UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: January 19, 2021

Mr. Dennis David Altman
Law Office
15 E. Eighth Street
Suite 200-W
Cincinnati, OH 45202

Ms. Brenda Mallory
U.S. Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Avenue, N.W. (MC2344a)
Washington, DC 20460-0000

Mr. Justin Derek Newman
Law Office
15 E. Eighth Street
Suite 200-W
Cincinnati, OH 45202

Ms. Megan Claire Wachspress
Sierra Club
Environmental Law Program
2101 Webster Street
Suite 1300
Oakland, CA 94612

Re: Case No. 21-3057, *Sierra Club, et al v. EPA, et al*
Originating Case No. : EPA-R05-OAR-2020-055

Dear Counsel,

This case has been docketed as number **21-3057** with the caption that is enclosed on a separate page. Please check the caption for accuracy and notify the Clerk's Office if any corrections should be made.

Before preparing any documents to be filed, counsel are strongly encouraged to read the Sixth Circuit Rules at www.ca6.uscourts.gov. If you have not established a PACER account and registered with this court as an ECF filer, you should do so immediately.

The following forms should be downloaded from the web site and filed with the Clerk's office by **February 2, 2021**. If payment did not accompany the petition for review, the $500 filing fee should also be paid by this date.

	Appearance of Counsel
Petitioner:	Disclosure of Corporate Affiliations
	Application for Admission to 6th Circuit Bar (if applicable)
Respondent:	Appearance of Counsel

Additionally, the respondent shall file the administrative record or certified list by **March 01, 2021**. Fed. R. App. P. 17(a).

More specific instructions are printed on each form. These deadlines are important - if the initial forms are not timely filed and necessary fees paid, the case will be dismissed for want of prosecution. If you have questions after reviewing the forms and the rules, please contact the Clerk's office for assistance.

Sincerely yours,

s/C. Anthony Milton
Case Manager
Direct Dial No. 513-564-7026

Enclosure

OFFICIAL COURT OF APPEALS CAPTION FOR 21-3057

SIERRA CLUB; OHIO ENVIRONMENTAL COUNCIL; DONNA BALLINGER; MARILYN WALL

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ANDREW WHEELER, Administrator, U.S. Environmental Protection Agency

Respondents

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SIERRA CLUB, OHIO ENVIRONMENTAL COUNCIL, DONNA BALLINGER, and MARILYN WALL

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, Administrator, U.S. Environmental Protection Agency

Respondents.

No. _____

PETITION FOR REVIEW

Pursuant to Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1), Rule 15 of the Federal Rules of Appellate Procedure, and Sixth Circuit Rule 15, Sierra Club, Ohio Environmental Council, Donna Ballinger, and Marilyn Wall (collectively, "Petitioners") file this petition for review of the U.S. Environmental Protection Agency's ("EPA") rule entitled *Air Plan Approval; Ohio; Technical Amendment*, which was published in the Federal Register at 85 Fed. Reg. 73,636 (Nov. 19, 2020).

DATED: January 18, 2021

Respectfully Submitted,

/s/ Megan Wachspress
Megan Wachspress
Sierra Club
2101 Webster St., Suite 1300
Oakland, CA 94612
(510) 646-0681
megan.wachspress@sierraclub.org

Counsel for Sierra Club and Ohio Environmental Council

/s/ D. David Altman
D. David Altman
Justin D. Newman
AltmanNewman Co. LPA
15 E. 8th St., Suite 200W
Cincinnati, OH 45202
Tel: (513) 721-2180
daltman@environlaw.com
jnewman@environlaw.com

Counsel for Marilyn Wall and Donna Ballinger

CERTIFICATE OF SERVICE

I hereby certify that I will have served the foregoing Petition for Review and by sending a copy by certified mail, return receipt requested to each of the following addresses on the 19th day of January, 2021.

Andrew Wheeler
Administrator
Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Correspondence Control Unit
Office of General Counsel (2311)
United States Environmental Protection Agency
William Jefferson Clinton Federal Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C., 20460

David Fotouhi
Acting General Counsel
U.S. Environmental Protection Agency
William Jefferson Clinton Building 1200
Pennsylvania Ave., N.W.
Washington, DC 20460
fotouhi.david@epa.gov

Jeffrey A. Rosen
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Kurt Thiede
Administrator
U.S. EPA Region 5
77 W. Jackson Blvd.
Chicago, IL 60604
thiede.kurt@epa.gov

Dated: January 18, 2021

/s/ Megan Wachspress
Megan Wachspress

Counsel for Petitioners

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 January 19, 2021. 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

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

Dated: October 21, 2020.

John Busterud,

Regional Administrator, Region IX.

For reasons set out in the preamble, EPA amends 40 CFR part 52, chapter I, to read 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 F—California

■ 2. Section 52.220 is amended by adding paragraph (c)(544) to read as follows:

§ 52.220 Identification of plan-in part.

* * * * *

(c) * * *

(544) The following regulations were submitted on April 5, 2019 by the Governor's designee as an attachment to a letter dated April 3, 2019.

(i) *Incorporation by reference.*

(A) Calaveras County Air Pollution Control District.

(*1*) Rule 428, ''NSR Requirements for New and Modified Major Sources in Nonattainment Areas,'' adopted on March 12, 2019.

(*2*) [Reserved]

(B) Mariposa County Air Pollution Control District.

(*1*) Regulation XI, ''NSR Requirements for New and Modified Major Sources in the Mariposa County Air Pollution Control District,'' adopted on March 12, 2019.

(*2*) [Reserved]

(ii) [Reserved]

* * * * *

■ 3. Section 52.281 is amended by revising paragraph (d) to read as follows:

§ 52.281 Visibility protection.

* * * * *

(d) The provisions of § 52.28 are hereby incorporated and made part of the applicable plan for the State of California, except for the air pollution control districts listed below. The provisions of § 52.28 remain the applicable plan for any Indian reservation lands, and any other area of Indian country where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, located within the State of California, including any such areas located in the air pollution control districts listed below.

(1) Monterey County air pollution control district,

(2) Sacramento County air pollution control district,

(3) Calaveras County air pollution control district, and

(4) Mariposa County air pollution control district.

* * * * *

[FR Doc. 2020–23922 Filed 11–18–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2020–055; FRL–10016–32–Region 5]

Air Plan Approval; Ohio; Technical Amendment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing the removal of the air pollution nuisance rule from the Ohio State Implementation Plan (SIP) using a Clean Air Act (CAA) error correction provision. EPA has determined that this rule was not relied upon by Ohio to demonstrate implementation, maintenance or enforcement of any national ambient air quality standard (NAAQS). Upon the effective date of this action, the nuisance rule will no longer be part of the Ohio SIP.

DATES: This final rule is effective on December 21, 2020.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2020–0055. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, 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 through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19. We recommend that you telephone Rachel Rineheart, Environmental Engineer, at (312) 886–7017 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Rachel Rineheart, Environmental Engineer, Air Permits Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–7017, *rineheart.rachel@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

I. What is the background for this action?

The CAA was first enacted in 1970. Section 110(a)(1) required each state to submit to EPA a SIP that provided for the implementation, maintenance and enforcement of the NAAQS. In the 1970s and early 1980s, thousands of state and local agency regulations were submitted to EPA for incorporation into SIPs, ostensibly to fulfill the new Federal requirements. In many cases, states submitted entire regulatory air pollution programs, including many elements not required by the CAA. Due to time and resource constraints, EPA's review of these submittals focused primarily on the rules addressing the new substantive requirements of the CAA, and we approved many other

elements into the SIP with minimal review. We now recognize that some of these elements may be appropriate for state and local agencies to adopt and implement, but should not become federally enforceable SIP requirements; these include rules that prohibit air pollution nuisances. Such rules generally have no connection to the purposes for which SIPs are developed and approved, namely the implementation, maintenance, and enforcement of the NAAQS.

Ohio rule AP–2–07, "Air pollution nuisances prohibited," was approved by EPA into the Ohio SIP on April 15, 1974. *See* 39 FR 13542. Subsequently, Ohio amended and renumbered the rule as OAC 3745–15–07 and submitted it as a revision to the SIP. EPA approved the amended rule on August 13, 1984. *See* 49 FR 32182. OAC 3745–15–07 prohibits the "emission or escape into the open air from any source or sources whatsoever, of smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, odors, or any other substances or combinations of substances, in such manner or in such amounts as to endanger the health, safety or welfare of the public, or cause unreasonable injury or damage to property."

On March 23, 2020, EPA proposed, under the authority of section 110(k)(6) of the CAA, to remove Ohio's nuisance rule from the Ohio SIP because it does not have a reasonable connection to the attainment and maintenance of the NAAQS and EPA erred in approving it as part of the Ohio SIP.

II. Response to Comments Received on the Proposed Rule

EPA received some comments that were political in nature or that where otherwise beyond the scope of this action (*i.e.,* related to climate change, water quality, or other non-NAAQS related issues), and EPA will not be responding to these comments. Adverse comments that were germane to the action and EPA's response to those comments are summarized below.

A. Extension of Comment Period

EPA's notice of proposed rulemaking (NPRM) was published in the **Federal Register** on March 23, 2020, with a 30-day comment period ending April 22, 2020. *See 85 FR 16309.* The timing of publication coincided with the Ohio Department of Health Director's Stay at Home Order, issued on March 22, 2020. EPA received four requests for an extension to the public comment period citing difficulties in communicating with and organizing interested parties, limited access to supporting information, and lack of childcare due to the COVID–19 pandemic and the Stay at Home Order. Three requests sought a 60-day extension and one request sought an extension to May 13, 2020. On April 22, 2020, EPA granted a 30-day extension to the comment period to May 22, 2020. *See 85 FR 22378.* No additional requests for extension were received.

B. Comments Supporting the Removal of Ohio's Nuisance Rule From the SIP

EPA received comments in support of EPA's NPRM from the Ohio Chamber of Commerce, the Ohio Chemistry Technology Council, The Ohio Manufacturers' Association, API Ohio, and the Ohio Oil and Gas Association.

C. Comments Opposing the Removal of Ohio's Nuisance Rule From the SIP

EPA received comments opposing the removal of the Ohio nuisance rule from the Sierra Club, the Ohio Environmental Council, Ohio Citizen Action, Altman Newman Co. LPA, the National Resources Defense Council, and more than 1800 individual commenters who submitted their comments as part of a letter-writing campaign. The following discussion provides a summary of the comments received and EPA's response to each comment.

Comment 1: Commenters had requested a 60-day extension of the April 22, 2020, deadline for comments, while EPA granted a 30-day extension until May 22, 2020. The commenters state: "During the revised comment period there has been no opportunity for neighbors and community groups to learn about this action, to meet face-to-face to discuss its implications, or to even seek public records because public offices have been closed and unable to produce documents. Furthermore, the press has been understandably focused on the immediately life-threatening pandemic. These circumstances have had a particularly devastating impact on the rights of poor and minority communities to learn of EPA's proposed action and to comment on citizen concerns."

Response: SIPs are rulemaking actions under the Administrative Procedure Act, which does not specify a period for public comment. However, a 30-day period is consistent with most SIP actions proposed by EPA and with the intent of Congress as reflected in CAA section 307(h) (42 U.S.C. 7607(h)), which governs certain Federal administrative proceedings. It should be noted that EPA is not required to specifically notify any particular entity of its rulemaking actions; notification of all parties is accomplished through publications in the **Federal Register**. EPA published the NPRM to remove Ohio's nuisance rule in the **Federal Register** and initially provided 30 days for public comment. As stated previously, the publication of EPA's NPRM coincided with the Stay at Home Order in Ohio due to the COVID–19 pandemic. Based on the generalized concerns identified by commenters, including difficulty communicating with interested parties and issues with childcare, EPA granted a 30-day extension of the comment period. Although generally claiming, for example, that during the extended comment period there has been "no opportunity" to "seek public records because public offices have been closed," the commenters did not identify any public records that would have been sought or explained how such records might have been relevant, and have made no showing of any attempt to obtain any such records. Moreover, EPA's original NPRM and NPRM extension did not limit the ability of any interested party to request an additional extension based on updated or more detailed concerns, but no additional request for extension was received after the NPRM 30-day extension.

Comment 2: EPA cannot lawfully eliminate Ohio Admin. Code 3745–15–07 from Ohio's State Implementation Plan through the CAA's error correction mechanism.

Response: Section 110(k)(6) of the CAA provides EPA with the authority to make corrections to actions that are subsequently found to be in error. *Alabama Environmental Council* v. *Administrator,* 711 F.3d 1277, 1286 (11th Cir. 2013) ("110(k)(6) provides an avenue for correcting a SIP revision approved in error"); see also *Ass'n of Irritated Residents* v. *EPA,* 790 F.3d 934, 948 (9th Cir. 2015) (110(k)(6) is a "broad provision" enacted to provide the EPA with an avenue to correct errors). The key provisions of section 110(k)(6) for present purposes are that the Administrator has the authority to "determine" when a SIP approval was "in error," and when the Administrator does so, may then revise the SIP approval "as appropriate," in the same manner as the prior action, and do so without requiring any further submission for the state. *Id.* at 1288. Moreover, CAA section 110(k)(6) "confers discretion on the EPA to decide if and when it will invoke the statute to revise a prior action." *Id.;* 790 F.3d at 948 (section 110(k)(6) grants

"EPA the discretion to decide when to act pursuant to that provision").[1]

While CAA section 110(k)(6) provides EPA with the authority to correct its own "error," nowhere does this provision or any other provision in the CAA define what qualifies as "error." Thus, EPA believes that the term should be given its plain language, everyday meaning, which includes all unintentional, incorrect or wrong actions or mistakes.

EPA has used CAA section 110(k)(6) as authority to make substantive corrections to remove a variety of provisions from SIPs that are not related to the attainment or maintenance of NAAQS or any other CAA requirement. *See, e.g.,* "Approval and Promulgation of Implantation Plans; Kentucky: Approval of Revisions to the State Implementation Plan," 75 FR 2440 (January 15, 2010) (correcting the SIP by removing a provision, approved in 1982, used to address hazardous or toxic air pollutants); "Approval and Promulgation of Implementation Plans; New York," 73 FR 21546 (April 22, 2008) (issuing a direct final rule to correct a prior SIP by removing a general duty "nuisance provision" that had been approved in 1984); "Correction of Implementation Plans; American Samoa, Arizona, California, Hawaii, and Nevada State Implementation Plans," 63 FR 34641 (June 27, 1997) (correcting five SIPs by deleting a variety of administrative provisions concerning variances, hearing board procedures, and fees that had been approved during the 1970s).

Comment 3: The proposed rule lacks any basis for the assertion that the air pollution nuisance rule in Ohio's SIP was approved in error and thus fails to meet the plain text requirements for application of 110(k)(6).

Response: The NPRM published on March 23, 2020, 85 FR 16309, states that EPA is "proposing to remove Ohio's nuisance rule from the Ohio SIP because it does not have a reasonable connection to the attainment and maintenance of the NAAQS," and that the "prior approval of OAC 3745–15–07 into the Ohio SIP was in error." In addition, the NPRM stated that the Ohio Environmental Protection Agency (Ohio EPA) had confirmed that Ohio did not rely on and did not intend to rely on the provision for purposes of attainment or maintenance of the NAAQS.

CAA section 110(k)(6) does not define the term "error." EPA believes that the term should be given its plain language, common meaning, such that an error is a mistake or an incorrect, wrong, or inaccurate action. Under section 110(k)(6) EPA must make an error determination and provide the "the basis thereof." There is no indication that this is a substantial burden for the Agency to meet. To the contrary, the requirement is met if EPA clearly articulates the error and the basis thereof. *Ass'n of Irritated Residents,* 790 F.3d at 948; *see also Alabama Environmental Council,* 711 F.3d at 1287–1288 (EPA must "articulate an 'error' and provide 'the basis' " of its error determination, citing with approval EPA's error articulation in another EPA action at 76 FR 25178 (May 3, 2011)).

Here, EPA articulated its error and provided the basis thereof: SIPs provide for the implementation, maintenance, and enforcement of the NAAQS; the Ohio nuisance rule is not associated with the implementation, maintenance, or enforcement of the NAAQS; and EPA's previous approval in the SIP of the rule was erroneous. EPA's exclusion from the SIP of a nuisance provision unrelated to attainment and maintenance of the NAAQS is consistent with previous Agency practice. EPA has removed nuisance provisions from several SIPs, including those for the State of Michigan, 64 FR 7790, Commonwealth of Kentucky (Jefferson County portion), 66 FR 53657, and the State of Nevada, 69 FR 54006. Additionally, EPA has issued final rules declining to approve nuisance provisions into SIPs. (See 45 FR 73696, 46 FR 11843, 46 FR 26303 and 63 FR 51833.)[2]

Comment 4: EPA's approval of the Ohio nuisance rule was purposeful and not in error as demonstrated by the August 13, 1984, 49 FR 32182, approval of revisions to the nuisance rule and subsequent comments from EPA on title V permits issued in Ohio which state that the nuisance rule is an applicable requirement under the SIP. Furthermore, inclusion of the nuisance rule is so integral to the SIP that it has been included in every title V permit issued and every permit issued by Ohio since adoption.

Response: The permit comments related to the Ohio nuisance rule are correct in that the rule is currently in the SIP and therefore an "applicable requirement" under the title V operating permit program. Confirmation of the fact that the rule is part of the SIP in the permitting process has no bearing on the appropriateness of that rule for inclusion in the SIP. The determination of whether a state rule is appropriate for inclusion in the SIP is beyond the scope of the permitting process. Inclusion of the Ohio nuisance rule in state permits does not demonstrate that the rule is integral to the SIP which is limited in scope by the CAA to the implementation, maintenance, and enforcement of the NAAQS. To the contrary, as noted, the Ohio EPA indicated that the nuisance rule was not intended to address the attainment or maintenance of the NAAQS.

The fact that EPA approved a revision to the Ohio nuisance rule in 1984 does not make approval any less in error; rather, it merely indicates that EPA unfortunately repeated its error. Nor is it material whether the error was intentional (or, per the commenters, "purposeful") or inadvertent. It was erroneous for EPA to approve, as part of the SIP, the non-NAAQS related nuisance rule, and EPA has the authority under section 110(k)(6) to correct that error.

Comment 5: States have the right to create regulations that are more stringent than the Federal requirements.

Response: EPA does not dispute a state's right to create requirements that, as a matter of state law, are more stringent than the Federal requirements. Congress affirmed this principle in section 116 of the CAA. This does not, however, alter the fact that the requirements contained in SIP provisions are limited in scope by section 110(a) of the CAA. SIPs must provide for the implementation, maintenance, and enforcement of the NAAQS. Ohio's nuisance rule has no nexus to these statutorily prescribed requirements.

Comment 6: The record for the proposed action states that EPA was taking action to promote the novel doctrine of "regional consistency." Such a doctrine completely contradicts the well-established principle that SIPs are tailored by states to meet their specific

[1] CAA section 110(k)(6) was added to the CAA as part of the CAA Amendments of 1990. Prior to the addition of that subsection, there was no express provision in section 110 for EPA to correct erroneous actions, on its own initiative and without further State action. Indeed, prior to the addition of 110(k)(6), the United States Court of Appeals for the Third Circuit had held that EPA lacked the authority to modify a SIP to correct its mistakes, unless it followed the then-existing revision procedure involving State review and other action. *Concerned Citizens of Bridesburg* v. *EPA,* 836 F.2d 777 (1987). Although there is no statement in the legislative history of the CAA Amendments of 1990 that Congress specifically responded to *Concerned Citizens* in enacting 110(k)(6), it is telling that the addition 110(k)(6) effectively overruled that decision.

[2] Moreover, it is EPA's longstanding position that measures to control non-criteria pollutants may not legally be made part of the SIP. See February 9, 1979, memorandum "Status of State/Local Air Pollution Control Measures Not Related to NAAQS," from Michael A. James, Associate General Counsel Air, Noise and Radiation Division.

air pollution needs and desired protections.

Response: EPA believes that the commenter's reference to "the record" refers to a January 30, 2020, email from John Mooney, Acting Director, Air and Radiation Division, EPA, Region 5, to Robert Hodanbosi, Chief, Air Pollution Control, Ohio EPA (January email) that was placed in the docket for this rulemaking. It notes that similar provisions had already been removed from the SIPs of other Region 5 states, "because states did not rely on those provisions for attainment and maintenance of the NAAQS." The purpose of the email was to inquire whether Ohio had relied on its nuisance rule in attainment and maintenance of the NAAQS before proceeding with an error correction. The reference in the January email to other state actions merely notes that EPA has reached a similar conclusion in other rulemaking actions.

Comment 7: The public cannot precisely tell what the question asked regarding Ohio EPA's reliance on the nuisance rule for "attainment" or "maintenance" in the January email means.

Response: The January email and the Ohio EPA response were included in the docket for the proposed rulemaking. The January email was clear in its request that Ohio EPA confirm that it had not relied upon the nuisance rule in any aspect related to the attainment or maintenance of a NAAQS. In Ohio EPA's response, it specifically states that it had not relied on the nuisance rule for "SIP planning, nonattainment designations, redesignation requests, maintenance plans, and determination of nonattainment areas or their boundaries." EPA finds that Ohio EPA clearly understood the question being asked and clearly identified what was meant by "attainment" and "maintenance" in its response to EPA.

Comment 8: Commenters provided a declaration from William M. Auberle, a former official with the Regional Air Pollution Control Agency (RAPCA). Mr. Auberle states that he has direct knowledge of the inclusion of the Ohio nuisance rule in the Ohio SIP, that the nuisance rule is an important regulatory tool in achieving and maintaining the NAAQS, and that he personally used the nuisance rule while an official with RAPCA as an enforcement tool for achieving and maintaining the NAAQS.

Response: RAPCA is a bureau of the Division of Environmental Health within Public Health—Dayton and Montgomery County. It is a county agency that contracts with the Ohio EPA to enforce state and local air pollution control regulations in a six-county region of Ohio. EPA does not dispute that state and local agencies may have used the nuisance rule to achieve reductions in criteria pollutants or the importance of the rule as a tool for local authorities in the protection of public health and welfare. However, using the nuisance rule to achieve criteria pollutant reductions is not equivalent to relying on the rule for SIP purposes, which may include SIP planning, nonattainment designations, redesignation requests, maintenance plans, and determination of nonattainment areas or their boundaries. Furthermore, Ohio EPA, the state agency responsible for development and implementation of the SIP, has stated that it did not find "any instances of the nuisance rule, OAC 3745–15–07, being relied upon, or intended to be relied upon, for attainment or maintenance of any NAAQS."

Comment 9: Congress intended citizen suits to be an integral part of CAA enforcement, including SIP enforcement. The NPRM ignores the important role of citizen suits in CAA enforcement.

Response: Congress limited the scope of SIPs required under section 110 of the CAA to the implementation, maintenance, and enforcement of the NAAQS. The purpose of this rulemaking action is to remove OAC 3745–15–07 from the Ohio SIP because it does not support such implementation, maintenance, and enforcement. This rulemaking action does not invalidate the Ohio law or affect its applicability to Ohio sources. Facilities located in Ohio are still subject to the state nuisance rule. While removal of this rule from the SIP would preclude its enforcement in Federal courts, it has no impact on the authority to bring citizen suits in state courts under state law.

Comment 10: Commenters state that the NPRM would harm already vulnerable Ohioans by eliminating an important environmental justice tool. Commenters also raise concerns with the potential impact on other sensitive populations such as children, the elderly, and individuals with various health issues including respiratory illnesses.

Response: The purpose of this rulemaking action is to remove OAC 3745–15–07 from the Ohio SIP because it is not related to the implementation, maintenance, and enforcement of the NAAQS. This rulemaking action does not invalidate the Ohio law or affect its applicability to Ohio sources. Facilities located in Ohio are still subject to the state nuisance rule. EPA supports programs and activities that promote enforcement of health and environmental statutes in areas with minority populations and low-income populations and the protection of children, the elderly, and other vulnerable populations.

Comment 11: Several commenters note recent studies linking particulate matter pollution to an increased incidence of COVID–19 infection and the potential for increased adverse outcomes in areas with higher levels of air pollution. Commenters state that considering the current pandemic, EPA should not be relaxing air pollution requirements at this time.

Response: The purpose of this rulemaking action is to remove OAC 3745–15–07 from the Ohio SIP because it is not an element of a plan for the implementation, maintenance, and enforcement of the NAAQS. Consideration of the impacts of air pollution on COVID–19 cases is beyond the scope of section 110 of the CAA and, thus, beyond the scope of this rulemaking. Furthermore, this rulemaking action does not invalidate the Ohio nuisance law or affect its applicability to Ohio sources, which remain subject to the rule as a matter of state law.

Comment 11: The following comment was made by over 1800 individuals through a letter-writing campaign.

"I oppose the rollback of the nuisance provision of Ohio's Clean Air Act regulations.

The nuisance provision ensures that threats to Ohioans' health and safety are prohibited, no matter what, and allows Ohio residents to take local pollution problems into their own hands and protect their communities by taking polluters to court. Without this provision, it will be more difficult for Ohioans to address local pollution problems.

Eliminating this provision also destroys an important tool that gives both regulators and Ohio residents flexibility to address serious health concerns based on new scientific developments."

Response: The purpose of this rulemaking action is to remove OAC 3745–15–07 from the Ohio SIP because it is not an element of a plan for the implementation, maintenance, and enforcement of the NAAQS. This rulemaking action does not invalidate the Ohio nuisance law, affect its applicability to Ohio sources or preclude citizen suits in state court.

III. What action is EPA taking?

EPA has determined that OAC 3745–15–07 was not relied upon by Ohio to

demonstrate the implementation, maintenance, or enforcement of the NAAQS. Consequently, EPA finds that its prior approval of OAC 3745–15–07 into the Ohio SIP was in error. To correct this error, EPA is removing OAC 3745–15–07 from the approved Ohio SIP pursuant to section 110(k)(6) of the CAA, and codifying this removal by revising the appropriate paragraph under 40 CFR part 52, subpart KK, 52.1870 (Identification of Plan).

IV. Incorporation by Reference

In this document, EPA is amending regulatory text that includes incorporation by reference. As described in the amendments to 40 CFR part 52 set forth below, EPA is removing provisions of the EPA-Approved Ohio Regulations from the Ohio SIP, which is incorporated by reference in accordance with the requirements of 1 CFR part 51. EPA has made, and will continue to make the SIP generally available through *www.regulations.gov* and at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because it is not a significant regulatory action under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 19, 2021. 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: October 26, 2020.

Kurt Thiede,

Regional Administrator, Region 5.

For reasons set out in the preamble, 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.*

§ 52.1870 [Amended]

■ 2. In § 52.1870, the table in paragraph (c) is amended by removing the entry for "3745–15–07" under "Chapter 3745–15 General Provisions on Air Pollution Control".

[FR Doc. 2020–24065 Filed 11–18–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2019–0127; FRL–10014–90–Region 9]

Air Plan Approval; California; Sacramento Metropolitan Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve revisions to the Sacramento Metropolitan Air Quality Management District (SMAQMD) portion of the California State Implementation Plan (SIP). These revisions concern emissions of volatile organic compounds (VOCs) from the surface coating operations of plastic parts and products. We are approving a local rule to regulate these emission sources under the Clean Air Act (CAA or the "Act"), and we are approving a negative