**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA–R03–OAR–2014–0299; FRL–9917–84–Region 3]**

## Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Infrastructure Requirements for the 2010 Sulfur Dioxide National Ambient Air Quality Standards

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

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) revision submitted by the State of West Virginia pursuant to the Clean Air Act (CAA). Whenever new or revised National Ambient Air Quality Standards (NAAQS) are promulgated, the CAA requires states to submit a plan for the implementation, maintenance, and enforcement of such NAAQS. The plan is required to address basic program elements, including, but not limited to regulatory structure, monitoring, modeling, legal authority, and adequate resources necessary to assure attainment and maintenance of the standards. These elements are referred to as infrastructure requirements. The State of West Virginia has made a submittal addressing the infrastructure requirements for the 2010 sulfur dioxide ($SO_2$) NAAQS.

**DATES:** This final rule is effective on November 17, 2014.

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2014–0299. All documents in the docket are listed in the *www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, i.e., 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 available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE., Charleston, West Virginia 25304.

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**SUPPLEMENTARY INFORMATION:**

### I. Summary of SIP Revision

On June 22, 2010 (75 FR 35520), EPA promulgated a revised NAAQS for the 1-hour primary $SO_2$ at a level of 75 parts per billion (ppb), based on a 3-year average of the annual 99th percentile of 1-hour daily maximum concentrations. Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe.

On June 25, 2013, the West Virginia Department of Environmental Protection (WV DEP) submitted a SIP revision that addresses the infrastructure elements specified in section 110(a)(2) of the CAA, necessary to implement, maintain, and enforce the 2010 sulfur dioxide NAAQS. On May 14, 2014 (79 FR 27524), EPA published a notice of proposed rulemaking (NPR) for the State of West Virginia proposing approval of West Virginia's submittal. In the NPR, EPA proposed approval of the following infrastructure elements: Section 110(a)(2)(A), (B), (C) (enforcement and minor new source review), (D)(ii), (E)(i) and (iii), (F), (G), (H), (J) (consultation, public notification, and visibility protection), (K), (L), and (M), or portions thereof.[1]

West Virginia did not submit section 110(a)(2)(I) which pertains to the nonattainment requirements of part D, Title I of the CAA, since this element is not required to be submitted by the 3-year submission deadline of section 110(a)(1), and will be addressed in a separate process. EPA will take separate action on the portions of section 110(a)(2)(C), (D)(i)(II), and (J) as they relate to West Virginia's prevention of significant deterioration (PSD) program. EPA had previously approved West Virginia's PSD program with the narrow exception of the definition of regulated new source review pollutant for its failure to include condensables. *See* 77 FR 63736 (October 17, 2012) and 78 FR 27062 (May 9, 2013) (finalizing limited, narrow disapproval). At this time, EPA is not proposing action on section 110(a)(2)(D)(i)(II) for visibility protection for the 2010 $SO_2$ NAAQS. Although West Virginia's infrastructure SIP submittal for the 2010 $SO_2$ NAAQS referred to West Virginia's regional haze SIP for section 110(a)(2)(D)(i)(II) for visibility protection, EPA intends to take separate action on West Virginia's submittal for this element at a later date as explained in the technical support document (TSD) for the May 14, 2014 NPR. The Agency will also take separate action on section 110(a)(2)(E)(ii) as it relates to section 128 (State Boards). This rulemaking action also does not include action on section 110(a)(2)(D)(i)(I) of the CAA because West Virginia's June 25, 2013 infrastructure SIP submittal did not include provisions for this element. EPA will take later, separate action on section 110(a)(2)(D)(i)(I) for the 2010 $SO_2$ NAAQS for West Virginia.

The rationale supporting EPA's proposed rulemaking action, including the scope of infrastructure SIPs in general, is explained in the published NPR and the TSD accompanying the NPR and will not be restated here. The NPR and TSD are available in the docket for this rulemaking at *www.regulations.gov,* Docket ID Number EPA–R03–OAR–2014–0299.

### II. Public Comments and EPA's Responses

EPA received comments from the Sierra Club on the May 14, 2014 proposed rulemaking action on West Virginia's 2010 $SO_2$ infrastructure SIP. A full set of these comments is provided in the docket for today's final rulemaking action.

#### *A. Background Comments*

1. The Plain Language of the CAA

*Comment 1:* Sierra Club contends in background comments that the plain language of section 110(a)(2)(A) of the CAA, legislative history of the CAA, case law, EPA regulations such as 40 CFR 51.112(a), and EPA interpretations in rulemakings require the inclusion of enforceable emission limits in an

[1] In EPA's May 14, 2014 NPR, EPA stated it would take separate action on the portions of CAA section 110(a)(2) infrastructure elements for the 2010 $SO_2$ NAAQS as they relate to West Virginia's prevention of significant deterioration (PSD) permitting program, as required by part C of Title I of the CAA. 79 FR 27524. This included portions of the following infrastructure elements: section 110(a)(2)(C), (D)(i)(II), and (J). In the ''Proposed Action'' section of the NPR, EPA inadvertently listed section 110(a)(2)(J) in our proposed approval without clarifying the proposed approval was limited to the portions of 110(a)(2)(J) related only to consultation, public notification and visibility protection. As the NPR and accompanying Technical Support Document discussed the elements EPA intended to propose for approval for section 110(a)(2)(J) to the exclusion of PSD portions, EPA believes this omission was inadvertent, and EPA clarifies in this action that our approval of West Virginia's 2010 $SO_2$ infrastructure SIP for section 110(a)(2)(J) is limited to the portions addressing consultation, public notification, and visibility protection.

infrastructure SIP to prevent NAAQS exceedances in areas not designated nonattainment. Sierra Club then contends that the West Virginia 2010 $SO_2$ infrastructure SIP revision did not revise the existing $SO_2$ emission limits in response to the 2010 $SO_2$ NAAQS and fails 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 Commenter states that on its face the CAA ''requires I–SIPs to be adequate to prevent exceedances of the NAAQS.'' In support, the Commenter 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 commenter 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 Commenter makes general allegations that West Virginia does not have sufficient protective measures to prevent $SO_2$ NAAQS exceedances. EPA addressed the adequacy of West Virginia's infrastructure SIP for 110(a)(2)(A) purposes to meet applicable requirements of the CAA in the TSD accompanying the May 14, 2014 NPR and explained why the SIP includes enforceable emission limitations and other control measures necessary for maintenance of the 2010 $SO_2$ NAAQS throughout the state.[2] These include applicable portions of 45CSR10 (To Prevent and Control Air Pollution from the Emissions of Sulfur Oxides), 45CSR11 (Prevention of Air Pollution Emergency Episodes), 45CSR13 (Permits for Construction, Modification, Relocation and Operation of Stationary Sources of Air Pollutants, Notification Requirements, Temporary Permits, General Permits, and Procedures for Evaluation), 45CSR14 (Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution for the Prevention of Significant Deterioration), 45CSR19 (Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution Which Cause or Contribute to Nonattainment), and 45CSR41 (Control of Annual Sulfur Dioxide Emissions to Mitigate Interstate Transport of Fine Particulate Matter and Sulfur Dioxide). Additionally, the following state rules are applicable to sulfur oxide emission limitations and control measures: 45CSR10A (Testing, Monitoring, Recordkeeping and Reporting Requirements Under 45CSR10), 45CSR16 (Standards of Performance for New Stationary Sources), and 45CSR18 (Control of Air Pollution from Combustion of Solid Waste), 45CSR33 (Acid Rain Provisions and Permits). Further, in 2012, EPA granted limited approval and limited disapproval of West Virginia's regional haze SIP which also includes emission measures related to $SO_2$. 77 FR 16932 (March 23, 2012). As discussed in the TSD for this rulemaking, EPA finds these provisions adequately address section 110(a)(2)(A) to aid in attaining and/or maintaining the NAAQS and finds West Virginia demonstrated that it has the necessary tools to implement and enforce the NAAQS.

1. The Legislative History of the CAA

*Comment 2:* Sierra Club cites two excerpts from the legislative history of the 1970 CAA claiming they support an interpretation that SIP revisions under CAA section 110 must include emissions limitations sufficient to show maintenance of the NAAQS in all areas of West Virginia. Sierra Club also contends that the legislative history of the CAA supports the interpretation that infrastructure SIPs under section 110(a)(2) must include enforceable emission limitations, citing the Senate Committee Report and the subsequent Senate Conference Report accompanying the 1970 CAA.

*Response 2:* As provided in the previous response, the CAA, as enacted in 1970, including its legislative history, cannot be interpreted in isolation from the later amendments that refined that structure and deleted relevant language from section 110 concerning demonstrating attainment. In any event, the two excerpts of legislative history the commenter cites merely provide that states should include enforceable emission limits in their SIPs and they do not mention or otherwise address whether states are required to include maintenance plans for all areas of the state as part of the infrastructure SIP. As provided earlier in this rulemaking action, the TSD for the proposed rule explains why the SIP includes enforceable emissions limitations for the relevant area.

2. Case Law

*Comment 3:* Sierra Club also discusses several cases applying the CAA which Sierra Club claims support their 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

[2] The TSD for this action is available on line at *www.regulations.gov,* Docket ID Number EPA–R03–OAR–2014–0299.

enforced should result in ambient air which meet the national standards.'' Sierra Club also cites to *Pennsylvania Dept. of Envtl. 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 commenter contends that the 1990 Amendments do not alter how courts have interpreted the requirements of section 110, quoting *Alaska Dept. of Envtl. 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 specif[ies] 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 Envtl. 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 3:* None of the cases the Commenter cites support the Commenter's contention that section 110(a)(2)(A) is clear 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 Act). Rather, the courts reference section 110(a)(2)(A) (or section 110(a)(2)(B) of the pre-1990 CAA) in the background section of decisions in the context of a challenge to an EPA action on revisions to a SIP that was 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) not to 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 Envtl. 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 Commenter quotes does not interpret but rather merely describes section 110(a)(2)(A). The Commenter 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.[3] 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 state implementation plan in response to EPA's finding under section 110(k)(5) that the previously approved SIP was in substantially adequate 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 to 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 and adoption of a remedial FIP were lawful. The Commenter suggests that *Alaska Dept. of Envtl. 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 Commenter 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 commenter cites, *Mich. Dept. of Envtl. 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 to section 110(a)(2)(A) solely for the

[3] While the commenter does contend that the State shouldn't be allowed to rely on emission reductions that were developed for the prior $SO_2$ standards (which we address herein), it does not claim that any of the measures are not ''emissions limitations'' within the definition of the CAA.

purpose of providing a brief background of the CAA.

Finally, in *Conn. Fund for Env't, Inc.* v. *EPA,* the D.C. Circuit was reviewing EPA action on a control measure SIP provision which adjusted the percent of sulfur permissible in fuel oil. 696 F.2d 169 (D.C. Cir. 1982). The D.C. Circuit focused on whether EPA needed to evaluate effects of 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.

3. EPA Regulations, Such as 40 CFR 51.112(a)

*Comment 4:* The Commenter cites to 40 CFR 51.112(a), providing that ''[e]ach 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].'' The Commenter asserts that this regulation requires all SIPs to include emissions limits necessary to ensure attainment of the NAAQS. The Commenter 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.'' The Commenter 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 4:* The Commenter'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 Commenter recognizes 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). And, 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 section 175A and 182. The Commenter 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 rather was meant 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 new ''Part D'' 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: $SO_X$ and PM (portion)''), 51.14 (''Control strategy: CO, HC, $O_X$ and $NO_2$ (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.

4. EPA Interpretations in Other Rulemakings

*Comment 5:* The Commenter also references two prior EPA rulemaking actions where EPA disapproved or proposed to disapprove SIPs and claimed they were actions in which EPA relied on section 110(a)(2)(A) and 40 CFR 51.112 to reject infrastructure SIPs. The Commenter first points to a 2006 partial approval and partial disapproval of revisions to Missouri's existing plan addressing the $SO_2$ NAAQS. In that action, EPA cited section 110(a)(2)(A) 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 $SO_2$ 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 $SO_2$ SIP for Indiana, where the revision removed an emission limit that applied to a specific emissions source at a facility in the State. 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 $SO_2$ 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.''

*Response 5:* EPA does not agree that the two prior actions referenced by the Commenter establish how EPA reviews infrastructure SIPs. It is clear from both the final Missouri rule and the proposed and final Indiana rule that EPA was not reviewing initial infrastructure SIP submissions under section 110 of the CAA, but rather reviewing 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 in 71 FR 12623 addressed a control strategy SIP and not an infrastructure SIP. The Indiana action provides even less support for the Commenter's position. The review in that rule was of a completely different requirement than the section 110(a)(2)(A) SIP. Rather, in that case, the State had an approved $SO_2$ 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 $SO_2$ 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.

As discussed in detail in the TSD and NPR, EPA finds the West Virginia SIP meets 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 State demonstrated that it has the necessary tools to implement and enforce a NAAQS.

Therefore, EPA approves the West Virginia $SO_2$ infrastructure SIP.[4]

*B. Comments on West Virginia SIP $SO_2$ Emission Limits*

*Comment 6:* Citing section 110(a)(2)(A) of the CAA, Sierra Club contends that EPA may not approve the proposed infrastructure SIP because it does not include enforceable 1-hour $SO_2$ emission limits for sources currently allowed to cause NAAQS exceedances. Sierra Club asserts the proposed infrastructure SIP fails to include enforceable 1-hour $SO_2$ emissions limits or other required measures to ensure attainment and maintenance of the $SO_2$ 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 1-hour $SO_2$ NAAQS because $SO_2$ impacts are strongly source-oriented. Sierra Club states coal-fired electric generating units (EGUs) are large contributors to $SO_2$ emissions but contends West Virginia did not demonstrate that emissions allowed by the proposed infrastructure SIP from such large sources of $SO_2$ will ensure compliance with the 2010 1-hour $SO_2$ NAAQS. The commenter claims 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 West Virginia including the John E. Amos Plant (Amos), the Harrison Power Station (Harrison), and the Kanawha River Plant (Kanawha). Sierra Club asserts the results of the air dispersion modeling it conducted employing EPA's AERMOD program for modeling used the plants' allowable and maximum emissions and showed the plants could cause exceedances of the 2010 $SO_2$ NAAQS with either allowable or maximum emissions.[5] Based on the modeling, Sierra Club asserts the West Virginia $SO_2$ infrastructure SIP submittal authorizes the three EGUs to cause exceedances of the NAAQS with allowable and maximum emission rates and therefore the infrastructure SIP fails to include adequate enforceable emission limitations or other required measures for sources of $SO_2$ sufficient to ensure attainment and maintenance of the 2010 $SO_2$ NAAQS and, therefore, EPA must disapprove West Virginia's proposed SIP revision. In addition, Sierra Club asserts ''EPA must impose additional emission limits on the plants that ensure attainment and maintenance of the NAAQS at all times.''

*Response 6:* 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-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 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. And, more detailed, later-enacted provisions govern the substantive planning process, including planning for attainment of the NAAQS.

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 demonstrate that it has the necessary tools to implement and enforce a NAAQS, such as adequate state personnel and an enforcement program. As discussed

[4] As stated previously, EPA will take later, separate action on several portions of West Virginia's $SO_2$ infrastructure SIP submittal including the portions of the SIP submittal addressing section 110(a)(2)(C), (D)(i)(II), and (J) for PSD, 110(a)(2)(D)(i)(II) (visibility protection), and 110(a)(2)(E)(ii) for State Boards.

[5] Sierra Club asserts its modeling followed protocols pursuant to 40 CFR Part 50, Appendix W and EPA's March 2011 guidance for implementing the 2010 $SO_2$ NAAQS.

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 $SO_2$ 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 $SO_2$ NAAQS 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 with the $SO_2$ 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 unclassifiable areas in infrastructure SIPs due in June 2013 as EPA had previously suggested in its 2010 $SO_2$ 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 West Virginia's $SO_2$ infrastructure SIP, on traditional infrastructure elements'' in section 110(a)(1) and (2) rather than on modeling demonstrations for future attainment for unclassifiable areas.[6]

Therefore, EPA asserts 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, extending as far as 10 years following area designations for some elements. 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 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 West Virginia has 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. A state, like West Virginia, 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, West Virginia submitted a list of existing emission reduction measures in the SIP that control emissions of $SO_2$ as discussed above in response to a prior comment and discussed in detail in our TSD. West Virginia's SIP revision reflects several provisions that have the ability to reduce $SO_2$. Although the West Virginia SIP relies on measures and programs used to implement previous $SO_2$ NAAQS, these provisions will provide benefits for the 2010 $SO_2$ NAAQS. The identified West Virginia SIP measures help to reduce overall $SO_2$ and are not limited to reducing $SO_2$ levels to meet one specific NAAQS.

Additionally, as discussed in EPA's TSD supporting the NPR, West Virginia has the ability to revise its SIP when necessary (e.g in the event the Administrator finds the plan 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). *See* W.Va. Code section 22–5–4(a)(16) (authorizing WV DEP to do all things necessary to prepare and submit SIPs).

EPA believes the requirements for emission reduction measures for an area designated nonattainment to come into attainment with the 2010 primary $SO_2$ 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 1-hour $SO_2$ 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 1-hour $SO_2$ standard. EPA designated portions of Brooke and Marshall Counties in West Virginia as nonattainment areas for the 2010 1-hour $SO_2$ NAAQS. 78 FR 47191 (August 5, 2013). In separate future actions, EPA intends to address the designations for all other areas for which the Agency has yet to issue designations. *See* 79 FR 27446 (May 13, 2014) (proposing process and timetables by which state air agencies would characterize air quality around $SO_2$ sources through ambient monitoring and/or air quality modeling techniques and submit such data to the EPA for designations with 2010 $SO_2$ NAAQS). For the partial areas designated nonattainment in August 2013 within West Virginia, attainment SIPs are due by April 4, 2015 and must contain demonstrations that the areas will attain as expeditiously as

[6] In EPA's final $SO_2$ 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 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 $SO_2$ 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/implement.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 nonattainment with the $SO_2$ 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 $SO_2$ 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 $SO_2$ NAAQS. *See* Infrastructure SIP Guidance.

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 $SO_2$ 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 West Virginia must include additional $SO_2$ emission limits on sources in order to demonstrate future attainment, where needed, for the portions of Brooke and Marshall Counties designated nonattainment to reach attainment with the 2010 1-hour $SO_2$ NAAQS.

The Commenter'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 West Virginia $SO_2$ infrastructure SIP.

As noted in EPA's preamble for the 2010 $SO_2$ NAAQS, determining compliance with the $SO_2$ NAAQS will likely be a source-driven analysis and EPA has explored options to ensure that the $SO_2$ designations process realistically accounts for anticipated $SO_2$ reductions at sources that we expect will be achieved by current and pending national and regional rules. *See* 75 FR 35520. As mentioned previously above, EPA has proposed a process to address additional areas in states which may not be attaining the 2010 $SO_2$ NAAQS. 79 FR 27446 (proposing process for further designations with additional monitoring or modeling). In addition, in response to lawsuits in district courts seeking to compel EPA's remaining designations of undesignated areas under the NAAQS, EPA has proposed to enter a settlement under which this process would require an earlier round of designations focusing on areas with larger sources of $SO_2$ emissions, as well as enforceable deadlines for the later rounds of designations. However, because the purpose of an infrastructure SIP submission is for more general planning purposes, EPA does not believe West Virginia was obligated during this infrastructure SIP planning process to account for controlled $SO_2$ 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 including Amos, Harrison, and Kanawha, 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. EPA has issued non-binding guidance for states to use in conducting, if they choose, additional analysis to support designations for the 2010 $SO_2$ *NAAQS. $SO_2$ NAAQS Designations Modeling Technical Assistance Document,* EPA Office of Air and Radiation and Office of Air Quality Planning and Standards, December 2013, available at *http://www.epa.gov/airquality/sulfurdioxide/implement.html.* Sierra Club's AERMOD modeling for the West Virginia EGUs was conducted prior to the issuance of this guidance and may not address all recommended elements EPA may consider important to modeling for 2010 $SO_2$ NAAQS for designations purposes or for eventual attainment demonstration purposes for the counties in West Virginia designated nonattainment. In addition, while EPA has extensively discussed the use of modeling for attainment demonstration purposes and for designations, EPA has recommended that such modeling was not needed for the $SO_2$ infrastructure SIPs needed for the 2010 $SO_2$ NAAQS. *See* April 12, 2012 letters to states regarding $SO_2$ implementation and *Implementation of the 2010 Primary 1-Hour $SO_2$ NAAQS, Draft White Paper for Discussion,* May 2012, available at *http://www.epa.gov/airquality/sulfurdioxide/implement.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 $SO_2$ Nonattainment Area SIP Submissions.*

In conclusion, EPA disagrees with Sierra Club's statements that EPA must disapprove West Virginia's infrastructure SIP submission because it does not establish at this time specific enforceable $SO_2$ emission limits either on coal-fired EGUs or other large $SO_2$ sources in order to demonstrate attainment with the NAAQS.

*Comment 7:* Sierra Club asserts that modeling is the appropriate tool for evaluating adequacy of infrastructure SIPs and ensuring attainment and maintenance of the 2010 $SO_2$ NAAQS. The commenter refers to EPA's historic use of air dispersion modeling for attainment designations as well as ''SIP revisions.'' The Commenter cites to prior EPA statements that the Agency has used modeling for designations and attainment demonstrations, including statements in the 2010 $SO_2$ NAAQS preamble, EPA's 2012 Draft White Paper for Discussion on Implementing the 2010 $SO_2$ NAAQS, and a 1994 $SO_2$ Guideline Document, as modeling could better address the source-specific impacts of $SO_2$ emissions and historic challenges from monitoring $SO_2$ emissions.[7]

The Commenter also cited to several cases upholding EPA's use of modeling in NAAQS implementation actions, including the *Montana Sulphur* case, *Sierra Club* v. *Costle,* 657 F.2d 298 (D.C. Cir. 1981), *Republic Steel Corp.* v. *Costle,* 621 F.2d 797 (6th Cir. 1980), and *Catawba County* v. *EPA,* 571 F.3d 20 (D.C. Cir. 2009). The Commenter discusses statements made by EPA staff discussing use of modeling and monitoring in setting emission limitations or determining ambient concentrations resulting from sources, discussing performance of AERMOD as a model, and discussing that modeling is capable of predicting whether the NAAQS is attained and whether individual sources contribute to $SO_2$ NAAQS violations. The Commenter cites to EPA's history of employing air dispersion modeling for increment compliance verifications in the permitting process for the PSD program required in part C of the CAA. The Commenter claims the Amos, Kanawha, and Harrison plants are examples of sources in elevated terrain where the AERMOD model functions

[7] The Commenter also cites to a 1983 EPA Memorandum on section 107 designations policy regarding use of modeling for designations and to the 2012 *Mont. Sulphur & Chem. Co.* case where EPA had designated an area in Montana as nonattainment due to modeled violations of the NAAQS.

appropriately in evaluating ambient impacts.

The Commenter asserts 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 $SO_2$ emission limits on a source due to cross-state impacts. The Commenter claims 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.

The Commenter 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.

Finally, the Commenter claims that West Virginia's proposed $SO_2$ infrastructure SIP lacks emission limitations informed by air dispersion modeling and therefore fails to ensure West Virginia will achieve and maintain the 2010 $SO_2$ NAAQS. Sierra Club claims EPA must require adequate, 1-hour $SO_2$ emission limits in the infrastructure SIP that show no exceedances of NAAQS when modeled.

*Response 7:* EPA agrees with the Commenter that air dispersion modeling, such as AERMOD, can be an important tool in the CAA section 107 designations process and in the attainment SIP process pursuant to sections 172 and 192, including supporting required attainment demonstrations. EPA agrees that prior EPA statements, EPA guidance, and case law support the use of air dispersion modeling in the designations process and attainment demonstration process, as well as in analyses of whether existing approved SIPs remain adequate to show attainment and maintenance of the $SO_2$ NAAQS. However, EPA disagrees with the Commenter that EPA must disapprove the West Virginia $SO_2$ infrastructure SIP for its alleged failure to include source-specific $SO_2$ emission limits that show no exceedances of the NAAQS when modeled.

As discussed previously above 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 $SO_2$ emission limits on specific sources. While EPA had initially suggested in the final 2010 $SO_2$ 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 $SO_2$ 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.'' [8] 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 $SO_2$ NAAQS, which could include use of air dispersion modeling. *See* April 23, 2014 *Guidance for 1-Hour $SO_2$ Nonattainment Area SIP Submissions* and 79 FR 27446 (proposing process and timetables for additional $SO_2$ designations informed through ambient monitoring and/or air quality modeling). While the EPA guidance for attainment SIPs and the proposed process for additional designations 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 West Virginia $SO_2$ infrastructure SIP submittal contains the structural requirements to address elements in section 110(a)(2) as discussed in detail in our TSD supporting 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 $SO_2$ in a $SO_2$ infrastructure SIP. In the TSD for this rulemaking action, EPA provided a detailed explanation of West Virginia's ability and authority to conduct air quality modeling when required and its authority to submit modeling data to the EPA.

EPA finds Sierra Club's discussion of case law, guidance, and EPA staff statements regarding advantages of AERMOD as an air dispersion model to be irrelevant to our analysis here of the West Virginia infrastructure SIP, as this SIP for section 110(a) is not an attainment SIP required to demonstrate

[8] 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.*

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, including its citation to *Catawba County,* are likewise irrelevant as EPA's present approval of West Virginia's infrastructure SIP is 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 $SO_2$ National Ambient Air Quality Standard'' (U.S. EPA, 2010a), AERMOD is the preferred model for single source modeling to address the 1-hour $SO_2$ 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 $SO_2$ 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 West Virginia EGUs or updated modeling information in the appropriate context, EPA will address the resubmitted modeling or updated modeling in the appropriate future context when an analysis of whether West Virginia's emissions limits are adequate to show attainment and maintenance of the NAAQS is warranted.

The Commenter correctly noted that the Third Circuit upheld EPA's Section 126 Order imposing $SO_2$ 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 Commenter appears to have cited to this matter to demonstrate again EPA's use of modeling for certain aspects of the CAA. EPA agrees with the Commenter regarding the appropriate role air dispersion modeling has for designations, attainment SIPs, and demonstrating significant contributions to interstate transport. However, EPA's approval of West Virginia's infrastructure SIP is based on our determination that West Virginia has 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 Commenter that EPA must require additional emission limitations in the West Virginia $SO_2$ infrastructure SIP 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 consider the Sierra Club's modeling data on the Amos, Kanawha, and Harrison plants based on administrative law principles regarding consideration of comments provided during a rulemaking process. EPA asserts that it has considered the modeling submitted by the Commenter as well as all the submitted comments of Sierra Club. As discussed in detail in the Responses above, however, EPA does not believe the infrastructure SIPs required by section 110(a) are the appropriate place to require 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 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 in finding that it is not relevant to the approvability of West Virginia's proposed infrastructure SIP for the 2010 $SO_2$ NAAQS.

*Comment 8:* Sierra Club asserts that EPA may not approve the West Virginia proposed $SO_2$ infrastructure SIP because it fails to include enforceable emission limitations with a 1-hour averaging time that applies at all times. The Commenter cites to CAA section 302(k) which requires emission limits to apply on a continuous basis. The Commenter claims EPA has stated that 1-hour averaging times are necessary for the 2010 $SO_2$ NAAQS citing to a February 3, 2011, EPA Region 7 letter to the Kansas Department of Health and Environment regarding need for 1-hour $SO_2$ emission limits in a PSD permit, an EPA Environmental Hearing Board (EHB) decision rejecting use of 3-hour averaging time for a $SO_2$ limit in a PSD permit, and EPA's disapproval of a Missouri SIP which relied on annual averaging for $SO_2$ emission rates.[9]

Sierra Club also contends EPA must include monitoring of $SO_2$ emission limits on a continuous basis using a continuous emission monitor system or systems (CEMs) and cites to section 110(a)(2)(F) which requires a SIP to establish a system to monitor emissions from stationary sources and to require submission of periodic emission reports. Sierra Club contends infrastructure SIPs must require such $SO_2$ CEMs to monitor $SO_2$ sources regardless of whether sources have control technology installed to ensure limits are protective of the NAAQS. Thus, Sierra Club contends EPA must require enforceable emission limits, applicable at all times, with 1-hour averaging periods, monitored continuously by large sources of $SO_2$ emissions and must disapprove West Virginia's infrastructure SIP which fails to require emission limits with adequate averaging times.

*Response 8:* EPA disagrees that EPA must disapprove the proposed West Virginia infrastructure SIP without enforceable $SO_2$ emission limitations with 1-hour averaging periods that apply at all times and with required CEMs, as these issues are not appropriate for resolution at this stage in advance of the state's submission of an attainment demonstration for its designated nonattainment areas. As explained in detail in previous Responses, the purpose of the infrastructure SIP is to ensure that a state has the structural capability to attain and maintain the NAAQS and thus additional $SO_2$ emission limitations to ensure attainment and

[9] Sierra Club cited to *In re: Mississippi Lime Co.,* PSDAPLPEAL 11–01, 2011 WL 3557194, at *26–27 (EPA Aug. 9, 2011) and 71 FR 12623, 12624 (March 13, 2006) (EPA disapproval of a control strategy $SO_2$ SIP).

maintenance of the NAAQS are not required for such infrastructure SIPs.[10] Likewise, EPA need not address for the purpose of approving West Virginia's infrastructure SIP whether CEMs or some other appropriate monitoring of $SO_2$ emissions is necessary to demonstrate compliance with emission limits to show attainment of the 2010 NAAQS as EPA believes such $SO_2$ emission limits and an attainment demonstration are not a prerequisite to our approval of West Virginia's infrastructure SIP.[11] Therefore, because EPA finds West Virginia's $SO_2$ infrastructure SIP approvable without the additional $SO_2$ emission limitations showing attainment of the NAAQS, EPA finds the issues of appropriate averaging periods and monitoring requirements for such future limitations not relevant at this time for our approval of the infrastructure SIP. Sierra Club has cited to prior EPA discussion on emission limitations required in PSD permits (from an EAB decision and EPA's letter to Kansas' permitting authority) pursuant to part C of the CAA which is not relevant nor applicable to section 110 infrastructure SIPs. In addition, as discussed previously, the EPA disapproval of the 2006 Missouri SIP was a disapproval relating to a control strategy SIP required pursuant to part D attainment planning and is likewise not relevant to our analysis of infrastructure SIP requirements.

EPA has explained in the TSD supporting this rulemaking action how the West Virginia SIP meets requirements in section 110(a)(2)(F) related to monitoring. W.Va. Code section 22–5–4(a)(15) authorizes West Virginia to require installation, maintenance, and replacement of equipment such as CEMs to monitor continuously $SO_2$ emissions where necessary and required. Further, W.Va. Code section 22–5–4(a)(14) and (15) authorizes West Virginia to require information such as periodic reports on the nature and amounts of emissions and emissions-related data from owners or operators of stationary sources of $SO_2$ emissions which West Virginia then requires through permits and compliance orders. Pursuant to 40 CFR Part 51, subpart A, ''Air Emission Reporting Rule,'' West Virginia provides source-specific emissions data to EPA. Thus, EPA finds West Virginia has the authority and responsibility to monitor air quality for the relevant NAAQS pollutants at appropriate locations and to submit data to EPA in a timely manner in accordance with 110(a)(2)(F) and the Infrastructure SIP Guidance. *See* Infrastructure SIP Guidance at p. 45–46.

*Comment 9:* Sierra Club states that enforceable emission limits in SIPs or permits are necessary to avoid nonattainment designations in areas where modeling or monitoring shows $SO_2$ levels exceed the 1-hour $SO_2$ NAAQS and cites to a February 6, 2013 EPA document, *Next Steps for Area Designations and Implementation of the Sulfur Dioxide Nation Ambient Air Quality Standard,* which Sierra Club contends discussed how states could avoid future nonattainment designations. The Commenter asserts EPA should add enforceable emission limits to the West Virginia Infrastructure SIP to prevent future nonattainment designations and to protect public health. The Commenter claims the modeling it conducted for Amos, Kanawha, and Harrison indicates thirty-one counties in West Virginia are at risk for being designated nonattainment with the 2010 $SO_2$ NAAQS without such enforceable $SO_2$ limits. The Commenter states EPA must ensure large sources cannot cause exceedances of the one-hour $SO_2$ NAAQS to comply with section 110(a)(2)(A) and to avoid future nonattainment designations. The Commenter asserts nonattainment designations create rigorous CAA requirements which could be avoided presently if states adopt and EPA approves such $SO_2$ emission limitations. In addition, the Commenter asserts adding $SO_2$ emission limitations on certain sources now would bring regulatory certainty for coal-fired EGUs and ultimately save such entities money as the sources could plan now for compliance with emission limits as well as with other CAA requirements such as the Mercury Air Toxic Standards, transport rules and regional haze requirements. In summary, the Commenter asserts EPA must disapprove the West Virginia infrastructure SIP and establish enforceable emission limits to ensure large sources of $SO_2$ do not cause exceedances of the 2010 $SO_2$ NAAQS which would avoid nonattainment designations and bring ''regulatory certainty'' to sources in West Virginia.

*Response 9:* EPA appreciates the Commenter's concern with assisting West Virginia in avoiding nonattainment designations with the 2010 $SO_2$ NAAQS and with assisting coal-fired EGUs in achieving regulatory certainty as EGUs make informed decisions on how to comply with CAA requirements. However, Congress designed the CAA such that states have the primary responsibility for assuring air quality within their geographic area by submitting SIPs which will specify how the state will achieve and maintain the NAAQS within the state. Pursuant to section 107(d), the states make initial recommendations of designations for areas within each state and EPA then promulgates the designations after considering the state's submission and other information. EPA promulgated initial designations for the 2010 $SO_2$ NAAQS in August 2013. EPA proposed on May 14, 2014 an additional process for further designations of additional areas in each state for the 2010 $SO_2$ NAAQS. 79 FR 27446. EPA has also proposed to enter a settlement to resolve deadline suits reading the remaining designations that would, if entered by the court, impose deadlines for three more rounds of designations. Under these proposed schemes, West Virginia would have the initial opportunity for proposing additional areas for designations for the 2010 $SO_2$ NAAQS. While EPA appreciates Sierra Club's comments, further designations will occur pursuant to the section 107(d) process, and in accordance with any applicable future court orders addressing the designations deadline suits and, if promulgated, future EPA rules addressing additional monitoring or modeling to be conducted by states. West Virginia may on its own accord decide to impose additional $SO_2$ emission limitations to avoid future designations to nonattainment. However, such considerations are not required of West Virginia to consider at the infrastructure SIP stage of NAAQS implementation, as this action relates to our approval of West Virginia's $SO_2$ infrastructure SIP submittal pursuant to section 110(a) of the CAA, and Sierra Club's comments regarding designations under section 107 are neither relevant nor germane to EPA's approval of West Virginia's $SO_2$ infrastructure SIP.

[10] For a discussion on emission averaging times for emissions limitations for $SO_2$ attainment SIPs, see the April 23, 2014 *Guidance for 1-Hour $SO_2$ Nonattainment Area SIP Submissions.* EPA explained that it is possible, in specific cases, for states to develop control strategies that account for variability in 1-hour emissions rates through emission limits with averaging times that are longer than 1-hour, using averaging times as long as 30-days, but still provide for attainment of the 2010 $SO_2$ NAAQS as long as the limits are of at least comparable stringency to a 1-hour limit at the critical emission value. EPA has not yet evaluated any specific submission of such a limit, and so is not at this time prepared to take final action to implement this concept. If and when a state submits an attainment demonstration that relies upon a limit with such a longer averaging time, EPA will evaluate it then.

[11] EPA believes the appropriate time for application of monitoring requirements to demonstrate continuous compliance by specific sources is when such 1-hour emission limits are set for specific sources whether in permits issued by West Virginia pursuant to the SIP or in attainment SIPs submitted in the part D planning process.

Likewise, while EPA appreciates Sierra Club's concern for providing ''regulatory certainty'' for coal-fired EGUs in West Virginia, such concerns for regulatory certainty are not requirements for infrastructure SIPs as outlined by Congress in section 110(a)(2) nor as discussed in EPA's Infrastructure SIP Guidance. *See Commonwealth of Virginia, et al.,* v. *EPA,* 108 F.3d 1397, 1410 (D.C. Cir. 1997) (citing *Natural Resources Defense Council, Inc.* v. *Browner,* 57 F.3d 1122, 1123 (D.C. Cir. 1995)) (discussing that states have primary responsibility for determining an emission reductions program for its areas subject to EPA approval dependent upon whether the SIP as a whole meets applicable requirements of the CAA). Thus, EPA does not believe it is appropriate and necessary to condition approval of West Virginia's infrastructure SIP upon inclusion of a particular emission reduction program as long as the SIP otherwise meets the requirements of the CAA. Sierra Club's comments regarding emission limits providing ''regulatory certainty'' for EGUs are irrelevant to our approval of West Virginia's infrastructure SIP for the 2010 $SO_2$ NAAQS, and EPA disagrees that we must disapprove the infrastructure SIP for not including enforceable emissions limitations to prevent future nonattainment designations or aid in providing ''regulatory certainty.''

*Comment 10:* The Commenter claims EPA must disapprove the proposed 2010 $SO_2$ NAAQS for its failure to include measures to ensure compliance with section 110(a)(2)(A) for the 2010 $SO_2$ NAAQS. The Commenter claims the provisions listed by West Virginia for section 110(a)(2)(A) in its 2010 $SO_2$ NAAQS infrastructure SIP are not appropriate for the NAAQS as evidenced by the Commenter's modeling for plants which are not in areas presently designated nonattainment for the 2010 $SO_2$ NAAQS. Sierra Club claims West Virginia wrongly relies on CAA part D attainment planning requirements to address NAAQS exceedances. The Commenter asserts that the infrastructure SIP required by section 110(a) must provide assurances that the NAAQS will be attained and maintained for areas not designated nonattainment. The Commenter claims the proposed infrastructure SIP relies on emission limits added to the SIP prior to the 2010 $SO_2$ NAAQS and does not include hourly $SO_2$ emission limits. Sierra Club therefore contends the proposed infrastructure SIP cannot ensure West Virginia will attain and maintain the 2010 $SO_2$ NAAQS and EPA must disapprove the SIP and require 1-hour emission limits to address exceedances shown by Sierra Club's submitted modeling.

*Response 10:* EPA disagrees with Sierra Club that it must disapprove the West Virginia proposed infrastructure SIP for the 2010 $SO_2$ NAAQS for the reasons already discussed in response to other comments from Sierra Club. Generally, it is not appropriate to bypass the attainment planning process by imposing separate requirements, such as additional $SO_2$ emission limits on sources, outside the attainment planning process. Such actions would be disruptive and premature absent exceptional circumstances. *See Homer City/Mansfield Order* at 10–19 (finding Pennsylvania SIP did not require imposition of 1-hour $SO_2$ emission limits on sources independent of the part D attainment planning process contemplated by the CAA). As discussed in the *Homer City/Mansfield Order,* imposing different emission limitation requirements outside of the attainment planning process contemplated by Congress in part D of the CAA to address requirements for attaining the NAAQS might ultimately prove inconsistent with the attainment SIP West Virginia will submit for nonattainment areas even where one source is likely responsible for nonattainment. *Id.* As discussed in great detail above, the conceptual purpose of an infrastructure SIP submission is to assure that an air agency's SIP contains the necessary structural requirements for the new or revised NAAQS. Infrastructure SIP Guidance at p. 2.

As mentioned previously, while EPA had in 2010 initially suggested that states submit in section 110(a) infrastructure SIPs substantive attainment demonstration SIPs for unclassifiable areas based on air dispersion modeling, EPA subsequently gathered additional information and clarified its position. The April 12, 2012 letters to states, draft White Paper in May 2012 and February 6, 2013 memorandum on next steps, as previously discussed, clearly recommend states focus section 110(a) infrastructure SIPs due in June 2013, such as West Virginia's $SO_2$ infrastructure SIP, on ''traditional infrastructure elements'' in section 110(a)(1) and (2) rather than on modeling demonstrations for future attainment for unclassifiable areas.[12]

Therefore, EPA disagrees with the Commenter that the infrastructure SIP must be disapproved for failure to include measures to ensure compliance with the 2010 $SO_2$ NAAQS. As Congress provided for state primacy in implementing the NAAQS, West Virginia will appropriately evaluate and impose necessary $SO_2$ emission limits on sources where needed for areas in West Virginia designated nonattainment with the 2010 $SO_2$ NAAQS under section 107.[13]

*Comment 11:* The Commenter alleges that the proposed $SO_2$ infrastructure SIP does not address sources significantly contributing to nonattainment or interfering with maintenance of the NAAQS in other states as required by section 110(a)(2)(D)(i)(I) of the CAA, and states EPA must therefore disapprove the infrastructure SIP and impose a Federal implementation plan (FIP). Sierra Club claims its modeling shows that at least one plant in the State, Harrison, is contributing to exceedances in other states. Sierra Club states that the CAA requires infrastructure SIPs to address cross-state air pollution within three years of the NAAQS promulgation. The Commenter argues that West Virginia has not done so and that the EPA must disapprove the proposed infrastructure SIP and issue a FIP to correct these shortcomings. The Commenter references the recent Supreme Court decision, *EPA* v. *EME Homer City Generation, L.P. et al.,* 134 S. Ct. 1584 (2014), which supports the states' mandatory duty to address cross-state pollution under section 110(a)(2)(D)(i)(I) and affirmed EPA's ability to impose a FIP upon states' failures to address cross-state air pollution.

*Response 11:* EPA disagrees with Sierra Club's statement that EPA must disapprove the submitted 2010 $SO_2$ infrastructure SIP due to West Virginia's failure to address section

[12] The February 6, 2013 memorandum is more completely the February 6, 2013 memorandum, ''Next Steps for Area Designations and Implementation of the Sulfur Dioxide National Ambient Air Quality Standard'' available at *http://www.epa.gov/airquality/sulfurdioxide/implement.html.*

[13] EPA also notes that in EPA's final rule regarding the 2010 $SO_2$ NAAQS, EPA noted that it anticipates several forthcoming national and regional rules, such as the Industrial Boilers standard under CAA section 112, are likely to require significant reductions in $SO_2$ emissions over the next several years. *See* 75 FR 35520. EPA continues to believe similar national and regional rules will lead to $SO_2$ reductions that will help achieve compliance with the 2010 $SO_2$ NAAQS prior to 2017. If it appears that states with areas designated nonattainment in 2013 will nevertheless fail to attain the NAAQS as expeditiously as practicable (but no later than August 2018) during EPA's review of attainment SIPs required by section 172, the CAA provides authorities and tools for EPA to solve such failure, including, as appropriate, disapproving submitted SIPs and promulgating federal implementation plans.

110(a)(2)(D)(i)(I). In EPA's NPR proposing to approve West Virginia's infrastructure SIP for the 2010 $SO_2$ NAAQS, EPA clearly stated that it was not taking any final action with respect to the good neighbor provision in section 110(a)(2)(D)(i)(I) which addresses emissions that significantly contribute to nonattainment or interfere with maintenance of the NAAQS in another state. West Virginia did not make a SIP submission to address the requirements of section 110(a)(2)(D)(i)(I) for the 2010 $SO_2$ NAAQS, and thus there is no such submission upon which EPA could take action under section 110(k) of the CAA. EPA cannot act under section 110(k) to disapprove a SIP submission that has not been submitted to EPA. EPA also disagrees with the Commenter that EPA cannot approve an infrastructure SIP submission without the good neighbor provision. EPA additionally believes there is no basis for the contention that EPA has triggered its obligation to issue a FIP addressing the good neighbor obligation under section 110(c), as EPA has neither found that West Virginia failed to timely submit a required 110(a)(2)(D)(i)(I) SIP submission as to the 2010 $SO_2$ NAAQS or made such a submission that was incomplete, nor has EPA disapproved a SIP submission addressing 110(a)(2)(D)(i)(I) with respect to the 2010 $SO_2$ NAAQS.

EPA acknowledges the Commenter's concern for the interstate transport of air pollutants and agrees in general with the Commenter that sections 110(a)(1) and (a)(2) of the CAA generally require states to submit, within three years of promulgation of a new or revised NAAQS, a plan which addresses cross-state air pollution under section 110(a)(2)(D)(i)(I). However, EPA disagrees with the Commenter's argument that EPA cannot approve an infrastructure SIP submission without the good neighbor provision. Section 110(k)(3) of the CAA authorizes EPA to approve a plan in full, disapprove it in full, or approve it in part and disapprove it in part, depending on the extent to which such plan meets the requirements of the CAA. This authority to approve state SIP revisions in separable parts was included in the 1990 Amendments to the CAA to overrule a decision in the Court of Appeals for the Ninth Circuit holding that EPA could not approve individual measures in a plan submission without either approving or disapproving the plan as a whole. *See* S. Rep. No. 101–228, at 22, 1990 U.S.C.C.A.N. 3385, 3408 (discussing the express overruling of *Abramowitz* v. *EPA,* 832 F.2d 1071 (9th Cir. 1987)).

EPA interprets its authority under section 110(k)(3) of the CAA, as affording EPA the discretion to approve or conditionally approve individual elements of West Virginia's infrastructure SIP submission for the 2010 1-hour $SO_2$ NAAQS, separate and apart from any action with respect to the requirements of section 110(a)(2)(D)(i)(I) of the CAA with respect to that NAAQS. EPA views discrete infrastructure SIP requirements, such as the requirements of 110(a)(2)(D)(i)(I), as severable from the other infrastructure elements and interprets section 110(k)(3) as allowing it to act on individual severable measures in a plan submission. In short, EPA believes that even if West Virginia had made a SIP submission for section 110(a)(2)(D)(i)(I) of the CAA for the 2010 $SO_2$ NAAQS, which to date it has not, EPA would still have discretion under section 110(k) of the CAA to act upon the various individual elements of the state's infrastructure SIP submission, separately or together, as appropriate.

The Commenter raises no compelling legal or environmental rationale for an alternate interpretation. Nothing in the Supreme Court's April 2014 decision in *EME Homer City* alters our interpretation that we may act on individual severable measures, including the requirements of section 110(a)(2)(D)(i)(I), in a SIP submission. *See EPA* v. *EME Homer City Generation, L.P.,* 134 S. Ct. 1584 (affirming a state's obligation to submit a SIP revision addressing section 110(a)(2)(D)(i)(I) independent of EPA's action finding significant contribution or interference with maintenance). In sum, the concerns raised by the Commenter do not establish that it is inappropriate or unreasonable for EPA to approve the portions of West Virginia's June 25, 2013 infrastructure SIP submission for the 2010 $SO_2$ NAAQS.

Furthermore, as discussed above, EPA has no obligation to issue a FIP pursuant to 110(c)(1) to address West Virginia's obligations under section 110(a)(2)(D)(i)(I) until EPA first either finds West Virginia failed to make the required submission addressing the element or the State has made such a submission but it is incomplete, or EPA disapproves a SIP submittal addressing that element. Until either occurs, EPA does not have the authority to issue a FIP pursuant to section 110(c) with respect to the good neighbor provision. Therefore, EPA disagrees with the Commenter's contention that it must issue a FIP for West Virginia to address 110(a)(2)(D)(i)(I) for the 2010 $SO_2$ NAAQS at this time.

*Comment 12:* Sierra Club contends that the EPA must disapprove the proposed infrastructure SIP because it does not contain adequate provisions to prohibit sources and emissions in West Virginia from interfering with another state's visibility as required by section 110(a)(2)(D)(i)(II) of the CAA. The Commenter cites to the Supreme Court's decision in *EME Homer City* in support of its statement that West Virginia's duty to protect visibility is a mandatory duty. The Commenter asserts EPA ignores its deadline by not acting in the present rulemaking on the visibility prong of section 110(a)(2)(D)(i)(II) and asserts EPA cites no legally defensible reason for not acting. The Commenter also asserts EPA must also act on section 110(a)(2)(J) when a NAAQS is revised. Finally, the Commenter argues that the ''deadline for state action has passed'' and EPA must disapprove the $SO_2$ infrastructure SIP and issue a FIP to address the failings of the infrastructure SIP to protect visibility in other states.

*Response 12:* EPA disagrees with the Commenter that in today's rulemaking action EPA must disapprove the West Virginia $SO_2$ infrastructure SIP for its failure to protect visibility and issue a FIP for West Virginia addressing visibility protection. In EPA's NPR proposing to approve West Virginia's infrastructure SIP for the 2010 $SO_2$ NAAQS, EPA clearly stated that it was not proposing to take final action at that time with respect to the visibility protection provisions in section 110(a)(2)(D)(i)(II). While West Virginia did make a SIP submission to address the requirements of section 110(a)(2)(D)(i)(II) for visibility protection and cited to its regional haze SIP as meeting these requirements, EPA did not propose to take any action in the NPR with respect to West Virginia's visibility protection obligations pursuant to section 110(a)(2)(D)(i)(II).[14]

[14] On March 23, 2012 (77 FR 16937), EPA finalized a limited approval and limited disapproval of West Virginia's June 18, 2008 regional haze SIP to address the first implementation period for regional haze. There was a limited disapproval of this SIP because of West Virginia's reliance on the Clean Air Interstate Rule (CAIR) to meet certain regional haze requirements, which EPA replaced in August 2011 with the Cross-State Air Pollution Rule (CSAPR) (76 FR 48208 (August 8, 2011)). In a separate but related action, EPA issued a FIP that replaced West Virginia's reliance on CAIR with reliance on CSAPR for certain regional haze requirements. 77 FR 33642 (June 7, 2012). Later, the D.C. Circuit issued a decision in *EME Homer City Generation, L.P.* v. *EPA,* 696 F.3d 7 (D.C. Cir. 2012), cert. granted 133 U.S. 2857 (2013) vacating CSAPR and keeping CAIR in place pending the promulgation of a valid replacement rule. Subsequently, on April 30, 2014, the Supreme Court vacated the D.C. Circuit decision

Continued

As indicated in EPA's NPR, EPA anticipates taking action in the future on the portion of West Virginia's June 25, 2013 SIP submission addressing visibility protection.[15] EPA disagrees with the Commenter that EPA cannot approve a portion of an infrastructure SIP submittal without taking action on the visibility protection provision. Further, there is no basis for the contention that EPA must issue a FIP under section 110(c) within two years, as EPA has neither disapproved nor found that West Virginia failed to submit a required 110(a)(2)(D)(i)(II) SIP submission addressing visibility protection for the 2010 $SO_2$ NAAQS.

As previously discussed regarding good-neighbor SIP provisions for infrastructure SIPs, EPA disagrees with the Commenter's argument that EPA cannot approve a SIP without certain elements such as the visibility protection element. Section 110(k)(3) of the CAA authorizes EPA to approve a plan in full, disapprove it in full, or approve it in part and disapprove it in part, depending on the extent to which such plan meets the requirements of the CAA. As discussed above, this authority to approve SIP revisions in separable parts was included in the 1990 Amendments to the CAA. *See* S. Rep. No. 101–228, at 22, 1990 U.S.C.C.A.N. 3385, 3408 (discussing the express overruling of *Abramowitz* v. *EPA).*

As discussed above, EPA interprets its authority under section 110(k)(3) of the CAA, as affording EPA the discretion to approve individual elements of West Virginia's infrastructure submission for the 2010 $SO_2$ NAAQS, separate and apart from any action with respect to the requirements of section 110(a)(2)(D)(i)(II) for visibility protection. EPA views discrete infrastructure SIP requirements as severable from the other infrastructure elements and interprets section 110(k)(3) as allowing it to act on individual, severable measures. In short, EPA believes we have discretion under section 110(k) of the CAA to act upon the various individual elements of the state's infrastructure SIP submission, separately or together, as appropriate. The concerns raised by the Commenter do not establish that it is inappropriate or unreasonable for EPA to approve portions of West Virginia's June 25, 2013 infrastructure SIP submission for the 2010 $SO_2$ NAAQS.

EPA also has no obligation to issue a FIP to address West Virginia's obligations under section 110(a)(2)(D)(i)(II) until EPA first finds West Virginia failed to satisfy its visibility protection obligations with a complete SIP submittal addressing that element or disapproves any SIP submittal addressing that element. Until such occurs, EPA may not issue any further FIP for visibility protection pursuant to section 110(c).

With regards to the Commenter's concerns for section 110(a)(2)(J), EPA also disagrees with the Commenter that EPA ''must act'' on section 110(a)(2)(J) when a NAAQS is revised. Preliminarily, EPA notes that we did propose to approve in the NPR the portion of the June 25, 2013 infrastructure SIP submittal for the 2010 $SO_2$ NAAQS which addressed section 110(a)(2)(J) for visibility protection. As discussed in the TSD accompanying the NPR for this rulemaking, EPA stated that it recognizes that states are subject to visibility and regional haze program requirements under part C of the CAA.[16] In the establishment of a new NAAQS such as the 2010 $SO_2$ NAAQS, however, the visibility and regional haze program requirements under part C of Title I of the CAA do not change and there are no applicable visibility obligations under part C ''triggered'' under section 110(a)(2)(J) when a new NAAQS becomes effective. Therefore, EPA appropriately proposed approval of West Virginia's 2010 $SO_2$ infrastructure SIP revision for section 110(a)(2)(J) for the reasons identified in the TSD (i.e., West Virginia's SIP addresses visibility protection for section 110(a)(2)(J) and for part C of the CAA through its regional haze SIP).

## III. Final Action

EPA is approving the following infrastructure elements or portions thereof of West Virginia's SIP revision: Section 110(a)(2)(A), (B), (C) (enforcement and minor new source review), (D)(ii), (E)(i) and (iii), (F), (G), (H), (J) (consultation, public notification, and visibility protection), (K), (L), and (M). EPA will take separate rulemaking action for the 2010 $SO_2$ NAAQS on the portions of section 110(a)(2)(C), (D)(i)(II), and (J) as they relate to West Virginia's PSD program and will take separate action on section 110(a)(2)(E)(ii) as it relates to section 128 (State Boards) and section 110(a)(2)(D)(i)(II) for visibility protection. This rulemaking action does not include section 110(a)(2)(I) of the CAA which pertains to the nonattainment requirements of part D, Title I of the CAA, since this element is not required to be submitted by the 3-year submission deadline of section 110(a)(1), and will be addressed in a separate process. This rulemaking action also does not include action on section 110(a)(2)(D)(i)(I) for the 2010 $SO_2$ NAAQS.

## IV. Statutory and Executive Order Reviews

### *A. General Requirements*

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 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);

and remanded the matter including CSAPR to the D.C. Circuit for further proceedings. *EME Homer City,* 134 S. Ct. 1584. EPA believes that the *EME Homer City* decision impacts the reasoning that formed the basis for EPA's limited approval and limited disapproval of West Virginia's regional haze SIP and the FIP. Depending upon the outcome of additional proceedings concerning CSAPR in the D.C. Circuit on remand, EPA will take further rulemaking action, if necessary or required, regarding the limited approval and limited disapproval of the West Virginia regional haze SIP. As of the time of this rulemaking, CSAPR remains stayed before the D.C. Circuit pending further proceedings.

[15] One way in which section 110(a)(2)(D)(i)(II) for visibility protection may be satisfied for any relevant NAAQS is through an air agency's confirmation in its infrastructure SIP submission that it has an approved regional haze SIP that fully meets the requirements of 40 CFR 51.308 or 51.309. Infrastructure SIP Guidance at p. 33. As previously indicated, West Virginia has a regional haze SIP with limited approval and limited disapproval and a FIP which addresses replacement of CSAPR for CAIR for certain regional haze requirements.

[16] The TSD is available in the docket for this rulemaking at *www.regulations.gov,* Docket ID Number EPA–R03–OAR–2014–0299.

• 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.

*B. Submission to Congress and the Comptroller General*

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).

*C. Petitions for Judicial Review*

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, 2014. 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, which satisfies certain infrastructure requirements of section 110(a)(2) of the CAA for the 2008 ozone NAAQS for the State of West Virginia, 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, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: September 30, 2014.

**William C. Early,**

*Acting Regional Administrator, Region III.*

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.*

## Subpart XX—West Virginia

■ 2. In § 52.2520, the table in paragraph (e) is amended by adding the entry for Section 110(a)(2) Infrastructure Requirements for the 2010 Sulfur Dioxide NAAQS at the end of the table to read as follows:

**§ 52.2520 Identification of plan.**

* * * * *

(e) * * *

| Name of non-regulatory SIP revision | Applicable geographic area | State submittal date | EPA approval date | Additional explanation |
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| Section 110(a)(2) Infrastructure Requirements for the 2010 1-Hour Sulfur Dioxide NAAQS. | Statewide ..... | 6/25/13 | 10/16/14 [*Insert* **Federal Register** *citation*]. | This action addresses the following CAA elements: 110(a)(2)(A), (B), (C) (enforcement and minor new source review), (D)(ii), (E)(i) and (iii), (F), (G), (H), (J) (consultation, public notification, and visibility protection), (K), (L), and (M). |

[FR Doc. 2014–24658 Filed 10–15–14; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R05–OAR–2011–0888; FRL–9917–61–Region 5]**

## Approval and Promulgation of Air Quality Implementation Plans; Indiana; Infrastructure SIP Requirements for the 2008 Lead NAAQS

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

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking final action to approve elements of a state implementation plan (SIP) submission by Indiana regarding the infrastructure requirements of sections 110(a)(1) and (2) of the Clean Air Act (CAA) for the 2008 lead (Pb) national ambient air quality standards (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 state's responsibilities under the CAA. The proposed rulemaking associated with today's final action was published on August 19, 2013, and EPA received one comment letter during the comment period, which ended on September 18, 2013. The concerns raised in this letter, as well as EPA's responses, will be addressed in this final action.

**DATES:** This final rule is effective on November 17, 2014.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2011–0888. All documents in the docket are listed in the *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* or