



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2014-0423; FRL-9953-18-Region 4]

Air Plan Approval; Florida; Infrastructure Requirements

for the 2010 Sulfur Dioxide National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve the State Implementation Plan (SIP) submissions, submitted by the State of Florida, through the Florida Department of Environmental Protection (FDEP), on June 3, 2013, and supplemented on January 8, 2014, for inclusion into the Florida SIP. This final action pertains to the infrastructure requirements of the Clean Air Act (CAA or Act) for the 2010 1-hour sulfur dioxide (SO₂) national ambient air quality standard (NAAQS). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance and enforcement of each NAAQS promulgated by EPA, which is commonly referred to as an “infrastructure SIP submission.” FDEP certified that the Florida SIP contains provisions that ensure the 2010 1-hour SO₂ NAAQS is implemented, enforced, and maintained in Florida. EPA has determined that the Florida’s infrastructure SIP submissions, provided to EPA on June 3, 2013, and supplemented on January 8, 2014, satisfy the required infrastructure elements for the 2010 1-hour SO₂ NAAQS.

DATES: This rule is effective [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2014-0423. All documents in the docket are listed on the www.regulations.gov web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information 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 at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Michele Notarianni, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Ms. Notarianni can be reached via electronic mail at notarianni.michele@epa.gov or via telephone at (404) 562-9031.

SUPPLEMENTARY INFORMATION:

I. Background and Overview

On June 2, 2010 (75 FR 35520, June 22, 2010), EPA promulgated a revised primary SO₂ NAAQS to an hourly standard of 75 parts per billion (ppb) based on a 3-year average of the annual 99th percentile of 1-hour daily maximum concentrations. Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs for the 2010 1-hour SO₂ NAAQS to EPA no later than June 2, 2013.¹

EPA is acting upon the SIP submissions from Florida that address the infrastructure requirements of CAA sections 110(a)(1) and 110(a)(2) for the 2010 1-hour SO₂ NAAQS. The requirement for states to make a SIP submission of this type arises out of CAA section 110(a)(1). Pursuant to section 110(a)(1), states must make SIP submissions “within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof),” and these SIP submissions are to provide for the “implementation, maintenance, and enforcement” of such NAAQS.

In a proposed rulemaking published on August 24, 2015, EPA proposed to approve Florida’s June 3, 2013, and January 8, 2014, 2010 1-hour SO₂ NAAQS infrastructure SIP submissions.² *See* 80 FR 51157. The details of Florida’s submissions and the rationale for EPA’s actions are explained in the proposed rulemaking. Comments on the proposed

¹ In the proposed action, EPA incorrectly cited a date of June 22, 2013, for the due date of infrastructure SIPs for the 2010 1-hour SO₂ NAAQS. 80 FR 51158 (August 24, 2015).

² Florida’s 2010 1-hour SO₂ NAAQS infrastructure SIP submission dated June 3, 2013, and supplemented on January 8, 2014, are also collectively referred to as “Florida’s SO₂ infrastructure SIP” in this action.

rulemaking were due on or before September 23, 2015. EPA received adverse comments on the proposed action.

II. Response to Comments

EPA received one set of comments on the August 24, 2015, proposed rulemaking to approve Florida's 2010 1-hour SO₂ NAAQS infrastructure SIP submissions intended to meet the CAA requirements for the 2010 1-hour SO₂ NAAQS. A summary of the comments and EPA's responses are provided below.³ A full set of these comments is provided in the docket for today's final rulemaking action.

A. Comments on Infrastructure SIP Requirements for Enforceable Emission Limits

1. The Plain Language of the CAA

Comment 1: The Commenter contends that the plain language of section 110(a)(2)(A) of the CAA requires the inclusion of enforceable emission limits in an infrastructure SIP to prevent NAAQS exceedances in areas not designated nonattainment. In support, the Commenter quotes the language in section 110(a)(1) that requires states to adopt a plan for implementation, maintenance, and enforcement of the NAAQS and the language in section 110(a)(2)(A) that requires SIPs to include enforceable emissions limitations as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the CAA. The Commenter then states that applicable requirements of the CAA include requirements for the attainment and maintenance of the NAAQS, and that CAA section 110(a)(2)(A) requires infrastructure SIPs to include enforceable emission limits to prevent exceedances of the NAAQS.

³ EPA's responses to these comments are consistent with actions taken on 2010 1-hour SO₂ NAAQS infrastructure SIP submissions for Virginia (80 FR 11557, March 4, 2015) at <https://www.gpo.gov/fdsys/pkg/FR-2015-03-04/pdf/2015-04377.pdf> and West Virginia (79 FR 62022, October 16, 2014) at <https://www.gpo.gov/fdsys/pkg/FR-2014-10-16/pdf/2014-24658.pdf>.

The Commenter claims that Florida's SIP submission does not meet this asserted requirement. Thus, the Commenter asserts that EPA must disapprove Florida's proposed SO₂ infrastructure SIP submission because it fails to include enforceable emission limitations necessary to ensure attainment and maintenance of the NAAQS as required by CAA section 110(a)(2)(A). The Commenter then contends that the Florida 2010 1-hour SO₂ infrastructure SIP submission fails to comport with CAA requirements for SIPs to establish enforceable emission limits that are adequate to prohibit NAAQS exceedances in areas not designated nonattainment.

Response 1: EPA disagrees that section 110 must be interpreted in the manner suggested by the Commenter in the context of infrastructure SIP submissions. Section 110 is only one provision that is part of the complicated structure governing implementation of the NAAQS program under the CAA, as amended in 1990, and it must be interpreted in the context of not only that structure, but also of the historical evolution of that structure. In light of the revisions to section 110 since 1970 and the later-promulgated and more specific SIP planning requirements of the CAA, EPA interprets the requirement in section 110(a)(1) that the plan provide for "implementation, maintenance and enforcement" in conjunction with the requirements in section 110(a)(2)(A) to mean that the infrastructure SIP must contain enforceable emission limits that will aid in attaining and/or maintaining the NAAQS and that the state demonstrate that it has the necessary tools to implement and enforce a NAAQS, such as adequate state personnel and an enforcement program.

With regard to the requirement for emission limitations in section 110(a)(2)(A), EPA has interpreted this to mean, for purposes of infrastructure SIP submissions, 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 elect to impose as part of such SIP submission. As EPA stated in "Guidance on

Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2),” dated September 13, 2013, (Infrastructure SIP Guidance), “[t]he conceptual purpose of an infrastructure SIP submission is to assure that the air agency’s SIP contains the necessary structural requirements for the new or revised NAAQS, whether by establishing that the SIP already contains the necessary provisions, by making a substantive SIP revision to update the SIP, or both. Overall, the infrastructure SIP submission process provides an opportunity ... to review the basic structural requirements of the air agency’s air quality management program in light of each new or revised NAAQS.” Infrastructure SIP Guidance at pp. 1-2. Florida appropriately demonstrated that its SIP has SO₂ emissions limitations and the “structural requirements” to implement the 2010 1-hour SO₂ NAAQS in its infrastructure SIP submission.

The Commenter makes general allegations that Florida does not have sufficient protective measures to prevent SO₂ NAAQS exceedances. EPA addressed the adequacy of Florida’s infrastructure SIP for 110(a)(2)(A) purposes in the proposed rule and explained why the SIP includes enforceable emission limitations and other control measures that aid in maintaining the 2010 1-hour SO₂ NAAQS throughout the State. These include State regulations which collectively establish enforceable emissions limitations and other control measures, means or techniques for activities that contribute to SO₂ concentrations in the ambient air, and provide authority for FDEP to establish such limits and measures as well as schedules for compliance through SIP-approved permits to meet the applicable requirements of the CAA. *See* 80 FR 51161. EPA finds these provisions adequately address section 110(a)(2)(A) to aid in attaining and/or maintaining the 2010 1-hour SO₂ NAAQS and finds Florida demonstrated that it has the necessary tools to implement and enforce the 2010 1-hour SO₂ NAAQS.

2. *The Legislative History of the CAA*

Comment 2: The Commenter cites two excerpts from the legislative history of the 1970 CAA and claims that the “legislative history of infrastructure SIPs provides that states must include enforceable emission limits in their infrastructure SIPs sufficient to ensure the implementation, maintenance, and attainment of each NAAQS in all areas of the State.”

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 attainment. In any event, the two excerpts of legislative history the Commenter cites merely provide that states should include enforceable emission limits in their SIPs and they do not mention or otherwise address whether states are required to impose additional emission limitations or control measures as part of the infrastructure SIP submission, as opposed to requirements for other types of SIP submissions such as attainment plans required under section 110(a)(2)(I). As provided in Response 1, the proposed rule explains why the SIP includes sufficient enforceable emissions limitations for purposes of the infrastructure SIP submission.

3. *Case Law*

Comment 3: The Commenter also discusses several court decisions concerning the CAA, which the Commenter claims support its contention that courts have been clear that section 110(a)(2)(A) requires enforceable emissions limits in infrastructure SIP submissions to prevent violations of the NAAQS. The Commenter 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 the specific rules to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards.” The

Commenter also cites to *Pennsylvania Dept. of Env'tl. Resources v. EPA*, 932 F.2d 269, 272 (3d Cir. 1991) for the proposition that the CAA directs EPA to withhold approval of a SIP where it does not ensure maintenance of the NAAQS, and to *Mission 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 Env'tl. Conservation v. EPA*, 540 U.S. 461, 470 (2004) which in turn quoted section 110(a)(2)(A) of the CAA and also stated that “SIPs must include certain measures Congress specified” to ensure attainment of the NAAQS. The Commenter also quotes several additional opinions in this vein. *Mont. Sulphur & Chem. Co. v. EPA*, 666 F.3d 1174, 1180 (9th Cir. 2012) (“[t]he Clean Air Act directs states to develop implementation plans – SIPs – that ‘assure’ attainment and maintenance of [NAAQS] through enforceable emissions limitations”); *Mich. Dept. of Env'tl. Quality v. Browner*, 230 F.3d 181 (6th Cir. 2000) (“EPA’s deference to a state is conditioned on the state’s submission of a plan ‘which satisfies the standards of § 110(a)(2)’ and which includes emission limitations that result in compliance with the NAAQS”; and *Hall v. EPA* 273 F.3d 1146 (9th Cir. 2001) for the proposition that EPA may not approve a SIP revision that does not demonstrate how the rules would not interfere with attainment and maintenance of the NAAQS.

Response 3: None of the cases the Commenter cites support the Commenter’s contention that it is clear that section 110(a)(2)(A) requires infrastructure SIP submissions to include detailed plans providing for attainment and maintenance of the NAAQS in all areas of the state, nor do they shed light on how EPA may reasonably interpret section 110(a)(2)(A). With the exception of *Train*, none of the cases the Commenter cites specifically concerned the interpretation of CAA section 110(a)(2)(A) (or section 110(a)(2)(B) of the pre-1990 Act).

Rather, the other courts referenced section 110(a)(2)(A) (or section 110(a)(2)(B) of the pre-1990 CAA) in the background section of decisions in the context of a challenge to an EPA action on revisions to a SIP that was required and approved as meeting other provisions of the CAA or in the context of an enforcement action.

In *Train*, 421 U.S. 60, the Court was addressing a state revision to an attainment plan submission made pursuant to section 110 of the CAA, the primary statutory provision at that time addressing 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, so long as the state met other applicable requirements of the CAA, 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 the specific SIP at issue 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.

The decision in *Pennsylvania Dept. of Env'tl. Resources* was also decided based on a pre-1990 provision of the CAA. At issue was whether EPA properly rejected a revision to an approved SIP 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. This decision did not address the

question at issue in this action, i.e., what a state must include in an infrastructure SIP submission for purposes of section 110(a)(2)(A). Yet, even if the Court had interpreted that provision, EPA notes that it was modified by Congress in 1990; thus, this decision has little bearing on the issue here.

At issue in *Mision Industrial*, 547 F.2d 123, was the definition of “emissions limitation” not whether section 110 requires the state to demonstrate how all areas of the state will attain and maintain the NAAQS as part of their infrastructure SIPs. The language from the opinion the Commenter quotes does not interpret but rather merely describes section 110(a)(2)(A). The Commenter does not cite to this case to assert that the measures relied on by the state in the infrastructure SIP are not “emissions limitations” and the decision in this case has no bearing here. 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 and adoption of a remedial FIP were lawful. The Commenter suggests that *Alaska Dept. of Env’tl. Conservation*, 540 U.S. 461, stands for the proposition that the 1990 CAA Amendments do not alter how courts interpret section 110. This claim is inaccurate. Rather, the Court quoted section 110(a)(2)(A), which, as noted previously, differs from the pre-1990 version of that provision and the court makes no mention

of the changed language. Furthermore, the Commenter also quotes the Court’s statement that “SIPs must include certain measures Congress specified,” but that statement specifically referenced the requirement in section 110(a)(2)(C), which requires an enforcement program and a program for the regulation of the modification and construction of new sources. Notably, at issue in that case was the State’s “new source” permitting program, not what is required for purposes of an infrastructure SIP submission for purposes of section 110(a)(2)(A).

Two of the cases the Commenter cites, *Mich. Dept. of Env’tl. Quality*, 230 F.3d 185, and *Hall*, 273 F.3d 1146, interpret CAA section 110(l), the provision governing “revisions” to plans. Neither case, however, addressed the question at issue here, i.e, what states are required to address for purposes of an infrastructure SIP submission for purposes of section 110(a)(2)(A). In those cases, the courts cited to section 110(a)(2)(A) solely for the purpose of providing a brief background of the CAA.

EPA does not believe any of these court decisions addressed required measures for infrastructure SIPs and believes nothing in the opinions addressed whether infrastructure SIP submissions must contain emission limitations or measures to ensure attainment and maintenance of the NAAQS.

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

Comment 4: The Commenter cites to 40 CFR 51.112(a), providing that “Each plan must demonstrate that the measures, rules, and regulations contained in it are adequate to provide for the timely attainment and maintenance of the national standard that it implements.” The Commenter relies on a statement in the preamble to the 1986 action restructuring and consolidating provisions in part 51, in which EPA stated that “[i]t is beyond the scope of th[is] rulemaking to address the provisions of Part D of the Act . . .” 51 FR 40656. Thus, the

Commenter contends that “the provisions of 40 C.F.R. § 51.112 are not limited to nonattainment SIPs; the regulation instead applies to Infrastructure SIPs, which are required to attain and maintain the NAAQS in all areas of a state, including those not designated nonattainment.”

Response 4: The Commenter’s reliance on 40 CFR 51.112 to support its argument that infrastructure SIPs must contain emission limits which ensure attainment and maintenance of the NAAQS is incorrect. It is clear on its face that 40 CFR 51.112 directly applies to state SIP submissions for control strategy SIPs, i.e., plans that are specifically required to attain and/or maintain the NAAQS. These regulatory requirements apply when states are developing “control strategy” SIPs under other provisions of the CAA, such as attainment plans required for the various NAAQS in Part D and maintenance plans required in section 175A. The Commenter’s suggestion that 40 CFR 51.112 must apply to all SIP submissions required by section 110 based on the preamble to EPA’s action “restructuring and consolidating” provisions in part 51, is also incorrect.⁴ 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.

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 NO₂ (portion)”), 51.80 (“Demonstration of attainment: Pb (portion)”), and 51.82 (“Air quality data (portion)”). *Id.* at 40660. Thus, the

⁴EPA 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. *See* 51 FR 40657.

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: The Commenter also references a 2006 partial approval and partial disapproval of revisions to Missouri's existing plan addressing the SO₂ NAAQS and claims it was an action in which EPA relied on section 110(a)(2)(A) and 40 CFR 51.112 to reject an infrastructure SIP. Specifically, the Commenter asserts that in that action, EPA cited section 110(a)(2)(A) as a basis for disapproving a revision to the State plan on the basis that the State failed to demonstrate the SIP was sufficient to ensure attainment and maintenance of the SO₂ 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 SO₂ NAAQS.

Response 5: EPA's partial approval and partial disapproval of revisions to restrictions on emissions of sulfur compounds for the Missouri SIP in 71 FR 12623 specifically addressed Missouri's attainment SIP submission—not Missouri's infrastructure SIP submission. It is clear from the final Missouri rule that EPA was not reviewing an initial infrastructure SIP submission, but rather reviewing proposed SIP revisions that would make an already approved SIP designed to demonstrate attainment of the NAAQS less stringent. Therefore, EPA does not agree that the 2006 Missouri action referenced by the Commenter establishes how EPA reviews infrastructure SIP submissions for purpose of section 110(a)(2)(A).

As discussed in the proposed rule, EPA finds that the Florida 2010 1-hour SO₂ infrastructure 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 2010 1-hour SO₂ NAAQS and that

the State demonstrated that it has the necessary tools to implement and enforce the 2010 1-hour SO₂ NAAQS.⁵

B. Comments on Florida SIP SO₂ Emission Limits

Comment 6: The Commenter asserts that EPA may not approve the Florida proposed SO₂ 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 that emission limits must limit the quantity, rate or concentration of emissions and must apply on a continuous basis. The Commenter states that “[e]nforceable emission limitations contained in the I-SIP must, therefore, be accompanied by proper averaging times; otherwise an appropriate numerical emission limit could allow for peaks that exceed the NAAQS and yet still be permitted since they would be averaged with lower emissions at other times.” The Commenter also cites to recommended averaging times in EPA guidance providing that SIP emissions limits, “should not exceed the averaging time of the applicable NAAQS that the limit is intended to help attain.” EPA Memorandum of Apr. 23, 2014, to Regional Air Division Directors, Regions 1 – 10, Guidance for 1-Hour SO₂ NAAQS Nonattainment Area SIP Submissions, at 22, available at https://www.epa.gov/sites/production/files/2016-06/documents/20140423guidance_nonattainment_sip.pdf. The Commenter also notes that this EPA guidance provides that “any emissions limits based on averaging periods longer than 1 hour should be designed to have comparable stringency to a 1-hour average limit at the critical emission value.”

⁵ EPA’s final action does not address CAA section 110(a)(2)(D)(i)(I) because Florida has not made a submission for these elements.

The Commenter also cites to a February 3, 2011, EPA Region 7 letter to the Kansas Department of Health and Environment regarding the need for 1-hour SO₂ emission limits in a prevention of significant deterioration (PSD) permit, an EPA Environmental Hearing Board decision rejecting use of a 3-hour averaging time for a SO₂ limit in a PSD permit, and EPA's disapproval of a Missouri SIP which relied on annual averaging for SO₂ emission rates and claims EPA has stated that 1-hour averaging times are necessary for the 2010 1-hour SO₂ NAAQS.⁶ The Commenter states, "Therefore, in order to ensure that Florida's Infrastructure SIP actually implements the SO₂ NAAQS in every area of the state, the I-SIP must contain enforceable emission limits with one-hour averaging times, monitored continuously, for large sources of SO₂." The Commenter asserts that EPA must disapprove Florida's infrastructure SIP because it fails to require emission limits with adequate averaging times.

Response 6: As explained in detail in previous responses, the purpose of the infrastructure SIP is to ensure that a state has the structural capability to implement and enforce the NAAQS and thus, additional SO₂ emission limitations to ensure attainment and maintenance of the NAAQS are not required for such infrastructure SIPs.⁷ EPA disagrees that it must disapprove the proposed Florida infrastructure SIP submission merely because the SIP does not contain

⁶ The Commenter 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 SO₂ SIP).

⁷ For a discussion on emission averaging times for emissions limitations for SO₂ attainment SIPs, see the April 23, 2014, *Guidance for 1-Hour SO₂ Nonattainment Area SIP Submissions*. As noted by the commenter, 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 SO₂ 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 taken final action to approve any specific submission of such a limit that a state has relied upon to demonstrate NAAQS attainment, and Florida has not submitted such a limit for that purpose here, so it is premature at this time to evaluate whether any emission limit in Florida's SIP is in accordance with the April 23, 2014, guidance. If and when Florida submits an emission limitation that relies upon such a longer averaging time to demonstrate NAAQS attainment, EPA will evaluate it then.

enforceable SO₂ emission limitations with 1-hour averaging periods that apply at all times, as this issue is not appropriate for resolution in this action in advance of EPA action on the State's submissions of other required SIP submissions including an attainment plan for two areas which are designated nonattainment pursuant to section 107 of the CAA.⁸ Therefore, because EPA finds Florida's SO₂ infrastructure SIP approvable without the additional SO₂ emission limitations showing attainment of the NAAQS, EPA finds the issue of appropriate averaging periods for such future limitations not relevant at this time.

Further, Commenter's citation to a prior EPA discussion on emission limitations required in PSD permits (from EPA's Environmental Appeals Board decision and EPA's letter to Kansas' permitting authority) pursuant to part C of the CAA is neither relevant nor applicable to infrastructure SIP submissions under CAA section 110. In addition, and as previously discussed, the EPA disapproval of the 2006 Missouri SIP was a disapproval relating to an attainment plan SIP submission required pursuant to part D attainment planning and is likewise not relevant to the analysis of infrastructure SIP requirements.

Comment 7: Citing to section 110(a)(1) and (a)(2)(A) of the CAA, the Commenter contends that EPA may not approve Florida's infrastructure SIP because it does not include enforceable 1-hour emission limits for sources that the Commenter claims are currently contributing to NAAQS exceedances. The Commenter asserts that emission limits are especially important for meeting the 1-hour SO₂ NAAQS because SO₂ impacts are strongly source oriented. The Commenter states that "[d]espite the large contribution from coal-fired EGUs [electricity generating units] to the State's SO₂ pollution, Florida's I-SIP lacks enforceable emissions

⁸ There are two designated nonattainment areas pursuant to CAA section 107 for the 2010 1-hour SO₂ NAAQS in Florida and the State has submitted attainment plans for the 2010 1-hour SO₂ NAAQS for sections 172, 191 and 192. EPA believes the appropriate time for examining the necessity of 1-hour SO₂ emission limits on specific sources is within the attainment planning process.

limitations applicable to its coal-fired EGUs sufficient to ensure the implementation, attainment, and maintenance of the 2010 SO₂ NAAQS.” The Commenter refers to air dispersion modeling it conducted for two power plants in Florida, the C.D. McIntosh, Jr. Power Plant and the Crist Electric Generating Plant, which are located outside of the State’s two nonattainment areas, and claims that “...the emission limitations relied on for implementation of the NAAQS in the I-SIP are insufficient to prevent exceedances of the NAAQS.” Further, the Commenter cites two court cases to support its statement that “...an agency may not ignore information put in front of it” and that thus, the Commenter contends that EPA must consider its expert air dispersion modeling submitted over the years which demonstrate the inadequacy of Florida’s rules and regulations for SO₂ emissions.” The Commenter summarizes its modeling results for the C.D. McIntosh, Jr. Power Plant and the Crist Electric Generating Plant, stating that the data predict exceedances of the standard “over wide areas of the state.” Thus, the Commenter contends that Florida’s infrastructure submissions are “substantially inadequate to attain and maintain the NAAQS which it implements as evidenced by expert air dispersion modeling demonstrating that the emission limits under the laws and regulations cited to in the SO₂ I-SIP Certification allow for exceedances of the NAAQS.” Thus, the Commenter asserts that EPA must disapprove Florida’s SIP submissions, and must establish a FIP “which incorporates necessary and appropriate source-specific enforceable emission limitations (preferably informed by modeling) on C.D. McIntosh, Jr. Power Plant and Crist Electric Generating Plant, as well as any other major sources of SO₂ pollution in the State which are not presently located in nonattainment areas and have modeled exceedances of the NAAQS.” Further, the Commenter states that “For C.D. McIntosh and Crist, enforceable emission limitations must be at least as stringent as the modeling-based

limits [provided by the Commenter] in order to protect the one-hour SO₂ NAAQS and implement, maintain, and enforce the standard in Florida.”

Response 7: As stated previously, EPA believes that the proper inquiry is whether Florida has met the basic, structural SIP requirements appropriate at the point in time EPA is acting upon the infrastructure submissions. Emissions limitations and other control measures, whether on coal-fired EGUs or other SO₂ sources, that may be needed to attain and maintain the NAAQS in areas designated nonattainment for that NAAQS are due on a different schedule from the section 110 infrastructure SIP submission. A state, like Florida, may reference pre-existing SIP emission limits or other rules contained in part D plans for previous NAAQS in an infrastructure SIP submission for purposes of section 110(a)(2)(A). For example, Florida submitted a list of existing emission reduction measures in the SIP that control emissions of SO₂ as discussed above in response to a prior comment and discussed in the proposed rulemaking on Florida’s SO₂ infrastructure SIP. These provisions have the ability to reduce SO₂ overall. Although the Florida SIP relies on measures and programs used to implement previous SO₂ NAAQS, these provisions are not limited to reducing SO₂ levels to meet one specific NAAQS and will continue to provide benefits for the 2010 1-hour SO₂ NAAQS.

Regarding the air dispersion modeling conducted by the Commenter pursuant to AERMOD for the C.D. McIntosh, Jr. Power Plant and the Crist Electric Generating Plant, EPA is not in this action making a determination regarding the air quality status in the area where these EGUs are located, and is not evaluating whether emissions applicable to these EGUs are adequate to attain and maintain the NAAQS. Consequently, the EPA does not find the modeling information relevant for review of an infrastructure SIP for purposes of section 110(a)(2)(A). When additional areas in Florida are designated under the 2010 1-hour SO₂ NAAQS, and if any

additional areas in Florida are designated nonattainment in the future, any potential future modeling submitted by the State with designations or attainment demonstrations would need to account for any new emissions limitations Florida develops to support such designation or demonstration, which at this point is unknown. While EPA has extensively discussed the use of modeling for attainment demonstration purposes and for designations,⁹ EPA has recommended that such modeling was not needed for the SO₂ infrastructure SIPs for the 2010 1-hour SO₂ NAAQS for purposes of section 110(a)(2)(A), which are not actions in which EPA makes determinations regarding current air quality status. See April 12, 2012, letters to states and 2012 Draft White Paper.¹⁰

In conclusion, EPA disagrees with the Commenter's statements that EPA must disapprove Florida's infrastructure SIP submissions because it does not establish specific enforceable SO₂ emission limits, either on coal-fired EGUs or other large SO₂ sources, in order to demonstrate attainment and maintenance with the 2010 1-hour SO₂ NAAQS at this time.

Comment 8: The Commenter alleges that the SO₂ infrastructure SIP submittal does not address sources significantly contributing to nonattainment or interfering with maintenance of the 2010 1-hour SO₂ NAAQS in other states as required by section 110(a)(2)(D)(i)(I) of the CAA, and asserts EPA must therefore disapprove the infrastructure SIP and impose a FIP. The Commenter states that "Florida's reliance on a 2012 EPA memorandum in which EPA stated that it did 'not intend to make findings that states failed to submit SIPs to comply with section 110(a)(2)(D)(i)(I)' is improper", and that such guidance contradicts the CAA. The Commenter

⁹ See for example, EPA's discussion of modeling for characterizing air quality in the Agency's August 21, 2015, final rule at 80 FR 51052 and for nonattainment planning in the April 23, 2014, *Guidance for 1-Hour SO₂ Nonattainment Area SIP Submissions*.

¹⁰ *Implementation of the 2010 Primary 1-Hour SO₂ NAAQS, Draft White Paper for Discussion*, May 2012 (2012 Draft White Paper) and a sample April 12, 2012, letter from EPA to states are available in the docket for this action.

notes that the Supreme Court disapproved the view that states cannot address section 110(a)(2)(D)(i) until EPA resolves issues related to CSAPR and that compliance with this provision is a “mandatory duty”, citing to *Homer City*, 696 F.3d 7, 37 (D.C. Cir. 2012), rev’d, No. 12-1182, slip op. at 27-28 (U.S. Apr. 29, 2014). The Commenter also highlights from Order on Petition No. VI-2014-04 at 10 (citing *EPA v. EME Homer City Generation*, 134 S.Ct. 1584, 1601 (2014) that, “[T]he Supreme Court has affirmed that the EPA is not required to provide any implementation guidance before states’ interstate transport obligation can be addressed.”

Response 8: This action does not address whether sources in Florida are significantly contributing to nonattainment or interfering with maintenance of the 2010 1-hour SO₂ NAAQS in another state as required by section 110(a)(2)(D)(i)(I) of the CAA (the good neighbor provision). Thus, EPA disagrees with the Commenter’s statement that EPA must disapprove the submitted 2010 1-hour SO₂ infrastructure SIP due to Florida’s failure to address section 110(a)(2)(D)(i)(I). In EPA’s proposed rulemaking to approve Florida’s infrastructure SIP for the 2010 1-hour SO₂ NAAQS, EPA clearly stated that it was not taking any action with respect to the good neighbor provision in section 110(a)(2)(D)(i)(I). Florida did not make a submission to address the requirements of section 110(a)(2)(D)(i)(I) for the 2010 1-hour SO₂ NAAQS, and thus there is no such submission upon which EPA proposed to take action on under section 110(k) of the CAA. Similarly, EPA disagrees with the Commenter’s assertion that EPA cannot approve other elements of an infrastructure SIP submission without the good neighbor provision. There is no basis for the contention that EPA has triggered its obligation to issue a FIP to address the good neighbor obligation under section 110(c), as EPA has neither found that Florida failed to timely submit a required 110(a)(2)(D)(i)(I) SIP submission for the 2010 1-hour SO₂ 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 1-hour SO₂ 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 Florida's infrastructure SIP submissions for the 2010 1-hour SO₂ 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 Florida had made a SIP submission for section 110(a)(2)(D)(i)(I) of the CAA for the 2010 1-hour SO₂ 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 Florida's infrastructure SIP submission for the 2010 1-hour SO₂ NAAQS.

EPA has no obligation at this time to issue a FIP pursuant to 110(c)(1) to address Florida's obligations under section 110(a)(2)(D)(i)(I) until EPA first either finds Florida failed to make a required submission addressing the element or the State has made such a submission but it is incomplete, or EPA disapproves a SIP submission addressing that element. Until either occurs, EPA does not have the obligation 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 Florida to address 110(a)(2)(D)(i)(I) for the 2010 1-hour SO₂ NAAQS at this time.

III. Final Action

EPA is taking final action to approve Florida's infrastructure submissions submitted on June 3, 2013, and supplemented on January 8, 2014, for the 2010 1-hour SO₂ NAAQS for the above described infrastructure SIP requirements. EPA is taking final action to approve Florida's infrastructure SIP submissions for the 2010 1-hour SO₂ NAAQS because the submissions are consistent with section 110 of the CAA.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (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, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. section 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United

States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [**insert date 60 days after date of publication 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 may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 14, 2016.

V. Anne Heard,

Acting Regional Administrator,

Region 4.

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 K—Florida

2. Section 52.520(e), is amended by adding the entry “110(a)(1) and (2) Infrastructure Requirements for the 2010 1-hour SO₂ National Ambient Air Quality Standards” at the end of the table to read as follows:

§ 52.520 Identification of plan.

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(e) * * *

EPA-Approved Florida Non-regulatory Provisions

Provision	State effective date	EPA approval date	Federal Register notice	Explanation
**	**	*	*	*
110(a)(1) and (2) Infrastructure Requirements for the 2010 1-hour Primary SO ₂ National Ambient Air Quality Standards	6/3/2013	[Insert date of publication in <u>Federal Register</u>]	[Insert Federal register citation]	With the exception of section for provisions relating to 110(a)(2)(D)(i)(I) (prongs 1 and 2) concerning interstate transport requirements

[FR Doc. 2016-23292 Filed: 9/29/2016 8:45 am; Publication Date: 9/30/2016]