

VIA EMAIL

Ohio Environmental Protection Agency, DAPC Lazarus Government Center
ANR Comments
P.O. Box 1049
Columbus, Ohio 43216-1049
DAPC-Comments@epa.ohio.gov

October 6, 2025

RE: Comments regarding the draft Request for Removal of Ohio Administrative Code (OAC) Rule 3745-15-07, "Air Pollution Nuisances Prohibited" From Ohio's SIP

Comments of Donna Ballinger, Marilyn Wall, Ohio Environmental Council, Sierra Club, and Case Western Reserve University Environmental Law Clinic.

The proposed removal of the Ohio Air Nuisance Rule ("ANR") from Ohio's approved State Implementation Plan ("SIP") effectively conceals or dilutes emissions of air pollutants that otherwise would be subject to regulation under the Clean Air Act's ("CAA") national ambient air quality standards ("NAAQS"). Allowing these emissions to escape the technology that would otherwise control or minimize them and allowing these escaping nuisance emissions to particularly deteriorate the lives of those who live near the fenceline of a polluting facility invites the wholesale circumvention of the requirements of the CAA.

That is why the undersigned individuals, community groups, and environmental and public interest organizations ("Commenters") submit these comments in opposition to the Ohio Environmental Protection Agency's ("OEPA") draft Request for Removal of Ohio Administrative Code ("OAC") Rule 3745-15-07, "Air Pollution Nuisances Prohibited," from Ohio's approved SIP. OAC 3745-15-07, often referred to as the "air nuisance rule," or the "ANR," must remain in Ohio's SIP because it is the most effective tool available to Ohio citizens to combat exposure to pollutants—such as smoke, ashes, fumes, gases, vapors, and acids—that are harmful to their health and that damage their property, when government fails to protect people from air violations. The ANR is particularly imperative to those living in the fenceline communities that

immediately surround pollution sources.¹ See, e.g., [*Sierra Club v. United States EPA*, 60 F.4th 1008, 1018 \(6th Cir.2023\)](#) (recognizing that citizen suits are meant to increase enforcement of public laws like the CAA when “the government lacks the resources or will to handle the entire task.”).

These comments are provided against the backdrop of (1) the USEPA’s 2020 ***polluter-driven unlawful removal*** of the ANR from Ohio’s SIP after nearly 50 uninterrupted years and (2) USEPA’s ***law-and fact-driven reinstatement*** of the ANR into Ohio’s SIP in 2025. In 2020, USEPA unilaterally removed the ANR from Ohio’s SIP based solely on a strategy suggested to it by a law firm representing an Ohio company that, at that time, was facing an ANR claim. An appeal to the Sixth Circuit by some of the undersigned brought to light the fallacies of the factually and legally unsupported bases provided to USEPA by industry attorneys. It also brought to light the true history, purpose, and use of the ANR as a federally-enforceable Clean Air Act (CAA) enforcement mechanism. The Sixth Circuit appeal resulted in USEPA’s agreement to a remand of the ANR removal back to USEPA.

In its January 2025 reinstatement of the ANR, USEPA admitted that its 2020 ANR removal was deficient, in part because USEPA “failed to adequately consider” facts “indicating the reliance on the ANR to enforce the NAAQS.” 90 Fed. Reg. 6811, 6815 (Jan. 21, 2025). USEPA further noted that “[a]s a number of courts have recognized, Congress intended citizen suits under the CAA to be an important enforcement mechanism within the broader protective scheme of the CAA.” *Ibid.* USEPA even specifically acknowledged Ohio’s own use of the ANR in 2021 to enforce the NAAQS. After a detailed evaluation of the *State of Ohio v. Republic Steel* case,² USEPA concluded that the “State of Ohio used the ANR to ensure the Republic Steel Facility complies with the lead NAAQS—in other words, to enforce the lead NAAQS.” *Id.* at 6816-17. In short, USEPA recognized and corrected its own errors in the face of undisputable facts and law.

OEPA is once again at the same crossroads where it went down the wrong path last time. OEPA can be the health and environmental guardian it is supposed to be for

¹ The significance of the ANR, its history and application as a key avenue of recourse for fenceline communities, and the real-world harm to Ohio’s most vulnerable populations from the USEPA’s legally improper action in 2020 to remove the ANR from Ohio’s SIP is detailed in the April 24, 2024 comment letter submitted by Marilyn Wall, Donna Ballinger, and other commenters to the USEPA (see Exhibit 1). That letter urged USEPA to protect the public by restoring the ANR to Ohio’s SIP, which USEPA ultimately did. See 90 Fed. Reg. 6811 (Jan. 21, 2025).

² *State of Ohio v. Republic Steel*, Case No. 2021CV00949 (Stark County, Ohio).

all Ohioans³ by following the law—including the Ohio Constitution, directly on-point Sixth Circuit authority and USEPA interpretations, and the clear requirements of the federal CAA—and withdrawing its draft ANR removal request and keep the ANR in Ohio’s SIP. Or, OEPA can disregard the health and welfare of the most vulnerable Ohioans—by ignoring all of the relevant law, ignoring all of the history of the ANR, and ignoring all 50 years of the ANR’s application—and submit its request to remove the ANR from Ohio’s SIP.

The law should guide the conscience of Ohio’s decision makers. OEPA cannot, legally, seek to remove the ANR from Ohio’s SIP in the manner proposed. As detailed in these comments, an unconstitutional statutory mandate (HB 96) neither requires nor allows OEPA to ignore relevant law and undisputed facts in order to seek removal of the ANR. Even if HB 96 were not unconstitutional, OEPA cannot move forward because it has not made the showing required under the CAA before a revision to any SIP can be approved.

Further, OEPA’s stated intention to maintain the ANR as part of state regulations and enforce it “where appropriate” is an illusory reassurance, at best. First, the ANR is the deterrent to Ohio’s failure to exercise its duty. Second, over the years OEPA has proven itself unable, and often unwilling, to take effective enforcement action against the worst ANR offenders. Third, even if OEPA were to attempt to do so in the future, HB 96—in a second unconstitutional provision—places significant limits on OEPA’s ability to enforce the ANR (and all other laws, regulations, permits, etc. for which OEPA has authority). See, revisions to RC 3704.01(H), 3704.09(B)-(C), 3704.031(B).⁴ These restrictions include prohibiting OEPA from using community air monitoring data as evidence in any type of enforcement and prohibits the Director from conducting community air monitoring.⁵ Such strangleholds on OEPA’s ANR-related enforcement capabilities underscore the importance and necessity of citizen enforcement. But, the ANR is not enforceable by Ohio residents under state law, only under federal law. Now more than ever, Ohioans need the ANR to remain federally enforceable for citizens under the CAA in order to be able to protect Ohio families, communities, and

³ According to OEPA’s Mission and Values statement, OEPA “is a trusted leader and environmental steward using innovation, quality service and public involvement to ensure a safe and healthy environment for all Ohioans.” <https://epa.ohio.gov/about/mission-and-values>

⁴ These revisions can be seen in the text of HB 96, at pages 1432-1433, 1448, and 1449. https://search-prod.lis.state.oh.us/api/v2/general_assembly_136/legislation/hb96/07_EN/pdf/

⁵ Community air monitoring is broadly defined as any measurement or quantification of the concentrations of air contaminants.

public health, especially when neither USEPA nor OEPA are able to or willing to take action.

I. The significance of the ANR to fenceline communities.

Appreciating the significance of the ANR may be challenging for those fortunate enough to live out of reach of direct emissions from an industrial facility. But, for people like Commenter Donna Ballinger—whose efforts led to the Sixth Circuit remand decision—living just a few hundred feet away from an iron and steel plant in Middletown, Ohio (the Middletown Works plant) is a daily reminder of the importance of the ANR.

The Middletown Works plant is Ms. Ballinger's neighbor. It consists of about 40 regulated air pollution sources. Ms. Ballinger's Middletown neighborhood is a fenceline community that takes the brunt of the air pollution generated by the plant's iron and steel-making operations. The plant releases dangerous pollutants into the ambient air, including sulfur dioxide, acid gases, oxides of nitrogen, and thousands of tons of particulate matter (e.g. dust, calcium compounds, graphite, soot, kish, slag, iron/metallic particles). For years, wave after wave of pollution has wafted across the plant's fenceline into this surrounding neighborhood and continues to this day.

Ms. Ballinger has described the black, gray, and white particles and pieces of metal from Middletown Works that fall and settle on her yard, house, and car nearly every day. She has described how this fallout has covered and destroyed everything outside, including her cars, deck, window sills, home, and grandchildren's toys, and how it also gets into her house. She has described how huge clouds of air pollution rise up from Middletown Works, pass over, and sometimes completely surround her house. She has described the rotten egg smell, her difficulty breathing, her burning eyes, nose, and throat, and her cough after being exposed. Sadly, this is a familiar scene to fenceline communities.⁶

In Middletown, air quality monitors (i.e. NAAQS monitors) show frequent short-term (less than 24-hour) extremely elevated levels of particulate matter PM10 and PM2.5. These elevated levels are repeatedly measured each year, going back decades. Ambient air monitoring in Middletown also shows that Middletown Works is one of the largest contributors of criteria pollutants in Butler County and that its pollution extends to adjacent Hamilton County. *The USEPA's EJ Screen tool showed, before it*

⁶ These facts were presented in Ms. Ballinger's February 2, 2022 declaration offered in support of Plaintiffs' petition to the Sixth Circuit for review of the USEPA's 2020 removal of the ANR from Ohio's SIP. Her declaration is attached hereto as Attachment 1 of the April 24, 2024 comment letter referenced in footnote 1 above (Exhibit 1 of these comments).

was taken down by USEPA, that Middletown is in the top 5 to 20 percent for most elevated concentrations of PM2.5 in the United States.

Particulate matter, on its own, poses significant health risks. The elevated levels and frequent high spikes of pollution in Middletown indicate higher exposures and put the vulnerable Middletown community at elevated risk. Yet, despite all of the clear data revealing the scope of the health risks associated with air pollution in Middletown, OEPA has deemed the five-county *region* in which Ms. Ballinger lives to be “in attainment” based on the regional NAAQS monitoring. That is because, in that larger geographic region, the fenceline communities around air nuisance sources are overburdened by the air nuisance releases *that never reach the regional air quality monitors*. Moreover, data from NAAQS monitors in areas of high readings of particulate are averaged with data from NAAQS monitors in areas of lower readings of particulate. When all that data is averaged together and the highest and lowest air pollution readings are excluded and three years of data are averaged, the dangerous high level waves of pollution in Middletown are “diluted” out of existence. Thus, a region can technically be in attainment, while adults and children living in fenceline communities within that region continue to breathe in air pollution at levels that, on their own, regularly exceed NAAQS. *The ANR, operates as a check in these fenceline communities by leading to reductions of NAAQS pollutants that endanger health and welfare, regardless of what is measured at the regional monitors*. In Ohio the ANR has served as the fail-safe means of preventing circumvention of the NAAQS. Again, it is imperative that this check be federally enforceable so that Ohioans can enforce the CAA when OEPA or USEPA is unable or unwilling to do so.

In its request to remove the ANR from Ohio’s SIP, OEPA implies that its “commitment to ensuring compliance of Ohio entities” renders a federally-enforceable ANR unnecessary. OEPA’s purported commitment provides little reassurance to Ms. Ballinger who has been fighting to no avail—prior to and during the nearly five-year absence of the ANR—to persuade OEPA to take action to address the nuisance conditions she lives in as a next-door neighbor of Middletown Works. Yet, rather than requiring Middletown Works to stop its pollution, local air officials affiliated with OEPA have merely asked Ms. Ballinger why she doesn’t move. See Exhibit 1, Attachment 1, Donna Ballinger Decl., at ¶8. As discussed above, the enforcement restrictions in HB 96 make OEPA enforcement ANR conditions even less likely.

II. The factually accurate history of the ANR.

OEPA misstates the history of the ANR’s deliberate inclusion in Ohio’s SIP.

The history of the formation of Ohio's SIP shows that the ANR was not only initially included as a means for ensuring Ohio's air quality would meet any NAAQS promulgated by the USEPA under the CAA, but also deliberately kept in the SIP to achieve that purpose for decades. While Ohio's first SIP in May 31, 1972 was vacated by the courts a year later,⁷ Ohio revised its plan, approved by USEPA on April 15, 1974.⁸ *The ANR was included as part of Ohio's 1974 federally-approved SIP* (then codified at AP-2-07). See 49 Fed. Reg. 32,181 (Aug. 13, 1994).

The fact the ANR was an intentional part of the original SIP, designed to ensure the NAAQS would be met, is not speculation. Testimony from a former top Ohio air regulator involved the original compilation of and use of the SIP from 1971 to 1977, William Auberle, shows Ohio's intent behind the inclusion of the ANR in the SIP. Dr. Auberle's testimony about OEPA's intent is unequivocal and unrebutted, yet completely ignored by OEPA in its so-called "demonstration." Dr. Auberle made clear:

From the outset of Ohio's SIP development process, inclusion of the ANR was purposeful and important to Ohio's air pollution control officials . . . Multiple Ohio communities . . . faced the challenge of reducing air pollutant emissions to achieve and maintain the [NAAQS]. The ANR was an important regulatory tool in this process.

Ex. 1, Attachment 3, William Auberle Decl. at ¶ 7- 11.

Dr. Auberle's Declaration directly contradicts OEPA's implication in its "demonstration" that USEPA erred in originally approving the ANR's inclusion as Ohio's SIP because USEPA was rushed and approved the SIP with minimal review. There was no rush in the SIP development nor the decision to include the ANR. It was not a "throw-in" provision. It was deliberate, well thought through, and designed to ensure NAAQS were attained, maintained and could be enforced.

This commitment to the ANR can also be seen by the fact that a decade later the SIP was revised to reflect revisions to the ANR. In 1984, USEPA approved a SIP revision that modified the ANR to "includ[e] an exemption for sources of odor which are not currently regulated under other portions of the SIP" and to remove references to "comfort" and "related terms and phrases." 49 Fed. Reg. at 32,181. This revision deliberately aligned the ANR with criteria pollutants standards to ensure it was directly tied to all NAAQS. OEPA's act of revising the SIP with these changes to the ANR and

⁷ See, 37 Fed. Reg. 10,842, 10,886-87 (May 31, 1972) [First SIP approval] and *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 174 (6th Cir. 1973) [vacating original SIP].

⁸ 39 Fed. Reg. 13,539 (Apr. 15, 1974).

the USEPA's 1984 approval of that revision is recognition that the modified rule squarely fit the purposes of the SIP.

And, over thirty years later, OEPA committed to the presence of the ANR in its SIP when, as part of a five-year state regulatory review process under Ohio Revised Code Chapter 119 that did not involve USEPA, Ohio made stylistic changes to OAC 3745-15-07, effective in July 2015. Ex. 2, Response to Comments, p. 1-2, 6-8. During this review process Ohio did not suggest the ANR was included in the SIP in error, and the OEPA specifically rejected industry comments urging its removal. *Id.* at 7.

The USEPA has also, on at least three separate occasions, deliberately reaffirmed the importance of the ANR to CAA enforcement in Ohio. In 1999, USEPA Region 5 advised Ohio that USEPA would object to CAA facility operating permits that did not include the ANR and other SIP provisions among their federally enforceable terms and conditions. Ex. 3, June 18, 1999 letter. In 2012, the USEPA again affirmed that the ANR was a federally enforceable provision within Ohio's permits in response to an inquiry by Ohio. Ex. 4, April 25, 2012 letter.

Finally, after initially placating industry's 2019 request to remove the ANR from the Ohio SIP via its error-correcting authority, the USEPA agreed to a remand of that action back to the agency from the Sixth Circuit.⁹ Remand was only requested after the petitioners explained in briefing the numerous legal and factual flaws provided by industry. By Final Rule dated January 21, 2025, the USEPA reinstated the ANR in the SIP, effective February 20, 2025. 90 Fed. Reg. 6811. In doing so, USEPA acknowledged that "the ANR's inclusion in the Ohio SIP was not erroneous," and found that the USEPA's 2020 removal of the ANR from the SIP was erroneous. 89 Fed. Reg. 13304, 13304, 13308 (Feb. 22, 2024). *In its removal request, OEPA completely fails to account for all the critical findings made by the USEPA regarding the proper role of the ANR in the Ohio SIP.*

By finding that the ANR's original inclusion in the SIP was not a mistake, the USEPA understands that the ANR is an important CAA enforcement tool used by Ohio residents and OEPA; that it is federally enforceable in court, and that, as a control requirement in effect before 1990, it cannot be removed from the SIP without a full anti-backsliding demonstration.

⁹ See *Sierra Club v. United States EPA*, 60 F.4th 1008, 1018 (6th Cir. 2023). The State intervened in this appeal and is therefore well aware of all that transpired, including the findings by the Sixth Circuit and the remand back to USEPA.

III. OEPA omits that the ANR has played a substantial role in citizen enforcement of the NAAQS.

Tellingly absent from OEPA's purported 110(l) demonstration is any discussion of the prevalent use of the ANR as a tool to enforce the NAAQS. The purpose of the SIP, as stated in the CAA in Section 110 is "attainment, maintenance, *and enforcement...*" of the NAAQS. 42 U.S.C. § 7410 (emphasis added). In fact, the Sixth Circuit recognized that the ANR had been used by citizens and the state of Ohio for NAAQS enforcement. *Sierra Club v. United States EPA*, 60 F.4th 1008, 1018 (6th Cir. 2023). Even Ohio has admitted to using the ANR to enforce the NAAQS. Ex. 5, October 19, 2022 letter to the Sixth Circuit Clerk.

Congress intended citizen suits to be an integral part of CAA enforcement, including SIP enforcement. The following sampling of cases underscores the importance of the ANR to NAAQS enforcement over the years in Ohio.

- *Duren v. Worthington Custom Plastics*, No. 1:93-cv-0050 (S.D. Ohio, filed in 1993): Multi-media citizen suit included an ANR claim and was settled.
- *Hertzler v. Vernay Laboratories, Inc.*, No. 3:99-cv-451 (S.D. Ohio, filed in 1999): Multi-media citizen suit case included waste cleanup and nuisance claims and led to settlement that included enjoining future ANR violations.
- *Booth v. Georgia-Pacific Corp.*, No. 2:00-cv-0035 (S.D. Ohio, filed in 2000): Explosion/ANR class action/citizen suit led to appointment of expert air auditors to evaluate post-explosion operations.
- *Arnett and Environmental Community Organization v. Willard Industries, Inc.*, No. 1:02-cv-087 (S.D. Ohio, filed in 2002): ANR claim resolved by consent decree whereby facility agreed to cut fugitive emissions and reduce other air pollutants by 40%.
- *Fisher v. Perma-Fix of Dayton, Inc.*, No. 3:04-cv-418 (S.D. Ohio, filed in 2004): Citizen suit included ANR violations that led to a consent decree and supplemental federal agreement granting citizen oversight to eliminate ongoing ANR violations.
- *Graffs and Maddoxes v. Haverhill North Coke Company*, No. 1:09-cv-00670 (S.D. Ohio, filed in 2009): Defendants sought to dismiss ANR claim, dismissal denied, and case ended in settlement.

- *Sampsons and Gannons v. SunCoke Energy, Inc.*, No. 1:17-cv-658 (S.D. Ohio, filed in 2017): ANR citizen suit that resulted in settlement.
- *Ballinger and Sierra Club v. AK Steel - Middletown Works*: First citizen suit ANR notice filed in 2017 resulted in federal testing, which led to a **potential acute human health hazard** finding, which in turn led to state findings and orders. Follow up citizen suit notice was sent in August 2018 and the environmental problems are still unresolved.
- *State of Ohio and City of St. Bernard v. Phthalchem, Inc.*, No. A-8907973 (Hamilton County Court of Common Pleas, filed in 1989): Classic air nuisance case involving blue dyes and PM, compounded by the fact defendant was the largest unpermitted air facility in Ohio; ended in a consent decree and subsequent injunctions to abate nuisances.

It is striking that there is no testimony or other evidence that the ANR has been used abusively by those enforcing the provision in Ohio in the above cases or otherwise.

However, such formal litigation is the tip of the iceberg of the importance of the ANR to SIP enforcement, as the Auberle Declaration points out. Ex. 1, Att. 3, ¶ 8, 12-13. Working with facility neighbors, Sierra Club and other local environmental groups have used the ANR to secure changes that reduce air pollution from local plants, including:

- PMC Specialties Group, Inc. – Around 1993, Sierra Club, Ohio Citizen Action (OCA), and the Environmental Community Organization (ECO) worked with facility neighbors who complained about emissions to get PMC to install scrubbers and upgrade equipment.
- Morton International (acquired by Rohm & Haas, 1999) – Sierra Club and OCA worked with citizens who complained about facility emissions to successfully pressure Morton to redo their pump system, which was a significant air pollution source.

Sierra Club also cited the ANR in following up on community air complaints about Celotex and various asphalt plants, including Valley Asphalt, in the 1990s and 2000s.

In addition, in the early 2000s, the regional air agency, SWOAQA, and OEPA used a survey¹⁰ they conducted near the then AK Steel Middletown Works plant to document the facility was a nuisance as part of a lawsuit in which Sierra Club was an intervenor plaintiff (*United States v. AK Steel Corp.*, S.D. Ohio No. C-1-00530); hundreds of tons of particulate were eliminated as a result of that action.

Removing the ANR would terminate this type of effective citizen suit enforcement. Moreover, OEPA's blatant disregard for—and failure to disclose to the public in its notice—the historic use of the ANR to enforce the NAAQS undermines the credibility of the State and flies in the face of notice and comment requirements by withholding directly relevant information from the public.

The effectiveness of the ANR to enforce the NAAQS also explains why industrial polluters want it out of the SIP.

IV. Ohio's attempt to remove the ANR is the latest in the years long chronic polluter-driven effort to dispense with the ANR.

The General Assembly and Governor DeWine's unconstitutional attempts to remove the nearly 50-year-old ANR from the federally-enforceable SIP and to significantly limit the types of evidence OEPA can rely on in enforcing all air pollution laws are hostile acts against Ohio citizens that reflect the ever-increasing control of industrial polluters over Ohio's government. Yet, the ANR is only problematic to members of the industrial community that are *actually causing nuisance emissions in surrounding communities*. Still, both Ohio's legislative and executive branches abandoned the people of Ohio to protect these polluters. Industry influence over the ANR is not debatable. HB 96 and OEPA's request for removal of the ANR are just the latest in a long-standing polluter-driven effort to escape accountability to the public by removing the ANR from the SIP.

In June and October 2019, two letters from LeAnn Johnson Koch of the law firm Perkins Coie were submitted to USEPA, laying out a strategy to allow industrial polluters to ignore the impact of its emissions on its closest neighbors – i.e. to take away the ability for citizens to enforce the ANR directly against polluters by removing the ANR from the Ohio SIP (attached hereto as Exhibits 6 and 7). More specifically, the Perkins Coie letters described a strategy for the USEPA to remove the ANR from the SIP, which USEPA did—illegally—in 2020. The reasoning behind the strategy provided

¹⁰ HB 96's new prohibition on use of community air monitoring in enforcement efforts could prevent OEPA from using surveys like this in the future because this survey sought to measure or quantify levels of air contamination.

to USEPA is clear: Perkins Coie represented SunCoke Energy, which, at the time the strategy was provided to USEPA, *had a federal citizen suit claim pursuant to the ANR pending against it*. *Sierra Club v. United States EPA*, 60 F.4th 1008, 1014-15 (6th Cir. 2023). One of the false justifications engineered by Perkins Coie to remove the ANR was that the ANR is unrelated to Ohio's control strategy for the attainment and maintenance of the NAAQS.¹¹

The Sierra Club, OEC, Donna Ballinger, and Marilyn Wall appealed the USEPA's removal of the ANR from Ohio's SIP to the Sixth Circuit. This appeal resulted in a remand back to the USEPA, causing it to reconsider its removal of the ANR. Ultimately, the USEPA reinstated the ANR into Ohio's SIP by Final Rule dated January 21, 2025.

Within 5 months of USEPA's reinstatement of the ANR, Ohio's General Assembly and the Governor ordered OEPA, through HB 96, to protect non-compliant polluters from accountability to the neighbors they harm by revising the SIP to remove the ANR. This suspect statutory directive was executed through a budget bill with the ANR removal directive tacked on late in the legislative process. With this polluter-influenced directive in hand, OEPA, on August 5, 2025, made available to the public its draft request to USEPA to remove the ANR from Ohio's SIP, which is the subject of these comments.

HB 96 is an unconstitutional and otherwise improper attempt to circumvent the CAA provisions that set forth the specific requirements that must be met before a SIP can be revised. OEPA has failed to meet the SIP revision requirements in any event. Yet, perhaps most alarming is the seemingly unabashed ease with which Ohio's legislative and executive branches have willingly put the interests of all polluters before the health and safety of the citizens they were elected to represent and protect.

V. An unconstitutional statute is neither a mandatory nor permissible basis on which to request a SIP revision.

OEPA states it is only seeking to revise the SIP to remove the ANR because HB 96 directs this result. In fact, HB 96 is unconstitutional because it violates the Ohio Constitution's One Subject Rule and it cannot serve as a legal justification for OEPA's action. The provisions in HB 96 removing the ANR violate the One Subject Rule because the provisions lack a logical nexus with the budgetary purposes of HB 96 and

¹¹ Another false and unsupported justification was that the ANR "has had unintended consequences for businesses in Ohio." Ex. 7, Oct. 19 letter, p. 1. The letter offers no examples of any "consequence." In fact, the only consequence of the ANR is the intended consequence of prohibiting emission of air pollution at levels that harm health or property. Moreover, there is not a shred of testimony that the ANR has ever been used in a way that is abusive or unwarranted, as noted above.

were introduced late in the legislative process for a budget bill. OEPA cannot and should not remove a SIP provision that directly protects public health simply to satisfy an illegal tactical move by the Ohio legislature.

VI. OEPA's proposal relies on bases rejected by the Sixth Circuit.

Even if HB 96 were not unconstitutional, OEPA's proposal to remove the ANR cannot be approved because it is based on factors that have already been rejected by the Sixth Circuit when considering USEPA's improper removal of the ANR in 2020. See *Sierra Club v. United States EPA*, 60 F.4th 1008 (6th Cir. 2023). The State of Ohio was an intervenor in that appeal and is well aware that its arguments are factually and legally baseless.

A. The ANR has a connection to the implementation, maintenance, or enforcement of the NAAQS.

OEPA ignores that not all air pollution makes it to the NAAQS monitors where it can be measured. The ANR fills that gap by serving as a tool to protect fenceline communities by allowing direct enforcement actions that will bring to light evidence that the NAAQS are not actually being achieved throughout the air quality control region, as the CAA intends. Thus, removal of the ANR from the SIP undermines the CAA's goals and the purpose of the NAAQS standards and fosters circumvention of the NAAQS. Contrary to OEPA's arguments, the ANR is directly connected to the NAAQS and, in fact, was modified to make clear it only applied to "odors" that originate from criteria pollutants. 49 Fed. Reg. at 32,181.

OEPA further ignores federal court rulings and USEPA findings on this precise issue. First, the Sixth Circuit has held that a nexus between the ANR and the NAAQS does, in fact, exist for SIP purposes. The Court specifically found Petitioners had successfully established that they "used the ANR for NAAQS enforcement even when not in active litigation." *Sierra Club*, 60 F.4th at 1018. In addition, the Court found that: "[u]ntil the EPA removed the ANR from Ohio's SIP in 2020, parties authorized to enforce Ohio's SIP could and did bring CAA enforcement actions for violations of the ANR." *Id.* at 1014. The Court also concluded "the ANR plays a role [in the SIP] beyond litigation by creating incentives for Ohio-based facilities to limit their emissions." *Id.* at 1017. These are judicial findings of the very "nexus" Ohio claims does not exist.

Second, USEPA recognized a clear connection between the ANR and the NAAQS in its final rule reinstating the ANR to Ohio's SIP. "[T]he type of air pollution identified in the ANR—smoke, ashes, fumes, gases, and vapors—could have a nexus to several NAAQS, including particulate matter (PM), sulfur dioxide (SO₂), lead, and ozone. And...

the Ohio ANR has a demonstrated connection to the enforcement of the NAAQS.” 90 Fed. Reg. 6811, 6814. In fact, “[i]n the proposed rule, [US]EPA references three citizen suits and one Ohio EPA action as demonstrating where the ANR was used as a tool to enforce the NAAQS.” Id. at 6815. In the end, USEPA acknowledged in its final rule that “the Ohio ANR does have a demonstrated connection to the implementation, maintenance, and enforcement of the NAAQS. Accordingly, our previous action to unilaterally remove it from Ohio’s SIP was in error.” Id.

Finally, OEPA ignores the State’s own admission—made on the eve of oral argument in the Sixth Circuit case reviewing the USEPA’s 2020 ANR removal—that the ANR is a NAAQS enforcement tool that OEPA has used to reduce NAAQS pollution. Ex. 5.

B. The ANR is federally enforceable under the CAA.

OEPA’s claim that the ANR is not a federally enforceable emission limitation or other control measure, means or technique again directly contradicts the controlling Sixth Circuit ruling and USEPA’s determinations in the final rule reinstating the ANR. OEPA fails to even acknowledge that, contrary to its position, the Sixth Circuit held that the ANR is enforceable under the CAA. *Sierra Club*, 60 F.4th at 1018. Specifically, the Court held “the two cases cited by the EPA as supporting its claim that CAA citizen suits cannot be brought for ANR violations are not persuasive” and held “[i]t is appropriate to conclude that the Ohio ANR can be (and has been) used in CAA citizen suits.” *Ibid*. Similarly, in its final rule reinstating the ANR, USEPA highlighted, as but one example, a CAA citizen suit “in which an individual resident invoked the Ohio ANR to seek relief from numerous airborne pollutants emitted from a nearby waste treatment facility.” USEPA noted that the district court held, over the defendant’s argument to the contrary, that the nuisance provision was federally enforceable. See 90 Fed. Reg. 6811, 6815, citing *Fisher v. Perma-Fix of Dayton, Inc.*, No. 3:04–CV– 418, 2006 WL 212076, at *5 (S.D. Ohio Jan. 27, 2006).

VII. OEPA has failed to demonstrate that removing the ANR from the SIP will not interfere with other CAA requirements.

OEPA’s 110(l) “demonstration” ignores an entire portion of the requirements of Section 110(l). Because SIPs are federally-approved programs that detail how a state will meet, maintain, and enforce the NAAQS, any revision to a SIP must also be federally-approved to ensure that the revision will not undermine the state’s compliance with the CAA. Specifically, “[t]he Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress...*or any other applicable*

requirement of this Act.” 42 U.S.C.S. § 7410(l) (CAA § 110(l)) (emphasis added). Thus, to obtain approval for a SIP revision, the state must demonstrate that the proposed SIP revision will not interfere with attainment, maintenance, or enforcement of the NAAQS or interfere with any other applicable CAA requirement (i.e. a “110(l) demonstration”).

OEPA’s 110(l) demonstration cannot support removing the ANR from Ohio’s SIP because OEPA has failed to demonstrate that removing the ANR will not interfere with attainment, maintenance, or enforcement of the NAAQS. The ANR’s clear connection to enforcement of the NAAQS is shown in Sections III and VI, herein. OEPA’s listing in its revised 110(l) demonstration of other SIP regulations that set NAAQS-related emissions limits does not diminish the connection of the ANR to the NAAQS. To the contrary, the ANR acts as a failsafe to address nuisance conditions that exist *despite existing emissions limits*. In other words, while far away regional NAAQS monitors may show an area to be in attainment, air pollutants in the immediate vicinity of the emissions source (i.e. pollutants in the neighborhoods adjacent to the facility) can still far exceed the NAAQS, resulting in nuisance conditions. The ANR allows Ohioans to bring these exceedances—which would otherwise go unabated—into compliance. Thus, removing the ANR from the SIP unquestionably violates section 110(l) by interfering with attainment, maintenance, and enforcement of the NAAQS. Removing the provision fosters circumvention of the NAAQS.

OEPA’s 110(l) demonstration further fails because it does not demonstrate that removal of the ANR will not interfere with *other* applicable CAA requirements.

At a minimum, removing the ANR is not permissible without demonstrating that removing it would not interfere with Ohio’s ability to:

- 1) Meet the applicable requirements relating to nonattainment areas. 42 U.S.C. §§ 7410(a)(2)(I), 7502(c). This includes the **anti-backsliding requirements** in 42 U.S.C. § 7515 (CAA §193). This means that a substitute mechanism is required to be created to require equivalent or greater reduction of all VOCs, particulates, SO₂ and its precursors, NO_x and its precursors, and lead that are reduced under the ANR; and,
- 2) Meet the applicable requirements relating to prevention of significant deterioration of air quality and visibility protection.¹² 42 U.S.C. § 7410(a)(2)(J) (citing 42 U.S.C. § 7470).

¹² The CAA requires that all SIPs “shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant

See 42 U.S.C. § 7470(1).

First, under the CAA anti-backsliding provision (or “Savings Clause”), “[n]o control requirement in effect . . . before November 15, 1990 in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990 in any manner unless the modification insures *equivalent or greater emission reduction* of such air pollutant.” 42 U.S.C. § 7515. This anti-backsliding provision is essential for implementing the goals of the CAA. “Considered as a whole, the Act reflects Congress’s intent that air quality should be improved until safe and never allowed to retreat thereafter.” *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 900 (D.C. Cir. 2006). In fact, the Clean Air Act’s anti-backsliding provisions are specifically designed to guard against efforts to roll back protections as OEPA is proposing to do here.

In its “193 demonstration,” OEPA espouses two reasons why removing the ANR does not violate the antibacksliding protections. Both reasons are based on incorrect interpretations of CAA section 193 and, therefore, do not support removal of the ANR.

First, OEPA incorrectly implies that the ANR is not a “control requirement” because it does not impose specific emissions limitations. To the contrary, USEPA explained clearly:

The CAA does not specifically define what qualifies as a “control requirement” in the context of section 110 SIPs, and EPA therefore interprets the term broadly in accordance with its plain meaning, i.e. that it refers to any “requirement” that imposes some form of “control” with respect to any of the NAAQS pollutants. The term “control requirement” is similar to the language in CAA section 110(a)(2)(A) referring to “emissions limitations and other control measures, means, or techniques.” As explained and illustrated by the specific examples in a previous comment response, the ANR has been invoked on multiple occasions with the goal and ultimate outcome of limiting emissions of criteria pollutants and their precursors. Thus, the ANR has been used as a measure, means, or technique, to control relevant emissions, which means that it squarely falls within the definition of a “control requirement” as the term is used in CAA section 193.

90 Fed. Reg. 6811, 6820 (Jan. 21, 2025). Thus, a requirement does not have to include “emissions limitations” to constitute a “control requirement” for purposes of the CAA’s

deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 . . . as attainment or unclassifiable.” 42 U.S.C. § 7471.

anti-backsliding rule. OEPA's attempt to remove the ANR without identifying or promulgating any provision to off-set the increase in emissions that will result without the ANR in place therefore violates the CAA's anti-backsliding provision.

Second, OEPA argues that the anti-backsliding provision is met because areas that were classified as "nonattainment" prior to 1990 have been redesignated to "maintenance" areas. OEPA's interpretation runs contrary to the fundamental purpose of the anti-backsliding provision, which is to *prevent a reversal in progress made* in improving air quality. A state cannot, as OEPA argues, remove pre-1990 control requirements just because a nonattainment area is reclassified to a maintenance area. That is because it was those control requirements that brought the area out of nonattainment in the first place. Again, removing a control requirement without identifying or promulgating any provision to off-set the increase in emissions that will result—as OEPA is proposing to do by the removal of the ANR—will simply cause the area to revert back to nonattainment. This is the precise situation that Section 193 was designed to prevent.¹³

OEPA effectively admits it cannot show that removing the ANR will not interfere with the anti-backsliding requirements by bemoaning the fact it has never quantified the amount of air pollution reduction that is achieved via the presence of the ANR – either as a result of direct citizen enforcement, OEPA enforcement, or the deterrent effect it has on industry operations and air pollution releases. Yet, because the ANR only ever reduces air emission by eliminating nuisance-level emissions, its removal would necessarily result only in *fewer emissions reductions, not equivalent or greater emissions reductions*.

Similarly, OEPA's removal request fails to discuss or demonstrate that removing the ANR will not interfere with the CAA's prevention of significant deterioration requirements or visibility requirements. The purposes of preventing significant deterioration of air quality and protecting visibility include, e.g.:

¹³ The anti-backsliding provision of section 172 of the CAA further illustrates this point. Section 172(e) governs future modifications of a NAAQS provides: "If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for *controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation*. 42 U.S.C. 7502(e) (emphasis added). In other words, even if a relaxed NAAQS effectively renders a non-attainment area an attainment area, controls still cannot be less stringent than what they were when the area was non-attainment.

1) protecting “public health and welfare from any actual or potential adverse effect which in the Administrator’s judgment may reasonably be anticipated to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air, notwithstanding attainment and maintenance of all [NAAQS]” and

2) assuring “that any decision to permit increased air pollution in any area to which this section applies is made *only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decision making process.*”

42 U.S.C. §§ 7470(1), (5). Since the ANR is specifically designed to protect citizens from disproportional nuisance level emissions that adversely impact “public health and welfare,” removal of it will circumvent a key purpose behind the CAA’s prevention of significant deterioration provisions. Overall, for areas in attainment where the prevention of significant deterioration standards apply, OEPA is required to show that any increase in pollutants caused by unabated nuisances (i.e. from the removal of the ANR) is within allowable incremental increases. OEPA has failed to make such showing.

OEPA’s reasoning that the ANR cannot be relied on in the SIP because OEPA cannot *model* the impact of the ANR does not support its removal request. *Actual data* from air monitoring events, whether at NAAQS monitors or within the affected communities, is direct evidence of the rise or fall in emission levels. In fact, OEPA’s 110(l) demonstration recognizes that “Ohio’s ANR may have an impact on emissions.” OEPA’s claim that it cannot quantify the level of reduction achieved is merely an admission that the ANR does, in fact, directly impact air quality.

Finally, outside of the anti-backsliding provision, OEPA has failed to even identify any other “applicable requirements” that are relevant to its request to remove the ANR. Without identifying those other requirements, the public cannot provide informed comments on any claim that removing the ANR will not interfere with other CAA requirements. OEPA’s reliance on USEPA’s 2005 draft guidance on demonstrating noninterference under section 110(l) merely highlights the insufficiency of OEPA’s section 110(l) demonstration. For example, the guidance provides a list of numerous other “applicable requirements” that must be met in order to modify a SIP, including, e.g., Air Toxics and regional haze, which may be problematic when removing the ANR. The guidance also makes clear any noninterference demonstration must include a showing that the revision will not interfere with compliance of other states (i.e. section 110(a)(2)(D) “good neighbor” requirements). OEPA has made no

showing that any of these other requirements will be met if the ANR is removed from the SIP.

Further, this is a uniquely bad time to abandon proven air pollution requirements. The Cleveland area, which is currently ranked the ninth worst in the nation for year-round particle pollution by the American Lung Association, was recently reclassified to “serious” nonattainment for ozone—a step backwards. See <https://www.lung.org/media/press-releases/2025-cleveland-sota>; 89 Fed. Reg. 101901 (December 17, 2024). And, there are areas deemed to be in attainment where citizens still experience air quality poor enough to prompt action by the local government. For example, the City of Cincinnati and the Cincinnati Health department recently deployed over 3 dozen air monitors across Cincinnati’s neighborhoods continuing the City’s over 100-year long battle with excess air pollution and poor air quality. Ex. 8, News Article “Cincinnati installs air monitors across city to fight long battle with pollution.” This project is being undertaken despite the Cincinnati area’s designation as in attainment. See, https://www3.epa.gov/airquality/greenbook/anayo_oh.html

Because of these failures and because of the nexus between the ANR and NAAQS-regulated pollutants (see section VI, above), OEPA is unable to demonstrate that removing the ANR will not interfere with “applicable” CAA requirements as required under §110(l). OEPA should, therefore, not submit its request for removal of the ANR from Ohio’s SIP.

VIII. What other states have included or removed from their SIPs is irrelevant.

OEPA tries to bolster its flawed ANR removal request by stating that other states have removed “their respective ANR as part of the SIP.” OEPA’s vague and factually bald assertion ignores both U.S. Supreme Court precedent and USEPA’s evaluation of this exact issue when reinstating the ANR to Ohio’s SIP. In its reinstatement of the ANR into Ohio’s SIP, USEPA correctly rejected the idea that because other states have removed their nuisance provisions from their SIPs, Ohio’s ANR must also be removed.

Instead, USEPA recognized the U.S. Supreme Court’s directive that each state is given “wide discretion” in formulating its SIP and that Congress left “considerable latitude” to the states in determining how the NAAQS would be met. 90 Fed. Reg. 6811, 6814 (Jan. 21, 2025) (quoting *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976); *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 87 (1975)). However, any proposed revision must include the required showing that air quality will not degrade. Thus, USEPA correctly reasoned that “evaluating a state’s SIP submission requesting to remove a nuisance provision from the state’s SIP...would include an evaluation of the specific nuisance provision’s connection to the implementation and enforcement of the NAAQS.” *Id.*

(internal quotations removed). Evaluating Ohio's specific nuisance provision, USEPA acknowledged the connection between the types of pollutants identified in the ANR (e.g. smoke, ashes, fumes, gases, and vapors) and several NAAQS (e.g. particulate matter, sulfur dioxide, lead, and ozone), ultimately concluding that "the Ohio ANR has a demonstrated connection to the enforcement of the NAAQS." OEPA cites no precedent that undermines USEPA's finding of a demonstrated nexus between Ohio's ANR and the NAAQS.

In its FAQ page on the ANR removal, OEPA identifies California and New York as states that have removed their "respective Air Nuisance Rule." OEPA provides no facts or evaluation of those specific nuisance provisions or their connection to implementation and enforcement of the NAAQS. In fact, the removal of California and New York's provisions provides no support for removal of Ohio's ANR. Unlike Ohio's ANR, California's nuisance provision failed to identify a single type of NAAQS-connected pollutant, making only a vague reference to "air contaminants." While New York's nuisance provision did identify specific types of pollutants, it was similar to California's in that there was no history of use of this nuisance rule by citizens to enforce the NAAQS and there was no opposition to the rulemaking removing it. In sharp contrast, there is a clear history of use of the ANR as a means to enforce the NAAQS in Ohio and USEPA received over 1,000 comments opposing the Ohio SIP change. Finally, unlike the ANR, USEPA's removal of California and New York's nuisance provisions was not challenged in and, thus, not upheld by a court.

Commenters

Marilyn Wall has spent decades involved with local, regional and state-wide education on air, water, and waste disposal issues. She is the past chair of the Miami Group of the Sierra Club, the Ohio Chapter of the Sierra Club, and of the Environmental Community Organization (ECO), has served on governmental advisory boards, and has served on the national Board of the Sierra Club. She personally participated in ANR litigation, including cases involving Willard Industries and AK Steel, and utilized the ANR in problem-solving discussions with PMC Specialties Group, Inc. and Morton International.

Donna Ballinger lives near the furnaces at the Cleveland-Cliffs Middletown Works facility and has diligently sought enforcement of CAA violations, especially PM violations.

The Ohio Environmental Council is a statewide environmental advocacy and education organization based in Columbus, Ohio. It represents thousands of members statewide who share a collective vision of a clean, healthy, Ohio where communities

live in harmony with their natural environment. It has supported the continued inclusion of the Air Nuisance Rule in Ohio's State Implementation Plan throughout its storied history, including in the recent Sixth Circuit litigation over its unlawful removal in 2019. The OEC joins these comments in support of the legal and factual arguments made regarding the Ohio EPA's attempted 2025 unlawful removal of the Rule from Ohio's State Implementation Plan.

The Sierra Club is a national nonprofit organization of approximately 611,500 members nationwide, and 17,000 members in Ohio. The Sierra Club's purposes are to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's ecosystems and resources; to educate and enlist humanity in the protection and restoration of the quality of the natural and human environment; and to use all lawful means to carry out these objectives. Sierra Club also seeks to reduce the harmful effects of air pollution on vulnerable people and ecosystems and is committed to environmental justice and alleviating the disproportionate burdens suffered by fenceline communities. Sierra Club and its members are greatly concerned about air quality, and the Club has a long history of involvement in air quality-related activities on both the local and national levels, including in Ohio.

The Case Western Reserve University School of Law Environmental Law Clinic is an interdisciplinary clinic that addresses environmental law and policy problems on behalf of individuals, nonprofits and community organizations. The Environmental Law Clinic covers a broad range of environmental issues but focuses predominantly on environmental and energy justice concerns in Northeast Ohio, and has several clients impacted by air quality issues.

Respectfully submitted by:



D. David Altman
Justin D. Newman

AltmanNewman Co. LPA
15 E. 8th St., Suite 200W
Cincinnati, OH 45202
(513) 721-2180
daltman@environlaw.com
jnewman@environlaw.com

COMMENTERS

/s/ Christopher Tavenor
Christopher Tavenor (0096642)
Ohio Environmental Council
556 E Town Street,
Columbus, OH 43215
(614) 487-7506 - Telephone
ctavenor@theOEC.org

Counsel for the Ohio Environmental Council



Miranda Leppla (0086351)
Director, Environmental Law Clinic
Kendall McPherson (0105377)
Environmental Law Clinic Attorney Fellow
Doug Smits
Certified Legal Intern
Hely Patel
Certified Legal Intern
Case Western Reserve University
School of Law, Environmental Law Clinic
11075 East Blvd.
Cleveland, OH 44106
Tel: 216-368-2766
miranda.leppla@case.edu
kendall.mcpherson@case.edu

cc: Chris Beekman, SIP Supervisor, Division of Air Pollution Control,
Christopher.Beekman@epa.ohio.gov

EXHIBIT 1

To comments of Donna Ballinger, Marilyn Wall, Ohio
Environmental Council, Sierra Club, and Case Western Reserve
University Environmental Law Clinic

VIA REGULATIONS.GOV AND EMAIL

U.S. Environmental Protection Agency, Region 5
Attainment Planning and Maintenance Section
Air Programs Branch
Attn: Sarah Arra
arra.sarah@epa.gov

April 24, 2024

Re: Comments Regarding *Air Plan Approval; Ohio; Withdrawal of Technical Amendment*, Proposed Rule, 89 Fed. Reg. 13304 (Feb. 22, 2024); Docket ID No. EPA-R05-OAR-2020-0055

Comments of AltmanNewman Co. LPA; Donna Ballinger; Marilyn Wall; Athens County's Future Action Network; Black Appalachian Coalition; Buckeye Environmental Network; Citizen Pollution Watch; Communities United for Action; Environmental Law & Policy Center; FracTracker Alliance; FreshWater Accountability Project; Groundwork Ohio River Valley; The Junction Coalition; Miami Group, Ohio Sierra Club; Northeast Ohio Black Health Coalition; Ohio Citizen Action; Ohio Environmental Council; The People Over Petrol Coalition; SOBE Concerned Citizens; Karen and Richard Johnson; Camille Rodeheimer

The undersigned individuals, groups, and organizations ("Commenters") submit these comments in support of USEPA's February 22, 2024 proposed rule (89 Fed. Reg. 13304) to reinstate the Ohio Air Nuisance Rule ("ANR") to the Ohio State Implementation Plan ("SIP"). Specifically, the Commenters, which represent a broad spectrum of Ohio communities and public interest, health, civil rights, and environmental groups, urge USEPA to immediately finalize the proposed rule and return the ANR to the Ohio SIP.

These comments are being submitted by statewide organizations with thousands of members throughout Ohio, regional organizations addressing pollution in Appalachia and the Ohio River Valley, and groups and individuals focused on local pollution sources across Ohio, in rural communities and metropolitan areas spanning Ohio from Toledo to Athens and Cleveland to Cincinnati.

As a result of the prior erroneous removal of the ANR from the SIP, Ohioans—particularly environmental justice communities—have spent over four years without their only effective tool to combat exposure to air-borne toxics, particles, soot, odors, acids, and other pollutants that are harmful to their health and damage their property. They have been without the only effective tool to stop backdoor circumvention of the National Ambient Air Quality

Standards (NAAQS). Many Ohioans experience ongoing nuisance conditions caused by nearby polluters on a frequent or daily basis. If restored to the SIP, the ANR will, once again, allow affected communities to take legal action to stop the pollution. Because the ANR is not enforceable by Ohio residents under state law, Ohioans need the ANR to be federally enforceable under the Clean Air Act (CAA) in order to protect Ohio families, communities, and public health, especially when neither USEPA nor Ohio EPA are taking action.

The Sixth Circuit's decision, leading to the remand of the 2020 rule removing the ANR and the record developed in that case, brought to light an important air pollution regulation reality—that the ANR, because it applies statewide to air pollution sources, is a crucial air pollution control strategy to enforce and avoid circumvention of the NAAQS program. The NAAQS program created under the CAA is designed to address regional air quality, while regulations like the ANR protect air quality in fenceline communities surrounding pollution sources. The ANR fills a critical local gap in the regional NAAQS scheme by requiring reduction of pollutants to improve local air quality and is a “safety net” that was deliberately provided by Ohio to protect communities, including those on the fenceline of the worst sources. The ANR quells circumvention of the NAAQS scheme by preventing releases that *should be* directed to NAAQS air pollution monitors from escaping detection by being released into the fenceline communities. The Sixth Circuit's decision recognizes that the ANR acts as a check on air pollution sources even outside of litigation. The 2020 removal decimated the significance of the ANR in Ohio's scheme to comply with the CAA. The Sixth Circuit, in the decision that led to this remand, described the long-standing role that ANR enforcement played, until the ANR's removal, in Ohio's NAAQS scheme.

In addition to this important NAAQS role, the ANR operated for over 50 years as a tool for fenceline communities to protect themselves. Regional NAAQS monitoring is evaluated by averaging the data obtained throughout that region over one or three years. However, ***people in fenceline communities are not exposed to “averages” of pollution***; rather, they are exposed to repeated and frequent waves of extremely elevated “spikes” in air pollution, typically lasting minutes or hours. Such short exposures to high levels of air pollution can be extremely harmful to health and welfare and those waves of severe pollution often do not show up in regional NAAQS monitors. The ANR provides a tool to force pollution sources to eliminate these elevated waves of pollution. In other words, both the NAAQS and the ANR are needed to fulfill the CAA's promises of protecting and enhancing air quality by reducing or eliminating air pollution that poses a danger to public health and welfare in Ohio. 42 U.S.C. § 7401.

For example, Petitioner Donna Ballinger—whose efforts led to the Sixth Circuit remand decision—lives only a few hundred feet away from Middletown Works, an iron and steel plant in Middletown, Ohio. In Middletown, NAAQS monitors show frequent short-term (less than 24-hour) extremely elevated levels of particulate matter PM10 and PM2.5. These elevated levels are repeatedly measured each year, going back decades. Ambient air monitoring in Middletown also shows that Middletown Works is one of the largest contributors of criteria pollutants in Butler County and that its pollution extends to adjacent Hamilton County. ***The USEPA's EJ Screen***

tool shows that Middletown is in the top 5 to 20 percent for most elevated concentrations of PM2.5 in the United States.¹

Particulate matter, on its own, poses significant health risks. The elevated levels and frequent high spikes of pollution in Middletown indicate higher exposures and put the vulnerable Middletown community at elevated risk.² Yet, despite all of this clear data revealing the scope of the health risks associated with air pollution in Middletown, Ohio EPA has deemed the **region** in which Ms. Ballinger lives to be “in attainment” based on the regional NAAQS monitoring. That is because, in that larger geographic region, the fenceline communities around air nuisance sources are overburdened by the air nuisance releases that never reach the regional monitors. Moreover, data from NAAQS monitors in areas of high readings of particulate are averaged with data from NAAQS monitors in areas of lower readings of particulate. When all that data is averaged together and the highest and lowest air pollution readings are excluded, the high levels in Middletown become “diluted.” Thus, a region can technically be in attainment, while adults and children living in fenceline communities within that region continue to breathe in air pollution at levels that, on their own, regularly exceed NAAQS on a near-daily basis. The ANR, if placed back in Ohio’s SIP as USEPA proposes, will resume operation as a check in these fenceline communities by leading to reductions of NAAQS pollutants that endanger health and welfare, regardless of what is measured at the regional monitors.

Until its removal from the SIP, federal enforcement of the ANR had been a key avenue of recourse for fenceline communities to secure air quality even close to the NAAQS standards. The ANR needs to be restored to Ohio’s SIP so that Ohioans receive the protection the CAA is supposed to ensure. Moreover, by reinstating the ANR, industry will no longer be able to regularly violate air quality standards within fenceline communities with impunity.

This is one reason why inclusion and approval of the ANR in Ohio’s SIP was not a “mistake” 50 years ago. The declaration of a former high-level environmental official in Ohio, who was personally and directly involved in the original promulgation of the ANR, shows that the ANR was deliberately included in the SIP as a critical air pollution control strategy. In particular, that declaration confirms the ANR had been deliberately added to the Ohio SIP for CAA compliance in 1974 to give Ohioans an enforcement tool to combat pollution; USEPA reapproved its inclusion in 1984 and again in 2012 and 2015. Prior to the 2020 removal, the ANR had been used successfully, both inside and outside of court, by individual residents, community groups and local governments to improve Ohio’s air quality and protect the health of fenceline communities. This is all confirmed by evidence submitted to and the findings of the U.S. Court of Appeals for the Sixth Circuit in *Sierra Club, et al. v. EPA, et al.*, Case No. 21-3057

¹ <https://ejscreen.epa.gov/mapper/>

² Particulate matter frequently includes metals and hazardous air pollutants (HAPs), also known to be harmful to health. Substantial information exists about the impact of metals, including lead, on human health. Among this information is a specific study of lead, zinc and tin in a recreational park near the Middletown Works facility. The study presented evidence of steel and coal pollution in a high child use setting and further found that the “high correlation of known constituents of steel suggests [Middletown Works] as the source.” Dietrich, M., Huling, J., & Krekeler, M. P. (2018). Metal pollution investigation of Goldman Park, Middletown Ohio: Evidence for steel and coal pollution in a high child use setting. *Science of The Total Environment*, 618, 1350-1362. <https://doi.org/10.1016/j.scitotenv.2017.09.246>.

(6th Cir.). Neither industry, the State of Ohio, nor USEPA provided any evidence to dispute the ANR's use. In fact, Ohio EPA confirmed, on the eve of oral argument, that the ANR is a NAAQS enforcement tool that Ohio has used to reduce NAAQS pollution. The proposed rule correctly recognizes all this and recognizes that "the ANR's inclusion in the Ohio SIP was not erroneous." 89 Fed. Reg. at 13308.

Critically, the Commenters support the USEPA's findings that the ANR's original inclusion in the SIP was not a mistake, but instead was an important CAA enforcement tool that Ohio residents had used in the subsequent decades to bring about pollution reductions in their communities, that the ANR is federally enforceable in court, and that the ANR—a control requirement in effect before 1990 in the SIP—cannot be removed from the SIP—by USEPA or Ohio—without a full anti-backsliding demonstration by Ohio EPA and review and analysis by USEPA. We also support USEPA's finding that the 2020 removal **was** a mistake that should be corrected in the proposed rulemaking. These critical findings are grounded in the Sixth Circuit's remand decision and demonstrate that full reinstatement is legally required.

Further, ***the Commenters urge immediate reinstatement because irreparable harm has been done to communities since the ANR's 2020 removal and will continue until the ANR is restored to Ohioans.*** As an illustration, Ms. Ballinger provides an attached declaration showing that she has had to confront pollution for four additional years because ANR enforcement rights for her and the Middletown, Ohio community were taken away by the 2020 removal. See Ballinger declaration, Attachment 1. Failure to finalize the proposed rule, resulting in permanent removal of the ANR, would continue to have devastating consequences for Ohioans living in environmental justice communities and near fracking sites, industrial factories, coal ash disposal operations, or in the midst of environmental disasters like the 2023 Norfolk Southern train derailment in East Palestine, Ohio. Failure to restore the ANR would permanently enable polluters by eliminating the consequences for localized air pollution. The law and the facts warrant immediate reinstatement of the ANR to Ohio's SIP.

We also file these comments in support of USEPA's more careful scrutiny and rejection of the original ANR removal strategy supplied by the Perkins Coie law firm in 2019—an action wholly consistent with, and a necessary result of, the Sixth Circuit's findings in its remand decision. The flawed Perkins Coie strategy was proffered on behalf of a company that was, at the time, ***facing an ANR enforcement action brought by a southeastern Ohio family.*** Jim Sampson, one member of that family, provided detailed sworn testimony in federal court that was subject to full cross examination. He described the daily occurrence of "terrible rank odors" and "pasty sludge" released from the neighboring coke plant, the oil film that the sludge left on his house, deck, and outside furniture, and the sore throats, headaches, and breathing problems experienced by himself and/or his grandchildren. See Sampson Declaration, Attachment 2, including testimony transcript at pages 39-50 and 80-81. He also explained how OEPA failed to take action even in light of his complaints directly to the agency. See Sampson Declaration, Attachment 2, testimony transcript p. 34. All of his evidence was admitted into the record in federal court. Mr. Sampson knows first-hand how devastating it feels to be ignored by the state agency that is supposed to protect public health and the environment while, at the same time, that agency works secretly with powerful polluters to deny the rights it is supposed to help protect. See Sampson Declaration, Attachment 2.

The Perkins Coie strategy to have the ANR removed in the midst of Mr. Sampson's efforts to obtain relief from the daily onslaught of emissions underscores how formidable a tool like the ANR is when either the law or Ohio EPA—the regulatory agency charged with enforcement of the law—fails to protect vulnerable populations.

We further explain these bases below and provide additional factual and legal grounds supporting USEPA's proposed ANR reinstatement.

A. THE PROPOSED RULE RESTORES THE ONLY EFFECTIVE TOOL FOR CITIZENS TO PROTECT THE QUALITY OF AIR IN THEIR OWN NEIGHBORHOODS.

Donna Ballinger's and the Sampsons' experiences with large air pollution sources within hundreds of feet from their homes demonstrate the daily reality of life in a fenceline community subjected to an active air nuisance. The experiences of Ms. Ballinger and hundreds of others in her community are illustrative.

The Middletown Works plant is Ms. Ballinger's neighbor. It consists of nearly 50 regulated air pollution sources. Her Middletown neighborhood is a fenceline community that takes the brunt of the air pollution generated by the plant's iron and steel-making operations. The plant releases dangerous pollutants into the ambient air, including sulfur dioxide, acid gases, oxides of nitrogen, and thousands of tons of particulate matter (e.g. dust, calcium compounds, graphite, soot, kish, slag, iron/metallic particles).

For years, wave after wave of pollution wafted across the plant's fenceline into this surrounding neighborhood. The VOCs and NO_x from the facility rise past the fenceline community going higher into the ambient air where they mix to form ozone.³ The multitudes of different particulate matter similarly mix with particulate matter from other sources in the region as do the sulfur dioxides and acid gases, forming more SO₂. Some of these NAAQS-regulated pollutants ultimately travel to the NAAQS monitors miles away—only there is the air quality measured (and the data averaged over one-year or three-year periods) to determine whether the larger air quality region has “attained” the relevant NAAQS.

Regardless of what those far-off monitors show about “regional attainment,” the reality for those, like Ms. Ballinger, who live in the fenceline community next to the Middletown Works plant, is near-constant exposure to intense and highly concentrated clouds of particulate and related emissions. Ms. Ballinger describes a familiar scene to fenceline communities across Ohio:

Black, gray, and white particles and pieces of metal from Middletown Works fall all over and settle on my yard, house and car nearly every day . . . [t]his fallout has

³ Ozone, one of the pollutants for which USEPA has set a NAAQS is formed “...when volatile organic compounds and nitrogen oxides react in presence of heat and sunlight. It is the main component of smog.” National Ambient Air Quality Standards | Hamilton County Environmental Services, OH (southwestohioair.org).

covered and destroyed everything outside, including my cars, deck, window sills, home and grandchildren's toys and it also gets in my house . . . [H]uge plumes and clouds of air pollution rise up from several areas at the Middletown Works plant and pass over, and sometimes completely surround my house . . . I feel the particles from the clouds and plumes hit my skin . . . [T]he plant releases rotten egg smelling and other foul, chemical clouds and substances . . . [A]fter I am exposed to the pollution from Middletown Works, I have difficulty breathing, my eyes, nose and throat burn, and I cough . . . During recent years, nearly continuous waves of plumes and clouds of air pollution from Middletown Works have become much more severe . . .

Attachment 1, Ex. 1 at ¶¶ 3-7.⁴ This pattern repeats itself throughout Ohio in neighborhoods surrounding a wide variety of polluting facilities. ***This is precisely the type of scenario the ANR is designed to remedy.***

Inclusion of the federally enforceable ANR in the SIP precludes polluting facilities from creating an air nuisance under the ANR even if they are “in compliance” with other SIP-required standards and limitations in the permit. Thus, the ANR assures that air pollution ***does not have a disproportionate and adverse impact on fenceline communities.***

Moreover, the ANR greatly simplifies the enforcement process for residents. Facilities can have tens or even hundreds of separate points where air emissions are subject to different emissions limits. Without the ANR, Ohioans must take on the extreme burden of showing, through costly expert investigation and testimony, which emission point is causing the nuisance and proving a violation of a numeric standard. The ANR cuts through this burden by making the nuisance prohibition facility-wide and focusing the proof required in court on what Ohioans—the actual receptors of the pollution—are experiencing and how they are suffering from the nuisance.

Thus, prior to removal of the ANR, Jim and Bobbi Sampson, in their citizen suit to end violations of the ANR, were able to use pollution photographs and video, a journal of pollution observations, testimony of the effects of exposure to the pollution, and data showing pollution levels ***on his own property and in the surrounding community*** at a court hearing. See Attachment 2, Sampson Declaration referencing hearing transcript pages 39-45. And other affected residents in their community were able to testify in federal court regarding the air pollution nuisance being created in their community.

Had the ANR not been removed from the SIP in 2020, Ms. Ballinger could have issued another Notice of Intent to Sue in order to bring an end to the air pollution nuisance that has affected her and hundreds of her neighbors.⁵ Then she could have filed a federal lawsuit and

⁴ Ms. Ballinger's October 2017 and August 2018 Notice Letters, attached to her 2022 declaration, describe in more detail the impact of the AK Steel facility on her, her family, and the fenceline community in which she lives.

⁵ Despite the entry of a state consent order to settle ***Ohio's allegation that Middletown Works had violated the ANR***, Middletown Works continued to violate the ANR, thus giving Ms. Ballinger another opportunity to file an ANR enforcement suit had the ANR remained a part of the SIP.

sought an injunction using the evidence she had collected over the years: thousands of photographs, years of repeated reports of pollution to Ohio EPA, and alarmingly elevated levels of PM_{2.5} regularly measured on her property. Yet instead of devoting her time to ending the air nuisance, Ms. Ballinger was forced to appeal the unlawful removal of the ANR.

The USEPA's 2020 ANR removal harmed fenceline communities by taking away the most direct and effective tool for protecting those communities from nuisance emissions. The proposed rule reinstating the ANR to the SIP restores this vital enforcement tool.

B. THE PROPOSED RULE CORRECTS THE PRIOR EPA ADMINISTRATOR'S BLIND RELIANCE ON INDUSTRY LOBBYISTS.

The purposes of the CAA are “to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population” and to reduce pollution. 42 U.S.C. § 7401(b). Congress tasked the states with primary responsibility for reducing or eliminating air pollution that poses “dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation.” *Id.* at 7401(a). As detailed below, the State of Ohio, in developing its plan for reducing or eliminating air pollution that threatened public health and welfare (the SIP), deliberately included the ANR.

There is a standard for the use of the limited error correction authority the USEPA has under the CAA. When an agency has secret, backdoor meetings with a law firm that hands an agency the game plan and the game plan is based on a series of legal and factual fallacies, and most importantly based on the utterly baseless assertion that the ANR's inclusion 50 years ago was a “mistake,” the USEPA must quickly and properly correct this error.

The record here shows that, in an egregious departure from implementing the CAA as Congress mandated, USEPA: (1) based on the secret request of the Perkins Coie law firm—legal counsel to a company that was then facing an ANR citizen suit—removed the ANR in 2020 without getting any input from affected Ohio residents; (2) adopted, without question (or any legal research, apparently) a flawed playbook for the removal; and (3) hid that secret impetus for the 2020 removal from the public. Such backroom dealings violate the principles of governmental transparency that are a bedrock of our democratic government and erode the public's trust in agencies tasked with guarding public health and safety.

USEPA relied on Perkins Coie to the detriment of the very people USEPA is charged with protecting—Ohio residents suffering from air pollution nuisances. The United States defended, at likely great expense to taxpayers, an appeal of the 2020 removal that should have never been necessary due to USEPA's apparent failure to verify the soundness of the legal arguments set forth by Perkins Coie. Briefing in the appeal and the Sixth Circuit's remand decision show the Perkins Coie playbook is flat wrong. As a result, Ohioans have suffered unjustly for four years.

Perkins Coie provided multiple erroneous assertions upon which the 2020 removal of the ANR was predicated. One such assertion was that the ANR, after removal from the SIP, would still be enforceable by Ohioans under a state statute or common law. The Sixth Circuit, in its

remand decision, rejected this position as legally erroneous. First, the Sixth Circuit held that the “county-resident” requirement of R.C. 3767.03 precluded its effectiveness as a substitute for the ANR. Second, with respect to common law, the Sixth Circuit similarly held that “[s]tate nuisance lawsuits are not a sufficient substitute for CAA citizen suits” and “state-law nuisance claims and CAA citizen suits for violations of the ANR are not interchangeable because important components of their requirements and remedies differ.” *Sierra Club, et al. v. United States EPA*, 60 F.4th 1008, 1020 (6th Cir. 2023).

Another erroneous assertion by Perkins Coie underlying the 2020 removal is that the ANR has no nexus to the NAAQS and that, as a narrative limitation, it was not “federally enforceable.” The Sixth Circuit also rejected this position and held, instead, that the ANR is enforceable and had, in fact, been used to enforce the SIP and NAAQS. *Sierra Club*, 60 F.4th at 1014.

These binding rulings have now been properly incorporated into USEPA’s current proposed rule to reinstate the ANR and reinforce that reinstatement is legally proper. While USEPA is prohibited from considering one of the flawed bases Perkins Coie supplied—that the ANR has caused “unintended” economic harm—it is worth addressing. USEPA blindly adopted Perkins Coie’s definition of “error” in order to improperly accommodate a polluting industry’s interest in avoiding the “economic harm” that it “suffers” by spending its resources to control nuisance emissions plaguing its neighbors instead of keeping them as profit. *Sierra Club*, 60 F.4th at 1014-1015. Consideration of such economic factors in the use of error correction authority is prohibited by the plain language of the CAA.

Even if such factors could be considered, Perkins Coie’s assertion is meritless. The oft-repeated but unsupported assertion that strong environmental regulations economically harm business has proven to be wrong again and again over the past 50 years that environmental regulations, including the ANR as part of the SIP, have been in place. Rather, lowering exposures to criteria (and other) pollutants results in a healthier economy by supporting a healthier workforce, reducing the burden on the healthcare system and lowering the cost of health care associated with pollution-related disease. In fact, EPA’s own analysis indicates that air pollution control is highly cost-effective, yielding an estimated return of \$30 for every dollar invested.⁶

C. THE PROPOSED RULE HONORS THE FACTUAL HISTORY OF THE ANR’S DELIBERATE INCLUSION IN OHIO’S SIP.

It is imperative for the USEPA to use its limited error correction authority to promptly reinstate the ANR on remand, when USEPA ignored the actual history of the ANR’s inclusion in the SIP. That history shows that the ANR was not only deliberately put into the Ohio SIP when the SIP was originally created, but intentionally reapproved as a part of the SIP over the intervening 50 years.

⁶ <https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act-1990-2020-second-prospective-study>

Testimony from a former top Ohio air regulator involved in the rule's original promulgation and the original compilation of the SIP, William Auberle, shows Ohio's intent during the initial time period when the SIP was first created. USEPA approved this SIP in 1971 and again in 1974 (after it was vacated for unrelated reasons). See 37 Fed. Reg. 10842, 10886-87 (May 31, 1972) and 39 Fed. Reg. 13,539 (Apr. 15, 1974). Mr. Auberle's testimony about Ohio EPA's intent is unequivocal and unrebutted:

From the outset of Ohio's SIP development process, inclusion of the ANR was purposeful and important to Ohio's air pollution control officials . . . Multiple Ohio communities . . . faced the challenge of reducing air pollutant emissions to achieve and maintain the [NAAQS]. The ANR was an important regulatory tool in this process.

Attachment 3, William Auberle, Decl. at ¶ 11 discussing the development of Ohio's SIP.

Mr. Auberle has first-hand knowledge of the development of Ohio's SIP from 1970 to 1977. Attachment 3 at ¶¶ 7-10. During the appeal of the 2020 removal, Ohio did not challenge or rebut Mr. Auberle's sworn statement. He testified for the record that he "directly participated in discussions and development of the Ohio SIP" and served as "founding member and Chair of the Ohio Association of Local Air Pollution Control Officials, which advised the Ohio EPA on SIP development, including the inclusion of the ANR in the Ohio SIP." *Id.* at ¶ 10. This clear record was ignored by the USEPA and current Ohio EPA officials when they originally claimed the inclusion of the ANR was a 50-year-old "mistake." In addition, when removing the ANR in 2020, the USEPA ignored the very clear factual pattern showing that the ANR's inclusion in the SIP was an intentional part of the SIP. As the Sixth Circuit acknowledged:

The ANR has been revised twice. In 1984, Ohio proposed and the EPA approved a revision "including an exemption for sources of odor which are not currently regulated under other portions of the SIP" and removing references to "comfort." 49 Fed. Reg. at 32,181. In 2015, as part of a five-year state regulatory review process, Ohio made stylistic changes to the ANR to clarify the rule without changing its meaning.

Sierra Club, 60 F.4th at 1013-1014.

Ohio's 1984 revision is of particular importance as illustrated by the Third Circuit's opinion in *Concerned Citizens of Bridesburg v. USEPA*, 836 F.2d 777 (3rd Cir. 1987), which shows why Ohio's ANR's inclusion in the SIP was never "in error." The Third Circuit specifically found that USEPA changed its policy about including odor nuisance regulations in SIPs in 1980 after the agency considered whether to develop a separate "odor NAAQS." *Id.* at 786. The Third Circuit rebuked the USEPA for unilaterally removing the odor regulations without giving the state a chance to revise the odor regulation to better tie it to NAAQS pollutants.⁷ Thus, a change in policy drove removal of odor nuisance provisions from SIPs—making the error correcting authority unavailable to the USEPA. More importantly, however, Ohio responded to the USEPA's 1980 "change in policy" by modifying the ANR to ensure it was

⁷ The court also noted that the USEPA said it might accept more specific odor regulations tied to NAAQS-regulated pollutants. *Id.* at 787 (citing 51 Fed. Reg. at 18,440).

not merely an “odor nuisance” provision but was aligned with the NAAQS, just as the Third Circuit suggested. This intentional modification was subsequently approved by the USEPA in 1984, making clear the revised ANR did not violate its “new” policy regarding “odor nuisance” provisions and was again deliberately included and approved as part of the SIP under that new policy.

Importantly, Ohio EPA’s 1984 SIP revision only contained one modification to the SIP and that one change involved revisions to the ANR. There was no other issue before the USEPA. This revision aligned the ANR with the NAAQS by removing references to odors from sources that do not emit any NAAQS pollutants and removing “interference with comfort” language. The USEPA approved these changes, specifically noting that they did not affect the SIP because they only removed portions of the ANR that addressed non-NAAQS pollutants.

In addition to these formal approvals of the ANR in the SIP, there are other examples that show the deliberateness with which the ANR has remained in the SIP. In 1999, Ohio EPA sent a letter to the USEPA stating its intent to remove both the state’s Best Available Technology air permit requirement and the ANR from the SIP. ***It was met with public opposition and USEPA itself advised Ohio that it could not remove the ANR from any permits issued to sources within nonattainment areas without running afoul of anti-backsliding provisions.***⁸ In 2001, the Ohio EPA withdrew the request to remove the ANR from the SIP.

As the above recounting of the ANR’s history shows, the ANR’s inclusion in the SIP has never been “in error” but was always a result of a deliberate decision-making process of state and federal officials. The CAA error correction authority was never intended to unwind prior officials’ judgments so they could be replaced by a new administration’s agenda or whim. Removal of the ANR from the SIP can only be accomplished if the CAA’s requisite showings are made under, for example, 42 U.S.C. §§ 7410(a)(2)(H)(i), 7410(a)(2)(H)(ii), 7410 (a)(2)(I), 7410(k)(5), and 7515.

The USEPA’s proposed action restoring the ANR to the SIP is needed to honor the true history of the ANR in the SIP and to correct its past erroneous use of the error correction authority.

D. THE PROPOSED RULE RECTIFIES USEPA’S IMPROPER USE OF ERROR CORRECTION AUTHORITY IN 2020.

The Sixth Circuit held, in the case that approved this remand, that in order to invoke its error correction authority, USEPA’s error must have been present at the time the agency’s action was originally taken. *Sierra Club v. United States EPA*, 60 F.4th 1008, 1013 (6th Cir. 2023) (citing *Ala. Env’t Council v. EPA*, 711 F.3d 1277, 1287-88 (11th Cir. 2013); *Texas v. EPA*, 726 F.3d 180, 204 (D.C. Cir. 2013) (Kavanaugh, J., dissenting)). USEPA’s proposed action properly follows this judicial pronouncement. Since the actual history of the ANR’s inclusion in the SIP demonstrates that prior administrations considered its inclusion to be intentional, lawful, and sound public policy, the ANR’s inclusion cannot later be deemed an “error” simply because new federal officials would have reached a different conclusion fifty years earlier or because a third

⁸ See Attachment 4, June 18, 1999 letter from USEPA to Ohio EPA.

party asked them to pretend differently. Consequently, the USEPA’s current proposal to restore the ANR to the SIP is necessary to correct what is a true error—the USEPA’s 2020 misapplication of its “error correction” authority at the behest of a polluter.

In the proposed rule, USEPA reevaluates its use of its error correction authority to remove the ANR from the SIP based on its mistaken belief that “. . . [the ANR] had no nexus to the implementation, maintenance, or enforcement of the NAAQS, and that Ohio did not rely on the ANR to meet these statutorily prescribed requirements.” 89 Fed. Reg. at 13307. The Sixth Circuit held, and USEPA now agrees, that the ANR does have a clear nexus to the SIP. And, the State of Ohio belatedly admitted that it has, in fact, used the ANR to enforce the NAAQS. Hence, the USEPA correctly finds its 2020 removal of the ANR was improper; the ANR removal should be immediately reversed by promulgating the proposed rule as a final action.

E. THE PROPOSED RULE CORRECTLY RECOGNIZES THAT USEPA IMPROPERLY MODIFIED OHIO’S SIP BY NOT FIRST PERFORMING AN ANTI-BACKSLIDING ANALYSIS.

“Considered as a whole, the Act reflects Congress’s intent that air quality should be improved until safe and never allowed to retreat thereafter.” *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 900 (D.C. Cir. 2006). In fact, the Clean Air Act’s anti-backsliding provisions are specifically designed to guard against efforts to roll back protections.

USEPA, in its proposed action, now correctly recognizes that the “anti-backsliding” provision under Section 193, 42 U.S.C. § 7515,⁹ applies whenever the USEPA uses its error correction authority to remove control requirements in existence before November 15, 1990. The ANR is a “control requirement” in existence before November 15, 1990. Thus, USEPA could not, as it attempted to do in the 2020 ANR removal, use its error correction authority to modify or remove the ANR unless the agency’s removal of the ANR somehow insured “equivalent or greater emission reductions of such air pollutant.” 42 U.S.C. § 7515. Removal of the ANR could not have survived this standard. Since the ANR works to reduce air nuisances not otherwise being enforced, the ANR can only help to improve air quality. Its removal could only result in ***fewer*** emissions reductions, ***not equivalent or greater***.

In short, USEPA’s 2020 use of error correction authority to remove the ANR from the SIP circumvented protective CAA processes to ensure air quality is not compromised by shifting political winds. The USEPA’s proposed rule is needed to correct this harm caused by its original, erroneous action.

Moreover, outside of its error correction authority, USEPA can only substitute its program for a state SIP, revise a state SIP or make a “SIP call” requiring states to modify their

⁹ This section provides that “No control requirement in effect . . . before November 15, 1990 in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990 in any manner unless the modification insures equivalent or greater emission reduction of such air pollutant.” This section does not exempt removal under the USEPA’s “error correction” authority. And, there are nonattainment areas in Ohio where the ANR applied.

SIPs *when that State SIP is “substantially inadequate” to meet the NAAQS or as necessary to make it comply with other affirmative requirements in the CAA.* 42 USC § 7410(k)(5). Under no reasonable analysis can the inclusion of the ANR cause the Ohio SIP to be “inadequate” to meet any NAAQS. To the contrary, as described herein, the ANR **contributes to Ohio’s compliance with** the CAA. Further, as discussed below, the CAA does not prohibit the use of nuisance or qualitative, “narrative” regulations, particularly ones directly targeted to NAAQS-regulated pollutants as Ohio’s ANR is. Thus, USEPA was not free to substitute its own elements of a SIP for the state program as it did in the 2020 action.

Significantly, the threatened deterioration of local air quality that will continue to result from removal of the ANR demonstrates with certainty that Ohio is similarly precluded from removing the ANR from the SIP once it is restored. Ohio EPA cannot remove the ANR unless it can establish that doing so will not interfere with attainment, maintenance or enforcement of the NAAQS or other requirements. This includes meeting the anti-backsliding requirements, the reasonable further progress requirements, and the protection of prevention of significant deterioration and visibility requirements.

Specifically, for Ohio to revise the SIP under 42 U.S.C. §7410 (CAA § 110) to remove the ANR, it must:

- 1) Hold a public hearing. 42 U.S.C. § 7410(l);
- 2) Demonstrate that the revision would not “interfere with any applicable requirement concerning attainment and reasonable further progress. . . or any other applicable requirement of this chapter.”¹⁰ 42 U.S.C. § 7410(l);
- 3) Meet the applicable requirements relating to nonattainment areas. 42 U.S.C. §§ 7410(a)(2)(I), 7502(c). This includes the anti-backsliding requirements in 42 U.S.C. § 7515, which provide that requirements in existence prior to 1990, such as the ANR, cannot be removed “in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.” This also means a substitute mechanism is required to be created to require equivalent or greater reduction of all VOCs, particulates, SO₂ and its precursors, NO_x and its precursors, and lead that are reduced under the ANR; and,
- 4) Meet the applicable requirements relating to prevention of significant deterioration of air quality and visibility protection.¹¹ 42 U.S.C. § 7410(a)(2)(J) (citing 42 U.S.C. § 7470).

¹⁰ Reasonable Further Progress is defined as “such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.” 42 U.S.C. § 7501(1).

¹¹ The CAA requires that all SIPs “shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant

Prevention of significant deterioration requirements are particularly significant because they involve consideration of nuisance impacts. The purposes of preventing significant deterioration of air quality and protecting visibility include, e.g.:

- 1) protecting “public health and welfare from any actual or potential adverse effect which in the Administrator’s judgment may reasonably be anticipated to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air, notwithstanding attainment and maintenance of all [NAAQS]” and
- 2) assuring “that any decision to permit increased air pollution in any area to which this section applies is made ***only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.***”

42 U.S.C. §§ 7470(1), (5) (emphasis added). In addition, to remove the ANR, Ohio EPA must show, for areas in attainment, any increase in pollutants caused by unabated nuisances is within allowable incremental increases under prevention of significant deterioration requirements.

Through its proposed reinstatement of the ANR, USEPA has properly recognized that the backsliding analyses were not performed in the 2020 removal and that reinstatement of the ANR is therefore legally required.

F. THE PROPOSED RULE CORRECTLY RECOGNIZES THE NEXUS BETWEEN THE ANR AND ENFORCEMENT OF NAAQS.

USEPA’s proposed action properly recognizes the findings made by the Sixth Circuit, dispelling the myth that the ANR had never been used for NAAQS-related purposes. The Sixth Circuit has eliminated any credible claim the ANR cannot be part of the federally enforceable SIP because it had no “nexus” to NAAQS implementation, maintenance or enforcement. Specifically, the Sixth Circuit found that:

Until the EPA removed the ANR from Ohio’s SIP in 2020, parties authorized to enforce Ohio’s SIP could and did bring CAA enforcement actions for violations of the ANR. *See City of Ashtabula v. Norfolk S. Corp.*, 633 F. Supp. 2d 519, 528-29 (N.D. Ohio 2009) (finding that plaintiff may bring an ANR claim under a CAA citizen suit); *Fisher v. Perma-Fix of Dayton, Inc.*, No. 3:04-CV-418, 2006 WL 212076, at *5 (S.D. Ohio Jan. 27, 2006) (same); *see also Sampson v. SunCoke Energy, Inc.*, No. 1:17-cv-00658 (S.D. Ohio); *Graff v. Haverhill N. Coke Co.*, No. 1:09-cv-00670 (S.D. Ohio).

Sierra Club, 60 F.4th at 1014. The Sixth Circuit also noted that the State had used the ANR for enforcement:

deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 . . . as attainment or unclassifiable.” 42 U.S.C. § 7471.

In March 2020, the EPA proposed removing the ANR from Ohio’s SIP. 85 Fed. Reg. 16,309 (Mar. 23, 2020). The EPA stated that it had “reviewed the docket files” regarding the ANR and found “no information” indicating that the state had relied or ever intended to rely on the rule for attainment or maintenance of any NAAQS. *Id.* at 16,309-10. The EPA referenced an email from an Ohio EPA official that “confirmed” as much, *id.* at 16,310, although Ohio has since acknowledged that, in 2021, the state brought a lawsuit against an iron and steel manufacturing facility for violating the ANR, citing the facility’s exceedance of the lead NAAQS as proof. ***Neither the EPA’s proposal nor the EPA’s email exchange with the Ohio EPA official discussed whether the ANR had a role in NAAQS enforcement.*** 85 Fed. Reg. at 16,309-10.

Id. at 1015 (emphasis added).¹² And, the Court noted the non-litigation uses of the ANR:

These uses of the ANR include sending notices of intent to sue that have resulted in facility modifications and consent decrees, and submitting comments in response to proposed EPA action in Ohio. It is not “speculative” to say that reinstating the ANR as part of Ohio’s SIP would permit Petitioners to use it to redress their injuries. Without the ANR, Petitioners are barred from doing so.

Id. at 1018.

USEPA erred in the 2020 removal of the ANR by failing to recognize the nexus between the ANR and the NAAQS. The proposed action corrects that error. The USEPA’s original position incorrectly provided that “using the nuisance rule to achieve criteria pollutant reductions is not equivalent to relying on the rule for SIP purposes.” *Sierra Club*, 60 F.4th at 1016 (citing Fed. Reg. at 73,639). This is a false distinction. The NAAQS monitors reflect the air quality based on the actual emissions from industry that reach the monitors—not just the emissions quantified by or “relied upon” by Ohio. Emission reductions are, as a matter of fact, inextricably reflected in the monitoring data and cannot be extracted. The fact the Ohio EPA cannot quantify the impact of those ANR-related reductions only means Ohio cannot make the requisite showing that the NAAQS has been met or will be met without those reductions—the very step the USEPA circumvented in the 2020 action. The proposed rule needs to be immediately promulgated to correct that prior error.

The Sixth Circuit also made special note of the manner in which the ANR’s presence in the SIP was directly related to NAAQS enforcement, noting that enforcement not only meant litigation, but a deterrent to litigation by spurring compliance. The Court specifically found the Petitioners had successfully established that they “used the ANR for NAAQS enforcement even when not in active litigation.” *Sierra Club*, 60 F.4th at 1018. The Sixth Circuit specifically found that “the ANR plays a role beyond litigation by creating incentives for Ohio-based facilities to limit their emissions.” *Id.* at 1017.

¹² There is also evidence that there is a nexus between the ANR and the NAAQS in Ohio EPA enforcement cases involving Dravo Basic Materials, Progressive Excavating, Sandusky Dock Corp., and Montgomery County—enforcement cases apparently still being overlooked by Ohio EPA.

These judicial pronouncements of connections between the ANR and the NAAQS is a description of a nexus, further demonstrating that the ANR was always a proper part of the SIP.

USEPA now recognizes that it previously failed to adequately consider the role the ANR played in enforcement of the NAAQS in Ohio. 89 Fed. Reg. at 13306-08. By now recognizing the fact the ANR has been used both by residents and the Ohio EPA to enforce the NAAQS, the USEPA is correcting its error of contending that “no nexus” existed.

G. THE PROPOSED RULE CORRECTLY RECOGNIZES THAT INCLUSION OF THE ANR IN THE SIP IS CLEARLY PROPER UNDER THE CAA.

In the 2020 action the USEPA attempted to justify its removal of the ANR from the SIP by claiming the ANR’s inclusion in the SIP was “not permissible.” As the USEPA now recognizes in its proposed rule, the CAA does not limit the manner in which a state can bring about compliance with the federally-established air quality standards. 89 Fed. Reg. at 13306. The agency now acknowledges that the Supreme Court confirmed this principle in *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975) when it found that § 7410 gives states wide berth to design their own regulations to attain, maintain and enforce NAAQS. And under federal law SIPs can, in fact, be more stringent than the minimum requirements of § 7410.

There is no ambiguity in Section 7410. It does not make any strategy “impermissible”; it merely sets **minimum requirements** of what must be included. Nowhere does the CAA preclude states from relying on first-hand reports of excess NAAQS-regulated emissions (e.g., VOCs, SO₂, PM, etc. at levels that are causing a nuisance) from people actually living in close proximity to a facility. In fact, it is clear that ANR-type regulations are encompassed by the broad terms of the CAA. The CAA specifically requires that SIPs include “enforceable emissions **limitations** and other **control measures, means** or techniques . . . as may be necessary **or appropriate** to meet the applicable requirements of this Act.” 42 U.S.C. § 7410(a)(2)(A) (emphasis added). As the Sixth Circuit found in its remand decision, the ANR is an enforceable emissions limitation. *Sierra Club*, 60 F.4th at 1018.

Second, § 7410(a)(2)(B)(i) requires states to establish and operate “appropriate devices, methods, systems and procedures necessary to monitor, compile and analyze data on ambient air quality. “Data” simply means “facts.” Oxford dictionary defines “data” as “facts and statistics collected together for reference or analysis.” Actual people, living in fenceline communities, offer some of the best, real-time data as to the quantity of emissions being released by an industry that is, or should be, regulated under Ohio’s SIP. The experiences and reports of these fenceline communities are “data” that should be considered in any rulemaking that truly aspires to reach the goals and purpose of the CAA.

Because it could not point to any prohibition against using nuisance regulations in the CAA to justify its removal action, the USEPA assumed the converse—that because one type of regulation is “required,” any other type is not “allowed.”¹³ This interpretation is arbitrary and

¹³ For example, while § 7410(a)(2)(K) does require a plan to provide for air quality modeling for predicting the effect of any emission on air quality, that in no way *limits* other strategies for controlling or monitoring emissions.

capricious. Just because a SIP must contain certain provisions to be approvable, that does not mean the CAA **only allows** those provisions in a SIP.

As USEPA, in the proposed rule, now correctly recognizes, the CAA “sets only a minimum standard that the States may exceed in their discretion.” 89 Fed. Reg. at 13306 (citing *Union Elec. Co. v. EPA*, 427 U.S. 246, 260 (1976)) and *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 79). As there are no legal grounds for concluding nuisance regulations like the ANR are **prohibited** from being in a SIP, it is right and proper that the USEPA now reinstates the ANR to the SIP as proposed in the current rule.

H. THE PROPOSED RULE IS A PROPER USE OF USEPA’S ERROR CORRECTION AUTHORITY.

Restoration of the ANR to the Ohio SIP to correct the improper removal in 2020 is the quintessential example of how the USEPA’s error correction authority is properly used. The error being corrected is the prior improper removal of the ANR. As discussed at length herein, that error was clearly present at the time USEPA removed the ANR from the SIP in 2020. The use of the error correction authority is particularly appropriate where a federal court of appeals, here the Sixth Circuit, has made specific findings pointing out the errors that plagued the agency’s initial action.

I. THE PROPOSED RULE IS CONSISTENT WITH THE COMMENTERS’ INTEREST IN PROTECTING PUBLIC HEALTH.

The Commenters are strong advocates of public health, work to bring light to environmental justice issues, and/or assist community-based organizations in their efforts to sustain a healthy community. Many members of these organizations have first-hand knowledge of the adverse health effects stemming from increased exposure to excess particulates and other NAAQS pollutants. Such health effects include, e.g., chronic pulmonary disease, asthma, headaches, and upper respiratory problems. These organizations have observed how removal of the ANR has adversely affected the lives of Ohioans—particularly those living in environmental justice communities—over the last several years.

It has long been established that EJ communities—which are disproportionately located in close proximity to polluting industries—bear the brunt of the harmful emissions released into the air by their neighbors. Yet, the NAAQS monitors are most often located miles from those fenceline communities, leaving enforcement of the ANR in federal court as their best protection. USEPA’s 2020 removal of the ANR from the SIP abandoned those fenceline communities.

The undersigned organizations strongly support USEPA’s proposal to restore the ANR to the SIP because the ANR promotes the public interest that the CAA was explicitly designed to protect. As the Sixth Circuit noted in its decision, “Congress enacted the [CAA] to ‘protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.’” *Sierra Club*, 60 F.4th at 1012 (quoting 42 U.S.C. § 7401(b)(1)). Congress also recognized the need for citizen enforcement of the CAA in the instances when the government fails to act and granted residents the right to enforce emission standards or limitations in federal court. 42 U.S.C. § 7604. Providing the most highly impacted

April 24, 2024

Page 17 of 18

neighbors of a polluting facility the legal means to protect the air they breathe from excess pollution best accomplishes those stated CAA purposes.

For the foregoing reasons, the Commenters urge USEPA to immediately promulgate the proposed rule and immediately restore the ANR to Ohio's SIP.

Respectfully submitted by:

/s/ D. David Altman

/s/ Justin D. Newman

AltmanNewman Co. LPA

15 E. 8th St., Suite 200W

Cincinnati, OH 45202

(513) 721-2180

daltman@environlaw.com

jnewman@environlaw.com

COMMENTERS

Donna Ballinger
Middletown

Marilyn Wall
Cincinnati

Roxanne Groff
**Athens County's Future Action Network
(AFCAN)**

Kidest Gebre, Communications &
Environmental Campaigns Manager
Black Appalachian Coalition (BLAC)

Zach Bollheimer, Executive Director
Buckeye Environmental Network

Jenny Morgan
Citizen Pollution Watch

Erica S. McConnell, Staff Attorney
**Environmental Law & Policy Center,
Columbus**

Shannon Smith, Executive Director
FracTracker Alliance

Lea Harper, Managing Director
FreshWater Accountability Project

Tanner Yess, Executive Director
Groundwork Ohio River Valley

Alicia Smith, Executive Director
The Junction Coalition

Sally Dannemiller, Chair
Miami Group, Ohio Sierra Club

Yvonka M. Hall, MPA, Executive Director
Northeast Ohio Black Health Coalition

Rachael Belz, CEO
Ohio Citizen Action

Chris Tavenor, General Counsel
Ohio Environmental Council

Cheryl Johncox, Regional Coordinator
The People Over Petrol Coalition

April 24, 2024
Page **18** of **18**

Lynn Anderson
SOBE Concerned Citizens

Clark Beck, President
Communities United For Action

Karen and Richard Johnson
Grafton

Camille Rhodehamel
Elyria

ATTACHMENT 1

DECLARATION OF DONNA BALLINGER

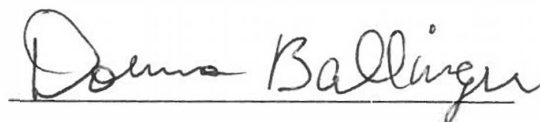
I, Donna Ballinger, declare as follows:

1. I am over 18 years of age.
2. The information in this declaration is based on my personal knowledge.
3. This declaration is an update to the declaration I provided on February 2, 2022, attached here as Exhibit 1. I provided that prior declaration as part of the federal appeal that I and others filed challenging USEPA's removal of the Air Nuisance Rule (ANR) from the Ohio State Implementation Plan (SIP) in late 2020.
4. I understand that, as a result of the federal court's decision in my appeal, USEPA is now proposing to put the ANR back into the Ohio SIP.
5. The removal of the ANR in 2020 has caused members of my Middletown, Ohio community and me to continue to suffer from nuisance air pollution from the Middletown Works iron and steel plant for four additional years. During these long years, we were unable to use the ANR to fight for pollution reductions or to seek a stop to the air pollution from Middletown Works.
6. In my 2022 declaration, I described the air pollution from Middletown Works in paragraphs 3-7. The air nuisance conditions I described in 2022 have continued.
7. I continue to live in my home at 3014 Ottawa Street, just hundreds of feet from the Middletown Works plant. The plant continues to release huge plumes and clouds of air pollution that I watch pass over or surround my house and land on my property. I am also greatly concerned about the hundreds of tons of small particle pollution that Middletown Works has released and continues to release into my community. My prior ANR enforcement notice letters sought to reduce small particle pollution and otherwise protect my family and community.
8. The plant also continues, almost every day, to release black, gray, and white particles and pieces of metal that come down like rain all over my property and cover everything. Recently, I have noticed a new black greasy substance on my property. The pollution clouds have continued to release rotten egg and other foul-smelling odors.
9. What I have described as "fallout" from the Middletown steel plant has continued to get on my property and in my home. I have continued to experience health effects after breathing this pollution, including breathing problems, burning in my eyes, nose, and throat, respiratory illnesses, headaches, and nausea. I also have ongoing aches and pains all over my body. I worry that these pains result from the pollution.

10. My fears and concerns about the effects this near constant pollution has on my health and my family's health has not lessened. I am particularly concerned about the really small particle pollution from the Middletown steel plant. It is my understanding these particles get deep into people's lungs and are dangerous.
11. Because of the pollution, I try to keep my children and grandchildren away from my house. Instead of letting them visit me, I try to visit them where they live. However, I do have one daughter, two young grandchildren, and my partner who currently live with me, and I am very concerned about the effects of the pollution on their health.
12. The pollution has also taken a great toll on me mentally. It is very hard for me to manage the fear and apprehension caused by living in these conditions on a daily basis.
13. Since my 2022 declaration, I have continued to report these nuisance emissions to Ohio EPA officials. The agency has not required Middletown Works to stop the pollution. The pollution I experience often happens at night. The agency refuses to send anyone out at night to investigate. Most recently, I called the agency in early April 2024 to report the fallout I was experiencing at that time and to ask for samples. No one returned my call until April 16, 2024. Despite eventually returning my call, the agency has really done nothing in response to my recent reports.
14. I fully support USEPA's proposed rule to put the ANR back in the SIP. This will allow Ohioans, like me, to bring air nuisance claims to protect themselves and their communities. USEPA needs to put the rule back in as soon as possible. Once it is back in the SIP, I will resume my efforts with the Sierra Club to enforce the ANR against Middletown Works to protect me, my family, and my community from the small particle and other toxic pollution emitted from that plant.
15. Marilyn Wall, from Sierra Club, and I have spoken to many people who live in Middletown who agree that the ANR should be restored and who have signed a petition to try to get USEPA to put it back into Ohio law as soon as possible.

I declare, pursuant to 28 U.S.C. § 1746, under penalty of perjury that the foregoing is true and correct.

Executed on April 23, 2024.

A handwritten signature in cursive script that reads "Donna Ballinger". The signature is written in dark ink and is positioned above the printed name.

Donna Ballinger

EXHIBIT 1

**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 JANE)
NISHIDA, Acting Administrator, U.S.)
Environmental Protection Agency,)

Respondents.

No. 21-3057

**DECLARATION OF DONNA BALLINGER IN SUPPORT OF PETITION
FOR REVIEW**

I, Donna Ballinger, declare as follows:

1. My name is Donna Ballinger. I am over 18 years of age. The information in this declaration is based on my personal knowledge. If called to testify, I would testify to the facts as stated in this declaration.
2. I live in Butler County, Ohio. My current address is 3014 Ottawa Street, Middletown, Ohio 45044. I have lived at this address since October 2012.

3. The AK Steel Middletown Works plant (now called Cleveland-Cliffs Middletown Works) is located at 1801 Crawford Street, Middletown, Ohio 45044, a few hundred feet from my home and easily visible from my property. I have lived near Middletown Works throughout my 57 year life. During recent years, nearly continuous waves of plumes and clouds of air pollution from Middletown Works have become much more severe, made my life unbearable, and deprived me of safety and security in my home.
4. I have directly and repeatedly observed that huge plumes and clouds of air pollution rise up from several areas at the Middletown Works plant and pass over, and sometimes completely surround, my house. When I am outside, I can feel the particles from the clouds and plumes hit my skin. Fires and explosions are frequent. The plant releases rotten egg smelling and other foul, chemical clouds and substances. The plumes, dust clouds, noises, odors, and fallout seem to never stop—the plant operates 24 hours a day, 7 days a week.
5. Black, gray, and white particles and pieces of metal from Middletown Works fall all over and settle on my yard, house, and car nearly every day. I call these materials “fallout.” This fallout has covered and destroyed everything outside, including my cars, deck, window sills, home, and grandchildren’s toys, and it also gets in my house. Even if I sweep inside

every day, there will be more black fallout to sweep up the next day. When my grandchildren visit, I try to keep them inside the house because if they play outside, they come back inside covered in black substances from Middletown Works. I still worry about my family's health even when they are inside my home because I know the materials from the plant are getting inside my house too.

6. I am afraid and concerned about the effect the nearly constant pollution will have (or has already had) on my health and my family's and neighbors' health. I am especially concerned for my partner, who lives with me, because I have noticed that he does not have the energy he once had and now gets out of breath easily. I am concerned about my grandchildren's exposure and the effect on their lungs and health because I know whether they are in inside or outside, as long as they are on my property, they are breathing in the pollution. Friends and other family used to visit my home but have stopped because they cannot stand the odors and other pollution and get headaches and sinus congestion or infections after visiting.
7. During and after I am exposed to the pollution from Middletown Works, I have difficulty breathing, my eyes, nose, and throat burn, and I cough. I have also experienced sinus congestion, sinus infections and other

respiratory problems, headaches, and nausea. The odors are frequently so strong that I have to cover my nose and mouth and run inside to get away from the worst of the pollution. I understand my sinus infections, which I believe result from Middletown Works, are more frequent than any normal person should have. I understand that the pollution emitted from Middletown Works is harmful to health and that I, and those around me, are being harmed by this pollution.

8. For over four years, I have reported this pollution and its effects on my property and health to Ohio EPA when it happens, which is frequently every day for weeks or months at a time. Ohio EPA has never required the pollution from Middletown Works to stop. Instead, local air officials affiliated with Ohio EPA have asked me, rather than requiring Middletown Works to stop its pollution, why I simply don't move.
9. In May 2017, after I learned of Sierra Club's and Marilyn Wall's efforts in Middletown to get Dick's Creek cleaned up by the polluter, I contacted Marilyn to ask for her help in stopping the air pollution from Middletown Works. My conversations with Marilyn and my desire to protect myself, my family, and my community from the Middletown Works pollution led me to join Sierra Club. In particular, I joined Sierra Club to get help

putting a stop to the pollution from Middletown Works and to protect my community and family.

10. As part of these efforts, I learned about the existence of the Ohio Air Nuisance Rule, and learned that the Air Nuisance Rule has been used by citizens to protect people and communities from polluters like Middletown Works.
11. Marilyn Wall and I have dedicated hundreds of hours over the past four years to investigating and documenting adverse impacts that Middletown Works is having on health and property. We have gone door to door and canvassed homes on almost every street near Middletown Works and on all sides of the plant. We arranged for a survey of people in my neighborhood. Dozens of other Middletown residents have reported similar bad air pollution experiences and impacts to their property and their health.
12. I have also learned that Middletown Works gives off hundreds of tons of particulate matter, including smaller particles known as PM 2.5, each year. I understand that exposure to PM 2.5 is very unhealthy. Because of this, PM 2.5 is a pollutant of special concern to me. I monitor almost every day for PM 2.5 through the use of a personal handheld air monitoring device that directly measures PM 2.5 concentrations in the air where I live. On hundreds of occasions I have measured elevated concentrations of PM 2.5.

I am greatly worried about my exposure to these smaller particles of pollution.

13. Because of the severity of the pollution, I, along with the Sierra Club, hired attorneys with AltmanNewman Co., LPA in 2017 to enforce the Air Nuisance Rule against Middletown Works. We provided a 60-Day Notice of Intent to file a Clean Air Act citizen suit to Middletown Works on October 6, 2017. See Attachment A for a true and accurate copy of that letter, which alleges that Middletown Works has continually and repeatedly violated the Air Nuisance Rule.
14. In response to the 2017 notice letter, the State of Ohio entered into a consent decree with the owner of Middletown Works. I understand the consent decree was entered just hours before our 60-day period waiting period to file suit expired.
15. Since the consent decree was signed, the amount and frequency of fallout, odors, and other pollution emitted from Middletown Works have gotten worse, not better. As a result, Sierra Club and I issued a second 60-Day Notice of Intent to file a Clean Air Act citizen suit to Middletown Works on August 17, 2018. See Attachment B for a true and accurate copy of that letter, which alleges that Middletown Works is still in violation of the Air Nuisance Rule despite the consent decree. After that 2018 notice,

regulators and AK Steel agreed to other modifications at Middletown Works.

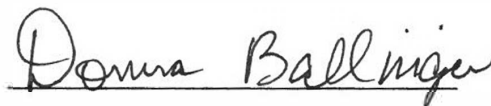
16. None of these steps by Ohio EPA have lessened the frequency and severity of pollution from Middletown Works. Rather, these steps have only had the effect of forcing the community to delay enforcement to see if conditions would improve. Even as of the date of this declaration, the pollution has not improved.
17. I am aware, from a federal government notice, that the Air Nuisance Rule was removed from the Ohio State Implementation Plan (SIP) in late 2020. Because the air pollution from Middletown Works remained severe in late 2019 and throughout 2020, it was clear to me that Ohio EPA was never going to actually stop the nuisance, and that I would need to ask a federal court, as part of a citizen suit, to enforce the Air Nuisance Rule. Removal of the Air Nuisance Rule from the Ohio SIP has already prevented me, for over a year, from taking such steps to protect my family, my home, and my community.
18. I understand that the Air Nuisance Rule, prior to its removal from Ohio's federal plan, could be used by citizens like me to limit PM 2.5 pollution, especially when the environmental agencies have not put a stop to the pollution. Removal of the Air Nuisance Rule from the Ohio SIP has taken

away the most important enforcement right that I could have used to protect my home, property, and my community and likely prolonged my, my family's, and my neighbors' exposure to elevated levels of pollution, including PM 2.5.

19. When US EPA announced that it was considering removing the Air Nuisance Rule from the State Implementation Plan, Marilyn Wall, the Sierra Club, and I submitted comments opposing the removal. Despite hundreds of comments opposing removal, including our comments, US EPA removed the Rule from the Ohio SIP. Marilyn, Sierra Club, and I are asking the Court to restore the Rule to the Ohio SIP and to restore my right to protect my family and community. If the Air Nuisance Rule is placed back in the Ohio SIP, I will definitely try to enforce the Air Nuisance Rule to protect the Middletown community from the PM 2.5 and other toxic pollution emitted from Middletown Works.

I declare, pursuant to 28 U.S.C. § 1746, under penalty of perjury that the foregoing is true and correct.

Executed on February 2, 2022.

A handwritten signature in cursive script that reads "Donna Ballinger". The signature is written in dark ink and is positioned above the printed name.

Donna Ballinger

ATTACHMENT A

October 6, 2017

**VIA CERTIFIED MAIL – RETURN RECEIPT
REQUESTED**

AK Steel Holding Corporation
c/o: Roger K. Newport
9227 Centre Pointe Drive
West Chester, OH 45069

AK Steel Corporation
c/o: Roger K. Newport
9227 Centre Pointe Drive
West Chester, OH 45069

AK Steel - Middletown Works
c/o: Dale Rupp, General Manager
1801 Crawford Street
Middletown, OH 45044

**Re: 60-Day Notice of Intent to File Citizen Suit Under Clean Air Act Section 304(a) for
Violations of the Clean Air Act by AK Steel Holding Corporation and AK Steel
Corporation at the Middletown Works Iron and Steel Plant in Middletown, Ohio**

Dear Messrs. Newport and Rupp:

My law firm represents Donna Ballinger, who resides in Middletown, Ohio on Ottawa Street and the Sierra Club (clients). Pursuant to Section 304(a) of the Clean Air Act (CAA), 42 U.S.C. § 7604(a), and 40 C.F.R. Part 54, Donna Ballinger and the Sierra Club and its members hereby notify you that AK Steel Holding Corporation and AK Steel Corporation (the Responsible Parties) have violated and will continue to violate emission standards and limitations under CAA Section 304(a) & (f)¹ as described in this Notice. Unless these violations and the underlying causes are fully and verifiably remediated within 60 days, my clients intend to file a citizen suit seeking civil penalties

¹ 42 U.S.C. § 7604(a)(1) & (f)

for the Responsible Parties' violations and an injunction compelling the Responsible Parties to comply with the CAA. During this 60-day period, we are willing to meet with the Responsible Parties and/or any and all interested government officials to implement concrete and enforceable steps to end these violations.

The Responsible Parties and Location of the Violations

AK Steel Corporation owns and operates an iron and steel manufacturing plant, Middletown Works, located at 1801 Crawford Street, Middletown, Ohio 45044 on a 2,791-acre parcel in Butler County (the Facility). AK Steel Corporation is a wholly owned subsidiary of AK Steel Holding Corporation.

The odors; smoke; flames; black, red, or orange plumes; and clouds containing a myriad of particulates and other substances (including: ash; black, white, silver, yellow, or red material; dust; coal; coke; coke breeze; soot; kish; slag; broken-glass-like particulates; and iron/metallic particles) that the Responsible Parties have released, and continue to release from the Facility have repeatedly violated and continue to violate emission standards and limitations, permit requirements, the National Emission Standards for Hazardous Air Pollutants (NESHAPs), and Ohio's federally-approved State Implementation Plan (Ohio SIP), including the air pollution nuisance provision (Ohio Adm. Code § 3745-15-07), all of which are federally enforceable by citizens. The Responsible Parties are owners and/or operators of the Facility and are persons who have violated and who are in violation of the emission standards and limitations set forth herein.

Background

Donna Ballinger has lived in the vicinity of the Facility for her entire 53-year life and has lived at her current address, 3014 Ottawa Street, Middletown, Ohio 45044, since October 2012. Ms. Ballinger's property is south and west of and in close proximity to the Facility. The odors and substances and/or combinations of substances released from the Facility discussed in this Notice have caused Ms. Ballinger to be greatly concerned for her health and welfare and have caused unreasonable damage to her property. Ms. Ballinger is a member of the Sierra Club.

Sierra Club, founded in 1892, is the nation's oldest and largest grassroots nonprofit environmental organization, with more than 825,000 members nationwide. The Ohio Chapter has over 23,000 members, including 506 in Butler County. Sierra

Club's Ohio Chapter has an extensive history of grassroots environmental protection in Ohio. Sierra Club's purposes are to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's ecosystems and resources; to educate and enlist humanity in the protection and restoration of the quality of the natural and human environment; and to use all lawful means to carry out these objectives. Since its founding over a century ago, Sierra Club has become a leader in working to reduce air pollution. The Sierra Club's members include people who live and breathe air in Ohio, and who are affected by the quality of Ohio air. Ms. Ballinger and other members of the Sierra Club have suffered and continue to suffer injuries directly traceable to the Responsible Parties' CAA violations.

The Facility operates under a Title V Permit² issued to AK Steel Corporation by the Ohio Environmental Protection Agency.

Activities that Violate the Clean Air Act

As part of its iron and steel making operation, the Facility has: 76 by-product coke ovens and related air contaminant sources (emissions units B918, P067, P068, P070, P075, T002, and T021), including quenching operations (F021 and P043); paved and unpaved roadways and parking areas (F001); operations that handle, load and unload, process, store, and transfer coal, raw materials, iron bearing materials, coke, ore, slag, flux material, and fluxing agents (F002, P901, F003, F004, F005, F008, F010, F012); basic oxygen furnaces and related air contaminant sources (P926, P927, F011, and F025); a continuous caster (P902); slab scarfing and slitting equipment (F015); coating lines (P019 and P022); a hot metal pouring and desulfurization station (P047); electrogalvanizing line (P062); a cold rolling steel operation (P065); a hot strip mill (P094); a flushing liquor and tar decanter tank, equipped with gas blanketing (P096); a blast furnace (P925); a steel refining station (P934); vacuum degassing operations (P935); hot metal pouring and desulfurization operations (P047 and P956); annealing operations (B021, B022, B023, and B026); industrial boilers (B007, B008, B009, and B010); ladle and tundish preheaters (B027, B028, B029, B030, B031, and B032); steel pickling lines (P023 and P024); slab reheat furnaces (P009, P010, P011, and P012); temper mills (P091, P092, and P095); a corrective rewind line (P093); gasoline and diesel dispensing facilities (G001); and metal parts spray painting operations (K001).

² Unless otherwise specified, the term "Title V Permit" refers collectively to the Facility's permit P0096473, effective January 3, 2005, and all subsequent renewals, including its renewal (P0105157) issued August 10, 2017.

The Responsible Parties' CAA violations stem from their illegal, improper, and/or careless operation of the Facility, poor maintenance of the Facility, failure to employ emission controls, and release of excess emissions from the Facility. In addition, the Responsible Parties have allowed and continue to allow noxious odors; clouds of particulates (containing, *inter alia*: ash; black, white, silver, yellow, or red material; dust; coal; coke; coke breeze; soot; kish; slag; broken-glass-like particulates; and iron/metallic particles); hazardous air pollutants; greenhouse gases; oxides of nitrogen; sulfur dioxide; acid gases; organic compounds; volatile organic chemicals; and toxic metals to be released from the Facility and to be deposited onto nearby properties, including Ms. Ballinger's property.

Each of these CAA violations, as further described in this Notice, is a violation of an "emission standard or limitation" under the CAA for which citizens may bring suit and obtain enforceable relief. Each violation involves one or more of the following "emission standards or limitations" under the CAA: (1) an emission limitation, standard of performance, or emission standard under 42 U.S.C. § 7604(f)(1); (2) a condition or requirement of a permit under 42 U.S.C. § 7604(f)(3); and (3) a standard or limitation established in a Title V permit or in the Ohio SIP under 42 U.S.C. § 7604(f)(4). The Responsible Parties are each persons who have repeatedly violated and who are in violation of emission standards or limitations.

The Facility Is Operated in Such a Manner as to Create an Air Pollution Nuisance in Violation of the CAA, the Title V Permit, and the Ohio SIP

Under the CAA, the Ohio Administrative Code, and the Title V Permit, the Facility is subject to the "air pollution nuisance prohibition" of Ohio Adm. Code § 3745-15-07:

[T]he 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, is hereby found and declared to be a public nuisance. It shall be unlawful for any person to cause, permit or maintain any such public nuisance.

Importantly, the federally enforceable and Ohio EPA-issued Title V Permit also mandates that "air contaminants emitted by the emissions units covered by [the

permit shall not cause a public nuisance, in violation of OAC rule 3745-15-07." (emphasis added)³ Hence, Ohio's air pollution nuisance provision is federally enforceable under the Title V Permit, is federally enforceable both because it is part of the Ohio SIP and because it is an "emission standard or limitation" under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4).

The Facility has released, and continues to release, noxious odors, ash, dust, coal, coke, coke breeze, soot, kish, slag, broken glass-like particulates, iron/metallic particles, hazardous air pollutants, acid gases (such as hydrochloric acid), oxides of nitrogen, sulfur dioxide, organic compounds, volatile organic chemicals, and toxic metals. These odors and substances are visibly emitted or spewed from one or more of the iron, steel, or coke making operations as black or gray smoke; dust clouds; red, orange, or black plumes; explosions; fire; and haze and enter the community surrounding the Facility. The odors invade nearby residents' properties, including Ms. Ballinger's property, and permeate inside the homes. The ash, dust, coal, coke, soot, kish, and other particulates and air contaminants frequently settle onto nearly every surface of the properties surrounding the Facility.

The deleterious substances being released from the Facility are known to be toxic and/or to cause adverse health effects, including cancer. For example, coke oven and steel plant emissions and many metals found in the particulate matter released from the Facility are known carcinogens or are extremely toxic, even at low levels. Exposure to particulate matter, including PM10 and PM2.5, is linked with "premature death in people with heart or lung disease, nonfatal heart attacks, irregular heartbeat, aggravated asthma, decreased lung function, and increased respiratory symptoms, such as irritation of airways, coughing, and difficulty breathing." Exposure to PM10 causes irritation of the eyes, nose, and throat. *PM2.5 poses the greatest risk to health because the particles can become lodged deep in the lungs and may enter the bloodstream.* People with heart or lung diseases, older adults, and children are the most vulnerable. Exposure to PM2.5 is associated with increased risk of premature death from heart or lung disease. PM2.5 can cause or aggravate respiratory diseases, such as asthma and bronchitis. *In fact, there is no safe level of exposure to PM2.5.* Benzene is a human carcinogen, and exposure significantly increases the risk of leukemia, and increases the risk of Hodgkin's lymphoma. Hydrochloric acid is corrosive and can cause difficulty breathing and nasal and respiratory irritation when inhaled. Sulfur dioxide is toxic to the respiratory system and can cause permanent injury with exposure to small

³ Part I.A.20, No. P0096473 and A.21., No. P0105157.

quantities. In addition, many of these air contaminants, substances, and combinations of substances released from the Facility are known to damage property.

The odors and releases from the Facility have interfered with the use and enjoyment of Ms. Ballinger's property, caused unreasonable damage to her property, aggravated existing health conditions, and endangered her health and welfare. Particulate fallout from the Facility intermittently lands on Ms. Ballinger's property. The frequency and intensity of the fallout has greatly increased in the past six months or so. The particulate deposits include large pieces of metal that accumulate and cover her cars, deck, window sills, home, and grandchildren's toys. The black deposits are difficult to clean and some of the material cannot be washed off. The particulates accumulate on and damage her gutters—which were installed less than a year ago and already need to be replaced. The particulate fallout drops "like rain" because Ms. Ballinger can feel it hitting her body, even though the particles are not always visible.

Ms. Ballinger cannot tolerate being outside her home because releases from the Facility make it difficult for her to breathe. She rarely, if ever, cooks outside. Intermittent loud noises from the Facility shake her house. Analysis of samples taken after a recent and especially heavy particulate fallout event—which covered her cars and property and a four-block area to the south, west and north of her home—showed that 70-80 percent of the sample was slag and included particulates "resembling glass slivers and pieces of broken glass." Ms. Ballinger feels panicked and concerned for her health and is especially concerned about learning that she is breathing air with broken-glass-like particulates.

When exposed to the odors, ashes, dust, dirt, grime, coal and coke wastes, soot, kish, slag, broken glass-like particulates, iron/metallic particles, and other particulates, my client and her neighbors, and other Sierra Club members, suffer a range of irritating to unbearable symptoms such as: coughing, difficulty breathing, sinus congestion, and other respiratory problems; headaches; nausea; burning noses and throats; a "coal stove" or metallic taste in the mouth; and burning eyes. Even pets are adversely impacted by Facility emissions, frequently coughing or scratching their skin after exposure. The sulfur, chemical, coal, coal burning, gas, steel-making, or coking odors from the Facility interfere with Ms. Ballinger's and other residents' use and enjoyment of their decks and porches and have even kept residents up all night. Ms. Ballinger refrains from opening her windows, but strong odors still invade her home.

The visible deposits of ashes, dust, dirt, grime, coal and coke wastes, soot, kish, slag, broken glass-like particulates, iron/metallic particles, and other particulates (called “fallout” by my client and other residents) accumulate frequently on Ms. Ballinger’s and her neighbors’ properties. The fallout covers nearly every surface—yards, decks, homes, outdoor furniture, and vehicles—and even gets inside homes. The visible deposits coat vehicles and damage paint. Due to the nature of the particulates, the material is very difficult to clean and remove. Residents struggle to keep their properties and homes clean. HVAC filters must be changed more often. The visible deposits accumulate quickly and often reappear within a couple of days after an attempted cleaning. The fallout has been so thick it resembles snow fall. On numerous occasions, residents go outside in the morning to find that the particulates have been deposited overnight. The impacts of periods of particularly heavy fallout can be felt for days or several weeks at a time. On days of heavy fallout, substances from the Facility will visibly accumulate on residents’ skin and clothes if they are outside for only 10 to 15 minutes.

Hamilton County Department of Environmental Services/Southwest Ohio Air Quality Agency staff have collected numerous samples of the fallout on Ms. Ballinger’s and several neighbors’ properties. Analysis of the samples show that the fallout contains mostly kish, coke, coke breeze, magnetic iron particles, slag, broken-glass-like particulates, graphite, and calcium compounds—directly attributable to the Facility.

The noxious odors, smoke, haze, clouds, ash, dust, coal, coke, coke breeze, soot, kish, iron/metallic particles, hazardous air pollutants, and other deleterious substances released from the Facility into the surrounding community have created conditions that endanger the health, safety, and welfare of Ms. Ballinger, residents, and other Sierra Club members and have caused unreasonable injury to residents’ properties on, at least, the following exemplar dates: 9/14/2012; 9/21–22/2012; 10/8/2012; 10/16/2012; 11/19/2012; 11/27/2012; 12/6/2012; 12/12/2012; 12/13–14/2012; 12/15–17/2012; 3/8/2013; 3/25/2013; 5/1/2013; 5/21/2013; 5/28/2013; 6/19/2013; 7/13/2013; 7/14/2013; 7/25/2013; 8/13/2013; 8/14/2013; 8/17/2013; 8/23/2013; 8/24/2013; 8/30/2013; 9/3/2013; 9/6/2013; 9/14/2013; 9/17/2013; 9/20/2013; 9/26/2013; 10/8/2013; 10/10/2013; 10/11/2013; 11/4/2013; 11/11/2013; 2/3/2014; 2/7/2014; 3/6/2014; 3/18/2014; 3/19/2014; 5/22–23/2014; 6/2/2014; 6/14/2014; 6/15/2014; 6/23/2014; 6/27/2014; 6/29/2014; 6/30/2014; 7/14/2014; 7/25/2014; 7/26/2014; 7/31/2014; 8/1/2014; 8/6–8/2014; 8/10/2014; 8/12/2014; 8/16/2014; 8/28/2014; 8/29/2014; 9/5/2014; 9/28–29/2014; 10/20/2014; 12/4–5/2014; 12/19/2014; 12/21/2014; 12/22/2014; 2/7/2015; 3/12/2015; 3/15/2015; 3/22/2015; 4/15/2015; 5/22/2015; 6/10/2015; 7/16/2015; 7/22/2015; 7/23–26/2015; 7/29/2015; 8/10/2015; 8/13/2015; 8/28/2015; 9/14/2015; 9/15/2015;

9/19/2015–10/7/2015; 10/9–10/2015; 10/20/2015; 10/21/2015; 10/26/2015; 11/28/2015; 2/17/2016; 2/21/2016; 4/15–16/2016; 4/19/2016; 5/22–24/2016; 5/31/2016; 6/2–3/2016; 6/5–6/2016; 6/7–8/2016; 6/17/2016; 6/19/2016; 6/28/2016; 7/9/2016; 8/4/2016; 8/11/2016; 8/22/2016; 9/19/2016; 10/5/2016; 10/11–13/2016; 11/11–12/2016; 11/18/2016; 11/21/2016; 2/12/2017; 2/16/2017; 2/21/2017; 3/30/2017; 5/1/2017; 5/10/2017; 5/18/2017; 5/25/2017; 5/30–31/2017; 6/5/2017; 6/9–10/2017; 6/10–11/2017; 6/20/2017; 6/26/2017; 7/5/2017; 7/11/2017; 7/13/2017; 7/18/2017; 7/31/2017 8/9/2017; 8/14/2017; 8/16/2017; 8/21/2017; 8/28/2017; 8/29/2017; 8/30/2017; 9/2/2017; 9/4/2017; 9/6/2017; 9/8/2017; 9/11/2017; 9/14/2017; 9/15/2017; 9/16/2017; 9/17/2017; 9/18/2017; 9/19/2017; 9/21/2017; 9/22/2017; 9/23/2017; 9/24/2017; 9/25/2017; 9/26/2017; 9/27/2017; 9/28/2017; 9/29/2017; 9/30/2017; 10/1/2017; 10/2/2017; 10/3/2017; 10/4/2017; and 10/6/2017. The accounts of multiple witnesses, public records, and/or the Responsible Parties' own records corroborate events.

These releases have resulted from the Responsible Parties' illegal, improper, and careless operation of the Facility. The Responsible Parties are aware that the Facility has released, and continues to release, these nuisance emissions and odors that have harmed and continue to harm the Facility's neighbors. Despite this, the Responsible Parties have failed to abate the nuisance.

The releases from the Facility, in the manner described above, are a public nuisance under Ohio Adm. Code § 3745-15-07 in violation of Ohio's SIP, the Title V Permit, and the CAA. The public nuisance is ongoing and will continue after the date of this letter and the subsequent filing of a lawsuit, unless and until the Responsible Parties take verifiable and enforceable steps to abate the nuisance. My clients are providing notice for the violations listed above, as well as all ongoing and continuing violations, including those committed subsequent to the date of this Notice.

Other CAA Violations

Exceedances of the particulate matter emissions limit for the No. 3 Blast Furnace (P925)

The Title V Permit limits the emission of particulates from the No. 3 Blast Furnace to 73.8 pounds per hour.⁴ This permit requirement is an "emission standard or limitation" under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on reports prepared and certified to be true, accurate, and complete by Facility personnel and submitted to Ohio EPA, this requirement was exceeded on at least the

⁴ P925 Part III.A.I.1, No. P0096473 and C.23.b)(1)b., No. P0105157.

following dates: 8/22/2012; 9/2/2012; 9/4/2012; 9/7/2012; 9/8/2012; 9/10/2012; 9/16/2012 (2 times); 9/17/2012 (2 times); 9/26/2012; 9/27/2012; 9/30/2012; 10/4/2012; 10/11/2012; 10/12/2012; 10/20/2012; 11/28/2012; 12/11/2012; 12/21/2012; 12/29/2012; 1/15/2013; 1/16/2013; 1/21/2013; 1/30/2013; 2/15/2013 (2 times); 2/19/2013; 3/17/2013; 3/18/2013; 4/29/2013; 4/30/2013 (2 times); 5/7/2013; 5/14/2013 (2 times); 5/16/2013; 5/17/2013; 5/20/2013; 5/27/2013 (2 times); 5/28/2013; 6/5/2013 (2 times); 6/12/2013; 6/21/2013; 7/17/2013; 7/18/2013; 7/20/2013; 7/21/2013 (4 times); 7/22/2013 (6 times); 7/23/2013; 7/24/2013; 7/25/2013; 7/28/2013; 8/1/2013; 8/2/2013 (4 times); 8/4/2013 (2 times); 8/7/2013 (2 times); 8/9/2013 (2 times); 8/11/2013; 8/16/2013; 8/17/2013 (2 times); 8/18/2013; 8/20/2013; 8/21/2013 (6 times); 8/23/2013 (3 times); 8/30/2013 (3 times); 8/31/2013; 9/1/2013; 9/5/2013; 9/6/2013; 9/7/2013; 9/8/2013; 9/9/2013; 9/10/2013; 9/11/2013 (4 times); 9/12/2013 (3 times); 9/15/2013; 9/24/2013 (2 times); 9/25/2013 (2 times); 9/26/2013; 9/27/2013 (2 times); 9/29/2013 (2 times); 9/30/2013; 10/3/2013; 10/6/2013; 10/22/2013 (2 times); 10/29/2013; 11/1/2013 (3 times); 11/4/2013; 11/6/2013; 11/7/2013; 11/8/2013; 12/7/2013; 12/10/2013 (2 times); 12/25/2013; 1/2/2014; 1/5/2014; 1/22/2014; 3/27/2014; 3/30/2014; 5/12/2014; 8/5/2014; 8/23/2014; 9/8/2014; 9/26/2014; 10/24/2014; 10/27/2014; 10/28/2014; 10/29/2014; 11/1/2014; 12/19/2014; 1/12/2015; 1/29/2015; 6/9/2015; 6/10/2015 (2 times); 6/26/2015; 6/27/2015; 6/28/2015; 7/20/2015; 9/24/2015 (2 times); 11/12/2015 (2 times); 12/17/2015; 10/13/2016; 11/29/2016; 12/6/2016; 12/13/2016 (2 times); 12/15/2016 (2 times); 12/21/2016; 12/30/2016; 1/14/2017; 1/16/2017; 2/27/2017; 3/6/2017; 3/13/2017; 3/14/2017; 3/17/2017; 3/18/2017; 3/25/2017 (2 times); 4/5/2017; 4/8/2017; 4/10/2017 (2 times); 4/22/2017; 4/26/2017 (2 times); 4/30/2017 (2 times); 8/3/2017; and 8/9/2017. Each of these exceedances is a violation of the Title V Permit, the Ohio SIP, and the CAA.

Failure to maintain the RS scrubber water flow rate at or above the required minimum of 661 gallons per minute (P925)

The Title V Permit requires that the RS scrubber water flow rate be maintained at or above a minimum of 661 gallons per minute (gpm).⁵ This requirement is an “emission standard or limitation” under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on reports prepared and certified to be true, accurate, and complete by Facility personnel and submitted to Ohio EPA, the RS scrubber water flow rates were below the required minimum of 661 gpm on at least the following dates: October 27 and 28, 2014 for five consecutive shifts. Each of these failures is a violation of the Title V Permit, the Ohio SIP, and the CAA.

⁵ P925 Part III.A.II.2, No. P0096473 and C.23.d)(7)c, No. P0105157.

*Failure to maintain the required inlet static pressure in the Secondary Emissions Control
Baghouse for the Basic Oxygen Furnaces (P926 and P927)*

The Title V Permit, the NESHAPs for Integrated Iron and Steel Manufacturing Facilities, and the Facility's operations and maintenance plan requires the Facility to maintain the inlet static pressure of 6 inches W.C. in the Secondary Emissions Control Baghouse.⁶ This requirement is an "emission standard or limitation" under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on reports prepared and certified to be true, accurate, and complete by Facility personnel and submitted to Ohio EPA, the Responsible Parties failed to maintain the required inlet static pressure on at least the following dates: August 22, 2012; April 23, 2014; May 17, 2014; 8 days between March 9 and March 31, 2015; 9 days between April 1 to April 22, 2015; January 29, 2017; and January 30, 2017. Each of these failures is a violation of the Title V Permit, the Ohio SIP, and the CAA.

Exceedances of the hydrochloric acid emissions limit for the Pickling Lines (P023 & P024)

The Title V Permit and the NESHAPs for Steel Pickling – HCl Process Facilities and Hydrochloric Acid Regeneration Plants limits the hydrochloric acid (HCl) emissions from the Pickling Lines to 18 parts per million by volume (ppmv).⁷ This requirement is an "emission standard or limitation" under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on reports prepared and certified to be true, accurate, and complete by Facility personnel and submitted to Ohio EPA, this limit was exceeded on or between at least the following dates: July 10 to August 15, 2014 (P024) and October 21, 2016 to Jan. 19, 2017 (P023). Each of these exceedances is a violation of the Title V Permit, the Ohio SIP, and the CAA.

*Failure to employ required reasonably available control measures for pushing operations at the
No. 2 Coke Plant (B918)*

The Title V Permit requires the Facility to minimize or eliminate visible fugitive particulate emissions through the employment of reasonably available control measures (RACM). The Facility must, at a minimum, employ a pushing emission control system consisting of a fixed duct and land-based coke guide evacuated to a baghouse collector.⁸

⁶ P926 & P927 Part III.A.I.2.g, No. P0096473; C.29.c) – d), No. P0105157; 40 CFR Part 63, Subpart FFFFF.

⁷ P023 & P024 Part III.A.I.1 and A.I.2.b.i., No. P0096473; C.33.b)(1)e. and b)(2)a.i., No. P0105157; 40 CFR Part 63, Subpart CCC.

⁸ B918 Part III.A.I.1, No. P0096473; C.1.b)(1)v., No. P0105157.

This requirement is an “emission standard or limitation” under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on reports prepared and certified to be true, accurate, and complete by Facility personnel and submitted to Ohio EPA, the Facility failed to employ the required RACM on at least the following dates: October 5 – 6, 2012 while pushing 39 ovens; October 16, 2013; and May 12, 2014. Each of these failures is a violation of the Title V Permit, the Ohio SIP, and the CAA.

Failure to operate the emergency bypass bleeder flare on the No. 2 Coke Plant with a continuously operable pilot flame (B918)

The Title V Permit requires the emergency bypass bleeder flare to be operated with a continuously operable pilot flame.⁹ This requirement is an “emission standard or limitation” under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on reports prepared and certified to be true, accurate, and complete by Facility personnel and submitted to Ohio EPA, the Facility failed to continuously operate the pilot flame on at least the following dates: January 1, 2013; January 9, 2013; June 2, 2016; and June 15, 2016. Each of these failures is a violation of the Title V Permit, the Ohio SIP, and the CAA.

Failure to employ reasonably available control measures and good operating or engineering practices (B918, F001, F002, F012, F015, F025, P019, P022, P047, P062, P065, P094, P901, P902, P925, P935, P956, P926, P927, B027, B028, B029, B030, B031, B032, F003, F004, F005, F008, F010, P024, P091, P092, P093, and P095)

The Title V Permit requires the Facility to employ reasonably available control measures and good operating or engineering practices to minimize or eliminate visible emissions of fugitive dust.¹⁰ This requirement is an “emission standard or limitation” under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on documented reports by Middletown residents near the Facility, the Facility failed to employ the required control measures on at least the following dates: 9/14/2012; 9/21–

⁹ B918 Part III.A.II.1.c., No. P0096473.

¹⁰ Part III.A.I.1. for B918, F001, F002, F012, F015, F025, P019, P022, P047, P062, P065, P094, P901, P902, P935, B027, B028, B029, B030, B031, B032, F003, F004, F005, F008, F010, P024, P091, P092, P093, and P095 and Part III.A.I.2 for P925, P956, P926, and P927, No. P0096473; C.1.b)(1)v., C.2.b)(1)c., C.3.b)(1)b. & (2), C.5.b)(1)b. & (2)b., C.6.b)(1)b. & (2)a., C.8.b)(1)b., C.9.b)(1)b., C.10.b)(1)b., C.12.b)(1)c., C.13.b)(1)d., C.14.b)(1)c., C.19.b)(1)b., C.21.b)(1)b. & (2)b., C.22.b)(1)b. & (2)a., C.23.b)(1)e. & (2), C.25.b)(1)c. & (2), C.26.b)(1)c. & (2)a., C.29.b)(1)c. & (2)a., C.31.b)(1)b., C.32.b)(1)b. & (2), C.33.b)(1)g., C.35.b)(1)b. & (2)a., No. P0105157.

22/2012; 10/8/2012; 10/16/2012; 11/19/2012; 12/6/2012; 12/12/2012; 12/13–14/2012; 12/15–17/2012; 3/8/2013; 3/25/2013; 5/1/2013; 5/21/2013; 6/19/2013; 7/13/2013; 7/14/2013; 8/13/2013; 8/14/2013; 8/17/2013; 8/23/2013; 8/30/2013; 9/3/2013; 9/14/2013; 9/17/2013; 9/20/2013; 9/26/2013; 10/8/2013; 10/10/2013; 10/11/2013; 11/4/2013; 11/11/2013; 2/3/2014; 2/7/2014; 3/18/2014; 3/19/2014; 5/22–23/2014; 6/2/2014; 6/14/2014; 6/15/2014; 6/23/2014; 6/27/2014; 6/29/2014; 6/30/2014; 7/14/2014; 7/25/2014; 7/26/2014; 7/31/2014; 8/1/2014; 8/6–8/2014; 8/10/2014; 8/12/2014; 8/28/2014; 8/29/2014; 9/5/2014; 9/28–29/2014; 10/20/2014; 12/4–5/2014; 12/19/2014; 12/21/2014; 12/22/2014; 3/15/2015; 3/22/2015; 5/22/2015; 6/10/2015; 7/16/2015; 7/22/2015; 7/23–26/2015; 7/29/2015; 8/10/2015; 8/13/2015; 8/28/2015; 9/14/2015; 9/15/2015; 9/19/2015–10/7/2015; 10/9–10/2015; 10/20/2015; 10/21/2015; 2/17/2016; 2/21/2016; 4/15–16/2016; 4/19/2016; 5/22–24/2016; 5/31/2016; 6/2–3/2016; 6/5–6/2016; 6/7–8/2016; 6/17/2016; 6/19/2016; 6/28/2016; 7/9/2016; 8/4/2016; 8/11/2016; 8/22/2016; 9/19/2016; 10/11–13/2016; 11/11–12/2016; 11/18/2016; 11/21/2016; 2/12/2017; 2/16/2017; 2/21/2017; 3/30/2017; 5/1/2017; 5/10/2017; 5/18/2017; 5/25/2017; 5/30–31/2017; 6/5/2017; 6/9–10/2017; 6/10–11/2017; 6/20/2017; 6/26/2017; 7/5/2017; 7/11/2017; 7/13/2017; 7/18/2017; 8/9/2017; 8/14/2017; 8/21/2017; 8/28/2017; 8/29/2017; 8/30/2017; 9/6/2017; 9/8/2017; 9/11/2017; 9/14/2017; 9/15/2017; 9/16/2017; 9/17/2017; 9/18/2017; 9/19/2017; 9/21/2017; 9/22/2017; 9/23/2017; 9/24/2017; 9/25/2017; 9/26/2017; 9/27/2017; 9/28/2017; 9/29/2017; 9/30/2017; 10/1/2017; 10/2/2017; 10/3/2017; 10/4/2017; and 10/6/2017. Each of these failures is a violation of the Title V Permit, the Ohio SIP, and the CAA.

Failure to operate the flare with a continuously operable pilot flame when the basic oxygen furnace is in operation and oxygen blows are occurring (P927)

The Title V Permit requires the flare to be operated at all times when the basic oxygen furnace is in operation and oxygen blows are occurring.¹¹ This requirement is an “emission standard or limitation” under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on reports prepared and certified to be true, accurate, and complete by Facility personnel and submitted to Ohio EPA, the Facility failed to continuously operate the pilot flame for the flare for at least eight heats on at least the following dates: March 21, 2017 and March 25, 2017. Each of these failures is a violation of the Title V Permit, the Ohio SIP, and the CAA.

¹¹ P927 Part III.A.II.1. and A.III.2., No. P0096473; C.29.d)(1), No. P0105157.

*Exceedances of the visible emissions opacity limit for the No. 15 Basic Oxygen Furnace
(P926)*

The Title V Permit and the NESHAPS for Integrated Iron and Steel Manufacturing Facilities limits the opacity of visible particulate emissions from the No. 15 Basic Oxygen Furnace to 20 percent as a three-minute average.¹² This requirement is an “emission standard or limitation” under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on USEPA Method 9 visual determinations of opacity emissions performed by SWOAQA staff, this limit was exceeded on at least the following dates: August 4, 2017 and August 30, 2017. Each of these exceedances is a violation of the Title V Permit, the Ohio SIP, and the CAA.

The CAA violations are ongoing

This Notice is not intended to describe the full extent of pollution at and interference with neighboring properties or all of the Responsible Parties’ acts and omissions that contribute to these ongoing violations. The violations described above are ongoing and will continue after the date of this letter and the subsequent filing of a lawsuit. These violations are and have been preventable and are the result of the Responsible Parties’ illegal, improper, and/or careless operations of the Facility. My clients are providing notice for the violations listed above, as well as all ongoing and continuing violations, including those committed subsequent to the date of this Notice.

The Persons Giving Notice

Donna Ballinger and the Sierra Club are the persons giving notice. Their contact information is as follows:

Donna Ballinger
3014 Ottawa Street
Middletown, Ohio 45044
513-217-7034

Sierra Club
2101 Webster St.

¹² P926 Part III.A.I.1, No. P0096473; B.5 and C.29.b)(1)b., No. P0105157; 40 CFR Part 63, Subpart FFFFFFFF (40 CFR § 63.7790(a)).

Suite 1300
Oakland, CA 94612
415-977-5500

Sierra Club, Ohio Chapter
131 North High Street
Columbus, OH 43215
614-461-0734

Donna Ballinger and Sierra Club are represented by counsel, identified below:

D. David Altman
D. David Altman Co., L.P.A.
15 East 8th Street, Suite 200W
Cincinnati, Ohio 45202
(513) 721-2180 x100
Fax: (513) 721-2299
daltman@environlaw.com

Conclusion

My clients would prefer to resolve this matter within the next 60 days without filing suit. To that end, my clients are willing to discuss solutions and seek full and complete information about, and the abatement of, the environmental conditions that now exist at and around the affected properties. If enforcement litigation is necessary, my clients will seek injunctive relief compelling the Responsible Parties to: abate the Clean Air Act violations; install effective air pollution controls; effectively control ash, kish, coke, coal, and other particulate emissions; perform a complete assessment and remediation of affected properties; perform any corrective action or remediation necessary to abate the endangerment to health and welfare; and to otherwise curtail the Responsible Parties' violations. To assure that concrete and enforceable actions are timely implemented, my clients will seek the appointment of both a special master to directly oversee the remedy and a citizen oversight committee. My clients will also seek any other relief that the Court may deem appropriate, including litigation costs and civil penalties.

Because the violations and discovery of these violations are ongoing, nothing in this Notice should be construed as limiting any further claim under this Notice or the

Citizen Suit Notice

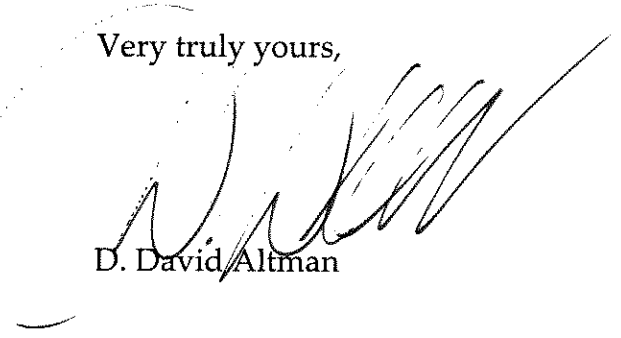
October 6, 2017

Page 15 of 17

filing of any additional notice that may be presented on behalf of my clients or any other person adversely affected.

All future questions and correspondence regarding this matter should be directed to me.

Very truly yours,



D. David Altman

cc via certified mail:

Corporation Service Company
Statutory Agent
AK Steel Holding Corporation
50 West Broad Street, Suite 1330
Columbus, OH 43215

Corporation Service Company
Statutory Agent
AK Steel Corporation
50 West Broad Street, Suite 1330
Columbus, OH 43215

Scott Pruitt
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Robert A. Kaplan
Acting Regional Administrator, Region 5
U.S. Environmental Protection Agency

Citizen Suit Notice

October 6, 2017

Page 16 of 17

Ralph Metcalfe Federal Building
77 West Jackson Blvd.
Chicago, IL 60604

The Honorable Jeff Sessions
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

The Honorable John R. Kasich
Governor of Ohio
Riffe Center
77 South High Street
30th Floor
Columbus, OH 43215-6117

The Honorable Mike DeWine
Ohio Attorney General
30 E. Broad St.
14th Floor
Columbus, OH 43215

Craig W. Butler
Director
Ohio Environmental Protection Agency
50 West Town Street
Suite 700
Columbus, OH 43215

Robert Hodanbosi
Chief
Division of Air Pollution Control
Ohio Environmental Protection Agency
50 W. Town St.
Suite 700
Columbus, OH 43215

Citizen Suit Notice

October 6, 2017

Page 17 of 17

Holly Christmann

Director

Southwest Ohio Air Quality Agency

250 William Howard Taft Rd.

First Floor

Cincinnati, OH 45219

Bonnie Buthker

Chief

Southwest District Office

Ohio Environmental Protection Agency

401 East Fifth Street

Dayton, OH 45402

ATTACHMENT B

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

AK Steel Holding Corporation
c/o: Roger K. Newport
9227 Centre Pointe Drive
West Chester, OH 45069

AK Steel Corporation
c/o: Roger K. Newport
9227 Centre Pointe Drive
West Chester, OH 45069

AK Steel - Middletown Works
c/o: Dale Rupp, General Manager
1801 Crawford Street
Middletown, OH 45044

August 17, 2018

Re: 60-Day Notice of Intent to File Citizen Suit Under Clean Air Act Section 304(a) for Violations of the Clean Air Act by AK Steel Holding Corporation and AK Steel Corporation at the Middletown Works Iron and Steel Plant in Middletown, Ohio

Dear Messrs. Newport and Rupp:

My law firm represents Donna Ballinger, who resides in Middletown, Ohio on Ottawa Street and the Sierra Club (clients). Pursuant to Section 304(a) of the Clean Air Act (CAA), 42 U.S.C. § 7604(a), and 40 C.F.R. Part 54, Donna Ballinger and the Sierra Club and its members hereby notify you that AK Steel Holding Corporation and AK Steel Corporation (the Responsible Parties) have violated and will continue to violate emission standards and limitations under CAA Section 304(a) & (f)¹ as described in this Notice. Just two weeks after a referral from the Ohio EPA to the Ohio Attorney

¹ 42 U.S.C. § 7604(a)(1) & (f)

General's office, the Ohio EPA and AK Steel filed the December 4, 2017 consent decree (CD). The CD appears to have been filed to attempt to hinder any community enforcement effort and was filed in state court with no notice to the affected community. The CD will not achieve compliance with the CAA and fails to require abatement of the unlawful nuisance conditions created by the Responsible Parties.

Unless these violations and the underlying causes are fully and verifiably remediated within 60 days, my clients intend to file a citizen suit seeking civil penalties for the Responsible Parties' violations and an injunction compelling the Responsible Parties to comply with the CAA. During this 60-day period, we are willing to meet with the Responsible Parties and/or any and all interested government officials to implement concrete and enforceable steps to end these violations.

The Responsible Parties and Location of the Violations

AK Steel Corporation owns and operates an iron and steel manufacturing plant, Middletown Works, located at 1801 Crawford Street, Middletown, Ohio 45044 on a 2,791-acre parcel in Butler County (the Facility). AK Steel Corporation is a wholly owned subsidiary of AK Steel Holding Corporation.

The odors; smoke; flames; black, red, or orange plumes; and clouds containing a myriad of particulates and other substances (including: ash; black, white, silver, yellow, or red material; dust; coal; coke; coke breeze; soot; kish; slag; broken-glass-like particulates; and iron/metallic particles) that the Responsible Parties have released, and continue to release from the Facility have repeatedly violated and continue to violate emission standards and limitations, permit requirements, the National Emission Standards for Hazardous Air Pollutants (NESHAPs), and Ohio's federally-approved State Implementation Plan (Ohio SIP), including the air pollution nuisance provision (Ohio Adm. Code § 3745-15-07), all of which are federally enforceable by citizens. The Responsible Parties are owners and/or operators of the Facility and are persons who have violated and who are in violation of the emission standards and limitations set forth herein.

Background

Donna Ballinger has lived in the vicinity of the Facility for her entire 53-year life and has lived at her current address, 3014 Ottawa Street, Middletown, Ohio 45044, since October 2012. Ms. Ballinger's property is south and west of and in close proximity to the

Facility. The odors and substances and/or combinations of substances released from the Facility discussed in this Notice have caused Ms. Ballinger to be greatly concerned for her health and welfare and have caused unreasonable damage to her property. Ms. Ballinger is a member of the Sierra Club.

Sierra Club, founded in 1892, is the nation's oldest and largest grassroots nonprofit environmental organization, with more than 825,000 members nationwide. The Ohio Chapter has over 23,000 members, including 506 in Butler County. Sierra Club's Ohio Chapter has an extensive history of grassroots environmental protection in Ohio. Sierra Club's purposes are to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's ecosystems and resources; to educate and enlist humanity in the protection and restoration of the quality of the natural and human environment; and to use all lawful means to carry out these objectives. Since its founding over a century ago, Sierra Club has become a leader in working to reduce air pollution. The Sierra Club's members include people who live and breathe air in Ohio, and who are affected by the quality of Ohio air. Ms. Ballinger and other members of the Sierra Club have suffered and continue to suffer injuries directly traceable to the Responsible Parties' CAA violations.

The Facility operates under a Title V Permit² issued to AK Steel Corporation by the Ohio Environmental Protection Agency.

No Agency is Diligently Prosecuting Violations of the Standards and Limitations Stated
Herein

On December 4, 2017, after receiving Ms. Ballinger's and Sierra Club's October 6, 2017 notice of intent to file a CAA citizen suit, the State of Ohio simultaneously filed a complaint and proposed consent decree—with no notice to the affected community—against the Responsible Parties in the Butler County, Ohio Court of Common Pleas. Within 30 minutes of filing the complaint, a consent decree (CD) was signed by the court and entered. And only after the Clerk's office closed for the day did the State of Ohio notify our office that an action had been filed. The case was deemed closed.

² Unless otherwise specified, the term "Title V Permit" refers collectively to the Facility's permit P0096473, effective January 3, 2005, and all subsequent renewals, including the renewal issued August 10, 2017 (P0105157).

The State's actions deprived Ms. Ballinger, the Sierra Club, and the Middletown community of any opportunity to participate, object, or intervene. The State of Ohio acted with full awareness that our clients and the Middletown community had an interest and stake in any "enforcement" deal it made with the Responsible Parties.

The State of Ohio has a long history of failing to bring the Responsible Parties into compliance with the CAA. The December 4, 2017 CD is another example of this failure.

The CD does not enforce, resolve, or otherwise remedy the violations discussed in this Notice. For example, the State of Ohio has not required that the violations of Ohio Adm. Code § 3745-15-07 be abated and has not mandated a remedy for the causes of the air nuisance. In fact, the CD authorizes the nuisance to continue so long as the Responsible Parties provide some affected citizens annual power washing of their homes and vouchers or reimbursement for some car washes. Because the CD only attempts to address property impacts limited to particulate accumulations on vehicles and house siding, the CD is incapable of, and not reasonably calculated to, abate the odor or health nuisance caused by the Responsible Parties.

Further, the CD only purports to touch upon five sources of particulate emissions and entirely fails to require that anything be done for dozens of other particulate pollution sources, including other large emitters of particulate matter. Other provisions of the CD, including those relating to the five sources, are, on their face, illusory, as they require nothing more than studies or analyses, reporting on potential corrective steps, and then updating of the Facility's Operation and Maintenance Plans, "if necessary." The CD contains no enforceable standards for particulate emission reductions and no requirement to operate or implement technology or corrective measures after the period of study. Compliance with the CD will not result in compliance with the CAA, including Ohio Adm. Code § 3745-15-07.

Additionally, on June 19, 2018, the Ohio EPA issued an interim administrative order to AK Steel related to excess benzene and visible particulate emissions. The order does not reference or enforce the air nuisance provision, and PM_{2.5} is, by definition, not a visible particulate emission. Further, the work in the interim order is limited in scope and will not remedy the severe air nuisance impacting the community. In short, the nuisance has continued to remain severe and nearly daily, and no administrative agency, including Ohio EPA, has taken steps to bring the nuisance to an end. Ms.

Ballinger, members of the Sierra Club, and the Middletown community have suffered and will continue to suffer irreparable harm, including exposure to toxic air emissions.

Activities that Violate the Clean Air Act

As part of its iron and steel making operation, the Facility has: 76 by-product coke ovens and related air contaminant sources (emissions units B918, P067, P068, P070, P075, T002, and T021), including quenching operations (F021 and P043); paved and unpaved roadways and parking areas (F001); operations that handle, load and unload, process, store, and transfer coal, raw materials, iron bearing materials, coke, ore, slag, flux material, and fluxing agents (F002, P901, F003, F004, F005, F008, F010, F012); basic oxygen furnaces and related air contaminant sources (P926, P927, F011, and F025); a continuous caster (P902); slab scarfing and slitting equipment (F015); coating lines (P019 and P022); a hot metal pouring and desulfurization station (P047); electrogalvanizing line (P062); a cold rolling steel operation (P065); a hot strip mill (P094); a flushing liquor and tar decanter tank, equipped with gas blanketing (P096); a blast furnace (P925); a steel refining station (P934); vacuum degassing operations (P935); hot metal pouring and desulfurization operations (P047 and P956); annealing operations (B021, B022, B023, and B026); industrial boilers (B007, B008, B009, and B010); ladle and tundish preheaters (B027, B028, B029, B030, B031, and B032); steel pickling lines (P023 and P024); slab reheat furnaces (P009, P010, P011, and P012); temper mills (P091, P092, and P095); a corrective rewind line (P093); gasoline and diesel dispensing facilities (G001); and metal parts spray painting operations (K001).

The Responsible Parties' CAA violations stem from their illegal, improper, and/or careless operation of the Facility, poor maintenance of the Facility, failure to employ emission controls, and release of excess emissions from the Facility. In addition, the Responsible Parties have allowed and continue to allow noxious odors; clouds of particulates (containing, *inter alia*: ash; black, white, silver, yellow, or red material; dust; coal; coke; coke breeze; soot; kish; slag; broken-glass-like particulates; and iron/metallic particles); hazardous air pollutants; greenhouse gases; oxides of nitrogen; sulfur dioxide; acid gases; organic compounds; volatile organic chemicals; and toxic metals to be released from the Facility and to be deposited onto nearby properties, including Ms. Ballinger's property.

Each of these CAA violations, as further described in this Notice, is a violation of an "emission standard or limitation" under the CAA for which citizens may bring suit and obtain enforceable relief. Each violation involves one or more of the following

“emission standards or limitations” under the CAA: (1) an emission limitation, standard of performance, or emission standard under 42 U.S.C. § 7604(f)(1); (2) a condition or requirement of a permit under 42 U.S.C. § 7604(f)(3); and (3) a standard or limitation established in a Title V permit or in the Ohio SIP under 42 U.S.C. § 7604(f)(4). The Responsible Parties are each persons who have repeatedly violated and who are in violation of emission standards or limitations.

The Facility Is Operated in Such a Manner as to Create an Air Pollution Nuisance in Violation of the CAA, the Title V Permit, and the Ohio SIP

Under the CAA, the Ohio Administrative Code, and the Title V Permit, the Facility is subject to the “air pollution nuisance prohibition” of Ohio Adm. Code § 3745-15-07:

[T]he 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, is hereby found and declared to be a public nuisance. It shall be unlawful for any person to cause, permit or maintain any such public nuisance.

Importantly, the federally enforceable and Ohio EPA-issued Title V Permit also mandates that “air contaminants emitted by the emissions units covered by [the] permit shall not cause a public nuisance, in violation of OAC rule 3745-15-07.” (emphasis added)³ Hence, Ohio’s air pollution nuisance provision is federally enforceable under the Title V Permit, is federally enforceable both because it is part of the Ohio SIP and because it is an “emission standard or limitation” under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4).

The Facility has released, and continues to release, noxious odors, ash, dust, coal, coke, coke breeze, soot, kish, slag, broken glass-like particulates, iron/metallic particles, hazardous air pollutants, acid gases (such as hydrochloric acid), oxides of nitrogen, sulfur dioxide, organic compounds, volatile organic chemicals, and toxic metals. These odors and substances are visibly emitted or spewed from one or more of the iron, steel,

³ Part I.A.20, No. P0096473 and A.21., No. P0105157.

or coke making operations as black or gray smoke; dust clouds; red, orange, or black plumes; explosions; fire; and haze and enter the community surrounding the Facility. The odors invade nearby residents' properties, including Ms. Ballinger's property, and permeate inside the homes. The ash, dust, coal, coke, soot, kish, and other particulates and air contaminants frequently settle onto nearly every surface of the properties surrounding the Facility.

The deleterious substances being released from the Facility are known to be toxic and/or to cause adverse health effects, including cancer. For example, coke oven and steel plant emissions and many metals and chemicals found in the particulate matter released from the Facility are known carcinogens or are extremely toxic, even at low levels. Exposure to particulate matter, including PM10 and PM2.5, is linked with "premature death in people with heart or lung disease, nonfatal heart attacks, irregular heartbeat, aggravated asthma, decreased lung function, and increased respiratory symptoms, such as irritation of airways, coughing, and difficulty breathing." Exposure to PM10 causes irritation of the eyes, nose, and throat. *PM2.5 poses the greatest risk to health because the particles can become lodged deep in the lungs and may enter the bloodstream*, inducing and contributing to heart disease, reduced life expectancy, and lung diseases. PM2.5 and other ultrafine particles in air pollution have been rated as a Group 1, known human carcinogen. People with heart or lung diseases, older adults, and children are the most vulnerable. PM2.5 can cause or aggravate respiratory diseases, such as asthma and bronchitis. In 2012, coke production was rated as an occupation known to cause cancer by the International Agency for Research on Cancer. *In fact, there is no safe level of exposure to PM2.5.* Real-time PM2.5 data, recently collected pursuant to an ambient air monitoring protocol, demonstrates that AK Steel is emitting ultrafine particles at levels known to be injurious to both healthy and vulnerable populations. These data also further corroborate the air nuisance reports of Ms. Ballinger and other community members.

Benzene is a human carcinogen, and exposure significantly increases the risk of leukemia, and increases the risk of Hodgkin's lymphoma. Hydrochloric acid is corrosive and can cause difficulty breathing and nasal and respiratory irritation when inhaled. Sulfur dioxide is toxic to the respiratory system and can cause permanent injury with exposure to small quantities. In addition, many of these air contaminants, substances, and combinations of substances released from the Facility are known to damage property.

The odors and releases from the Facility have interfered with the use and enjoyment of Ms. Ballinger's property, caused unreasonable damage to her property, aggravated existing health conditions, and endangered her health and welfare. Particulate fallout from the Facility intermittently lands on Ms. Ballinger's property. The frequency and intensity of the fallout has greatly increased in the past year or so. The particulate deposits include large pieces of metal that accumulate and cover her cars, deck, window sills, home, and grandchildren's toys. The black deposits are difficult to clean and some of the material cannot be washed off. The particulates accumulate on and damage her gutters—which were installed about a year ago and already need to be replaced. The particulate fallout drops "like rain" because Ms. Ballinger can feel it hitting her body, even though the particles are not always visible.

Ms. Ballinger cannot tolerate being outside her home because releases from the Facility make it difficult for her to breathe. She rarely, if ever, cooks outside. Intermittent loud noises from the Facility shake her house. Analysis of samples taken after a recent and especially heavy particulate fallout event—which covered her cars and property and a four-block area to the south, west and north of her home—showed that 70-80 percent of the sample was slag and included particulates "resembling glass slivers and pieces of broken glass." Ms. Ballinger feels panicked and concerned for her health and is especially concerned about learning that she is breathing air with broken-glass-like particulates.

When exposed to the odors, ashes, dust, dirt, grime, coal and coke wastes, soot, kish, slag, broken glass-like particulates, iron/metallic particles, and other particulates, my client and her neighbors, and other Sierra Club members, suffer a range of irritating to unbearable symptoms such as: coughing, difficulty breathing, sinus congestion, and other respiratory problems; headaches; nausea; burning noses and throats; a "coal stove" or metallic taste in the mouth; and burning eyes. Even pets are adversely impacted by Facility emissions, frequently coughing or scratching their skin after exposure. The sulfur, chemical, coal, coal burning, gas, steel-making, or coking odors from the Facility interfere with Ms. Ballinger's and other residents' use and enjoyment of their decks and porches and have even kept residents up all night. Ms. Ballinger refrains from opening her windows, but strong odors still invade her home.

The visible deposits of ashes, dust, dirt, grime, coal and coke wastes, soot, kish, slag, broken glass-like particulates, iron/metallic particles, and other particulates (called "fallout" by my client and other residents) accumulate frequently on Ms. Ballinger's and her neighbors' properties. The fallout covers nearly every surface—yards, decks,

homes, outdoor furniture, and vehicles—and even gets inside homes. The visible deposits coat vehicles and damage paint. Due to the nature of the particulates, the material is very difficult to clean and remove. Residents struggle to keep their properties and homes clean. HVAC filters must be changed more often. The visible deposits accumulate quickly and often reappear within a couple of days after an attempted cleaning. The fallout has been so thick it resembles snow fall. On numerous occasions, residents go outside in the morning to find that the particulates have been deposited overnight. The impacts of periods of particularly heavy fallout can be felt for days or several weeks at a time. On days of heavy fallout, substances from the Facility will visibly accumulate on residents' skin and clothes if they are outside for only 10 to 15 minutes.

Hamilton County Department of Environmental Services/Southwest Ohio Air Quality Agency staff have collected numerous samples of the fallout on Ms. Ballinger's and several neighbors' properties. Analysis of the samples show that the fallout contains mostly kish, coke, coke breeze, magnetic iron particles, slag, broken-glass-like particulates, graphite, and calcium compounds—directly attributable to the Facility.

The noxious odors, smoke, haze, clouds, ash, dust, coal, coke, coke breeze, soot, kish, iron/metallic particles, hazardous air pollutants, and other deleterious substances released from the Facility into the surrounding community have created conditions that endanger the health, safety, and welfare of Ms. Ballinger, residents, and other Sierra Club members and have caused unreasonable injury to residents' properties on, at least, the following exemplar dates: 9/14/2012; 9/21–22/2012; 10/8/2012; 10/16/2012; 11/19/2012; 11/27/2012; 12/6/2012; 12/12/2012; 12/13–14/2012; 12/15–17/2012; 3/8/2013; 3/25/2013; 5/1/2013; 5/21/2013; 5/28/2013; 6/19/2013; 7/13/2013; 7/14/2013; 7/25/2013; 8/13/2013; 8/14/2013; 8/17/2013; 8/23/2013; 8/24/2013; 8/30/2013; 9/3/2013; 9/6/2013; 9/14/2013; 9/17/2013; 9/20/2013; 9/26/2013; 10/8/2013; 10/10/2013; 10/11/2013; 11/4/2013; 11/11/2013; 2/3/2014; 2/7/2014; 3/6/2014; 3/18/2014; 3/19/2014; 5/22–23/2014; 6/2/2014; 6/14/2014; 6/15/2014; 6/23/2014; 6/27/2014; 6/29/2014; 6/30/2014; 7/14/2014; 7/25/2014; 7/26/2014; 7/31/2014; 8/1/2014; 8/6–8/2014; 8/10/2014; 8/12/2014; 8/16/2014; 8/28/2014; 8/29/2014; 9/5/2014; 9/28–29/2014; 10/20/2014; 12/4–5/2014; 12/19/2014; 12/21/2014; 12/22/2014; 2/7/2015; 3/12/2015; 3/15/2015; 3/22/2015; 4/15/2015; 5/22/2015; 6/10/2015; 7/16/2015; 7/22/2015; 7/23–26/2015; 7/29/2015; 8/10/2015; 8/13/2015; 8/28/2015; 9/14/2015; 9/15/2015; 9/19/2015–10/7/2015; 10/9–10/2015; 10/20/2015; 10/21/2015; 10/26/2015; 11/28/2015; 2/17/2016; 2/21/2016; 4/15–16/2016; 4/19/2016; 5/22–24/2016; 5/31/2016; 6/2–3/2016; 6/5–6/2016; 6/7–8/2016; 6/17/2016; 6/19/2016; 6/28/2016; 7/9/2016; 8/4/2016; 8/11/2016; 8/22/2016; 9/19/2016; 10/5/2016; 10/11–13/2016; 11/11–12/2016; 11/18/2016; 11/21/2016;

Citizen Suit Notice

August 17, 2018

Page 10 of 20

2/12/2017; 2/16/2017; 2/21/2017; 3/30/2017; 5/1/2017; 5/10/2017; 5/18/2017; 5/25/2017; 5/30-31/2017; 6/5/2017; 6/9-10/2017; 6/10-11/2017; 6/20/2017; 6/26/2017; 7/5/2017; 7/11/2017; 7/13/2017; 7/18/2017; 7/31/2017 8/9/2017; 8/14/2017; 8/16/2017; 8/21/2017; 8/28/2017; 8/29/2017; 8/30/2017; 9/2/2017; 9/4/2017; 9/6/2017; 9/8/2017; 9/11/2017; 9/14/2017; 9/15/2017; 9/16/2017; 9/17/2017; 9/18/2017; 9/19/2017; 9/21/2017; 9/22/2017; 9/23/2017; 9/24/2017; 9/25/2017; 9/26/2017; 9/27/2017; 9/28/2017; 9/29/2017; 9/30/2017; 10/1/2017; 10/2/2017; 10/3/2017; 10/4/2017; 10/6/2017; 10/7/2017; 10/9/2017; 10/10/2017; 10/11/2017; 10/12/2017; 10/13/2017; 10/14/2017; 10/15-31/2017; 11/1/2017; 11/2/2017; 11/3/2017; 11/4/2017; 11/5/2017; 11/6/2017; 11/7/2017; 11/8/2017; 11/9/2017; 11/10/2017; 11/11/2017; 11/12/2017; 11/13/2017; 11/14/2017; 11/15/2017; 11/16/2017; 11/17/2017; 11/18/2017; 11/19/2017; 11/20/2017; 11/21/2017; 11/23/2017; 11/24/2017; 11/25/2017; 11/26/2017; 11/27/2017; 11/28/2017; 11/29/2017; 11/30/2017; 12/1/2017; 12/2/2017; 12/3/2017; 12/4/2017; 12/5/2017; 12/6/2017; 12/7/2017; 12/8/2017; 12/9/2017; 12/10/2017; 12/12/2017; 12/13/2017; 12/14/2017; 12/15/2017; 12/16/2017; 12/17/2018; 12/18/2017; 12/19/2017; 12/20/2017; 12/21/2017; 12/22/2017; 12/24/2017; 12/25/2017; 12/26/2017; 12/27/2017; 12/28/2017; 12/29/2017; 12/30/2017; 12/31/2017; 1/1/2018; 1/3/2018; 1/4/2018; 1/5/2018; 1/6/2018; 1/7/2018; 1/8/2018; 1/10/2018; 1/14/2018; 1/15/2018; 1/16/2018; 1/17/2018; 1/18/2018; 1/19/2018; 1/22/2018; 1/27/2018; 1/29/2018; 1/30/2018; 2/8/2018; 2/9/2018; 2/10/2018; 2/12/2018; 2/13/2018; 2/14/2018; 2/15/2018; 2/16/2018; 2/18/2018; 2/23/2018; 2/24/2018; 2/25/2018; 2/27/2018; 3/5/2018; 3/6/2018; 3/8/2018; 3/10/2018; 3/12/2018; 3/18/2018; 3/19/2018; 3/20/2018; 3/21/2018; 3/28/2018; 3/30/2018; 3/31/2018; 4/1/2018; 4/18/2018; 4/23/2018; 4/25/2018; 4/27/2018; 4/29/2018; 4/30/2018; 5/1/2018; 5/2/2018; 5/6/2018; 5/8/2018; 5/9/2018; 5/11/2018; 5/12/2018; 5/13/2018; 5/14/2018; 5/15/2018; 5/17/2018; 5/18/2018; 5/19/2018; 5/20/2018; 5/21/2018; 5/22/2018; 5/23/2018; 5/24/2018; 5/25/2018; 5/26/2018; 5/27/2018; 5/28/2018; 5/29/2018; 5/30/2018; 6/2/2018; 6/3/2018; 6/4/2018; 6/5/2018; 6/6/2018; 6/7/2018; 6/8/2018; 6/10/2018; 6/12/2018; 6/13/2018; 6/14/2018; 6/15/2018; 6/16/2018; 6/17/2018; 6/20/2018; 6/21/2018; 6/23/2018; 6/24/2018; 6/26/2018; 6/27/2018; 6/28/2018; 6/29/2018; 6/30/2018; 7/1/2018; 7/2/2018; 7/3/2018; 7/4/2018; 7/6/2018; 7/8/2018; 7/9/2018; 7/10/2018; 7/12/2018; 7/13/2018; 7/14/2018; 7/15/2018; 7/16/2018; 7/17/2018; 7/19/2018; 7/20/2018; 7/22/2018; 7/23/2018; 7/24/2018; 7/27/2018; 7/28/2018; 7/29/2018; 7/31/2018; 8/2/2018; 8/4/2018; 8/6/2018; 8/9/2018; 8/10/ 2018; 8/12/2018; and 8/13/2018. The accounts of multiple witnesses, public records, and/or the Responsible Parties' own records corroborate events.

These releases have resulted from the Responsible Parties' illegal, improper, and careless operation of the Facility. The Responsible Parties are aware that the Facility has released, and continues to release, these nuisance emissions and odors that have

harmed and continue to harm the Facility's neighbors. Despite this, the Responsible Parties have failed to abate the nuisance.

The releases from the Facility, in the manner described above, are a public nuisance under Ohio Adm. Code § 3745-15-07 in violation of Ohio's SIP, the Title V Permit, and the CAA. The public nuisance is ongoing and will continue after the date of this letter and the subsequent filing of a lawsuit, unless and until the Responsible Parties take verifiable and enforceable steps to abate the nuisance. My clients are providing notice for the violations listed above, as well as all ongoing and continuing violations, including those committed subsequent to the date of this Notice.

Other CAA Violations

Exceedances of the particulate matter emissions limit for the No. 3 Blast Furnace (P925)

The Title V Permit limits the emission of particulates from the No. 3 Blast Furnace to 73.8 pounds per hour.⁴ This permit requirement is an "emission standard or limitation" under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on reports prepared and certified to be true, accurate, and complete by Facility personnel and submitted to Ohio EPA, this requirement was exceeded on at least the following dates: 8/22/2012; 9/2/2012; 9/4/2012; 9/7/2012; 9/8/2012; 9/10/2012; 9/16/2012 (2 times); 9/17/2012 (2 times); 9/26/2012; 9/27/2012; 9/30/2012; 10/4/2012; 10/11/2012; 10/12/2012; 10/20/2012; 11/28/2012; 12/11/2012; 12/21/2012; 12/29/2012; 1/15/2013; 1/16/2013; 1/21/2013; 1/30/2013; 2/15/2013 (2 times); 2/19/2013; 3/17/2013; 3/18/2013; 4/29/2013; 4/30/2013 (2 times); 5/7/2013; 5/14/2013 (2 times); 5/16/2013; 5/17/2013; 5/20/2013; 5/27/2013 (2 times); 5/28/2013; 6/5/2013 (2 times); 6/12/2013; 6/21/2013; 7/17/2013; 7/18/2013; 7/20/2013; 7/21/2013 (4 times); 7/22/2013 (6 times); 7/23/2013; 7/24/2013; 7/25/2013; 7/28/2013; 8/1/2013; 8/2/2013 (4 times); 8/4/2013 (2 times); 8/7/2013 (2 times); 8/9/2013 (2 times); 8/11/2013; 8/16/2013; 8/17/2013 (2 times); 8/18/2013; 8/20/2013; 8/21/2013 (6 times); 8/23/2013 (3 times); 8/30/2013 (3 times); 8/31/2013; 9/1/2013; 9/5/2013; 9/6/2013; 9/7/2013; 9/8/2013; 9/9/2013; 9/10/2013; 9/11/2013 (4 times); 9/12/2013 (3 times); 9/15/2013; 9/24/2013 (2 times); 9/25/2013 (2 times); 9/26/2013; 9/27/2013 (2 times); 9/29/2013 (2 times); 9/30/2013; 10/3/2013; 10/6/2013; 10/22/2013 (2 times); 10/29/2013; 11/1/2013 (3 times); 11/4/2013; 11/6/2013; 11/7/2013; 11/8/2013; 12/7/2013; 12/10/2013 (2 times); 12/25/2013; 1/2/2014; 1/5/2014; 1/22/2014; 3/27/2014;

⁴ P925 Part III.A.I.1, No. P0096473 and C.23.b)(1)b., No. P0105157.

3/30/2014; 5/12/2014; 8/5/2014; 8/23/2014; 9/8/2014; 9/26/2014; 10/24/2014; 10/27/2014; 10/28/2014; 10/29/2014; 11/1/2014; 12/19/2014; 1/12/2015; 1/29/2015; 6/9/2015; 6/10/2015 (2 times); 6/26/2015; 6/27/2015; 6/28/2015; 7/20/2015; 9/24/2015 (2 times); 11/12/2015 (2 times); 12/17/2015; 10/13/2016; 11/29/2016; 12/6/2016; 12/13/2016 (2 times); 12/15/2016 (2 times); 12/21/2016; 12/30/2016; 1/14/2017; 1/16/2017; 2/27/2017; 3/6/2017; 3/13/2017; 3/14/2017; 3/17/2017; 3/18/2017; 3/25/2017 (2 times); 4/5/2017; 4/8/2017; 4/10/2017 (2 times); 4/22/2017; 4/26/2017 (2 times); 4/30/2017 (2 times); 8/3/2017; and 8/9/2017. Each of these exceedances is a violation of the Title V Permit, the Ohio SIP, and the CAA.

Failure to maintain the RS scrubber water flow rate at or above the required minimum of 661 gallons per minute (P925)

The Title V Permit requires that the RS scrubber water flow rate be maintained at or above a minimum of 661 gallons per minute (gpm).⁵ This requirement is an “emission standard or limitation” under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on reports prepared and certified to be true, accurate, and complete by Facility personnel and submitted to Ohio EPA, the RS scrubber water flow rates were below the required minimum of 661 gpm on at least the following dates: October 27 and 28, 2014 for five consecutive shifts. Each of these failures is a violation of the Title V Permit, the Ohio SIP, and the CAA.

Failure to maintain the required inlet static pressure in the Secondary Emissions Control Baghouse for the Basic Oxygen Furnaces (P926 and P927)

The Title V Permit, the NESHAPs for Integrated Iron and Steel Manufacturing Facilities, and the Facility’s operations and maintenance plan requires the Facility to maintain the inlet static pressure of 6 inches W.C. in the Secondary Emissions Control Baghouse.⁶ This requirement is an “emission standard or limitation” under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on reports prepared and certified to be true, accurate, and complete by Facility personnel and submitted to Ohio EPA, the Responsible Parties failed to maintain the required inlet static pressure on at least the following dates: August 22, 2012; April 23, 2014; and May 17, 2014. Each of these failures is a violation of the Title V Permit, the Ohio SIP, and the CAA.

⁵ P925 Part III.A.II.2, No. P0096473 and C.23.d)(7)c., No. P0105157.

⁶ P926 & P927 Part II.A.3, No. P0096473; B.5., No. P0105157; 40 CFR Part 63, Subpart FFFFF.

Failure to maintain the required tap hood damper set point for the Basic Oxygen Furnaces (P926 and P927)

The Title V Permit, the NESHAPs for Integrated Iron and Steel Manufacturing Facilities, and the Facility's operations and maintenance plan requires the Facility to maintain the tap hood damper set point in the Basic Oxygen Furnaces.⁷ This requirement is an "emission standard or limitation" under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on reports prepared and certified to be true, accurate, and complete by Facility personnel and submitted to Ohio EPA, the Responsible Parties failed to maintain the required tap hood damper set point on at least the following dates: 8 days between March 9 and March 31, 2015; 9 days between April 1 to April 22, 2015; January 29, 2017; and January 30, 2017. Each of these failures is a violation of the Title V Permit, the Ohio SIP, and the CAA.

Exceedances of the hydrochloric acid emissions limit for the Pickling Lines (P023 & P024)

The Title V Permit and the NESHAPs for Steel Pickling – HCl Process Facilities and Hydrochloric Acid Regeneration Plants limits the hydrochloric acid (HCl) emissions from the Pickling Lines to 18 parts per million by volume (ppmv).⁸ This requirement is an "emission standard or limitation" under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on reports prepared and certified to be true, accurate, and complete by Facility personnel and submitted to Ohio EPA, this limit was exceeded on or between at least the following dates: July 10 to August 15, 2014 (P024) and October 21, 2016 to Jan. 19, 2017 (P023). Each of these exceedances is a violation of the Title V Permit, the Ohio SIP, and the CAA.

Failure to employ required reasonably available control measures for pushing operations at the No. 2 Coke Plant (B918)

The Title V Permit requires the Facility to minimize or eliminate visible fugitive particulate emissions through the employment of reasonably available control measures (RACM). The Facility must, at a minimum, employ a pushing emission control system consisting of a fixed duct and land-based coke guide evacuated to a baghouse collector.⁹

⁷ P926 & P927 Part II.A.3, No. P0096473; B.5., No. P0105157; 40 CFR Part 63, Subpart FFFFF.

⁸ P023 & P024 Part III.A.I.1 and A.I.2.b.i., No. P0096473; C.33.b)(1)e. and b)(2)a.i., No. P0105157; 40 CFR Part 63, Subpart CCC.

⁹ B918 Part III.A.I.1, No. P0096473; C.1.b)(1)v., No. P0105157.

This requirement is an “emission standard or limitation” under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on reports prepared and certified to be true, accurate, and complete by Facility personnel and submitted to Ohio EPA, the Facility failed to employ the required RACM on at least the following dates: October 5 – 6, 2012 while pushing 39 ovens; October 16, 2013; and May 12, 2014. Each of these failures is a violation of the Title V Permit, the Ohio SIP, and the CAA.

Failure to operate the emergency bypass bleeder flare on the No. 2 Coke Plant with a continuously operable pilot flame (B918)

The Title V Permit requires the emergency bypass bleeder flare to be operated with a continuously operable pilot flame.¹⁰ This requirement is an “emission standard or limitation” under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on reports prepared and certified to be true, accurate, and complete by Facility personnel and submitted to Ohio EPA, the Facility failed to continuously operate the pilot flame on at least the following dates: January 1, 2013; January 9, 2013; June 2, 2016; and June 15, 2016. Each of these failures is a violation of the Title V Permit, the Ohio SIP, and the CAA.

Failure to employ reasonably available control measures and good operating or engineering practices (B918, F001, F002, F012, F015, F025, P019, P022, P047, P062, P065, P094, P901, P902, P925, P935, P956, P926, P927, B027, B028, B029, B030, B031, B032, F003, F004, F005, F008, F010, P024, P091, P092, P093, and P095)

The Title V Permit requires the Facility to employ reasonably available control measures and good operating or engineering practices to minimize or eliminate visible emissions of fugitive dust.¹¹ This requirement is an “emission standard or limitation” under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on documented reports by Middletown residents near the Facility, the Facility failed to

¹⁰ B918 Part III.A.II.1.c., No. P0096473.

¹¹ Part III.A.I.1. for B918, F001, F002, F012, F015, F025, P019, P022, P047, P062, P065, P094, P901, P902, P935, B027, B028, B029, B030, B031, B032, F003, F004, F005, F008, F010, P024, P091, P092, P093, and P095 and Part III.A.I.2 for P925, P956, P926, and P927, No. P0096473; C.1.b)(1)v., C.2.b)(1)c., C.3.b)(1)b. & (2), C.5.b)(1)b. & (2)b., C.6.b)(1)b. & (2)a., C.8.b)(1)b., C.9.b)(1)b., C.10.b)(1)b., C.12.b)(1)c., C.13.b)(1)d., C.14.b)(1)c., C.19.b)(1)b., C.21.b)(1)b. & (2)b., C.22.b)(1)b. & (2)a., C.23.b)(1)e. & (2), C.25.b)(1)c. & (2), C.26.b)(1)c. & (2)a., C.29.b)(1)c. & (2)a., C.31.b)(1)b., C.32.b)(1)b. & (2), C.33.b)(1)g., C.35.b)(1)b. & (2)a., No. P0105157.

Citizen Suit Notice

August 17, 2018

Page 15 of 20

employ the required control measures on at least the following dates: 9/14/2012; 9/21–22/2012; 10/8/2012; 10/16/2012; 11/19/2012; 12/6/2012; 12/12/2012; 12/13–14/2012; 12/15–17/2012; 3/8/2013; 3/25/2013; 5/1/2013; 5/21/2013; 6/19/2013; 7/13/2013; 7/14/2013; 8/13/2013; 8/14/2013; 8/17/2013; 8/23/2013; 8/30/2013; 9/3/2013; 9/14/2013; 9/17/2013; 9/20/2013; 9/26/2013; 10/8/2013; 10/10/2013; 10/11/2013; 11/4/2013; 11/11/2013; 2/3/2014; 2/7/2014; 3/18/2014; 3/19/2014; 5/22–23/2014; 6/2/2014; 6/14/2014; 6/15/2014; 6/23/2014; 6/27/2014; 6/29/2014; 6/30/2014; 7/14/2014; 7/25/2014; 7/26/2014; 7/31/2014; 8/1/2014; 8/6–8/2014; 8/10/2014; 8/12/2014; 8/28/2014; 8/29/2014; 9/5/2014; 9/28–29/2014; 10/20/2014; 12/4–5/2014; 12/19/2014; 12/21/2014; 12/22/2014; 3/15/2015; 3/22/2015; 5/22/2015; 6/10/2015; 7/16/2015; 7/22/2015; 7/23–26/2015; 7/29/2015; 8/10/2015; 8/13/2015; 8/28/2015; 9/14/2015; 9/15/2015; 9/19/2015–10/7/2015; 10/9–10/2015; 10/20/2015; 10/21/2015; 2/17/2016; 2/21/2016; 4/15–16/2016; 4/19/2016; 5/22–24/2016; 5/31/2016; 6/2–3/2016; 6/5–6/2016; 6/7–8/2016; 6/17/2016; 6/19/2016; 6/28/2016; 7/9/2016; 8/4/2016; 8/11/2016; 8/22/2016; 9/19/2016; 10/11–13/2016; 11/11–12/2016; 11/18/2016; 11/21/2016; 2/12/2017; 2/16/2017; 2/21/2017; 3/30/2017; 5/1/2017; 5/10/2017; 5/18/2017; 5/25/2017; 5/30–31/2017; 6/5/2017; 6/9–10/2017; 6/10–11/2017; 6/20/2017; 6/26/2017; 7/5/2017; 7/11/2017; 7/13/2017; 7/18/2017; 8/9/2017; 8/14/2017; 8/21/2017; 8/28/2017; 8/29/2017; 8/30/2017; 9/6/2017; 9/8/2017; 9/11/2017; 9/14/2017; 9/15/2017; 9/16/2017; 9/17/2017; 9/18/2017; 9/19/2017; 9/21/2017; 9/22/2017; 9/23/2017; 9/24/2017; 9/25/2017; 9/26/2017; 9/27/2017; 9/28/2017; 9/29/2017; 9/30/2017; 10/1/2017; 10/2/2017; 10/3/2017; 10/4/2017; 10/6/2017; 10/7/2017; 10/9/2017; 10/10/2017; 10/11/2017; 10/12/2017; 10/13/2017; 10/14/2017; 10/15–31/2017; 11/1/2017; 11/2/2017; 11/3/2017; 11/4/2017; 11/5/2017; 11/6/2017; 11/7/2017; 11/8/2017; 11/9/2017; 11/10/2017; 11/11/2017; 11/12/2017; 11/13/2017; 11/14/2017; 11/15/2017; 11/16/2017; 11/17/2017; 11/18/2017; 11/19/2017; 11/20/2017; 11/21/2017; 11/23/2017; 11/24/2017; 11/25/2017; 11/26/2017; 11/27/2017; 11/28/2017; 11/29/2017; 11/30/2017; 12/1/2017; 12/2/2017; 12/3/2017; 12/4/2017; 12/5/2017; 12/6/2017; 12/7/2017; 12/8/2017; 12/9/2017; 12/10/2017; 12/12/2017; 12/13/2017; 12/14/2017; 12/15/2017; 12/16/2017; 12/17/2018; 12/18/2017; 12/19/2017; 12/20/2017; 12/21/2017; 12/22/2017; 12/24/2017; 12/25/2017; 12/26/2017; 12/27/2017; 12/28/2017; 12/29/2017; 12/30/2017; 12/31/2017; 1/1/2018; 1/3/2018; 1/4/2018; 1/5/2018; 1/6/2018; 1/7/2018; 1/8/2018; 1/10/2018; 1/14/2018; 1/15/2018; 1/16/2018; 1/17/2018; 1/18/2018; 1/19/2018; 1/22/2018; 1/27/2018; 1/29/2018; 1/30/2018; 2/8/2018; 2/9/2018; 2/10/2018; 2/12/2018; 2/13/2018; 2/14/2018; 2/15/2018; 2/16/2018; 2/18/2018; 2/23/2018; 2/24/2018; 2/25/2018; 2/27/2018; 3/5/2018; 3/6/2018; 3/8/2018; 3/10/2018; 3/12/2018; 3/18/2018; 3/19/2018; 3/20/2018; 3/21/2018; 3/28/2018; 3/30/2018; 3/31/2018; 4/1/2018; 4/18/2018; 4/25/2018; 4/27/2018; 4/29/2018; 4/30/2018; 5/1/2018; 5/2/2018; 5/6/2018; 5/8/2018; 5/9/2018; 5/11/2018; 5/12/2018; 5/13/2018; 5/14/2018; 5/15/2018; 5/17/2018; 5/18/2018; 5/19/2018; 5/20/2018; 5/21/2018; 5/22/2018; 5/23/2018; 5/24/2018; 5/25/2018; 5/26/2018; 5/27/2018; 5/28/2018; 5/29/2018; 5/30/2018;

6/2/2018; 6/3/2018; 6/4/2018; 6/5/2018; 6/6/2018; 6/7/2018; 6/8/2018; 6/10/2018; 6/12/2018; 6/13/2018; 6/14/2018; 6/15/2018; 6/16/2018; 6/17/2018; 6/20/2018; 6/21/2018; 6/23/2018; 6/24/2018; 6/26/2018; 6/27/2018; 6/28/2018; 6/29/2018; 6/30/2018; 7/1/2018; 7/2/2018; 7/3/2018; 7/4/2018; 7/6/2018; 7/8/2018; 7/9/2018; 7/10/2018; 7/12/2018; 7/13/2018; 7/14/2018; 7/15/2018; 7/16/2018; 7/17/2018; 7/19/2018; 7/20/2018; 7/22/2018; 7/23/2018; 7/24/2018; 7/27/2018; 7/28/2018; 7/29/2018; 7/31/2018; 8/2/2018; 8/4/2018; 8/6/2018; 8/9/2018; 8/10/2018; 8/12/2018; and 8/13/2018. Each of these failures is a violation of the Title V Permit, the Ohio SIP, and the CAA.

Failure to operate the flare with a continuously operable pilot flame when the basic oxygen furnace is in operation and oxygen blows are occurring (P927)

The Title V Permit requires the flare to be operated at all times when the basic oxygen furnace is in operation and oxygen blows are occurring.¹² This requirement is an “emission standard or limitation” under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on reports prepared and certified to be true, accurate, and complete by Facility personnel and submitted to Ohio EPA, the Facility failed to continuously operate the pilot flame for the flare for at least eight heats on at least the following dates: March 21, 2017 and March 25, 2017. Each of these failures is a violation of the Title V Permit, the Ohio SIP, and the CAA.

Exceedances of the visible emissions opacity limit for the No. 15 Basic Oxygen Furnace (P926)

The Title V Permit and the NESHAPS for Integrated Iron and Steel Manufacturing Facilities limits the opacity of visible particulate emissions from the No. 15 Basic Oxygen Furnace to 20 percent as a three-minute average.¹³ This requirement is an “emission standard or limitation” under 42 U.S.C. § 7604(f)(1), 42 U.S.C. § 7604(f)(3), and 42 U.S.C. § 7604(f)(4). Based on USEPA Method 9 visual determinations of opacity emissions performed by SWOAQA staff, this limit was exceeded on at least the following dates: August 4, 2017 and August 30, 2017. Each of these exceedances is a violation of the Title V Permit, the Ohio SIP, and the CAA.

¹² P927 Part III.A.II.1. and A.III.2., No. P0096473; C.29.d)(1), No. P0105157.

¹³ P926 Part III.A.I.1, No. P0096473; B.5 and C.29.b)(1)b., No. P0105157; 40 CFR Part 63, Subpart FFFFFF (40 CFR § 63.7790(a)).

The CAA violations are ongoing

This Notice is not intended to describe the full extent of pollution at and interference with neighboring properties or all of the Responsible Parties' acts and omissions that contribute to these ongoing violations. The violations described above are ongoing and will continue after the date of this letter and the subsequent filing of a lawsuit. These violations are and have been preventable and are the result of the Responsible Parties' illegal, improper, and/or careless operations of the Facility. My clients are providing notice for the violations listed above, as well as all ongoing and continuing violations, including those committed subsequent to the date of this Notice.

The Persons Giving Notice

Donna Ballinger and the Sierra Club are the persons giving notice. Their contact information is as follows:

Donna Ballinger
3014 Ottawa Street
Middletown, Ohio 45044
513-217-7034

Sierra Club
2101 Webster St.
Suite 1300
Oakland, CA 94612
415-977-5500

Sierra Club, Ohio Chapter
131 North High Street
Columbus, OH 43215
614-461-0734

Donna Ballinger and Sierra Club are represented by counsel, identified below:

D. David Altman
AltmanNewman Co., L.P.A.
15 East 8th Street, Suite 200W
Cincinnati, Ohio 45202

Citizen Suit Notice

August 17, 2018

Page 18 of 20

(513) 721-2180 x100

Fax: (513) 721-2299

daltman@environlaw.com

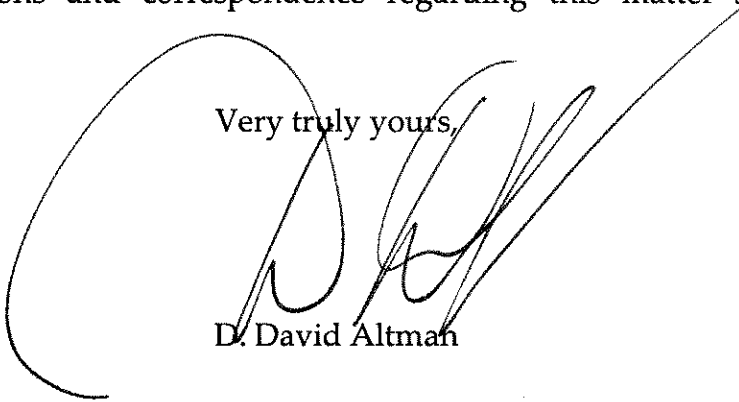
Conclusion

My clients would prefer to resolve this matter within the next 60 days without filing suit. To that end, my clients are willing to discuss solutions and seek full and complete information about, and the abatement of, the environmental conditions that now exist at and around the affected properties. If enforcement litigation is necessary, my clients will seek injunctive relief compelling the Responsible Parties to: abate the Clean Air Act violations; install effective air pollution controls; effectively control ash, kish, coke, coal, and other particulate emissions; perform a complete assessment and remediation of affected properties; perform any corrective action or remediation necessary to abate the endangerment to health and welfare; and to otherwise curtail the Responsible Parties' violations. To assure that concrete and enforceable actions are timely implemented, my clients will seek the appointment of both a special master to directly oversee the remedy and a citizen oversight committee. My clients will also seek any other relief that the Court may deem appropriate, including litigation costs and civil penalties.

Because the violations and discovery of these violations are ongoing, nothing in this Notice should be construed as limiting any further claim under this Notice or the filing of any additional notice that may be presented on behalf of my clients or any other person adversely affected.

All future questions and correspondence regarding this matter should be directed to me.

Very truly yours,


D. David Altman

Citizen Suit Notice

August 17, 2018

Page 19 of 20

cc via certified mail:

Corporation Service Company
Statutory Agent
AK Steel Holding Corporation
50 West Broad Street, Suite 1330
Columbus, OH 43215

Corporation Service Company
Statutory Agent
AK Steel Corporation
50 West Broad Street, Suite 1330
Columbus, OH 43215

Andrew Wheeler
Acting Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Cathy Stepp
Regional Administrator, Region 5
U.S. Environmental Protection Agency
Ralph Metcalfe Federal Building
77 West Jackson Blvd.
Chicago, IL 60604

The Honorable Jeff Sessions
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

The Honorable John R. Kasich
Governor of Ohio
Riffe Center

Citizen Suit Notice

August 17, 2018

Page 20 of 20

77 South High Street
30th Floor
Columbus, OH 43215-6117

The Honorable Mike DeWine
Ohio Attorney General
30 E. Broad St.
14th Floor
Columbus, OH 43215

Craig W. Butler
Director
Ohio Environmental Protection Agency
50 West Town Street
Suite 700
Columbus, OH 43215

Robert Hodanbosi
Chief
Division of Air Pollution Control
Ohio Environmental Protection Agency
50 W. Town St.
Suite 700
Columbus, OH 43215

Holly Christmann
Director
Southwest Ohio Air Quality Agency
250 William Howard Taft Rd.
First Floor
Cincinnati, OH 45219

Bonnie Buthker
Chief
Southwest District Office
Ohio Environmental Protection Agency
401 East Fifth Street
Dayton, OH 45402

ATTACHMENT 2

DECLARATION OF JAMES SAMPSON

I, James Sampson, declare as follows:

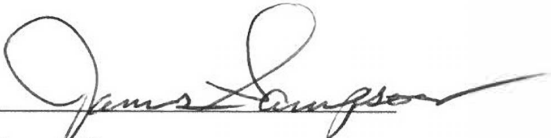
1. I am over 18 years of age and of sound mind.
2. I have personal knowledge of the information set forth herein.
3. I offer this declaration in support of the proposed rule that would put the Air Nuisance Rule (ANR) back into the Ohio State Implementation Plan (SIP) so the ANR can once again be enforced by citizens.
4. I lived on Back Road in Franklin Furnace, Ohio most of my life and was close with many of my neighbors. Back Road was my home and I had no plans to leave. From 1984 to 2022, my wife, Bobbi, and I lived and raised our children on Back Road. For many years, starting in 2002, one of our adult sons lived in a second house on our property with his wife and their five children. Bobbi and I are the primary caregivers for our grandson, who was born in 1999 with disabilities. We have two other sons and a total of 11 grandchildren. We used to host all family holidays at our Back Road home.
5. That all changed when the Haverhill Coke Plant, owned by SunCoke, began operating about 1,500 feet from my home.
6. For years Bobbi and I made reports of the life-altering pollution to the Ohio EPA. Our reports were disregarded, or worse. It seemed like Ohio EPA didn't believe us because when agency staff came out to "investigate"—usually 2-3 days after we called—they would say that they couldn't smell the odor, see the pollution, and didn't experience the symptoms we described. It became clear to me that Ohio EPA would not help us.
7. After years of trying to get the State of Ohio to protect us, we sought legal help and we personally used the ANR to file a citizen suit enforcement action in federal court to protect us, our family, our property, and our community from the harmful effects of air pollution from a neighboring coke production facility.
8. As part of our citizen suit, I testified at a preliminary injunction hearing in the US District Court for the Southern District of Ohio.
9. At that preliminary injunction hearing, I testified about my direct observations of pollution coming from various areas of the coke plant, which was visible from my property, and traveling to, and over, my property. I testified about the effects of the frequent and repeated haze, clouds, and plumes that prevented us from using and enjoying our outside spaces, including our swimming pool, porch, and grilling area. I testified about the terrible symptoms that we suffered from exposure to the pollution.
10. I have attached a true and accurate copy of the transcript and select visual exhibits (Att. A) from that hearing that describe these impacts. I was cross-examined by

Defendants' attorneys. My testimony and my exhibits were all accepted into evidence at the hearing.

11. I submit this sworn testimony to make it clear what was at stake when Ohio residents lost the ability to use the air nuisance rule for over four years.
12. Now, I understand USEPA is proposing to put the ANR back into the SIP. I am relieved to hear this and fully support the proposal. I hope my story illustrates how important having the ANR in the SIP is to Ohio citizens.
13. Restoration of the ANR to the SIP is necessary in order for other citizens, like Bobbi and me, to protect themselves and their families and communities.
14. We no longer live on Back Road. While we waited for a ruling on our preliminary injunction hearing, we were notified the USEPA in Chicago had decided to take the ANR away from us and the other Ohio residents who needed it to fight pollution. When we lost that tool, our case ended in a confidential settlement.
15. Long after our case was settled and after we moved, we learned that the USEPA disclosed information in connection with an appeal our lawyers and others had filed about making the ANR available to Ohio residents again. We learned that a law firm working for the *Defendants in our case* had secretly met with both Ohio officials and top USEPA officials in Chicago to work out a plan to deny Bobbi and me of the ability to use the ANR.
16. Even though the USEPA knew of our suit and knew how to reach our lawyers, no one from the government contacted us or our lawyers to explore or investigate the real world impact of this plan to get rid ANR enforcement. We understand that the official records show the USEPA made no contacts with health groups or environmental groups or organizations to consider the impact of this action.
17. The first word our lawyers had about the proposed removal occurred one day after the first state-wide COVID mandatory shutdown.
18. It is sickening to me that powerful polluters can use the government to secretly plan to deny regular people of rights they have had for decades. We find at least some consolation in the fact that the Sixth Circuit Court of Appeals saw fit to reference our plight in its written opinion on the appeal.

I declare, pursuant to 28 U.S.C. § 1746, under penalty of perjury that the foregoing is true and correct.

Executed on April 22, 2024.



James Sampson

ATTACHMENT A

September 14, 2018

Preliminary Injunction Hearing Transcript Excerpts

This attachment includes the following selected visual exhibits from the 2018 preliminary injunction hearing. Each of these exhibits was accepted into evidence at that hearing:

1. PX7
2. PX8
3. PX10
4. PX11
5. PX12
6. PX14
7. PX19

1 All right. It works best if you get about six to eight
2 inches away from the microphone. Right there. Direct your
3 answers toward David. And when you're comfortable, no reason
4 to be nervous, just state your full name and spell your last
5 name so Luke can take it down.

6 THE WITNESS: All right. Do I push the button when I
7 do that?

8 THE COURT: No, no. You're fine.

9 MR. ALTMAN: Here I am.

10 THE COURT: No. Just state your name and spell your
11 last name.

12 THE WITNESS: All right. My name's James Sampson.
13 That's S-a-m-p-s-o-n.

14 THE COURT: Thank you.

15 David?

16 JAMES SAMPSON

17 a witness herein, having been first sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. ALTMAN:

20 Q. Yes. Mr. Sampson, where do you live?

21 A. I live at 2737 Back Road, Unit C, Franklin Furnace, Ohio.

22 Q. And, sir, I'm going to show you Plaintiffs' Exhibit 1 that
23 we're going to put up on the screen over there. And I think
24 you may have in the witness binder a paper copy of that, but
25 would you -- can you -- this is a Google Earth aerial map of

1 the area where you live.

2 MR. ALTMAN: Do we have a stipulation that this is --

3 MR. GUTTMANN: Yes.

4 MR. ALTMAN: Yes. We've got a stipulation that this
5 is a fair and reasonable representation.

6 THE COURT: Okay. So Exhibit 1 is admitted. Okay.

7 MR. ALTMAN: Of the area depicted.

8 (Plaintiffs' Exhibit 1 was admitted.)

9 Q. Sir, can you identify the location of your house on
10 Plaintiffs' Exhibit 1. And you can do it by words; you don't
11 have to get up.

12 THE COURT: Just say where it says your house.

13 A. On the upper center section of the screen we're the second
14 residence, "Sampson residence." It's marked with a yellow pin.

15 Q. And you see the words "Sampson residence" there?

16 A. Yes.

17 Q. And that's an accurate place where your house lives?

18 A. Yes, sir, it is.

19 Q. How long have you lived there, sir?

20 A. We've lived at that address since 1984.

21 Q. And were you familiar with the Back Road area before you
22 moved into your present home?

23 A. Yes, sir.

24 Q. And how is that?

25 A. My parents actually bought the house that's marked

1 "Kinstler residence" there beside our name in 1965. I was 13
2 at the time.

3 Q. And so you grew up there. Is that your testimony?

4 A. Yes, my teenage years.

5 Q. And describe the Back Road area that you remember as you
6 grew up and then advanced in age.

7 A. All right. It was a rural community, mostly farmland. We
8 had a highway, the four-lane highway that's there represented
9 in front of our residence. There also was a chemical plant at
10 the end of the road that we lived on.

11 Q. What was it called back then?

12 A. It was USS Chemical.

13 Q. And is that plant still there today?

14 A. Part of the plant is.

15 Q. And you mentioned there were highways in the area.

16 A. Yes, sir.

17 Q. And is that highway the same highway that's there today?

18 A. Yes.

19 Q. And it's U.S. 52?

20 A. Yes, U.S. 52. It runs east and west.

21 Q. Was there a railroad in the area when you grew up?

22 A. Yes, sir. It was Norfolk and Western Railroad. Later that
23 was changed to Norfolk and Southern.

24 Q. Now describe your home at 2737C.

25 A. We have a ranch style residence on 1.2 acres of property,

1 2300 square feet, approximately. We also have another home on
2 that property that my youngest son and his wife and five
3 grandchildren live in. It's 1600 square feet. We have an
4 in-ground pool in the backyard, some garden areas and flower
5 gardens and so forth.

6 Q. Can you describe the heating and air conditioning system,
7 if any, in your home.

8 A. Yes, sir. We have a heat pump system with electric backup,
9 forced air furnace. And that also is the case in the other
10 residence.

11 Q. And does either of those systems, or both of them, take air
12 from the outside and bring it inside?

13 A. Yes, they do.

14 Q. I'm sorry?

15 A. Yes, they do.

16 Q. And who else, if anyone, lives on that property, your home
17 property, with you?

18 A. My wife and I live at the residence 2737C, and we also have
19 a grandson that's 19 that lives with us.

20 Q. And what's his name?

21 A. His name is Brian Austin. We refer to him as Austin.

22 Q. And how long has he lived with you?

23 A. He's been there since he was an infant.

24 Q. Are you employed outside the home?

25 A. No, sir, I'm not.

1 Q. Have you ever been employed outside the home?

2 A. Yes, sir.

3 Q. And where did you work and when?

4 A. Throughout the years -- I really started out in a
5 mechanical background, and service manager for International
6 Harvester. In later years I was hired by CSX and worked there
7 a while as a machinist. And I was laid off in '88, and I
8 started working in an industrial cleaning company that was in
9 the area. And I worked into an abrasive waterjet cutting
10 technology where we performed cutting in flammable
11 environments.

12 Q. And how long did you work there?

13 A. I worked there until 2001, October 2001.

14 Q. And did there come a time, obviously, when you stopped
15 working there, I believe you testified?

16 A. Yes.

17 Q. And what was, very briefly, the reason for that?

18 A. I was in an industrial accident in 1998 where another
19 gentleman was in harm's way and I made a reaction to try to
20 save him. And which, you know, it did pay off, but I tried to
21 stop a 1500-pound door. And just the reaction to catch it, it
22 mashed my left hand severely, and I've got -- I've had several
23 reconstructive surgeries over the years.

24 Q. And you eventually left that job on a disability?

25 A. Yes, sir.

1 Q. But does that injury have any impact on anything the
2 Court's going to see today?

3 A. Yes. It affects my ability to really hold a camera steady,
4 as you try to do when you're taking photography and videos and
5 so forth. I have very limited use of my left extremity.

6 Q. And let's talk about the arrival of a coke plant in your
7 area. Did there come a time when another industry came to the
8 immediate area of your home?

9 A. Yes, sir. In 2005.

10 Q. What happened?

11 A. SunCoke built the coke plant facility that you can see on
12 the screen. Or actually in 2005 it was part of that particular
13 plant.

14 Q. When did you learn that a coke plant was going to come to
15 your area?

16 A. You know, I'm thinking it was somewhere in 2003 or 2004. I
17 don't remember the exact date.

18 Q. And did you learn anything about the coming plant?

19 A. Yes, sir. Actually, I was invited to accompany the county
20 commissioners, our township trustees, and I think the
21 Portsmouth Local Air Agency representatives were on a bus, and
22 we all were taken down to the plant that they had in Virginia,
23 and they kind of explained the operation and --

24 Q. Do you remember generally, just very generally what they
25 told you?

1 A. Yes, sir. You know, they told us that it was state-of-the-
2 art technology, that the coke plant would not have the
3 emissions of the old coke plant, everything -- their term was
4 that they use negative ovens, and therefore that kept the
5 emissions from being transplanted around the communities, and
6 that they -- all the stockpiles of coal and coke would be
7 covered in like round concrete houses, you know, and it
8 wouldn't be exposed to the environment outside.

9 They made no mention of the frequency of pollution clouds
10 when they cool the final product or anything during that
11 demonstration.

12 Q. Did the coke plant ultimately open?

13 A. Yes, sir. It opened in 2005.

14 Q. And after it opened did the coke plant have any impact on
15 you or your property?

16 A. Yes, sir. It didn't take long for us to realize that we
17 were being affected by pollution clouds and coke hazes that
18 traveled onto our property, over our properties and also the
19 neighborhood property. And, you know, we started getting
20 deposits of sludge paste, oily-based black/silverish-looking
21 particulate matter all over everything on the outside of the
22 properties.

23 Q. Did you ever experience any of the phenomena that you just
24 described before the coke plant opened?

25 A. Absolutely not.

1 Q. And so, again, you first detected these things after it
2 opened?

3 A. After it opened.

4 Q. I believe that's what you said.

5 A. Yes.

6 Q. Did there come a time when you decided to report the coke
7 plant?

8 A. Yes, sir. My first reporting incident actually was to the
9 plant manager Stan Wash, I believe was his name, and I talked
10 with Mr. Wash about what was taking place on our property and
11 the odors that we were being impacted by. And he and the
12 environmental, the man that was the environmental party there
13 at the local plant, came over to our home and they talked to
14 me, and I, you know, showed him what was happening to our
15 property.

16 Q. How did you do that?

17 A. You know, our window, the window ledges, the siding of our
18 house, our deck. I think I had a young grandchild that was
19 outside barefooted, and, you know, I lifted his foot up and
20 showed the black on the bottom of a bare foot.

21 Q. And as a result of that visit did anything happen?

22 A. Mr. Wash told me that he would investigate it and they
23 would try to correct it, that the state was -- the plant was in
24 a state of startup operation and that we would see
25 improvements.

1 Q. And did you see any improvements?

2 A. No. We saw -- actually, we started noticing, you know, it
3 was piling up more and we were being affected, more of the
4 gaseous odors, just terrible rank odors that would accompany
5 the pollution clouds when they drifted over our property and
6 into our property.

7 Q. Did you make any other reports to the plant?

8 A. Yes, sir. I've called the Portsmouth Local Air Agency and
9 talked to a lady by the name of Cindy Charles.

10 Q. And what, if anything, did -- where did that lead?

11 A. Mrs. Charles told me that she would investigate it and call
12 the plant, and she would come out into the neighborhood and
13 talk with us.

14 THE COURT: Who is she with, Jim?

15 THE WITNESS: Pardon?

16 THE COURT: Who is Mrs. Charles with?

17 MR. ALTMAN: PLAA, the Portsmouth Local Air Agency.

18 THE COURT: Okay.

19 MR. ALTMAN: Which is a contract agency that works the
20 area.

21 THE COURT: Okay.

22 Q. Did anything happen as a result of your contacting Mrs.
23 Charles?

24 A. There were no changes made. She did come out and she told
25 me that she talked to the plant and that they didn't notice

1 anything for us to complain about, and at the time she was
2 there, she didn't notice anything, and that she had made them
3 aware at the plant, and they said that they would, you know,
4 try to take the neighborhood into consideration.

5 Q. Did anything change after Cindy Charles talked with you?

6 A. No, sir.

7 Q. Did you ever talk to anybody else from the plant?

8 A. Yeah. At a later date they had another plant manager. I
9 found out when I called over to the plant to make another
10 complaint and make them aware of our concern. His name was
11 John Esseman, and he was actually a local Scioto County
12 resident. And he had taken over the position of plant
13 management I think not long before I made the call and talked
14 to him.

15 And he also came over to our property, and, you know, I
16 talked about the terrible and rank odors that were affecting us
17 and, you know, we were starting to cough and, you know, the
18 kids are dragging all the dirt into the house. We were opening
19 our doors and green oven odors or terrible odors are entering
20 our homes, or our home and also my son's home.

21 You know, I also showed him the sludge that's on the
22 outside furniture. Our in-ground pool, that particular morning
23 there was black settlements in the bottom of the pool. And,
24 you know, I talked to him about all that, and Mr. Esseman told
25 me that he would go back to the plant and talk to the people

1 and they'd try to take corrective action.

2 Q. And did things improve after John Esseman made this visit?

3 A. No, sir.

4 Q. And how often at this period of time were these events
5 occurring?

6 A. They occurred daily. You know, it -- it is affected to the
7 various neighborhood properties by wind direction a lot, but
8 there's these dozens of pollution clouds that come from two
9 points in the plant that happen at intervals that sometimes are
10 a few minutes apart and last for a few hours. And those clouds
11 that you'll see on the photographs later, they just travel over
12 the neighborhood, and the wind velocity kind of determines how
13 those clouds go through the atmosphere. On a calm day they
14 kind of go straight up, and if the wind's mild, they just drift
15 over our properties. And then if we have brisk winds, the
16 clouds lay down and, you know, they come in at a different
17 elevation.

18 Q. And --

19 A. And that's also true for the hazes, that also those two
20 areas of the plant that I just spoke of, there's a lot of low-
21 lying hazes that surround the coke plant and the property and
22 you can just watch the haze drift from the coke plant and
23 across the railroad and across the interstate -- or I call it
24 an interstate; it's a four-lane highway -- onto our properties
25 and our neighbors' properties.

1 Q. Did those things happen before and happen today, or did
2 they stop?

3 A. No, they still happen.

4 Q. Did you contact anybody from the State of Ohio?

5 A. Yes. I think I made maybe another contact or two with the
6 PLAA. I've also called the state EPA. And this time, you
7 know, I've gotten more frustrated, I guess, and discouraged.
8 So I called the state EPA, and this time I asked them if there
9 was some type of a complaint that I could be sure that it was
10 registered and documented, and I believe the term for that is a
11 verified complaint. So I asked for a verified complaint, and I
12 asked for records with the information and the investigation
13 that took place to be forwarded back to me.

14 Q. Did you get those records?

15 A. No, sir.

16 Q. Did anything, though, happen after your call to the Ohio
17 EPA?

18 A. No.

19 Q. I mean did conditions change, is what I mean.

20 A. No. No, same conditions.

21 Q. Now, did there come a time when the plant changed in size?

22 A. Yeah. They were there approximately three years and they
23 built another unit. If you look at the coke plant
24 photograph --

25 Q. Let the record reflect --

1 A. -- there's a yellow pin that says "Haverhill Coke Plant,"
2 and just above that pin you can see the separation of Unit 1,
3 being that long black row, and then it's my understanding that
4 Unit 2 is about where that pin is, and it continues down toward
5 U.S. -- or toward the old county road 52. And it's my
6 understanding that there's a hundred ovens in each of those
7 units.

8 MR. ALTMAN: And let the record reflect that the
9 witness was pointing toward the exhibit, Plaintiffs' Exhibit 1,
10 and to the central area running diagonally from the lower left
11 to the upper right and a dark area in the middle of that
12 diagonally in his testimony just now.

13 Q. So is the plant doubled in size? Is that what you're
14 saying?

15 A. Yes, it has.

16 Q. But after it doubled in size, did the phenomena you've
17 described today so far go away?

18 A. No, sir. Actually, it was multiplied because there was
19 additional processing going on at the plant.

20 Q. All right. Let's turn back to the fact that you're not
21 employed outside the home. How do you spend your time in
22 recent years, which has been how many years now since you've
23 been --

24 A. I've been retired almost 17 years now.

25 Q. All right. In the last 17 years, generally how do you

1 spend your time?

2 A. Well, we had a grandson that was born in '99 who has, you
3 know, lived with us since he was an infant, and my wife and
4 I've cared for him. He has a disability. He was diagnosed
5 profoundly deaf at eight months old, and we were -- you know,
6 it's devastating to hear that, and we started going to doctors.
7 I started with our family doctor and one of the local doctors
8 that handles hearing impairment.

9 And we went through a period with him of trying on hearing
10 aids, and we found out about a new technology that was called a
11 cochlear implant. And we started trying to find everything we
12 could about the cochlear implant, and we started coming to
13 University of Cincinnati Children's Hospital.

14 And, you know, I'll try to make this as short as I can, but
15 there's a lot of detail.

16 We met a doctor -- Dr. Choo -- at the Children's Hospital
17 here in Cincinnati, and he determined that Austin would be a
18 candidate for an implant. So at age two he was implanted. And
19 my wife and I are his primary caregivers, and, of course, this
20 has taken a lot of our time, doctors' visits, research, and so
21 forth. So after the --

22 Q. Did you find out he had some other condition as well?

23 A. After the implant, we started going to speech therapy and
24 working with therapists, and they recognized that he had other
25 issues.

1 Q. And what are those other issues?

2 A. We had evaluations, and it was determined that he has PDD,
3 pervasive developmental disorder, and he's also on the autism
4 spectrum disorder.

5 Q. And he is 19 years old. Did you testify to that?

6 A. Yes.

7 Q. And you've had him for quite a while. How much time does
8 taking care of Austin consume?

9 A. From the time we get up in the morning until the end of the
10 day. My wife is just completely encapsulated around his daily
11 activity and his needs, and the same speaks for me.

12 Q. And has anything about the coke plant caused issues with
13 your work with Austin?

14 A. Oh, yeah. You know, he goes -- he loves the outdoors. And
15 in his early developmental training, everything had to be
16 visual. So there was a time we started planting seeds in the
17 cups on the windowsills at the house, and he would watch things
18 grow. And, you know, he would learn that, you know, you could
19 eat a bean or a potato or whatever we were trying to experiment
20 with.

21 And we took that outdoors as he got older, and he started
22 planting little gardens and flowers around the yard. And, you
23 know, we tried to use everything. Every opportunity that we
24 had with him was an opportunity to teach and to develop.

25 Q. My question, though, is how does the coke plant have any

1 interaction with any of that?

2 A. Well, you know, as the years -- as Austin grew older and
3 the years went by and we kept being impacted with the amounts
4 of pollution from the clouds and the hazes, I got concerned
5 about what was taking place on our property. You know, when I
6 started seeing our grandkids running around with black all over
7 their feet, you know that's on the ground and it's being beaten
8 into the ground with the rains, and, you know, I became
9 concerned about the contaminants that could possibly be in our
10 soil.

11 So in the past few years we haven't consumed any of the
12 garden things that he grows, the fruits and the vegetables, but
13 we have allowed him to grow the garden, because that's his
14 hobby and it's his passion, and we just switch those.
15 Unbeknownst to him, we'll switch out the green beans and the
16 tomatoes and whatever he carries in the house.

17 Q. What do you do with what he grew?

18 A. Well, some of it we actually have preserved. We did
19 canning and we put it in jars and taught him how to preserve
20 the food, and we take the jars and we put them in a closet.

21 And then we buy beans and stuff from the Amish farms, the
22 local community. Darrell will bring -- Mr. Kinstler, you'll
23 talk to later, sells produce and we get stuff from him. And
24 then we also get beans and stuff from Kroger's. And Bobbi
25 fixes that, and we'll take a jar of his beans and pour them

1 down the garbage disposal.

2 But, you know, he takes great pride, when we sit down at
3 the dinner table, that he knows that he's made a contribution.

4 Q. What's the texture of the substances that you've talked
5 about have come onto your property and still come onto your
6 property, this black substance you talk about? Explain the
7 texture of that.

8 A. You know, it comes onto the property and it settles, and,
9 you know, if you rub your hands against it, it's a pasty
10 sludge. It kind of leaves an oil film on some of the property,
11 the siding of our homes, the tables, you know, on the deck and
12 the outside furniture and so forth, the chairs. It's on
13 everything.

14 Q. Well, can't you just take a garden hose and squirt it off?

15 A. A garden hose doesn't work.

16 Q. What do you mean?

17 A. This material has to be scrubbed off. I use these white
18 Scotch-Brite compound pads and Dawn dishwashing liquid, and we
19 scrub everything with them. It's not really an abrasive pad,
20 but it is a polishing-type pad, and, you know, we rinse those
21 out in the Dawn dishwashing liquid and so forth.

22 Q. Now, you've described several kinds of pollution that you
23 say is from the coke plant today. Have you done anything to
24 record your observations about this pollution in any manner?

25 A. Yes.

1 Q. And what have you done?

2 A. Well, in the early days, you know, I started taking
3 pictures almost immediately.

4 Q. When you say the early days, you mean after the plant --

5 A. 2005 after the plant opened.

6 Q. Okay.

7 A. You know, my first thing was to try to capture what was
8 taking place visually with photographs.

9 Q. Did you ever show those photographs to any of these people
10 that you made complaints to?

11 A. Yes.

12 Q. Do you remember any of the names of those people you showed
13 the photographs to?

14 A. Well, you know, I've showed the photographs to Cindy
15 Charles. I've showed them to John Wash, I've showed them to
16 John Esseman, the two plant managers that I mentioned earlier.

17 I've also showed them to an investigator and an attorney
18 that was representing SunCoke during a previous lawsuit. And
19 he wanted some of the photos, but I wouldn't pass the photos
20 along.

21 Q. And the previous lawsuit, was that a lawsuit you filed?

22 A. No, sir.

23 Q. You were a witness in that lawsuit?

24 A. Yes, sir.

25 Q. Okay. And you provided those photos --

1 A. Yes.

2 Q. -- for the record in that lawsuit?

3 A. Yes, sir.

4 Q. Okay. What else have you done besides -- did you say
5 photos?

6 A. Photos and videos.

7 Q. Oh, you did videos as well?

8 A. Yes.

9 Q. Okay. And have you provided videos?

10 A. Yes, sir.

11 Q. And anything else you've done to record any of your
12 observations of pollution?

13 A. Yes. About a year and a half ago in April of 2017 we were
14 introduced to an environmental monitoring program that tracked
15 the 2.5 particulate. So we started taking the monitor out onto
16 our property at different intervals and doing recording
17 sessions to record those 2.5 activities.

18 Q. And did that continue?

19 A. Yes. That's continued onward until the present time.

20 Q. And did you change the method or manner in which you did
21 the recording at any point?

22 A. Yes.

23 Q. Would you tell the Court.

24 A. Well, in April when we started doing it, we took --

25 Q. Oh, by the way, where did that equipment come from, to the

1 best of your knowledge?

2 A. That equipment is part of the University of Cincinnati air
3 monitoring program, to my understanding.

4 Q. Okay. And tell me about changes in what you did with the
5 air monitors.

6 A. All right. When we were first introduced to how to use the
7 technology, we would go around various locations in our yard
8 and aim the monitor toward the coke plant at various places,
9 and we'd set it and take a few-minute session and, you know, it
10 was an attention-getter right off the bat with us.

11 Q. What do you mean by that?

12 A. You know, I'm out here monitoring and I'm not seeing -- I
13 really don't see anything unusual at times, and the monitor, I
14 can watch the numbers on the monitor as they change from like a
15 green to a yellow, and at times they've went orange and at
16 times they go red.

17 Q. What do you mean green, yellow, orange, red?

18 A. Well, it's my understanding the low numbers are a standard,
19 I believe, by the United Health Organization, what their limits
20 are. I think it goes up to 11 in the green zone. And then
21 when it goes to 12, it enters into a yellow zone. And then at
22 35, 36, it will go into like an orange zone because
23 you're getting more particulate. And then you go into red
24 numbers that are, you know, extremely hazardous.

25 And, you know, I can recognize, as these numbers increase,

1 that I'm being affected while I'm out there with the monitor,
2 because I start coughing and hacking when the numbers are
3 elevated. I can smell -- you know, the intensity of the odors
4 sometimes are worse, and sometimes they're just so bad that you
5 have to run for cover.

6 Q. Now, did you change the way you took readings at some
7 point?

8 A. Yes, sir. In November of 2017 we talked with a gentleman
9 by the name of William Auberle, and he instructed us what he
10 referred to as a protocol and that we needed to follow his
11 protocol and do our monitoring sessions and our recordings
12 following the protocol at the exact location. We needed to
13 monitor, sit in an area that was in clear view of the coke
14 plant with no obstructions. And we were to monitor a minimum
15 of ten-minute session and that each ten-minute session -- like
16 a 20-minute session that I monitored would be two sessions, and
17 those two sessions could not overlap.

18 So, you know, when I take the monitor out in the yard, I've
19 got my phone that carries the app. programmed to where that
20 screen stays lit up for ten minutes, and that's how I really
21 know I'm in that ten-minute period as the monitor's taking the
22 information.

23 Q. And so you've followed that protocol as best you can?

24 A. Yes.

25 Q. And you've continued to do that?

1 A. Yes, sir.

2 Q. Okay. Have you done anything else to record or memorialize
3 in any way your observations of the coke plant?

4 A. Yes, sir. Of course, while the monitor is processing the
5 technology capabilities that it has, you know, I'm taking a
6 visual of the area and what's happening at that time. And I
7 keep a daily log that, you know, I just document the wind
8 direction, is it cloudy, sunny, is it a post-rain period where
9 maybe it rained an hour before, did we have a fog, a haze, you
10 know, data like that that we can pass on to Mr. Auberle.

11 And then I also try to log how I'm affected during these
12 sessions, because there are many times that I am affected. My
13 throat gets tight, we're breathing a lot of gas-type odors, and
14 I start coughing. I hack. Some of the extreme exposure, I've
15 had my gag reflex triggered and I've actually thrown up on my
16 property many times.

17 Q. Again, when do you write these things down?

18 A. Usually I write them down as I -- when I take the monitor
19 back into our home. I have a desk or a -- well, actually, it's
20 an old piece of furniture, a dresser that we have inside the
21 door, and it's just perfect height for me to write down the
22 notebook.

23 The first thing I do is type my name, the date, the wind
24 direction, and the weather conditions onto the app. on the
25 telephone. And I do that inside, because a lot of times, the

1 outdoors, I want to get back in as soon as I can. And also, I
2 don't have good hands, so I really need to lay that phone down
3 on that surface. And I do that first, and then I make my notes
4 onto the notepad. And then I take the phone app., and I've got
5 an Excel program that I enter the data that's recorded on the
6 app. And the data, it's the date, the time the monitor was
7 running, the start time and the end time, there's a little note
8 of the conditions and the effects, and then there's a note that
9 we refer to as an SM and NSM.

10 Q. And that's what you testified about before, when you sense
11 you're affected and when you're not?

12 A. Yes.

13 Q. Is there anything else? For example, have you continued,
14 with all of the app. and all of the monitoring equipment, have
15 you continued to take photographs?

16 A. Yes. I take photos and videos, and I especially try to
17 take those when I see that the 2.5 readings are elevated, you
18 know, I really especially try to take pictures and videos to
19 enter into evidence, you know, to prove what's taken place
20 during that monitoring session.

21 And I also try to capture photographs that are telling
22 what's affecting our neighborhood and some of our surrounding
23 neighbors' properties.

24 Q. Now let's limit what you say next to the last three to four
25 years, which are the period that the motion we have pending and

1 the lawsuit itself focus on. Can you tell me generally how the
2 plant has impacted your life in any way.

3 A. Yes, sir. You know, I'm an outdoors person. I love
4 summer, spring especially, and I'm constantly trying to do
5 things around the house. I bring Austin along with me to try
6 to teach him everything that I can teach him about caring for
7 property, enjoying his hobbies, and developing him as the days
8 go on.

9 And when we're outside, I have literally seen thousands
10 upon thousands of pollution clouds come from the coke plant and
11 pass over our home. I've seen coke hazes that come in the
12 direction of our home from the coke plant and enter onto our
13 property. I've seen those clouds of pollution go on over our
14 surrounding neighbors. I've seen the hazes go on up to the
15 Back Road area, which is probably 250 feet from our house and
16 against a hillside. And I've watched those hazes kind of
17 expand along that neighborhood and affect our neighbors.

18 And during a lot of these situations -- and, of course, I'm
19 trying to grasp a visual what's taking place here, and I'm
20 trying to take photographs and videos at times -- you know, I'm
21 being exposed to a lot of gas, really foul and rank odors.
22 And, you know, I didn't know anything about 2.5 four years ago.
23 I just thought more of being particulate, pasty particulate
24 matter that we were breathing in. But I tell Austin to go in
25 the house, or if my other grandchildren are out in the yard at

1 that time, you know, I try to shoo them on over to get them
2 inside.

3 But, you know, I've been affected. In the past four years
4 I've got concerns for my health. My throat is swollen at all
5 times, and I'm sure you've noticed my voice is raspy. And, you
6 know, I didn't have these effects before. And I've coughed and
7 I've hacked, and, you know, quite frankly, I'm concerned about
8 that.

9 Q. What about any impact on your mind that you want to share?

10 A. You know what? I -- I just think that I get depressed.
11 You know, my first -- in the earlier days I was aggravated,
12 just overwhelmed with frustration of the additional work
13 cleaning, you know. Because we have tried to keep our property
14 up, and we've tried to do improvements every year to the
15 property, and we have. And, you know, it's frustrating.

16 Our swimming pool, all these settlements getting in it and
17 creating extra work cleaning the pool. I have to actually take
18 the sand filter apart annually now, instead of three years that
19 I used to do it before the coke plant. And I have to take it
20 apart annually because the filter gets stopped up on the top
21 with sludge and paste residue that has this particulate that I
22 recognize of coming from the coke plant that I've cleaned up
23 over the years.

24 And, you know, again, in the earlier years I thought about
25 this as being a dirt problem -- or not really a dirt problem

1 but a pollution problem and an aggravation to me. But as I've
2 seen my body changing and some of the effects of being exposed
3 to the stuff, I really kind of thought how stupid am I that I
4 didn't think what chemicals are in this water that, you know,
5 our grandkids are in.

6 Q. You mentioned your grandchildren. How many grandchildren
7 do you have living on the property?

8 A. We have six.

9 Q. And do any of them have any breathing, any difficulties
10 breathing?

11 A. If you would have asked me this question last week, I would
12 have said five. But Saturday our youngest granddaughter was
13 taken to Urgent Care, and she's diagnosed with a sinus
14 infection and upper respiratory infection. So that number's
15 six.

16 Q. And what about the other children? Are there any that have
17 any other breathing-related disorders?

18 A. All six of the -- or the other five children all have sinus
19 and allergy issues. Two of the kids have been diagnosed with
20 asthma.

21 Q. And which two?

22 A. Levi is 13, and Jaden is six.

23 Q. And how old was Levi when his parents moved to the
24 property?

25 A. You know, I think Levi was somewhere around four. I can't

1 give the exact age. Jaden, I know, was probably a year old, I
2 imagine, maybe a little more.

3 Q. And have the children had attacks of asthma?

4 A. Do what?

5 Q. Have the children had asthma attacks?

6 A. Oh, yes, yes. And Jaden -- Jaden is the six-year-old -- I
7 mean, he suffers. You can just watch his chest, the breathing
8 problems and the complications that he's having. And they have
9 been prescribed with, I think they call them, nebulizers and
10 some kind of breathing treatments.

11 Q. Now, you mentioned feeling some depression. Has the stress
12 affected you in any other way?

13 A. Absolutely.

14 Q. How?

15 A. You know, I'm concerned. You know, these kids, they're
16 outside playing all the time, they're young. We try to stress
17 keep your tennis shoes on, or your whatever, those plastic
18 shoes they wear anymore. Clogs, I call them. Keep your shoes
19 on. Don't run around in the grass barefooted. But, you know,
20 they're kids, and they don't listen to you.

21 They've got trampolines. They've had trampolines all
22 throughout the years that they've lived there. And they go out
23 and rough and tumble on the trampoline and jump, and I can see
24 their feet black. Their hands where they catch themselves on
25 the trampoline, get the pasty stuff on their hands. They land

1 on their legs, and the side of their legs will have some smears
2 on them. And, you know, while they're out there playing and
3 doing all this stuff, their breathing naturally is increasing
4 and their heart rate is increasing, so they're taking more
5 stuff in and, you know, I'm concerned for their health.

6 And I know that they have serious sinus issues, and the two
7 that have the asthma, you know, when -- we don't know when
8 these clouds are going to attack us, you know. They can happen
9 several times a day, or you can be out there during the day and
10 it's a nice, sunny day that everything's going pretty good, and
11 then all at once what I call a green oven and all the odors and
12 everything from that oven come in. And so, you know -- and if
13 we're out there, we try to run the kids into the house and we
14 try to get into the house.

15 Q. Now, remind me how long you've lived in the house you are.

16 A. We've lived in our house since '84. And my son and his
17 wife and the five kids -- well, the five kids haven't been
18 there the whole time, but they moved in in 2002.

19 Q. And both of those --

20 A. Both of those homes are on our property.

21 Q. Right. But both of those dates of move-in predate the
22 existence of the coke plant; correct?

23 A. Yes.

24 Q. Okay. Now I'd like you to tell the Court about the
25 experiences you've had, as specifically as you can, in July and

1 August, in the two months leading up to this hearing.

2 A. All right. Well, you know, in July and August we've just
3 been impacted throughout the month. Our entire neighborhood
4 has been encapsulated with a blue haze, and I can watch that
5 haze spread from the grounds of the coke plant, and it's
6 distributed throughout the neighborhood. And, you know, I'm
7 outside trying to take monitor readings --

8 Q. But tell me, take me to July and tell what has happened in
9 July, and then we'll go to August.

10 A. Okay. Early in July, of course, you know, we're preparing
11 for the 4th of July. And, of course, we have three sons, three
12 daughter-in-laws and 11 grandchildren, and they always come to
13 our home for the holidays.

14 This year July the 4th was in the middle of the week, and
15 our son and daughter that live in Miamisburg, they were going
16 to come down and spend the 4th with us on July the 2nd.

17 So on the morning of July the 2nd, I'm outside washing all
18 the tables and things outside that we were going to try to have
19 an outdoor get-together, and about 10:30 that morning the green
20 oven attacked at our property once again. And, you know, I ran
21 in and got the monitor and set it up. And I came back in the
22 house and I told Bobbi, my wife, that we could forget about the
23 outdoor eating, that we were going to have to bring everything
24 inside as far as our family get-together, because it appeared
25 it's going to be another holiday weekend that we're going to

1 get hammered from the emissions and the pollution.

2 Q. Well, were you right or were you wrong?

3 A. Well, absolutely right.

4 Q. What happened after that?

5 A. You know, we continued to have episodes from the coke plant
6 where we were being pounded with the pollution clouds and the
7 particulate matter from the clouds and the gaseous odors. I
8 call them rank. And so on during the month --

9 Q. Yes.

10 A. -- you know, I took a lot of photographs and I took some
11 videos to try to capture some of those moments. I took those
12 from not only our property but in other areas around the coke
13 plant and some of our neighbors.

14 Q. And what about in August?

15 A. August was pretty much more of the same. Early in August I
16 would go out early in the morning -- it seems like especially
17 the early morning hours it's -- I don't know if they do a lot
18 of their processing and everything during the night or
19 whatever, but a lot of times in the early morning I notice a
20 lot more things than maybe middle of the day per se.

21 But I believe it was the 4th of August, you know, I noticed
22 a haze coming toward us, and I knew my PM readings were high.
23 And I thought, man, I've got to jump in my Jeep and drive up
24 the road and go around and see what's taking place. So I drove
25 around over by the coke plant in the farm fields that surround

1 it and took some photographs to try to document those
2 conditions.

3 And, you know, as the month progressed we had more of those
4 experiences. I jumped in the car and went around and pretty
5 much repeated that from various locations. And, you know, as
6 the month came to a close, and I believe August 26th in
7 particular, I mean, we were getting PM numbers over 100 and up
8 in the high 120s throughout the month.

9 Q. Do you have any understanding as to the accuracy of the
10 AirBeam technology you're using when it gets above 100?

11 A. Sir, really the only thing I understand, you know, that
12 I've read where the EPA has approved this type of monitoring
13 technology.

14 Q. Oh, I'm sorry. But the question I asked, did you know
15 anything about the --

16 A. You know, I've heard that when the monitor gets up over a
17 hundred that it doesn't tell the story, as far as the numbers,
18 as accurately.

19 Q. You've heard it underreports, is that what you're -- or
20 overreports?

21 A. I've heard that it underreports.

22 Q. Okay. Now, did you prepare declarations for today's
23 hearing?

24 A. Yes, sir.

25 Q. And you've got a binder of exhibits in front of you.

1 MR. ALTMAN: And the exhibit?

2 THE COURT: It's Exhibit 2.

3 MR. ALTMAN: I should be able to remember 2 and 3.

4 THE COURT: It's Exhibit 2, Jim.

5 A. Number 2.

6 Q. Number 2 and Number 3.

7 A. Okay.

8 Q. Have you seen those documents before?

9 A. Yes, sir.

10 Q. And do they bear your signatures at the end?

11 A. Yes, they do.

12 Q. Does each bear your signature at the end?

13 A. Yes.

14 Q. And are the documents dated?

15 A. Yes, sir, they are.

16 Q. Let's focus on Plaintiffs' Exhibit 2. What's the date on
17 Plaintiffs' Exhibit 2?

18 A. The 5th day of July, 2018.

19 Q. All right. And on Plaintiffs' Exhibit 3 what's the date?

20 A. I believe that's September 5th, 2018.

21 Q. And have you had occasion to review these documents in
22 recent days?

23 A. Yes, sir.

24 Q. Is there anything about them you would want to change or
25 correct?

1 A. No. I believe they're clear and accurate representations.

2 Q. All right. And you made that statement under penalty of
3 perjury on the dates you just indicated on each document?

4 A. Yes, sir, I can.

5 Q. You did, though, when you signed; right?

6 A. Yes. Yes, I did.

7 Q. All right. And do these fairly and accurately contain some
8 of your observations about the last two months?

9 A. Yes, sir.

10 Q. July and August?

11 A. Yes.

12 MR. ALTMAN: Okay. Your Honor, could we take a very
13 short break, just five minutes --

14 THE COURT: Sure.

15 MR. ALTMAN: -- at this point before we get into
16 video? And then --

17 THE COURT: Of course.

18 MR. ALTMAN: -- that's it for the witness.

19 THE COURT: Okay. So we'll take a five-minute break,
20 and you can step down, Jim.

21 THE WITNESS: Okay.

22 THE COURT: Thank you.

23 THE WITNESS: I'm out of here.

24 THE COURT: Don't leave.

25 (Witness temporarily excused.)

1 COURTROOM DEPUTY: Court is now in recess.

2 (Recess taken: 10:36 AM - 10:46 AM.)

3 (James Sampson resumes the witness stand.)

4 THE COURT: You guys ready?

5 MR. ALTMAN: Ready, Your Honor.

6 THE COURT: Okay. Go ahead.

7 BY MR. ALTMAN:

8 Q. We're back on the record, sir. I'm going to show you some
9 videos and photos and ask you a little bit about where these
10 materials, or those photos and videos, were taken. And let me
11 go to the first photo, which is PX 4.

12 THE COURT: David, can I just interrupt. I'm assuming
13 you guys have gone over this.

14 Are there any objections to these, John?

15 MR. GUTTMANN: No, Your Honor.

16 MR. ALTMAN: Oh, I'm sorry, Your Honor. We have a
17 stipulation on -- I'm going to still ask him a couple of
18 questions.

19 THE COURT: No, no, I'm fine with that. But we can
20 just deem them admitted and we can move through it; right?

21 MR. ALTMAN: Yes. Yes, Your Honor.

22 THE COURT: Okay, good.

23 Q. Sir, would you look at that photo and tell me, did you take
24 that photo?

25 A. Yes, sir, I did.

1 Q. And from where did you take it?

2 A. I took that from our property.

3 Q. And would you explain what, if anything, that shows. Oh,
4 by the way, when was it taken, do you know?

5 A. This picture was June the 30th of 2018.

6 Q. And what, if anything, was the purpose? What were you
7 trying to show when you took that photo?

8 A. Well, there's two things that stand out. The particulate
9 above the white steam appearance, you can see a lot of the
10 particulates that's a part of that process. And the velocity
11 or the traveling of the air was bringing that toward our
12 property and onto our property. It also captures the haze that
13 surrounds the coke plant property and comes down into our
14 community.

15 MR. ALTMAN: May I approach?

16 THE COURT: Yeah, of course.

17 Q. Are you talking about these areas (indicating)?

18 A. Yes, sir.

19 Q. And I'm indicating the hills or trees behind the coke
20 plant.

21 A. Yes, sir.

22 Q. And it's your testimony, actually being there, that that is
23 a haze?

24 A. Yes, sir.

25 Q. And how do you know that that material and the haze come

1 from the coke plant?

2 A. Well, this picture doesn't really show it because of the
3 trees, but if you're on the road, the Back Road or the highway
4 and other locations around our community, you can just see the
5 heaviness of that haze and see it distributing itself into the
6 community as it travels outward.

7 THE COURT: Jim, are those two structures on either
8 side, are those part of the plant?

9 THE WITNESS: Yes, sir.

10 THE COURT: Okay.

11 THE WITNESS: I think each -- I think each unit has
12 five of those little short stacks. And that structure to the
13 right of it, I don't really know what it is.

14 MR. ALTMAN: All right. Let's go on to the next
15 exhibit, and this is a video. And, Your Honor, there's sound
16 that we want to have admitted because it's what he said at the
17 time, but we're not going to play the sound now at the hearing.

18 THE COURT: Okay.

19 MR. ALTMAN: But you'll be able to hear it.

20 THE COURT: All right.

21 MR. ALTMAN: Would you run the video.

22 Q. And, Jim -- excuse me, Mr. Sampson, where were you when you
23 shot this video?

24 A. All right. This video was taken from our side yard. You
25 know, I'm standing in the yard, and I'm sure I've got the 2.5

1 monitor doing a recording.

2 THE COURT: And that's 52 in front; right?

3 THE WITNESS: Yes. And that's U.S. Route 52 there in
4 front of it and the railroad is just on this side of the tree
5 line.

6 A. And you can watch the pollution cloud leaving the coke
7 plant, and it's traveling in the direction of our property and
8 the property of some of our neighbors. And, you know, you can
9 see the particulate there in the forefront of the process, and,
10 you know, there's -- I can watch this particulate drop and just
11 kind of be distributed onto our property. It's hard to capture
12 in photographs, but --

13 MR. ALTMAN: That's a video. Were you at the end of
14 that video, Mike?

15 MR. WEBER: Yeah, that was it.

16 Q. And did you experience that coming across to your property,
17 that particular cloud?

18 A. Yes, sir, I did. Absolutely.

19 Q. All right.

20 A. You know, this is --

21 Q. Well, wait a minute. Let's get the date on this. And this
22 is Plaintiffs' Exhibit --

23 MR. WEBER: This is Plaintiffs' Exhibit 6.

24 Q. -- 6, and where were you when you shot this video?

25 A. Okay. Once again I'm on our property in our side yard,

1 and, you know, I call this a dirty, a really dirty pollution
2 cloud. I'd like to point out all the different colors in this.
3 You can see the blacks and the grays, but there's a lot of
4 yellow. This photo really doesn't do it justice, but it is
5 there.

6 Q. And I'm indicating, for the record, the area on the photo
7 that the --

8 Is this the area you're calling --

9 A. Yes.

10 Q. -- yellow, where I'm indicating here?

11 A. Yes, sir. And this particular cloud's also coming in
12 toward our property, and I'm being affected by this cloud by
13 coughing, hacking, and, actually, I gagged and threw up at this
14 particular incident.

15 Q. And is that part that Mike Weber has panned onto, is
16 that -- is it your testimony, I think it was, that this is
17 coming over your house, this dark area?

18 A. Yes, this is passing over our house.

19 THE COURT: Jim, hang on just a second.

20 MR. GUTTMANN: Your Honor, with the zooming in, it
21 makes it look like the cloud is closer to the photographer than
22 it really is. I'd like to have the images shown as they're
23 shown without them being zoomed in by a computer.

24 MR. ALTMAN: Well, they're not zooming.

25 MR. GUTTMANN: Well, they --

1 THE COURT: Time out, time out. I don't mind having
2 the, I guess I'll call it the foreground -- well, no. The
3 further-away pictures, as long as it starts there, and then you
4 can always zoom in just like you can put a photograph under a
5 magnifying glass. As long as it's clear for the record what's
6 going on, it's fine.

7 MR. GUTTMANN: All right. That's fine.

8 THE COURT: Yeah, I understand this.

9 Q. But to make sure your testimony's clear, Mr. Sampson, is
10 the stuff at the top of the plume coming over toward your
11 property?

12 A. Yes, sir.

13 Q. That day at that time?

14 A. Absolutely. The morning I took that picture, those two
15 power lines that you see there, they're inside our property
16 line and the property that borders now the Moores' property, or
17 Bentleys'. I'm not sure who owns the property. But the clouds
18 were over our property at that time, and they were going in the
19 direction of Kinstlers', the Adkins' home next to the
20 Kinstlers, the Waddells', the Gannons' property. You know, a
21 picture just can't tell the story how vast this thing was
22 spread out. And you can see black particulate --

23 Q. Wait a minute. We just shifted to Plaintiffs' --

24 MR. WEBER: I can go back.

25 Q. -- Exhibit 7.

1 MR. WEBER: 7 (nods head up and down).

2 Q. I'm sorry, Mr. Sampson. Was that -- were you finished
3 talking about --

4 A. Well, I can tell what I wanted to say with this photo.
5 That would be fine.

6 Q. Go ahead.

7 A. Okay. This particular photo was taken in the early
8 morning. I believe this might be July the 14th. Again you can
9 see the yellow coloration in that cloud, blacks and grays, and
10 once again the southerly winds are bringing this pollution
11 cloud over in the direction of our property. The PM monitor is
12 also running at the time of this photograph. And I don't
13 remember the exact recording, but, you know, they were
14 extremely high that morning. Also --

15 Q. Yeah. Because I was going to ask you, you've been
16 testifying about the cloud that's to the left --

17 A. Yeah.

18 Q. -- on Exhibit 7. But you are about to now, I think, go to
19 the "also." What were you going to say?

20 A. All right. Also in this photo you can see that on the
21 newer unit that was put into production around 2008, they are
22 also going through their process and there's another cloud.
23 And SunCoke put pamphlets out in our mail over the past couple
24 years, and, you know, they say they do this about a hundred
25 times a day. And when you think of a hundred times a day, you

1 know, I'd like to point out, I looked at it, well, that's about
2 every four hours -- or a cloud every four hours -- I've lost my
3 train of thought. I'm sorry.

4 A hundred clouds per day distributed over a 24-hour period,
5 but it doesn't work that way. Sometimes they do this process
6 in periods of two to four hours, and they do it at the same
7 time on Unit -- what I call Unit 1 and Unit 2, so you kind of
8 get the double whammy when this occurs. And it's frequent
9 where you see both quenches taking place at the same time.

10 Q. Now, is it your testimony, though, that material from the
11 cloud on your left in Plaintiffs' Exhibit 7 is coming toward
12 your property and over your property?

13 A. Absolutely.

14 MR. NEWMAN: Okay. Mike, let's go to 8.

15 Q. All right. You may have started to testify about this
16 earlier. This is a still photo. And what is that depicted in
17 the middle of the lower part of the photo? What's the facility
18 there?

19 A. Well, that's -- of course, naturally, that's SunCoke, and
20 I'm over on Ironton Avenue on a farm road when I took this
21 photo. And I'm trying to capture that not only do those clouds
22 go up and over properties, but they also are low hanging, and
23 this photo is showing where it leaves that black box, and you
24 can see it distributed, and it's also going in the direction of
25 our property.

1 Q. And are you speaking of this structure you call the black
2 box?

3 A. That structure and the heavier cloud that you're seeing
4 above it.

5 Q. Uh-huh.

6 A. And the wind direction is moving that cloud in the
7 direction of our properties.

8 Q. So this black box is on the lower right part of the
9 exhibit?

10 A. Yes.

11 Q. Okay.

12 A. Okay?

13 Q. Now, why is it you happened to take that photograph from
14 that location, which is not your house?

15 A. Okay. That morning, again, I get up in the morning and I
16 take the equipment out to take an air monitor sample, and I saw
17 the haze of the coke plant coming across the field, and I
18 actually saw it come past the railroad, on past the interstate
19 and onto our property and the property of our neighbors. And
20 that haze travels up to the hillside, and there are times when
21 the haze is that low that you can just -- you know, you kind of
22 watch it spread out through the neighborhood.

23 Q. And so what did you do?

24 A. Well, I finished my ten-minute recording session and took
25 my notes and everything. And I thought, I've got to jump in

1 the Jeep with the camera and drive over and around to the
2 plant.

3 So I drive up the Back Road a mile and a half. I go down
4 Haverhill Lane toward Old 52 about a mile and then swing back
5 up Old 52 heading west about a mile and a half, and I went into
6 the entrance of Ironton Avenue, which is on the western side of
7 the plant. And I went past Ironton Avenue where the
8 residential houses are and entered into the farm field, and
9 there are soybean fields on both sides of that road. So I just
10 parked on that farmer's road and got out and tried to capture
11 the direction of the pollution clouds and also the angle and
12 how widely distributed it was through that area.

13 THE COURT: So, Jim, can you see your property in that
14 picture?

15 THE WITNESS: My property would be --

16 There's a little tiny white spot there on the telephone --
17 by a telephone pole, Dave. Down just a little bit. Down just
18 a little bit. Okay. Right there.

19 We're going to be across the highway all the way over to
20 the end of that screen.

21 THE COURT: Okay.

22 THE WITNESS: Those trees, those two trees are in a
23 lot of the photos that I've shown, and that's pretty much a
24 straight shot from our house.

25 THE COURT: Okay.

1 Q. So to be clear, is it your testimony that the material that
2 you say is coming from the coke plant is crossing the road and
3 going to your house?

4 A. Absolutely.

5 Q. And, in fact, you had encountered it at your house that
6 morning before you drove around to the other side of the plant?

7 A. Absolutely. And that morning, again, I'm outside breathing
8 the gases and the pollution of that cloud, and it had a health
9 impact on me and I started coughing and hacking again.

10 Q. But you got all the way around the other side and you still
11 saw this same --

12 A. Yeah.

13 Q. -- what you see in the photo?

14 A. Yes.

15 MR. ALTMAN: Mike, go to Plaintiffs' Exhibit 1 for
16 just a minute, because this is one that -- there we go.

17 Q. If I understand your testimony, tell me where to point on
18 this map to show approximately where, just roughly where you
19 were.

20 A. All right. Dave, move your pen upward. Upward, up the
21 screen. See the number is 373 -- or 273 right in the middle,
22 or toward the middle of the screen?

23 THE COURT: Move toward the box, Dave. Dave, there's
24 a box.

25 MR. ALTMAN: Where?

1 THE COURT: Right there.

2 A. Right there. Okay. That road that's just on the other
3 side of you, okay, move it up and to your right.

4 Q. Up here (indicating)?

5 A. Right along in there I parked on that little road, the
6 little white line there.

7 Q. So right to the right of the 373 symbol?

8 A. Yeah.

9 Q. And that's where you took the photograph from?

10 A. Yeah.

11 MR. ALTMAN: Okay. Let's go back to the photograph.
12 We'll go to the next, which I think --

13 Are we on 8?

14 THE COURT: 8.

15 MR. WEBER: Yeah, we were on 8. We want to stay on 8
16 here, I believe.

17 MR. ALTMAN: No. We want to go to 9.

18 Q. All right. And did you do anything else from approximately
19 that same location while you were out there that morning?

20 A. This photograph's taken from Old 52.

21 Q. Oh, a different location?

22 A. Yes, this is a different location. You know, again,
23 there's a soybean field there, but that soybean field is --

24 Q. Different soybean field?

25 A. Different soybean field than the one we looked at before.

1 Q. And what does this show?

2 A. Okay.

3 MR. ALTMAN: And what day is this?

4 MR. WEBER: This is August 4th, still.

5 Q. Still August 4th.

6 A. Okay. Once again, you know, I'm trying to show the
7 circumference area around the plant, so I stopped on U.S. 52.
8 It's a county road now. It's the old two-lane highway, the
9 original U.S. 52.

10 And there was a wide area there that I could pull off of,
11 and I felt I could safely take a video and some pictures from
12 that area. And I'm trying to get the angle of the direction of
13 the coke plant haze that you can see traveling across that
14 other soybean field that we had in that other picture going in
15 the vicinity of our property and our surrounding neighbors.

16 Q. So you're saying at this point when you moved, it was still
17 going in the -- whatever you're talking about, this material
18 from the plant was still going in the direction of your
19 property?

20 A. Yeah, yeah. And, you know --

21 Q. And is your property to the left?

22 A. -- it could have been a different cloud of pollution, you
23 know, they might have took another bed of coke and, you know,
24 been a few minutes between them.

25 MR. ALTMAN: Mike, did you finish running the video?

1 MR. WEBER: Yes.

2 MR. ALTMAN: Okay. Let's go to 10. Is that --

3 THE COURT: That's 8 again.

4 MR. WEBER: This is 10.

5 Q. All right. And this is a still video from the same day;
6 correct?

7 A. Yes.

8 Q. And what does this show, and where did you take it from?

9 A. I'm on old U.S. 52.

10 Q. So it's the same location as the video?

11 A. South of the plant, yes.

12 Q. And what does this show with respect to where the clouds
13 are and your house?

14 A. Our house would be probably five inches from the left of
15 the screen --

16 Q. Down this way (indicating).

17 A. -- over toward the hill. Right along in there, you know,
18 just short of the hillside. Our property is probably --

19 Q. What impact does this hillside have on any of these waves
20 or clouds?

21 A. Well, you know, a lot of times when these clouds are
22 hanging low like this, and the gases, they go to the hill and
23 it stops. And, you know, it's kind of a wall that prevents it
24 from going on, and then they just start moving whichever way
25 they can move, I guess, and then they also settle.

1 MR. ALTMAN: Okay. Let's go to the next video -- or
2 photo, Mike.

3 COURTROOM DEPUTY: What number is that, please?

4 MR. ALTMAN: We're on 11.

5 COURTROOM DEPUTY: Thank you.

6 MR. ALTMAN: PX, Plaintiffs' 11.

7 Q. What date is this, Jim, do you remember?

8 A. This could be one of two dates. I believe this one --

9 Q. Well, let's just --

10 MR. WEBER: This one is August 15th.

11 Q. August 15.

12 A. August 15th. This is another morning that I seen the hazes
13 coming from the coke plant toward our property.

14 Q. First of all, what is that depicted in Plaintiffs' --

15 A. You know what? I've got three things there that stand out
16 to me. We've got a lot of particulate coming from that
17 conveyor area, that building, brown building.

18 Q. And when you're saying particulate, are you talking --

19 A. About that black cloud there.

20 Q. And I'm indicating. Is this what you're talking about?

21 A. Yes.

22 Q. And I'm pointing to a black cloud above a prominent
23 building in the foreground.

24 A. Yes.

25 Q. Go ahead.

1 A. Okay. And that morning you can see the wind direction's
2 affecting that cloud and it's coming in the direction of our
3 property and surrounding neighbors.

4 Q. And where were you standing or where were you when you took
5 this photograph?

6 A. Okay. Again, I jumped in the Jeep and -- grabbed the
7 camera and jumped in the Jeep and drove up the Back Road
8 between Keith and Freida Otworth's home and the old Graff home.

9 Q. Okay. And so far all of this is in July and August except
10 for the first one, which was the last day of June or end of
11 June?

12 A. Yes.

13 Q. Yeah.

14 A. And, you know, I want to point out, that black particulate
15 there especially, that's an ongoing daily occurrence that we
16 see quite frequently.

17 Q. Okay. Is there anything else about that photograph that
18 you --

19 A. Okay. You see a lot of emissions low to the ground there
20 to the right of that brown building, between that -- the round
21 building there.

22 Q. Are you talking about --

23 A. All that smog pollution in there.

24 Q. -- this area right around here (indicating)?

25 A. Yes, yes. So I'm trying to demonstrate that, you know,

1 that's a pretty bad morning where it's hanging close to the
2 ground. And then also in the background of the photo once
3 again you see the haze from the coke plant. And, you know, the
4 emissions are distributed outward not only in close proximity
5 to the plant, but, you know, the river's just on the other side
6 of it, and it's affecting a large area.

7 Q. Okay. Let's go to --

8 MR. ALTMAN: What are we on, 16?

9 MR. WEBER: This is 12.

10 Q. 12, all right.

11 A. Here's another photograph that was taken that same morning,
12 probably four or five minutes after the past photo. And I
13 moved it up on the Back Road about a quarter of a mile to
14 another location and pulled off the side of the road by the
15 Stafford property.

16 Q. And what direction is this material headed toward?

17 A. All this material is heading in the direction of our home.
18 And, you know, this is showing the black box there on the
19 left-hand side and, of course, the pollution cloud there. It's
20 also showing the same as that past photo, the black particulate
21 from that building and conveyor area, and the emissions that
22 are hanging low to the ground there to the right of that
23 building, and the entire area with the blue haze that's
24 surrounding.

25 Q. And when you say blue haze, what makes you think the blue

1 haze is coming from the coke plant?

2 A. Well, when you drive by the coke plant and you get in areas
3 where the trees aren't blocking it, you can actually watch
4 these low-lying clouds as they span out. And, you know, when
5 they do a hundred of those a day and they put that hot coke in
6 railcars and it has emissions rising from it as it's cooling, I
7 guess, you know, it just spreads out. And over the course of
8 the hours and days, day after day, we just get a haze that
9 surrounds the area and, you know, I can see it.

10 Q. You don't know what process the haze is coming from;
11 correct?

12 A. You know, I think it's from multiple processes.

13 MR. ALTMAN: All right. 13.

14 Q. This is a video, Jim. We're going to run some of this.
15 What day was this?

16 A. I believe this was --

17 Q. Well, let us tell you.

18 MR. WEBER: August 16th.

19 Q. This purports to be August 16th. Do you remember that
20 morning?

21 A. Yes, sir. I believe this video was taken somewhere just
22 after 7:00 AM. And of course, once again I went out and took
23 my 2.5 readings that I've been recording, and I saw these
24 pollution clouds passing over and going over to the Gannons'
25 property and our properties and other properties, and I

1 wanted --

2 You know, I know that from our yard it's hard to get a wide
3 picture or a wide view, so I drove up to the end of our
4 driveway, which is about a 600-foot drive, but it's probably
5 400, 450 feet from where I'm normally standing when I'm taking
6 photographs.

7 So I could try to capture a little wider angle and showing
8 that these pollution clouds are passing over our little
9 neighborhood and particulate from these clouds -- again, in
10 this cloud it doesn't really show as well as the other, but in
11 the center of that there was some yellowish tint in that
12 particular cloud like we saw earlier in those, you can see it
13 in the middle of the screen right there, as well as the blacks
14 and the grays. And, you know, along with this comes stinks and
15 odors that really have an effect.

16 Q. All right. Anything else about this, Mr. Sampson?

17 A. (No audible response.)

18 Q. All right. Let's go to 14.

19 A. I remember this morning.

20 Q. What morning was this?

21 A. This is August the 26th. It's slight -- it's, I think,
22 maybe about eight minutes after 6:00, if I remember. I hadn't
23 been up a few minutes, and when I opened the door to the house,
24 it pulls inward, I sucked the smell of green ovens into our
25 family room and, I mean, it was rank.

1 So I grabbed the monitor and the equipment that I use with
2 it and took it out and put it in position, and immediately I
3 saw the numbers were in the red and they were over a hundred.
4 And what really stuck out to me this morning, you know, besides
5 the pollution and the rankness of the air, was the black sky.
6 I mean, there isn't a cloud in the sky that morning.
7 Everything was black. And this pollution just illuminated this
8 morning that was coming from the coke plant, and it was just
9 engulfing our neighborhood.

10 And if I -- I know that this morning the PM monitors went
11 up into the 120s, in the high 120s, and it absolutely -- my
12 throat tightened up, started gagging. Once again I lost it. I
13 had a swig of Mountain Dew when I first got up in the morning,
14 and, you know, I lost it out in the yard. And I took three 2.5
15 readings in about an hour, and those readings fluctuated from
16 the 70s on up 90s and into the 120s.

17 MR. ALTMAN: All right. Are we on 15? Let's go to
18 the next one, Mike.

19 Q. And is that the same day?

20 A. This is the same morning. There's probably a three- or
21 four-minute lapse. This is after that first photo. And once
22 again this is showing a process that's taking place at that
23 time. I think the other photo was more of an after they'd
24 finished up a process, but this they're actually putting the
25 water on the material, however they do it over there. And it's

1 coming in the direction of our neighborhood.

2 Also, in between the upper two electrical wires there's a
3 pocket of yellow haze that I'd like to point out in that once
4 again.

5 MR. ALTMAN: Let the record reflect Mike just zoomed
6 in on the area.

7 Q. Is this the area you're referring to?

8 A. Yes.

9 Q. And as you saw it that morning --

10 A. Yes.

11 Q. -- and as we see it now on the photograph? And that's
12 around the -- just to the left of center of the plume in the
13 cloud?

14 A. Yes. And like I said, that's probably a 6:12, 6:15 AM in
15 the morning on the 26th when I took that picture.

16 Q. And I believe you said these had a physical effect on you?

17 A. Absolutely. And, you know, along with the coughing,
18 hacking and gagging, you know, I have headache after headache.
19 I forgot to mention that earlier. But, you know, I'm smelling
20 gases when I'm out there with this stuff.

21 MR. ALTMAN: All right. Let's go to the next one,
22 Mike.

23 Q. And what date is this? Is this still the 26th?

24 A. Yeah, this is still the 26th. This is probably before
25 noon.

1 Q. But it's later the same day?

2 A. Yeah. I think this is somewhere around 11:30, maybe a
3 little later that morning.

4 Q. And what does that show?

5 A. And I'm showing that we're still -- the process is still
6 taking place that morning. I'm still seeing the particulate in
7 the clouds from the plant. You know, I can see a pocket there
8 that I noticed had yellow. It's not as noticeable in this
9 picture as some of the others, but, you know, if -- as you
10 watch the drifting of the clouds, you can kind of watch that
11 darker areas, a lot of times they kind of get out away from the
12 whiteness and you can see the particulate fall. You can
13 actually watch particulate fall outlining that steam barrier
14 that takes place there. And also it points out on the 26th
15 where also we've got a lot of blue haze in the area around the
16 plant.

17 Q. And what indicates the blue haze, as you call it?

18 A. The background where the treeline behind the plant.

19 Q. You're talking about --

20 A. Yes.

21 Q. -- this area in just below the middle of the photo?

22 A. Yes, sir. And also there's a pocket right there. You can
23 see through the window those three limbs.

24 MR. ALTMAN: Okay. Here (indicating).

25 All right. Mike?

1 Q. We're on Plaintiffs' Exhibit --

2 MR. WEBER: 17.

3 Q. -- 17, and we're getting toward the end of August now.

4 MR. ALTMAN: The 26th?

5 MR. WEBER: The 26th.

6 Q. This next one is still the 26th.

7 MR. WEBER: Correct.

8 A. Yeah. This is probably a midafternoon photograph, or
9 video, I mean.

10 Q. And what does this show that adds to our understanding of
11 what can happen in one day?

12 A. Yeah. You know, the -- if I remember right, this is
13 somewhere midafternoon. And the process is still continuing
14 and has been all day, and I've been monitoring with a 2.5, and
15 all throughout the day we've had 2.5 readings that were in the
16 40s, 50s, 90s, over 100, 120-something. You know, you see that
17 process and that little black cloud came out of an entrapment,
18 I would guess, maybe a delayed action to their process.

19 But also, Dave, in the middle there you can see a yellow
20 tint once again. Up. Up. Right along in here and to your
21 left just a little bit. Down just a little now. Right in
22 there.

23 That yellow air, and, of course, I know it's moving and
24 going upward as you're looking. Also, below the magnitude of
25 the cloud there's a lot of particulate hanging underneath that

1 right in the middle, Dave. Right to your right. Oh, stop.

2 Now come down.

3 Q. (Indicating.)

4 A. Over to your left just a little. Right along in here and
5 down.

6 Q. (Indicating.)

7 A. That area right there, that's particulate that I can notice
8 is starting to fall. And, you know, the winds bring that in
9 whatever direction it's going, and, you know, it's dispensed
10 around the neighborhood.

11 MR. NEWMAN: All right. Mike, will you --

12 MR. WEBER: All right. Here's our last one.

13 MR. NEWMAN: And what date is this, Mike?

14 MR. WEBER: The 26th as well.

15 MR. ALTMAN: Okay.

16 A. You know, once again, as the day proceeds we've still got
17 the process going on, and you can see the particulate that's
18 there in the photograph.

19 And the direction of this particulate is actually moving
20 more toward the Otworths' and the Wurtses', the Zorns'
21 properties, and the properties that our new neighbors have.
22 So, you know, we're showing a difference in the wind direction
23 here. And also once again in those telephone wire area in that
24 photo you can see the yellow tint to that, and, you know, again
25 all --

1 Q. Toward the center, left center of the screen?

2 A. Yes. And even though this cloud is moving away from our
3 property, I'm still getting high 2.5 readings. They're not as
4 high as they were when it was being pushed directly toward us,
5 but the 2.5 readings had -- by this time I think probably down
6 around the 40s, I think, at that particular time of day.

7 Q. Now, why do you take these photos?

8 A. Well, we have to have proof and evidence of what's taking
9 place.

10 Q. But why doesn't somebody else take them?

11 A. I don't want Bobbi to do it. You know, it -- it's
12 terrible. There's days that it's just terrifying to be out on
13 these days like the 26th of August when, all day long, you're
14 seeing elevated readings that's causing you to have physical
15 effects. And, you know, I just don't want her out there.

16 Q. Now, has anything that we've shown in these exhibits of
17 videos and photographs that comes from the chemical plant, the
18 railroad, or the highway?

19 A. No.

20 Q. And have you noticed that your health, any health impacts
21 may have any variance with the readings that you're getting?

22 A. Well --

23 Q. For you personally.

24 A. For myself personally, when you're out in those -- when
25 those elevated readings are up there, immediately my ears start

1 ringing, you know. That's a sure sign of a headache for me.

2 And, you know, it's just minutes coming that I'm going to have
3 a headache.

4 On the 26th of August I had headaches from the time I got
5 up that morning and went outside at just after 6:00 until we
6 went to bed that night, because I'd been out trying to capture
7 all this. And you know, my throat is swollen, my sinuses are
8 tore up, I'm stressed out, I'm disgusted, the anxiety of it,
9 the worry for my family. You know, I've got six grandchildren,
10 and all throughout the day they're coming in and out and
11 they're wanting to do whatever activity they want to do that
12 day, and really I have to be the bad guy that tells them, hey,
13 you've got to get inside.

14 Q. So --

15 A. So it's stressful.

16 Q. -- when you hear SunCoke is claiming that the things you've
17 been complaining about for many years are due to the chemical
18 plant, the highway, or the railroad -- or I guess your
19 imagination, but I don't think they come right out and say
20 that -- how does that make you feel?

21 A. Well, you know, first of all, I know that I know that this
22 is coke plant pollution and emissions. I've lived there since
23 1965 when my parents moved there. We've raised our three
24 children there. The neighborhood community kids and their
25 friends have been on our property. They never had black feet

1 and smudge all over them. We could sit on our picnic tables
2 and our chairs out on our deck and we didn't have anything to
3 worry about.

4 You know, I might have to go out and clean, a garden hose,
5 you know, naturally you get dirt and grass pollution and
6 everything that takes place. I have never smelled the coke
7 plant on our property. I have never called the EPA or the --

8 Q. You mean the coke plant or the chemical plant?

9 A. The chemical plant. I've never been affected by the
10 chemical plant. I've never called the Portsmouth Local Air
11 Agency or the EPA on the chemical plant. I've never called the
12 air agency or the EPA, in all these years that I've been there,
13 on the railroad. I've never called the railroad or the
14 management of the chemical plant to complain.

15 As far as the highway, back in the '60s when that highway
16 was new and they were producing a lot of steel at Armco, that
17 highway had a constant flow of traffic, and a lot of it diesel
18 truck traffic. It never bothered us. And in 2005 when the
19 coke plant came into our neighborhood, they assured us that we
20 weren't going to be interfered with in any way with pollution
21 from that plant because it was state-of-the-art technology.
22 And, you know, I've done my best to try to show, in as short a
23 time as possible, how we've been impacted by it. And it does
24 come from that coke plant.

25 MR. ALTMAN: Thank you, Mr. Sampson. I pass the

1 witness.

2 CROSS-EXAMINATION

3 BY MS. REDDY:

4 Q. Good morning, Mr. Sampson.

5 A. Good morning.

6 Q. I have just a few questions for you.

7 A. All right.

8 Q. Now, you testified to a range of adverse health effects
9 that you say are caused by the Haverhill facility; is that
10 correct?

11 A. Yes.

12 Q. Before this case was filed, did anyone tell you that the
13 plant was causing adverse health effects?

14 A. No.

15 Q. After this case was filed but before this motion was filed,
16 did anybody tell you that the plant was causing adverse health
17 effects?

18 MR. ALTMAN: Objection as to anything that might get
19 into lawyer-client.

20 THE COURT: Okay. So don't discuss anything that you
21 and your attorney may have discussed, but if you had other
22 conversations with other people, you can cover that.

23 A. I've discussed with our attorney.

24 Q. Have you ever had a doctor tell you that the coke plant is
25 causing your adverse health effects?

1 A. No.

2 Q. You mentioned the former Graff property at several points
3 during your testimony; is that right?

4 A. Yes.

5 Q. You knew the Graffs and the Maddoxes in that lawsuit; is
6 that correct?

7 A. I knew that the Graffs and Maddoxes had a lawsuit against
8 SunCoke.

9 Q. And you said that you have been experiencing adverse
10 impacts from the coke plant since 2005 when it opened?

11 A. Yes.

12 Q. And you did not decide to get involved as a plaintiff in
13 that lawsuit?

14 A. No.

15 MR. ALTMAN: Your Honor --

16 THE COURT: Overruled.

17 Q. The Graffs and Maddoxes no longer live on Back Road, do
18 they?

19 A. No, they don't.

20 Q. And they moved from Back Road after that case settled; is
21 that correct?

22 A. I don't really know anything about the case. I know that
23 they moved from the Back Road the latter part of summer, maybe,
24 or fall of 2016. I believe it was 2016. I can't really
25 accurately say the date.

1 Q. And you decided to file this lawsuit after the Graffs and
2 Maddoxes moved in 2016; is that correct?

3 A. Actually, my wife and I started thinking about filing the
4 lawsuit earlier than that date. We talked with attorneys, I
5 believe, in July of 2016.

6 Q. But you didn't file it until July of 2017; correct?

7 A. That's correct.

8 Q. Do you know what the National Ambient Air Quality Standards
9 are?

10 A. Do I know what what?

11 Q. The National Ambient Air Quality Standards are.

12 A. I've heard of it, but I can't give you an accurate answer,
13 you know, what it is.

14 Q. Well, I'm going to refer to those standards as the NAAQS
15 for short. Are you aware that U.S. EPA is required to
16 establish NAAQS at a level that protects public health and that
17 includes a margin of safety for sensitive populations, such as
18 children and the elderly?

19 MR. ALTMAN: Objection. Misleading to the extent that
20 it goes beyond what the NAAQS is aimed at.

21 THE COURT: Well, if he knows about this organization
22 and if they have standards or not, he can testify. If he
23 doesn't, he doesn't.

24 A. I mean, I've heard of it. I mean, but as far as knowing
25 details about it, I don't know the details.

1 Q. Have you heard of the U.S. Environmental Protection Agency?

2 A. Yes.

3 Q. Are you aware that there are five ambient air monitors
4 located around the facility?

5 A. I don't know of five. I know there are air monitors around
6 the facility. Some of them are on the Back Road.

7 Q. Are you aware that there are two monitors on Back Road that
8 measure PM2.5?

9 A. No.

10 Q. So you don't know what any of those monitors' results are?

11 A. Well, I know we have monitors. I don't know what they
12 measure.

13 Q. I'm not referring to your monitors. I'm referring to --

14 A. I'm talking about the stationary monitors that -- one's up
15 on a hill, and there's one behind the Graff property.

16 Q. So you are aware that there are two stationary monitors?

17 A. But I don't know what they monitor.

18 Q. And so you don't know what the results of their monitoring
19 are?

20 A. No.

21 Q. You've lived on Back Road either at your current location
22 or at the location where your parents lived for almost 49
23 years; is that correct?

24 A. From 1965 to the present time, all that period, I believe,
25 but slightly under three years. In the mid-'70s we didn't, I

1 think '74 to maybe the summer of '77, somewhere close to a
2 three-year period we didn't live there. Other than that, I've
3 been there. So how many years that is I --

4 Q. Okay. And you've been experiencing symptoms, you say,
5 since the plant first opened in 2005?

6 A. That's correct.

7 Q. And yet you didn't file this lawsuit until 2017?

8 A. That's correct.

9 Q. And you lived there when the second battery of ovens were
10 built in 2008; correct?

11 A. That's right.

12 Q. Did you object to Ohio EPA or anyone else regarding the
13 construction of that second battery of ovens?

14 A. I expressed concerns to our township trustees.

15 Q. In 2008?

16 A. Yes.

17 Q. And you testified that you have complained to the
18 Portsmouth Local Air Agency; correct?

19 A. That's right.

20 Q. And that Ms. Charles investigated your complaint?

21 A. Yes. Well, I know she investigated one complaint. She
22 told me she was going to investigate the other, so --

23 Q. You testified that you and your family have had to curtail
24 your outdoor activities; right?

25 A. That's correct.

1 Q. And that's due to the impacts you say are coming from the
2 Haverhill facility?

3 A. Yes.

4 Q. Are you aware that your AirBeam monitors will collect
5 things such as pollen?

6 MR. ALTMAN: Objection.

7 THE COURT: If he knows what they collect, he can
8 answer. If he's discussed the protocol, he can testify.

9 A. I don't know what. You know, it's my understanding they're
10 collecting 2.5 particulate that, you know, we can't see, so I
11 don't really know what they're -- I have no idea what the 2.5
12 pollen things are or anything about it, but I do know that I'm
13 collecting visual and physical attacks.

14 Q. Is it your understanding that your monitors will collect
15 any 2.5 from any source?

16 A. You know, I don't know. They're monitoring 2.5. I don't
17 know how far they reach out or anything like that. I guess
18 it's right there in my neighborhood.

19 Q. Is it your understanding that your monitors will collect
20 PM2.5 on your property no matter where it came from?

21 A. I know that I'm monitoring 2.5.

22 Q. Do you raise bees, Mr. Sampson?

23 A. My grandson has a beehive.

24 Q. And I assume that beehive is outdoors?

25 A. Yes.

1 Q. Do you participate with him in activities related to
2 raising the bees?

3 A. Absolutely.

4 Q. And you began raising these bees after this lawsuit was
5 filed; correct?

6 A. I began raising the bees as an educational tool for my
7 grandson.

8 Q. And that was after the lawsuit was filed?

9 A. After the lawsuit.

10 Q. Do you and your grandson use a smoker to move the bees or
11 extract honey from the hive?

12 A. We've taken no honey from the hive. We do use the smoker
13 to make the bees go down in the hive on occasion, not very
14 often.

15 Q. Your son lives in a rental home on your property; is that
16 correct?

17 A. Yes.

18 Q. Does he pay you rent?

19 A. Yes.

20 Q. You know that Ohio EPA has proposed issuing a new Title V
21 permit to the plant; is that right?

22 A. That's my understanding, yes.

23 Q. And you requested that Ohio EPA conduct a public hearing on
24 that draft permit; correct?

25 A. Yes.

1 Q. You attended that hearing, didn't you?

2 A. Yes.

3 Q. And you provided Ohio EPA with a copy of the Complaint and
4 your motion for a preliminary injunction in this case; right?

5 A. Yes.

6 Q. And you requested that Ohio EPA wait until the Court rules
7 on this motion before issuing the permit; correct?

8 MR. ALTMAN: Objection. I think it misstates what he
9 requested.

10 THE COURT: Well, he would know what he requested.

11 So just answer the question to the best of your ability,
12 Jim.

13 A. I don't recollect requesting that they wait until after.
14 But I read a statement that's public document, and that
15 statement will reflect what I said at the hearing.

16 Q. Now, we saw during your testimony several photos and videos
17 that you took; correct?

18 A. Uh-huh.

19 Q. And these videos depict what was going on at the Haverhill
20 facility at the time; correct?

21 A. That's correct.

22 Q. And you also testified that you can see particulate matter
23 drop from the sky; right?

24 A. Yes.

25 Q. There was no videos included in what we looked at today

1 that showed particulate matter dropping on your property, were
2 there?

3 MR. ALTMAN: Objection. That's completely misleading.

4 THE COURT: Well, if he can answer the question,
5 David.

6 A. I've stated that I have seen particulate matter fall from
7 the clouds of pollution that have come from the coke plant onto
8 my property, and that's true and accurate.

9 Q. Have you taken any videos of that particulate landing on
10 your property?

11 A. I have tried. I have tried to take videos, and I do have
12 videos that do show particulate. I don't really know -- they
13 weren't included in today's presentation, but I know that I
14 have photos. I'm not sure about the video.

15 Q. Just to clarify, we didn't see any videos today, there was
16 nothing in the evidence we saw today that showed particulate
17 matter dropping on your property.

18 A. Well, I think if we could slow the videos down, you know,
19 enough and it would show up, it would represent that gravity is
20 taking place and it is dropping and being broadcast throughout
21 our area.

22 Q. Well, I'm asking about your property.

23 A. My property is being affected by it. The particulate is
24 laying on my property and the things on my property.

25 Q. Okay. But we didn't see a video showing that today?

1 That's what my question is.

2 A. No.

3 MS. REDDY: I have no further questions.

4 THE COURT: David?

5 MR. ALTMAN: I just have one.

6 REDIRECT EXAMINATION

7 BY MR. ALTMAN:

8 Q. When Ms. Reddy asked you a question about the community
9 meeting, you attended that community meeting?

10 A. Yes.

11 Q. What was the testimony of your neighbors at that meeting,
12 if you can summarize it?

13 A. Well, I mean, a lot of the testimonies of the surrounding
14 community was concern.

15 Q. Concern for what?

16 A. Concern for more pollution being allowed to come in, number
17 one, and concerned about their health and their safety and some
18 of the conditions that they've had to live with up to the point
19 of that meeting and the impact that the plant's had on the
20 community.

21 Q. Did they testify about their specific concerns at the
22 meeting? Did some of them testify?

23 A. Yes, absolutely.

24 Q. And did somebody get up and say anything that they were
25 wrong?

1 A. We had a neighbor -- Mr. Lavender --

2 Q. No, no, no. That they were wrong, that they had no reason
3 to be concerned. Did anybody get up and say --

4 A. Oh, yes. To say that the coke plant's safe --

5 Q. Yeah.

6 A. -- and that the people should have no concerns --

7 Q. Right.

8 A. -- they no hazardous emissions, that was Mr. Rob Brager.

9 Q. And who is he, to your knowledge?

10 A. He's an attorney for SunCoke. And also Diana Starkweather,
11 I believe, is the EPA and safety manager on site for Haverhill
12 coke, and she more or less echoed the statements that Mr.
13 Robert Brager made.

14 MR. ALTMAN: Nothing further at this time, Your Honor.

15 THE COURT: Bina, have you got anything?

16 MS. REDDY: No.

17 THE COURT: Okay.

18 You can step down, Jim.

19 MR. ALTMAN: Thank you, sir.

20 THE WITNESS: Thank you.

21 THE COURT: Thank you.

22 (Witness excused.)

23 MR. ALTMAN: At this time we call Roger Lavender --

24 THE COURT: Okay.

25 MR. ALTMAN: -- as our next witness.















ATTACHMENT 3

DECLARATION OF WILLIAM M. AUBERLE

I, William M. Auberle, declare as follows:

1. I am over 18 years of age and of sound mind.
2. I have personal knowledge of the information set forth herein.
3. I am a Professor Emeritus of Civil and Environmental Engineering at Northern Arizona University and a Principal at EN3 Professionals, LLC. I have been practicing environmental engineering with a principal emphasis on air pollution engineering for more than 50 years as a regulatory official, consulting engineer and academic.
4. During my career, I have served as a consultant to governments, industries, courts, and communities.
5. I have served on a number of advisory boards to federal agencies and state and local governments, including gubernatorial task forces. I was appointed to and served seven terms as a member of USEPA's Clean Air Act Advisory Committee during the Clinton, Bush and Obama administrations.
6. I am a licensed professional engineer in Louisiana, Ohio, Michigan and Arizona, and am Board certified in air pollution engineering by the American Academy of Environmental Engineers and Scientists. I have an LHD from Northern Arizona University.
7. From 1970 to 1977, I was the founding Supervisor of the Regional Air Pollution Control Agency (RAPCA), the regional air pollution control agency which serves a six-county region in the Dayton-Springfield, Ohio area.
8. During my service with RAPCA, I participated in writing and enforcing a wide range of air pollution control laws, regulations and ordinances. These included air pollution nuisance limitations. Following creation of the Ohio EPA, I used Ohio's updated Air Nuisance Rule (ANR) and permit conditions to enforce the federal Clean Air Act. More specifically, I used the ANR as an enforcement tool (and deterrent to violations) for achieving and maintaining the National Ambient Air Quality Standards (NAAQS), including particulate matter (PM).
9. As Supervisor of RAPCA, I directly served as an advisor to the Director of the Ohio EPA, once the agency was created by Governor Gilligan. This included working as the arm of the Ohio EPA in the RAPCA area and serving on Ohio EPA task forces and committees.
10. I have direct, firsthand knowledge of the inclusion of the ANR in Ohio's State Implementation Plan (SIP). As Supervisor of RAPCA I directly participated in

discussions and development of the Ohio SIP. Additionally, I served as a founding member and Chair of the Ohio Association of Local Air Pollution Control Officials, which advised the Ohio EPA on SIP development, including the inclusion of the ANR in the Ohio SIP.

11. From the outset of Ohio's SIP development process, inclusion of the ANR was purposeful and important to Ohio's air pollution control officials, including myself. Achieving NAAQS was vitally important to protect the health and welfare of our citizens. Multiple Ohio communities, including those served by RAPCA, faced the challenge of reducing air pollutant emissions to achieve and maintain these standards. The ANR was an important regulatory tool in this process. Throughout my career, including my seven terms as a member of the USEPA's Clean Air Act Advisory Committee, I have followed the progress of Clean Air Act implementation in Ohio.
12. I have also continued to apply the ANR as an engineering and air pollution control consultant and as an expert witness in state and federal court cases. I am aware that since the inclusion of the ANR in the original Ohio SIP, it has continued to be included in every SIP renewal, including in 2012 and in 2017. Thus, the ANR, since 1974, has been a necessary element of the SIP. It is important in achieving and maintaining the NAAQS, and to protecting the health and welfare of the people of Ohio.
13. The ANR remains an integral part of the Ohio SIP. Specific federal and state air pollution control requirements to achieve and maintain the NAAQS continue to evolve as NAAQS are modified and better emissions control technologies develop. These advances, however, do not address some specific air pollution conditions. In these circumstances applying, and complying with, the Ohio ANR is important to protecting the health and welfare of the affected citizens.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21st day of May 2020.



William M. Auberle

ATTACHMENT 4

Correspondence



June 18, 1999

Robert F. Hodanbosi, Chief
Division of Air Pollution Control
Ohio Environmental Protection Agency
122 South Front Street
P. O. Box 1049
Columbus, Ohio 43266-1049

Dear Mr. Hodanbosi:

For the past several months, we have had discussions with you and your staff about inconsistencies with incorporating provisions of your State Implementation Plan (SIP) as applicable requirements in operating permits under your Title V Permit Program. More specifically, we are concerned that the Best Available Technology (BAT) requirements, nuisance regulation, and toxics policy which are contained in the SIP and/or SIP-approved permits, are not identified as federally enforceable terms in your Title V permits.

On March 31, 1999, John Seitz, Director of the U. S. Environmental Protection Agency's (EPA) Office of Air Quality Planning and Standards, wrote a letter to the California Air Pollution Control Officers Association in response to their questions regarding federal enforceability. In that letter, Mr. Seitz stated our view that "all provisions contained in an EPA-approved SIP and all terms and conditions in a permit issued under any SIP-approved permit program are...federally enforceable.... [A]ll such terms and conditions are also federally enforceable 'applicable requirements' that must be incorporated into the Federal side of a Title V permit." This position was reiterated in a May 20, 1999, letter to you from Mr. Seitz.

BAT is a requirement of State's Permit to Install (PTI) program, approved into the Ohio SIP. The PTI program serves, in part, to meet the general (or "minor") new source review requirements of section 110 (a)(2)(C) of the Clean Air Act (Act), which requires SIPs to include a

program for the regulation of the modification and construction of any stationary source as necessary to assure that national ambient air quality standards are achieved. Specific BAT limitations for individual sources are established in specific PTIs. Because BAT terms and conditions are created under the PTI program, which is in turn contained in the Ohio SIP, they are federally enforceable. As requirements under the SIP they also are "applicable requirements" within the meaning of the Act section 504(a) and 40 CFR 70.2 and, therefore, must reside in the Federal and State enforceable section of the Title V permit. Similarly, the terms and conditions implementing Ohio's nuisance regulation and toxics policy are included in the SIP and/or a SIP-approved permit and thus are considered federally enforceable applicable requirements for Title V purposes. They should be reflected as such in the Title V permit.

Section 505(b)(1) of the Act calls upon EPA to object to any proposed permit that is not in compliance with applicable requirements, including the requirements of a SIP. Accordingly, Title V permits which are issued with BAT, nuisance, and toxics policy terms and conditions that are misrepresented as State-only enforceable are subject to EPA objection.

It is our understanding that you intend to submit a SIP revision package requesting removal of the BAT requirements, thus making them State enforceable only. We ask that, prior to this resource intensive effort, you make all necessary assurances that this action will meet all of the planning requirements of the Act, including both specific and general requirements intended to assure the attainment and maintenance of the National Ambient Air Quality Standards and the prevention of significant deterioration of air quality. The BAT program appears to be integral to Ohio's plan for meeting many of these requirements. In addition, sections 110(l) and 193 of the Act are "antibacksliding" provisions that prohibit the approval of a SIP revision that would interfere with any applicable requirement of the Act and, in the case of nonattainment areas, require that control requirements be replaced by measures of ensuring equal or greater emissions reductions. Thus, before we could approve the removal of the BAT program from the SIP, you must demonstrate that removal of BAT would not adversely affect the various statutory requirements that BAT addresses. This will also enable our review process to be done in a timely fashion. In addition, if you choose to make the nuisance regulation and toxics policy State enforceable only, we ask that this be included as part of your SIP revision package.

Please keep in mind that the removal of these provisions from the SIP

will not affect the continuing Federal enforceability of existing PTIs. As noted above, either inclusion in the SIP or in a permit issued pursuant to a SIP-approved program renders a requirement federally enforceable. Here, the BAT requirements are contained in PTIs issued pursuant to Ohio's SIP-approved PTI program. Therefore, for sources with existing PTIs containing BAT, the BAT requirement still would have to be included on the federally enforceable side of the Title V permit. This is true also for nuisance and state toxics requirements contained in existing PTIs. We continue to have the authority to enforce BAT and the other provisions at these sources until appropriate regulatory steps are taken.

We look forward to continuing to work with you on this issue. If you have any questions or wish to discuss this issue further, please call Genevieve Damico, of my staff, at (312) 353-4761.

Sincerely yours,

/s/

Stephen Rothblatt, Chief
Air Programs Branch



AIR AND RADIATION DIVISION
77 WEST JACKSON BOULEVARD (A-18J)
CHICAGO, ILLINOIS 60604
(800) 621-8431 or (312) 353-2212

EXHIBIT 2

To comments of Donna Ballinger, Marilyn Wall, Ohio
Environmental Council, Sierra Club, and Case Western Reserve
University Environmental Law Clinic



Division Name

Response to Comments

Rule: Ohio Administrative Code (OAC) Chapter 3745-15, "General Provisions on Air Pollution Control"

Agency Contact for this Package

Division Contact: Paul Braun, DAPC, 614-644-3734, paul.braun@epa.ohio.gov

Ohio EPA held a 30-day comment period ending November 7, 2014 on the above mentioned rules and the associated business impact analysis document. This document summarizes the comments and questions received during the comment period.

Ohio EPA reviewed and considered all comments received during the public comment period. By law, Ohio EPA has authority to consider specific issues related to protection of the environment and public health.

In an effort to help you review this document, the questions are grouped by topic and organized in a consistent format. The name of the commenter follows the comment in parentheses.

General/Overall Concerns

Comment 1: Upon review of the proposed rule changes, we respectfully submit that they are of such an inconsequential stylistic nature that they do not warrant a change in the familiar status quo, and certainly do not warrant the administrative costs and potential disagreements attendant to revisions of fully-approved SIP provisions. We therefore think "no change" is the more appropriate, common sense outcome of the five-year review of Chapter 15. **(Robert L. Brubaker and Eric B. Gallon, Porter Wright Morris & Arthur LLP)**

Response 1: Ohio EPA is required by Ohio Revised Code (ORC) 119.032, every 5 years, to review each of the rules promulgated by the agency. OAC Chapter 3745-15 is currently undergoing its 5-year review.

While Ohio EPA concedes that some of the changes being made to the rules in this chapter are minor in nature, the 5-year review is considered the appropriate time to make these types of minor updates.

3745-15-01, "Definitions"

Comment 2: 3745-15-01 (B): The proposed omission of paragraph (B) in rule 3745-15-01 is detrimental and unnecessary to the rule of the law. Paragraph (B) defines terms such as language, "Agency", "OEPA", "EPA" and/or "board" that define entities and departments that administer the rule and/or the law.

3745-15-01(S): The proposed addition of paragraph (S) is unnecessary and irrelevant to the rule. Refer to paragraph (B) as currently stated in rule 3745-15-01 for a correct and relevant wording of the EPA, OEPA, agency, and board respectfully.

Solutions:

3745-15-01 (B): Do not omit paragraph (B).
(Scott Bushbaum, Sierra Club, Miami Group)

Response 2: The stand-alone terms "Agency" and "Board" as defined in OAC 3745-15-01(B) are no longer used to describe the Ohio EPA in Ohio's air pollution control rules. Ohio EPA is, therefore, removing the terms for clarity. Because the definition was arranged alphabetically by the word "agency", it is being moved alphabetically to paragraph (S) because the definition now starts with "O."

Comment 3: 3745-15-01 (N): The proposed omission of paragraph (N), where the language, "Effective date of these rules" should remain and refer to new effective dates. This language is important and relevant to the law and code of law.

Solutions:

3745-15-01 (N): Do not omit paragraph (N). I suggest simply changing the language to reflect new dates and the Clean Air Act, wherever applicable in the rule and throughout rule 3745.

(Scott Bushbaum, Sierra Club, Miami Group)

Response 3: The term "Effective date of these rules" is no longer used in Ohio EPA's air pollution control rules, except in instances where the term means the effective date of a newly promulgated rule where the date is unknown during the writing of the rule language. Ohio EPA, Division of Air Pollution Control has systematically gone over our rules during previous 5-year reviews and replaced this term with the actual, intended date or removed the term where it is irrelevant. This definition, which sets a specific date for this term, is no longer necessary and has been identified as potentially confusing for the regulated public. As such, Ohio EPA is removing this definition.

Comment 4: 3745-15-01 (O): The proposed change of the word, "source(s)" to word, "source" is unnecessary and quantifies the rule language incorrectly.

Solutions:

3745-15-01(O): Do not remove or change the word "source(s)". The context of the language as is currently stated in rule 3745-15-01 is correct and relevant language.

(Scott Bushbaum, Sierra Club, Miami Group)

Response 4: The Ohio Legislative Services Commission (LSC), in their "Rule Drafting Manual" (Fourth Edition, May, 2006) indicates in Section 5.8.4, P.46, that in terms of number..."The singular includes the plural and the plural includes the singular. It is generally preferable to write in the singular, unless the plural is more appropriate to the context."

The use of the parenthetical (s) is counter to LSC rule writing procedure and, therefore, Ohio EPA is converting these terms to the singular to avoid confusion and to bring Ohio EPA rule language in-line with state rule formatting convention.

Comment 5: Solutions:
3745-15-01 (BB): I suggest reviewing the changes in paragraph (BB). The proposed changes in language, "incorporated" to "referenced", and "regulation" to "rule" are questionable as to the relevance and importance of the proposed changes with regard to how the language is currently stated. The context of the proposed language needs not interfere with other language throughout rule 3745-21 or rule of law throughout rule 3745.
(Scott Bushbaum, Sierra Club, Miami Group)

Response 5: Ohio EPA is required by Section 121.72 of the Ohio Revised Code (ORC) to provide potentially affected parties with information regarding items that have been incorporated by reference within our rules. To fulfill these requirements, Ohio EPA has included information on the availability (how to obtain copies) and the date, edition, or version of the item referenced. This paragraph fulfills this requirement for the entire chapter and is consistent with procedures used by Ohio EPA and other agencies.

3745-15-05, ""De Minimis" air contaminant source exemption"

Comment 6: 3745-15-05 (F): The language proposed in rule 3745-15-05, paragraph (F) is unnecessary. No punctuation, ie: a period, appears at the end of the sentence where the word "director" ends the proposed sentence as well.

Solution:

3745-15-05 (F): Do not change paragraph (F). The context and wording of rule 3745-15-05, paragraph (F) is currently correct and relevant to the rule and the code of law.

(Scott Bushbaum, Sierra Club, Miami Group)

Response 6: The change made to this paragraph was for the removal of the gender specific pronoun to meet LSC rule formatting guidelines. The lack of a period after the word "director" is a function of Ohio's Rule Authoring Software. The period is actually preserved after the struck language.

Comment 7: One proposed set of changes - to the definition of a de minimis source in OAC 3745-15-05 - is more than stylistic, and is clearly unlawful. Ohio EPA proposes to modify "ten" and "twenty five" to the numerical decimal expressions "10.0" and "25.0." The problem is that the proposed changes would amend the statutory exemption for de minimis sources in section 3704.011 of the Ohio Revised Code. Ohio EPA is, of course, a creature of statute, and is not authorized to amend or enlarge its statutory jurisdiction. The General Assembly chose not to base the de minimis exemption on decimal fractions beyond a single whole number integer. In the hypothetical circumstance of an air contaminant source with potential PM emissions of 10.4 pounds per day, that

amount would not be more than ten pounds when rounded to the nearest whole number integer. The legislation does not authorize Ohio EPA to consider fractions to the right of the decimal point in applying the ten pounds per day and twenty five tons per year de minimis criteria **(Robert L. Brubaker and Eric B. Gallon, Porter Wright Morris & Arthur LLP)**

Response 7: Ohio EPA considers a de-minimus source to be a source that emitted 10.0 and 25.0 pounds of contaminants per day or less and the draft amendment was made to clarify this interpretation. The commenter does point out, however, that the language in the rule appears to be directly taken from Ohio Revised Code (ORC) 3704.011 which includes whole number integers (ten instead of 10.0) and Ohio EPA agrees with this observation. In the interest of having the language in this rule match the language in the Revised Code, Ohio EPA will revert the draft changes back to the original whole number integers.

3745-15-06, "Malfunction of equipment; scheduled maintenance; reporting"

Comment 8: 3745-15-06 (A) (3): The proposed changes in punctuation and the omission of language, "and" in rule number 3745-15-06, paragraph (A), number (3) is unnecessarily removing quantifying and important enforcement of the rule and the code of law.

Solution:

3745-15-06 (A) (3): Do not change any punctuation or language in rule 3745-15-06. The context and enforcement of the rule and rule of law is better exemplified by the current language and punctuation. **(Scott Bushbaum, Sierra Club, Miami Group)**

Response 8: The use of the word "and" in this instance is unnecessary. Paragraph (A)(3) indicates that the report "...shall include the following:". This implies that all of the listed items must be included, therefore, "and" is not necessary and has been deleted along with the format change.

This change also brings this rule, stylistically, in-line with Ohio EPA and LSC rule formatting guidelines.

Comment 9: The proposed stylistic changes to the malfunction rule, OAC 3745-15-06, are of particular concern. The rule has been in place for decades without problems of style the Agency proposes to fix. More importantly, U.S. EPA policies with respect to malfunctions are in a state of flux at the present time.

Ohio EPA should not expose this rule to the SIP revision approval process before U.S. EPA's actions and policies with respect to currently-approved SIP malfunction provisions, like Ohio's, are more clear and settled.
(Robert L. Brubaker and Eric B. Gallon, Porter Wright Morris & Arthur LLP)

Response 9: As noted in Response 1, the 5-year review is the time to make minor, stylistic changes such as the ones in the draft rule. The minor rule changes are being made to bring the rule in-line with state and agency rule formatting conventions. This change does not alter the content, nor intent of the rule. Ohio EPA will evaluate the context of the changes to the final rules of this chapter and determine the need, on a rule-by-rule basis, for requesting incorporation of the changes into Ohio's SIP. Ohio EPA will take your comment into consideration when deciding whether to submit the changes in this particular rule, the malfunction rule, to USEPA as a SIP revision.

3745-15-07, "Air pollution nuisances prohibited"

Comment 10: Solution: 3745-15-07 (A)(B): I suggest analyzing the criteria for exempting certain air pollution nuisances from the proposed language changes in rule 3745-15-07. If it is determined that these air pollution nuisances are not endangering the health, safety, property or welfare of the public, then do not change the language of the rule. I suggest then that when the rule is up for Early Stakeholder Outreach and JCARR review in five years, then suggest/propose changes in the language of rule 3745-15-07, paragraphs (A) and (B) respectfully.
(Scott Bushbaum, Sierra Club, Miami Group)

Response 10: OAC Chapter 3745-15 is currently undergoing its 5-year review. The rule was sent out for a 30-day early stakeholder comment period ending November 5, 2013. No comments or suggestions were received on this rule at that time. Ohio EPA then went ahead and made changes intended to clarify the rule without changing the intent of the rule.

Comment 11: The proposed stylistic changes to the nuisance rule, OAC 3745-15-07, do not change its meaning, and do not warrant the administrative costs of minor stylistic revision. The problem with the nuisance rule is not its punctuation, but rather the misperception of its status as federal rather than State-only law. The nuisance rule was clearly never designed or intended to be an integral part of the Ohio SIP NAAQS attainment strategy, nor was it ever publicly noticed or technically supported as such. The nuisance rule became particularly controversial subsequent to the introduction of the Title V permit program in the mid- 1990s, because it does not fit the definition of a Title V "applicable requirement." It is not required by the Clean Air Act and does not "implement relevant requirements of the Clean Air Act." See OAC 3745-77- 01(H)(1). It is therefore not a Title V "applicable requirement," but rather a State-only requirement. Nevertheless, Ohio EPA has placed the nuisance rule on the federally-enforceable side of Title V permits, which has led to a number of ERAC appeals (still pending) challenging the mischaracterization of the Ohio nuisance rule as a Title V "applicable requirement." Region 5 has appropriately approved the removal of the similar nuisance rule from Michigan's SIP, and the same should happen for Ohio. Region 5 approved Michigan's request to remove Rule 901, the Michigan nuisance rule, from Michigan's SIP because U.S. EPA correctly concluded that "the rule does not have a reasonable connection to the national ambient air quality standards (NAAQS) and related air quality goals of the Clean Air Act." See 63 Fed. Reg. 27492 (May 19, 1998). Ohio should likewise remove the nuisance rule from its SIP as soon as possible. **(Robert L. Brubaker and Eric B. Gallon, Porter Wright Morris & Arthur LLP)**

Response 11: Thank you for your comment. This comment is outside the purview of this rulemaking, however Ohio EPA will take this comment into consideration when determining if Ohio will request U.S. EPA to reconsider Ohio's nuisance rule as a SIP provision.

Comment 12: If any revision is to be proposed to the Ohio nuisance rule, it should be to add an explicit exemption for any source/pollutant combination subject to, and in substantial compliance with, an Ohio EPA or U.S. EPA rule, order, or permit requirement specifying allowable emissions, control requirements, or work practices for that source/pollutant combination. Emissions that environmental protection agencies have specifically addressed with technically exacting emission limits or control requirements should not be exposed to inconsistent overlapping public nuisance liability (that is inherently more subjective and nebulous)..
(Robert L. Brubaker and Eric B. Gallon, Porter Wright Morris & Arthur LLP)

Response 12: Ohio EPA is now not proposing any changes to the nuisance rule. It is important to point out, however, that if the emissions from a source of any substance are found to be a public nuisance, then the source must be subject to the nuisance rule even if it is complying with its permitted limits so that the nuisance can be abated.

3745-15-08, "Circumvention"

Comment 13: 3745-15-08: The proposed changes in rule number 3745-15-08 are relevant to the enforcement and to the intent of the rule and the code of law.
(Scott Bushbaum, Sierra Club, Miami Group)

Response 13: Ohio EPA thanks you for your comment.

End of Response to Comments

EXHIBIT 3

To comments of Donna Ballinger, Marilyn Wall, Ohio
Environmental Council, Sierra Club, and Case Western Reserve
University Environmental Law Clinic

Correspondence



June 18, 1999

Robert F. Hodanbosi, Chief
Division of Air Pollution Control
Ohio Environmental Protection Agency
122 South Front Street
P. O. Box 1049
Columbus, Ohio 43266-1049

Dear Mr. Hodanbosi:

For the past several months, we have had discussions with you and your staff about inconsistencies with incorporating provisions of your State Implementation Plan (SIP) as applicable requirements in operating permits under your Title V Permit Program. More specifically, we are concerned that the Best Available Technology (BAT) requirements, nuisance regulation, and toxics policy which are contained in the SIP and/or SIP-approved permits, are not identified as federally enforceable terms in your Title V permits.

On March 31, 1999, John Seitz, Director of the U. S. Environmental Protection Agency's (EPA) Office of Air Quality Planning and Standards, wrote a letter to the California Air Pollution Control Officers Association in response to their questions regarding federal enforceability. In that letter, Mr. Seitz stated our view that "all provisions contained in an EPA-approved SIP and all terms and conditions in a permit issued under any SIP-approved permit program are...federally enforceable.... [A]ll such terms and conditions are also federally enforceable 'applicable requirements' that must be incorporated into the Federal side of a Title V permit." This position was reiterated in a May 20, 1999, letter to you from Mr. Seitz.

BAT is a requirement of State's Permit to Install (PTI) program, approved into the Ohio SIP. The PTI program serves, in part, to meet the general (or "minor") new source review requirements of section 110 (a)(2)(C) of the Clean Air Act (Act), which requires SIPs to include a

program for the regulation of the modification and construction of any stationary source as necessary to assure that national ambient air quality standards are achieved. Specific BAT limitations for individual sources are established in specific PTIs. Because BAT terms and conditions are created under the PTI program, which is in turn contained in the Ohio SIP, they are federally enforceable. As requirements under the SIP they also are "applicable requirements" within the meaning of the Act section 504(a) and 40 CFR 70.2 and, therefore, must reside in the Federal and State enforceable section of the Title V permit. Similarly, the terms and conditions implementing Ohio's nuisance regulation and toxics policy are included in the SIP and/or a SIP-approved permit and thus are considered federally enforceable applicable requirements for Title V purposes. They should be reflected as such in the Title V permit.

Section 505(b)(1) of the Act calls upon EPA to object to any proposed permit that is not in compliance with applicable requirements, including the requirements of a SIP. Accordingly, Title V permits which are issued with BAT, nuisance, and toxics policy terms and conditions that are misrepresented as State-only enforceable are subject to EPA objection.

It is our understanding that you intend to submit a SIP revision package requesting removal of the BAT requirements, thus making them State enforceable only. We ask that, prior to this resource intensive effort, you make all necessary assurances that this action will meet all of the planning requirements of the Act, including both specific and general requirements intended to assure the attainment and maintenance of the National Ambient Air Quality Standards and the prevention of significant deterioration of air quality. The BAT program appears to be integral to Ohio's plan for meeting many of these requirements. In addition, sections 110(l) and 193 of the Act are "antibacksliding" provisions that prohibit the approval of a SIP revision that would interfere with any applicable requirement of the Act and, in the case of nonattainment areas, require that control requirements be replaced by measures of ensuring equal or greater emissions reductions. Thus, before we could approve the removal of the BAT program from the SIP, you must demonstrate that removal of BAT would not adversely affect the various statutory requirements that BAT addresses. This will also enable our review process to be done in a timely fashion. In addition, if you choose to make the nuisance regulation and toxics policy State enforceable only, we ask that this be included as part of your SIP revision package.

Please keep in mind that the removal of these provisions from the SIP

will not affect the continuing Federal enforceability of existing PTIs. As noted above, either inclusion in the SIP or in a permit issued pursuant to a SIP-approved program renders a requirement federally enforceable. Here, the BAT requirements are contained in PTIs issued pursuant to Ohio's SIP-approved PTI program. Therefore, for sources with existing PTIs containing BAT, the BAT requirement still would have to be included on the federally enforceable side of the Title V permit. This is true also for nuisance and state toxics requirements contained in existing PTIs. We continue to have the authority to enforce BAT and the other provisions at these sources until appropriate regulatory steps are taken.

We look forward to continuing to work with you on this issue. If you have any questions or wish to discuss this issue further, please call Genevieve Damico, of my staff, at (312) 353-4761.

Sincerely yours,

/s/

Stephen Rothblatt, Chief
Air Programs Branch



AIR AND RADIATION DIVISION
77 WEST JACKSON BOULEVARD (A-18J)
CHICAGO, ILLINOIS 60604
(800) 621-8431 or (312) 353-2212

EXHIBIT 4

To comments of Donna Ballinger, Marilyn Wall, Ohio
Environmental Council, Sierra Club, and Case Western Reserve
University Environmental Law Clinic



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

APR 25 2012

REPLY TO THE ATTENTION OF:

Michael W. Ahern
Manager, Permit Issuance and Data Management Section
Ohio Environmental Protection Agency
Division of Air Pollution Control
50 West Town Street
Suite 700
P.O. Box 1049
Columbus, Ohio 43216

RE: Clarifications concerning federal enforceability of Ohio Administrative Code (OAC) rule 3745-15-07 nuisance permit term in Ohio OAC Chapter 3745-77 Title V permits.

Dear Mr. Ahern,

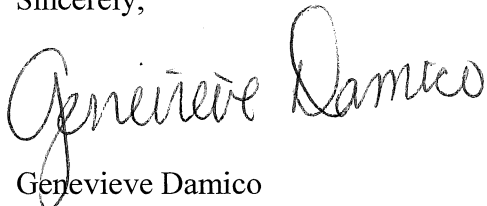
Thank you for your letter dated April 4, 2012, regarding the U.S. Environmental Protection Agency's position on the federal enforceability of Ohio's nuisance rule, OAC 3745-15-07, in Title V permits. Your letter specifically asks EPA to clarify whether, under Section 504(a) of the Clean Air Act (CAA) and 40 C.F.R. § 70.2, all provisions in State Implementation Plans (SIPs) are federally enforceable, or whether there have been any decisions or policy changes since 1999 that would lead EPA to have a different conclusion than that which was stated in the June 1999 letter from Steve Rothblatt to Bob Hodanbosi with respect to objecting to proposed Title V permits that identify Ohio's nuisance provisions as state-only enforceable.

Upon re-examining the underlying regulations, Section 504(a) of the CAA, and 40 C.F.R. § 70.2, we reaffirm our position that, because EPA has approved it into the Ohio SIP, OAC 3745-15-07 is a federally enforceable permit term for purposes of Title V permits. As noted above, you referenced in your letter a June 1999 letter from Steve Rothblatt to Bob Hodanbosi. In Enclosure A to that letter, EPA explained stated that "all provisions contained in an EPA-approved SIP and all terms and conditions in SIP-approved permits are ... federally enforceable.... [A]ll such terms and conditions are also federally enforceable 'applicable requirements' that must be incorporated into the Federal side of a Title V permit." Thus, if nuisance provisions apply to a stationary source either because it is subject to the provisions in the Ohio SIP or because a permit issued pursuant to a SIP-approved program contains the requirements, the terms must be included in the federally enforceable side of the source's Title V permit.

Your letter also asked about any decisions or policy changes since 1999 that would lead EPA to have a different conclusion. EPA has not issued any guidance that would contradict this outcome.

We look forward to continuing to work with you on this issue. If you have any questions or wish to discuss this issue further, please feel free to contact me or Charmagne Ackerman, of my staff, at (312) 886-0448.

Sincerely,

A handwritten signature in cursive script that reads "Genevieve Damico". The signature is written in dark ink and is positioned above the printed name.

Genevieve Damico
Chief
Air Permits Section

EXHIBIT 5

To comments of Donna Ballinger, Marilyn Wall, Ohio
Environmental Council, Sierra Club, and Case Western Reserve
University Environmental Law Clinic



DAVE YOST
OHIO ATTORNEY GENERAL

Office of the Solicitor General
Office 614-466-8980
Fax 614-466-5087

October 19, 2022

Office of the Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988

Re: Notice of additional information in *Sierra Club, et al. v. United States Environmental Protection Agency*, No. 21-3057

Dear Ms. Hunt:

Yesterday, during preparation for argument in this case, the State learned of information potentially relevant to this case. In particular, the State has, on at least one occasion, brought a claim for violation of Ohio Administrative Code 3745-15-07 (“the Air Nuisance Rule”) that cited exceedances of the federal ambient air-quality standards as evidence of the nuisance caused by a polluting facility. *See* attachment A.

The State of Ohio does not believe that this new information calls into question the propriety of the U.S. EPA’s decision to remove the Air Nuisance Rule from Ohio’s State Implementation Plan. Among other things, as the U.S. EPA noted in its action in this case, “using the nuisance rule to achieve criteria pollutant reductions is not equivalent to relying on the rule for [State Implementation Plan] purposes.” 85 Fed. Reg. at 73,639. The State will be happy to address at argument any questions that the Court may have.

DAVE YOST
Ohio Attorney General

/s/ Benjamin M. Flowers

BENJAMIN M. FLOWERS*
Solicitor General

**Counsel of Record*

SAMUEL C. PETERSON
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
bflowers@ohioattorneygeneral.gov

Counsel for the State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2022, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

/s/ Benjamin M. Flowers

Benjamin M. Flowers
Solicitor General

ATTACHMENT A**FILED****JUL 02 2021**STARK COUNTY COMMON PLEAS COURT
CIVIL DESIGNATION FORM

**PURSUANT TO LOCAL RULE 9.02, THIS FORM MUST BE FILLED OUT IN ITS ENTIRETY.
IF THIS FORM IS NOT FILLED OUT IN ITS ENTIRETY, THE COMPLAINT AND ALL
OTHER DOCUMENTS WILL BE RETURNED BY THE CLERK WITHOUT FILING.**

CASE NUMBER _____

2021 CV 00949**Farmer**PLAINTIFF

STATE OF OHIO EX REL. DAVE YOST, OHIO ATTORNEY GENERAL

-VS-

DEFENDANT REPUBLIC STEEL

Has this case been previously filed and dismissed? ____ Yes X No. If yes, list case no.
and
judge. _____

List all related pending case(s) including case number and judge. ____ None _____

CIVIL CATEGORIES: PLACE (X) IN ONE CATEGORY ONLY

{ } A. Professional Tort

{ } E. Foreclosure

{ } Medical Malpractice

{ } Dental Malpractice

{ } Optometric Malpractice

{ } F. Administrative Appeal

{ } Chiropractic Malpractice

{ X } G. Complex Litigation Classification Requested

{ } Legal Malpractice

{ } Other Malpractice

{ } B. Product Liability

{ } H. Other Civil

{ } C. Other Tort

{ } Contract Case

{ } Personal Injury

{ } Miscellaneous Civil

{ } Personal Injury- Auto

{ } Real Property

{ } Miscellaneous

{ } Consumer Sales Practices Act

{ } Credit Card Case

{ } D. Workers Compensation

Brief Factual Summary: The State of Ohio requests injunctive relief and civil penalties against Defendant Republic Steel for creating a public nuisance through its excessive lead emissions at a steel and iron factory in Canton, Stark County, Ohio.

Description of damages including all special damages to date: Defendant has caused a public nuisance and endangered the health and safety of Ohio's residents through its excessive lead emissions. Ohio law sets the maximum amount of per day penalties per violation at \$25,000 per day per violation.

Do you think this case should be referred to the Court Mediation Program at this time?

Yes X No **Reasons:** The parties have reached an initial agreement and will seek to enter a Consent Order for Preliminary Injunction alongside of this Complaint. The parties may require the Court Mediation Program at a future date.

Is this case based on a violation of the Ohio Mortgage Broker Act (ORC 1322) ? ____ Yes X No

Firm Name (Print or Type)

Casey Chapman

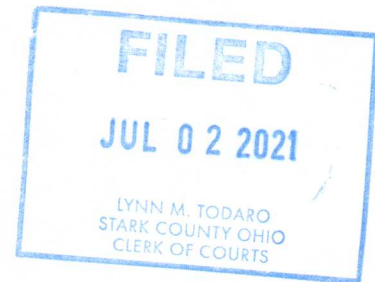
Attorney of Record (Print or Type)

Ohio Attorney General's Office
30 East Broad Street, 25th Floor,
Columbus, Ohio 43215
Telephone (614) 466 2766
REV. 9/09

Signature

Casey Chapman / signed w. consent M. Meyer 0075253

Attorney Registration Number 0086286



IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO, *ex rel.*
DAVE YOST,
OHIO ATTORNEY GENERAL
30 East Broad Street, 25th Floor
Columbus, OH 43215

Plaintiff,

v.

REPUBLIC STEEL
c/o
Corporation Service Company
50 West Broad Street
Suite 1330
Columbus, Ohio 43215

Defendant.

CASE NO. 2021CV00949

JUDGE

Farmer

COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES

Defendant Republic Steel is the owner and operator of an iron and steel manufacturing facility located at 2633 Eighth Street Northeast, Canton, Stark County, Ohio, 44704. Defendant has, on numerous occasions, operated its facility in violation of the terms of its air pollution control permits and committed other air pollution violations. Violations include, but are not limited to, excess emissions of lead, which endangers human health and the environment.

Therefore, Plaintiff, the State of Ohio, on relation of its Attorney General Dave Yost, and at the written request of the Director of the Ohio Environmental Protection Agency (“Director” and “Ohio EPA” accordingly), brings this action to enforce Ohio Revised Code (“R.C.”) Chapter 3704 and the rules adopted thereunder. Plaintiff alleges as follows:

GENERAL ALLEGATIONS

1. Republic Steel is a Delaware company, registered as a foreign corporation in Ohio.
2. Defendant has transacted business or contracted to supply services or goods in the State of Ohio, and has an interest in, uses, or possesses real property in the State of Ohio under R.C. 2307.382.
3. Defendant is a “person” as defined by R.C. 1.59, 2307.381, and 3704.01, and Ohio Adm.Code 3745-15-01.
4. Defendant is an “owner or operator,” as defined in Ohio Adm.Code 3745-15-01, of a steel and iron manufacturing facility, known as Republic Steel – Canton, located at 2633 Eight Street NE, Canton, Stark County, Ohio 44704 (“the Facility”).
5. The Facility is a “facility” as defined by Ohio Adm.Code 3745-15-01.
6. As part of their business at the Facility, Defendant operates equipment and conducts other activities that emit or cause the emission of “air contaminants” as defined in R.C. 3704.01.
7. The Canton City Public Health Air Pollution Control Division (“Canton APC”) is the contractual agent of Ohio EPA in Stark County, pursuant to R.C. 3704.111 and 3704.112.¹
8. Title V of the Clean Air Act, 42 U.S.C. 7661 through 42 U.S.C. 7661f, established

¹ Throughout this Complaint, both Ohio EPA and Canton APC will be referred to as “Ohio EPA.”

a comprehensive operating permit system for new and existing sources of air pollution (“Title V program”). The purpose of the Title V program is to combine all of a source’s air emissions requirements, including both federal and state requirements, into a single document and create mechanisms for tracking compliance with those requirements, thereby enhancing the source’s ability to comply with applicable air emissions requirements and the States’ and the public’s ability to monitor a facility’s compliance with its air emissions requirements.

9. Ohio EPA administers the federally approved Title V program in Ohio. Ohio’s Title V rules are found in Ohio Adm.Code 3745-77-01 through Ohio Adm.Code 3745-77-11 and Ohio Adm.Code 3745-78-01 through Ohio Adm.Code 3745-78-02.

10. Pursuant to R.C. 3704.03 and 3704.036 and the rules adopted thereunder, Ohio EPA issued an initial Title V Permit to Operate P0101209 (“PTO”) to Defendant’s predecessor, Republic Engineered Products, Inc., for the Facility, with an effective date of April 24, 2002, and then a modified Title V PTO P0101210, with an effective date of January 1, 2006, under which Defendant sought coverage and currently operates.

11. Ohio EPA issued an initial installation Permit to Install (“PTI”) 15-01578 on December 10, 2004 to Defendant to install the Flexcast operations with the ability of leaded-steel operations. Ohio EPA later issued a modified PTI P0120406 on December 2, 2016 to Defendant to add leaded steel operations at Continuous Bloom Casting Facility (“CBCF”), which Ohio EPA administratively modified as PTI P0123277 on October 18, 2017.

12. Pursuant to the terms of PTI P0123277, an ambient air monitor is installed directly South of the Facility, at 3150 Georgetown Road Northeast.

13. Defendant's PTI P0123277 requires, in part: if the ambient air monitor measures lead in the air equal to or greater than 0.11 ug/m³ as a three-month average, then the permittee shall submit a written proposal of additional actions to minimize airborne lead. The PTI also requires Defendant to perform lead ambient air monitoring, which Defendant asked Canton APC to perform for Defendant, and Canton APC agreed to perform for Defendant.

14. Section 109 of the Clean Air Act, 42 U.S.C. § 7409, requires the Administrator to promulgate regulations establishing national ambient air quality standards ("NAAQS") for those air pollutants for which air quality criteria have been issued pursuant to Section 108 of the Clean Air Act, 42 U.S.C. 7408 ("criteria pollutants"). The United States Environmental Protection Agency ("U.S. EPA") sets the NAAQS for safe levels of criteria pollutants in the ambient air to protect the public health.

15. The NAAQS for lead is 0.15 micrograms per cubic meter ("ug/m³") for a three-month rolling average.

16. Republic Steel is the only known source of lead in the vicinity of the Georgetown Rd. lead monitoring Site.

17. Ambient air monitoring results from the air monitor located at 3150 Georgetown Road Northeast, which is across the street from the Defendant's Facility, measured the average amount of lead in the ambient air at 0.25 ug/m³ for the three-month period from March 2018 through May 2018, and the average amount of lead in the ambient air at 0.167 ug/m³ for the three-month period from January 2019 through March 2019.

18. On June 29, 2018, the Director issued Final Findings and Orders ("DFFOs") to Defendant, ordering Defendant to alleviate the excess lead emissions at the Facility

including ceasing operation until corrective actions were taken. On May 14, 2019, the Director issued DFFOs to Defendant, ordering Defendant to alleviate the excess lead emissions at the Facility including ceasing operation during times of high lead emissions, conducting investigations, and improving operations.

19. On May 7, 9, and 13 of 2021, Defendant emitted elevated levels of lead in the amounts of 1.69, 2.6, and 2.26 ug/m^3 , respectively. This resulted in the three-month average of at least 0.38 ug/m^3 , which exceeds the lead NAAQS of 0.15 ug/m^3 .

20. Under the terms of the DFFOs, Defendant was required to cease production of lead products as a result of these emissions by June 11, 2021, and Defendant did in fact cease steel operations.

21. The results of the monitoring at the Georgetown Rd. monitoring location for the month of May 2021 reported a monthly average of 0.6196 ug/m^3 . The May 2021 values, along with the values from March and April 2021, reported a three-month rolling average of 0.30 ug/m^3 , twice the value of the national ambient air quality standard.

22. Revised Code 3704.05(A) provides that no person shall cause, permit, or allow emission of an air contaminant in violation of any rule adopted by the Director of Ohio EPA under R.C. 3704.03.

23. Revised Code 3704.05(C) provides, in part, that no person who is the holder of a permit issued pursuant to R.C. 3704.03(F) or (G) shall violate any of the permit's terms or conditions.

24. Revised Code 3704.05(G) states that no person shall violate any order, rule, or determination of the Director issued, adopted, or made under R.C. Chapter 3704.

25. Revised Code 3704.05(J)(2) provides, in part, that no person shall violate any applicable requirement of a Title V permit or any permit condition, or any rule adopted by the Director pursuant to the Title V permit program.

26. Revised Code 3704.06(B) provides, in part, that the Attorney General has authority upon request of the Director to bring an action to enjoin conduct in violation of R.C. 3704.05, and pursuant to R.C. 3704.06(C), to seek civil penalties of not more than \$25,000.00 for each day of each violation except for violations of R.C. Chapter 3704 regarding the prevention or abatement of odors.

27. All rules referenced in this Complaint have been adopted by the Director pursuant to R.C. Chapter 3704.

28. This Court has jurisdiction over the subject matter of this action pursuant to R.C. 3704.05 and R.C. 3704.06, personal jurisdiction over the Defendant pursuant to R.C. 2307.382, 3704.05, and R.C. 3704.06, and authority to grant the relief requested pursuant to R.C. Chapter 3704.

29. Venue is proper in this Court pursuant to Civ.R. 3(C).

30. Pursuant to Civ.R. 8(A), the State informs the Court that the amount sought is in excess of \$25,000.

31. The general allegations contained in the preceding paragraphs are applicable to each Count of the Complaint and are incorporated by reference into each as if fully restated in each Count.

COUNT ONE: MAINTAINING A PUBLIC NUISANCE

32. Ohio Adm.Code 3745-15-07(A) prohibits causing, permitting, or maintaining a public nuisance.

33. Ohio Adm.Code 3745-15-07(A) defines a public nuisance as the emission or escape into the open air from any source or sources whatsoever, of smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, or any other 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.

34. PTO P0101210 and PTIs 15-01578 and P0123277 prohibit operating the Facility in such a manner as to cause a nuisance in violation of Ohio Adm.Code 3745-15-07.

35. On numerous occasions since at least May 2018, Defendant has caused or allowed lead emissions to emit from the Facility that led to exceedances of the lead NAAQS three-month average and thus endangered the health, safety or welfare of the public and/or caused unreasonable injury or damage to property.

36. Defendant exceeded the lead NAAQS in the following three-month average periods: March through May 2018, April through June 2018, May through July 2018, January through March 2019, February through April 2019, March through May 2019, and March through May 2021.

37. The conduct alleged in this Count constitutes violations Ohio Adm.Code 3745-15-07(A), and R.C. 3704.05(A), (C), (G), and (J)(2), for which Defendant is liable and subject to injunctive relief pursuant to R.C. 3704.06(B) and for a civil penalty of not more than \$25,000 per day for each day of violation pursuant to R.C. 3704.06(C), including each day of violation that occurs after the filing of this Complaint.

PRAYER FOR RELIEF

THEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

- A. Preliminarily and permanently enjoin Defendant, pursuant to R.C. 3704.06(B), to comply with R.C. Chapter 3704, the rules adopted thereunder, Permits P0101210, 15-01578, and P0123277, and the Director's Final Findings and Orders.
- B. Order Defendant to refrain from creating a public nuisance from its lead emissions.
- C. Order Defendant, pursuant to R.C. 3704.06(C), to pay a civil penalty in the amount of Twenty-Five Thousand Dollars (\$25,000.00) per day for each day of each violation alleged in the Complaint, including each day of each violation that occurs after the filing of this Complaint.
- D. Order Defendant to pay all costs and fees for this action including attorney fees assessed by the Office of the Ohio Attorney General and extraordinary enforcement costs incurred by the State.
- E. Retain jurisdiction of this suit for the purpose of making any order or decree the Court may deem necessary at any time to carry out its judgment.
- F. Grant such other relief as may be just, equitable, and appropriate in this case.

Respectfully submitted,

DAVE YOST
OHIO ATTORNEY GENERAL

Casey Chapman / *signed w. consent*
M. Meyer 0075253

CASEY CHAPMAN (0086286)
Assistant Attorneys General
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3400
Telephone: (614) 466-2766
Facsimile: (614) 644-1926
Casey.Chapman@OAG.gov

CAMERON F. SIMMONS (0073904)
Assistant Attorney General
Environmental Enforcement Section
615 West Superior Ave., 11th Floor
Cleveland, Ohio 44113
Telephone: (216) 777-8064
Facsimile: (614) 644-1926
Cameron.Simmons@OAG.gov

Attorneys for Plaintiff, State of Ohio

EXHIBIT 6

To comments of Donna Ballinger, Marilyn Wall, Ohio
Environmental Council, Sierra Club, and Case Western Reserve
University Environmental Law Clinic

LeAnn M. Johnson Koch
LeAnnJohnson@perkinscoie.com

June 11, 2019

D. +1.202.654.6209

F. +1.202.654.9943

VIA CERTIFIED AND ELECTRONIC MAIL

Cathy Stepp
Regional Administrator
Environmental Protection Agency, Region 5
Air and Radiation Division
77 West Jackson Boulevard
Chicago, Illinois 60604

Re: Request to Remove the Public Nuisance Provision from the Ohio State Implementation Plan

Dear Ms. Stepp:

I am writing to request that EPA correct an error in Ohio's State Implementation Plan ("SIP"), specifically, the inclusion of a public nuisance provision, OAC-3745-15-07, which is unrelated to Ohio's control strategy for the attainment and maintenance of the National Ambient Air Quality Standards ("NAAQS").¹ EPA has clear authority under Clean Air Act Section 110(k)(6) to make corrections to SIPs by removing provisions not sufficiently related to maintenance or attainment of the NAAQS and has done so numerous times with provisions similar to the Ohio public nuisance provision as described below.

I. EPA has clear authority to remove the general nuisance provision from the SIP.

Under section 110(k)(6) of the CAA, EPA has authority to revise a SIP whenever the agency determines that the "action approving, disapproving, or promulgating any plan or plan revision (or part thereof) . . . was in error." Once EPA has determined there is an error, "the Administrator may . . . revise such action as appropriate *without requiring any further submission from the State.*"² EPA interprets this provision "to authorize EPA to correct a promulgated regulation when:

- (1) "EPA *clearly erred by failing to consider or by inappropriately considering information* made available to the EPA at the time of the promulgation, or the information made available at the time of promulgation is subsequently demonstrated to have been clearly inadequate, and

¹ See OAC-3745-15-07 at Attachment 1.

² 42 U.S.C. § 7410(k)(6) (emphasis added) (Attachment 2).

(2) “[O]ther information persuasively supports a change in the regulation.”³

EPA has used its § 110(k)(6) authority many times to remove public nuisance provisions similar to the Ohio public nuisance provision and has clear authority to do so.

II. It is EPA’s longstanding policy and practice to remove general nuisance provisions from SIPs.

Since at least 1979, EPA has interpreted the CAA as prohibiting the inclusion in SIPs of state rules that are unrelated to the attainment or maintenance of the NAAQS.⁴ In a 1979 memorandum, the EPA Office of General Counsel stated that “OGC has always advised the Regions that *measures to control non-criteria pollutants may not legally be made part of a SIP*. Section 110 of the Clean Air Act makes clear that the SIPs have this limitation.”⁵ EPA has consistently reinforced this interpretation by removing general nuisance provisions from SIPs.

The CAA was first amended in 1970. As part of the amendment, states were required to develop SIPs to reduce air pollution in areas not meeting the NAAQS. In response to the amendment, thousands of state and local agency regulations were submitted to EPA for incorporation into SIPs in the 1970s and early 1980s.⁶ Many states and districts submitted their entire programs, “including many elements not required pursuant to the Act.”⁷ Due to resource constraints, EPA conducted focused reviews of the submissions, paying attention to “the required technical, legal, and enforcement elements” and conducting only “minimal review” of the other elements.⁸

EPA has since recognized that many of the provisions initially approved in SIPs “were not appropriate for approval,” including provisions “that prohibit emissions causing general nuisance or annoyance in the community.”⁹ As a result, EPA has removed general nuisance

³ Designation of Areas for Air Quality Planning Purposes; California; Morongo Band of Mission Indians, 78 Fed. Reg. 51, 53 (Jan. 2, 2013) (emphasis added).

⁴ Memorandum from Michael James, Associate General Counsel of EPA’s Air, Noise, and Radiation Division to Regional Counsel and Air Branch Chief regarding “Status of State/Local Air Pollution Control Measures not related to NAAQS,” February 9, 1979 (Attachment 3).

⁵ *Id.*

⁶ Air Plan Revisions; California; Technical Amendments, 83 Fed. Reg. 43576, 43576 (Aug. 27, 2018) (Attachment 4).

⁷ Approval and Promulgation of Implementation Plans; Designation of Areas for Air Quality Planning Purposes; Wyoming; Corrections, 61 Fed. Reg. 47058, 47058 (Sept. 6, 1996) (Attachment 5).

⁸ *Id.*; 83 Fed. Reg. at 43576.

⁹ 83 Fed. Reg. at 43576.

provisions, including odor control provisions, from SIPs because they do “not have a reasonable connection to the NAAQS and related air quality goals of the Clean Air Act.”¹⁰

In 1999, for example, EPA removed “a general prohibition against air pollution” from the New York SIP.¹¹ EPA determined that “[s]uch a general provision is not designed to control NAAQS pollutants such that EPA could rely on it as a NAAQS attainment and maintenance strategy.”¹² Using almost identical language, EPA removed a nuisance provision from the Georgia SIP, because it was “not related to the attainment and maintenance of the [NAAQS].”¹³ EPA did the same in Michigan by removing from the SIP “a general rule that prohibits the emission of an air contaminant which is injurious to human health or safety, animal life, plant life of significant economic value, property, or which causes unreasonable interference with the comfortable enjoyment of life and property.”¹⁴ The rule had primarily been used to address odors and other local nuisances and not to attain or maintain the NAAQS.¹⁵ Similarly, in a direct final rule published in 1996, EPA removed odor control rules from the Wyoming SIP, because they had been “erroneously incorporated into the SIP” and “[did] not have a reasonable connection” to the NAAQS.¹⁶ EPA has also stricken odor regulations from the Minnesota and Puerto Rico SIPs¹⁷ and has declined to incorporate odor provisions into the Montana and Washington SIPs as part of larger SIP submissions.¹⁸

¹⁰ Approval and Promulgation of Implementation Plans; New York, 63 Fed. Reg. 65557, 65557 (Nov. 27, 1998) (Attachment 6).

¹¹ *Id.* On November 27, 1998, EPA published notice of the direct final rulemaking to remove the nuisance provision from the SIP. The notice took effect on January 26, 1999, after a 60-day public comment period during which EPA received no comments on the rule.

¹² *Id.*

¹³ Approval and Promulgation of Implementation Plans; Georgia: Approval of Revisions to the State Implementation Plan, 71 Fed. Reg. 13551 (March 16, 2006) (Attachment 7).

¹⁴ Approval and Promulgation of Implementation Plans; Michigan Correction, 64 Fed. Reg. 7790, 7791 (February 17, 1999) (Attachment 8).

¹⁵ *Id.*

¹⁶ 61 Fed. Reg. at 47058.

¹⁷ Approval and Promulgation of Implementation Plans; Minnesota, 60 Fed. Reg. 27411 (May 24, 1995) (Attachment 9); Approval and Promulgation of Implementation Plans; Commonwealth of Puerto Rico, 62 Fed. Reg. 3211 (January 22, 1997) (removing Rule 420 from the Puerto Rico SIP, which is an odor provision) (Attachment 10).

¹⁸ Clean Air Act Approval and Promulgation of PM₁₀ Implementation Plan for Montana, 59 Fed. Reg. 2537, 2539 (January 18, 1994) (Attachment 11); Approval and Promulgation of Implementation Plans: Washington, 59 Fed. Reg. 44324, 44326 (August 29, 1994) (Attachment 12).

Last year, EPA approved proposed SIP revisions submitted by New Hampshire, which included the removal of two references to “nuisance” in the New Hampshire SIP.¹⁹ EPA found that “the term ‘nuisance’ in Env-A 1000, as defined in state law, is a broad concept that could be applied to prohibit impacts that bear no reasonable connection to the NAAQS.”²⁰ Also in 2018, EPA proposed the removal of a “general-nuisance type” rule from the California SIP.²¹ This year, EPA removed the definition of “nuisance” from the Oregon SIP because, as EPA noted in its notice of proposed rulemaking, the definition of “nuisance” is “not appropriate for SIP approval” and is not “related to attainment and maintenance of the NAAQS and carrying out other specific requirements of section 110 of the CAA.”²²

III. The public nuisance provision in the Ohio SIP is not related to the attainment of NAAQs and should not be removed from the Ohio SIP

Like the examples above, the Ohio public nuisance provision was approved into the SIP when EPA had limited resources and, as a result, approved provisions into SIPs that had no connection to the NAAQS. The Ohio public nuisance provision was initially promulgated as regulation AP-2-07, now OAC-3745-15-07, by the Ohio Air Pollution Control Board (predecessor to Ohio EPA) and was approved as part of the Ohio SIP on April 15, 1974.²³

As EPA explained in past rulemakings, state and local agencies can choose whether to adopt and enforce these nuisance provisions, but it would be inappropriate to make them federally enforceable.²⁴ General nuisance provisions have “essentially no connection to the purposes for which SIPs are developed and approved, namely the implementation, maintenance, and enforcement of the [NAAQs].”²⁵ The public nuisance provision in the Ohio SIP is no different. OAC 3745-15-07 reads as follows:

(A) The emission or escape into the open air from any source or sources whatsoever, of smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, 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

¹⁹ See Air Plan Approval; New Hampshire; Rules for Open Burning and Incinerators, 83 Fed. Reg. 6972 (February 16, 2018) (Attachment 13).

²⁰ *Id.* at 6974.

²¹ See 83 Fed. Reg. 43576.

²² See Air Plan Approval; OR: Lane County Outdoor Burning and Enforcement Procedure Rules, 83 Fed. Reg. 60386, 60388 (proposed rule) (November 26, 2018) (Attachment 14); *see also* 84 Fed. Reg. 5000 (final rule) (February 20, 2019) (Attachment 15).

²³ See Approval and Promulgation of Implementation Plans, 39 Fed. Reg. 13539 (April 15, 1974) (Attachment 16).

²⁴ See, *e.g.*, 83 Fed. Reg. 43576.

²⁵ *Id.*

unreasonable injury or damage to property, is hereby found and declared to be a public nuisance. It shall be unlawful for any person to cause, permit or maintain any such public nuisance.

(B) The emission or escape into the open air from any source or sources of odors whatsoever that is subject to regulation under Chapter 3745-17, 3745-18, 3745-21, or 3745-31 of the Administrative Code and is operated in such a manner to emit such amounts of odor as to endanger the health, safety, or welfare of the public, or cause unreasonable injury or damage to property, is hereby found and declared to be a public nuisance. It shall be unlawful for any person to cause, permit or maintain any such public nuisance.

The Ohio public nuisance provision covers a broad range of activity, prohibiting the discharge from *any* source of *any* substance or odor that will harm the public or property. Like the provisions EPA has already removed from other SIPs, this provision is a general prohibition against public nuisances.²⁶ For example, the nuisance provision removed from the New York SIP (discussed above) provided that “no person shall cause or allow any air contamination source to emit any material having an opacity equal to or greater than 20 percent.”²⁷ EPA determined that this was simply “a general prohibition against air pollution” that was “not designed to control NAAQS pollutants such that EPA could rely on it as a NAAQS attainment and maintenance strategy.”²⁸ Similarly, the Ohio provision is a general prohibition against creating a public nuisance. Broadly-defined air pollution “does not necessarily equate to a condition that would interfere with attainment or maintenance of the NAAQS.”²⁹

EPA has even given an example of a nuisance provision that would not be appropriate for inclusion in a SIP:

“A person shall not discharge from any source whatsoever such quantities of air contaminants or other material which cause injury, detriment, nuisance or annoyance to any considerable number of persons or to the public or which endanger the comfort, repose, health or safety of any such persons or the public or which cause or have a natural tendency to cause injury or damage to business or property.”³⁰

²⁶ The general nuisance provision is even couched, aptly, in the “General Provisions on Air Pollution Control” section of the Ohio SIP.

²⁷ 6 NY-CRR 211.2.

²⁸ 63 Fed. Reg. at 65557.

²⁹ 83 Fed. Reg. at 6974.

³⁰ 83 Fed. Reg. at 43576 n.1.

Cathy Stepp
June 11, 2019
Page 6

The Ohio provision is almost identical to EPA's hypothetical provision and is no more related to attainment and maintenance of the NAAQS than EPA's example or the general nuisance provisions that EPA has already removed from other SIPs. Thus, EPA should remove the public nuisance provision from the Ohio SIP.

We appreciate your consideration of our request and look forward to hearing back from you.

Very truly yours,



LeAnn Johnson Koch

cc (via electronic mail):

Laurie Stevenson, Director, Ohio EPA
Todd Anderson, Deputy Director of Legal, Ohio EPA
Michael Guastella, Deputy Director, Government and Business Relations, Ohio EPA
Robert Hodanbosi, Chief, Division of Air Pollution Control, Ohio EPA
Drew Bergman, Esq., Assistant Chief Counsel, Ohio EPA
Pamela Blakely, Chief Permits and Grants Section, EPA Region 5

Attachment 1

OAC-3745-15-07 Air pollution nuisances prohibited.

- (A) The emission or escape into the open air from any source or sources whatsoever, of smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, 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, is hereby found and declared to be a public nuisance. It shall be unlawful for any person to cause, permit or maintain any such public nuisance.
- (B) The emission or escape into the open air from any source or sources of odors whatsoever that is subject to regulation under Chapter 3745-17, 3745-18, 3745-21, or 3745-31 of the Administrative Code and is operated in such a manner to emit such amounts of odor as to endanger the health, safety, or welfare of the public, or cause unreasonable injury or damage to property, is hereby found and declared to be a public nuisance. It shall be unlawful for any person to cause, permit or maintain any such public nuisance.

Attachment 2

Clean Air Act § 110(k)(6)

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

Attachment 3

02/09/1979

VOC570209791

Category: 57 – Exemptions/Applicability

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
February 9, 1979

Office of
General Counsel

MEMORANDUM

SUBJECT: Status of State/Local Air Pollution Control
Measures Not Related to NAAQS

FROM: Michael A. James, Associate General Counsel
Air, Noise and Radiation Division (A-133)

TO: Regional Counsels
Regional Air Branch Chiefs

I want to bring to your attention an issue that I neglected asking Jeff Corer and Larry Novey to mention at the Air Branch Chiefs' Meeting in Atlanta last week. That issue is the status on the SIP of State or local air pollution control measures that are not designed to control national ambient air quality standard (criteria) pollutants or their precursors.

OGC has always advised the Regions that measures to control non-criteria pollutants may not legally be made part of a SIP. Section 110 of the Clean Air Act makes clear that the SIPs have this limitation.¹ This limited scope seems to be pretty well understood and only rarely does a Regional Office include a non-criteria pollutant measure in a SIP approval proposal.

I mention this now because as States submit their major SIP revisions to meet the new requirements of Part D and other provisions of the 1977 Amendments, they may not always differentiate between their regulations to control criteria pollutants and their air pollution control regulations in general. The Regional Office should differentiate if the State does not. The usual practice is that the Region notes in the proposed approval/disapproval preamble that EPA is not taking any action on an identified non-criteria pollutant measure because it cannot legally be part of the SIP.

Regulations for controlling odors, fluorides,² and arsenic are some of the non-criteria pollutant measures that have been included in State submissions for EPA approval. Visible emissions regulations are, to my knowledge, always considered SIP measures and are required for many source

¹ Measures that are not part of the approved SIP may not be enforced by EPA.

² State fluoride regulations covering certain source categories are subject to EPA approval under S 111(d), but not as parts of SIPs.

categories by 40 CFR 51.19©). If you have any questions about whether a particular emission limitation may be included in the SIP, please contact OAQPS staff on technical issues, and my staff on legal questions.

cc: Dick Rhoads
Steve Kuhrtz

Attachment 4

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule to approve Maryland's 2017 progress report 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.

List of Subjects in 40 CFR Part 52

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

Authority: 42 U.S.C. 7401 *et seq.*

Dated: August 15, 2018.

Cosmo Servidio,

Regional Administrator, Region III.

[FR Doc. 2018–18526 Filed 8–24–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2018–0133; FRL–9982–76—Region 9]

Air Plan Revisions; California; Technical Amendments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to delete various local rules from the California State Implementation Plan (SIP) that were approved in error. These rules include general nuisance provisions, certain federal performance requirements, hearing board procedures, variance provisions, and local fee provisions. The EPA has determined that the continued presence of these rules in the SIP is potentially confusing and thus problematic for affected sources, the state, local agencies, and the EPA. The intended effect of this proposal is to delete these rules to make the SIP consistent with the Clean Air Act. The EPA is also proposing to make certain other corrections to address errors made in previous actions taken by the EPA on California SIP revisions.

DATES: Any comments must arrive by September 26, 2018.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2018–0133 at <http://www.regulations.gov>, or via email to Kevin Gong, at gong.kevin@epa.gov. For comments submitted at [Regulations.gov](http://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be removed or edited from [Regulations.gov](http://www.regulations.gov). For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia

submissions, and general guidance on making effective comments, please visit <http://www.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT:

Kevin Gong, EPA Region IX, (415) 972–3073, gong.kevin@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document, “we,” “us” and “our” refer to the EPA.

Table of Contents

- I. Why is the EPA proposing to correct the SIP?
- II. What is the EPA’s authority to correct errors in SIP rulemakings?
- III. Which rules are proposed for deletion?
- IV. What other corrections is the EPA proposing to make?
- V. Proposed Action and Request for Public Comment
- VI. Incorporation by Reference
- VII. Statutory and Executive Order Reviews

I. Why is the EPA proposing to correct the SIP?

The Clean Air Act (CAA or “Act”) was first enacted in 1970. In the 1970s and early 1980s, thousands of state and local agency regulations were submitted to the EPA for incorporation into the SIP to fulfill the new federal requirements. In many cases, states submitted entire regulatory air pollution programs, including many elements not required by the Act. Due to time and resource constraints, the EPA’s review of these submittals focused primarily on the new substantive requirements, and we approved many other elements into the SIP with minimal review. We now recognize that many of these elements were not appropriate for approval into the SIP. In general, these elements are appropriate for state and local agencies to adopt and implement, but it is not necessary or appropriate to make them federally enforceable by incorporating them into the applicable SIP. These include:

A. Rules that prohibit emissions causing general nuisance or annoyance in the community.¹ Such rules address local issues but have essentially no connection to the purposes for which SIPs are developed and approved, namely the implementation, maintenance, and enforcement of the

¹ An example of such a rule is as follows: A person shall not discharge from any source whatsoever such quantities of air contaminants or other material which cause injury, detriment, nuisance or annoyance to any considerable number of persons or to the public or which endanger the comfort, repose, health or safety of any such persons or the public or which cause or have a natural tendency to cause injury or damage to business or property.

national ambient air quality standards (NAAQS). See CAA section 110(a)(1).

B. Local adoption of federal New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP) requirements either by reference or by adopting text identical or modified from the requirements found in 40 Code of Federal Regulations (CFR) part 60 or 61. Because the EPA has independent authority to implement 40 CFR parts 60 and 61, it is not appropriate to make parallel local authorities federally enforceable by approving them into the applicable SIP.

C. Rules that govern local hearing board procedures and other administrative requirements such as fees, frequency of meetings, salaries paid to board members, and procedures for petitioning for a local hearing.

D. Variance provisions that provide for modification of the requirements of the applicable SIP. State- or district-issued variances provide an applicant with a mechanism to obtain relief from state enforcement of a state or local rule under certain conditions. Pursuant to federal law, specifically section 110(i) of the CAA, 42 U.S.C. 7410(i), neither the EPA nor a state may revise a SIP by issuing an "order, suspension, plan revision or other action modifying any requirement of an applicable implementation plan" without a plan promulgation or revision. The EPA and California have long recognized that a state-issued variance, though binding as a matter of state law, does not prevent the EPA from enforcing the underlying SIP provisions unless and until the EPA approves that variance as a SIP revision.

The variance provisions included in this action are deficient for various reasons, including their failure to address the fact that a state- or district-issued variance has no effect on federal enforceability unless the variance is submitted to and approved by the EPA as a SIP revision. Therefore, their inclusion in the SIP is inconsistent with the Act and may be confusing to regulated industry and the general public. Moreover, because state-issued variances require independent EPA approval to modify the substantive requirements of a SIP, removal of these variance provisions from the SIP will have no effect on regulated entities. See *Industrial Environmental Association v. Browner*, No. 97-71117 (9th Cir., May 26, 2000).

E. Local fee provisions that are not economic incentive programs and are not designed to replace or relax a SIP emission limit. While it is appropriate for local agencies to implement fee provisions, for example, to recover costs for issuing permits, it is generally not appropriate to make local fee collection federally enforceable.

II. What is the EPA's authority to correct errors in SIP rulemakings?

Section 110(k)(6) of the CAA, as amended in 1990, provides that, whenever the EPA determines that the EPA's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification or reclassification was in error, the EPA may in the same manner as the approval, disapproval, or promulgation revise such action as

appropriate without requiring any further submission from the state. Such determination and the basis thereof must be provided to the state and the public. We interpret this provision to authorize the EPA to make corrections to a promulgated regulation when it is shown to our satisfaction (or we discover) that (1) we clearly erred by failing to consider or by inappropriately considering information made available to the EPA at the time of the promulgation, or the information made available at the time of promulgation is subsequently demonstrated to have been clearly inadequate, and (2) other information persuasively supports a change in the regulation. See 57 FR 56762, at 56763 (November 30, 1992) (correcting designations, boundaries, and classifications of ozone, carbon monoxide, particulate matter and lead areas).

III. Which rules are proposed for deletion?

The EPA has determined that the rules listed in Table 1 below are inappropriate for inclusion in the SIP, but were previously approved into the SIP in error. Dates that these rules were submitted by the state and approved by the EPA are provided. We are proposing deletion of these rules and any earlier versions of these rules from the individual air pollution control district portions of the California SIP under CAA section 110(k)(6) as inconsistent with the requirements of CAA section 110. A brief discussion of the proposed deletions is provided in the following paragraphs.

TABLE 1—LOCAL AIR DISTRICT RULES PROPOSED FOR DELETION

Rule or regulation	Title	Submittal date	EPA approval
Amador County Air Pollution Control District (APCD)			
Rule 5	Nuisance	June 30, 1972	37 FR 19812 (September 22, 1972).
Rule 6	Additional Exception	June 30, 1972	37 FR 19812 (September 22, 1972).
Antelope Valley Air Quality Management District (AQMD)			
Los Angeles County APCD Rule 51 ...	Nuisance	June 30, 1972	37 FR 19812 (September 22, 1972).
Bay Area AQMD			
Division 11	Hydrogen Sulfide	February 21, 1972	37 FR 10842 (May 31, 1972).
Section 11101	[establishes hydrogen sulfide limits] ...	November 2, 1973	42 FR 23802 (May 11, 1977); corrected at 42 FR 42219 (August 22, 1977).
Regulation 8	Emission Standards for Hazardous Pollutants.	January 10, 1975	42 FR 23802 (May 11, 1977).
Butte County AQMD			
Section 2-1	[general nuisance provision]	February 21, 1972	37 FR 10842 (May 31, 1972).
Rule 619	Effective Date of Decision	February 10, 1986	52 FR 3226 (February 3, 1987).

TABLE 1—LOCAL AIR DISTRICT RULES PROPOSED FOR DELETION—Continued

Rule or regulation	Title	Submittal date	EPA approval
Calaveras County APCD			
Rule 205	Nuisance	July 22, 1975	42 FR 23803 (May 11, 1977); corrected at 42 FR 42219 (August 22, 1977).
Rule 603	Hearing Board Fees	July 22, 1975	42 FR 23803 (May 11, 1977); corrected at 42 FR 42219 (August 22, 1977).
Colusa County APCD			
Rule 4.5	Nuisance	June 30, 1972	37 FR 19812 (September 22, 1972).
Rule 4.6	Additional Exception	June 30, 1972	37 FR 19812 (September 22, 1972).
Eastern Kern APCD			
Kern County APCD Rule 419	Nuisance	June 30, 1972	37 FR 19812 (September 22, 1972).
Kern County APCD Rule 420	Exception	June 30, 1972	37 FR 19812 (September 22, 1972).
El Dorado County AQMD			
Rule 52	Nuisance	February 21, 1972	37 FR 10842 (May 31, 1972).
Rule 53	Exceptions to Rule 52	February 21, 1972	37 FR 10842 (May 31, 1972).
Rule 706	Failure to Comply with Rules	May 23, 1979	46 FR 27115 (May 18, 1981).
Feather River AQMD			
Yuba County Rule 9.7	Permit Actions	March 30, 1981	47 FR 15585 (April 12, 1982).
Yuba County Rule 9.8	Variance Actions	March 30, 1981	47 FR 15585 (April 12, 1982).
Glenn County APCD			
Rule 78	Nuisance	June 30, 1972	37 FR 19812 (September 22, 1972).
Rule 79	Exceptions	June 30, 1972	37 FR 19812 (September 22, 1972).
Great Basin Unified APCD			
Rule 402	Nuisance	April 21, 1976	42 FR 28883 (June 6, 1977).
Rule 617	Emergency Variances	December 17, 1979 ..	46 FR 8471 (January 27, 1981).
Imperial County APCD			
Rule 117	Nuisances	February 21, 1972	37 FR 10842 (May 31, 1972).
Rule 513	Record of Proceedings	November 4, 1977	43 FR 35694 (August 11, 1978).
Lake County AQMD			
Section 1602	Petition Procedures	March 30, 1981	47 FR 15784 (April 13, 1982).
Section 1701.Q	[excess emissions estimate for variance petitions].	February 10, 1986	52 FR 3226 (February 3, 1987).
Lassen County APCD			
Rule 3:2	Permit Fees	June 30, 1972	37 FR 19812 (September 22, 1972).
Rule 3:3	Permit Fee Schedules	June 30, 1972	37 FR 19812 (September 22, 1972).
Rule 3:4	Analysis Fees	June 30, 1972	37 FR 19812 (September 22, 1972).
Rule 3:5	Technical Reports, Charges For	June 30, 1972	37 FR 19812 (September 22, 1972).
Rule 4:2	Nuisance	June 30, 1972	37 FR 19812 (September 22, 1972).
Mariposa County APCD			
Rule 205	Nuisance	January 10, 1975	42 FR 42219 (August 22, 1977).
Mendocino County APCD			
Rule 4.A	General	February 21, 1972	37 FR 10842 (May 31, 1972).
Rule 620	Hearing Procedures	August 6, 1982	47 FR 50864 (November 10, 1982).
Modoc County APCD			
Rule 3:2	Nuisance	June 30, 1972	37 FR 19812 (September 22, 1972).
Rule 3:6	Additional Exception	June 30, 1972	37 FR 19812 (September 22, 1972).

TABLE 1—LOCAL AIR DISTRICT RULES PROPOSED FOR DELETION—Continued

Rule or regulation	Title	Submittal date	EPA approval
Mojave Desert AQMD			
Riverside County Rule 51	Nuisance	February 21, 1972	37 FR 10842 (May 31, 1972).
Riverside County APCD Rule 106	Record of Proceedings	February 21, 1972	37 FR 10842 (May 31, 1972).
South Coast AQMD Rule 1231	Judicial Review	January 2, 1979	45 FR 30626 (May 9, 1980).
Monterey Bay Air Resources District			
Monterey-Santa Cruz County Unified APCD Rule 402.	Nuisance	February 21, 1972	37 FR 10842 (May 31, 1972).
San Benito County APCD Rule 403	Nuisance	February 21, 1972	37 FR 10842 (May 31, 1972).
North Coast Unified AQMD			
Del Norte County APCD Regulation IV, introductory paragraph.	[untitled but represents a general nuisance type of provision].	February 21, 1972	37 FR 10842 (May 31, 1972).
Del Norte County APCD Rule 340	Technical Report Charges	November 10, 1976 ..	43 FR 25677 (June 14, 1978).
Del Norte County APCD Rule 620	Hearing Procedures	November 10, 1976 ..	43 FR 25677 (June 14, 1978).
Del Norte County APCD Rule 620	Hearing Procedures	August 6, 1982	47 FR 50864 (November 10, 1982).
Del Norte County APCD Rule 630	Decisions	November 10, 1976 ..	43 FR 25677 (June 14, 1978).
Del Norte County APCD Rule 640	Record of Proceedings	November 10, 1976 ..	43 FR 25677 (June 14, 1978).
Del Norte County APCD Rule 650	Appeal of Decision	November 10, 1976 ..	43 FR 25677 (June 14, 1978).
Humboldt County APCD Rule 51	Prohibited Emissions	February 21, 1972	37 FR 10842 (May 31, 1972).
Trinity County APCD Regulation IV, introductory paragraph.	[untitled but represents a general nuisance type of provision].	June 30, 1972	37 FR 19812 (September 22, 1972).
Trinity County APCD Rule 56	Failure to Comply with Rules	June 30, 1972	37 FR 19812 (September 22, 1972).
Trinity County APCD Rule 62	Preliminary Matters	June 30, 1972	37 FR 19812 (September 22, 1972).
Trinity County APCD Rule 67	Lack of Permit	June 30, 1972	37 FR 19812 (September 22, 1972).
Trinity County APCD Rule 68	Issuance of Subpoenas, Subpoenas Duces Tecum.	June 30, 1972	37 FR 19812 (September 22, 1972).
Trinity County APCD Rule 620	Hearing Procedures	August 6, 1982	47 FR 50864 (November 10, 1982).
Northern Sierra AQMD			
Nevada County APCD Rule 700	Applicable Articles of the Health and Safety Code.	June 6, 1977	43 FR 41039 (September 14, 1978).
Nevada County APCD Rule 703 (paragraphs (E) and (I)).	Contents of Petitions	June 6, 1977	43 FR 41039 (September 14, 1978).
Nevada County APCD Rule 711	Evidence	April 10, 1975	43 FR 25687 (June 14, 1978).
Plumas County APCD Rule 51	Prohibited Emissions	June 30, 1972	37 FR 19812 (September 22, 1972).
Plumas County APCD Rule 516 (paragraph (C)).	Emergency Variance Provisions	June 22, 1981	47 FR 17486 (April 23, 1982).
Plumas County APCD Rule 701	General	January 10, 1975	43 FR 25680 (June 14, 1978).
Plumas County APCD Rule 702	Filing Petitions	January 10, 1975	43 FR 25680 (June 14, 1978).
Plumas County APCD Rule 703	Contents of Petitions	June 22, 1981	47 FR 17486 (April 23, 1982).
Plumas County APCD Rule 704	Petitions for Variances	January 10, 1975	43 FR 25680 (June 14, 1978).
Plumas County APCD Rule 710	Notice of Public Hearing	June 22, 1981	47 FR 17486 (April 23, 1982).
Plumas County APCD Rule 711	Evidence	January 10, 1975	43 FR 25680 (June 14, 1978).
Plumas County APCD Rule 712	Preliminary Matters	January 10, 1975	43 FR 25680 (June 14, 1978).
Plumas County APCD Rule 713	Official Notice	January 10, 1975	43 FR 25680 (June 14, 1978).
Plumas County APCD Rule 714	Continuances	January 10, 1975	43 FR 25680 (June 14, 1978).
Plumas County APCD Rule 715	Decision	January 10, 1975	43 FR 25680 (June 14, 1978).
Plumas County APCD Rule 716	Effective Date of Decision	January 10, 1975	43 FR 25680 (June 14, 1978).
Sierra County APCD Rule 516 (paragraph (C)).	Emergency Variance Provisions	June 22, 1981	47 FR 17486 (April 23, 1982).
Sierra County APCD Rule 703	Contents of Petitions	June 22, 1981	47 FR 17486 (April 23, 1982).
Sierra County APCD Rule 710	Notice of Public Hearing	June 22, 1981	47 FR 17486 (April 23, 1982).
Northern Sonoma County APCD			
52	Nuisance	June 30, 1972	37 FR 19812 (September 22, 1972).
85	Failure to Comply with Rules	June 30, 1972	37 FR 19812 (September 22, 1972).
91	Preliminary Matters	June 30, 1972	37 FR 19812 (September 22, 1972).
96	Lack of Permit	June 30, 1972	37 FR 19812 (September 22, 1972).
600	Authorization	October 16, 1985	52 FR 12522 (April 17, 1987).
610	Petition Procedure	October 16, 1985	52 FR 12522 (April 17, 1987).
620	Hearing Procedures	August 6, 1982	47 FR 50864 (November 10, 1982).

Amador County APCD

Amador County APCD Rule 5 (Nuisance) is a general-nuisance type of prohibitory rule. As such, Rule 5 was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. Amador County APCD Rule 6 (Additional Exception) provides an exception to Amador County APCD Rule 5 and should be deleted if Rule 5 is deleted. In this action, we are proposing to delete Amador County APCD Rules 5 and 6 from the Amador County portion of the California SIP.

Antelope Valley AQMD

Formed in 1997, the Antelope Valley AQMD administers air quality management programs in the Southeast Desert portion of Los Angeles County that is referred to as "Antelope Valley." The Antelope Valley AQMD portion of the California SIP includes rules adopted by various air pollution control agencies that had jurisdiction over stationary sources in Antelope Valley since 1972, including the Los Angeles County APCD, the Southern California APCD, the South Coast AQMD, and the Antelope Valley AQMD. Los Angeles County APCD Rule 51 (Nuisance) is a general-nuisance type of prohibitory rule. As such, Rule 51 was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. Although Rule 51 was rescinded in the South Coast AQMD portion of Los Angeles County at 64 FR 71660 (December 22, 1999), the rescission did not apply within the Antelope Valley AQMD portion of the county because, by the time of the 1999 action, the South Coast AQMD no longer had jurisdiction within the Antelope Valley portion of Los Angeles County. In this action, we propose to delete Los Angeles County APCD Rule 51 (Nuisance) from the Antelope Valley AQMD portion of the California SIP.

Bay Area AQMD

Bay Area AQMD Division 11 (Hydrogen Sulfide) (including sections 11100, 11101, 11102, 11102.1–11102.8) was approved as part of the original SIP for the Bay Area AQMD portion of the California SIP. Section 11101, which is untitled but establishes hydrogen sulfide limits, was superseded by approval of Section 11101 at 42 FR 23802 (May 11, 1977), as corrected and recodified at 42 FR 42219 (August 22, 1977). There has never been a NAAQS for hydrogen sulfide, and thus, Bay Area AQMD Division 11 (including sections 11100, 11101, 11102, 11102.1–11102.8) does not relate to the NAAQS and was approved in error.

Bay Area AQMD Regulation 8 (Emission Standards for Hazardous Pollutants), as approved in 1977, includes certain definitions and four substantive rules: Rule 1 (NESHAPS General Provisions), Rule 2 (Emission Standard for Asbestos), Rule 3 (Emission Standard for Beryllium), and Rule 4 (Emission Standard for Beryllium Rocket Motor Firing). Bay Area AQMD Regulation 8 adopts text identical or modified from the requirements found in 40 CFR part 60 or 61, and because the EPA has independent authority to implement 40 CFR parts 60 and 61, it was not appropriate to make parallel local authorities federally enforceable by approving Regulation 8 into the Bay Area AQMD portion of the California SIP. In this action, we are proposing to delete Division 11 (including the amended version of section 11101), and Regulation 8 from the BAAQMD portion of the California SIP.

Butte County AQMD

Butte County AQMD Section 2–1 is a general-nuisance type of prohibitory rule. As such, Section 2–1 was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. Butte County AQMD Rule 619 (Effective Date of Decision) relates to hearing board procedures, and as such, was inappropriate for inclusion in the SIP and was thus approved by the EPA in error. In this action, we are proposing to delete Section 2–1 and Rule 619 from the Butte County AQMD portion of the California SIP.

Calaveras County APCD

Calaveras County APCD Rule 205 (Nuisance) is a general-nuisance type of prohibitory rule. As such, Rule 205 was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. Calaveras County APCD Rule 603 (Hearing Board Fees) relates to hearing board procedures, and as such, was inappropriate for inclusion in the SIP and was thus approved by the EPA in error. In this action, we are proposing to delete Rules 205 and 603 from the Calaveras County APCD portion of the California SIP.

Colusa County APCD

Colusa County APCD Rule 4.5 (Nuisance) is a general-nuisance type of prohibitory rule. As such, Rule 4.5 was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. Colusa County APCD Rule 4.6 (Additional Exception) provides an exception to Colusa County APCD Rule 4.5 and should be deleted if Rule 4.5 is deleted. In this action, we are proposing to delete Rules 4.5 and 4.6 from the

Colusa County APCD portion of the California SIP.

Eastern Kern APCD

Kern County APCD Rule 419 (Nuisance) is a general-nuisance type of prohibitory rule. As such, Rule 419 was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. Kern County APCD Rule 420 (Exception) provides an exception to Kern County APCD Rule 419 and should be deleted if Rule 419 is deleted. In this action, we are proposing to delete Rules 419 and 420 from the Eastern Kern APCD portion of the California SIP.

El Dorado County AQMD

El Dorado County AQMD Rule 52 (Nuisance) is a general-nuisance type of prohibitory rule. As such, Rule 52 was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. El Dorado County AQMD Rule 53 (Exceptions to Rule 52) provides an exception to El Dorado County AQMD Rule 52 and should be deleted if Rule 52 is deleted. El Dorado County AQMD Rule 706 (Failure to Comply with Rules) establishes certain hearing board procedures, and as such, was inappropriate for inclusion in the SIP and was thus approved by the EPA in error. In this action, we are proposing to delete Rules 52, 53, and 706 from the El Dorado County AQMD portion of the California SIP.

Feather River AQMD

Formed in 1991, the Feather River AQMD administers air quality management programs in Yuba County and Sutter County. The Feather River AQMD portion of the California SIP includes rules adopted by the predecessor agencies, the Yuba County APCD and the Sutter County APCD, to the extent that such rules have not been superseded or removed through EPA approval of rules or rescissions adopted by the Feather River AQMD. Yuba County APCD Rules 9.7 (Permit Actions) and 9.8 (Variance Actions) establish certain hearing board procedures, and as such, were inappropriate for inclusion in the SIP and were thus approved by the EPA in error. In this action, we are proposing to delete Rules 9.7 and 9.8 from the Feather River AQMD portion of the California SIP.

Glenn County APCD

Glenn County APCD Rule 78 (Nuisance) is a general-nuisance type of prohibitory rule. As such, Rule 78 was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. Glenn County APCD Rule 79

(Exceptions) provides an exception to Glenn County APCD Rule 78 and should be deleted if Rule 78 is deleted. In this action, we are proposing to delete Rules 78 and 79 from the Glenn County APCD portion of the California SIP.

Great Basin Unified APCD

Great Basin Unified APCD Rule 402 (Nuisance) is a general-nuisance type of prohibitory rule. As such, Rule 402 was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. Great Basin Unified APCD Rule 617 (Emergency Variance) allows an owner or operator of stationary sources to file a petition for an emergency variance under certain circumstances and provides for review and action on the petition by the APCO and hearing board. As described above, such provisions are inconsistent with section 110(i) of the CAA and were thus approved by the EPA in error. In this action, we are proposing to delete Rules 402 and 617 from the Great Basin Unified APCD portion of the California SIP.

Imperial County APCD

Imperial County APCD Rule 117 (Nuisance) is a general-nuisance type of prohibitory rule. As such, Rule 117 was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. Imperial County APCD Rule 513 (Record of Proceedings) establishes certain hearing board procedures, and as such, was inappropriate for inclusion in the SIP and was thus approved by the EPA in error. In this action, we are proposing to delete Rules 117 and 513 from the Imperial County APCD portion of the California SIP.

Lake County AQMD

Lake County AQMD Section 1602 (Petition Procedures) establishes certain hearing board procedures, and as such, was inappropriate for inclusion in the SIP and was thus approved by the EPA in error. Lake County AQMD Section 1701.Q requires that petitions for variances include an excess emission estimate and supporting documentation. As described above, variance provisions are inconsistent with section 110(i) of the CAA and were thus approved by the EPA in error. In this action, we are proposing to delete Sections 1602 and 1701.Q from the Lake County AQMD portion of the California SIP.

Lassen County APCD

Lassen County APCD Rules 3:2, 3:3, 3:4, and 3:5 are local fee provisions that were not appropriate for inclusion in the SIP and thus were approved by the EPA in error. On January 18, 2002 (67

FR 2573), the EPA deleted without replacement earlier versions of these same rules that had been submitted as part of the original California SIP on February 21, 1972 and approved on May 31, 1972 (37 FR 10842), but we did not recognize at the time of our 2002 action that the subject rules had been superseded by rules submitted on June 30, 1972 and approved on September 22, 1972 (37 FR 19812). In this action, we propose to delete the later-submitted and approved fee rules for Lassen County. Lassen County APCD Rule 4:2 (Nuisance) is a general-nuisance type of prohibitory rule. As such, Rule 4:2 was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. In this action, we are proposing to delete Rule 4:2 and the fee rules discussed above from the Lassen County APCD portion of the California SIP.

Mariposa County APCD

Mariposa County APCD Rule 205 (Nuisance) is a general-nuisance type of prohibitory rule. As such, Rule 205 was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. In this action, we are proposing to delete Rule 205 from the Mariposa County APCD portion of the California SIP.

Mendocino County APCD

Mendocino County APCD Rule 4.A (General) is a general-nuisance type of prohibitory rule. As such, Rule 4.A was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. Mendocino County APCD Rule 620 (Hearing Procedures) establishes certain hearing board procedures, and as such, was inappropriate for inclusion in the SIP and was thus approved by the EPA in error. In this action, we are proposing to delete Rules 4.A and 620 from the Mendocino County APCD portion of the California SIP.

Modoc County APCD

Modoc County APCD Rule 3:2 (Nuisance) is a general-nuisance type of prohibitory rule. As such, Rule 3:2 was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. Modoc County APCD Rule 3:6 (Additional Exception) provides an exception to Modoc County APCD Rule 3:2 and should be deleted if Rule 3:2 is deleted. In this action, we are proposing to delete Rules 3:2 and 3:6 from the Modoc County APCD portion of the California SIP.

Mojave Desert AQMD

Regulation of stationary air pollution sources in Riverside County is split between the South Coast AQMD (which

has jurisdiction over all Riverside County except the Palo Verde Valley) and the Mojave Desert AQMD (which has jurisdiction over the Palo Verde Valley portion of Riverside County). The Palo Verde Valley portion of Riverside County left the South Coast AQMD and joined the Mojave Desert AQMD on July 1, 1994. The applicable SIP for the Riverside County portion of the Mojave Desert AQMD (*i.e.*, the Palo Verde Valley) consists, in part, of rules that were adopted originally by the Riverside County APCD and by the South Coast AQMD and then approved by the EPA prior to July 1, 1994, and that have not yet been superseded or rescinded through EPA approval of SIP revisions adopted by the Mojave Desert AQMD.

Riverside County APCD Rule 51 (Nuisance) is a general-nuisance type of prohibitory rule. As such, Rule 51 was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. Riverside County APCD Rule 106 (Record of Proceedings) is proposed herein for deletion because it establishes certain hearing board procedures and was thus inappropriate for inclusion in the SIP and approved by the EPA in error. South Coast AQMD Rule 1231 (Judicial Review), also proposed herein for deletion, establishes certain district board procedures, and as such, was inappropriate for inclusion in the SIP and approved by the EPA in error.² In this action, we are proposing to delete Riverside County Rules 51 and 106 and South Coast AQMD Rule 1231 from the Riverside County portion of the Mojave Desert AQMD portion of the California SIP.

Monterey Bay Air Resources District

The Monterey Bay Air Resources District (formerly named the Monterey Bay Unified APCD) was formed in 1974 when the Monterey-Santa Cruz County Unified APCD merged with the San Benito County APCD. The rules adopted by the predecessor agencies remain in the SIP to the extent they have not been superseded or rescinded through EPA approvals of rules or rescissions adopted by the unified air district. Monterey-Santa Cruz County Unified APCD Rule 402 (Nuisance) and San Benito County APCD Rule 403 (Nuisance) are general-nuisance type of prohibitory rules. As such, Rules 402 and 403 were inappropriate for inclusion in the SIP and, thus, were

² The EPA approved the rescission of South Coast AQMD Rule 1231 at 64 FR 71660 (December 22, 1999), but the rescission was not applicable within the Palo Verde Valley portion of Riverside County because the Palo Verde Valley had joined Mojave Desert AQMD several years before the rescission was approved.

approved by the EPA in error. In this action, we are proposing to delete Rules 402 and 403 from the Monterey Bay Air Resources District portion of the California SIP.

North Coast Unified AQMD

Established in 1982, the North Coast Unified AQMD has jurisdiction over Del Norte, Humboldt and Trinity counties, and the North Coast Unified AQMD portion of the applicable California SIP includes rules that were adopted by these counties and approved by the EPA and not superseded or rescinded through subsequent SIP actions. The introductory paragraphs for Del Norte County APCD's Regulation VI (Prohibitions) and Trinity County APCD's Regulation IV (Prohibitions) and Humboldt County APCD Rule 51 (Prohibited Emissions) are general- nuisance type of prohibitory rules. As such, the introductory paragraphs of Regulation IV and Rule 51 were inappropriate for inclusion in the SIP and, thus, were approved by the EPA in error. Del Norte County APCD Rules 620 (Hearing Procedures), 630 (Decisions), 640 (Record of Proceedings) and 650 (Appeal of Decision) and Trinity County APCD Rules 56 (Failure to Comply with Rules), 62 (Preliminary Matters), 67 (Lack of Permit), 68 (Issuance of Subpoenas, Subpoenas Duces Tecum) and 620 (Hearing Procedures) establish certain hearing board procedures, and as such, were inappropriate for inclusion in the SIP and were approved by the EPA in error. Del Norte County APCD Rule 340 (Technical Report Charges) is a local fee provision that also was not appropriate for inclusion in the SIP and was approved in error. In this action, we are proposing to delete the various rules listed above from the North Coast Unified AQMD portion of the California SIP.

Northern Sierra AQMD

Established in 1986, the Northern Sierra AQMD has jurisdiction over Nevada, Plumas, and Sierra counties, and the Northern Sierra AQMD portion of the applicable California SIP includes rules that were adopted by these counties and approved by the EPA and not superseded or rescinded through subsequent SIP actions. Plumas County APCD Rule 51 (Prohibited Emissions) is a general- nuisance type of prohibitory rule. As such, Rule 51 was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. Nevada County APCD Rules 700 (Applicable Articles of the Health and Safety Code), 703 (Contents of Petitions) (paragraphs (E) and (I)) and 711 (Evidence); Plumas County APCD Rules

701 (General), 702 (Filing Petitions), 703 (Contents of Petitions), 704 (Petitions for Variances), 710 (Notice of Hearing), 711 (Evidence), 712 (Preliminary Matters), 713 (Official Notice), 714 (Continuances), 715 (Decision) and 716 (Effective Date of Decision); and Sierra County APCD Rules 703 (Contents of Petitions) and 710 (Notice of Public Hearing) establish certain hearing board procedures, and as such, were inappropriate for inclusion in the SIP and were thus approved by the EPA in error. Plumas County APCD Rule 516 (Upset and Breakdown Conditions) (paragraph C ("Emergency Variance Provisions")) and Sierra County APCD Rule 516 (Upset and Breakdown Conditions) (paragraph C ("Emergency Variance Provisions")) allow an owner or operator of stationary sources to file a petition for an emergency variance under certain circumstances and provides for review and action on the petition by the APCO and hearing board. As described above, such provisions are inconsistent with section 110(i) of the CAA and were thus not appropriate for inclusion in the SIP and were approved by the EPA in error. In this action, we are proposing to delete the various rules listed above from the Northern Sierra AQMD portion of the California SIP.

Northern Sonoma County APCD

Northern Sonoma County APCD Rule 52 (Nuisance) is a general- nuisance type of prohibitory rule. As such, Rule 52 was inappropriate for inclusion in the SIP and, thus, was approved by the EPA in error. Northern Sonoma County APCD Rules 85 (Failure to Comply with Rules), 91 (Preliminary Matters), 96 (Lack of Permit), 600 (Authorization), 610 (Petition Procedure) and 620 (Hearing Procedures) establish certain hearing board procedures, and as such, were inappropriate for inclusion in the SIP and were thus approved by the EPA in error. In this action, we are proposing to delete Rules 52, 85, 91, 96, 600, 610 and 620 from the Northern Sonoma County APCD portion of the California SIP.

IV. What other corrections is the EPA proposing to make?

The EPA is also proposing certain error corrections not because the rules were originally approved into the SIP in error but because of other types of errors made in the course of the SIP rulemaking action. Each such proposal is described in the following paragraphs.

Antelope Valley AQMD

With respect to the Antelope Valley AQMD portion of the California SIP, we are proposing three additional corrections related to the following: Los Angeles County APCD Regulation VI (Orchard or Citrus Grove Heaters), South Coast AQMD Rule 1186 (PM₁₀ Emissions from Paved and Unpaved Roads, and Livestock Operations), and Antelope Valley AQMD Rules 107 (Certification of Submissions and Emission Statements) and 1151 (Motor Vehicle and Mobile Equipment Coating Operations).

Rescission of Los Angeles County APCD Regulation VI (Orchard or Citrus Grove Heaters): Los Angeles County APCD Regulation VI includes the following rules: Rule 100 (Definitions), Rule 101 (Exceptions), Rule 102 (Permits Required), Rule 103 (Transfer), Rule 105 (Application for Permits), Rule 106 (Action on Applications), Rule 107 (Standards for Granting Permits), Rule 108 (Conditional Approval), Rule 109 (Denial of Applications), Rule 110 (Appeals), Rule 120 (Fees), and Rule 130 (Prohibitions). California submitted Los Angeles County APCD Regulation VI on June 30, 1972, and the EPA approved it on September 22, 1972 (37 FR 19812). Rule 120 was deleted without replacement at 67 FR 2573 (January 18, 2002), but the other Regulation VI rules remain in the SIP.

Regulation VI was rescinded in the Southeast Desert portion of Los Angeles County at 43 FR 40011 (September 8, 1978), but was reinstated throughout Los Angeles County when the EPA approved a SIP revision extending the jurisdiction of the South Coast AQMD to the Southeast Desert portion of the county and replacing the SIP rules that had been in effect for the Southeast Desert portion of Los Angeles County with those that applied in the South Coast AQMD. *See* 48 FR 52451 (November 18, 1983). At that time, the applicable SIP for the South Coast AQMD included Regulation VI because the EPA inadvertently failed to codify the rescission of the rules in an action affecting the South Coast AQMD portion of Los Angeles County published at 43 FR 25684 (June 14, 1978). In the final action on June 14, 1978, the EPA indicated: "The changes to Regulation VI, Orchard Grove Heaters, contained in the above mentioned submittals and being acted upon by this notice include total replacement of county rules by California Health and Safety Code sections covering Orchard Heaters." 43 FR at 25685. However, the regulatory text deleting Regulation VI without replacement was not included in the

final rule, and thus, Regulation VI became part of the legacy SIP inherited by the Antelope Valley AQMD when it was established in 1997 in the Southeast Desert portion of Los Angeles County. In this action, we are proposing to add regulatory text deleting Regulation VI consistent with our action as described in the preamble to the June 14, 1978 final rule and to delete Los Angeles County APCD Regulation VI from the South Coast AQMD portion of the California SIP and to thereby delete Los Angeles County APCD Regulation VI from the Antelope Valley AQMD portion of the California SIP.

Deletion of South Coast Rule 1186 (PM₁₀ Emissions from Paved and Unpaved Roads, and Livestock Operations) for Implementation in the Antelope Valley AQMD: In a final rule published at 72 FR 64946 (November 19, 2007), the EPA added a paragraph to 40 CFR 52.220(c)(278)(i)(A) deleting South Coast AQMD Rule 1186 without replacement for implementation in the Antelope Valley AQMD. This paragraph was added in error. Originally adopted on February 14, 1997, no version of South Coast AQMD Rule 1186 has been approved by the EPA for implementation in the Antelope Valley. See footnote 4 in the proposed rule (63 FR 42786, August 11, 1998).³ Thus, we are proposing to delete the erroneous regulatory language that was added by the November 19, 2007 final rule.

Reorganization of the CFR Affecting Antelope Valley AQMD Rules 107 and 1151: In a final rule published at 80 FR 13495 (March 16, 2015), we approved a rule adopted by the Sacramento Metropolitan AQMD but the amendatory instructions revising paragraph 40 CFR 52.220(c)(423) were in error such that rules that had been approved and listed under “(i) Incorporation by reference,” were erroneously moved under the “(ii) Additional materials” portion of paragraph 40 CFR 52.220(c)(423), including Antelope Valley AQMD Rules 107 (Certification of Submissions and Emission Statements) and 1151 (Motor Vehicle and Mobile Equipment Coating Operations), which were approved in 2013. See 78 FR 21545 (April 11, 2013) (approval of Rule 107) and 78 FR 58459 (September 24, 2013) (approval of Rule

1151). We are proposing to revise paragraph 40 CFR 52.220(c)(423) consistent with the rulemakings affecting that paragraph.

Eastern Kern APCD

Approval of 15% and Post-1996 Rate-of-Progress (ROP) Elements for the 1-Hour Ozone NAAQS: On January 8, 1997 (62 FR 1150), the EPA took final action to approve revisions to the California SIP for ozone for six nonattainment areas, including the San Joaquin Valley ozone nonattainment area, which at the time was defined to include all of Kern County (as well as seven other counties in the Central Valley) and thus subject to the jurisdiction of two air districts: The San Joaquin Valley Unified APCD and the Eastern Kern APCD. Among other elements, the EPA approved “the ROP plans (the original 1994 submittal for 15% ROP requirements and the Kern District portion of the San Joaquin Valley, and the 1996 substitute submittal for post-1996 requirements) as meeting the 15% ROP requirements of section 182(b)(1) and the post-1996 ROP requirements of section 182(c)(2) of the Act.” 62 FR at 1172. In the corresponding regulatory language of the January 8, 1997 final rule, the EPA explicitly identified the approved 15% and post-1996 ROP elements from the San Joaquin Valley Unified APCD but failed to do the same for the Eastern Kern APCD. Compare 40 CFR 52.220(c)(204)(i)(D)(1) (for the San Joaquin Valley Unified APCD) with 40 CFR 52.220(c)(205)(i)(A)(1) (for the Eastern Kern APCD). 62 FR at 1186. To clarify that, in our 1997 final rule, the EPA approved the 15% and post-1996 ROP demonstrations from the Eastern Kern APCD for the 1-hour ozone standard, we propose to revise 40 CFR 52.220(c)(205)(i)(A)(1) to explicitly add the 15% ROP and post-1996 ROP plans to the existing list of approved elements.

Incorporation by Reference of Approved Rules 108 and 417: On April 22, 2004 (69 FR 21713), the EPA took final action to approve certain rules adopted by the Eastern Kern APCD, including Rules 108 (Stack Sampling) and 417 (Agricultural and Prescribed Burning). Due to erroneous amendatory instructions, the CFR was not updated to reflect this final action. More specifically, the amendatory instructions on page 21715 of the April 22, 2004 final rule should have added paragraph (c)(321)(i)(A) to section 40 CFR 52.220 instead of paragraph (c)(321)(i)(B) because the latter was already in use to identify certain rules adopted by the San Joaquin Valley Unified APCD. We propose to fix this

error by correcting the amendatory instructions.

El Dorado County AQMD

Reorganization of the CFR Affecting El Dorado County AQMD Rule 101: On October 10, 2001 (66 FR 51578), the EPA approved revisions to the El Dorado County AQMD portion of the California SIP. Among the approved revisions was El Dorado County AQMD Rule 101 (General Provisions and Definitions). The final rule codifies the approval of Rule 101 in paragraph 40 CFR 52.220(c)(280)(i)(B), which lists approved rules adopted by the El Dorado County AQMD, but due to a publishing error, the codification of the approval of Rule 101 is found in paragraph 40 CFR 52.220(c)(280)(i)(C), which lists EPA-approved rules adopted by the Yolo-Solano AQMD. We propose to fix this error accordingly.

Approval of El Dorado County AQMD Rule 1000.1 (Emission Statement Waiver): On May 26, 2004 (69 FR 29880), the EPA approved emissions statement rules for seven air districts in California, including Rule 1000 (Emission Statement) submitted for the El Dorado County AQMD portion of the California SIP. All but one of the emissions statement rules that were approved on May 26, 2004 include language providing a waiver to any class or category of stationary sources that emit less than 25 tons per year of volatile organic compounds (VOC) or oxides of nitrogen (NO_x) if certain conditions are met, which is consistent with CAA section 182(a)(3)(B)(ii). Unlike the rules that provide for the waiver as a paragraph within the emissions statement rule itself, the El Dorado County AQMD provides for the exemption in a separate rule, namely, Rule 1000.1 (Emission Statement Waiver).⁴ Although Rule 1000.1 was submitted along with Rule 1000 on November 12, 1992, we only listed the latter rule as approved in our May 26, 2004 final action but should have listed both. We propose to add Rule 1000.1 (Emission Statement Waiver) in paragraph 40 CFR 52.220(c)(190)(i)(C)(1) to clarify that our May 26, 2004 approval included both Rule 1000 and Rule 1000.1.

Reorganization of the CFR Affecting El Dorado County AQMD Actions Listed

⁴ El Dorado County AQMD Rule 1000.1 provides: “The APCO may waive this requirement to any class or category of stationary sources which emit less than 25 tons per year of oxides of nitrogen or reactive organic gas if the district provides the Air Resources Board with an emission inventory of sources emitting greater than 10 tons per year of nitrogen oxides or reactive organic gas based on the use of emission factors acceptable to the Air Resources Board.”

³ Footnote 4 states: “As indicated above, the SCAQMD has jurisdiction over the South Coast Air Basin (SCAB) and Coachella Valley PM-10 serious nonattainment areas. This Federal Register action for the SCAQMD excludes the Los Angeles County portion of the Southeast Desert AQMA, otherwise known as the Antelope Valley Region in Los Angeles County, which is now under the jurisdiction of the Antelope Valley Air Pollution Control District as of July 1, 1997.” 63 FR 42786, at 42788 (August 11, 1998).

in 40 CFR 52.220(c)(27)(viii): On July 9, 2008 (73 FR 39237), the EPA approved revisions to the Northern Sierra AQMD portion of the California SIP, including rescission of certain rules that had been adopted by the Nevada County APCD. In the July 9, 2008 final rule, we added regulatory language to reflect the rule rescissions in paragraph 40 CFR 52.220(c)(27)(vii), which lists rules and rule rescissions applicable to the Nevada County APCD portion of the California SIP, but due to a publisher's error, the regulatory language is found in paragraph 40 CFR 52.220(c)(27)(viii), which lists rules and rule rescissions applicable to the El Dorado County AQMD portion of the California SIP. We propose to fix this error accordingly.

Great Basin Unified APCD

Disapproval of Great Basin Unified APCD Rule 401 (Fugitive Dust): On August 13, 2009 (74 FR 40750), the EPA took final action to disapprove revisions to the Great Basin Unified APCD portion of the California SIP. Specifically, the EPA *disapproved* Great Basin Unified APCD Rule 401 (Fugitive Dust); however, we mistakenly added a paragraph incorporating this rule by reference in 40 CFR 52.220 ("Identification of plan") as if we had *approved* the rule as part of the California SIP. To correct this error, we propose to remove the corresponding paragraph (*i.e.*, 40 CFR 52.220(c)(350)(i)(A)(2)) from 40 CFR 52.220.

Lake County AQMD

Reinstatement of Lake County AQMD Tables I through IV: On June 27, 1997 (62 FR 34641), the EPA took final action to correct certain errors in previous actions on SIPs and SIP revisions by deleting without replacement the affected local rules. With respect to certain rules that were adopted by the Lake County AQMD, submitted by California on February 10, 1977, and approved by the EPA on August 4, 1978 (43 FR 34463), we added a paragraph, *i.e.*, (c)(37)(iv)(D), to 40 CFR 52.220 (Identification of plan) that states: "Previously approved on August 4, 1978 and now deleted without replacement Rules . . . , and Tables I to V." 62 FR at 34645. First, Lake County AQMD Table V (Table of Standards, Applicable Statewide) was *disapproved* on August 4, 1978 (43 FR 34463), and because it was disapproved, it was not part of the SIP and need not be deleted. Second, Lake County AQMD Table I (Agencies Designated to Issue Agricultural Burning Permits), Table II (Daily Quota of Agricultural Material that May Be Burned by Watershed), Table III (Guides

for Estimating Dry Weights of Several California Fuel Types), and Table IV (Particulate Matter Emissions Standard for Process Units and Process Equipment) are substantive provisions relied upon by certain prohibitory rules and were not approved "in error." We are proposing to reinstate Lake County AQMD Tables I through IV by revising the regulatory language in 40 CFR 52.220(c)(37)(iv)(D) accordingly.⁵

Mojave Desert AQMD

Rescission of Riverside County APCD Regulation V (Orchard or Citrus Grove Heaters): Riverside County APCD Regulation V includes the following rules: Rule 75 (Definitions), Rule 76 (Exceptions), Rule 77 (Permits Required), Rule 78 (Application of Permits), Rule 79 (Action on Applications), Rule 80 (Standards for Granting Permits), Rule 81 (General Restrictions and Conditions of Permits), Rule 83 (Denial of Applications), Rule 84 (Appeals), Rule 85 (Classification of Orchard, Field Crop or Citrus Grove Heaters), and Rule 86 (Prohibitions). California submitted Riverside County APCD Regulation V on February 21, 1972 as part of the original California SIP, and the EPA approved it on May 31, 1972 (37 FR 10842).

Regulation V was rescinded in the Southeast Desert portion of Riverside County at 43 FR 40011 (September 8, 1978), but was reinstated throughout Riverside County when the EPA approved a SIP revision extending the jurisdiction of the South Coast AQMD to the Southeast Desert portion of the county and replacing the SIP rules that had been in effect for the Southeast Desert portion of Riverside County with those that applied in the South Coast AQMD. *See* 47 FR 25013 (June 9, 1982). At that time, the applicable SIP for the South Coast AQMD included Regulation V because the EPA inadvertently failed to codify the rescission of the rules in an action affecting the South Coast AQMD portion of Riverside County published at 43 FR 25684 (June 14, 1978). In the June 14, 1978, final action, the EPA indicated: "The changes to Regulation VI, Orchard Grove Heaters, contained in the above mentioned submittals and being acted upon by this notice include total replacement of county rules by California Health and Safety Code sections covering Orchard Heaters." 43 FR at 25685. However, the

regulatory text deleting Regulation V without replacement was not included in the final rule, and thus, Regulation V became part of the legacy SIP inherited by the Mojave Desert AQMD when the Palo Verde Valley portion of Riverside County joined the Mojave Desert AQMD in 1994. In this action, we are proposing to add regulatory text deleting Regulation V consistent with our action as described in the preamble to the June 14, 1978 final rule and to delete Riverside County APCD Regulation V from the South Coast AQMD portion of the California SIP and to thereby delete Riverside County APCD Regulation V from the Mojave Desert AQMD portion of the California SIP.

Monterey Bay Air Resources District

Disapproval of Monterey Bay Air Resources District Rule 200 (Permits Required): On March 26, 2015 (80 FR 15899), the EPA took final action to approve or disapprove certain revisions to the Monterey Bay Air Resources District portion of the California SIP. One of the actions finalized on March 26, 2015 was the disapproval of an amended version of Rule 200 (Permits Required) that had been submitted on May 8, 2001. Although we *disapproved* Rule 200, we mistakenly added a paragraph incorporating this rule by reference in 40 CFR 52.220 ("Identification of plan") as if we had *approved* the rule as part of the California SIP. *See* 40 CFR 52.220(c)(284)(i)(A)(5). To correct this error, we propose to remove the corresponding paragraph (*i.e.*, (c)(284)(i)(A)(5)) from section 52.220 (Identification of plan).

Rescission of Monterey Bay Air Resources District Rule 208 (Standards for Granting Permits to Operate): In that same March 26, 2015, final rule (80 FR 15899), we approved the rescission of Monterey Bay District Rule 208 (Standards for Granting Permits to Operate), which had been submitted on February 6, 1985 and approved on July 13, 1987 (52 FR 26148), but we did not add corresponding regulatory language to remove the rule from the SIP. We propose to add a paragraph to 40 CFR 52.220(c)(159)(iii) to indicate that Monterey Bay District Rule 208 has been deleted without replacement.

North Coast Unified AQMD

Erroneous Amendatory Instruction for Disapproval of Certain Open Burning Rules: On May 18, 1981 (46 FR 27116), the EPA disapproved certain open burning rules adopted by the Santa Barbara County APCD, but the amendatory instructions erroneously listed the disapproved rules in

⁵ Since 1997, the EPA has approved newer versions of Lake County AQMD Tables I and II, and thus, as a practical matter, reinstatement of Tables I through IV, as approved in 1978, would only reinstate Tables III and IV as part of the current applicable SIP for the Lake County AQMD portion of the California SIP.

subparagraph (6) of 40 CFR 52.273(a), which lists disapproved rules adopted by the Humboldt County APCD. The correct listing should have been in subparagraph (19), which lists disapproved rules adopted by the Santa Barbara County APCD. The erroneous amendatory instructions were based on the previous format of 40 CFR 52.273 and failed to account for the complete re-organization of 40 CFR 52.273 that the EPA published that same year at 46 FR 3883 (January 16, 1981). We are proposing to revise paragraph 40 CFR 52.273 to accurately reflect the 1981 disapproval of the Santa Barbara County open burning rules.

Northern Sierra AQMD

Codification of Approval of Northern Sierra AQMD Rules 212 and 213: On September 16, 1997 (62 FR 48480), the EPA took direct final action to approve certain revisions to the Northern Sierra AQMD portion of the California SIP. In the direct final rule, we indicated that we were approving Northern Sierra AQMD Rules 212 (Process Weight Table) and 213 (Storage of Gasoline Products) along with many other district rules, see 62 FR 48481/column 1 and 62 FR at 48482/column 2; however, in the regulatory portion of the direct final rule, we failed to include Rules 212 and 213 in the list of approved rules. We are proposing to add Rules 212 and 213 to the list of approved rules in 40 CFR 52.220(c)(246)(i)(A)(1).

Reinstatement of Nevada County APCD Rule 404 (Excluding Paragraph (D)): On June 27, 1997 (62 FR 34641), the EPA took final action to correct certain errors in previous actions on SIPs and SIP revisions by deleting without replacement the affected local rules. With respect to a rule that was adopted by the Nevada County APCD, submitted by California on October 15, 1979, and approved by the EPA on May 18, 1981 (46 FR 27115), we added a paragraph, *i.e.*, (c)(52)(xii)(B), to 40 CFR 52.220 (Identification of plan) that states: “Previously approved on May 18, 1981 and now deleted without replacement Rule 404.” 62 FR at 34646. In our proposed error correction, 61 FR 38664 (July 25, 1996), we indicated that the rule we intended to delete was Rule 404 (“Emergency Variance Procedures”), but the correct title of Rule 404 is “Upset Conditions, Breakdown or Scheduled Maintenance,” and “Emergency Variance Procedures” is the title of paragraph (D) of Rule 404. Thus, we intended to delete only paragraph (D) of Rule 404 but erroneously indicated in the final rule that we were deleting without replacement the entire rule.

Accordingly, we propose to amend paragraph (c)(52)(xii)(B) to refer only to paragraph (D) of Rule 404.

V. Proposed Action and Request for Public Comment

The EPA has reviewed the rules listed in Table 1 above and determined that they were previously approved into the applicable California SIP in error. Deletion of these rules will not relax the applicable SIP and is consistent with the Act. Therefore, under section 110(k)(6) of the CAA, the EPA is proposing to delete the rules listed in Table 1 above and any earlier versions of these rules from the corresponding air pollution control district portions of the California SIP. These rules include general nuisance provisions, federal NSPS or NESHAP requirements, hearing board procedures, variance provisions, and local fee provisions. We are also proposing to make certain other corrections to fix errors in previous rulemakings on California SIP revisions as described in section IV above. We will accept comments from the public on this proposal until September 26, 2018.

VI. Incorporation by Reference

In this action, for the most part, the EPA is proposing to delete rules that were previously incorporated by reference from the applicable California SIP. However, we are also proposing to include in a final EPA rule regulatory text that reinstates incorporation by reference of certain rules that were previously incorporated by reference but deleted in error, and regulatory text that includes incorporation by reference of rules not previously incorporated. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to reinstate incorporation by reference Lake County AQMD Table I (Agencies Designated to Issue Agricultural Burning Permits), Table II (Daily Quota of Agricultural Material that May Be Burned by Watershed), Table III (Guides for Estimating Dry Weights of Several California Fuel Types), and Table IV (Particulate Matter Emissions Standard for Process Units and Process Equipment) and Nevada County APCD Rule 404 (Upset Conditions, Breakdown or Scheduled Maintenance) (excluding paragraph (D)) and to incorporate by reference Eastern Kern APCD Rules 108 (Stack Sampling) and 417 (Agricultural and Prescribed Burning), El Dorado County AQMD Rule 1000.1 (Emission Statement Waiver) and Northern Sierra AQMD Rules 212 (Process Weight Table) and 213 (Storage of Gasoline Products), as described in section IV of this preamble. The EPA has made, and

will continue to make, these materials available through www.regulations.gov and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

VII. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely corrects errors in previous rulemakings and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed 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 SIP approvals are exempted 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 Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address disproportionate human health or

environmental effects with practical, appropriate, 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 the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed 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).

List of Subjects in 40 CFR Part 52

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

Authority: 2 U.S.C. 7401 *et seq.*

Dated: August 8, 2018.

Deborah Jordan,

Acting Regional Administrator, Region IX.

[FR Doc. 2018-18408 Filed 8-24-18; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 97

[EPA-R06-OAR-2016-0611; FRL-9982-50—Region 6]

Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan: Proposal of Best Available Retrofit Technology (BART) and Interstate Transport Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On October 17, 2017, the EPA published a final rule partially approving the 2009 Texas Regional Haze State Implementation Plan (SIP) submission and promulgated a Federal Implementation Plan (FIP) for Texas to address certain outstanding Clean Air Act (CAA) regional haze requirements. Because the EPA believes that certain aspects of the final rule could benefit from additional public input, we are proposing to affirm our October 2017 SIP approval and FIP promulgation and to provide the public with an opportunity to comment on relevant aspects, as well as other specified related issues.

DATES: Comments must be received on or before October 26, 2018.

Public Hearing:

We are holding an information session, for the purpose of providing additional information and informal discussion for our proposal. We are also holding a public hearing to accept oral comments into the record:

Date: Wednesday, September 26, 2018

Time: Information Session: 1:30 p.m.–3:30 p.m.

Public hearing: 4:00 p.m.–8:00 p.m. (including a short break)

Location: Joe C. Thompson Conference Center (on the University of Texas (UT) Campus), Room 1.110, 2405 Robert Dedman Drive, Austin, Texas 78712.

For additional logistical information regarding the public hearing please see the **SUPPLEMENTARY INFORMATION** section of this action.

ADDRESSES: Submit your comments, identified by Docket No. EPA-R06-OAR-2016-0611, at <http://www.regulations.gov> or via email to R6-TX-BART@epa.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

Docket: The index to the docket for this action is available electronically at <http://www.regulations.gov> and in hard copy at the EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.*, copyrighted material), and some may not be publicly available at either location (*e.g.*, CBI).

The Texas regional haze SIP is also available online at: https://www.tceq.texas.gov/airquality/sip/bart/haze_sip.html.

www.tceq.texas.gov/airquality/sip/bart/haze_sip.html. It is also available for public inspection during official business hours, by appointment, at the Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT:

Jennifer Huser, Air Planning Section (6MM-AA), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733, telephone 214-665-7347; email address Huser.Jennifer@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

Joe C. Thompson Conference Center parking is adjacent to the building in Lot 40, located at the intersection of East Dean Keeton Street and Red River Street. Additional parking is available at the Manor Garage, located at the intersection of Clyde Littlefield Drive and Robert Dedman Drive. If arranged in advance, the UT Parking Office will allow buses to park along Dedman Drive near the Manor Garage for a fee.

The public hearing will provide interested parties the opportunity to present information and opinions to us concerning our proposal. Interested parties may also submit written comments, as discussed in the proposal. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at the public hearing. We will not respond to comments during the public hearing. When we publish our final action, we will provide written responses to all significant oral and written comments received on our proposal. To provide opportunities for questions and discussion, we will hold an information session prior to the public hearing. During the information session, EPA staff will be available to informally answer questions on our proposed action. Any comments made to EPA staff during an information session must still be provided orally during the public hearing, or formally in writing within 30 days after completion of the hearings, in order to be considered in the record.

At the public hearing, the hearing officer may limit the time available for each commenter to address the proposal to three minutes or less if the hearing officer determines it to be appropriate. We will not be providing equipment for commenters to show overhead slides or make computerized slide presentations. Any person may provide written or oral

Attachment 5

published on July 11, 1996. EPA will not institute a second comment period on this document.

EFFECTIVE DATE: This withdrawal is effective September 6, 1996.

FOR FURTHER INFORMATION CONTACT: William C. Denman, Regulatory Planning and Development Section, Air Programs Branch, United States Environmental Protection Agency, Region 4, Atlanta Federal Center, 100 Alabama Street, SW, Atlanta, Georgia 30303-3104, (404) 562-9030.

SUPPLEMENTARY INFORMATION: See the information provided in the direct final rule located in the final rules section of the July 11, 1996 Federal Register at (61 FR 36502), and in the document located in the proposed rule section of the July 11, 1996 Federal Register at (61 FR 36534).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone.

Dated: August 29, 1996.

A. Stanley Meiburg,

Acting Regional Administrator.

[FR Doc. 96-22809 Filed 9-5-96; 8:45 am]

BILLING CODE 6560-50-P

40 CFR Parts 52 and 81

[FRL-5560-4]

Approval and Promulgation of Implementation Plans; Designation of Areas for Air Quality Planning Purposes; Wyoming; Corrections

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rulemaking.

SUMMARY: EPA is promulgating corrections to the State Implementation Plan (SIP) for the State of Wyoming regarding the State's ambient standards for fluorides and hydrogen sulfide and the State's odor control regulation. EPA has determined that these rules were erroneously incorporated into the SIP. EPA is removing these rules from the approved Wyoming SIP because the rules do not have a reasonable connection to the national ambient air quality standards (NAAQS) and related air quality goals of the Clean Air Act. The intended effect of this correction to the SIP is to make the SIP consistent with the requirements of the Clean Air Act, as amended in 1990 ("the Act"), regarding EPA action on SIP submittals and SIPs for national primary and secondary ambient air quality standards.

In addition, EPA is amending the boundary description for the "Powder River Basin" PM-10 unclassifiable area in 40 CFR 81.351. EPA promulgated revisions to 40 CFR 81.351 in a November 3, 1995 rulemaking, and EPA erroneously published an incorrect boundary description for the Powder River Basin area. This document corrects that error.

DATES: This action will become effective on November 5, 1996, unless adverse comments are received within 30 days of publication. If the effective date is delayed, timely notice will be published in the Federal Register.

ADDRESSES: Copies of the documents relative to this action are available for inspection during normal business hours at the following location: Air Program, Environmental Protection Agency, Region VIII, 999 18th Street, Suite 500, Denver, Colorado 80202-2466.

FOR FURTHER INFORMATION CONTACT: Vicki Stamper, 8P2-A, Environmental Protection Agency, Region VIII, 999 18th Street, Suite 500, Denver, Colorado 80202-2466, (303) 312-6445.

SUPPLEMENTARY INFORMATION:

I. Corrections to SIP

The Act was first amended in 1970. At this time, a large number of SIPs were submitted to EPA to fulfill the new Federal requirements. In many cases, states and districts submitted their entire programs, including many elements not required pursuant to the Act. Due to resource constraints at that time, EPA's review of these submittals focused primarily on the required technical, legal, and enforcement elements of the submittals. At the time, EPA did not perform a detailed review of the numerous provisions submitted, to determine if each provision was related to protection of the NAAQS. Provisions approved as part of states' SIPs should generally be related to attainment and maintenance of the NAAQS, consistent with the authority in section 110 of the Act under which these plans are approved by EPA.

During a recent review of the contents of the Wyoming SIP, EPA determined that three provisions of the State's rules were approved as part of the SIP which did not have a reasonable connection to the NAAQS-related air quality goals of the Act. These State rules include the ambient standard for hydrogen sulfide in Section 7 of the Wyoming Air Quality Standards and Regulations (WAQSR), the 1972 version of the ambient standard for fluorides in Section 11 of

the WAQSR,¹ and the odor control rules in Section 16 of the WAQSR. In addition, documents included in the State's November 19, 1993 title V operating permit program submittal indicated that the State did not consider these three rules part of the federally-approved SIP. EPA consequently notified the State of this discrepancy in a June 26, 1995 letter and offered to correct the SIP pursuant to section 110(k)(6) of the Act by removing these three rules from the SIP, since they are not reasonably connected to the NAAQS-related air quality goals of the Act. The State responded in a letter dated September 19, 1995 requesting that EPA remove these three provisions from the approved SIP.

Section 110(k)(6) of the amended Act provides: Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

Since the State of Wyoming's rules for hydrogen sulfide ambient standards, fluoride ambient standards, and odor control have no reasonable connection to the NAAQS-related air quality goals of the Act and since the State has requested that EPA remove these rules from the approved SIP, EPA has found that approval of these State rules was in error. Consequently, EPA is removing Sections 7, 11, and 16 of the WAQSR from the approved Wyoming SIP pursuant to section 110(k)(6) of the Act.

II. Correction of Boundary Description for the Powder River Basin Area

On November 3, 1995, EPA promulgated revisions to the State of Wyoming's PM-10 area designation table in 40 CFR 81.351 pursuant to the State's adoption and EPA's approval of prevention of significant deterioration (PSD) increments for PM-10 (see 60 FR 55800). In that notice, EPA cited an earlier and incorrect boundary description for the area designated as the "Powder River Basin" in Campbell and Converse counties. EPA promulgated a revised boundary description for the Powder River Basin area on September 12, 1995 (60 FR 47299), and that revised boundary

¹ Section 11 of the WAQSR was amended by the State in 1986, but that version was never submitted to, or approved by, EPA as part of the SIP for Wyoming.

should have been reflected in the November 3, 1995 rulemaking. Therefore, this notice corrects the boundary description for the Powder River Basin area to reflect the September 12, 1995 rulemaking.

III. Final Action

EPA is removing Sections 7, 11, and 16 of the WAQSR from the approved Wyoming SIP pursuant to section 110(k)(6) of the Act. In addition, EPA is correcting the boundary description for the Powder River Basin PM-10 unclassifiable area in 40 CFR 81.351 to reflect the boundary description promulgated for the area on September 12, 1995 (60 FR 47299).

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this Federal Register publication, EPA is proposing to correct the SIP should adverse or critical comments be filed. Under the procedures established in the May 10, 1994 Federal Register (59 FR 24054), this action will be effective November 5, 1996, unless, by October 7, 1996, adverse or critical comments are received.

If such comments are received, this action will be withdrawn before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on this action serving as a proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective on November 5, 1996.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to a SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

IV. Administrative Requirements

A. Executive Order 12866

This action has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214-2225), as revised by a July 10, 1995 memorandum from Mary Nichols, Assistant Administrator for Air and

Radiation. The Office of Management and Budget (OMB) has exempted this regulatory action from E.O. 12866 review.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 600, *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000. This action does not impose any new requirements. Therefore, the Administrator certifies that this action will not have a significant impact on a substantial number of small entities.

C. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that this correction action promulgated does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action corrects this state implementation plan, pursuant to section 110(k)(6) of the Act, by removing three State rules that were erroneously incorporated into the SIP. Thus, this action will impose no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

D. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule

and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

E. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 5, 1996. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review must 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

40 CFR Part 52

Environmental protection, Air pollution control, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

Dated: August 14, 1996.

Jack W. McGraw,
Acting Regional Administrator.

Title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

Subpart ZZ—Wyoming

2. A new § 52.2634 is added to read as follows:

§ 52.2634 Correction of approved plan.

The following rules of the Wyoming Air Quality Standards and Regulations have been removed from the approved plan pursuant to section 110(k)(6) of the Clean Air Act (as amended in 1990): Section 7, Hydrogen Sulfide; Section 11, Fluorides; and Section 16, Odors.

PART 81—[AMENDED]

1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

2. In § 81.351, the Wyoming PM-10 table is amended by revising the entry

for "Powder River Basin" to read as follows:

§ 81.351 Wyoming.

* * * * *

WYOMING—PM-10

Designated area	Designation		Classification	
	Date	Type	Date	Type
* * * *	* * * *	* * * *	* * * *	* * * *
Campbell County (part) Converse County (part). That area bounded by Township 40 through 52 North, and Ranges 69 through 73 West, inclusive of the Sixth Principal Meridian, Campbell and Converse Counties, excluding the areas defined as the Pacific Power and Light Area, the Hampshire Energy Area, and the Kennecott/Puron PSD Baseline Area.—Powder River Basin.	11/15/90	Unclassifiable		
* * * *	* * * *	* * * *	* * * *	* * * *

* * * *

[FR Doc. 96-22645 Filed 9-5-96; 8:45 am]

BILLING CODE 6560-50-P

[FRL-5604-9]

40 CFR Part 300

National Oil and Hazardous Substances Contingency Plan; National Priorities List Update

AGENCY: Environmental Protection Agency.

ACTION: Notice of deletion of Whiteford Sales & Service, Inc., site from the National Priorities List.

SUMMARY: The U.S. Environmental Protection Agency (EPA) Region 5 announces the deletion of the Whiteford Sales & Service, Inc., (WSS) site from the National Priorities List (NPL). The NPL is Appendix B of 40 CFR Part 300 which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which EPA promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended. This action is being taken by EPA and the State of Indiana because it has been determined that all appropriate Fund-financed responses at the WSS site under CERCLA have been implemented, that the WSS site poses no significant threat to public health or the environment, and that no further clean-up action at the site is appropriate.

EFFECTIVE DATE: September 6, 1996.

FOR FURTHER INFORMATION CONTACT: Mary Tierney, U.S. EPA Region 5 (SR-6J), 77 W. Jackson Blvd., Chicago, IL 60604; (312) 886-4785. Information on the site is available at the local

information repository located at: The St. Joseph County Public Library, Main Branch, 122 W. Wayne St., South Bend, Indiana. Requests for copies of documents should be directed in writing to the Regional Docket Office. The contact for the Regional Docket Office is E. Levy, U.S. EPA Region 5 (MRI-13J), 77 W. Jackson Blvd., Chicago, IL 60604.

SUPPLEMENTARY INFORMATION: The site to be deleted from the NPL is the Whiteford Sales & Service, Inc. (WSS) site located within the city limits of South Bend, St. Joseph County, IN, approximately 1 and ½ miles southwest of downtown. A Notice of Intent to Delete for the site was published on May 3, 1996 in the Federal Register (61 FR 19889). The closing date for public comments on the Notice of Intent to Delete was June 3, 1996. EPA received no comments and, therefore, no Responsiveness Summary was prepared.

EPA identifies sites that appear to present a significant risk to public health, welfare, or the environment, and maintains the NPL as the list of those sites. Sites on the NPL may be the subject of Hazardous Substance Response Trust Fund (Fund) financed remedial actions. As described in § 300.425(e)(3) of the NCP, sites deleted from the NPL remain eligible for additional Fund-financed remedial actions in the unlikely event that conditions at the site warrant such actions. Deletion of a site from the NPL does not affect responsible party liability or impede agency efforts to recover costs associated with response efforts.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: August 13, 1996.

David A. Ullrich,

Acting Regional Administrator.

40 CFR Part 300 is amended as follows:

PART 300—[AMENDED]

1. The authority citation for Part 300 continues to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601-9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp.; p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp.; p. 193.

Appendix B—[Amended]

2. Table 1 of Appendix B to Part 300 is amended by removing the site "Whiteford Sales & Service/ Nationalease, South Bend, Indiana".

[FR Doc. 96-22650 Filed 9-5-96; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Parts 10 and 12

[CGD 94-029]

RIN 2115-AE94

Modernization of Examination Methods

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

Attachment 6

(C) During a 60-day period prescribed by the Librarian in a proceeding to set reasonable terms and rates for a new type of eligible nonsubscription service or new subscription service, or

(D) As otherwise agreed to by the parties.

(4) Phonorecords: During 1997 and each subsequent tenth calendar year.

(5) Digital Phonorecord Deliveries: During 1997 and each subsequent fifth calendar year, or as otherwise agreed to by the parties.

(6) Coin-operated phonorecord players (jukeboxes): Within one year of the expiration or termination of a negotiated license authorized by 17 U.S.C. 116.

* * * * *

§ 251.62 [Amended]

6. In § 251.62, paragraph (a) is amended by removing the word "subscription" and adding in its place the phrase "ephemeral recordings, certain" after the word "cable,".

Dated: November 18, 1998.

Marybeth Peters,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

[FR Doc. 98-31657 Filed 11-25-98; 8:45 am]

BILLING CODE 1410-33-U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region II Docket No. NY29-1-187a; FRL-6193-5]

Approval and Promulgation of Implementation Plans; New York

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is promulgating a correction to the State Implementation Plan (SIP) for the State of New York regarding the State's general prohibition on air pollution. EPA has determined that this rule was erroneously incorporated into the SIP. EPA is removing this rule from the approved New York SIP because the rule does not have a reasonable connection to the national ambient air quality standards (NAAQS) and related air quality goals of the Clean Air Act. The intended effect of this correction to the SIP is to make the SIP consistent with the requirements of the Clean Air Act, as amended in 1990 ("the Act"), regarding EPA action

on SIP submittals and SIPs for national primary and secondary ambient air quality standards.

EFFECTIVE DATE: This direct final rule is effective on January 26, 1999 without further notice, unless EPA receives adverse comment by December 28, 1998. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: All comments should be addressed to: Ronald Borsellino, Chief, Air Programs Branch, Environmental Protection Agency, Region II Office, 290 Broadway, New York, New York 10007-1866.

Copies of the documents relevant to this action are available for inspection during normal business hours at the following address:

Environmental Protection Agency, Region II Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007-1866.

FOR FURTHER INFORMATION CONTACT:

Henry Feingersh, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th floor, New York, New York 10007-1866, (212) 637-4249.

SUPPLEMENTARY INFORMATION:

I. Correction to SIP

EPA has determined that Part 211.2 of Title 6 of the New York Code of Rules and Regulations (NYCRR), which was approved in 1984 as part of the SIP, does not have a reasonable connection to the NAAQS and related air quality goals of the Clean Air Act and is not properly part of the SIP.

Part 211.2 is a general prohibition against air pollution. Such a general provision is not designed to control NAAQS pollutants such that EPA could rely on it as a NAAQS attainment and maintenance strategy. After it came to the attention of EPA that Part 211.2 was not properly part of the SIP, EPA in turn brought the matter to the attention of the New York State Department of Environmental Conservation (NYSDEC). NYSDEC shared EPA's understanding that Part 211.2 was improperly approved into the SIP.

EPA, pursuant to section 110(k)(6) of the Act, is correcting the SIP since Part 211.2 is not reasonably related to the NAAQS-related air quality goals of the Act. Section 110(k)(6) of the amended Act provides: "Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification or reclassification was in

error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise any such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and the public." It should be noted that section 110(k)(6) has also been used by EPA to delete an improperly approved odor provision from the Wyoming SIP. 61 FR 47058 (1996).

Since the State of New York's Part 211.2 has no reasonable connection to the NAAQS-related air quality goals of the Act, EPA has found that the approval of this State rule was in error. The State has reached the same conclusion and concurs with EPA's decision that Part 211.2 was submitted and approved in error and should be removed from the approved SIP. Consequently, EPA is removing 6 NYCRR Part 211.2 from the approved New York SIP, pursuant to section 110(k)(6) of the Act.

II. EPA Final Rulemaking Action

EPA is removing 6 NYCRR Part 211.2 of the New York air quality Administrative Rules from the approved New York SIP pursuant to section 110(k)(6) of the Act.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should relevant adverse comments be filed. This rule will be effective January 26, 1999 without further notice unless the Agency receives relevant adverse comments by December 28, 1998.

If EPA receives such comments, then EPA will publish a timely withdrawal of the final rule informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this rule. Any parties interested in commenting on this rule should do so at this time. If no such comments are received, the public is advised that this action will be effective on January 26, 1999 and no further action will be taken on the proposed rule.

III. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order (E.O.)

12866, entitled "Regulatory Planning and Review."

B. Executive Order 12875

Under E.O. 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a state, local, or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, E.O. 12875 requires EPA to develop an effective process permitting elected officials and other representatives of state, local, and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create a mandate on state, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of E.O. 12875 do not apply to this rule.

C. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to E.O. 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance

costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co., v. U.S. EPA*, 427 U.S. 246, 255-66 (1976); 42 U.S.C. 7410(a)(2).

F. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to state, local, or tribal governments in the aggregate, or to private sector, of \$100 million or more. Under Section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated annual costs of \$100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

G. 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 rule 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**. This rule is not a "major" rule as defined by 5 U.S.C. 804(2).

H. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 26, 1999. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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, Intergovernmental relations, Reporting and recordkeeping.

Dated: November 16, 1998.

William J. Muszynski,
Acting Regional Administrator, Region 2.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C 7401 *et seq.*

Subpart HH—New York

2. Section 52.1679 is amended by revising the entry for “Part 211, General Prohibitions” to read as follows:

§ 52.1679 EPA-approved New York State regulations.

New York State regulation	State effective date	Latest EPA approval date	Comments
* Part 211, General Prohibitions	* 8/11/83	* November 27, 1998 [citation of this document].	* Section 211.2 has been removed from the approved plan.
*	*	*	*

[FR Doc. 98–31542 Filed 11–25–98; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MO 055–1055; FRL–6134–3]

Approval and Promulgation of Implementation Plans; State of Missouri

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is taking final action to approve the State Implementation Plan (SIP) revisions submitted by the state of Missouri to broaden the current visible emissions rule exceptions to include smoke-generating devices. This revision would allow smoke generators to be used for military and other types of training when operated under applicable requirements.

DATES: This rule is effective on December 28, 1998.

ADDRESSES: Comment may be addressed to Kim Johnson, Environmental Protection Agency, Air Planning and Development Branch, 726 Minnesota Avenue, Kansas City, Kansas 66101.

Copies of the state submittal are available at the following address for inspection during normal business hours: Environmental Protection Agency, Air Planning and Development Branch, 726 Minnesota Avenue, Kansas City, Kansas 66101; and the Environmental Protection Agency, Air & Radiation Docket and Information Center, Air Docket (6102), 401 M Street, SW, Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Kim Johnson at (913) 551–7975.

SUPPLEMENTARY INFORMATION:

I. Background

This amendment broadens the current rule exceptions to include smoke-generating devices in general when a required permit or a written determination that a permit is not required has been issued. The amendment defines a smoke-generating device as a specialized piece of equipment which is not an integral part of a commercial, industrial or manufacturing process and whose sole purpose is the creation and dispersion of fine solid or liquid particles in a gaseous medium. This revision would allow smoke generators to be used for military training at such facilities as Fort Leonard Wood as long as such facilities operate in accordance with applicable permit requirements.

No comments were received in response to the public comment period regarding this rule action.

For more background information the reader is referred to the proposal for this rulemaking published on May 7, 1998, at 63 FR 25191.

II. Final Action

The EPA is taking final action to approve, as a revision to the SIP, the amendment to Rule 10 CSR 10–3.080, “Restriction of Emission of Visible Air Contaminants,” submitted by the state of Missouri on July 10, 1996.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to the SIP shall be considered separately in light of specific technical, economic, and environmental

factors and in relation to relevant statutory and regulatory requirements.

III. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866 entitled “Regulatory Planning and Review.”

B. Executive Order 12875

Under Executive Order 12875, the EPA may not issue a regulation that is not required by statute and that creates a mandate upon a state, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments or the EPA consults with those governments. If the EPA complies by consulting, Executive Order 12875 requires the EPA to provide to the OMB a description of the extent of the EPA’s prior consultation with representatives of affected state, local, and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires the EPA to develop an effective process permitting elected officials and other representatives of state, local and tribal governments “to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.”

Today’s rule does not create a mandate on state, local or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of

Attachment 7

Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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 rule 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 Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 15, 2006. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: March 6, 2006.

Richard E. Greene,

Regional Administrator, Region 6.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart SS—Texas

§ 52.2270 [Amended]

■ 2. The table in § 52.2270(c) entitled "EPA Approved Regulations in the Texas SIP" is amended under Chapter 106, Subchapter A, by removing the entry for section 106.5, "Public Notice."

[FR Doc. 06-2478 Filed 3-15-06; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2005-GA-0005-200601; FRL-8045-4]

Approval and Promulgation of Implementation Plans; Georgia: Approval of Revisions to the State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is correcting the State Implementation Plan (SIP) for the State of Georgia to remove a provision relating to a Georgia general "nuisance" rule. EPA has determined that this provision relating to Georgia Rule 391-3-1.02(2)(a)1, was erroneously incorporated into the SIP. EPA is removing this rule from the approved Georgia SIP because the Georgia rule is not related to the attainment and maintenance of the national ambient air quality standards (NAAQS). This final rule addresses comments made on the proposed rulemaking EPA previously published for this action.

DATES: *Effective Date:* This rule will be effective April 17, 2006.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2005-GA-0005. All documents in the docket are listed on the <http://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 <http://www.regulations.gov> or in hard copy at the Regulatory Development Section, Air Planning 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 to 4:30, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: Sean Lakeman, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9043. Mr. Lakeman can also be reached via electronic mail at lakeman.sean@epa.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. What Action Is EPA Taking?
- II. What Is the Background for the Action?
- III. Response to Comments
- IV. Final Action

V. Statutory and Executive Order Reviews

I. What Action Is EPA Taking?

EPA is taking final action to remove Georgia Rule 391–3–1.02(2)(a)1, a general “nuisance” provision, from the Georgia SIP. EPA has determined that this rule was erroneously incorporated into the SIP. EPA is removing this rule from the approved Georgia SIP, because the rule is not related to the attainment and maintenance of the NAAQS.

II. What Is the Background for the Action?

The first significant amendments to the Clean Air Act (CAA) occurred in 1970 and 1977. Following these amendments, a large number of SIPs were submitted to EPA to fulfill new Federal requirements. In many cases, states and districts submitted their entire programs, including many elements not required pursuant to the CAA. Due to resource constraints during this timeframe, EPA’s review of these submittals focused primarily on the required technical, legal, and enforcement elements of the submittals. At the time, EPA did not perform a detailed review of the numerous provisions submitted to determine if each provision was related to the attainment and maintenance of the NAAQS. However, provisions approved by EPA as part of states’ SIPs should generally be related to attainment and maintenance of the NAAQS, consistent with the authority in section 110 of the CAA under which these plans are approved by EPA.

During the process of responding to a recent citizen petition of a title V operating permit in Georgia, EPA determined that a provision of the State’s rules, approved as part of the SIP on January 3, 1980 (45 FR 780), is not related to the attainment and maintenance of the NAAQS. This State rule, “Georgia Air Quality Control Rule 391–3–1.02(2)(a)1,” is a general nuisance provision. Georgia has never used this rule as part of a Federal air quality standard attainment or maintenance plan. Georgia has also not relied on or attributed any emission reductions from this rule to any such plans (October 31, 2005, e-mail from Ron Methier, Georgia Environmental Protection Division, to Dick Schutt, U.S. Environmental Protection Agency.) For these reasons, EPA’s 1980 approval of this provision into the Georgia SIP was in error. EPA is therefore removing the provision from the approved SIP under the authority of section 110(k)(6) of the CAA. Section 110(k)(6) provides: “Whenever the Administrator determines that the Administrator’s

action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation, revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.”

On November 29, 2005 (70 FR 71446), EPA proposed to remove the provision from the approved SIP under the authority of section 110(k)(6) of the CAA. EPA subsequently received both supporting and adverse comments. At the request of several commenters, EPA reopened and extended the comment period through January 23, 2006 (71 FR 2177, January 13, 2006). In this action, EPA is addressing the adverse comments received and taking final action as described in Section I and Section IV.

III. Response to Comments

EPA received comments from three commenters who were in favor of the proposed change, five commenters who asked general questions, and two commenters who opposed the proposed change to the Georgia SIP. A summary of the adverse comments received on the proposed rule, published November 29, 2005 (70 FR 71446) and EPA’s response to these comments is presented below.

Comment: The commenter asserts that the purpose of the rule change proposed in the November 29, 2005 **Federal Register** notice (70 FR 71446) is to thwart citizen efforts to end hazardous air releases that they assert are a threat to their children, health, and economy.

Response: The purpose of SIPs, approved pursuant to section 110 of the CAA, is to implement a program to attain and maintain the NAAQS. The Georgia nuisance rule is not directed at either attainment or maintenance of any NAAQS. Therefore, through this action EPA is removing it from the federally approved Georgia SIP. The effect of this action is to remove the Georgia Rule for Air Quality Control, 391–3–1.02(2)(a)1, as a federally enforceable element of the state program to attain and maintain the NAAQS. However, EPA’s action does not affect the enforceability of the rule as a matter of state law. Nothing in today’s action affects citizens’ ability to use state law provisions to enforce the rule in state court.

Comment: The commenter asserts that “EPA did not provide any supporting documentation in the **Federal Register**

to support their contention that the Georgia Rule for Air Quality Control, 391–3–1.02(2)(a)1 is reiterated in Georgia Code Title 41-Nuisance Rule, or that the same protections from the release of hazardous air pollutants listed in CAA Title 1, section 112 can be obtained under the Georgia Nuisance Rule.”

Response: The commenter seems to show some confusion over the two different provisions of the CAA (section 110 and section 112). The commenter also seems to misunderstand the focus of SIPs and section 110 of the CAA. Section 110 focuses on attainment and maintenance of the NAAQS, while section 112 focuses on hazardous air pollutants. A SIP is a mechanism provided under the Act to ensure states attain and maintain national ambient air quality standards. Other provisions of the Act, such as section 112 provide for the direct Federal regulation of hazardous air pollutants. Whether the Georgia rule provides the same or similar protections against hazardous air pollutants as provided under the Federal program provided under section 112 of the Act is not relevant for EPA’s determination that the rule should not be included as part of a plan to address the NAAQS.

Comment: Several commenters assert the CAA requires state SIPs to contain enforceable emissions limitations and other control measures as may be necessary or appropriate to meet the applicable requirements and that the intent of the CAA was to provide states flexibility in creating their SIPs, as long as the state’s rules and regulations were at least as stringent as the CAA. Furthermore, the commenters assert the proposed rule seeks to overturn the Georgia Rule for Air Quality Control, 391–3–1.02(2)(a)1, which could be interpreted to be more protective of human health than provisions in the CAA.

Response: Section 116 of the CAA states that, “Nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.” Section 116 of the CAA thus explains that unless pre-empted under one of several

enumerated provisions of the Act, the state may adopt regulations more stringent than those required under the Act. It does not, however, as the commenter suggests, require that any "more stringent" state regulations be included as part of the federally enforceable SIP. EPA policy is that nuisance provisions unrelated to attainment and maintenance of the NAAQS should not be included as part of the SIP. (see 64 FR 7790, 66 FR 53657 and 69 FR 54006.)

Comment: Several commenters asserted that "EPA is overstepping its authority when proposing a rule change without a vote from the governing body, the Georgia Board of Natural Resources, which would also include the public participation provisions in CAA section 110."

Response: Although the commenters are correct in their assertion that public participation is a prerequisite to SIP revision submissions under the CAA section 110(a)(2), this stipulation applies to implementation plans submitted by a State under the CAA. The proposed correction invokes CAA section 110(k)(6), which states, "Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public." Since the approval of the Georgia Rule for Air Quality Control 391-3-1.02(2)(a)1 into the State of Georgia's SIP was in error, EPA is well within its authority to remove this component from the Georgia SIP without first requiring a SIP submission from the State. On November 29, 2005, notice of the proposed removal of the rule from the state SIP, including a 30-day comment period, was published in the **Federal Register**. On January 13, 2006, the comment period was extended through January 23, 2006.

Comment: The commenter asserts that the proposed rule, published on November 29, 2005 (70 FR 71446), is not supported by documentation of EPA's determination that the Georgia Rule for Air Quality Control, 391-3-1.02(2)(a)1, was erroneously incorporated into the State of Georgia's SIP.

Response: The proposed rule published on November 29, 2005 (70 FR 71446), states, "since the State's

"nuisance" provision is not directed at the attainment and maintenance of the NAAQS, EPA has found that its prior approval of this particular rule (into the SIP) was in error." This statement was supported by an examination of the SIP and an email exchange with the State, which confirmed that the provision at issue had not been relied on for purposes of attainment or maintenance of any NAAQS. 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 removed nuisance provisions from the SIPs of 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.)

Comment: The commenter asserts that the "rule change proposed in EPA-R04-OAR-2005-GA-0005-0001 is intended to circumvent agency responsibility to implement strategies to address disproportionately high and adverse human health and environmental effects of its programs, policies, and activities on minority populations and low-income population in Brunswick, Georgia," Executive Order 12898—Environmental Justice and Executive Order 13045—Protection of Children from Environmental Health Risks and Safety Risks.

Response: The CAA aims to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population * * * and to encourage and assist the development and operation of regional air pollution prevention control programs." 42 U.S.C. 7401(b)(1). Section 110 of the CAA requires states to adopt a plan which provides for implementation, maintenance, and enforcement of the national ambient air quality standards, including carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter and sulfur oxides. The purpose of this rulemaking action is to remove Georgia Air Quality Control Rule 391-3-1.02(2)(a)1 from the Georgia SIP, because it does not support the attainment and maintenance of the NAAQS. This rulemaking action does not invalidate the Georgia law or affect its applicability to Georgia sources. Facilities located in Georgia are still subject to the state nuisance provision. 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 purpose of the SIP is to address attainment and maintenance of the NAAQS in all areas of the country. Other programs under the CAA address hazardous air pollutants (see CAA section 112). The State of Georgia has adopted Maximum Achievable Control Technology (MACT) and National Emission Standards for Hazardous Air Pollutants (NESHAP) standards that reflect the federal standards, and these standards are enforceable through other mechanisms that do not include the Georgia SIP, which is affected by this rulemaking.

Comment: The commenter asserts that the "rule change proposed in EPA-R04-OAR-2005-GA-0005-0001, is intended to circumvent Executive Order 12866—Regulatory Planning and Review by not allowing for a comment period of at least 60 days." Several commenters requested that the comment period be extended. One commenter requested an extension of 60 days from the date the EPA "formally notified its legal counsel of the proposed rule," which it asserts was on December 15, 2005.

Response: SIPs are rulemakings 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. Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. The Office of Management and Budget has exempted this regulatory action from Executive Order 12866, entitled "Regulatory Planning and Review." We note that in response to comments received, EPA extended the comment period for the proposed rule change through January 23, 2006. See 71 FR 2177. It should be noted that EPA is not required to notify any entity of its rulemaking actions; notification of all parties is accomplished through publications in the **Federal Register**.

Comment: The commenter asserts that it followed the public participation requirements set forth for the title V permitting process and that through this action to remove 391-3-1-.02(2)(a)1 from the Georgia SIP, EPA is frustrating that process. A commenter further asserts that the purpose of the rule change proposed in EPA-OAR-2005-GA-0005-0001 is to thwart citizen efforts to end hazardous air releases that it claims are a "threat to our children, our health, and our economy."

Response: Although title V permits are required to contain conditions that

are necessary to assure compliance with all the applicable requirements of the CAA, including the requirements of the applicable SIP, the title V permit may also contain state-only enforceable requirements. Once the final rule takes effect, Georgia Rule 391–3–1–.02(2)(a)1 will become a state-only enforceable rule that will continue to be applicable to facilities in Georgia. For the reasons provided above, however, EPA believes this action to remove the nuisance provision from the SIP is appropriate.

Comment: The commenter asserts that “proposed rule R04–OAR–2005–GA–0005–0001 is not supported by documentation of EPA’s determination that the rule, Georgia Rule for Air Quality Control, 391–3–1.02(2)(a)1, was erroneously incorporated into the Georgia SIP.” Furthermore, the commenter alleges that “without supporting documentation, the EPA’s action in adopting this rule is arbitrary and capricious, and violates every aspect of the Administrative Procedures Act.”

Response: In support of its decision to remove Georgia Air Quality Control Rule 391–3–1–.02(2)(a)1 from the Georgia SIP, EPA determined that this is a general nuisance provision that is not related to the attainment and maintenance of the NAAQS. Georgia has never used this rule as part of a federal air quality standard attainment or maintenance plan. In addition, Georgia has not relied on or attributed any emission reductions from this rule to any such plans. 70 FR 71447 (November 29, 2005). In support of these conclusions, EPA relied on an email from Georgia that indicated it had checked its records and made these findings. As explained above, EPA’s action to exclude from the SIP a nuisance provision unrelated to attainment or maintenance of any NAAQS is consistent with prior Agency practice.

Comment: The commenter asserts that the Georgia Environmental Protection Division (EPD) has a history of allowing unregulated and unpermitted hazardous air releases from certain facilities. Furthermore, the commenter alleges that some permit applications had remained unacted upon by the Georgia EPD since 1986, and that without valid permits, emission control equipment operations are not enforceable by either the Georgia EPD or the EPA.

Response: Our action to exclude the nuisance provision from the Georgia SIP does not affect the enforceability of the rule as a matter of state law. The issue of whether Georgia adequately enforces or permits hazardous air pollutants has no bearing on whether the nuisance

provision should be part of a plan to attain and maintain standards for NAAQS.

Comment: The commenter questions the legal basis of the proposed action and whether there is a compelling reason to change the rule.

Response: In the **Federal Register** Notice proposing to remove the Georgia nuisance rule, 391–3–1.02(2)(a)1, from the Georgia SIP, 70 FR 71446, EPA cited the basis for its action. First, the Agency explained that the purpose of the SIP is to provide for how the state will attain and maintain the NAAQS. EPA then explained that because the nuisance rule is unrelated to attainment and maintenance of the NAAQS, “EPA’s 1980 approval of this provision into the Georgia SIP was in error and EPA is, therefore, proposing to remove the provision from the approved SIP under the authority of section 110(k)(6) of the CAA. Section 110(k)(6) provides: ‘Whenever the Administrator determines that the Administrator’s action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.’” 70 FR 71447 (Nov. 29, 2005).

Comment: The commenter alleges that a “reasonable person could easily find that the EPA blatantly misrepresented the purpose of the proposed rule change. At a minimum, the EPA is misusing their powers to propose rule changes in the **Federal Register**, and the case might actually be that the information presented in the **Federal Register** is fraudulent.”

Response: EPA vigorously disagrees with the commenter’s allegation that the Agency misrepresented, misused, or engaged in any other fraudulent practice in proposing this rule change. As provided above, EPA has an established history of removing and excluding state nuisance rules, which are unrelated to attaining or maintaining the NAAQS, from the SIP.

Comment: The commenter asked how the citizen’s petition of a Title V operating permit in Georgia led EPA to find an erroneously approved rule.

Response: The citizen’s petition of the Title V operating permit for the Hercules Corporation, in the State of Georgia, specifically cites the Georgia Rule for Air Quality Control, 391–3–1.02(2)(a)1 as a rule of which the

Hercules Corporation is in violation. Hence, through this petition, it was brought to EPA’s attention that this particular rule was incorporated into the Georgia SIP. Because EPA has concluded that this rule is unrelated to attainment or maintenance of any NAAQS and thus was erroneously approved into the SIP, EPA is using section 110(k)(6), error correction, to remove the rule from the approved SIP.

Comment: A commenter asked whether EPA had done any research to determine how many erroneous laws were approved by the EPA in their rush to approve SIPs.

Response: EPA has many rulemaking and other activities that are required under the CAA or that are otherwise a priority under the Act, and thus has not had the time or resources to perform an extensive review of the SIPs to determine if any rules are erroneously incorporated. However where, through other means errors in the SIPs come to light, it is appropriate for EPA to correct the errors.

Comment: The commenter asserts that the CAA requires states to hold public hearings when revising a SIP and that EPA should hold a public hearing on the removal of the “nuisance” rule from the SIP. The commenter also asserts that this is “particularly troublesome given that the SIP contained the nuisance rule for over 25 years and the proposed elimination was prompted only after a lawsuit was filed regarding the nuisance rule.”

Response: As outlined above, section 110(k)(6) does not require a public hearing when making a correction to a SIP. Section 110(k)(6) of the CAA states that “whenever” the Administrator determines that the Administrator’s action approving any plan “was in error,” the Administrator may in the same manner as the approval, revise such action as appropriate. By this action EPA is removing the provision from the Georgia SIP in the same manner as EPA approves SIPs.

IV. Final Action

Since Georgia Rule 391–3–1–.02(2)(a)1 is not directed at the attainment and maintenance of the NAAQS, EPA has found that its prior approval of this particular rule (into the SIP) was in error. Consequently, in order to correct this error, EPA is removing Georgia Rule 391–3–1–.02(2)(a)1 from the approved Georgia SIP pursuant to section 110(k)(6) of the CAA, and codifying this deletion by revising the appropriate paragraph under 40 CFR part 52, subpart L, section 52.570 (Identification of Plan).

V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a “significant regulatory action” and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001). This action merely corrects an error and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule corrects an error and does not impose any additional enforceable duty beyond that required by state law, it 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).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely

corrects an error, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. This rule also is not subject to Executive Order 13045 “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), because it is not economically significant.

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through the Office of Management and Budget, explanations when the Agency decides not to use available and applicable VCS. This action does not involve technical standards. Therefore, EPA did not consider the use of any VCS. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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 rule 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 May 15, 2006. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides, Volatile organic compounds.

Dated: March 6, 2006.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart L—Georgia

■ 2. Section 52.570 is amended in the table to paragraph (c) by revising the entry for “391–3–1–.02(2)(a) General Provisions” to read as follows:

§ 52.570 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED GEORGIA REGULATIONS				
State citation	Title/subject	State effective date	EPA approval date	Explanation
* 391–3–1–.02(2)(a)	* General Provisions	* 01/09/91	* 3/16/06 [Insert first page of publication].	* Except for paragraph 391–3–1–.02(2)(a)1.
*	*	*	*	*

Attachment 8

requirements of section 3(b) of E.O. 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act (CAA) do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of a flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. EPA.*, 427 U.S. 246, 256–66 (1976); 42 U.S.C. 7410(a)(2).

F. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 (“Unfunded Mandates Act”), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated annual costs to State, local, or tribal governments in the aggregate; or to private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule. EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated annual costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new

requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

G. 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 rule 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 rule is not a “major rule” as defined by 5 U.S.C. 804(2).

H. 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 April 19, 1999. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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, Nitrogen oxide, Ozone, Volatile organic compounds.

Dated: February 2, 1999.

David A. Ullrich,

Acting Regional Administrator, Region V.

Part 52, Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart O—Illinois

2. Section 52.720 is amended by adding paragraph (c)(146) to read as follows:

§ 52.720 Identification of plan.

* * * * *

(c) * * *
(146) On February 13, 1998, the Illinois Environmental Protection Agency (IEPA) submitted a revision to the Illinois State Implementation Plan (SIP). This revision amends certain sections of the Clean-Fuel Fleet Program (CFFP) in the Chicago ozone nonattainment area to reflect that fleet owners and operators will have an additional year to meet the purchase requirements of the CFFP. The amendment changes the first date by which owners or operators of fleets must submit annual reports to IEPA from November 1, 1998 to November 1, 1999. In addition, this revision corrects two credit values in the CFFP credit program.

(i) Incorporation by reference.

(A) 35 Illinois Administrative Code 241; Sections 241.113, 241.130, 241.140, 241.Appendix B.Table A, 241.Appendix B.Table D adopted in R95–12 at 19 Ill. Reg. 13265, effective September 11, 1995; amended in R98–8, at 21 Ill. Reg. 15767, effective November 25, 1997.

(ii) Other Material.

(A) February 13, 1998, letter and attachments from the Illinois Environmental Protection Agency’s Bureau of Air Chief to the United States Environmental Protection Agency’s Regional Air and Radiation Division Director submitting Illinois’ amendments to the Clean Fuel Fleet regulations as a revision to the ozone State Implementation Plan.

[FR Doc. 99–3522 Filed 2–16–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[M167–02–7275; FRL–6302–3]

Approval and Promulgation of Implementation Plans; Michigan: Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a correction to the State Implementation Plan (SIP) for the State of Michigan regarding the State’s emission limitations and prohibitions for air contaminant or water vapor. EPA has determined that Michigan’s air quality Administrative Rule, R336.1901 (Rule 901) was erroneously incorporated into the SIP. EPA is removing this rule from the

approved Michigan SIP because the rule does not have a reasonable connection to the national ambient air quality standards (NAAQS) and related air quality goals of the Clean Air Act. The intended effect of this correction to the SIP is to make the SIP consistent with the requirements of the Clean Air Act, as amended in 1990 ("the Act"), regarding EPA action on SIP submittals and SIPs for national primary and secondary ambient air quality standards.

EFFECTIVE DATE: This final rule is effective on March 19, 1999.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the following address: United States Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. (Please telephone Victoria Hayden at (312) 886-4023 before visiting the Region 5 Office.)

A copy of this SIP revision is available for inspection at the following location: Office of Air and Radiation (OAR) Docket and Information Center (Air Docket 6102), room M1500, United States Environmental Protection Agency, 401 M Street S.W., Washington, D.C. 20460, (202) 260-7548.

FOR FURTHER INFORMATION CONTACT: Victoria Hayden, Environmental Engineer, Regulation Development Section (AR-18J), Air Programs Branch, Air and Radiation Division, United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604; Telephone Number (312) 886-4023.

SUPPLEMENTARY INFORMATION: On May 19, 1998, EPA published a direct final rule (63 FR 27492) approving the removal of Rule 901 of the Michigan air quality Administrative Rules from the approved Michigan SIP pursuant to section 110(k)(6) of the Act. The formal SIP correction request was submitted by the Michigan Department of Environmental Quality on January 29, 1998. In the May 19, 1998 direct final rulemaking, EPA stated that if adverse comments were received on the final approval within 30 days of its publication, EPA would publish a document announcing the withdrawal of its direct final rulemaking action. Because EPA received adverse comments on the direct final rulemaking within the prescribed comment period, EPA withdrew the May 19, 1998 final rulemaking action to remove Rule 901 from Michigan's approved SIP. This withdrawal document appeared in the **Federal Register** on July 29, 1998 [63 FR 40370].

A companion proposed rulemaking notice to approve the removal of Rule 901 from Michigan's approved SIP was published in the Proposed Rules section of the May 19, 1998 **Federal Register** (63 FR 27541).

Response to Comments

Several groups submitted letters commenting on the May 19, 1998 direct final rulemaking that were both opposed to and in favor of the removal of Rule 901 from the State of Michigan's approved SIP. About half of the letters received were from community organizations and environmental organizations from across the State that urged EPA to maintain Rule 901 as part of Michigan's approved SIP stating its importance to the citizens of Michigan's health, welfare and quality of life. Other letters received, largely representing industry, supported EPA's May 19, 1998 direct final rulemaking to remove Rule 901. EPA evaluated the comments, which have been incorporated into the docket for the rulemaking. The following discussion summarizes and responds to the comments received.

Comment: It is important to have broad environmental statutes like Rule 901 in the SIP to protect local air quality.

Response: Michigan Rule 901 is a general rule that prohibits the emission of an air contaminant which is injurious to human health or safety, animal life, plant life of significant economic value, property, or which causes unreasonable interference with the comfortable enjoyment of life and property. It is a State rule that has been primarily used to address odors and other local nuisances. Historically, the rule has not been used for purposes of attaining or maintaining any of the National Ambient Air Quality Standards (NAAQS). In accordance with the Clean Air Act, only rules pertaining to the attainment and maintenance of the NAAQS can be lawfully required as part of a SIP.

Comment: Communities need the assistance of federal agencies to challenge State and local authorities to do all that is in their power to reduce pollution in local neighborhoods. One commentator references a particular neighborhood that suffers from heavy odors from surrounding industrial and municipal sources.

Response: The Clean Air Act does not authorize the EPA to specifically require States to adopt rules to address odors and nuisances as part of their SIPs. Only rules that have a reasonable connection to the NAAQS and related air quality goals of the Clean Air Act are required. Rule 901 was never submitted for

purposes of attaining or maintaining the NAAQS and was, therefore, incorrectly submitted to EPA for inclusion in the SIP. Although Rule 901 will be removed from the SIP, Rule 901 will remain as a State rule and still be enforceable at the State level. In addition, Michigan has submitted, and EPA has approved, regulations to attain the NAAQS under the Clean Air Act. These regulations are directly related to protecting human health and will continue to be federally enforceable.

Comment: Rule 901 is the only rule that provides basis for enforcement actions related to odor and nuisance offenses. A commentator hopes that the removal of Rule 901 results in a substitute rule that is more relevant and can be readily enforced by the State. Residents of the State of Michigan should have the protection from odors, fumes in high concentrations, blowing dust, and other negative air quality issues that the local and county municipal governments cannot or are unable to enforce because of the cost or because of the lack of expertise or jurisdiction.

Response: As stated previously, the Clean Air Act does not authorize EPA to specifically require the State to develop rules to address odor and nuisance offenses. The Clean Air Act does require States to develop rules to protect public health and welfare. If a pollution source or combination of sources is presenting an imminent and substantial endangerment to public health or welfare, or the environment, the State of Michigan, as well as the EPA, have the ability under section 303 of the Act to take action against that source. Because the Clean Air Act does not require State rules to address odors and nuisances, EPA is approving the removal of Rule 901 from Michigan's approved SIP.

Final Action

The EPA is approving the removal of Rule 901 of the Michigan air quality Administrative Rules from the approved Michigan SIP pursuant to section 110(k)(6) of the Act.

Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from review under Executive Order 12866, entitled "Regulatory Planning and Review."

B. Executive Order 12875

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a state, local, or tribal

government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected state, local, and tribal governments, the nature of their concerns, copies of written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of state, local, and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates." Today's rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

C. Executive Order 13045

Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that the EPA determines (1) is "economically significant," as defined under Executive Order 12866, and (2) the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effect of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to Executive Order 13045 because it is not an economically significant regulatory action as defined by Executive Order 12866, and it does not address an environmental health or safety risk that would have a disproportionate effect on children.

D. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly affects or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal

governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities." Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian Tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. This final rule will not have a significant impact on a substantial number of small entities because it removes requirements from the SIP. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities.

F. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, the EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of \$100 million or more. Under Section 205, the EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires the EPA to establish a plan for informing and advising any small governments that

may be significantly or uniquely impacted by the rule.

This is an action to remove rules from the Michigan SIP. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

G. 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 rule 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**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

H. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 19, 1999. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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, Reporting and recordkeeping.

Authority: 42 U.S.C. 7401-7671q.

Dated: February 2, 1999.

David A. Ullrich,
Acting Regional Administrator.

40 CFR Part 52, is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C 7401-7671q.

Subpart X-Michigan

2. Section 52.1174 is amended by adding paragraph (q) to read as follows:

§ 52.1174 Control strategy: Ozone.

* * * * *

(q) Correction of approved plan—Michigan air quality Administrative Rule, R336.1901 (Rule 901)—Air Contaminant or Water Vapor, has been removed from the approved plan pursuant to section 110(k)(6) of the Clean Air Act (as amended in 1990).

[FR Doc. 99–3837 Filed 2–16–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Parts 61 and 63**

[FRL–6233–6]

Approval of the Clean Air Act, Section 112(l), Delegation of Authority to Three Local Air Agencies in Washington; Correction and Clarification

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule and delegation of authority; correction and clarification.

SUMMARY: This action provides a correction and clarification to a direct final **Federal Register** action published on December 1, 1998 (see 63 FR 66054), that granted Clean Air Act, section 112(l), delegation of authority for three local air agencies in Washington to implement and enforce specific 40 CFR parts 61 and 63 federal National Emission Standards for the Hazardous Air Pollutants (NESHAP) regulations which have been adopted into local law. This action corrects several typographical errors in the EPA Action section of the preamble of the December 1, 1998, direct final rule, and also clarifies the extent of that delegation with respect to Indian country.

DATES: This action is effective on February 17, 1999.

ADDRESSES: Copies of the requests for delegation and other supporting documentation are available for public inspection at the following location: U.S. Environmental Protection Agency, Region X, Office of Air Quality (OAQ–107), 1200 Sixth Avenue, Seattle, WA, 98101.

FOR FURTHER INFORMATION CONTACT: Andrea Wullenweber, US EPA, Region X (OAQ–107), 1200 Sixth Avenue, Seattle, WA, 98101, (206) 553–8760.

SUPPLEMENTARY INFORMATION:**I Administrative Requirements**

Under Executive Order (E.O.) 12866, Regulatory Planning and Review (58 FR 51735, October 4, 1993), this action is

not a “significant regulatory action” and is therefore, not subject to review by the Office of Management and Budget. In addition, this action does not impose any enforceable duty, contain any unfunded mandate, or impose any significant or unique impact on small governments as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This rule also does not require prior consultation with State, local, and tribal government officials as specified by Executive Order 12875 (58 FR 58093, October 28, 1993) or Executive Order 13084 (63 FR 27655, May 10, 1998), or involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). Because this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), entitled “Protection of Children from Environmental Health Risks and Safety Risks,” because EPA interprets E.O. 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This rule is not subject to E.O. 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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 rule 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**. This rule 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 April 19, 1999. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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)).

II Clarification

On December 1, 1998, EPA promulgated direct final approval of the Washington Department of Ecology (Ecology) request, on behalf of three local air agencies, for program approval and delegation of authority to implement and enforce specific 40 CFR parts 61 and 63 federal NESHAP regulations which have been adopted into local law (as apply to both Part 70 and non-Part 70 sources). The three local air agencies that will be implementing and enforcing these regulations are: the Northwest Air Pollution Authority (NWAPA); the Puget Sound Air Pollution Control Agency (PSAPCA); and the Southwest Air Pollution Control Authority (SWAPCA). In the direct final rule and delegation of authority, an explanation of the applicability of that action to sources and activities located in Indian country was inadvertently omitted. Beginning on page 66054, in the issue of Tuesday, December 1, 1998, make the following correction, in the EPA Action section of the preamble, at the end of the Delegation of Specific Standards subsection. On page 66057, in the second column, after the first paragraph, add the following statement:

“The delegation approved by this rule for NWAPA, PSAPCA, and SWAPCA to implement and enforce NESHAPs does not extend to sources or activities located in Indian country, as defined in 18 U.S.C. 1151. Consistent with previous federal program approvals or delegations, EPA will continue to implement the NESHAPs in Indian country because the local air agencies did not adequately demonstrate their authority over sources and activities located within the exterior boundaries of Indian reservations and other areas in Indian country.

The one exception to this limitation is within the boundaries of the Puyallup Indian Reservation, also known as the 1873 Survey Area. Under the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. 1773, Congress explicitly provided state and local agencies, such as PSAPCA, authority over activities on non-trust lands within the 1873 Survey Area. After consulting with the Puyallup Tribe of Indians, EPA’s delegation in this rule applies to sources and activities on non-trust lands within the 1873 Survey Area. Therefore, PSAPCA will implement and enforce

Attachment 9

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42.U.S.C. 7401–7671q.

Subpart S—Kentucky

2. Section 52.920, is amended by adding paragraph (c)(78) to read as follows:

§ 52.920 Identification of plan.

* * * * *

(c) * * *

(78) Operating Permit requiring VOC RACT for Calgon Corporation in the Kentucky portion of the Ashland/Huntington ozone nonattainment area, submitted November 11, 1994.

(i) Incorporation by reference. Natural Resources and Environmental Protection Cabinet; Kentucky Department for Environmental Protection; Division for Air Quality; Permit 0–94–020; Calgon Carbon Corporation, effective on November 17, 1994.

(ii) Other material. Letter of November 23, 1994, from the Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet.

[FR Doc. 95–12617 Filed 5–23–95; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 52

[MN30–1–6215a; FRL–5183–8]

Approval and Promulgation of Implementation Plans; Minnesota

AGENCY: Environmental Protection Agency.

ACTION: Direct final rule.

SUMMARY: Minnesota submitted a revision intended to simplify and update the rules in its State Implementation Plan (SIP). These revisions included deleting regulations that are redundant with Federal New Source Performance Standards (NSPS) regulations, removing odor regulations and other similar regulations from the SIP, and recodifying the regulations. In the case of open burning, the State requested removal of the regulations from the SIP or, in the alternative, replacing these regulations with statutes that regulate open burning. USEPA is replacing the open burning regulations in the SIP with the new statutes and is approving all other revisions requested by the State.

EFFECTIVE DATE: This action will be effective July 24, 1995 unless adverse or critical comments are received by June 23, 1995. If the effective date is delayed,

timely notice will be published in the **Federal Register**.

ADDRESSES: Written comments should be addressed to: William L. MacDowell, Chief, Regulation Development Section, Air Enforcement Branch (AE–17J), United States Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Copies of the SIP revision request and U.S. EPA's analysis are available for public inspection during normal business hours at the following addresses: United States Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard (AE–17J), Chicago, Illinois 60604; and Jerry Kurtzweg (6102), United States Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: John Summerhays, Air Enforcement Branch, Regulation Development Section (AE–17J), United States Environmental Protection Agency, Region 5, Chicago, Illinois 60604, (312) 886–6067.

SUPPLEMENTARY INFORMATION:**I. Review of State Submittal**

On November 23, 1993, the Minnesota Pollution Control Agency (MPCA) submitted a request to (1) eliminate a number of regulations that need not be included in the Minnesota State Implementation Plan (SIP), (2) recodify the remaining regulations, and (3) make miscellaneous other changes. Each of these types of revisions are discussed in separate sections below.

Elimination of Regulations

MPCA recommended elimination of several categories of regulations from the SIP. The category with the most regulations recommended for elimination are regulations that repeat the requirements for new sources established by the United States Environmental Protection Agency (USEPA) in various New Source Performance Standards (NSPS). Some of these regulations also govern emissions from “existing sources,” i.e. sources that existed before the effective date of or otherwise not subject to a relevant NSPS. Most of these regulations were submitted in 1981. In its 1982 rulemaking on these regulations, USEPA approved these regulations only for “existing sources,” reflecting concern that these regulations would either be unnecessary by virtue of being redundant with Federal NSPS or be detrimental by virtue of causing uncertainty as to which of conflicting State versus Federal provisions apply. In this context, “existing sources”

should be considered not only to include sources that existed prior to the effective date of the NSPS but also to include sources that are newer but are not subject to the NSPS due to size or other reasons.

Minnesota's submittal refines the list of rules which, by USEPA's approach, should be removed from the SIP or applied only to “existing sources.” In the cases of regulations for portland cement plants, asphalt concrete plants, grain elevators, sulfuric acid plants, and nitric acid plants, the State has specified which portions of the relevant sets of rules regulate new sources and which portions regulate existing sources. In the cases of regulations for lead smelters and brass and bronze plants, there are no existing brass or bronze plants and the only existing lead smelter is subject to a separate more stringent administrative order in the SIP. Therefore, the regulations apply only to new sources and should be eliminated from the SIP in their entirety. In the cases of regulations for incinerators and sewage sludge incinerators, MPCA does not identify portions of the rules that only apply to new sources but comments that USEPA should state that the SIP only includes these rules as they apply to existing sources (which again may include newly constructed sources that are not subject to NSPS). USEPA concurs with Minnesota's list of which of these rules should be removed from the SIP, and is modifying the SIP accordingly.

A second set of regulations recommended for elimination concern odors and acid/base fallout. MPCA's submittal states that these regulations were not intended for purposes of achieving air quality standards or other Clean Air Act purposes and remain unnecessary for such purposes. Specifically, Minnesota requests on this basis that USEPA delete the set of regulations entitled Ambient Odor Control, the set entitled Limits for Animal Matter Odors, and the set entitled Limits on Acid, Base Emissions. These regulations were adopted around 1970 and were submitted and approved as part of a package that included all extant air pollution regulations. USEPA concurs with Minnesota's request and is removing these regulations from the SIP.

A third set of regulations recommended for elimination concern indirect sources. These regulations establish permitting requirements for the facilities such as highways, shopping malls, and airports that attract motor vehicles and thus indirectly cause mobile source emissions. These regulations were submitted in 1981 and approved by USEPA in 1982.

Nevertheless, section 110(a)(5)(A)(iii) of the Clean Air Act (added in 1977) states that "Any State may * * * suspend or revoke any [indirect source review program], provided the [implementation plan] meets the requirements of [section 110]." Minnesota is maintaining these regulations as State enforceable requirements, and will continue to implement indirect source review, but the State is seeking to remove these regulations from the federally enforceable SIP. The SIP has been found to meet the requirements of Section 110, and so the criteria in section 110(a)(5)(A)(iii) for removal of the indirect source regulations from Minnesota's SIP have been satisfied. Consequently, USEPA is removing these regulations from the SIP.

A final set of regulations recommended for elimination concern open burning. MPCA explained that the Minnesota Legislature rescinded these air pollution regulations and incorporated similar restrictions into legislation administered by the Minnesota Department of Natural Resources (DNR). MPCA argued that particulate matter emitted from open burning was not found to be significant in the State's development of plans to address the nonattainment areas, and argued that these regulations may be considered to be nuisance regulations rather than particulate matter regulations. Nevertheless, MPCA's submittal states "If the EPA does not approve the MPCA's request to remove the open burning program from the SIP, then the MPCA requests that the applicable portions of [the current statute that addresses open burning] be incorporated as part of Minnesota's SIP * * *."

Minnesota's open burning regulations generally prohibit open burning of leaves and other vegetative material, with exemptions for campfires and cooking and exemptions for certain types of burning which may be conducted upon receipt of a permit. Open burning causes emissions most notably of particulate matter and also of carbon monoxide, hydrocarbons, and air toxicants. MPCA has not attempted to analyze the ambient impact of eliminating these restrictions. Available evidence is limited but suggests that the impacts of open burning can be significant. Therefore, absent evidence to the contrary, USEPA finds that open burning should be retained as part of the Minnesota SIP. USEPA further finds that the alternative of revising the SIP by replacing the old regulations with the new statute is fully appropriate. The statute provides essentially the same or better air quality benefits insofar as it

provides for more effective administration of similar restrictions. This alternative would remove the open burning program from "MPCA's regulatory program," as requested by MPCA. (This portion of the SIP would be administered by the Minnesota DNR.) Although Minnesota planned in any case to continue the open burning restrictions in force, this alternative would retain these restrictions as part of the Federal SIP, thereby retaining Federal authority to object should the State subsequently wish to end the restrictions. Therefore, USEPA is approving Minnesota's alternative of replacing MPCA regulations with State statutes.

Recodification

MPCA requested that USEPA renumber the rules in the SIP to be consistent with the State's current numbering system. This renumbering itself would not change any of the substance of the requirements included in these rules. USEPA approves this renumbering, to make the SIP consistent with current State rule numbering.

Other Revisions

The most significant other revisions requested by MPCA concern the definitions given in Rule 7005.0100. All of the definitions requested by MPCA are acceptable. However, rulemaking on these revisions is complicated by the interrelationship with other rulemakings on Rule 7005.0100. In USEPA's rulemaking on a prior recodification request (published March 23, 1993, at 58 FR 15433), USEPA chose not to approve post-1985 revisions to Rule 7005.0100 due to their significance to permitting rules which were still under review. Recent rulemaking on a subsequent set of permitting rules approved selected revisions to this rule. Consequently, this submittal includes only a small number of definitions that differ from definitions that have already been approved. Nevertheless, for convenience, USEPA is approving the full set of definitions in Rule 7005.0100 as submitted by MPCA. (Note that Subpart 25a, defining "National Emissions Standards for Hazardous Air Pollutant," was excluded from MPCA's submittal and is therefore excluded from the approved SIP.)

A further significant revision included in MPCA's recodification submittal is an enhancement of requirements for sources to report emissions. (These provisions do not address the requirements in amended section 114 of the Clean Air Act for enhanced compliance monitoring.) USEPA approves this revision, which

would replace Rule 7005.1870 (4) with Rules 7019.3000 and 7019.3010.

Rulemaking Action

USEPA is making various revisions in accordance with Minnesota's request. USEPA is recodifying the SIP to reflect the new Minnesota rule numbering. In addition, this action (1) replaces the open burning regulations with the current statutory provisions (rather than removing the restrictions altogether), (2) modifies the delineation of new source limits that are excluded from the SIP, (3) removes the odor regulations and indirect source regulations from the SIP, (4) incorporates the enhanced emission reporting regulations, and (5) makes various other minor revisions requested by MPCA. The codification of this rulemaking delineates the revised SIP. The specific regulations that are revised by this action are discussed in detail in the technical support document for this rulemaking.

This action is being taken without prior proposal because the changes are believed to be noncontroversial and USEPA anticipates no significant comments on them. This action will be effective July 24, 1995 unless adverse or critical comments are received by June 23, 1995.

Nothing in this action should be construed as permitting, allowing or establishing a precedent for any future request for revision to any SIP. USEPA shall consider each request for revision to the SIP in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

This action has been classified as a Table 3 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214-2225), as revised by an October 4, 1993 memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation. The OMB has exempted this regulatory action from Executive Order 12866 review.

Under the Regulatory Flexibility Act, 5 U.S.C. § 600 *et seq.*, USEPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. (5 U.S.C. §§ 603 and 604.) Alternatively, USEPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D of the CAA do not create any new requirements, but

simply approve requirements that the State is already imposing. Therefore, because the Federal SIP-approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The CAA forbids USEPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. USEPA*, 427 U.S. 246, 256–66 (S.Ct. 1976); 42 U.S.C. section 7410(a)(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [60 days from the date of publication]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, New source review, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides, Volatile organic compounds.

Note: Incorporation by reference of the State Implementation Plan for the State of Minnesota was approved by the Director of the Federal Register on July 1, 1982.

Dated: March 20, 1995.

David A. Ullrich,

Acting Regional Administrator.

Title 40 of the Code of Federal Regulations, chapter I, 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. 7401–7671q.

2. Section 52.1220 is amended by adding paragraph (c)(40) to read as follows:

§ 52.1220 Identification of plan.

* * * * *

(c) * * *

(40) On November 23, 1993, the State of Minnesota requested recodification of the regulations in its State Implementation Plan, requested removal of various regulations, and submitted recodified regulations containing minor revisions.

(i) Incorporation by reference.

(A) Minnesota regulations in Chapters 7005, 7007, 7009, 7011, 7017, 7019, and 7023, effective October 18, 1993.

(B) Submitted portions of Minnesota Statutes Sections 17.135, 88.01, 88.02, 88.03, 88.16, 88.17, and 88.171, effective 1993.

3. Section 52.1222 is revised to read as follows:

§ 52.1222 EPA-approved Minnesota State regulations.

The following table identifies the State regulations submitted to and approved by EPA as revisions to the Minnesota State Implementation Plan (SIP). This table is for informational purposes only and does not have any independent regulatory effect. This table also does not include administrative orders that have been approved into the SIP. To determine regulatory requirements for a specific situation consult the plan identified in § 52.1220. To the extent that this table conflicts with § 52.1220, § 52.1220 governs.

TABLE 52.1222.—EPA APPROVED REGULATIONS

Rule description	Minnesota rule numbers	Contents of SIP	Effective date	Relevant ¶s in § 52.1220 ¹
Definitions and Abbreviations	7005.0100–.0110	Full rules except def'n of NESHAP.	10/18/93	b,c20,c40.
Air Emission Permits	7007.0050–.1850	Full rules	8/10/93	b,c3,c5, c24,c26,c39.
Offsets	7007.4000–.4030	Full rules	10/18/93	c33.
Ambient Air Quality Standards ...	7009.0010–.0080	All except 7009.0030 and 7009.0040.	10/18/93	b,c3,c26.
Air Pollution Episodes	7009.1000–.1110	Full rules	10/18/93	c1,c21.
Applicability	7011.0010, .0020	Full rules	10/18/93	b,c20
Opacity	7011.0100–.0120	All except 7011.0120	10/18/93	b,c3,c20.
Fugitive Particulate	7011.0150	Full rules	10/18/93	b.
Indirect Heating Equipment	7011.0500–.0550	Full rules	10/18/93	b,c3,c20,c21
Direct Heating Equipment	7011.0600–.0620	Full rules	10/18/93	c20,c21.
Industrial Process Equipment	7011.0700–.0735	Full rules	10/18/93	b,c20
Portland Cement Plants	7011.0800–.0825	All except 7011.0810	10/18/93	c20,c40.
Asphalt Concrete Plants	7011.0900–.0920	All except 7011.0910	10/18/93	c20,c40.
Grain Elevators	7011.1000–.1015	All except 7011.1005(2)	10/18/93	c20,c25,c40.
Coal Handling Facilities	7011.1100–.1140	All except 7011.1130	10/18/93	c21.
Incinerators	7011.1201–.1207	All rules for “existing sources” ² ..	10/18/93	b,c20,c40.
Sewage Sludge Incinerators	7011.1300–.1325	All rules for “existing sources” ...	10/18/93	c20,c40
Petroleum Refineries	7011.1400–.1430	All rules for “existing sources” ...	10/18/93	c20,c21.
Liquid Petroleum and VOC Storage Vessels.	7011.1500–.1515	All rules for “existing sources” ...	10/18/93	b,c21.
Sulfuric Acid Plants	7011.1600–.1630	All except 7011.1610	10/18/93	b,c3,c21,c40
Nitric Acid Plants	7011.1700–.1725	All except 7011.1710	10/18/93	b,c3,c21,c40.
Inorganic Fibrous Materials	7011.2100–.2105	All rules	10/18/93	c20.
Stationary Internal Combustion Engine.	7011.2300	Entire rule	10/18/93	b,c21.
CEMS	7017.1000	Entire Rule	10/18/93	c20.
Performance Tests	7017.2000	Entire Rule	10/18/93	c20.
Notifications	7019.1000	Entire Rule	10/18/93	c20.
Reports	7019.2000	Entire Rule	10/18/93	c20.
Emission Inventory	7019.3000, .3010	All rules	10/18/93	c20,c40.

TABLE 52.1222.—EPA APPROVED REGULATIONS—Continued

Rule description	Minnesota rule numbers	Contents of SIP	Effective date	Relevant ¶s in § 52.1220 ¹
Motor Vehicles Open Burning	7023.0100–.0120 Portions of Chapter 17 and 88 of MN Statutes.	All rules All submitted portions of Sections 17.135, 88.01, 88.02, 88.03, 88.16, 88.17, and 88.171.	10/18/93 1993	b,c21. b,c21,c26, c40.

¹ Recodifications affect essentially all rules but are shown only for substantively revised rules.² "Existing" sources are sources other than those subject to a new source performance standard.

[FR Doc. 95–12619 Filed 5–23–95; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 180

[PP 3F4233/R2134; FRL–4953–9]

RIN 2070–AB78

Bromoxynil; Pesticide Tolerance**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: This document establishes a time-limited tolerance, to expire on April 1, 1997, for residues of the herbicide bromoxynil (3,5-dibromo-4-hydroxybenzonitrile) resulting from the application of its octanoic and heptanoic acid esters in or on the raw agricultural commodity (RAC) cottonseed (transgenic BXN varieties only) at 0.04 part per million (ppm). Rhone-Poulenc AG Co. submitted petitions requesting EPA to establish the maximum permissible residue of the herbicide in or on the RAC.

EFFECTIVE DATE: This regulation becomes effective May 24, 1995.

ADDRESSES: Written objections, identified by the document control number, [PP 3F4233/R2134], may be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. A copy of any objections and hearing requests filed with the Hearing Clerk should be identified by the document control number and submitted to: Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring copy of objections and hearing requests to: Rm. 1132, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202. Fees accompanying objections shall be labeled "Tolerance Petition Fees" and forwarded to: EPA Headquarters Accounting Operations Branch, OPP

(Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251.

A copy of objections and requests for hearings filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies and requests for hearings must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and requests for hearings will also be accepted on disks in WordPerfect in 5.1 file format or ASCII file format. All copies of objections and requests for hearings in electronic form must be identified by the docket number [PP 3F4233/R2134]. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and requests for hearings on this rule may be filed online at many Federal Depository Libraries. Additional information on electronic submissions can be found below in this document.

FOR FURTHER INFORMATION CONTACT: By mail: Robert Taylor, Product Manager (PM) 25, Registration Division (7505C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 241, 1921 Jefferson Davis Hwy., Arlington, VA 22202, (703)–305–6800; e-mail: taylor.robert@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of March 29, 1995 (60 FR 16111), EPA issued a proposed rule that gave notice that the Rhone-Poulenc AG Co., P.O. Box 12014, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709, had submitted a pesticide petition, PP 3F4233, to EPA proposing to amend 40 CFR 180.324 by establishing a regulation to permit residues of the herbicide bromoxynil (3,5-dibromo-4-hydroxybenzonitrile) resulting from the application of its octanoic and heptanoic acid esters in or on the raw agricultural commodity (RAC) transgenic cottonseed at 0.04 ppm. There were no comments or requests for referral to an advisory committee received in response to the notice of filing.

The tolerance will expire on April 1, 1997. Based upon the evaluation of a mouse carcinogenicity study currently under review and submission of an analytical method, residue data, and livestock metabolism study on the metabolite, the Agency will determine whether establishing permanent tolerances is appropriate. Residues remaining in or on the raw agricultural commodity after expiration of this tolerance will not be considered actionable if the pesticide is legally applied during the term of, and in accordance with, the provisions of the conditional registration.

There were no negative comments or requests for referral to an advisory committee received in response to the proposed rule.

The data submitted with the proposal and other relevant material have been evaluated and discussed in the proposed rule. Based on the data and information considered, the Agency concludes that the time-limited tolerance will protect the public health. Therefore, the time-limited tolerance is established as set forth below.

Any person adversely affected by this regulation may, within 30 days after publication of this document in the **Federal Register**, file written objections and/or request a hearing with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issue(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). A request for a hearing will be granted if the Administrator determines that the material submitted shows the following:

Attachment 10

flap fittings at wing station (WS) 123.38, in accordance with Saab Service Bulletin SAAB 340-57-027, Revision 01, dated June 30, 1995.

(1) If no cracking or damage is found, and the flap fittings have not been modified or replaced, repeat the visual inspection thereafter at intervals not to exceed 800 hours time-in-service.

(2) If any cracking is found, prior to further flight, replace the flap fittings with new improved flap fittings, and install improved bushings, in accordance with the Accomplishment Instructions (Modification 2628—Part 3) of the service bulletin. After this modification is accomplished, no further action is required by this AD.

(b) Within 4,500 hours time-in-service after the effective date of this AD, perform an inspection to determine the size of the inboard and outboard holes (swaged bushings) of the flap fittings, and to detect loose swaged bushings, in accordance with Saab Service Bulletin SAAB 340-57-027, Revision 01, dated June 30, 1995.

(1) If the sizes of the holes are within the limits specified in the service bulletin, and if no loose swaged bushings are found, prior to further flight, install improved bushings in accordance with the Accomplishment Instructions (Modification 2628—Part 1) of the service bulletin. After this modification is accomplished, no further action is required by this AD.

(2) If the size of any hole is outside the limits specified in the service bulletin, or if any loose swaged bushing is found, prior to further flight, install oversize bushings in the flap fittings, and install improved bushings, in accordance with the Accomplishment Instructions (Modification 2628—Part 2) of the service bulletin. After this modification is accomplished, no further action is required by this AD.

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM-113.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM-113.

(d) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(e) The inspections, replacement, and installations shall be done in accordance with Saab Service Bulletin SAAB 340-57-027, Revision 01, dated June 30, 1995. This incorporation by reference was approved by the Director of the Federal Register, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51, as of January 27, 1997 (61 FR 66885, December 19, 1996). Copies may be obtained from SAAB Aircraft AB, SAAB Aircraft

Product Support, S-581.88, Linköping, Sweden. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(f) This amendment is effective January 27, 1997.

Issued in Renton, Washington, on January 14, 1997.

S. R. Miller,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97-1439 Filed 1-21-97; 8:45 am]

BILLING CODE 4910-13-U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Region II Docket No. 150; PR4-2, FRL-5675-1]

Approval and Promulgation of Implementation Plans; Commonwealth of Puerto Rico

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is announcing the approval of revisions to the Puerto Rico "Regulations for the Control of Atmospheric Pollution," submitted to EPA by the Puerto Rico Environmental Quality Board (EQB) on September 29, 1995. This action approves revisions to Rules 102, 105, 106, 107, 109, 110, 111, 114, 117, 121, 201, 203, 204, 205, 206, 209, 301, 401, 402, 403, 404, 405, 406, 408, 409, 410, 412, 413, 414, 417, and 501. At the request of EQB, EPA will be taking final action on Rules 112 and 211 at a later date. EPA is not incorporating new Rule 422 into the federally approved Puerto Rico State Implementation Plan (SIP). EPA is also withdrawing Rules 411, 418, 419, 420 and 421 from the Puerto Rico SIP at the request of the EQB. However, although requested by the EQB, EPA is not withdrawing Rule 404 from the SIP. In addition, EPA is adding a new section to the Code of Federal Regulations which clearly identifies those Puerto Rico regulations which are a part of the SIP.

EFFECTIVE DATE: This rule is effective February 21, 1997.

ADDRESSES: Copies of the state submittal(s) are available at the following addresses for inspection during normal business hours: Environmental Protection Agency, Region II Office, Air Programs Branch,

290 Broadway, 25th Floor, New York, New York 10007-1866

Environmental Protection Agency, Region II Caribbean Field Office Centro Europa Building, Suite 417, 1492 Ponce de Leon Avenue, Stop 22, Santurce, Puerto Rico 00909

Environmental Protection Agency, Air and Radiation Docket and Information Center, Air Docket (6102), 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Kirk J. Wieber, Environmental Engineer, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007-1866, (212) 637-4249.

SUPPLEMENTARY INFORMATION: On June 21, 1996 (61 FR 31886), EPA published, in the Federal Register, a proposed rulemaking concerning revisions to the Puerto Rico "Regulations for the Control of Atmospheric Pollution" (the Regulations). On September 29, 1995, the Puerto Rico Environmental Quality Board (EQB) submitted to EPA a request for approval of revisions to the Puerto Rico Regulations. Included in that request were revisions to the general Regulations, regulations needed to support the Title V of the Clean Air Act (Act) Operating Permits Program, revisions to the Puerto Rico PM₁₀ SIP for the Municipality of Guaynabo, and, a request that certain rules of the Regulations which are currently included as part of Puerto Rico's approved SIP be withdrawn from the SIP. However, these regulations will remain enforceable by Puerto Rico. Also included, was a regulation concerning Hazardous Air Pollutants (HAPs) to be approved by EPA under section 112(l) of the Act. Under the context of the Act, the Commonwealth of Puerto Rico is regarded as a state.

The revisions and rationale for EPA's approval and rulemaking actions were explained in the June 21, 1996 proposal and will not be restated here. The reader is referred to the proposal for a detailed explanation of Puerto Rico's SIP revision.

In response to EPA's proposed approval of Puerto Rico's SIP revision, comments were received from eight interested parties. The commenters are as follows: American Petroleum Institute [A], Puerto Rico Sun Oil Company [B], Schering-Plough Corporation [C], Puerto Rico Manufacturers Association [D], Pharmaceutical Research and Manufacturers of America [E], Ford Motor Company [F], National Environmental Development Association [G], Texaco Inc. [H]. All of the comments received were of a similar

nature. The comments and EPA's responses are listed below.

Comment

Among the changes to the Puerto Rico SIP proposed to be adopted by EPA is an amendment to Rule 112, "Compliance Determination/Certification," of the Puerto Rico Regulations which provides that "any credible evidence may be used for the purpose of establishing whether a person has violated or is in violation of the Puerto Rico SIP and that certain information will constitute presumptively credible evidence of whether a violation has occurred."

The use of other "credible evidence" has been recognized under the Act, but specifically limited to penalty calculations as evidence of the duration of a violation proven through the use of approved reference test methods. Consequently, the commenters assert that the proposed revision in question affecting Rule 112 is not consistent with, nor required or supported by the Act and its legislative history. Absent a legal foundation to support the inclusion of the "credible evidence" provision of Rule 112, the commenter objected to its proposed incorporation into the SIP. EPA should withhold taking any final action regarding Rule 112. [A,B,C,D,E,F,G,& H]

Response

Puerto Rico's Rule 112 was adopted in response to EPA's SIP requirement notification that was issued in conjunction with the release of EPA's Enhanced Monitoring (EM) rule which was proposed on October 22, 1993 (58 FR 54648). However, adverse comments were received with respect to EPA's EM proposed rule. EPA has developed a Compliance Assurance Monitoring (CAM) rule to replace the EM rule. EPA announced the availability of the draft in September 1995 and a revised version on August 13, 1996 (61 FR 41991). EPA anticipates proposing the CAM rule by December 1996 and promulgating it by July 1997. The August 13, 1996 Federal Register notice states that the rulemaking on the credible evidence provisions as proposed originally in October 22, 1993 is expected to be finalized ahead of the CAM rule, in December 1996. EQB formally requested, in an October 4, 1996 letter, that EPA delay approval of Rule 112 until EPA promulgates the credible evidence rule and/or the CAM rule. This would allow EPA and EQB to further evaluate Rule 112 to determine if it meets EPA's final requirements. Therefore, EPA concurs with EQB's request that EPA withhold taking final

action on Puerto Rico's revision to Rule 112 until EQB submits a future request.

Comment

Upon the adoption and promulgation of Rule 211, "Synthetic Minor Source Emissions" by EQB, EQB issued Resolution R-96-13-4 on March 26, 1996 clarifying the underlying intended purpose of the rule. EPA should incorporate the clarifications made by EQB regarding this rule, as drafted in EQB's Resolution R-96-13-4, in order that the synthetic minor source provisions of the Puerto Rico SIP be interpreted consistent with its underlying intended scope and extent. [D]

Response

EQB informed EPA in an October 4, 1996 letter of its intent to change the definition of "Minor Source (for the purpose of Rule 211)" in Rule 102, "Definitions" of the Regulations, to delete the exclusion which provides that sources subject to a New Source Performance Standards or National Emission Standard for Hazardous Air Pollutants cannot be considered minor sources for the purpose of limiting potential emissions of criteria pollutants. Because EQB has informed EPA of this plan to revise the Regulation pursuant to the Resolution R-96-13-4, EQB and EPA have agreed to withhold taking final action on Rule 211 until it is further revised by EQB and submitted to EPA as a SIP revision. Similarly, EPA is withholding action on Rule 211 to the extent that it would be a method to provide sources with a mechanism to limit potential HAP emissions under 112(l) of the Act. EPA will address this when EQB submits the revised regulation defining minor source for purposes of Rule 211 for EPA approval. Therefore, EPA concurs with EQB's request that EPA withhold taking final action on Puerto Rico's revision to Rule 211 until EQB submits a future request.

Conclusion

EPA is approving revisions to Rules 102, 105, 106, 107, 109, 110, 111, 114, 117, 121, 201, 203, 204, 205, 206, 209, 301, 401, 402, 403, 404, 405, 406, 408, 409, 410, 412, 413, 414, 417, and 501 of the Puerto Rico Regulations. As requested by the EQB, final action on Rules 112 and 211 will be delayed until issues associated with these rules are resolved by EQB and EPA. In addition, EPA is not incorporating new Rule 422 into the federally approved Puerto Rico SIP. EPA is also withdrawing Rules 411, 418, 419, 420 and 421 from the Puerto Rico SIP at the request of the EQB.

Although requested by the EQB, EPA is not withdrawing Rule 404 from the SIP.

Additionally, a new § 52.2723 of the Code of Federal Regulations, "EPA—approved Puerto Rico regulations," is being promulgated in the regulatory section at the end of this action. This new section identifies all Puerto Rico regulations approved by EPA as part of the Puerto Rico SIP, the dates when the regulations were made effective by the Commonwealth, and the dates (and Federal Register citation) when they were last approved by EPA for incorporation into the Puerto Rico SIP.

New § 52.2723 also includes regulations which were previously approved by EPA. Puerto Rico's September 28, 1995 SIP submittal consisted of the compiled air regulations which included regulations that had not been changed, however, these rules have been given a new Commonwealth effective date. Therefore, EPA is listing them in § 52.2723 under a new Commonwealth effective date and new EPA approval date.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to the SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Administrative Requirements

Executive Order 12866

This action has been classified as a Table 3 action for signature by the Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214-2225), as revised by a July 10, 1995 memorandum from Mary Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget (OMB) has exempted this regulatory action from E.O. 12866 review.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D of the Act do not

create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the federal SIP approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the Act, preparation of a flexibility analysis would constitute federal inquiry into the economic reasonableness of state action. The Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. U.S. EPA*, 427 U.S. 246, 255-66 (1976); 42 U.S.C. 7410(a)(2).

Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to private sector, of \$100 million or more. Under Section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to

the private sector, result from this action.

Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

Petitions for Judicial Review

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 24, 1997. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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, Particulate matter, Reporting and recordkeeping requirements.

Dated: December 13, 1996.

William J. Muszynski,

Acting Regional Administrator.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

Subpart BBB—Puerto Rico

2. Section 52.2720 is amended by adding paragraph (c)(36) to read as follows:

§ 52.2720 Identification of plan.

* * * * *

(c) * * *

(36) Revisions to the Puerto Rico Regulations for the Control of Atmospheric Pollution (the Regulations) submitted on September 29, 1995 by the Puerto Rico Environmental Quality Board (EQB).

(i) Incorporation by reference.

(A) Regulations:

(1) Amendments to Part I, "General Provisions", Rules 102, 105, 106, 107, 109, 110, 111, 114, 117, and 121, effective September 28, 1995.

(2) Amendments to Part II, "Approval and Permit", Rules 201, 203, 204, 205, 206, and 209, effective September 28, 1995.

(3) Amendments to Part III, "Variance", Rule 301, effective September 28, 1995.

(4) Amendments to Part IV, "Prohibitions", Rules 401, 402, 403, 404, 405, 406, 408, 409, 410, 412, 413, 414, and 417, effective September 28, 1995.

(5) Amendments to Part V, "Fees", Rule 501, effective September 28, 1995.

(ii) Additional information.

(A) Request by EQB to remove Rules 411, 418, 419, 420 and 421 of Part IV, "Prohibitions" of the Regulations from the federally approved SIP dated September 29, 1995.

(B) An October 4, 1996 letter from EQB to EPA requesting that EPA delay approval of Rules 112 and 211.

3. A new § 52.2723 is added to Subpart BBB to read as follows:

§ 52.2723 EPA—approved Puerto Rico regulations.

REGULATION FOR THE CONTROL OF ATMOSPHERIC POLLUTION

Puerto Rico regulation	Common-wealth effective date	EPA approval date	Comments
PART I, GENERAL PROVISIONS			
Rule 101—Title	9/28/95	[Insert date of publication and FR page citation.]	
Rule 102—Definitions	9/28/95	do.	
Rule 103—Source Monitoring, Recordkeeping, Reporting, Sampling and Testing Methods.	9/28/95	do.	
Rule 104—Emission Data Available to Public Participation.	9/28/95	do.	
Rule 105—Malfunction	9/28/95	do.	
Rule 106—Test Methods	9/28/95	do.	

REGULATION FOR THE CONTROL OF ATMOSPHERIC POLLUTION—Continued

Puerto Rico regulation	Common-wealth effective date	EPA approval date	Comments
Rule 107—Air Pollution Emergencies	9/28/95	do.	
Rule 108—Air Pollution Control Equipment	9/28/95	do.	
Rule 109—Notice of Violation	9/28/95	do.	
Rule 110—Revision of Applicable Rules and Regulations.	9/28/95	do.	
Rule 111—Applications, Hearings, Public Notice	9/28/95	do.	
Rule 113—Closure of a Source	9/28/95	do.	
Rule 114—Compulsory and Optional Hearing	9/28/95	do.	
Rule 115—Punishment	9/28/95	do.	
Rule 116—Public Nuisance	9/28/95	do.	
Rule 117—Overlapping or Contradictory Provisions	9/28/95	do.	
Rule 118—Segregation and Combination of Emissions	9/28/95	do.	
Rule 119—Derogation	9/28/95	do.	
Rule 120—Separability Clause	9/28/95	do.	
Rule 121—Effectiveness	9/28/95	do.	

PART II, APPROVAL AND PERMIT

Rule 201—Location Approval	9/28/95	do.	
Rule 202—Air Quality Impact Analysis	9/28/95	do.	
Rule 203—Permit to Construct a Source	9/28/95	do.	
Rule 204—Permit to Operate a Source	9/28/95	do.	
Rule 205—Compliance Plan for Existing Emission Sources.	9/28/95	do.	
Rule 206—Exemptions	9/28/95	do.	
Rule 207—Continuing Responsibility for Compliance ...	9/28/95	do.	
Rule 208—Agricultural Burning Authorized	9/28/95	do.	
Rule 209—Modification of the Allowed Sulfur-in-Fuel Percentage.	9/28/95	do.	
Rule 210—(Reserved) Part III, "Variance".			

PART III, VARIANCE

Rule 301—Variances Authorized	9/28/95	do.	
Rule 302—Emergency Variances	9/28/95	do.	

PART IV, PROHIBITIONS

Rule 401—Generic Prohibitions	9/28/95	do.	
Rule 402—Open Burning	9/28/95	do.	
Rule 403—Visible Emissions	9/28/95	do.	
Rule 404—Fugitive Emissions	9/28/95	do.	
Rule 405—Incineration	9/28/95	do.	
Rule 406—Fuel Burning Equipment	9/28/95	do.	
Rule 407—Process Sources	9/28/95	do.	
Rule 408—Asphaltic Concrete Batching Plants	9/28/95	do.	
Rule 409—Non-Process Sources	9/28/95	do.	
Rule 410—Maximum Sulfur Content in Fuels	9/28/95	do.	
Rule 412—Sulfur Dioxide Emissions: General	9/28/95	do.	
Rule 413—Sulfuric Acid Plants	9/28/95	do.	
Rule 414—Sulfur Recovery Plants	9/28/95	do.	
Rule 415—Non-Ferrous Smelters	9/28/95	do.	
Rule 416—Sulfite Pulp Mills	9/28/95	do.	
Rule 417—Storage of Volatile Organic Compounds	9/28/95	do.	
Rule 423—Limitations for the Guaynabo PM ₁₀ Non-attainment Area.	4/2/94	5/31/95; 60 FR 28333.	

PART V, FEES

Rule 501—Permit Fees	9/28/95	do.	
Rule 502—Excess Emission Fees	9/28/95	do.	
Rule 503—Test Fees	9/28/95	do.	
Rule 504—Modification	9/28/95	do.	

Attachment 11

(4) New Rule 460.4, adopted on September 19, 1991.

[FR Doc. 94-1059 Filed 1-14-94; 8:45 am]
BILLING CODE 5560-50-P

40 CFR Part 52

[MT9-1-6134 & MT13-1-6133; FRL-4807-5]

Clean Air Act Approval and Promulgation of PM₁₀ Implementation Plan for Montana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this action, EPA approves the State implementation plan (SIP) submitted by the State of Montana to achieve attainment of the National ambient air quality standards (NAAQS) for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM₁₀). The SIP was submitted by Montana to satisfy certain Federal requirements for an approvable moderate nonattainment area PM₁₀ SIP for Missoula. In this final rule, EPA also approves the Missoula City-County Air Pollution Control Program, except several rules regarding emergency procedures, permitting, open burning, wood-waste burners, new source performance standards, hazardous air pollutant standards, and variances. EPA will propose separate action on these rules when the State fulfills its related commitments. One commitment has been fulfilled (see the This Action section of this document for more information). If the State fails to fulfill the remainder of its commitments, EPA will take appropriate action. Further, EPA is declining to take action on Missoula's odor provisions.

EFFECTIVE DATE: This rule will become effective on February 17, 1994.

ADDRESSES: Copies of the State's submittal and other information are available for inspection during normal business hours at the following locations: Environmental Protection Agency, Region VIII, Air Programs Branch, 999 18th Street, Suite 500, Denver, Colorado 80202-2405; Montana Department of Health and Environmental Sciences, Air Quality Bureau, Cogswell Building, Helena, Montana 59620-0901; and Mr. Jerry Kurtzweg, ANR-443, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Amy Platt, Environmental Protection Agency, Region VIII, (303) 293-1769.

SUPPLEMENTARY INFORMATION:

I. Background

The Missoula, Montana area was designated nonattainment for PM₁₀ and classified as moderate under sections 107(d)(4)(B) and 188(a) of the Clean Air Act, upon enactment of the Clean Air Act Amendments of 1990.¹ See 56 FR 56694 (November 6, 1991); 40 CFR 81.327 (Missoula and vicinity). The air quality planning requirements for moderate PM₁₀ nonattainment areas are set out in subparts 1 and 4 of part D, title I of the Act.

EPA has issued a "General Preamble" describing its preliminary views on how EPA intends to review SIPs and SIP revisions submitted under title I of the Act, including those State submittals containing moderate PM₁₀ nonattainment area SIP requirements (see generally 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28, 1992)). Because EPA is describing its interpretations here only in broad terms, the reader should refer to the General Preamble for a more detailed discussion of the interpretations of title I advanced in this final action and the supporting rationale.

Those States containing initial moderate PM₁₀ nonattainment areas (i.e., those areas designated nonattainment for PM₁₀ under section 107(d)(4)(B) of the Act) were required to submit, among other things, the following provisions by November 15, 1991:

1. Provisions to assure that reasonably available control measures (RACM) (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology (RACT)) shall be implemented no later than December 10, 1993;

2. Either a demonstration (including air quality modelling) that the plan will provide for attainment as expeditiously as practicable but no later than December 31, 1994, or a demonstration that attainment by that date is impracticable;

3. Quantitative milestones which are to be achieved every 3 years and which demonstrate reasonable further progress (RFP) toward attainment by December 31, 1994; and

¹ The 1990 Amendments to the Clean Air Act made significant changes to the air quality planning requirements for areas that do not meet (or that significantly contribute to ambient air quality in a nearby area that does not meet) the PM₁₀ National Ambient Air Quality Standards (see Public Law No. 101-549, 104 Stat. 2399). References herein are to the Clean Air Act, as amended ("the Act"), 42 U.S.C. 7401, et seq.

4. Provisions to assure that the control requirements applicable to major stationary sources of PM₁₀ also apply to major stationary sources of PM₁₀ precursors except where the Administrator determines that such sources do not contribute significantly to PM₁₀ levels which exceed the NAAQS in the area. See sections 172(c), 188, and 189 of the Act.

Some provisions are due at a later date. States with initial moderate PM₁₀ nonattainment areas were required to submit a permit program for the construction and operation of new and modified major stationary sources of PM₁₀ by June 30, 1992 (see section 189(a)). Such States also must submit contingency measures by November 15, 1993 that become effective without further action by the State or EPA, upon a determination by EPA that the area has failed to achieve RFP or to attain the PM₁₀ NAAQS by the applicable statutory deadline. See section 172(c)(9) and 57 FR 13543-13544.

On September 15, 1993, EPA announced its proposed approval of the Missoula, Montana moderate nonattainment area PM₁₀ SIP, including parts of the Missoula City-County Air Pollution Control Program, as meeting those moderate nonattainment area PM₁₀ SIP requirements due on November 15, 1991 (58 FR 48339-48343). In that proposed rulemaking action and related Technical Support Document (TSD), EPA described in detail its interpretations of title I and its rationale for proposing to approve the Missoula moderate nonattainment area PM₁₀ SIP, taking into consideration the specific factual issues presented.

EPA requested public comments on all aspects of the proposal (please reference 58 FR 48343), and comments from the State of Montana and Stone Container Corporation were received during the comment period, which ended on October 15, 1993. (For further discussion of these public comments, please see below and the Addendum to the TSD for EPA's proposed rulemaking action on this SIP.) This final action on the Missoula moderate nonattainment area PM₁₀ SIP, and portions of the Missoula City-County Air Pollution Control Program, is unchanged from the September 15, 1993 proposed approval action, except for two typographical errors noted by EPA. First, in the table describing sources, controls, emission reductions, and effective dates, the effective date for the Louisiana-Pacific permit modification should have been listed as March 20, 1992 instead of January 23, 1992, as indicated. Second, under the Enforceability Issues section, the final modification date for Stone

Container Corporation's air quality permit #2589-M should have been January 23, 1992 instead of November 25, 1992, as indicated.

The discussion herein provides only a broad overview of the proposed action EPA is now finalizing. The public is referred to the September 15, 1993 proposed rule for a more in-depth discussion of the action now being finalized.

II. Response to Comments

EPA did not receive any adverse public comments regarding its September 15, 1993 proposed approval of the Missoula moderate nonattainment area PM₁₀ SIP (58 FR 48339-48343). However, the State of Montana submitted comments for clarification purposes, and Stone Container Corporation submitted comments to express general support for EPA's action. Comments were as follows.

In a letter dated September 24, 1993 from Jeff Chaffee, Montana Department of Health and Environmental Sciences, to Amy Platt, EPA, and through verbal communications, the State indicated that since submitting the original moderate nonattainment area PM₁₀ SIP for Missoula, it discovered a minor arithmetic error in its 24-hour attainment and maintenance demonstrations, as well as an error in the way it had addressed background concentrations in both the 24-hour and annual attainment and maintenance demonstrations. The background concentrations, i.e., naturally occurring PM₁₀ concentrations that cannot be controlled, had not been subtracted from the 24-hour and annual design values before apportioning the credits derived from the outlined control measures. The State has corrected these calculations, and with the adjustments, the 24-hour and annual attainment values (i.e., ambient PM₁₀ air quality levels achieved by 1995²) are as follows: 143.8 µg/m³ and 44.7 µg/m³, respectively. (Before these adjustments, the 24-hour and annual attainment values were 142.1 µg/m³ and 45.3 µg/m³, respectively.) The adjusted 24-hour and annual maintenance values (i.e., ambient PM₁₀ air quality levels maintained through January 1, 1998) are 147.0 µg/m³ and 45.5 µg/m³, respectively. (Before these adjustments, the 24-hour and annual maintenance

values were 145.2 µg/m³ and 46.2 µg/m³, respectively.)

Since these corrected calculations are based on properly handling the background concentration and since the adjusted values still adequately demonstrate attainment and maintenance of the PM₁₀ NAAQS and do not represent major changes to those considered in EPA's proposed action, EPA is proceeding with its approval of this SIP. There is no need to adopt additional control measures based on these adjusted calculations.

Comments were also received in an October 11, 1993 letter from Larry Weeks, Stone Container Corporation, to Amy Platt, EPA. The comments were not adverse and expressed general support for EPA's action on the Missoula PM₁₀ SIP. However, several of Stone Container's comments indicate a misunderstanding of EPA's intended action on this SIP and need further explanation.

First, EPA did not propose to approve the odor control rules contained in the SIP submittal and Stone Container communicated its support but referenced "Montana's odor control rules." EPA's action regarding odor regulations applies specifically to the Missoula City-County regulation (Chapter IX, Subchapter 14, Rule 1427) contained in the SIP submittal.

Second, Stone Container submitted comments suggesting it viewed the reduction in allowable PM₁₀ emissions from its No. 5 recovery boiler as voluntary reductions. Stone Container's recovery boilers were identified by chemical mass balance receptor modelling to contribute 8.1% of the PM₁₀ ambient concentrations in Missoula. The SIP submittal demonstrated that Stone Container is contributing to the PM₁₀ nonattainment problem in the Missoula and vicinity nonattainment area and that reductions in allowable emissions from recovery boiler No. 5 are part of an enforceable permit that are necessary to demonstrate expeditious attainment of the PM₁₀ NAAQS in the area. EPA agrees with the State's judgement that the reduction in allowable emissions from recovery boiler No. 5 is necessary to ensure expeditious attainment of the PM₁₀ NAAQS in the area. EPA's final approval of this limitation means that it will become part of the federally enforceable implementation plan. See, e.g., sections 113 and 302(q) of the Act.

Next, Stone Container commented that because EPA proposed to approve the control requirement exclusion for major stationary sources of PM₁₀ precursors authorized by section 189(e) of the Act, it would not make sense for

the SIP to include contingency measures that would call for limitations on industrial sources. Contingency measures for moderate PM₁₀ nonattainment areas are due to EPA no later than November 15, 1993 and were not submitted by the State as part of the SIP revisions being addressed in this action. Thus, this comment is misplaced and does not address a matter within the scope of the September 15, 1993 proposed action on the SIP submittals for the Missoula area. For clarification purposes, EPA simply notes that EPA's finding that major sources of PM₁₀ precursors do not contribute significantly to PM₁₀ levels in excess of the NAAQS in Missoula addresses PM₁₀ precursors only. Note that this finding is based on the current character of the area including, for example, the existing mix of sources in the area. It is possible, therefore, that future growth could change the significance of precursors in the area. Stone Container has been shown to be currently contributing to primary PM₁₀ emissions in Missoula.

Finally, since Stone Container has been shown to contribute to the PM₁₀ ambient concentrations in Missoula, contingency measures that include limitations on its emissions could be sought by the State. Although Stone Container is located outside the nonattainment area, it is still a contributing source (approximately 8% of the PM₁₀ ambient concentrations in Missoula). Therefore, it may be necessary and reasonable to include emission reductions at Stone Container as part of the contingency measures for Missoula. EPA will reserve judgement on the adequacy of any contingency measures submitted by the State until such time as EPA receives a contingency measure submittal and provides public notice and opportunity for public comment on its adequacy.

This Action

Section 110(k) of the Act sets out provisions governing EPA's review of SIP submittals (see 57 FR 13565-13566). The Governor of Montana submitted the Missoula PM₁₀ SIP with a letter dated June 4, 1992, and requested that EPA take action on the June 4, 1992 submittal together with the August 20, 1991 submittal of the Missoula City-County Air Pollution Control Program. The submittals taken together were intended to satisfy those moderate nonattainment area PM₁₀ SIP requirements due for Missoula on November 15, 1991. As described in EPA's proposed action on this SIP (58 FR 48339-48343, September 15, 1993), the Missoula moderate nonattainment area PM₁₀ plan includes, among other

² The Clean Air Act calls for attainment by December 31, 1994. Section 189(c)(1). EPA interprets the State's demonstration as providing for attainment by January 1, 1995. EPA is approving the State's demonstration on the basis of the de minimis differential between the two dates.

things, a comprehensive and accurate emissions inventory, control measures that satisfy the RACM requirement, a demonstration (including air quality modelling) that attainment of the PM₁₀ NAAQS will be achieved by January 1, 1995 (see footnote #2), provisions for meeting the November 15, 1994 quantitative milestone and reasonable further progress, and enforceability documentation. Further, EPA proposed to determine that major sources of precursors of PM₁₀ do not contribute significantly to PM₁₀ levels in excess of the NAAQS in Missoula.³ Please refer to EPA's notice of proposed rulemaking (58 FR 48339) and the TSD for that action for a more detailed discussion of these elements of the Missoula plan.

In this final rulemaking, EPA announces its approval of those elements of the Missoula, Montana moderate nonattainment area PM₁₀ SIP that were due on November 15, 1991, and submitted on August 20, 1991 and June 4, 1992. In this final action, EPA is also announcing its approval of the Missoula City-County Air Pollution Control Program regulations (which were submitted on August 20, 1991 and June 4, 1992) except for the following provisions: Chapter IX—Subchapter 4, Emergency Procedures; Subchapter 11, Permit, Construction & Operation of Air Contaminant Sources; Subchapter 13, Open Burning; Subchapter 14, Rule 1407, Wood-Waste Burners, Rule 1423, Standard of Performance for New Stationary Sources (NSPS), Rule 1424, Emission Standards for Hazardous Air Pollutants (NESHAPs), and Rule 1427, Control of Odors in Ambient Air; and Chapter X, Variances. EPA described the deficiencies associated with these rules in its notice of proposed rulemaking and the TSD for that action.

EPA finds that the State of Montana's PM₁₀ SIP for the Missoula moderate nonattainment area meets the Reasonably Available Control Measures (RACM), including Reasonably Available Control Technology (RACT), requirement. Five sources/source categories were identified as contributing to the PM₁₀ nonattainment problem in Missoula and, therefore, were targeted for control in the SIP. The State has demonstrated that by applying control measures to area sources (re-entrained road dust, residential wood combustion, prescribed burning, and

motor vehicle exhaust), as well as reducing allowable emissions through air quality permit modifications for Louisiana-Pacific and Stone Container, Missoula will be in attainment by January 1, 1995 (see footnote #2). It does not appear that applying further control measures to these sources would expedite attainment. EPA views the following measures as reasonable, enforceable, and responsible for significant PM₁₀ emissions reductions in Missoula: (a) Missoula County Rule 1401(7), which sets sanding and chip sealing standards and street sweeping and flushing requirements; (b) Missoula County Rule 1401(9), which establishes liquid de-icer requirements; (c) industry permit modifications made to reduce allowable PM₁₀ emissions from Stone Container Corporation's recovery boiler No. 5 and Louisiana-Pacific Corporation's particle board dryers; and (d) the Federal tailpipe standards, which provide an ongoing benefit due to fleet turnover. Further, although no credit was claimed in the SIP, EPA is approving the following measures to make them federally enforceable and to further strengthen the SIP. The measures provide additional PM₁₀ air quality protection. These measures are: (a) Missoula County Rule 1428, which sets standards for the regulation for solid fuel burning devices; and (b) Missoula County Rule 1310(3), which sets standards for the regulation of prescribed wildland open burning.

A more detailed discussion of the individual source contributions, their associated control measures (including available control technology) and an explanation of why certain available control measures were not implemented, can be found in the TSD accompanying EPA's proposed approval of the Missoula moderate PM₁₀ nonattainment area SIP (58 FR 48339–48343). EPA has reviewed the State's documentation and concluded that it adequately justifies the control measures to be implemented. The implementation of Montana's PM₁₀ nonattainment plan for Missoula will result in the attainment of the PM₁₀ NAAQS by January 1, 1995 (see footnote #2). By this notice EPA is approving the Missoula PM₁₀ moderate nonattainment area plan's control measures as satisfying the RACM, including RACT, requirement.

As noted, EPA did not propose approval, nor is EPA taking final action, on some portions of the Missoula City-County Air Pollution Control Program regulations. To address EPA-identified deficiencies in the Missoula and statewide SIP, the State committed to complete additional tasks to correct

these deficiencies (except the concerns EPA raised regarding the variance provisions). A more detailed explanation of the State's commitments can be found in EPA's September 15, 1993 proposed approval of the Missoula moderate nonattainment area PM₁₀ SIP (58 FR 48339–48343) and the TSD for that action). Since none of the rules associated with these commitments has an impact on the attainment demonstration, credited control strategies in the Missoula PM₁₀ SIP, or other Federal Clean Air Act SIP requirements for the Missoula moderate PM₁₀ nonattainment area due to EPA on November 15, 1991, EPA will take separate action, as appropriate, when such commitments are fulfilled by the State, and also will address the variances chapter at that time. Further, EPA is declining to take action on Chapter IX, Subchapter 14: Rule 1427, Control of Odors in Ambient Air. These odor provisions do not have a reasonable connection to the NAAQS-related air quality goals of the Clean Air Act.

The State has fulfilled one commitment to revise its NSPS and NESHAPs regulations to incorporate all Federal requirements promulgated through July 1, 1992. In a March 9, 1993 submittal, the State satisfied this commitment, and EPA will announce its action on these revisions in a separate notice.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for a revision to any SIP. Each request for a revision to the SIP shall be considered separately in light of specific technical, economic, and environmental factors, and in relation to relevant statutory and regulatory requirements.

Final Action

This document announces EPA's final action on the action proposed at 58 FR 48339. As noted elsewhere in this final action, EPA received no adverse public comments on the proposed action. As a direct result, the Regional Administrator has reclassified this action from Table 1 to Table 3 under the processing procedures established at 54 FR 2214, January 19, 1989.

Regulatory Process

Under the Regulatory Flexibility Act, 5 U.S.C. 600, *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant economic impact on a substantial number of small entities. Small entities

³ The consequences of this finding are to exclude these sources from the applicability of PM₁₀ nonattainment area control requirements. Note that EPA's finding is based on the current character of the area including, for example, the existing mix of sources in the area. It is possible, therefore, that future growth could change the significance of precursors in the area.

include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP-approval does not impose any new requirements, I certify that it does not have a significant impact on a substantial number of small entities affected. Moreover, due to the nature of the Federal-state relationship under the Clean Air Act, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. U.S. E.P.A.*, 427 U.S. 246, 256-66 (1976); 42 U.S.C. 7410(a)(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 21, 1994. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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).)

Executive Order (EO) 12866

This action has been classified as a Table 3 action by the Regional Administrator under the procedures published in the *Federal Register* on January 19, 1989 (54 FR 2214-2225). On January 6, 1989, the Office of Management and Budget waived Table 2 and 3 SIP revisions (54 FR 2222) from the requirements of section 3 of Executive Order 12291 for a period of two years. USEPA has submitted a request for a permanent waiver for Table 2 and Table 3 SIP revisions. OMB has agreed to continue the waiver until such time as it rules on USEPA's request. This request continues in effect under Executive Order 12866 which superseded Executive Order 12291 on September 30, 1993.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur

dioxide, and Volatile organic compounds.

Note: Incorporation by reference of the State Implementation Plan for the State of Montana was approved by the Director of the Federal Register on July 1, 1982.

Dated: November 3, 1993.

Kerrigan Clough,

Acting Regional Administrator.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

Subpart BB—Montana

2. Section 52.1370 is amended by adding paragraph (c)(30) to read as follows:

§ 52.1370 Identification of plan.

* * * * *

(c) * * *

(30) The Governor of Montana submitted a portion of the requirements for the moderate nonattainment area PM₁₀ State Implementation Plan (SIP) for Missoula, Montana, and the Missoula City-County Air Pollution Control Program regulations with letters dated August 20, 1991 and June 4, 1992. The submittals were made to satisfy those moderate PM₁₀ nonattainment area SIP requirements due for Missoula on November 15, 1991.

(i) Incorporation by reference.

(A) Stipulation signed April 29, 1991 between the Montana Department of Health and Environmental Sciences and the Missoula City-County Air Pollution Control Board, which delineates responsibilities and authorities between the two entities.

(B) Board order issued on June 28, 1991 by the Montana Board of Health and Environmental Sciences approving the comprehensive revised version of the Missoula City-County Air Pollution Control Program.

(C) Board order issued on March 20, 1992 by the Montana Board of Health and Environmental Sciences approving the amendments to Missoula City-County Air Pollution Control Program Rule 1401, concerning the use of approved liquid de-icer, and Rule 1428, concerning pellet stoves.

(D) Missoula County Rule 1401 (7), effective June 28, 1991, which addresses sanding and chip sealing standards and street sweeping and flushing requirements.

(E) Missoula County Rule 1401 (9), effective March 20, 1992, which addresses liquid de-icer requirements.

(F) Missoula County Rule 1428, effective June 28, 1991, with revisions to sections (2)(l)-(p), (4)(a)(i), and (4)(c)(vi) of Rule 1428, effective March 20, 1992, which addresses requirements for solid fuel burning devices.

(G) Missoula County Rule 1310 (3), effective June 28, 1991, which addresses prescribed wildland open burning.

(H) Other Missoula City-County Air Pollution Control Program regulations effective June 28, 1991, as follows: Chapter I. Short Title; Chapter II. Declaration of Policy and Purpose; Chapter III. Authorities for Program; Chapter IV. Administration; Chapter V. Control Board, Meetings-Duties-Powers; Chapter VI. Air Quality Staff; Chapter VII. Air Pollution Control Advisory Council; Chapter VIII. Inspections; Chapter IX., Subchapter 7 General Provisions; Chapter IX., Subchapter 14, Emission Standards, Rules 1401, 1402, 1403, 1404, 1406 (with amendments effective March 20, 1992), 1411, 1419, 1425, and 1426; Chapter XI. Enforcement, Judicial Review and Hearings; Chapter XII. Criminal Penalties; Chapter XIII. Civil Penalties; Chapter XIV. Non-Compliance Penalties; Chapter XV. Separability Clause; Chapter XVI. Amendments and Revisions; Chapter XVII. Limitations, and Appendix A, Maps.

(ii) Additional material.

(A) Montana Department of Health and Environmental Sciences Air Quality Permit #2303-M, with a final modification date of March 20, 1992, for Louisiana-Pacific Corporation's particle board manufacturing facility.

(B) Montana Department of Health and Environmental Sciences Air Quality Permit #2589-M, with a final modification date of January 23, 1992, for Stone Container Corporation's pulp and paper mill facility.

(C) Federal tailpipe standards, which provide an ongoing benefit due to fleet turnover.

[FR Doc. 94-1061 Filed 1-14-94; 8:45 am]

BILLING CODE 5560-50-F

40 CFR Part 52

[MD29-1-6195; FRL-4826-8]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Technical Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Correcting amendments.

Attachment 12

relation to relevant statutory and regulatory requirements.

EPA is publishing this document without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this Federal Register publication, the EPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective October 28, 1994, unless by September 28, 1994, adverse or critical comments are received.

If the EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent notice that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on this action, in conjunction with the document in the proposed rules section of today's Federal Register, serving as a proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective on October 28, 1994.

Regulatory Process

Under the Regulatory Flexibility Act, 5 U.S.C. 600 et seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises and government entities with jurisdiction over populations of less than 50,000.

The removal of these rules from the SIP does not create any new requirements, because there are no longer any sources subject to these rules in the District. Therefore, because the Federal SIP-approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-state relationship under the CAA, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. United States E.P.A.*, 427 U.S. 248, 256-66 (S. Ct. 1976); 42 U.S.C. 7410 (a)(2).

The Office of Management and Budget has exempted this regulatory action from Executive Order 12866 review.

List of Subjects in 40 CFR Part 52

Environmental Protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Note: Incorporation by reference of the State Implementation Plan for the State of California was approved by the Director of the Federal Register on July 1, 1982.

Date: August 10, 1994.

Felicia Marcus,
Regional Administrator.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

Subpart F—California

2. Section 52.220 is amended by revising paragraphs (c)(6) and (c)(183)(i)(A)(2); and by adding paragraph (c)(41)(ii)(A)(1) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(6) Revised regulations for all APCD's submitted on June 30, 1972, by the Governor, except for:

(i) San Diego County Air Pollution Control District.

(A) Rule 65 is now removed without replacement as of March 14, 1989.

* * * * *

(41) * * *

(ii) * * *

(A) * * *

(1) Rule 65 is now removed without replacement as of March 14, 1989.

* * * * *

(183) * * *

(i) * * *

(A) * * *

(2) Rule 61.9, adopted on March 14, 1989, is now removed without replacement as of April 19, 1994.

* * * * *

[FR Doc. 94-21170 Filed 8-26-94; 8:45 am]
BILLING CODE 5560-50-M

40 CFR Part 52

[WA-10-1-5830a; WA-21-1-6278a; FRL-5017-3]

Approval and Promulgation of Implementation Plans: Washington

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: Environmental Protection Agency (EPA) approves numerous amendments to Regulations I and II of the Puget Sound Area Pollution Control Agency's (PSAPCA) rules and the addition of Regulation III, for the control of air pollution in Pierce, King, Snohomish, and Kitsap Counties, Washington, as revisions to the Washington State Implementation Plan (SIP). In addition, EPA approves the part D New Source Review (Article 6) rules as they apply to PSAPCA's jurisdiction (Pierce, King, Snohomish, and Kitsap Counties). These revisions were submitted by the Director of the Washington State Department of Ecology (WDOE) on September 11, 1992 and October 20, 1993 in accordance with the requirements of section 110 and part D of the Clean Air Act (herein the Act) and superseded and replaced previously submitted rules by PSAPCA. In accordance with Washington statutes, PSAPCA rules must be at least as stringent as the WDOE statewide rules.

DATES: This final rule will be effective on October 28, 1994, unless adverse or critical comments are received by September 28, 1994. If the effective date is delayed, timely notice will be published in the Federal Register.

ADDRESSES: Written comments should be addressed to:

Montel Livingston, SIP Manager, Air Programs Branch (AT-082), EPA, Docket #WA10-1-5830 and WA21-1-6278, 1200 Sixth Avenue, Seattle, Washington 98101.

Documents which are incorporated by reference are available for public inspection at the Air and Radiation Docket and Information Center, EPA, 401 M Street, SW., Washington, DC 20460. Copies of material submitted to EPA may be examined during normal business hours at the following locations: EPA, Region 10, Air Programs Branch, 1200 Sixth Avenue (AT-082), Seattle, Washington 98101, and Washington Department of Ecology, PO Box 47600, Olympia, Washington 98504.

FOR FURTHER INFORMATION CONTACT: Montel Livingston, Air Programs Branch (AT-082), EPA, Region 10, Seattle, Washington 98101, (206) 553-0180.

SUPPLEMENTARY INFORMATION:

I. Background

On September 11, 1992, the Director of WDOE submitted to EPA Region 10 revised and updated regulations for PSAPCA affecting King, Pierce, Snohomish, and Kitsap Counties. Included in this submittal were numerous revisions, renumbering/movement of rules, additions, and deletions, as approved by the Board of Directors of PSAPCA, to its currently federally approved regulations I and II. Also included in this submittal was regulation III, a new regulation not previously in the EPA approved Washington SIP. On October 8, 1993, the Director of WDOE submitted to EPA Region 10 another set of updated PSAPCA revisions to regulations I, II, and III affecting King, Pierce, Snohomish, and Kitsap Counties which superseded the September 11, 1992, submittal. PSAPCA and WDOE held joint public hearings each time to receive public comment on the September 11, 1992 and October 8, 1993 revisions to PSAPCA's rules as updates to the Washington SIP, and no public testimony was offered. Among these amendments were technical amendments to bring PSAPCA regulations into conformance with the open burning program for the state of Washington, revisions to PSAPCA's New Source Review provisions to comply with new requirements under the Act, various definition changes to improve clarity of new and revised sections, and overall strengthening measures for the control of ozone within the affected nonattainment areas and, generally, the control of particulate matter.

II. Description of Plan Revisions

The PSAPCA amendments submitted by WDOE on September 11, 1992 and October 8, 1993 for inclusion into the Washington SIP were essentially local air pollution regulations which are at least as stringent as the statewide rules of the WDOE.

To begin, this rulemaking action includes several revisions to the following Articles of the previously EPA approved PSAPCA regulations.

Regulation I

Article I Policy, Short Title and Definitions; Article 3 General Provisions; Article 6 New Source Review; Article 8 Outdoor Fires; and Article 9 Emission Standards.

Regulation II

Article I Purpose, Policy, Short Title and Definitions; Article 2 Gasoline

Marketing Emission Standards; Article 3 Miscellaneous Volatile Organic Compound Emission Standards; and Article 4 General Provisions.

For those revisions to regulations I and II which involve emission standards and are part of the current EPA approved Washington SIP, the overall effect of each of the amendments is to reduce the allowable emissions. The new source review provisions of article 6, regulation I were revised to meet the new requirements of part D of the Act as set forth in the General Preamble for the Implementation of title I of the Clean Air Act Amendments of 1990 (57 FR 13498, April 16, 1992). For those revisions to article I, regulation II, which involved definitions, some definitions were deleted which are no longer used and new definitions were added which apply to new sections of the Regulation.

This rulemaking action also includes the addition of the following elements for inclusion into the Washington SIP:

Regulation I

Article 5 Registration, all sections.

Article 6 New Source Review, section 6.10 Work Done Without an Approval.

Article 9 Emission Standards, sections 9.08, 9.11, 9.13, 9.15, 9.16, 9.17, 9.20.

Article 11 Ambient Air Quality Standards and Control Measure Required, all sections.

Article 12 Standards of Performance for Continuous Emission Monitoring Systems, all sections.

Article 13 Solid Fuel Burning Device Standards, all sections.

Regulation II

Article 3 Miscellaneous Volatile Organic Compound Emission Standards, sections 3.03, 3.04, 3.08, and 3.11.

Regulation III

Article 1 General Requirements, all sections.

Article 2 Review of Toxic Air Contaminant Sources, all sections.

Article 3 Source-Specific Emission Standards, all sections; and

Article 4 Asbestos Control Standard, all sections.

The overall effect of the additions to regulation I which involve emission standards is to reduce allowable emissions as they are additional requirements and do not supersede the requirements already in the SIP. The overall effect of the addition of regulation III provides for additional control measures for ozone and particulate matter, and strengthens measures for the control of ozone and

particulate matter within the affected nonattainment areas.

Finally, this rulemaking action includes action taken by PSAPCA's Board of Directors which approved the deletion of some elements from PSAPCA's regulations I and II of the Washington SIP and the renumbering and movement of certain rules within PSAPCA's regulations. Where the rules previously had been approved by EPA, EPA is approving the renumbering and movement of rules as submitted by the State.

Regulation I—Deletions and Movement of Rules

Deletions: Sections 3.03 Investigations and Studies by the Control Officer; 3.12 Appeals from Board Orders; 3.13 Status of Orders on Appeal; 3.15 Interfering with or Obstructing Agency Personnel; 3.21 Service of Notice; 6.05 Information Required for Notice of Construction and Application for Approval; 6.11 Conditional Approval; 6.12 Time Limits; 8.05 Emission Standard Exemptions; and 9.02 Outdoor Fires. Provisions for appeals (previously section 3.11 Orders and Hearings) are now found under section 3.17 Appeal of Orders. Section 7.02 Filing Fees previously had been part of the EPA approved Washington SIP because it covered fees for more than just 7.01 Variances, which was not a part of the EPA approved SIP. However, now section 7.02 has been revised and renumbered as a part of the new Variance Article and EPA will be taking no action on both the variance provision and the filing fee provision. Provisions for emission standard exemptions and outdoor fires are now found under Article 8 Outdoor Fires.

Regulation II—Deletions and Movement of Rules

Deletion: Section 2.13 Schedule of Control Dates. Provisions for Solvent Metal Cleaners (previously section 2.09) are now found under regulation III, section 3.05.

Deletions: Sections 3.02 High Vapor Pressure Volatile Organic Compound Storage in External Floating Roof Tanks; 3.11 Schedule of Compliance Dates; 4.01 Enforcement; and 4.03 Alternative Control Dates. Provisions for section 3.02 can now be found under section 2.04; provisions for Leaks from Gasoline Transport Tanks and Vapor Recovery Systems (previously section 3.03) can now be found under section 2.08; provisions for Perchloroethylene Dry Cleaning Systems (previously section 3.04) can now be found under Regulation III, section 3.03. Provisions

for enforcement may be found in Regulation I, section 3.15.

Under Washington statutes, rules of any local air pollution control authority must be at least as stringent as the statewide rules of the WDOE. Since EPA has already approved the statewide rules as meeting the requirements of the Act (July 27, 1993 (58 FR 4581)), with the exceptions described below, EPA is approving numerous amendments to the PSAPCA regulations I and II, and regulation III in their entirety.

Finally, EPA is taking no action on the following articles and sections which were included in the September 11, 1992 and October 8, 1993 submittals but have not been included in the Washington SIP in the past. Specifically, under Regulation I, EPA is taking no action on the following:

Article 4 Variances (all sections);

Article 9 Emission Standards

Section 9.10 Emission of

Hydrochloric Acid; and

Section 9.12 Odor and Nuisance Control Measures.

III. Discussion of New Source Review Revisions

Regulation I, Article 6 New Source Review is currently approved by EPA as meeting the requirements of part D of the Act and 40 CFR 51.165 as in effect prior to the Clean Air Act Amendments of 1990. However, the 1990 Amendments established numerous new requirements for part D new source review programs depending upon the seriousness of the nonattainment problem. Furthermore, the Amendments established specific deadlines for submittal of revisions to existing SIP new source review programs for each nonattainment pollutant and area classification.

There are a number of nonattainment areas within PSAPCA's jurisdiction. Specifically, there are three moderate PM₁₀ nonattainment areas, one marginal ozone nonattainment area, and one moderate carbon monoxide nonattainment area. Revisions to new source review rules were required to be submitted to EPA by June 30, 1992 for PM₁₀, November 15, 1992 for ozone, and November 15, 1992 for carbon monoxide. However, because of the classification of the nonattainment areas, only minor revisions to the existing approved rules were required by the Amendments. These needed revisions are described in detail in sections III.A.2., III.B.2.f., III.C.1.d., and III.G. of the "General Preamble for the Implementation of title I of the Clean Air Act Amendments of 1990 (57 FR 13498, April 16, 1992)."

The revisions to the PSAPCA regulations submitted on October 8, 1993: (1) Establish a minimum offset ratio of 1.10 to 1 for all nonattainment pollutants (Section 6.07(d)(3)); (2) require that the offsets come from sources in the same nonattainment area (Section 6.07(d)(3)); (3) require that the amount of emission reduction credit be based on the lower of a source's current actual or allowable emissions to ensure that offsets represent real reductions in actual emissions and that no credit is given for reductions otherwise required by the Act (Section 6.08(b)); (4) ensure that offsets will be federally-enforceable at the time the part D new source review permit is issued (Section 6.08(d)) and that the actual reduction will occur by the time that the new major source or major modification would begin operation (Section 6.07(d)(3)); and (5) expanded the coverage of the alternatives analysis to all nonattainment pollutants (6.07(d)(4)). These changes represent the revisions to the currently approved PSAPCA regulations required by the Clean Air Act Amendments as set forth in the "General Preamble" for moderate PM₁₀, marginal ozone, and moderate carbon monoxide nonattainment areas.

Section 189(e) of the Act, however, requires that the control requirements for PM₁₀ also apply to sources of PM₁₀ precursors unless the Administrator determines that such sources do not significantly contribute to PM₁₀ levels that exceed the PM₁₀ standards. EPA has made such determinations for the Kent and Seattle PM₁₀ nonattainment areas (58 FR 40059-40060 and 59 FR 32370-32376). Based on information contained in the SIP for the Tacoma PM₁₀ nonattainment area submitted by WDOE on November 15, 1991, EPA is determining, by this action, that such sources in the Tacoma PM₁₀ nonattainment area do not significantly contribute to PM₁₀ levels that exceed the PM₁₀ standards. The basis for this determination is discussed in more detail in the technical support document that is part of the public docket for this rulemaking. EPA is, therefore, granting approval of the PSAPCA part D NSR rules as they apply to PSAPCA's jurisdiction and is approving the rules for the ozone and carbon monoxide nonattainment areas.

IV. Summary of EPA Action

In this action, EPA approves numerous amendments to the PSAPCA rules as revisions to the Washington SIP. Specifically, EPA approves:

A. Revisions to Regulation I: Article 1; Article 3; Article 6; Article 8; and Article 9; and the rescission under

Article 3 of sections 3.03 (Investigations and Studies by the Control Officer), 3.12, 3.13 (Status of Orders on Appeal), 3.15, and 3.21; under Article 6 the rescission of sections 6.05, 6.11, and 6.12; under Article 8 the rescission of section 8.05; and, under Article 9 the rescission of section 9.02;

B. Revisions to Regulation II: Article 1, Article 2, Article 3 and Article 4; and the rescission under Article 2 of section 2.13; under Article 3 the rescission of sections 3.02, and 3.11 (Schedule of Compliance Dates); and under Article 4 the rescission of sections 4.01 and 4.03;

C. Additions to Regulation I: Article 5, Article 6, sections 6.10 and 6.12; Article 9, sections 9.08, 9.11, 9.13, 9.15, 9.16, 9.17, and 9.20; Article 11; Article 12; and Article 13;

D. Additions to Regulation II: Article 3, sections 3.03 (Can and Paper Coating Operations), 3.04 (Motor Vehicle and Mobile Equipment Coating Operations), 3.08, and 3.11 (Coatings and Ink Manufacturing); and

E. Adoption of Regulation III, all Articles.

V. Administrative Review

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D of the CAA do not create any new requirements, but simply approve requirements that the state is already imposing. Therefore, because the federal SIP-approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the federal-state relationship under the CAA, preparation of a regulatory flexibility analysis would constitute federal inquiry into the economic reasonableness of state action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. U.S.E.P.A.*, 427 U.S. 246, 256-66 (S.Ct. 1976); 42 U.S.C. 7410(a)(2).

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this Federal Register

publication, the EPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will be effective October 28, 1994, unless, by September 28, 1994, adverse or critical comments are received.

If the EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent notice that will withdraw the final action. All public comments received will be addressed in a subsequent final rule based on this action serving as a proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no such comments are received, the public is advised that this action will be effective October 28, 1994.

The EPA has reviewed this request for revision of the federally-approved SIP for conformance with the provisions of the 1990 Clean Air Act Amendments enacted on November 15, 1990. The EPA has determined that this action conforms with those requirements.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to the SIP shall be considered separately in light of specific technical, economic and environmental factors and in relation to relevant statutory and regulatory requirements.

This action has been classified as a Table 3 action by the Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214-2225), as revised by an October 4, 1993 memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation. The OMB has exempted this regulatory action from E.O. 12866 review.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 28, 1994. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule 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), 42 U.S.C. 7607(b)(2)).

List of Subjects in 40 CFR Part 52

Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation

by reference, Ozone, Volatile organic compounds.

Note: Incorporation by reference of the Implementation Plan for the State of Washington was approved by the Director of the Office of Federal Register on July 1, 1982.

Dated: July 13, 1994.

Gerald A. Emison,

Acting Regional Administrator.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

Subpart WW—Washington

2. Section 52.2470 is amended by adding paragraph (c) (43) to read as follows:

§ 52.2470 Identification of plan.

(c) * * *

(43) On September 11, 1992 and October 8, 1993 the Director of the WDOE submitted revisions to PSAPCA's rules for the control of air pollution in Pierce, King, Snohomish, and Kitsap Counties, Washington as revisions to the Washington SIP. These revisions superseded and replaced previously submitted rules by PSAPCA.

(i) Incorporation by reference.

(A) September 11, 1992 letter from the Director of WDOE to EPA Region 10 submitting revisions to PSAPCA's rules for the control of air pollution in King, Pierce, Snohomish, and Kitsap Counties, Washington, for inclusion into the Washington SIP.

(B) Regulations I, II, and III as adopted by the Board of Directors, PSAPCA, and submitted through the WDOE to EPA Region 10, as a revision to the SIP, with a WDOE adopted date of September 16, 1992.

(C) October 8, 1993 letter from the Director of WDOE to EPA Region 10 submitting revisions to PSAPCA's rules for the control of air pollution in King, Pierce, Snohomish, and Kitsap Counties, Washington, for inclusion into the Washington SIP.

(D) Regulations I, II, and III as adopted by the Board of Directors, PSAPCA, and submitted through WDOE to EPA Region 10, as a revision to the SIP, with a WDOE adopted date of October 18, 1993.

3. Section 52.2479 is amended by revising the entry and the entry heading for "Puget Sound Air Pollution Control Authority—Regulation I" and the entry and entry heading for "Puget Sound Air

Pollution Control Authority—Regulation II"; and by adding a new entry "Puget Sound Air Pollution Control Agency—Regulation III" to read as follows:

§ 52.2479 Contents of the federally approved, state submitted implementation plan.

* * * * *

Puget Sound Air Pollution Control Agency—Regulation I

Article 1 Policy, Short Titles and

Definitions

- 1.01 Policy (10-10-73)
- 1.03 Name of Agency (3-13-68)
- 1.05 Short Title (3-13-68)
- 1.07 General Definitions (11-19-92)

Article 3 General Provisions

- 3.01 Duties and Powers of the Control Officer (8-8-91)
- 3.03 Display of Notices: Removal or Mutilation Prohibited (8-8-91)
- 3.05 Investigations by the Control Officer (8-8-91)
- 3.07 False and Misleading Oral Statements: Unlawful Reproduction or Alteration of Documents (8-8-91)
- 3.09 Violations—Notice (8-8-91)
- 3.11 Civil Penalties (9-10-92)
- 3.13 Criminal Penalties (8-8-91)
- 3.15 Additional Enforcement (8-8-91)
- 3.17 Appeal of Orders (8-8-91)
- 3.19 Confidential Information (8-8-91)
- 3.21 Separability (8-8-91)

Article 5 Registration

- 5.02 Definition and Components of Registration Program (12-9-82)
- 5.03 Registration Required (8-9-90)
- 5.05 General Requirements for Registration (8-9-90)
- 5.07 Fees—Registration Program (12-12-91)
- 5.08 Shut Down Sources (11-12-87)
- 5.09 Noncompliance is Unlawful (12-9-82)
- 5.10 Surcharge for Mandatory Training Programs (11-14-91)
- 5.11 Surcharge for Blenders of Oxygenated Gasoline (11-19-92)

Article 6 New Source Review

- 6.03 Notice of Construction (11-19-92)
- 6.04 Filing Fees (11-19-92)
- 6.06 Requirements for Public Notice (3-13-80)
- 6.07 Order of Approval—Order to Prevent Construction (11-19-92)
- 6.08 Emission Reduction Credit Banking (11-19-92)
- 6.09 Notice of Completion (11-19-92)
- 6.10 Work Done Without an Approval (11-12-87)

Article 8 Outdoor Fires

- 8.01 Policy (4-9-92)
- 8.02 Outdoor Fires—Prohibited Types (5-13-93)
- 8.03 Outdoor Fires—Prohibited Areas (5-13-93)
- 8.04 General Conditions (4-9-92)

Article 9 Emission Standards

- 9.03 Emission of Air Contaminant: Visual Standard (5-11-89)
- 9.04 Deposition of Particulate Matter (6-9-83)
- 9.05 Incinerator Burning (6-9-88)

- 9.06 Refuse Burning Equipment: Time Restriction (6-9-88)
- 9.07 Emission of Sulfur Oxides (6-9-88)
- 9.08 Combustion and Marketing of Waste-Derived Fuels (2-13-86)
- 9.09 Emission of Particulate Matter: Concentration Standards (5-11-89)
- 9.11 Emission of Air Contaminant: Detriment to Person or Property (6-9-83)
- 9.13 Emission of Air Contaminant: Concealment and Masking Restricted (6-9-88)
- 9.15 Fugitive Dust: Emission Standard (8-10-89)
- 9.16 Spray Coating Operations (6-13-91)
- 9.17 Report of Startup, Shutdown, Breakdown, or Upset Condition (5-10-84)
- 9.20 Maintenance of Equipment (6-9-88)
- Article 11 Ambient Air Quality Standards and Control Measure Required
- 11.01 Air Quality Control Measures (8-14-80)
- 11.03 Ambient Air Quality Standards: Suspended Particulate (8-14-80)
- 11.04 Ambient Air Quality Standards: PM₁₀ (6-9-88)
- 11.05 Ambient Air Quality Standards: Lead (8-14-80)
- 11.06 Ambient Air Quality Standards: Carbon Monoxide (8-14-80)
- 11.07 Ambient Air Quality Standards: Ozone (8-14-80)
- 11.08 Ambient Air Quality Standards: Nitrogen Dioxide (8-14-80)
- 11.09 Ambient Air Quality Standards: Sulfur Dioxide (8-14-80)
- Article 12 Standards of Performance for Continuous Emission Monitoring Systems
- 12.01 Introduction (8-10-89)
- 12.02 Continuous Emission Monitoring Requirement (8-10-89)
- 12.03 Quality Assurance Requirements (8-10-89)
- 12.04 Record Keeping and Reporting Requirements (8-10-89)
- Article 13 Solid Fuel Burning Device Standards
- 13.01 Policy and Purpose (9-26-91)
- 13.03 Opacity Standards (10-11-90)
- 13.04 Prohibited Fuel Types (9-26-91)
- 13.05 Curtailment (9-26-91)

Puget Sound Air Pollution Control Agency—Regulation II

- Article 1 Purpose, Policy, Short Title and Definitions
 - 1.01 Purpose (3-13-80)
 - 1.02 Policy (6-13-91)
 - 1.03 Short Title (12-11-80)
 - 1.04 General Definitions (12-11-80)
 - 1.05 Special Definitions (6-13-91)
- Article 2 Gasoline Marketing Emission Standards
 - 2.03 Petroleum Refineries (6-13-91)
 - 2.04 Volatile Organic Compound Storage Tanks (6-13-91)
 - 2.05 Gasoline Loading Terminals (1-9-92)
 - 2.06 Bulk Gasoline Plants (6-13-91)
 - 2.07 Gasoline Stations (1-9-92)
 - 2.08 Leaks from Gasoline Transport Tanks and Vapor Recovery Systems (6-13-91)
- Article 3 Miscellaneous Volatile Organic Compound Emission Standards

- 3.01 Cutback Asphalt Paving (6-13-91)
- 3.03 Can and Paper Coating Operations (6-13-91)
- 3.04 Motor Vehicle and Mobile Equipment Coating Operations (6-13-91)
- 3.05 Graphic Arts Systems (12-11-80)
- 3.07 Petroleum Solvent Dry Cleaning Systems (2-11-82)
- 3.08 Polyester, Vinylester, Gelcoat, and Resin Operations (6-13-91)
- 3.09 Aerospace Component Coating Operations (6-13-91)
- 3.11 Coatings and Ink Manufacturing (7-15-91)
- Article 4 General Provisions
 - 4.02 Testing and Monitoring (6-13-91)
 - 4.04 Exceptions to VOC Emission Standards and Requirements (12-11-80)
 - 4.05 Separability (12-11-80)

Puget Sound Air Pollution Control Agency—Regulation III

- Article 1 General Requirements
 - 1.01 Policy (2-11-93)
 - 1.02 Short Title (1-9-92)
 - 1.03 Area Sources of Toxic Air Contaminants (8-9-90)
 - 1.05 Purpose and Approach (8-9-90)
 - 1.07 General Definitions (1-9-92)
 - 1.08 Special Definitions (2-11-93)
 - 1.09 Emission Monitoring Requirements (8-9-90)
 - 1.11 Reporting Requirements (8-9-90)
- Article 2 Review of Toxic Air Contaminant Sources
 - 2.01 Applicability (1-9-92)
 - 2.03 New or Altered Toxic Air Contaminant Sources (8-9-90)
 - 2.05 Registered Sources of Toxic Air Contaminants (8-9-90)
- Article 3 Source-Specific Emission Standards
 - 3.01 Chromic Acid Plating and Anodizing (1-9-92)
 - 3.03 Perchloroethylene Dry Cleaners (1/9/92)
 - 3.05 Solvent Metal Cleaners (8-9-90)
 - 3.07 Ethylene Oxide Sterilizers and Aerators (1-9-92)
- Article 4 Asbestos Control Standard
 - 4.01 Application Requirements and Fees (2-11-93)
 - 4.02 Procedures for Asbestos Emission Control (2-11-93)
 - 4.03 Disposal of Asbestos-Containing Waste Material (2-11-93)

* * * * *

[FR Doc. 94-21173 Filed 8-26-94; 8:45 am]

BILLING CODE 6560-50-P

40 CFR Part 52

[CA 95-1-6591a; FRL-5055-7]

Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision, Bay Area Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action on revisions to the California

State Implementation Plan. The revisions concern Rule 8-8, "Wastewater (Oil-Water) Separators" from the Bay Area Air Quality Management District (BAAQMD). This approval action will incorporate this rule into the federally approved SIP. The intended effect of approving this rule is to regulate emissions of volatile organic compounds (VOCs) in accordance with the requirements of the Clean Air Act, as amended in 1990 (CAA or the Act). In addition, the final action on this rule serves as a final determination that the deficiency in this rule has been corrected and that on the effective date of this action, any sanction or Federal Implementation Plan (FIP) clock is stopped. The revised rule controls VOC emissions from separation of oil-water mixtures. Thus, EPA is finalizing the approval of this revision into the California SIP under provisions of the CAA regarding EPA action on SIP submittals, SIPs for national primary and secondary ambient air quality standards and plan requirements for nonattainment areas.

DATES: This final rule is effective on October 28, 1994 unless adverse or critical comments are received by September 28, 1994. If the effective date is delayed, a timely notice will be published in the **Federal Register**.

ADDRESSES: Copies of the rule revision and EPA's evaluation report for the rule are available for public inspection at EPA's Region IX office during normal business hours. Copies of the submitted rule revision are available for inspection at the following locations:

Rulemaking Section (A-5-3), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901.

Environmental Protection Agency, Air Docket 6102, 401 "M" Street, SW., Washington, DC 20460.

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 "L" Street, Sacramento, CA 92123-1095.

Bay Area Air Quality Management District, 939 Ellis Street, San Francisco, CA 94109.

FOR FURTHER INFORMATION CONTACT: Erik H. Beck, Rulemaking Section (A-5-3), Air and Toxics Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, Telephone: (415) 744-1190. Internet: beck.erik@epamail.epa.gov.

Attachment 13

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards. Therefore, the EPA is not considering the use of any voluntary consensus standards.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). As explained previously, the SIP revision being approved in this action includes identical BART emission limits

and related administrative requirements (i.e., monitoring, recordkeeping and reporting requirements) to the EPA's 2012 FIP.

L. Congressional Review Act (CRA)

This rule is exempt from the CRA because it is a rule of particular applicability.

M. 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 April 17, 2018. 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* CAA section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by

reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: February 8, 2018.

E. Scott Pruitt,
Administrator.

Part 52, chapter I, title 40 of the Code of Federal Regulations 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 HH—New York

■ 2. In § 52.1670, the table in paragraph (d) is amended by revising the entry “Roseton Generating Station-Dynegy” to read as follows:

§ 52.1670 Identification of plan.

* * * * *

(d) * * *

EPA-APPROVED NEW YORK SOURCE-SPECIFIC PROVISIONS

Name of source	Identifier No.	State effective date	EPA approval date	Comments
Roseton Generating Station	NYSDEC Facility No. 33346000075.	12/5/2016	2/16/2018	Best Available Retrofit Technology (BART) emission limits for SO ₂ pursuant to 6 NYCRR part 249 for Units 1 and 2.
* * *	* * *	* * *	* * *	* * *

* * *

§ 52.1686 [Removed and Reserved]

■ 3. Section 52.1686 is removed and reserved.

[FR Doc. 2018–03192 Filed 2–15–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2017–0138; FRL–9973–19–Region 1]

Air Plan Approval; New Hampshire; Rules for Open Burning and Incinerators

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving State Implementation Plan (SIP) revisions submitted by the State of New Hampshire on August 9, 2011 and July 23, 2013. These SIP revisions establish rules for open burning and establish emission standards and operating practices for incinerators and wood waste burners that are not regulated pursuant to Federal incinerator standards. We are also approving revisions to the definitions of “Incinerator” and “Wood Waste Burner,” submitted by the State on July 23, 2013 and October 26, 2016, respectively. This action is being taken in accordance with the Clean Air Act (CAA).

DATES: This rule is effective on March 19, 2018.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R01–OAR–2017–0138. 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 at www.regulations.gov or at the U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office

Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact 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 legal holidays.

FOR FURTHER INFORMATION CONTACT:

Alison C. Simcox, Environmental Scientist, Air Quality Planning Unit, Air Programs Branch (Mail Code OEP05–02), U.S. Environmental Protection Agency, Region 1, 5 Post Office Square, Suite 100, Boston, Massachusetts, 02109–3912; (617) 918–1684; simcox.alison@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA.

Table of Contents

- I. Background and Purpose
- II. Response to Comments
- III. Final Action
- IV. Incorporation by Reference
- V. Statutory and Executive Order Reviews

I. Background and Purpose

On January 10, 2003, New Hampshire Department of Environmental Services (NH DES) submitted a SIP revision for Env-A 1000 (Prevention, Abatement and Control of Open Source Air Pollution). On August 9, 2011, NH DES submitted an updated version of this regulation. Because the 2011 submittal superseded the previous submission, the State withdrew the 2003 submittal on May 5, 2014. The withdrawal letter is included in the docket for this action.

On July 23, 2013, NH DES submitted Env-A 1900 (Incinerators and Wood Waste Burners) and Env-A 101.104 (definition of “Incinerator”) to EPA for approval. Env-A 1900 is not currently part of the federally-approved New Hampshire SIP. The definition of the term “Incinerator” is currently part of the New Hampshire SIP, but is codified at Env-A 101.59¹ and does not include a reference to “wood-waste burners.” The submitted definition of “Incinerator” adds “wood-waste burners” to the definition and is codified at Env-A 101.104. The current SIP-approved version of the definition of “Incinerator” (Env-A 101.59) will be replaced by the new definition of that term (Env-A 101.104) as a result of this approval.

A definition of “Wood Waste Burner” is currently part of the New Hampshire SIP, but is codified as Env-A 101.95 and

explicitly excludes incinerators. On October 26, 2016, NH DES submitted a revision of the definition of “Wood Waste Burner” (Env-A 101.219) to EPA for approval. This revised definition does not exclude incinerators. The current SIP-approved version of the definition of “Wood Waste Burner” (Env-A 101.95) will be replaced by the new definition of that term (Env-A 101.219) as a result of this approval.

The version of Env-A 1900 (Incinerators and Wood Waste Burners) submitted by the State to EPA included an affirmative defense provision for malfunction, which is defined as a sudden and unavoidable breakdown of process or control equipment. On April 13, 2016, NH DES sent a letter to EPA withdrawing the affirmative defense provision in Env-A 1900 (*i.e.*, 1902.02). In addition, an earlier SIP submission of Env-A 1900 had included an exception to the 20-percent visible emissions limit that would have allowed these emissions to be exceeded for one period of 6 continuous minutes in any 60-minute period during startup, shutdown, or malfunction. However, NH DES removed this exception from the July 23, 2013 submittal.

These SIP revisions establish rules for open burning and establish emission standards and operating practices for incinerators and wood waste burners that are not regulated pursuant to Federal incinerator standards. New Hampshire also submitted revisions to the definitions of “Incinerator” and “Wood Waste Burner” on July 23, 2013 and October 26, 2016, respectively.

On September 6, 2017, EPA published a Notice of Proposed Rulemaking (82 FR 42054) and Direct Final Rulemaking (DFRN) (82 FR 42037) proposing to approve and approving, respectively, the revisions submitted by New Hampshire on August 9, 2011, July 23, 2013, and October 26, 2016.

In the DFRN, EPA stated that if an adverse comment were to be submitted to EPA by October 6, 2017, the action would be withdrawn and not take effect, and a final rule would be issued based on the NPR. EPA received a comment that is not relevant to this SIP action, and one adverse comment that is relevant, before the close of the comment period. Therefore, EPA withdrew the DFRN on November 6, 2017 (82 FR 51349).

This action is a final rule based on the NPR. A detailed discussion of New Hampshire's August 9, 2011; July 23, 2013; and October 26, 2016, SIP revisions, and EPA's rationale for approving these were provided in the DFRN and will not be restated here, except to the extent relevant to our

response to the public comments we received.

II. Response to Comments

EPA received public comments from anonymous commenters on our September 6, 2017 NPR. All of the comments are contained in the docket for this final action. One commenter submitted a comment that is not relevant to this SIP action and, therefore, requires no response. One commenter submitted two comments that are adverse and are discussed below.

Comment 1: An anonymous commenter noted that the proposed revisions to New Hampshire's Env-A 1000 (Prevention, Abatement and Control of Open Source Air Pollution) removes the reference to National Ambient Air Quality Standards (NAAQS) nonattainment areas for particulate matter (PM) pollution that appears in the current SIP-approved version of Env-A 1000. The commenter stated that “EPA should not be allowed to reduce emission standards just because a corporation or company incinerator wants to burn more wood. Wood is a particularly dirty fuel source that causes significant particulate matter pollution both 2.5 microns and 10 microns.”

Response 1: The SIP-approved Env-A 1000 (provision 1001.02) allowed for certain types of open burning if: (1) Not prohibited by local ordinance or officials having jurisdiction, such as state forest fire wardens, and (2) where the particular area has not been designated nonattainment in relation to the NAAQS for PM. Under Env-A 1000, such burning was allowed in NAAQS nonattainment areas for PM (when not prohibited by local ordinance or officials having jurisdiction) if written authorization had been obtained by the NH DES. In the revised version of Env-A 1000, the State has removed the restriction on these activities in nonattainment areas for particulates. EPA believes that the version of Env-A 1000 we are approving is consistent with CAA requirements for SIP revisions, notwithstanding the absence of references to nonattainment areas for NAAQS as a limiting condition on certain types of burning. Because there have never been any designated nonattainment areas for PM in New Hampshire, the current provision is not in fact imposing any restrictions on emissions. Thus, the emissions reductions attributable to the revised version of Env-A 1000 we are approving is functionally the same as the prior version. Moreover, we note that the current ambient levels of PM within the

¹ This appears to be an error because there are two different terms numbered 101.59 in Env-A 101, and the term “incinerator” is listed after term number 48 and before term number 50.

State are below the currently applicable PM NAAQS. In the event that ambient PM in New Hampshire were to exceed the applicable NAAQS, we would expect the State to add additional emissions controls to address the appropriate sources to bring the area back into attainment.

Comment 2: The same anonymous commenter asserted that the “EPA also can’t remove nuisance provisions as they can cover enforcement of NAAQS pollutants that cause nuisances to neighboring communities and disadvantages communities. Sometimes only nuisance provisions are the only enforcement mechanism available to the little people that can’t afford big lawyers or consent decrees with big companies.”

Response 2: New Hampshire’s revision to Env-A 1000 removes two references to “nuisance” in the current SIP, which was approved in 1994. EPA believes that the State’s revised version of the regulation is approvable under the CAA because the term “nuisance” in Env-A 1000, as defined in state law, is a broad concept that could be applied to prohibit impacts that bear no reasonable connection to the NAAQS and related air-quality goals of the CAA. The fact that something may cause a nuisance does not necessarily equate to a condition that would interfere with attainment or maintenance of the NAAQS. The wording of the prior version of the SIP provision was not sufficiently related to attainment and maintenance of the PM NAAQS to warrant inclusion in the SIP. See, for example, analogous instances in which EPA has removed from SIPs certain regulations that prohibit odors (61 FR 47058, September 6, 1996), or that contain a general prohibition against air pollution (63 FR 65557, November 27, 1998).

III. Final Action

EPA is approving and incorporating two regulations into the New Hampshire SIP. The two regulations include revised Env-A 1000 (Prevention, Abatement and Control of Open Source Air Pollution) submitted by the State of New Hampshire on August 9, 2011, effective on May 1, 2011; and Env-A 1900 (Incinerators and Wood Waste Burners) submitted by the State on July 23, 2013, effective April 23, 2013, except for the withdrawn affirmative defense provision. The revised version of Env-A 1000 that we are approving into the SIP will replace the existing SIP-approved version of Env-A 1000.

In addition, EPA is approving a revised definition of “Incinerator” (Env-A 101.104), submitted by the State on July 23, 2013, effective April 23, 2013,

which replaces the definition of “Incinerator” currently in the New Hampshire SIP (numbered Env-A 101.59). We are also approving a revised definition of “Wood Waste Burner” (Env-A 101.219), submitted by the State on October 26, 2016, effective January 14, 2005, which replaces the definition of “Wood Waste Burner” currently in the New Hampshire SIP (numbered Env-A 101.95). Thus, the SIP at Env-A 101.59 and at Env-A 101.95 will read “[reserved].”

New Hampshire organizes Env-A 101 (Definitions) alphabetically, and also assigns a codification number, in sequential order, to each defined term. Because the State’s SIP submissions did not include the entirety of Env-A 101, and the State has added other definitions to Env-A 101 over time (not all of which are SIP-approved), our approval of the two definitions in this action will result in the numbered codification assigned to the defined terms being out of numerical sequence in the SIP. However, the two defined terms will still be in alphabetical order.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the New Hampshire Code of Administrative Rules described in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these materials generally available through <https://www.regulations.gov>, and/or at the EPA Region 1 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA’s approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.²

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act 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 Clean Air Act.

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 Clean Air Act; 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

² 62 FR 27968 (May 22, 1997).

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. Section 804, however, exempts from section 801 the following types of rules: Rules of particular applicability; rules relating to agency management or personnel; and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of nonagency parties. 5 U.S.C. 804(3). Because this is a rule of particular applicability, EPA is not required to submit a rule report regarding this action under section 801. Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 20, 2017. 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: February 6, 2018.

Alexandra Dapolito Dunn,
Regional Administrator, EPA New England.

For the reasons set forth 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.*

Subpart EE—New Hampshire

■ 2. In § 52.1520 paragraph (c), amend the table by:

■ a. Adding four entries for “Env-A 100” after the entry “Env-A 100; Organizational Rules: Definitions”;

■ b. Revising the entry “Env-A 1000”; and

■ c. Adding in numerical order an entry “Env-A 1900”.

The revision and additions read as follows:

§ 52.1520 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED NEW HAMPSHIRE REGULATIONS

State citation	Title/subject	State effective date	EPA approval date ¹	Explanations
Env-A 100	Definition of “Incinerator”	04/29/2003	02/16/2018, [Insert Federal Register citation].	Remove Part Env-A 101.59, definition of “Incinerator” and replace with “[reserved].”
Env-A 100	Definition of “Wood Waste Burner”.	04/29/2003	02/16/2018, [Insert Federal Register citation].	Remove Part Env-A 101.95, definition of “Wood Waste Burner” and replace with “[reserved].”
Env-A 100	Definition of “Incinerator”	04/23/2013	02/16/2018, [Insert Federal Register citation].	Approve Part Env-A 101.104, definition of “Incinerator.”
Env-A 100	Definition of “Wood Waste Burner”.	01/14/2005	02/16/2018, [Insert Federal Register citation].	Approve Part Env-A 101.219, definition of “Wood Waste Burner.”
Env-A 1000	Control of Open Burning	05/01/2011	02/16/2018, [Insert Federal Register citation].	Approve Part Env-A 1000 “Prevention, Abatement and Control of Open Source Air Pollution.”
Env-A 1900	Emission Standards and Operating Practices for Incinerators.	04/23/2013	02/16/2018, [Insert Federal Register citation].	Approve Part Env-A 1900 “Incinerators and Wood Waste Burners.”

¹ In order to determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** notice cited in this column for the particular provision.

* * * * *

[FR Doc. 2018–03251 Filed 2–15–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2014–0247; FRL–9973–03]

Pendimethalin; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation amends the tolerances for residues of pendimethalin in or on alfalfa, forage and alfalfa, hay. BASF Corporation requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective February 16, 2018. Objections and requests for hearings must be received on or before April 17, 2018, and must be filed in accordance with the instructions provided in 40 CFR part

Attachment 14

through the annual compliance review proceedings, but also proposes an alternative before-the-fact review of rate adjustments. *Id.* at 10. The Postal Service submits these proposed rules and alternative proposed rules in Appendix I of the Petition.

IV. Invitation to Comment

The Commission establishes Docket No. RM2019–2 for consideration of matters raised in the Petition. More information on the Petition may be accessed via the Commission's website at <http://www.prc.gov>. Interested persons may submit comments on the Petition no later than December 10, 2018.

Pursuant to 39 U.S.C. 505, Kenneth E. Richardson is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in the above-captioned docket.

V. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. RM2019–2 for consideration of the matters raised by the Petition of the United States Postal Service to Initiate a Rulemaking Concerning Ratemaking Procedures for Inbound Letter Post and Related Services, filed November 16, 2018.

2. Comments are due no later than December 10, 2018.

3. Pursuant to 39 U.S.C. 505, the Commission appoints Kenneth E. Richardson to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

4. The Secretary shall arrange for publication of this Notice in the **Federal Register**.

By the Commission.

Stacy L. Ruble,
Secretary.

[FR Doc. 2018–25665 Filed 11–23–18; 8:45 am]

BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2018–0596; FRL–9986–94–Region 10]

Air Plan Approval; OR: Lane County Outdoor Burning and Enforcement Procedure Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to approve and incorporate by reference (IBR) into the Oregon State Implementation Plan (SIP) the Lane Regional Air Protection Agency's (LRAPA) revised outdoor burning rule submitted by the Oregon Department of Environmental Quality (ODEQ) on July 19, 2018. The revised rule, as it applies in Lane County, Oregon, clarifies terminology and provides additional controls of outdoor burning activities, reducing particulate emissions and strengthening the Oregon SIP. In addition, the EPA proposes to approve but not IBR the enforcement procedures and civil penalties rule for LRAPA submitted by the ODEQ on September 25, 2018. The revised rule contains revisions that bring enforcement procedures and civil penalties rule into alignment with recent changes in Oregon State regulations.

DATES: Comments must be received on or before December 26, 2018.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–OAR–2018–0596, at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [regulations.gov](https://www.regulations.gov). The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Christi Dubois at (360) 753–9081, or dubois.christi@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document, wherever “we,” “us,” or “our” is used, it is intended to refer to the EPA.

Table of Contents

- I. Background
- II. Evaluation of Revisions

A. Title 47: Outdoor Burning

B. Title 15: Enforcement Procedures and Civil Penalties

III. Proposed Action

IV. Incorporation by Reference

V. Oregon Notice Provision

VI. Statutory and Executive Order Reviews

I. Background

Each State has a Clean Air Act (CAA) State Implementation Plan (SIP), containing the control measures and strategies used to attain and maintain the national ambient air quality standards (NAAQS) established for the criteria pollutants (carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, sulfur dioxide). The SIP contains such elements as air pollution control regulations, emission inventories, attainment demonstrations, and enforcement mechanisms. The SIP is a compilation of these elements and is revised and updated by a State over time—to keep pace with Federal requirements and to address changing air quality issues in that State.

The Oregon Department of Environmental Quality (ODEQ) implements and enforces the Oregon SIP through rules set out in Chapter 340 of the Oregon Administrative Rules (OAR), Divisions 200 to 268, apply in all areas of the State, except where the Oregon Environmental Quality Commission (EQC) has designated Lane Regional Air Protection Agency (LRAPA) to administer rules within its area of jurisdiction.

LRAPA has been designated by the EQC to implement and enforce State rules in Lane County, and to adopt local rules that apply within Lane County. LRAPA may promulgate a local rule in lieu of a State rule provided: (1) it is as strict as the corresponding State rule; and (2) it has been submitted to and approved by the EQC. This delegation of authority to LRAPA in the Oregon SIP is consistent with CAA section 110(a)(2)(E) requirements for State and local air agencies.

On July 19, 2018 and September 25, 2018, the ODEQ and LRAPA submitted revisions to the Oregon SIP as it applies in Lane County. These changes update the LRAPA Title 47 outdoor burning rule providing clarification and additional controls of outdoor burning activities in Lane County and align the Title 15 enforcement procedure and civil penalties rule with recently approved State rules in OAR Chapter 340, Division 12 (80 FR 64346, October 23, 2015).

II. Evaluation of Revisions

A. Title 47: Outdoor Burning

LRAPA regulates outdoor burning throughout Lane County, Oregon, except for agricultural burning, forest slash burning permitted by the Oregon Department of Forestry or U.S. Forest Service, and fire department training burns. The LRAPA Title 47 outdoor burning rule, most recently approved by the EPA on October 23, 2015, is an element of the SIP strategy outlining how Oregon will meet Federal air quality standards to protect public health and the environment (80 FR 64346). In general, the revised LRAPA outdoor burning rule provides for additional controls of outdoor burning activities in Lane County, Oregon. In addition, the submitted revisions make clarifications, incorporate housekeeping changes that eliminate duplicative text, change the “open burning” reference to “outdoor burning”, separate the reference of Eugene-Springfield Urban Growth Boundary (ESUGB) to the Eugene Urban Growth Boundary (UGB) and the Springfield UGB (noting each as a separate and distinct UGB), clean up typographical errors, and format and renumber sections and paragraphs. The key substantive changes are discussed below.

General

LRAPA revised the general policy section of Title 47, Section 47–001 to clarify the outdoor burning rule applies in Lane County in accordance with OAR 340–264–0160(1). This State rule establishes the outdoor burning requirements in Lane County are not to be less stringent than Oregon’s rule and prohibits LRAPA from regulating agricultural outdoor burning. In addition, LRAPA added “bonfires” and “ecological conversion” to the list of outdoor burning categories to provide clarification and a more complete list of what types of permits LRAPA issues for outdoor burning.

Exemptions

LRAPA revised the agricultural outdoor burning exemption language in Section 47–005 to align with OAR 340–264–0040 and ORS 468A.020 and made clear that this type of burning is still subject to the requirements and prohibitions of local jurisdictions and the State Fire Marshal. The exemption for recreational fires on private property or in designated recreational areas was tightened in two ways: the prohibition on recreational fires on yellow and red home wood heating advisory days now extends from at least October through May (as opposed to November through

February in the current SIP) and now applies in the Oakridge Urban Growth Boundary (in addition to within the Eugene and Springfield Urban Growth Boundaries and the city limits of Oakridge). Although outdoor barbequing remains exempt, woody yard trimmings, leaves and grass clippings may no longer be burned as fuel. Religious ceremonial fires remain exempt; however, LRAPA clarified the allowable size, location, and fuel source. Larger fires are to be permitted under the “Bonfire” requirement under Section 47–020 *Outdoor Burning Letter Permit*. LRAPA expects religious ceremonial fires to occur infrequently and the definition requires that such fires be controlled, be “integral to a religious ceremony or ritual,” and that prohibited materials not be burned.

Definitions

In general, the revisions to LRAPA’s definitions in Section 47–010 clarify the types of burn categories, and further define restrictions and burn boundaries. For example, the “bonfire” definition establishes the size of a controlled outdoor fire to be larger than 3 feet in diameter and 2 feet in height. This helps to distinguish between what is allowed as a bonfire, or what is considered “recreational” or “religious ceremonial”. LRAPA also clarified that a bonfire cannot serve as a disposal for prohibited materials listed in Section 47–015(1)(e). LRAPA bounded the definition of “religious ceremonial fire”, setting limits on pile size, defining materials that can and cannot be burned and defining where the burn can take place. Finally, LRAPA defined “outdoor burning letter permit”, issued pursuant to Section 47–020, to authorize burning of select materials at a defined site and under certain conditions. These updates provide clarification designed to enhance the enforceability of the rule. We propose to approve the submitted revisions to Title 47 definitions because the changes strengthen the SIP and are consistent with the CAA.

Outdoor Burning Requirements

LRAPA Section 47–015 contains most of the general requirements for all outdoor burning and specific requirements for the following burn types: residential, construction and demolition, commercial, industrial, and forest slash. The general outdoor burning requirements have been made more stringent in many respects. First, subsection 47–015(1)(e) regarding prohibited materials has been expanded to broadly prohibit the burning of items which, when burned, normally emit dense smoke noxious odors, or

hazardous air contaminants, and specifically adds cardboard, clothing and grass clippings to the list of such items. The prohibition on the outdoor burning of cardboard and clothing was included to be at least as stringent with OAR 340–264–0160. In addition, a new provision was added, Section 47–015(1)(i), which prohibits the outdoor burning in barrels throughout Lane County.

Residential outdoor burning is allowed only on approved burning days with the start and end times for burning set as part of the daily burning advisory issued by LRAPA. The previous start and end times, beginning at sunrise and extending until sunset, were eliminated to avoid misinterpretation of the hours set by the LRAPA outdoor burning advisory, which generally allows the burn to commence a minimum of several hours after sunrise and requires the burn to be extinguished at least several hours prior to sunset.

LRAPA also added and expanded several provisions defining outdoor burning limits for the cities of Eugene, Springfield, Oakridge and Lowell and their associated urban growth boundaries; and the cities of Coburg, Cottage Grove, Creswell, Dunes City, Junction City, Veneta and Westfir. For example, LRAPA expanded outdoor burning limits from the Eugene city limits to the Eugene UGB, except that outdoor burning of wood yard trimmings is allowed on lots of two acres or more. The outdoor burning prohibition for Springfield was expanded to include the UGB, except that outdoor burning of woody yard trimmings is allowed on lots of one half acre or more. The Oakridge outdoor burning boundary was also expanded to include the UGB. In addition, LRAPA added that outdoor burning within Florence city limits is prohibited per Florence city ordinance. These changes strengthen the previous rule, which only restricted the burning of woody yard trimmings within the Eugene and Springfield city limits and as otherwise prohibited by some city fire codes. LRAPA’s approved burn days are still from March 1 through June 15 and October 1 through October 31. LRAPA also formalized the prohibition of the outdoor burning of grass clippings throughout Lane County; however, the outdoor burning of fallen leaves and woody yard trimmings is still allowed, subject to restrictions based on time and location.

In general, these revisions impose more stringent requirements on additional geographic areas, increasing the overall stringency of the restrictions on outdoor burning, and the EPA

proposes to approve them as consistent with CAA requirements.

Letter Permits

Section 47–020 authorizes certain types of outdoor burning under letter permits issued by LRAPA. Section 47–020(2) has been amended, increasing the fees for letter permits issued for outdoor burning of standing vegetation from \$100 to \$1,000. A new provision in Section 47–020(2) authorizes the Director to compromise on the permit fee, on a case by case basis, based on set factors. In addition, Subsection 47–020(4) was amended to increase the permit fee for outdoor burning from \$4 per cubic year to \$10 per cubic yard, with a minimum fee of \$100. The fee applies to all outdoor burning except for prescribed burning of standing vegetation, which is addressed in Section 47–010(2).

The EPA proposes to find the revised LRAPA Title 47 outdoor burning rule provides for additional controls on outdoor burning which are designed to reduce particulate emissions in Lane County and strengthen Oregon's SIP. Based on the EPA's review and analysis of the revised rule, the EPA is proposing to approve the submitted Title 47 revisions to the Oregon SIP for Lane County as meeting the requirements of section 110 of the Clean Air Act.

Rules not Appropriate for SIP Approval

Title 47 contains several provisions that are not appropriate for SIP approval, including but not limited to nuisance, fire safety, and Title V. The EPA's authority to approve SIPs extends to provisions related to attainment and maintenance of the NAAQS and carrying out other specific requirements of section 110 of the CAA. In this action, the EPA is not approving into the SIP the following provisions of Title 47 because they are inappropriate for SIP approval: LRAPA 47–010—definition of “nuisance”; LRAPA 47–015(1)(d); LRAPA 47–015(1)(h); LRAPA 47–020(3); LRAPA 47–020(9)(i); and LRAPA 47–020(10) (80 FR 64346, October 23, 2015).

B. Title 15: Enforcement Procedure and Civil Penalties

Title 15 outlines enforcement procedures and civil penalty provisions that apply to air quality regulations implemented by LRAPA and approved by the EPA into the SIP. Title 15 provides the authority and procedures under which LRAPA notifies regulated entities of violations, determines the appropriate penalties for violations, and assesses penalties for such violations.

LRAPA updated Title 15 to correspond to the State enforcement rule in OAR Chapter 340, Division 12, approved by the EPA on October 23, 2015 (80 FR 64346). LRAPA revisions implement legislative increases in statutory maximum penalties, align violation classifications and magnitudes with program priorities, and provide greater mitigating credit for correcting violations. In addition, the rules incorporate housekeeping changes that include eliminating duplicative text, changing references from “the Agency” to “LRAPA” and “open burning” to “outdoor burning”, formatting and renumbering the sections and paragraphs, and cleaning up typographical errors. The key substantive changes are discussed below.

Overall, LRAPA aligned its definitions with those in the corresponding State rule recently reviewed and approved by the EPA on October 23, 2015 (80 FR 64346). Key definition changes include adding definitions for “alleged violation”, “conduct”, “notice of civil penalty assessment”, “residential owner-occupant” and “willful” and removing the term “risk of harm”. To mirror the State's definition, LRAPA revised the term “magnitude of the violation” by removing language that is procedural in nature. Detailed procedures are centralized in Section 15–030 *Civil Penalty Determination Procedure (Mitigating and Aggravating Factors)*. LRAPA also simplified the definition of “violation” to remove redundant language defining the three classes of violation (class I, II and III).

The submitted revisions also include several rule sections revised to be consistent with OAR Chapter 340, Division 12. LRAPA revised Section 15.018 *Notice of Permit Violations and Exceptions* to align with OAR 340–012–0038 by including language requiring no advance notice prior to assessment of a civil penalty if the permittee has an Air Contaminant Discharge Permit (ACDP) condition that implements the SIP under the CAA and the permit violation would disqualify a State program from Federal approval or delegation.

Section 15.025 *Civil Penalty Matrices* was revised to align with State civil penalties in OAR 340–012–0140. The LRAPA penalty matrices and applications were updated to directly reflect Oregon's SIP-approved penalty amounts. LRAPA also amended Section 15.030 *Civil Penalty Determination* to provide the director the discretion to increase the penalty amount to \$25,000 per violation per day of violation to correspond with OAR 340–012–0160(4).

In addition, the civil penalty formulation factors were updated to mirror language in OAR 340–012–0045 and OAR 340–012–0145. The submitted revisions increase the additional civil penalties for violations that pose an extreme hazard to public health or cause extensive environmental damage to mirror those in OAR 340–200–012–0155. As stated in Section 15–045, nothing in Title 15 is intended to preclude LRAPA from assessing a penalty of up to the maximum allowed for the violation by Oregon Revised Statutes 468 (ORS 468).

LRAPA also aligned Section 15.060 *Selected Magnitude Categories* with the State SIP-approved language in OAR 340–012–0135 by removing a duplicative table defining significant emission rate amounts for selected air pollutant magnitude determinations. This information can now be found in LRAPA's Title 12, Tables 2 and 3.

The EPA has reviewed the revisions to the LRAPA Title 15 enforcement procedures and civil penalties rule and finds the rule continues to provide LRAPA with adequate authority to enforce the SIP as required by section 110 of the Clean Air Act. The EPA therefore proposes to approve into the SIP the revisions to Title 15 to the extent the provisions relate to section 110 of the CAA and determining compliance with and for purposes of implementation of SIP-approved requirements. We note that we are not incorporating Title 15 by reference into the Code of Federal Regulations (CFR). These types of rules are generally not incorporated by reference into the CFR because they may conflict with the EPA's independent administrative and enforcement procedures under the CAA.

III. Proposed Action

We propose to approve and incorporate by reference into the Oregon SIP the submitted revisions to the LRAPA Title 47 outdoor burning rule, Sections 001, 005, 010 (except the definition of “nuisance”), 015 (except (1)(d) and (1)(h)), and 020 (except (3), (9)(i), and (10)). These rules were State effective July 13, 2018 and submitted to the EPA by the ODEQ and LRAPA on July 19, 2018.

We also propose to approve, but not incorporate by reference, the submitted revisions to the LRAPA Title 15 enforcement procedures and civil penalty rule, Sections 001, 005, 015, 018, 020, 025, 030, 035, 040, 045, 055, 057, 060, and 065. These rules were State effective on September 14, 2018, and submitted by the ODEQ and LRAPA on September 25, 2018. They align LRAPA's Title 15 rule with the ODEQ's

Division 12 and provide LRAPA with authority needed for SIP approval.

IV. Incorporation by Reference

In this document, we are proposing to include in a final rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, we are proposing to incorporate by reference the provisions described above in Section III. Proposed Action. The EPA has made, and will continue to make, these documents generally available electronically through <https://www.regulations.gov> and in hard copy at the appropriate EPA office (see the **ADDRESSES** section of this preamble for more information).

V. Oregon Notice Provision

Oregon Revised Statute 468.126 prohibits the ODEQ from imposing a penalty for violation of an air, water or solid waste permit unless the source has been provided five days' advanced written notice of the violation and has not come into compliance or submitted a compliance schedule within that five-day period. By its terms, the statute does not apply to Oregon's title V program or to any program if application of the notice provision would disqualify the program from Federal delegation. Oregon has previously confirmed that, because application of the notice provision would preclude EPA approval of the Oregon SIP, no advance notice is required for violation of SIP requirements.

VI. 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, the EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, this proposed 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 proposed 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 SIP approvals are exempted 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 this action does not involve technical standards; and
- Does not provide the 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).

The proposed SIP would not be approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed 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).

List of Subjects in 40 CFR Part 52

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

Authority: 42 U.S.C. 7401 *et seq.*

Dated: November 9, 2018.

Chris Hladick,

Regional Administrator, Region 10.

[FR Doc. 2018-25679 Filed 11-23-18; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 158

[EPA-HQ-OPP-2018-0668; FRL-9984-47]

RIN 2070-AK41

Notification of Submission to the Secretaries of Agriculture and Health and Human Services; Pesticides; Technical Amendment to Data Requirements for Antimicrobial Pesticides

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification of submission to the Secretaries of Agriculture and Health and Human Services.

SUMMARY: This document notifies the public as required by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) that the EPA Administrator has forwarded to the Secretary of the United States Department of Agriculture (USDA) and the Secretary of the United States Department of Health and Human Services (HHS) a draft regulatory document concerning Pesticides; Technical Amendment to Data Requirements for Antimicrobial Pesticides. The draft regulatory document is not available to the public until after it has been signed and made available by EPA.

DATES: On October 29, 2018, the EPA Administrator forwarded to the Secretary of the United States Department of Agriculture (USDA) and the Secretary of the United States Department of Health and Human Services (HHS) a draft regulatory document concerning Pesticides; Technical Amendment to Data Requirements for Antimicrobial Pesticides.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA-HQ-OPP-2018-0668, is available at <http://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg. Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460-0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPP Docket is (703) 305-5805. Please review the visitor instructions and additional information about the docket available at <http://www.epa.gov/dockets>.

Attachment 15

the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

IV. Paperwork Reduction Act of 1995

This final order establishes special controls that refer to previously approved collections of information found in other FDA regulations and guidance. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in the guidance document “De Novo Classification Process (Evaluation of Automatic Class III Designation)” have been approved under OMB control number 0910–0844; the collections of information in 21 CFR part 820, regarding quality system regulation, have been approved under OMB control number 0910–0073; the collections of information in 21 CFR part 814, subparts A through E, regarding premarket approval, have been approved under OMB control number 0910–0231; the collections of information in part 807, subpart E, regarding premarket notification submissions, have been approved under OMB control number 0910–0120; and the collections of information in 21 CFR part 801, regarding labeling, have been approved under OMB control number 0910–0485.

List of Subjects in 21 CFR Part 872

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 872 is amended as follows:

PART 872—DENTAL DEVICES

- 1. The authority citation for part 872 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

- 2. Add § 872.5571 to subpart F to read as follows:

§ 872.5571 Auto titration device for oral appliances.

(a) *Identification.* An auto-titration device for oral appliances is a prescription home use device that determines a target position to be used for a final oral appliance for the reduction of snoring and mild to moderate obstructive sleep apnea.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) Clinical performance testing must evaluate the following:

(i) Performance characteristics of the algorithm; and

(ii) All adverse events.

(2) Non-clinical performance testing must demonstrate that the device performs as intended under anticipated conditions for use, including the following:

(i) Validation of the closed loop algorithm;

(ii) Mechanical integrity over the expected use life;

(iii) Characterization of maximum force, distance, and speed of device movement; and

(iv) Movement accuracy of intraoral components.

(3) Performance testing must demonstrate the wireless compatibility, electrical safety, and electromagnetic compatibility of the device in its intended use environment.

(4) Software verification, validation, and hazard analysis must be performed.

(5) The patient-contacting components of the device must be demonstrated to be biocompatible.

(6) Performance data must validate the reprocessing instructions for any reusable components.

(7) Patient labeling must include:

(i) Information on device use, including placement of sensors and mouthpieces;

(ii) A description of all alarms; and

(iii) Instructions for reprocessing any reusable components.

(8) A human factors assessment must evaluate simulated use of the device in a home use setting.

Dated: February 14, 2019.

Lowell J. Schiller,

Acting Associate Commissioner for Policy.

[FR Doc. 2019–02824 Filed 2–19–19; 8:45 am]

BILLING CODE 4164–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2018–0596; FRL–9989–56–Region 10]

Air Plan Approval; OR: Lane County Outdoor Burning and Enforcement Procedure Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving and incorporating by reference into the Oregon State Implementation Plan (SIP)

the Lane Regional Air Protection Agency’s (LRAPA) revised outdoor burning rule submitted by the Oregon Department of Environmental Quality (ODEQ) on July 19, 2018. The revised rule, as it applies in Lane County, Oregon, clarifies terminology and provides additional controls of outdoor burning activities, reducing particulate emissions and strengthening the Oregon SIP. In addition, the EPA is approving but not incorporating by reference the enforcement procedures and civil penalties rule for LRAPA submitted by the ODEQ on September 25, 2018. The revised rule brings the enforcement procedures and civil penalties rule, as it applies in Lane County, into alignment with recent changes in Oregon State regulations.

DATES: This final rule is effective March 22, 2019.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R10–OAR–2018–0596. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information the disclosure of which 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 at <https://www.regulations.gov>, or please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Christi Duboiski at (360) 753–9081, or duboiski.christi@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document, wherever “we,” “us,” or “our” is used, it is intended to refer to the EPA.

Table of Contents

- I. Background
- II. Response to Comment
- III. Final Action
- IV. Incorporation by Reference
- V. Oregon Notice Provision
- VI. Statutory and Executive Order Reviews

I. Background

On July 19, 2018 and September 25, 2018, the ODEQ and LRAPA submitted revisions to the Oregon SIP as they apply in Lane County. On November 18, 2018, the EPA proposed to approve the LRAPA Title 47 outdoor burning rule which provided clarification and additional controls of outdoor burning activities in Lane County (83 FR 60836).

We also proposed to approve the Title 15 enforcement procedure and civil penalties rule, bringing LRAPA's rule into alignment with recently approved State rules. The public comment period for our proposed action ended on December 26, 2018. We received no adverse comments.

II. Response to Comment

We received one comment in support of the proposed approval of the LRAPA Title 47 outdoor burning rule and the Title 15 enforcement procedure and civil penalties rule. A full copy of the comment received is available in the docket for this final action.

III. Final Action

We are approving, and incorporating by reference into the Oregon SIP, the submitted revisions to the LRAPA Title 47 outdoor burning rule, Sections 001, 005, 010 (except the definition of "nuisance"), 015 (except (1)(d) and (1)(h)), and 020 (except (3), (9)(i), and (10)). The revisions to Title 47 became State effective July 13, 2018 and were submitted to the EPA by the ODEQ and LRAPA on July 19, 2018. The submitted changes clarify terminology and provide additional controls of outdoor burning activities in Lane County, Oregon.

We are also approving, but not incorporating by reference, the submitted revisions to the LRAPA Title 15 enforcement procedures and civil penalty rule, Sections 001, 005, 015, 018, 020, 025, 030, 035, 040, 045, 055, 057, 060, and 065. The revisions to Title 15 became State effective on September 14, 2018 and were submitted by the ODEQ and LRAPA on September 25, 2018. The submitted changes align LRAPA's Title 15 rule with the ODEQ's Division 12 and provide LRAPA with authority needed for SIP approval.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, we are finalizing the incorporation by reference as described in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these materials generally available through <https://www.regulations.gov> and at the EPA Region 10 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully Federally-enforceable under

sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.¹

V. Oregon Notice Provision

Oregon Revised Statute 468.126, prohibits ODEQ from imposing a penalty for violation of an air, water or solid waste permit unless the source has been provided five days' advanced written notice of the violation and has not come into compliance or submitted a compliance schedule within that five-day period. By its terms, the statute does not apply to Oregon's title V program or to any program if application of the notice provision would disqualify the program from federal delegation. Oregon has previously confirmed that, because application of the notice provision would preclude EPA approval of the Oregon SIP, no advance notice is required for violation of SIP requirements.

VI. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Clean Air Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. 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 SIP approvals are exempted 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 Clean Air Act; and
- Does not provide the 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).

The SIP is not approved to apply on any Indian reservation land or in any other area where the 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 it 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. The 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 Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 22, 2019. 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

¹ 62 FR 27968 (May 22, 1997).

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.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: February 4, 2019.

Chris Hladick,

Regional Administrator, Region 10.

For the reasons stated 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.*

Subpart MM—Oregon

■ 2. In § 52.1970:

■ a. In paragraph (c), table 4 is amended by revising the table heading, the

heading for “Title 47” and the entries “47–001”, “47–005”, “47–010”, “47–015”, and “47–020” and adding a footnote number 1 to the end of the table.

■ b. In paragraph (e), remove the table “Lane County Regional Air Pollution Authority Regulations, Approved But Not Incorporated by Reference” and add in its place the table “Lane Regional Air Protection Agency (LRAPA) Rules, Approved But Not Incorporated by Reference”.

The revisions and additions read as follows:

§ 52.1970 Identification of plan.

* * * * *

(c) * * *

TABLE 4—EPA-APPROVED LANE REGIONAL AIR PROTECTION AGENCY (LRAPA) RULES FOR OREGON¹

LRAPA citation	Title/subject	State effective date	EPA approval date	Explanations
*	*	*	*	*
Title 47—Rules for Outdoor Burning				
47–001	General Policy	7/13/2018	2/20/2019, [insert Federal Register citation].	
47–005	Exemptions from these Rules	7/13/2018	2/20/2019, [insert Federal Register citation].	
47–010	Definitions	7/13/2018	2/20/2019, [insert Federal Register citation].	Except the definition of “nuisance”.
47–015	Outdoor Burning Requirements	7/13/2018	2/20/2019, [insert Federal Register citation].	Except (1)(d) and (1)(h).
47–020	Letter Permits	7/13/2018	2/20/2019, [insert Federal Register citation].	Except (3), (9)(i), and (10).
*	*	*	*	*

¹ EPA’s approval is limited to the extent the provisions relate to section 110 of the Clean Air Act and determining compliance with and for purposes of implementation of SIP-approved requirements.

* * * * *

(e) * * *

* * * * *

LANE REGIONAL AIR PROTECTION AGENCY (LRAPA) RULES, APPROVED BUT NOT INCORPORATED BY REFERENCE

LRAPA citation	Title/subject	State effective date	EPA approval date	Explanation
Title 13—General Duties and Powers of Board and Director				
13–005	Authority of the Agency	3/31/2014	10/5/2018, 83 FR 50274	
13–010	Duties and Powers of the Board of Directors.	3/31/2014	10/5/2018, 83 FR 50274	
13–020	Duties and Function of the Director	3/31/2014	10/5/2018, 83 FR 50274	
13–025	Conflict of Interest	3/31/2014	10/5/2018, 83 FR 50274	
13–030	Advisory Committee	3/31/2014	10/5/2018, 83 FR 50274	
13–035	Public Records and Confidential Information.	3/31/2014	10/5/2018, 83 FR 50274	
Title 14—Rules of Practice and Procedure				
14–110	Definitions	3/23/2018	10/5/2018, 83 FR 50274	

LANE REGIONAL AIR PROTECTION AGENCY (LRAPA) RULES, APPROVED BUT NOT INCORPORATED BY REFERENCE—
Continued

LRAPA citation	Title/subject	State effective date	EPA approval date	Explanation
Rulemaking				
14-115	Rulemaking Notice	3/23/2018	10/5/2018, 83 FR 50274	
14-120	Rulemaking Hearings and Process	3/23/2018	10/5/2018, 83 FR 50274	
14-125	Temporary Rules	3/23/2018	10/5/2018, 83 FR 50274	
14-130	Petition to Promulgate, Amend or Repeal Rule—Content of Petition, Filing of Petition.	3/23/2018	10/5/2018, 83 FR 50274	
14-135	Declaratory Rulings	3/23/2018	10/5/2018, 83 FR 50274	
Contested Cases				
14-140	Contested Case Proceedings Generally.	3/23/2018	10/5/2018, 83 FR 50274	
14-145	Agency Representation by Environmental Law Specialist.	3/23/2018	10/5/2018, 83 FR 50274	
14-147	Authorized Representative of Respondent other than a Natural Person in a Contested Case Hearing.	3/23/2018	10/5/2018, 83 FR 50274	
14-150	Liability for the Acts of a Person's Employees.	3/23/2018	10/5/2018, 83 FR 50274	
14-155	Consolidation or Bifurcation of Contested Case Hearings.	3/23/2018	10/5/2018, 83 FR 50274	
14-160	Final Orders	3/23/2018	10/5/2018, 83 FR 50274	
14-165	Default Orders	3/23/2018	10/5/2018, 83 FR 50274	
14-170	Appeal to the Board	3/23/2018	10/5/2018, 83 FR 50274	
14-175	Power of the Director	3/23/2018	10/5/2018, 83 FR 50274	
14-185	Request for Stay Pending Judicial Review.	3/23/2018	10/5/2018, 83 FR 50274	
14-190	Request for Stay—Motion to Intervene	3/23/2018	10/5/2018, 83 FR 50274	
14-200	Request for Stay—Agency Determination.	3/23/2018	10/5/2018, 83 FR 50274	
14-205	Request for Stay—Time Frames	3/23/2018	10/5/2018, 83 FR 50274	
Title 15—Enforcement Procedure and Civil Penalties				
15-001	Policy	9/14/2018	2/20/2019, [insert Federal Register citation]	
15-003	Scope of Applicability	6/13/1995	8/3/2001, 66 FR 40616	
15-005	Definitions	9/14/2018	2/20/2019, [insert Federal Register citation]	
15-010	Consolidation of Proceedings	6/13/1995	8/3/2001, 66 FR 40616	
15-015	Notice of Violation	9/14/2018	2/20/2019, [insert Federal Register citation]	
15-018	Notice of Permit Violations (NPV) and Exceptions.	9/14/2018	2/20/2019, [insert Federal Register citation]	
15-020	Enforcement Actions	9/14/2018	2/20/2019, [insert Federal Register citation]	
15-025	Civil Penalty Schedule Matrices	9/14/2018	2/20/2019, [insert Federal Register citation]	
15-030	Civil Penalty Determination Procedure (Mitigating and Aggravating Factors).	9/14/2018	2/20/2019, [insert Federal Register citation]	
15-035	Written Notice of Civil Penalty Assessment—When Penalty Payable.	9/14/2018	2/20/2019, [insert Federal Register citation]	
15-040	Compromise or Settlement of Civil Penalty by Director.	9/14/2018	2/20/2019, [insert Federal Register citation]	
15-045	Stipulated Penalties	9/14/2018	2/20/2019, [insert Federal Register citation]	
15-050	Additional Civil Penalties	6/13/1995	8/3/2001, 66 FR 40616	
15-055	Air Quality Classification of Violation ...	9/14/2018	2/20/2019, [insert Federal Register citation]	
15-057	Determination of Violation Magnitude ..	9/14/2018	2/20/2019, [insert Federal Register citation]	
15-060	Selected Magnitude Categories	9/14/2018	2/20/2019, [insert Federal Register citation]	
15-065	Appeals	9/14/2018	2/20/2019, [insert Federal Register citation]	

LANE REGIONAL AIR PROTECTION AGENCY (LRAPA) RULES, APPROVED BUT NOT INCORPORATED BY REFERENCE—
Continued

LRAPA citation	Title/subject	State effective date	EPA approval date	Explanation
Title 31—Public Participation				
31-0070	Hearing Procedures	3/23/2018	10/5/2018, 83 FR 50274	

* * * * *

[FR Doc. 2019-02545 Filed 2-19-19; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 52****[EPA-R03-OAR-2018-0508; FRL-9989-15-Region 3]****Approval and Promulgation of Air Quality Implementation Plans; Maryland; Reasonably Available Control Technology (RACT) State Implementation Plan (SIP) Under the 2008 Ozone National Ambient Air Quality Standard (NAAQS)****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a revision to the State of Maryland's state implementation plan (SIP). The State of Maryland's SIP revision satisfies the volatile organic compound (VOC) reasonably available control technology (RACT) requirements for the 2008 8-hour ozone national ambient air quality standard (NAAQS). The State of Maryland will address RACT for oxides of nitrogen (NO_x) in another SIP submission. Maryland's VOC RACT submittal for the 2008 ozone NAAQS includes certification that previously adopted RACT controls in Maryland's SIP approved by EPA under the 1-hour ozone and 1997 8-hour ozone NAAQS were reviewed based on the currently available technically and economically feasible controls, and that they continue to represent RACT; a negative declaration for certain control technique guideline (CTG) categories that no facilities exist in the State for these certain categories; and adoption of new or more stringent RACT determinations where necessary. This action is being taken under the Clean Air Act (CAA).

DATES: This final rule is effective on March 22, 2019.**ADDRESSES:** EPA has established a docket for this action under Docket ID

Number EPA-R03-OAR-2018-0508. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., 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 through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT:Gregory A. Becoat, (215) 814 2036, or by email at becoat.gregory@epa.gov.

SUPPLEMENTARY INFORMATION: On August 18, 2016, the Maryland Department of the Environment (MDE) submitted a revision to its SIP that addresses the VOC requirements of RACT for the 2008 8-hour ozone NAAQS.

I. Background**A. General**

Ozone is formed in the atmosphere by photochemical reactions between VOCs and NO_x in the presence of sunlight. In order to reduce ozone, the CAA requires control of VOC and NO_x emission sources to achieve emission reductions in moderate and above ozone nonattainment areas. Among effective control measures, RACT controls significantly reduce VOC and NO_x emissions from major stationary sources.

RACT is defined as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility.¹ Section 172(c)(1) of the CAA provides that SIPs for nonattainment areas must

include reasonably available control measures (RACT) for attainment of the NAAQS, including emissions reductions from existing sources through adoption of RACT. A major source in a nonattainment area is defined as any stationary source that emits or has the potential to emit NO_x or VOC emissions greater than a certain ton per year threshold that varies based on the ozone nonattainment classification of the area: Marginal, Moderate, Serious, or Severe. See "major stationary source" in CAA sections 182(b), 184(b) and 302. Sections 182(b)(2) and 182(f)(1) of the CAA require states with ozone nonattainment areas classified as moderate or higher to implement RACT controls on all stationary sources and source categories covered by a CTG document issued by EPA, and also on all major sources of VOC and NO_x emissions located in the area. EPA's CTGs provide guidance for RACT control requirements for various VOC source categories. The CTGs typically identify a particular control level that EPA recommends as being RACT. In some cases, EPA has issued Alternative Control Techniques guidelines (ACTs), primarily for NO_x source categories, which in contrast to the CTGs, only present a range of possible control options but do not identify any particular option as the recommendation for what can be RACT. Section 183(c) of the CAA requires EPA to revise and update CTGs and ACTs as the Administrator determines necessary. States are required to implement RACT for the source categories covered by CTGs through the SIP.

Section 184(a) of the CAA establishes a single ozone transport region (OTR) comprising all or part of 12 eastern states and the District of Columbia,² including the entire State of Maryland. Section 184(b)(1)(B) and (2) of the CAA set forth requirements for states in the OTR. Specifically, section 184(b)(1)(B) requires the implementation of RACT in OTR states with respect to all sources of VOC covered by a CTG. Additionally,

¹ See December 9, 1976 memorandum from Roger Strelow, Assistant Administrator for Air and Waste Management, to Regional Administrators, "Guidance for Determining Acceptability of SIP Regulations in Non-Attainment Areas." see also 44 FR 53761, 53762 (September 17, 1979).

² Only a portion of the Commonwealth of Virginia is included in the OTR.

Attachment 16

Title 21—Food and Drugs

CHAPTER I—FOOD AND DRUG ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SUBCHAPTER C—DRUGS

PART 135c—NEW ANIMAL DRUGS IN ORAL DOSAGE FORMS

n-Butyl Chloride Capsules

The Commissioner of Food and Drugs has evaluated a new animal drug application (92-481V) filed by Hart-Delta, Inc., 5055 Choctaw Drive, Baton Rouge, LA 70805, proposing safe and effective use of n-butyl chloride capsules as an anthelmintic for dogs. The application is approved.

Therefore, pursuant to provisions of the Federal Food, Drug, and Cosmetic Act (sec. 512(i), 82 Stat. 347; 21 U.S.C. 360b(i)) and under authority delegated to the Commissioner (21 CFR 2.120), Part 135c is amended in § 135c.77 by redesignating paragraphs (a); (b); and (c) (i), (2) (i), (ii), and (iii), and (3) as paragraph (a) (i), (2), (3) (i), (ii) (a), (b), (c), and (iii), respectively, and by adding a new paragraph (b). As revised, § 135c.77 reads as follows:

§ 135c.77 n-Butyl chloride capsules, veterinary.

(a) (1) *Specifications.* n-Butyl chloride capsules, veterinary contain 272 milligrams or 816 milligrams of n-butyl chloride in each capsule.

(2) *Sponsor.* See code No. 060 in § 135.501(c) of this chapter.

(3) *Conditions of use.* (i) It is used for the removal of ascarids (*Toxocara canis* and *Toxascaris leonina*) and hookworms (*Ancylostoma caninum*, *Ancylostoma braziliense*, and *Uncinaria stenocephala*) from dogs and of the ascarid (*Toxocara cati*) and hookworm (*Ancylostoma tubaeforme*) from cats.

(ii) (a) Animals should not be fed for 18 to 24 hours before being given the drug. Puppies and kittens should be wormed at 6 weeks of age. However, if heavily infested, they may be wormed at 4 or 5 weeks of age. Administration of the drug should be followed in ½ to 1 hour with a teaspoonful to a tablespoonful of milk of magnesia or 1 or 2 milk of magnesia tablets. Normal rations may be resumed 4 to 8 hours after treatment. Puppies and kittens should be given a repeat treatment in a week or 10 days. After that they should be treated every 2 months (or as symptoms reappear) until a year old. When the puppy or kitten is a year old, one treatment every 3 to 6 months is sufficient.

(b) For dogs or cats that have been wormed regularly, treatment every 3 to 6 months will be sufficient. If a dog or cat has not been wormed previously and has the symptoms of large roundworms a dose should be given and repeated in 10 days. Removal of hookworms may require 3 or 4 doses at 10-day intervals.

(c) Puppies, dogs, cats, or kittens weighing 1 to 3 pounds should be given 2 capsules per dose which contain 272

milligrams of n-butyl chloride each. Such animals weighing 4 to 5 pounds should be given 3 such capsules. Animals weighing 6 to 7 pounds should be given 4 such capsules and animals weighing 8 to 9 pounds should be given 5 such capsules. Animals weighing 10 to 20 pounds should be given 3 capsules which contain 816 milligrams of n-butyl chloride each, animals weighing 20 to 40 pounds should be given 4 such capsules and animals weighing over 40 pounds should be given 5 such capsules with the maximum dosage being 5 capsules, each of which contains 816 milligrams of n-butyl chloride.

(iii) A veterinarian should be consulted before using in severely debilitated dogs or cats and also prior to repeated use in cases which present signs of persistent parasitism.

(b) (1) *Specifications.* n-Butyl chloride capsules, veterinary contain 221, 442, 884, or 1,768 milligrams or 4.42 grams of n-butyl chloride in each capsule.

(2) *Sponsor.* See code No. 102 in § 135.501(c) of this chapter.

(3) *Conditions of use.* (i) It is used for the removal of ascarids (*Toxocara canis* and *Toxascaris leonina*) and hookworms (*Ancylostoma caninum*, *Ancylostoma braziliense*, and *Uncinaria stenocephala*) from dogs.

(ii) (a) Dogs should not be fed for 18 to 24 hours before being given the drug. Administration of the drug should be followed in ½ to 1 hour with a mild cathartic. Normal rations may be resumed 4 to 8 hours after treatment.

(b) The drug is administered orally to dogs. Capsules containing 221 milligrams of n-butyl chloride are administered to dogs weighing under 5 pounds at a dosage level of 1 capsule per 1¼ pound of body weight. Capsules containing 442 milligrams of n-butyl chloride are administered to dogs weighing under 5 pounds at a dosage level of 1 capsule per 2½ pounds body weight. Capsules containing 884 milligrams of n-butyl chloride are administered to dogs as follows: Weighing under 5 pounds, 1 capsule; weighing 5-10 pounds, 2 capsules; weighing 10-20 pounds, 3 capsules; weighing 20-40 pounds, 4 capsules; over 40 pounds, 5 capsules. Capsules containing 1,768 milligrams of n-butyl chloride are administered at a dosage level of 1 capsule per dog weighing 5-10 pounds. Capsules containing 4.42 grams of n-butyl chloride are administered at a dosage level of 1 capsule per dog weighing 40 pounds or over.

(iii) A veterinarian should be consulted before using in severely debilitated dogs.

Effective date. This order shall be effective on April 15, 1974.

(Sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i)))

Dated: April 9, 1974.

C. D. VAN HOUWELING,
Director, Bureau of
Veterinary Medicine.

[FR Doc.74-3519 Filed 4-12-74;8:45 am]

Title 25—Internal Revenue

CHAPTER I—INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY
PART 600—STATEMENT OF PROCEDURAL RULES

CFR Correction

In the April 1, 1973, edition of 26 CFR Parts 600 to End, the FEDERAL REGISTER page citation in the second line of the effective date note following § 601.601 (page 102), now reading "37 FR 8246", should read "38 FR 8246".

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

PART 52—APPROVAL AND PROMULGATION OF STATE IMPLEMENTATION PLANS

Ohio

On January 31, 1972, the Governor of Ohio submitted the "Implementation Plan for the Control of Suspended Particulates, Sulfur Dioxide, Carbon Monoxide, Hydrocarbons, Nitrogen Dioxide, and Photochemical Oxidants in the State of Ohio" to the Administrator of the Environmental Protection Agency. The plan was adopted by the Ohio Air Pollution Control Board following public hearings held on January 18, 1972, in Columbus, Ohio. This plan was submitted pursuant to section 110 of the Clean Air Act, as amended, which requires States to adopt implementation plans to achieve and maintain the national ambient air quality standards (40 CFR Part 50). On May 31, 1972 (37 FR 10842), the Administrator approved the Ohio plan with specific exceptions. Subsequently, amendments were submitted which permitted full approval of the plan on September 22, 1972 (37 FR 19806).

On June 28, 1973, the United States Court of Appeals for the Sixth Circuit decided the case of Buckeye Power Company, et al. v. EPA, 481 F.2d 162. The court vacated the Administrator's approval of the Ohio plan and remanded the case to the Agency for compliance with section 553 of the Administrative Procedure Act, as articulated in the court's opinion, viz., to take comments, data or other evidence from interested parties, and to express the basis for administrative actions.

On August 27, 1973, the Governor of Ohio withdrew from the proposed Ohio plan the control strategy and regulations for control of sulfur oxides. Accordingly, the plan as of this date contains control strategies designed to achieve the national primary ambient air quality standards for particulate matter, carbon monoxide, hydrocarbons, nitrogen oxides and photochemical oxidants throughout the State of Ohio no later than mid-1975 and to achieve the secondary particulate standards in Ohio with the exception of the Metropolitan Cleveland Infrastate Region (Cleveland) and the Ohio portions of the Northwest Pennsylvania-

Youngstown Interstate Region (Youngstown) and the Steubenville-Weirton-Wheeling Interstate Region (Steubenville). It is anticipated that a new control strategy to achieve national standards for sulfur oxides will be submitted by the Governor of Ohio in the near future. Upon submission, the plan will be published as proposed rule-making for public comments prior to final approval or disapproval.

PUBLIC COMMENT

On November 15, 1973 (38 FR 31542), the Administrator published as proposed rule-making the extant provisions of the Ohio implementation plan and requested public comment thereon. Several responses were received and the major issues and EPA responses thereto can be summarized as follows:

(1) It was suggested that a public hearing be held to consider approval of the plan because of the importance of the proposed action. The Environmental Protection Agency believes that sufficient opportunity for public impact on the plan has been provided by the State public hearing and the Federal public comment period held in accordance with the requirements of section 553 of the Administrative Procedure Act. In this regard, oral presentations are not required (5 U.S.C. 553(c) (1967)).

(2) It was alleged that particulate control is inextricably interwoven with sulfur dioxide control. The Environmental Protection Agency feels that such interdependence does not prevail for the majority of sources. In those exceptional instances where particulate and sulfur dioxide control problems are interdependent, procedures are available to consider any compliance difficulties on a case-by-case basis.

(3) It was suggested that the particulate and hydrocarbon control strategies of the plan be disapproved because the control provisions are more stringent than necessary to achieve national standards for several areas of the State. Section 110(a) of the Clean Air Act (42 U.S.C. 1857c-5) requires the Administrator to approve a plan, or portion thereof, if he determines that it meets the requirements listed in section 110(a) (2) (A)-(H). Implementing regulations in 40 CFR Part 51 (Requirements for Preparation, Adoption and Submission of State Implementation Plans) require each State to develop control strategies adequate to attain and maintain the national ambient air quality standards. By definition, a plan with measures more stringent than necessary to achieve the national standards will meet these requirements.

Furthermore, section 116 of the Act (42 U.S.C. 1857d-1) preserves the right of States to adopt and enforce whatever standards, emission limitations or control requirements deemed necessary providing they are as stringent as Clean Air Act and 40 CFR Part 51 requirements. Taken together, the statutory and regulatory provisions clearly preclude the Administrator from disapproving a State

plan in which control provisions may be more stringent than necessary to achieve national standards in a particular area.

(4) Several representatives of fuel-burning sources commented that it is impossible to comply with the requirements of AP-3-07 (Control of visible air contaminants from stationary sources) during periods of startup, shut-down and malfunction. While the agency is aware of the merits of this argument, AP-3-07, to the extent that it may under certain conditions be a form of control more stringent than necessary to achieve the national standards, is subject to the same arguments presented in Item (3) above, and, on that basis, can not be disapproved.

(5) It was claimed that many sources will be unable to comply with the July 1, 1975, date for compliance with the regulations because of lengthy time requirements for installing new control equipment. The State regulations have been in effect since early 1972 and a three-year compliance time frame is generally deemed adequate for installing needed control systems. If special problems exist, procedures are available for case-by-case consideration.

(6) Several comments noted that nitrogen dioxide emission limitations were unnecessary because the Environmental Protection Agency has proposed reclassifying all Ohio air quality control regions as Priority III. Even if the Ohio Nitrogen Dioxide Plan constitutes control more stringent than necessary to achieve the national standards, the Administrator may not disapprove the plan for reasons presented in Item (3) above. When the Environmental Protection Agency has completed reclassification of regions for nitrogen dioxide, Ohio may wish to consider revising or removing the existing emission regulations from the applicable plan.

(7) The hydrocarbon and carbon monoxide control regulations were criticized for requiring immediate compliance. While the Environmental Protection Agency recognizes the wisdom of regulating compliance by means of a schedule, immediately enforceable regulations do not per se constitute grounds for disapproval. The Environmental Protection Agency has noted that variance procedures adopted by Ohio can be used to permit the operation of sources during the period necessary to achieve compliance with the regulations.

(8) Other comments concerned economic infeasibility of control requirements and lack of attention to cost-effectiveness in the plan. While the Environmental Protection Agency is concerned that no serious economic dislocation be created as a result of emission controls, there is no provision for disapproval on such a basis within the § 110(a) requirements. It is the position of the Environmental Protection Agency that any serious difficulties of compliance can be resolved through utilization of available State and Federal procedures.

(9) Additional comments concerned the feasibility of a sulfur dioxide control

strategy. Inasmuch as no such strategy has been proposed by the State, these comments will be addressed when EPA takes action on the sulfur dioxide control strategy.

APPROVAL COMMENTS

The Ohio Implementation Plan meets the requirements of Section 110 of the Clean Air Act, as amended, and the regulations for Preparation, Adoption, and Submittal of Implementation Plans in 40 CFR Part 51, and is approved with four exceptions.

The first exception relates to requirements for review of indirect sources as promulgated by the Administrator on June 18, 1973 (38 FR 15834). The State was required to submit a plan revision by August 15, 1973. No submission has been received from Ohio and on October 30, 1973 (38 FR 29893), the Environmental Protection Agency reaffirmed its March 8, 1973 (38 FR 6279), disapproval of all State plans for lack of procedures to review construction of indirect sources. At the same time the Administrator proposed a Federal regulation to correct this plan deficiency in Ohio as well as many other States. The Environmental Protection Agency conducted a public hearing in Columbus on November 30, 1973, on the proposed regulation and a final version was promulgated on February 25, 1974 (39 FR 7270). Meanwhile, the disapproval notice pertaining to new indirect source review procedures required by 40 CFR 51.18 remains unaffected by this notice. The February 25, 1974, publication also provided for a disapproval relating to § 51.12(g), air quality maintenance plan requirements for all States; this disapproval remains in effect.

The second exception relates to the adequacy of the control strategy and regulations for control of sulfur oxides. Because the Governor of Ohio withdrew the originally submitted control strategy and regulations for control of sulfur oxides, the plan must be noted as deficient in that respect. However, the Ohio Environmental Protection Agency is adopting a new strategy and regulations for the control of sulfur oxides and submittal as a plan revision is forthcoming. The Environmental Protection Agency is, therefore, not proposing a sulfur oxides control strategy at this time.

The third exception concerns plans to attain secondary standards for particulate matter in certain air quality control regions and the fourth exception relates to public comment procedures on review of new or modified sources; these exceptions are more fully described below.

A detailed description of the plan approval is set forth as follows: The originally published plan of May 31, 1972, contained a classification of regions (§ 52.1871) and attainment dates for national standards (§ 52.1875). These sections are retained with this publication. From time to time, § 52.1870 Identification of plan has been amended as new submissions have been made. This section is retained as originally published

on May 31, 1972, together with any subsequent amendments. Sections 52.1874 and 52.1876 have previously been revoked.

With regard to requirements of 40 CFR Part 51, the Administrator has made the following determinations: The plan strategy to achieve national standards for particulate matter by implementation of Ohio regulations AP-3-01, Definitions; AP-3-06, Classification of Regions; AP-3-07, Control of Visible Air Contaminants from Stationary Sources; AP-3-08, Open Burning Prohibited; AP-3-09, Restriction of Emission of Fugitive Dust and Gases; AP-3-10, Restriction on Emissions from Incinerators; AP-3-11, Restriction on Emission of Particulate Matter from Fuel Burning Equipment; and AP-3-12, Restriction of Emission of Particulate Matter from Industrial Process, meets the appropriate requirements of 40 CFR 51.13 and 51.22. Utilizing the example region approach for the particulate matter strategy development, EPA has determined that the 80 percent emission reduction obtainable by implementation of the above-cited regulations will be adequate to achieve the primary standards statewide.

The strategy will also achieve the secondary standards throughout the State, with the exception of the Youngstown, Cleveland and Steubenville regions. On May 31, 1972, when the Ohio plan was originally approved, the Administrator granted 18-month extensions for submission of plans to achieve the secondary standards for particulate matter in the Youngstown, Cleveland, and Steubenville regions (40 CFR 52.1872(a)). The time for submission of these plans expired July 31, 1973, and retention of the extension provision by this publication does not alter that expiration date. On January 25, 1974, the required plans were submitted by the State of Ohio; the submission will be published as proposed rule-making before the Administrator approves or disapproves it. Although a disapproval notice will be published at this time, a substitute strategy will not be proposed for attainment of secondary standards for particulate matter in the above-identified regions unless review of the State submission indicates a substitute strategy will be necessary.

The application of the emission limitations per the P-2 curve in AP-3-11(B) (3) and AP-3-12(B) (3) and the P-3 curve in AP-3-12(B) (4) of the Ohio regulations to sources of particulate matter in Priority II and III regions will achieve secondary standards with a sufficient amount of leeway to provide for maintenance of these standards as well. In a letter from the Director of the Ohio EPA, dated June 6, 1973, the State indicates that the portions of regulations AP-3-11, (B) (4) and AP-3-12(B) (5) requiring sources in Priority II and III regions to achieve an additional emission reduction have been submitted for informational purposes only. Therefore, these requirements will not be deemed a part of the

applicable implementation plan for the State of Ohio.

The plan strategy to achieve the national standards for photochemical oxidants (hydrocarbons) by implementation of Ohio regulations AP-5-01, Definitions; AP-5-06, Classification of Regions; AP-5-07, Control of Emission of Organic Materials from Stationary Sources, meets the appropriate requirements of 40 CFR 51.14 and 51.22. EPA has determined that the 40% reduction obtainable by implementation of the above-cited regulations will be adequate to achieve the national standards insofar as control of stationary sources is required.

Ohio submitted plans to achieve the photochemical oxidant standards in the Metropolitan Dayton Intrastate Region (Dayton) on July 24, 1973, and in the Ohio portions of the Metropolitan Cincinnati Interstate (Cincinnati) and the Metropolitan Toledo Interstate (Toledo) regions on June 29, 1973. These plans were published on August 15, 1973 (38 FR 22045), as proposed rulemaking and final action approving the Dayton and Toledo plans was taken on November 8, 1973 (38 FR 30971). On November 8, EPA also disapproved the deficiencies in the transportation plan for the Cincinnati region and promulgated substitute regulations. An oversight correction is being made to change the citation of § 51.15 to § 51.14 in the November 8 promulgation of § 52.1877. Today's action, together with the action taken on November 8, constitute the complete Federal plan for attainment and maintenance of national standards for photochemical oxidants (hydrocarbons).

The plan strategy to achieve the national standards for carbon monoxide by implementation of Ohio regulations, AP-5-06, Classification of Regions and AP-5-08, Control of Carbon Monoxide Emissions from Stationary Sources, meets the appropriate requirements of 40 CFR 51.14 and 51.22. Expected emission reductions on affected stationary sources of approximately 80 percent have been determined by the Administrator to be adequate to achieve the national standards.

The plan strategy to achieve the national standard for nitrogen dioxide by implementation of Ohio Regulations AP-7-05, Classification of Regions and AP-7-06, Control of Nitrogen Oxide Emissions from Stationary Sources meets the appropriate requirements of 40 CFR 51.14 and 51.22. Expected emission reductions have been determined by the Administrator to be adequate to achieve the national standard.

All of the regulations comprising the control strategies are immediately effective, thus meeting the requirements of 40 CFR 51.15.

The plan description of Ohio's ambient air monitoring program and source surveillance procedures meets the requirements of 40 CFR 51.17 and 40 CFR 51.19.

The plan presentation of Ohio's legal authority to carry out the provisions of

the plan meets the requirements of 40 CFR 51.11. In addition, the plan description of the legal authority needed by local governmental units to carry out assigned roles and of interstate cooperation agreements is approved as meeting the requirements of 40 CFR 51.21.

The description of resources available to carry out the plan meets the requirements of 40 CFR 51.20. The procedures to require self-monitoring by a source in Ohio regulations AP-9-02 and AP-9-03, the procedures to require submission of emission information in Ohio regulation AP-2-03, and the procedures to make emission data available to the public in Ohio regulation AP-9-08 meet the requirements of 40 CFR 51.19 and 51.10(e). The procedures to implement control plans in case of emergency episode situations in AP-11-01, AP-11-02, AP-11-03, and AP-11-04 of the Ohio Regulations meet requirements of 40 CFR 51.16.

Review procedures provided in Ohio regulation AP-9-02 satisfy the requirements of 40 CFR 51.18 with the exception of paragraph (h) relating to public comment procedures and paragraph (a) with respect to review of indirect sources as noted above. Since Ohio regulations do not provide for public comment on review of new or modified sources a disapproval notice is published today together with a corrective regulation requiring the State to provide for public comment as part of its new source review procedure. The Administrator finds good cause for promulgating this correction without having first proposed it, since the substantive rights of those seeking permits to construct or modify sources are not affected and such procedures are clearly required by 40 CFR 51.18, which was previously available for public comment prior to promulgation. Furthermore, it is in the public interest to cause a procedure for allowing public comment on State actions affecting the environment to be instituted. The Administrator will accept written comments on the public comment requirement postmarked not later than May 15, 1974. Changes to the regulation will be made, where appropriate, based on the comments received.

The rules and regulations submitted meet the requirements of 40 CFR 51.22. All of the substantive provisions thereof, as identified in this notice of approval, become part of the applicable implementation plan for the State of Ohio, subject to the exceptions noted herein.

More detailed information supporting this decision is available in the "Evaluation Report of the Ohio Implementation Plan," which may be examined at the Freedom of Information Center, EPA, Room 329, 401 M Street, S.W., Washington, D.C., and at the Program Support Branch, EPA, Region V, 1 North Wacker Drive, Chicago, Illinois 60606.

This notice of final rulemaking is is-

sued under the authority of section 110 of the Clean Air Act (42 U.S.C. 1857c-5).

Dated: April 8, 1974.

JOHN QUARLES,
Acting Administrator.

Part 52 of Chapter I, Title 40, of the Code of the Federal Regulations is amended as follows:

Subpart KK—Ohio

1. Section 52.1870 is amended by adding paragraph (c) (4) as follows:

§ 52.1870 Identification of plan.

(c) * * *

(4) June 6, 1973, by the Director, Ohio Environmental Protection Agency.

2. Section 52.1873 is revised to read as follows:

§ 52.1873 Approval status.

With the exceptions set forth in this subpart, the Administrator approves Ohio's plan for the attainment and maintenance of the national standards. The State included various provisions in its plan relating to AP-3-11(B) (4) and AP-3-12(B) (5) which, as described in the Governor's letter of June 6, 1973, were included for information purposes only and were not to be considered a part of the plan to implement national standards. Accordingly, these additional provisions are not considered a part of the applicable plan.

§ 52.1877 [Amended]

3. Section 52.1877 is amended by changing the citation of § 51.15 to § 51.14.

4. Section 52.1879 is amended by adding paragraphs (c) and (d) as follows:

§ 52.1879 Review of new sources and modifications.

(c) The requirements of § 51.18(h) of this chapter are not met because the State failed to submit procedures providing for public comment on review of new or modified stationary sources.

(d) Regulation providing for public comment. (1) For purposes of this paragraph, "Director" shall mean the "Director of the Ohio Environmental Protection Agency".

(2) Prior to approval or disapproval of the construction or modification of a stationary source, the Director shall:

(i) Make a preliminary determination whether construction or modification of the stationary source should be approved, approved with conditions or disapproved;

(ii) Make available in at least one location in the region in which the proposed stationary source would be constructed or modified, a copy of all materials submitted by the owner or operator, a copy of the Director's preliminary determination, and a copy or summary of other materials, if any, considered by the Director in making his preliminary determination; and

(iii) Notify the public, by prominent advertisement in a newspaper of general circulation in the region in which the proposed stationary source would be constructed or modified, of the opportunity for public comment on the information submitted by the owner or operator and the Director's preliminary determination on the approvability of the new or modified stationary source.

(3) A copy of the notice required pursuant to this paragraph shall be sent to the Administrator through the appropriate regional office and to all other State and local air pollution control agencies having jurisdiction within the region where the stationary source will be constructed or modified.

(4) Public comments submitted in writing within 30 days of the date such information is made available shall be considered by the Director in making his final decision on the application.

5. Sections 52.1880 and 52.1881 are added as follows:

§ 52.1880 Control strategy: Particulate matter.

(a) The requirements of § 51.13 of this chapter are not met because the Ohio plan does not provide for attainment and maintenance of the secondary standards for particulate matter in the Greater Metropolitan Cleveland Intrastate Region and the Ohio portions of the Northwest Pennsylvania-Youngstown and the Steubenville-Weirton-Wheeling Interstate Regions.

§ 52.1881 Control strategy: Sulfur oxides (sulfur dioxide).

(a) The requirements of § 51.13 of this chapter are not met because the Ohio plan does not provide for attainment and maintenance of the national standards for sulfur oxides (sulfur dioxide).

[FR Doc.74-8576 Filed 4-12-74;8:45 am]

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Southwest Pennsylvania AQCR, Gasoline Transfer Vapor Control

On November 28, 1973, the Environmental Protection Agency, acting under court order, promulgated a number of transportation control measures for the Southwest Pennsylvania Intrastate Air Quality Control Region. Among these measures was a regulation requiring vapor recovery devices, capable of reducing hydrocarbon emissions by 90 percent, to be installed for use during the transfer of gasoline between delivery trucks and storage tanks at service stations and elsewhere.

The gasoline transfer vapor control regulation is applicable to gasoline transfer operations in the Allegheny County portion of the Southwest Pennsylvania Intrastate AQCR. Public comment on this regulation, as well as on the other measures promulgated, was invited by the Environmental Protection Agency for an additional thirty days from the date of promulgation. The Associated Petroleum Industries of Pennsylvania did sub-

mit a number of thoughtful comments within the thirty day period.

One specific comment from the Associated Petroleum Industries referred to a portion of the gasoline transfer vapor control regulation which provides that gasoline delivery vehicles "may be refilled only at facilities equipped with a vapor recovery system, or the equivalent, which can recover at least 90 percent by weight of the organic compounds in the vapors displaced from the delivery vessel during refilling." The Associated Petroleum Industries pointed out that it is unclear whether this provision applies to reloading at facilities in Allegheny County, the Southwest Pennsylvania Intrastate AQCR, or to reloading at any facility regardless of geographical location. The regulation is, therefore, being amended today to indicate that the restriction against reloading a delivery vehicle at facilities not equipped with the specified vapor recovery system applies only to reloading within the Southwest Pennsylvania Intrastate Air Quality Control Region.

It should be noted that even though attainment of photochemical oxidant (hydrocarbon) standards can be achieved in the Southwest Pennsylvania Intrastate AQCR by control only of the service stations within the Allegheny County portion of the Region, the control of the so-called "bulk loading" facilities at which gasoline delivery vehicles reload, is necessary on an AQCR-wide basis. This control is necessary because unlike carbon monoxide pollution, which builds up in a fairly localized area surrounding the point of emission, photochemical oxidant pollution is an area-wide phenomenon in which hydrocarbon emissions at any point in the Southwest Pennsylvania Region, a natural air basin, may result in high oxidant levels at far distant points within the Region. Therefore, if the vapor collected within Allegheny County were released outside the County but within the AQCR, the oxidant levels in Allegheny County may well not be reduced at all. Without bulk facility control on an AQCR-wide basis, nothing may be gained.

The Associated Petroleum Industries also pointed out that reference was made in the vapor control regulation to an additional regulation controlling gas transfer vapor emissions. The regulation had been in an earlier draft of the Southwest Pennsylvania promulgation, but had subsequently been found to be unnecessary and was deleted. Therefore, the reference should also have been deleted and is today being deleted.

In view of the fact that this notice simply makes clear previously ambiguous provisions and in view of the fact that substantial prior opportunities for comment on these provisions have been given, the Administrator finds that good cause exists for making these amendments effective April 15, 1974. It should be noted to avoid confusion that the effective date is merely the date on which the amendments become an official part of the regulation. It is not the date for

EXHIBIT 7

To comments of Donna Ballinger, Marilyn Wall, Ohio
Environmental Council, Sierra Club, and Case Western Reserve
University Environmental Law Clinic

October 18, 2019

LeAnn M. Johnson Koch
LeAnnJohnson@perkinscoie.com
D. +1.202.654.6209
F. +1.202.654.9943

VIA ELECTRONIC MAIL

John Mooney
Acting Director
Environmental Protection Agency, Region 5
Air and Radiation Division
77 West Jackson Boulevard
Chicago, IL 60604-3507

Leverett Nelson, Esq.
Regional Counsel
Environmental Protection Agency, Region 5
Office of Regional Counsel
77 West Jackson Boulevard
Chicago, IL 60604-3507

Re: Removal of the Public Nuisance Provision from the Ohio State Implementation Plan

Dear Mr. Mooney and Mr. Nelson:

Thank you for meeting on October 1, 2019 to discuss correcting the Ohio state implementation plan ("SIP") to remove the public nuisance rule (OAC 3745-15-07) ("nuisance rule"). As we discussed at the meeting, the nuisance rule is a general rule prohibiting public nuisances. It has no connection with the purposes for which SIPs are developed and approved, no reasonable connection with the National Ambient Air Quality Standards ("NAAQS"), and has not been used by Ohio as part of its NAAQS control strategy. As such, the nuisance rule should not have been included in the SIP when it was approved by EPA in 1972 and then again in 1974.

Now that EPA is aware of the error, the SIP should be corrected using EPA's authority under Clean Air Act ("CAA") Section 110(k)(6), as EPA has done in numerous other instances. Using the agency's authority under CAA Section 110(k)(6) to remove the nuisance rule will conserve agency resources and expediently correct an error that has had unintended consequences for businesses in Ohio.

1. The Ohio Nuisance Rule Is Not Reasonably Related to Attainment and Maintenance of the NAAQS in Ohio

In 1979, after the 1977 Amendments to the Clean Air Act, EPA was in the process of reviewing many States' SIP submissions. At that time, EPA's Office of General Counsel ("OGC") advised its Regional Counsel that States' measures that either control non-criteria air pollutants or are not sufficiently related to the State's strategy for the attainment and maintenance of the NAAQS, may not legally be included in SIPs.¹ Over the past twenty years, numerous SIPs have been corrected to remove nuisance rules similar to Ohio's and other general air pollution control rules consistent with EPA's guidance.

The Ohio nuisance rule is most similar to the nuisance rules in California, Michigan, and Georgia, all of which were removed from the SIP using CAA Section 110(k)(6). The Ohio rule provides that:

[t]he emission or escape into the open air from any source or sources whatsoever, of smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, 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, is hereby found and declared to be a public nuisance. It shall be unlawful for any person to cause, permit or maintain any such public nuisance.

The nuisance rule does not identify criteria air pollutants, require any particular reductions or controls, establish limits or standards, and reductions in emissions from compliance with the nuisance rule are not quantified or accounted for in the State's attainment demonstration. The Ohio rule is the classic example of a general prohibition on air pollution that bears no relation to reductions in NAAQS regulated pollutants.

Most recently, EPA issued a technical correction to the California SIP, to remove numerous local nuisance rules very similar to the Ohio nuisance rule that were "approved in error." 84 Fed. Reg. 45422, 45422 (August 29, 2019). In each case, the local rule prohibits the discharge of "air contaminants or other material which cause injury, detriment, nuisance, or annoyance" 83 Fed. Reg. 43577 (August 27, 2018); *see, e.g.*, Amador County APCD Rule 205 (nuisance); Butte County AQMD Section 2-1 (nuisance). EPA determined that the local

¹ Memorandum from Michael James, Associate General Counsel of EPA's Air, Noise, and Radiation Division to Regional Counsels and Air Branch Chief regarding "Status of State/Local Air Pollution Control Measures not related to NAAQS," February 9, 1979 ("OGC Memo").

nuisance rules were included in error because they are general prohibitions against air pollution and not part of the districts' NAAQS control strategies. *Id.* at 43576-77.

Michigan's Rule 901 was removed from Michigan's SIP in 1999 for similar reasons. EPA determined that Rule 901 is "a general rule that prohibits the emission of an air contaminant which is injurious to human health or safety . . . or which causes unreasonable interference with the comfortable enjoyment of life or property." 64 Fed. Reg. 7790, 7791 (Feb. 17, 1999). In using its authority to correct the Michigan SIP under CAA Section 110(k)(6), EPA explained that it was removing the nuisance rule from the SIP because it primarily has been used to address odors and other nuisances and "the rule does not have a reasonable connection to the national ambient air quality standards (NAAQS) and related air quality goals of the Clean Air Act." *Id.*

Likewise, Georgia's nuisance rule was removed from the SIP pursuant to CAA Section 110(k)(6) "because the rule is not related to the attainment and maintenance of the NAAQS." 71 Fed. Reg. 13551, 13552 (March 16, 2006).

Ohio's nuisance rule is no different than the California, Michigan, Georgia and other nuisance rules that have been removed from SIPs. The Ohio nuisance rule prohibits undefined quantities of "smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, or any other substances or combinations of substances" Similarly, the Michigan nuisance rule (Mich. Admin. Code R 336.1901) prohibits "air contaminants," defined as "dust, fume, gas, mist, odor, smoke, vapor, or any combination thereof." *Id.* at R 336.1101(f). The Georgia nuisance rule (Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(1)) also prohibits "air contaminants", including but not limited to "solid or liquid particulate matter, dust, fumes, gas, mist, smoke, or vapor" *Id.* at 391-3-1-.01(c). And many of the local rules removed from the California SIP prohibit "air contaminants," which are defined, for example, to include "smoke, dust, charred paper, soot, grime, carbon, noxious acids, fumes, gases, odors, or particulate matter." Amador County APCD Rule 102 (definition of "air contaminant or pollutant"); Amador County APCD Rule 205 (nuisance).

The term "air contaminant," as used in the California, Michigan, Georgia, and other nuisance rules, matches the list of substances regulated in the Ohio nuisance rule, i.e., "smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, or any other substances or combinations of substances." *Cf., e.g.,* N.Y. Comp. Codes R. & Regs. tit. 6, § 211.1 (general prohibition on the emission of "air contaminants," defined at § 200.1 to include "chemical[s], dust, compound[s], fume[s], gas[es], mist, odor[s], smoke, vapor[s], pollen or any combination thereof"). There is nothing unique about the substances regulated under the Ohio nuisance rule.

During our meeting, EPA asked whether the reference to “dust” in the Ohio nuisance rule could be viewed as controlling particulate matter or whether the reference to “acids” could be viewed as controlling sulfur dioxide emissions. While it is possible that prohibiting undefined quantities of dust and acids has the incidental effect of reducing some quantity of PM or SO₂, reducing criteria air pollutants is not the purpose of the rule and the rule is not sufficiently prescriptive to be used by Ohio as part of its NAAQS control strategy for PM or SO₂. If the incidental control of criteria air pollutants was sufficient to make a rule part of the State NAAQS control strategy, EPA would not have been able to make the corrections it did to the California, Georgia, Michigan, and numerous other SIPs.

As a practical matter, it is impossible for Ohio to quantify reductions in criteria air pollutant emissions attributable to the nuisance rule based on the vague language in the rule, and Ohio has not done so. Compliance with the nuisance rule can only be determined through case-by-case adjudications of subjective factors, without any pre-defined compliance test methods. Compare the citizen suit provision in CAA Section 304, which requires that a claim must be premised on an enforceable emission standard or limitation to be cognizable, stating in part that “Section 304 would not substitute a ‘common law’ or court-developed definition of air quality.” S. Rep. No. 91-1196, at 36, 37-38 (1970). Unlike CAA Section 110(a)(2), the nuisance rule does not limit “the quantity, rate, or concentration of emissions of air pollutants on a continuous basis” to enable a State to rely on it for purposes of its NAAQS demonstration. At least this level of specificity is also needed for States to be able to demonstrate that they are attaining and maintaining compliance with the NAAQS.

To violate the Ohio nuisance rule, a source must emit enough smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, or other substances to “endanger the health, safety or welfare of the public, or cause unreasonable injury or damage to property.” OAC 3745-15-07. The rule provides no objective or quantitative measure of the amount of emissions that would endanger the public or unreasonably injure or damage property. For this reason, the nuisance rule is not sufficiently prescriptive to be used by Ohio to meet its legal obligation to demonstrate the attainment and maintenance of the NAAQS.

In contrast, there are provisions in the Ohio SIP expressly intended to control criteria air pollutant emissions, including nitrogen oxides, particulate matter, and sulfur dioxide. *See, e.g.*, OAC 3745-14, nitrogen oxides; OAC 3745-17, particulate matter; OAC 3745-18, sulfur dioxide. They specify the quantity, rate, or concentration of each air pollutant that may be emitted and Ohio uses these provisions as part of the State NAAQS control strategy and in the attainment demonstration. The nuisance rule is entirely different from the pollutant specific limits used by Ohio to demonstrate attainment and maintenance of the NAAQS.

2. EPA Should Use Its CAA Section 110(k)(6) Authority to Correct the Error

CAA Section 110(k)(6) (Corrections), is the mechanism to be used by EPA to correct an error in a SIP approval. As you know, it provides that, whenever EPA determines that its “action approving, disapproving, or promulgating any plan or plan revision (or part thereof) . . . was in error, [EPA] may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate *without requiring any further submission from the State.*” 42 U.S.C. § 7410(k)(6) (emphasis added). It authorizes EPA to correct a SIP where “(1) EPA clearly erred in failing to consider or inappropriately considered information made available to EPA at the time of the promulgation, or the information made available at the time of promulgation is subsequently demonstrated to have been clearly inadequate; and (2) other information persuasively supports a change in the regulation.” See 57 Fed. Reg. 56762, 56763 (November 30, 1992).

In contrast, CAA Section 110(k)(5) (Calls for Plan Revisions) is to be used when EPA determines that a SIP is inadequate to attain or maintain compliance with the NAAQS. Under CAA Section 110(a)(2)(h), State plans must provide for revisions from time to time as may be necessary to account for revisions to NAAQS standards and when EPA determines that the SIP is substantially inadequate to attain the NAAQS. Section 110(l) (Plan Revisions) describes the mechanics of doing so. In addition to being the legally correct vehicle to be used to correct an error in a SIP approval, Section 110(k)(6) has the advantage of being the fastest mechanism and conserves agency resources while affording the public the opportunity for notice and public comment.

Using Section 110(k)(6) to revise the SIP is also consistent with the OGC Memo.² As EPA’s General Counsel recognized at the time, States “may not always differentiate between their regulations to control criteria pollutants and their air pollution control regulations in general.” *Id.* EPA’s General Counsel advised EPA that it should differentiate if the State does not and that EPA should not act on an identified non-criteria pollutant measure because it cannot legally be part of the SIP. The OGC Memo directs EPA to prevent errors in the SIP, even when they are the result of an error in the State submission. Therefore, EPA should use Section 110(k)(6) to correct its error even though Ohio erred by including the nuisance rule in its plan submission.

During our meeting, EPA asked if Ohio intended for the nuisance rule to remain a part of the SIP when, in 1984, it removed odors from the rule (OAC 3745-15-07(B)) but left the general

² OGC Memo, *supra* note 1.

nuisance provision in OAC 3745-15-07(A). The reason Ohio's SIP was revised in 1984 to narrow the scope of the nuisance rule was explained in Am. Sub. SB 78, enacted by the 139th General Assembly, effective June 29, 1982 (copy attached). That legislation excluded "agricultural production activities" from Ohio EPA's jurisdiction under the Ohio Air Pollution Control Act, by amending the definition of "air contaminant" in Section 3704.01(B) of the Ohio Revised Code.

The only Ohio EPA air pollution rule that applied to "agricultural production activities" at the time was the nuisance rule, OAC 3745-15-07. Since "agricultural production activities" were not subject to regulation under Chapters 3745-17, -18, -21, or -31, odors from "agricultural production activities" were not subject to OAC 3745-15-07 as amended in 1982. Eliminating the applicability of the nuisance rule to odors from "agricultural production activities" did not reflect a judgment on the part of Ohio EPA that the remaining provisions of OAC 3745-15-07 were related to attainment and maintenance of the NAAQS. The SIP had to be revised to comply with the General Assembly mandate to exempt agricultural operations and did not reflect any determination that the odor provisions were not appropriately included in the SIP. Importantly, OAC 3745-15-07 still applies to odors from the vast majority of sources in Ohio, i.e., those sources subject to regulation under OAC Chapters 3745-17, -18, -21, or -31.

As we also discussed, Ohio submitted a request to modify the SIP in 1999 to remove the nuisance rule. Ohio would not have requested that the nuisance rule be removed from the SIP if the nuisance rule were part of its NAAQS control strategy.

3. The Removal of the Nuisance Rules Will Not Lessen Environmental Protection in Ohio

Removing the nuisance rule from the SIP will not lessen environmental protection in Ohio or its local neighborhoods. As EPA noted when it removed a similar provision from the Michigan SIP, "[a]lthough Rule 901 will be removed from the SIP, Rule 901 will remain as a state rule and still be enforceable at the State level." 64 Fed. Reg. 7790, 7791 (Feb. 17, 1999). EPA also noted that the regulations intended to attain the NAAQS will still be federally enforceable and the State and EPA retain the ability to take action under Section 303 of the CAA to prevent an imminent and substantial endangerment. *Id.* For the same reasons, correcting the Ohio SIP will not lessen environmental protection in Ohio.

John Mooney
Rett Nelson
October 18, 2019
Page 7

4. Conclusion

There is no evidence that the former Ohio Air Pollution Control Board, in 1972 when the nuisance rule (then AP-02-07) was submitted, or in 1974 when the nuisance rule was approved as part of the SIP, determined that the nuisance rule was “necessary or appropriate” to attain and maintain the NAAQS. Since then, there is no evidence that Ohio has relied on the nuisance rule in any attainment demonstration or otherwise considers the nuisance rule to be part of its NAAQS control strategy.

Accordingly, EPA’s May 31, 1972 and April 15, 1974 approvals of Ohio’s SIP were in error. As EPA has done in other States, it should correct the error using CAA Section 110(k)(6) to conserve agency resources and expedite the correction of an error that has had the unintended consequence of harming businesses in Ohio.

Very truly yours,

A handwritten signature in black ink, appearing to read 'LeAnn Johnson Koch', with a stylized, cursive script.

LeAnn Johnson Koch

Attachment

cc: Cheryl Newton (via electronic mail)
Kurt Thiede, Esq. (via electronic mail)

EXHIBIT 8

To comments of Donna Ballinger, Marilyn Wall, Ohio
Environmental Council, Sierra Club, and Case Western Reserve
University Environmental Law Clinic

Cincinnati installs air monitors across city to fight long battle with pollution

Mary LeBus

The video above is from FOX19 NOW's previous coverage.

CINCINNATI (WXIX) - Over three dozen monitors have been installed across Cincinnati's neighborhoods to monitor the city's air quality, a tricky issue the region has faced for well-over a century now.

In an effort to educate residents and improve air quality by 2028, the Cincinnati Health Department and the Office of Environment and Sustainability collaborated to create the [Cincy Air Watch Project](#) - a subset of the 2023 Green Cincinnati Plan.

The initiative includes the installation of the [PurpleAir Flex Monitors](#), which collects data that appears online, allowing people to access information about the city's air quality whenever they want. Each monitor costs \$289 in addition to a power supply that is sold separately for \$45 (totaling to about \$12,358).



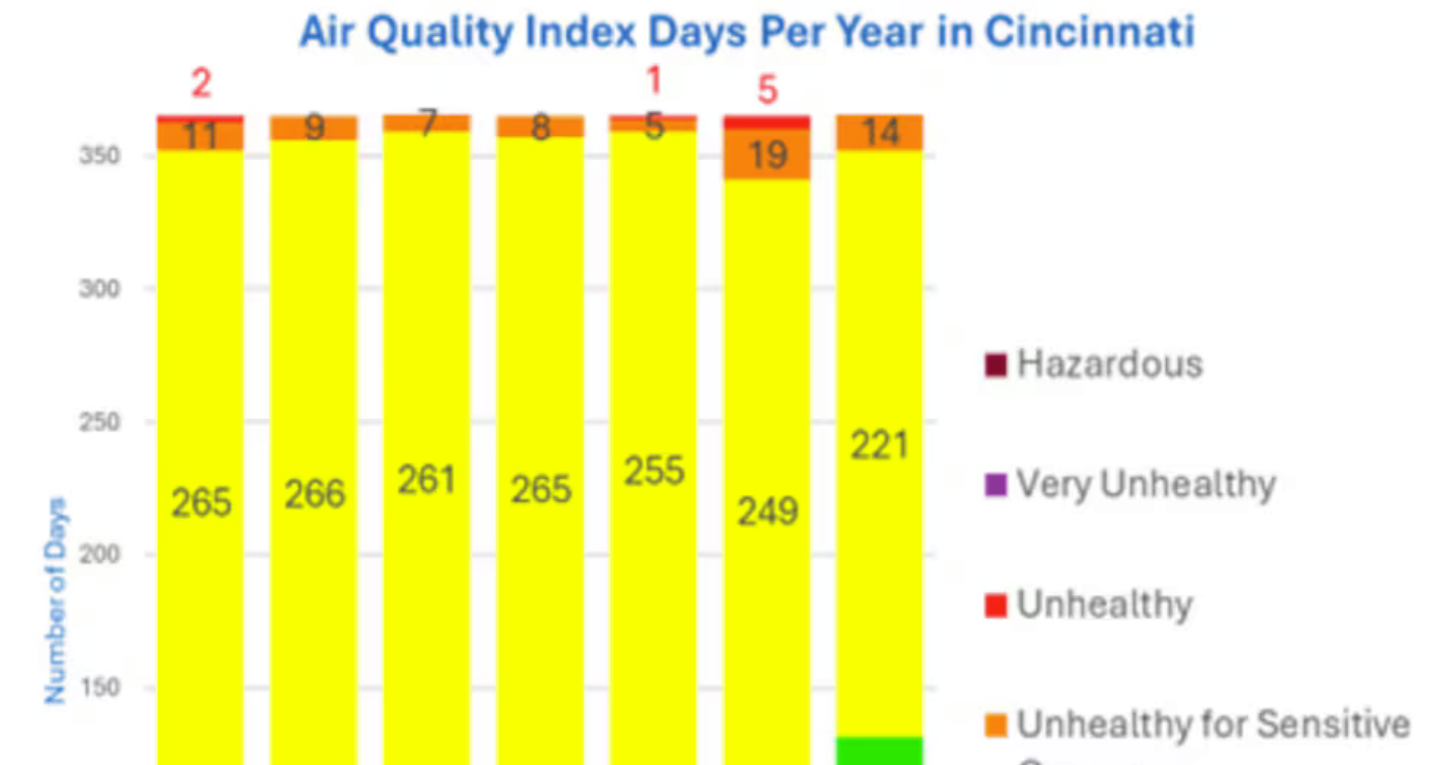


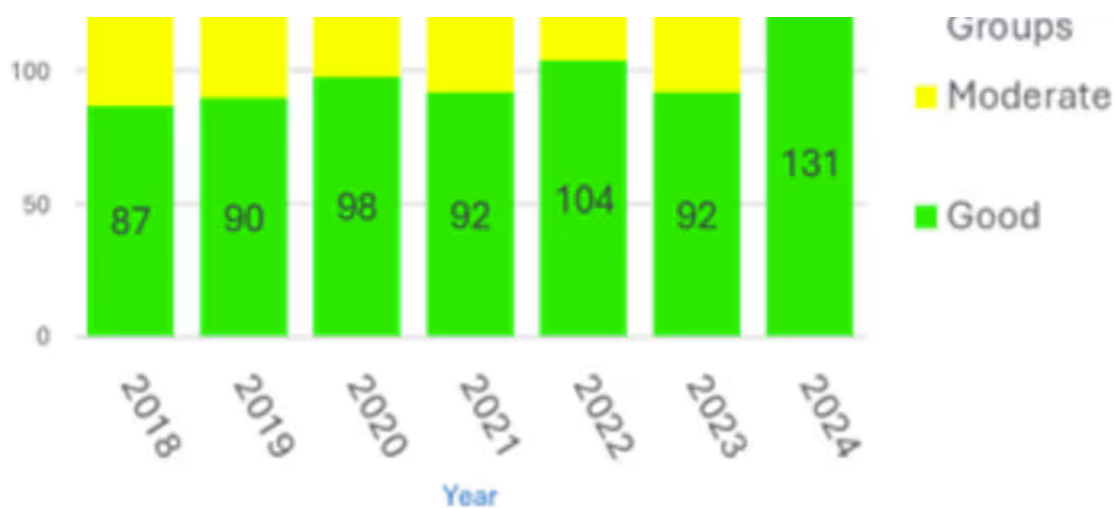
Thirty-seven PurpleAir monitors have been distributed across Cincinnati to monitor the city's air quality. (Provided: Cincinnati Health Department)

“Thirty-seven monitors have been placed so far with the goal to place one in every neighborhood. It was important to us that we place these monitors at locations that people go [to], so we have been very fortunate to have found wonderful community partners,” said Environmental Epidemiologist Meriel Vigran, MPH.

What does poor air quality look like? How does it impact us?

The city has dealt with “moderate” air quality for most of the days in 2018 to 2024, according to an Air Quality Index provided by the health department.





Air Quality Indices in Cincinnati from 2018-2024, according to EPA Outdoor Air Quality Data.(Cincinnati Health Department)

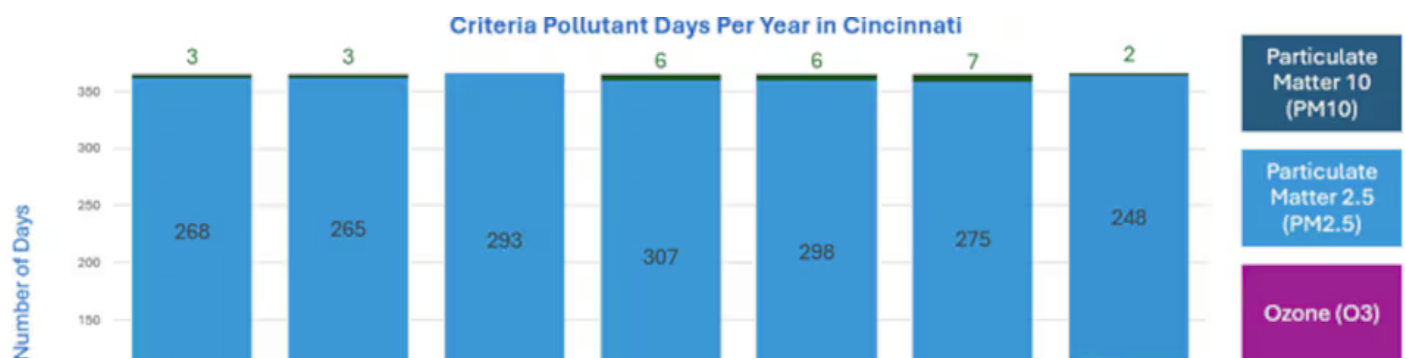
Although Cincinnati has rarely had “unhealthy” or “hazardous” air quality days within the last seven years, the city still deals with [frequent air pollution](#), “highlighting a continued need for environmental vigilance and action,” Vigran says.

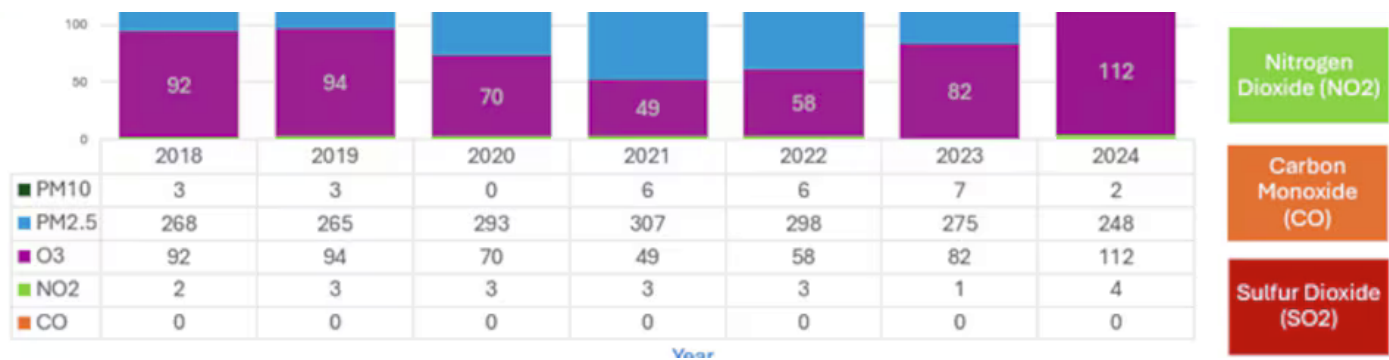
“Poor air quality is proven to negatively impact our health and environment. The term air quality relates to the amount of pollution or tiny pieces suspended in the air. The five most commonly studied types of air pollution are carbon monoxide (CO), ozone (O₃), nitrogen dioxide (NO₂), sulfur dioxide (SO₂), and solid particle pollution called particulate matter (PM),” she explained.

[Particulate matter](#), specifically PM 2.5 - a fine mixture of liquid and solid particles that can be harmful to a person’s health - is one of those pollutants Cincinnatians inhale more often than others, which can be harmful to a person’s health, causing issues like asthma, lung disease and heart disease.

The pollutant is released into the air from various sources, such as construction sites and power plants, according to the Environmental Protection Agency.

Another air pollutant Cincinnatians come in contact with is [ground-level ozone](#), which forms when sunlight reacts with nitrogen oxides and volatile organic compounds. These chemicals are often released from cars or factories and can cause respiratory issues and damage people’s airways depending on the level of exposure, the EPA says.





Most of the air pollutants Cincinnati deals with are particulate matter and ground-level ozone, according to EPA data.(Cincinnati Health Department)

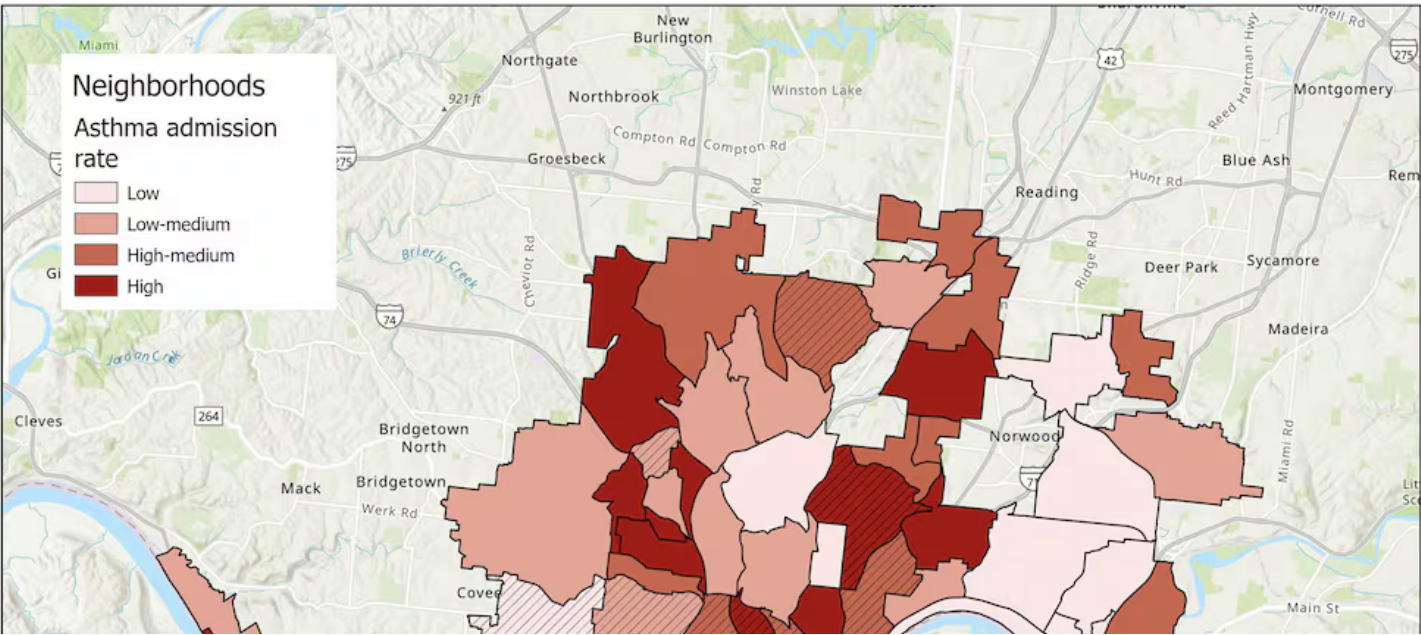
Why do some neighborhoods have more air quality monitors than others?

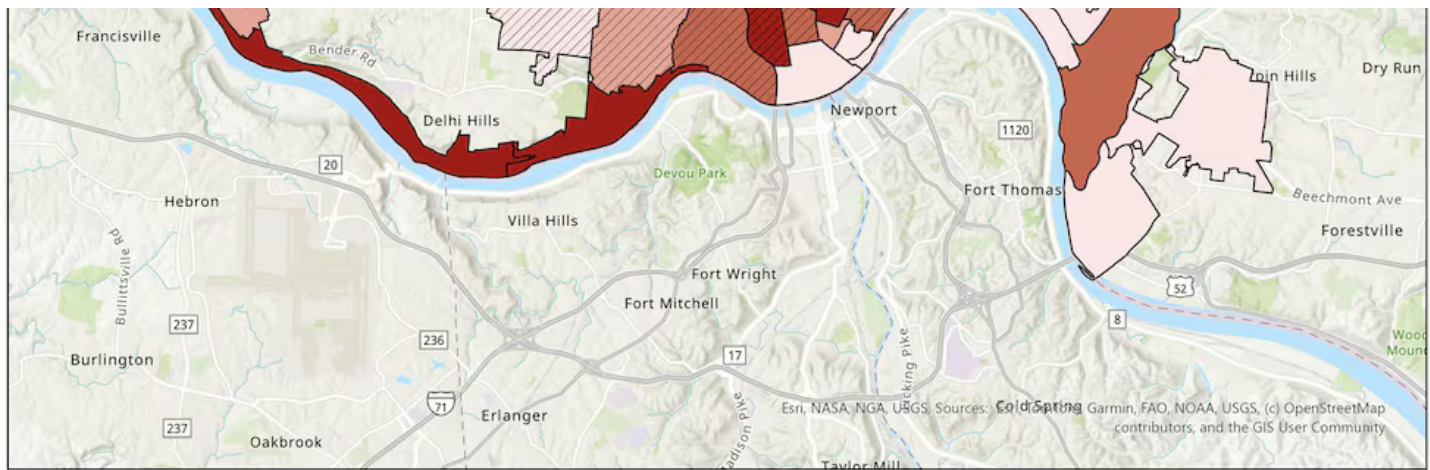
As the city continues to find ways to obtain PurpleAir monitors for all 52 neighborhoods in Cincinnati, some places have several, such as Avondale and Westwood.

“Our initial roll out did focus on placing monitors [in] ‘priority neighborhoods,’ which for this project we are defining as areas with heightened air quality concern due to their correlation with asthma prevalence from the [2021 Climate Equity Indicators Report](#),” Vigran tells FOX19 NOW.

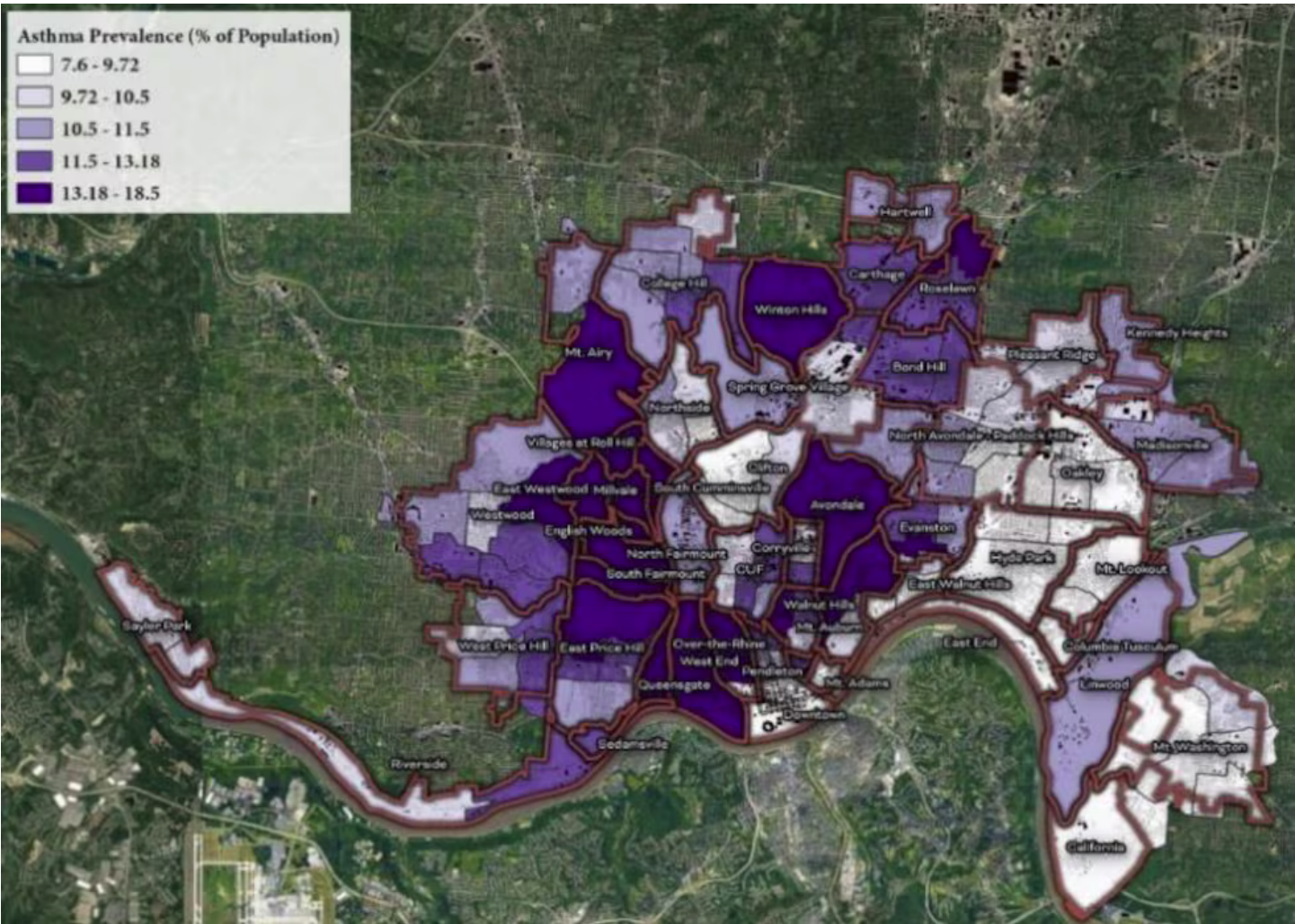
The health department also used data found by Dr. Andrew Beck, who they say tracked asthma-related emergency room admissions at Cincinnati Children’s Hospital for every 1,000 patients under 19 years old in 2023.

“That found a similar pattern of poor health outcomes in the Mill Creek Valley and along the I-75 & I-71 corridor,” Vigran said. “Cincinnati neighborhoods with high rates of asthma often overlap with areas of low tree canopy cover and urban heat islands according to the 2021 Climate Equity Indicators Report.”





This map depicts asthma-related incidents for people under 19 years old (per 1,000) who were admitted to Cincinnati Children's Hospital in 2023.(Cincinnati Health Department)



Asthma prevalence rate per neighborhood in Cincinnati.(Cincinnati Health Department)

Vigran says that data from this project will help inform residents understand the relationship between local air quality and Cincinnati health outcomes, as well as the relationship between air quality and the city’s “built environment.”

Why does Cincinnati have “moderate” air quality most days?

The Queen City has a long history of combatting air pollution - a history that dates back all the way to its industrialization.

Throughout the 1800s, Cincinnati was known for its meatpacking production, manufacturing of various goods and utilizing steamboats and trains for shipping items across the U.S.

By the late 1880s, it was considered the largest city in Ohio with a population of nearly 300,000 people and one of the most densely populated cities in the nation, according to [an article](#) provided by provided by the [Southwest Ohio Air Quality Agency](#).

But with its industrialization and population size, residents also experienced various forms of pollution.

“Cincinnati’s history of heavy industry and historic reliance on coal-burning created significant air pollution issues for over a century. However, dedicated efforts to improve air quality have been ongoing since the late 1800s,” Vigran said.

Many smoke and air ordinances were passed at the local level since the 1881, however, the air quality did not start to significantly improve until the [federal and state governments got involved](#).

Additionally, the layout of Cincinnati does not help when it comes to pollution

“The city sits in a valley, and this topography often traps pollutants, preventing them from dispersing,” explains Vigran.

Although much improvement has been made since the 19th century, Vigran says Cincinnati’s air quality still struggles with ground-level ozone and particulate matter.

See a spelling or grammatical error in our story? [Please click here to report it](#).

Do you have a photo or video of a breaking news story? Send [it to us here](#) with a brief description.

Copyright 2025 WXIX. All rights reserved.