



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2012-0079; FRL-9731-5]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action 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 May 2, 2011, SIP revision modifies Alabama's New Source Review (NSR), Prevention of Significant Deterioration (PSD), and Nonattainment New Source Review (NNSR) programs to adopt into the Alabama SIP federal NSR PSD requirements for the fine particulate matter (PM_{2.5}) national ambient air quality standards (NAAQS) as promulgated in EPA's 2008 NSR PM_{2.5} Implementation Rule and the 2010 PM_{2.5} PSD Increment, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC) Rule. The SIP revision also changes the State's general and transportation conformity regulations. EPA is approving portions of Alabama's May 2, 2011, SIP revision because they are consistent with the Clean Air Act (CAA or Act) and EPA regulations regarding NSR permitting. EPA received one off-topic comment on the August 6, 2012, proposed rulemaking, and a brief response is provided below.

EFFECTIVE DATE: This rule will be effective [insert 30 days after date of publication in the Federal Register].

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2012-0079. All documents in the docket are listed on the www.regulations.gov web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov 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 Florida 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. Ms. Bradley's telephone number is (404) 562-9352; e-mail address: bradley.twunjala@epa.gov. For information regarding NSR, contact

Ms. Yolanda Adams, Air Permits Section, at the same address above. Ms. Adams' telephone number is (404) 562-9214; e-mail address: adams.yolanda@epa.gov. For information regarding the PM_{2.5} NAAQS, contact Mr. Joel Huey, Regulatory Development Section, at the same address above. Mr. Huey's telephone number is (404) 562-9104; e-mail address: huey.joel@epa.gov.

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I. Background

EPA is taking final action to approve portions of Alabama's May 2, 2011, SIP revision to adopt federal NSR permitting requirements and federal general and transportation conformity regulations into the SIP. Alabama's May 2, 2011, SIP revision includes 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*. These changes adopt federal PSD permitting regulations promulgated in the final rulemakings entitled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers (PM_{2.5})," 73 FR 28321 (May 16, 2008), hereafter referred to as the "NSR PM_{2.5} Rule" and "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),” 75 FR 64864 (October 20, 2010), hereafter referred to as the “PM_{2.5} PSD Increment-SILs-SMC Rule.” Additionally, the SIP revision changes the State’s general and transportation conformity regulations which incorporate by reference (IBR)¹ the federal conformity updates.

EPA is not approving in this action: (1) NNSR changes amended at rule 335-3-14-.05;² (2) SIL thresholds and provisions promulgated in EPA’s PM_{2.5} PSD Increment-SILs-SMC Rule, 75 FR 64864 (October 20, 2010);³ 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.

On August 6, 2012, EPA published a proposed rulemaking to approve the aforementioned changes to Alabama’s SIP. *See* 77 FR 46664. Comments on the proposed rulemaking were due on or before September 7, 2012, and EPA received one off-topic comment. Although EPA has no obligation to respond to such comments, a brief response is provided in section III of this notice.

¹ In this document IBR means incorporate or incorporates by reference.

² 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.

³ 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).

Pursuant to section 110 of the CAA, EPA is now taking final action to approve the changes to Alabama's SIP as provided in EPA's August 6, 2012, proposed rulemaking. A summary of the background for today's final action is provided below. EPA's August 6, 2012, proposed rulemaking contains more detailed information regarding the Alabama SIP revision being approved today and the rationale for today's final action. Detailed information regarding the PM_{2.5} NAAQS and NSR Program can also be found in EPA's August 6, 2012, proposed rulemaking as well as the abovementioned final rulemakings.

A. NSR PM_{2.5} Rule

On May 16, 2008, EPA finalized the NSR PM_{2.5} Rule, which revised the NSR program requirements to establish the framework for implementing preconstruction permit review for the PM_{2.5} NAAQS in both attainment areas and nonattainment areas (NAA) that: (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 (SO₂) and nitrogen oxides (NO_x)); (3) establish PM_{2.5} emission offsets; (4) provide exceptions to the grandfathering policy for permits being reviewed under the PM₁₀ surrogate program; and (5) require states to account for gases that condense to form particles (condensables) in PM_{2.5} and PM₁₀ emission limits in PSD NNSR permits. Additionally, the NSR PM_{2.5} Rule authorized states to adopt provisions in their NNSR rules that would allow interpollutant offset trading. *See* 73 FR 28321. States were required to provide SIP submissions to address the requirements for the NSR PM_{2.5} Rule by May 16, 2011. Alabama's May 2, 2011, SIP revision addresses both the PSD and

NNSR requirements related to EPA's May 16, 2008, NSR PM_{2.5} Rule. However, EPA is only taking final action on the PSD portion of the State's May 2, 2011, SIP revision.

1. PM₁₀ Surrogate and Grandfathering Policy

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 PM₁₀ as a surrogate, with two exceptions.⁴ The first exception is a “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 2008 final rule. The second exception was that states with SIP-approved PSD programs could continue to implement the Seitz Memo's PM₁₀ 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 comes first. On May 18, 2011 (76 FR 28646), EPA took final action to repeal the grandfathering provision at 40 CFR 52.21(i)(1)(xi). This final action ended the use of the 1997 PM₁₀ 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

⁴ After EPA promulgated the NAAQS for PM_{2.5} in 1997, the Agency issued guidance documents related to using PM₁₀ as a surrogate for PM_{2.5} entitled: “Interim Implementation of New Source Review Requirements for PM_{2.5},” John S. Seitz, EPA, October 23, 1997 (the “Seitz Memo”) and “Implementation of New Source Review Requirements in PM-2.5 Nonattainment Areas” (the “2005 PM_{2.5} NNSR Guidance”). 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. The 2005 PM_{2.5} NNSR Guidance provided direction regarding implementation of the NNSR provisions in PM_{2.5} NAA in the interim period between the effective date of the PM_{2.5} NAA designations (April 5, 2005) and EPA's promulgation of final PM_{2.5} NNSR regulations (this included recommending that until EPA promulgated the PM_{2.5} major NSR regulations, “States should use a PM₁₀ nonattainment major NSR program as a surrogate to address the requirements of nonattainment major NSR for the PM_{2.5} NAAQS.”).

before July 15, 2008)⁵ that did not have a final and effective PSD permit before the effective date of the repeal will not be able to rely on the 1997 PM₁₀ Surrogate Policy to satisfy the PSD requirements for PM_{2.5} unless the application includes a valid surrogacy demonstration.⁶ See 76 FR 28646. In its May 2, 2011, SIP revision, Alabama did not adopt the grandfathering provision at 40 CFR 52.21(i)(1)(xi) into its PSD regulations. Therefore, Alabama's SIP is consistent with current federal regulations regarding the repeal of the 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 PM₁₀ 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 PM₁₀ in permits issued. See 40 CFR 51.166(b)(49)(vi), 52.21(b)(50)(vi) and “Emissions Offset Interpretative Ruling” (40 CFR Part 51, Appendix S). On March 16, 2012, 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. See

⁵ 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 PM₁₀ Surrogate Policy as a means of satisfying the PSD requirements for PM_{2.5}. See 76 FR 28321.

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 PM₁₀ 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).

77 FR 15656. 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.”⁷ 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 and requesting that EPA not approve into the Alabama SIP the term “particulate matter emissions” (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.

B. PM_{2.5} PSD Increment SILs-SMC Rule

The PM_{2.5} PSD Increment-SILs-SMC Rule provided additional regulatory requirements under the PSD program regarding the implementation of the PM_{2.5} NAAQS for NSR including: (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 PM_{2.5} data gathering required for a PSD permit application. The SILs and SMC are numerical values that represent thresholds of

⁷ The term “particulate matter emissions” includes particles that are larger than PM_{2.5} and PM₁₀ and is an indicator measured under various New Source Performance Standards (NSPS) at 40 CFR part 60. In addition to the NSPS for PM, it is noted that states have 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.

insignificant, i.e., *de minimis*,⁸ modeled source impacts or monitored (ambient) concentrations, respectively. EPA established such values 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}. 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 (D.C. Circuit Court).⁹

1. PSD Increments

PSD increments prevent air quality in clean areas from deteriorating to the level set by the NAAQS. Therefore, an increment is the mechanism used to estimate “significant deterioration”¹⁰ of air quality for a pollutant in an area. 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.” When a source applies for a permit to emit a regulated pollutant in an area that meets the NAAQS, the state and EPA must

⁸ 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.

⁹ 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.

¹⁰ 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 for that pollutant. Section 169(4) of the CAA provides that the baseline concentration of a pollutant for a particular baseline area is generally the air quality at the time of the first application for a PSD permit in the area.

determine if emissions of the regulated pollutant from the source will cause significant deterioration in air quality. As described in the PM_{2.5} PSD Increment-SILs-SMC Rule, pursuant to the authority under section 166(a) of the CAA, EPA promulgated numerical PSD increments for PM_{2.5} as a new pollutant¹¹ for which NAAQS were established after August 7, 1977,¹² 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 64869 and the ambient air increment tables at 40 CFR 51.166(c)(1) and 52.21(c). 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 date) to establish the PM_{2.5} NAAQS specific dates associated with the implementation of PM_{2.5} PSD increments. See 75 FR 64864.

2. Significant Impact Levels

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

¹¹ EPA generally characterized the PM_{2.5} NAAQS as a NAAQS for a new indicator of PM. EPA did not replace the PM₁₀ 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).

¹² 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.

new stationary source or modification is considered to cause or contribute to a violation of the NAAQS.¹³

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. *See* 75 FR 64864. When a proposed major new source or major modification projects (using air quality modeling) a PM_{2.5} 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 in EPA's existing NNSR regulations at 51.165(b)¹⁴ 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

¹³ EPA has also allowed the SILs under the PSD program to determine: (1) when a proposed source's ambient impacts warrants a comprehensive (cumulative) source impact analysis and; (2) the size of the impact area within which the air quality analysis is completed. *See* 75 FR 64864. 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.

¹⁴ 40 CFR 51.165(b) require states to operate a preconstruction review permit program for major stationary sources that wish to locate in an attainment or unclassifiable area but would cause or contribute to a violation of the NAAQS. The regulations in 40 CFR 51.165(b) establish the minimum requirements for 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).

to the October 20, 2010, rule, the concept of a SIL was not previously incorporated into the PSD regulations. 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).

3. Significant Monitoring Concentrations

As mentioned above, the SMC numerical value represents a threshold of insignificant (i.e., *de minimis*) monitored ambient impacts on pollutant concentrations. In the PM_{2.5} PSD Increment-SILs-SMC Rule, EPA established a PM_{2.5} SMC of 4 µg/m³ to be used as a screening tool by a major source subject to PSD to determine the subsequent level of PM_{2.5} data gathering required for a PSD permit application. 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 as such, may be allowed to forego the preconstruction monitoring requirement for a particular pollutant at the discretion of the reviewing authority.

Recently, the Sierra Club filed suit challenging EPA's authority to implement the PM_{2.5} SILs¹⁵ as well as the SMC for PSD purposes as promulgated in the October 20, 2012, rule. *Sierra Club v. EPA*, Case No 10-1413, D.C. Circuit Court. Specifically, regarding the SMC, Sierra Club claims that the use of SMCs to exempt a source from submitting a year's worth of monitoring data is inconsistent with the CAA. EPA responded to Sierra Club's claims in a Brief dated April 6, 2012, which describes the Agency's authority to develop and promulgate SMC.¹⁶ A copy of EPA's April 6, 2010, Brief can be found in the docket for today's final rulemaking at www.regulations.gov using docket ID: EPA-R04-OAR-2012-0079.

C. General and Transportation Conformity

In addition to the adoption of NSR federal regulations mentioned above, Alabama's SIP revision updates the State's General and Transportation Conformity regulations¹⁷ at Chapter 335-3-17 - *Conformity of Federal Actions to State Implementation Plans*. Alabama's Conformity regulations at 335-3-17 include Transportation Conformity rules at 335-3-17.01 and General

¹⁵ As mentioned earlier, due to litigation by the Sierra Club, EPA is not taking final action on the SILs portion of the Alabama's May 2, 2011, SIP revision at this time but will take action once the court case regarding SILs implementation is resolved.

¹⁶ 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.

¹⁷ 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 62314. 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.

Conformity rules at 335-3-17.02. The May 2, 2011, SIP revision updates Alabama conformity regulations at Chapter 335-3-17 to be consistent with recent updates to federal General Conformity¹⁸ regulations promulgated on April 5, 2010 (*See* 75 FR 17254) and transportation conformity regulations regarding implementation of the PM_{2.5} and PM₁₀ nonattainment and maintenance areas.

II. This Action

As was noted previously, EPA proposed approval of portions of Alabama's May 2, 2011, SIP revision on August 6, 2012, and EPA received one off-topic comment. Although EPA is not obligated to respond to off-topic comments, EPA is nonetheless providing a brief response below. The complete comment is available in the docket for this rulemaking action, but a summary of the comment is as follows. The Commenter states that s/he "would like to see the science research they put into this" and suggested that, "an independent review board to look into this with an unbiased opinion." As was explained in the detailed August 6, 2012, proposed rulemaking and supporting docketed information, EPA is obligated to take action on Alabama's May 2, 2011, SIP revision. The technical and legal basis for today's action was explained in the August 6, 2012, rulemaking, summarized in this final action, and further supported by the additional information provided in the docket for today's rulemaking action. Nothing in the CAA mandates that an independent review board look into today's SIP action. Notably, the

¹⁸Alabama IBR the federal General Conformity regulations at 40 CFR 93, Subpart B.

comment raises nothing substantively on-point regarding this rulemaking action; but rather, makes broad generalizations that do not appear relevant to today's action.

EPA is now taking final action to approve into the Alabama SIP portions of the State's May 2, 2011, SIP revision to adopt the PSD permitting regulations to implement the PM_{2.5} NAAQS, including the NSR PM_{2.5} and PM_{2.5} Increment-SILs-SMC Rules and changes to the State's General and Transportation Conformity regulations as proposed on August 6, 2012. *See* 77 FR 46664. ADEM's PSD preconstruction regulations are found at rule 335-3-14-.04 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. 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. ADEM's SIP revision adopts the NSR PM_{2.5} Rule PSD provisions, including: (1) the requirement for NSR permits to address directly emitted PM_{2.5} and precursor pollutants; (2) the amendment establishing significant emission rates for direct PM_{2.5} and precursor pollutants (SO₂ and NO_x) (at 335-3-14-.04(2)(w)) and recognizing 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); and (3) the PSD requirement for states to address condensable PM in establishing enforceable emission limits for PM₁₀ and PM_{2.5} (at 353-14-.04(2)(ww)(5)) as amended at 40 CFR 51.166(b)(49). Additionally, 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. As

mentioned earlier, EPA anticipates taking action on the May 2, 2011, SIP revision NNSR amendments in a separate rulemaking. Regarding the condensable provision, in light of Alabama's request in its June 18, 2012, letter and EPA's intention to amend the definition of "regulated NSR pollutant" as discussed in the March 16, 2012, correction rulemaking, EPA is not taking final action to approve the terminology "particulate matter emissions" into the Alabama SIP (at 353-14-.04(2)(ww)(5)) for the condensable provision in the definition of "*regulated NSR pollutant*." See 77 FR 15656. EPA is, however, taking final action to approve into the Alabama SIP 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 PM₁₀.

With respect to the PM_{2.5} PSD Increment-SILs SMC Rule, EPA is taking final action to also approve into the Alabama SIP the PSD increments for the PM_{2.5} annual and 24-hour NAAQS pursuant to section 166(a) of the CAA and the SMC of 4 µg/m³ for the PM_{2.5} NAAQS. The May 2, 2011, SIP revision includes: (1) the PM_{2.5} increments as promulgated 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 353-14-.04(2)(m)) as amended 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") (at 353-14-.04(2)(n)1), and "*baseline area*" (at 353-14-.04(2)(o)) as amended at 51.166(b)(15)(i) and (ii) and 52.21(b)(15)(i).

Regarding the SILs and SMC, EPA's authority to implement the PM_{2.5} SILs and SMC is currently the subject of litigation by the Sierra Club. 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

SMCs and SILs *de minimis* thresholds. *Sierra Club v. EPA*, Case No 10-1413 D.C. Circuit.

However, EPA is finalizing approval of the promulgated SMC thresholds into the Alabama SIP (at rule 335-3-14.04(8)(h)) because the Agency believes the SMC is a valid exercise of the Agency's *de minimis* authority as well as the fact they are consistent with EPA's promulgated levels in the PM_{2.5} PSD Increment-SILs-SMC Rule. The ongoing litigation may result in the court decision that may require subsequent rule revisions and SIP revisions from Alabama

In response to the litigation, EPA requested that the court remand and vacate 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} so that EPA can make necessary rulemaking revisions to that text.¹⁹ In light of EPA's request for remand and vacatur and our acknowledgement of the need to revise the regulatory text presently contained at paragraph (k)(2) of sections 51.166 and 52.21, the Agency has determined at this time not to approve the SILs portion of ADEM's May 2, 2011, SIP revision that contains the affected regulatory text in Alabama's PSD regulations at rule at rule 335-3-14-04(10)(b). EPA will take 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.²⁰ 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

¹⁹ In the preamble to the October 20, 2010, final rule EPA indicates that the Agency does 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. See 75 FR 64864 at 64899.

²⁰ EPA is currently developing guidance to provide a provisional course of action to implement the PM_{2.5} SILs pending revision to implementing (k)(2) provisions and the litigation. The guidance will ensure that the PM_{2.5} SILs are properly applied as part of a PSD compliance demonstration to show that a source's impact will not cause or contribute to a violation of the PM_{2.5} NAAQS or increment.

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 facts that EPA did not request the court to remand and vacate language at 51.165(b) and that 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 taking final action 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.

Finally, EPA is taking final action to approve Alabama's changes to the State's General and Transportation conformity regulations to be consistent with federal regulations. These changes include updating the IBR date at 335-3-17.02 to July 1, 2010, to be consistent with federal General Conformity rules (as promulgated on April 5, 2010) and to update the 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 PM₁₀ nonattainment and maintenance areas.

III. Final Action

EPA is taking final action to approve portions of Alabama's May 2, 2011, SIP revisions (with the exception of the term "particulate matter emissions," the NNSR revisions and the SILs threshold and provisions) adopting federal regulations amended in the NSR PM_{2.5} and the PM_{2.5}

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

PSD Increment-SILs-SMC Rules to implement the PM_{2.5} NAAQS for the NSR program because they are consistent with section 110 of the CAA and its regulations regarding NSR permitting.

IV. 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 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 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.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action 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).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of this document in the Federal Register].

Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action 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. This action may not be challenged later in proceedings to enforce its requirements.

See section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference,
Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements and
Volatile organic compounds.

Dated: September 10, 2012

A. Stanley Meiburg
Acting Regional Administrator,
Region 4.

40 CFR part 52 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.*

Subpart B – Alabama

2. Section 52.50(c) is amended under Chapters 335-3-14 and 335-3-17 by revising the entries for “Section 335–3–14–.03,” “Section 335–3–14–.04,” “Section 335–3–17–.01,” and “Section 335–3–17–.02” to read as follows:

§52.520 Identification of plan

* * * * *

(c)* * *

EPA Approved Alabama Regulations

State citation	Title/subject	State effective date	EPA approval date	Explanation
**	**	*	*	*
Chapter No. 335–3–14 Air Permits				
**	**	*	*	*
Section 335–3–14–.03	Standards for Granting Permits	May 23, 2011	[Insert date of publication in <u>Federal Register</u>] [Insert citation of publication]	
Section 335–3–14–.04	Air Permits Authorizing Construction in Clean Air Areas [:prevention of Significant	May 23, 2011	[Insert date of publication in <u>Federal Register</u>] [Insert citation of publication]	As of [Insert date of publication in <u>Federal Register</u>] Section 335-3-14-.04 does not include Alabama’s

	Deterioration (PSD)]			revision to adopt the PM _{2.5} SILs threshold and provisions (as promulgated in the October 20, 2010 PM _{2.5} PSD Increment-SILs- SMC Rule at 40 CFR 1.166(k)(2) and the term “particulate matter emissions” (as promulgated in the May 16, 2008 NSR PM _{2.5} Rule (at 40 CFR 51.166(b)(49)(vi)).
**	**	*	*	*
Chapter No. 335–3–17 Conformity of Federal Actions to State Implementation Plans				
Section 335–3– 17.01	Transportation Conformity	May 23, 2011	[Insert date of publication in <u>Federal Register</u>] [Insert citation of publication]	
Section 335–3– 17–.02	General Conformity	May 23, 2011	[Insert date of publication in <u>Federal Register</u>] [Insert citation of publication]	
**	**	*	*	*

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[FR Doc. 2012-23586 Filed 09/25/2012 at 8:45 am; Publication Date: 09/26/2012]