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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2009–0807; FRL–9936–54–Region 5]

Air Plan Approval; Ohio; Test Methods; Error Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is determining that a portion of an October 26, 2010, action was in error and is making a correction pursuant to section 110(k)(6) of the Clean Air Act. The October 26, 2010, EPA action approved various revisions to Ohio regulations in the EPA approved state implementation plan (SIP). The revisions were intended to consolidate air quality standards into a new chapter of rules and to adjust the cross references accordingly in various related Ohio rules. These changes included a specific revision to the cross reference in the Ohio rule pertaining to methods for measurements for comparison with the particulate matter air quality standards. This final correction action removes any misperception that EPA approved any revision to the pertinent rule other than the revised cross reference. This action will therefore assure that the codification of the October 26, 2010, action is in accord with the actual substance of the action.

DATES: This final rule is effective on December 7, 2015.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2009–0807. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone John Summerhays, Environmental Scientist, at (312) 886–6067 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: John Summerhays, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6067, *summerhays.john@epa.gov.*

SUPPLEMENTARY INFORMATION: This supplementary information section is arranged as follows:

I. Summary of EPA's Proposed Rulemaking

On June 4, 2003, Ohio submitted a variety of revisions to the EPA approved version of Ohio Administrative Code (OAC) 3745–17 in the state's SIP, which regulates particulate matter and opacity from affected sources. While EPA subsequently approved many of these revisions, EPA published action on June 27, 2005, proposing to disapprove specific submitted revisions in OAC 3745–17–03(B) that in EPA's view relaxed existing SIP opacity limitations without an adequate analysis under section 110(l) or section 193 of the Clean Air Act.[1] Consistent with this proposed disapproval, the version of OAC 3745–17–03(B) submitted by the state on June 4, 2003, was not, and is not, an approved provision of the Ohio SIP.

On September 10, 2009, for purposes of consolidating its existing SIP rules identifying applicable air quality standards, and to adjust the cross references between rules accordingly, Ohio submitted additional revisions to several of its existing rules to EPA for approval into the SIP. Most notably, these rule revisions included a modification to the existing cross reference in OAC 3745–17–03(A), which was necessary because the ambient particulate matter measurement method identified in this paragraph was for purposes of assessing attainment with the ambient air quality standards now located in OAC 3745–25–02, rather than in OAC 3745–17–02.

On October 26, 2010, at 75 FR 65572, EPA published a direct final action approving the relevant revisions in the September 10, 2009, submission. In the preamble and in the codification of the October 26, 2010, action, EPA erroneously listed the approved SIP revisions as including the entirety of OAC 3745–17–03, rather than specifying more precisely that the approval as it pertained to OAC 3745–17–03 applied only to the revised cross reference in OAC 3745–17–03(A). This error left the misimpression that EPA had approved other significant substantive revisions in OAC 3745–17–03, including those in OAC 3745–17–03(B) that EPA had previously proposed to disapprove. The codification in the October 26, 2010, action with respect to OAC 3745–17–03 should have been explicitly limited to OAC 3745–17–03(A), to reflect the EPA approval of only the revised cross reference.

EPA subsequently recognized that the codification erroneously left the misimpression that it had approved more of OAC 3745–17–03 than the revision of the cross reference in OAC 3745–17–03(A). On April 3, 2013, at 78 FR 19990, EPA published action to correct the error. EPA took this action pursuant to its general rulemaking authority under Administrative Procedures Act section 553. Two parties challenged EPA's April 3, 2013, action, and one of these parties also filed a petition for reconsideration of that action, objecting that EPA failed to correct the error in the October 26, 2010, action in accordance with the procedures of section 110(k)(6) of the Clean Air Act.

EPA responded to the petition for reconsideration by agreeing to take this action pursuant to section 110(k)(6), as requested by the petitioner. Accordingly, EPA published proposed rulemaking on February 7, 2014, using its authority under section 110(k)(6) to correct errors in its rulemaking of October 26, 2010.[2] Given the petitioners' expressed interest in commenting on EPA's action, EPA elected to use its authority under section 110(k)(6) for this action because, under these circumstances, it would provide the best mechanism to correct the apparent misunderstandings concerning the error in the October 26, 2010, action.

EPA's February 7, 2014, proposal provides an extensive description of the error in its October 26, 2010, rulemaking, provided in subsections entitled, ''What was the error in description and codification?'', ''What precipitated this error?'', and ''Why was it evident that this was an error?'' It is not necessary to repeat that detailed explanation here. EPA proposed to correct the error to remove any misimpression in its October 26, 2010,

[1] See 70 FR 36901 (June 27, 2005).

[2] See 79 FR 7412 (Feb. 7, 2014).

rulemaking that EPA had approved any revisions to OAC 3745–17–03 other than the cross reference in OAC 3745–17–03(A). Specifically, EPA proposed to take action pursuant to Clean Air Act section 110(k)(6) repromulgating the correction published on April 3, 2013. EPA solicited comments on this proposed error correction, while noting that any comments on the technical or legal merits of certain substantive revisions to OAC 3745–17–03 (*e.g.,* the opacity-related provisions in OAC 3745–17–03(B)) or on the pending proposed disapproval of those provisions would not be germane to this error correction rulemaking.

EPA intended to correct the error in the October 26, 2010, action first and then separately to complete the action to address the merits of the substantive revisions to OAC 3745–17–03 in the June 4, 2003, SIP submission that were the subject of the June 27, 2005, proposed disapproval. To this end, EPA published a supplemental proposal on June 26, 2014, reopening comment on its prior proposed disapproval of revisions to OAC 3745–17–03.[3] Subsequently, however, Ohio has withdrawn the portion of the June 4, 2003, submission that EPA proposed to disapprove.[4]

Accordingly, since the provisions is withdrawn, EPA does not need to complete action on the June 4, 2003, SIP submission. Significantly, this also confirms that the submitted substantive revisions to OAC 3745–17–03 are not part of the EPA approved SIP and that the EPA's October 26, 2010, action could not have revised those elements of the existing version of OAC 3745–17–03 in the SIP, inadvertently or otherwise. Except for an amendment to the cross reference to ambient air quality standards in OAC 3745–17–03(A) (which EPA approved on October 26, 2010), the version of OAC 3745–17–03 in the SIP remains the version effective in the state on January 31, 1998, approved by EPA on October 16, 2007.

II. Comments and EPA's Responses

EPA received comments on its proposed error correction from three parties: (i) The Ohio Environmental Protection Agency (Ohio EPA); (ii) the Ohio Utility Group; and (iii) a group including the Ohio Chamber of Commerce, Ohio Manufacturers Association, and Ohio Chemistry Technology Council (Chamber *et al.*). The following are significant adverse comments from each commenter and EPA's responses.

Ohio EPA

Comment: The commenter asserted that: ''On February 7, 2014, U.S. EPA proposed, as an error correction, to remove from Ohio's State Implementation Plan (SIP) a previously approved (October 26, 2010) portion of OAC Rule 3745–17–07 regarding methods for measurements to determine compliance with Ohio's 20% opacity limitation.'' [5] With this statement, the commenter is implying that EPA in fact approved substantive revisions to OAC 3745–17–03 in the October 26, 2010, action, rather than merely approved the cross reference in OAC 3745–17–03(A). The commenter suggested that EPA acted on ''the entirety'' of the revisions to OAC 3745–17–03.

Response: EPA disagrees with the commenter's premise that the Agency approved any portion of OAC 3745–17–03 other than the revision to the cross reference in OAC 3745–17–03(A). EPA's February 17, 2014, proposed action rule provides an extensive explanation of the error that occurred in the October 26, 2010, action and the genesis of the error. Ohio's clearly stated purpose in making the September 10, 2009, submission was to consolidate its existing SIP provisions relating to ambient air quality standards and to revise certain cross references in existing approved SIP rules in order to reflect that reorganization. The specific SIP revisions at issue in the state's submission were reflected in redline and the redlined document identified the cross reference in OAC 3745–17–03(A) as the only revision relevant to OAC 3745–17–03. This indicates that approval of any substantive revisions in OAC 3745–17–03(B) would have been beyond the scope of the rulemaking. Moreover, EPA had already proposed to disapprove revisions to OAC 3745–17–03(B) on June 27, 2005, EPA received numerous, substantial comments for and against that proposed disapproval, and the rulemaking of October 26, 2010, provided no evidence of consideration of any of these comments. Although the commenter described EPA's proposed error correction action as an action to ''remove . . . a previously approved'' portion of rule, this is simply incorrect. EPA did not ''previously approve'' the portions of OAC 3745–17–03 that the Agency rulemaking of October 26, 2010, did not substantively address. EPA fully acknowledged in the February 17, 2014, proposal that the error that occurred in the October 26, 2010, action was the result of misunderstandings and miscommunications that it is seeking to rectify in this final error correction action. EPA is taking this final action in order to avoid further confusion on the part of regulated entities, regulators, and members of the public.

Comment: The commenter stated that it ''firmly believes [that the provision in OAC 3745–17–03(B)] is fully approvable.'' The commenter explained that it was ''attaching, and reaffirming'' its prior comments on EPA's proposed disapproval of this provision in the June 27, 2005, action. The commenter further requested that ''[c]onsideration should be taken to the previous comments submitted by Ohio EPA and others regarding the approvability of the provision at question in this action.''

Response: As explained in the February 17, 2014, proposal for this action, EPA is focusing this section 110(k)(6) rulemaking on the specific error that occurred in the October 26, 2010, action. This rulemaking is not addressing the substantive merits of any portion of OAC 3745–17–03. Instead, this rulemaking is addressing whether EPA made an error in its October 26, 2010, rulemaking by including a codification that went beyond the scope of the rulemaking and whether EPA should correct that error by correcting the codification to reflect that the only portion of OAC 3745–17–03 that was addressed in that rulemaking was the cross reference in OAC 3745–17–03(A). Accordingly, the commenter's resubmission of its prior comments on the June 27, 2005, proposed disapproval is inappropriate and not germane to this action.

In addition to being outside the scope of this error correction action, EPA notes that the commenter's arguments also support EPA's conclusion that the October 26, 2010, action was in error to the extent that it appeared to approve any revision beyond the cross reference in OAC 3745–17–03(A). The commenter explicitly acknowledged that EPA previously received significant comments concerning the merits of OAC 3745–17–03(B), in particular comments that in the commenter's view warrant reversal of EPA's prior proposed disapproval. Furthermore, the commenter in effect argued that EPA has not adequately considered these comments. This is fully consistent with EPA's own observation that its October 26, 2010, rulemaking provided no

[3] See 79 FR 36277 (June 26, 2014).

[4] See letter from Craig W. Butler, Director, Ohio EPA, to Susan Hedman, Regional Administrator, USEPA Region 5, dated September 5, 2014, ''request[ing] withdrawal of [Ohio's] June 4, 2003 request to incorporate paragraph (B)(1)(b) into Ohio's SIP.''

[5] EPA's October 26, 2010, rulemaking makes no reference to OAC 3745–17–07 (containing opacity limits). EPA presumes that the commenter intends to refer to OAC 3745–17–03, which among other provisions has provisions relating to measurement of opacity.

evidence of any consideration of public comments concerning OAC 3745–17–03(B) whatsoever (again, because this provision was outside the scope of that rulemaking). Thus, the commenter appeared to agree with EPA's view that the October 26, 2010, rulemaking does not provide any evidence of the consideration of comments regarding OAC 3745–17–03(B) that would be necessary for any approval or disapproval of OAC 3745–17–03(B) to be considered lawful. Moreover, the commenter did not appear to dispute EPA's view that rulemaking on OAC 3745–17–03(B) could not be considered a lawful and valid part of the October 26, 2010, rulemaking even if it had been intended to be within the scope of the rulemaking. As explained in the February 17, 2014, proposal for this action, EPA had no such intentions and the fact that EPA did not address prior substantive comments on the merits of OAC 3745–17–03(B) should have alerted the commenter and other parties to this fact.

Finally, EPA acknowledges the commenter's request that that EPA complete its consideration of comments on the merits of OAC 3745–17–03(B), but such consideration is outside the scope of this rulemaking. By separate action, EPA intended to address the merits of the substantive revisions to OAC 3745–17–03 in the June 4, 2003, SIP submission that were the subject of the June 27, 2005, proposed disapproval. To this end, EPA published a supplemental proposal on June 26, 2014, reopening comment on its prior proposed disapproval of certain substantive revisions to OAC 3745–17–03.[6] Subsequently, however, Ohio withdrew its submittal of revisions to OAC 3745–17–03(B).[7] This renders consideration of comments with respect to the withdrawn submission moot, both for purposes of the June 27, 2005, proposed disapproval and for purposes of this error correction action.

Comment: The commenter objected that ''U.S. EPA has made certain assertions regarding [OAC 3745–17–03(B)] that go beyond the scope of this proposed correction. U.S. EPA refers to the provision as 'significant and substantive' and states the 'unapproved' revisions 'would allow significantly more opacity during certain periods.' '' The commenter disputed these statements. The commenter asserted its belief that ''U.S. EPA has crossed the threshold and cannot go forward with the package under 110(k), since U.S. EPA is now making a technical argument as to why the previously approved SIP revision is no longer acceptable.'' The commenter also argued that ''as a procedural matter, U.S. EPA must start over from the beginning and outline and address the entire technical issue in full and not use the 110(k) 'error' approach.''

Response: The premise of the commenter's arguments is that EPA's February 17, 2014, action in effect proposed to finalize EPA's prior proposed disapproval of certain portions of OAC 3745–17–03, not merely correcting the error that led to the misimpression that EPA had already approved the revisions in toto. The commenter is thereby ignoring EPA's clear statements about the actual scope of this error correction.

As explained in the February 17, 2014, proposal for this action, EPA is focusing this section 110(k)(6) rulemaking on the specific error that occurred in the October 26, 2010, action. EPA provided extensive discussion and explanation of the error that occurred in the October 26, 2010, action and why EPA could not be considered to have acted on any revisions to OAC 3745–17–03 that were outside the scope of that rulemaking. EPA explained the significance of OAC 3745–17–03(B) in the February 17, 2014, proposal as a means of explaining why EPA considered it important to correct the errors in its October 26, 2010, rulemaking. EPA noted in passing that it had already proposed to disapprove certain provisions for reasons that were already a matter of public record in the **Federal Register** as a means of emphasizing that it could not have approved those revisions in the October 26, 2010, action without an explicit discussion and justification for any such approval.

The commenter appears to agree that the revisions in OAC 3745–17–03(B) that it advocated for EPA to approve are significant and substantive. EPA statements regarding the significance of the error, however, cannot be considered to constitute final review of the merits of the erroneously addressed provisions. The October 26, 2010, action clearly did not address the merits of OAC 3745–17–03(B), and EPA's action proposing to correct an error related to these provisions did not address the merits of these provisions either.

The commenter disagreed in particular with EPA's characterization of OAC 3745–17–03(B) in the February 17, 2014, proposal as allowing significantly more opacity during certain periods. A more precise statement would have been that EPA had proposed to disapprove the pertinent revisions to OAC 3745–17–03(B) in the June 27, 2005, proposal based in significant part on the view that the revisions would allow significantly more opacity during certain periods. The commenter, along with several other commenters, has disputed EPA's proposed views regarding the merits of OAC 3745–17–03(B). As explained in detail in the February 17, 2014, proposal for this error correction, however, EPA did not intend, and could not have intended, to address the substantive merits of those revisions in the October 26, 2010, action. Indeed, with Ohio's withdrawal of its request for rulemaking on these provisions, EPA will no longer be conducting final rulemaking on the merits of OAC 3745–17–03(B). Nevertheless, the more relevant point is that the existence of these disputes as to the merits of OAC 3745–17–03(B) illustrates the importance of correcting any errors that might create the misimpression that EPA had completed its review of these issues. EPA believes that the significance of the provisions in OAC 3745–17–03(B) and the outstanding questions regarding whether those provisions could have been approved consistent with CAA requirements provide added value to correcting any misimpressions regarding the status of those provisions, namely misimpressions reasserted in these comments that EPA had already completed rulemaking on these provisions.

Contrary to the commenter's statement, EPA's proposed rulemaking to correct the errors in its October 26, 2010, action was not based on a technical argument regarding the merits of OAC 3745–17–03(B), including any technical argument as to whether these provisions allow significantly more opacity during certain periods. This assertion regarding whether the now withdrawn revisions to OAC 3745–17–03 would allow more opacity (made in EPA's 2005 proposed rulemaking addressing the merits of Ohio's now withdrawn SIP revision and contested by various commenters) illustrates the significance of the error in the October 26, 2010, action. However, the commenter provided no reason why characterization of the issue as significant and identification of any of the unresolved issues that were not addressed in the October 26, 2010, rulemaking (or elsewhere) should preclude EPA from assuring that the

[6] See 79 FR 36277 (June 26, 2014).

[7] See letter from Craig W. Butler, Director, Ohio EPA, to Susan Hedman, Regional Administrator, USEPA Region 5, dated September 5, 2014, which may be found in the docket for this final action.

October 26, 2010, rulemaking is characterized properly.

Comment: The commenter objected to EPA statements in a separate unrelated rulemaking regarding SIP revisions for the State of Alabama. The commenter referred to EPA statements that the commenter characterized as citing ''the 2005 proposed disapproval of Ohio's revision, in part, as justification for the proposed disapproval of Alabama's revision.'' The commenter further asserted that this ''mislead[s] the readers of the Alabama proposal that Ohio's proposed disapproval has followed its due course, when it has not.'' The commenter requested that ''any action taken on the Alabama proposal should not be used as justification for disapproving Ohio's provision.''

Response: EPA acknowledges that the proposed action concerning the State of Alabama mentioned the June 27, 2005, proposed disapproval of the Ohio submission. The existence of that proposal was, and is, a matter of record. EPA mentioned the June 27, 2005, proposed disapproval merely as means of explaining its views on relevant issue, not as a basis for a particular final action. The commenter did not explain why this comment concerning a proposed action in another state is relevant to the present error correction action concerning Ohio, nor does EPA consider it germane to this final action. In any event, the state has now withdrawn the portion of the submission that EPA proposed to disapprove, so this comment is moot.

Ohio Utility Group

Comment: The commenter asserted that ''U.S. EPA's action is not trivial and is not a mere 'correction.' In support of this statement, the commenter recited its view of the history of rulemaking on OAC 3745–17–03(B), including adoption by Ohio and proposed disapproval by EPA. The commenter observed that EPA received extensive comments on the June 27, 2005, proposed disapproval, but acknowledged that ''U.S. EPA never finalized this proposed action and, based on a review of the record, U.S. EPA never responded to comments submitted on this proposed rule.'' The commenter presented a summary of arguments in support of the merits of the opacity ''exemption'' in OAC 3745–17–03(B) that EPA proposed to disapprove in the June 27, 2005, proposal, and concluded that ''this exemption is technically defensible and the data [compiled to formulate the exemption] were never rebutted by U.S. EPA.''

Response: The commenter did not elaborate on its argument that EPA's proposed error correction action ''is not trivial'' or why EPA's proposed action is not consistent with EPA's authority to correct errors under section 110(k)(6). To the extent that the commenter is arguing that EPA's authority under section 110(k)(6) is limited to correcting ''trivial'' errors, EPA disagrees. On its face, section 110(k)(6) authorizes EPA to correct any error in a rulemaking action and does not restrict that authority to correction of errors that other parties might characterize as ''trivial.'' By its plain terms, EPA's authority under section 110(k)(6) extends broadly to ''action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification.'' Similarly, by its plain terms EPA's authority is not limited with respect to the nature or seriousness of the error, *i.e.,* it is not restricted to correction of ''trivial'' errors.

EPA and the commenters appear to agree on the fact that the revisions to OAC 3745–17–03(B) that EPA proposed to disapprove are important substantive provisions. In EPA's view, the importance of these provisions makes it necessary for EPA to clarify the fact that the October 26, 2010, rulemaking did not make any substantive revision to these provisions, and EPA cannot be considered to have lawfully acted on the revisions provisions without considering the comments for and against its June 27, 2005, proposal to disapprove them. Regardless of whether the error was ''trivial'' or not, EPA has concluded that the error warrants correction pursuant the authority of section 110(k)(6) (or under authorities that EPA is not using in this action).

The commenters' substantive arguments regarding the merits of OAC 3745–17–03(B) are not germane here, because they are not relevant to determining whether the codification contained in EPA's October 26, 2010, action was an erroneous description of that rulemaking action. The only issue in this action is EPA's correction of the error. Moreover, now that the state has withdrawn the submission seeking substantive revisions to OAC 3745–17–03(B), these comments are moot.

Comment: The commenter, in describing EPA's actions, states that ''[i]n 2010, . . . it appeared that U.S. EPA approved [OAC] 3745–17–03 in its entirety.''

Response: The commenter evidently agrees that EPA had only ''appeared'' to have approved substantive revisions to OAC 3745–17–03(B) in the October 26, 2010, action, because that is how they themselves describe what occurred.

Comment: The commenter made several assertions that it believes preclude EPA from finalizing this error correction. First, the commenter ''object[ed] to U.S. EPA's statement that a comment period was not required in issuing [the correction EPA published on April 3, 2013].'' The commenter stated that section 110(k)(6) dictates how EPA should make corrections to past rulemakings. The commenter also noted that section 110(k)(6) in particular requires that an error made through notice and comment rulemaking can only be corrected through notice and comment rulemaking. The commenter asserted that EPA's April 3, 2013, action to effectuate the correction of the October 26, 2010, action was invalid because it failed to meet this requirement of section 110(k)(6).

Response: While EPA continues to believe that the Administrative Procedures Act provides independent authority for agencies to issue corrections, that authority was not the basis of this rulemaking. The commenter submitted a petition for reconsideration requesting that EPA publish notice and solicit comment pursuant to its error correction authority under Clean Air Act section 110(k)(6). EPA granted that request, and this action is the final step of the requested error correction rulemaking. The commenter objected to the procedure EPA used to correct the error in the April 3, 2013, rulemaking, but that rulemaking is being replaced by this rulemaking under section 110(k)(6). Thus, comments concerning the procedure EPA should or should not have followed with respect to the April 3, 2013, rulemaking are not relevant and in fact are made moot by this action. In short, EPA is correcting the error by the procedure that the commenter advocated.

Comment: The commenter also objected that EPA did not have ''good cause'' (in its April 3, 2013, rulemaking) under the Administrative Procedures Act section 553(b) to make corrections without undergoing notice and comment. The commenter asserted its view that notice and comment (for EPA's April 3, 2013, action) was ''not impracticable, unnecessary or contrary to the public interest.'' In other words, the commenter disagreed with EPA's determination that there was a good cause exception to the normal requirements for notice and comment, given the nature of error at issue.

Response: EPA disagrees with the commenter's conclusion that correction of what was essentially a typographical

error requires full notice and comment rulemaking in all cases. Nevertheless, EPA notes that this comment suggests that the commenter acknowledged that Administrative Procedures Act section 553(b) authorizes corrections, even without notice and opportunity for comment, so long as EPA adequately justifies the decision not to undergo notice and opportunity for comment. In any case, EPA concludes that this rulemaking does not invoke that authority to forego notice and comment for good cause, and this action makes moot the rulemaking (published April 3, 2013) that did invoke that authority.

Comment: The commenter also objected to EPA's description of the error in the October 26, 2010, action as essentially a typographical error. The commenter claimed that ''[t]he Utilities did not submit comments [at the time of EPA's October 26, 2010, rulemaking] because U.S. EPA approved Ohio Adm. Code 3745–17–03 in its entirety as the notice indicated. Had the Utilities understood that these rules were selective to subpart (A), the Utilities may have submitted comments on this proposal.''

Response: As an initial matter, EPA notes that the commenter's claim supports the Agency's view that the error in the October 26, 2010, action engendered confusion and misunderstanding among some affected parties. The commenter speculates that had EPA's October 26, 2010, rulemaking used preamble language and a codification that more clearly identified that the only revision to OAC 3745–17–03 that EPA was approving was the cross reference in OAC 3745–17–03(A), it might have commented. Presumably those comments would have urged EPA to approve portions of OAC 3745–17–03 that were outside the scope and purpose of the applicable state submission, which with respect to OAC 3745–17–03 only requested the revision of the cross reference in OAC 3745–17–03(A). In such a hypothetical situation, EPA presumably would have responded to those comments by explaining that it was not approving any revision to OAC 3745–17–03 beyond the cross reference in OAC 3745–17–03(A) and that comments beyond that narrow issue were beyond the scope of the October 26, 2010, rulemaking.

In any case, the commenter has now had the opportunity to comment on the very issue that it speculated it would have commented on under the 2010 conditions it hypothesized. The proposed rulemaking for this error correction action proposed to find that rulemaking on portions of OAC 3745–17–03 other than OAC 3745–17–03(A) in the 2010 air quality standards rulemaking would have been outside the scope of that rulemaking. Thus, EPA solicited comment on precisely the issue that the commenter speculated it would have commented on in its hypothesized 2010 circumstances, *i.e.,* whether or not rulemaking on OAC 3745–17–03(B) would have been an appropriate part of the 2010 rulemaking on Ohio's air quality standards submittal. Of note is that in the actual, present circumstances, the commenter had the benefit of express EPA statements in the February 7, 2014, proposal, stating that any action in response to Ohio's submittal of September 10, 2009, on portions of OAC 3745–17–03 other than OAC 3745–17–03(A) would be outside the scope of the rulemaking because it would not be pertinent to the SIP revision request that EPA was considering.

Finally, EPA notes that the commenter did in fact comment, to urge approval of revisions in OAC 3745–17–03(B), without contesting EPA's view that these provisions are outside the scope of the relevant state submission and EPA's rulemaking thereon. As explained in the proposal for this action, those revisions were not at issue in its October 26, 2010, rulemaking and are not at issue in this error correction. EPA regrets the inconvenience to all parties that arose from the error in its October 26, 2010, rulemaking. However, the point here is that it is unnecessary to speculate on how the commenter would have commented on the October 26, 2010, rulemaking had that rulemaking more clearly stated that the only revision to OAC 3745–17–03 under consideration was the revision to the cross reference in OAC 3745–17–03(A). The commenter has now had the opportunity to comment on the applicable issues, and EPA is addressing its comments here.

Comment: The commenter also objected to EPA's statements in the proposal for this action that it is correcting what is essentially a typographical error. The commenter asserted that this ''correction is not trivial.''

Response: The commenter did not explain its substantive grounds for objecting to EPA's proposed error correction. The commenter omits any rationale for why the significance of the provisions of OAC 3745–17–03(B) would justify labeling the mistaken codification in EPA's October 26, 2010, rulemaking as anything other than an error or why, regardless of label, the misleading codification does not warrant correction. For example, the commenter implies that a significance criterion applies in judging whether a statement is in error, as if an action with significant ramifications cannot be in error or that errors cannot have significant consequences. However, the commenter offered no rationale for why the misstatements in the October 26, 2010, rulemaking, whatever the significance of those misstatements, should not be considered to be in error.

EPA's proposed rulemaking provides extensive discussion of why EPA believes that the codification in its October 26, 2010, action was in error, including multiple reasons that demonstrate that EPA did not intend and could not have intended to approve provisions in OAC 3745–17–03 that were beyond the stated purpose of Ohio's submission, which with respect to OAC 3745–17–03 was only to revise the cross reference in OAC 3745–17–03(A). Conspicuously absent from the commenter's comments is any specific argument contesting EPA's rationale for this error correction, be it to question EPA's interpretation of Ohio's September 10, 2009, submission, to dispute that EPA did not intend and could not have intended to take action on OAC 3745–17–03(B), or to challenge EPA's assertion that in any case there has been no legally valid action on OAC 3745–17–03(B) because EPA has not addressed pertinent comments on its prior proposed disapproval of that separate revision (including comments that the commenter itself attests to making).

Comment: The commenter states, ''the Utilities disagree with U.S. EPA's assertion that its 'correction' does not allow substantive comments on Ohio Adm. Code 3745–17–03.'' The commenter further asserted that ''U.S. EPA's action is essentially making Ohio's SIP more stringent than it was when it approved Ohio Adm. Code 3745–17–03 in 2010. . . . [Therefore,] the Utilities believe that substantive comments on Ohio Adm. Code 3745–17–03 are proper and should be considered by U.S. EPA.''

Response: These comments misrepresent EPA's assertion, mischaracterize EPA's action, and provide no rationale for EPA to change its views on relevant matters. EPA's proposed rulemaking states: ''any substantive revisions to OAC 3745–17–03, including any revisions to OAC 3745–17–03(B)(1), are not at issue in this rulemaking. Only comments regarding EPA's correction of the error in the October 26, 2010, action are germane to this rulemaking under section 110(k)(6).'' The commenter may elect to make comments that are not germane, and the commenter has

exercised its right to do so, though the commenter has not challenged EPA's proposed rationale as to the scope of comments that should be considered germane. For example, even if EPA's action could be misconstrued as a substantive revision to the approved SIP (which it is not), and whether the newer version of OAC 3745–17–03(B) is less stringent than the older version (as the commenter contended in these comments) or not (as the commenter contended in its attached comments from 2005), the commenter does not explain why this asserted change in stringency justifies predicating EPA's action to correct an error on the substantive merits of erroneously codified provisions. Therefore, EPA concludes that comments as to the substantive merits of OAC 3745–17–03(B) are not germane to this action, which only addresses the error that occurred in the October 26, 2010, action pertaining to Ohio EPA's submission regarding its air quality standards rules.

Similarly, the commenter mischaracterized EPA's proposed error action, asserting that EPA is hereby removing an approval of portions of OAC 3745–17–03 that, it asserted, EPA approved in the October 26, 2010, action. The proposed rulemaking explained at length that EPA cannot have approved any portion of 3745–17–03 in 2010 other than the cross reference in OAC 3745–17–03(A), and so the action EPA proposed clarifies the approved SIP without changing the substance of what has actually been approved. Again, the commenter provided no rationale for adopting its views as to the nature of EPA's proposed action rather than the views EPA proposed.

Chamber et al.

Comment: The commenter provided an extensive description of provisions in OAC 3745–17–03(B). The commenter also provided a history of this provision, including Ohio's submission of the provision to EPA in June 2003, EPA's proposal to disapprove the provision in June 2005, the (erroneous) appearance of EPA approving the provision on October 26, 2010, the EPA correction of this appearance on April 3, 2013, without reference to correction authority in Clean Air Act section 110(k)(6), a petition for EPA to reconsider this correction, and EPA's proposal published on February 7, 2014, to make this correction under the authority of Clean Air Act section 110(k)(6).

Response: EPA generally agrees with the commenters recitation of the facts, but does not agree with the implication that ''appearing'' to approve the revision means that it was in fact approved. Moreover, this portion of these comments provides background information and does not urge any changes to EPA's views underlying the relevant proposed action, and so no detailed review of this portion of these comments is warranted. Any history of the provisions of OAC 3745–17–03(B) should also note that Ohio (subsequent to these comments) has withdrawn its submission that sought approval of the provision.

Comment: The commenter stated that it ''submit[ted] these comments for two reasons. First, we would like to briefly address EPA's comment that the COMS provision is 'significant and substantive' and 'would allow significantly more opacity during certain periods.' This appears to be a reference to [text in EPA's June 2005 proposed rulemaking (at 70 FR 36903), quoted in the comment].''

The commenter raised several objections to these EPA statements. The commenter asserted that the scenario EPA discussed in the June 2005 proposed disapproval, intended as an example case in which the revised version of OAC 3745–17–03(B) ''allow[s] excess opacity on occasions that excess opacity is currently prohibited,'' to reflect an unlikely pattern of operation that would not be expected to be identified as a violation using the reference method (Method 9) of the unrevised rule. ''In summary, the alternative of continuous instrumental monitoring of in-stack opacity in lieu of periodic Method 9 visible emission observations may be 'significant and substantive' in terms of imposing more stringent performance obligations, but it certainly [is] not a 'significant and substantive' relaxation of the performance obligation where Method 9 is the SIP reference test for opacity.''

Response: The commenter is correct that the pertinent statement in the February 7, 2014, proposed rulemaking reflects the views expressed in the cited statement in EPA's June 27, 2005, proposed rulemaking. The commenter also observed that EPA has not completed rulemaking pursuant to this June 2005 proposed disapproval. EPA's purpose for making these statements in the proposal for this error correction was to provide context and to explain the significance of the error, not to take a substantive position. To be clear, in the June 2005 proposal, EPA proposed to find that the revised version of OAC 3745–17–03(B) would have allowed significantly more opacity during certain periods and that the state had failed to provide a section 110(l) or section 193 analysis to justify the resulting relaxation; subsequently, EPA received comments disputing that finding, and EPA has not yet taken final action on that proposal.

Because Ohio has withdrawn its June 2003 submission, however, EPA will be conducting no further rulemaking on that submission. Therefore, it is no longer germane to any ongoing rulemaking whether Ohio's June 2003 submission would have tightened or relaxed the stringency of Ohio's existing SIP. In any case, the desirability of clarifying the status of OAC 3745–17–03(B) is not contingent on any final judgment regarding the effect of previously submitted revisions to OAC 3745–17–03(B) on allowable opacity. In its February 7, 2014, proposal, EPA sought merely to explain why the error in its October 26, 2010, final rule warranted correction. Comments from the Ohio Utilities Group discussed above suggest that the provisions of OAC 3745–17–03(B), and the associated relaxation of requirements, are too important to be the subject of an error correction. These comments from the Chamber *et al.* argue that the provisions of OAC 3745–17–03(B) are not a ''significant and substantive'' relaxation of the opacity-related requirements and in fact may be a ''significant and substantive'' tightening of performance obligations. Regardless of these conflicting comments, three parties have concluded that the status of OAC 3745–17–03(B) is sufficiently important to comment on rulemaking proposing to clarify the status of this rule. Even aside from questions regarding the substantive consequences of revisions to OAC 3745–17–03(B), EPA seeks clarity regarding which rules have been approved into the SIP, especially for rules that prompt significant substantive interest. Consequently, EPA has concluded that it is important to clarify the scope of EPA's rulemaking on Ohio's submittal addressing air quality standards and to correct the errors in the October 26, 2010, action that created a misimpression that EPA had approved OAC 3745–17–03(B)as a part of the SIP.

Comment: The commenter also asked that EPA complete its rulemaking action on the June 2003 SIP revision that EPA addressed in the June 2005 proposed disapproval.

Response: Ohio has withdrawn the pertinent elements of its June 2003 SIP revision submission. Thus, no portion of this submission remains pending.

III. What action is EPA taking?

Pursuant to section 110(k)(6), EPA is determining that its October 26, 2010, rulemaking was in error to the extent

that it appeared to approve revisions to OAC 3745–17–03 beyond the revision to the cross reference in OAC 3745–17–03(A). Through this action, EPA is clarifying that in the October 26, 2010, action, the Agency did not approve any revisions to OAC 3745–17–03 except for the specific revision to the cross reference in OAC 3745–17–03(A) requested by the state. But for that change, the currently applicable version of OAC 3745–17–03 in the Ohio SIP is the version effective in the state on January 31, 1998, approved by EPA on October 16, 2007. The currently applicable version of OAC 3745–17–03 in the Ohio SIP does not contain any revisions addressed in EPA's proposed approval and disapproval on June 27, 2005. This action establishes that the codification of EPA's October 26, 2010, action, in relevant part at 40 CFR 52.1870(c)(151)(i)(A), is clarified pursuant to the authority of Clean Air Act section 110(k)(6) to codify the approval of only the revised cross reference in OAC 3745–17–03(A) and not of any other portions of OAC 3745–17–03. In particular, EPA in that action did not approve any revisions related to OAC 3745–17–03(B).

On April 3, 2013, EPA used its authority under section 553 of the Administrative Procedures Act to amend the erroneous codification in its October 26, 2010, rulemaking without notice and comment rulemaking. In that rulemaking, EPA corrected the erroneous statements and the misleading codification to reflect more clearly that EPA had only approved the one narrow revision requested by the state in OAC 3745–17–03, *i.e.,* the revision of the cross reference in OAC 3745–17–03(A). Thus, effective April 3, 2013, the Code of Federal Regulations has properly reflected the corrected codification. In response to a petition for reconsideration, EPA today is replacing that prior correction with an error correction pursuant to section 110(k)(6). Nevertheless, during the pendency of the current rulemaking pursuant to section 110(k)(6), EPA opted not to stay or revoke the correction action of April 3, 2013, to avoid exacerbating the misimpressions caused by the October 26, 2010, error. Therefore, the *status quo* is that the Code of Federal Regulations already reflects the corrected codification.

Ordinarily, a rulemaking establishing a corrected codification would include not just a preamble but would also include a codification section, in which the Office of the Federal Register is instructed to amend the applicable sections of the Code of Federal Regulations. However, this action involves circumstances in which the pertinent section of the Code of Federal Regulations already correctly reflects the EPA approved version of OAC 3745–17–03, as a result of action taken April 3, 2013. Conceptually, this action replaces the pertinent revisions to the Code of Federal Regulations promulgated on April 3, 2013, with identical revisions pursuant to this action. In practical terms, the net effect of this action is no change in the Code of Federal Regulations. It is inappropriate to provide a null set of instructions, to instruct the Office of the Federal Register to make no changes to the Code of Federal Regulations. Therefore, this action includes no instructions to the Office of the Federal Register, no requested revisions to the Code of Federal Regulations, and indeed no codification section. As a result, the Office of the Federal Register's records will show the pertinent revisions as being made April 3, 2013. Nevertheless, this action should be viewed as replacing those corrections, promulgated under the authority of Administrative Procedures Act section 553, with identical corrections, promulgated under the authority of Clean Air Action section 110(k)(6).

IV. 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, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. This action merely corrects an error in EPA's prior action and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

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

In addition, this rule 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.

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

Under section 307(b)(1) of the 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 4, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: October 22, 2015.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2015–28095 Filed 11–4–15; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Office of the Secretary of the Interior

43 CFR Part 10

[NPS–WASO–NAGPRA–19087; PPWOCRADN0–PCU00RP14.R50000]

RIN 1024–AE00

Disposition of Unclaimed Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: This final rule provides procedures for the disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated or discovered on, and removed from, Federal lands after November 16, 1990. It implements section 3(b) of the Native American Graves Protection and Repatriation Act.

DATES: The rule is effective December 7, 2015.

FOR FURTHER INFORMATION CONTACT: Melanie O'Brien, Manager, National NAGPRA Program, National Park Service, 1849 C Street NW., Washington, DC 20240, telephone (202) 354–2204, email *melanie_o'brien@nps.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Secretary of the Interior (Secretary) is responsible for implementation of the Native American Graves Protection and Repatriation Act (NAGPRA or Act) (25 U.S.C. 3001 *et seq.*), including the issuance of appropriate regulations implementing and interpreting its provisions. NAGPRA addresses the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations in certain human remains, funerary objects, sacred objects, and objects of cultural patrimony, for which the Act uses the broader term ''cultural items'' (25 U.S.C. 3001(3)). Pursuant to Section 13 of NAGPRA (25 U.S.C. 3011), the Department of the Interior (Department) published the initial rules to implement NAGPRA in 1995 (60 FR 62158, December 4, 1995); those rules are now codified at 43 CFR part 10. Subsequently, the Department published additional rules concerning:

- Civil penalties (68 FR 16354, April 3, 2003);
- Future applicability (72 FR 13189, March 21, 2007); and
- Disposition of culturally unidentifiable human remains (75 FR 12378, March 15, 2010).

Section 3(b) of the Act (25 U.S.C. 3002 (b)) explicitly directs the Secretary to publish regulations for the disposition of unclaimed cultural items excavated or discovered on, and removed from, Federal lands after November 16, 1990. When we published the NAGPRA regulations on December 4, 1995, we reserved 43 CFR 10.7 for this purpose.

This rule is limited to Federal lands, as NAGPRA provides that ownership or control of any cultural item excavated or discovered on, and removed from, tribal land after November 16, 1990, is in either a known lineal descendant (for human remains and associated funerary objects) or in the Indian tribe from whose tribal land the cultural items were removed, and does not require the lineal descendant or the Indian tribe to make a claim for the cultural items.

Consultation regarding a proposed rule for § 10.7 began in 2005. On three separate occasions, we consulted with representatives of Indian tribes, Native Hawaiian organizations, museums, and scientific organizations. We also consulted with the Native American Graves Protection and Repatriation Review Committee (Review Committee) during its scheduled meetings in Albuquerque, NM (November 2005); Washington, DC (April 2007); Phoenix, AZ (October 2007); and Washington, DC (November 2010).

We published a proposed rule on October 29, 2013 (78 FR 64436). Public comment was invited for a 60-day period, ending December 30, 2013. The proposed rule also was posted on the National Park Service's National NAGPRA Program Web site. The Review Committee commented on the record on the proposed rule at a public meeting on November 6, 2013.

Summary of and Responses to Comments on the Proposed Rule

During the comment period, we received 27 written comments on the proposed rule, contained in 20 separate submissions from 5 Indian tribes, 1 Indian organization, 1 non-federally recognized Indian group, 1 Native Hawaiian organization, 1 museum, 1 scientific organization, 3 Federal entities, 6 individual members of the public, and 1 anonymous commenter. All relevant comments on the proposed rule were considered during the final rulemaking.

Final Rule 43 CFR 10.2 Definition of ''Unclaimed Cultural Items''

Comment 1: Four commenters stated that the definition of unclaimed cultural items should include the phrase ''as used in § 10.7 of this part.''

Our Response: The term ''*unclaimed cultural items''* is used only in § 10.7 and therefore the specific reference is not needed.

Comment 2: Three commenters stated that the definition of unclaimed cultural items should be expanded and the difference between the categories of unclaimed cultural items be clarified. One of these commenters added that the definition should provide a timeframe that structures how long cultural items must be held by the Federal agency prior to being classified as unclaimed.

Our Response: We agree. In the final rule, we have revised the definition of unclaimed cultural items and clarified the difference between the categories. We have included a timeframe.

Comment 3: Four commenters stated that the definition of unclaimed cultural items imposes an inappropriate time limit on Indian tribes and Native Hawaiian organizations to make claims for cultural items. One of these commenters added that the definition assumes Federal agencies have been proactive and have provided notice to all potential claimants.

Our Response: A potential claimant may make a claim for unclaimed cultural items at any time prior to transfer or reinterment under this rule. While the rule establishes a timeframe for cultural items to become unclaimed, there is no timeline imposed for Federal agencies to transfer or to reinter cultural items. We feel the timeframes established by the definitions in this final rule strike an appropriate balance between assuring Federal agencies that the NAGPRA process will end at a certain time and granting non-claimant Indian tribes and Native Hawaiian organizations an opportunity to request the transfer of these cultural items.

Comment 4: One commenter stated that the definition of ''disposition'' in § 10.2(g)(5) should be changed to include disposition of unclaimed cultural items.