BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of the Final Rule:	)	Docket ID No. EPA-R04-OAR-2005-AL-0002
Approval and Promulgation of Implementation Plans: Alabama: Approval of Revisions to the Visible Emissions Rule	)	SECOND PETITION FOR RECONSIDERATION

BACKGROUND

On December 12, 2008, Alabama Environmental Council, Sierra Club, Natural Resources Defense Council, and Our Children's Earth Foundation (Petitioners) petitioned the Administrator of the Environmental Protection Agency ("the Administrator" or "EPA") to reconsider the final rule captioned above and published at 73 Fed. Reg. 60957 (Oct. 15, 2008). On December 19, 2008, Alabama Power submitted a response to the petition. On December 31, 2008, the Petitioners both replied to Alabama Power's submission and stated a new ground why the agency should grant reconsideration: namely that the DC Circuit's decision in *Sierra Club v. Environmental Protection Agency,* 551 F.3d 1019 (D.C. Cir. 2008) (hereinafter the "SSM MACT decision") made the agency's action on this SIP revision untenable. On January 15, 2009, the agency denied the petition for reconsideration.

Also, as pointed out in the first petition for reconsideration, when the agency issued the final rule on October 15, 2008, it failed to include a number of documents in the rulemaking record. On January 9, 2009, the agency almost doubled the number of documents in the docket, adding twenty new documents. None of those documents, of course, were available to the Petitioners at the time the initial Petition for Reconsideration or the subsequent submission of December 31, 2008 were prepared.

Accordingly, Petitioners are now filing a second Petition for Reconsideration, stating two new grounds. First, the agency never addressed our argument regarding the SSM MACT case. Second, the new documents added to the docket show that throughout the consideration of this matter, the agency acted in an arbitrary and duplicitous manner in failing to renotice this rulemaking for public comment given the differences between what EPA called for from Alabama in the April 12, 2007 proposal and what Alabama actually submitted for approval on August 22, 2008.[1]

I. The SSM MACT Case Requires Reconsideration of this Matter

In its January 15, 2009 denial of the initial petition for reconsideration, the

[1] In making this second petition for reconsideration, Petitioners hereby incorporate by reference their original petition submitted on December 12, 2008 and their subsequent filing on December 31, 2008.

agency ignored Petitioners' December 31, 2008 submission which alerted the agency to the DC Circuit's SSM MACT decision and explained why this decision represented an additional ground warranting reconsideration. Without repeating what was said there, Petitioners offer the following points:

(1) The SSM MACT case makes clear that when the Act calls for the imposition of an emission limitation, at least some standard must apply at all times. *See* 551 F.3d at 1027 ("the SSM exemption violates the CAA's requirement that some section 112 standard apply continuously");

(2) As pointed out in Petitioners' comment letter on the proposal, [Doc. 10], 40 C.F.R. § 51.212 requires that SIPs contain visible emission (opacity) limitations. Under the SSM MACT decision, this requirement mandates that some opacity standard must be in place at all times;

(3) As pointed out in Petitioners' comment letter on the proposal, [Doc. 10], the replaced rule violated this requirement because it contained automatic exemptions for startup, shutdown, load change, and any other exemption the Alabama Department of Environmental Management ("ADEM") saw fit to grant. EPA's proposed solution was defective because it retained these automatic exemptions, and

(4) The 22% daily cap provision did not fix this flaw in the proposal

because it does not apply during periods of startup, shutdown, load change, and any other exemption ADEM sees fit to grant. In other words, the final rule applies no opacity standard during periods of startup, shutdown, load change, or any other exemption ADEM sees fit to grant, and therefore, it is illegal under Section 302(k) of the Act, 42 U.S.C. § 7602(k).

II. The Newly Disclosed Documents Require Reconsideration of this Matter

1. The New Documents Show that EPA Required Alabama to Add the 22% Daily Cap Provision in Order to Make the SIP Rule Approvable.

Since filing the first petition for reconsideration, Petitioners have maintained that because the rule Alabama submitted to EPA differed from the one EPA mandated in the 2007 proposal, 72 Fed. Reg. 18428 (April 12, 2007), EPA should have reproposed approval. The final version of the rule differs from EPA's recommendations because it adds a 22% daily cap. In its January 15 denial of the petition for reconsideration, EPA stated that it reconsideration was unnecessary because:

> the additional daily limit makes the opacity limits under the SIP revision, as approved, more stringent than those that were originally proposed for approval. Thus, it is difficult to see what "new and different criticisms" the petitioners would offer if EPA had provided a new round of notice and comment on the inclusion of a daily limit in the SIP revision as approved.

Letter from J.I. Palmer, Jr. to George Hays (Jan. 15, 2009), at 3. Mr. Palmer goes

on to note that:

> [T]the SIP revision, as approved, contained all of the requirements specified in the proposed approval and thus conformed to the requirements of that notice. It is true that the final SIP revision included not only a requirement to maintain average quarterly opacity, as specifically required in the proposal, but also a requirement to maintain average daily opacity; however, EPA considers the inclusion of this additional measure, which makes the SIP revision more stringent. to be entirely consistent with the terms of the notice proposing approval. EPA does not believe that the statements that ADEM's submission should "be consistent with" and "conform specifically to" the changes identified in the notice require that no additional provisions, even those that make the rule more stringent in response to public comment, could be approved without further notice and comment.

Id. at 3-4 (footnotes omitted).

Thus, EPA's logic is as follows: EPA's proposal in 2007 was approvable "as is." Thus, EPA reasoned, anything the State did to make the proposal more stringent was superfluous, and therefore, no reproposal was necessary.

Accordingly, if the record showed that EPA did not believe the proposal was approvable "as is," making the 22% daily cap necessary in EPA's mind for approval, then reproposal would be necessary unless the 22% daily cap would be a logical outgrowth of the proposal that petitioners should have anticipated and commented upon.

In fact, the record shows that EPA did not believe that its 2007 proposal was approvable and that was why EPA required Alabama to adopt the 22% daily cap

provision. First, note that in an e-mail from Jeff Kitchens of ADEM to Joel Huey of EPA dated April 25, 2008 [Doc 40, at pdf p. 3], ADEM recognized what petitioners have been saying all along, that unless ADEM's submission "conform[ed] specifically" to EPA's 2007 proposal, EPA would have to repropose approval. Kitchens e-mail shows that ADEM therefore wanted to go forward with a rule that did conform specifically to what EPA proposed.[2]

Nevertheless, the docket shows that EPA insisted that it could not approve a rule that "specifically conformed." First, in a letter from ADEM Director Trey Glenn to Alabama Governor Bob Riley dated July 11, 2008 [Doc. 30], Glenn says that it was EPA that had come up with the 22% daily average opacity cap, and that "several suggestions were made by EPA regarding language that we could change in the proposed rule to address some of the issues that EPA had raised with my staff." Glenn goes on to say that he was originally opposed to the idea, but then changed his mind. Governor Riley himself confirms that the daily average cap was required by EPA:

> On Tuesday, June 2, representatives of **EPA Region 4 asked ADEM** to reconsider additional changes to Alabama's proposed SIP revision related

[2] The version of the Kitchens' e-mail included in the record does not include the proposed rule Kitchens attached to his e-mail. That proposed rule, attached hereto as Attachment 1, shows that ADEM's proposed rule did not include any provision for a 22% daily cap.

> to opacity. The ideas presented were not different from those discussed during a March 26 meeting here in Montgomery.
>
> Wednesday morning, June 3, **the ADEM Director accepted EPA's ideas** and offered to add to Alabama's proposed SIP revision a new obligation to maintain daily average opacity at 22%

Letter from Governor Riley to Administrator Johnson dated June 17, 2008 (emphasis added) [Doc. 25].

In a July 2 letter back to Riley, Johnson confirmed that the 22% daily cap requirement came from EPA: "As a result of those discussions, ADEM recently **agreed** to include a new obligation to maintain daily average opacity at 22 percent." [Doc. 27].

It was, of course, necessary for EPA to require changes to its 2007 proposal [Doc. 6] because, as petitioners pointed out in their comments on that proposal, [Doc. 10], the proposal was flawed for a number of reasons including the fact that the proposal allowed, on a daily basis, opacity to increase for 2.4 hours per day from 40% to 100%, thereby allowing more particulate to be emitted than the status quo allowed. The 22% daily cap attempts to resolve this problem, but as pointed out in petitioners' earlier reconsideration submissions and below, the 22% cap solution is flawed, and the entire rule continues to be flawed.

Because EPA mandated this change to its 2007 proposal to correct that proposal's flaws, EPA should have reproposed the rule. EPA could not, however,

repropose the rule and meet ADEM's timing demands. In notes taken regarding a June 3, 2008 call between ADEM and EPA, [Doc. 41, at pdf p. 3], ADEM's Air Director Ron Gore told EPA that: "any alternative that would start the process over is not acceptable" and that "[t]here is not enough time to consider the 22% daily average alternative because there is insufficient time to check with industry to see if this approach will address their concerns."

EPA elected not to repropose. In so doing, not only did EPA violate the law, but it also misrepresented the facts, both in its final rulemaking action in October 2008, [Doc. 21] and again in its denial of the petition for reconsideration. In the preamble to the final rulemaking, EPA stated:

> ADEM decided to submit the necessary revisions proposed by EPA in our April 2007 Federal Register notice to support final approval. ADEM also decided to include an additional limitation on opacity based on public comments.

[Doc. 21 at 60958/2]. *See also* January 15, 2009 Letter from Palmer to Hays (restating the same language verbatim).

As set out above, ADEM did not decide to include the additional limitation based on public comment. ADEM put in the additional language because EPA required it to do so. Had EPA disclosed the truth, then it would have had to repropose the rule because it would have been an admission that the 2007 proposal

was not approvable "as is."

2. The New Documents Show that the Administrator's Conclusion that Greater Opacity Does Not Necessarily Mean Greater Particulate Was Irrational.

Two weeks after Administrsator Johnson wrote to Governor Riley confirming that ADEM had "agreed" to include a new obligation into the revision, Administrator Johnson exacerbated the arbitrary nature of EPA's actions in this matter by sending a memorandum to Governor Riley stating that:

> After performing substantial analysis EPA's professional staff and scientists cannot conclude that the proposed change will impede the ability of Alabama to meet its Clean Air Act obligations. This is because, as a general matter, there is no reliable and direct correlation between opacity and PM emissions. While that may seem counterintuitive to some, ***it is the unequivocal scientific conclusion of the Agency's air pollution experts : greater opacity does not necessarily mean more particulate matter***.

[Doc. 36] (emphasis added).

This statement is arbitrary and capricious for three reasons: first, the record does not cite any statements from the Agency's air pollution experts, so what statements was the Administrator relying upon here? Indeed, the SIP Consistency Process Record shows that other regions disagreed with the approach taken in this rulemaking, so the scientific conclusion of the agency could not have been "unequivocal." Second, if the agency really thought that greater opacity does not necessarily mean more particulate matter, why did it require Alabama to include

the 22% daily cap provision in this rule? Third, the agency included only two articles discussing the relationship between opacity and particulate matter. The first, a 1972 German study recording dust emissions from cement kilns concluded that: "there was a definite linear relationship between extinction anti dust concentration." [Doc. 38 at pdf p. 10]. Second, the agency included an ESP Manual from SRI which documented instances when there did not appear to be a correlation between opacity and particulate. [Doc. 30 at pdf pp. 16]. Nevertheless, the authors note that:

> For a transmissometer to be useful as monitor of the mass concentration, the properties of the particles (other than mass) being monitored must remain fairly constant over the monitoring period. **Experimental data are available showing that good opacity mass concentration calibration can be obtained on some sources. The sources that have been evaluated include coal-fired power; lignite-fired power plants; a cement plant; a Kraft pulp mill recovery furnace; petroleum refinery; asphaltic concrete plant; and a sewage sludge incinerator.**
>
> * * *
>
> For an emission source with high efficiency particulate control equipment, the size distribution of the emitted particulate matter may be relatively constant. Therefore, emission sources with variable emission and low efficiency particulate control equipment i.e. cyclone and low energy scrubbers) can be expected to provide poorer correlation of instack plume opacity to particle mass concentration. **Transmissometers may be useful indicators of mass emissions, once calibrated, on sources where the aerosol properties remain constant**.

Id. at pdf pp. 16-17 (emphasis added).

Given these statements, how does one conclude that: "greater opacity does not necessarily mean more particulate matter"? According to the studies quoted above, depending on the source and control scheme, greater opacity ***does*** necessarily mean more particulate matter.

3. The New Documents Show that the Agency, in this Case, Did Not Fulfill its Responsibility to Protect the NAAQS As Required by Section 110(l).

In addition to reaching an irrational conclusion based on the documentary record, the Administrator's memorandum to Mr. Palmer embodies an unlawful methodology for implementing Section 110(l) of the Act. [Doc. 36]. In his memorandum, Administrator Johnson states that to make a Section 110(l) determination, "the agency needs ***to review the available information*** and make a decision based on whether the weight of the evidence, ***after appropriate inquiry***, indicates the revision will interfere with applicable requirements." *Id*.

Here the record shows that they agency did not make an "appropriate inquiry." Under 40 C.F.R. § 51.112, states must submit the following information with SIP submissions to show that: "the measures, rules, and regulations contained in it are adequate to provide for the timely attainment and maintenance of the national standard that it implements":

> (1) A summary of the computations, assumptions, and judgments used to determine the degree of reduction of emissions (or reductions in the growth of emissions) that will result from the implementation of the control strategy.
>
> (2) A presentation of emission levels expected to result from implementation of each measure of the control strategy.
>
> (3) A presentation of the air quality levels expected to result from implementation of the overall control strategy presented either in tabular form or as an isopleth map showing expected maximum pollutant concentrations.
>
> (4) A description of the dispersion models used to project air quality and to evaluate control strategies.

40 C.F.R. § 51.112(b).

Previously, EPA has apparently allowed states to avoid making such a demonstration by assuring itself that the loss of a control measure would be offset by "new and contemporaneous emissions reductions" elsewhere. *See Kentucky Resources Council v. EPA*, 467 F.3d 986, 995 (6th Cir. 2006). With this rule, however, EPA did not make this sort of "equivalency determination;" rather, for "the first time," EPA relied "on the uncertainty in the opacity-PM relationship as basis for approving a SIP revision under 110(1)." [Doc. 35 at 2].

The agency cannot simply rely upon uncertainty in this way. Section 51.112 imposes an affirmative responsibility on a state seeking a revision to make a demonstration that a plan will provide for timely attainment. Here, the state

submitted no demonstration at all, and the agency accepted this dearth of information in making its Section 110(l) determination. Making decisions in ignorance is not an "appropriate inquiry." The agency could have done much more to determine whether the rule as proposed would actually lead to increased particulate emissions. In fact, agency staff actually suggested that this be done. According to an internal ADEM memorandum, EPA staff suggested to ADEM that:

> [ADEM] could require sources subject to the opacity rule revisions to perform source specific testing to determine the expected PM emission rates at elevated levels of opacity. This would complement the proposed rule by providing more data to show that any increased level of particulate matter allowed by the opacity rule revision would not cause a problem with the PM2.5 NAAQS.

Memorandum from Jeffery W. Kitchens, ADEM, to file (June 4, 2008), appended hereto as Attachment 2.

The state refused to submit this information. Furthermore, there is absolutely no data of any kind showing that all 22% daily opacity averages would yield the equivalent amount of particulate. As we have mentioned before, we believe the daily cap provision does not ensure that particulate emissions will not increase given the bundling of opacity exceedances that the rule allows.

The regulatory scheme created by EPA simply does not allow the agency to

relax standards without undertaking a technical analysis, and EPA should have insisted on an analysis consistent with Section 51.112 from the state before EPA processed this submission.

III. Documents Released as Part of a Partial FOIA Response Regarding this Matter Show that the Public Comment Process Has Been Handled in a Fundamentally Unfair Manner

On June 19, 2008, counsel for petitioners sent a Freedom of Information Act ("FOIA") request to the agency asking for material related to this rule. As Attachment 3 shows, EPA still has not provided a final response to that request, even though the request was made of EPA **three months before** the agency went final with this rule and **five months before** any court challenge to this rulemaking was due.

Nevertheless, a review of EPA's interim response shows the following: First, Attachment 4, an e-mail to EPA forwarding a letter from "Manufacture Alabama," shows that on May 20, 2008, EPA received public comment from industry stakeholders and that the letter was circulated among several EPA employees.[3] There is no record that the letter was returned to the sender without being considered. How did it come to pass that Manufacture Alabama knew that

[3] The FOIA response did not actually include the actual letter from Manufacture Alabama, and therefore the response was incomplete.

rule revisions were being contemplated? Review of the docket provides answers. The docket, [Doc. 41 at pdf p. 3], shows that EPA knew that the state was feeding industry stakeholders with the particulars of the discussions between ADEM and EPA to see if the approach "address[ed] their concerns." Since EPA knew this backdoor public process was ongoing, why then did EPA not reopen the comment period to the public at large at that time?

Even more odd, after EPA finalized the rulemaking, EPA sent a letter to one of the petitioners, Michael Churchman, *see* Attachment 5, noting that EPA considered, as part of its final action, matters Churchman discussed in a letter he sent on August 25, 2008. *See* Attachment 6 for a copy of the August 25 letter. If this letter was considered, why does the docket not reflect that? Furthermore, if EPA was going to consider additional material, why did it not inform the public so that the public would know that EPA was entertaining additional public comment? Interestingly, the EPA's response to petitioners' FOIA request also shows that EPA distributed an August 22, 2007 submission (post-comment period) from Hunton & Williams, lawyers for the Utility Air Regulatory Group ("UARG") to at least 35 EPA employees. *See* Attachment 7. On the other hand, the record indicates that a September 21, 2008 submission from the Petitioners, *see*

Attachment 8,[4] including several expert reports, was disregarded. All of this begs the question: how exactly did EPA determine which post-comment period submissions it was going to review, and which was it going to ignore?

The documents mentioned above show that EPA handled the entire public process regarding this matter in an arbitrary, cavalier manner, and for that reason alone, the petition should be granted, the rule should be vacated, and the public comment period should be reopened.

IV. Allowing Public Comment on Alabama's SIP Revision Would Require Disapproval.

In its January 15, 2009 denial of the petition for reconsideration, the agency suggested that "it is not clear whether petitioners even object to the addition of the 22 percent provision, except insofar as they object to approval of the entire rule." Petitioners respectfully suggest that EPA has not carefully read our previous submissions, particularly our submission of December 31, 2008. Without restating those earlier submissions, petitioners wish to remind EPA of the following:

(1) the 22% daily cap is illegal because it incorporates automatic exemptions as does the rest of the restated opacity rule, making it illegal under the

[4]In the interest of space, the attachments included with the September 21 letter have not been included here, but they can be provided upon request.

SSM MACT decision;

(2) the 22% daily cap provision is not RACT;

(3) approval of the 22% daily cap provision was illegal because there is absolutely 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% opacity once-per-hour; and

(4) the 22% daily cap provision would still allow the bundling of high opacity periods, thereby failing to insure compliance with three-hour mass emission limitations.

As mentioned in Petitioners' earlier submissions, the final rule simply was not a logical outgrowth of EPA's proposal, and consequently, the comment period should have been reopened so that EPA could have considered the four points set out above.

CONCLUSION

For the reasons set forth above, this petition for reconsideration should be granted as requested.

Respectfully submitted this 25th day of February, 2008,

s/ George E. Hays
George E. Hays, Esq.
236 West Portal Avenue #110
San Francisco, California 94127
(415) 566-5414

Counsel for Petitioners

List of Attachments

1. E-mail from Jeff Kitchens of ADEM to Joel Huey of EPA (April 25, 2008) w/ attachment

2. Memorandum from Jeffery W. Kitchens, ADEM, to file (June 4, 2008)

3. Letter from Russell L. Wright to George E. Hays (Feb. 6, 2009)

4. E-mail regarding Manufacture Alabama Submission (May 20, 2008)

5. Letter from J.I. Palmer to Michael Churchman (Oct. 31, 2008)

6. Letter from Michael Churchman to Administrator Stephen L. Johnson (Aug. 25, 2008)

7. E-mail regarding August 22, 2007 UARG Submission

8. Letter from William J. Moore, III to Administrator Stephen L. Johnson (Sept. 21, 2008)

ATTACHMENT 1

Document Log

From	To
"Kitchens, Jeff" <JWK@adem.state.al.us>	Joel Huey/R4/USEPA/US@EPA
CC	**BCC**
"Gore, Ron" <RWG@adem.state.al.us> "Howard, Chris" <CH@adem.state.al.us> "Owen, Tim" <TSO@adem.state.al.us> "Brown, Larry" <LWB@adem.state.al.us> "Graham, Amy" <AGraham@adem.state.al.us>	
Subject	**Date/Time**
Proposed language for opacity rule revision	04/25/2008 10:55 AM
Comments	

Releasable

Document Body

Joel:

As we discussed earlier, the April 12, 2007 Federal Register Notice concerning possible changes to our opacity rules states that our rule language must conform specifically to the recommended changes (as outlined in the FR). Otherwise, EPA would have to re-evaluate the changes and re-propose approval of the SIP submittal. Attached is draft rule language that we feel meets all the recommended changes outlined in the FR notice. The attached document contains the entire Chapter 4; however, the only section that is being revised is 4-.01.

We would like for you and other appropriate EPA staff to review the draft language and provide us with concurrence that the draft language does indeed meet all the necessary changes outlined in the FR notice. **We would appreciate a response no later than May 8, 2008.**

If you have any questions, please feel free to contact me.

Jeffery W. Kitchens, Chief
Industrial Minerals Section
Energy Branch
Air Division, ADEM
(334) 271-7875

D3Chapter4 With Opacity Revisions 0308 (3).doc

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
AIR DIVISION - AIR POLLUTION CONTROL PROGRAM

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CHAPTER 335-3-4
CONTROL OF PARTICULATE EMISSIONS

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335-3-4-.01 Visible Emissions.

(1) Visible Emissions Restrictions for Stationary Sources.

(a) Except as provided in subparagraphs (b), (c), (d), or (e) of this paragraph, no person shall discharge into the atmosphere from any source of emission, particulate of an opacity greater than that designated as twenty percent (20%) opacity, as determined by a six (6) minute average.

(b) For a person not covered by paragraphs (3) and (4) of this rule, during one six (6) minute period in any sixty (60) minute period, a person may discharge into the atmosphere from any source of emission, particulate of an opacity not greater than that designated as forty percent (40%) opacity.

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(c) The Director may approve exceptions to this rule or specific sources which hold permits under chapter 335-3-14; provided however, such exceptions may be made for startup, shutdown, load change, and rate change or other short, intermittent periods of time upon terms approved by the Director and made a part of such permit.

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(d) The Director may also approve exceptions to this rule in accordance with the following provisions:

1. The owner or operator of the affected source shall request in writing for the Director to provide an opportunity for the determination of the opacity of emissions during sampling and testing required pursuant to rule 335-3-1-.08.

2. Upon receipt from such owner or operator of the written report of the results of the sampling and testing conducted pursuant to rule 335-3-1-.08, the Director will make a finding concerning compliance with opacity and other applicable standards.

3. If the Director determines that an affected source is in compliance with all applicable standards for which the sampling and testing are being conducted in accordance with rule 335-3-1-.08 but during such sampling and testing the affected source fails to meet any applicable opacity standard, he shall notify the owner or operator and advise him that he may petition the Director within ten (10) days of receipt of notification to make appropriate adjustment to the opacity standard for the affected source.

4. The Director may grant such a petition upon a demonstration by the owner or operator that the affected source and associated air pollution control equipment were operated and maintained in a manner to minimize the opacity of emissions during the sampling and testing; that such sampling and testing were performed under the conditions established by the Director; and that the affected source and associated air pollution control equipment were incapable of being adjusted or operated to meet the applicable opacity standard.

5. Upon the conclusion of sampling and testing as required above, the Director may establish an opacity standard for the affected source at a level at which the source will be able, as indicated by the sampling and testing, to meet the opacity standard at all times during which the source is meeting the mass emissions standards. If sufficient data is not available to the Director to establish such opacity standards, the Director may require additional sampling and testing as necessary to make such a determination of opacity.

(e) The provisions of this paragraph shall not apply to combustion sources in single-family and duplex dwellings where such sources are used for heating or other domestic purposes.

(2) For a person subject to subparagraph (1)(b) of this rule, ~~C~~compliance with opacity standards in this rule shall be determined by conducting observations in accordance with Reference Method 9 in Appendix A, 40 CFR Part 60, as the same may be amended requiring a six (6) minute average as determined by twenty-four (24) consecutive readings, at intervals of fifteen (15) seconds each.

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(3) The conditions in paragraph (4) of this rule apply to each emissions unit that meets all of the following requirements:

(a) A Continuous Opacity Monitoring System (COMS) is used for indication of opacity of emissions;

(b) With respect to opacity limitations, the units are subject only to the opacity provisions stated in paragraph (1) of this rule; and

(c) The COMS system utilized is required to comply with the requirements of 40 CFR 60.13 or 40 CFR 75.14 (if applicable) and is required to be certified in accordance with the requirements of 40 CFR 60, Appendix B, Performance Specification 1.

(4) Except as otherwise exempt under subparagraphs 1(c) or 1(d) of this rule, no permittee shall discharge into the atmosphere from any source of emission, particulate of an opacity greater than that designated as twenty percent (20%) opacity, as determined by a six (6) minute average, except that during each calendar quarter, the permittee may discharge into the atmosphere from any emissions unit qualifying under paragraph (3) of this rule, particulate with an opacity exceeding 20% for not more than twenty-four (24), six (6) minute periods in any calendar day, if such periods do not exceed 2.0 percent of the source operating hours for which the opacity standard is applicable and for which the COMS is indicating valid data.

Author: James W. Cooper and John E. Daniel; Ronald W. Gore.
Statutory Authority: Code of Alabama 1975, §§22-28-14, 22-22A-5, 22-22A-6, and 22-22A-8.
History: Effective Date: January 18, 1972.
Amended: June 5, 1979; November 21, 1996; October 2, 2003; XXXXXX, 2008.

335-3-4-.02 Fugitive Dust and Fugitive Emissions.[1]

(1) No person shall cause, suffer, allow, or permit any materials to be handled, transported, or stored; or a building, its appurtenances, or a road to be used, constructed, altered, repaired, or demolished without taking reasonable precautions to prevent particulate matter from becoming airborne. Such reasonable precautions shall include, but not be limited to, the following:

(a) Use, where possible, of water or chemicals for control of dust in the demolition of existing buildings or structures, construction operations, the grading of roads, or the clearing of land;

[1] Section 4.2.1 and 4.2.2 of the Alabama Air Pollution Control Commission rules and Regulations now cited as ADEM Administrative Code rule 335-3-4-.02(1) and 335-3-4-.02(2) were declared unconstitutional by the Alabama Supreme Court in Ross Neely Express, Inc. v. Alabama Department of Environmental Management, 437 So. 2d 82 (Ala. 1983).

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Deleted: During each calendar quarter, the permittee will not be deemed in violation of rule 335-3-4-.01(1) if the non-exempt excess emissions periods do not exceed 2.0 percent of the source operating hours for which the opacity standard is applicable and for which the COMS is indicating valid data.
Deleted: (5) Nothing in paragraph (4) of this rule shall be construed to supercede the validity of opacity readings taken under paragraph (2) of this rule.
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ATTACHMENT 2

ONIS "TREY" GLENN, III
DIRECTOR

BOB RILEY
GOVERNOR

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June 4, 2008

MEMORANDUM

TO: File

FROM: Jeffery W. Kitchens

RE: Opacity Rule

At approximately 2:11 pm CDT on May 30, 2008, I called Ms. Beverly Banister of EPA Region 4 regarding their progress on the Department's proposed revisions to the opacity rule. Ms. Banister returned my call at approximately 3:27 pm CDT on the same day. Dick Schutt, Lynorae Benjamin, Joel Huey, and Barrett Parker were also on the call with Ms. Banister. Ms. Banister stated that EPA wanted to resume the conversation regarding the opacity rule that was started at the meeting held in Montgomery. Ms. Banister stated that, through the SIP consistency process, EPA had refined some of the proposals offered to the Department at the Montgomery meeting. Ms. Banister stated that she felt that these proposals could strengthen the current proposed rule. Joel Huey listed the following three options:

1. We could require sources subject to the opacity rule revisions to perform source-specific testing to determine the expected PM emission rates at elevated levels of opacity. This would complement the proposed rule by providing more data to show that any increased level of particulate matter allowed by the opacity rule revision would not cause a problem with the $PM_{2.5}$ NAAQS.
2. We could utilize what has been termed the "North Carolina" approach. Under this scenario, we would have to revise the rule to allow no more than 24 times in a day when the opacity exceeds 20%, but we would limit the maximum opacity to 40% opacity.
3. We could utilize the "22% daily average approach, whereby the daily average opacity would be capped at 22%.

When asked, Barrett Parker stated that the information obtained from Item 1 above would have to be input into models to determine the ambient impacts from any increase in particulate matter. Joel Huey stated that he was not sure of the mechanisms needed to implement Item 3. He stated that Region 4 would need to do more work with Headquarters and more discussion would be needed if we decided to utilize this option.

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(205) 941-1603 (Fax)

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(251) 432-6533
(251) 432-6598 (Fax)

Ms. Banister stated that the Region felt that the above options could be utilized without having to go back through public comment; however, she would need to check with OGC to make sure. A conference call was scheduled to be held at 8:00 am CDT on June 3, 2008.

During the call on June 3, 2008, members of EPA Region 4, EPA OGC, EPA OECA, and EPA OAQPS were on the call. Mr. Gore informed Ms. Banister that Options 1 and 2 would not solve the problem at hand and Option 3 would not meet the Department's timeliness needs. Furthermore, the Department has not looked closely to see if Option 3 would work for all the regulated facilities that would be impacted by the proposed rule.

ATTACHMENT 3

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

February 6, 2009

Mr. George Hays
Attorney at Law
236 West Portal Avenue #110
San Francisco, California 94129

RE: Freedom of Information Act Request Nos. 01-RIN-00224-08; 02-RIN-01833-08; 04-RIN-00533-08; 05-RIN-01352-08; 06-RIN-00563-08; 07-RIN-00511-08; 08-RIN-002287-08; 09-RIN-00539-08; 10-RIN-00317-08 and HQ-RIN-01706-08

Dear Mr. Hays:

This is the interim final response to your Freedom of Information Act (FOIA) request of June 19, 2008, for any and all materials pertaining to the proposed Alabama Opacity Rule, EPA-R04-OAR-2005-AL-002, up to and including, the date of this request. You further clarified your request to include all records which were not previously provided on an earlier FOIA (identified as 4-RIN-00442-07), submitted to Region 4, by Mr. William Moore, III.

To date, the Environmental Protection Agency (EPA), Region 4, has provided three previous partial responses to this request on September 5, 2008, September 25, 2008, and October 24, 2008. However, pursuant to your telephone conversation of January 22, 2009, with LouAnn Gross, Chief of the Region 4 FOIA Records Services Section, you discussed the final processing of your request. Due to the volume of records identified in response to your request, we have agreed to provide this interim final response determination, along with a categorical list of exempt records and appeal procedures. In addition, we will make every reasonable effort to complete the processing of this request and provide a final response to you within the next 30 days.

Inasmuch as our review of the records has included a view with an eye toward disclosure, we are unable to provide you with some of the documents or portions of documents which have been determined to be exempt from mandatory disclosure by virtue of 5 U.S.C. §§ 552 (b)(2), (b)(5), and (b)(6) of the FOIA. A categorical index of exempt records along with the basis for withholding is enclosed.

Exemption 2 of the FOIA exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency." This exemption encompasses two distinct categories of information. One category is that of internal matters of a relatively trivial nature commonly referred to as "low 2" information. The other category involves more substantial internal matters, the

disclosure of which would risk circumvention of a legal requirement and is referred to as "high 2" information. Some of the documents you have requested fall under the "low 2" category of Exemption 2.

Exemption 5 of the FOIA protects "inter-agency or intra-agency" memorandums or letters which would not be available by law to a party in litigation with the agency. The documents being withheld under Exemption 5 fall under the following privileges: deliberative process privilege, attorney-client privilege and attorney work-product privilege.

The most commonly invoked privilege incorporated within Exemption 5 is the deliberative process privilege, the general purpose of which is to "prevent injury to the quality of agency decisions." Specifically, three policy purposes consistently have been held to constitute the basis for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted: and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.

The attorney work-product privilege protects documents and other memoranda prepared by an attorney in contemplation of litigation. The privilege is not limited to civil proceedings, but rather extends to administrative proceedings and to criminal matters as well.

The attorney-client privilege protects confidential communications between an attorney and his client relating to a matter for which the client has sought professional advice. The privilege is not limited to the context of litigation.

Exemption 6 of the FOIA permits the withholding of a record if its disclosure would constitute a clearly unwarranted invasion of personal privacy.

You may appeal this partial denial to the National Freedom of Information Officer, U.S. EPA, Records, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, D.C. 20460, FAX: (202) 566-2147, E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, N.W. If you are submitting your appeal, via hand delivery, courier service, or overnight delivery, you must address it to 1301 Constitution Avenue, N.W., Room 6416J, Washington, D.C. 20001. The appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter may include the RIN listed above. For quickest possible handling, the appeal letter and its envelope should be marked "**Freedom of Information Act Appeal**."

Should you have any questions regarding the withheld information or appeal procedure, please contact Priscilla Johnson, FOIA Specialist, Office of Environmental Accountability, at (404) 562-9614. Should you have any other questions regarding this response, please contact Rosie Gray, FOIA Specialist, at (404) 562-8685.

Sincerely,

R. J. Ashmead, for

Russell L. Wright, Jr.
Assistant Regional Administrator
Office of Policy and Management

Enclosure
Categorical Listing of
Exempt Records

CATEGORICAL LISTING OF EXEMPT RECORDS[1]

Freedom of Information Act Request Nos. 01-RIN-00224-08; 02-RIN-01833-08; 03-RIN-01250-08; 04-RIN-00533-08; 05-RIN-01352-08; 06-RIN-00000-08; 07-RIN-00511-08; 08-RIN-002287-08; 09-RIN-00539-08; 10-RIN-00317-08 and HQ-RIN-01706-08

Documents withheld pursuant to Exemptions 5 U.S.C. §§ 552 (b)(2), (b)(5) and (b)(6)

All responsive records for this matter have been reviewed with an eye toward disclosure, and some discretionary releases have been made; however, the determination has been made that the following categories of documents are exempt from release:

Deliberative process privileged emails. These include emails to and/or from EPA personnel across the United States discussing numerous issues pertaining to the Alabama opacity SIP revision. These emails include all emails that are also attorney-client privileged and attorney-work product privileged. These emails are within the date ranges requested.

Attorney-client privileged emails. These emails include discussions with and between attorneys and clients, including Regional attorneys, as well as attorneys at the various EPA Headquarters offices. These emails would also include legal advice provided. In all cases, these emails involved discussions on the subjects including, but not limited to, the Alabama opacity SIP revision, Alabama's visible emissions rule, EPA's review of the SIP revisions, modeling, legal analysis of public comments, applicable law and regulations, and legal analysis regarding related topics. These emails are within the date ranges requested.

Attorney work product privileged emails. These emails include emails to and/or from attorneys with text including legal analysis. These emails were sent providing advice to the clients on matters that the attorneys anticipated litigation. The topics included all those described above for the attorney-client privileged emails. These emails are within the date ranges requested.

Exemption 2. Documents related solely to the internal personnel rules and practices of an agency (both trivial and substantial in nature) – Example: Call in numbers for conference calls to discuss this matter.

Exemption 6. Documents which contain personal privacy information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

---

[1] Pursuant to 40 C.F.R. § 2.113(d)(1), the documents identified in the listing above have been determined to be voluminous, and therefore, have been described categorically.

Exemption 6. Documents which contain personal privacy information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Exemption 5. Other Documents. Handwritten notes, internal communications which include internal email correspondence, briefing papers, briefing comments, issue papers, review comments, drafts, revisions, option papers, recommendations, and analyses (legal and technical).

ATTACHMENT 4

Document Log

From	To
Joel Huey/R4/USEPA/US	Lynorae Benjamin/R4/USEPA/US@EPA Dick Schutt/R4/USEPA/US@EPA Lynda Crum/R4/USEPA/US@EPA Nancy Tommelleo/R4/USEPA/US@EPA
CC	**BCC**
Stacy Harder/R4/USEPA/US@EPA	
Subject	**Date/Time**

[redacted]

Stacy Harder /R4/USEPA/US
05/20/2008 04:55 PM

To Joel Huey/R4/USEPA/US@EPA
cc
Subject Fw: Manufacture Alabama's Comments Supporting EPA's Proposed Approval of Revisions...

Information Redacted pursuant to 5 U.S.C. Section 552 (b)(5), Exemption 5, Privileged Inter/Intra Agency Document
SpecificPrivilege:

Stacy E. Harder
U.S. Environmental Protection Agency, Region 4
Air, Pesticides & Toxics Management Division
61 Forsyth Street, SW
Atlanta, GA 30303
(p) 404.562.9042
(f) 404.562.9019

----- Forwarded by Stacy Harder/R4/USEPA/US on 05/20/2008 04:55 PM -----

"Rebecca Camerio " <rebecca@manufacturealabama.org>
05/20/2008 04:51 PM
Please respond to <rebecca@manufacturealabama.org>

To Stacy Harder/R4/USEPA/US@EPA
cc
Subject Manufacture Alabama's Comments Supporting EPA's Proposed Approval of Revisions...

Ms. Harder:

Please find attached a letter from Manufacture Alabama regarding EPA's Proposed Approval of Revisions to the Visible Emissions Portion of the Alabama State Implementation Plan, Docket No. R04-OAR-2005-AL-0002.

Should you have any questions or comments, please feel to contact MA President George Clark at 334-386-3000 or MA's Environmental Chairman Tony Owens at 334-855-5233.

Thank you for your time.

Rebecca Camerio
Vice President Finance
Manufacture Alabama
(334) 386-3000

Upcoming Events

June 3-5, 2008	Washington Fly-In
September 25-26, 2008	MA Fall Meeting
November 6, 2008	Decatur Reverse Trade Show
November 12, 2008	Environmental Conference

EPA - Harder.pdf

Document Log

From

Geoffrey Wilcox/DC/USEPA/US

To

Lynda Crum/R4/USEPA/US@EPA Lynda Crum/R4/USEPA/US

CC

David Orlin/DC/USEPA/US@EPA
Kevin McLean/DC/USEPA/US@EPA
Sara Schneeberg/DC/USEPA/US@EPA

BCC

Information Redacted pursuant to 5 U.S.C. Section 552 (b)(5), Exemption 5, Privileged Inter/Intra Agency Document

Specific Privilege: Attorney Client Work Product Deliberative

Subject

Date/Time

[redacted]

Information Redacted pursuant to
5 U.S.C. Section 552 (b)(5), Exemption 5,
Privileged Inter/Intra Agency D

[redacted]

"Rebecca Camerio"
<rebecca@manufacturealabama.org>
05/20/2008 04:51 PM
Please respond to <rebecca@manufacturealabama.org>

To Stacy Harder/R4/USEPA/US@EPA
cc
Subject Manufacture Alabama's Comments Supporting EPA's Proposed Approval of Revisions...

Information Redacted pursuant to
5 U.S.C. Section 552 (b)(5), Exemption 5,
Privileged Inter/Intra Agency Document

SpecificPrivilege: Attorney Client Attorney Work Product Deliberative

Ms. Harder:

Please find attached a letter from Manufacture Alabama regarding EPA's Proposed Approval of Revisions to the Visible Emissions Portion of the Alabama State Implementation Plan, Docket No. R04-OAR-2005-AL-0002.

Should you have any questions or comments, please feel to contact MA President George Clark at 334-386-3000 or MA's Environmental Chairman Tony Owens at 334-855-5233.

Thank you for your time.

Rebecca Camerio
Vice President Finance
Manufacture Alabama

ATTACHMENT 5

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

OCT 31 2008

Mr. Michael J. Churchman
Executive Director
Alabama Environmental Council
2717 Seventh Avenue South
Suite 300
Birmingham, Alabama 35233

Dear Mr. Churchman:

Thank you for your August 25, 2008, letter to Stephen L. Johnson, Administrator of the U.S. Environmental Protection Agency (EPA), concerning the State of Alabama's proposed revisions to the visible emissions rules of its State Implementation Plan (SIP). Your letter was forwarded to the EPA Region 4 office for response.

In your August 25, 2008, letter, you articulate several concerns regarding the proposed SIP revision. Those concerns relate to notice and comment process requirements for any further EPA action on our April 12, 2007, proposed rulemaking, and the recent proposals for $PM_{2.5}$ air quality designations in Alabama and potential short-term impacts from Alabama's proposed SIP revision. Your letter also alleges that EPA officials met with proponents of the revisions and you express concern over a lack of EPA response to your previous correspondence to Administrator Johnson requesting a meeting with EPA.

The concerns raised in your August 25, 2008, letter regarding the proposed SIP revisions are matters that were considered by EPA during its review of this SIP revisions and our positions with regard to those matters are reflected in the final rule which was signed on October 1, 2008, and published in the Federal Register on October 15, 2008. As for external meetings set for the purpose of discussing the proposed SIP revision, EPA officials held such discussions with Alabama officials and the Alabama Congressional delegation. The notes from those discussions are summarized as part of the docket for the final rule and are public information.

We apologize for the delay in the response to your August 2008 correspondence and appreciate your desire to protect and preserve the environment. If you have further questions on this matter, please contact Beverly Banister, Director of the Region 4 Air, Pesticides and Toxics Management Division, at (404) 562-9077.

Sincerely,

J. I. Palmer, Jr.
Regional Administrator

cc: Trey Glenn, ADEM

ATTACHMENT 6

Alabama Environmental Council

For a clean and healthy Alabama

2717 Seventh Avenue South
Suite 300
Birmingham, Alabama 35233
michael@aeconline.org
205.322.3126

www.aeconline.org

Mary Burks
1921-2007
Founder

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August 25, 2008

Administrator Stephen L. Johnson
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Proposed Alabama Opacity Revision

Dear Administrator Johnson,

I am writing to you again regarding a proposed change to the Alabama State Implementation Plan regarding opacity standards. I previously wrote to you on June 20th of this year on behalf of my organization as well as three other groups concerned about Alabama air quality. At that time, I noted that you and your staff had been involved in a number of meetings with the proponents of a relaxation to Alabama's opacity rules, and I asked for a meeting where we might have the opportunity to express our views. So far, you have not even given me the courtesy of a response.

On Friday, the Alabama Environmental Management Commission adopted a relaxation to Alabama's opacity rules. As you know, if the EMC's action becomes final (and we currently considering whether to challenge it at the state level) in order for that action to become law, EPA must approve it into the SIP. If it wasn't troubling enough that EPA has refused to meet with my organization about this very controversial issue, now I have been informed that EPA is considering giving final approval to this rule without even putting out a proposal. In doing so, EPA would apparently rely upon a proposed rulemaking discussing why a previous proposed SIP revision regarding opacity was unacceptable. *See* 72 Fed. Reg. 18428 (April 12, 2007) and 72 Fed. Reg. 32569 (June 13, 2007). That proposal cannot serve as an adequate basis from which EPA can proceed because there was not even rule language available upon which to comment. Furthermore, since that time, circumstances related to air quality in Alabama have materially changed. Just last week, EPA announced that it intended to designate three counties in Alabama as failing to meet the 24-hour fine particle ($PM_{2.5}$) standard and designate a fourth county as unclassifiable. *See* http://www.epa.gov/pmdesignations/2006standards/rec/letters/04_AL_EPAMOD.pdf . Given the profound short-term impacts that could be caused by the proposed relaxation to Alabama's opacity rule and EPA's failure to address those issues at all in its 2007 federal register notices, going forward with final rulemaking on the opacity rule without public comment would be irresponsible, unwise, and illegal.

Thank you in advance for your attention to this matter.

For a Clean and Healthy Alabama

Michael J. Churchman
Executive Director

cc:

Jimmy Palmer
Beverly Banister
Mary J. Wilkes
Charles Ingebretson
Marcus Peacock
Granta Nakayama
Adam Kushner

ATTACHMENT 7

Document Log

From	To
Stacy Harder/R4/USEPA/US	Dick Schutt/R4/USEPA/US@EPA
CC	**BCC**
Kay Prince/R4/USEPA/US@EPA Joel Huey/R4/USEPA/US@EPA Sean Lakeman/R4/USEPA/US@EPA	
Subject	**Date/Time**
Fw: Supplemental Comments in EPA R04-OAR-2005-AL-0002	08/21/2007 11:07 AM
Comments	

Releasable

Document Body

Stacy E. Harder
U.S. Environmental Protection Agency, Region 4
Air, Pesticides & Toxics Management Division
61 Forsyth Street, SW
Atlanta, GA 30303
(p) 404.562.9042
(f) 404.562.9019

----- Forwarded by Stacy Harder/R4/USEPA/US on 08/21/2007 11:07 AM -----

"Freeman, Lauren" <lfreeman@hunton.com>
08/17/2007 07:14 PM

To Stacy Harder/R4/USEPA/US@EPA
cc
Subject Supplemental Comments in EPA R04-OAR-2005-AL-0002

Ms. Harder -

Attached for the Agency's consideration are some brief supplemental comments of the Utility Air Regulatory Group on EPA's Proposed Approval of Revisions to the Visible Emissions Portion of the Alabama Implementation Plan (Docket EPA-R04-OAR-2005-AL-0002). Please feel free to contact me with any questions.

Lauren Freeman
Partner
lfreeman@hunton.com
Hunton & Williams LLP
1900K Street, N.W.
Washington, DC 20006

Phone: (202) 778-2248
Fax: (202) 828-3762
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UARG Supplemental Comments.pdf

HUNTON WILLIAMS

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1900 K STREET, N.W.
WASHINGTON, D.C. 20006-1109

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

LAUREN E. FREEMAN
DIRECT DIAL: 202-778-2248
EMAIL: lfreeman@hunton.com

FILE NO: 31531.200001

August 17, 2007

VIA E-MAIL

Ms. Stacey Harder
Regulatory Development Section, Air Planning Branch
Air, Pesticides and Toxics Management Division
United States Environmental Protection Agency
61 Forsyth Street, S.W., 12th Floor
Atlanta, Georgia 30303-8960

Supplemental Comments of the Utility Air Regulatory Group on EPA's Proposed Approval of Revisions to the Visible Emissions Portion of the Alabama Implementation Plan (Docket EPA R04-OAR-2005-AL-0002)

Dear Ms. Harder,

On June 11, 2007, the Utility Air Regulatory Group ("UARG") submitted comments in response to EPA's April 12, 2007 proposed approval of visible emissions rule revisions submitted by the Alabama Department of Environmental Management for inclusion in its State Implementation Plan ("SIP") (72 Fed. Reg. 18428). *See* EPA-R04-OAR-2005-0002-0012. On June 12, EPA published notice in the *Federal Register* that the comment period was being reopened until July 11, 2007. The Alabama Environmental Council, *et al.*, ("AEC"), apparently having received advance notice of the reopening, filed its comments on the last day of the reopened comment period. *See* EPA-R04-OAR-2005-00020010 ("AEC Comments"). UARG submits these additional comments to address AEC's significant mischaracterization of the law on two issues: (1) the standard for evaluating SIP revisions under Clean Air Act ("CAA" or "the Act") § 110(l), and (2) the consistency of the proposed approval with the CAA definition of "emission limitation" and EPA policy.

The Section 110(l) Standard

AEC asserts that EPA's proposal is inconsistent with CAA § 110(l) because EPA has not evaluated whether Alabama's "rule 'as is' is adequately protective of the NAAQS." AEC Comments at 7 and 10. To support this claim, AEC cites *Hall v. EPA*, 273 F.3d 1146 (9th Cir. 2001), in which the court rejected EPA's application of a "no relaxation" standard to its evaluation of a SIP revision for Clark County, Nevada. In *Hall*, the court concluded that because the area had failed to attain the ambient standards under the existing SIP-approved rules, those rules did not provide an appropriate "baseline" for analysis. 273 F.3d at 1160-61.

As the court makes clear, however, the test applied by the court (and cited by AEC) does *not* apply to SIP revisions for areas that are already attaining the applicable standard:

> **Our concern is with the EPA's analysis of the new source rules governing control measures for particulate matter and carbon monoxide in areas of Clark County that are *not* in attainment for those pollutants.** Accordingly, our discussion focuses on the analysis that the EPA must conduct for pollution control measures relating to pollutants in *nonattainment* areas. Hall also appears to fault the EPA's analysis of rules governing emissions of pollutants in areas where Clark County is in attainment for the pollutant, *i.e.*, he criticizes Clark County's revised monitoring requirements for ozone, a pollutant for which Clark County is in attainment. **Our assessment of the EPA's reasoning does not apply to review of rules governing areas that are in attainment. The EPA's "no relaxation" rule clearly would be appropriate in areas that achieved attainment under preexisting rules.** ...

273 F.3d at 1160 n.11 (emphasis added). As the court goes on to explain:

> ... we **do not hold that the EPA never can rely on past approval of rules in approving revisions that are equally stringent**. It can, so long as no intervening developments have undermined the soundness of the prior approval. ...

Id. at 1161 n.12 (emphasis added).

Alabama is still in attainment with the PM_{10} NAAQS, and attainment plans for $PM_{2.5}$ are not due until April of 2008. EPA's evaluation with respect to the $PM_{2.5}$ NAAQS will come next year when Alabama submits its plan for attainment of that standard. *See Ky. Res. Council, Inc. v. EPA*, 467 F.3d 986, 995-96 (6th Cir. 2006) (rejecting petitioners' view that a state must demonstrate attainment of a standard with a future attainment demonstration deadline in order to determine non-interference of a SIP revision request under § 110(l)). Because Alabama achieved attainment of the existing NAAQS under pre-existing rules, and there have been no intervening developments that undermine the soundness of the prior approval, application of a "no relaxation" rule to EPA's evaluation under § 110(l) is clearly appropriate.

The Definition of "Emission Limitation"

AEC also asserts that EPA's proposed approval would authorize exemptions that are unlawful under CAA § 302(k) and 40 C.F.R. § 51.100(z), which define the term "emission limitation" as a requirement that limits emissions on a "continuous basis." AEC thus suggests that in order to qualify as an emission limitation under the Act, a requirement cannot allow for *any* automatic exemption because that would mean that the limit was not "continuous" or that it did not require "continuous compliance." As support for this position, AEC cites EPA's "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (Sept. 20. 1999) ("EPA SIP SSM Policy") and *Sierra Club v. Tennessee Valley Authority*, 430 F.3d 1337, 1348 (11th Cir. 2005). AEC Comments at 5-6. Neither reference supports that assertion.

Contrary to AEC's suggestion, the CAA definition of emission limitation was not designed to prohibit *all* exemptions from emission limits, or to require the same level of control at all times. Rather, like CAA § 123, it was specifically directed at the use of "intermittent controls" (*i.e.*, varying emissions based on meteorological conditions) and "dispersion techniques" (*i.e.*, the use of tall stacks) -- neither of which is at issue in this proceeding. *See*, H.R.Rep. No. 294, 95th Cong. 1st Sess. 92 (1977); *Kamp v. Hernandez*, 752 F.2d 1444, 1451-53 (9th Cir. 1985). As long as a source complies with a standard *as it is written*, including any exemptions, that source is in "continuous compliance" with that emission limitation as the term is used by EPA and by the court in *Sierra Club v. Tennessee Valley Authority*.

In fact, there is nothing unusual or unlawful about a regulation specifying periods or conditions to which an emission limitation or standard automatically does not apply. AEC itself cites an EPA notice under the New Source Performance Standards ("NSPS") in which the Agency described the opacity standards as not applying "during periods of startup, shutdown, and malfunction" ("SSM"), or "during other periods of exemption as specified in individual regulations." 39 Fed. Reg. 9308, 9309 (Mar. 8, 1974). In a 1982 memorandum, EPA similarly described "continuous compliance" as meeting "without interruption, all applicable emission limitations and other control requirements, *unless such limitations specifically provide otherwise*." *See* Definition of "Continuous Compliance" and Enforcement of O&M Violations, Memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation (June 21, 1982).

Although SSM provisions are one of the most common exemptions, they are not the only ones. For example, EPA promulgated an exemption in NSPS, Subpart S stating that certain emissions in excess of the numerical standard for fluorides are considered to be "in compliance" as long as the control equipment were properly operated and maintained during the period. 40 C.F.R. § 60.192. In NSPS Subpart BB, EPA provides that exceedances of

opacity and total reduced sulfur ("TRS") limits are not violations of the general duty in § 60.11(d) as long as they do not exceed a certain percent of the possible periods in a calendar quarter (one percent for TRS, and 6 percent for opacity). 40 C.F.R. § 60.284(e). In both cases, EPA explained that the standards were designed to allow for "inherent emissions [or control device] variability" that might result in exceedances of the numerical limit even when the required control device is properly operated and maintained. 45 Fed. Reg. 44202-3 (June 30, 1980); 43 Fed. Reg 7568, 7571 (Feb. 23, 1978).

EPA's SIP SSM Policy also does not declare all automatic exemptions, or provisions designed to address variability in the operation of control technology, to be unlawful or inconsistent with CAA § 302(k) or 40 C.F.R. § 51.100(z). While it is EPA's policy to restrict states' use of generally applicable, automatic exemptions for excess emissions due to SSM events, this is because such events by their nature occur at a frequency that is difficult to predict, thus making their impacts on air quality difficult to predict as well. Standards that account for the inherent limitations or variability in the operation of control technology through specific exemptions, the impacts of which can be evaluated, are not prohibited by that policy. *See, e.g.*, EPA SIP SSM Policy, Attachment at 5-6; 70 Fed. Reg. 61556 (2005).

* * * *

UARG hopes the Agency will consider these points as it responds to the comments received on its proposal. If you have any questions about UARG's comments, please contact me at 202-778-2248.

Sincerely,

/s/

Lauren E. Freeman

Document Log

From

Joel Huey/R4/USEPA/US

To

Lynda Crum/R4/USEPA/US@EPA
Nancy Tommelleo/R4/USEPA/US@EPA
Geoffrey Wilcox/DC/USEPA/US@EPA
David Orlin/DC/USEPA/US@EPA
Adam Kushner/DC/USEPA/US@EPA
Ron Rutherford/NEIC/USEPA/US@EPA
Patrick Foley/DC/USEPA/US@EPA
Brenda Johnson/R4/USEPA/US@EPA
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CC

Stacy Harder/R4/USEPA/US@EPA
Dick Schutt/R4/USEPA/US@EPA
Kay Prince/R4/USEPA/US@EPA

BCC

Subject

Fw: Supplemental Comments in EPA R04-OAR-2005-AL-0002

Date/Time

08/22/2007 02:43 PM

Comments

[redacted]

Information Redacted pursuant to
5 U.S.C. Section 552 (b)(5), Exemption 5,
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Privileged Inter/Intra Agency Document
Specific Privilege: Deliberative

"Freeman, Lauren"
<lfreeman@hunton.com>
08/17/2007 07:14 PM

To Stacy Harder/R4/USEPA/US@EPA
cc
Subject Supplemental Comments in EPA R04-OAR-2005-AL-0002

Ms. Harder -

Attached for the Agency's consideration are some brief supplemental comments of the Utility Air Regulatory Group on EPA's Proposed Approval of Revisions to the Visible Emissions Portion of the Alabama Implementation Plan (Docket EPA-R04-OAR-2005-AL-0002). Please feel free to contact me with any questions.

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UARG Supplemental Comments.pdf

Document Log

From

Randall Robinson/R5/USEPA/US

To

Joel Huey/R4/USEPA/US@EPA

CC

John Summerhays/R5/USEPA/US@EPA

BCC

Subject

Re: Fw: Supplemental Comments in EPA R04-OAR-2005-AL-0002

Date/Time

08/29/2007 11:30 AM

Comments

[redacted]

Stacy Harder /R4/USEPA/US
08/21/2007 11:07 AM

To Dick Schutt/R4/USEPA/US@EPA

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cc Kay Prince/R4/USEPA/US@EPA, Joel Huey/R4/USEPA/US@EPA, Sean Lakeman/R4/USEPA/US@EPA

Subject Fw: Supplemental Comments in EPA R04-OAR-2005-AL-0002

Stacy E. Harder
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----- Forwarded by Stacy Harder/R4/USEPA/US on 08/21/2007 11:07 AM -----

"Freeman, Lauren" <lfreeman@hunton.com>
08/17/2007 07:14 PM

To Stacy Harder/R4/USEPA/US@EPA

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ATTACHMENT 8

The Law Office of
William J. Moore, III
1648 Osceola Street
Jacksonville, Florida 32204

Telephone (904) 685-2172
Facsimile (904) 685-2175

via U. S. Mail & E-mail September 21, 2008

Administrator Stephen L. Johnson
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: ***Proposed Relaxation of Alabama SIP Rules Governing Opacity***

Dear Administrator Johnson:

I am writing on behalf of my clients, the Alabama Environmental Council, Inc. ("AEC"), Sierra Club, Our Children's Earth Foundation ("OCE") and the Natural Resources Defense Council ("NRDC"), regarding a proposed change to the Alabama State Implementation Plan's ("Alabama SIP") opacity rules.

As you should be aware from AEC's prior correspondence of August 25, 2008, the Alabama Environmental Management Commission ("AEMC") recently enacted a revision to Alabama's opacity rules. Before that decision was made, AEC, Sierra Club, OCE and NRDC submitted a series of expert reports, other documents and information to the AEMC for consideration. Because the information submitted by AEC, Sierra Club, OCE and NRDC to the AEMC is highly relevant to any decision that EPA may ultimately make regarding whether to approve and incorporate the new Alabama rule into the Alabama SIP, my clients request that you consider and fully respond to that information.[1]

My clients also wish to reiterate that a new notice and public comment period is required as a matter of law before any final action can be taken by EPA on any Alabama SIP revision relating to opacity. If EPA is contemplates taking final action on Alabama's new opacity rule, AEC and NRDC request that EPA first provide for a new notice and comment period. Alabama's new opacity rule, which was just approved by the AEMC, is significantly different from what was initially proposed by Alabama (and rejected by EPA) and what EPA suggested could be approvable.[2] *See* 72 Fed. Reg. 18428 (April 12, 2007); 72 Fed. Reg. 32569 (June 13, 2007). For this reason, my clients and the general public have not had an opportunity to provide comments to EPA on Alabama's new opacity rule and have not been provided with any analysis from EPA

[1] The information previously submitted to the AEMC and which is now provided to EPA is attached to this letter (and to the associated e-mail transmitting this letter). If AEC and NRDC need to do anything further in order to ensure that EPA will adequately consider and respond to this information, please let me know.

[2] EPA failed to provide any specific language for an opacity rule that it believed could be approved as part of the Alabama SIP.

regarding the new opacity rule.[3] Additionally, on August 19, 2008, EPA made a determination to designate three counties in Alabama as non-attainment areas for PM-2.5 and a fourth county as unclassifiable. http://www.epa.gov/pmdesignations/2006standards/rec/letters/04_AL_EPAMOD.pdf. This development significantly altered the framework upon which EPA's original analysis was based, *see* generally 72 Fed. Reg. 18428 (April 12, 2007); 72 Fed. Reg. 32569 (June 13, 2007), and is substantial enough to warrant a new public notice and comment period. Moreover, providing a new notice and comment period is particularly appropriate here because the promulgation and approval of Alabama's new opacity rule has triggered so much public interest at the state level which EPA has not evaluated or otherwise taken into account.

On a different issue, it has come to our attention that EPA appears to be taking inconsistent positions on the issue of whether a percentage-based absolute opacity exemption can be approved into a SIP and what is required to approve such a provision. *See, e.g.*, 12/3/07 EPA's Merits Brief in *Arizona Public Service Company and Sierra Club v. EPA*, Consolidated Nos. 07-9546 and 07-9547, Tenth Circuit Court of Appeals, at 24-39. My clients request that the issue of the consistency of EPA's legal positions taken on this issue across the country be thoroughly addressed by EPA before any final action is taken concerning the Alabama SIP's opacity rules.

Finally, AEC, Sierra Club, OCE and NRDC have been asking for a meeting with you since June 20, 2008 and you have never responded to them. EPA officials appear to have had quite a few meetings and telephone calls with representatives for the State of Alabama. My clients are quite disappointed with the treatment and lack of respect that you have shown them and would formally request again that you arrange to meet with them to discuss some of the very important issues relating to EPA's proposal to revise the Alabama SIP's opacity rules. Regardless of whether you agree with my clients views about this issue, it is hard to understand what harm could be caused by meeting with clients and engaging in a civilize discussion regarding this matter.

In closing, I would ask that EPA please respond to this letter and confirm that the information being submitted with it will be considered and responded to by EPA and treated as part of EPA's administrative record. Also, please let me know if and when that a meeting can be arranged between yourself and representatives of my clients.

Sincerely,

William J. Moore, III

cc: Marcus Peacock
Jimmy Palmer
Charles Ingebretson
Granta Nakayama
Beverly Banister
Mary Wilkes
Adam Kushner
enclosures:

[3] And Alabama's new opacity rule is not a logical outgrowth of any prior public comments and EPA's responses. It contains different substantive provisions which the public has every right to review and comment on now.