FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Kay Wade, Bridge Administration Branch, Coast Guard; telephone 504–671–2128, e-mail *Kay.B.Wade@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Union Pacific Railroad has requested a temporary deviation from the operating schedule for the swing span bridge across the Calcasieu River, mile 36.4, at Westlake, Calcasieu Parish, Louisiana. The swing span bridge has a vertical clearance of 1.07 feet above mean high water, elevation 3.56 feet Mean Gulf Level in the closed-to-navigation position.

In accordance with 33 CFR 117.5, the bridge currently opens on signal for the passage of vessels. This deviation allows the swing span of the bridge to remain closed to navigation from 8 a.m. through 5 p.m. with an opening for the passage of vessels from 12 noon to 1 p.m. on the following Thursdays: June 2, 9, 16, 23, and 30, 2011.

The closures are necessary in order to remove and install the structural steel, new gear motors, and shafts at both ends of the bridge and the center pivot pier. This maintenance is essential for the continued operation of the bridge. Notices will be published in the Eighth Coast Guard District Local Notice to Mariners and will be broadcast via the Coast Guard Broadcast Notice to Mariners System.

Navigation on the waterway is minimal at the bridge site. The very limited commercial traffic at the bridge site consists of commercial tugs with tows. There are only two companies that transit above the bridge. The bridge will be able to open for emergencies if necessary. There are no alternate waterway routes available. Based on experience and coordination with waterway users, it has been determined that these closures will not have a significant effect on vessels that use the waterway.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: May 9, 2011.

David M. Frank,

Bridge Administrator.

[FR Doc. 2011–12246 Filed 5–17–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2003–0062: FRL–9306–9]

RIN 2060–AP75

Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$); Final Rule To Repeal Grandfather Provision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is issuing a final rule that repeals the "grandfather" provision for particulate matter less than 2.5 micrometers ($PM_{2.5}$) under the Federal Prevention of Significant Deterioration (PSD) permit program, which is administered by EPA in states that lack a PSD permit program in their approved state implementation plan (SIP). The grandfather provision allowed certain facilities under certain circumstances to satisfy the PSD permit program requirements for $PM_{2.5}$ by meeting the requirements for controlling particulate matter less than 10 micrometers (PM_{10}) and analyzing impacts on PM_{10} air quality as a surrogate approach based on an EPA policy known as the "1997 PM_{10} Surrogate Policy." In its February 11, 2010, notice of proposed rulemaking, EPA also proposed to end early the 1997 PM_{10} Surrogate Policy in EPA-approved state PSD programs during the remainder of the SIP development period, which ends on May 16, 2011. EPA is taking no final action on that aspect of the proposal.

DATES: This final rule is effective on July 18, 2011.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2003–0062. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information may not be publicly available, *e.g.,* Confidential Business Information (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 Air Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue, Northwest, Washington, DC. 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) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

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.*

SUPPLEMENTARY INFORMATION: The information in this Supplementary Information section of this preamble is organized as follows:

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I. General Information

A. Does this action apply to me?

Entities potentially affected by this action include 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 final $PM_{2.5}$ New Source Review (NSR) Implementation Rule (73 FR 28321), but have not yet received a final and effective permit authorizing the source to commence construction.

The EPA estimates that fewer than 30 proposed new major sources or modifications will be affected by the repeal of the grandfather provision in the Federal PSD program. At least two projects known to have been grandfathered received final permits to construct (that are effective) prior to EPA taking action to stay the provision in June 2009; EPA's final action to repeal the grandfather provision does not apply retroactively to such permits.

The majority of sources potentially affected are expected to be in the following groups:

Industry group	NAICS [a]
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.

[a] North American Industry Classification System.

Entities affected by this action also include state and local governments responsible for implementing PSD pre-construction permit programs for new and modified major stationary sources under the Federal PSD permit program (40 CFR 52.21).

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 will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this final rule will be posted in the regulations and standards section of our NSR home page located at *http://www.epa.gov/nsr.*

II. Overview of This Final Rule

In this final rule we [1] are taking final action on one of the two actions that we proposed in a notice of proposed rulemaking on February 11, 2010, at 75 FR 6827. We are taking final action on the proposal to repeal the grandfather provision for $PM_{2.5}$ contained in the Federal PSD rules at 40 CFR 52.21(i)(1)(xi). The grandfather provision, applicable only to PSD source applications that were determined to be complete before July 15, 2008, enabled those applications to continue to be reviewed for PM_{10} (*i.e.,* the 1997 PM_{10} Surrogate Policy) in lieu of the new requirements for $PM_{2.5}$, which became effective on July 15, 2008.

When EPA issued the PM_{10} Surrogate Policy in 1997, the policy enabled sources, EPA, and state and local permitting authorities to address the PSD requirements for $PM_{2.5}$ simply by satisfying the requirements for PM_{10}—a regulated form of particulate matter (PM) that includes $PM_{2.5}$ as well as larger particles. As explained in the 1997 PM_{10} Surrogate Policy, some alternative to directly addressing $PM_{2.5}$ was necessary at that time because of various technical problems that made it infeasible to estimate $PM_{2.5}$ and conduct the analyses necessary to demonstrate compliance with the applicable $PM_{2.5}$ requirements under the PSD program as required by section 165 of the Clean Air Act (CAA or Act).

More recently, EPA has made important progress in addressing the technical issues that impeded a $PM_{2.5}$ analysis. With the deployment and operation of the monitoring network for $PM_{2.5}$ beginning in 1999, ambient air quality monitoring data has become more abundantly available. Also, EPA has promulgated screening tools, including a significant emissions rate (SER), significant impact levels (SILs), and a significant monitoring concentration (SMC) to streamline the implementation of the PSD program for $PM_{2.5}$. Finally, EPA has issued revised test methods for sampling emissions of $PM_{2.5}$ and its condensable fraction, and issued interim modeling guidance for modeling $PM_{2.5}$ emissions to complete a cumulative air quality analysis for $PM_{2.5}$.

Accordingly, in this final action, EPA will end the use of the 1997 PM_{10} Surrogate Policy for PSD permits under the Federal PSD program (40 CFR 52.21) for sources that have been covered by the grandfather provision (that is, those sources for which a complete permit application was submitted before July 15, 2008 [2]) and that have not yet been issued a permit by the effective date of this final rule. After this final rule becomes effective, in order for those permits to be issued, such applications will have to be reviewed directly against the $PM_{2.5}$ requirements or, alternatively, use a surrogate approach for $PM_{2.5}$ (other than the 1997 PM_{10} Surrogate Policy) that is consistent with the applicable case law. Thus, those affected PSD permit applications must be amended to include further analyses to demonstrate compliance with the PSD requirements for $PM_{2.5}$. Alternatively, those affected PSD permit applications must show that PM_{10} is an adequate surrogate for $PM_{2.5}$ for that specific project. The demonstration must show, at a minimum, that the source's emissions are controlled to a level that satisfies Best Available Control Technology (BACT) requirements for $PM_{2.5}$ and that the emissions will not cause or contribute to a violation of any National Ambient Air Quality Standard (NAAQS or standard) for $PM_{2.5}$.

[1] In this preamble, the terms "we," "us," and "our" refer to the EPA.

[2] Sources that applied for a PSD permit under the Federal PSD program on or after July 15, 2008, are already excluded from using the 1997 PM_{10} Surrogate Policy as a means of satisfying the PSD requirements for $PM_{2.5}$. *See* 73 FR 28321.

We believe that it is appropriate to terminate the use of the 1997 PM_{10} Surrogate Policy at this time for those PSD applications grandfathered under the Federal PSD program because the necessary technical tools to conduct $PM_{2.5}$ analyses for PSD sources are now available. The 1997 PM_{10} Surrogate Policy was always intended as an interim measure that was to remain in effect only as long as needed. Over the past 13 years, EPA believes that the necessary technical tools and test methods required to show compliance with $PM_{2.5}$ have been developed and, hence, we believe that the need for this interim approach no longer exists.

We do not believe that the use of the 1997 PM_{10} Surrogate Policy affords the same degree of protection of the $PM_{2.5}$ NAAQS from major new and modified stationary sources as does the direct analysis of $PM_{2.5}$ emissions. In addition to the fact that the original $PM_{2.5}$ NAAQS promulgated in 1997 were generally more stringent than the corresponding PM_{10} NAAQS, the strengthening of the 24-hour primary $PM_{2.5}$ NAAQS in 2005 created a greater disparity between the relative stringency of the $PM_{2.5}$ and PM_{10} standards. Thus, now that the necessary technical tools are available, we believe that it is important to move as quickly as possible to implement fully the PSD program for $PM_{2.5}$.

We recognize that this action will in some cases increase the PSD permit review timeframe (although not unexpectedly) for the affected grandfathered sources, but we believe that the use of the 1997 PM_{10} Surrogate Policy should be permanently discontinued under the Federal PSD program. Those grandfathered sources with pending permits have been on notice since June 1, 2009, (the date of our **Federal Register** notice announcing that we had agreed to reconsider the grandfather provision and to administratively stay the provision so that we could propose repealing it) that EPA was considering ending the grandfather provision for $PM_{2.5}$ and, as noted above, now have additional technical tools to complete the permitting process for $PM_{2.5}$.

In our February 2010 proposed rule, we also proposed to end the use of the 1997 PM_{10} Surrogate Policy for permits issued under PSD programs implemented by states as part of their approved SIP. We received and have reviewed some comments that support an early end to the policy and some comments that oppose ending the policy earlier than the original May 16, 2011, sunset date. Some of the opposing comments also asked EPA to extend the time that the policy could be used beyond the original sunset date. At this time, however, we are taking no action on our proposal to end the use of the 1997 PM_{10} Surrogate Policy or to otherwise change the time period during which the policy could continue to be used.

Thus, as announced in the May 2008 rulemaking, the 1997 PM_{10} Surrogate Policy may not be used for any state PSD permits after the 3 years allowed for SIP development (ending May 16, 2011). With the end of the 1997 PM_{10} Surrogate Policy in SIP-approved states on May 16, 2011, and the repeal of the grandfather provision in this final action, the 1997 PM_{10} Surrogate Policy may not be relied on for any pending or future applications.

III. Background

A. Prevention of Significant Deterioration Program

The NSR provisions of the 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 NAAQS to protect public health and secondary NAAQS to protect public welfare. Once we have set these standards, states must develop, adopt, and submit to us for approval SIPs that contain emission limitations and other 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 (short for "Prevention of Significant Deterioration") 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.[3] 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.,* to be a "PSD source"), among other requirements, it must undertake a series of analyses for each regulated NSR pollutant subject to review to demonstrate that it will use the 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," such as national parks and wilderness areas, additional review must be conducted to protect the Class I area's increments and special attributes referred to as "air quality related values."

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 issues 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 PM and the NAAQS for $PM_{2.5}$

Fine particles in the atmosphere are made up of a complex mixture of components. Common constituents include sulfates; nitrates; 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 PM 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 $PM_{2.5}$. "Primary" particles are emitted directly into the air as solid or liquid particles (*e.g.,* elemental

[3] We have delegated our authority to some states that lack an approved PSD program in their SIPs and have requested the authority to implement the Federal PSD program. The EPA remains the reviewing authority in non-delegated states lacking SIP-approved programs. The current status of individual state PSD programs can be found at EPA's Web site at *http://www.epa.gov/nsr/where.html.*

carbon from diesel engines or fire activities, or condensable organic particles from gasoline engines). "Secondary" particles (*e.g.,* sulfates and nitrates) form in the atmosphere as a result of various chemical reactions.

The health effects associated with exposure to $PM_{2.5}$ are significant and well studied. Epidemiological studies have shown a significant correlation between elevated $PM_{2.5}$ levels and premature mortality. Other important effects associated with $PM_{2.5}$ 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 $PM_{2.5}$ exposure include older adults, people with heart and lung disease, and children.

The EPA has established primary health-based long-term and short-term NAAQS for $PM_{2.5}$. The long-term annual average standard is 15 micrograms per cubic meter ($\mu g/m^3$), established in 1997. *See* 62 FR 38652. The short-term 24-hour standard is 35 $\mu g/m^3$, established in 2006. *See* 71 FR 61286. 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 $PM_{2.5}$ such as visibility impairment, soiling, and materials damage.

In addition, EPA has established a short-term primary and secondary NAAQS for PM_{10} as an indicator for coarse PM. The short-term standard for PM_{10} is 150 $\mu g/m^3$. *See* 71 FR 61236.

C. How is the PSD program for $PM_{2.5}$ implemented?

After we promulgated the NAAQS for $PM_{2.5}$ in 1997, we issued a guidance document titled, "Interim Implementation for the New Source Review Requirements for $PM_{2.5}$" (John S. Seitz, EPA, October 23, 1997).[4] That guidance document, referred to throughout this preamble as the "1997 PM_{10} Surrogate Policy," allows proposed major sources and major modifications to satisfy the PSD requirements for $PM_{2.5}$ by meeting the requirements for controlling PM_{10} and for analyzing impacts on PM_{10} air quality as a surrogate approach. The 1997 PM_{10} Surrogate Policy was designed to temporarily help states implement the CAA requirements for PSD pertaining to the new $PM_{2.5}$ NAAQS and $PM_{2.5}$ as a regulated pollutant. We intended to make the policy available until we resolved the known technical difficulties associated with addressing $PM_{2.5}$.[5]

We believed the 1997 PM_{10} Surrogate Policy was necessary because 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." The EPA policy for implementing the Federal PSD program provides that the term "any NAAQS" applies to any existing NAAQS, including new or revised NAAQS upon their effective date. Also, section 165(a)(4) requires BACT for each pollutant subject to PSD regulation. $PM_{2.5}$ became a regulated pollutant when EPA promulgated the NAAQS for $PM_{2.5}$ in 1997.

On November 1, 2005, we proposed the Clean Air Fine Particle Implementation Rule ($PM_{2.5}$ Implementation Rule) to implement the 1997 $PM_{2.5}$ NAAQS. *See* 70 FR 65984. The $PM_{2.5}$ Implementation Rule proposal described the requirements that states and tribes must meet in their implementation plans for attainment of the $PM_{2.5}$ NAAQS. Among other things, that rule proposal sought comments on revisions to the NSR program in attainment and unclassifiable areas (the PSD program), and in nonattainment areas (the nonattainment NSR program).

For PSD, EPA proposed to revise the existing PSD rules in several ways: by proposing a PSD major source threshold and SER for $PM_{2.5}$; proposing to define applicable precursors to regulate under PSD and SERs for those precursors; proposing to clarify that condensable $PM_{2.5}$ must be included in determining major source status; proposing options for implementing the preconstruction monitoring requirements for $PM_{2.5}$; and proposing transition provisions for implementing the new PSD requirements for $PM_{2.5}$.

On September 21, 2007, EPA proposed additional program elements for the PSD program for $PM_{2.5}$ that were not included in the 2005 $PM_{2.5}$ Implementation Rule proposal. The 2007 PSD proposal included several options for defining the $PM_{2.5}$ increments, SILs, and an SMC for $PM_{2.5}$. Increments define maximum allowable increases in pollutant concentrations above a baseline concentration for a particular area. The SILs and SMC are useful screening tools for effectively implementing the air quality impact requirements under PSD. *See* 72 FR 54112.

On May 16, 2008, EPA published a final $PM_{2.5}$ NSR Implementation Rule to complete the rulemaking for NSR based on the 2005 $PM_{2.5}$ Implementation Rule proposal. The 2008 $PM_{2.5}$ NSR Implementation Rule contains requirements for state and tribal plans to implement the Act's preconstruction review provisions for the $PM_{2.5}$ NAAQS in both attainment and nonattainment areas. *See* 73 FR 28321. The 2008 $PM_{2.5}$ NSR Implementation Rule generally requires that, as of the effective date of the new rule (July 15, 2008), major stationary sources seeking permits must begin directly satisfying the $PM_{2.5}$ requirements, rather than relying on the 1997 PM_{10} Surrogate Policy. In $PM_{2.5}$ attainment (or unclassifiable) areas, the new PSD requirements under 40 CFR 51.166 set forth the $PM_{2.5}$ 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 $PM_{2.5}$ requirements in states lacking approved PSD programs in their SIPs.

Although the 2008 $PM_{2.5}$ NSR Implementation Rule generally requires states to begin implementing the new $PM_{2.5}$ requirements upon the July 15, 2008, effective date of the rule, EPA provided two transition provisions within the PSD program under specific conditions. The first of these transition provisions, a grandfather provision, applied specifically to certain sources that had applied for PSD permits pursuant to the Federal PSD program under 40 CFR 52.21. The second transition provision allowed states to continue using the 1997 PM_{10} Surrogate Policy on an interim basis to implement the $PM_{2.5}$ requirements in any state PSD program that is part of an approved SIP. This latter exception was to apply to permit reviews under state PSD programs until the end of the 3-year SIP development period (which ends in May 2011) or until EPA approves the revised state program, whichever comes first.

[4] 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.*

[5] We identified various technical difficulties, including the lack of necessary tools to calculate the emissions of $PM_{2.5}$ and related precursors, the lack of adequate modeling techniques to project ambient impacts, the lack of $PM_{2.5}$ monitoring sites, and the lack of adequate approved test methods.

IV. Grandfather Provision for $PM_{2.5}$ in the Federal PSD Program

A. What is the grandfather provision for $PM_{2.5}$?

Under certain circumstances, EPA has 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, (*i.e.,* the effective date of the revisions to the Federal PSD regulations to implement the PM_{10} NAAQS) are not required to meet the requirements for PM_{10}, but may instead satisfy the requirements for total suspended particulate matter (TSP) 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 increments for PM_{10} in the applicable implementation plan are not required to meet the increment requirements for PM_{10}, but may instead satisfy the increment requirements for TSP that were previously in effect. Also, 40 CFR 52.21(b)(i)(9) provides that new sources or sources making modifications that submitted complete permit applications before the provisions embodying the maximum allowable increase for nitrogen oxides (the nitrogen dioxide increments) took effect are not required to demonstrate compliance with the new increment requirements to be eligible to receive the permit.

Similarly, the 2008 $PM_{2.5}$ NSR Implementation Rule added a grandfather provision allowing permit applicants that had submitted a complete application under the Federal PSD program at 40 CFR 52.21 prior to the July 15, 2008, effective date, but had not yet received their PSD permit by that date, to continue being reviewed using the 1997 PM_{10} Surrogate Policy. The grandfather provision for $PM_{2.5}$, added as new paragraph (xi) to 40 CFR 52.21(i)(1), was not proposed for notice and comment in the 2005 $PM_{2.5}$ Implementation Rule proposal. Instead, the 2005 $PM_{2.5}$ Implementation Rule proposal had provided that when we issued the final rule, the new $PM_{2.5}$ requirements would take effect immediately in PSD permits issued in states where the Federal PSD program applies. *See* 70 FR 65986 at 66043.

As described more in the discussion that follows in section IV.B of this preamble, EPA has twice stayed the grandfather provision for $PM_{2.5}$, with the first of the two stays beginning on June 1, 2009. Consequently, permits covered by the grandfather provision that had not already been issued by the effective date of the first stay could not be issued relying upon the 1997 PM_{10} Surrogate Policy as the basis for approval during the time periods that the stays remained in effect.[6] Prior to the stays, the grandfather provisions remained in effect from July 15, 2008, until June 1, 2009, during which time PSD permit applications relying on the 1997 PM_{10} Surrogate Policy to satisfy the PSD requirements for $PM_{2.5}$ continued to be acceptable for purposes of approving and issuing the PSD permits.

B. Why did EPA propose to repeal the grandfather provision for $PM_{2.5}$?

On July 15, 2008, Earthjustice, acting on behalf of the Natural Resources Defense Council and the Sierra Club, submitted a petition to the Administrator seeking reconsideration of four provisions of the 2008 $PM_{2.5}$ NSR Implementation Rule.[7] One of the four challenged provisions was the grandfather provision for $PM_{2.5}$ under the Federal PSD program. In the petition, the petitioners argued that "EPA unlawfully failed to present this grandfather provision and accompanying rationale to the public for comment." *See* July 15 Petition at 6. Thus, petitioners argued, EPA had not given interested parties any notice of and the opportunity to comment on the grandfather provision that EPA adopted in 40 CFR 52.21(i)(1)(xi) in the final rule. Moreover, with regard to the grandfather 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), where it allowed for the grandfathering of only those sources on which construction had commenced before enactment of the 1977 Clean Air Act Amendments. *See* July 15 Petition at 7.

Finally, petitioners argued that the technical difficulties associated with ambient monitoring, estimating emissions, and air quality modeling that led to the adoption of the 1997 PM_{10} Surrogate Policy no longer existed. Hence, the petitioners argued that all sources must conduct the required analyses for $PM_{2.5}$ directly without relying on the 1997 PM_{10} Surrogate Policy, and, therefore, there was no justification for continuing to allow any sources to rely on the grandfather provision. *See* July 15 Petition at 8. In sum, petitioners asserted that the grandfather provision in 40 CFR 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. However, on February 10, 2009, the same petitioners submitted a second petition similar to thefirst to EPA.[8]

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 2008 $PM_{2.5}$ NSR Implementation Rule and the January 2009 denial of petitioners' first petition for reconsideration. In response to the second petition, the Administrator reversed the Agency's earlier decision and agreed to reconsider each of the four challenged provisions.

In a letter dated April 24, 2009, the Administrator indicated that the Agency would reconsider the grandfather provision and propose to repeal the grandfather 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 $PM_{2.5}$ monitoring, emissions estimation, and air quality modeling that led to the PM_{10} Surrogate Policy in 1997." Finally, the

[6] At the time the grandfather provision for $PM_{2.5}$ was put into effect, we estimate that fewer than thirty 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 and before the June 1, 2009, administrative stay took effect.

[7] Available in the docket for this rulemaking at *http://www.regulations.gov,* document number EPA–HQ–OAR–2003–0062–0279.1.

[8] Available in the docket for this rulemaking at *http://www.regulations.gov,* document number EPA–HQ–OAR–2003–0062–0281.

Administrator's letter announced an administrative stay of the grandfather provision for 3 months under the authority of section 307(d)(7)(B) of the Act.

The 3-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. *See* 74 FR 26098. In order to allow additional time necessary to finalize this rulemaking, EPA proposed and promulgated a second stay that stayed the grandfather provision until June 22, 2010. *See* 74 FR 48153, September 22, 2009. During the second stay, on February 11, 2010, EPA issued a notice of proposed rulemaking that proposed repealing the grandfather provision. *See* 75 FR 6827. The same notice also proposed to end early the use of the 1997 PM_{10} Surrogate Policy in PSD programs implemented by states under an approved SIP. EPA is taking no final action on the latter proposed action, as described further in section V of this preamble.

C. Summary of Comments and Responses on the Proposed Repeal of the Grandfather Provision

A total of 38 commenters, including 7 commenters speaking at the public hearing held on February 26, 2010, responded to the 2010 notice of proposed rulemaking. Most of these commenters specifically addressed the proposed repeal of the grandfather provision for $PM_{2.5}$ in the Federal PSD rule at 40 CFR 52.21(i)(1)(xi).

Seven commenters support the proposal to repeal the grandfather provision, while 20 expressly opposed it. The commenters provided various reasons for their positions. The following discussion summarizes the significant comments and our responses categorized by specific topics. A more detailed summary of the comments and our responses is contained in the Response to Comment document in the docket for this rulemaking.

1. Comments on Legal Concerns

Comments on Legality of the Grandfather Provision:

Some environmental group commenters support EPA's proposed repeal, in part, because of their interpretation that the grandfather provision is illegal. The commenters claim that EPA has no discretion to waive or grandfather any permits under the Federal PSD program. On the other hand, 12 commenters disagree that there is anything unlawful about the grandfather provision for $PM_{2.5}$. Those commenters claim that EPA clearly has the authority to establish a grandfather provision as part of a transition procedure for implementing new requirements. Some of these commenters point out that EPA indicated in the 2008 $PM_{2.5}$ NSR Implementation Rule that the grandfather provision was consistent with existing grandfather provisions contained in 40 CFR 52.21(i)(1)(x).

Response:

We disagree with the comments stating that EPA may not establish grandfather provisions in appropriate circumstances. Our decision to repeal the grandfather provision here does not reflect any conclusion by EPA that the grandfather provision for $PM_{2.5}$, or grandfather provisions in general, are unlawful. See also our response to the following comments on statutory authority.

Comments on Statutory Authority:

Several commenters argue against the petitioners' claim in the 2009 petition for reconsideration that section 168(b) of the Act restricts EPA's ability to grandfather sources by allowing for the grandfathering of only those sources on which "construction was commenced * * * after June 1, 1975, and prior to the enactment of the Clean Air Act Amendments of 1977 * * *." These commenters argue that Congress' inclusion of a one-time grandfather provision upon enactment of the PSD program is clearly different from grandfathering when a new pollutant is identified for regulation by a NAAQS, which the Act does not address. These commenters urge EPA to confirm that the grandfather provision in section 168 (intended to ease transition upon enactment of the PSD statute) does not constrain the Agency with respect to offering reasonable transition provisions when pollutants become newly subject to a NAAQS. The commenters argue instead that the existence of the grandfather provision in section 168 generally indicates that Congress intended for smooth transitions to new programs under the Act.

One of these commenters argues that in the PSD program, EPA has included grandfather provisions when it adopted a number of new permitting requirements, and that the Act gives EPA substantial discretion to decide on the specifics of PSD applicability. (Citing *Envt'l Defense* v. *Duke Energy Corp.,* 127 S. Ct. 1423, 1433–34 (2007).) Another of the commenters claims that a repeal of the grandfather provision would be unfair and contrary to the Act.

Finally, some commenters expressly call upon EPA to clarify that it retains the authority to issue transition policies, such as the grandfather provision, when new NAAQS are issued.

Response:

We do not agree with the petitioners' original claim that EPA lacks authority to adopt and implement the grandfather provision for $PM_{2.5}$. Thus, we agree with the commenters who also question the petitioners' claim. In particular, we do not agree that the existence of certain grandfathering in section 168(b) of the Act is properly read to prohibit grandfathering in all other circumstances. As discussed previously in section IV.A of this preamble, and as pointed out in some of the comments, we have relied on the use of grandfather provisions in past NSR regulations where we believed that it was appropriate as part of the transition process for implementing new requirements. In the preamble to the 2008 $PM_{2.5}$ NSR Implementation Rule, we stated our position that the $PM_{2.5}$ grandfather provision is 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 (measured as TSP) from the then-new PM_{10} requirements established in 1987. However, while we continue to believe that we have the discretion to use grandfather provisions in the PSD program where appropriate, we have decided to repeal the grandfather provision for $PM_{2.5}$ at 40 CFR 52.21(i)(1)(xi) on policy grounds, as discussed later in this preamble.

Comments on the Section 165(c) Requirement To Issue a PSD Permit within 1 Year:

One commenter points to section 165(c) of the Act as creating a 1-year deadline for issuing a PSD permit after a complete application has been submitted, and argues that since most, if not all, of the permit applications that would be affected by the repeal of the grandfather provision were likely submitted more than 1 year before the initial (administrative) stay of the grandfather provision took effect, those applications are entitled to final action consistent with the grandfather provision and the use of PM_{10} as a surrogate for $PM_{2.5}$. The commenter further argues that, in addition to allowing EPA or states with delegated PSD authority to continue ongoing violations of the section 165(c) deadline, repealing the grandfather provision for $PM_{2.5}$ would deepen and perpetuate the "unlawful" effects of the stay.

Response:

We do not dispute that some of the permit applications relying on the grandfather provision were not granted or denied within the 1-year period provided in section 165(c) of the Act,

but disagree that this is a valid justification for allowing the use of the grandfather provision, for all of the reasons discussed in this preamble. In making this comment, the commenter has not shown that the failure to act on those applications within 1 year can be attributed to the stays of the grandfather provision (which, as the commenter recognizes, came into effect almost 1 year after the grandfather provision for $PM_{2.5}$ was promulgated). Indeed, the fact that a permit was not issued within a year during the time that the grandfather provision was in effect suggests that there were other factors that prevented the source from receiving a permit within the 1-year period provided by CAA section 165(c). Moreover, even if the grandfather provision had not been stayed with respect to those pending applications (or if the 1997 PM_{10} Surrogate Policy were to become available to the applicant through some other mechanism in the future), it is not clear that the applications provided the information or analyses necessary under the case law to demonstrate that PM_{10} is a reasonable surrogate such that the 1997 PM_{10} Surrogate Policy could be used. *See, e.g.,* discussion of case law in 75 FR 6827, 6831–32 (February 11, 2010). Finally, if the applicant believes that it can demonstrate that surrogacy is consistent with the case law, then it may do so under the case law even in the absence of EPA's 1997 PM_{10} Surrogate Policy.

Comments on the Legality of Repealing the Grandfather Provision for $PM_{2.5}$:

Some commenters opposing the proposed repeal of the grandfather provision for $PM_{2.5}$ argue that the repeal, in addition to the second petition for reconsideration, is illegal. With regard to the repeal action, some commenters question EPA's alleged position that it must repeal the grandfather provision because there was not adequate notice to the public of EPA's intent to continue the use of the 1997 PM_{10} Surrogate Policy. The commenters disagree with this position, claiming that a failure to provide for notice and comment on a provision of a rule cannot be a reason to repeal that provision.

One commenter disputes that there was inadequate notice because technical difficulties of measuring, modeling, and monitoring $PM_{2.5}$ have been well known since 1997 and were fully documented during the rulemaking. Thus, the commenter asserts that EPA lacked the technical basis to require sources that had complete applications pending at that time of the promulgation of the 2008 $PM_{2.5}$ NSR Implementation Rule to measure or predict $PM_{2.5}$ concentration. In addition, this commenter asserts that EPA failed to meet the administrative requirements for terminating the 1997 PM_{10} Surrogate Policy. Specifically, the commenter states that EPA would have had to provide notice of the withdrawal of the 1997 PM_{10} Surrogate Policy to reverse its use by sources grandfathered by the final 2008 $PM_{2.5}$ NSR Implementation Rule.[9] Based on these assertions, the commenter contends that EPA may not repeal the grandfather provision retroactively.

Two commenters believe that the grandfather provision, while not explicitly proposed, was a logical outgrowth of the proposal. One of the commenters expresses the belief that EPA raised for comment, in the 2005 $PM_{2.5}$ Implementation Rule proposal, issues concerning appropriate means for and timing of the transition to implementation of $PM_{2.5}$ requirements in the PSD program. The other commenter alleges that the 2005 $PM_{2.5}$ Implementation Rule proposal expressly announced continued use of the 1997 PM_{10} Surrogate Policy as Option 1 at 70 FR 66044 and solicited comment on this approach.

The latter commenter also argues that the 2010 proposal to repeal the grandfather provision for $PM_{2.5}$ represents a dangerous procedural precedent. While acknowledging that some actions adopted in a final rule could clearly be outside the scope of the proposed rule, the commenter asserts that as an overarching rule, the determination of whether regulatory actions adopted by a previous Administration's final rule were a logical outgrowth of the proposed rule should be left for the courts to decide. The commenter believes that leaving such decisions to the courts will ensure objective and consistent determinations of administrative law, rather than politically-influenced determinations that likely will shift from Administration to Administration. The commenter contends that the grandfather provision is not an instance that warrants EPA's departure from that principle.

One commenter claims that the issue of the lawfulness of the grandfather provision was previously addressed and decided by EPA in the January 14, 2009, denial of the first petition for reconsideration of the final 2008 $PM_{2.5}$ NSR Implementation Rule. The commenter contends that EPA's reliance on the second petition for reconsideration, filed on February 10, 2009, is contrary to section 307(d)(7)(B) of the Act because the second petition did not contain any new information that would justify reconsideration and, thus, the second petition was untimely and unfounded.

Response:

We do not agree with the commenters' claim that we are repealing the grandfather provision because of the lack of adequate notice to the public. The lack of prior public notice was a basis only for granting reconsideration and going through a subsequent rulemaking. EPA's decision to repeal the grandfather provision is not based on the fact that the provision was not explicitly proposed in the 2005 $PM_{2.5}$ Implementation Rule proposal. EPA in this rule is not taking any position on whether a lack of public notice could be a basis for repealing a rule, or on the other issues that these comments raise concerning the adequacy of public notice, logical outgrowth, the timeliness of the second petition for reconsideration, and other procedural matters.

We believe that the Act provides EPA with sufficient authority to issue transition policy, including grandfather provisions, as needed to provide for the reasonable implementation of new NSR requirements. This is evidenced by the fact that we have established grandfather provisions in the past, as described in section IV.A of this preamble. However, it should not be taken to mean that we have or intend to automatically use grandfathering as a transition mechanism for all changes in NSR requirements. In this case, we continue to believe that the technical tools needed to carry out a $PM_{2.5}$ analysis are currently available to the degree necessary to justify requiring sources to comply with the $PM_{2.5}$ requirements via $PM_{2.5}$ analyses for BACT and air quality impacts. Indeed, this is what all other sources that are not subject to the grandfather provision but are located in areas subject to the Federal PSD program are required to do. Alternatively, sources may use an appropriate surrogacy demonstration in accordance with past court decisions. For this reason and the other substantive reasons discussed in this preamble, we have decided to repeal the grandfather provision for $PM_{2.5}$.

Finally, we wish to clarify a point made by the commenter who alleged that the 2005 $PM_{2.5}$ Implementation Rule proposal expressly announced and sought comment on the continued use of the 1997 PM_{10} Surrogate Policy as Option 1. That proposal actually

[9] In support of this position, the commenter cites *Appalachian Power* v. *EPA,* 208 F.3d 1015, 1028 (D.C. Cir. 2001); *Alaska Professional Hunters Association* v. *FAA,* 177 F.3d 1030, 1033–34 (D.C. Cir. 1999); and *Paralyzed Veterans of America* v. *D.C. Arena L.P.,* 117 F.3d 579, 586 (D.C. Cir. 1997).

proposed to allow the continued use of the 1997 PM_{10} Surrogate Policy only for states that have SIP-approved PSD programs and need additional time to revise their rules to address the $PM_{2.5}$ requirements. For all other circumstances involving the NSR rules, we clearly stated that PSD applicants would be subject to the $PM_{2.5}$ requirements as of the effective date of the final rule. *See* 70 FR 66043–44.

2. Comments on the Burden on Sources Resulting From Repeal of the Grandfather Provision

In the 2010 proposal to repeal the grandfather provisions for $PM_{2.5}$, EPA solicited comments on the burdens that may be incurred by sources affected by a repeal of the grandfather provision. *See* 75 FR 6833. Several commenters express concern that repeal of the grandfather provision would unfairly penalize permit applicants who were in the process of obtaining construction permits.

Comment:

One commenter states that repeal would effectively impose retroactive requirements on sources that relied on past EPA statements of the law and the effect of the Agency's regulations, which goes against the concepts of fundamental fairness and equity.

Response:

We disagree with the premise of this comment: that the repeal of the grandfather provision imposes new requirements. The 1997 PM_{10} Surrogate Policy did not eliminate any PSD requirements; it simply provided an alternative means of demonstrating compliance with the applicable requirements that were already in the PSD regulations at 40 CFR 52.21 when the $PM_{2.5}$ NAAQS became effective in 1997. Thus, the repeal of the grandfather provision does not impose new requirements on any source. The commenter's concern about the fairness of our decision is addressed in the next response.

Comment:

Some commenters indicate that repeal would result in "permit gridlock." These commenters state that each regulatory change adds another year onto the permitting process, during which more regulations could change and add further delay. The commenters contend that because of the length of the process, the major applicable rules need to stay constant (in all but extraordinary circumstances) in order for the process to proceed in a logical and orderly fashion.

Another commenter claims that repeal of the grandfather provision would arbitrarily and unreasonably penalize applicants for the delay of the reviewing authority in discharging its permitting responsibilities. The commenter provides an example where two applicants (Applicants A and B) submit complete applications on the same date more than a year before the effective date of the stay of the grandfather provision, but Applicant A's permit is approved and issued before the effective date of the stay and Applicant B's permit is not yet ready to be issued on the effective date of the stay. The commenter concludes that, through no fault of Applicant B, EPA's violation of its nondiscretionary statutory duty to act within 1 year would impose on the applicant the significant costs and delay involved in undertaking a new analysis of PM and, potentially, revising the permit application.

One commenter opines that an important principle underlies all grandfather provisions, including this $PM_{2.5}$ grandfather provision. This principle is that a source that relies in good faith on EPA's existing standards and procedures to design a construction project and prepare a PSD permit application based upon that design should have the right to rely upon those existing standards and procedures and should not later be penalized retroactively when the standards and/or procedures change and, more importantly, go into effect after the application was submitted.

The same commenter goes on to point out that the issuance of a PSD permit under the grandfather provision would not establish any future waiver of compliance or long-term exemption under law or in practice because the Act requires all sources, including those that have undergone PSD review, to comply with limitations the state determines in its SIP are necessary to meet NAAQS (including any future revised NAAQS) as well as to comply with any New Source Performance Standards. According to the commenter, this ensures that, regardless of whether a source avoided direct evaluation of its $PM_{2.5}$ emissions during NSR because of the grandfather provision, its $PM_{2.5}$ emissions will still be evaluated for compliance with the $PM_{2.5}$ NAAQS.

Response:

In projecting the burdens of extended permitting time and effort, the commenters assume that if we did not repeal the grandfather provision, sources could rely on the 1997 PM_{10} Surrogate Policy without further analysis. However, as discussed in the 2010 proposal preamble (*see* 75 FR 6831–32) and later in section V.C.1.b of this preamble, at present sources are only able to use the policy after completing a surrogacy demonstration consistent with the case law (*i.e.*, PM_{10} must be shown to be a reasonable surrogate for $PM_{2.5}$ under the circumstances of the specific permit) and within the limits of the policy itself (*i.e.*, there must be continuing technical reasons why a $PM_{2.5}$ analysis is not technically feasible). These key prerequisites cannot be assumed to be met automatically, and the commenters have not shown these prerequisites to be met with respect to any of the applications that would be covered by the grandfather provision. Thus, even if the grandfather provision were to remain in force, additional analysis would be required of sources seeking to continue using the 1997 PM_{10} Surrogate Policy under that provision.

The EPA has considered the comments concerning how a repeal of the grandfather provision might impact the permitting process and allegedly create unfairness and inequity in some of the hypothetical circumstances described in the comments. We recognize that the commenters' concerns pertain to the fairness of our proposal to change the procedures for demonstrating compliance with the $PM_{2.5}$ requirements in mid-permit process for individual permits. However, we believe that we have an obligation to weigh those concerns and associated burdens against our interpretation of the Act, which requires that PSD sources must demonstrate that their emissions will not cause or contribute to a violation of the $PM_{2.5}$ NAAQS, and such demonstration should provide adequate assurance that such compliance will occur. We believe that the 1997 PM_{10} Surrogate Policy, which has been in effect for about 13 years, no longer provides an acceptable means of making the required demonstration in light of the availability of the technical tools needed to complete a $PM_{2.5}$ analysis. Thus, as part of our obligation to evaluate the need for transition policy both initially and on an ongoing basis, we have concluded that such burdens are neither unfair nor inequitable in comparison to the benefits associated with having a better understanding of the impacts the source's emissions will have on the $PM_{2.5}$ NAAQS. This conclusion is based on our belief that the approach set forth in the 1997 EPA policy memo, while necessary in the absence of the technical tools needed to implement the PSD program for $PM_{2.5}$ directly, is sufficiently deficient in its ability to satisfy the $PM_{2.5}$ requirements (in that it lacks a surrogacy demonstration), particularly with regard to possible

adverse impacts on the $PM_{2.5}$ NAAQS, that it should no longer be available as a means of meeting those requirements now that the necessary technical tools for a $PM_{2.5}$ analysis are available. Case law allows the use of surrogates when properly applied. Hence, we point out that the use of a valid surrogate approach in general is not prohibited by our action in this final rule.

Finally, we note that we did not stay the grandfather provision until almost 1 year following its effective date. Some permits were issued during the time that the grandfather provision was in effect. Grandfathered sources for which a PSD permit was not issued during that period likely had problems related to factors other than the $PM_{2.5}$ analyses that prevented the source from receiving a permit.

3. Comments on the Number of Sources Affected by Repeal

Comment:

We did not receive any comments that either validate or dispute the number of sources that we estimated would be affected by the stay of the grandfather provision for $PM_{2.5}$.[10] One commenter observes that EPA has recognized that continued use of the grandfather provision would affect very few, if any, still-pending permits, and finds it hard to understand why EPA feels it necessary not only to discontinue the grandfather provision altogether, but also to do so immediately by issuing the administrative stay. This commenter believes that the facts presented by EPA undercut the petitioners' claim that grandfathering certain permit applications presents an irreparable harm.

Response:

In the 2010 proposal to repeal the grandfather provision, we reported that we were aware of 27 sources that had submitted PSD permit applications under the Federal PSD program prior to July 15, 2008— the effective date of the 2008 $PM_{2.5}$ NSR Implementation Rule— but did not receive their permits by that date. Thus, these applications fell within the scope of the grandfather provision at the time it was promulgated. 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 21 applications, it is our understanding that the sources have already directly addressed, or are planning to directly address, the applicable $PM_{2.5}$ requirements in order to obtain a permit. At least two of the sources are reportedly planning to take enforceable emissions limitations on their $PM_{2.5}$ emissions in order to avoid the PSD requirements for $PM_{2.5}$ altogether.

Although only a few remaining grandfathered sources would be affected by a repeal of the grandfather provision, we believe that any air quality assessment contained in a PSD permit should reflect as accurately as possible the actual impacts that could be experienced in the area of concern. We do not believe that an analysis of PM_{10} emissions impacts on the PM_{10} NAAQS sufficiently represents the potential impacts that a source may have on the $PM_{2.5}$ NAAQS. We did not base our decision to repeal the grandfather provision on the number of sources that could ultimately have to submit revised analyses to satisfy the PSD requirements for $PM_{2.5}$.

4. Comments on Retroactive Implementation

Comment:

Several commenters who oppose the proposed repeal of the grandfather provision support a position, based on a statement by EPA in the 2010 proposal, that a repeal of the grandfather provision would not impact any PSD permits that relied on the 1997 PM_{10} Surrogate Policy that became final and effective before the stay of the provision. *See* 75 FR 6833. However, one commenter who supports repealing the grandfather provision takes exception to those opposing commenters' position and requests a clarification as follows:

> To the extent EPA is saying simply that the repeal does not change the defensibility of a source's reliance on the illegal policy, we agree. But EPA should clarify that it is not claiming that its action somehow protects past illegal permitting decisions. The Surrogate Policy is and always has been illegal. Reliance on this illegal policy is subject to challenge and cannot be protected by EPA preamble statements that lack any authority or force of law.

Response:

Neither EPA's repeal of the grandfather provision nor its ending of the 1997 PM_{10} Surrogate Policy in SIP-approved states changes the defensibility of a source's previous reliance on the 1997 PM_{10} Surrogate Policy. Put another way, repeal of the grandfather provision and the ending of the 1997 PM_{10} Surrogate Policy does not create a new basis for arguing that the permit was not properly issued. However, a challenge to a permit that is not based on the repeal itself (such as a challenge claiming that the 1997 PM_{10} Surrogate Policy did not provide a valid means of meeting the CAA requirements or that the policy was not applied properly to the permit being challenged) is not impacted by repealing the grandfather provision for $PM_{2.5}$.

5. Comments on the Technical Tools Needed for a $PM_{2.5}$ Analysis

Some of the commenters responding to the 2010 proposal to repeal the grandfather provision for $PM_{2.5}$ agree with EPA's conclusion that the technical issues associated with the implementation of a PSD program for $PM_{2.5}$ have been largely resolved. However, most of the commenters believe that the necessary technical tools for $PM_{2.5}$, *i.e.*, ambient monitoring data, emissions data (including emissions inventories, emissions factors, and stack testing methods), and air quality modeling techniques, are not yet sufficiently available to carry out an adequate analysis for $PM_{2.5}$. One commenter claims that technical problems continue to exist and points out that even EPA has acknowledged that some technical issues remain to be addressed. The commenter states that this shows EPA has not satisfied its burden to establish that the $PM_{2.5}$ program can be implemented by states.

Response:

We do not agree with the commenter's claim that because some technical issues remain to be addressed, we should not require applicants to begin carrying out a $PM_{2.5}$ analysis to satisfy the PSD requirements. We believe that there is a sufficient technical basis to allow sources to begin focusing on $PM_{2.5}$ emissions and direct demonstrations of compliance with the $PM_{2.5}$ standards without the use of surrogates. In the March 23, 2010, EPA modeling guidance memorandum titled, "Modeling Procedures for Demonstrating Compliance with the $PM_{2.5}$ NAAQS," we provide procedures that help an applicant complete both a preliminary significant impact analysis and a cumulative impact analysis to determine the impact of a PSD source or modification on the $PM_{2.5}$ NAAQS.[11]

In addition, we have recently addressed some of the important components of the PSD program for

[10] A state agency commenter claims that EPA's repeal of the grandfather provision for $PM_{2.5}$ could affect up to 16 of the agency's pending PSD projects. However, this agency's PSD program is part of an EPA-approved SIP and, as such, does not appear to be affected by the grandfather provision. Instead, we believe that the affected PSD projects would be affected by the ending of the 1997 PM_{10} Surrogate Policy. Thus, we address this comment in the section V, where our final action on ending the 1997 PM_{10} Surrogate Policy in SIP-approved PSD programs is addressed.

[11] This guidance memorandum for $PM_{2.5}$ modeling can be found on EPA's Web site at *http://www.epa.gov/ttn/scram.*

$PM_{2.5}$ that were described by various commenters. We published a final rule to revise the PM test methods to measure in-stack concentrations of $PM_{2.5}$ emissions and condensables on December 21, 2010, at 75 FR 80118. As discussed further in section IV.C.6 of this preamble, we issued the final rule containing the $PM_{2.5}$ increments, SILs, and SMC on October 20, 2010, at 75 FR 64864. All of these documents, along with the availability of ambient monitoring data and the other necessary tools that we describe in our responses to comments that follow, provide a sound and sufficient technical basis for completing necessary analyses of impacts of proposed sources on $PM_{2.5}$ ambient levels.

a. Comments on Ambient Monitoring Data

Comment:

One state agency commenter states that ambient air monitoring data may not represent "true" $PM_{2.5}$ concentrations because the Federal Reference Monitors include particle sizes above $PM_{2.5}$ in the $PM_{2.5}$ particle count. The commenter believes that it is difficult to evaluate PSD and minor NSR permits without representative ambient monitoring data to verify the accuracy or appropriateness of emissions factors and dispersion modeling predictions.

Response:

As part of its periodic review of the NAAQS, EPA recently evaluated the latest available science for PM in its "Integrated Science Assessment (ISA) for Particulate Matter" (EPA, 2009). This document included a discussion of Federal Reference Methods (FRMs) and other PM test methods. Also, FRMs and Federal Equivalent Methods for PM were discussed in detail in the 2004 PM Air Quality Criteria Document (EPA, 2004). These discussions document the fact that the size-selective nature of the FRM for $PM_{2.5}$ was developed based on epidemiological studies which used ambient fine particle sampler measurements as indicators of exposure. The position and shape of the $PM_{2.5}$ FRM's fractionation curve was specified as a means of separating particles contained in the fine-thoracic regime of ambient aerosols (*e.g.,* those generated by combustion, coagulation, condensation) from those particles produced by other mechanisms (*e.g.,* mechanically generated). The $PM_{2.5}$ FRM was not designed nor intended to collect all particles less than 2.5 micrometers (μm) aerodynamic diameter while excluding all particles greater than 2.5 μm aerodynamic diameter. Even so, the slope of the $PM_{2.5}$ FRM's fractionation is quite sharp and only a small fraction of particles greater than 2.5 μm are included in the $PM_{2.5}$ mass concentration measurement. As an example, less than 2 percent of 3.2 μm particles in the ambient air are included in the mass concentration measurement, and virtually all particles larger than this size are totally excluded from the $PM_{2.5}$ mass concentration measurement. Therefore, concerns regarding potential $PM_{2.5}$ mass measurement bias associated with large ambient particles are unfounded. As a result, the $PM_{2.5}$ FRM provides accurate $PM_{2.5}$ mass concentration measurements for purposes of determining compliance with the $PM_{2.5}$ NAAQS, and for evaluating the effectiveness of $PM_{2.5}$ control initiatives.

Comment:

Some commenters believe that some states may not have adequate ambient monitoring data to determine ambient background levels. A commenter claims that many states do not yet understand or have sufficient $PM_{2.5}$ ambient data to support the regional modeling initiatives, which would make assessing and enforcing the $PM_{2.5}$ NAAQS difficult and problematic for both the regulators and the regulated community.

Response:

States have been operating a large and robust network of $PM_{2.5}$ samplers since 1999. As part of each state's required monitoring network, each stack is required to have a least one $PM_{2.5}$ site to monitor for regional background and at least one $PM_{2.5}$ site to monitor for regional transport. *See* section 4.7.3, Appendix D to 40 CFR part 58. While there is flexibility in the location and methods used for these sites, given the spatial uniformity of $PM_{2.5}$ compared to PM_{10} and the large number of $PM_{2.5}$ samplers operating, EPA believes there are sufficient $PM_{2.5}$ data to support data needs such as modeling.

Comment:

Another commenter claims that there is no guidance available on how to determine representative (and reasonable) $PM_{2.5}$ background concentrations for air quality modeling analyses. The commenter contends that applying the current EPA-approved methodologies for determining background concentrations to $PM_{2.5}$ would result in background concentrations of $PM_{2.5}$ in excess of 80 percent (and many cases in excess of 95 percent) of the NAAQS for $PM_{2.5}$ for vast areas of the United States, which would leave a $PM_{2.5}$ emission source only an allowable air quality impact (as determined from modeling) of 1–4 μg/m^3. According to the commenter, even a small (less than 25 MMBtu/hr) natural gas-fired boiler or a baghouse with an allowable emission limit of as little 0.2 lb/hr will typically have an impact greater than 1–4 μg/m^3. The commenter believes that without additional guidance, neither of these types of small sources could be permitted.

Response:

Generally, the ambient monitoring data used as part of the cumulative analysis should represent concentrations from emissions from existing sources that are not also being modeled. However, based on recent guidance contained in the March 23, 2010, EPA modeling guidance memorandum titled, "Modeling Procedures for Demonstrating Compliance with the $PM_{2.5}$ NAAQS,"[12] we recommend a different approach for $PM_{2.5}$, which reflects the fact that secondary (precursor) impacts on ambient $PM_{2.5}$ concentrations from individual source emissions cannot adequately be estimated by currently-accepted modeling techniques. That is, we recommend that the monitoring data for $PM_{2.5}$ account for the contribution of secondary $PM_{2.5}$ formation representative of the area being modeled for the proposed PSD source. *See* March 23, 2010, Guidance, at pages 7–8. To the extent that accounting for precursor impacts involves sources from which $PM_{2.5}$ emissions are also being modeled, the March 23, 2010, guidance states (at page 7) that the double-counting problem generally will be of less importance for $PM_{2.5}$ than the representativeness of the monitor for secondary contributions. We also intend to address separately more detailed guidance on the determination of representative background data for $PM_{2.5}$.

b. Comments on Emissions Factors and Emissions Inventories

Comment:

Several state agency and industry commenters cite continued problems with inadequate emissions factors and emissions inventories for estimating the amount of $PM_{2.5}$ being emitted from a new project or from existing sources that must be modeled to demonstrate compliance with the $PM_{2.5}$ NAAQS. For example, one commenter states that there is extremely limited information concerning emissions factors for $PM_{2.5}$ from industrial sources, without which it is not possible to accurately model the impacts of $PM_{2.5}$. Another commenter states that emissions inventory data for $PM_{2.5}$ are in development and grossly incomplete. Another commenter disputes EPA's claim that emissions factors and emissions inventory data are

[12] *http://www.epa.gov/ttn/scram.*

readily available, stating that such information is not yet readily available in a quality-assured format on a source-by-source and point-by-point basis as needed for regulatory permitting analyses. Another commenter adds that while progress has occurred since 2008, the inventories are far from complete and EPA has yet to finalize a $PM_{2.5}$ test method.

A state agency commenter claims that representative emission factors are not available for the majority of industries. The commenter adds that EPA clearly stated in the preamble to the final 2007 $PM_{2.5}$ Implementation Rule (citing 72 FR 20654–55, April 25, 2007) that the quality of available direct filterable and condensable $PM_{2.5}$ national industry average emissions factors, such as those found in EPA's "Compilation of Air Pollutant Emission Factors" (AP–42), is often insufficient to establish effective source-specific emissions limits, and expected states to rely on directly measured emissions data.

The same commenter recognizes the caveats related to using the factors in AP–42, but states that often these factors are the "best or only method available for estimating emissions, in spite of their limitations" (quoting from AP–42, Volume I, Fifth Edition, January 1995, Introduction to AP–42). The commenter concludes that while EPA advised stakeholders of its concern related to $PM_{2.5}$ implementation in 1997, EPA has not updated many of the emissions factors. In addition, the commenter believes that factors for condensable emissions are suspect due to the use of a test method EPA is currently seeking to revise, and directly measured data to develop realistic emissions factors are not available for many industries at this time.

Response:

We believe that progress has been made in the development of emissions factors for $PM_{2.5}$ since the time the comments were submitted. When EPA established a transition period for NSR purposes in 2008 waiving the requirement that states address condensable PM in establishing enforceable emissions limits for either PM_{10} or $PM_{2.5}$ in NSR permits, it was to provide time for sources and state/local reviewing authorities to improve the emissions factors for the filterable and condensable PM that they need for the development of emissions inventories, source-specific emissions, and control levels achievable with emissions controls. *See* 73 FR 28334–35 (providing a waiver until January 1, 2011, unless the SIP or applicable permit condition otherwise required their inclusion).

The Agency knows of several states and other organizations that have improved their ability to accurately characterize these emissions. For example, the Mid-Atlantic Regional Air Management Association (MARAMA) conducted a study to identify emissions tests that employed EPA's recommended procedures under Test Method 202, promulgated in 1990. The emissions factors developed by MARAMA are expected to be superior to the latest published AP–42 emissions factors even though both efforts attempted to eliminate tests that did not use the recommended options to minimize artifact formation. Also, the State of Pennsylvania and the San Joaquin Valley United Air Pollution Control District in California have performed or required the performance of tests using Other Test Method (OTM) 27 and/or OTM 28 to better characterize the emissions of $PM_{2.5}$ from sources and source categories from which they believed improved emissions information was needed.[13]

Although the final revised test methods for $PM_{2.5}$ were only recently promulgated, on December 21, 2010, EPA has had a long history of supporting the use of improved procedures to perform particle sizing at 2.5 micrometers using modifications of Method 201A, to employ procedures included in the 1990 version of Method 202 for condensable PM, and to employ the additional changes included in OTM 28 for condensable PM (to minimize artifact formation).

As part of the Information Collection Requests that EPA has issued to sources in support of the development of standards for select source categories, we have required testing using OTM 27 (for $PM_{2.5}$ only) and OTM 28. These emissions data are being used by EPA in the rule development process. These data are also now available for sources and states to use in the development of improved emissions factors, emissions inventories, source emissions estimates, control measures evaluations, and development of applicable requirements.

With regard to comments regarding the adequacy of existing emissions inventories, we respond that, while the National Emissions Inventory (NEI) and state SIP inventories are evolving, their quality is sufficient for permit modeling for including the emissions sources other than the source(s) being permitted. The NEI generally uses the best available information and much of that information is supplied by the states. States can take advantage of new data stemming from OTM 27 and OTM 28, as mentioned previously, to further improve their inventory estimates in the 2009 inventory years and beyond. A preliminary version of the 2008 NEI has been made available to state and local agencies, tribes and EPA Regional Offices, and an updated version is scheduled to be posted on EPA's Web site for public availability in April of 2011, to support future modeling efforts. The NEI and state inventories will continue to improve as emission factors become available based on the new $PM_{2.5}$ test method.

The EPA also has been supplementing the inventories provided by the states with estimates of condensable PM emissions for many years. These estimates have included particle sizing at 2.5 micrometers of the filterable PM and the addition of CPM. We recognize that there are some source categories where the condensable PM emissions may be biased high due to artifact issues and that some source categories where the condensable PM emissions are biased low due to permitted adjustments to test data and absence of condensable PM testing. We do not think that these inventory uncertainties justify not using the available data to develop inventories; we believe that ignoring this information introduces greater error than using the data. The EPA believes that sources and states should use these data as criteria for identifying areas needing emissions testing to correct biases. We will respond to comments concerning the test methods for $PM_{2.5}$ in the immediately following subsection.

c. Comments on the In-Stack Emissions Test Method for $PM_{2.5}$

Comment:

Closely tied to the comments citing a lack of adequate emissions factors for $PM_{2.5}$ are comments claiming the lack of an adequate test method for measuring direct $PM_{2.5}$ emissions—especially condensable PM emissions. Some commenters argue that it would be inappropriate for EPA to repeal the grandfather provision and require applicants to complete a $PM_{2.5}$ analysis without the use of a surrogate until adequate $PM_{2.5}$ emissions test methods are adopted by EPA.

One commenter claims that without final rules on test methods, the state agency is without specific authority to require applicants to comply with this

[13] These OTM methods represent improved methods for measuring $PM_{2.5}$ emissions, including condensable $PM_{2.5}$. These and other OTM methods have not yet been subject to the Federal rulemaking process, but have been reviewed by EPA's Emissions Measurement Center staff and placed on the EPA Web site at *http://www.epa.gov/ttn/emc/prelim.html*.

portion of the $PM_{2.5}$ requirements. An industry commenter expresses concern with being required to perform an emissions test to demonstrate compliance with a PSD permit $PM_{2.5}$ emissions limit when there are no federally approved methods, and with significant remaining technical issues associated with the test methods for measuring $PM_{2.5}$.

Another industry commenter states that although EPA has proposed revisions to existing Method 201A to allow measurement of filterable $PM_{2.5}$, the revised method is not final, and it is not applicable to units with entrained moisture droplets in the stack (*e.g.,* units with wet stacks due to wet flue gas desulfurization (FGD)). Because many sources (including many large electric generating units) use wet FGD to control sulfur dioxide emissions and therefore will be unable to use proposed revised Method 201A, the commenter sees no justification for the conclusion that the technical issues associated with measuring $PM_{2.5}$ have been resolved. Some commenters indicate that problems associated with unacceptable artifact levels in existing test methods can overstate the results when sampling for $PM_{2.5}$ emissions.

Response:

We acknowledge the problems that some states and sources have experienced with sampling $PM_{2.5}$ emissions. Until recently, EPA **Federal Register** test methods have been primarily used for determining compliance with EPA regulations published in parts 60, 61, and 63.[14] We have not seen a need to publish source test methods in the **Federal Register** that are primarily for other regulatory purposes, such as compliance with NAAQS-related permit limits. As a result, many air pollutants or precursor compounds do not have a promulgated Federal test method. Also, the **Federal Register** test methods do not address all possible stack or pollutant release conditions. We provide test methods on our Emissions Measurement Center Web site [15] that can be used to quantify an extended range of pollutants and an extended range of release conditions. While not complete, these measurement methods provide a resource for states to supplement the available **Federal Register** test methods.

We note, however, that on March 25, 2009, EPA proposed amendments to Methods 201A and 202—in-stack test methods for PM. *See* 74 FR 12970. For Method 201A, we proposed to add a particle-sizing device to allow for sampling of $PM_{2.5}$. For at least 5 years prior to the test method proposal, EPA provided guidance addressing the majority of the artifact formation associated with the 1991 published version of that method.[16] As mentioned previously, the final test method rule was promulgated on December 21, 2010, and became effective on January 1, 2011. The amendments to Method 202 revise the sample collection and recovery procedures of the method to reduce the formation of reaction artifact levels that could lead to inaccurate and overstated measurements of condensable PM. The amendments to Method 202 also result in increased precision of the method and improve the consistency of measurements obtained between source tests performed under different regulatory authorities.

As noted by the commenters, at this time there is no recognized method for quantifying $PM_{2.5}$ emissions from sources that have entrained water droplets. We have an active effort to develop a test method that can be used under such conditions, but at this time it is unclear whether a suitable test method can be developed. As provided in the proposed revision to Method 201A, we believe that until the test method development is complete, the use of EPA Method 5 provides a reasonable substitute for a stack condition-specific test method that performs particulate sizing at 2.5 micrometers.

Even before the final test method rule revising Methods 201A and 202 was finalized, for a number of years, we had been posting guidance on our Web site for measuring emissions of $PM_{2.5}$, including the condensable fraction.[17] The equipment, supplies, and procedures provided by this guidance have been improved over time by stakeholders who have submitted constructive comments. We believe this posted guidance has provided a reasonable means to quantify emissions that are suitable for use in developing emissions inventories; for developing information that is useful in developing appropriate achievable emissions levels for sources; and for assessing the performance of a source's PM controls.

We recognize that it is desirable to provide detailed documentation of the conduct of source test methods such that there is consistency between establishing the applicable requirements and the method used to demonstrate compliance with those requirements. We do not believe that sources and states should be limited to **Federal Register** test methods for developing their emissions inventories, for developing applicable requirements, and for demonstrating compliance with applicable requirements. Accordingly, we believe that it is appropriate for sources and states to use other test methods, even if there is a **Federal Register** test method, as long as the test method used is a reliable indicator of the emissions performance for the regulated pollutant.

d. Comments on Air Quality Models

Comment:

Commenters supporting EPA's proposal to repeal the grandfather provision generally believe that sufficient modeling tools are available to complete a $PM_{2.5}$ analysis. One local agency commenter states that air quality modeling of direct $PM_{2.5}$ emissions is readily available using EPA-approved models.

The same commenter also claims that several states (New York, New Jersey, Connecticut) have developed policies by which permit applicants use standard modeling techniques to propose permit limits on $PM_{2.5}$ emissions that would not cause or contribute to an exceedance of the $PM_{2.5}$ NAAQS. The commenter acknowledges the present difficulty in modeling secondary $PM_{2.5}$ emissions, but points out that this does not preclude a permit applicant from determining whether the direct emissions of $PM_{2.5}$ from the proposed source or modification will cause or contribute to a violation of the NAAQS. An environmental group commenter similarly agrees with EPA's conclusion that the challenges related to modeling are not a valid basis for using PM_{10} as a surrogate.

Other commenters, however, express concern about the lack of adequate modeling techniques to fully address the $PM_{2.5}$ impacts resulting from both direct $PM_{2.5}$ emissions and $PM_{2.5}$ precursors. One commenter describes current problems associated with trying to model the impacts of $PM_{2.5}$ precursors and expresses concern that by not including formation of $PM_{2.5}$ from precursor emissions, the complete

[14] **Federal Register** test methods are methods that have been proposed in the **Federal Register** for public review and comment. When those methods are promulgated they become the official Code of Federal Regulations Methods, which may be used individually or in combination with other methods by Federal, State or local agencies or sources to quantify emissions cited by the regulations for which the methods were developed and within the limitations specified in the method itself without further EPA approval.

[15] *http://www.epa.gov/ttnemc01/.*

[16] EPA guidance on predecessors for Method 201A can be found at *http://www.epa.gov/ttn/emc/prelim.html* and *http://www.epa.gov/ttn/emc/ctm.html.*

[17] In addition to the Web sites identified in the earlier footnote, *see* also *http://www.epa.gov/ttn/emc/methods/method202.html.*

impact cannot be assessed. Another commenter acknowledges that the air quality dispersion model, AERMOD, can accurately estimate the impact of direct $PM_{2.5}$ emissions, but believes that this is inadequate because elevated ground level readings of $PM_{2.5}$ seem to have little to do with local direct $PM_{2.5}$ emissions, but instead result from several days of stagnating atmospheric conditions that lead to the build-up of secondary nitrates and sulfates in the air. The commenter points out that AERMOD does not address the chemical transformations that lead to the creation of these nitrates and sulfates from precursor emissions.

Response:

We agree with the commenters who indicate that our proposal to repeal the grandfather provision should be finalized despite the technical difficulties with estimating the impacts from emissions of $PM_{2.5}$ precursors. We acknowledge that current modeling techniques do not adequately account for the secondarily-formed ambient impacts of $PM_{2.5}$ caused by $PM_{2.5}$ precursors. We are currently working on techniques to address such deficiencies in order to improve the ability to estimate overall impacts of $PM_{2.5}$ against the NAAQS and upcoming increments. Nevertheless, models are available to model the ambient impact of direct $PM_{2.5}$ emissions, and we believe that it is reasonable to carry out the required air quality impact analyses with these models. In a March 23, 2010, EPA modeling guidance memorandum titled, "Modeling Procedures for Demonstrating Compliance with $PM_{2.5}$ NAAQS," we provided procedures that enable an applicant to complete both a preliminary significant impact analysis and a cumulative impact analysis to determine the impact of a PSD source or modification on the $PM_{2.5}$ NAAQS.[18] The guidance memorandum refers to the recommended procedures as a screening-level analysis or a "First Tier modeling analysis" for demonstrating compliance with $PM_{2.5}$ NAAQS and increments. The guidance memorandum acknowledges that techniques for modeling the individual source contributions to secondary formation of $PM_{2.5}$ from precursor emissions are not currently provided for within EPA's "Guideline on Air Quality Models" (also published as Appendix W of 40 CFR part 51). However, the March 2010 guideline memorandum provides procedures to account for the secondary contribution from regional and local sources of precursor emissions as part of the cumulative impact analysis for appropriate comparison to the annual and daily $PM_{2.5}$ NAAQS through the use of monitored background ambient concentrations. We are planning to provide additional guidance on $PM_{2.5}$ modeling for PSD permitting that will include more details on conducting such modeling, including options to enable more complete accounting for individual source contributions to secondary $PM_{2.5}$ formation when their precursor emissions are sufficient to warrant inclusion. Therefore, we believe that the tools and models now available to address direct $PM_{2.5}$ emissions, and to a lesser extent secondarily-formed $PM_{2.5}$, are in total sufficient, along with our other reasons provided in this preamble, to support our conclusion that it is appropriate to repeal the grandfather provision for $PM_{2.5}$, thereby ending the use of the 1997 PM_{10} Surrogate Policy under the Federal PSD program.

6. Comments on the Lack of Key $PM_{2.5}$ Implementation Requirements

Comment:

Several state agency, state/local agency association, private citizen, and industry commenters oppose EPA's proposed repeal of the grandfather provision because EPA has yet to take final action under 40 CFR 51.166 and 52.21 to address key parameters needed to implement the PSD permit program for $PM_{2.5}$. The key parameters include SILs, an SMC, and increments for $PM_{2.5}$.

Response:

On October 20, 2010, we promulgated a final rule at 75 FR 64864 that contains the $PM_{2.5}$ increments, SILs, and SMC. Under that rule, the SILs and SMC became effective in the Federal PSD program as of December 20, 2010, and the $PM_{2.5}$ increments will become effective on October 20, 2011. Thus, under the Federal program there is no longer cause for the commenters' concern that implementation of PSD for $PM_{2.5}$ will be difficult and burdensome due to the absence of the screening levels embodied in the SILs and SMC.

There will be some period after the repeal of the grandfather provision under this final rule before the $PM_{2.5}$ increments become effective. However, note that in the preamble to the October 20, 2010, final rule for $PM_{2.5}$ increments, SILs, and SMC we stated that under that rule, sources applying for a PSD permit under the Federal PSD program after the major source baseline date for $PM_{2.5}$ (*i.e.,* after October 20, 2010), but before the $PM_{2.5}$ increments become effective (*i.e.,* before October 20, 2011), will be considered to consume $PM_{2.5}$ increment. (Under section 169(4) of the Act and the implementing regulations at 40 CFR 52.21(b)(13) and (14), any major source that commences construction after the major source baseline date consumes increment, which will be the case for any source that receives its permit after that date.) We stated further that, while EPA will not require any such source to include a $PM_{2.5}$ increment analysis as part of its initial PSD application, an increment analysis ultimately will be required before the permit may be issued if the date of issuance will occur after October 20, 2011 (the trigger date for the $PM_{2.5}$ increment), when the $PM_{2.5}$ increments can be triggered under the Federal PSD program. *See* 74 FR 64899. Any formerly grandfathered source that has not yet received its final permit will be subject to the same transition provisions for $PM_{2.5}$ increments.

D. What final action is EPA taking on the grandfather provision for $PM_{2.5}$?

We have decided to repeal the grandfather provision for $PM_{2.5}$ contained in the Federal PSD program at 40 CFR 52.21(i)(1)(xi). As the result of this final action, any PSD permit application previously covered by the grandfather provision that is not issued a final and effective PSD permit before the effective date of this rule will not be able to rely on the 1997 PM_{10} Surrogate Policy to satisfy the PSD requirements for $PM_{2.5}$. Unless the application includes a valid surrogacy demonstration (*i.e.,* the applicant can show that meeting the requirements for PM_{10} will also meet the requirements for $PM_{2.5}$), the application will need to contain $PM_{2.5}$ data and analyses to meet the $PM_{2.5}$ requirements to ensure that the applicable administrative record for the permit application is sufficient to demonstrate compliance with those requirements. Such requirements include the analyses necessary to (1) establish the appropriate BACT emissions limitation(s) for $PM_{2.5}$ in the permit, as required by section 165(a)(4) of the Act, and (2) demonstrate that the emissions increase from the proposed new or modified major stationary source will not cause or contribute to a violation of the $PM_{2.5}$ NAAQS, as required by section 165(a)(3) of the Act. For any application that previously was relying completely on a PM_{10} surrogate analysis based solely on the 1997 PM_{10} Surrogate Policy, additional information will be required to fulfill these requirements.

The EPA is aware of 27 sources that had submitted PSD permit applications under the Federal PSD program prior to July 15, 2008—the effective date of the 2008 $PM_{2.5}$ NSR Implementation Rule—but did not receive their permits by that

[18] *http://www.epa.gov/ttn/scram.*

date. While some of these applicants for PSD permits have already sought alternative means of obtaining the necessary permit, those that have not yet done so will be required to provide a $PM_{2.5}$ analysis that demonstrates the application of BACT and that the source's emissions will not cause or contribute to a violation of the $PM_{2.5}$ NAAQS or use a surrogate approach, as long as that approach comports with the conditions set forth by previous court determinations concerning surrogacy demonstrations. This final rule ensures that the 1997 PM_{10} Surrogate Policy will no longer be applicable to satisfy the PSD requirements for $PM_{2.5}$ under the Federal PSD program.

V. What action is EPA taking on the 1997 PM_{10} Surrogate Policy for state PSD programs?

On February 11, 2010, EPA proposed to end the 1997 PM_{10} Surrogate Policy in SIP-approved states before May 16, 2008. In that notice, EPA described the current status of the 1997 PM_{10} Surrogate Policy under state PSD programs that are part of an approved SIP, and explained why EPA was proposing to end the use of the 1997 PM_{10} Surrogate Policy early. 75 FR 6833–34 (Feb. 11, 2010). As indicated above, EPA in this **Federal Register** notice is taking no action concerning its proposal to end early the use of the 1997 PM_{10} Surrogate Policy under state PSD programs that are part of an approved SIP. Accordingly, the use of the 1997 PM_{10} Surrogate Policy under such state programs will end on May 16, 2011, in accordance with the discussion in the May 16, 2008, preamble. 73 FR 28321, at 28340–41.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 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 Executive Order 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 adding any new paperwork requirements (*e.g.,* monitoring, reporting, and recordkeeping) as part of this final action. This action amends one part of the regulations at 40 CFR 52.21 by repealing the grandfather provision that affects fewer than 30 sources. However, the approved ICR for the NSR program was prepared as if the 2008 $PM_{2.5}$ NSR Implementation Rule, which added $PM_{2.5}$ to the NSR program, would be fully implemented immediately upon the effective date of the rule without any phase-in period during which either the grandfather provision or 1997 PM_{10} 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 grandfather provision or 1997 PM_{10} 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 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 final rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's 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 final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any new requirements or burdens on small entities. We have determined that small entities will not incur any adverse impacts as a result of this action to amend the regulations at 40 CFR 52.21 (by repealing the grandfather provision that affects fewer than 30 sources). Small businesses and other small entities generally are not subject to the PSD program, which applies only to new major stationary sources and major modifications at existing major stationary sources. In addition, we do not believe that any small governments serve as PSD reviewing authorities.

D. Unfunded Mandates Reform Act

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any 1 year. This action only amends one part of the regulations at 40 CFR 52.21 by repealing the grandfather provision that affects fewer than 30 sources. 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. This final rule applies only to new major stationary sources and to major modifications at existing major stationary sources, and we have no indication that small governments own or operate any major sources that are potentially affected by this action. In addition, we do not believe that any small governments serve as PSD reviewing authorities.

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 amends one part of the regulations at 40 CFR 52.21 by repealing the grandfather provision for $PM_{2.5}$ that affects fewer than 30 sources. Thus, Executive Order 13132 does not apply to this final 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 solicited comment on the proposed rule from state and local officials. We received comments from 11 state/local regulatory agency and regulatory agency association commenters concerning the proposed repeal of the grandfather provision under the Federal PSD program and the early end of the 1997 PM_{10} Surrogate

Policy under SIP-approved state PSD programs. The comments pertaining to our repeal of the grandfather provision are summarized and addressed in this preamble and in a Technical Support Document in the Docket for this rulemaking.

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. Thus, Executive Order 13175 does not apply to this action.

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

The 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 $PM_{2.5}$ are adequately protected against the adverse effects of $PM_{2.5}$ emissions from new and modified sources of air pollution by ending the use of the 1997 PM_{10} Surrogate Policy as a substitute approach for satisfying the $PM_{2.5}$ requirements under the Federal PSD program.

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

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866. The EPA is amending one part of the regulations at 40 CFR 52.21 (expected to affect fewer than 30 regulated entities). Only a portion of the sources involved in the production or distribution of energy could be impacted.

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. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider 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.

The EPA has concluded that this final rule does not result in disproportionately high and adverse human health or environmental effects on minority and/or low income populations. The rule only amends one part of the regulations at 40 CFR 52.21 by repealing the grandfather provision that affects fewer than 30 sources. 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 final rule.

K. 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. The 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 on July 18, 2011.

L. Conclusion and Determination Under Section 307(d)

Pursuant to section 307(d)(1)(J) of the CAA, this action is subject to the provisions of section 307(d). Further, to the extent that any aspects of this rule are not subject to the provisions of section 307(d) pursuant to section 307(d)(1)(J), the Administrator determines that this rule is subject to the provisions of section 307(d) pursuant to section 307(d)(1)(V).

VII. Judicial Review

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by July 18, 2011. Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Under section 307(b)(2) of the Act, the requirements of this final action may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

VIII. Statutory Authority

The statutory authority for this action is provided by the CAA, as amended (42 U.S.C. 7401 *et seq.*). Relevant portions of the Act include, but are not necessarily limited to, sections 101, 110, 165, and 301 of the CAA as amended (42 U.S.C. 7401, 7410, 7475, and 7601). This action is also subject to section 307(d) of the Act (42 U.S.C. 7607(d)).

List of Subjects in 40 CFR Part 52

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

Dated: May 10, 2011.

Lisa P. Jackson,

Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is 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).

[FR Doc. 2011–12089 Filed 5–17–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2011–0372; FRL–9307–3]

Interim Final Determination To Defer Sanctions, Sacramento Metro 1-Hour Ozone Nonattainment Area, California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule.

SUMMARY: EPA is making an interim final determination to defer imposition of sanctions based on a proposed determination, published elsewhere in this **Federal Register**, that the State of California is no longer required to submit or implement a Clean Air Act (CAA) Section 185 fee program (Termination Determination) for the Sacramento Metro 1-hour Ozone nonattainment area (Sacramento Metro Area) to satisfy anti-backsliding requirements for the 1-hour Ozone standard.

DATES: This interim final determination is effective on May 18, 2011. However, comments will be accepted until June 17, 2011.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2011–0372, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov*.

3. *Mail or deliver:* Andrew Steckel (Air–4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an "anonymous access" system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. 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.

Docket: Generally, documents in the docket for this action are available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at *http://www.regulations.gov,* some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material, large maps), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Lily Wong, EPA Region IX, (415) 947–4114, *wong.lily@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to EPA.

I. Background

On January 5, 2010 (75 FR 232), we published a finding that the State of California failed to submit State Implementation Plans (SIPs) to satisfy CAA section 185 for three 1-hour Ozone nonattainment areas: Sacramento Metro Area, Southeast Desert, and Los Angeles-South Coast Air Basin. As discussed in our January 2010 action, the finding regarding the Sacramento Metro Area addressed the Yolo/Solano Air Quality Management District, Feather River Air Quality Management District, Placer County Air Pollution Control District and El Dorado County Air Quality Management District. It did not address the Sacramento Metropolitan Air Quality Management District. This finding started a sanctions clock for imposition of offset sanctions 18 months after January 5, 2010 and highway sanctions 6 months later, pursuant to section 179 of the CAA and our regulations at 40 CFR 52.31.

On July 7, 2010 and in an update on April 13, 2011, the California Air Resources Board (CARB) submitted a request that EPA determine that the CAA section 185 obligation has been terminated for the Sacramento Metro Area. This termination determination request was supported by data demonstrating that the Sacramento Metro Area has attained the 1-hour Ozone standard based on the most recent three years of complete, quality-assured and certified data (2007–2009), and that the improvement in air quality resulted from permanent and enforceable emissions reductions. In the Proposed Rules section of today's **Federal Register**, we have proposed approval of this submittal. Based on today's proposed approval, we are taking this final rulemaking action, effective on publication, to defer imposition of sanctions that were triggered by our January 5, 2010 finding of failure to submit for the Sacramento Metro Area based on a finding that it is more likely than not that the Sacramento Metro Area is no longer obligated to submit a 185 program.

EPA is providing the public with an opportunity to comment on this deferral of sanctions. If comments are submitted that change our assessment described in this final determination and the proposed CAA section 185 termination determination for the Sacramento Metro Area, we would take final action proposing to deny or denying the termination determination request and lifting this deferral of the sanctions. If no comments are submitted that change our assessment, then with regard to the finding of failure to submit discussed previously, any imposed sanctions would no longer apply and any sanction clocks would be permanently terminated on the effective date of a final CAA section 185 termination determination.

II. EPA Action

We are making an interim final determination to defer CAA section 179 sanctions associated with the Sacramento Metro Area's 1-hour Ozone CAA section 185 obligation based on our concurrent proposal to approve a CAA section 185 termination determination which would remove the obligation of the state to submit a section 185 SIP when finalized.

Because EPA has preliminarily determined that the State is not obligated to submit the SIP that was the basis of EPA's finding of failure to submit, relief from sanctions should be provided as quickly as possible. Therefore, EPA is invoking the good cause exception under the Administrative Procedure Act (APA) in not providing an opportunity for comment before this action takes effect (5 U.S.C. 553(b)(3)). However, by this action EPA is providing the public with