6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2012-0079; FRL- 9708-6]

Approval and Promulgation of Implementation Plans; State of Alabama: General and Transportation Conformity & New Source Review Prevention of Significant Deterioration for Fine Particulate Matter ($PM_{2.5}$)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve changes to the Alabama State Implementation Plan (SIP), submitted by the Alabama Department of Environmental Management (ADEM) to EPA on May 2, 2011. The SIP revision modifies Alabama's New Source Review (NSR), Prevention of Significant Deterioration (PSD), and Nonattainment New Source Review (NNSR) programs as well as general and transportation conformity regulations. Specifically, the May 2, 2011, SIP revision adopts federal NSR permitting requirements provisions into the Alabama SIP regarding implementation of the $PM_{2.5}$ national ambient air quality standards (NAAQS), revises the State's NNSR rules, and updates the State's general and transportation conformity regulations. All changes in the May 2, 2011, SIP revision are necessary to comply with federal requirements. EPA is proposing approval of Alabama's May 2, 2011, revision to the Alabama SIP because the Agency has preliminarily determined that the changes are consistent with the Clean Air Act (CAA or Act).

DATES: Comments must be received on or before [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID No EPA-R04-OAR-2012-0079, by one of the following methods:

1. www.regulations.gov : Follow the on-line instructions for submitting comments.
2. E-mail: R4-RDS@epa.gov.
3. Fax: (404) 562-9019.
4. Mail: EPA-R04-OAR-2012-0079 Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.
5. Hand Delivery or Courier: Ms. Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Instructions: Direct your comments to Docket ID No. EPA-R04-OAR-2012-0079. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through

www.regulations.gov or e-mail information that you consider to be CBI or otherwise protected. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at http://www.epa.gov/epahome/dockets.htm.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, i.e., 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 in www.regulations.gov or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to

4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding the Alabama SIP, contact Ms. Twunjala Bradley, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Telephone number: (404) 562-9352; e-mail address: bradley.twunjala@epa.gov. For information regarding NSR, contact Mrs. Yolanda Adams, Air Permits Section, at the same address above. Telephone number: (404) 562-9214; e-mail address: adams.yolanda@epa.gov. For information regarding $PM_{2.5}$ NAAQS, contact Mr. Joel Huey, Regulatory Development Section, at the same address above. Telephone number: (404) 562-9104; e-mail address: huey.joel@epa.gov.

SUPPLEMENTARY INFORMATION:

I. What Actions are EPA Proposing?

On May 2, 2011, ADEM submitted a SIP revision to EPA for approval into the Alabama SIP to adopt federal requirements for NSR permitting, and general and transportation conformity.[1] Alabama's SIP revision makes changes to the regulations at Administrative Code for Division 3: Chapter 335-3-14 –*Permits* and Chapter 335-3-17 – *Conformity of Federal Actions to State Implementation Plans* to comply with federal NSR permitting and conformity regulations respectively. First, the May 2, 2011, SIP revision addresses NSR requirements amended in the May 16, 2008, final rulemaking entitled "Implementation of the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers" (73 FR 28321) and the October 20, 2010, final rulemaking entitled "Final Rule Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$) – Increments, Significant Impact Levels (SILs) and Significant monitoring Concentration (SMC): Final Rule, ($PM_{2.5}$ PSD Increment-SILs-SMC Rule)" (75 FR 64864). Second, the submission revises the State's NNSR regulations to be consistent with federal NSR Regulations. Lastly, Alabama's SIP revision changes the State's general and transportation conformity regulations which incorporate by reference (IBR)[2] the federal conformity updates. Pursuant to section 110 of the CAA, EPA is proposing to approve these changes, with the exception of the threer elements below, into the Alabama SIP.

[1] Alabama's May 2, 2011, SIP revision also made changes to the state's New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP)(at Chapters 335-3-10 and 11 respectively) and title V regulations at Chapter 335-3-16 to adopt recent federal changes to the NSPS and NESHAP and major source operating permits regulations respectively. However, EPA is not proposing action to approve these revisions as they are not part of the Alabama federally approved SIP.

[2] In this document IBR means incorporate or incorporates by reference.

The three elements of ADEM's May 2, 2011, SIP revision which EPA is not proposing to approve in this action are: (1) the NNSR changes amended at rule 335-3-14-.05;[3] (2) SIL thresholds and provisions promulgated in EPA's $PM_{2.5}$ PSD Increment-SILs-SMC Rule (75 FR 64864, October 20, 2010);[4] and (3) the term "particulate matter emissions" when accounting for condensable particles for $PM_{2.5}$ emission limits for the definition of "regulated NSR pollutant" (77 FR 15656, March 16, 2012). EPA will consider action on the NNSR changes and SILs provisions separate from this rulemaking.

II. What is EPA's Proposed Action for the NSR Implementation Requirements for the $PM_{2.5}$ NAAQS?

Today's proposed action to revise Alabama's SIP relates to EPA's NSR $PM_{2.5}$ Rule and the $PM_{2.5}$ PSD Increment-SILs-SMC Rule. In the NSR $PM_{2.5}$ Rule, EPA finalized regulations to implement the NSR program for the $PM_{2.5}$ NAAQS. As a result of EPA's final NSR $PM_{2.5}$ Rule, states were required to submit SIP revisions to EPA no later than May 16, 2011, to address these requirements for both the PSD and NNSR programs. EPA's $PM_{2.5}$ PSD Increment-SILs-SMC Rule established PSD increments, SILs and SMC which address additional components for making PSD permitting determinations for $PM_{2.5}$ NAAQS. These requirements address air quality modeling and monitoring provisions for fine particle pollution in areas protected by the PSD program

[3] Alabama's May 2, 2011, SIP revision also made changes to its NNSR regulations to be consistent with federal NSR regulations including provisions promulgated in the NSR $PM_{2.5}$ Rule, $PM_{2.5,}$ PSD Increment-SILs-SMC rule and other NSR rulemakings. EPA will consider action on this portion of Alabama's May 2, 2011, SIP in a separate rulemaking.

[4] EPA's authority to implement the SILs and SMC for PSD purposes has been challenged by the Sierra Club. *Sierra Club v. EPA*, Case No 10-1413 United States Court of Appeals for the District of Columbia (D.C. Circuit Court).

(that is attainment or unclassifiable/attainment areas for the NAAQS). The $PM_{2.5}$ PSD Increment-SILs-SMC Rule required states to submit SIP revisions to adopt the required PSD increments by July 20, 2012. Together these two rules address the NSR permitting requirements needed to implement the $PM_{2.5}$ NAAQS. Alabama's May 2, 2011, SIP revision adopts into the Alabama SIP the PSD and NNSR[5] requirements promulgated in these two rules to be consistent with federal regulations. More detail on the NSR $PM_{2.5}$ Rule and the $PM_{2.5}$ PSD Increment-SILs-SMC Rule can be found in EPA's May 16, 2008 (73 FR 28321), and October 20, 2010 (75 FR 64864), final rules respectively and are summarized below.

A. Fine Particulate Matter and the NAAQS

Fine particles in the atmosphere are made up of a complex mixture of components. Common constituents include sulfate; nitrate; ammonium; elemental carbon; a great variety of organic compounds; and inorganic material (including metals, dust, sea salt, and other trace elements) generally referred to as "crustal" material, although it may contain material from other sources. Airborne particulate matter (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) are considered to be "fine particles" and are also known as $PM_{2.5}$. "Primary" particles are emitted directly into the air as a solid or liquid particle (e.g., elemental carbon from diesel engines or fire activities, or condensable organic particles

[5] EPA anticipates taking action on Alabama's May 2, 2011, SIP revision NNSR changes in a separate rulemaking.

from gasoline engines). "Secondary" particles (e.g., sulfate and nitrate) form in the atmosphere as a result of various chemical reactions.

The health effects associated with exposure to $PM_{2.5}$ include potential aggravation of respiratory and cardiovascular disease (i.e., lung disease, decreased lung function, asthma attacks and certain cardiovascular issues). Epidemiological studies have indicated a correlation between elevated $PM_{2.5}$ levels and premature mortality. Groups considered especially sensitive to $PM_{2.5}$ exposure include older adults, children, and individuals with heart and lung diseases. For more details regarding health effects and $PM_{2.5}$ see EPA's website at http://www.epa.gov/oar/particlepollution/ (See heading "Health and Welfare").

On July 18, 1997 (62 FR 38652), EPA revised the NAAQS for PM to add new standards for fine particles, using $PM_{2.5}$ as the indicator. Previously, EPA used PM_{10} (inhalable particles smaller than or equal to 10 micrometers in diameter) as the indicator for the PM NAAQS. EPA established health-based (primary) annual and 24-hour standards for $PM_{2.5}$, setting an annual standard at a level of 15.0 micrograms per cubic meter ($\mu g/m^3$) and a 24-hour standard at a level of 65 $\mu g/m^3$. At the time the 1997 primary standards were established, EPA 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. On October 17, 2006 (71 FR 61236), EPA revised the primary and secondary 24-hour NAAQS for $PM_{2.5}$ to 35 $\mu g/m^3$ and retained the existing annual $PM_{2.5}$ NAAQS of 15.0 $\mu g/m^3$.

B. What is the NSR Program?

The CAA NSR program is a preconstruction review and permitting program applicable to certain new and modified stationary sources of air pollutants regulated under the CAA. The program includes a combination of air quality planning and air pollution control technology requirements. The CAA NSR program is composed of three separate programs: PSD, NNSR, and Minor NSR. PSD is established in part C of title I of the CAA and applies in areas that meet the NAAQS – "attainment areas" – as well as areas where there is insufficient information to determine if the area meets the NAAQS – "unclassifiable areas." The NNSR program is established in part D of title I of the CAA and applies in areas that are not in attainment of the NAAQS – "nonattainment areas." The Minor NSR program addresses construction or modification activities that do not qualify as "major" and applies regardless of the designation of the area in which a source is located. Together, these programs are referred to as the NSR program. EPA regulations governing the implementation of these programs are contained in 40 CFR sections 51.160 - .166; 52.21, .24; and part 51, appendix S.

Section 109 of the CAA requires EPA to promulgate a primary NAAQS to protect public health and a secondary NAAQS to protect public welfare. Once EPA sets those standards, states must develop, adopt, and submit a SIP to EPA for approval that includes emission limitations and other control measures to attain and maintain the NAAQS. See CAA section 110. Each SIP is also required to include a preconstruction review program for the construction and modification of any stationary source of air pollution to assure the maintenance of the NAAQS. The applicability of the PSD program to a major stationary source must be determined in advance of construction and is a pollutant-specific determination. Once a major source is determined to be subject to the PSD program (and thus is a PSD source), among other requirements, it must undertake a series of analyses to demonstrate that it will use the best

available control technology (BACT) and will not cause or contribute to a violation of any NAAQS or increment. Alabama's May 2, 2011, SIP submittal revises the state's PSD and NNSR permitting regulations.

C. NSR $PM_{2.5}$ Implementation Rule

On May 16, 2008, EPA finalized the NSR $PM_{2.5}$ Rule to implement the $PM_{2.5}$ NAAQS, including changes to the NSR program (73 FR 28321). The NSR $PM_{2.5}$ Rule revised the federal NSR program requirements to establish the framework for implementing preconstruction permit review for the $PM_{2.5}$ NAAQS in both attainment and nonattainment areas. Specifically, the NSR $PM_{2.5}$ Rule established the following NSR requirements to implement the $PM_{2.5}$ NAAQS: (1) require NSR permits to address directly emitted $PM_{2.5}$ and precursor pollutants; (2) establish significant emission rates for direct $PM_{2.5}$ and precursor pollutants (including sulfur dioxide (SO_2) and nitrogen oxides (NOx)); (3) establish $PM_{2.5}$ emission offsets; (4) provide exceptions to PM_{10} grandfathering policy; and (5) require states to account for gases that condense to form particles (condensables) in $PM_{2.5}$ and PM_{10} emission limits in PSD or NNSR permits. Additionally, the NSR $PM_{2.5}$ Rule authorized states to adopt provisions in their NNSR rules that would allow interpollutant offset trading. Alabama's May 2, 2011, SIP revision addresses the PSD and NNSR requirements related to EPA's May 16, 2008, NSR $PM_{2.5}$ Rule. A few key issues described in greater detail below include the PM_{10} surrogate and grandfathering policy and the condensable provision.

1. PM_{10} Surrogate and Grandfathering Policy

After EPA promulgated the NAAQS for $PM_{2.5}$ in 1997, (62 FR 38652, July 18, 1997) the Agency issued a guidance document entitled "Interim Implementation of New Source Review Requirements for $PM_{2.5}$." John S. Seitz, EPA, October 23, 1997 (the "Seitz Memo"). The Seitz Memo was designed to help states implement NSR requirements pertaining to the new $PM_{2.5}$ NAAQS in light of technical difficulties posed by $PM_{2.5}$ at that time. Specifically, the Seitz Memo stated: "PM-10 may properly be used as a surrogate for PM-2.5 in meeting NSR requirements until these difficulties are resolved."

EPA also issued a guidance document entitled "Implementation of New Source Review Requirements in PM-2.5 Nonattainment Areas" (the "2005 $PM_{2.5}$ NNSR Guidance")) on April 5, 2005, the date that EPA's $PM_{2.5}$ nonattainment area designations became effective for the 1997 NAAQS. The 2005 $PM_{2.5}$ NNSR Guidance provided direction regarding implementation of the nonattainment major NSR provisions in $PM_{2.5}$ nonattainment areas in the interim period between the effective date of the $PM_{2.5}$ nonattainment area designations (April 5, 2005) and EPA's promulgation of final $PM_{2.5}$ NNSR regulations. Besides re-affirming the continuation of the PM_{10} Surrogate Policy for $PM_{2.5}$ attainment areas set forth in the Seitz Memo, the 2005 $PM_{2.5}$ NNSR Guidance recommended that until EPA promulgated the $PM_{2.5}$ major NSR regulations, "States should use a PM_{10} nonattainment major NSR program as a surrogate to address the requirements of nonattainment major NSR for the $PM_{2.5}$ NAAQS."

In the NSR $PM_{2.5}$ Rule, EPA required that major stationary sources seeking permits must begin directly satisfying the $PM_{2.5}$ requirements, as of the effective date of the rule, rather than relying on PM_{10} as a surrogate, with two exceptions. The first exception is the "grandfathering" provision in the federal PSD program at 40 CFR 52.21(i)(1)(xi). This grandfathering provision applied to sources that had applied for, but had not yet received, a final and effective PSD permit

before the July 15, 2008, effective date of the May 16, 2008, final rule. The second exception was that states with SIP-approved PSD programs could continue to implement the Seitz Memo's PM_{10} Surrogate Policy for up to three years (until May 2011) or until the individual revised state PSD programs for $PM_{2.5}$ are approved by EPA, whichever came first. For additional information on the NSR $PM_{2.5}$ Rule, see 73 FR 28321.[6]

On February 11, 2010, EPA proposed to repeal the grandfathering provision for $PM_{2.5}$ contained in the federal PSD program at 40 CFR 52.21(i)(1)(xi) and to end early the PM_{10} Surrogate Policy applicable in states that have a SIP-approved PSD program. *See* 75 FR 6827. In support of this proposal, EPA explained that the $PM_{2.5}$ implementation issues that led to the adoption of the PM_{10} Surrogate Policy in 1997 have been largely resolved to a degree sufficient for sources and permitting authorities to conduct meaningful permit-related $PM_{2.5}$ analyses.

On May 18, 2011 (76 FR 28646), EPA took final action to repeal the $PM_{2.5}$ grandfathering provision at 40 CFR 52.21(i)(1)(xi). This final action ended the use of the 1997 PM_{10} Surrogate Policy for PSD permits under the federal PSD program at 40 CFR 52.21. In effect, any PSD permit applicant previously covered by the grandfathering provision (for sources that completed and submitted a permit application before July 15, 2008)[7] that did not have a final and effective PSD permit before the effective date of the repeal would no longer be able to rely on the 1997 PM_{10} Surrogate Policy to satisfy the PSD requirements for $PM_{2.5}$ unless the application included a valid surrogacy demonstration. *See* 76 FR 28646.

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[6]Additional information on this issue can also be found in an August 12, 2009, final order on a title V petition describing the use of PM_{10} as a surrogate for $PM_{2.5}$. In the Matter of *Louisville Gas & Electric Company*, Petition No. IV-2008-3, Order on Petition (August 12, 2009).

[7] 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* 76 FR 28321.

Alabama's May 2, 2011, SIP revision did not adopt the grandfathering provision at 40 CFR 52.21(i)(1)(xi) in accordance with the repeal of the $PM_{2.5}$ grandfathering provision.

2. "Condensable" Provision

In the NSR $PM_{2.5}$ Rule, EPA revised the definition of "regulated NSR pollutant" for PSD to add a paragraph providing that "particulate matter (PM) emissions, $PM_{2.5}$ emissions and PM_{10} emissions" shall include gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures and that on or after January 1, 2011, such condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions limitations for PM, $PM_{2.5}$ and PM_{10} in permits. *See* 40 CFR 51.166(b)(49)(vi), 52.21(b)(50)(vi) and "Emissions Offset Interpretative Ruling" (40 CFR part 51, appendix S). A similar paragraph added to the NNSR rule does not include "particulate matter (PM) emissions." *See* 40 CFR 51.165(a)(1)(xxxvii)(D).

On March 16, 2012 (77 FR 15656), EPA proposed a rulemaking to amend the definition of "regulated NSR pollutant" promulgated in the NSR $PM_{2.5}$ Rule regarding the PM condensable provision at 40 CFR 51.166(b)(49)(vi), 52.21(b)(50)(i) and EPA's Emissions Offset Interpretative Ruling.[8] The rulemaking proposes to remove the inadvertent requirement in the NSR $PM_{2.5}$ Rule that the measurement of condensable "particulate matter emissions" be included as part of the measurement and regulation of "particulate matter emissions." The term "particulate matter emissions" includes particles that are larger than $PM_{2.5}$ and PM_{10} and is an indicator measured under various New Source Performance Standards (NSPS) (40 CFR part

[8] The comment period for this proposed rulemaking ended May 15, 2012.

60).[9] Alabama's May 2, 2011, SIP revision adopts EPA's definition for regulated NSR pollutant for condensables (at 40 CFR 51.166(b)(49)(vi)), including the term "particulate matter emissions," as promulgated in the NSR $PM_{2.5}$ Rule. EPA's review of Alabama's May 2, 2011, SIP revision with regard to the NSR $PM_{2.5}$ Rule condensable provision is provided below in Section II.E.

D. $PM_{2.5}$ PSD-Increment-SILs-SMC Rule.

As mentioned above, EPA finalized the $PM_{2.5}$ PSD Increment-SILs-SMC Rule to provide additional regulatory requirements under the PSD program regarding the implementation of the $PM_{2.5}$ NAAQS for NSR.[10] Specifically, the rule establishes the following to implement the $PM_{2.5}$ NAAQS for the PSD program: (1) $PM_{2.5}$ increments pursuant to section 166(a) of the CAA to prevent significant deterioration of air quality in areas meeting the NAAQS; (2) SILs used as a screening tool (by a major source subject to PSD) to evaluate the impact a proposed major source or modification may have on the NAAQS or PSD increment; and (3) a SMC, (also a screening tool) used by a major source subject to PSD to determine the subsequent level of data gathering required for a PSD permit application for emissions of $PM_{2.5}$.

Alabama's May 2, 2011, SIP revision adopts the NSR changes promulgated in the $PM_{2.5}$ PSD Increment-SILs-SMC Rule to be consistent with the federal NSR regulations and to implement the state's NSR program for the $PM_{2.5}$ NAAQS. More detail on the $PM_{2.5}$ PSD Increment-SILs-SMC Rule can be found in EPA's final rule (75 FR 64864, October 20, 2010)

[9] In addition to the NSPS for PM, it is noted that states regulated "particulate matter emissions" for many years in their SIPs for PM, and the same indicator has been used as a surrogate for determining compliance with certain standards contained in 40 CFR part 63, regarding National Emission Standards for Hazardous Air Pollutants.

[10] EPA proposed approval of the PSD Increments-SILs-SMC Rule on September 21, 2007 (72 FR 54112).

and is summarized below. More details regarding Alabama's revision to its NSR regulations are also summarized below in Section II.E.2.

1. What are PSD Increments?

As established in part C of title I of the CAA, EPA's PSD program protects public health from adverse effects of air pollution by ensuring that construction of new or modified sources in attainment or unclassifiable/attainment areas does not lead to significant deterioration of air quality while simultaneously ensuring that economic growth will occur in a manner consistent with preservation of clean air resources. Under section 165(a)(3) of the CAA, a PSD permit applicant must demonstrate that emissions from the proposed construction and operation of a facility "will not cause, or contribute to, air pollution in excess of any maximum allowable increase or allowable concentration for any pollutant." In other words, when a source applies for a permit to emit a regulated pollutant in an area that meets the NAAQS, the state and EPA must determine if emissions of the regulated pollutant from the source will cause significant deterioration in air quality. Significant deterioration occurs when the amount of the new pollution exceeds the applicable PSD increment, which is the "maximum allowable increase" of an air pollutant allowed to occur above the applicable baseline concentration[11] for that pollutant. PSD increments prevent air quality in clean areas from deteriorating to the level set by the

[11] Section 169(4) of the CAA provides that the baseline concentration of a pollutant for a particular baseline area is generally the same air quality at the time of the first application for a PSD permit in the area.

NAAQS. Therefore an increment is the mechanism used to estimate "significant deterioration" of air quality for a pollutant in an area.

For PSD baseline purposes, a baseline area for a particular pollutant emitted from a source includes the attainment or unclassifiable/attainment area in which the source is located as well as any other attainment or unclassifiable/attainment area in which the source's emissions of that pollutant are projected (by air quality modeling) to result in an ambient pollutant increase of at least 1 $\mu g/m^3$ (annual average). *See* 40 CFR 52.21(b)(15)(i). Under EPA's existing regulations, the establishment of a baseline area for any PSD increment results from the submission of the first complete PSD permit application and is based on the location of the proposed source and its emissions impact on the area. Once the baseline area is established, subsequent PSD sources locating in that area need to consider that a portion of the available increment may have already been consumed by previous emissions increases. In general, the submittal date of the first complete PSD permit application in a particular area is the operative "baseline date."[12] On or before the date of the first complete PSD application, emissions generally are considered to be part of the baseline concentration, except for certain emissions from major stationary sources. Most emissions increases that occur after the baseline date will be counted toward the amount of increment consumed. Similarly, emissions decreases after the baseline date restore or expand the amount of increment that is available. *See* 75 FR 64864. As described in the $PM_{2.5}$ PSD Increment-SILs-SMC Rule, pursuant to the authority under section

[12] Baseline dates are pollutant specific. That is, a complete PSD application establishes the baseline date only for those regulated NSR pollutants that are projected to be emitted in significant amounts (as defined in the regulations) by the applicant's new source or modification. Thus, an area may have different baseline dates for different pollutants.

166(a) of the CAA, EPA promulgated numerical increments for $PM_{2.5}$ as a new pollutant[13] for which the NAAQS were established after August 7, 1977,[14] and derived 24-hour and annual $PM_{2.5}$ increments for the three area classifications (Class I, II and III) using the "contingent safe harbor" approach. *See* 75 FR 64864 (October 20, 2010) and table at 40 CFR 51.166(c)(1).

In addition to PSD increments for the $PM_{2.5}$ NAAQS, the $PM_{2.5}$ PSD Increment-SILs-SMC Rule amended the definition at 40 CFR 51.166 and 52.21 for "major source baseline date" and "minor source baseline date" (including trigger dates) to establish the $PM_{2.5}$ NAAQS specific dates associated with the implementation of $PM_{2.5}$ PSD increments (75 FR 64864, October 20, 2010). In accordance with section 166(b) of the CAA, EPA required the states to submit revised implementation plans to EPA for approval (to adopt the $PM_{2.5}$ PSD increments) within 21 months from promulgation of the final rule (by July 20, 2012). Each state was responsible for determining how increment consumption and the setting of the minor source baseline date for $PM_{2.5}$ would occur under its own PSD program. Regardless of when a State begins to require $PM_{2.5}$ increment analysis and how it chooses to set the $PM_{2.5}$ minor source baseline date, the emissions from sources subject to PSD for $PM_{2.5}$ for which construction commenced after October 20, 2010, (major source baseline date) consume the $PM_{2.5}$ increment and should be included in the increment analyses occurring after the minor source baseline date is established for an area under the state's revised PSD program. As discussed in detail in Section II.E.2,

[13] EPA generally characterized the $PM_{2.5}$ NAAQS as a NAAQS for a new indicator of PM. EPA did not replace the PM_{10} NAAQs with the NAAQS for $PM_{2.5}$ when the $PM_{2.5}$ NAAQS were promulgated in 1997. EPA rather retained the annual and 24-hour NAAQS for $PM_{2.5}$ as if $PM_{2.5}$ was a new pollutant even though EPA had already developed air quality criteria for PM generally. *See* 75 FR 64864 (October 20, 2012).

[14] EPA interprets 166(a) to authorize EPA to promulgate pollutant-specific PSD regulations meeting the requirements of section 166(c) and 166(d) for any pollutant for which EPA promulgates a NAAQS after 1977.

Alabama's May 2, 2011, SIP revision adopts the $PM_{2.5}$ increment permitting requirements promulgated in the $PM_{2.5}$ PSD Increment-SILs-SMC Rule.

2. What are SILs and SMCs?

EPA's $PM_{2.5}$ PSD Increment-SILs-SMC Rule, also established SILs and SMC for the $PM_{2.5}$ NAAQS to address air quality modeling and monitoring provisions for fine particle pollution in areas protected by the PSD program (that is areas that are designated attainment or unclassifiable/attainment for the NAAQS). The SILs and SMC are numerical values that represent thresholds of insignificant, i.e., *de minimis*, modeled source impacts or monitored (ambient) concentrations, respectively. The *de minimis* principle is grounded in a decision described by the court case *Alabama Power Co.* v. *Costle,* 636 F.2d 323, 360 (D.C. Cir. 1980). In this case, reviewing EPA's 1978 PSD regulations, the court recognized that ''there is likely a basis for an implication of *de minimis* authority to provide exemption when the burdens of regulation yield a gain of trivial or no value." 636 F.2d at 360. *See* 75 FR 64864 (October 20, 2010). EPA established such values for $PM_{2.5}$ in the $PM_{2.5}$ PSD Increment-SILs-SMC rule to be used as screening tools by a major source subject to PSD to determine the subsequent level of analysis and data gathering required for a PSD permit application for emissions of $PM_{2.5}$. As part of the response to comments on October 20, 2010, final rulemaking, EPA explained that the agency agrees that the SILs and SMC used as *de minimis* thresholds for the various pollutants are useful tools that enable permitting authorities and PSD applicants to screen out "insignificant" activities; however, the fact remains that these values are not required by the Act as part of an approvable SIP program. EPA believes that most states are likely to adopt the SILs and SMC because of the useful purpose they serve regardless of our position that the values are not

mandatory. Alternatively, states may develop more stringent values if they desire to do so. In any case, states are not under any SIP-related deadline for revising their PSD programs to add these screening tools. *See* 75 FR 64864, 64900 (October 20, 2010). EPA is not proposing to approve the SILs provisions promulgated in the PSD portion of the $PM_{2.5}$ PSD Increment-SILs-SMC Rule into the Alabama SIP PSD program in this rulemaking. EPA's authority to implement the SILs and SMC for PSD purposes has been challenged by the Sierra Club. *See Sierra Club v. EPA*, Case No. 10-1413 (D.C. Circuit Court).[15] More details regarding Alabama's changes to its NSR regulations are also summarized below in Section II.E.

a. Significant Impact Levels.

SILs are numeric values derived by EPA that may be used to evaluate the impact a proposed major source or modification may have on the NAAQS or PSD increment. The primary purpose of the SILs is to identify a level of ambient impact that is sufficiently low relative to the NAAQS or increments that such impact can be considered insignificant or *de minimis*. EPA's policy has been to allow the use of the SILs as *de minimis* thresholds under the NSR programs at 40 CFR 51.165(b) and part 51, appendix S, to determine whether the predicted ambient impact resulting from the emissions increase at a proposed major new stationary source or modification is considered to cause or contribute to a violation of the NAAQS. EPA has also allowed the SILs under the PSD program to determine: (1) when a proposed source's ambient

[15] On April 6, 2012, EPA filed a brief with the D.C. Circuit court defending the Agency's authority to implement SILs and SMC for PSD purposes.

impacts warrants a comprehensive (cumulative) source impact analysis[16] and; (2) the size of the impact area within which the air quality analysis is completed (75 FR 64864, October 20, 2010).

In the $PM_{2.5}$ PSD Increment-SILs-SMC Rule, EPA established the SILs threshold which reflects the degree of ambient impact on $PM_{2.5}$ concentrations that can be considered *de minimis* and would justify no further analysis or modeling of the air quality impact of a source in combination with other sources in the area because the source would not cause or contribute to an exceedance of the $PM_{2.5}$ NAAQS or the $PM_{2.5}$ increments (75 FR 64864, October 20, 2010). The $PM_{2.5}$ PSD Increment-SILs-SMC Rule established SILs to evaluate the impact that a proposed new source or modification may have on the $PM_{2.5}$ NAAQS or increment. When a proposed major new source or major modification of $PM_{2.5}$ projects (using air quality modeling) has an impact less than the $PM_{2.5}$ SILs, the proposed construction or modification is considered to not have a significant air quality impact and would not need to complete a cumulative impact analysis involving an analysis of other sources in the area. Additionally, a source with a de minimis ambient impact would not be considered to cause or contribute to a violation of the $PM_{2.5}$ NAAQS or increments.

The October 20, 2010, rule established the $PM_{2.5}$ SILs at EPA's existing NNSR regulations at 51.165(b) and the PSD regulations at 40 CFR 51.166(k)(2), 52.21(k)(2) and part 51, appendix S as optional screening tools that became effective on December 20, 2010. Prior to the October 20, 2010, rule, the concept of a SIL was not previously incorporated into the PSD regulations. The regulations in 40 CFR 51.165(b)[17] establish the minimum requirements for

[16] A cumulative analysis is a modeling analysis used to show that the allowable emissions increase from the proposed source along with other emission increases from existing sources, will not result in a violation of either the NAAQS or increment.

[17] 40 CFR 51.165(b) require states to operate a preconstruction review permit program for major stationary sources

nonattainment NSR programs in SIPs but apply specifically to major stationary sources and major modifications located in attainment or unclassifiable/attainment areas. *See* 40 CFR 51.165(b). Where a PSD source located in such areas may have an impact on an adjacent nonattainment area, the PSD source must still demonstrate that it will not cause or contribute to a violation of the NAAQS in the adjacent area. Where emissions from a proposed PSD source or modification would have an ambient impact in a nonattainment area that would exceed the SILs, the source is considered to cause or contribute to a violation of the NAAQS and may not be issued a PSD permit without obtaining emissions reductions to compensate for its impact. *See* 40 CFR 51.165(b)(2)–(3). Alabama's May 2, 2011, SIP submittal addresses the $PM_{2.5}$ SILS thresholds and provisions promulgated in the October 20, 2010, rule at 40 CFR 51.165(b)(2) and 51.166(k)(2). Further analysis of Alabama's submission is explained below in Section II.E.2.

b. Significant Monitoring Concentrations.

Under the CAA and EPA regulations, an applicant for a PSD permit is required to gather preconstruction monitoring data in certain circumstances. Section 165(a)(7) calls for "such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any areas which may be affected by emissions from such source." In addition, section 165(e) requires an analysis of the air quality in areas affected by a proposed major facility or major modification and calls for gathering one year of monitoring data unless the reviewing authority determines that a complete and adequate analysis may be accomplished in a shorter period. These requirements are codified in EPA's PSD regulations at 40 CFR 51.166(m) and 40 CFR 52.21(m). In accordance with EPA's Guideline for Air Quality

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that wish to locate in an attainment or unclassifiable area but would cause or contribute to a violation of the NAAQS.

Modeling (40 CFR part 51, Appendix W), the preconstruction monitoring data is primarily used to determine background concentrations in modeling conducted to demonstrate that the proposed source or modification will not cause or contribute to a violation of the NAAQS. *See* 40 CFR part 51, Appendix W, section 9.2. SMC are numerical values that represent thresholds of insignificant, i.e., *de minimis*, monitored (ambient) impacts on pollutant concentrations. In EPA's $PM_{2.5}$ PSD Increment-SILs-SMC Rule, EPA established a SMC of 4 $\mu g/m^3$ for $PM_{2.5}$ to be used as a screening tool by a major source subject to PSD to determine the subsequent level of data gathering required for a PSD permit application for emissions of $PM_{2.5}$.

Using the SMC as a screening tool, sources may be able to demonstrate that the modeled air quality impact of emissions from the new source or modification, or the existing air quality level in the area where the source would construct, is less than the SMC, *i.e., de minimis,* and may be allowed to forego the preconstruction monitoring requirement for a particular pollutant at the discretion of the reviewing authority. *See* 75 FR 64864 (October 20, 2010) and 40 CFR 51.166(i)(5) and 52.21(i)(5). As mentioned above, SMCs are not minimum required elements of an approvable SIP under the CAA. This *de minimis* value is widely considered to be a useful component for implementing the PSD program, but is not absolutely necessary for the states to implement PSD programs. States can satisfy the statutory requirements for a PSD program by requiring each PSD applicant to submit air quality monitoring data for $PM_{2.5}$ without using *de minimis* thresholds to exempt certain sources from such requirements. The SMC became effective under the Federal PSD program on December 20, 2010. However, states with EPA-approved PSD programs that adopt the SMC for $PM_{2.5}$ may use the SMC, once it is part of an approved SIP, to determine when it may be appropriate to exempt a particular major stationary source or major modification from the monitoring requirements under its State PSD program.

Alabama's May 2, 2011, SIP revision adopts the SMC threshold into the Alabama SIP. More detail on Alabama's SIP is discussed below in Section II.E.2

c. SILs-SMC Litigation

Recently, the Sierra Club filed suit challenging EPA's authority to promulgate the $PM_{2.5}$ SILs and SMC for PSD purposes as promulgated in the $PM_{2.5}$ PSD Increment-SILs-SMC Rule. *Sierra Club v. EPA*, Case No. 10-1413 (D.C. Circuit Court). Specifically, Sierra Club claims that the SILs and SMC screening tools adopted in the October 20, 2010, rule are inconsistent with the CAA and EPA's *de minimis* authority. [18] *See Sierra Club v. EPA*, Case No. 10-1413 (D.C. Circuit). EPA responded to Sierra Club's claims in a Brief dated April 6, 2012, which described the Agency's authority to develop and promulgate SILs and SMC.[19] A copy of EPA's April 6, 2012, Brief can be found in the docket for today's rulemaking at www.regulations.gov using docket ID: EPA-R04-OAR-2012-0079.

E. What is EPA's Analysis of Alabama's SIP Revision Adopting NSR $PM_{2.5}$ Implementation Provisions?

Alabama currently has a SIP-approved NSR program for new and modified stationary sources found at Chapter 335-3-14. ADEM's PSD preconstruction regulations are found at Rule

[18] EPA interprets section 165(a)(3) of the CAA to allow the use of significance levels as a means to demonstrate that a source will not cause or contribute to any violation of the NAAQS or increments. The terms "cause or contribute to" and "demonstrate" are ambiguous and EPA reasonably interprets the statue to allow sources that do not contribute significantly to ambient air concentrations of $PM_{2.5}$ to demonstrate compliance through modeling of the source's impact measured against the SILs.

[19] Additional information on this issue can also be found in an April 25, 2010, comment letter from EPA Region 6 to the Louisiana Department of Environmental Quality regarding the SILs-SMC litigation. A copy of this letter can be found in the docket for today's rulemaking at www.regulations.gov using docket ID: EPA-R04-OAR-2012-0079.

335-3-14-.04 – *Air Permits Authorizing Construction in Clean Air Areas (Prevention of Significant Deterioration (PSD)*) and apply to major stationary sources or modifications constructed in areas designated attainment or unclassifiable/attainment as required under part C of title I of the CAA with respect to the NAAQS.[20] Additionally, rule 335-3-14-.03 establishes general standards for granting permits in the state. ADEM's May 2, 2011, changes to Chapter 335-3-14 were submitted to adopt into the State's NSR permitting program PSD provisions promulgated in the NSR $PM_{2.5}$ Rule and the $PM_{2.5}$ PSD Increment-SILs-SMC rule. These changes to Alabama's regulations became state effective on May 23, 2011. EPA is proposing to approve the changes at rule 335-3-14-.03 and .04 into the Alabama SIP to be consistent with federal NSR regulations (at 40 CFR 51.166 and 52.21) and the CAA. As mentioned earlier, EPA anticipates taking action on the May 2, 2011, SIP revision NNSR amendments in a separate rulemaking.

1. NSR $PM_{2.5}$ Implementation Rule

Alabama's May 2, 2011, SIP revision establishes that the State's existing NSR permitting program requirements for PSD apply to the $PM_{2.5}$ NAAQS and its precursors. Specifically, the SIP revision adopts the following NSR $PM_{2.5}$ Rule PSD provisions into the Alabama SIP: (1) the requirement for NSR permits to address directly emitted $PM_{2.5}$ and precursor pollutants; (2) significant emission rates for direct $PM_{2.5}$ and precursor pollutants (SO_2 and NO_x) and (3) the requirement that conde dinsable PM be addressed in enforceable PM_{10} and $PM_{2.5}$ emission limits

[20] ADEM's Rule 335-3-14-.05 – *Air Permits Authorizing Construction in or Near Non-Attainment Areas* applies to major stationary sources or modifications constructed in areas designated nonattainment as required under part D of title I of the CAA with respect to the NAAQS. However, in today's rulemaking, EPA is only proposing to take action on the PSD provision and will take action on the NNSR changes in a separate action.

included in PSD permits. The May 2, 2011, SIP revision changes 1) establish that the State's NSR permitting program requirements for PSD apply to the $PM_{2.5}$ NAAQS and its precursors; 2) recognize $PM_{2.5}$ precursors at 335-3-14-.04(2)(b) and 335-3-14-.04(2)(w) (as amended at 40 CFR 51.166(b)(23)(i)); 3) sets significant emission rates for both direct $PM_{2.5}$ and $PM_{2.5}$ precursors for major modifications at existing sources at 335-3-14-.04(2)(w) (as amended at 51.166(b)(23)(i)); and 4) adopt the requirement that condensable PM_{10} and $PM_{2.5}$ emissions be accounted for in PSD applicability determinations and in establishing emissions limitations for PM at 353-14-.04(2)(ww)(5) (as amended at 40 CFR 51.166(b)(49)).

As mentioned above, Alabama's May 2, 2011, SIP revision also adopts into the State's NSR regulations the requirement to address condensable PM in making applicability determinations and in establishing enforceable emission limits in PSD permits, as required under the NSR $PM_{2.5}$ Rule. As discussed in Section II.C.2, under a separate action, EPA has proposed to correct the inadvertent inclusion of "particulate matter emissions" in the definition of "regulated NSR pollutant" as an indicator for which condensable emissions must be addressed *(*77 FR 75656, March 16, 2012). Further, on June 18, 2012, the State of Alabama provided a letter to EPA clarifying the State's intent in light of EPA's March 16, 2012, proposed rulemaking. A copy of this letter can be found in the docket for today's rulemaking at www.regulations.gov using docket ID: EPA-R04-OAR-2012-0079. Specifically, Alabama requested that EPA not approve the term "particulate matter emissions" (at rule 335-3-14-.04(ww)(5) and.05(ww)(2)) as part of the definition for "regulated NSR pollutant" regarding the inclusion of condensable emissions in applicability determinations and in establishing emissions limitations for PM. Therefore, given the State's request and EPA's intention to amend the definition of "regulated NSR pollutant," EPA is not proposing action to approve the terminology

"particulate matter emissions" into the PSD regulations of the Alabama SIP for the condensable provision in the definition of "regulated NSR pollutant." EPA is, however, proposing to approve into the Alabama SIP at 335-3-14-.04(ww)(5) the remaining condensable requirement at 40 CFR 51.166(b)(49)(vi), which requires that condensable emissions be accounted for in applicability determinations and in establishing emissions limitations for $PM_{2.5}$ and PM_{10}. Alabama's condensable provision will be consistent with the federal rule once EPA finalizes the March 16, 2012, rulemaking. EPA's May 18, 2011 (76 FR 28646), final rulemaking repealed the PM_{10} "grandfathering" provision, as noted in Section II.C above. Alabama's May 2, 2011, SIP revision does not address 40 CFR 52.21(i)(1)(ix) promulgated in the NSR $PM_{2.5}$ Rule and is in accordance with the repeal of the $PM_{2.5}$ grandfathering provision. EPA has preliminarily determined that Alabama's May 2, 2011, SIP revision is consistent with the NSR $PM_{2.5}$ Rule for PSD and section 110 of the CAA. *See* 73 FR 28321 (May 16, 2008).

2. $PM_{2.5}$ PSD Increment-SILs-SMC Rule Provisions.

Alabama's May 2, 2011, SIP revision adopts, into the Alabama SIP, at Chapter 335-3-14 the following PSD provisions promulgated in the $PM_{2.5}$ PSD Increment-SILs-SMC Rule: (1) PSD increments for $PM_{2.5}$ annual and 24-hour NAAQS pursuant to section 166(a) of the CAA; (2) SILs to be used as a screening tool to evaluate the impact a proposed major source or modification may have on the NAAQS or PSD increment; and (3) SMC, also used as a screening tool, to determine the level of data gathering required of a major source in support of its PSD permit application for $PM_{2.5}$ emissions.

Specifically, regarding the PSD increments, the SIP revision changes include: 1) the $PM_{2.5}$ increments as promulgated in at 40 CFR 51.166(c)(1) and (p)(4) (for Class I Variances)

and 2) amendments to the terms "major source baseline date" (at 40 CFR 51.166(b)(14)(i)(c)) and 52.21(b)(14)(i)(c)), "minor source baseline date"(including establishment of the "trigger date") and "baseline area" (as amended at 51.166(b)(15)(i) and (ii) and 52.21(b)(15)(i)). These changes provide for the implementation of the $PM_{2.5}$ PSD increments for the $PM_{2.5}$ NAAQS in the state's PSD program. In today's action, EPA is proposing to approve Alabama's May 2, 2011, SIP revision provisions to address the $PM_{2.5}$ PSD increment provisions promulgated in the $PM_{2.5}$ PSD Increments SILs-SMC Rule.

Regarding the SILs and SMC established in the October 20, 2010, $PM_{2.5}$ PSD Increment-SILs-SMC Rule, the Sierra Club has challenged EPA's authority to implement SILs and SMC. In a brief filed in the D.C. Circuit on April 6, 2012, EPA described the Agency's authority under the CAA to promulgate and implement the SMC and SILs *de minimis* thresholds. With respect to the SMCs, Alabama's SIP revision includes the SMC of 4 $\mu g/m^3$ for $PM_{2.5}$ NAAQS at rule 335-3-14.04(8)(h) that was added to the existing monitoring exemption at 40 CFR 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c). EPA is proposing to approve the $PM_{2.5}$ SMC into the Alabama SIP as EPA believes the use of the SMC is a valid exercise of the Agency's *de minimis* authority. Furthermore, Alabama's May 2, 2011, SIP revision is consistent with EPA's current promulgated provisions in the October 20, 2010, rule. However, EPA notes that future Court action may require subsequent rule revisions and SIP revisions from Alabama.

Alabama's SIP revision to adopt the new PSD requirements for $PM_{2.5}$ pursuant to the $PM_{2.5}$ PSD Increment-SILs-SMC Rule also includes the new regulatory text at 40 CFR 51.166(k)(2) and 52.21(k)(2), concerning the implementation of SILs for $PM_{2.5}$. EPA stated in the preamble to the $PM_{2.5}$ PSD Increment-SILs-SMC Rule that we do not consider the SILs to be a mandatory SIP element, but regard them as discretionary on the part of regulating authority for

use in the PSD permitting process. Nevertheless, as mentioned above, the $PM_{2.5}$ SILs are currently the subject of litigation before the U.S. Court of Appeals. (*Sierra Club v. EPA*, Case No 10-1413, D.C. Circuit). In response to that litigation, EPA has requested that the Court remand and vacate the regulatory text in the EPA's PSD regulations at paragraph (k)(2) so that EPA can make necessary rulemaking revisions to that text. In light of EPA's request for remand and vacatur and the agency's acknowledgement of the need to revise the regulatory text presently contained at paragraph (k)(2) of sections 51.166 and 52.21, EPA does not believe that it is appropriate at this time to approve that portion of the State's implementation plan revision that contains the affected regulatory text in the State's PSD regulations, at rule 335-3-14-04(10)(b). Instead, EPA is taking no action at this time with regard to these specific provisions contained in the SIP revision. EPA anticipates taking action on the SILs portion of Alabama's May 2, 2011, SIP revision in a separate rulemaking once the issue regarding the court case has been resolved.

The $PM_{2.5}$ PSD Increment-SILs-SMC rule promulgated $PM_{2.5}$ SILs thresholds in the NNSR regulations at 40 CFR 51.165(b)(2). Alabama's May 2, 2011 submission also adopts the $PM_{2.5}$ SILs thresholds in their general permits provisions at rule 335-3-14-.03(1)(g)[21] to be consistent with amendments to 40 CFR 51.165(b) in the $PM_{2.5}$ PSD Increment-SILs-SMC Rule. In light of the fact that EPA did not request the court to remand and vacate language at 51.165(b) and the agency has explained its authority to develop and promulgate SILs in the brief filed with the D.C. Circuit Court concerning the litigation, EPA is proposing to approve Alabama's adoption of the $PM_{2.5}$ SILs thresholds at 335-3-14-.03(1)(g). EPA notes, however, that the SILs-SMC litigation is ongoing and therefore future Court action may require subsequent rule revisions and SIP submittals from the State of Alabama.

[21] The provisions at 335-3-14-.03(1)(g) are consistent with SILs provisions at 40 CFR 51.165(b).

The aforementioned amendments to Alabama's SIP provide the framework for implementation of $PM_{2.5}$ NAAQS in the states NSR permitting. Based on review and consideration of Alabama's May 2, 2011, SIP revision, EPA has made the preliminary determination to approve the aforementioned PSD permitting provisions promulgated in the NSR $PM_{2.5}$ Rule and $PM_{2.5}$ PSD Increment-SILs-SMC Rule into the Alabama SIP to implement the NSR program for the $PM_{2.5}$ NAAQS.

III. What is EPA's Proposed Action for Changes to Alabama's General and Transportation Conformity Regulations?

In addition to the adoption of NSR federal regulations mentioned above, Alabama's SIP revision updates the State's General Conformity regulations at Chapter 335-3-17 - *Conformity of Federal Actions to State Implementation Plans* to be consistent with recent updates to federal General Conformity regulations promulgated on April 5, 2010 (75 FR 17254). Alabama's Conformity regulations at 335-3-17 include Transportation Conformity rules at 335-3-17.01 and General Conformity rules at 335-3-17.02. Pursuant to section 176(c) of the CAA, General Conformity ensures that federal actions comply with the NAAQS. In order to meet this CAA requirement, a federal agency must demonstrate that every action that it undertakes, approves, permits or supports will conform to the appropriate State, Tribal or Federal Implementation Plan.[22] Alabama IBR the federal General Conformity regulations at 40 CFR 93, Subpart B. Particularly, Alabama's May 2, 2011, SIP submission updates the IBR date at 335-3-17.02 to

[22] In November 1993, EPA promulgated two sets of regulations to implement section 176(c). First, on November 24, EPA promulgated the Transportation Conformity Regulations (applicable to highways and mass transit) to establish the criteria and procedures for determining that transportation plans, programs, and projects which are funded under title 23 U.S. C. or the Federal Transit Act conform with the SIP. *See* 58 FR 62188. On November 30, 1993, EPA promulgated regulations, known as the General Conformity Regulations (applicable to everything else), to ensure that other federal actions also conformed to the SIPs. *See* 58 FR 63214).

July 1, 2010, to be consistent with federal General Conformity rules (as promulgated on April 5, 2010) and updates its Transportation Conformity SIP at 335-3-17-.01 effective May 23, 2011, to include EPA's transportation conformity rule updates regarding implementation of the $PM_{2.5}$ and PM_{10} nonattainment and maintenance areas. EPA has preliminarily determined that Alabama's May 2, 2011, updates to Alabama's general and transportation Conformity regulations are consistent with CAA and EPA's regulations governing conformity.

IV. Proposed Action

EPA is proposing to approve portions of Alabama's May 2, 2011, SIP revision adopting federal regulations amended in the May 16, 2008, NSR $PM_{2.5}$ Rule; the October 20, 2010, $PM_{2.5}$ PSD Increment-SILs-SMC rule; and updates to the State's general and transportation conformity regulations into the Alabama SIP with the exception of the provisions listed in Section I. EPA has made the preliminary determination that this SIP revision, with regard to aforementioned proposed actions, is approvable because it is consistent with section 110 of the CAA and EPA regulations regarding NSR permitting and conformity.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Particulate matter, Reporting and recordkeeping requirements.

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

Dated: July 20, 2012

A. Stanley Meiburg,

Acting Regional Administrator,

Region 4.

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