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EPA Denial Of Alabama SIP May Crimp States' Efforts To Ease Opacity Limits

Environmentalists are lauding EPA Region IV's rejection of an Alabama state air quality plan provision that the agency said unlawfully eased smokestack opacity limits, saying it is likely to dissuade other states from attempting to adopt the provision that critics argue could lead to violations of particulate matter (PM) emissions limits.

The agency March 29 issued its final reconsideration of the Bush EPA's approval in 2008 of the provision, which Alabama adopted through a change to its state implementation plan (SIP), an air quality blueprint outlining the pollution cuts states will impose on sources to attain EPA air standards. Environmentalists asked the Obama EPA to reconsider the Bush-era approval. *Relevant documents are available on InsideEPA.com.*

The provision eased Alabama's opacity limits, which are measures of the pollutants a facility releases determined by the darkness of the smoke, applicable to fine PM emissions. The SIP revisions were first submitted to EPA in 2003 and not approved until 2008, the result of a lot of back-and-forth, according to one Alabama industry source.

But EPA in a fact sheet released with the final reconsideration and rejection of the plan said the change and supporting data "do not ensure continued compliance with the Clean Air Act requirements in affected areas."

Environmentalists say the highly anticipated decision is likely to prevent other states from seeking similar changes to their opacity rules. One environmentalist involved in the petition says that other states contemplating such changes include Ohio, North Carolina and some Western states.

"There has been an effort around the country . . . to undermine opacity standards," so the fact that EPA said no to Alabama "will be very important in stopping this sort of effort from taking hold around the rest of the country. It is quite significant," the source says. Further, because the issue "was hotly debated and considered within EPA" beyond Region IV, "my impression is there's been a lot of wait-and-see" by other states. "I suspect if it had gone the other way we would have seen a flood of similar types of proposals which we're now not going to see."

The disapproval also sends a clear message to states that they cannot "give sources a free pass from compliance" with Clean Air Act requirements. "EPA basically upheld the concept that they expect compliance to be continuous," the source says, because it rejected Alabama's attempts to allow some periods of high opacity.

Another environmentalist says that Alabama's SIP change made in 2008 gave sources exemptions from PM limits "as long as they could get their equipment back under control within a few hours."

EPA in the fact sheet says that allowing some high opacity periods "does not provide a sufficient basis to conclude that these specific changes to Alabama's visual emissions requirements would not result in increased PM emissions in a nonattainment area over what would have been allowed under the previously approved SIP rule."

EPA says its disapproval decision -- not yet published in the *Federal Register* -- means that Alabama's opacity rule will revert to its pre-2008 form. "Our disapproval is not creating requirements beyond those that were already in place prior to the action that we reconsidered. We do not anticipate increased cost of compliance for those sources that were already in compliance with the previous regulation," EPA says.

Despite the agency's rejection and plan for Alabama to revert to pre-2008 opacity requirements, industry and the Alabama Department of Environmental Management (ADEM) plan to sue over EPA's decision.

An ADEM source says the state will address two issues in litigation: its belief that a SIP reconsideration is not the proper mechanism for EPA to disapprove a previously approved change, and the merits of EPA's decision.

The source notes that Alabama in making the change was seeking to "level the playing field" for industrial sources in the state, which lack exemptions from emission limits for emergencies or malfunctions. "So we have found that as environmental compliance becomes more litigious, our lack of having that provision makes it impossible for our regulated industries to comply with the rules because they are held to a higher standard," the source says.

The source adds that ADEM asked EPA a decade ago if it would approve an rule exempting some emissions associated with emergency malfunctions from counting toward emission limits, but EPA denied that request. The change to the opacity SIP was considered another way to allow some emissions exemptions due to emergencies. "The bottom line in all this is a regulated entity in Alabama can try as hard as it can to stay in compliance 100 percent of the time and if they miss by 0.1 percent they can be held liable for that excusable malfunction," the source says.

A power industry source in the state notes that a pending case in the U.S. Court of Appeals for the 11th Circuit, *Alabama Environmental Council v. U.S. EPA*, will now be revived. The case was originally filed in late 2008 by environmentalists to challenge the Bush EPA's SIP approval, and industry and the state intervened on EPA's behalf to defend it as one of the most stringent in the country. The case was put on hold pending EPA's reconsideration.

"This is the state plan for opacity that was approved by EPA and devised by the [ADEM] after many years of discussion and debate. It has been the state plan for more than two years. Essentially what happened is the administration changed and EPA has done a 180 . . . and they can't do that. And we are going to proceed with our legal rights in the 11th Circuit. . . . You can't just rescind something you said was perfectly fine." -- *Dawn Reeves*

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