

## EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES

State citation	Title/Subject	State effective date	EPA Approval date	Explanation [former SIP citation]
*	*	*	*	*
9 VAC 5, Chapter 20 .....	General Provisions			
*	*	*	*	*
Part II .....	Air Quality Programs			
*	*	*	*	*
5–20–203 .....	Air Quality Maintenance Areas .....	3/11/15	8/14/15 [Insert Federal Register Citation].	List of maintenance areas revised to include Northern Virginia localities for fine particulate matter (PM <sub>2.5</sub> ).
5–20–204 .....	Nonattainment Areas ....	3/11/15	8/14/15 [Insert Federal Register Citation].	List of nonattainment areas revised to exclude Northern Virginia localities for fine particulate matter (PM <sub>2.5</sub> ).
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**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52****[EPA–R05–OAR–2012–0991; EPA–R05–OAR–2013–0435; FRL–9932–15–Region 5]****Air Plan Approval; Indiana and Ohio; Infrastructure SIP Requirements for the 2010 NO<sub>2</sub> and SO<sub>2</sub> NAAQS****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking final action to approve elements of state implementation plan (SIP) submissions by Indiana regarding the infrastructure requirements of section 110 of the Clean Air Act (CAA) for the 2010 nitrogen dioxide (NO<sub>2</sub>) and sulfur dioxide (SO<sub>2</sub>) national ambient air quality standards (NAAQS), and by Ohio regarding the infrastructure requirements of section 110 of the CAA for the 2010 SO<sub>2</sub> NAAQS. The infrastructure requirements are designed to ensure that the structural components of each state's air quality management program are adequate to meet the requirements of the CAA. The proposed rulemaking for Ohio's 2010 SO<sub>2</sub> infrastructure submittal associated with today's final action was published on July 25, 2014, and EPA received one comment letter during the comment period, which ended on August 25, 2015. In the July

25, 2014 rulemaking, EPA also proposed approval for Ohio's 2008 lead, 2008 ozone, and 2010 NO<sub>2</sub> infrastructure submittals. Those approvals have been finalized in separate rulemakings. The proposed rulemaking for Indiana's 2010 NO<sub>2</sub> and SO<sub>2</sub> infrastructure submittals associated with today's final action was published on February 27, 2015, and EPA received one comment letter during the comment period, which ended on March 30, 2015. The concerns raised in these letters, as well as EPA's responses, are addressed in this final action.

**DATES:** This final rule is effective on September 14, 2015.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2012–0991 (2010 NO<sub>2</sub> infrastructure elements) or EPA–R05–OAR–2013–0435 (2010 SO<sub>2</sub> infrastructure elements). All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly-available only in hard copy. Publicly-available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the U.S. Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that

you telephone Sarah Arra at (312) 886–9401 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA. This **SUPPLEMENTARY INFORMATION** section is arranged as follows:

- I. What is the background of these SIP submissions?
- II. What is our response to comments received on the proposed rulemaking?
- III. What action is EPA taking?
- IV. Statutory and Executive Order Reviews

**I. What is the background of these SIP submissions?****A. What does this rulemaking address?**

This rulemaking addresses infrastructure SIP submissions from the Indiana Department of Environmental Management (IDEM) submitted on January 15, 2013, for the 2010 NO<sub>2</sub> NAAQS and on May 22, 2013, for the 2010 SO<sub>2</sub> NAAQS. This rulemaking also addresses infrastructure SIP submissions from the Ohio Environmental Protection Agency (OEPA) submitted on June 7, 2013, for the 2010 SO<sub>2</sub> NAAQS.

**B. Why did the state make this SIP submission?**

Under sections 110(a)(1) and (2) of the CAA, states are required to submit

infrastructure SIPs to ensure that their SIPs provide for implementation, maintenance, and enforcement of the NAAQS. These submissions must contain any revisions needed for meeting the applicable SIP requirements of section 110(a)(2), or certifications that their existing SIPs for NO<sub>2</sub> and SO<sub>2</sub> already meet those requirements.

EPA has highlighted this statutory requirement in multiple guidance documents, including the most recent guidance document entitled “Guidance on Infrastructure State Implementation Plan (SIP) Elements under CAA Sections 110(a)(1) and (2)” issued on September 13, 2013.

### *C. What is the scope of this rulemaking?*

EPA is acting upon Indiana and Ohio’s SIP submissions that address the infrastructure requirements of CAA sections 110(a)(1) and 110(a)(2) for the 2010 SO<sub>2</sub> NAAQS and also the 2010 NO<sub>2</sub> NAAQS for Indiana. The requirement for states to make SIP submissions of this type arises out of CAA section 110(a)(1). Pursuant to section 110(a)(1), states must make SIP submissions “within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof),” and these SIP submissions are to provide for the “implementation, maintenance, and enforcement” of such NAAQS. The statute directly imposes on states the duty to make these SIP submissions, and the requirement to make the submissions is not conditioned upon EPA’s taking any action other than promulgating a new or revised NAAQS. Section 110(a)(2) includes a list of specific elements that “[e]ach such plan” submission must address.

EPA has historically referred to these SIP submissions made for the purpose of satisfying the requirements of CAA sections 110(a)(1) and 110(a)(2) as “infrastructure SIP” submissions. Although the term “infrastructure SIP” does not appear in the CAA, EPA uses the term to distinguish this particular type of SIP submission from submissions that are intended to satisfy other SIP requirements under the CAA, such as “nonattainment SIP” or “attainment plan SIP” submissions to address the nonattainment planning requirements of part D of title I of the CAA, “regional haze SIP” submissions required by EPA rule to address the visibility protection requirements of CAA section 169A, and nonattainment new source review (NSR) permit program submissions to address the permit requirements of CAA, title I, part D.

This rulemaking will not cover three substantive areas that are not integral to acting on a state’s infrastructure SIP submission: (i) Existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction (“SSM”) at sources, that may be contrary to the CAA and EPA’s policies addressing such excess emissions; (ii) existing provisions related to “director’s variance” or “director’s discretion” that purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA (collectively referred to as “director’s discretion”); and, (iii) existing provisions for Prevention of Significant Deterioration (PSD) programs that may be inconsistent with current requirements of EPA’s “Final NSR Improvement Rule,” 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) (“NSR Reform”). Instead, EPA has the authority to address each one of these substantive areas in separate rulemaking. A detailed rationale, history, and interpretation related to infrastructure SIP requirements can be found in our May 13, 2014, proposed rule entitled, “Infrastructure SIP Requirements for the 2008 Lead NAAQS” in the section, “What is the scope of this rulemaking?” (see 79 FR 27241 at 27242–27245).

In addition, EPA is not acting on section 110(a)(2)(D)(i)(I), interstate transport significant contribution and interference with maintenance for the Indiana and Ohio 2010 SO<sub>2</sub> submittals, a portion of section 110(a)(2)(D)(i)(II) with respect to visibility, and 110(a)(2)(F) with respect to visibility for the 2010 NO<sub>2</sub> and SO<sub>2</sub> submittals for Indiana and the 2010 SO<sub>2</sub> submittal for Ohio, and portions of 110(a)(2)(C), 110(a)(2)(D)(i)(II), and 110(a)(2)(F) with respect to PSD for Ohio’s 2010 SO<sub>2</sub> submittal. EPA has already taken action on the portion related to PSD for Ohio’s 2010 SO<sub>2</sub> infrastructure submittal in the February 27, 2015 rulemaking (see 80 FR 10591). EPA is also not acting on section 110(a)(2)(I)—Nonattainment Area Plan or Plan Revisions Under Part D, in its entirety. The rationale for not acting on elements of these requirements was included in EPA’s August 19, 2013, proposed rulemaking or is discussed below in today’s response to comments.

## **II. What is our response to comments received on the proposed rulemaking?**

EPA received one comment letter from the Sierra Club regarding its July 25, 2014, proposed rulemaking (79 FR

43338) on Ohio’s 2010 SO<sub>2</sub> NAAQS Infrastructure SIP submittal. EPA did not receive any comments on its February 27, 2015, proposed rulemaking (80 FR 10644) on Indiana’s 2010 NO<sub>2</sub> NAAQS Infrastructure SIP, but did receive one comment from the Sierra Club relevant to the SO<sub>2</sub> submittal. The majority of the SO<sub>2</sub>-related comments from the Sierra Club for Indiana and Ohio are identical. The comments are summarized and responded to together; however, the few differences in the comments are explicitly pointed out.

*Comment 1:* Sierra Club contends that the plain language of section 110(a)(2)(A) of the CAA and the legislative history of the CAA require the inclusion of enforceable emission limits in an infrastructure SIP to prevent NAAQS exceedances in areas not designated nonattainment. Sierra Club also asserts that the Ohio and Indiana 2010 SO<sub>2</sub> infrastructure SIP revisions did not revise the existing SO<sub>2</sub> emission limits in response to the 2010 SO<sub>2</sub> NAAQS and failed to comport with CAA requirements for SIPs to establish enforceable emission limits that are adequate to prohibit NAAQS exceedances in areas not designated nonattainment.

The Sierra Club states that, on its face, the CAA “requires I–SIPs to be adequate to prevent exceedances of the NAAQS.” In support, the Sierra Club quotes the language in section 110(a)(1) which requires states to adopt a plan for implementation, maintenance, and enforcement of the NAAQS, and the language in section 110(a)(2)(A) which requires SIPs to include enforceable emissions limitations as may be necessary to meet the requirements of the CAA and which Sierra Club claims include the maintenance plan requirement. Sierra Club notes the CAA definition of emission limit and reads these provisions together to require “enforceable emission limits on source emissions sufficient to ensure maintenance of the NAAQS.”

*Response 1:* EPA disagrees that section 110 is clear “on its face” and must be interpreted in the manner suggested by Sierra Club. Section 110 is only one provision that is part of the complicated structure governing implementation of the NAAQS program under the CAA, as amended in 1990, and it must be interpreted in the context of not only that structure, but also of the historical evolution of that structure. In light of the revisions to section 110 since 1970 and the later-promulgated and more specific planning requirements of the CAA, EPA interprets the requirement in section 110(a)(2)(A) that the plan provide for

“implementation, maintenance and enforcement” to mean that the infrastructure SIP must contain enforceable emission limits that will aid in attaining and/or maintaining the NAAQS and that the state demonstrate that it has the necessary tools to implement and enforce a NAAQS, such as adequate state personnel and an enforcement program. With regard to the requirement for emission limitations, EPA has interpreted this to mean, for purposes of section 110, that the state may rely on measures already in place to address the pollutant at issue or any new control measures that the state may choose to submit. As EPA stated in “Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2),” dated September 13, 2013 (Infrastructure SIP Guidance), “[t]he conceptual purpose of an infrastructure SIP submission is to assure that the air agency’s SIP contains the necessary structural requirements for the new or revised NAAQS, whether by establishing that the SIP already contains the necessary provisions, by making a substantive SIP revision to update the SIP, or both. Overall, the infrastructure SIP submission process provides an opportunity . . . to review the basic structural requirements of the air agency’s air quality management program in light of each new or revised NAAQS.” Infrastructure SIP Guidance at p. 2.

The Sierra Club makes general allegations that Ohio and Indiana do not have sufficient protective measures to prevent SO<sub>2</sub> NAAQS exceedances. EPA addressed the adequacy of Ohio and Indiana’s infrastructure SIPs for 110(a)(2)(A) purposes to meet applicable requirements of the CAA in the proposed rulemakings and explained why the SIPs include enforceable emission limitations and other control measures necessary for maintenance of the 2010 SO<sub>2</sub> NAAQS throughout the state. For Ohio, these limits are found in Chapter 3745–18, Sulfur Dioxide Limitations, of Ohio’s SIP. For Indiana, these limits are found in 326 Indiana Administrative Code (IAC) 7–1.1, 326 IAC 7–4, and 326 IAC 7–4.1. As discussed in the proposed rulemakings, EPA finds that these provisions adequately address section 110(a)(2)(A) to aid in attaining and/or maintaining the applicable NAAQS, and finds that Ohio and Indiana have demonstrated that they have the necessary tools to implement and enforce these NAAQS.

*Comment 2:* The Sierra Club cites 40 CFR 51.112(a), providing that each plan “must demonstrate that the measures, rules and regulations contained in it are

adequate to provide for the timely attainment and maintenance of the [NAAQS].” It asserts that this regulation requires all SIPs to include emissions limits necessary to ensure attainment of the NAAQS. The Sierra Club states that “[a]lthough these regulations were developed before the Clean Air Act separated infrastructure SIPs from nonattainment SIPs—a process that began with the 1977 amendments and was completed by the 1990 amendments—the regulations apply to I–SIPs.” It relies on a statement in the preamble to the 1986 action restructuring and consolidating provisions in part 51, in which EPA stated that “[i]t is beyond the scope of th[is] rulemaking to address the provisions of Part D of the Act . . . .” 51 FR 40656, 40656 (November 7, 1986).

*Response 2:* The Sierra Club’s reliance on 40 CFR 51.112 to support its argument that infrastructure SIPs must contain emission limits “adequate to prohibit NAAQS exceedances” and adequate or sufficient to ensure the maintenance of the NAAQS is not supported. As an initial matter, EPA notes and the Sierra Club recognizes that this regulatory provision was initially promulgated and “restructured and consolidated” prior to the CAA Amendments of 1990, in which Congress removed all references to “attainment” in section 110(a)(2)(A). In addition, it is clear on its face that 40 CFR 51.112 applies to plans specifically designed to attain the NAAQS. EPA interprets these provisions to apply when states are developing “control strategy” SIPs such as the detailed attainment and maintenance plans required under other provisions of the CAA, as amended in 1977 and again in 1990, such as sections 175A, 182, and 192. The Sierra Club suggests that these provisions must apply to section 110 SIPs because in the preamble to EPA’s action “restructuring and consolidating” provisions in part 51, EPA stated that the new attainment demonstration provisions in the 1977 Amendments to the CAA were “beyond the scope” of the rulemaking. It is important to note, however, that EPA’s action in 1986 was not to establish new substantive planning requirements, but merely to consolidate and restructure provisions that had previously been promulgated. EPA noted that it had already issued guidance addressing the new “Part D” attainment planning obligations. Also, as to maintenance regulations, EPA expressly stated that it was not making any revisions other than to re-number those provisions. 51 FR at 40657.

Although EPA was explicit that it was not establishing requirements

interpreting the provisions of the new “Part D” of title I of the CAA, it is clear that the regulations being restructured and consolidated were intended to address control strategy plans. In the preamble, EPA clearly stated that 40 CFR 51.112 was replacing 40 CFR 51.13 (“Control strategy: SO<sub>x</sub> and PM (portion)”), 51.14 (“Control strategy: CO, HC, O<sub>x</sub> and NO<sub>2</sub> (portion)”), 51.80 (“Demonstration of attainment: Pb (portion)”), and 51.82 (“Air quality data (portion)”). *Id.* at 40660. Thus, the present-day 40 CFR 51.112 contains consolidated provisions that are focused on control strategy SIPs, and the infrastructure SIP is not such a plan.

*Comment 3:* The Sierra Club references two prior EPA rulemaking actions where EPA disapproved or proposed to disapprove SIPs, and claims that they were actions in which EPA relied on section 110(a)(2)(A) and 40 CFR 51.112 to reject infrastructure SIPs. It first points to a 2006 partial approval and partial disapproval of revisions to Missouri’s existing plan addressing the SO<sub>2</sub> NAAQS (71 FR 12623). In that action, EPA cited section 110(a)(2)(A) of the CAA as a basis for disapproving a revision to the state plan on the basis that the State failed to demonstrate the SIP was sufficient to ensure maintenance of the SO<sub>2</sub> NAAQS after revision of an emission limit and cited to 40 CFR 51.112 as requiring that a plan demonstrates the rules in a SIP are adequate to attain the NAAQS. Second, Sierra Club cites a 2013 disapproval of a revision to the SO<sub>2</sub> SIP for Indiana, where the revision removed an emission limit that applied to a specific emissions source at a facility in the State (78 FR 78721). In its proposed disapproval, EPA relied on 40 CFR 51.112(a) in proposing to reject the revision, stating that the State had not demonstrated that the emission limit was “redundant, unnecessary, or that its removal would not result in or allow an increase in actual SO<sub>2</sub> emissions.” EPA further stated in that proposed disapproval that the State had not demonstrated that removal of the limit would not “affect the validity of the emission rates used in the existing attainment demonstration.”

The Sierra Club also asserts that EPA stated in its 2013 infrastructure SIP guidance that states could postpone specific requirements for start-up shutdown, and malfunction (SSM), but did not specify the postponement of any other requirements. The commenter concludes that emissions limits ensuring attainment of the standard cannot be delayed.

*Response 3:* EPA does not agree that the two prior actions referenced by the

Sierra Club establish how EPA reviews infrastructure SIPs. It is clear from both the final Missouri rulemaking and the proposed and final Indiana rulemakings that EPA was not reviewing initial infrastructure SIP submissions under section 110 of the CAA, but rather revisions that would make an already approved SIP designed to demonstrate attainment of the NAAQS less stringent. EPA's partial approval and partial disapproval of revisions to restrictions on emissions of sulfur compounds for the Missouri SIP addressed a control strategy SIP and not an infrastructure SIP. The Indiana action provides even less support for the Sierra Club's position. The review in that rule was of a completely different requirement than the section 110(a)(2)(A) SIP. In that case, the State had an approved SO<sub>2</sub> attainment plan and was seeking to remove from the SIP provisions relied on as part of the modeled attainment demonstration. EPA proposed that the State had failed to demonstrate under section 110(l) of the CAA why the SIP revision would not result in increased SO<sub>2</sub> emissions and thus interfere with attainment of the NAAQS. Nothing in that rulemaking addresses the necessary content of the initial infrastructure SIP for a new or revised NAAQS. Rather, it is simply applying the clear statutory requirement that a state must demonstrate why a revision to an approved attainment plan will not interfere with attainment of the NAAQS.

EPA also does not agree that any requirements related to emission limits have been postponed. As stated in a previous response, EPA interprets the requirements under 110(a)(2)(A) to include enforceable emission limits that will aid in attaining and/or maintaining the NAAQS and that the state demonstrate that it has the necessary tools to implement and enforce a NAAQS, such as adequate state personnel and an enforcement program. With regard to the requirement for emission limitations, EPA has interpreted this to mean, for purposes of section 110, that the state may rely on measures already in place to address the pollutant at issue or any new control measures that the state may choose to submit. Emission limits providing for attainment of a new standard are triggered by the designation process and have a different schedule in the CAA than the submittal of infrastructure SIPs.

As discussed in detail in the proposed rules, EPA finds that the Ohio and Indiana SIPs meet the appropriate and relevant structural requirements of section 110(a)(2) of the CAA that will aid in attaining and/or maintaining the NAAQS, and that the States have

demonstrated that they have the necessary tools to implement and enforce a NAAQS.

*Comment 4:* Sierra Club also discusses several cases applying the CAA which it claims support its contention that courts have been clear that section 110(a)(2)(A) requires enforceable emissions limits in infrastructure SIPs to prevent violations of the NAAQS. Sierra Club first cites to language in *Train v. NRDC*, 421 U.S. 60, 78 (1975), addressing the requirement for "emission limitations" and stating that emission limitations "are specific rules to which operators of pollution sources are subject, and which if enforced should result in ambient air which meet the national standards." Sierra Club also cites to *Pennsylvania Dept. of Env'tl. Resources v. EPA*, 932 F.2d 269, 272 (3d Cir. 1991) for the proposition that the CAA directs EPA to withhold approval of a SIP where it does not ensure maintenance of the NAAQS, and to *Mision Industrial, Inc. v. EPA*, 547 F.2d 123, 129 (1st Cir. 1976), which quoted section 110(a)(2)(B) of the CAA of 1970. The Sierra Club contends that the 1990 Amendments do not alter how courts have interpreted the requirements of section 110, quoting *Alaska Dept. of Env'tl. Conservation v. EPA*, 540 U.S. 461, 470 (2004), which in turn quoted section 110(a)(2)(A) of the CAA and also stated that "SIPs must include certain measures Congress specified" to ensure attainment of the NAAQS. The Commenter also quotes several additional opinions in this vein. *Mont. Sulphur & Chem. Co. v. EPA*, 666 F.3d 1174, 1180 (9th Cir. 2012) ("The Clean Air Act directs states to develop implementation plans—SIPs—that 'assure' attainment and maintenance of [NAAQS] through enforceable emissions limitations"); *Hall v. EPA* 273 F.3d 1146, 1153 (9th Cir. 2001) ("Each State must submit a [SIP] that specifies the manner in which [NAAQS] will be achieved and maintained within each air quality control region in the State"); *Conn. Fund for Env't, Inc. v. EPA*, 696 F.2d 169, 172 (D.C. Cir. 1982) (CAA requires SIPs to contain "measures necessary to ensure attainment and maintenance of NAAQS"). Finally, the commenter cites *Mich. Dept. of Env'tl. Quality v. Browner*, 230 F.3d 181 (6th Cir. 2000) for the proposition that EPA may not approve a SIP revision that does not demonstrate how the rules would not interfere with attainment and maintenance of the NAAQS.

*Response 4:* None of the cases the Sierra Club cites support its contention that section 110(a)(2)(A) requires that infrastructure SIPs must include detailed plans providing for attainment

and maintenance of the NAAQS in all areas of the state, nor do they shed light on how section 110(a)(2)(A) may reasonably be interpreted. With the exception of *Train*, none of the cases the Commenter cites concerned the interpretation of CAA section 110(a)(2)(A) (or section 110(a)(2)(B) of the pre-1990 CAA). Rather, the courts reference section 110(a)(2)(A) (or section 110(a)(2)(B) of the pre-1990 CAA) in the background sections of decisions in the context of challenges to EPA actions on revisions to SIPs that were required and approved as meeting other provisions of the CAA or in the context of an enforcement action.

In *Train*, 421 U.S. 60, the Court was addressing a state revision to an attainment plan submission made pursuant to section 110 of the CAA, the sole statutory provision at that time regulating such submissions. The issue in that case concerned whether changes to requirements that would occur before attainment was required were variances that should be addressed pursuant to the provision governing SIP revisions or were "postponements" that must be addressed under section 110(f) of the CAA of 1970, which contained prescriptive criteria. The Court concluded that EPA reasonably interpreted section 110(f) to not restrict a state's choice of the mix of control measures needed to attain the NAAQS and that revisions to SIPs that would not impact attainment of the NAAQS by the attainment date were not subject to the limits of section 110(f). Thus, the issue was not whether a section 110 SIP needs to provide for attainment or whether emissions limits are needed as part of the SIP; rather the issue was which statutory provision governed when the state wanted to revise the emission limits in its SIP if such revision would not impact attainment or maintenance of the NAAQS. To the extent the holding in the case has any bearing on how section 110(a)(2)(A) might be interpreted, it is important to realize that in 1975, when the opinion was issued, section 110(a)(2)(B) (the predecessor to section 110(a)(2)(A)) expressly referenced the requirement to attain the NAAQS, a reference that was removed in 1990.

The decision in *Pennsylvania Dept. of Env'tl. Resources* was also decided based on the pre-1990 provision of the CAA. At issue was whether EPA properly rejected a revision to an approved plan where the inventories relied on by the state for the updated submission had gaps. The Court quoted section 110(a)(2)(B) of the pre-1990 CAA in support of EPA's disapproval, but did not provide any interpretation of that

provision. Yet, even if the Court had interpreted that provision, EPA notes that it was modified by Congress in 1990; thus, this decision has little bearing on the issue here.

At issue in *Mision Industrial*, 547 F.2d 123, was the definition of “emissions limitation,” not whether section 110 requires the state to demonstrate how all areas of the state will attain and maintain the NAAQS as part of their infrastructure SIPs. The language from the opinion the Sierra Club quotes does not interpret but rather merely describes section 110(a)(2)(A). Sierra Club does not raise any concerns about whether the measures relied on by the state in the infrastructure SIP are “emissions limitations,” and the decision in this case has no bearing here.<sup>1</sup>

In *Mont. Sulphur & Chem. Co.*, 666 F.3d 1174, the Court was reviewing a Federal implementation plan (FIP) that EPA promulgated after a long history of the state failing to submit an adequate SIP in response to EPA’s finding under section 110(k)(5) that the previously approved SIP was substantially inadequate to attain or maintain the NAAQS, which triggered the state’s duty to submit a new SIP to show how it would remedy that deficiency and attain the NAAQS. The Court cited generally sections 107 and 110(a)(2)(A) of the CAA for the proposition that SIPs should assure attainment and maintenance of NAAQS through emission limitations, but this language was not part of the Court’s holding in the case, which focused instead on whether EPA’s finding of SIP inadequacy, disapproval of portions of the state’s responsive SIP and attainment demonstration, and adoption of a remedial FIP were lawful.

The Sierra Club suggests that *Alaska Dept. of Env’tl. Conservation*, 540 U.S. 461, stands for the proposition that the 1990 CAA Amendments do not alter how courts interpret section 110. This claim is inaccurate. Rather, the Court quoted section 110(a)(2)(A), which, as noted previously, differs from the pre-1990 version of that provision, and the Court makes no mention of the changed language. Furthermore, the Sierra Club also quotes the Court’s statement that “SIPs must include certain measures Congress specified,” but that statement specifically referenced the requirement in section 110(a)(2)(C), which requires an enforcement program and a program

for the regulation of the modification and construction of new sources. Notably, at issue in that case was the state’s “new source” permitting program, not its infrastructure SIP.

Two of the cases the Sierra Club cites, *Mich. Dept. of Env’tl. Quality*, 230 F.3d 181, and *Hall*, 273 F.3d 1146, interpret CAA section 110(l), the provision governing “revisions” to plans, and not the initial plan submission requirement under section 110(a)(2) for a new or revised NAAQS, such as the infrastructure SIP at issue in this instance. In those cases, the courts cited section 110(a)(2)(A) solely for the purpose of providing a brief background of the CAA.

Finally, in *Conn. Fund for Env’t, Inc. v. EPA*, 696 F.2d 169 (D.C. Cir. 1982), the D.C. Circuit was reviewing EPA action on a control measure SIP provision which adjusted the percent of sulfur permissible in fuel oil. The D.C. Circuit focused on whether EPA needed to evaluate effects of the SIP revision on one pollutant or effects of change on all possible pollutants; therefore, the D.C. Circuit did not address required measures for infrastructure SIPs, and nothing in the opinion addressed whether infrastructure SIPs needed to contain measures to ensure attainment and maintenance of the NAAQS.

*Comment 5:* Citing section 110(a)(2)(A) of the CAA, Sierra Club contends that EPA may not approve the proposed infrastructure SIPs because they do not include enforceable one hour SO<sub>2</sub> emission limits for sources that show NAAQS exceedances through modeling. Sierra Club asserts the proposed infrastructure SIPs fail to include enforceable one hour SO<sub>2</sub> emissions limits or other required measures to ensure attainment and maintenance of the SO<sub>2</sub> NAAQS in areas not designated nonattainment as required by section 110(a)(2)(A). Sierra Club asserts that emission limits are especially important for meeting the 2010 SO<sub>2</sub> NAAQS because SO<sub>2</sub> impacts are strongly source-oriented. Sierra Club states that coal-fired electric generating units (EGUs) are large contributors to SO<sub>2</sub> emissions but contends that Ohio and Indiana did not demonstrate that emissions allowed by the proposed infrastructure SIPs from such large sources of SO<sub>2</sub> will ensure compliance with the 2010 SO<sub>2</sub> NAAQS.

For Ohio, the Sierra Club claims that the proposed infrastructure SIP would allow major sources to continue operating with present emission limits. Sierra Club then refers to air dispersion modeling it conducted for three coal-fired EGUs in Ohio including the Cardinal Power Plant (Brilliant), the

Sammis Station (Stratton), and the Zimmer Plant (Moscow). Sierra Club asserts that the results of the air dispersion modeling it conducted employing EPA’s AERMOD program for modeling used the plants’ allowable and actual emissions, and showed that the plants could cause exceedances of the 2010 SO<sub>2</sub> NAAQS with either allowable emissions at all three facilities or actual emissions at the Zimmer Plant.<sup>2</sup>

For Indiana, the Sierra Club also claims that the proposed infrastructure SIP would allow major sources to continue operating with present emission limits. Sierra Club then refers to air dispersion modeling it conducted for three coal-fired EGUs in Indiana, including the A.B. Brown Plant (Mount Vernon), the Clifty Creek Plant (Madison), and the Gibson Plant (Owensville). Sierra Club asserts that the results of the air dispersion modeling it conducted employing EPA’s AERMOD program for modeling used the plants’ allowable and actual emissions, and showed the plants could cause exceedances of the 2010 SO<sub>2</sub> NAAQS with either allowable or actual emissions at all three facilities.

Based on the modeling, Sierra Club asserts that the Ohio and Indiana SO<sub>2</sub> infrastructure SIP submittals authorize these EGUs to cause exceedances of the NAAQS with allowable and actual emission rates, and therefore that the infrastructure SIP fails to include adequate enforceable emission limitations or other required measures for sources of SO<sub>2</sub> sufficient to ensure attainment and maintenance of the 2010 SO<sub>2</sub> NAAQS. As a result, Sierra Club claims EPA must disapprove Ohio and Indiana’s proposed SIP revisions. In addition, Sierra Club asserts that additional emission limits should be imposed on the plants that ensure attainment and maintenance of the NAAQS at all times.

*Response 5:* EPA believes that section 110(a)(2)(A) of the CAA is reasonably interpreted to require states to submit SIPs that reflect the first step in their planning for attainment and maintenance of a new or revised NAAQS. These SIP revisions, also known as infrastructure SIPs, should contain enforceable control measures and a demonstration that the state has the available tools and authority to develop and implement plans to attain and maintain the NAAQS. In light of the structure of the CAA, EPA’s long-

<sup>1</sup> While the Sierra Club does contend that the State shouldn’t be allowed to rely on emission reductions that were developed for the prior SO<sub>2</sub> standards (which we address herein), it does not claim that any of the measures are not “emissions limitations” within the definition of the CAA.

<sup>2</sup> Sierra Club asserts its modeling followed protocols pursuant to 40 CFR part 50, Appendix W, EPA’s March 2011 guidance for implementing the 2010 SO<sub>2</sub> NAAQS, and EPA’s December 2013 SO<sub>2</sub> NAAQS Designation Technical Assistance Document for the for both Indiana and Ohio.

standing position regarding infrastructure SIPs is that they are general planning SIPs to ensure that the state has adequate resources and authority to implement a NAAQS in general throughout the state and not detailed attainment and maintenance plans for each individual area of the state. As mentioned above, with regard to the requirement for emission limitations, EPA has interpreted this to mean that states may rely on measures already in place to address the pollutant at issue or any new control measures that the state may choose to submit.

EPA's interpretation that infrastructure SIPs are more general planning SIPs is consistent with the CAA as understood in light of its history and structure. When Congress enacted the CAA in 1970, it did not include provisions requiring states and the EPA to label areas as attainment or nonattainment. Rather, states were required to include all areas of the state in "air quality control regions" (AQCRs) and section 110 set forth the core substantive planning provisions for these AQCRs. At that time, Congress anticipated that states would be able to address air pollution quickly pursuant to the very general planning provisions in section 110 and could bring all areas into compliance with a new NAAQS within five years. Moreover, at that time, section 110(a)(2)(A)(i) specified that the section 110 plan provide for "attainment" of the NAAQS and section 110(a)(2)(B) specified that the plan must include "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance [of the NAAQS]." In 1977, Congress recognized that the existing structure was not sufficient and that many areas were still violating the NAAQS. At that time, Congress for the first time added provisions requiring states and EPA to identify whether areas of a state were violating the NAAQS (*i.e.*, were nonattainment) or were meeting the NAAQS (*i.e.*, were attainment) and established specific planning requirements in section 172 for areas not meeting the NAAQS. In 1990, many areas still had air quality not meeting the NAAQS, and Congress again amended the CAA and added yet another layer of more prescriptive planning requirements for each of the NAAQS. At that same time, Congress modified section 110 to remove references to the section 110 SIP providing for attainment, including removing pre-existing section 110(a)(2)(A) in its entirety and

renumbering subparagraph (B) as section 110(a)(2)(A). Additionally, Congress replaced the clause "as may be necessary to insure attainment and maintenance [of the NAAQS]" with "as may be necessary or appropriate to meet the applicable requirements of this chapter." Thus, the CAA has significantly evolved in the more than 40 years since it was originally enacted. While at one time section 110 of the CAA did provide the only detailed SIP planning provisions for states and specified that such plans must provide for attainment of the NAAQS, under the structure of the current CAA, section 110 is only the initial stepping-stone in the planning process for a specific NAAQS. In addition, more detailed, later-enacted provisions govern the substantive planning process, including planning for attainment of the NAAQS, depending upon how air quality status is judged under other provisions of the CAA, such as the designations process under section 107.

As stated in response to a previous comment, EPA asserts that section 110 of the CAA is only one provision that is part of the complicated structure governing implementation of the NAAQS program under the CAA, as amended in 1990, and it must be interpreted in the context of not only that structure, but also of the historical evolution of that structure. In light of the revisions to section 110 since 1970 and the later-promulgated and more specific planning requirements of the CAA, EPA reasonably interprets the requirement in section 110(a)(2)(A) of the CAA that the plan provide for "implementation, maintenance and enforcement" to mean that the infrastructure SIP must contain enforceable emission limits that will aid in attaining and/or maintaining the NAAQS and that the state must demonstrate that it has the necessary tools to implement and enforce a NAAQS, such as an adequate monitoring network and an enforcement program. As discussed above, EPA has interpreted the requirement for emission limitations in section 110 to mean that the state may rely on measures already in place to address the pollutant at issue or any new control measures that the state may choose to submit. Finally, as EPA stated in the Infrastructure SIP Guidance which specifically provides guidance to states in addressing the 2010 SO<sub>2</sub> NAAQS, "[t]he conceptual purpose of an infrastructure SIP submission is to assure that the air agency's SIP contains the necessary structural requirements for the new or revised NAAQS, whether by

establishing that the SIP already contains the necessary provisions, by making a substantive SIP revision to update the SIP, or both." Infrastructure SIP Guidance at p. 2.

On April 12, 2012, EPA explained its expectations regarding the 2010 SO<sub>2</sub> NAAQS infrastructure SIPs via letters to each of the states. EPA communicated in the April 2012 letters that all states were expected to submit SIPs meeting the "infrastructure" SIP requirements under section 110(a)(2) of the CAA by June 2013. At the time, the EPA was undertaking a stakeholder outreach process to continue to develop possible approaches for determining attainment status with the SO<sub>2</sub> NAAQS and implementing this NAAQS. EPA was abundantly clear in the April 2012 letters to states that EPA did not expect states to submit substantive attainment demonstrations or modeling demonstrations showing attainment for potentially unclassifiable areas in infrastructure SIPs due in June 2013, as EPA had previously suggested in its 2010 SO<sub>2</sub> NAAQS preamble based upon information available at the time and in prior draft implementation guidance in 2011 while EPA was gathering public comment. The April 2012 letters to states recommended states focus infrastructure SIPs due in June 2013, such as Ohio and Indiana's SO<sub>2</sub> infrastructure SIP, on "traditional infrastructure elements" in section 110(a)(1) and (2) rather than on modeling demonstrations for future attainment for potentially unclassifiable areas.<sup>3</sup>

<sup>3</sup> In EPA's final SO<sub>2</sub> NAAQS preamble (75 FR 35520 (June 22, 2010)) and subsequent draft guidance in March and September 2011, EPA had expressed its expectation that many areas would be initially designated as unclassifiable due to limitations in the scope of the ambient monitoring network and the short time available before which states could conduct modeling to support their designations recommendations due in June 2011. In order to address concerns about potential violations in these potentially unclassifiable areas, EPA initially recommended that states submit substantive attainment demonstration SIPs based on air quality modeling by June 2013 (under section 110(a)) that show how their unclassifiable areas would attain and maintain the NAAQS in the future. *Implementation of the 2010 Primary 1-Hour SO<sub>2</sub> NAAQS, Draft White Paper for Discussion*, May 2012 (for discussion purposes with Stakeholders at meetings in May and June 2012), available at <http://www.epa.gov/airquality/sulfurdioxide/implementation.html>. However, EPA clearly stated in this 2012 Draft White Paper its clarified implementation position that it was no longer recommending such attainment demonstrations for unclassifiable areas for June 2013 infrastructure SIPs. *Id.* EPA had stated in the preamble to the NAAQS and in the prior 2011 draft guidance that EPA intended to develop and seek public comment on guidance for modeling and development of SIPs for sections 110 and 191 of the CAA. Section 191 of the CAA requires states to submit SIPs in accordance with section 172 for areas designated

Therefore, EPA continues to believe that the elements of section 110(a)(2) which address SIP revisions for nonattainment areas including measures and modeling demonstrating attainment are due by the dates statutorily prescribed under subparts 2 through 5 under part D of title I. The CAA directs states to submit these 110(a)(2) elements for nonattainment areas on a separate schedule from the “structural requirements” of 110(a)(2) which are due within three years of adoption or revision of a NAAQS. The infrastructure SIP submission requirement does not move up the date for any required submission of a part D plan for areas designated nonattainment for the new NAAQS. Thus, elements relating to demonstrating attainment for areas not attaining the NAAQS are not necessary for states to include in the infrastructure SIP submission, and the CAA does not provide explicit requirements for demonstrating attainment for areas potentially designated as “unclassifiable” (or that have not yet been designated) regarding attainment with a particular NAAQS.

As stated previously, EPA believes that the proper inquiry at this juncture is whether Ohio and Indiana have met the basic structural SIP requirements appropriate at the point in time EPA is acting upon the infrastructure submittal. Emissions limitations and other control measures needed to attain the NAAQS in areas designated nonattainment for that NAAQS are due on a different schedule from the section 110 infrastructure elements. States, like Ohio and Indiana, may reference pre-existing SIP emission limits or other rules contained in part D plans for previous NAAQS in an infrastructure SIP submission. For example, Ohio and Indiana submitted lists of existing emission reduction measures in the SIP that control emissions of SO<sub>2</sub> as discussed above in response to a prior comment and discussed in detail in our proposed rulemakings. Ohio and Indiana’s SIP revisions reflect several provisions that have the ability to reduce SO<sub>2</sub>. Although the Ohio and Indiana SIPs rely on measures and programs used to implement previous SO<sub>2</sub> NAAQS, these provisions will

provide benefits for the 2010 SO<sub>2</sub> NAAQS. The identified Ohio and Indiana SIP measures help to reduce overall SO<sub>2</sub> and are not limited to reducing SO<sub>2</sub> levels to meet one specific NAAQS.

Additionally, as discussed in EPA’s proposed rules, Ohio and Indiana have the ability to revise their SIPs when necessary (e.g., in the event the Administrator finds their plans to be substantially inadequate to attain the NAAQS or otherwise meet all applicable CAA requirements) as required under element H of section 110(a)(2).

EPA believes the requirements for emission reduction measures for an area designated nonattainment to come into attainment with the 2010 primary SO<sub>2</sub> NAAQS are in sections 172 and 192 of the CAA, and, therefore, the appropriate time for implementing requirements for necessary emission limitations for demonstrating attainment with the 2010 SO<sub>2</sub> NAAQS is through the attainment planning process contemplated by those sections of the CAA. On August 5, 2013, EPA designated as nonattainment most areas in locations where existing monitoring data from 2009–2011 indicated violations of the 2010 SO<sub>2</sub> standard. EPA designated Lake County and portions of Clermont, Morgan, Washington, and Jefferson Counties in Ohio and portions of Marion, Morgan, Daviess, Pike, and Vigo Counties in Indiana as nonattainment areas for the 2010 SO<sub>2</sub> NAAQS. 78 FR 47191 (August 5, 2013). In separate future actions, EPA will address the designations for all other areas for which the Agency has yet to issue designations. *See, e.g.*, 79 FR 27446 (May 13, 2014) (proposing process and timetables by which state air agencies would characterize air quality around SO<sub>2</sub> sources through ambient monitoring and/or air quality modeling techniques and submit such data to the EPA for future attainment status determinations under the 2010 SO<sub>2</sub> NAAQS). For the areas designated nonattainment in August 2013 within Ohio and Indiana, attainment SIPs were due by April 4, 2015, and must contain demonstrations that the areas will attain as expeditiously as practicable, but no later than October 4, 2018, pursuant to sections 172, 191 and 192, including a plan for enforceable measures to reach attainment of the NAAQS. EPA believes it is not appropriate to bypass the attainment planning process by imposing separate requirements outside the attainment planning process. Such actions would be disruptive and premature absent exceptional circumstances and would interfere with a state’s planning process. *See In the*

*Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petitions Numbers III–2012–06, III–2012–07, and III 2013–01 (July 30, 2014) (hereafter, *Homer City/Mansfield Order*) at 10–19 (finding Pennsylvania SIP did not require imposition of SO<sub>2</sub> emission limits on sources independent of the part D attainment planning process contemplated by the CAA). EPA believes that the history of the CAA and intent of Congress for the CAA as described above demonstrate clearly that it is within the section 172 and general part D attainment planning process that Ohio and Indiana must include additional SO<sub>2</sub> emission limits on sources in order to demonstrate future attainment, where needed.

The Sierra Club’s reliance on 40 CFR 51.112 to support its argument that infrastructure SIPs must contain emission limits adequate to provide for timely attainment and maintenance of the standard is also not supported. As explained previously in response to the background comments, EPA notes this regulatory provision clearly on its face applies to plans specifically designed to attain the NAAQS and not to infrastructure SIPs which show the states have in place structural requirements necessary to implement the NAAQS. Therefore, EPA finds 40 CFR 51.112 inapplicable to its analysis of the Ohio and Indiana SO<sub>2</sub> infrastructure SIPs.

As noted in EPA’s preamble for the 2010 SO<sub>2</sub> NAAQS, determining compliance with the SO<sub>2</sub> NAAQS will likely be a source-driven analysis, and EPA has explored options to ensure that the SO<sub>2</sub> designations process realistically accounts for anticipated SO<sub>2</sub> reductions at sources that we expect will be achieved by current and pending national and regional rules. *See* 75 FR 35520 (June 22, 2010). As mentioned previously above, EPA has proposed a process to address additional areas in states which may not be attaining the 2010 SO<sub>2</sub> NAAQS. *See* 79 FR 27446 (May, 13, 2014), proposing process for gather further information from additional monitoring or modeling that may be used to inform future attainment status determinations). In addition, in response to lawsuits in district courts seeking to compel EPA’s remaining designations of undesignated areas under the NAAQS, EPA has been placed under a court order to complete the designations process under section 107. However, because the purpose of an infrastructure SIP submission is for more general planning purposes, EPA does not believe Ohio and Indiana were obligated during this infrastructure SIP

nonattainment with the SO<sub>2</sub> NAAQS. After seeking such comment, EPA has now issued guidance for the nonattainment area SIPs due pursuant to sections 191 and 172. *See Guidance for 1-Hour SO<sub>2</sub> Nonattainment Area SIP Submissions*, Stephen D. Page, Director, EPA’s Office of Air Quality Planning and Standards, to Regional Air Division Directors Regions 1–10, April 23, 2014. In September 2013, EPA had previously issued specific guidance relevant to infrastructure SIP submissions due for the NAAQS, including the 2010 SO<sub>2</sub> NAAQS. *See Infrastructure SIP Guidance*.



planning process to account for controlled SO<sub>2</sub> levels at individual sources. See *Homer City/Mansfield Order* at 10–19.

Regarding the air dispersion modeling conducted by Sierra Club pursuant to AERMOD for the coal-fired EGUs, EPA is not at this stage prepared to opine on whether it demonstrates violations of the NAAQS, and does not find the modeling information relevant at this time for review of an infrastructure SIP. While EPA has extensively discussed the use of modeling for attainment demonstration purposes and for designations and other actions in which areas' air quality status is determined, EPA has recommended that such modeling was not needed for the SO<sub>2</sub> infrastructure SIPs needed for the 2010 SO<sub>2</sub> NAAQS. See April 12, 2012, letters to states regarding SO<sub>2</sub> implementation and *Implementation of the 2010 Primary 1-Hour SO<sub>2</sub> NAAQS, Draft White Paper for Discussion*, May 2012, available at <http://www.epa.gov/airquality/sulfurdioxide/implementation.html>. In contrast, EPA recently discussed modeling for designations in our May 14, 2014, proposal at 79 FR 27446 and for nonattainment planning in the April 23, 2014, *Guidance for 1-Hour SO<sub>2</sub> Nonattainment Area SIP Submissions*.

In conclusion, EPA disagrees with Sierra Club's statements that EPA must disapprove Ohio and Indiana's infrastructure SIP submissions because they do not establish at this time specific enforceable SO<sub>2</sub> emission limits either on coal-fired EGUs or other large SO<sub>2</sub> sources in order to demonstrate attainment with the NAAQS.

*Comment 6:* Sierra Club asserts that modeling is the appropriate tool for evaluating adequacy of infrastructure SIPs and ensuring attainment and maintenance of the 2010 SO<sub>2</sub> NAAQS. It refers to EPA's historic use of air dispersion modeling for attainment designations as well as "SIP revisions."

The Sierra Club cites to *Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) and *NRDC v. EPA*, 571 F.3d 1245, 1254 (D.C. Cir. 2009) for the general proposition that it would be arbitrary and capricious for an agency to ignore an aspect of an issue placed before it and for the statement that an agency must consider information presented during notice-and-comment rulemaking.

The Sierra Club cites prior EPA statements that the Agency has used modeling for designations and attainment demonstrations, including statements in the 2010 SO<sub>2</sub> NAAQS preamble, EPA's 2012 Draft White Paper for Discussion on Implementing the 2010 SO<sub>2</sub> NAAQS, and a 1994 SO<sub>2</sub>

Guideline Document, as modeling could better address the source-specific impacts of SO<sub>2</sub> emissions and historic challenges from monitoring SO<sub>2</sub> emissions. The Sierra Club discusses EPA's history of employing air dispersion modeling for increment compliance verifications in the permitting process for the PSD program and discusses different scenarios where the AERMOD model functions appropriately.

The Sierra Club asserts that EPA's use of air dispersion modeling was upheld in *GenOn REMA, LLC v. EPA*, 722 F.3d 513 (3rd Cir. 2013) where an EGU challenged EPA's use of CAA section 126 to impose SO<sub>2</sub> emission limits on a source due to cross-state impacts. The Sierra Club claims that the Third Circuit in *GenOn REMA* upheld EPA's actions after examining the record which included EPA's air dispersion modeling of the one source as well as other data.

Finally, the Sierra Club agrees that Ohio and Indiana have the authority to use modeling for attainment demonstrations, but claims that Ohio and Indiana's proposed SO<sub>2</sub> infrastructure SIPs lack emission limitations informed by air dispersion modeling and therefore fail to ensure Ohio and Indiana will achieve and maintain the 2010 SO<sub>2</sub> NAAQS. Sierra Club claims Ohio and Indiana must require adequate one hour SO<sub>2</sub> emission limits in the infrastructure SIP that show no exceedances of NAAQS when modeled.

For Indiana, the Sierra Club specifically points out the need for modeling demonstrated by Duke Energy's Gibson Plant. It alleges that the air monitor is not showing the true picture of the occurring violations. The Sierra Club states that its model predicts no impact at the monitor, but violations nearby.

*Response 6:* EPA agrees with the Sierra Club that air dispersion modeling, such as AERMOD, can be an important tool in the CAA section 107 designations process, in the attainment SIP process pursuant to sections 172 and 192, including supporting required attainment demonstrations, and in other actions in which areas' air quality status is determined. EPA agrees that prior EPA statements, EPA guidance, and case law support the use of air dispersion modeling in these processes, as well as in analyses of whether existing approved SIPs remain adequate to show attainment and maintenance of the SO<sub>2</sub> NAAQS. However, EPA disagrees with the Sierra Club that EPA must disapprove Ohio's and Indiana's SO<sub>2</sub> infrastructure SIPs for their alleged failure to include source-specific SO<sub>2</sub>

emission limits that show no exceedances of the NAAQS when modeled, since this is not an action in which air quality status is being determined or for which there is a duty for the States to demonstrate future attainment of the NAAQS in areas that may be violating it.

As discussed previously and in the Infrastructure SIP Guidance, EPA believes the conceptual purpose of an infrastructure SIP submission is to assure that the air agency's SIP contains the necessary structural requirements for the new or revised NAAQS and that the infrastructure SIP submission process provides an opportunity to review the basic structural requirements of the air agency's air quality management program in light of the new or revised NAAQS. See Infrastructure SIP Guidance at p. 2. EPA believes the attainment planning process detailed in part D of the CAA, including attainment SIPs required by sections 172 and 192 for areas not attaining the NAAQS, is the appropriate place for the state to evaluate measures needed to bring nonattainment areas into attainment with a NAAQS and to impose additional emission limitations such as SO<sub>2</sub> emission limits on specific sources as needed to achieve such future attainment. While EPA had initially suggested in the final 2010 SO<sub>2</sub> NAAQS preamble (75 FR 35520) and subsequent draft guidance in March and September 2011 that EPA recommended states submit substantive attainment demonstration SIPs based on air quality modeling in section 110(a) SIPs due in June 2013 to show how areas expected to be designated as unclassifiable would attain and maintain the NAAQS, these initial statements in the preamble and 2011 draft guidance were based on EPA's initial expectation that most areas would by June 2012 be initially designated as unclassifiable due to limitations in the scope of the ambient monitoring network and the short time available before which states could conduct modeling to support designations recommendations in 2011. However, after receiving comments from the states regarding these initial statements and the timeline for implementing the NAAQS, EPA subsequently stated in the April 12, 2012, letters to the states and in the May 2012 *Implementation of the 2010 Primary 1-Hour SO<sub>2</sub> NAAQS, Draft White Paper for Discussion* that EPA was clarifying its implementation position and that EPA was no longer recommending such attainment demonstrations supported by air dispersion modeling for unclassifiable



areas (which had not yet been designated) for June 2013 infrastructure SIPs. EPA reaffirmed this position that EPA did not expect attainment demonstrations for areas not designated nonattainment for infrastructure SIPs in the February 6, 2013, memorandum, "Next Steps for Area Designations and Implementation of the Sulfur Dioxide National Ambient Air Quality Standard."<sup>4</sup> As previously mentioned, EPA had stated in the preamble to the NAAQS and in the prior 2011 draft guidance that EPA intended to develop and seek public comment on guidance for modeling and development of SIPs for sections 110, 172 and 191–192 of the CAA. After receiving such further comment, EPA has now issued guidance for the nonattainment area SIPs due pursuant to sections 191–192 and 172 and proposed a process for further designations for the 2010 SO<sub>2</sub> NAAQS, which could include use of air dispersion modeling. See April 23, 2014, *Guidance for 1-Hour SO<sub>2</sub> Nonattainment Area SIP Submissions* and 79 FR 27446 (proposing process and timetables for additional gathering of information to support future attainment status determinations informed through ambient monitoring and/or air quality modeling). While the EPA guidance for attainment SIPs and the proposed process for additional information gathering discusses use of air dispersion modeling, EPA's 2013 Infrastructure SIP Guidance did not require use of air dispersion modeling to inform emission limitations for section 110(a)(2)(A) to ensure no exceedances of the NAAQS when sources are modeled. Therefore, as discussed previously, EPA believes the Ohio and Indiana SO<sub>2</sub> infrastructure SIP submittals contains the structural requirements to address elements in section 110(a)(2) as discussed in detail in our proposed approval and in our response to a prior comment. EPA believes infrastructure SIPs are general planning SIPs to ensure that a state has adequate resources and authority to implement a NAAQS. Infrastructure SIP submissions are not intended to act or fulfill the obligations of a detailed attainment and/or maintenance plan for each individual area of the state that is not attaining the NAAQS. While infrastructure SIPs must address modeling authorities in general for section 110(a)(2)(K), EPA believes 110(a)(2)(K) requires infrastructure SIPs

to provide the state's authority for air quality modeling and for submission of modeling data to EPA, not specific air dispersion modeling for large stationary sources of pollutants such as SO<sub>2</sub> in a SO<sub>2</sub> infrastructure SIP. In the proposed rules for this action, EPA provided a detailed explanation of Ohio's and Indiana's abilities and authorities to conduct air quality modeling when required and their authority to submit modeling data to the EPA.

EPA finds Sierra Club's discussion of case law and guidance to be irrelevant to our analysis here of the Ohio and Indiana infrastructure SIPs, as this SIP for section 110(a) is not an attainment SIP required to demonstrate attainment of the NAAQS pursuant to section 172. In addition, Sierra Club's comments relating to EPA's use of AERMOD or modeling in general in designations pursuant to section 107 are likewise irrelevant as EPA's present approval of Ohio's and Indiana's infrastructure SIPs are unrelated to the section 107 designations process. Nor is our action on this infrastructure SIP related to any new source review (NSR) or PSD permit program issue. As outlined in the August 23, 2010, clarification memo, "Applicability of Appendix W Modeling Guidance for the 1-hour SO<sub>2</sub> National Ambient Air Quality Standard" (U.S. EPA, 2010a), AERMOD is the preferred model for single source modeling to address the 2010 SO<sub>2</sub> NAAQS as part of the NSR/PSD permit programs. Therefore, as attainment SIPs, designations, and NSR/PSD actions are outside the scope of a required infrastructure SIP for the 2010 SO<sub>2</sub> NAAQS for section 110(a), EPA provides no further response to the Commenter's discussion of air dispersion modeling for these applications. If Sierra Club resubmits its air dispersion modeling for the Ohio and Indiana EGUs, or updated modeling information in the appropriate context where an evaluation of areas' air quality status is being conducted, including the Gibson Plant referenced in this comment, EPA will address the resubmitted modeling or updated modeling in the appropriate future context when an analysis of whether Ohio and Indiana's emissions limits are adequate to show attainment and maintenance of the NAAQS is warranted.

The Sierra Club correctly noted that the Third Circuit upheld EPA's section 126 Order imposing SO<sub>2</sub> emissions limitations on an EGU pursuant to CAA section 126. *GenOn REMA, LLC v. EPA*, 722 F.3d 513. Pursuant to section 126, any state or political subdivision may petition EPA for a finding that any

major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of section 110(a)(2)(D)(i)(I), which relates to significant contributions to nonattainment or maintenance in another state. The Third Circuit upheld EPA's authority under section 126 and found EPA's actions neither arbitrary nor capricious after reviewing EPA's supporting docket which included air dispersion modeling as well as ambient air monitoring data showing violations of the NAAQS. The Sierra Club appears to have cited this matter to demonstrate again EPA's use of modeling for certain aspects of the CAA. EPA agrees with the Sierra Club regarding the appropriate role air dispersion modeling has for designations, attainment SIPs, and demonstrating significant contributions to interstate transport. However, EPA's approval of Ohio and Indiana's infrastructure SIPs is based on our determination that Ohio and Indiana have the required structural requirements pursuant to section 110(a)(2) in accordance with our explanation of the intent for infrastructure SIPs as discussed in the 2013 Infrastructure SIP Guidance. Therefore, while air dispersion modeling may be appropriate for consideration in certain circumstances, EPA does not find air dispersion modeling demonstrating no exceedances of the NAAQS to be a required element before approval of infrastructure SIPs for section 110(a) or specifically for 110(a)(2)(A). Thus, EPA disagrees with the Sierra Club that EPA must require additional emission limitations in the Ohio and Indiana SO<sub>2</sub> infrastructure SIPs informed by air dispersion modeling and demonstrating attainment and maintenance of the 2010 NAAQS.

In its comments, Sierra Club relies on *Motor Vehicle Mfrs. Ass'n and NRDC v. EPA* to support its comments that EPA *must now* consider the Sierra Club's modeling data based on administrative law principles regarding consideration of comments provided during a rulemaking process. EPA notes that it has considered the modeling submitted by the Sierra Club, as well as all of its submitted comments, to the extent that they are germane to the action being undertaken here. This action is not, in addition to being the traditional action on infrastructure SIPs described above, a response to a separate administrative petition to determine the air quality status of Ohio and Indiana generally. Therefore, the information Sierra Club has submitted regarding such a potential determination is not germane to this action. As discussed in detail in the

<sup>4</sup> The February 6, 2013 "Next Steps for Area Designations and Implementation of the Sulfur Dioxide National Ambient Air Quality Standard," one of the April 12, 2012 state letters, and the May 2012 Draft White Paper are available at <http://www.epa.gov/airquality/sulfurdioxide/implement.html>.

Responses above, EPA does not believe the infrastructure SIPs required by section 110(a) must contain emission limits demonstrating future attainment with a NAAQS. Part D of the CAA contains numerous requirements for the NAAQS attainment planning process including requirements for attainment demonstrations in section 172 supported by appropriate modeling. As also discussed previously, section 107 supports EPA's use of modeling in the designations process. In *Catawba*, the D.C. Circuit upheld EPA's consideration of data or factors for designations other than ambient monitoring. EPA does not believe state infrastructure SIPs must contain emission limitations informed by air dispersion modeling

demonstrating current future NAAQS attainment in order to meet the requirements of section 110(a)(2)(A). Thus, EPA has not evaluated the persuasiveness of the Commenter's submitted modeling for that purpose, and finds that it is not relevant to the approvability of Ohio's and Indiana's proposed infrastructure SIPs for the 2010 SO<sub>2</sub> NAAQS.

### III. What action is EPA taking?

For the reasons discussed in our February 27, 2015, proposed rulemaking and in the above responses to public comments, EPA is taking final action to approve Indiana's infrastructure SIP for the 2010 NO<sub>2</sub> and SO<sub>2</sub> NAAQS as proposed.

For the reasons discussed in our July 25, 2014, proposed rulemaking, EPA is taking final action to approve Ohio's infrastructure SIP for the 2010 SO<sub>2</sub> NAAQS as proposed. In the July 25, 2014, rulemaking, EPA also proposed approval for Ohio's 2008 lead, 2008 ozone, and 2010 NO<sub>2</sub> infrastructure submittals. Those approvals have been finalized in separate rulemakings (*see* 79 FR 60075, October 6, 2014, and 79 FR 62019, October 16, 2014). In today's rulemaking, we are taking final action on only the infrastructure SIP requirements for the 2010 SO<sub>2</sub> NAAQS for Ohio. Our final actions by element of section 110(a)(2) and NAAQS, are contained in the table below.<sup>5</sup>

Element	2010 NO <sub>2</sub> NAAQS for Indiana	2010 SO <sub>2</sub> NAAQS for Indiana	2010 SO <sub>2</sub> NAAQS for Ohio
(A): Emission limits and other control measures .....	A	A	A
(B): Ambient air quality monitoring and data system .....	A	A	A
(C)1: Enforcement of SIP measures .....	A	A	A
(C)2: PSD .....	A	A	A
(D)1: Contribute to nonattainment/interfere with maintenance of NAAQS .....	A	NA	NA
(D)2: PSD .....	A	A	A
(D)3: Visibility Protection .....	NA	NA	NA
(D)4: Interstate Pollution Abatement .....	A	A	A
(D)5: International Pollution Abatement .....	A	A	A
(E)1: Adequate resources .....	A	A	A
(E)2: State boards .....	A	A	A
(F): Stationary source monitoring system .....	A	A	A
(G): Emergency power .....	A	A	A
(H): Future SIP revisions .....	A	A	A
(I): Nonattainment area plan or plan revisions under part D .....	NA	NA	NA
(J)1: Consultation with government officials .....	A	A	A
(J)2: Public notification .....	A	A	A
(J)3: PSD .....	A	A	A
(J)4: Visibility protection (Regional Haze) .....	NA	NA	NA
(K): Air quality modeling and data .....	A	A	A
(L): Permitting fees .....	A	A	A
(M): Consultation and participation by affected local entities .....	A	A	A

In the table above, the key is as follows:

A ..... Approve.  
a ..... Approved in a previous Rulemaking.  
NA ..... No Action/Separate Rule-making.

### IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA 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 Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- 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

<sup>5</sup> As stated previously, EPA will take later, separate action on portions of Ohio and Indiana's

SO<sub>2</sub> infrastructure SIP submittal including the portions of the SIP submittal addressing section

110(a)(2)(D)(i)(I) and the visibility portion of 110(a)(2)(D)(i)(II).

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, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

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 October 13, 2015. 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, sulfur dioxide, nitrogen dioxide, Reporting and recordkeeping requirements.

Dated: August 3, 2015.

**Susan Hedman,**

*Regional Administrator, Region 5.*

40 CFR part 52 is amended as follows:

### PART 52— APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

- 2. In § 52.770 the table in paragraph (e) is amended by adding entries in alphabetical order for “Section 110(a)(2) Infrastructure Requirements for the 2010 NO<sub>2</sub> NAAQS” and “Section 110(a)(2) Infrastructure Requirements for the 2010 SO<sub>2</sub> NAAQS” to read as follows:

#### § 52.770 Identification of plan.

\* \* \* \* \*

(e) \* \* \*

### EPA-APPROVED INDIANA NONREGULATORY AND QUASI-REGULATORY PROVISIONS

Title	Indiana date	EPA Approval	Explanation
* * *			
Section 110(a)(2) Infrastructure Requirements for the 2010 NO <sub>2</sub> NAAQS.	1/15/2013	8/14/2015, [insert Federal Register citation].	This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D)(i)(I), (D)(i)(II) except visibility, (D)(ii), (E), (F), (G), (H), (J) except visibility, (K), (L), and (M).
Section 110(a)(2) Infrastructure Requirements for the 2010 SO <sub>2</sub> NAAQS.	5/22/2013	8/14/2015, [insert Federal Register citation].	This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D)(i)(II) except visibility, (D)(ii), (E), (F), (G), (H), (J) except visibility, (K), (L), and (M).
* * *			

- 3. Section 52.1891 is amended by revising paragraph (h) to read as follows:

#### § 52.1891 Section 110(a)(2) Infrastructure Requirements.

\* \* \* \* \*

(h) Approval—In a June 7, 2013, submittal, Ohio certified that the State has satisfied the infrastructure SIP requirements of section 110(a)(2)(A) through (H), and (J) through (M) for the 2010 SO<sub>2</sub> NAAQS. We are not finalizing action on section 110(a)(2)(D)(i)(I)—Interstate transport prongs 1 and 2 or visibility portions of section 110(a)(2)(D)(i)(II) and 110(a)(2)(J).

[FR Doc. 2015–20020 Filed 8–13–15; 8:45 am]

**BILLING CODE 6560–50–P**

### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 180

[EPA–HQ–OPP–2014–0496; FRL–9931–06]

#### Fludioxonil; Pesticide Tolerances

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes tolerances for residues of fludioxonil in or on carrots, the stone fruit group 12–12, and the rapeseed subgroup 20A, except flax seed. Interregional Research Project Number 4 (IR–4) requested the tolerances for carrots and the stone fruit group 12–12, and Syngenta Crop Protection requested the tolerance for the rapeseed subgroup 20A under the

Federal Food, Drug, and Cosmetic Act (FFDCA).

**DATES:** This regulation is effective August 14, 2015. Objections and requests for hearings must be received on or before October 13, 2015, 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:** The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2014–0496, is available at <http://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room