ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2006–0130–200725; FRL–8551–5]

Approval and Promulgation of Implementation Plans Florida: Prevention of Significant Deterioration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed approval and proposed conditional approval.

SUMMARY: EPA is proposing to conditionally approve State Implementation Plan (SIP) revisions submitted by the State of Florida on February 3, 2006. The proposed revisions modify Florida's Prevention of Significant Deterioration (PSD) permitting regulations in the SIP to address changes to the federal New Source Review (NSR) regulations, which were promulgated by EPA on December 31, 2002, and reconsidered with minor changes on November 7, 2003 (collectively, these two final actions are referred to as the ''2002 NSR Reform Rules''). The proposed revisions include provisions for baseline emissions calculations, an actual-to-projected-actual methodology for calculating emissions changes, options for plantwide applicability limits, and recordkeeping and reporting requirements. As part of the conditional approval, Florida will have twelve months from the date of EPA's final conditional approval of the SIP revisions in which to revise its PSD recordkeeping requirements and several definitions in order to be consistent with existing federal law.

In addition to and in conjunction with the proposed conditional approval of Florida's PSD permitting program SIP revisions, EPA is proposing to approve Florida's concurrent February 3, 2006, request to make the State's PSD permitting program applicable to electric power plants which are also subject to the Florida Electrical Power Plant Siting Act (PPSA). This proposed approval follows the receipt of adverse comments on, and EPA's subsequent withdrawal of, EPA's May 25, 2007, direct final rule granting full approval to Florida to implement its PSD permitting program for sources subject to the PPSA.

DATES: Comments must be received on or before May 5, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2006–0130, by one of the following methods:

1. *www.regulations.gov*: Follow the on-line instructions for submitting comments.
2. *E-mail: adams.yolanda@epa.gov*.
3. *Fax:* 404–562–9019.
4. *Mail:* ''EPA–R04–OAR–2006–0130,'' 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. Yolanda Adams, 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–2006–0130.'' 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* Web site 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 a.m. to 4:30 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding the Florida State Implementation Plan, contact Ms. Heidi LeSane, 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. The telephone number is (404) 562–9074. Ms. LeSane can also be reached via electronic mail at *lesane.heidi@epa.gov*. For information regarding New Source Review, contact Ms. Yolanda Adams, Air Permits Section, at the same address above. The telephone number is (404) 562–9214. Ms. Adams can also be reached via electronic mail at *adams.yolanda@epa.gov*.

SUPPLEMENTARY INFORMATION:

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I. What actions are being proposed?

NSR Reform Revisions. On February 3, 2006, the State of Florida, through the Florida Department of Environmental Protection (FDEP), submitted revisions to the Florida SIP. The submittal consists of revisions to the following

FDEP rules: Chapter 62–204, ''Air Pollution Control—General Provisions;'' Chapter 62–210, ''Stationary Sources—General Provisions;'' and Chapter 62–212, ''Stationary Sources—Preconstruction Review.'' The revisions were made to update the Florida PSD program to make it consistent with changes to the federal NSR regulations published on December 31, 2002 (67 FR 80186) and November 7, 2003 (68 FR 63021). EPA is proposing to conditionally approve the February 3, 2006, SIP submittal consistent with section 110(k)(4) of the Clean Air Act (''CAA'' or ''Act'').

Pursuant to section 110(k)(4) of the CAA, EPA may conditionally approve a portion of a SIP revision based on a commitment from the state to adopt specific, enforceable measures no later than twelve months from the date of final conditional approval. If the state fails to commit to undertake the necessary changes, or fails to actually make the changes within the twelve month period, EPA will issue a finding of disapproval. EPA is not required to propose the finding of disapproval. The necessary revisions to the Florida SIP will materially alter the existing SIP-approved rule. As a result, the State must also provide a new SIP submittal to EPA for approval that includes the rule changes within twelve months from the date of EPA's final action conditionally approving Florida's PSD program. As with any SIP revision, Florida must undergo public notice and comment, and allow for a public hearing (and any other procedures required by State law) on the proposed changes to its rules. If Florida fails to adopt and submit the specified measures by the end of one year (from the final conditional approval), or fails to make a SIP submittal to EPA within twelve months following the final conditional approval, EPA will issue a finding of disapproval. If Florida timely revises its rules and submits the revised SIP submittal, EPA will process that SIP revision consistent with the CAA.

Generally, with regard to the conditional approval of Florida's PSD program, Florida must revise its PSD recordkeeping requirements and several definitions in the rules. Section III below provides more details regarding EPA's analysis of Florida's PSD program and the changes that are necessary to the Florida rules in order for full approval of Florida's SIP revision.

Applicability of Florida's SIP-approved PSD permitting program to electric power plants. In addition to and in conjunction with the proposed conditional approval of Florida's PSD SIP revisions, EPA is proposing to approve Florida's concurrent February 3, 2006, request to make the State's PSD permitting program applicable to electric power plants subject to the Florida PPSA. Any final approval of this request would mean that Florida's SIP-approved PSD permitting program, including any final conditional approval of the State's PSD revisions noted above, would apply to electric power plants in Florida in lieu of the current federally delegated PSD program.

II. What is the background of EPA's proposed action on the Florida PSD rule revisions?

On December 31, 2002 (67 FR 80186), EPA published final rule changes to 40 Code of Federal Regulations (CFR) parts 51 and 52, regarding the CAA's PSD and Nonattainment NSR (NNSR) programs. On November 7, 2003 (68 FR 63021), EPA published a notice of final action on the reconsideration of the December 31, 2002, final rule changes. In that November 7, 2003, final action, EPA added the definition of ''replacement unit,'' and clarified an issue regarding plantwide applicability limitations (PALs). Collectively, these two EPA final actions are referred to as the ''2002 NSR Reform Rules.'' The purpose of this action is to propose to conditionally approve the SIP submittal from Florida, which addresses EPA's 2002 NSR Reform Rules.

The 2002 NSR Reform Rules are part of EPA's implementation of Parts C and D of title I of the CAA, 42 U.S.C. 7470–7515. Part C of title I of the CAA, 42 U.S.C. 7470–7492, is the PSD program, which applies in areas that meet the National Ambient Air Quality Standards (NAAQS)—''attainment'' areas—as well as in areas for which there is insufficient information to determine whether the area meets the NAAQS—''unclassifiable'' areas. Part D of title I of the CAA, 42 U.S.C. 7501–7515, is the NNSR program, which applies in areas that are not in attainment of the NAAQS—''nonattainment'' areas. Collectively, the PSD and NNSR programs are referred to as the ''New Source Review'' or NSR programs. EPA regulations implementing these programs are contained in 40 CFR 51.165, 51.166, 52.21, 52.24, and part 51, appendix S.

The CAA's NSR programs are preconstruction review and permitting programs applicable to new and modified stationary sources of air pollutants regulated under the CAA. The NSR programs of the CAA include a combination of air quality planning and air pollution control technology program requirements. Briefly, section 109 of the CAA, 42 U.S.C. 7409, requires EPA to promulgate primary NAAQS to protect public health and secondary NAAQS to protect public welfare. Once EPA sets those standards, states must develop, adopt, and submit to EPA for approval, a SIP that contains emissions limitations and other control measures to attain and maintain the NAAQS. Each SIP is required to contain a preconstruction review program for the construction and modification of any stationary source of air pollution to assure that the NAAQS are achieved and maintained; to protect areas of clean air; to protect air quality related values (such as visibility) in national parks and other areas; to assure that appropriate emissions controls are applied; to maximize opportunities for economic development consistent with the preservation of clean air resources; and to ensure that any decision to increase air pollution is made only after full public consideration of the consequences of the decision.

The 2002 NSR Reform Rules made changes to five areas of the NSR programs. In summary, the 2002 Rules: (1) Provide a new method for determining baseline actual emissions; (2) adopt an actual-to-projected-actual methodology for determining whether a major modification has occurred; (3) allow major stationary sources to comply with plant-wide applicability limits to avoid having a significant emissions increase that triggers the requirements of the major NSR program; (4) provide a new applicability provision for emissions units that are designated clean units; and (5) exclude pollution control projects (PCPs) from the definition of ''physical change or change in the method of operation.'' On November 7, 2003, EPA published a notice of final action on its reconsideration of the 2002 NSR Reform Rules (68 FR 63021), which added a definition for ''replacement unit'' and clarified an issue regarding PALs. For additional information on the 2002 NSR Reform Rules, see 67 FR 80186 (December 31, 2002), and *http://www.epa.gov/nsr*.

After the 2002 NSR Reform Rules were finalized and effective (March 3, 2003), industry, state, and environmental petitioners challenged numerous aspects of the 2002 NSR Reform Rules, along with portions of EPA's 1980 NSR Rules (45 FR 52676, August 7, 1980). On June 24, 2005, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit Court) issued a decision on the challenges to the 2002 NSR Reform Rules. *New York* v. *United States*, 413 F.3d 3 (DC Cir. 2005). In summary, the DC Circuit Court vacated portions of the

rules pertaining to clean units and PCPs, remanded a portion of the rules regarding recordkeeping, 40 CFR 52.21(r)(6) and 40 CFR 51.166(r)(6), and either upheld or did not comment on the other provisions included as part of the 2002 NSR Reform Rules. On June 13, 2007 (72 FR 32526), EPA took direct final action to revise the 2002 NSR Reform Rules to remove from federal law all provisions pertaining to clean units and the PCP exemption that were vacated by the DC Circuit Court. This proposed action on the Florida SIP is consistent with the decision of the DC Circuit Court because Florida's submittal does not include any portions of the 2002 NSR Reform Rules that were vacated as part of the June 2005 decision.

With regard to the remanded portions of the 2002 NSR Reform Rules related to recordkeeping, on December 21, 2007, EPA took final action on the proposed revisions by establishing that ''reasonable possibility'' applies where source emissions equal or exceed 50 percent of the CAA NSR significance levels for any pollutant (72 FR 72607). The ''reasonable possibility'' provision identifies for sources and reviewing authorities the circumstances under which a major stationary source undergoing a modification that does not trigger major NSR must keep records. Florida's regulations do not include the ''reasonable possibility'' language. Florida's SIP revisions require all modifications that use the actual-to-projected-actual methodology to meet the recordkeeping requirements. Thus, with regard to the reasonable possibility issue, Florida's rules are at least as stringent as the current federal rules (*see, e.g.*, F.A.C. section 62–212.300). However, another aspect of Florida's recordkeeping requirements is not consistent with the recordkeeping provisions set forth in the federal rules at 40 CFR 51.166(r)(6). As is explained in more detail below, Florida will have to revise its recordkeeping requirements as part of the proposed conditional approval.

The 2002 NSR Reform Rules require that state agencies adopt and submit revisions to their SIP permitting programs implementing the minimum program elements of the 2002 NSR Reform Rules no later than January 2, 2006. (Consistent with changes to 40 CFR 51.166(a)(6)(i), state agencies are now required to adopt and submit SIP revisions within 3 years after new amendments are published in the **Federal Register**.) State agencies may meet the requirements of 40 CFR part 51, and the 2002 NSR Reform Rules, with different but equivalent regulations.

On February 3, 2006, FDEP submitted a SIP revision for the purpose of revising the State's PSD permitting provisions. These changes were made primarily to adopt EPA's 2002 NSR Reform Rules. These revisions became State-effective on February 2, 2006, and February 12, 2006. Even though Florida currently has nonattainment rules approved in the SIP, this submittal did not include revisions to the NNSR rules because there are currently no nonattainment areas in Florida. Copies of Florida's revised PSD rules, as well as the State's Technical Support Document (TSD), can be obtained from the Docket, as discussed in the **ADDRESSES** section above.

As is discussed in further detail below, EPA believes the revisions contained in the Florida submittal are approvable for inclusion into the Florida SIP so long as the specific changes described below are made within twelve months of the date of EPA's final conditional approval. As a result, EPA is proposing to conditionally approve the Florida SIP revisions, consistent with section 110(k)(4) of the CAA.

III. What is EPA's Analysis of Florida's PSD program revisions and what are the conditions for full SIP-approval?

This section summarizes EPA's analysis of the changes being proposed for inclusion into the Florida SIP.

F.A.C. Chapter 62–204, entitled ''Air Pollution Control—General Provisions'' contains general air pollution control requirements that apply regardless of the type or size of the emissions source. F.A.C. section 62–204.260 sets forth PSD increments for pollutants for which EPA has established such increments. Definitions at section 62–204.200 describe those emissions which affect (i.e. expand or consume) PSD increment. Under previous FDEP rules, some provisions related to increment consumption and expansion were located at section 62–212.400. The current rule revisions consolidate all such provisions in the definitions at section 62–204.200 for greater clarity. In addition, rule language has been amended to more closely reflect the federal rules.

F.A.C. Chapter 62–210, entitled ''Stationary Sources—General Requirements,'' contains definitions of terms used in Chapter 62–212, as well as other stationary source rules. Chapter 62–210 also establishes general permitting, public notice, reporting, and permit application requirements. Chapter 62–212, entitled ''Stationary Sources—Preconstruction Review'' contains specific preconstruction permitting requirements for various types of air construction permits, including minor source permits, PSD permits, NNSR permits, and the more recently added PAL permits. Revisions were made to these rules to incorporate changes resulting from the 2002 NSR Reform Rules, with the exception that F.A.C. section 62–212.500, entitled, ''Preconstruction Review for Nonattainment Areas'' was not revised since there are no longer any nonattainment areas in Florida. This rule will need to be amended if nonattainment areas are designated in Florida in the future.

F.A.C. section 62–212.400 contains the State's PSD preconstruction review program as required under Part C of title I of the CAA. The PSD program applies to major stationary sources or modifications constructing in areas that are designated as attainment or unclassifiable with respect to the NAAQS. Florida's PSD program was originally approved into the SIP by EPA on December 22, 1983, and has been revised several times. The current changes to F.A.C. Chapters 62–204, 62–210 and 62–212, which EPA is now proposing to conditionally approve into the Florida SIP, were submitted to update the existing Florida regulations to be consistent with the current federal PSD rules, including the 2002 NSR Reform Rules. The SIP revision addresses baseline actual emissions, actual-to-projected-actual applicability tests, and PALs.

EPA's evaluation of the Florida SIP submittal included a line-by-line comparison of the proposed revisions with the federal requirements. As a general matter, state agencies may meet the requirements of 40 CFR part 51, and the 2002 NSR Reform Rules, with different but equivalent regulations. While some states choose to incorporate by reference the applicable federal rules, other states (such as Florida) choose to draft rules that track the federal language but contain differences. As part of its February 3, 2006, SIP submittal, Florida provided EPA with an Equivalency Determination and Response to Comments (ED and RTC) that address differences from the federal rules noted by EPA in its comments on Florida's prehearing submittal. As a point of clarification, although FAC section 62–204.800, ''Federal Regulations Adopted by Reference,'' includes 40 CFR part 52, this Florida rule does not legally ''incorporate by reference'' the entirety of part 52. According to Florida's ED and RTC, the reference to part 52 does not make those

regulations applicable, but rather, other rules, such as the PSD rule currently at issue, define how the elements of part 52 will apply in Florida.

Although EPA has determined that some of the differences in Florida's PSD program are acceptable, some differences are not consistent with the federal rules. Therefore, EPA has determined that Florida's PSD program does not meet all the program requirements for the preparation, adoption and submittal of implementation plans for the Prevention of Significant Deterioration of Air Quality, set forth at 40 CFR 51.166 and revisions are necessary for full approval.

The required changes relate to the definitions of ''new emissions unit,'' ''PSD pollutant,'' ''significant emissions rate,'' and the recordkeeping requirements found at 51.166(r)(6). Consistent with section 110(k)(4) of the CAA, EPA may conditionally approve Florida's SIP revision based on the State's commitment to adopt specific, enforceable measures by a date certain, not to exceed one year after the date of the final conditional approval.

A discussion of the specific changes to Florida's rules comprising the SIP revision, as well as the additional changes that must be made by Florida as part of the conditional approval, follows. The discussion addresses both acceptable deviations from the federal rules, as well as the differences that are subject to the conditional approval.

1. New Emissions Unit

Florida's definition for ''new emissions unit'' for PSD purposes is found in F.A.C. section 62–210.200(184).[1] This definition is not consistent with the federal definition found at 40 CFR 51.166(b)(7)(i). Pursuant to federal law, a ''new emissions unit'' is ''any emissions unit that is (or will be) newly constructed and that has existed for less than 2 years from the date such emissions unit first operated.'' 40 CFR 51.166(b)(7)(i). Under Florida law, however, a ''new emissions unit'' is ''any emissions unit that is or will be newly constructed and that has enlisted for less than 2 years from the date of *beginning normal operation*.'' See, F.A.C. section 62–210.200(184) (emphasis added). Florida's ED and RTC indicate that the use of the term ''beginning normal operation'' takes into account that most new units undergo a ''shakedown'' period during which the unit is operating but may not have normal, representative emissions. FDEP therefore believes that this term clarifies the intent of the federal requirement. EPA disagrees that this language is equivalent to the federal rule. Florida must revise its regulations to better define what is meant by ''beginning normal operation,'' to ensure that the ''shakedown'' period does not continue for an unbounded period of time. EPA recommends that Florida adopt the language of the federal rule. However, if Florida chooses otherwise, FDEP will need to provide EPA with an equivalency demonstration supporting the new, more specific, regulation. In addition, EPA also identified a typographical error in this provision that should be addressed. The language ''* * * that has *enlisted* for less than * * *'' should read ''* * * that has *existed* for less than * * *.'' F.A.C. section 62–210.200(184) (emphasis added).

2. Pollution Control Project (PCP)

As mentioned previously, the PCP exemption provisions of the federal rules, including the definition of ''pollution control project,'' were vacated by the DC Circuit Court. Florida's regulations still include a definition for ''pollution control project'' (found at F.A.C. section 62–210.200(209)). In its ED and RTC, Florida explains that this term is no longer used anywhere within the Florida regulations and the intent is to exclude clean coal technology demonstration projects from triggering a major modification. However, such projects are excluded at 51.166(b)(2)(iii)(j), and F.A.C. section 62–210.200(161)(c)9. Even though Florida's definition of ''pollution control project'' is not the same as the vacated federal definition, EPA believes that the use of the term ''PCP'' in the Florida regulations may be confusing to both the public and the regulated community, and could be misconstrued as the vacated portion of the federal rules. Because the clean coal technology demonstration project exemption is already independently defined and included in F.A.C. section 62–210.200(190)(c)9, EPA recommends that the term ''pollution control project'' be removed from the rules to be included in the Florida SIP.

3. Regulated NSR Pollutant

Florida's definition of ''PSD Pollutant'' found at F.A.C. section 62–210.200(219) is intended to be equivalent to the federal definition of ''Regulated NSR pollutant'' at 51.166(b)(49). Florida defines ''PSD Pollutant'' as ''any pollutant listed as having a significant emissions rate as defined in F.A.C. section 62–210.200.'' The definition of ''significant emissions rate,'' found at F.A.C. section 62–210.200(243), includes ''a rate listed at 40 CFR 52.21(b)(23)(i) * * * specifically the following rates,'' and proceeds to list rates for carbon monoxide, nitrogen oxides, sulfur dioxide, particulate matter, ozone, lead, fluorides, sulfuric acid mist, hydrogen sulfide, total reduced sulfur, reduced sulfur compounds, municipal waste combustor organics, metals, and acid gases, municipal solid waste landfills emissions, and mercury. The federal definition of ''Regulated NSR Pollutant'' includes: (1) Any pollutant for which a NAAQS has been promulgated and any constituents or precursors for such pollutants identified by the Administrator; (2) any pollutant that is subject to any standard promulgated under section 111 of the Act; (3) any Class I or II substance subject to a standard promulgated under or established by title VI of the Act; and (4) any pollutant that otherwise is subject to regulation under the Act.

In its ED and RTC, Florida explains that its definition of significant emissions rate includes all pollutants for which a NAAQS has been promulgated thus far, all precursors for such pollutants which have thus far been identified by the Administrator, all pollutants subject to standards promulgated under section 111 of the Act, and all pollutants thus far regulated under the Act. Florida acknowledges that its rules do not include ozone depleting substances (i.e., Class I and Class II substances subject to a standard under title VI of the CAA) in the definition of PSD pollutant. Because ozone depleting substances are regulated NSR pollutants pursuant to federal law, Florida must also regulate such pollutants in order for its PSD program to meet the requirements of the federal program. Therefore, as part of the conditional approval, Florida must revise its rules to include Class I and Class II substances in its list of PSD pollutants.

4. Significant Emissions Rate

The definition of ''significant emissions rate,'' found at F.A.C. section 62–210.200(243), includes ''a rate listed at 40 CFR 52.21(b)(23)(i) * * * specifically the following rates,'' and proceeds to list rates for specific pollutants. Federal regulations define ''significant'' as a rate of emissions that

[1] The references to the Florida regulations in this notice correspond to the numbering in the SIP submittal. Since Chapter 62–210 contains definitions for other stationary source rules and these definitions are maintained in alphabetical order, the references given in this notice do not correspond to the current Florida regulations due to subsequent amendments to Florida stationary rules. This is the case for all definitions being discussed in this notice.

would equal or exceed a pollutant specific list of emissions rates. See, 40 CFR Part 51.166(b)(23)(i). In addition, federal law defines significant as ''any emissions rate'' of a regulated NSR pollutant that is not listed in § 51.166(b)(23)(i), and ''any emissions rate'' at a major stationary source constructing within 10 kilometers of a Class I area, which would have an impact on such area equal to or greater than 1 microgram per cubic meter (μg/m^3) over a 24-hour average. Florida's PSD rules do not include ''any emissions rate'' for a pollutant that is not listed in the significant emissions rate list, but that could otherwise be considered a regulated NSR pollutant (i.e. ''any pollutant that is otherwise subject to regulation under the Act''). In addition, Florida's PSD rules limit the Class I area impact provision to only those pollutants that are listed in the significant emissions rates list. See, F.A.C. section 62–210.200(243)(b). In its ED and RTC, Florida explains that its PSD rules include all pollutants that are currently regulated under the federal rules, and which fall within FDEP's existing statutory authority. For those pollutants which may become regulated NSR pollutants in the future, FDEP commits to adopting those pollutants into the State's PSD rules as soon as possible after EPA's promulgation. EPA agrees that Florida's PSD rules include significant emissions rates for all currently regulated NSR pollutants, except ozone depleting substances (discussed above), and that Florida's approach to adopting any other pollutants as part of its definition of PSD pollutant in an expeditious manner after promulgation by EPA, is an acceptable approach to ensuring that Florida's PSD program is consistent with the federal PSD program.

5. Mercury

As a general matter, hazardous air pollutants (HAPs) are not regulated NSR pollutants unless they are also regulated as a constituent or precursor of a general pollutant listed under Section 108 of the Act. Pursuant to Section 112(b)(6) of the CAA, the PSD provisions of the CAA ''shall not apply to pollutants listed in'' Section 112. Mercury is specifically listed as a HAP in Section 112(b)(1). As a result, the CAA's PSD program does not apply to mercury. Section 110 of the CAA, governing SIP review and approval, describes what types of regulations should be included in the SIP; specifically, regulations supporting attainment and maintenance of the NAAQS. Mercury is not identified as a criteria pollutant for which a NAAQS is established, nor is it identified as a constituent of such a pollutant or a precursor of such a pollutant. As a result, regulations governing mercury should not be included in SIPs. As previously mentioned, Florida's definition of ''significant emissions rate,'' found at F.A.C. section 62–210.200(243), includes ''a rate listed at 40 CFR 52.21(b)(23)(i) * * * specifically the following rates,'' and it proceeds to list rates for among other pollutants, mercury.

In its ED and RTC, Florida explains that its PSD program has included a significant emission rate for mercury since the 1980s. However, following the enactment of the 1990 amendments to the CAA, EPA advised states to remove HAPs from PSD rules included in the SIP. Florida did remove some HAPs, but retained mercury. Because the 1990 CAA Amendments (and the addition of Section 112(b)(6)) has altered EPA's approach with regard to mercury, EPA is now seeking to remedy the inclusion of mercury in the Florida SIP as a PSD pollutant. Notably, Florida may retain mercury as a regulated pollutant pursuant to State authority and State law. However, mercury cannot be included as a regulated pollutant in the SIP. As part of the conditional approval, Florida must withdraw its request that EPA include a significant emissions rate for mercury in the Florida SIP, specifically section 200.243(a)2 of F.A.C. Chapter 62–210.

6. Recordkeeping Requirements

Federal rules at 40 CFR 51.166(r)(6)(i)(c) require that the owner or operator document and maintain a record of the description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under the definition of ''projected actual emissions'' (i.e. that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project, including any increased utilization due to product demand growth) and an explanation as to why this amount was excluded, and any netting calculations if applicable. F.A.C. section 62–212.300(3)(a) requires each applicant to provide at a minimum, the nature and amounts of emissions from the emissions unit, including baseline actual emissions and projected actual emissions when used to determine PSD applicability, and when used to establish a PAL. However, Florida rules do not specifically require a record of the amount of emissions excluded pursuant to the projected actual emissions requirements, an explanation as to why these emissions were excluded, and any netting calculations if applicable. As part of the conditional approval, Florida must revise its rules to make the recordkeeping requirements consistent with the federal recordkeeping requirements at 40 CFR 51.166(r)(6).

7. Replacement Unit

As previously mentioned, on November 7, 2003 (68 FR 63021), EPA added a definition of ''replacement unit'' to federal NSR rules. See, 40 CFR 51.166(32). EPA also revised the definition of ''emissions unit'' to clarify that a replacement unit is considered an existing emissions unit and therefore is eligible for the actual-to-projected-actual test for major NSR applicability determinations. Florida rules do not include a definition of replacement unit, and do not specify in the definition of existing emissions unit that a replacement unit is considered an existing emissions unit. As stated in the preamble to the November 7, 2003 (68 FR 63021) rule amendments, the December 2002 rules, ''* * * as supplemented by the discussion in the December 2002 preamble, are self-implementing for replacement units.'' Florida intends to implement these provisions consistent with federal regulations. In other words, in Florida a replacement unit is considered an existing emissions unit and therefore is eligible for the actual-to-projected-actual test for major NSR applicability test determinations. Therefore, based on Florida's intent to implement these provisions consistent with federal regulations, EPA does not believe that this difference from the federal regulations makes Florida's PSD program less stringent than the federal program.

8. Malfunction Emissions

Federal regulations require the inclusion of emissions associated with malfunctions in the calculation of ''projected actual emissions'' and ''baseline actual emissions.'' Florida's definitions of ''projected actual emissions'' and ''baseline actual emissions'' at F.A.C. sections 62–210.200(34) and (215) respectively, do not require the inclusion of emissions associated with malfunctions. Florida will be relying only on quantifiable emissions that can be verified. Given that Florida will be consistently applying this approach for both ''projected actual emissions'' and

''baseline actual emissions'' and that this approach will not prevent malfunctions from being exceedances of applicable standards, EPA has determined that this difference does not make Florida's PSD program less stringent than the federal program. These changes do not affect source obligations regarding excess emissions related notifications that may be required by State or federal law.

9. Major Stationary Source

One of the changes proposed in the Florida submittal is to replace the State definition of ''major stationary source'' with the federal definition contained at 40 CFR 52.21(b). For the most part, the effect of this change is simply to reword the State definition so that it reads the same as the federal definition. EPA notes, however, that in replacing the Florida definition with the federal definition, the State has adopted the phrase ''except the activities of any vessel.'' This phrase was remanded and vacated by the DC Circuit Court, and Florida had explicitly excluded this language from the State rule when it initially adopted the State PSD regulations. *See, Natural Resources Defense Council v. EPA*, 725 F.2d 761 (DC Cir. 1984). This change may have the effect of excluding activities that were previously covered by the state rule. Hence, EPA requests clarification as to whether it is the state's intention to amend the SIP to include this language, or whether it was an unintended consequence of adopting the federal definition verbatim.

In summary, EPA is proposing to conditionally approve, into Florida's SIP, revisions to Florida's PSD permitting program. As part of the conditional approval mechanism, within twelve months of EPA's final action on the conditional approval, the State must: (1) Revise the definition of ''new emissions unit'' to be consistent with the federal definition or revise the definition to define what is meant by ''beginning normal operation'' and provide an equivalency demonstration supporting the revised definition; (2) revise the definition of ''significant emissions rate'' to include ozone depleting substances; (3) withdraw the request that EPA include a significant emissions rate for mercury in the Florida SIP, specifically section 200.243(a)2 of F.A.C. Chapter 62–210; and (4) revise the recordkeeping requirements at F.A.C. section 62–212.300 to be consistent with federal requirements. If Florida fails to comply with these four requirements in the specified period of time, EPA will issue a finding of disapproval.

IV. What is the background of prior EPA action on Florida's PSD program for electric power plants?

For reasons described further below, electric power plants subject to the Florida PPSA have historically been permitted by FDEP (through a federal delegation of authority from EPA) under the federal PSD program rather than the Florida SIP-approved PSD permitting program. With the reasons for the necessity of such delegation of federal authority removed, Florida requests that electric power plants within the State now be permitted under the State's SIP-approved PSD permitting program. Because EPA agrees with Florida that the necessity for such federal delegation no longer exists, EPA is proposing to approve Florida's request to make the State's PSD permitting program (rather than the federal PSD permitting program) applicable to electric power plants in the State.

As noted earlier, Part C of the CAA establishes the PSD permitting program—a preconstruction review program that applies to areas of the country that have attained the NAAQS. CAA 160–169, 42 U.S.C. 7470–7479. In such areas, a major stationary source may not begin construction or undertake certain modifications without first obtaining a PSD permit. In broad overview, the program (1) limits the impact of new or modified major stationary sources on ambient air quality and (2) requires the application of state-of-the-art pollution control technology, known as best available control technology. CAA 165, 42 U.S.C. 7475.

EPA has promulgated two largely identical sets of regulations to implement the PSD program. One set, at 40 CFR 52.21, contains EPA's own federal PSD program under which EPA is the permitting authority in states operating without an EPA-approved state program. The other set of regulations contains minimum requirements that state PSD programs must meet to be approved by EPA as part of a SIP. 40 CFR 51.166. Over time, most states have received EPA approval for their PSD programs.

In order to comply with the established minimum requirements of the CAA, Florida adopted its own PSD regulations on June 10 and October 28, 1981. The Florida PSD program was proposed for approval on December 14, 1982 (47 FR 55964) and initially approved by EPA into the Florida SIP on December 22, 1983 (48 FR 52713). The approval transferred to FDEP the legal authority to process and issue PSD permits to sources in Florida that are required to obtain PSD permits.

One category of sources not covered by EPA's 1983 approval of Florida's PSD program was electric power plants. This was because, at the time, a separate Florida law known as the Florida Electrical Power Plant Siting Act (PPSA), Florida Statutes Section 403.501 *et seq.*, required permits for electric power plants to be issued solely by the Power Plant Site Certification Board under the PPSA, rather than by FDEP under Florida's PSD regulations. Such a conflict between the PPSA and Florida's PSD program created impediments to implementation and enforcement of the State's PSD program by FDEP for such power plants and precluded EPA's SIP-approval of Florida's PSD program as to these sources. As a result, on November 5, 1985, EPA delegated partial authority to FDEP to conduct the technical and administrative portion of the federal PSD program for power plants subject to the Florida PPSA (with EPA retaining final permitting authority). Letter from Jack E. Ravan, EPA Region 4, to Victoria J. Tschinkel, Florida Department of Environmental Regulation (November 5, 1985).

On July 1, 1986, the Florida Legislature amended the PPSA in an effort to extricate the implementation of PSD regulations from the State's non-SIP power plant siting regulations and thereby allow FDEP to issue PSD permits to those sources subject to the PPSA. On its face, the 1986 Florida legislative amendment appeared to provide FDEP with authority to fully implement (i.e., issue and enforce) federal PSD regulations for sources subject to the PPSA. Thus, on September 25, 1986, EPA restored full delegation of federal authority to Florida for these sources. Public notice of this restoration of full federal delegation was published on October 27, 1986 (51 FR 37972).

Although full federal delegation was restored to FDEP in October 1986, Florida did not subsequently submit to EPA a SIP revision requesting approval to apply its SIP-approved State PSD program to electrical power plants subject to the PPSA (in lieu of the fully delegated federal PSD program). Thus, FDEP continued to issue permits to sources subject to the PPSA under its federally-delegated authority until 1992. However, in February 1992, EPA became aware of an issued Florida court opinion wherein the state court expressly declared that Florida's 1986 legislative amendments to the PPSA did not confer on FDEP the authority to issue federally-enforceable PSD permits

containing conditions which differed from those imposed by the PPSA Siting Board during the source's site certification. Letter from Greer C. Tidwell, EPA Region 4, to Carol M. Browner, Florida Department of Environmental Regulation (February 5, 1992); *TECO Power Services Corp. v. Florida Department of Environmental Regulation*, First District Court of Appeal, Case No, 91–300 (December 20, 1991). In response to EPA's inquiries concerning this state court opinion, FDEP responded that ''the practical effect of the decision is to render ineffective the 1986 amendments and return the law to the same essential configuration as it appeared in 1985. Therefore, in the absence of further amendment to the PPSA, it would appear necessary for EPA to resume final permitting authority over PSD for new PPSA sources.'' Letter from Carol M. Browner, Florida Department of Environmental Regulation, to Greer C. Tidwell, EPA Region 4 (April 27, 1992). EPA agreed with FDEP, and consequently, on August 7, 1992, we revoked Florida's full federal delegation of PSD authority for PPSA sources. FDEP, however, retained partial federal delegation to conduct the technical and administrative portion of the federal PSD program for power plants subject to the Florida PPSA (with EPA again retaining final permitting authority). Letter from Greer C. Tidwell, EPA Region 4, to Carol M. Browner, Florida Department of Environmental Regulation (August 7, 1992).

In 1993, the Florida Legislature again amended the PPSA to address concerns over the inappropriate influence of the Florida Power Plant Siting Board's certification decisions on the PSD permitting process. The amendments, which took effect on April 22, 1993, expressly provided that the ''Department's action on a federally required new source review or prevention of significant deterioration permit shall differ from the actions taken by the siting board regarding the certification if the federally approved state implementation plan requires such a different action to be taken by the department. Nothing in this part the PPSA shall be construed to displace the federally approved permit program.'' In light of this 1993 amendment to the PPSA, FDEP requested that EPA grant it full federal delegation of PSD permitting authority for sources subject to both the federal PSD regulations and the PPSA. Letter from Virginia B. Wetherell, Florida Department of Environmental Protection, to Patrick Tobin, EPA Region 4 (September 27, 1993) . Because the 1993 PPSA amendment made clear that FDEP is the final permitting authority for PSD and new source review permits and can act in a manner different from the PPSA Siting Board if Florida's PSD or new source review regulations require such a different action, EPA once again granted full federal delegation to FDEP on October 26, 1993. Letter from Patrick Tobin, EPA Region 4, to Virginia Wetherell, Florida Department of Environmental Protection. (October 26, 1993).

The statutory amendment to the PPSA made by the Florida Legislature in 1993 forms the basis of the State's 2006 request for EPA approval to make Florida's SIP-approved State PSD program, rather than the federal PSD program, applicable to sources subject to the PPSA. In addition, during EPA's review of this request, the PPSA was again amended (on June 19, 2006), to among other things, further extricate Florida's PSD permitting process from its PPSA process. See, Florida Public Health Code 403.0872. Specifically, language requiring that a PPSA application for certification include ''documents necessary for the department to render a decision on any permit required pursuant to any federally delegated or approved permit program'' was deleted from the PPSA; language requiring that FDEP's action on a PSD permit be based on the recommended order of the PPSA certification hearing was removed; and requirements that administrative procedures used in the issuance of PSD and operating permits follow the administrative procedures of the PPSA were also removed.

Following our review of both the 1993 and June 19, 2006, amendments to the PPSA, the Agency published a direct final rule on May 25, 2007, finding that the PPSA amendments provided FDEP the authority to fully implement and enforce Florida's PSD program for electric power plants located within the State and we granted it full approval to implement the State's PSD program for electric power plants subject to the PPSA. 72 FR 29287 (May 25, 2007). However, because adverse comments on the direct final rule were received, we withdrew the rule on June 28, 2007 (72 FR 35355) and indicated that the rule would not take effect.

V. What is the basis for EPA's proposed SIP-approval of the inclusion of electric power plants in Florida's PSD program?

EPA continues to believe, for the reasons detailed above, that the 1993 and June 2006 Florida legislative amendments to the State's PPSA rectified past concerns that the Florida PPSA infringed on FDEP's authority to issue State PSD permits to sources subject to both the State's PSD regulations and the Florida PPSA in such a manner that SIP-approval of the State's PSD program for those sources was precluded. We also believe that by proposing this SIP-approval through this rulemaking (rather than by direct final rulemaking) and in conjunction with our proposed action on the Florida PSD program SIP revisions, we have addressed the main concerns raised by commenters in response to our May 25, 2007, direct final rule. For example, a number of environmental organizations, in jointly submitted comments, expressed concern that a direct final rulemaking was not the proper process for this particular SIP action because of public interest in providing comments, that any SIP-approval to make the State's PSD program, rather than the federal PSD program, applicable to electric power plants in Florida required a full review of the State's PSD regulations to ensure compliance with federal law, and that any such SIP-approval should be done in conjunction with a review of the State's PSD regulatory revisions made for purposes of addressing EPA's 2002 NSR Reform Rules.

While EPA disagrees that our previous direct final rulemaking for this matter was not procedurally appropriate and that a wholesale revisiting of all Florida PSD regulations is required in order to make the State's PSD program applicable to sources covered by the PPSA, we believe that there is value-added to the public's review of this matter by including it with our proposed action on the State's current PSD revisions. In addition, we have, in response to other comments made on our May 2007 direct final rule, added more detail and Docket material in this proposed rulemaking action in support of the various delegations of federal authority made to FDEP since 1985 in response to the PPSA problem. Finally, with regard to several remaining comments on the May 2007 direct final rule, EPA notes that SIP approval actions, whether done through a direct final rulemaking process or a proposed/final rulemaking process are not Section 307(d) rulemakings under the CAA and do not require the inclusion of elements listed in Section 307(d)(3). Rather, EPA chooses to use the Administrative Procedure Act's notice and comment rulemaking process to ensure public notice of EPA action. In any event, we believe that today's proposed rulemaking includes all information

necessary for informed public comment on the proposed approval.

VI. Proposed Action

EPA is proposing to conditionally approve revisions to the Florida SIP (F.A.C. Chapters 62–204, 62–210 and 62–212) submitted by FDEP on February 3, 2006. As part of the conditional approval, Florida must (1) revise the definition of ''new emissions unit'' to be consistent with the federal definition or revise the definition to define what is meant by ''beginning normal operation'' and provide an equivalency demonstration supporting the revised definition; (2) revise the definition of ''significant emissions rate'' to include ozone depleting substances; (3) withdraw the request that EPA include a significant emissions rate for mercury in the Florida SIP, specifically section 200.243(a) 2 of F.A.C. Chapter 62–210; and (4) revise the recordkeeping requirements at 62–212.300 to be consistent with federal requirements.

In addition to and in conjunction with the proposed conditional approval of Florida's PSD SIP revisions, EPA is proposing to approve Florida's concurrent February 3, 2006, request to make the State's PSD permitting program applicable to electric power plants subject to the Florida PPSA. Any final approval of this request would mean that Florida's SIP-approved PSD permitting program, including any final conditional approval of the State's PSD revisions noted above, would apply to electric power plants in Florida in lieu of the current federally delegated PSD program.

VII. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), these proposed actions are not ''significant regulatory actions'' and therefore are not subject to review by the Office of Management and Budget. For this reason, these actions are also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). These proposed actions merely propose to approve State law as meeting Federal requirements and impose no additional requirements beyond those imposed by State law. Accordingly, the Administrator certifies that the proposed approvals in this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule proposes to approve pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This proposed rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (59 FR 22951, November 9, 2000). These proposed actions also do not have Federalism implications because they do not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). These proposed actions merely propose to approve State rules implementing a Federal standard, and do not alter the relationship or the distribution of power and responsibilities established in the CAA. This proposed rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it approves State rules implementing a Federal standard.

In reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the CAA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: March 27, 2008.

J.I. Palmer, Jr.,

Regional Administrator, Region 4.

[FR Doc. E8–7073 Filed 4–3–08; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 300 and 635

[Docket No. 080221247–8166–01]

RIN 0648–AU88

International Fisheries; Atlantic Highly Migratory Species

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments; notice of public hearings.

SUMMARY: NMFS proposes to modify permitting and reporting requirements for the Highly Migratory Species (HMS) International Trade Permit (ITP) to improve program efficacy and enforceability, and implement the International Commission for the Conservation of Atlantic Tunas (ICCAT) bluefin tuna catch documentation (BCD) program. The modified regulations would also require that shark fin importers, exporters, and re-exporters obtain the HMS ITP to assist NMFS in monitoring trade of shark fins, and would implement the new definition of ''import'' contained in the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: Written comments on the proposed rule and supporting documents must be received on or before May 5, 2008. Comments sent to the Office of Management and Budget (OMB) on the information collection requirements of the proposed rule must also be received on or before May 5, 2008.

The public hearings will be held in April (see the **SUPPLEMENTARY INFORMATION** section for further details).

ADDRESSES: You may submit comments, identified by ''A0648–AU88'', by any one of the following methods:

• Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov*