6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R03-OAR-2014-0522; FRL--9923-79-Region 3]**

# Approval and Promulgation of Air Quality Implementation Plans; 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 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 implementation, maintenance, and enforcement of the NAAQS. These elements are referred to as infrastructure requirements. The Commonwealth of Virginia made a submittal addressing the infrastructure requirements for the 2010 sulfur dioxide ($SO_2$) primary NAAQS.

**DATES:** This final rule is effective on **[insert date 30 days from date of publication].**

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2014-0522. All documents in the docket are listed in the www.regulations.gov website. 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 e-mail at schmitt.ellen@epa.gov.

**SUPPLEMENTARY INFORMATION**:

**I. Summary of SIP Revision**

On June 22, 2010 (75 FR 35520), EPA promulgated a 1-hour primary $SO_2$ NAAQS at a level of 75 parts per billion (ppb), based on a 3-year average of the annual 99$^{th}$ percentile of 1-hour daily maximum concentrations. The new NAAQS is codified at 40 CFR 50.17, while the prior NAAQS are at 40 CFR 50.4. 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 18, 2014, the Commonwealth of Virginia, through the Virginia Department of Environmental Quality (VADEQ), 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 $SO_2$ NAAQS. On August 22, 2014 (79 FR 49731), EPA published a notice of proposed rulemaking (NPR) for Virginia proposing approval of the submittal. In the NPR, EPA

proposed approval of the following infrastructure elements: Section 110(a)(2)(A), (B), (C), (D)(i)(II) (prevention of significant deterioration), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J) (consultation, public notification, and prevention of significant deterioration), (K), (L), and (M).

Virginia did not submit section 110(a)(2)(I) which pertains to the nonattainment requirements of part D, Title I of the CAA, because 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. At this time, EPA is not taking action on section 110(a)(2)(D)(i)(II) or (J) for visibility protection for the 2010 $SO_2$ NAAQS as explained in the NPR. Although Virginia's infrastructure SIP submittal for the 2010 $SO_2$ NAAQS referred to Virginia's regional haze SIP for section 110(a)(2)(D)(i)(II) and (J) for visibility protection, EPA intends to take later, separate action on Virginia's submittal for these elements as explained in the NPR and the Technical Support Document (TSD) which accompanied the NPR. This rulemaking action also does not include action on section 110(a)(2)(D)(i)(I) of the CAA because Virginia's June 18, 2014 infrastructure SIP submittal did not include provisions for this element; therefore EPA will take later, separate action on section 110(a)(2)(D)(i)(I) for the 2010 $SO_2$ NAAQS for Virginia as explained in the NPR. Finally, EPA will also take later, separate action with respect to Section 110(a)(2)(E)(ii) regarding CAA section 128 requirements for State Boards for the 2010 $SO_2$ NAAQS as explained in the NPR.

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-2014-0522. The

discussion below in responding to comments on the NPR provides additional rationale to the extent necessary and appropriate to provide such responses and support the final action.

## II. Public Comments and EPA's Responses

EPA received comments from the Sierra Club on the August 22, 2014 proposed rulemaking action on 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 infrastructure SIP to prevent NAAQS exceedances in areas not designated nonattainment. Sierra Club then contends that the 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 asserted 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 the main objective of the infrastructure SIP process "is to ensure that all areas of the country meet the NAAQS," and that nonattainment areas are addressed through nonattainment SIPs. The Commenter asserts the NAAQS are the foundation for specific emission limitations for most large stationary sources, such as coal-fired power plants. The Commenter discusses the CAA's framework whereby states have primary responsibility to assure air quality within the state pursuant to CAA section 107(a) which the states carry out

through SIPs such as infrastructure SIPs required by section 110(a)(2). The Commenter also states that on its face the CAA requires infrastructure 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 the 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. As we have previously explained in response to Sierra Club's similar comments in taking action on Virginia's 2008 ozone NAAQS infrastructure SIP (*see* 79 FR 17043, 17047 (March 27, 2014)), 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.

EPA interprets infrastructure SIPs as more general planning SIPs, 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. More detailed, later-enacted provisions govern the substantive planning process, including planning for attainment of the NAAQS.

Thus, 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 that structure and 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 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. 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.[1]

[1] Thus, EPA disagrees with Sierra Club's general assertion that the main objective of infrastructure SIPs is to ensure all areas of the country meet the NAAQS, as we believe the infrastructure SIP process is the opportunity to review the structural requirements of a state's air program. EPA, however, does agree with Sierra Club that the NAAQS are the foundation upon which emission limitations are set, but we believe, as explained in responses to subsequent comments, that these emission limitations are generally set in the attainment planning process envisioned by part D

The Commenter makes general allegations that Virginia does not have sufficient protective measures to prevent $SO_2$ NAAQS exceedances. 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 August 22, 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 Commonwealth.[2] These include applicable portions of the following chapters of 9 VAC 5: 40 (Existing Stationary Sources),[3] 50 (New and Modified Stationary Sources), and 91 (Motor Vehicle Inspection and Maintenance in Northern Virginia).[4] Further, in 2012, EPA granted limited approval of Virginia's regional haze SIP which also includes emission measures related to $SO_2$. 77 FR 35287 (June 13, 2012). As discussed in the TSD for

---

of title I of the CAA, including, but not limited to, CAA sections 172 and 191-192.

[2] The TSD for this action is available on line at www.regulations.gov, Docket ID Number EPA-R03-OAR-2014-0522.

[3] 9VAC5 Chapter 40 includes emission standards for $SO_2$ for many source categories including, but not limited to, portland cement, primary and secondary metal operations, sulfuric acid production, sulfur recovery operations, and lightweight aggregate process operations.

[4] When EPA proposed to approve Virginia's $SO_2$ infrastructure SIP in August 2014, we included in the TSD for section 110(a)(2)(A) a reference to 9VAC5 Chapter 140 which was Virginia's SIP approved regulations implementing EPA's Clean Air Interstate Rule (CAIR), a cap-and-trade program to reduce $SO_2$ and nitrogen oxide (NOx) emissions at electric generating units (EGUs) aimed at reducing interstate impacts on ozone and particulate matter concentrations in downwind states. In August 2011, EPA issued the Cross-State Air Pollution Rule (CSAPR) to replace CAIR, which had been remanded by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). *See North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008). *See also* 76 FR 48208 (August 8, 2011) (promulgation of CSAPR). New litigation commenced in the D.C. Circuit concerning CSAPR during which the D.C. Circuit initially vacated CSAPR in *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), cert. granted 133 U.S. 2857 (2013) and ordered continued implementation of CAIR. However, the United States Supreme Court vacated that decision and remanded CSAPR to the D.C. Circuit for further proceedings. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014). After the Supreme Court's decision, EPA filed a motion to lift the stay of CSAPR and asked the D.C. Circuit to toll CSAPR's compliance deadlines by three years. On October 23, 2014, after EPA proposed to approve Virginia's $SO_2$ infrastructure SIP, the D.C. Circuit granted EPA's motion and lifted the stay on CSAPR. *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir. Oct. 23, 2014), Order at 3. EPA views the D.C. Circuit's October 23, 2014 Order as also granting EPA's request to toll CSAPR's compliance deadlines and will therefore commence implementation of CSAPR on January 1, 2015. 79 FR 71663 (December 3, 2014) (interim final rule revising CSAPR compliance deadlines). Therefore, EPA began implementing CSAPR on January 1, 2015 and ceased implementing CAIR on December 31, 2014 because CSAPR replaced CAIR. Virginia EGU's will continue to be subject to a cap-and-trade program for reducing $SO_2$ emissions which will preserve reductions at such EGUs achieved through CAIR; however, this program will be CSAPR, implemented as a FIP by EPA, until such time as Virginia adds the provisions of CSAPR to its SIP. CSAPR requires substantial reductions of $SO_2$ and NOx emissions from EGUs in 28 states in the Eastern United States that significantly contribute to downwind nonattainment or interfere with maintenance of the 1997 fine particulate matter ($PM_{2.5}$) and ozone NAAQS and 2006 $PM_{2.5}$ NAAQS.

this rulemaking, EPA finds the provisions for $SO_2$ emission limitations and measures adequately address section 110(a)(2)(A) to aid in attaining and/or maintaining the NAAQS and finds Virginia demonstrated that it has the necessary tools to implement and enforce the NAAQS.

**2. 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 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. *See also* 79 FR at 17046 (responding to comments on Virginia's ozone infrastructure SIP). 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 in response to another comment in this rulemaking, the TSD for the proposed rule explains why the Virginia SIP includes enforceable emissions limitations for $SO_2$ for the relevant area.

**3. 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 exceedances 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 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, Sierra Club 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 Sierra Club cites support its 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 sections 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). Sierra Club does not raise any concerns about whether the measures relied on by the Commonwealth in the infrastructure SIP are "emissions limitations" and the decision in this case has no bearing

here.[5] In *Mont. Sulphur & Chem. Co.*, 666 F.3d 1174, the Court was reviewing a federal implementation plan (FIP) that EPA promulgated after a long history of the state failing to submit an adequate SIP in response to EPA's finding under section 110(k)(5) that the previously approved SIP was substantially inadequate to attain or maintain the NAAQS, which triggered the state's duty to submit a new SIP to show how it would remedy that deficiency and attain the NAAQS. The Court cited generally 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, disapproval of the state's responsive attainment demonstration, 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, Sierra Club also quotes the Court's statement that "SIPs must include certain measures Congress specified," but that statement specifically referenced the requirement in section 110(a)(2)(C), which requires an enforcement program and a program for the regulation of the modification and construction of new sources. Notably, at issue in that case was the state's "new source" permitting program, not its infrastructure SIP.

Two of the cases Sierra Club 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

[5] While Sierra Club does contend that the Commonwealth 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.

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.

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 the SIP revision on one pollutant or effects of changes 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.

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

**Comment 4:** Sierra Club 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]." Sierra Club asserts that this regulation requires all SIPs to include emissions limits necessary to ensure attainment of the NAAQS. Sierra Club states that "[a]lthough these regulations were developed before the Clean Air Act separated infrastructure SIPs from nonattainment SIPs – a process that began with the 1977 amendments and was completed by the 1990 amendments – the regulations apply to I-SIPs." Sierra Club 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:** Sierra Club's reliance on 40 CFR 51.112 to support its argument that infrastructure SIPs must contain emission limits "adequate to prohibit NAAQS exceedances" and adequate or sufficient to ensure the maintenance of the NAAQS is not supported. As an initial matter, EPA notes and the 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 191-192. 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.

**5. EPA Interpretations in Other Rulemakings**

**Comment 5:** Sierra Club 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) 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. *See* 78 FR 17157, 17,158 (March 20, 2013) (proposed rule on Indiana $SO_2$ SIP) and 78 FR 78720, 78721 (December 27, 2013) (final rule on Indiana $SO_2$ SIP). 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 Sierra Club 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. 78 FR 78720. 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 provisions from the SIP that it 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. *See* 78 FR 17157. Nothing in that proposed or final 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 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 Commonwealth demonstrated that it has the

necessary tools to implement and enforce a NAAQS. Therefore, EPA approves the Virginia $SO_2$ infrastructure SIP.[6]

**B. Comments on 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 Sierra Club claims is required by section 110(a)(2)(A). Sierra Club asserts an infrastructure SIP must ensure, through state-wide regulations or source specific requirements, proper mass limitations and short term averaging on specific large sources of pollutants such as power plants. 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 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.[7] Sierra Club then refers to air dispersion modeling it conducted for two coal-fired EGUs in Virginia, Chesapeake Energy Center and Yorktown Power Station. Sierra Club asserts the results of the air dispersion modeling it conducted employing

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

[7] Sierra Club provides a chart in its comments claiming 65 percent of $SO_2$ emissions in Virginia are from coal-fired power plants based on 2011 data.

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.[8] Based on the modeling, Sierra Club asserts the Virginia $SO_2$ infrastructure SIP submittal authorizes the two 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. Sierra Club cites to information from the owner of Chesapeake Energy Center and Yorktown Power Station regarding the retirement of certain units at those plants in 2015 and 2016 and asserts such planned retirements should be incorporated into the Virginia infrastructure SIP as necessary to ensure attainment and maintenance of the NAAQS. Sierra Club therefore asserts EPA must disapprove 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 infrastructure SIPs that reflect the first step in their planning for attainment and maintenance of a new or revised NAAQS. These SIP revisions should contain a demonstration that the state has the available tools and authority to develop and implement plans to attain and maintain the NAAQS and show that the SIP has enforceable control measures. 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

[8] Sierra Club asserts its modeling followed protocols pursuant to 40 CFR Part 50, Appendix W and EPA's 2005 Guideline on Air Quality Models.

maintenance plans for each individual area of the state. As mentioned above, EPA has interpreted this to mean, with regard to the requirement for emission limitations, 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.

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 SIP must contain enforceable emission limits that will aid in attaining and/or maintaining the NAAQS and that the Commonwealth demonstrate that it has the necessary tools to implement and enforce a NAAQS, such as adequate state personnel and an enforcement program. As discussed above, EPA has interpreted the requirement for emission limitations in section 110 to mean that the state may rely on measures already in place to address the pollutant at issue or any new control measures that the state may choose to submit. Finally, as EPA stated in the Infrastructure SIP Guidance which specifically provides guidance to states in addressing the 2010 $SO_2$ 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, EPA was undertaking a stakeholder outreach process to continue to develop possible approaches for determining attainment status under the $SO_2$ NAAQS and implementing this NAAQS. EPA was abundantly clear in the April 2012 letters that EPA did not expect states to submit substantive attainment demonstrations or modeling demonstrations showing attainment for areas not designated nonattainment in infrastructure SIPs due in June 2013. Although EPA had previously suggested in its 2010 $SO_2$ NAAQS preamble and in prior draft implementation guidance in 2011 that states should, in the unique $SO_2$ context, use the section 110(a) SIP process as the vehicle for demonstrating attainment of the NAAQS, this approach was never adopted as a binding requirement and was subsequently discarded in the April 2012 letters to states. The April 2012 letters recommended states focus infrastructure SIPs due in June 2013, such as 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 areas not designated as nonattainment.[9]

[9] 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 (2012 Draft White Paper) (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*

Therefore, EPA asserts the elements of section 110(a)(2) which address SIP revisions for $SO_2$ nonattainment areas including measures and modeling demonstrating attainment are due by the dates statutorily prescribed under subpart 5 under part D. Those submissions are due no later than 18 months after an area is designed nonattainment for $SO_2$, under CAA section 191(a). Thus, 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 infrastructure SIP submissions, and the CAA does not provide explicit requirements for demonstrating attainment for areas 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 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 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, 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

---

*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.

prior comment and discussed in detail in the TSD. These provisions have the ability to reduce $SO_2$ overall. Although the Virginia SIP relies on measures and programs used to implement previous $SO_2$ NAAQS, these provisions are not limited to reducing $SO_2$ levels to meet one specific NAAQS and will continue to provide benefits for the 2010 $SO_2$ NAAQS.

Additionally, as discussed in EPA's TSD supporting the NPR, 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* Code of Virginia 10.1-1308 (authorizing Virginia's Air Pollution Control Board to promulgate regulations to abate, control, and prohibit air pollution throughout the Commonwealth).

EPA believes the requirements for emission reduction measures for an area designated nonattainment for the 2010 primary $SO_2$ NAAQS are in sections 172 and 191-192 of the CAA, and therefore, the appropriate avenue for implementing requirements for necessary emission limitations for demonstrating attainment with the 2010 $SO_2$ 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. 78 FR 47191. At that time, no areas in Virginia had monitoring data from 2009-2011 indicating violations of the 1-hour $SO_2$ standard, and thus no areas were designated nonattainment in Virginia. In separate future actions, EPA intends to address the designations for all other areas for which EPA has yet to issue designations. *See, e.g.,* 79 FR 27446 (May 13, 2014) (proposing process and timetables by which state air agencies would characterize air quality around $SO_2$ sources through ambient

monitoring and/or air quality modeling techniques and submit such data to the EPA). Although no areas within Virginia have yet been designated nonattainment, any future nonattainment designations under the 2010 $SO_2$ NAAQS within the Commonwealth will set appropriate due dates for any applicable attainment SIPs required pursuant to CAA sections 172, 191, and 192. EPA believes it is not appropriate to bypass the attainment planning process by imposing separate attainment planning process requirements outside the attainment planning process and into the infrastructure SIP 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 Virginia must include additional $SO_2$ emission limits on sources in order to demonstrate future attainment, where needed, for any areas in Virginia or other states that may be designated nonattainment in the future, in order 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 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 and implementation processes realistically account 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 be found to not be attaining the 2010 $SO_2$ NAAQS. 79 FR 27446 (proposing process for further monitoring or modeling of areas with larger $SO_2$ sources). 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.[10] However, because the purpose of an infrastructure SIP submission is for more general planning purposes, EPA does not believe Virginia is obligated to account for controlled $SO_2$ levels at individual sources during this infrastructure SIP planning process. *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 Chesapeake Energy Center and Yorktown Power Station, EPA is not at this stage prepared to opine on whether the modeling demonstrates violations of the NAAQS, and does not find the modeling information relevant for review of an infrastructure SIP. EPA has issued non-binding guidance for states to use in conducting, if they choose, additional

[10] These lawsuits have not yet been fully resolved, as of the date of this final action.

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 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 the 2010 $SO_2$ NAAQS for designations purposes. If any areas in Virginia are designated nonattainment in the future, any potential future modeling in attainment demonstrations by the Commonwealth would need to account for any new emissions limitations Virginia develops to support such demonstration, which at this point are unknown. Therefore, it is premature at this point to evaluate whether current modeled allowable $SO_2$ levels would be sufficient to show future attainment of the NAAQS. 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 and 2012 Draft White Paper. 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*.[11]

Finally, EPA also disagrees with the Commenter that the Virginia infrastructure SIP should incorporate the planned retirement dates of certain emission units at Chesapeake Energy Center and Yorktown Power Station to ensure attainment and maintenance of the NAAQS. Because EPA does not believe Virginia's infrastructure SIP requires at this time 1-hour $SO_2$ emission

[11] EPA does not disagree with Sierra Club's data indicating coal-fired power plants represented a majority of the $SO_2$ emissions in Virginia based on 2011 data. However, such data are not relevant to EPA's approval of Virginia's $SO_2$ infrastructure SIP, and EPA therefore provides no additional response.

limits on these sources or other large stationary sources to prevent exceedances of the $SO_2$ NAAQS for all the reasons discussed above in this response, EPA likewise does not believe incorporating planned retirement dates for $SO_2$ emitters is necessary for our approval of an infrastructure SIP which we have explained meets the structural requirements of section 110(a)(2). If any areas in Virginia are subsequently designated nonattainment with the 2010 $SO_2$ NAAQS, Virginia can address needed emission reductions, including reductions through source retirements, in any subsequent attainment planning process in accordance with part D of title I of the CAA.

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

**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.[12]

[12] 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 which upheld EPA's finding that the previously approved SIP for an area in Montana was substantially inadequate to attain the NAAQS due to modeled violations of the NAAQS.

Sierra Club 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 regarding the use of modeling and monitoring in setting emission limitations or determining ambient concentrations as a result of a source's emissions, discussing performance of AERMOD as a model, if AERMOD is capable of predicting whether the NAAQS is attained, and whether individual sources contribute to $SO_2$ NAAQS violations. Sierra Club cites to EPA's history of employing air dispersion modeling for increment compliance verifications in the permitting process for the Prevention of Significant Deterioration (PSD) program required in part C of title I of the CAA. The Commenter claims the Chesapeake Energy Center and Yorktown Power Station are examples of sources located in elevated terrain where the AERMOD model functions appropriately in evaluating ambient impacts.

Sierra Club 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 that an agency must consider information presented during notice-and-comment rulemaking.

Finally, Sierra Club claims that Virginia's proposed $SO_2$ infrastructure SIP lacks emission limitations informed by air dispersion modeling and therefore fails to ensure 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 Sierra Club that air dispersion modeling, such as AERMOD, can be an important tool in the CAA section 107 designations process for $SO_2$ and in the sections 172 and 191-192 attainment SIP process, 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 $SO_2$ 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 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 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 sections 172 and 191-192 attainment SIPs, 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.

EPA had initially recommended that states submit substantive attainment demonstration SIPs based on air quality modeling in the final 2010 $SO_2$ NAAQS preamble (75 FR 35520) and in subsequent draft guidance issued in September 2011 for the section 110(a) SIPs due in June 2013 in order 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 expectation at the time, that by June 2012, most areas would initially be 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 conducting extensive stakeholder outreach and 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 and in the 2012 Draft White Paper that EPA was clarifying its implementation position and was no longer recommending such attainment demonstrations supported by air dispersion modeling for unclassifiable areas (which had not yet been designated) for the June 2013 infrastructure SIPs. EPA then reaffirmed this position in the February 6, 2013 memorandum, "Next Steps for Area Designations and Implementation of the Sulfur Dioxide National Ambient Air Quality Standard."[13] 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

[13] 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.

receiving such further comment, EPA has now issued guidance for the nonattainment area SIPs due pursuant to sections 172 and 191-192 and proposed a process for further characterization of areas with larger $SO_2$ sources, 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 gathering additional information on impacts from larger $SO_2$ sources informed through ambient monitoring and/or air quality modeling). While the EPA guidance for attainment SIPs and the proposed process for further characterizing $SO_2$ emissions from larger sources both discuss the use air dispersion modeling, EPA's 2013 Infrastructure SIP Guidance did not suggest that states use 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 Virginia $SO_2$ infrastructure SIP submittal contains the structural requirements to address elements in section 110(a)(2) as discussed in detail in the TSD accompanying the proposed approval. 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. In the TSD for this rulemaking action, EPA provided a detailed explanation of 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 the analysis of Virginia's infrastructure SIP as this is not an attainment SIP required to demonstrate attainment of the NAAQS pursuant to sections 172 or 192. 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 Virginia's infrastructure SIP is unrelated to the section 107 designations process. Nor is EPA's 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 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 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 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 $SO_2$ NAAQS designations, attainment SIPs, and demonstrating significant contributions to interstate transport. However, EPA's approval of Virginia's infrastructure SIP is based on our determination that 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 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 Chesapeake Energy Center and Yorktown Power Station 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 title I 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 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 evaluated the persuasiveness of the Commenter's submitted modeling in finding that it is not relevant to the approvability of Virginia's proposed infrastructure SIP for the 2010 $SO_2$ NAAQS.

While EPA does not believe that infrastructure SIP submissions are *required* to contain emission limits, as suggested by the Commenter, EPA does recognize that in the past, states have used infrastructure SIP submittals as a 'vehicle' for incorporating regulatory revisions or source-specific emission limits into the state's plan. *See* 78 FR 73442 (December 6, 2013) (approving regulations Maryland submitted for incorporation into the SIP along with the 2008 Ozone infrastructure SIP to address ethics requirements for State Boards in sections 128 and 110(a)(2)(E)(ii)). While these SIP revisions are intended to help the state meet the requirements of section 110(a)(2), these "ride-along" SIP revisions are not intended to signify that all infrastructure SIP submittals should have similar regulatory revisions or source-specific emission limits. Rather, the regulatory provisions and source-specific emission limits the state relies on when showing compliance with section 110(a)(2) have likely already been incorporated into the

state's SIP prior to each new infrastructure SIP submission; in some cases this was done for entirely separate CAA requirements, such as attainment plans required under section 172, or for previous NAAQS.

**Comment 8:** Sierra Club asserts that EPA may not approve the 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 the need for 1-hour $SO_2$ emission limits in a PSD permit, an EPA Environmental Hearing Board (EHB) decision rejecting use of a 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.[14]

Sierra Club also contends that infrastructure SIPs approved by 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. Sierra Club contends any monitoring performed for the New Source Performance Standards (NSPS) in 40 CFR Part 60 is inadequate for the NAAQS because NSPS monitoring does not call for monitoring during every hour of source operation which Sierra Club

[14] 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).

asserts is needed to protect the 1-hour $SO_2$ 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 with CEMS, and therefore must disapprove Virginia's infrastructure SIP which Sierra Club claims fails to require emission limits with adequate averaging times.

**Response 8:** EPA disagrees that EPA must disapprove the proposed Virginia infrastructure SIP because the SIP does not contain enforceable $SO_2$ emission limitations with 1-hour averaging periods that apply at all times, along with requiring CEMS, as these issues are not appropriate for resolution at this stage in advance of the state's submission of an attainment demonstration for areas which may be designated nonattainment pursuant to section 107 of the CAA.[15] 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 maintenance of the NAAQS are not required for such infrastructure SIPs.[16] Likewise, EPA need not address, for the purpose of approving Virginia's infrastructure SIP, whether CEMS or some other appropriate monitoring of $SO_2$ emissions is necessary to demonstrate compliance with emission limits in order to show attainment of the 2010 $SO_2$ NAAQS as EPA believes such $SO_2$ emission limits and an attainment

[15] As EPA has stated, there are not presently any designated nonattainment areas pursuant to CAA section 107 for the 2010 $SO_2$ NAAQS in the Commonwealth. Thus, the Commonwealth, at this time, has no obligation to submit any attainment plans for the 2010 $SO_2$ NAAQS for sections 172, 191 and 192. EPA believes the appropriate time for examining necessity of 1-hour $SO_2$ emission limits on specific sources is within the attainment planning process.
[16] 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.

demonstration are not a prerequisite to EPA's approval of Virginia's infrastructure SIP.[17] Therefore, because EPA finds 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. 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 neither relevant nor applicable to section 110 infrastructure SIPs. In addition, as previously discussed, 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 the analysis of infrastructure SIP requirements.

EPA has explained in the TSD supporting this rulemaking action how the Virginia SIP meets requirements in section 110(a)(2)(F) related to monitoring. 9 VAC 5-40-100 requires sources in Virginia to install, maintain, and replace equipment such as CEMS to continuously monitor $SO_2$ emissions where necessary and required. Further, 9 VAC 5-40 requires sources in Virginia to report 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 through permits and compliance orders. Pursuant to 40 CFR Part 51, subpart A, "Air Emissions Reporting Requirements," Virginia provides source-specific emissions data to EPA. Thus, EPA finds 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

[17] 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 Virginia pursuant to the SIP or in attainment SIPs submitted in the part D planning process.

with 110(a)(2)(F) and the Infrastructure SIP Guidance.[18] *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 National Ambient Air Quality Standard*, which Sierra Club contends discusses how states could avoid future nonattainment designations. The Commenter asserts EPA should add enforceable emission limits to the Virginia infrastructure SIP to prevent future nonattainment designations and to protect public health. The Commenter claims the modeling it conducted for Chesapeake Energy Center and Yorktown Power Station indicates fourteen counties/independent cities in 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 2010 $SO_2$ 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 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 Virginia infrastructure SIP and

[18] While monitoring pursuant to NSPS requirements in 40 CFR Part 60 may not be sufficient for 1-hour $SO_2$ emission limits, EPA does not believe Sierra Club's comment regarding NSPS monitoring provisions is relevant at this time because EPA finds 1-hour $SO_2$ emission limits and associated monitoring and averaging periods are not required for our approval of Virginia's $SO_2$ infrastructure SIP.

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 Virginia.

**Response 9:** EPA appreciates the Commenter's concern with avoiding nonattainment designations in Virginia for the 2010 $SO_2$ NAAQS and with providing coal-fired EGUs regulatory certainty to help them make informed decisions on how to comply with CAA requirements. However, Congress designed the CAA such that states have the primary responsibility for achieving and maintaining the NAAQS within their geographic area by submitting SIPs which will specify the details of how the state will meet the NAAQS. 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 gathering further $SO_2$ emissions source information for implementing the 2010 $SO_2$ NAAQS. 79 FR 27446. EPA has also proposed to enter a settlement to resolve deadline suits regarding the remaining designations that would, if entered by the court, impose deadlines for three more rounds of designations. Under these proposed schemes, 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. Virginia may, on its own accord, decide to impose additional $SO_2$ emission limitations to avoid future designations to nonattainment. If Virginia areas are designated

nonattainment, Virginia will have the initial opportunity to develop additional emissions limitations needed to attain the NAAQS in the future, and EPA would be charged with reviewing whether those are adequate. If EPA were to disapprove the limits, then it would fall to EPA to adopt limits in a FIP. However, such considerations are not required of Virginia to consider at the infrastructure SIP stage of NAAQS implementation, as this action relates to our approval of 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 Virginia's $SO_2$ infrastructure SIP. Likewise, while EPA appreciates Sierra Club's concern for providing "regulatory certainty" for coal-fired EGUs in 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 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 EPA's approval of Virginia's infrastructure SIP for the 2010 $SO_2$ NAAQS, and EPA disagrees that the infrastructure SIP must be disapproved 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 infrastructure SIP for the 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 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 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 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 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.[19] *See Homer City/Mansfield Order* at 10-19 (finding Pennsylvania SIP did not require imposition of 1-hour $SO_2$ emission limits on sources

[19] Thus, EPA agrees with Virginia's response to Sierra Club when the Commenter raised these same comments to the Commonwealth during the drafting of Virginia's infrastructure SIP. Sierra Club's modeling of the coal-fired power plants $SO_2$ emissions is not relevant at this time.

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 any attainment SIP Virginia will submit (when required) for designated 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 substantive attainment demonstration SIPs for unclassifiable areas based on air dispersion modeling in section 110(a) infrastructure SIPs, EPA subsequently gathered additional information and clarified its position. The April 12, 2012 letters to states, 2012 Draft White Paper, and February 6, 2013 memorandum on next steps, as previously discussed, clearly recommend states focus section 110(a) infrastructure SIPs due in June 2013 on "traditional infrastructure elements" in section 110(a)(1) and (2) rather than on modeling demonstrations for future attainment for unclassifiable areas.[20]

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, Virginia should appropriately evaluate and impose necessary $SO_2$ emission limits on sources, where or when needed in Virginia, for any

[20] 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.

areas in Virginia which may later be designated nonattainment with the 2010 $SO_2$ NAAQS under section 107.[21]

**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 FIP. Sierra Club claims its modeling shows that at least one plant, Chesapeake Energy Center, 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 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' failure 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 Virginia's failure to address section 110(a)(2)(D)(i)(I). In EPA's NPR proposing to approve Virginia's infrastructure SIP for the

[21] 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. 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 FIPs. Likewise, for any areas designated nonattainment after 2013, EPA has the same authorities and tools available to address any areas which do not timely attain the NAAQS.

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. Virginia did not make a 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 proposed to take disapproval 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 other elements of 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 Virginia failed to timely submit a required 110(a)(2)(D)(i)(I) SIP submission for the 2010 $SO_2$ NAAQS or found that such a submission 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 Virginia's infrastructure SIP 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)(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 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 EPA's interpretation that EPA 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 Virginia's June 18, 2014 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 Virginia's obligations under section 110(a)(2)(D)(i)(I) until EPA first either finds Virginia failed to make the required submission addressing the element or the Commonwealth 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 Virginia to address 110(a)(2)(D)(i)(I) for the 2010 $SO_2$ NAAQS at this time.

Regarding Sierra Club's assertion that one stationary source is causing "exceedances" in other states according to the modeling conducted by Sierra Club, EPA believes such assertion is irrelevant to our action approving Virginia's infrastructure SIP for the 2010 $SO_2$ NAAQS because EPA has not proposed any action on section 110(a)(2)(D)(i)(I) regarding Virginia's obligations to address the transport of $SO_2$ emissions. EPA may consider such information if Sierra Club resubmits when EPA does act upon a Virginia SIP submission to address 110(a)(2)(D)(i)(I) obligations for the 2010 $SO_2$ NAAQS.

**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 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 Virginia's duty to protect visibility is a mandatory duty. The Commenter

asserts EPA ignores its deadline by not acting in today's rulemaking on the visibility prong of section 110(a)(2)(D)(i)(II) and asserts EPA cites no legally defensible reason for not acting. 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 Virginia $SO_2$ infrastructure SIP for its failure to protect visibility and issue a FIP addressing visibility protection for Virginia. In EPA's NPR proposing to approve Virginia's infrastructure SIP for the 2010 $SO_2$ NAAQS, EPA clearly stated that it was not proposing to take any action at that time with respect to the visibility protection provisions in section 110(a)(2)(D)(i)(II). While 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 and CAIR as meeting these requirements, EPA did not propose to take any action in the NPR with respect to Virginia's visibility protection obligations pursuant to section 110(a)(2)(D)(i)(II).[22] As indicated in EPA's NPR, EPA anticipates taking later action on the portion of Virginia's June 18,

[22] On June 13, 2012 (77 FR 35287), EPA finalized a limited approval of Virginia's October 4, 2010 regional haze SIP, and subsequent supplements, to address the first implementation period for regional haze. On June 7, 2012, EPA issued a limited disapproval of this SIP because of Virginia's reliance on CAIR to meet certain regional haze requirements, which EPA replaced in August 2011 with CSAPR (76 FR 48208 (August 8, 2011)). 77 FR 33641. EPA had also issued on June 7, 2012 in the same action a FIP that replaced Virginia's reliance on CAIR with reliance on CSAPR for certain regional haze requirements. *Id*. Later, as discussed previously, the D.C. Circuit in *EME Homer City Generation*, 696 F.3d 7, vacated CSAPR and kept CAIR in place. Subsequently, on April 30, 2014, the Supreme Court vacated the D.C. Circuit decision and remanded the matter to the D.C. Circuit for further proceedings. *EME Homer City*, 134 S. Ct. 1584. On October 23, 2014, after we proposed to approve Virginia's infrastructure SIP, the D.C. Circuit lifted the stay on CSAPR. *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir. Oct. 23, 2014), Order at 3. As mentioned in response to a prior comment, EPA began implementing CSAPR on January 1, 2015. 79 FR 71663 (December 3, 2014) (interim final rule revising CSAPR compliance deadlines). EPA will take appropriate action on Virginia's obligations under 110(a)(2)(D)(i)(II) for visibility protection in a subsequent rulemaking action.

2014 SIP submission addressing visibility protection.[23] 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 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 the 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 a 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 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

[23] 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, 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.

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 Virginia's June 18, 2014 infrastructure SIP submission for the 2010 $SO_2$ NAAQS.

EPA also has no obligation to issue a FIP to address Virginia's obligations under section 110(a)(2)(D)(i)(II) until EPA first finds 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).

**Comment 13:** The Commenter alleges the infrastructure SIP must not allow for such things as ambient air incremental increases, variances, exceptions, or exclusions for limits on sources of pollutants; otherwise, the Commenter alleges Virginia cannot assure compliance with infrastructure SIP requirements for the $SO_2$ NAAQS. The Commenter asserts the infrastructure SIP should not allow for certain sources to be exempt from permit requirements nor allow affirmative defenses or variances to "requirements" during startup, shutdown or malfunction (SSM) or due to hardship. The Commenter states EPA cannot delay acting on "startup, shutdown, and malfunction" of operations or director's variances because of the mandatory timeline for infrastructure SIPs under the CAA. The Commenter also asserts EPA should issue a finding of non-completeness and set forth a FIP because Virginia has failed to submit certain required components for its $SO_2$ infrastructure SIP. The Commenter maintains the CAA is clear and that EPA's "segmented and piecemeal approach" to approving Virginia's infrastructure SIP

is inappropriate because infrastructure SIPs must contain the entirety of a state's comprehensive plan to implement and maintain the NAAQS and because the components of section 110(a)(2) are interrelated. Thus, the Commenter asserts EPA must disapprove the $SO_2$ infrastructure SIP submittal and issue a FIP.

**Response 13**: EPA disagrees with the Commenter that EPA must disapprove Virginia's infrastructure SIP and issue a FIP, instead of acting in a "piecemeal" approach (as Sierra Club calls it) in approving the majority of Virginia's $SO_2$ infrastructure SIP while acting at a later date on certain specific elements of the SIP, including the portions related to transport and regional haze in 110(a)(2)(D)(i)(I) and (II) and the portion related to State Boards in 110(a)(2)(E)(ii). As explained in the NPR for this rulemaking action and in the responses above, EPA interprets its authority under section 110(k)(3) of the CAA as affording EPA the discretion to approve individual elements of Virginia's infrastructure submission for the 2010 $SO_2$ NAAQS, while taking later separate action on the infrastructure submission for the requirements of section 110(a)(2)(D)(i) for transport and visibility protection or 110(a)(2)(E)(ii) for State Board requirements. As explained previously, EPA views discrete infrastructure SIP requirements like transport, State Boards, and visibility protection as severable from the other infrastructure elements and interprets section 110(k)(3) as allowing EPA to act on individual, severable measures. Section 110(k)(3) expressly 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).*

In short, EPA believes that EPA has 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 Commenter has not provided any case law or EPA interpretation of section 110 to support its contrary interpretation that it is inappropriate or unreasonable for EPA to approve portions of Virginia's June 18, 2014 infrastructure SIP submission for the 2010 $SO_2$ NAAQS.

In addition, EPA also has no obligation to issue a FIP to address Virginia's obligations under section 110(a)(2)(D)(i)(I) or (II) or 110(a)(2)(E)(ii) until EPA first finds Virginia failed to satisfy its obligations with a complete SIP submittal addressing those elements or disapproves any SIP submittal addressing that element. Until such occurs pursuant to section 110(c), EPA may not issue any FIP for transport, visibility protection, or State Board requirements or the infrastructure SIP as a whole.

EPA also disagrees with the Commenter that EPA is required to address all potential deficiencies that may exist in the Virginia SIP in the context of evaluating an infrastructure SIP submission. In particular, EPA is not addressing any existing SIP provisions related to the treatment of emissions during SSM events, including automatic or director's discretion exemptions, overbroad state enforcement discretion provisions, or affirmative defense provisions. As EPA stated in the TSD for this rulemaking action, EPA is not approving or disapproving any existing Virginia regulatory or statutory provisions with regard to excess emissions during SSM of operations at any facility. EPA believes that a number of states may have SIP provisions related to emissions during SSM events which are contrary to the CAA and existing EPA guidance (August 11, 1999 Steven Herman and Robert Perciasepe Guidance Memorandum, "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and

Shutdown"), and EPA is addressing such potentially deficient SIP provisions in a separate rulemaking. *See* 78 FR 12460 (February 22, 2013) (proposed rulemaking on SSM SIP provisions). *See also* 79 FR 55920 (September 17, 2014) (supplemental proposed rulemaking on affirmative defense provisions). In the TSD, EPA also stated that EPA is not approving or disapproving any existing Virginia regulatory or statutory provisions with regard to director's discretion or variance provisions. EPA believes that a number of states may have such provisions which are contrary to the CAA and existing EPA guidance (*see* 52 FR 45109, November 1987), and EPA is also addressing such state regulations in the separate rulemaking. *See* 78 FR 12460. Similarly, EPA is not approving or disapproving any affirmative defense provisions applicable to excess emissions during SSM events in this action. EPA has separately proposed to address such existing affirmative defense provisions in the SIPs of many states, including Virginia. *See also* 79 FR 55920. In the meantime, EPA encourages any state having deficient SIP provisions related to the treatment of excess emissions during SSM events to take steps to correct them as soon as possible. Upon conclusion of EPA's SSM SIP call rulemaking, any states that EPA determines have impermissible SIP provisions related to SSM events will have time to adjust their SIPs where necessary and as required. As EPA is neither approving nor disapproving any new provisions related to automatic or director's discretion exemptions, overbroad state enforcement discretion provisions, or affirmative defense provisions in this rulemaking, EPA disagrees with Sierra Club's comment that the infrastructure SIP "must not allow for such things" and disagrees with any inference from the comment that EPA must disapprove the Virginia $SO_2$ infrastructure SIP because of any such existing deficient provisions. Moreover, EPA emphasizes that by approving Virginia's $SO_2$ infrastructure SIP submission, EPA is not approving or reapproving any such deficient provisions that exist in the current SIP.

Regarding the Commenter's statement that the infrastructure SIP should not allow Virginia to exempt certain sources from permitting, the Sierra Club fails to identify any exemptions from permitting that preclude EPA from approving the infrastructure SIP. EPA explained in the TSD for this rulemaking that Virginia's permitting program for major and minor stationary sources met requirements in the CAA for section 110(a)(2)(C). Specifically, EPA stated Virginia has a SIP-approved minor new source review (NSR) program located in 9 VAC 5-80-10 (New and Modified Stationary Sources) and 9 VAC 5-80-11 (Stationary Source Permit Exemption Levels) which regulates certain modifications and construction of stationary sources within areas covered by its SIP as necessary to assure the NAAQS are achieved. EPA had previously approved such provisions into the Virginia SIP as they met requirements for a minor NSR program in accordance with the CAA and 40 CFR 51.160. *See* 65 FR 21315 (April 21, 2000).

EPA's TSD for this rulemaking also explained Virginia's SIP met requirements in section 110(a)(2)(C) for a PSD permit program as required in part C of title I of the CAA. In Virginia, construction and modification of stationary sources are covered under Article 8, Permits for Major Stationary Sources and Major Modifications Locating in Prevention of Significant Deterioration Areas (9 VAC 5-80-1605 et seq.) which is included in the approved Virginia SIP. *See* 40 CFR 52.2420(c). Article 8 also provides that construction and modification of major stationary sources will not cause or contribute to a violation of any NAAQS (9 VAC 5-80-1635, Ambient Air Increments and 9 VAC 5-80-1645, Ambient Air Ceilings) and requires application of Best Available Control Technology to new or modified sources (9 VAC 5-80-1705, Control Technology Review). EPA has previously approved Virginia's PSD permit program as meeting the requirements in part C, title I of the CAA and 40 CFR 51.166. *See* 79 FR 10377 (February

25, 2014). The Sierra Club has not identified any specific exemption that is allegedly problematic or any recent amendments to the Virginia rules that has added such an exemption. The Sierra Club has not demonstrated that Virginia's permitting program for major and minor stationary sources does not meet requirements in the CAA for section 110(a)(2)(C).

## III. Final Action

EPA is approving the following elements of Virginia's June 18, 2014 SIP revision for the 2010 $SO_2$ NAAQS: Section 110(a)(2)(A), (B), (C), (D)(i)(II) (PSD requirements), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J) (consultation, public notification, and PSD), (K), (L), and (M). Virginia's SIP revision provides the basic program elements specified in Section 110(a)(2) necessary to implement, maintain, and enforce the 2010 $SO_2$ NAAQS. This final rulemaking action does not include action on section 110(a)(2)(I) which pertains to the nonattainment planning requirements of part D, title I of the CAA, because this element is not required to be submitted by the 3-year submission deadline of section 110(a)(1) of the CAA, and will be addressed in a separate process. Additionally, EPA will take later, separate action on section 110(a)(2)(D)(i)(I) (interstate transport of emissions), (D)(i)(II) (visibility protection), (J) (visibility protection) and (E)(ii) (Section 128, "State Boards") for the 2010 $SO_2$ NAAQS as previously discussed.

## IV. 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 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.

## 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 (Public Law 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 approving portions of Virginia’s infrastructure SIP for the 2010 $SO_2$

NAAQS 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 **[Insert date 60 days from date of publication of this document in the Federal Register]**. 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 2010 $SO_2$ 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, Sulfur dioxide.

February 5, 2015
Dated:

/s/
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 VV—Virginia**

2. Section 52.2420 is amended by:

a. In paragraph (e), adding an entry for "Section 110(a)(2) Infrastructure Requirements for the 2010 Sulfur Dioxide NAAQS" at the end of the table.

The amendments read as follows:

**§ 52.2420 Identification of plan.**

* * * * *

(e)* * *

| **Name of non-regulatory SIP revision** | **Applicable geographic area** | **State submittal date** | **EPA approval date** | **Additional explanation** |
|---|---|---|---|---|
| * * * | * * | * * | | |
| Section 110(a)(2) Infrastructure Requirements for the 2010 Sulfur Dioxide NAAQS | Statewide | 6/18/14 | [Insert Federal Register publication date] [Insert Federal Register citation] | This action addresses the following CAA elements, or portions thereof: 110(a)(2) (A), (B), (C), (D)(i)(II)(PSD), (D)(ii), (E)(i), (E)(iii), (F), (G), (H), (J)(consultation, notification, and PSD), (K), (L), and (M) . |

[FR Doc. 2015-04377 Filed 03/03/2015 at 8:45 am; Publication Date: 03/04/2015]