub>2.5</sub> NAAQS, and that applicants, states and EPA have the technical ability to address the PM<sub>2.5</sub> requirements directly rather than relying on a PM<sub>10</sub> analysis as a surrogate. February 2009 Petition at 4-6. As we noted previously, the Administrator granted the February 2009 petition for reconsideration in her April 24, 2009, letter.

C. Why is EPA proposing to end the PM<sub>10</sub> Surrogate Policy in SIP-approved states?

In this action, EPA is proposing to end the PM<sub>10</sub> Surrogate Policy before the end of the three-year transition period for revising SIPs (May 2011). The grounds for this proposal are that the PM<sub>2.5</sub> implementation issues that led to the adoption of the PM<sub>10</sub> Surrogate Policy in 1997 have been largely resolved to a degree sufficient for sources and permitting authorities to conduct meaningful permit-related PM<sub>2.5</sub> analyses. EPA had previously concluded that these difficulties had been resolved to a degree sufficient for all federal PSD permit reviews to begin direct PM<sub>2.5</sub>-based assessments as of the July 15, 2008, effective date of the May 2008 final rule. Section III.D of this preamble, which discusses our proposal to repeal the grandfathering provision in the federal PSD program, provides a more thorough discussion of the status of technical difficulties associated with PM<sub>2.5</sub> analyses. The EPA is seeking comments on whether the technical issues that gave rise to the PM<sub>10</sub> Surrogate

Policy in 1997 are sufficiently resolved that the policy is no longer needed either for federal or state permitting actions.

As mentioned earlier, in the May 2008 final rule, EPA allowed states to continue using the PM<sub>10</sub> Surrogate Policy on the grounds that states would need time to update their state laws and make SIP submissions to EPA. 73 FR at 28340-28341. In the final rule preamble, we said that "if a SIP-approved State is unable to implement a PSD program for the PM<sub>2.5</sub> NAAQS based on these final rules, the State may continue to implement a PM<sub>10</sub> program as a surrogate to meet the PSD program requirements for PM<sub>2.5</sub> pursuant to the 1997 guidance." 73 FR at 28341.

The existing provisions in many state implementation plans may already provide sufficient legal authority for several SIP-approved states to begin addressing PM<sub>2.5</sub> directly when issuing PSD permits. For example, if the state has adopted EPA's definition of "regulated NSR pollutant," then PM<sub>2.5</sub> falls within this definition, because PM<sub>2.5</sub> is a "pollutant for which a national ambient air quality standard has been promulgated." 40 CFR 51.166(b)(49)(i); 40 CFR 52.21(b)(50)(i). Therefore, such states may already have an EPA-approved SIP that authorizes the state to establish BACT limits for PM<sub>2.5</sub> and to demonstrate that a source will not cause or contribute to a violation of the PM<sub>2.5</sub> NAAQS using direct air quality modeling of the proposed unit's direct emissions of PM<sub>2.5</sub> to project the impact on the PM<sub>2.5</sub>

NAAQS.

One complication for states that seek to implement a full PM<sub>2.5</sub> analysis immediately under their existing SIPs may be the absence of a significant emissions rate for PM<sub>2.5</sub>. See, 73 FR at 28340. Assuming a state that has adopted EPA's definition of "regulated NSR pollutant" also applies EPA's definition of "significant emissions rate," then under the latter definition, any increase in emissions of PM<sub>2.5</sub> will be deemed significant. 40 CFR 51.166(b)(23)(ii); 40 CFR 52.21(b)(23)(ii). The most significant implication of the latter may be that some sources making modifications that increase PM<sub>2.5</sub> emissions in amounts less than 10 tons per year may have to undertake additional PSD review that would not be required if the state's SIP included the significant emissions rate for PM<sub>2.5</sub> set forth in EPA's May 2008 final rule.

The EPA requests comments on whether SIP-approved states should be considered "unable to implement a PSD program for the PM<sub>2.5</sub> NAAQS" because they lack the legal authority to implement the PSD program for PM<sub>2.5</sub>. In this context it would be helpful to hear commenters' views on whether the legal authority of SIP-approved states to implement a PM<sub>2.5</sub> program is impeded by the absence of a significant emissions rate for PM<sub>2.5</sub> or whether other factors present significant complications for states.

The EPA also recognizes that there are other issues that

could impact the decision to end the PM<sub>10</sub> Surrogate Policy. To help EPA consider these issues, we are specifically seeking comment on several additional questions. These questions are as follows:

- What are the environmental benefits or harms that will result from ending the policy before May 2011, and what are the environmental benefits or harms that will result if the PM<sub>10</sub> Surrogate Policy is left in place until May 2011?
- What implementation difficulties for state permitting authorities or PSD applicants seeking permits will result from ending the PM<sub>10</sub> Surrogate Policy before the three-year transition period?

In addition, EPA invites comments on any other points that interested parties believe are relevant to whether the PM<sub>10</sub> Surrogate Policy continues to be necessary for implementing the Act's PM<sub>2.5</sub> requirements.

D. What are the effects of ending the PM<sub>10</sub> Surrogate Policy in SIP-approved states?

When the PM<sub>10</sub> Surrogate Policy ends in SIP-approved states, the effects will be the same as those described previously in section III.E of this preamble, which discusses the effects of the proposed repeal of the grandfathering provision in states where the federal PSD program applies. If EPA decides to end the PM<sub>10</sub> Surrogate Policy before the end of the original

transition period in states with SIP-approved PSD programs, EPA is proposing that new and modified major sources seeking permits in such states would be thereafter required to conduct permit-related analyses based on PM<sub>2.5</sub> rather than PM<sub>10</sub>. EPA is taking comment on what kind of transition process, if any, should be allowed if EPA decides to end the PM<sub>10</sub> Surrogate Policy in the final rule.

## **V. 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 any new information collection burden that is not already accounted for in the approved information collection request (ICR) for the NSR program. We are not proposing any new paperwork requirements (e.g., monitoring, reporting, recordkeeping) as part of this proposed action. This action proposes to amend one part of the regulations at 40 CFR 52.21 by repealing the grandfathering

provision that affects about twenty-one sources, and to end the use of the 1997 PM<sub>10</sub> Surrogate Policy in SIP-approved states. However, the approved ICR for the NSR program was prepared as if the 2008 rule that added PM<sub>2.5</sub> to the NSR program would be fully implemented immediately upon the effective date of the rule, without any phase-in period during which the grandfathering provision or 1997 PM<sub>10</sub> Surrogate Policy would apply. Thus, while this action will result in increased permitting burden for those sources who would have otherwise been able to use the grandfathering provision or PM<sub>10</sub> Surrogate Policy, this burden is already included in the approved ICR. The OMB previously approved the information collection requirements contained in the existing regulations (40 CFR parts 51 and 52) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., and 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 proposal 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 one amendment to the regulations at 40 CFR 52.21 (by repealing the grandfathering provision that affects about twenty-one sources), and to end early our policy of allowing SIP-approved states to use the PM<sub>10</sub> Surrogate Policy. This does not create any new requirements or burdens. 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 contains no federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 ("URMA"), 2 U.S.C. 1531-1538 for state, local, and tribal governments or the private sector. This action only proposes to amend one part of the regulations at 40 CFR 52.21 (by repealing the grandfathering provision that affects about twenty-one sources), and to end early our policy of allowing SIP-approved states to use the PM<sub>10</sub> Surrogate Policy. Therefore, this action is not subject to the requirements of sections 202 or 205 of UMRA.

This action 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 Executive Order 13132. This action only proposes to amend one part of the

regulations at 40 CFR 52.21 (by repealing the grandfathering provision for PM<sub>2.5</sub> that affects about twenty-one sources), and to end early our policy allowing SIP-approved states to use the PM10 Surrogate Policy. Thus, Executive Order 13132 does not apply to this proposed rule.

In the spirit of Executive Order 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 Executive Order 13175 (65 FR 67249, November 9, 2000.) This action will not impose any new obligations or enforceable duties on tribal governments.

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 Executive Order 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 Executive Order has the potential to influence the regulation. This action is not

subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. In fact, this action will help ensure that the health-based national standards for PM<sub>2.5</sub> are adequately protected against the adverse effects of PM<sub>2.5</sub> emissions from new and modified sources of air pollution by ending the use of a surrogate analyses for PM<sub>2.5</sub> impacts.

#### 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 Executive Order 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. EPA is proposing to amend one part of the regulations at 40 CFR 52.21 (expected to affect about twenty-one regulated entities), and to end early the use of the PM<sub>10</sub> Surrogate Policy in SIP-approved states. In both instances, only a portion of the affected sources are involved in the production or distribution of energy.

#### 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 concluded that it is not practicable to determine whether there would be disproportionately high and adverse human health or environmental effects on minority and/or low income

populations from this proposed rule. The rule proposes only to amend to one part of the regulations at 40 CFR 52.21 (by repealing the grandfathering provision that affects about twenty-one sources), and to end early the PM<sub>10</sub> Surrogate Policy in SIP-approved states. The affected sources, after further analysis and data collection, may receive permitted emissions limits that are equally or more protective of public health than would be likely in the absence of this proposed rule change.

#### 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."

#### **VI. 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 in 40 CFR Part 52**

Administrative practices and procedures, Air pollution control, Environmental protection, Intergovernmental relations.

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Dated: February 4, 2010.

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Lisa P. Jackson,  
Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

**PART 52—[AMENDED]**

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, et seq.

**§52.21 [Amended]**

2. In §52.21, remove paragraph (i)(1)(xi).