

Labor, 200 Constitution Avenue, NW., Room N-5641, Washington, DC 20210.

• **Hand Delivery/Courier:** Please submit all comments to Thomas Dowd, Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5641, Washington, DC 20210.

Please submit your comments by only one method. The Department will post all comments received on <http://www.regulations.gov> without making any change to the comments, including any personal information provided. The <http://www.regulations.gov> Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. The Department cautions commenters not to include their personal information such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such submitted information will become viewable by the public via the <http://www.regulations.gov> Web site. It is the responsibility of the commenter to safeguard his or her information. Comments submitted through <http://www.regulations.gov> will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

Postal delivery in Washington, DC, may be delayed due to security concerns. Therefore, the Department encourages the public to submit comments via the Web site indicated above.

Docket: For access to the docket to read background documents or comments received, go the Federal eRulemaking portal at <http://www.regulations.gov>. The Department will also make all the comments it receives available for public inspection during normal business hours at the ETA Office of Policy Development and Research at the above address. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of the rule available, upon request, in large print and as electronic file on computer disk. The Department will consider providing the proposed rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the rule in an alternate format, contact the Office of Policy Development and Research at (202) 693-3700 (VOICE) (this is not a toll-free number) or 1-877-889-5627 (TTY/TDD).

FOR FURTHER INFORMATION CONTACT: For further information regarding 20 CFR part 655, contact William L. Carlson, PhD, Office of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5641, Washington, DC 20210; Telephone (202) 693-3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

For further information regarding 29 CFR parts 501, 780 and 788, contact James Kessler, Farm Labor Branch Chief, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3510, Washington, DC 20210; Telephone (202) 693-0070 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: On September 4, 2009, the Employment and Training Administration and the Employment Standards Administration of the Department of Labor issued a Notice of Proposed Rulemaking rule to amend regulations governing the certification of temporary employment of nonimmigrant workers in temporary or seasonal agricultural (H-2A) employment and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers. 74 FR 45906, Sept. 4, 2009. The proposed rule provided a comment period through October 5, 2009. The agencies have received several requests to extend the comment period and have decided to extend the comment period to October 20, 2009. Given the complexity of the proposed rule and the level of interest, as well as The Department's interest in receiving comments, the comment period is being extended until October 20, 2009.

Signed in Washington, DC, this 29th day of September 2009.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

Shelby Hallmark,

Acting Assistant Secretary, Employment Standards Administration.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2005-AL-0002-200913; FRL-8959-3]

Approval and Promulgation of Implementation Plans: Alabama: Proposed Approval of Revisions to the Visible Emissions Rule and Alternative Proposed Disapproval of Revisions to the Visible Emissions Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On April 3, 2009, EPA granted a February 25, 2009, petition seeking reconsideration of an October 15, 2008, final action approving a State Implementation Plan (SIP) revision regarding the State of Alabama's visible emissions rules. As part of its reconsideration process, EPA is now proposing to either affirm the previous rulemaking (which approved the revisions) or, alternatively, amend its previous rulemaking (*i.e.*, disapproving the revisions). EPA is seeking public comment on the issues raised in the petition for reconsideration as well as the actions proposed in this notice. EPA is also seeking public comment on the relationship between opacity and particulate matter mass emissions. Following its evaluation of the issues raised in the petition for reconsideration, and any information submitted during the public comment process, EPA will take final action either affirming the previous rulemaking or amending the previous rulemaking and disapproving the revisions to the visible emissions portion of Alabama's SIP.

DATES: Comments must be received on or before November 16, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2005-AL-0002, by one of the following methods:

1. www.regulations.gov: Follow the on-line instructions for submitting comments.
2. *E-mail:* benjamin.lynorae@epa.gov.
3. *Fax:* 404-562-9019.
4. *Mail:* "EPA-R04-OAR-2005-AL-0002," 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:* Lynorae Benjamin, Regulatory Development Section, Air Planning Branch, Air,

Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. "EPA–R04–OAR–2005–AL–0002." 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: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2005–AL–0002. All documents in the docket are listed on 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 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: Ms. Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9041. Ms. Benjamin can also be reached via electronic mail at lynorae.benjamin@epa.gov. For information regarding the Alabama SIP, contact Mr. Zuri Farnago at the same address listed above. The telephone number is (404) 562–9152. Mr. Farnago can also be reached via electronic mail at farnago.zuri@epa.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. What Is the Background for This Action?
- II. What Are EPA's Current Proposals?
 - A. Proposal to Affirm the October 15, 2008, Action and Approve the 2003/2008 Submittals
 - B. Proposal To Amend the October 15, 2008, Action and Disapprove the 2003/2008 Submittals
- III. What Additional Information Would EPA Like To Receive?
- IV. Proposed Actions
- V. Statutory and Executive Order Reviews

I. What Is the Background for This Action?

On September 11, 2003, the Alabama Department of Environmental Management (ADEM) submitted a request for EPA approval of a SIP submittal (2003 Submittal) containing proposed revisions to the visible emissions portion of the Alabama SIP, found at ADEM Administrative Code Chapter 335–3–4–.01, "Visible Emissions," and pertaining to sources of particulate matter (PM) emissions. In an action published on April 12, 2007 (72 FR 18428), EPA proposed to approve the proposed revisions contingent upon Alabama submitting a revised SIP submittal addressing EPA's concerns regarding impacts of the rule changes on attainment of the National Ambient Air Quality Standards (NAAQS), as set forth in 72 FR 18428–18434. EPA's proposal

notice explained that the State would have to provide EPA with a revised SIP submittal consistent with certain changes described by EPA in our April 12, 2007, notice of proposed rulemaking before EPA would approve the revisions.

EPA provided the public with 60 days to submit comments on the April 12, 2007, proposed rule and the specific changes needed to make the Alabama submittal approvable into the Alabama SIP. At the request of a commenter, EPA extended the public comment period by 30 days to July 11, 2007. EPA received four comment letters from industry representatives and one from the State air pollution control agency, all of which were in favor of the rulemaking. EPA received one comment letter, submitted on behalf of four environmental groups, opposed to the approval. In general, comments received that were adverse to the proposed rulemaking expressed concerns related to air quality impacts (particularly on the PM NAAQS), modeling analyses, EPA's technical assessment of the relationship between opacity and PM mass emissions, and application of Section 110(l) of the Clean Air Act (CAA). These comments, and EPA's responses to them, are discussed in more detail in EPA's final action on Alabama's SIP revisions taken on October 15, 2008 (73 FR 60957).

Following the close of the comment period, EPA and ADEM discussed some of the issues raised by the commenters, including comments regarding the potential impact of a revised visible emissions rule on attainment of the PM_{2.5} NAAQS in Alabama. Documents memorializing these conversations are part of the docket for EPA's final action. As a result of these discussions, ADEM decided to submit the necessary revisions proposed by EPA in the April 2007 **Federal Register** notice to support final approval. These revisions, submitted to EPA on August 22, 2008 (2008 Submittal), and the 2003 Submittal amend the requirements for units that are required to operate continuous opacity monitoring systems (COMS) and that are not subject to any opacity limits other than those of the Alabama SIP. ADEM also decided to include an additional limitation on opacity based on public comments on EPA's proposal. This additional provision limits subject sources to a daily opacity average of no more than 22 percent, excluding periods of startup, shutdown, load change and rate change (or other short intermittent periods upon terms approved by ADEM's Director and included in a State-issued

permit).¹ For further information about the technical details regarding the SIP revisions, see EPA's October 15, 2008, final action (73 FR 60957). The 2003 Submittal and the 2008 Submittal are referred to collectively in this notice as the "2003/2008 Submittals."

On October 15, 2008, EPA took final action to incorporate into the Alabama SIP, Alabama's revisions to its visible emissions rule (the rule changes included in the 2003/2008 Submittals). 73 FR 60957. This final action was effective on November 14, 2008. By its terms, the Alabama state rule change became effective (and thus applicable to sources) on May 14, 2009.

Following the October 2008 final action, EPA received two petitions for reconsideration submitted on behalf of the Alabama Environmental Council and other parties (Petitioners). The first petition for reconsideration, dated December 12, 2008, raised procedural and substantive concerns with EPA's October 15, 2008, final action, and was denied by EPA via letter on January 15, 2009. The second petition, dated February 25, 2009, raised additional procedural and substantive issues. EPA granted the second petition via letter on April 3, 2009. The main issues raised by the February 25, 2009, petition can be summarized as follows: (1) That EPA ignored Petitioners' December 31, 2008, comments regarding the DC Circuit's vacatur of the 40 CFR part 63 provisions pertaining to startup, shutdown, and malfunction and its impact on the opacity SIP revision; (2) that a new comment period was required because the 2007 proposal was not approvable "as is"; (3) that EPA's conclusion that greater opacity does not necessarily mean greater PM emissions was irrational; (4) that EPA failed to make an "appropriate inquiry" under section 110(l) and 40 CFR 51.112 to protect the NAAQS—there was no equivalency determination, only reliance on uncertainty; (5) that documents received as part of a Freedom of Information Act request indicate that some groups were given more access to the rulemaking than others, thus supporting the reopening of the public comment period; (6) that if the public comment period were reopened, EPA would be presented with information that would compel EPA to disapprove the SIP

revisions; and (7) that the petition also incorporated the original petition issues.² Both petitions are included in the docket for this action.

In the letter granting the February 2009 petition for reconsideration, EPA committed to conduct this reconsideration through a new rulemaking process. Through this process, which begins with this public notice, EPA is allowing for public comment and will make a determination either affirming its previous action and approving the revisions or amending the previous action and disapproving the revisions.

II. What Are EPA's Current Proposals?

A. Proposal To Affirm the October 15, 2008, Action and Approve the 2003/2008 Submittals

As was discussed in EPA's October 15, 2008, rulemaking, EPA believes that the primary issue in considering whether these SIP revisions were approvable was determining whether the approval of the revisions was consistent with section 110(l) of the CAA. In particular, determination of consistency with section 110(l) depends upon whether the proposed revisions would interfere with attainment of the NAAQS by increasing emissions of PM_{2.5}.³ Section 110(l) of the CAA provides in part that:

² The original petition raised approximately eight issues summarized as follows: (1) EPA was arbitrary and capricious in failing to reopen the public comment period when ADEM made changes to the rule after the close of the public comment period; (2) EPA was arbitrary and capricious in deviating from rulemaking policy regarding documentation of post-comment period meetings between EPA and ADEM and failing to meet with Petitioners in addition to ADEM; (3) EPA was arbitrary and capricious in proposing to approve a SIP revision before the rule had even been developed at the State level; (4) EPA failed to comply with rulemaking procedures by failing to complete the docket prior to finalizing the rulemaking action; (5) the rule does not represent reasonably available control technology (RACT) which is required because Alabama has PM_{2.5} nonattainment areas; (6) EPA's approval was not consistent with either section 110(l) or 193 due to likely increases in short-term PM emissions; (7) EPA's final action was not consistent with EPA policies on excess emissions and director's discretion; and (8) the final rule does not comply with 40 CFR Part 51 because it is not an "appropriate" visible emission limitation.

³ EPA's view has been that if the SIP revision does not interfere with attainment or maintenance of the PM_{2.5} NAAQS, then it is unlikely to interfere with other applicable requirements. For example, if EPA concludes that actual emissions of PM_{2.5} allowed under the SIP are not increasing as a result of the SIP revision, then no additional control requirements would be required under section 193 (assuming it otherwise applies to this action). Similarly, EPA anticipates that if the opacity standard is consistent with attainment of the NAAQS, then it would be an "appropriate" standard for purposes of Part 51, and would not interfere with other applicable requirements such as RACT. EPA solicits comment on these issues and

The Administrator shall not approve a revision of a [SIP] if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of [the Act].

In evaluating whether a SIP revision would interfere with attainment or maintenance, as required by section 110(l), EPA generally considers whether the SIP revision will allow for an increase in actual emissions to the air over what is allowed under the existing federally-approved SIP.⁴ EPA has concluded that preservation of the status quo air quality during the time new attainment or maintenance demonstrations are being prepared will prevent interference with CAA requirements, including the States' obligations to develop timely demonstrations. EPA does not believe that areas must produce a complete demonstration to make any revisions to the SIP, provided the status quo air quality is preserved.

The 2003/2008 Submittals at issue were the subject of extensive consideration because the question of whether they were expected to result in an increase in emissions of criteria pollutants, particularly PM_{2.5}, was a difficult issue to analyze technically. Opacity itself is not a criteria pollutant. Rather, opacity may be defined as the degree to which emissions reduce the transmission of light and obscure the view of an object in the background. (See 40 CFR 60.2.) Opacity requirements are significant environmentally for many reasons, including that they may be used as an indicator of the effectiveness of emission controls for PM emissions. Opacity may also be used to assist with implementation and enforcement of PM emission standards.

EPA's prior approval notice provides extensive discussion of the reasons why EPA concluded in that notice that section 110(l) had been satisfied. 73 FR 60957 (October 15, 2008).⁵ In particular, EPA stated as grounds for this conclusion that: "(1) The revision would not increase the allowable

whether there are other applicable requirements that require independent analysis under section 110(l) or other portions of the CAA.

⁴ EPA also accepts modeling demonstrations, as when an area is seeking approval of a maintenance plan, and in some cases (for areas designated attainment) EPA has accepted an analysis demonstrating that the SIP revision will not interfere with maintenance or other CAA requirements.

⁵ In addition, the Response to Comment document prepared by EPA for the final rule also addressed several issues raised by Petitioners.

¹ The director's discretion provisions under Alabama rule 335-3-4-.01(1)(c) and (d) would be unchanged by this SIP revision, so periods of excess emissions allowed in a permit pursuant to those provisions would continue to be allowed, as noted here. EPA notes that, as the director's discretion provisions are not being revised by ADEM or reviewed by EPA at present, nothing in this notice should be considered as endorsing those previously approved provisions.

average opacity levels; and (2) the relationship between changes in opacity and increases or decreases in ambient PM_{2.5} levels cannot be quantified readily for the sources subject to this SIP revision, and is particularly uncertain for short-term analyses.” 73 FR 60959.

In light of the issues raised in the February 2009 petition for reconsideration, including Petitioners’ arguments regarding the need to complete an equivalency determination under section 110(l), and the concerns about the nature of the relationship between opacity and PM, EPA is reconsidering and soliciting comment on its conclusion that the SIP revisions satisfied the requirements of section 110(l). If EPA concludes, following public comment on this reconsideration notice, that these two grounds remain an appropriate basis for approving the SIP revisions as meeting the requirements of section 110(l), and concludes that Petitioners have not identified other issues that lead to the conclusion that the SIP revisions interfere with any applicable requirement of the CAA, then EPA anticipates that it would affirm its prior approval of the SIP revisions.

Thus, EPA is now accepting comment on our previously articulated basis for approving the 2003/2008 Submittals, on the issues raised in the February 2009 petition for reconsideration, and how the issues raised in the February 2009 petition may impact EPA’s previous basis for approving the 2003/2008 Submittals.

B. Proposal To Amend the October 15, 2008, Action and Disapprove the 2003/2008 Submittals

In the February 25, 2009, petition for reconsideration, Petitioners lay out their rationale for why EPA should amend the October 2008 rulemaking and disapprove for the 2003/2008 Submittals. As part of the current reconsideration process, EPA is (1) outlining the following rationale, which could form the basis for amending the October rulemaking action; (2) proposing to amend the October rulemaking and disapprove the 2003/2008 Submittals based on the discussion below, and any other issues that may come to light as part of the public comment received through this notice; and (3) taking comment on this proposed alternate disapproval action and rationale.

Rationale for Proposed Disapproval

The most significant issue raised by petitioners in the February 25, 2009, petition is that approval of the 2003/2008 Submittals was not consistent with

Section 110(l) because, petitioners explain, the “bundling of high opacity periods” would result in increases in PM mass emissions, thus “interfering” with attainment and maintenance of the PM NAAQS.

The 2003/2008 Submittals allow for higher maximum opacity levels from the applicable facilities that were not previously authorized. In some cases, these increases may be up to 100 percent opacity. These visible emissions of up to 100 percent opacity for a certain period of time will be considered lawful—a distinct difference between the 2003/2008 SIP proposal and the previous SIP-approved rule. These types of emissions will be allowed from approximately 19 facilities affected by the rule change, including older coal-fired utilities, cement manufacturing facilities, and pulp and paper facilities, among others. Some of the affected facilities are located in or near the Birmingham, Alabama, area, which is currently designated as nonattainment for PM_{2.5}. Alabama also has a partial county that is part of the Chattanooga, Tennessee, PM_{2.5} nonattainment area, and one of the affected facilities is located near that area. In addition, the Birmingham area currently has a monitor that has registered design values above the 1997 8-hour ozone standard and is considered in violation of that NAAQS. As a result of the ozone violation, Alabama submitted a SIP revision, which was approved in a July 30, 2009, rulemaking (74 FR 37977) to adopt contingency measures for the Birmingham area.

As was discussed earlier in this notice, both Alabama’s previous visible emissions rule and the revised rule allow for opacity of 100 percent for periods of startup, shutdown, load change and rate change (or other short intermittent periods upon terms approved by ADEM’s Director and included in a State-issued permit). The previous rule, however, did not otherwise allow for opacity of 100 percent and allowed, instead, for opacity of up to 40 percent for one six-minute period per hour. Thus, in addition to periods of startup, shutdown, load change and rate change (or other short intermittent periods), the revised Alabama rule allows the same maximum time of excess opacity in a single day (up to 144 minutes per day) as the previous SIP-approved rule. The revised rule allows for an increase in the upper limit from 40 percent opacity to 100 percent opacity. Further, the revised rule allows for a daily aggregate of the 24 six-minute periods per day as opposed to 24 hourly periods per day.

The petition for reconsideration outlines several reasons why petitioners believe the 2003/2008 Submittals are not approvable, including (in paraphrase): (1) The 22 percent average daily opacity cap is illegal because it incorporates automatic exemptions, as does the rest of the opacity rule, making it illegal under the DC Circuit’s decision in *Sierra Club v. EPA*, 551 F.3d 1019 (DC Cir. 2008) (vacating certain provisions in 40 CFR part 63 regarding periods of startup, shutdown, and malfunction); (2) the 22 percent average daily opacity cap provision does not represent RACT; (3) approval of the 22 percent average daily opacity cap provision was illegal because there is no support for the proposition that allowing bundling of high opacity periods would allow no more particulate than the old regulatory scheme which allowed 40 percent opacity once per hour; and (4) the 22 percent average daily opacity cap provision would still allow the bundling of high opacity periods, thereby failing to ensure compliance with three-hour mass emission limitations.

Based on the information received to date, EPA believes that increases or decreases in PM_{2.5} emissions based on short-term increases in opacity cannot be quantified readily for the sources subject to this SIP revision. There are several contributors to the uncertainties associated with relating mass emissions to increases in opacity, including: (1) Differences between combustion technology characteristics and fuel components, (2) differences in control technology types, temperatures at which they operate, and load characteristics, (3) the recognition that both opacity and mass emissions are subject to significant variability over short periods of time and fluctuations such that one may act independently of the other, and (4) differences between the mass of particles that exists at the point of opacity measurement by the COMS (e.g., in the stack) and the direct PM_{2.5} that forms immediately upon exiting the stack (that are related to fuel components more than to control technology).

A significant issue for these SIP revisions is the degree of uncertainty that exists, and how to apply section 110(l) in the event EPA determines there is extreme uncertainty based on currently available data. Alabama has not provided EPA with an affirmative demonstration that the 2003/2008 Submittals will not interfere with attainment and maintenance of the NAAQS, reasonable further progress, or any other applicable requirement of the CAA—particularly for facilities located

in or near PM nonattainment areas. Petitioners argue that in order to preserve the integrity of the SIP revision process, section 110(l) requires more than mere uncertainty, i.e., an inability to predict with confidence, based on current data, the effect of changes on the opacity standard with respect to attainment of the NAAQS. Rather, section 110(l) requires an affirmative conclusion that the revision at issue will not interfere with any NAAQS or applicable requirement. Thus, one possible approach suggested by the petition would be to conclude that the SIP revisions could not be approved until additional data and analysis (e.g., source-specific testing) was submitted that provided a reasonable basis for concluding that the revision would not interfere with applicable requirements. This approach would provide protection for the NAAQS, consistent with the overall goals of the CAA. EPA solicits comment on this approach, particularly if the uncertainty (based on the available record) is too great to provide a basis for concluding that the SIP revisions are likely to interfere with timely attainment of the PM_{2.5} NAAQS, as a basis to amend and disapprove of the 2003/2008 Submittals.

III. What Additional Information Would EPA Like To Receive?

The relationship between opacity and PM mass emissions is a key component to evaluating the October 2008 rulemaking under Section 110(l). Thus, in addition to soliciting comments on the above proposals, EPA is also seeking comment on the relationship between opacity and the NAAQS (the PM₁₀ and PM_{2.5} NAAQS in particular). This information will help EPA gather additional information regarding petitioners' claims and Section 110(l). EPA specifically seeks public comment on the nature of the relationship between opacity and PM mass emissions over both the short and long term and when the opacity and PM mass emissions may have a predictable relationship to one another (e.g., when an opacity level of a certain amount would predict a PM mass emission of another certain amount). The public is encouraged to provide the following types of data and analyses to assist with EPA's reconsideration of its action on the 2003/2008 Submittals. Source-specific data from Alabama facilities affected by the 2003/2008 Submittals would provide particularly pertinent information; however, the following list of data/information would assist EPA in its analysis of the submittals:

- Concurrent measurements from COMS and PM continuous emission

monitoring systems, along with fuel analyses, process data, control device descriptions, and operational data;

- Concurrent opacity and PM emissions measurements, along with fuel analyses, process data, control device descriptions, and operational data;
- Information on relationships, empirical or modeled, between opacity and PM emissions (both filterable and condensable), such as statistical analyses that attempt to relate or correlate opacity with PM emissions (both filterable and condensable);
- Data on conditions—such as those associated with fuel, source, combustion, load, control, or particle characteristics—under which relationships exist between opacity and PM emissions;
- Other parameters that can be measured and related to PM emissions;
- Relationships between opacity and particle size, especially for fine PM;
- Benefit and/or cost information on compliance methods that measure PM on a direct, continuous basis and methods that rely on indicators, such as opacity, and/or rely on ongoing but infrequent PM emissions testing; and
- Any data supporting the particular issues raised in the petition for reconsideration.

EPA is now accepting public comment on the various bases identified in the petition for reconsideration, or that otherwise may be articulated, for amending the October rulemaking and disapproving the 2003/2008 Submittals.

IV. Proposed Actions

This rulemaking is part of EPA's reconsideration process on our October 15, 2008, final action approving Alabama's visible emissions SIP revisions. EPA is seeking public comment on proposals to affirm our prior action, which approved the SIP revisions, or amend and disapprove the revisions to Alabama SIP rule 335-3-4-.01 ("Visible Emissions"), submitted initially in 2003 and significantly revised and re-submitted on August 22, 2008.

The public is encouraged to submit any comments that it would like EPA to specifically respond to as part of this reopening of the public comment period. The October 15, 2008, final action remains in effect at this time. The Docket for this reopening has been populated with all the relevant information and is available electronically and in hardcopy in the Region 4 Office.

V. Statutory and Executive Order Reviews

- A. Executive Order 12866, Regulatory Planning and Review
- B. Paperwork Reduction Act
- C. Regulatory Flexibility Act
- D. Unfunded Mandates Reform Act
- E. Executive Order 13132, Federalism
- F. Executive Order 13175, Coordination With Indian Tribal Governments
- G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks
- H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use
- I. National Technology Transfer and Advancement Act

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled "Regulatory Planning and Review."

B. Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, OMB must approve all "collections of information" by EPA. The Act defines "collection of information" as a requirement for "answers to * * * identical reporting or recordkeeping requirements imposed on ten or more persons * * *" 44 U.S.C. 3502(3)(A).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP proposals under section 110 and subchapter I, part D of the CAA do not create any new requirements but simply propose approval of requirements that the State is already imposing. Therefore, because the Federal SIP approval or disapproval proposals do not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The CAA forbids EPA to base its

actions concerning SIPs on such grounds. *Union Electric Co., v. U.S. EPA*, 427 US 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval or disapproval action proposed does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action proposes to approve or disapprove pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that 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.” Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local

governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will 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, because it merely proposes to approve or disapprove a State rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This proposed rule does not have tribal implications, as specified in Executive Order 13175. This proposed rule will not have substantial direct effects on tribal governments, 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. Thus, Executive Order 13175 does not apply to this rule.

EPA specifically solicits additional comment on this proposed rule from tribal officials.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of

the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use “voluntary consensus standards” (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today’s action does not require the public to perform activities conducive to the use of VCS.

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.

Dated: September 10, 2009.

Stanley Meiburg,

Acting Regional Administrator, Region 4.
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