



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

JAN 15 2009

George E. Hays, Esq.
236 West Portal Avenue, #110
San Francisco, California 94127

Dear Mr. Hays,

This letter responds to the petition for reconsideration ("petition") you filed on behalf of the Alabama Environmental Council, Sierra Club, Natural Resources Defense Council, and Our Children's Earth Foundation ("petitioners") seeking reconsideration of the final rule entitled, "Approval and Promulgation of Implementation Plans: Alabama: Approval of Revisions to the Visible Emissions Rule," which was published on October 15, 2008 at 73 FR 60957. For the reasons set forth in this letter, the U.S. Environmental Protection Agency (EPA) denies the petition for reconsideration.

On September 11, 2003, the Alabama Department of Environmental Management (ADEM) submitted a request for EPA approval of a State Implementation Plan (SIP) submittal containing proposed revisions to the Visible Emissions portion of the Alabama SIP, found at ADEM Administrative Code (AAC) 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 stated that the State would have to provide EPA with a revised SIP submittal consistent with certain changes described by EPA in its April 12, 2007, notice of proposed rulemaking before EPA would approve the revisions.

Following the close of the comment period, EPA and ADEM discussed some 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. As a result of these discussions, ADEM decided to submit the necessary revisions proposed by EPA in its April 2007 Federal Register notice to support final approval. ADEM also decided to include an additional limitation on opacity based on public comments. 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).

This 22 percent cap was selected because it is equivalent to the maximum daily opacity average allowable under the current approved SIP, which allows opacity of up to 40 percent for 24 six-minute averages per day and up to 20 percent for the remainder of the day, 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). That is, under both the pre-existing SIP and the August 22, 2008, revisions, if a source were to operate at its maximum allowable opacity for an entire calendar day, 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), the opacity average for that day would be 22 percent.

In an October 15, 2008, Federal Register notice, EPA approved Alabama's SIP revision, as submitted on August 22, 2008. On behalf of petitioners, you filed a petition for review in the U.S. Court of Appeals for the Eleventh Circuit, and a petition for reconsideration, raising both procedural and substantive objections to the SIP approval.¹

The petition states that reconsideration should be granted because EPA was required to repropose approval of the rule in light of ADEM's decision to add the 22 percent daily limit on opacity in addition to the other opacity limits which EPA proposed to approve. The petition claims both that the final approved SIP revision is not a "logical outgrowth" of the proposed approval, and that EPA was further bound to repropose based on certain statements in the preamble to the proposal.

With regard to the first issue, it is well-established that "an agency must be able to respond flexibly to comments and need not provide a new round of notice and comment every time it modifies a proposed rule." Fertilizer Institute v. EPA, 935 F.2d 1303, 1311 (D.C. Cir. 1991); see also, International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 n. 51 (D.C. Cir. 1973) ("A contrary rule would lead to the absurdity that in rule-making under the Administrative Procedure Act (APA) the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary. . . . If such were the rule the proceedings might never be terminated.") (internal quotation omitted).

In Fertilizer Institute, the D.C. Circuit explained that a final rule must be a "logical outgrowth" of the proposed rule, and went on to explain: "This means that a final rule will be deemed to be the logical outgrowth of a proposed rule if a new round of notice and comment would not provide commenters with 'their first occasion to offer new and different criticisms which the agency might find convincing.'" Id. (quoting United Steelworkers of America v. Marshall, 647 F.2d 1189, 1225 (D.C.Cir.1980)).

¹ EPA notes that the SIP approval is not subject to the requirements of Clean Air Act (CAA) section 307(d), as it does not fall within any of the enumerated categories in section 307(d)(1). However, EPA has considered the petition for reconsideration pursuant to the CAA and the APA, 5 USC §§ 551 et seq.

In the case of this SIP revision, EPA explained in the proposal that ADEM's original submission was not approvable because it could lead to increases in average opacity levels over a calendar quarter. However, EPA proposed that it would approve a SIP revision if ADEM revised the proposed SIP revision in a way that would ensure that average quarterly opacity would not be greater than allowed under the then-existing SIP. EPA did not require a similar limit on daily opacity due to uncertainties concerning the relationship between opacity and PM mass emissions over short averaging times such as those less than 24 hours. 72 FR at 18432.

In comments filed by William J. Moore, III on behalf of petitioners, petitioners objected to EPA's proposed approval of a quarterly limit on average opacity to protect against interference with the 24-hour PM NAAQS and criticized EPA's justification for not comparing the stringency of average daily opacity levels under the then-existing SIP and the proposed revision. See Docket item EPA-R04-OAR-2005-AL-0002-0010 at 3.

The SIP revision that was finally approved included a limit on quarterly average opacity, as specified in the proposed approval, as well as a limit on daily average opacity. In light of the comments that were submitted, EPA respectfully disagrees with the contention that "[n]o one could have anticipated during the comment period that either ADEM or EPA would have turned to a daily average provision in an attempt to remedy the rule's flaws." Petition at 8. Moreover, 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.² Accordingly, this situation appears to fall well within the meaning of "logical outgrowth," and reproposal was not necessary to satisfy notice and comment requirements of the APA.

With regard to the second issue, the preamble to the proposed approval stated:

Alabama's revised submittal must be consistent with the changes discussed in this action for EPA to approve its incorporation into the SIP. If the revised language does not conform specifically to the recommended changes, EPA will need to re-evaluate Alabama's submittal and, if the changes are approvable, repropose approval of the SIP submittal.

72 FR at 18428. The petition claims that the SIP revision, as approved, did not satisfy this requirement, and therefore it would be arbitrary and capricious for EPA to approve the SIP revision without re-proposing it.

EPA notes that 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;

² The petition states that "the addition of the 22 percent rule does not, in petitioners' view, make this rule approvable", Petition at 6-7, but 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.

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.³

Accordingly, EPA does not believe that the inclusion of the 22 percent daily limit necessitated a new notice and comment period before approving the SIP revision.

The petition raises as additional procedural grounds for reconsideration alleged departures from Agency policy in granting meetings, docketing information,⁴ and in proposing approval before the State had finalized its submission.⁵

EPA disagrees that there were departures from established Agency policy, and further that any of these alleged departures from Agency policy would constitute grounds for setting aside the approval of the SIP revision under the APA. EPA notes that it extended the public comment period at the request of petitioners, and that the State is a unique stakeholder with respect to SIP revisions. Thus, EPA frequently meets with a state that has submitted a proposed SIP revision during the rulemaking process.

Furthermore, a similar SIP approval process was considered and approved by the U.S. Court of Appeals for the Ninth Circuit. In Hall v. EPA, 273 F.3d 1146 (9th Cir. 2001), EPA proposed to disapprove a SIP revision unless the local government made certain changes, the local government subsequently made a new SIP submission, and a citizen challenged EPA's decision to approve the SIP submission without subjecting it to a new round of notice and comment. The Ninth Circuit explicitly upheld that process, holding that "EPA did not have an obligation to seek comments on a finalized, revised new source review program, and [the citizen] had no right to comment 'after all changes ... were complete.'" Hall v. EPA, 273 F.3d 1146, 1163 (9th Cir. 2001).

³ Identicality is not required to satisfy either "conformity" or "consistency," but even assuming arguendo that the submitted SIP revision did not conform to the proposal, it would not be arbitrary or capricious for EPA to approve as a logical outgrowth a submission that made the proposed SIP revision more stringent in response to public comments.

⁴ Due to an inadvertent error, certain documents that were submitted to the electronic docket prior to signature were not made available on www.regulations.gov until recently. EPA regrets the delay in posting the documents to www.regulations.gov, but notes that the documents were included before signature in the paper docket maintained by Region 4 and the documents are now available on www.regulations.gov.

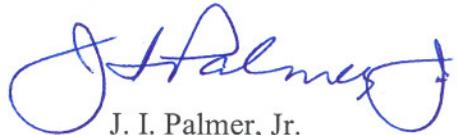
⁵ The question of whether EPA could propose approval contingent on ADEM making changes in the submission did not arise after the comment period closed, which provides an additional reason why granting reconsideration on that basis would not be appropriate.

Accordingly, EPA does not believe there are any procedural grounds for granting reconsideration of the final approval of the SIP revision.

The petition also states that reconsideration is warranted due to a number of “substantive errors.” All of these substantive issues could have been raised during the public comment period on the proposed approval. Indeed, the substantive issue that the petition discusses in greatest detail, whether the rule meets the requirements of section 110(l) of the Clean Air Act, is also the issue that was discussed in greatest detail in petitioners’ comments on the proposal. See Docket item EPA-R04-OAR-2005-AL-0002-0010 at 6-11. Since these issues did not arise after the close of the public comment period, EPA does not believe that it would be appropriate to grant reconsideration on these issues.

For the reasons discussed above, EPA has concluded that reconsideration of the final rule approving the SIP revision is not warranted. If you have any questions, please contact Beverly H. Banister, Director, EPA Region 4 Air, Pesticides and Toxics Management Division, at (404) 562-9070.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. I. Palmer, Jr.", with a stylized flourish at the end.

J. I. Palmer, Jr.
Regional Administrator