UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE ADMINISTRATOR

JAN 14 2009

Mr. Paul R. Cort
Earthjustice
426 17th Street, 5th Floor
Oakland, California 94612

Dear Mr. Cort:

This letter is in response to your July 15, 2008, Petition for Reconsideration and request for a stay on behalf of the Natural Resources Defense Council (NRDC) and Sierra Club (SC) related to the U.S. Environmental Protection Agency's (EPA's) final rule titled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)," which was published in the *Federal Register* on May 16, 2008, and effective on July 15, 2008. The specific provisions for which you requested reconsideration include (1) EPA's transition schedule and requirements for Prevention of Significant Deterioration (PSD) programs in State Implementation Plan (SIP)-approved states; (2) EPA's grandfathering provisions concerning use of the Particulate Matter Less Than 10 Micrometers (PM_{10}) surrogate policy contained in the regulations governing the federal PSD permitting program; (3) EPA's transition period for condensable particulate matter (CPM) emissions; and (4) EPA's preferred interpollutant trading ratios under the nonattainment NSR program. Due to the limited resources of the Agency, and for the reasons stated previously in support of the rule and as explained further below, EPA denies this petition for reconsideration and request for a stay.

The NRDC and SC petition requires EPA to consider the staff time and other resources that would be expended to reconsider this final rule in light of the many responsibilities of the Agency and the limited resources available to the Agency. EPA's conclusion is that the resources that would be required to complete the reconsideration process if the Agency granted your petition are more appropriately used on other matters.

Having considered your arguments with respect to each of the provisions for which you request reconsideration, EPA concludes that they do not demonstrate a need for reconsideration, for the reasons stated previously in support of the rule and as explained further below.

Transition Period for PSD Programs in SIP-approved States

In its petition, NRDC and SC claim that in our final rule we included new requirements governing the way in which states with SIP-approved PSD programs will come into compliance with the new PSD rules for $PM_{2.5}$ that are unlawful and arbitrary. The new PSD rules require

states to submit revised programs within three years from the publication of amended requirements in the *Federal Register* in accordance with 40 CFR 51.166(a)(6)(i). During the interim period prior to EPA approval of the revised rules, states may continue to implement the PM_{10} surrogate policy as a means of satisfying the new requirements for $PM_{2.5}$.

Consistent with past practice, we believe that it is reasonable to allow states up to three years to revise and submit SIP revisions containing the new requirements for the $PM_{2.5}$ PSD program, while allowing states the opportunity to rely on the PM_{10} surrogate policy in the interim if it is necessary to do so. Reconsideration is not warranted because the public had notice of the potential that EPA would give states this amount of time to submit SIP revisions. The three-year period within which states must adopt the new $PM_{2.5}$ requirements into SIP-approved programs is provided by the pre-existing PSD rules to allow states to revise their own regulations to reflect newly amended requirements. As stated in the May 16, 2008, preamble, "This rule follows our established approach for determining when States must adopt and submit revised SIPs following changes to the NSR regulations, but does not revise otherwise applicable SIP submittal deadlines." 73 FR 28321, 28341. The May 16, 2008, rule requires revision to the initial "infrastructure" SIPs that EPA required states to submit within three years of the promulgation of the $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS). Thus, the deadline in section 110(a)(1) of the Act does not apply to the SIP revisions submitted in response to the May 16, 2008, rule. The Act does not specifically address the timeframe by which states must submit SIP revisions. Nevertheless, we looked to section 110(a)(1) of the Act to guide our development of the previous rule that allows up to a 3-year SIP development period for states to incorporate new or amended PSD program requirements.

Petitioners' recommendation that upon reconsideration EPA should impose new $PM_{2.5}$ requirements under the existing federal PSD program (40 CFR 52.21) for all states until adequate SIP revisions have been approved fails to account for the time required to legally act to disapprove all affected state programs and undertake the necessary rulemaking to begin implementation of federal PSD for $PM_{2.5}$. Many states have already indicated that they have the general authority to regulate $PM_{2.5}$ under their existing SIPs even though specific regulatory changes are needed to fully implement the program in accordance with EPA's newly amended rules.

Use of the PM_{10} surrogate policy does not "waive" or "exempt" sources from complying with the statutory requirements; states with existing authority to implement the new $PM_{2.5}$ program will not need to continue implementing the PM_{10} surrogate policy. The surrogate policy remains in place to provide states lacking clear authority in state law to directly regulate $PM_{2.5}$ with the ability to issue permits satisfying the $PM_{2.5}$ requirements without unnecessary delay. As we explained in the May 16, 2008, preamble, "PM_{10} will act as an adequate surrogate for $PM_{2.5}$ in most respects, because all new major sources and major modification that would trigger PSD requirements for $PM_{2.5}$ would also trigger PM_{10} requirements because $PM_{2.5}$ is a subset of PM_{10}." 73 FR 28321, 28341. Nevertheless, we disagree with your contention that "The new transition scheme purports to allow source [sic] to be constructed or expanded even if they result in long-term contributions to violations of the $PM_{2.5}$ NAAQS."

We emphasize that the continued use of the PM_{10} surrogate policy is not mandatory, and case-by-case evaluation of the use of PM_{10} in individual permits is allowed to determine its adequacy of as a surrogate for $PM_{2.5}$. If, under a particular permitting situation, it is known that a source's emissions would cause or contribute to a violation of the $PM_{2.5}$ NAAQS, we do not believe that it is acceptable to apply the PM_{10} surrogate policy in the face of such predicted violation. Accordingly, each permit that relies on the PM_{10} surrogate policy to satisfy the new $PM_{2.5}$ requirements is subject to review as to the adequacy of such presumption.

Continuation of PM_{10} Surrogate Policy for Certain Pending Permit Applications Under the Federal PSD Program ("Grandfathering Provision")

NRDC and SC contend that our policy of allowing sources with complete applications submitted prior to the July 15, 2008, effective date of the federal PSD regulations at 40 CFR 52.21 to continue relying upon the PM_{10} surrogate policy is unlawful and arbitrary. Your contention was in part that we failed to present this grandfathering provision and accompanying rationale to the public for comment, and also that the Clean Air Act (Act) provides no authority for EPA to ground the grandfathering provision on the date of a source's permit application. You stated that upon reconsideration we "must require that $PM_{2.5}$ be addressed in all permits for sources that did not commence construction before the effective date of the $PM_{2.5}$ NAAQS." Your approach would require that we retroactively review all permits issued since the effective date of the $PM_{2.5}$ NAAQS, i.e., either July 18, 1997 – the date of the original $PM_{2.5}$ NAAQS, or October 17, 2006 – the date we revised the original $PM_{2.5}$ NAAQS. We do not consider this the best use of limited agency resources.

With regard to the petition's premise that the Act does not authorize EPA to grandfather sources on the basis of a complete application, we disagree. Section 168(b) of the Act provides for certain grandfathering based on a commence construction date, but says nothing – either explicitly or implicitly – about whether other grandfathering may occur or what criteria should be applied in allowing for additional grandfathering by regulation. Moreover, we believe that a decision to re-evaluate sources already grandfathered would unnecessarily disrupt state permitting programs by requiring such permits to be re-evaluated for impacts on the $PM_{2.5}$ NAAQS.

Even if we were to consider eliminating the new grandfathering provision that became effective on July 15, 2008, it could be of little consequence because we have determined that only nine sources actually submitted applications relying on the PM_{10} surrogate policy prior to July 15, 2008, such that they fall within the grandfather provision. Of these, interested persons submitted comments on the use of the surrogate policy with respect to only six of these applications. Moreover, we believe that control technologies qualifying as Best Available Control Technology (BACT) for PM_{10} are likely in many cases to serve as BACT for $PM_{2.5}$ as well.

Finally, as we noted above, the use of the surrogate policy for the sources grandfathered under the federal PSD program does not "waive" or "exempt" sources from complying with statutory requirements; rather, it presumes that assessing control technologies and modeling air

quality impacts for PM_{10} is an effective means of fulfilling those statutory requirements for $PM_{2.5}$ as well as for PM_{10} during the transition period being allowed.

Condensable Particulate Matter Emissions

NRDC and SC claim that our decision in the final NSR rule to allow states to exclude CPM from NSR applicability determinations and emissions control requirements until January 1, 2011, is unlawful and arbitrary. You further note that we did not propose such exclusion for public review and comment.

The final provisions on condensable particulate matter emissions were not adopted without notice, as you have claimed. As discussed in the notice of proposed rulemaking, the states and EPA have not consistently applied the NSR program to CPM. The final rule merely deferred the effective date of the proposed action and preserved the status quo in the interim – requiring continued enforcement of those SIPs and permits that clearly address CPM. Our decision in the final rules to allow states that have not previously addressed CPM to continue to exclude CPM during a transition period is the direct response to comments we received questioning whether available test methods and modeling techniques were reliable enough to support a requirement that all states immediately begin addressing CPM as originally proposed. See 73 FR at 28,335 (discussing comments and EPA's response).

The transition period is temporary, and the total time allowed could be shortened in conjunction with a faster-than-anticipated rulemaking for new or revised CPM test methods. Also, as discussed above, states with SIP provisions requiring CPM to be addressed are not allowed to exclude CPM, and other states at their discretion have opted to include CPM in their permit processes. In addition, some sources have elected to include CPM in their estimates of potential emissions in order to avoid possible delays (resulting from adverse public comment) in the issuance of needed permits.

Even where sources are not being required to address CPM, control technologies being selected as BACT for PM_{10} and $PM_{2.5}$ are capable of controlling CPM.

Interpollutant Trading Ratios

Finally, NRDC and SC claim that our decision to include preferred interpollutant trading ratios to facilitate the interpollutant trading of emissions offsets under the NSR program is unlawful and arbitrary. NRDC and SC assert that such ratios were developed and finalized without public input. Moreover, you claim that the Act does not permit interpollutant offset trading.

We believe the Act contains the necessary authority for us to regulate precursor emissions, including allowing offset trading of such precursors. As defined under section 302(g) of the Act, the term "air pollutant" "includes any precursors to the formation of any air pollutant, to the extent that the Administrator has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used."

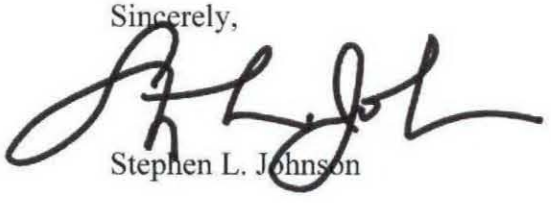
The rule does not require use of the preferred ratios, and public notice and comment is built into the process through which the interpollutant trading program is incorporated into the state NSR program. That is, each SIP revision containing an interpollutant trading program, including the preferred offset ratios or any other ratios independently adopted by the state, must be subjected to public notice and comment as part of the EPA approval process for the SIP (in addition to the public process required as part of the state's adoption of such provisions in their own rules.) Under 40 CFR part 51 appendix S, the interim authority for issuance of major permits in nonattainment areas by states, states may allow $PM_{2.5}$ precursor offsets "if such offsets comply with an interprecursor trading hierarchy and ratio approved by the Administrator." See new section IV.G.5 of appendix S. Moreover, each permit which relies on the interpollutant trading program to allow precursor emissions to offset new $PM_{2.5}$ emissions must undergo public review prior to approval and issuance.

Request for Stay of Implementation

NRDC and SC also request that EPA stay implementation of the final rule pending reconsideration or the rule. Because EPA is denying the petition for reconsideration in its entirety, a stay pending reconsideration is unnecessary.

We appreciate your comments and interest in this important matter.

Sincerely,



Stephen L. Johnson

cc: Mr. David S. Baron, Earthjustice
Mr. Timothy J. Ballo, Earthjustice