In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 15, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: October 1, 2008.

Elin D. Miller,

Regional Administrator, Region 10.

■ Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart C—Alaska

■ 2. Section 52.97 is added to read as follows:

§ 52.70 Interstate Transport for the 1997 8-hour ozone and PM2.5 NAAQS.

On February 7, 2008, the Alaska Department of Environmental Conservation submitted a SIP revision to meet the requirements of Clean Air Act section 110(a)(2)(D)(i). EPA has approved this submittal.

[FR Doc. E8–24279 Filed 10–14–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2005–AL–0002–200819; FRL–8727–7]

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve revisions to the Visible Emissions portion of the State Implementation Plan (SIP) submitted to EPA by the State of Alabama, via the Alabama Department of Environmental Management (ADEM), on September 11, 2003 (the ''2003 ADEM submittal''), and amended by a revision submitted to EPA on August 22, 2008 (the ''2008 ADEM amendment''). The open burning portion of the State of Alabama's 2003 ADEM submittal was previously approved in a separate action on March 9, 2006 (71 FR 12138) and is not relevant to this action. These revisions 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.

DATES: *Effective Date:* This rule will be effective November 14, 2008.

ADDRESSES: 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* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information 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: Mr. Joel Huey, 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) 562–9104. Mr. Huey can also be reached via electronic mail at *huey.joel@epa.gov*. For information regarding the Alabama SIP, contact Ms. Stacy Harder at the same address listed above. The telephone number is (404) 562–9042. Ms. Harder can also be reached via electronic mail at *harder.stacy@epa.gov*.

SUPPLEMENTARY INFORMATION:

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I. What Is the Background for This Action?

On September 11, 2003, ADEM submitted a request for EPA approval of a 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 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 our 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. We 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. We received one comment letter, submitted on behalf of four environmental groups, opposed to it. In general, comments received that were adverse to the proposed rulemaking expressed concerns related to air quality impacts, particularly on the particulate matter NAAQS, suggested inadequate modeling analyses by EPA, and expressed concern with EPA's technical assessment of the relationship between opacity and particulate matter mass emissions. These comments, and EPA's responses to them, are discussed in more detail below in Part III, ''Response to Comments.''

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 this action. As a result of these discussions, 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. 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] 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 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. The equation below illustrates the calculation of 22 percent average daily opacity allowed under the current SIP when T_1, the number of six-minute average 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), is zero.[2]

$$\frac{(100\%\ \text{opacity} \times T_1) + (40\%\ \text{opacity} \times 24\ \text{six} - \text{minute averages}) + (20\%\ \text{opacity} \times (240 - 24 - T_1)\ \text{six} - \text{minute averages})}{240\ \text{six} - \text{minute averages}}$$

$$= 22\%\ \text{opacity}$$

We derived allowable average daily opacity equations for the current SIP-approved rule and the 2008 ADEM submittal, substituted various exemption durations (T_1) in the equations, determined the corresponding allowable average daily opacities, and organized the results as shown in Table 1 below.

TABLE 1—CALCULATED ALLOWABLE AVERAGE DAILY OPACITY LEVELS FOR VARIOUS STARTUP, SHUTDOWN, LOAD CHANGE, AND RATE CHANGE DURATIONS (T_1), USING ALABAMA'S CURRENT SIP-APPROVED RULE AND THE 2008 ADEM SUBMITTAL

	Calculated allowable average daily opacity (percent) for various startup, shutdown, load change, and rate change durations (T_1)						
	$T_1 = 0$	$T_1 = 12$	$T_1 = 24$	$T_1 = 48$	$T_1 = 120$	$T_1 = 216$	$T_1 = 240$
Current SIP Approved Rule	22.0	26.0	30.0	38.0	62.0	94.0	100.0
2008 ADEM Submittal	22.0	25.9	29.8	37.6	61.0	92.2	100.0

The text of the new paragraphs added to AAC Chapter 335–3–4–.01 now reads as follows:

(3) The conditions in paragraphs (4) and (5) 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

[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 approving those provisions.

[2] This equation includes the variable, T_1, to represent 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) because such periods are allowed under both the existing SIP and the proposed revision, although EPA expects that such periods will not occur during most days. In calculating average opacity over a quarter in the April 12, 2007, proposal, EPA also used a range of values for such periods.

60.13 or 40 CFR 75.14 (if applicable) and is required to be certified in accordance with the requirements of 40 CFR part 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 calendar quarter operating hours for which the opacity standard is applicable and for which the COMS is indicating valid data.

(5) No permittee shall discharge into the atmosphere from any source of emission particulate of an opacity greater than 22% (excluding exempt periods allowed under subparagraphs (1)(c) and (1)(d) of this rule) averaged over each calendar day.

(6) For a person subject to paragraph (4) of this rule, compliance with the opacity standards in this rule shall be determined by COMS data.

(7) For emissions units described in paragraph (3) above, the permittee shall comply with paragraphs (4) and (5) within 6 months of EPA approval of paragraphs (3), (4), (5), and (6). Until 6 months after EPA approval of paragraphs (3), (4), (5), and (6), emissions units described by paragraph (3) above shall be subject to the emission limit in subparagraph (1)(a) of this rule, the exceptions in subparagraphs (1)(b), (1)(c) and (1)(d) of this rule, and the compliance measurement techniques in paragraph (2) of this rule.

For overall completeness of the changes to the Visible Emissions rule, ADEM also made minor revisions to AAC rules 335–3–4–.01(1)(a), 335–3–4–.01(1)(b), and 335–3–4–.01(2).[3] In accordance with the requirements of the Clean Air Act (CAA), as identified by EPA in our April 2007 proposed rule, ADEM held a public hearing on these revisions on August 6, 2008. The state-adopted revisions were submitted to EPA on August 22, 2008.

II. What Action Is EPA Taking?

Today's action addresses 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. These revisions amend the requirements for units that operate COMS and that are not subject to any opacity limits other than those of the Alabama SIP.[4] After consideration of the comments received in response to EPA's April 12, 2007, proposed rule and the State's final SIP revision submittal of August 22, 2008, EPA is taking final action to approve the revisions to the Visible Emissions portion of the Alabama SIP rule. EPA is taking this action pursuant to section 110(k) of the CAA.

This final action is based on EPA's determination that the proposed SIP revision satisfies the requirements of section 110(l) of the CAA. Consistent with our discussion of these issues in the proposed rulemaking (see 72 FR 18428), and after consideration of all public comments submitted thereon, this determination is based upon our findings that (1) the revision would not increase the allowable 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. In the proposal we calculated the ''average quarterly opacity'' allowed under both the existing SIP and the proposed revision and showed that the proposed revision, with changes specified in the notice, would result in no greater average quarterly opacity allowed than what is allowed under the current standard. Accordingly, we relied primarily on the first finding for a conclusion that the proposed revision, with changes, satisfied the requirements of section 110(l) with respect to the annual PM NAAQS. We relied on the second finding for a conclusion that the proposed revision satisfied the requirements of section 110(l) with respect to the 24-hour PM NAAQS.

In evaluating the changes submitted by Alabama on August 22, 2008, EPA notes that the revised rule as submitted is consistent with, but not limited to, the revisions outlined by EPA in the proposal notice. EPA's April 12, 2007, notice proposed to approve a revised rule, if one were submitted, allowing up to 2.4 hours per day of operation at opacity levels in excess of 20 percent, provided that the total of such periods did not exceed 2 percent of operating time in a quarter, 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 changes identified by EPA were intended to ensure that the allowable average quarterly opacity under the revised rule would be at least as stringent as (i.e., equal to or lower than) that allowed by the current approved SIP, and to clarify that only a single version of the opacity standard applies to any unit.

As discussed above, the rule as submitted includes not only the limits identified by EPA in the proposal notice but also an additional restriction that a source's daily average opacity may not exceed 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). As a result, unlike the opacity limits evaluated in the proposal, the average daily opacity allowed under the proposed revision as submitted is now no greater than under the current SIP. In this way, the rule as submitted allows us to evaluate the possible impact of changes to the opacity standard on the daily PM NAAQS using the approach we identified in the proposal for evaluating the possible impact of changes on the annual PM NAAQS. Since a calendar day is the shortest period over which compliance with the PM NAAQS is measured, EPA believes it is appropriate under this approach to evaluate whether the allowed average opacity over a calendar day would be any greater under the proposed revision, as submitted, as compared to the existing SIP. Accordingly, EPA believes both of the findings cited in the April 12, 2007, proposal provide support for our conclusion that the proposed revision as submitted satisfies the requirements of section 110(l) with respect to the 24-hour PM NAAQS.

The Alabama Visible Emissions rule revision being approved today provides, for sources meeting the criteria of the revised rule, two situations where opacity levels above 20 percent are

[3] The additional revisions are as follows in the underlined text:

AAC 335–3–4–.01(1)(a): '' Except as provided in subparagraphs (b), (c), (d), or (e) of this paragraph, *and paragraph (3) of this rule*, 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.''

335–3–4–.01(1)(b): ''*For a person not covered by paragraphs (3), (4), and (5) of this rule,* [d]uring 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.''

335–3–4–.01(2): ''*For a person subject to subparagraph (1)(b) of this rule,* [c]ompliance 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.''

[4] Although this new opacity standard would only apply to certain sources using COMS, consistent with EPA's and ADEM's credible evidence rules, nothing in the rule as revised should be construed to preclude the use of COMS to enforce the existing standard or the use of EPA Method 9 to enforce the revised standard.

allowed: (1) 24 six-minute averages per day of up to 100 percent opacity, provided that no subject source can exceed a daily average opacity of 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); and (2) 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 provisions in the first instance above do not apply if a source exceeds 20 percent opacity for more than two percent of the remaining operating time in a quarter, after subtracting out 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).

III. Response to Comments

EPA proposed to approve the Visible Emissions portion of the SIP revision contained in the 2003 ADEM submittal, provided the State revised it as described in the April 12, 2007, **Federal Register** Notice and submitted it as a SIP revision. At the request of a commenter, EPA extended the 60-day public comment period to 90 days, ending July 11, 2007. 72 FR 32569 (June 13, 2007). The final rule reflects our consideration of the State's revision submitted on August 22, 2008, and all comments received on the proposed action. This section responds to the significant comments.

Comment 1: Commenters objected to EPA's approval of Paragraphs (3), (4) and (5) of AAC rule 335–3–4–.01, stating that doing so would be approving an ''automatic exemption'' from certain emission limitations that must function on a ''continuous basis'' and would result in a violation of Section 302(k) of the CAA and 40 CFR 51.100(z).

Response: The revisions to ACC rule 335–3–4–.01 amend the requirements for certain units that operate COMS and are, therefore, revisions to the rule itself. A source that meets the requirements of the revised standard will be in continuous compliance with the standard. The provisions of the CAA and its implementing regulations cited by the commenters do not require that all SIP measures require compliance with the same numerical emission limitation at all times. *See Kamp* v. *Hernandez,* 752 F.2d 1444 (9 Cir.), *modified,* 778 F.2d 527 (9th Cir. 1985). EPA believes the rule, as amended, does not violate Section 302(k) of the CAA and 40 CFR 51.100(z).

Comment 2: Commenters stated that EPA's analysis of ACC rule 335–3–4–.01 is ''illegal'' because an ''analysis premised on the notion that a relaxation is acceptable as long as average emissions are equal to or no lower than the status quo runs afoul of *Hall,* which explicitly rejected that type of analysis.''

Response: The 9th Circuit Court of Appeals decision in *Hall* v. *U.S. E.P.A.,* 273 F.3d 1146, does not require EPA to disapprove the SIP revision at issue. It is not binding precedent in the 11th Circuit Court of Appeals, and two other circuits have agreed with EPA's view that a SIP revision may be approved under section 110(l) ''unless the agency finds it will make air quality worse.'' See *Kentucky Resources Council, Inc.* v. *EPA,* 467 F.3d 986 (6th Cir. 2006); *GHASP* v. *EPA,* No. 06–61030 (5th Cir. Aug. 13, 2008). Furthermore, although the *Hall* court adopted an approach, based on the facts of that case, under which ''EPA must be able to conclude that the particular plan revision before it is consistent with the *development* of an overall plan capable of meeting the Act's attainment requirements,'' EPA believes this revision is consistent with development of an overall plan capable of demonstrating attainment in a timely fashion.

Comment 3: Commenters stated that EPA must perform modeling analysis at every facility subject to the Alabama Visible Emissions rule at AAC rule 335–3–4–.01 and suggest that the State and EPA will be abdicating their responsibility to protect the NAAQS if they do not perform modeling analysis for every facility subject to the proposed rule.

Response: EPA disagrees with the commenters that modeling is required at every facility. As a matter of law, the CAA does not require EPA to perform modeling analysis at every facility subject to the Alabama Visible Emissions rule. For purposes of analyzing SIP revisions, as long as EPA evaluates all of the information before it in light of its expertise and has a reasonable basis for concluding that the rule revision satisfies the requirements of section 110(l) of the CAA, we are authorized to act on a SIP revision. As set forth in the proposed rule, we believe our technical analysis supports approval of the proposed revisions to the Visible Emissions portion of the Alabama SIP, rule 335–3–4–.01. See 72 FR 18428, 18431 (April 12, 2007).

Comment 4: Commenters stated that CAA section 110(l) requires EPA to evaluate whether the proposed SIP revision will make the ambient air worse and whether the existing SIP and the proposed revisions, taken together, will still achieve the necessary pollution reductions required for the State to continue to meet the NAAQS.

Response: Under section 110(l) of the CAA, EPA may not approve revisions to SIPs if the revisions would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the CAA. Therefore, in determining whether to approve the revisions to Alabama's Visible Emissions rule, we considered the relevant impacts of the proposed change in light of the type of requirement affected by the requested revision. In this instance, the State is proposing revisions to its opacity requirements. EPA notes that the opacity standard itself is not a NAAQS and that the PM emission reduction standards remain unchanged in the approved Alabama SIP. We have considered the impact of Alabama's proposed revision on the NAAQS for PM_{10} and $PM_{2.5}$, and on other applicable requirements, and determined that it satisfies the requirements of CAA section 110(l).

Comment 5: Commenters opposed EPA's approval of paragraphs (3), (4) and (5) of AAC rule 135–3–4–.01, stating that EPA's analysis did not include whether the current rule ''as is'' is adequately protective of the NAAQS and, therefore, EPA's comparison analysis is incapable of providing the information necessary to evaluate the 2003 ADEM submittal.

Response: The CAA requires EPA to evaluate the initial SIP submittal as well as all proposed revisions pursuant to the conditions set forth in section 110(l) of the CAA as cited above. EPA interprets the requirements of section 110(l) to apply with respect to the specific changes being proposed. EPA does not interpret section 110(l) to require a full attainment or maintenance demonstration before any changes to a SIP may be approved. See *Kentucky Resources Council, Inc.* v. *EPA,* 467 F.3d 986 (6th Cir. 2006); see also e.g., 70 FR 53 (Jan. 3, 2005), 70 FR 28429 (May 18, 2005) (proposed and final rules, upheld in *Kentucky Resources,* which discuss EPA's interpretation of section 110(l)). In this action, the State proposed only revisions to its opacity requirements. We evaluated the proposed revisions in light of the relationship between opacity and PM emissions and determined that a reliable and direct correlation could not be readily established, particularly for short-term periods. Nonetheless, there is at least an indirect relationship between opacity and PM emissions, including the use of opacity to track the

effectiveness of PM control equipment operation, and we considered the impact of Alabama's 2003 and 2008 revisions on the NAAQS for PM_{10} and $PM_{2.5}$ and on other applicable emission limits. We concluded that these SIP revisions satisfy the requirements of CAA section 110(l).

Comment 6: Commenters stated that EPA's rationale for approving AAC rule 335–3–4–.01, ''Visible Emissions,'' is not correct because AAC rule 335–3–14–.03(1)(h)(2), ''Emergency Exception,'' serves essentially the same purpose as a ''malfunction exception.'' Therefore, ADEM's claim that there is pressing need to adopt a new two-percent exemption lacks merit.

Response: We did not consider AAC rule 335–3–14–.03(1)(h)(2), ''Emergency Exception,'' in our decision to approve revisions to ACC rule 335–3–4–.01, ''Visible Emissions.'' EPA notes that it does not interpret AAC rule 335–3–14–.03(1)(h)(2) as providing the same sort of exemption for equipment malfunctions that is included in other SIPs (and would be approvable, subject to certain limitations, under current EPA policy and guidance). Section 110(l) requires us to evaluate proposed SIP revisions in relation to applicable requirements of the CAA, not state rules. EPA is not basing our approval of the revision on the lack of a ''malfunction exemption'' in Alabama's SIP.

Comment 7: Commenters stated that EPA may not have complied with the Agency's SIP Consistency Policy. If not, then the Regional Administrator was not authorized as a matter of law to promulgate the proposed SIP revision.

Response: EPA complied with its SIP consistency policy. Documentation of the process is contained in the docket for this rule.

Comment 8: Commenters stated that modeling shows the revisions to AAC rule 335–3–4–.01 would interfere with the $PM_{2.5}$ NAAQS.

Response: EPA does not agree that the modeling submitted by the commenters shows the revisions to the Alabama Visible Emissions rule would interfere with the $PM_{2.5}$ NAAQS. First, the modeling submitted by the commenters assumed that maximum PM emissions will occur at 100 percent opacity and that 100 percent opacity will occur when the electrostatic precipitator (ESP) is turned off. Commenters did not submit data to support this assumption. Data reviewed by EPA in considering this SIP revision suggest a wide variation in opacity associated with PM emission rates across a range of operating conditions for ESPs. For example, data from *Review of Concurrent Mass Emission and Opacity Measurements for Coal-burning Utility and Industrial Boilers* (EPA–600/7–80–062), which is listed in the docket for this rule and is publicly available, on similarly equipped and operated coal-fired electric utilities illustrate the variability of opacity with respect to ESP operation and of opacity with particulate matter emissions. In one example, a facility equipped with a fully energized ESP exhibited 22 percent opacity and a PM emissions rate of 0.314 lbs PM per million British thermal units (BTU). During another test run under the same operating conditions, this facility exhibited a 45 percent increase in opacity to 32 percent opacity, but a 60 percent decrease in PM emissions rate to 0.126 lbs PM per million BTU. Moreover, during another test series for this facility in which the ESP was fully energized for one run, then turned off for another run, the opacity remained constant at 22 percent. Thus, evidence in the docket indicates that, at least for some sources, there is not a universal correlation between operating conditions of the ESP and opacity.

Second, one commenter also stated that the facility could operate at 100 percent opacity for consecutive periods of 2.4 hours per day and up to 4.8 hours in two days back-to-back, thus creating the potential for significant short-term impacts on ambient air quality. The commenter is correct, provided that these periods of operation do not cause the source to exceed two percent of the source calendar operating hours or an average daily opacity of 22 percent. Given Alabama's newly adopted rule, in a hypothetical situation in which a source operated at 100 percent opacity for 2.4 hours, the facility would be limited to no more than 13.3 percent opacity for the remainder of the day; this limit is two-thirds of the otherwise generally applicable limit of 20 percent. EPA notes that the 24-hour PM NAAQS are measured on a calendar-day basis, not as a rolling 24-hour average. Accordingly, EPA does not believe the possibility that a facility could operate for 4.8 hours in two consecutive calendar days indicates that the revised rule would interfere with attainment and maintenance of the 24-hour PM NAAQS. Furthermore, as discussed below, nothing in the Visible Emissions rule excuses a source from compliance with any applicable PM emission limit.

The AERMOD model (a regulatory dispersion model) requires several inputs, including PM emission rate. Some commenters assumed a correlation between opacity and PM emission rate as part of their efforts to model the impact of the revised opacity rule on PM emissions and ambient PM concentrations. Opacity, the degree to which emissions reduce the transmission of light and obscure the view of an object in the background,[5] is a condition, not a pollutant. For a useful relationship to exist between the opacity and mass concentration of the particulate emissions from a pollution source, the characteristics of the particles (size, shape, and composition) must be sufficiently constant, and for a conventional transmissometer (e.g., COMS) to be useful as a monitor of the mass concentration, the particulate characteristics must remain constant over a useful period of time.[6]

There is a general relationship between opacity and PM, which generally develops over longer periods of time. While opacity is used as an indicator of compliance with PM limits in certain regulatory programs, establishing a relationship between PM and opacity that holds for all sources, fuels, control devices, and operating modes can be complex. Opacity may not be a reliable indicator of short-term mass emissions, or for use in projecting changes in short-term PM ambient air quality concentrations. A given opacity level can be associated with a *range* of mass emissions, the level of which depends on fuels, industry, boiler type, and controls. Although source-specific correlations between opacity and mass emissions can be established for some sources, none have been for the sources subject to this SIP revision and therefore assumptions must be made about how a change in the opacity rule might affect the level of PM mass emissions being modeled. These assumptions made about the relationship drive model results and, thus, are important in evaluating the result of the modeling exercise.

For the modeling submittals on the Colbert Plant, commenters assumed maximum opacity for maximum duration from turned-off PM emission control devices. They developed and used differing PM emission rates, one set of rates being four times larger than the other set of rates, underscoring the uncertainty inherent with relating opacity values to mass emissions. They both failed to include impacts of nearby emission sources and of secondary PM emissions, and they both used cumulative PM mass sizing estimates from AP–42 in their calculation of PM_{10} and $PM_{2.5}$; however, one commenter

[5] Measurement of the Opacity and Mass Concentration of Particulate Emissions by Transmissometry, EPA–650/2–74–128, p3.

[6] Measurement of the Opacity and Mass Concentration of Particulate Emissions by Transmissometry, EPA–650/2–74–128, p 21.

used an incorrect value that overpredicts $PM_{2.5}$, and underpredicts PM_{10}, by 2.3 times. One commenter included condensable PM emissions.

PM emissions associated with turned-off control devices are expected to be higher than PM emissions associated with more commonly occurring transient malfunctions of control devices, even though maximum opacity may occur from either situation. In order to examine the impact of Alabama's rule change on the NAAQS, we would need additional information on the range of emission rates associated with 100 percent opacity and other opacity levels. Estimation of PM emissions for a given opacity value is difficult without measurements and is the major deficiency and limitation of any modeling for this rule change. The range of emission rates that could produce 100 percent opacity is not known and is not discussed or established in the modeling submitted during the public comment period.

Therefore, although the modeling presented by commenters shows the possibility of an impact on the NAAQS under a worst-case scenario, the modeling does not convincingly demonstrate the impact of the rule change on the NAAQS because the level of PM emissions while operating at 100 percent opacity, and the source-specific relationship between opacity and PM emissions, are uncertain and are not demonstrated in the public record. For these reasons, the modeling cannot show that the rule change will interfere with the 24-hour NAAQS.

Comment 9: Commenters disagreed with EPA's assertion that ''the relationship between changes in opacity and increases or decreases in ambient $PM_{2.5}$ levels cannot be quantified readily and is particularly uncertain for short-term and site specific analyses.''

Response: EPA's assertion is consistent with the findings contained in *Review of Concurrent Mass Emission and Opacity Measurements for Coal-burning Utility and Industrial Boilers* (EPA–600/7–80–062), which is listed in the docket for this rule and is publicly available. That report was developed from over 400 concurrent particulate matter and opacity measurements and found that any useful and definitive relationships between stack particulate mass emission rates and their corresponding opacity levels appear to be site specific. In addition, as stated in the proposal notice, the uncertainty in assumptions about a correlation between opacity levels and ambient PM concentrations on short-term periods or site specific analyses is a function of many factors, including differences in the mass of particles that exist at the point of COMS measurement in the stack, the total mass of particles exiting the stack, including condensable particles that form immediately upon exposure to the ambient atmosphere, and the mass of particles an ambient sampler is capable of collecting. Commenters submitted no information that demonstrates that opacity can be reliably correlated with mass emissions over short time periods for a range of sources (or these specific sources) without performing site-specific analyses, and EPA is aware of none.

Comment 10: Commenters stated that analyzing air quality impacts on a quarterly basis is not appropriate because EPA already has 24-hour NAAQS standards for PM_{10} and $PM_{2.5}$.

Response: As we stated in the notice of proposed rulemaking and earlier in this final rule, section 110(l) prohibits EPA from approving any revision to a SIP that would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement. In this instance we believe that because the State regulation at issue pertains to opacity, the primary CAA requirements of concern should be impacts on compliance with the NAAQS for PM_{10} and $PM_{2.5}$, which include both daily and annual standards. The quarterly time frame commenters refer to is used in AAC rule 335–3–4–.01(4) to prohibit a source from operating at higher opacity levels for greater than 2 percent of the source operating hours per calendar quarter. In light of this specific provision that applies on a quarterly basis, and because analyzing for impacts on a quarterly basis provides a conservative basis for assessing impacts on an annual basis, we decided it appropriate to analyze air quality impacts on a quarterly basis to judge interference with the annual standards, and we concluded the requirements of section 110(l) have been satisfied with respect to all of the PM NAAQS.

Comment 11: Commenters stated that the 2003 revisions to AAC rule 335–3–4–.01, and the conditions set forth in the April 12, 2007, notice of proposed rulemaking, would lead to interference with compliance with mass particulate matter limits. As evidence that its assertion was correct, the commenters stated that if Tennessee Valley Authority (TVA) were to turn off its control equipment for any of its units at the Colbert plant for 2.4 consecutive hours, TVA would violate the PM standard (0.12 lb/mmBtu) at that unit.

Response: The PM limit of 0.12 lb/mmBtu under the Alabama SIP does not include any exempt periods and continues to apply regardless of any revisions to the opacity rule. EPA lacks the data necessary to determine quantitatively what impact, if any, the revisions to the rule would or could have on ambient PM emissions. As described earlier, the commenters' assertion of an approach that allows one to determine the amount of ambient PM emissions based on an increase in stack opacity is fraught with questionable assumptions such as de-energized control devices yielding 100 percent opacity and 100 percent opacity providing maximum PM emissions.

IV. Final Action

EPA is taking final action to approve the Visible Emissions portion of the SIP revisions submitted to EPA by the State of Alabama on September 11, 2003, and August 22, 2008. EPA is approving the revision of paragraphs (1) and (2), and addition of paragraphs (3), (4), (5), (6), and (7) to AAC rule 335–3–4–.01, ''Visible Emissions.''

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or

safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 15, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

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: October 1, 2008.

J.I. Palmer, Jr.,

Regional Administrator, Region 4.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart B—Alabama

■ 2. Section 52.50(c) is amended by revising the entry for ''Section 335–3–4.01'' to read as follows:

§ 52.50 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED ALABAMA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
*	*	*	*	*
Chapter 335–3–4 Control of Particulate Emissions				
Section 335–3–4–.01	Visible Emissions	9/30/2008	10/15/2008 [Insert citation of publication].	
*	*	*	*	*

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[FR Doc. E8–24031 Filed 10–14–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0132; FRL–8382–7]

Thiencarbazone-methyl; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of thiencarbazone-methyl [methyl 4-[[[(4,5-dihydro-3-methoxy-4-methyl-5-oxo-1*H*-1,2,4-triazol-1-yl)-carbonyl]amino]sulfonyl]-5-methyl-3-thiophenecarboxylate], *per se*, in or on field corn, pop corn, sweet corn, and wheat; combined residues of thiencarbazone-methyl and its metabolite BYH 18636-MMT [5-methoxy-4-methyl-2,4-dihydro-3*H*-1,2,4-triazol-3-one], calculated as the parent compound, in or on livestock commodities; and indirect or inadvertent combined residues of thiencarbazone-methyl and its metabolite BYH 18636-MMT-glucoside [2-hexopyranosyl-5-methoxy-4-methyl-2,4-dihydro-3*H*-1,2,4-triazol-3-one], calculated as the parent compound, in or on soybeans. Bayer CropScience requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective October 15, 2008. Objections and requests for hearings must be received on or before December 15, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0132. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (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