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List of Subjects in 40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 21, 2014.

Gina McCarthy,

Administrator.

For reasons set forth in the preamble, part 51 of chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

Subpart F—Procedural Requirements

■ 1. The authority citation for Part 51, Subpart F, continues to read as follows:

Authority: 42 U.S.C. 7401, 7411, 7412, 7413, 7414, 7470–7479, 7501–7508, 7601, and 7602.

§ 51.100—[Amended]

■ 2. Section 51.100, paragraph (s)(1) introductory text, is amended by removing the words ''and perfluorocarbon compounds which fall into these classes:'' and adding in their place the words ''2-amino-2-methyl-1-propanol; and perfluorocarbon compounds which fall into these classes:''.

[FR Doc. 2014–06790 Filed 3–26–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2013–0211; FRL–9908–46–Region–3]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Section 110(a)(2) Infrastructure Requirements for the 2008 Ozone 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 Commonwealth of 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 Commonwealth of Virginia has made a submittal addressing the infrastructure requirements for the 2008 ozone NAAQS.

DATES: This final rule is effective on April 28, 2014.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2013–0211. 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 Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Ellen Schmitt, (215) 814–5787, or by email at *schmitt.ellen@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary of SIP Revision

On July 2, 2013 (78 FR 39671), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Virginia proposing approval of Virginia's July 23, 2012 submittal to satisfy several requirements of section 110(a)(2) of the CAA for the 2008 ozone NAAQS. In the NPR, EPA proposed approval of the following infrastructure elements: Sections 110(a)(2)(A), (B), (C) (for enforcement and regulation of minor sources and minor modifications), (D)(i)(II) (for visibility protection), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J) (relating to consultation, public notification, and visibility protection requirements), (K), (L), and (M), or portions thereof. EPA is taking separate action on the portions of section 110(a)(2)(C), (D)(i)(II), and (J) as they relate to Virginia's prevention of significant deterioration (PSD) program and on section 110(a)(2)(E)(ii) as it relates to section 128 (State Boards). 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 three year submission deadline of section 110(a)(1), and will be addressed in a separate process. Virginia also did not include a component to address section 110(a)(2)(D)(i)(I) as it is not required in accordance with the *EME Homer City* decision from the United States Court of Appeals for the District of Columbia Circuit, until EPA has defined a state's contribution to nonattainment or interference with maintenance in another state. *See EME Homer City Generation, LP* v. *EPA,* 696 F.3d 7 (D.C. Cir. 2012), *cert. granted,* 133 U.S. 2857 (2013). Unless the *EME Homer City* decision is reversed or otherwise modified by the Supreme Court, states such as Virginia are not required to submit section 110(a)(2)(D)(i)(I) SIPs until the EPA has quantified their obligations under that section. Therefore, EPA is not acting on 110(a)(2)(D)(i)(I) for the 2008 ozone NAAQS.

The rationale supporting EPA's proposed rulemaking action, including the scope of infrastructure SIPs in general, is explained in the NPR and the technical support document (TSD) accompanying the NPR and will not be restated here. The TSD is available online at *www.regulations.gov,* Docket ID Number EPA–R03–OAR–2013–0211.

II. Public Comments and EPA's Responses

EPA received three sets of comments on the July 2, 2013 proposed rulemaking action of Virginia's 2008 ozone ''infrastructure'' SIP. The commenters include the State of Connecticut, the State of Maryland, and the Sierra Club. A full set of these comments is provided in the docket for today's final rulemaking action. As both States and Sierra Club made a comment regarding the same subject matter of transport and the States did not make any additional comments, a summary of the three comments dealing with transport and EPA's response to all three will be addressed first followed by a summary and responses to the remainder of Sierra Club's comments.

A. ''Interstate Transport'' Comments

Comment: The State of Connecticut and the State of Maryland as well as the Sierra Club each assert that the ability of downwind states to attain the 2008 ozone NAAQS is substantially compromised by interstate transport of pollution from upwind states. The States assert that they have done their share to reduce in-state emissions, and EPA should ensure each upwind state addresses contribution to another downwind state's nonattainment. They state that CAA section 110(a)(1) requires states like Virginia to submit, within three years of promulgation of a new NAAQS, a plan which provides for implementation, maintenance, and enforcement of such NAAQS within the state. They also argue that, under section 110(a)(2), Virginia was required to submit a complete SIP that demonstrated compliance with the good neighbor provision of section 110(a)(2)(D)(i)(I). Connecticut argues that pursuant to section 110(k) EPA ''must make a finding that Virginia has failed to submit the required SIP elements'' and that such a finding creates a two-year deadline for EPA to promulgate a Federal Implementation Plan (FIP). Maryland argues that ''[p]ursuant to the CAA section 110(k), the EPA must disapprove the section 110(a)(2)(D)(i)(I) SIP portion that Virginia has failed to submit.''

Both States further argue that the CAA does not give EPA discretion to approve a SIP without the good neighbor provision on the grounds that EPA would take separate action on Virginia's obligations under section 110(a)(2)(D)(i)(I). They assert that the only action available to EPA is promulgation of a FIP under section 110(c)(1) within two years. Connecticut asserts that the CAA ''gives EPA no discretion to approve a SIP without the good neighbor provision on the grounds that it intends to address Virginia's section 110(a)(2)(D)(i)(I) obligations in a separate action.'' Maryland further adds that if EPA believes that the *EME Homer City* decision prohibits EPA from disapproving the SIP before quantifying Virginia's significant contribution level, EPA should immediately promulgate Virginia's significant contribution level.

Similarly, Sierra Club argues that EPA cannot approve Virginia's Infrastructure SIP because it does not include provisions to address section 110(a)(2)(D)(i)(I), and that EPA cannot use *Homer City* ''as an excuse to ignore its obligations under Clean Air Act 110(a)(2)(D)(i)(I).'' Sierra Club argues the relevant portion of *Homer City* is dicta and that as this rulemaking would be appealed to the Fourth Circuit, not the D.C. Circuit; EPA is under no obligation to follow the D.C. Circuit *EME Homer City* decision in this rulemaking. Sierra Club concludes that EPA must find that Virginia has failed to submit a section 110(a)(2)(D)(i)(I) SIP and that EPA must issue a FIP ''within two years of its disapproval.''

Response: In this rulemaking EPA is not taking any final action with respect to the provisions in section 110(a)(2)(D)(i)(I)—the portion of the good neighbor provision which addresses emissions that significantly contribute to nonattainment or interfere with maintenance of the NAAQS in another state. The Commonwealth of Virginia did not make a SIP submission to address the requirements of section 110(a)(2)(D)(i)(I) and thus there is no such submission upon which EPA could take action under section 110(k). EPA did not propose to take any action with respect to Virginia's obligations pursuant to section 110(a)(2)(D)(i)(I) and is not, in this rulemaking action, taking any such action. Further, EPA could not, as Maryland urges, act under section 110(k) to disapprove a SIP that has not been submitted to EPA. EPA also is not taking any final action with respect to findings of failure to submit for the 2008 ozone NAAQS in this notice. On January 15, 2013, EPA published findings of failure to submit with respect to the infrastructure SIP requirements for the 2008 ozone NAAQS. *See* 78 FR 2882. In that action, EPA explained why it was not issuing any findings of failure to submit with respect to section 110(a)(2)(D)(i)(I). *Id.* at 2884–85. In that action, EPA explained the opinion of the U.S. Court of Appeals for the D.C. Circuit in *EME Homer City Generation* v. *EPA,* 696 F.3d 7, 31 (D.C. Cir. 2012), *cert. granted* 133 U.S. 2857 (2013), ''concluded that SIP cannot be deemed to lack a required submission or deemed deficient for failure to meet the 110(a)(2)(D)(i)(I) obligation until after EPA quantifies the obligation.'' *See* 78 FR at 2884–85; *see also EME Homer City,* 696 F.3d at 32. Therefore, under the D.C. Circuit decision *EME Homer City,* states like Virginia have no obligation to make a SIP submission to address section 110(a)(2)(D)(i)(I) for the 2008 ozone NAAQS until EPA has first defined the state's obligations. EPA could not, at this time, find that Virginia has failed to submit a required SIP element and as such, EPA has no obligation to make a finding of failure to submit under section 110(c)(1)(A).

EPA further disagrees with the commenters' suggestions that the Agency need not follow the D.C. Circuit opinion in *EME Homer City.* While the Supreme Court has agreed to review the *EME Homer City* decision during the Court's 2013–14 term, at this time, the D.C. Circuit's decision remains in place. EPA intends to act in accordance with the D.C. Circuit opinion in *EME Homer City* unless it is reversed or otherwise modified by the Supreme Court.

Further, because the EPA rule known as the Cross State Air Pollution Rule (CSAPR) reviewed by the court in *EME Homer City* was designated by EPA as a ''nationally applicable'' rule within the meaning of CAA 307(b)(1), all petitions for review of CSAPR were required to be filed in the D.C. Circuit. EPA accordingly believes the D.C. Circuit's decision in *EME Homer City* is also nationally applicable. As such, EPA does not intend to take any actions, even if they are only reviewable in another federal Circuit Court of Appeals, that are inconsistent with the decision of the D.C. Circuit in *EME Homer City.* EPA also finds no basis for one commenter's suggestion that the relevant portion of the D.C. Circuit opinion in *EME Homer City* opinion is dicta.

EPA also disagrees with the commenters' argument that EPA cannot approve a SIP 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 the

states' 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)).

As such, the Agency interprets its authority under section 110(k)(3), as affording EPA the discretion to approve or conditionally approve individual elements of Virginia's infrastructure submission for the 2008 8-hour ozone NAAQS, separate and apart from any action with respect to the requirements of section 110(a)(2)(D)(i)(I) 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 the SIP submission for section 110(a)(2)(D)(i)(I) were now relevant, which it is not, it would still have discretion under section 110(k) to act upon the various individual elements of the state's infrastructure SIP submission, separately or together, as appropriate. The commenters raise no compelling legal or environmental rationale for an alternate interpretation.

There is also no basis for the contention that EPA must issue a FIP within two years, as EPA has neither disapproved, nor found that Virginia failed to submit a required 110(a)(2)(D)(i)(I) SIP submission. Moreover, the D.C. Circuit clearly held in *EME Homer City* that even where EPA had issued findings of failure to submit 110(a)(2)(D)(i)(I) SIPs and/or disapproved such SIPs, EPA lacked authority to promulgate FIPs under 110(c)(1) where it had not previously quantified states' good neighbor obligations. *EME Homer City,* 696 F.3d at 31–37. And, as explained in this response to comment, EPA intends to comply with that decision unless it is reversed or otherwise modified by the Supreme Court. *See also* 78 FR 14683 (concluding that, under the D.C. Circuit opinion in *EME Homer City,* disapproval of a 110(a)(2)(D)(i)(I) SIP submitted by Kentucky did not start a FIP clock).

EPA notes, however, that it is working with state partners to assess next steps to address air pollution that crosses state boundaries and has begun work on a rulemaking to address transported air pollution affecting the eastern half of the United States. This rulemaking action is technically complex and must comply with the rulemaking requirements of CAA section 307(d).

In addition, EPA notes that Connecticut appears to have misread EPA's proposal. EPA did not, in the NPR, state as Connecticut appears to assume that it was approving the SIP without the good neighbor provision ''on the grounds that it intends to address Virginia's section 110(a)(2)(D)(i)(I) obligations in a separate action.'' In the NPR which proposed approval of portions of Virginia's infrastructure SIP for the 2008 ozone NAAQS, EPA stated that its proposed action did not include any proposed action on section 110(a)(2)(D)(i)(I) for Virginia's July 23, 2012 infrastructure SIP submission for the 2008 ozone NAAQS because this element was not required until EPA quantified the State's obligations pursuant to the *EME Homer City* opinion. *See* 78 FR 39651, 39652, (July 2, 2013). As discussed in this response to comment, EPA therefore has no obligation to find Virginia failed to satisfy its good neighbor obligations and no action is required at this time. EPA's approval of the Virginia July 23, 2012 infrastructure SIP submission for the 2008 ozone NAAQS for the portions described in the NPR was therefore appropriate.

B. Sierra Club Comments

Sierra Club made several additional comments which are provided in the docket for today's final rulemaking action and summarized below with EPA's response to each.

Comment 1: Sierra Club contends that EPA cannot approve the section 110(a)(2)(A) portion of Virginia's 2008 ozone infrastructure SIP revision because the plain language of 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 infrastructure SIP to prevent NAAQS violations in areas not designated nonattainment. Specifically, Sierra Club cites air monitoring reports for Charles County indicating violations of the NAAQS based on 2009–2011 and 2010–2012 design values and air quality monitoring reports for Chesterfield, Hanover, Henrico, and Stafford Counties and Hampton City indicating violations based on data from 2010–2012. The commenter alleges that these violations demonstrate that the infrastructure SIP fails to ensure that air pollution levels meet or are below the level of the NAAQS and thus the infrastructure SIP must be disapproved. Sierra Club notes that the violation of the NAAQS in Charles County based on data from 2009–2011 was known two months before Virginia submitted its ozone infrastructure SIP in July 2012 and that the data indicating violations based on data through 2012 was available in January 2013, but that Virginia failed to address the violations by enacting enforceable limits.

Furthermore, Sierra Club contends that the SIP must be disapproved because it does not include additional enforceable emission limits to address the NAAQS exceedances. Sierra Club contends that emission reductions from measures taken to meet the one-hour and 1997 8-hour ozone NAAQS, do not ensure attainment and maintenance of the 2008 ozone NAAQS. Sierra Club states that Virginia's SIP provisions which addressed the 1-hour and 1997 8-hour ozone NAAQS do not ensure Virginia will meet the stricter 2008 8-hour ozone NAAQS, especially as counties not designated nonattainment are exceeding the 2008 8-hour ozone NAAQS. The commenter also suggests that Virginia adopt specific controls that they contend are cost effective for reducing nitrogen oxides (NO_X), a precursor to ozone.

Response 1: EPA disagrees with the commenter that the statute is clear on its face that infrastructure SIPs must include detailed attainment and maintenance plans for all areas of the state and must be disapproved if air quality data that became available late in the process or after the SIP was due and submitted changes the status of areas within the state. The commenter's specific arguments that the statutory language, legislative history, case law, EPA regulations, and prior rulemaking actions by EPA mandate the narrow interpretation they advocate are addressed in subsections (1) through (5) of this rulemaking action. EPA believes that section 110(a)(2)(A) is reasonably interpreted to require states to submit SIPs that reflect the first step in their planning for attaining and maintaining a new or revised NAAQS and that they 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.

As an initial matter, EPA disagrees that air quality monitoring that became available four years following promulgation of the 2008 ozone NAAQS and only shortly before the SIP was submitted for one area (Charles County for 2009–2011) and after submission for

six counties (Chesterfield, Hanover, Henrico, Stafford, Hampton City, and Charles for 2010–2012) provides a basis for disapproving the Virginia ozone infrastructure SIP. States must develop SIPs based on the information they have during the SIP development process and data that becomes available near the end of that process or after that process is completed cannot undermine the reasonable assumptions that were made by the state based on the information it had available as it developed the plan. Thus, the data cited by the commenter should not be considered in determining whether the SIP should be approved. The suggestion that Virginia's ozone infrastructure SIP must include measures addressing violations of the standard that did not occur until shortly before or even after the SIP was due and submitted cannot be supported. The CAA provides states with three years to develop infrastructure SIPs and states cannot reasonably be expected to address the annual change in an area's design value for each year over that period, nor to predict the air quality data in periods after development and submission of the SIPs. Moreover, the CAA recognizes and has provisions to address changes in air quality over time, such as an area slipping from attainment to nonattainment or changing from nonattainment to attainment. These include provisions providing for redesignation in section 107(d) and provisions in section 110(k)(5) allowing EPA to call on the state to revise its SIP, as appropriate.

The commenter suggests that EPA must disapprove the Virginia ozone infrastructure SIP because the fact that areas in Virginia now have air quality data slightly above the standard proves that the infrastructure SIP is inadequate to demonstrate maintenance for those six areas. EPA disagrees with the commenter because EPA does not believe that section 110(a)(2)(A) requires detailed planning SIPs demonstrating either attainment or maintenance for specific geographic areas of the state. The infrastructure SIP is triggered by promulgation of the NAAQS, not designation. Moreover, infrastructure SIPs are due three years following promulgation of the NAAQS and designations are not due until two years (or in some cases three years) following promulgation of the NAAQS. Thus, during a significant portion of the period that a state has available for developing the infrastructure SIP, it does not know what the designation will be for individual areas of the state.[1] 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.

EPA's interpretation that infrastructure SIPs are more general planning SIPs is consistent with the statute 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 the 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 the 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, with the primary provisions for ozone in section 182. 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 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.

For all of these reasons, EPA disagrees with the commenter that EPA must disapprove an infrastructure SIP revision if there are monitored violations of the standard in the state and the section 110(a)(2)(A) revision does not have detailed plans for demonstrating how the state will bring that area into attainment. Rather, EPA believes that the proper inquiry at this juncture is whether the state has met the basic structural SIP requirements appropriate at the point in time EPA is acting upon the submittal.

Moreover, as addressed in EPA's proposed approval for this rule, Virginia submitted a list of existing emission reduction measures in the SIP that control emissions of volatile organic compounds (VOCs) and NO_X. Virginia's SIP revision reflects several provisions that have the ability to reduce ground level ozone and its precursors. The Virginia SIP relies on measures and programs used to implement previous ozone NAAQS. Because there is no substantive difference between the previous ozone NAAQS and the more recent ozone NAAQS, other than the level of the standard, the provisions relied on by Virginia will provide benefits for the new NAAQS; in other words, the measures reduce overall ground-level ozone and its precursors and are not limited to reducing ozone levels to meet one specific NAAQS.

EPA shares the commenter's concern regarding areas that are monitoring exceedances of the 2008 8-hour ozone NAAQS and will work appropriately with state and local agencies to address such exceedances. Further, in approving Virginia's infrastructure SIP revision, EPA is affirming that Virginia has sufficient authority to take the types of

[1] While it is true that there may be some monitors within a state with values so high as to make a nonattainment designation of the county with that monitor almost a certainty, the geographic boundaries of the nonattainment area associated with that monitor would not be known until EPA issues final designations. Moreover, the six areas of concern to the commenter do not fit that description in any event.

actions required by the CAA in order to bring such areas back into attainment.

1. The Plain Language of the CAA

Comment 2: The commenter states that on its face the CAA ''requires I–SIPs to be adequate to prevent violations 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 commenters claimed 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 2: EPA disagrees that section 110 is ''clear on its face'' and must be interpreted in the manner suggested by Sierra Club. As explained earlier in this rulemaking action, 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 the six counties of concern do not have any protective measures addressing ozone pollution. EPA addressed the adequacy of Virginia's infrastructure SIP for 110(a)(2)(A) purposes to meet applicable requirements of the CAA in the TSD accompanying the July 2, 2013 NPR and explained why the SIP includes enforceable emission limitations and other control measures necessary for maintenance of the 2008 ozone NAAQS throughout the state. For the six counties at issue, these include Virginia's enforceable emission limitations and other control measures at 9 VAC 5 Chapter 40 (Existing Stationary Sources), 9 VAC 5 Chapter 50 (New and Modified Stationary Sources), 9 VAC 5 Chapter 91 (Motor Vehicle Inspection and Maintenance in Northern Virginia), 9 VAC 5 Chapter 130 (Open Burning), and 9 VAC 5 Chapter 140 (Emissions Trading).

As discussed in the TSD accompanying the July 2, 2013 NPR, Virginia has also submitted maintenance plans, reasonable further action plans, and attainment demonstrations for the 1991 1-hour and the 1997 8-hour ozone NAAQS. Included in these plans and demonstrations are enforceable emissions limits, control measures, fees, and compliance schedules. These plans and demonstrations were prepared for the following areas: Hampton Roads, Richmond-Petersburg, Fredericksburg, Shenandoah National Park, and the Washington DC–MD–VA area. Virginia also submitted early action compact plans for the Winchester and Roanoke 1997 ozone NAAQS early action compact areas. The approved plans are listed in 40 CFR 52.2420(e).

2. The Legislative History of the CAA

Comment 3: Sierra Club cites two excerpts from the legislative history of the CAA Amendments of 1970 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 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 3: 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 areas.

3. Case Law

Comment 4: 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 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 *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''). 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 4: 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, in the context of a challenge to an EPA action, revisions to a SIP that was required and approved as meeting other provisions of the CAA or in the context of an enforcement action, the court references section 110(a)(2)(A) (or section 110(a)(2)(B) of the pre-1990 CAA) in the background section of its decision.

In *Train,* 421 U.S. 60, a case that was decided almost 40 years ago, 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 commenters do 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.[2] In *Mont. Sulphur & Chem. Co.,* 666 F.3d 1174, the court was reviewing a federal implementation plan that EPA promulgated after a long history of the state failing to submit an adequate state implementation plan. The court cited generally to section 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. 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 purpose of providing a brief background of the CAA.

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

Comment 5: 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 5: The commenter's reliance on 40 CFR 51.112 to support its argument that infrastructure SIPs must contain emission limits ''adequate to prohibit NAAQS violations'' 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

[2] While the commenters do contend that the State shouldn't be allowed to rely on emission reductions that were developed for the prior ozone standards (which we address above), they do not claim that any of the measures are not ''emissions limitations'' within the definition of the CAA.

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. *Id.* 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 51.112 contains consolidated provisions that are focused on control strategy SIPs and the infrastructure SIP is not such a plan.

5. EPA Interpretations in Other Rulemakings

Comment 6: 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 sulfur dioxide (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 proposed 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. 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 6: 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 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. As an initial matter, the Indiana action is a proposal and thus cannot be presumed to reflect the Agency's final position. In any event, the review in that rule was of a completely different requirement than the 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.

Comment 7: Sierra Club contends that EPA should disapprove Virginia's 2008 8-hour ozone infrastructure SIP revision with regard to the visibility component of 110(a)(2)(D)(i)(II) and (a)(2)(J) until such time that Virginia imposes best available retrofit technology (BART) for NOx and SO_2 for EGUs. The commenter asserts that the substitution of the Clean Air Interstate Rule (CAIR) for BART for EGUs violates the CAA including section 169A. The commenter asserts that CAIR is not permanent and enforceable and references litigation in the D.C. Circuit related to CAIR. *See North Carolina* v. *EPA,* 531 F.3d 896, *on rehearing,* 550 F.3d 1176 (D.C. Cir. 2008). The commenter refers to CAIR as ''vacated'' and therefore not able to be considered permanent and enforceable. The commenter includes comments challenging EPA's prior rulemakings that CAIR and CSAPR were ''better than BART'' and states that EPA could not rely on CAIR to support its proposed approval of the visibility components of Virginia's 2008 8-hour ozone infrastructure revision. The commenter also cites several rulemakings and proposed rulemakings on attainment plan SIPs, redesignation requests, and regional haze SIPs in which EPA had stated it could not fully approve SIP revisions that relied on CAIR reductions or had stated CAIR reductions could be permanent and enforceable only in tandem with CSAPR reductions.

Response 7: EPA disagrees with the commenter regarding the approvability of Virginia's SIP for section 110(a)(2)(D)(i)(II) and (a)(2)(J). As explained in detail in EPA's NPR related to today's rulemaking action and in the TSD, EPA believes that in light of the D.C. Circuit's decision to vacate CSAPR, also known as the Transport Rule (*see EME Homer City,* 696 F.3d 7), and the court's order for EPA to ''continue administering CAIR pending the promulgation of a valid replacement,'' it is appropriate for EPA to rely at this time on CAIR to support approval of Virginia's 2008 8-hour ozone infrastructure revision as it relates to visibility. EPA has been ordered by the D.C. Circuit to develop a new rule, and to continue implementing CAIR in the meantime. Unless the Supreme Court reverses or otherwise modifies the D.C. Circuit's decision on CSAPR in *EME Homer City,* EPA does not intend to act in a manner inconsistent with the decision of the D.C. Circuit. Based on the current direction from the court to continue administering CAIR, EPA

believes that it is appropriate to rely on CAIR emission reductions for purposes of assessing the adequacy of Virginia's infrastructure SIP revision with respect to prong 4 of section 110(a)(2)(D)(i)(II) while a valid replacement rule is developed and until submissions complying with any such new rule are submitted by the states and acted upon by EPA or until the *EME Homer City* case is resolved in a way that provides different direction regarding CAIR and CSAPR.

Furthermore, as neither the Commonwealth nor EPA has taken any action to remove CAIR from the Virginia SIP, CAIR remains part of the federally-approved SIP and can be considered in determining whether the SIP as a whole meets the requirement of prong 4 of 110(a)(2)(D)(i)(II). EPA is taking final action to approve the infrastructure SIP submission with respect to prong 4 because Virginia's regional haze SIP, which EPA has approved, in combination with its SIP provisions to implement CAIR adequately prevents sources in Virginia from interfering with measures adopted by other states to protect visibility during the first planning period.[3]

EPA disagrees with the commenter that the CAA does not allow states to rely on an alternative program such as CAIR in lieu of source-specific BART. EPA's regulations allowing states to adopt alternatives to BART that provide for greater reasonable progress, and EPA's determination that states may rely on CAIR to meet the BART requirements, have been upheld by the D.C. Circuit as meeting the requirements of the CAA. In the first case challenging the provisions in the regional haze rule allowing for states to adopt alternative programs in lieu of BART, the court affirmed EPA's interpretation of CAA section 169A(b)(2) as allowing for alternatives to BART where those alternatives will result in greater reasonable progress than BART. *Center for Energy and Economic Development* v. *EPA,* 398 F.3d 653, 660 (D.C. Cir. 2005) (finding reasonable EPA's interpretation of CAA section 169(a)(2) as requiring BART only as necessary to make reasonable progress). In the second case, *Utility Air Regulatory Group* v. *EPA,* 471 F.3d 1333 (D.C. Cir. 2006), the court specifically upheld EPA's determination that states could rely on CAIR as an alternative program to BART for EGUs in the CAIR-affected states. The court concluded that EPA's two-pronged test for determining whether an alternative program achieves greater reasonable progress was a reasonable one and also agreed with EPA that nothing in the CAA required EPA to ''impose a separate technology mandate for sources whose emissions affect Class I areas, rather than piggy-backing on solutions devised under other statutory categories, where such solutions meet the statutory requirements.'' *Id.* at 1340.

EPA also notes that CAIR has not been ''vacated'' as stated in Sierra Club's comment. As mentioned in EPA's TSD, CAIR was ultimately remanded by the D.C. Circuit to EPA without vacatur, and EPA continues to implement CAIR. EPA further notes that all of the rulemaking actions and proposed rulemaking actions cited by the commenter which discussed limited approvability of SIPs or redesignations due to the status of CAIR were issued by EPA prior to the vacatur of CSAPR when EPA was implementing CSAPR. Since the vacatur of CSAPR in August 2012 and with continued implementation of CAIR per the direction of the D.C. Circuit in *EME Homer City,* EPA has approved redesignations of areas to attainment of the 1997 fine particulate matter ($PM_{2.5}$) NAAQS in which states have relied on CAIR as an enforceable measure. *See* 77 FR 76415, December 28, 2012 (redesignation of Huntington-Ashland, West Virginia for 1997 $PM_{2.5}$ NAAQS, which was proposed 77 FR 68076, November 15, 2012); 78 FR 59841, September 30, 2013 (redesignation of Wheeling, West Virginia for 1997 $PM_{2.5}$ NAAQS, which was proposed 77 FR 73575, December 11, 2012); *and* 78 FR 56168, September 12, 2013 (redesignation of Parkersburg, West Virginia for 1997 $PM_{2.5}$ NAAQS, which was proposed 77 FR 73560, December 11, 2012).

More fundamentally, EPA disagrees with the commenter that the adequacy of the BART measures in the Virginia regional haze SIP is relevant to the question of whether the Commonwealth's SIP meets the requirements of section 110(a)(2)(D)(i) of the CAA with respect to visibility. EPA interprets the visibility provisions in this section of the CAA as requiring states to include in their SIPs measures to prohibit emissions that would interfere with the reasonable progress goals set to protect Class I areas in other states. The regional haze rule includes a similar requirement. *See* 40 CFR 51.308(d)(3). EPA notes that on June 13, 2012, EPA determined that Virginia's regional haze SIP adequately prevents sources in Virginia from interfering with the reasonable progress goals adopted by other states to protect visibility during the first planning period. *See* 77 FR 35287. *See also* 77 FR 3691, 3709 (January 25, 2012) (proposing approval of Virginia's regional haze SIP). As EPA's review of the Virginia regional haze SIP explains, the Commonwealth relied on enforceable emissions reductions already in place to address the impacts of Virginia on out-of-state Class I areas. The question of whether or not CAIR satisfies the BART requirements has no bearing on whether these measures meet the requirements of section 110(a)(2)(D)(i)(II) with respect to visibility.

In addition, with regard to the visibility protection aspect of section 110(a)(2)(J), as discussed in the TSD accompanying the NPR for this rulemaking action, EPA stated that it recognizes that states are subject to visibility and regional haze program requirements under part C of the Act. In the establishment of a new NAAQS such as the 2008 ozone 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 Virginia's 2008 8-hour ozone infrastructure SIP revision for section 110(a)(2)(J). As discussed for section 110(a)(2)(D)(i)(II) earlier in this rulemaking action, and in the TSD for this rulemaking action, Virginia has submitted SIP revisions to satisfy the requirements of part C of Title I of the CAA.[4] In summary, EPA believes that it appropriately proposed approval of Virginia's infrastructure SIP revision for the 2008 ozone NAAQS for the structural visibility protection requirements in 110(a)(2)(D)(i)(II).

Comment 8: Sierra Club states that EPA should disapprove Virginia's 2008 8-hour ozone infrastructure SIP revision under CAA sections 110(a)(2)(D)(i)(II) (visibility prong) and 110(a)(2)(J) because, as the commenter asserts, Virginia failed to submit its ''5-year

[3] Under CAA sections 301(a) and 110(k)(6) and EPA's long-standing guidance, a limited approval results in approval of the entire SIP submittal, even of those parts that are deficient and prevent EPA from granting a full approval of the SIP revision. *Processing of State Implementation Plan (SIP) Revisions,* EPA Memorandum from John Calcagni, Director, Air Quality Management Division, OAQPS, to Air Division Directors, EPA Regional Offices I–X, September 7, 1992, (1992 Calcagni Memorandum) located at *http://www.epa.gov/ttn/caaa/t1/memoranda/siproc.pdf.* Therefore, EPA believes it is appropriate to approve Virgina's 2008 ozone NAAQS infrastructure SIP for section 110(a)(2)(D)(i)(II) as it meets the requirements of that section despite the limited approval status of Virginia's regional haze SIP.

[4] The TSD is available online at *www.regulations.gov,* Docket ID Number EPA–R03–OAR–2013–0211.

Regional Haze Progress Report'' pursuant to 40 CFR 51.308(g) by the required date. Sierra Club references a July 17, 2008 SIP submittal from Virginia as the basis for determining when the five year progress report for regional haze was due.

Response 8: EPA disagrees with the commenter that Virginia's five year progress report was overdue at the time EPA proposed to approve Virginia's infrastructure SIP for the 2008 ozone NAAQS. On July 2, 2013, the date of the proposed approval of Virginia's SIP, Virginia was under no obligation to submit a five year progress report to meet the requirements in 40 CFR 51.308(g). On October 4, 2010, the Commonwealth of Virginia submitted as a SIP revision a comprehensive regional haze plan consisting of the following: Reasonable progress goals, calculations of baseline and natural visibility conditions, a long-term strategy for regional haze, BART determinations, and a monitoring strategy as required by 40 CFR 51.308(d) and (e). Previously, on July 17, 2008, Virginia had submitted to EPA the first of five SIP revisions containing a permit and a BART determination addressing 40 CFR 51.308(e) for the control of visibility-impairing emissions from a BART-eligible source in Virginia. Virginia submitted three additional SIP revisions containing permits and BART determinations addressing 40 CFR 51.308(e) on March 6, 2009, January 14, 2010, and November 19, 2010. A May 6, 2011 SIP revision also included a permit for a source for Virginia's reasonable progress goals required by 40 CFR 51.308(d). Although the July 2008, March 2009, January 2010, November 2010, and May 2011 SIP revision submittals from Virginia included BART determinations or a permit for reasonable progress goals for specific sources in Virginia as required by 40 CFR 51.308(e) (and 40 CFR 51.308(d) for one source in the May 2011 SIP revision), EPA does not believe these five submittals were comprehensive regional haze SIP submittals intended to meet the requirements of 40 CFR 51.308(d) as well as (e). However, the October 4, 2010 SIP submittal from Virginia did contain such a comprehensive regional haze plan addressing reasonable progress goals, visibility conditions, a long-term strategy for regional haze, and a monitoring strategy as required by 40 CFR 51.308(d).

EPA believes the appropriate regional haze SIP submission which Virginia should be evaluating for its reasonable progress as required by 40 CFR 51.308(g) is the October 4, 2010 submission. Consequently, Virginia's five year progress report for 40 CFR 51.308(g) is not due until October 4, 2015, five years from the first regional haze SIP submittal which comprehensively addressed 40 CFR 51.308(d) and (e).

Finally, EPA notes that on November 8, 2013 Virginia submitted its five year progress report for 40 CFR 51.308(g) significantly in advance of its October 4, 2015 due date. On February 11, 2014, EPA signed a separate rulemaking action proposing approval of that report. EPA's review of emissions data from Virginia's five year progress report shows that emissions of the key visibility-impairing pollutant for the southeast, SO_2, continued to drop from 428,070 tons per year (tpy) in 2002 to 268,877 tpy in 2007 to 115,436 tpy in 2011. The emissions inventories also show similar substantial declines in other pollutants, particularly NO_X, between 2007 and 2011.

In summary, EPA believes that it appropriately proposed approval of Virginia's infrastructure SIP revision for the 2008 ozone NAAQS for the structural requirements in 110(a)(2)(D)(i)(II) because the progress report was not yet due on the date of EPA's publication of the proposal. Therefore, EPA finds Virginia has met the basic structural visibility protection requirements in 110(a)(2)(D)(i)(II). Additionally, as stated previously, the visibility and regional haze program requirements under part C of Title I of the CAA do not change with the establishment of a new NAAQS such as the 2008 ozone NAAQS, and there are no applicable visibility obligations under part C ''triggered'' under section 110(a)(2)(J) when a new NAAQS becomes effective. Therefore, Virginia's obligation to submit a progress report in accordance with 40 CFR 51.308(g) is unrelated to 110(a)(2)(J), and EPA finds Virginia's 2008 ozone infrastructure SIP meets the obligations for 110(a)(2)(J).

While considering this comment, EPA became aware of an inadvertent error in the table contained in 40 CFR 51.2420(e) which incorrectly referred to Virginia's SIP submission on January 14, 2010 as January 14, 2012. EPA is correcting that error through this rulemaking action. EPA is also clarifying in the table in 40 CFR 51.2420(e) that Virginia's regional haze SIP submission was the October 4, 2010 submission as amended by the May 6, 2011 SIP submission. EPA is correcting the table to indicate that the other four SIP submissions pertained to BART determinations as required by 40 CFR 51.308(e). For further clarification, EPA is adding to the table in 40 CFR 51.2420(d) the BART permits submitted on July 17, 2008, March 6, 2009, January 14, 2010, and November 19, 2010 and the May 6, 2011 permit implementing requirements for reasonable progress as these permits are source-specific requirements which were previously approved and incorporated into the Virginia SIP but were inadvertently not added to the table in 40 CFR 51.2420(d) when approved with the regional haze SIP. *See* 77 FR 35287.

III. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1–1198, precludes granting a privilege to documents and information ''required by law,'' including documents and information ''required by Federal law to maintain program delegation, authorization or approval,'' since Virginia must ''enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. . . .'' The opinion concludes that ''[r]egarding § 10.1–1198, therefore, documents or other

information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.''

Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by Federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since ''no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its PSD, NSR, or Title V program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

IV. Final Action

EPA is approving the following infrastructure elements or portions thereof of Virginia's SIP revision: Section 110(a)(2)(A), (B), (C) (for enforcement and regulation of minor sources and minor modifications), (D)(i)(II) (for visibility protection), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J) (relating to consultation, public notification, and visibility protection requirements), (K), (L), and (M), or portions thereof as a revision to the Virginia SIP. EPA is taking separate rulemaking action on the portions of section 110(a)(2)(C), (D)(i)(II), and (J) as they relate to Virginia's PSD program and section 110(a)(2)(E)(ii) as it relates to section 128 (State Boards). 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 three year submission deadline of section 110(a)(1), and will be addressed in a separate process. This rulemaking action also does not include proposed action on section 110(a)(2)(D)(i)(I), because this element, or portions thereof, is not required to be submitted by a state until the EPA has quantified a state's obligations. *See EME Homer City Generation, LP v. EPA,* 696 F.3d 7 (D.C. Cir. 2012), *cert. granted,* 133 U.S. 2857 (2013). In addition, EPA is clarifying the table at 40 CFR 52.2420(e) to indicate the date of the regional haze SIP submission and dates of supplemental SIP submissions for BART provisions.

V. 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);
- 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 May 27, 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 Commonwealth of 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, Ozone.

Dated: March 7, 2014.

W. 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 VV—Virginia

■ 2. Section 52.2420 is amended by:

■ a. In paragraph (d), adding the entries for Georgia Pacific Corporation, MeadWestvaco Corporation, and O–N Minerals Facility at the end of the table.

■ b. In paragraph (e):

■ i. Revising the table entry for Regional Haze Plan,

■ ii. Adding an entry for Regional Haze Plan Supplements and BART determinations after the existing entry for Regional Haze Plan,

■ iii. Adding an entry for Section 110(a)(2) Infrastructure Requirements for the 2008 Ozone NAAQS at the end of the table.

The amendments read as follows:

§ 52.2420 Identification of plan.

* * * * *

(d) * * *

EPA-APPROVED SOURCE SPECIFIC REQUIREMENTS

Source name	Permit/Order or registration No.	State effective date	EPA Approval date	40 CFR Part 52 citation
*	*	*	*	*
Georgia Pacific Corporation	Registration No. 30389.	6/12/08	6/13/12 77 FR 35287	§ 52.2420(d); BART determination and permit.
MeadWestvaco Corporation	Registration No. 20328.	2/23/09 5/6/11	6/13/12 77 FR 35287	§ 52.2420(d); BART and Reasonable Progress determinations and permit.
O–N Minerals Facility	Registration No. 80252.	12/28/09 11/19/10	6/13/12 77 FR 35287	§ 52.2420(d); BART determination and permit.

(e) * * *

Name of non-regulatory SIP revision	Applicable geographic or area	State submittal date	EPA approval date	Additional explanation
*	*	*	*	*
Regional Haze Plan	Statewide	10/4/10	6/13/12 77 FR 35287	§ 52.2452(d); Limited Approval
Regional Haze Plan Supplements and BART determinations:	Statewide		6/13/12 77 FR 35287	§ 52.2452(d); Limited Approval
1. Georgia Pacific Corporation;		7/17/08		
2a. MeadWestvaco Corporation;		5/6/11		
b. MeadWestvaco Corporation;		3/6/09		
3. O–N Minerals Facility;		1/14/10		
4. Revision to the O–N Minerals Facility permit.		11/19/10		
*	*	*	*	*
Section 110(a)(2) Infrastructure Requirements for the 2008 Ozone NAAQS.	Statewide	6/23/12	3/27/14 *[Insert* **Federal Register** *page number where the document begins and date].*	This action addresses the following CAA elements, or portions thereof: 110(a)(2) (A), (B), (C), (D)(i)(II), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J), (K), (L), and (M) with the exception of PSD elements.

[FR Doc. 2014–06586 Filed 3–26–14; 8:45 am]

BILLING CODE 6560–50–P