

# Circuit Court Decision on PM<sub>2.5</sub> Significant Impact Levels and Significant Monitoring Concentration

## Questions and Answers

U.S. Environmental Protection Agency  
Office of Air Quality Planning and Standards  
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On January 22, 2013, the United States Court of Appeals for the District of Columbia Circuit (Court) granted a request from the Environmental Protection Agency (EPA) to vacate and remand to the EPA the portions of two Prevention of Significant Deterioration (PSD) PM<sub>2.5</sub> rules (40 CFR 51.166 and 40 CFR 52.21) addressing the Significant Impact Levels (SILs) for PM<sub>2.5</sub> so that the EPA could voluntarily correct an error in these provisions. The Court also vacated the parts of these two PSD rules establishing a PM<sub>2.5</sub> Significant Monitoring Concentration (SMC), finding that the EPA was precluded from using the PM<sub>2.5</sub> SMCs to exempt permit applicants from the statutory requirement to compile preconstruction monitoring data. While the Court's holdings are clear, the issuance of the mandate is withheld until seven days after the time to file a petition for rehearing expires on March 8, 2013, or after a timely petition is denied.<sup>1</sup> See Fed. R. App. P. 41(b). Upon issuance of the mandate, the Court's decision will become final and the affected provisions of 40 CFR 51.166 and 52.21 will be vacated.

Since the Court's decision, the EPA has received questions from a number of stakeholders who implement the PSD permitting program regarding the implications of the Court's decision in various contexts. This document is intended to communicate the Court's decision and the EPA's preliminary answers to the most common questions. The EPA is continuing to evaluate the implications of the Court's decision and may subsequently refine these answers as necessary.

At the same time as it is issuing this document, the EPA is also making available for public comment draft guidance addressing the EPA's recommendations for completing the air quality analysis for PM<sub>2.5</sub> to support PSD permitting decisions. Portions of that draft guidance reflect preliminary EPA views on how to complete a PM<sub>2.5</sub> air quality impacts analysis in a manner that is consistent with the January 22 court decision and prior EPA statements. The EPA's views on this topic subsequently may be refined based on public comments that are submitted on that draft guidance. The EPA also intends to develop a proposed rule to address the Court's decision.

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<sup>1</sup> No final decision has been made by the federal government on whether to seek rehearing.

Given the variability in individual permit applications and the terms of individual state PSD programs, these preliminary answers may not be applicable in all circumstances. Ultimately, it is up to individual permitting authorities to determine how best to implement their existing approved PSD programs in a manner that ensures that their actions on individual PSD permit applications are consistent with the Court's decision once it is effective. Moreover, the EPA advises permitting authorities to immediately align their permitting actions with the decision. The EPA Regional Offices will also be considering how the decision affects individual state program approvals that may be pending before the EPA. Accordingly, this document does not represent a final action with respect to any individual permit application or the EPA's review of any individual state implementation plan submission. This document is intended simply to provide the EPA's preliminary recommendations for handling situations that the EPA believes may be common across permit applications and programs.

## **I. Permits**

1. How does the Court's January 22, 2013 decision vacating the PM<sub>2.5</sub> SMC and paragraph (k)(2) in 40 CFR 52.21 (concerning the implementation of the PM<sub>2.5</sub> SILs) affect pending federal PSD permits?

- As a result of the Court's decision, federal PSD permits issued henceforth by either the EPA or a delegated state permitting authority pursuant to 40 CFR 52.21 should not rely on the PM<sub>2.5</sub> SMC to allow applicants to avoid compiling air quality monitoring data for PM<sub>2.5</sub>. Accordingly, all applicants requesting a federal PSD permit, including those having already applied for but have not yet received the permit, should submit ambient PM<sub>2.5</sub> monitoring data in accordance with the Clean Air Act requirements whenever either direct PM<sub>2.5</sub> or any PM<sub>2.5</sub> precursor is emitted in a significant amount. In lieu of applicants setting out PM<sub>2.5</sub> monitors to collect ambient data, applicants may submit PM<sub>2.5</sub> ambient data collected from existing monitoring networks when the permitting authority deems such data to be representative of the air quality in the area of concern for the year preceding receipt of the application. We believe that applicants will generally be able to rely on existing representative monitoring data to satisfy the monitoring data requirement.
- In keeping with the Court's decision vacating paragraph (k)(2), pending permits should not rely on the PM<sub>2.5</sub> SILs alone to demonstrate that the source will not cause or contribute to a violation of the PM<sub>2.5</sub> National Ambient Air Quality Standards (NAAQS) or increments. Our response to question 3, below, provides more information on this point.

2. How does the Court's decision vacating paragraph (k)(2) in 40 CFR 51.166 (concerning the implementation of the PM<sub>2.5</sub> SILs) and the PM<sub>2.5</sub> SMC affect pending PSD permits issued by states under EPA-approved PSD programs?

- Given the clarity of the Court's decision, states with EPA-approved PSD programs are advised to issue PSD permits in a manner consistent with the response to question 3 below concerning the use of PM<sub>2.5</sub> SILs, and to not rely on the PM<sub>2.5</sub> SMC to allow applicants to avoid compiling air quality monitoring data for PM<sub>2.5</sub> -- even when their existing state PSD regulations (whether or not included in an EPA-approved State Implementation Plan (SIP)) may still contain the PM<sub>2.5</sub> SMC and/or regulatory text equivalent to the vacated paragraph (k)(2) language for PM<sub>2.5</sub> SILs in 40 CFR 51.166.

3. May the PM<sub>2.5</sub> SILs be used to complete the required PM<sub>2.5</sub> air quality analysis in light of the Court's decision?

- The EPA does not interpret the Court's decision to preclude the use of SILs for PM<sub>2.5</sub> entirely but additional care should be taken by permitting authorities in how they apply those SILs so that the permitting record supports a conclusion that the source will not cause or contribute to a violation of the PM<sub>2.5</sub> NAAQS .
- PSD permitting authorities have the discretion to select PM<sub>2.5</sub> SIL values if the permitting record provides sufficient justification for the SIL values that are used and the manner in which they are used to support a permitting decision.
- The PM<sub>2.5</sub> SIL values in the EPA's regulations may continue to be used in some circumstances if permitting authorities take care to consider background concentrations prior to using these SIL values in particular ways.
- Because of the Court's decision vacating the PM<sub>2.5</sub> SMC, all applicants for a federal PSD permit should include ambient PM<sub>2.5</sub> monitoring data as part of the air quality impacts analysis. If the preconstruction monitoring data shows that the difference between the PM<sub>2.5</sub> NAAQS and the monitored PM<sub>2.5</sub> background concentrations in the area is greater than the EPA's PM<sub>2.5</sub> SIL value, then the EPA believes it would be sufficient in most cases for permitting authorities to conclude that a proposed source with a PM<sub>2.5</sub> impact below the PM<sub>2.5</sub> SIL value will not cause or contribute to a violation of the PM<sub>2.5</sub> NAAQS and to forego a more comprehensive cumulative modeling analysis for PM<sub>2.5</sub>.
- As part of a cumulative analysis, the applicant may continue to show that the proposed source does not contribute to an existing violation of the PM<sub>2.5</sub> NAAQS by demonstrating that the proposed source's PM<sub>2.5</sub> impact does not significantly contribute to an existing violation of the PM<sub>2.5</sub> NAAQS. However, permitting authorities should consult with the EPA before using any of the SIL values in the EPA's regulations for this

purpose (including the PM<sub>2.5</sub> SIL value in section 51.165(b)(2), which was not vacated by the Court).

4. How does the Court's decision on PM<sub>2.5</sub> SILs and SMC affect permits already issued?

- The EPA believes that sources with final PSD permits are not likely to be affected by the Court's decision, since they were issued in accordance with the rules in effect at that time.

5. In light of the Court's decision to vacate the PM<sub>2.5</sub> SMC, how will the EPA implement the PSD monitoring requirement, one subsection of which allows sources to be exempt from having to submit ambient monitoring data for any pollutant for which an SMC is not listed?

- The federal PSD regulations at 40 CFR 52.21(i)(5)(iii) provide the Administrator with discretionary authority to exempt a proposed source or modification from the PSD monitoring requirement for a particular pollutant "if the pollutant is not listed in [paragraph containing the various pollutant SMCs]."
- In its decision, the Court held that the EPA did not have the authority to use SMCs to exempt permit applicants from the statutory requirement in the Clean Air Act at section 165(e)(2) that ambient monitoring data for PM<sub>2.5</sub> be included in all PSD permit applications. To ensure that the Court's decision is not misapplied, we intend not to exempt sources from the monitoring requirement with respect to PM<sub>2.5</sub>. A future rulemaking will propose the necessary changes to ensure that sources will not be exempted from the monitoring requirement for PM<sub>2.5</sub>.

## II. State Implementation Plans

1. How does the Court's decision on PM<sub>2.5</sub> SILs and SMC affect the required SIP revisions for PM<sub>2.5</sub>?

- States should avoid including language in their SIP revision that is the same as or has a similar effect as the paragraph (k)(2) language in 40 CFR 51.166 and 52.21. As a result of the Court's decision, the EPA does not believe it can approve the portion of any SIP submission that is identical, or substantially similar, to the vacated (k)(2) regulatory text, but the EPA may approve the remainder of the SIP submission where it is appropriate to do so.
- Similarly, the SIP should not include the PM<sub>2.5</sub> SMC, which the Court's decision found inconsistent with the CAA. The EPA does not believe it can approve the portion of the

SIP that defines the PM<sub>2.5</sub> SMC, but it may approve the remainder of the SIP submission where it is appropriate to do so.

- Neither the PM<sub>2.5</sub> SILs nor the PM<sub>2.5</sub> SMC are required elements of the PSD SIP for PM<sub>2.5</sub>. Accordingly, States that have already made submissions including either provision are free to and are encouraged to withdraw those portions of their submissions in light of the Court's decision.

## 2. How does the Court's decision affect SIPs that have already been approved for PM<sub>2.5</sub>?

- The EPA will likely need to consider a rulemaking to remove the vacated provisions from its PSD regulations at 40 CFR 51.166 and 52.21. The EPA advises states with approved SIPs containing language that is the same as the PM<sub>2.5</sub> SILs and SMC provisions that the Court determined to be invalid to begin preparations to remove those provisions. However, if any rehearing or appeal of the court decision is sought, some uncertainty may remain on this issue until such rehearing or appeal of the Court's decision is concluded. Although the Court's decision is not final until the mandate is issued, the EPA advises permitting authorities to consider these provisions unlawful and, therefore, recommends that they not be applied to individual PSD permits even if they remain in state law or the states' approved SIPs.
- States should be advised that permits issued on the basis of these provisions may be inconsistent with the Clean Air Act and may be difficult to defend in administrative and judicial challenges. Once the Court's mandate is issued, the applicable provisions in the federal PSD regulations will be without legal effect.