

Dated: September 17, 2009.

**Michael G. Ensich,**

*Chief, Operations, Directorate of Civil Works.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-HQ-OAR-2003-0062; FRL-8961-1]

#### Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM<sub>2.5</sub>); Final Rule To Stay the Grandfathering Provision for PM<sub>2.5</sub>

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

**ACTION:** Final rule

**SUMMARY:** In this final action, EPA is issuing a stay, for nine months, on the “grandfathering” provision for particulate matter less than 2.5 micrometers (PM<sub>2.5</sub>) requirements in the Federal Prevention of Significant Deterioration (PSD) program. The grandfathering provision was added to the Federal PSD regulations on May 16, 2008, as part of the final rule titled, “Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM<sub>2.5</sub>).” This stay follows an administrative stay, which was in effect from June 1, 2009, until September 1, 2009, on the same provision. We believe this additional stay will provide sufficient time for EPA to propose, take public comment on, and issue a final action concerning the repeal of the grandfathering provision for PM<sub>2.5</sub> in the Federal PSD program.

**DATES:** Effective September 22, 2009, 40 CFR 52.21(i)(1)(xi) is stayed for a period of nine months, until June 22, 2010.

**ADDRESSES:** *Docket:* All documents in the docket are listed in the <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 <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.

**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).

#### SUPPLEMENTARY INFORMATION:

##### I. General Information

###### A. Does this action apply to me?

Entities affected by this final action are the owners and operators of proposed new sources and modifications who submitted a complete application for a PSD permit before the July 15, 2008 effective date of the PM<sub>2.5</sub> NSR Implementation Rule, but have not yet received their permit to construct. EPA has estimated that fewer than 20 proposed sources are covered by the grandfathering provision that is being stayed.

Additional entities affected by this final rule include State and local reviewing authorities responsible for issuing the PSD permits to the new and modified major stationary sources affected by this rule.

###### B. 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 final rule is also available on the World Wide Web in the regulations and standards section of our NSR home page located at <http://www.epa.gov/nsr>.

###### C. How is this preamble organized?

##### I. General Information

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## II. This Action

### A. Background

On May 16, 2008, the EPA (“we”) issued a final rule amending our PSD and nonattainment NSR regulations to add requirements for the preconstruction review of PM<sub>2.5</sub>. 73 FR 28321. The amendments addressed the major source threshold, significant emissions rate and offset ratios for PM<sub>2.5</sub>; interpollutant trading for offsets; and applicability of NSR to PM<sub>2.5</sub> precursors. The rule also provided for the transition of the new requirements for PM<sub>2.5</sub> in the NSR permitting process.

On February 10, 2009, Earthjustice, on behalf of the Natural Resources Defense Council (NRDC) and Sierra Club, submitted a petition for reconsideration of four specific provisions of the May 2008 final rule as provided for in Clean Air Act (CAA) 307(d)(7)(B).<sup>1</sup> The specific provisions challenged by the petitioners include: (1) A transition period for PSD programs in States with approved PSD rules in their approved State Implementation Plans (SIPs) to revise and submit their new PM<sub>2.5</sub> regulations to EPA within three years of the publication of the final rule. During the transition period, the rule allows States to continue using EPA’s 1997 surrogate policy by which an analysis based on PM<sub>10</sub> can be used to meet the requirements for the otherwise required PM<sub>2.5</sub>; (2) “grandfathering” under the Federal PSD program for permit applications submitted before the July 15, 2008, effective date of the new rule, which allows the PM<sub>10</sub> surrogate policy to continue to be used as the basis for approving such permits for PM<sub>2.5</sub>; (3) a transition period, during which time EPA is re-evaluating its test methods for condensable particulate matter (CPM) emissions, whereby States are not required to account for CPM in the permitting process; and (4) use of recommended interpollutant trading ratios to facilitate the trading of PM<sub>2.5</sub> precursors emissions reductions for new

<sup>1</sup> Paul Cort, Earthjustice, on behalf of the NRDC and Sierra Club, EPA-HQ-OAR-2003-0062-0281.

emissions of PM<sub>2.5</sub> in areas designated “nonattainment” for PM<sub>2.5</sub>.

Under CAA 307(d)(7)(B), the Administrator may commence a reconsideration proceeding if the petitioner raises an objection to a rule that was impracticable to raise during the comment period or if the grounds for the objection arose after the comment period. In either case, the objection must be of central relevance to the outcome of the rule. The Administrator may stay the effectiveness of the rule for up to three months during such reconsideration.

On April 24, 2009, we responded to the February 10, 2009 petition by letter indicating that we were convening a reconsideration proceeding for all four issues challenged in the petition and granting a 3-month administrative stay of one of the provisions—the grandfathering provision for PM<sub>2.5</sub> contained in the Federal PSD program at 40 CFR 52.21(i)(1)(xi). The letter also indicated that we would publish a notice of proposed rulemaking “in the near future” to propose repealing the grandfathering provision for PM<sub>2.5</sub> in the Federal PSD program, on the grounds that it was adopted without prior public notice and is no longer substantially justified in light of the resolution of 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.

The administrative stay of the grandfathering provision for PM<sub>2.5</sub> was issued and became effective on June 1, 2009. See 74 FR 26098, FR Doc. E9–12575. As noted above, our authority to stay a rule or portion thereof solely under the Administrator’s discretion is limited to three months. When we have issued similar administrative stays in the past, it has often been our practice to also propose an extension of the stay through a rulemaking process to ensure that there is little or no gap between the end of the stay and the completion of the final action.<sup>2</sup>

#### B. Final Rule

In this final rule we are staying the grandfathering provision in the Federal PSD regulations for nine months. As described above, the same provision was administratively stayed for 3 months; however, that stay ended on

September 1, 2009. Thus, there is a slight gap between the lapse of the administrative stay and the stay being issued under this final action. Nevertheless, we believe that the additional stay is needed and will provide adequate time for EPA to propose, take comment on, and issue a final action on issues that are associated with the grandfathering provision for PM<sub>2.5</sub> that we are proposing to repeal. Therefore, we are issuing this stay of the grandfathering provision for PM<sub>2.5</sub> contained in the Federal PSD program at 40 CFR 52.21(i)(1)(xi) for nine months, until June 22, 2010.

#### C. Comments and Responses

When we proposed this stay on July 23, 2009, we did not take comment on any substantive issues concerning the repeal of the grandfathering provision for PM<sub>2.5</sub> contained in the Federal PSD program, or on any of the other provisions subject to the reconsideration. Comments sought were to be limited to the issue of whether to establish this additional stay and how long this stay should be. 74 FR 36427 at 36429.

We received three comments on the proposal to establish this further stay on the grandfathering provision under the Federal PSD program. Only one of these comments, from an environmental organization, explicitly addressed the proposed stay. This comment supported the 9-month stay for several reasons. First, the commenter correctly pointed out that the exemption was promulgated in the final rule without undergoing notice and comment. Second, the commenter claimed that the grandfathering provision for PM<sub>2.5</sub> violates the CAA by waiving a core requirement of the CAA that assures source compliance with the national ambient air quality standards. In this regard, the commenter claimed that “There is simply no legal argument that compliance with the 24-hour PM<sub>10</sub> standard \* \* \* represents a demonstration that the source will not cause or contribute to a violation of either the annual or 24-hour PM<sub>2.5</sub> standards.” Finally, the commenter claimed that the exemption is arbitrary and capricious. In support of this claim, the commenter indicated that the technical issues raised in the 1997 Surrogate Policy memo have been resolved, and the continued use of a surrogate “is not in fact an accurate and reliable substitute for measuring or showing compliance with the PM<sub>2.5</sub> standard.”

One commenter apparently misunderstood the proposal to be an extension of the grandfathering

provision rather than a continuation of the stay of the provision. Based on this misunderstanding, the commenter appeared to support the grandfathering provision and an extension to it. The remaining commenter did not comment specifically on the proposed extension, but instead called upon EPA to “stop the proliferation of fine particulate matter.”

We agree with the environmental organization commenter that the grandfathering provision for PM<sub>2.5</sub> was not proposed for comment in the November 2005 PM<sub>2.5</sub> Implementation Rule proposal. This was acknowledged in the Administrator’s April 24 letter responding to the petitioners. With regard to this commenter’s other concerns, we plan to issue a separate **Federal Register** notice soliciting comments on issues related to (1) the repeal of the grandfathering provision for PM<sub>2.5</sub> contained in the Federal PSD program, and (2) ending the PM<sub>10</sub> Surrogate Policy in States with EPA-approved PSD programs in their SIP. In yet another subsequent notice, we plan to solicit comment on issues related to the remaining two provisions of the May 2008 final rule for which the Administrator granted reconsideration.

### III. Statutory and Executive Order Reviews

#### A. Executive Order 12866: Regulatory Planning and Review

This action is not a “significant regulatory action” under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

#### B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). This action only issues a stay of one provision within the final PM<sub>2.5</sub> NSR Implementation Rule for 9 months.

However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0033 [EPA ICR No. 1230.21]. 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

<sup>2</sup> The use of the word “extension” and other forms of “extend” in discussing the stays that follow an administrative stay is not intended to indicate that EPA is extending the administrative stay beyond the 3-month period authorized by CAA 307(d)(7)(B). The second stay is a separate stay, and only “extends” the initial administrative stay in the sense that the second stay adds to the overall time period during which the provision is stayed.

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 final rule 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 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 issue a stay of one amendment to the regulations at 40 CFR 52.21 concerning the grandfathering provision that affects fewer than 20 major stationary sources. No costs are associated with this amendment.

#### *D. Unfunded Mandates Reform Act*

This action does not contain a Federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, and tribal governments, in the aggregate, or the private sector in any one year. This action only stays one provision of the regulations at 40 CFR 52.21 concerning the grandfathering provision that affects fewer than 20 sources. Thus, this rule is not subject to the requirements of sections 202 or 205 of the Unfunded Mandates Reform Act (UMRA).

This final rule 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 final rule 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 EO

13132. This action only stays one provision of the regulations at 40 CFR 52.21 concerning the grandfathering provision for PM<sub>2.5</sub> that affects fewer than 20 sources. Thus, EO 13132 does not apply to this rule.

#### *F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This action does not have tribal implications, as specified in EO 13175 (65 FR 67249, November 9, 2000). This action will not impose any new obligations or enforceable duties on tribal governments. Thus, EO 13175 does not apply to this action.

#### *G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks*

EPA interprets EO 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 EO has the potential to influence the regulation. This action is not subject to EO 13045 because this rule stays one provision of the regulations at 40 CFR 52.21 concerning the grandfathering provision for PM<sub>2.5</sub> that affects fewer than 20 sources.

#### *H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not a “significant regulatory action” under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

#### *I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law 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 final rulemaking does not involve technical standards. Therefore,

EPA is not using 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 determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority and/or low income populations. The rule stays one part of the regulations at 40 CFR 52.21 by staying the grandfathering provision for PM<sub>2.5</sub>. 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 stay.

#### *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.”

#### *L. The Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective September 22, 2009.

*M. Basis for Making This Rule Effective on the Date of Publication*

Section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C. 553(b), generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register**. However, EPA is issuing this final rule under section 307(d)(1) of the CAA, which states:

The provisions of section 553 through 557 \* \* \* of Title 5 shall not, except as expressly provided in this section, apply to actions to which this subsection applies.

Thus, section 553(d) of the APA does not apply to this rule. EPA is nevertheless acting consistently with the policies underlying APA section 553(d) in making this rule effective on the date of publication. APA section 553(d)(3) provides an exception when the agency finds good cause exists for a period less than 30 days before effectiveness. We find good cause exists to make this rule effective upon publication because doing so alleviates potential administrative and regulatory confusion that could arise if the gap between the administrative stay that ended on September 1, 2009 and this stay were 30 days longer.

**IV. 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**

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

Dated: September 16, 2009.

**Lisa P. Jackson**,  
Administrator.

■ For reasons discussed in the preamble, the EPA amends 40 CFR part 52 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. Effective September 22, 2009, in § 52.21, paragraph (i)(1)(xi) is stayed until June 22, 2010.

[FR Doc. E9-22903 Filed 9-21-09; 8:45 am]

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**DEPARTMENT OF HOMELAND SECURITY****Federal Emergency Management Agency****44 CFR Part 64**

[Docket ID FEMA-2008-0020; Internal Agency Docket No. FEMA-8095]

**Suspension of Community Eligibility**

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Final rule.

**SUMMARY:** This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date.

**DATES: Effective Dates:** The effective date of each community's scheduled suspension is the third date ("Susp.") listed in the third column of the following tables.

**FOR FURTHER INFORMATION CONTACT:** If you want to determine whether a particular community was suspended on the suspension date or for further information, contact David Stearrett, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-2953.

**SUPPLEMENTARY INFORMATION:** The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the NFIP, 42 U.S.C. 4001 et seq.; unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance

with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, FEMA has identified the Special Flood Hazard Areas (SFHAs) in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year, on FEMA's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

**National Environmental Policy Act.** This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Considerations. No environmental impact assessment has been prepared.

**Regulatory Flexibility Act.** The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022,