

the current attributable owner as defined in § 1.271. This three-month period is not extendable.

**§ 1.387 Correction of failure to notify the Office of a change to the attributable owner and errors in notice of attributable owner in a patent.**

If, despite a good faith effort by the patent owner to notify the Office of the initial attributable owner as defined in § 1.271, and of any changes to the attributable owner as defined in § 1.271, in the manner required by §§ 1.273, 1.275, 1.277, 1.381, 1.383, and 1.385, the patent owner has failed to notify the Office of a change to the attributable owner or has indicated an incorrect or an incomplete attributable owner, the failure or error may be excused on petition accompanied by a showing of reason for the delay, error, or incompleteness, and the petition fee set forth in § 1.17(g).

Dated: January 16, 2014.

**Michelle K. Lee,**

*Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office.*

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**BILLING CODE 3510–16–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 52 and 81

[EPA–R03–OAR–2013–0090; FRL–9905–64–Region–3]

#### Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Approval of the Redesignation Requests and the Associated Maintenance Plans of the Charleston Nonattainment Area To Attainment for the 1997 Annual and 2006 24-Hour Fine Particulate Matter Standard

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve the State of West Virginia's requests to redesignate to attainment the Charleston nonattainment area for the 1997 annual and the 2006 24-hour fine particulate matter (PM<sub>2.5</sub>) national ambient air quality standard (NAAQS). EPA is also proposing to determine that the Charleston Area continues to attain both the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS. In addition, EPA is proposing to approve as a revision to the West Virginia state implementation plan

(SIP), the associated maintenance plans to show maintenance of the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS through 2025 for the Charleston Area. As part of the maintenance plan, EPA is proposing to approve a 2008 emissions inventory for the Charleston Area for the 2006 24-hour PM<sub>2.5</sub> NAAQS. EPA is proposing that the 2008 emissions inventory for volatile organic compounds (VOCs) and ammonia (NH<sub>3</sub>), in conjunction with inventories for nitrogen oxides (NO<sub>x</sub>), direct PM<sub>2.5</sub>, and sulfur dioxide (SO<sub>2</sub>) meet the comprehensive emissions inventory requirement of the Clean Air Act (CAA) for the 2006 24-hour PM<sub>2.5</sub> NAAQS. West Virginia's maintenance plans include insignificance findings for the mobile source contribution of PM<sub>2.5</sub> and NO<sub>x</sub> emissions for the Charleston Area for both the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS. EPA agrees with these insignificance findings, and is proposing approval of such findings for transportation conformity purposes. In this rulemaking action, EPA also addresses the effects of two decisions of the United States Court of Appeals for the District of Columbia (DC Circuit Court): The DC Circuit Court's August 21, 2012 decision to vacate and remand the Cross-State Air Pollution Control (CSAPR); and the DC Circuit Court's January 4, 2013 decision to remand to EPA two rules implementing the 1997 annual PM<sub>2.5</sub> NAAQS. This rulemaking action to propose approval of the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS redesignation requests and associated maintenance plans for the Charleston Area is based on EPA's determination that the Area has met the criteria for redesignation to attainment specified in the CAA for both the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS.

**DATES:** Written comments must be received on or before February 24, 2014.

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA–R03–OAR–2013–0090 by one of the following methods:

A. [www.regulations.gov](http://www.regulations.gov). Follow the on-line instructions for submitting comments.

B. Email: [fernandez.cristina@epa.gov](mailto:fernandez.cristina@epa.gov).

C. Mail: EPA–R03–OAR–2013–0090, Cristina Fernandez, Associate Director, Office of Air Quality Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street Philadelphia, Pennsylvania 19103.

D. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and

special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. EPA–R03–OAR–2013–0090. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through [www.regulations.gov](http://www.regulations.gov) or email. The [www.regulations.gov](http://www.regulations.gov) Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through [www.regulations.gov](http://www.regulations.gov), your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

**Docket:** All documents in the electronic docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, i.e., 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 in [www.regulations.gov](http://www.regulations.gov) or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE., Charleston, West Virginia 24304.

**FOR FURTHER INFORMATION CONTACT:** Rose Quinto, (215) 814-2182, or by email at [quinto.rose@epa.gov](mailto:quinto.rose@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**Table of Contents**

- I. Background
- II. EPA's Requirements
  - A. Criteria for Redesignation to Attainment
  - B. Requirements of a Maintenance Plan
- III. Summary of Proposed Actions
- IV. Effects of Recent Court Decisions on Proposed Actions
  - A. Effect of the August 21, 2012 DC Circuit Court Decision Regarding EPA's CSAPR
  - B. Effect of the January 4, 2013 DC Circuit Court Decision Regarding the PM<sub>2.5</sub> Implementation under Subpart 4 of Part D of Title I of the CAA
- V. EPA's Analysis of West Virginia's Submittals
  - A. Redesignation Requests
  - B. Maintenance Plans
  - C. Transportation Conformity Insignificance Determination
- VI. Proposed Actions
- VII. Statutory and Executive Order Reviews

**I. Background**

The first air quality standards for PM<sub>2.5</sub> were established on July 18, 1997 (62 FR 38652). EPA promulgated an annual standard at a level of 15 micrograms per cubic meter (µg/m<sup>3</sup>), based on a three-year average of annual mean PM<sub>2.5</sub> concentrations (the 1997 annual PM<sub>2.5</sub> standard). In the same rulemaking, EPA promulgated a 24-hour standard of 65 µg/m<sup>3</sup> based on a three-year average of the 98th percentile of 24-hour concentrations.

On January 5, 2005 (70 FR 944, 1014), EPA published air quality area designations for the 1997 PM<sub>2.5</sub> NAAQS. In that rulemaking action, EPA designated the Charleston Area as nonattainment for the 1997 annual PM<sub>2.5</sub> NAAQS. The Charleston Area is comprised of Kanawha and Putnam Counties. See 40 CFR 81.349.

On October 17, 2006 (71 FR 61144), EPA retained the annual average standard at 15 µg/m<sup>3</sup> but revised the 24-hour standard to 35 µg/m<sup>3</sup>, based again on the three-year average of the 98th percentile of the 24-hour concentrations (the 2006 annual PM<sub>2.5</sub> standard). On November 13, 2009 (74 FR 58688), EPA published designations for the 2006 24-hour PM<sub>2.5</sub> standard, which became effective on December 14, 2009. In that rulemaking action, EPA designated the Charleston Area as nonattainment for the 2006 24-hour PM<sub>2.5</sub> NAAQS. See 74 FR 58775 and 40 CFR 81.349.

In response to legal challenges of the annual standard promulgated in 2006, the DC Circuit Court remanded the 2006 annual standard to EPA for further consideration. See *American Farm Bureau Federation and National Pork*

*Producers Council, et. al. v. EPA*, 559 F.3d 512 (D.C. Cir. 2009). However, given that the 1997 annual and the 2006 annual PM<sub>2.5</sub> standards are essentially identical, attainment of the 1997 annual PM<sub>2.5</sub> standard would also indicate attainment of the remanded 2006 annual PM<sub>2.5</sub> standard. Since the Charleston Area is designated nonattainment for the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS, today's proposed rulemaking action addresses the redesignation to attainment of the Charleston Area for these standards.

On October 11, 2011 (76 FR 62640) and November 18, 2011 (76 FR 71450), EPA determined that the Charleston Area has attained the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS, respectively. Pursuant to 40 CFR 51.1004(c) and based on these determinations, the requirements for the Charleston Area to submit an attainment demonstration and associated reasonably available control measures (RACM), a reasonable further progress (RFP) plan, contingency measures, and other planning SIP revisions related to the attainment of either the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS are suspended until such time as: the Area is redesignated to attainment for each standard, at which time the requirements no longer apply; or EPA determines that the Area has again violated any of the standards, at which time such plans are required to be submitted.

On December 12, 2012 (77 FR 73923), EPA approved a 2002 emissions inventory for the 1997 annual PM<sub>2.5</sub> NAAQS for the Charleston Area. The emissions inventory was submitted with West Virginia's attainment plan for the 1997 annual PM<sub>2.5</sub> NAAQS on November 4, 2009, to meet the requirements of section 172(c)(3) of the CAA, one of the criteria for redesignation. The emissions inventory included emissions for 2002 that cover the general source categories of point, area, nonroad mobile, onroad mobile and biogenic sources which addressed not only direct emissions of PM<sub>2.5</sub>, but also emissions of all precursors with the potential to participate in PM<sub>2.5</sub> formation, i.e., SO<sub>2</sub>, NO<sub>x</sub>, VOC, and NH<sub>3</sub>.

On December 6, 2012, the State of West Virginia through the West Virginia Department of Environmental Protection (WVDEP) formally submitted a request to redesignate the Charleston Area from nonattainment to attainment for the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS. Concurrently, WVDEP submitted maintenance plans for the Area as SIP revisions to ensure continued attainment throughout the

Area over the next 10 years for the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS. The maintenance plans submitted for each of the standards are essentially the same, thus EPA is proposing to approve as a SIP revision a maintenance plan for both the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS. The December 6, 2012 submittal also includes a 2008 emissions inventory for PM<sub>2.5</sub>, SO<sub>2</sub>, and NO<sub>x</sub> for the 2006 24-hour PM<sub>2.5</sub> NAAQS, which WVDEP supplemented on June 24, 2013 to include emissions of VOC and NH<sub>3</sub>. EPA is proposing to approve the 2008 emissions inventory for the 2006 24-hour PM<sub>2.5</sub> NAAQS for PM<sub>2.5</sub>, SO<sub>2</sub>, NO<sub>x</sub>, VOC, and NH<sub>3</sub> in order to meet the emissions inventory requirement of section 172(c)(3) of the CAA.

In this proposed rulemaking action, EPA is taking into account two decisions of the DC Circuit Court. In the first of the two DC Circuit Court decisions, the DC Circuit Court, on August 21, 2012, issued *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), which vacated and remanded CSAPR and ordered EPA to continue administering the Clean Air Interstate Rule (CAIR) "pending . . . development of a valid replacement." *EME Homer City* at 38. The DC Circuit Court denied all petitions for rehearing on January 24, 2013. EPA and other parties filed for certiorari to the Supreme Court, and on June 24, 2013, the Supreme Court granted certiorari on EPA's petition for appeal of *EME Homer City Generation*. See *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), *cert. granted*, 570 U.S. — (2013). Nonetheless, EPA intends to continue to act in accordance with the *EME Homer City* opinion. In the second decision, on January 4, 2013, in *Natural Resources Defense Council (NRDC) v. EPA*, the DC Circuit Court remanded to EPA the "Final Clean Air Fine Particle Implementation Rule" (72 FR 20586, April 25, 2007) and the "Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers (PM<sub>2.5</sub>)" final rule (73 FR 28321, May 16, 2008). 706 F.3d 428 (D.C. Cir. 2013).

**II. EPA's Requirements**

*A. Criteria for Redesignation to Attainment*

The CAA provides the requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) of the CAA allows for redesignation providing that: (1) EPA determines that the area has attained the applicable NAAQS; (2) EPA has fully

approved the applicable implementation plan for the area under section 110(k) of the CAA; (3) EPA determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable Federal air pollutant control regulations and other permanent and enforceable reductions; (4) EPA has fully approved a maintenance plan for the area as meeting the requirements of section 175A of the CAA; and (5) the state containing such area has met all requirements applicable to the area under section 110 and part D of the CAA.

EPA has provided guidance on redesignation in the “State Implementation Plans; General Preamble for the Implementation of Title I of the CAA Amendments of 1990,” (57 FR 13498, April 16, 1992) (the “General Preamble”) and has provided further guidance on processing redesignation requests in the following documents: (1) “Procedures for Processing Requests to Redesignate Areas to Attainment,” Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (hereafter referred to as the “1992 Calcagni Memorandum”); (2) “State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (CAA) Deadlines,” Memorandum from John Calcagni, Director, Air Quality Management Division, October 28, 1992; and (3) “Part D New Source Review (Part D NSR) Requirements for Areas Requesting Redesignation to Attainment,” Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, October 14, 1994.

#### B. Requirements of a Maintenance Plan

Section 175A of the CAA sets forth the elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A of the CAA, the plan must demonstrate continued attainment of the applicable NAAQS for at least 10 years after approval of a redesignation of an area to attainment. Eight years after the redesignation, the state must submit a revised maintenance plan demonstrating that attainment will continue to be maintained for the 10 years following the initial 10-year period. To address the possibility of future NAAQS violations, the maintenance plan must contain such contingency measures, with a schedule for implementation, as EPA deems necessary to assure prompt correction of any future PM<sub>2.5</sub> violations.

The 1992 Calcagni Memorandum provides additional guidance on the content of a maintenance plan. The memorandum states that a PM<sub>2.5</sub> maintenance plan should address the following provisions: (1) An attainment emissions inventory; (2) a maintenance demonstration showing maintenance for 10 years; (3) a commitment to maintain the existing monitoring network; (4) verification of continued attainment; and (5) a contingency plan to prevent or correct future violations of the NAAQS.

### III. Summary of Proposed Actions

EPA is proposing to take several rulemaking actions related to the redesignation of the Charleston Area to attainment for both the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS. EPA is proposing to find that the Charleston Area meets the requirements for redesignation for the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS under section 107(d)(3)(E) of the CAA. EPA is thus proposing to approve West Virginia's request to change the legal designation for the Charleston Area from nonattainment to attainment for the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS.

EPA is also proposing to approve the associated maintenance plans for the Charleston Area as a revision to the West Virginia SIP for the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS, including the insignificance determinations for PM<sub>2.5</sub> and NO<sub>x</sub> for the onroad motor source contribution of the Charleston Area for both the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS. The approval of the maintenance plans is one of the CAA criteria for redesignation of the Charleston Area to attainment for both standards. West Virginia's maintenance plans are designed to ensure continued attainment in the Charleston Area for 10 years after redesignation for both the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS.

EPA previously determined that the Charleston Area has attained both the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS, therefore, EPA is proposing to find that the Area continues to attain both standards. See 76 FR 62640, October 11, 2011 and 76 FR 71450, November 18, 2011. EPA is also proposing to approve the 2008 comprehensive emissions inventory that includes PM<sub>2.5</sub>, SO<sub>2</sub>, NO<sub>x</sub>, VOC, and NH<sub>3</sub> for the Charleston Area as part of the West Virginia SIP for the 2006 24-hour PM<sub>2.5</sub> NAAQS in order to meet the requirements of section 172(c)(3) of the CAA.

### IV. Effects of Recent Court Decisions on Proposed Actions

#### A. Effect of the August 21, 2012 DC Circuit Court Decision Regarding EPA's CSAPR

##### 1. Background

EPA recently promulgated CSAPR (76 FR 48208, August 8, 2011), to replace CAIR, which has been in place since 2005. See 76 FR 59517. CAIR requires significant reductions in emissions of SO<sub>2</sub> and NO<sub>x</sub> from electric generating units to limit the interstate transport of these pollutants and the ozone and fine particulate matter they form in the atmosphere. See 76 FR 70093. The DC Circuit Court initially vacated CAIR, *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), but ultimately remanded the rule to EPA without vacatur to preserve the environmental benefits provided by CAIR, *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008).

On December 30, 2011, the DC Circuit Court issued an order addressing the status of CSAPR and CAIR in response to motions filed by numerous parties seeking a stay of CSAPR pending judicial review. In that order, the DC Circuit Court stayed CSAPR pending resolution of the petitions for review of that rule in *EME Homer City Generation, L.P. v. EPA* (No. 11–1302 and consolidated cases). The DC Circuit Court also indicated that EPA was expected to continue to administer CAIR in the interim until judicial review of CSAPR was completed.

On August 21, 2012, the DC Circuit Court issued a decision to vacate CSAPR. In that decision, it also ordered EPA to continue administering CAIR “pending the promulgation of a valid replacement.” *EME Homer City*, 696 F.3d at 38 (DC Cir. 2012). The DC Circuit Court denied all petitions for rehearing on January 24, 2013. EPA and other parties have filed petitions for certiorari to the U.S. Supreme Court. On June 24, 2013 the Supreme Court granted EPA's petition for certiorari. Nonetheless, EPA intends to continue to act in accordance with the *EME Homer City* opinion.

##### 2. Proposal on This Issue

In light of these unique circumstances and for the reasons explained subsequently, to the extent that attainment is due to emission reductions associated with CAIR, EPA is here proposing to determine that those reductions are sufficiently permanent and enforceable for purposes of sections 107(d)(3)(E)(iii) and 175A of the CAA. EPA, therefore, proposes to approve the

redesignation requests and the related SIP revisions for Kanawha and Putnam Counties in West Virginia, including West Virginia's plan for maintaining attainment of the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS in the Charleston Area.

As directed by the DC Circuit Court, CAIR remains in place and enforceable until substituted by a valid replacement rule. West Virginia's SIP revision lists CAIR as a control measure that was approved by EPA on August 6, 2009 (74 FR 38536) and became state-effective on May 1, 2008 for the purpose of reducing SO<sub>2</sub> and NO<sub>x</sub> emissions. CAIR was thus in place and getting emission reductions when the Charleston Area monitored attainment of the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS. The quality-assured, quality-controlled, certified monitoring data used to demonstrate the Area's attainment of both the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS was also impacted by CAIR.

To the extent that West Virginia is relying on CAIR in its maintenance plan, the recent directive from the DC Circuit Court in *EME Homer City* ensures that the reductions associated with CAIR will be permanent and enforceable for the necessary time period. EPA has been ordered by the DC Circuit Court to develop a new rule to address interstate transport to replace CSAPR, and the opinion makes clear that after promulgating that new rule, EPA must provide states an opportunity to draft and submit SIPs to implement that rule. Thus, CAIR will remain in place until: (1) EPA has promulgated a final rule through a notice-and-comment rulemaking process; (2) states have had an opportunity to draft and submit SIPs; (3) EPA has reviewed the SIPs to determine if they can be approved; and (4) EPA has taken action on the SIPs, including promulgating a Federal Implementation Plan (FIP) if appropriate. The DC Circuit Court's clear instruction to EPA that it must continue to administer CAIR until a valid replacement exists provides an additional backstop. By definition, any rule that replaces CAIR and meets the DC Circuit Court's direction would require upwind states to have SIPs that eliminate significant contributions to downwind nonattainment and prevent interference with maintenance in downwind areas.

Further, in vacating CSAPR and requiring EPA to continue administering CAIR, the DC Circuit Court emphasized that the consequences of vacating CAIR "might be more severe now in light of the reliance interests accumulated over the intervening four years." *EME Homer City*, 696 F.3d at 38. The accumulated

reliance interests include the interests of states who reasonably assumed they could rely on reductions associated with CAIR which brought certain nonattainment areas into attainment with the NAAQS. If EPA were prevented from relying on reductions associated with CAIR in redesignation actions, states would be forced to impose additional, redundant reductions on top of those achieved by CAIR. EPA believes this is precisely the type of irrational result the DC Circuit Court sought to avoid by ordering EPA to continue administering CAIR. For these reasons also, EPA believes it is appropriate to allow states to rely on CAIR, and the existing emissions reductions achieved by CAIR, as sufficiently permanent and enforceable for purposes such as redesignation. Following promulgation of the replacement rule, EPA will review SIP revisions as appropriate to identify whether there are any issues that need to be addressed.

#### *B. Effect of the January 4, 2013 DC Circuit Court Decision Regarding PM<sub>2.5</sub> Implementation Under Subpart 4 of Part D of Title I of the CAA*

##### 1. Background

On January 4, 2013, in *NRDC v. EPA*, the DC Circuit Court remanded to EPA the "Final Clean Air Fine Particle Implementation Rule" (72 FR 20586, April 25, 2007) and the "Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers (PM<sub>2.5</sub>)" final rule (73 FR 28321, May 16, 2008) (collectively, "1997 PM<sub>2.5</sub> Implementation Rule"). 706 F.3d 428 (D.C. Cir. 2013). The DC Circuit Court found that EPA erred in implementing the 1997 annual PM<sub>2.5</sub> NAAQS pursuant to the general implementation provisions of subpart 1 of Part D of Title I of the CAA (subpart 1), rather than the particulate-matter-specific provisions of subpart 4 of Part D of Title I (subpart 4). Although the DC Circuit Court did not directly address the 2006 24-hour PM<sub>2.5</sub> NAAQS, EPA is taking into account the DC Circuit Court's position on subpart 4 and the 1997 annual PM<sub>2.5</sub> NAAQS in evaluating redesignations for the 2006 24-hour PM<sub>2.5</sub> NAAQS.

##### 2. Proposal on This Issue

EPA is proposing to determine that the DC Circuit Court's January 4, 2013 decision does not prevent EPA from redesignating the Charleston Area to attainment for either the 1997 annual or the 2006 24-hour PM<sub>2.5</sub> NAAQS. Even in light of the DC Circuit Court's decision, redesignation for this Area is

appropriate under the CAA and EPA's longstanding interpretations of the CAA's provisions regarding redesignation. EPA first explains its longstanding interpretation that requirements that are imposed, or that become due, after a complete redesignation request is submitted for an area that is attaining the standard, are not applicable for purposes of evaluating a redesignation request. Second, EPA then shows that, even if EPA applies the subpart 4 requirements to the West Virginia redesignation requests and disregards the provisions of its 1997 PM<sub>2.5</sub> Implementation Rule recently remanded by the DC Circuit Court, the State's request for redesignation of the Area still qualifies for approval. EPA's discussion takes into account the effect of the DC Circuit Court's ruling on the Area's maintenance plan, which EPA views as approvable when subpart 4 requirements are considered.

##### a. Applicable Requirements for Purposes of Evaluating the Redesignation Requests

With respect to the 1997 PM<sub>2.5</sub> Implementation Rule, the DC Circuit Court's January 4, 2013 ruling rejected EPA's reasons for implementing the PM<sub>2.5</sub> NAAQS solely in accordance with the provisions of subpart 1, and remanded that matter to EPA, so that it could address implementation of the 1997 annual PM<sub>2.5</sub> NAAQS under subpart 4 of Part D of the CAA, in addition to subpart 1. For the purposes of evaluating the West Virginia's redesignation request for the Charleston Area, to the extent that implementation under subpart 4 would impose additional requirements for areas designated nonattainment, EPA believes that those requirements are not "applicable" for the purposes of section 107(d)(3)(E) of the CAA, and thus EPA is not required to consider subpart 4 requirements with respect to the redesignation of the Charleston Area. Under its longstanding interpretation of the CAA, EPA has interpreted section 107(d)(3)(E) to mean, as a threshold matter, that the part D provisions which are "applicable" and which must be approved in order for EPA to redesignate an area include only those which came due prior to a state's submittal of a complete redesignation request. *See* 1992 Calcagni Memorandum. *See also* "State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) on or after

November 15, 1992,” Memorandum from Michael Shapiro, Acting Assistant Administrator, Air and Radiation, September 17, 1993 (Shapiro memorandum); Final Redesignation of Detroit-Ann Arbor, (60 FR 12459, 12465–66, March 7, 1995); Final Redesignation of St. Louis, Missouri, (68 FR 25418, 25424–27, May 12, 2003); *Sierra Club v. EPA*, 375 F.3d 537, 541 (7th Cir. 2004) (upholding EPA’s redesignation rulemaking applying this interpretation and expressly rejecting Sierra Club’s view that the meaning of “applicable” under the statute is “whatever should have been in the plan at the time of attainment rather than whatever actually was in the plan and already implemented or due at the time of attainment”).<sup>1</sup> In this case, at the time that West Virginia submitted its redesignation requests for both standards, the requirements under subpart 4 were not due, and indeed, were not yet known to apply.

EPA’s view that, for purposes of evaluating the redesignation of the Charleston Area, the subpart 4 requirements were not due at the time West Virginia submitted the redesignation requests is in keeping with the EPA’s interpretation of subpart 2 requirements for subpart 1 ozone areas redesignated subsequent to the DC Circuit Court’s decision in *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882 (D.C. Cir. 2006). In *South Coast*, the DC Circuit Court found that EPA was not permitted to implement the 1997 8-hour ozone standard solely under subpart 1, and held that EPA was required under the statute to implement the standard under the ozone-specific requirements of subpart 2 as well. Subsequent to the *South Coast* decision, in evaluating and acting upon redesignation requests for the 1997 8-hour ozone standard that were submitted to EPA for areas under subpart 1, EPA applied its longstanding interpretation of the CAA that “applicable requirements,” for purposes of evaluating a redesignation, are those that had been due at the time the redesignation request was submitted. See, e.g., Proposed Redesignation of Manitowoc County and Door County Nonattainment Areas (75 FR 22047, 22050, April 27, 2010). In those rulemaking actions, EPA therefore did not consider subpart 2 requirements to be “applicable” for the purposes of evaluating whether the area should be

redesignated under section 107(d)(3)(E) of the CAA.

EPA’s interpretation derives from the provisions of section 107(d)(3) of the CAA. Section 107(d)(3)(E)(v) states that, for an area to be redesignated, a state must meet “all requirements ‘applicable’ to the area under section 110 and part D.” Section 107(d)(3)(E)(ii) provides that EPA must have fully approved the “applicable” SIP for the area seeking redesignation. These two sections read together support EPA’s interpretation of “applicable” as only those requirements that came due prior to submission of a complete redesignation request. First, holding states to an ongoing obligation to adopt new CAA requirements that arose after the state submitted its redesignation request, in order to be redesignated, would make it problematic or impossible for EPA to act on redesignation requests in accordance with the 18-month deadline Congress set for EPA action in section 107(d)(3)(D). If “applicable requirements” were interpreted to be a continuing flow of requirements with no reasonable limitation, states, after submitting a redesignation request, would be forced continuously to make additional SIP submissions that in turn would require EPA to undertake further notice-and-comment rulemaking actions to act on those submissions. This would create a regime of unceasing rulemaking that would delay action on the redesignation request beyond the 18-month timeframe provided by the CAA for this purpose.

Second, a fundamental premise for redesignating a nonattainment area to attainment is that the area has attained the relevant NAAQS due to emission reductions from existing controls. Thus, an area for which a redesignation request has been submitted would have already attained the NAAQS as a result of satisfying statutory requirements that came due prior to the submission of the request. Absent a showing that unadopted and unimplemented requirements are necessary for future maintenance, it is reasonable to view the requirements applicable for purposes of evaluating the redesignation request as including only those SIP requirements that have already come due. These are the requirements that led to attainment of the NAAQS. To require, for redesignation approval, that a state also satisfy additional SIP requirements coming due after the state submits its complete redesignation request, and while EPA is reviewing it, would compel the state to do more than is necessary to attain the NAAQS, without a showing that the additional

requirements are necessary for maintenance.

In the context of this redesignation, the timing and nature of the D.C. Circuit Court’s January 4, 2013 decision in *NRDC v. EPA* compound the consequences of imposing requirements that come due after the redesignation request is submitted. West Virginia submitted its redesignation requests for the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS on December 6, 2012 for Charleston Area, but the D.C. Circuit Court did not issue its decision remanding EPA’s 1997 PM<sub>2.5</sub> Implementation Rule concerning the applicability of the provisions of subpart 4 until January 2013.

To require West Virginia’s fully-completed and pending redesignation requests for both the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS to comply now with requirements of subpart 4 that the D.C. Circuit Court announced only in its January, 2013 decision on the 1997 PM<sub>2.5</sub> Implementation Rule, would be to give retroactive effect to such requirements when the State had no notice that it was required to meet them. The D.C. Circuit Court recognized the inequity of this type of retroactive impact in *Sierra Club v. Whitman*, 285 F.3d 63 (D.C. Cir. 2002),<sup>2</sup> where it upheld the D.C. Circuit Court’s ruling refusing to make retroactive EPA’s determination that the Area did not meet its attainment deadline. In that case, petitioners urged the D.C. Circuit Court to make EPA’s nonattainment determination effective as of the date that the statute required, rather than the later date on which EPA actually made the determination. The D.C. Circuit Court rejected this view, stating that applying it “would likely impose large costs on States, which would face fines and suits for not implementing air pollution prevention plans . . . even though they were not on notice at the time.” *Id.* at 68. Similarly, it would be unreasonable to penalize the State of West Virginia by rejecting its redesignation request for an area that is already attaining both the 1997 annual and 2006 24-hour PM<sub>2.5</sub> standards and that met all applicable requirements known to be in effect at the time of the requests. For EPA now to reject the redesignation requests solely because the State did not expressly address

<sup>1</sup> Applicable requirements of the CAA that come due subsequent to the area’s submittal of a complete redesignation request remain applicable until a redesignation is approved, but are not required as a prerequisite to redesignation. Section 175A(c) of the CAA.

<sup>2</sup> *Sierra Club v. Whitman* was discussed and distinguished in a recent D.C. Circuit Court decision that addressed retroactivity in a quite different context, where, unlike the situation here, EPA sought to give its regulations retroactive effect. *National Petrochemical and Refiners Ass’n v. EPA*, 630 F.3d 145, 163 (D.C. Cir. 2010), rehearing denied 643 F.3d 958 (D.C. Cir. 2011), cert denied 132 S. Ct. 571 (2011).

subpart 4 requirements of which it had no notice, would inflict the same unfairness condemned by the D.C. Circuit Court in *Sierra Club v. Whitman*.

#### b. Subpart 4 Requirements and West Virginia Redesignation Requests

Even if EPA were to take the view that the D.C. Circuit Court's January 4, 2013 decision requires that, in the context of pending redesignations for either the 1997 annual or 2006 24-hour PM<sub>2.5</sub> standards, subpart 4 requirements were due and in effect at the time West Virginia submitted its redesignation requests, EPA proposes to determine that the Charleston Area still qualifies for redesignation to attainment for both the 1997 annual and 2006 24-hour PM<sub>2.5</sub> standards. As explained subsequently, EPA believes that the two redesignation requests for the Charleston Area, though not expressed in terms of subpart 4 requirements, substantively meet the requirements of that subpart for purposes of redesignating the Area to attainment for both standards.

With respect to evaluating the relevant substantive requirements of subpart 4 for purposes of redesignating the Charleston Area, EPA notes that subpart 4 incorporates components of subpart 1 of part D, which contains general air quality planning requirements for areas designated as nonattainment. *See* Section 172(c). Subpart 4 itself contains specific planning and scheduling requirements for coarse particulate matter (PM<sub>10</sub>)<sup>3</sup> nonattainment areas, and under the D.C. Circuit Court's January 4, 2013 decision in *NRDC v. EPA*, these same statutory requirements also apply for PM<sub>2.5</sub> nonattainment areas. EPA has longstanding general guidance that interprets the 1990 amendments to the CAA, making recommendations to states for meeting the statutory requirements for SIPs for nonattainment areas. *See*, the General Preamble. In the General Preamble, EPA discussed the relationship of subpart 1 and subpart 4 SIP requirements, and pointed out that subpart 1 requirements were to an extent "subsumed by, or integrally related to, the more specific PM<sub>10</sub> requirements" (57 FR 13538, April 16, 1992). The subpart 1 requirements include, among other things, provisions for attainment demonstrations, RACM, RFP, emissions inventories, and contingency measures.

For the purposes of these redesignation requests, in order to identify any additional requirements which would apply under subpart 4, we

are considering the Charleston Area to be a "moderate" PM<sub>2.5</sub> nonattainment area. Under section 188 of the CAA, all areas designated nonattainment areas under subpart 4 would initially be classified by operation of law as "moderate" nonattainment areas, and would remain moderate nonattainment areas unless and until EPA reclassifies the area as a "serious" nonattainment area. Accordingly, EPA believes that it is appropriate to limit the evaluation of the potential impact of subpart 4 requirements to those that would be applicable to moderate nonattainment areas. Sections 189(a) and (c) of subpart 4 apply to moderate nonattainment areas and include the following: (1) An approved permit program for construction of new and modified major stationary sources (section 189(a)(1)(A)); (2) an attainment demonstration (section 189(a)(1)(B)); (3) provisions for RACM (section 189(a)(1)(C)); and (4) quantitative milestones demonstrating RFP toward attainment by the applicable attainment date (section 189(c)).

The permit requirements of subpart 4, as contained in section 189(a)(1)(A), refer to and apply the subpart 1 permit provisions requirements of sections 172 and 173 to PM<sub>10</sub>, without adding to them. Consequently, EPA believes that section 189(a)(1)(A) does not itself impose for redesignation purposes any additional requirements for moderate areas beyond those contained in subpart 1.<sup>4</sup> In any event, in the context of redesignation, EPA has long relied on the interpretation that a fully approved nonattainment new source review program is not considered an applicable requirement for redesignation, provided the area can maintain the standard with a prevention of significant deterioration (PSD) program after redesignation. A detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, "Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment." *See also* rulemakings for Detroit, Michigan (60 FR 12467–12468, March 7, 1995); Cleveland-Akron-Lorain, Ohio (61 FR 20458, 20469–20470, May 7, 1996); Louisville, Kentucky (66 FR 53665, October 23, 2001); and Grand Rapids, Michigan (61 FR 31834–31837, June 21, 1996).

With respect to the specific attainment planning requirements under

subpart 4,<sup>5</sup> when EPA evaluates a redesignation request under either subpart 1 and/or 4, any area that is attaining the PM<sub>2.5</sub> NAAQS is viewed as having satisfied the attainment planning requirements for these subparts. For redesignations, EPA has for many years interpreted attainment-linked requirements as not applicable for areas attaining the standard. In the General Preamble, EPA stated that: "The requirements for RFP will not apply in evaluating a request for redesignation to attainment since, at a minimum, the air quality data for the area must show that the area has already attained. Showing that the State will make RFP towards attainment will, therefore, have no meaning at that point."

The General Preamble also explained that: "[t]he section 172(c)(9) requirements are directed at ensuring RFP and attainment by the applicable date. These requirements no longer apply when an area has attained the standard and is eligible for redesignation. Furthermore, section 175A for maintenance plans . . . provides specific requirements for contingency measures that effectively supersede the requirements of section 172(c)(9) for these areas." *Id.* EPA similarly stated in its 1992 Calcagni Memorandum that, "The requirements for reasonable further progress and other measures needed for attainment will not apply for redesignations because they only have meaning for areas not attaining the standard."

It is evident that even if we were to consider the D.C. Circuit Court's January 4, 2013 decision in *NRDC v. EPA* to mean that attainment-related requirements specific to subpart 4 should be imposed retroactively<sup>6</sup> and thus are now past due, those requirements do not apply to an area that is attaining the 1997 annual and/or the 2006 24-hour PM<sub>2.5</sub> NAAQS, for the purpose of evaluating a pending request to redesignate the area to attainment. EPA has consistently enunciated this interpretation of applicable requirements under section 107(d)(3)(E) since the General Preamble was published more than twenty years ago. Courts have recognized the scope of EPA's authority to interpret "applicable requirements" in the redesignation context. *See Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004).

<sup>5</sup> I.e., attainment demonstration, RFP, RACM, milestone requirements, contingency measures.

<sup>6</sup> As EPA has explained above, we do not believe that the D.C. Circuit Court's January 4, 2013 decision should be interpreted so as to impose these requirements on the states retroactively. *Sierra Club v. Whitman*, *supra*.

<sup>3</sup> PM<sub>10</sub> refers to particulates nominally 10 micrometers in diameter or smaller.

<sup>4</sup> The potential effect of section 189(e) on section 189(a)(1)(A) for purposes of evaluating this redesignation is discussed in this rulemaking action.

Moreover, even outside the context of redesignations, EPA has viewed the obligations to submit attainment-related SIP planning requirements of subpart 4 as inapplicable for areas that EPA determines are attaining the 1997 annual and/or the 2006 24-hour PM<sub>2.5</sub> NAAQS. EPA's prior "Clean Data Policy" rulemakings for the PM<sub>10</sub> NAAQS, also governed by the requirements of subpart 4, explain EPA's reasoning. They describe the effects of a determination of attainment on the attainment-related SIP planning requirements of subpart 4. *See* "Determination of Attainment for Coso Junction Nonattainment Area," (75 FR 27944, May 19, 2010). *See also* Coso Junction Proposed PM<sub>10</sub> Redesignation, (75 FR 36023, 36027, June 24, 2010); Proposed and Final Determinations of Attainment for San Joaquin Nonattainment Area (71 FR 40952, 40954–55, July 19, 2006; and 71 FR 63641, 63643–47, October 30, 2006). In short, EPA in this context has also long concluded that to require states to meet superfluous SIP planning requirements is not necessary and not required by the CAA, so long as those areas continue to attain the relevant NAAQS.

Elsewhere in this notice, EPA determined that the Charleston Area has attained both the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS. Under its longstanding interpretation, EPA is proposing to determine here that the Area meets the attainment-related plan requirements of subparts 1 and 4 for both the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS. Thus, EPA is proposing to conclude that the requirements to submit an attainment demonstration under 189(a)(1)(B), a RACM determination under section 172(c)(1) and section 189(a)(1)(c), a RFP demonstration under 189(c)(1), and contingency measure requirements under section 172(c)(9) are satisfied for purposes of evaluating these redesignation requests.

#### c. Subpart 4 and Control of PM<sub>2.5</sub> Precursors

The D.C. Circuit Court in *NRDC v. EPA* remanded to EPA the two rules at issue in the case with instructions to EPA to re-promulgate them consistent with the requirements of subpart 4. EPA in this section addresses the D.C. Circuit Court's opinion with respect to PM<sub>2.5</sub> precursors. While past implementation of subpart 4 for PM<sub>10</sub> has allowed for control of PM<sub>10</sub> precursors such as NO<sub>x</sub> from major stationary, mobile, and area sources in order to attain the standard as expeditiously as practicable, section 189(e) of the CAA specifically provides

that control requirements for major stationary sources of direct PM<sub>10</sub> shall also apply to PM<sub>10</sub> precursors from those sources, except where EPA determines that major stationary sources of such precursors "do not contribute significantly to PM<sub>10</sub> levels which exceed the standard in the area."

EPA's 1997 PM<sub>2.5</sub> Implementation Rule, remanded by the D.C. Circuit Court, contained rebuttable presumptions concerning certain PM<sub>2.5</sub> precursors applicable to attainment plans and control measures related to those plans. Specifically, in 40 CFR 51.1002, EPA provided, among other things, that a state was "not required to address VOC [and NH<sub>3</sub>] as . . . PM<sub>2.5</sub> attainment plan precursor[s] and to evaluate sources of VOC [and NH<sub>3</sub>] emissions in the State for control measures." EPA intended these to be rebuttable presumptions. EPA established these presumptions at the time because of uncertainties regarding the emission inventories for these pollutants and the effectiveness of specific control measures in various regions of the country in reducing PM<sub>2.5</sub> concentrations. EPA also left open the possibility for such regulation of VOC and NH<sub>3</sub> in specific areas where that was necessary.

The D.C. Circuit Court in its January 4, 2013 decision made reference to both section 189(e) and 40 CFR 51.1002, and stated that, "In light of our disposition, we need not address the petitioners' challenge to the presumptions in [40 CFR 51.1002] that VOCs and NH<sub>3</sub> are not PM<sub>2.5</sub> precursors, as subpart 4 expressly governs precursor presumptions." *NRDC v. EPA*, at 27, n.10.

Elsewhere in the D.C. Circuit Court's opinion, however, the D.C. Circuit Court observed: "NH<sub>3</sub> is a precursor to fine particulate matter, making it a precursor to both PM<sub>2.5</sub> and PM<sub>10</sub>. For a PM<sub>10</sub> nonattainment area governed by subpart 4, a precursor is presumptively regulated. *See* 42 U.S.C. 7513a(e) [section 189(e)]." *Id.* at 21, n.7.

For a number of reasons, EPA believes that its proposed redesignations of the Charleston Area for the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS are consistent with the D.C. Circuit Court's decision on this aspect of subpart 4. First, while the D.C. Circuit Court, citing section 189(e), stated that "for a PM<sub>10</sub> area governed by subpart 4, a precursor is 'presumptively' regulated," the D.C. Circuit Court expressly declined to decide the specific challenge to EPA's 1997 PM<sub>2.5</sub> Implementation Rule provisions regarding NH<sub>3</sub> and VOC as precursors. The D.C. Circuit Court had no occasion to reach whether and how

it was substantively necessary to regulate any specific precursor in a particular PM<sub>2.5</sub> nonattainment area, and did not address what might be necessary for purposes of acting upon a redesignation request. However, even if EPA takes the view that the requirements of subpart 4 were deemed applicable at the time the state submitted the redesignation request, and disregards the 1997 PM<sub>2.5</sub> Implementation Rule's rebuttable presumptions regarding NH<sub>3</sub> and VOC as PM<sub>2.5</sub> precursors (and any similar provisions reflected in the guidance for the 2006 24-hour PM<sub>2.5</sub> NAAQS), the regulatory consequence would be to consider the need for regulation of all precursors from any sources in the Area to demonstrate attainment and to apply the section 189(e) provisions to major stationary sources of precursors. In the case of Charleston Area, EPA believes that doing so is consistent with proposing redesignation of the Area for the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS. The Area has attained both the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS without any specific additional controls of NH<sub>3</sub> and VOC and emissions from any sources in the Area.

Precursors in subpart 4 are specifically regulated under the provisions of section 189(e), which requires, with important exceptions, control requirements for major stationary sources of PM<sub>10</sub> precursors.<sup>7</sup> Under subpart 1 and EPA's prior implementation rule, all major stationary sources of PM<sub>2.5</sub> precursors were subject to regulation, with the exception of NH<sub>3</sub> and VOC. Thus we must address here whether additional controls of NH<sub>3</sub> and VOC from major stationary sources are required under section 189(e) of subpart 4 in order to redesignate the Area for the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS. As explained subsequently, we do not believe that any additional controls of NH<sub>3</sub> and VOC are required in the context of these redesignations.

In the General Preamble, EPA discusses its approach to implementing section 189(e). *See* 57 FR 13538–13542. With regard to precursor regulation under section 189(e), the General Preamble explicitly stated that control of VOC under other CAA requirements may suffice to relieve a state from the need to adopt precursor controls under section 189(e). *See* 57 FR 13542. EPA in

<sup>7</sup> Under either subpart 1 or subpart 4, for purposes of demonstrating attainment as expeditiously as practicable, a state is required to evaluate all economically and technologically feasible control measures for direct PM emissions and precursor emissions, and adopt those measures that are deemed reasonably available.

this proposal proposes to determine that West Virginia's SIP has met the provisions of section 189(e) with respect to NH<sub>3</sub> and VOC as precursors. This proposed supplemental determination is based on our findings that: (1) The Charleston Area contains no major stationary sources of NH<sub>3</sub> and (2) existing major stationary sources of VOC are adequately controlled under other provisions of the CAA regulating the ozone NAAQS.<sup>8</sup> In the alternative, EPA proposes to determine that, under the express exception provisions of section 189(e), and in the context of the redesignations of the Charleston Area, which is attaining the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS, at present NH<sub>3</sub> and VOC precursors from major stationary sources do not contribute significantly to levels exceeding the 1997 annual or the 2006 24-hour PM<sub>2.5</sub> NAAQS in the Area. See 57 FR 13539–42.

EPA notes that its 1997 PM<sub>2.5</sub> Implementation Rule provisions in 40 CFR 51.1002 were not directed at evaluation of PM<sub>2.5</sub> precursors in the context of redesignation, but at SIP plans and control measures required to bring a nonattainment area into attainment of the 1997 annual or the 2006 24-hour PM<sub>2.5</sub> NAAQS. By contrast, redesignation to attainment primarily requires the nonattainment area to have already attained due to permanent and enforceable emission reductions, and to demonstrate that controls in place can continue to maintain the standard. Thus, even if we regard the D.C. Circuit Court's January 4, 2013 decision as calling for "presumptive regulation" of NH<sub>3</sub> and VOC for PM<sub>2.5</sub> under the attainment planning provisions of subpart 4, those provisions in and of themselves do not require additional controls of these precursors for an area that already qualifies for redesignation. Nor does EPA believe that requiring West Virginia to address precursors differently than it has already would result in a substantively different outcome.

Although, as EPA has emphasized, its consideration here of precursor requirements under subpart 4 is in the context of a redesignation to attainment, EPA's existing interpretation of subpart 4 requirements with respect to precursors in attainment plans for PM<sub>10</sub> contemplates that states may develop attainment plans that regulate only those precursors that are necessary for

purposes of attainment in the area in question, i.e., states may determine that only certain precursors need be regulated for attainment and control purposes.<sup>9</sup> Courts have upheld this approach to the requirements of subpart 4 for PM<sub>10</sub>.<sup>10</sup> EPA believes that application of this approach to PM<sub>2.5</sub> precursors under subpart 4 is reasonable. Because the Charleston Area has already attained both the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS with its current approach to regulation of PM<sub>2.5</sub> precursors, EPA believes that it is reasonable to conclude in the context of this redesignation that there is no need to revisit the attainment control strategy with respect to the treatment of precursors. Even if the D.C. Circuit Court's decision is construed to impose an obligation, in evaluating this redesignation request, to consider additional precursors under subpart 4, it would not affect EPA's approval here of West Virginia's requests for redesignation of the Charleston Area for the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS. In the context of a redesignation, the Area has shown that it has attained the standards. Moreover, the State has shown and EPA has proposed to determine that attainment of both 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS in this Area is due to permanent and enforceable emissions reductions on all precursors necessary to provide for continued attainment of the standards. It follows logically that no further control of additional precursors is necessary. Accordingly, EPA does not view the January 4, 2013 decision of the D.C. Circuit Court as precluding redesignation of the Charleston Area to attainment for the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS at this time. In summary, even if West Virginia was required to address precursors for the Charleston Area under subpart 4 rather than under subpart 1, as interpreted in EPA's remanded 1997 PM<sub>2.5</sub> Implementation Rule, EPA would still conclude that the Area had met all applicable requirements for purposes of redesignation in accordance with section 107(d)(3)(E)(ii) and (v) of the CAA.

<sup>9</sup> See, e.g., "Approval and Promulgation of Implementation Plans for California—San Joaquin Valley PM<sub>10</sub> Nonattainment Area; Serious Area Plan for Nonattainment of the 24-Hour and Annual PM<sub>10</sub> Standards," 69 FR 30006 (May 26, 2004) (approving a PM<sub>10</sub> attainment plan that impose controls on direct PM<sub>10</sub> and NO<sub>x</sub> emissions and did not impose controls on SO<sub>2</sub>, VOC, or NH<sub>3</sub> emissions).

<sup>10</sup> See, e.g., *Assoc. of Irrigated Residents v. EPA et al.*, 423 F.3d 989 (9th Cir. 2005).

## V. EPA's Analysis of West Virginia's Submittal

EPA is proposing several rulemaking actions for Charleston Area: (1) To redesignate Charleston Area to attainment for both the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS; and (2) to approve into the West Virginia SIP the associated maintenance plans for both the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS. EPA is also proposing in this rulemaking action to approve the 2008 comprehensive emissions inventory to satisfy section 172(c)(3) requirement for the 2006 24-hour PM<sub>2.5</sub> NAAQS, one of the criteria for redesignation. EPA's proposed approvals of the redesignation requests and maintenance plans for the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS are based upon EPA's determination that the Area continues to attain both standards, which EPA is proposing in this rulemaking action, and that all other redesignation criteria have been met for the Charleston Area. The following is a description of how the WVDEP December 6, 2012 submittal and a supplemental submittal on June 24, 2013 satisfies the requirements of section 107(d)(3)(E) of the CAA for the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS.

### A. Requests for Redesignation

#### 1. Attainment

As noted previously, in the final rulemaking action dated October 11, 2011 (76 FR 62640), EPA determined that the Charleston Area has attained the 1997 annual PM<sub>2.5</sub> NAAQS. This determination of attainment was based upon complete, quality-assured and certified ambient air quality monitoring data for the period of 2007–2009 showing that the Area had attained the 1997 annual PM<sub>2.5</sub> NAAQS by its applicable attainment date of April 5, 2010. On November 18, 2011 (76 FR 71450), EPA determined that the Charleston Area had a clean data for the 2006 24-hour PM<sub>2.5</sub> NAAQS. The determination was based upon complete, quality assured, and certified ambient air monitoring data showing that this Area has monitored attainment of the 2006 24-hour PM<sub>2.5</sub> NAAQS based on the 2007–2009 data and data available to date for 2010 in EPA's Air Quality System (AQS) database. Further discussion of pertinent air quality issues underlying this determination was provided in the notice of proposed rulemakings for EPA's determination of attainment for this Area, published on July 15, 2011 (76 FR 41739) for the 1997 annual PM<sub>2.5</sub> NAAQS and August 19,

<sup>8</sup> The Charleston Area has reduced VOC emissions through the implementation of various control programs including VOC Reasonably Available Control Technology (RACT) regulations and various on-road and non-road motor vehicle control programs.

2011 (76 FR 51927) for the 2006 24-hour PM<sub>2.5</sub> NAAQS.

EPA has reviewed the ambient air quality PM<sub>2.5</sub> monitoring data in the Charleston Area consistent with the requirements contained at 40 CFR part 50, and recorded in EPA's AQS database. To support the previous determinations of attainment of the

Area, EPA has also reviewed more recent data in its AQS database, including certified, quality-assured data for the period from 2008–2010, 2009–2011 and 2010–2012. This data, shown in Table 1, shows that the Charleston Area continues to attain the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS. In addition, as discussed subsequently

with respect to the maintenance plan, WVDEP has committed to continue monitoring ambient PM<sub>2.5</sub> concentrations in accordance with 40 CFR part 58. Thus, EPA is proposing to determine that the Charleston Area continues and attain the 1997 and the 2006 24-hour PM<sub>2.5</sub> NAAQS.

TABLE 1—DESIGN VALUES FOR THE CHARLESTON AREA FOR THE 1997 ANNUAL AND THE 2006 24-HOUR PM<sub>2.5</sub> NAAQS (µg/m<sup>3</sup>) FOR 2008–2010, 2009–2011 AND 2010–2012

| Monitor ID<br>(located in Kanawha County) | 3-Year design values                          |                                                |                                               |                                                |                                               |                                                |
|-------------------------------------------|-----------------------------------------------|------------------------------------------------|-----------------------------------------------|------------------------------------------------|-----------------------------------------------|------------------------------------------------|
|                                           | 2008–2010<br>1997 annual<br>PM <sub>2.5</sub> | 2008–2010<br>2006 24-hour<br>PM <sub>2.5</sub> | 2009–2011<br>1997 annual<br>PM <sub>2.5</sub> | 2009–2011<br>2006 24-hour<br>PM <sub>2.5</sub> | 2010–2012<br>1997 annual<br>PM <sub>2.5</sub> | 2010–2012<br>2006 24-hour<br>PM <sub>2.5</sub> |
| 540390010 .....                           | 11.8                                          | 25                                             | 11.0                                          | 24                                             | 10.7                                          | 23                                             |
| 540390005 .....                           | 13.2                                          | 28                                             | 12.5                                          | 26                                             | 11.9                                          | 24                                             |

2. The Area Has Met All Applicable Requirements Under Section 110 and Subpart 1 of the CAA and Has a Fully Approved SIP Under Section 110(k) of the CAA

In accordance with section 107(d)(3)(E)(v) of the CAA, the SIP revisions for the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS for the Charleston Area must be fully approved under section 110(k) of the CAA and all the requirements applicable to the Area under section 110 of the CAA (general SIP requirements) and part D of Title I of the CAA (SIP requirements for nonattainment areas) must be met.

#### a. Section 110 General SIP Requirements

Section 110(a)(2) of Title I of the CAA delineates the general requirements for a SIP, which include enforceable emissions limitations and other control measures, means, or techniques, provisions for the establishment and operation of appropriate devices necessary to collect data on ambient air quality, and programs to enforce the limitations. The general SIP elements and requirements set forth in section 110(a)(2) of the CAA include, but are not limited to the following: (1) Submittal of a SIP that has been adopted by the state after reasonable public notice and hearing; (2) provisions for establishment and operation of appropriate procedures needed to monitor ambient air quality; (3) implementation of a source permit program; provisions for the implementation of Part C requirements PSD; (4) provisions for the implementation of Part D requirements for NSR permit programs; (5) provisions for air pollution modeling; and (6) provisions for public and local agency

participation in planning and emission control rule development.

Section 110(a)(2)(D) of the CAA requires that SIPs contain certain measures to prevent sources in a state from significantly contributing to air quality problems in another state. To implement this provision, EPA has required certain states to establish programs to address the interstate transport of air pollutants in accordance with the NO<sub>x</sub> SIP Call (63 FR 57356, October 27, 1998), amendments to the NO<sub>x</sub> SIP Call (64 FR 26298, May 14, 1999 and 65 FR 11222, March 2, 2000), and CAIR (70 FR 25162, May 12, 2005). However, section 110(a)(2)(D) of the CAA requirements for a state are not linked with a particular nonattainment area's designation and classification in that state. EPA believes that the requirements linked with a particular nonattainment area's designation and classifications are the relevant measures to evaluate in reviewing a redesignation request. The transport SIP submittal requirements, where applicable, continue to apply to a state regardless of the designation of any one particular area in the state. Thus, EPA does not believe that these requirements are applicable requirements for purposes of redesignation.

In addition, EPA believes that the other section 110(a)(2) elements of the CAA not connected with nonattainment plan submissions and not linked with an area's attainment status are not applicable requirements for purposes of redesignation. The Charleston Area will still be subject to these requirements after it is redesignated. EPA concludes that the section 110(a)(2) of the CAA and part D requirements which are linked with a particular area's designation and classification are the

relevant measures to evaluate in reviewing a redesignation request, and that section 110(a)(2) elements of the CAA not linked in the area's nonattainment status are not applicable for purposes of redesignation. This approach is consistent with EPA's existing policy on applicability of conformity (i.e., for redesignations) and oxygenated fuels requirement. *See* Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174, October 10, 1996), (62 FR 24826, May 7, 1997); Cleveland-Akron-Lorain, Ohio final rulemaking (61 FR 20458, May 7, 1996); and Tampa, Florida final rulemaking (60 FR 62748, December 7, 1995). *See also* the discussion on this issue in the Cincinnati, Ohio redesignation (65 FR 37890, June 19, 2000) and in the Pittsburgh, Pennsylvania redesignation (66 FR 53099, October 19, 2001).

EPA has reviewed the West Virginia SIP and has concluded that it meets the general SIP requirements under section 110(a)(2) of the CAA to the extent they are applicable for purposes of redesignation. EPA has previously approved provisions of West Virginia's SIP addressing section 110(a)(2) requirements, including provisions addressing PM<sub>2.5</sub>. *See* (76 FR 47062, August 4, 2011). These requirements are, however, statewide requirements that are not linked to the PM<sub>2.5</sub> nonattainment status of the Charleston Area. Therefore, EPA believes that these SIP elements are not applicable requirements for purposes of review of West Virginia's PM<sub>2.5</sub> redesignation requests.

#### b. Subpart 4 Requirements

Subpart 1 sets forth the basic nonattainment plan requirements applicable to PM<sub>2.5</sub> nonattainment areas. Under section 172 of the CAA, states

with nonattainment areas must submit plans providing for timely attainment and meet a variety of other requirements.

The General Preamble for Implementation of Title I discusses the evaluation of these requirements in the context of EPA's consideration of a redesignation request. The General Preamble sets forth EPA's view of applicable requirements for purposes of evaluating redesignation requests when an area is attaining the standard. *See* (57 FR 13498, April 16, 1992).

As noted previously, EPA has determined that the Charleston Area has attained both the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS. Pursuant to 40 CFR 51.2004(c), the requirement for West Virginia to submit for the Charleston Area an attainment demonstration and associated RACM, an RFP plan, contingency measures, and other planning SIPs related to the attainment of the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS are suspended until the Area is redesignated to attainment for each standard, or EPA determines that the Area again violated any of the standards, at which time such plans are required to be submitted. Since the attainment has been reached for the Area for the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS and continues to attain both standards, no additional measures are needed to provide for attainment. Therefore, the requirements of sections 172(c)(1), 172(c)(2), 172(c)(6), and 172(c)(9) of the CAA are no longer considered to be

available for purposes of redesignation of the Area for both standards.

Section 172(c)(3) of the CAA requires submission and approval of a comprehensive, accurate and current inventory of actual emissions. As a result of EPA's determinations of attainment of the Area for the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS, in which certain planning requirements were suspended for both standards, the only remaining requirement under section 172 of the CAA to be considered for purposes of redesignation of the Area is the comprehensive emissions inventory required under section 172(c)(3) of the CAA. As part of West Virginia's attainment plan submittal, the State submitted a 2002 emissions inventory for the Charleston Area for the 1997 annual PM<sub>2.5</sub> NAAQS on November 4, 2009 which includes emissions estimates that cover the general source categories of point sources, nonroad mobile sources, area sources and on-road mobile sources. The pollutants that comprise the inventory are NO<sub>x</sub>, VOCs, PM<sub>2.5</sub>, NH<sub>3</sub>, and SO<sub>2</sub>. On December 12, 2012 (77 FR 73923), EPA approved the 2002 emissions inventory for the 1997 annual PM<sub>2.5</sub> NAAQS.

The December 6, 2012 submittal included the 2008 comprehensive emissions inventory for the 2006 24-hour PM<sub>2.5</sub> NAAQS. The 2008 emissions inventory includes direct PM, NO<sub>x</sub> and SO<sub>2</sub>. *See* Tables 2 and 3 in this document. On June 24, 2013, West Virginia supplemented its submittal with the 2008 emission inventories for

NH<sub>3</sub> and VOC for the 2006 24-hour PM<sub>2.5</sub> NAAQS. The additional emission inventories information provided by the State addresses emissions of NH<sub>3</sub> and VOC from the general source categories of point sources, area sources, onroad mobile sources, and nonroad sources. *See* Tables 2 and 3 in this document. The state-submitted inventories were based on the data that West Virginia certified and submitted to the 2008 National Emissions Inventory (NEI) that is available at <http://www.epa.gov/ttn/chief/net/2008inventory.html>. The NEI is a comprehensive and detailed estimate of air emissions of both criteria and hazardous air pollutants from all air emissions sources. The NEI is prepared every three years by EPA based primarily upon emission estimates and emission model inputs provided by State, Local and Tribal air agencies.

The NEI point data category contains emission estimates for sources that are individually inventory and located at a fixed, stationary location. Point sources include large industrial facilities and electric power plants. The NEI nonpoint data category contains emissions estimates for sources which individually are too small in magnitude or too numerous to inventory as individual point sources. The NEI onroad and nonroad data categories contain mobile sources which are estimated for the 2008 NEI version 3 via the MOVES2010b and NONROAD models, respectively. NONROAD was run within the National Mobile Inventory Model (NMIM).

TABLE 2—KANAWHA COUNTY, CHARLESTON AREA 2008 EMISSIONS IN TONS PER YEAR (TPY) BY SOURCE SECTOR

| Sector        | Direct PM | NO <sub>x</sub> | SO <sub>2</sub> | NH <sub>3</sub> | VOC   |
|---------------|-----------|-----------------|-----------------|-----------------|-------|
| Point .....   | 792       | 10,222          | 20,018          | 15              | 1,850 |
| Area .....    | 1,658     | 786             | 977             | 86              | 2,786 |
| Nonroad ..... | 262       | 5,679           | 263             | 1               | 1,818 |
| Onroad .....  | 214       | 6,729           | 47              | 278             | 3,385 |
| Total .....   | 2,926     | 23,415          | 21,307          | 380             | 9,839 |

TABLE 3—PUTMAN COUNTY, CHARLESTON AREA 2008 EMISSIONS (TPY) BY SOURCE SECTOR

| Sector        | Direct PM | NO <sub>x</sub> | SO <sub>2</sub> | NH <sub>3</sub> | VOC   |
|---------------|-----------|-----------------|-----------------|-----------------|-------|
| Point .....   | 3,710     | 13,452          | 93,535          | 4               | 311   |
| Area .....    | 608       | 186             | 202             | 48              | 752   |
| Nonroad ..... | 100       | 2,725           | 141             | 0               | 261   |
| Onroad .....  | 54        | 1,609           | 12              | 61              | 710   |
| Total .....   | 4,477     | 17,972          | 93,891          | 113             | 2,034 |

EPA is proposing to approve the 2008 NH<sub>3</sub>, VOC, NO<sub>x</sub>, PM<sub>2.5</sub>, and SO<sub>2</sub> emissions inventory submitted by West Virginia for the 2006 24-hour PM<sub>2.5</sub>

NAAQS. For more information on EPA's analysis of the 2008 emissions inventory, see Appendix B of the State submittal and EPA's emissions

inventory technical support document (TSD) dated August 29, 2013, available in the docket for this rulemaking action at [www.regulations.gov](http://www.regulations.gov). Docket ID No.

EPA-OAR-RO3-2013-0090. Final approval of the 2008 emissions inventory will satisfy the emissions inventory requirement of section 172(c)(3) of the CAA for the 2006 24-hour PM<sub>2.5</sub> NAAQS.

Section 172(c)(4) of the CAA requires the identification and quantification of allowable emissions for major new and modified stationary sources in an area, and section 172(c)(5) of the CAA requires source permits for the construction and operation of new and modified major stationary sources anywhere in the nonattainment area. EPA has determined that, since the PSD requirements will apply after redesignation, areas being redesignated need not comply with the requirement that a nonattainment NSR program be approved prior to redesignation, provided that the area demonstrates maintenance of the NAAQS without part D NSR. A more detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994 entitled, "Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment." Nevertheless, West Virginia currently has an approved NSR program, codified in 45 CFR 19. *See* (71 FR 64468 November 2, 2006) (approving NSR program into the SIP). *See also* (77 FR 63736, October 17, 2012) (approving revisions to West Virginia's PSD program). However, West Virginia's PSD program for the 1997 annual PM<sub>2.5</sub> NAAQS will become effective in the Charleston Area upon redesignation to attainment.

Section 172(c)(7) of the CAA requires the SIP to meet the applicable provisions of section 110(a)(2) of the CAA. As noted previously, EPA believes the West Virginia SIP meets the requirements of section 110(a)(2) of the CAA that are applicable for purposes of redesignation.

Section 175A of the CAA requires a state seeking redesignation to attainment to submit a SIP revision to provide for the maintenance of the NAAQS in the area "for at least 10 years after the redesignation." In conjunction with its request to redesignate the Charleston Area to attainment status, West Virginia submitted SIP revisions to provide for maintenance of the 1997

annual and 2006 24-hour PM<sub>2.5</sub> NAAQS in the Charleston Area for at least 10 years after redesignation, throughout 2025. West Virginia is requesting that EPA approve this SIP revision as meeting the requirement of section 175A of the CAA. Once approved, the maintenance plans for the Charleston Area will ensure that the SIP for West Virginia meets the requirements of the CAA regarding maintenance of the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS for the Charleston Area. EPA's analysis of the maintenance plans is provided in section V.B of this document.

Section 176(c) of the CAA requires states to establish criteria and procedures to ensure that Federally supported or funded projects conform to the air quality planning goals in the applicable SIP. The requirement to determine conformity applies to transportation plans, programs, and projects developed, funded or approved under Title 23 of the United States Code (U.S.C.) and the Federal Transit Act (transportation conformity) as well as to all other Federally supported or funded projects (general conformity). State transportation conformity SIP revisions must be consistent with Federal conformity regulations relating to consultation, enforcement and enforceability which EPA promulgated pursuant to its authority under the CAA. EPA interprets the conformity SIP requirements as not applying for purposes of evaluating the redesignation request under section 107(d) of the CAA because state conformity rules are still required after redesignation and Federal conformity rules apply where state rules have not been approved. *See Wall v. EPA*, 265 F.3d 426, (6th Cir. 2001) (upholding this interpretation). *See also* (60 FR 62748, December 7, 1995) (discussing Tampa, Florida).

Thus, for purposes of redesignating to attainment the Charleston Area for the 1997 annual PM<sub>2.5</sub> NAAQS, EPA determines that the Area has met all applicable SIP requirements under part D of Title I of the CAA. EPA also determines that upon final approval of the 2008 comprehensive emissions inventory as proposed in this rulemaking action, the Charleston Area will also meet all applicable SIP requirements under part D of Title I of the CAA for purposes of redesignating

the Area to attainment for the 2006 24-hour PM<sub>2.5</sub> NAAQS.

c. The Charleston Area Has a Fully Approved Applicable SIP Under Section 110(k) of the CAA

For purposes of redesignation to attainment for the 1997 annual PM<sub>2.5</sub> NAAQS, EPA has fully approved all applicable requirements of the West Virginia SIP for the Area in accordance with section 110(k) of the CAA. Upon final approval of the 2008 comprehensive emissions inventory proposed in this rulemaking action, EPA will have fully SIP-approved all applicable requirements of the West Virginia SIP for the Area for purposes of redesignation to attainment for the 2006 24-hour PM<sub>2.5</sub> NAAQS in accordance with section 110(k) of the CAA.

### 3. Permanent and Enforceable Reductions in Emissions

For redesignating a nonattainment area to attainment, section 107(d)(3)(E)(iii) of the CAA requires EPA to determine that the air quality improvement in the area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP and applicable Federal air pollution control regulations and other permanent and enforceable reductions. EPA believes that West Virginia has demonstrated that the observed air quality improvement in the Area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP, Federal measures, and other state-adopted measures. In making this demonstration, West Virginia has calculated the change in emissions between 2005, one of the years used to designate the Area as nonattainment, and 2008, one of the years the Area monitored attainment as provided in Table 4. The reduction in emissions and the corresponding improvement in air quality over this time period can be attributed to a number of regulatory control measures that the Area and contributing areas have implemented in recent years. For more information on EPA's analysis of the 2005 and 2008 emissions inventory, see EPA's emissions inventory TSD dated August 29, 2013, available in the docket for this rulemaking action at [www.regulations.gov](http://www.regulations.gov). Docket ID No. EPA-OAR-RO3-2013-0090.

TABLE 4—COMPARISON OF 2005 BASE YEAR AND 2008 ATTAINMENT YEAR REDUCTIONS IN TPY IN THE CHARLESTON AREA

|                           | 2005   | 2008   | Decrease |
|---------------------------|--------|--------|----------|
| EGU NO <sub>x</sub> ..... | 38,226 | 17,555 | 20,671   |

TABLE 4—COMPARISON OF 2005 BASE YEAR AND 2008 ATTAINMENT YEAR REDUCTIONS IN TPY IN THE CHARLESTON AREA—Continued

|                                 | 2005    | 2008    | Decrease |
|---------------------------------|---------|---------|----------|
| EGU PM <sub>2.5</sub> .....     | 4,802   | 4,359   | 443      |
| EGU SO <sub>2</sub> .....       | 125,276 | 108,959 | 16,317   |
| Onroad NO <sub>x</sub> .....    | 10,776  | 8,337   | 2,439    |
| Onroad PM <sub>2.5</sub> .....  | 351     | 268     | 83       |
| Onroad SO <sub>2</sub> .....    | 214     | 59      | 155      |
| Nonroad NO <sub>x</sub> .....   | 973     | 897     | 76       |
| Nonroad PM <sub>2.5</sub> ..... | 119     | 113     | 6        |
| Nonroad SO <sub>2</sub> .....   | 76      | 14      | 62       |

#### a. Federal Measures Implemented

Reductions in PM<sub>2.5</sub> precursor emissions have occurred statewide and in upwind states as a result of Federal emission control measures, with additional emission reductions expected to occur in the future. The Tier 2 Emission Standards for Vehicles and Gasoline Sulfur Standards (Tier 2 Standards) have resulted in lower NO<sub>x</sub> and SO<sub>2</sub> emissions from new cars and light duty trucks, including sport utility vehicles. The Federal rules were phased in between 2004 and 2009. EPA has estimated that, after phasing in the new requirements, new vehicles emit less NO<sub>x</sub> in the following percentages: Passenger cars (light duty vehicles)—77 percent; light duty trucks, minivans, and sports utility vehicles—86 percent; and larger sports utility vehicles, vans, and heavier trucks—69–95 percent. EPA expects fleet wide average emissions to decline by similar percentages as new vehicles replace older vehicles. The Tier 2 standards also reduced the sulfur content of gasoline to 30 parts per million (ppm) beginning in January 2006, which reflects up to a 90 percent reduction in sulfur content.

EPA issued the Heavy-Duty Diesel Engine Rule in July 2000. This rule includes standards limiting the sulfur content of diesel fuel, which went into effect in 2004. A second phase took effect in 2007 which reduced PM<sub>2.5</sub> emissions from heavy-duty highway engines and further reduced the highway diesel fuel sulfur content to 15 ppm. The total program is estimated to achieve a 90 percent reduction in direct PM<sub>2.5</sub> emissions and a 95 percent reduction in NO<sub>x</sub> emissions for these new engines using low sulfur diesel, compared to existing engines using higher sulfur diesel fuel. The reduction in fuel sulfur content also yielded an immediate reduction in particulate sulfate emissions from all diesel vehicles.

In May 2004, EPA promulgated the Nonroad Diesel Rule for large nonroad diesel engines, such as those used in construction, agriculture, and mining, to

be phased in between 2008 and 2014.

The rule also reduces the sulfur content in nonroad diesel fuel by over 99 percent. Prior to 2006, nonroad diesel fuel averaged approximately 3,400 ppm sulfur. This rule limited nonroad diesel sulfur content to 500 ppm by 2006, with a further reduction to 15 ppm by 2010.

#### b. State and Local Measures

The Area's air quality is strongly affected by regulation of SO<sub>2</sub> and NO<sub>x</sub> from power plants. EPA promulgated the NO<sub>x</sub> SIP Call, CAIR and CASPR to address SO<sub>2</sub> and NO<sub>x</sub> emissions from EGUs and certain non-EGUs across the eastern United States. The affected EGUs in the Charleston Area are located at the Appalachian Power—Kanawha River Plant in Kanawha County and Appalachian Power—John E. Amos Plant in Putnam County. EPA issued the NO<sub>x</sub> SIP Call in 1998 pursuant to the CAA to require 22 states and the District of Columbia to reduce NO<sub>x</sub> emissions from large EGUs and large non-EGUs such as industrial boilers, internal combustion engines, and cement kilns. See (63 FR 57356, October 27, 1998). EPA approved West Virginia's Phase I NO<sub>x</sub> SIP Call rule on May 10, 2002 (67 FR 31733) and Phase II rule on September 28, 2006 (71 FR 56881). Emission reductions resulting from regulations developed in response to the NO<sub>x</sub> SIP Call are permanent and enforceable.

On March 10, 2005, EPA issued CAIR, which applies to 27 states and the District of Columbia. CAIR relied on 3 separate cap-and-trade programs to reduce SO<sub>2</sub> and NO<sub>x</sub> emissions. On August 4, 2009 (74 FR 38536), EPA approved West Virginia's CAIR rules into the West Virginia SIP. The maintenance plans for the Area for both 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS, thus, list CAIR as a control measure for the purpose of reducing SO<sub>2</sub> and NO<sub>x</sub> emissions from EGUs.

On August 8, 2011 (76 FR 48208), EPA promulgated CSAPR to replace CAIR, which has been in place since 2005. The D.C. Circuit Court initially

vacated CAIR, *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), but ultimately remanded the rule to EPA without vacatur to preserve the environmental benefits provided by CAIR, *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008). On August 21, 2012, the D.C. Circuit Court issued a decision to vacate CSAPR. In that decision, it also ordered EPA to continue administering CAIR “pending the promulgation of a valid replacement.” *EME Homer City*, 696 F.3d at 38. EPA and other parties have filed petitions for certiorari to the U.S. Supreme Court, and on June 24, 2013, the Supreme Court granted certiorari on EPA's petition for appeal of *EME Homer City Generation*. See *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), *cert. granted*, 570 U.S.—(2013). Nonetheless, EPA intends to continue to act in accordance with the *EME Homer City* opinion.

As noted earlier, EPA believes it is appropriate to allow states to rely on the existing emissions reductions achieved by CAIR, as sufficiently permanent and enforceable pending a valid replacement rule, for purposes such as a redesignation. CAIR was in place and thus getting emission reductions when the Charleston Area monitored attainment of the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS. The monitoring data used to demonstrate the Area's attainment of the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS was impacted by CAIR. EPA finds West Virginia appropriately included CAIR as a control measure in this SIP revision.

Furthermore, EGUs in this Area are subject to Federal consent decrees that have reduced emissions of NO<sub>x</sub> and SO<sub>2</sub> in the Area. There are two EGUs in the Charleston Area, namely, Appalachian Power, Kanawha River Plant in Kanawha County; and Appalachian Power, John E. Amos Plant in Putnam County. As part of a Federally enforceable consent decree, the Kanawha River Plant was required, on the date of entry, to operate low NO<sub>x</sub> burners continuously to control

emissions of NO<sub>x</sub> and also on the date of entry, units can only burn coal with sulfur content no greater than 1.75 lb/one million British Thermal Unit (mmBTU) on an annual average basis to reduce SO<sub>2</sub> emissions. Since 2008, additional controls have and will be

installed on EGUs within the Area which will continue to contribute to the reductions in precursor pollutants for PM<sub>2.5</sub>. Table 5 provides the reductions from EGUs in the Area from 2005 and 2008. EPA believes that West Virginia has adequately demonstrated that the

improvement in air quality in Charleston Area is due to permanent and enforceable emissions reductions resulting from implementation of the SIP, Federal measures, and other State-adopted measures.

TABLE 5—SUMMARY OF REDUCTIONS FROM EGUS IN THE CHARLESTON AREA, IN TPY

|                         | 2005    | 2008    | Reductions |
|-------------------------|---------|---------|------------|
| SO <sub>2</sub> .....   | 125,276 | 108,959 | 16,317     |
| NO <sub>x</sub> .....   | 38,226  | 17,555  | 20,671     |
| PM <sub>2.5</sub> ..... | 4,802   | 4,359   | 443        |

### B. Maintenance Plans

On December 6, 2012, WVDEP submitted maintenance plans for the Charleston Area for the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS as required by section 175A of the CAA. EPA's analysis for proposing approval of the maintenance plans are provided in this section.

#### 1. Attainment Emissions Inventory

An attainment inventory is comprised of the emissions during the time period associated with the monitoring data showing attainment. WVDEP developed emissions inventories for NO<sub>x</sub>, direct PM<sub>2.5</sub>, and SO<sub>2</sub> for 2008, one of the years in the period during which the Charleston Area monitored attainment of the 1997 annual PM<sub>2.5</sub> standard, as described previously. The 2008 point source inventory contained emissions for EGUs and non-EGU sources in Kanawha and Putnam Counties in West Virginia. WVDEP used the 2008 annual emissions inventory submitted to EPA's NEI database and EPA's Clean Air Markets Division (CAMD) database to compile their inventory. For the 2008 area source emissions, WVDEP used the 2008 NEI v1.5 data developed by EPA. For the 2008 nonroad mobile sources, WVDEP generated the emissions using EPA's NONROAD model. The 2008 onroad mobile source inventory was developed using the most current version of EPA's highway mobile source emissions model MOVES2010a. WVDEP used the Kentucky, Ohio, and West Virginia (KYOVA) Travel Demand Model, which is the most recent travel demand model provided by the KYOVA Interstate Planning Commission that covers the nonattainment counties in West Virginia. Information from the travel demand model combined with Highway Performance Monitoring Systems (HPMS) county-level data from each area were used in the emissions analysis. Additional data needed for input into the MOVES2010a model was provided by the Ohio Department of

Transportation (ODOT), Ohio EPA, West Virginia Department of Transportation (WVDOT), WVDEP, Kentucky Transportation Cabinet (KYTC), and the Kentucky Division of Air Quality (KDAQ).

EPA has reviewed the documentation provided by WVDEP and found the emissions inventory to be acceptable. For more information on EPA's analysis of the 2008 emissions inventory, see Appendix B of the State submittal and the emissions inventory TSD dated August 29, 2013, available on line at [www.regulations.gov](http://www.regulations.gov), Docket ID No. EPA-OAR-R03-2013-0090.

#### 2. Maintenance Demonstration

Section 175A requires a state seeking redesignation to attainment to submit a SIP revision to provide for the maintenance of the NAAQS in the area "for at least 10 years after the redesignation." EPA has interpreted this as a showing of maintenance "for a period of ten years following redesignation." Where the emissions inventory method of showing maintenance is used, its purpose is to show that emissions during the maintenance period will not increase over the attainment year inventory. See 1992 Calcagni Memorandum, pages 9–10.

For a demonstration of maintenance, emissions inventories are required to be projected to future dates to assess the influence of future growth and controls; however, the maintenance demonstration need not be based on modeling. See *Wall v. EPA*, *supra*; *Sierra Club v. EPA*, *supra*. See also 66 FR 53099–53100; 68 FR 25430–32. WVDEP uses projection inventories to show that the Area will remain in attainment and developed projection inventories for an interim year of 2018 and a maintenance plan end year of 2025 to show that future emissions of NO<sub>x</sub>, SO<sub>2</sub>, and direct PM<sub>2.5</sub> will remain at or below the attainment year 2008

emissions levels throughout the Charleston Area through the year 2025.

The projection inventories for the 2018 and 2025 point, area, and nonroad sources were based on the 2012 and 2018 Visibility Improvement State and Tribal Association of the Southeast (VISTAS)/Association of Southeastern Integrated Planning (ASIP) modeling inventory. West Virginia developed the 2018 point source inventory by interpolation between VISTAS/ASIP 2012 and 2018 modeling inventory. The 2025 EGU inventory for PM<sub>2.5</sub>, NO<sub>x</sub>, and SO<sub>2</sub> was kept the same as the VISTAS/ASIP 2018 inventory. The 2025 non-EGU inventory was extrapolated from the 2012 and 2018 inventory. Point source emissions for 2012 and 2018 were developed for EGUs and non-EGUs. For EGUs, WVDEP used the projection inventory developed by VISTAS/ASIP. VISTAS/ASIP analysis was based on EPA's Integrated Planning Model (IPM). The VISTAS/ASIP analysis projected future year emissions for EGUs under several scenarios based on the best information available at the time of the analysis. WVDEP used the "on the way" (OTW) projections, which took into account the reductions required by CAIR, as a basis for 2012 and 2018 EGU emissions. VISTAS/ASIP used EPA's Economic Growth Analysis System (EGAS), Version 4.0 to make the projections for non-EGUs, incorporating the growth factors suggested in the reports entitled, "Development of Growth Factors for Future Year Modeling Inventories (April 30, 2004)" and "CAIR Emission Inventory Overview (July 23, 2004)." EPA has reviewed the documentation provided by WVDEP and found the methodologies acceptable.

Area source emissions for 2018 were interpolated from the VISTAS/ASIP 2012 and 2018 inventories. The 2025 emissions were extrapolated from the VISTAS/ASIP 2012 and 2018 inventories. Growth and controls for emissions were based on the

methodologies applied by EPA for the CAIR analysis. Nonroad source emissions, including aircraft, locomotives, and commercial marine vessels (CMV) for 2018 were interpolated from the VISTAS/ASIP 2012 and 2018 inventories. CMV source emissions from SO<sub>2</sub> included in the 2025 inventory were held constant at 2018 levels because no further reduction in fuel sulfur content is expected. All

other nonroad source emissions for 2025 were extrapolated from the VISTAS/ASIP 2012 and 2018 inventories. The 2018 and 2025 onroad mobile source emissions were prepared using MOVES2010a following the same procedure as the 2008 inventory as described previously. EPA has determined that the emissions inventories discussed above as provided by WVDEP are approvable. For more

information on EPA's analysis of the emissions inventory, *see* Appendix B of the State submittal and EPA's TSD dated August 29, 2013, available on line at [www.regulations.gov](http://www.regulations.gov), Docket ID No. EPA-OAR-R03-2013-0090. Table 6 provides the inventories for the 2008 attainment year, the 2018 interim year, and the 2025 maintenance plan end year for the Area.

TABLE 6—COMPARISON OF 2008, 2018, AND 2025 SO<sub>2</sub>, NO<sub>x</sub>, AND DIRECT PM EMISSION TOTALS FOR THE CHARLESTON AREA (IN TPY)

|                                 | SO <sub>2</sub> | NO <sub>x</sub> | PM <sub>2.5</sub> |
|---------------------------------|-----------------|-----------------|-------------------|
| 2008 (attainment) .....         | 115,198         | 41,387          | 7,403             |
| 2018 (interim) .....            | 23,535          | 28,331          | 5,929             |
| 2018 (projected decrease) ..... | 91,663          | 13,056          | 1,474             |
| 2025 (maintenance) .....        | 23,694          | 27,291          | 5,869             |
| 2025 (projected decrease) ..... | 91,504          | 14,907          | 1,534             |

Table 6 shows that between 2008 and 2018, the Area is projected to reduce SO<sub>2</sub> emissions by 91,663 tpy, NO<sub>x</sub> emissions by 13,056 tpy, and direct PM emissions by 1,474 tpy. Between 2008 and 2025, the Area is projected to reduce SO<sub>2</sub> emissions by 91,504 tpy, NO<sub>x</sub> emissions by 14,907 tpy, and direct PM<sub>2.5</sub> emissions by 1,534 tpy. Thus, the projected emissions inventories show that the Area will continue to maintain the 1997 annual and 2006 PM<sub>2.5</sub> NAAQS during the 10 year maintenance period.

### 3. Monitoring Network

West Virginia's maintenance plans include a commitment to continue to operate its EPA-approved monitoring network, as necessary to demonstrate ongoing compliance with the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS. West Virginia currently operates two PM<sub>2.5</sub> monitors in the Charleston Area. These monitors are located in Kanawha County and operated by the West Virginia Division of Air Quality. West Virginia will consult with EPA prior to making any necessary changes to the network and will continue to quality assure the monitoring data in accordance with the requirements of 40 CFR part 58.

### 4. Verification of Continued Attainment

To provide for tracking of the emission levels in the Area, WVDEP requires major point sources to submit air emissions information annually and prepares a new periodic inventory for all PM<sub>2.5</sub> precursors every three years in accordance with EPA's Air Emissions Reporting Requirements (AERR). Emissions information will be compared to the attainment year inventory (2008) to assure continued attainment with the

1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS and will be used to assess emissions trends, as necessary.

### 5. Contingency Measures

The contingency plan provisions are designed to promptly correct a violation of either the 1997 annual or the 2006 24-hour PM<sub>2.5</sub> NAAQS that occurs in the Area after redesignation. Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to ensure that a state will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the events that would "trigger" the adoption and implementation of a contingency measure(s), the contingency measure(s) that would be adopted and implemented, and the schedule indicating the time frame by which the state would adopt and implement the measure(s).

West Virginia's maintenance plans outline the procedures for the adoption and implementation of contingency measures to further reduce emissions should a violation occur. West Virginia's contingency measures include a warning level response and an action level response. An initial warning level response is triggered for the 1997 annual PM<sub>2.5</sub> NAAQS when the average weighted annual mean for a single calendar year exceeds 15.5 µg/m<sup>3</sup> within the Charleston Area. An initial warning level response is triggered for the 2006 24-hour PM<sub>2.5</sub> NAAQS when the 98th percentile 24-hour PM<sub>2.5</sub> concentration for a single calendar year exceeds 35.5 µg/m<sup>3</sup> within the Area. In the case of triggering a warning level, a study will be conducted to determine if the

emissions trends show increasing concentrations of PM<sub>2.5</sub>, and whether this trend, if any, is likely to continue. If it is determined through the study that action is necessary to reverse emissions increases, West Virginia will follow the same procedures for control selection and implementation as for an action level response, and implementation of necessary controls will take place as expeditiously as possible, but no later than 12 months from the end of the most recent calendar year.

For the 1997 annual PM<sub>2.5</sub> NAAQS, the action level response will be prompted by any one of the following: (1) A warning level response study showing emissions increases; (2) a two-year average of the weighted annual mean of 15.0 µg/m<sup>3</sup> or greater occurs within the Area; or (3) a violation of the standard in the Area (i.e., a three-year average of the weighted annual means of 15.0 µg/m<sup>3</sup> or greater). For the 2006 24-hour PM<sub>2.5</sub> NAAQS, the action level response will be prompted by the following: (1) A warning level response study showing emissions increases; (2) a two-year average of the 98th percentile of 35 µg/m<sup>3</sup> or greater within the area; or (3) a violation of the standard in Area (i.e., a three-year average of the 98th percentile of 35 µg/m<sup>3</sup> or greater). If an action level response is triggered for any of the standards, West Virginia will adopt and implement appropriate control measures within 18 months from the end of the year in which monitored air quality triggering a response occurs. West Virginia will also consider whether additional regulations that are not a part of the maintenance plan can be implemented in a timely manner to respond to the trigger.

West Virginia commits to adopt and expeditiously implement the necessary corrective actions. West Virginia's potential contingency measures include the following: (1) Diesel reduction emission strategies, (2) alternative fuels and diesel retrofit programs for fleet vehicle operations, (3) tighter PM<sub>2.5</sub>, SO<sub>2</sub>, and NO<sub>x</sub> emissions offsets for new and modified major sources, (4) concrete manufacturing controls, and (5) additional NO<sub>x</sub> reductions. Additionally, West Virginia has identified a list of sources that could potentially be controlled, which include the following: Industrial, commercial and institutional (ICI) boilers for SO<sub>2</sub> and NO<sub>x</sub> controls, EGUs, process heaters, internal combustion engines, combustion turbines, other sources greater than 100 tpy, fleet vehicles, and aggregate processing plants.

#### 6. EPA's Evaluation of VOC and NH<sub>3</sub> Precursors in West Virginia's Maintenance Plans

With regard to the redesignation of the Charleston Area in evaluating the effect of the DC Circuit Court's remand of EPA's 1997 PM<sub>2.5</sub> Implementation Rule, which included presumptions against consideration of VOC and NH<sub>3</sub> as PM<sub>2.5</sub> precursors, EPA in this proposal is also considering the impact of the decision on the maintenance plan required under sections 175A and 107(d)(3)(E)(iv) of the CAA. To begin with, EPA notes that the Area has attained both the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS and that West Virginia has shown that attainment of these standards are due to permanent and enforceable emission reductions.

EPA proposes to determine that the West Virginia's maintenance plan shows continued maintenance of the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS by tracking the levels of the precursors whose control brought about attainment of the standards in the Charleston Area. EPA therefore believes that the only additional consideration related to the maintenance plan requirements that results from the DC Circuit Court's January 4, 2013 decision is that of assessing the potential role of VOC and NH<sub>3</sub> in demonstrating continued maintenance in this Area. As explained subsequently, based upon documentation provided by the State and supporting information, EPA believes that the maintenance plan for the Area need not include any additional emission reductions of VOC or NH<sub>3</sub> in order to provide for continued maintenance of the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS.

First, as noted previously in EPA's discussion of section 189(e), VOC emission levels in the Charleston Area have historically been well-controlled under SIP requirements related to ozone and other pollutants. Second, total NH<sub>3</sub> emissions throughout the Charleston Area are low, estimated to be less than 600 tons per year. See Table 7 in this document. This amount of NH<sub>3</sub> emissions appears especially small in comparison to the total amounts of SO<sub>2</sub>, NO<sub>x</sub>, and even direct PM<sub>2.5</sub> emissions from sources in the Area.

West Virginia's maintenance plan shows that significant emissions of direct PM, NO<sub>x</sub>, and SO<sub>2</sub> are projected to decrease by 1,534 tpy, 14,907 tpy, and 91,504 tpy, respectively, over the maintenance period in the Area. See

Table 6 in this document. In addition, emissions inventories used in the regulatory impact analysis (RIA) for the 2012 PM<sub>2.5</sub> NAAQS<sup>11</sup> show that VOC emissions in the Area are projected to decrease by 4,282 tpy between 2007 and 2020. NH<sub>3</sub> emissions are projected to increase by 55 tpy between 2007 and 2020; however this increase is not significant when compared with the emissions reductions projected for the other precursors. See Table 7 in this document. Given that the Charleston Area is already attaining the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS even with the current level of emissions from sources in the Area, the downward trend of emissions inventories would be consistent with continued attainment.

Indeed, projected emissions reductions for the precursors that West Virginia is addressing for purposes of the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS indicate that the Area should continue to attain both standards following the precursor control strategy that the State has already elected to pursue.

Even if VOC and NH<sub>3</sub> emissions were to increase unexpectedly between 2007 and 2025, the overall emissions reductions projected between 2008 and 2025 of direct PM<sub>2.5</sub>, NO<sub>x</sub>, and SO<sub>2</sub> would be sufficient to offset any increases. For these reasons, EPA believes that local emissions of all of the potential PM<sub>2.5</sub> precursors will not increase to the extent that they will cause monitored PM<sub>2.5</sub> levels to violate either the 1997 annual or 2006 24-hour PM<sub>2.5</sub> standard during the maintenance period.

TABLE 7—COMPARISON OF 2007 AND 2020 EMISSIONS OF VOC AND NH<sub>3</sub> FOR THE CHARLESTON AREA, IN TPY<sup>12</sup>

| Sector        | VOC    |       |                      | NH <sub>3</sub> |      |                      |
|---------------|--------|-------|----------------------|-----------------|------|----------------------|
|               | 2007   | 2020  | Net change 2007–2020 | 2007            | 2020 | Net Change 2007–2020 |
| Point .....   | 2,182  | 2,185 | 3                    | 20              | 161  | 141                  |
| Area .....    | 2,825  | 2,605 | –220                 | 118             | 120  | 2                    |
| Nonroad ..... | 2,413  | 1,494 | –919                 | 4               | 4    | 0                    |
| On-road ..... | 4,263  | 1,117 | –3,164               | 155             | 69   | –86                  |
| Fires .....   | 2,167  | 2,167 | 0                    | 150             | 150  | 0                    |
| Total .....   | 13,850 | 9,568 | –4,282               | 447             | 504  | 55                   |

In addition, available air quality modeling analyses show continued maintenance of the standard during the maintenance period. The current annual design value for the Area is 12.5 µg/m<sup>3</sup>

and the current 24-hour design value is 26 µg/m<sup>3</sup>, based on 2009–2011 air quality data, which are well below the levels of the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS. See Table 1 in this

document. Moreover, the modeling analysis conducted for the RIA for the 2012 PM<sub>2.5</sub> NAAQS indicates that the design values for the Charleston Area are expected to continue to decline

<sup>11</sup> "Review of the NAAQS for Particulate Matter—Regulatory Impact Analysis." Docket ID No. EPA–R03–OAR–2010–0955.

<sup>12</sup> These emissions estimates were taken from the emissions inventories developed for the RIA for the 2012 PM<sub>2.5</sub> NAAQS.

through 2020. In the RIA analysis, the 2020 modeled annual design value for the Area is 9.4  $\mu\text{g}/\text{m}^3$  and the 2020 24-hour design value is 17  $\mu\text{g}/\text{m}^3$ .<sup>13</sup> Given that most precursor emissions are projected to decrease through 2025, it is reasonable to conclude that monitored  $\text{PM}_{2.5}$  levels in the Area will also continue to decrease through 2025.

Thus, EPA believes that there is ample justification to conclude that the Charleston Area should be redesignated, even taking into consideration the emissions of other precursors potentially relevant to  $\text{PM}_{2.5}$ . After consideration of the DC Circuit Court's January 4, 2013 decision, and for the reasons set forth in this notice, EPA proposes to approve West Virginia's maintenance plans and requests to redesignate the Charleston Area to attainment for the 1997 annual and 2006 24-hour  $\text{PM}_{2.5}$  standards. This proposed rulemaking action is based on a showing that the West Virginia's maintenance plans provide for maintenance of both the 1997 annual and 2006 24-hour  $\text{PM}_{2.5}$  standards for at least 10 years after redesignation, throughout 2025, in accordance with section 175A of the CAA.

### C. Transportation Conformity Insignificance Determinations

Transportation conformity is required under section 176(c) of the CAA to ensure that Federally supported highway, transit projects, and other activities are consistent with (conform to) the purpose of the SIP. The CAA requires Federal actions in nonattainment and maintenance areas to "conform to" the goals of the SIP. This means that such actions will not cause or contribute to violations of a NAAQS or any interim milestone. Actions involving Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) funding or approval are subject to the Transportation Conformity Rule (40 CFR part 93, subpart A). Under this rule, metropolitan planning organizations (MPOs) in nonattainment and maintenance areas coordinate with state air quality and transportation agencies, EPA, FHWA, and FTA to demonstrate that their metropolitan transportation plans and transportation improvement plans (TIPs) conform to applicable SIPs. This is typically determined by showing that estimated emissions from existing and planned highway and transit systems are less than or equal to the motor vehicle emissions budgets (MVEBs) contained in a SIP.

For MVEBs to be approvable, they must meet, at a minimum, EPA's adequacy criteria in 40 CFR 93.118(e)(4). However, in certain instances, the Transportation Conformity Rule allows areas to forgo establishment of a MVEB where it is demonstrated that the regional motor vehicle emissions for a particular pollutant or precursor are an insignificant contributor to the air quality problem in an area. The general criteria for insignificance determinations can be found in 40 CFR 93.109(f). Insignificance determinations are based on a number of factors, including the percentage of motor vehicle emissions in the context of the total SIP inventory; the current state of air quality as determined by monitoring data for the relevant NAAQS; the absence of SIP motor vehicle control measures; and the historical trends and future projections of the growth of motor vehicle emissions. EPA's rationale for providing for insignificance determinations is described in the July 1, 2004, revision to the Transportation Conformity Rule at 69 FR 40004. Specifically, the rationale is explained on page 40061 under the subsection XXIII.B entitled, "Areas With Insignificant Motor Vehicle Emissions."

As part of the 1997 annual and the 2006 24-hour  $\text{PM}_{2.5}$  NAAQS redesignation requests and maintenance plans, West Virginia is requesting that EPA finds that onroad emission of direct PM and  $\text{NO}_x$  emissions for the Charleston Area are insignificant for transportation conformity purposes. On September 12, 2013, EPA initiated an adequacy review of the findings of insignificance for both the 1997 annual and the 2006 24-hour  $\text{PM}_{2.5}$  NAAQS that West Virginia included in its redesignation submittals. As such, notices of the submission of these findings were posted on the adequacy Web site (<http://epa.gov/otaq/stateresources/transconf/cursips.htm>). The public comment period closed on October 15, 2013. There were no public comments. EPA is acting on making these adequacy findings final through a separate notice of adequacy. Consistent with EPA's adequacy review of West Virginia's redesignation requests and maintenance plans and EPA's thorough review of the entire SIP submissions, EPA is proposing to approve West Virginia's insignificance determinations for the onroad motor vehicle contribution of  $\text{PM}_{2.5}$  and  $\text{NO}_x$  emissions to the overall  $\text{PM}_{2.5}$  emissions for the 1997 annual and the 2006 24-hour  $\text{PM}_{2.5}$  NAAQS for the Charleston Area.

Because EPA finds that West Virginia's submittals meet the criteria in the Transportation Conformity Rule for insignificance findings for motor vehicle emissions of  $\text{PM}_{2.5}$  and  $\text{NO}_x$  in the Charleston Area, it is not necessary to establish  $\text{PM}_{2.5}$  and  $\text{NO}_x$  MVEBs for the Area. EPA finds that the submittals demonstrate that  $\text{PM}_{2.5}$  and  $\text{NO}_x$ , regional motor vehicle emissions are insignificant contributors to the annual and daily  $\text{PM}_{2.5}$  air quality in the Charleston Area. These findings are based on the following: (1) West Virginia provided information that projects that onroad mobile source  $\text{NO}_x$  constitutes 8 percent or less of the Area's total  $\text{NO}_x$  emissions in 2018 and 2025 due to continuing fleet turnover; (2) West Virginia provided information that projects that onroad mobile source  $\text{PM}_{2.5}$  emissions constitute 3.62 percent of the Area's total  $\text{PM}_{2.5}$  emissions and decreases significantly in later analysis years to 1.89 percent (2018) and 1.40 percent (2025); (3) there are no SIP requirements for motor vehicle control measures for the Area and it is unlikely that motor vehicle control measures will be implemented for  $\text{PM}_{2.5}$  in the Area in the future; and (4) the Area has attained both the 1997 annual and the 2006 24-hour  $\text{PM}_{2.5}$  NAAQS. As a result, MVEBs for  $\text{PM}_{2.5}$  and  $\text{NO}_x$  are not required for the Charleston Area to maintain the 1997 annual and the 2006 24-hour  $\text{PM}_{2.5}$  NAAQS. EPA is proposing to approve the findings of insignificant contribution by onroad sources for  $\text{PM}_{2.5}$  and  $\text{NO}_x$ , resulting in no proposed MVEBs for the Charleston Area for the 2018 and 2025 projected maintenance years. Onroad emissions were calculated using the EPA required MOVES2010a model.

West Virginia did not provide emission budgets for  $\text{SO}_2$ , VOC, and  $\text{NH}_3$  because it concluded, consistent with the presumptions regarding these precursors in the Transportation Conformity Rule at 40 CFR 93.102(b)(2)(v), which predated and was not disturbed by the litigation on the 1997  $\text{PM}_{2.5}$  Implementation Rule, that emissions of these precursors from motor vehicles are not significant contributors to the Area's  $\text{PM}_{2.5}$  air quality problem.

EPA issued conformity regulations to implement the 1997 annual  $\text{PM}_{2.5}$  NAAQS in July 2004 and May 2005 (69 FR 40004, July 1, 2004 and 70 FR 24280, May 6, 2005). Those actions were not part of the final rule recently remanded to EPA by the DC Circuit Court in *NRDC v. EPA*, No. 08–1250 (Jan. 4, 2013), in which the DC Circuit Court remanded to EPA the 1997  $\text{PM}_{2.5}$  Implementation Rule because it concluded that EPA

<sup>13</sup> The 2020 projected  $\text{PM}_{2.5}$  design values are part of the RIA for the 2012  $\text{PM}_{2.5}$  NAAQS.

must implement that NAAQS pursuant to the PM-specific implementation provisions of subpart 4, rather than solely under the general provisions of subpart 1. That decision does not affect EPA's proposed approval of the insignificance findings.

First, as noted above, EPA's conformity rule implementing the 1997 annual PM<sub>2.5</sub> NAAQS was a separate action from the overall PM<sub>2.5</sub> implementation rule addressed by the DC Circuit Court and was not considered or disturbed by the decision. Therefore, the conformity regulations were not at issue in *NRDC v. EPA*.<sup>14</sup> In addition, as discussed in section V.A.1 of this rulemaking action, the air quality data show that the Charleston Area continues to attain both the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS. Further, West Virginia's maintenance plan shows continued maintenance through 2025 by demonstrating that NO<sub>x</sub>, SO<sub>2</sub>, and direct PM emissions continue to decrease through the maintenance period. With regard to SO<sub>2</sub>, the 2005 final conformity rule (70 FR 24280) based its presumption concerning onroad SO<sub>2</sub> MVEBs on emissions inventories that show that SO<sub>2</sub> emissions from onroad sources constitute a "de minimis" portion of total SO<sub>2</sub> emissions. For the Charleston Area, onroad mobile source SO<sub>2</sub> constitutes less than two tenths of one percent (less than 0.2 percent) of the Area's total SO<sub>2</sub> emissions in the 2018 and 2025 horizon years. For more information on EPA's review of the determination of insignificance, see the TSD dated October 29, 2013, available on line at [www.regulations.gov](http://www.regulations.gov), Docket ID No. EPA-OAR-R03-2013-0090.

## VI. Proposed Actions

EPA is proposing to approve the redesignation of the Charleston Area from nonattainment to attainment for the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS. EPA has evaluated West Virginia's redesignation requests and determined that upon approval of the 2008 comprehensive emissions inventory for the 2006 24-hour PM<sub>2.5</sub> NAAQS proposed in this rulemaking action, it would meet the redesignation criteria set forth in section 107(d)(3)(E) of the CAA for both standards. EPA

believes that the monitoring data demonstrate that the Charleston Area is attaining and will continue to attain the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS. EPA is also proposing to approve the associated maintenance plans for the Area submitted on December 6, 2012, as a revision to the West Virginia SIP because it meets the requirements of section 175A of the CAA for both standards. For transportation conformity purposes, EPA is also proposing to approve both the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS, West Virginia's determinations that onroad emissions of PM<sub>2.5</sub> and NO<sub>x</sub> are insignificant contributors to PM<sub>2.5</sub> concentrations in the Charleston Area. Final approval of these redesignation requests would change the official designations of the Charleston Area from nonattainment to attainment for the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS at 40 CFR part 81, and would incorporate into the West Virginia SIP the associated maintenance plans ensuring continued attainment of the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS in Charleston Area for the next 10 years, until 2025. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

## VII. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of the maintenance plan under section 107(d)(3)(E) of the CAA are actions that affect the status of geographical area and do not impose any additional regulatory requirements on sources beyond those required by state law. A redesignation to attainment does not in and of itself impose any new requirements, but rather results in the application of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this rulemaking action merely proposes to approve 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 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 (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 rule proposing to approve West Virginia's redesignation requests, maintenance plans, and transportation conformity insignificance determinations for the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS, and the 2008 emissions inventory for the 2006 24-hour PM<sub>2.5</sub> NAAQS for the Charleston Area, 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

### 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

### 40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

<sup>14</sup> The 2004 rulemaking action addressed most of the transportation conformity requirements that apply in PM<sub>2.5</sub> nonattainment and maintenance areas. The 2005 conformity rule included provisions addressing treatment of PM<sub>2.5</sub> precursors in MVEBs. See 40 CFR 93.102(b)(2). While none of these provisions were challenged in the *NRDC* case, EPA also notes that the Court declined to address challenges to EPA's presumptions regarding PM<sub>2.5</sub> precursors in the PM<sub>2.5</sub> implementation rule. *NRDC v. EPA*, at 27, n. 10.

**Authority:** 42 U.S.C. 7401 *et seq.*

**Dated:** December 17, 2013.

**W.C. Early,**

*Acting Regional Administrator, Region III.*

[FR Doc. 2014-01181 Filed 1-23-14; 8:45 am]

**BILLING CODE** 6560-50-P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 76

[MB Docket No. 12-3; FCC 13-162]

#### Sports Blackout Rules

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Commission seeks comment on its proposal to eliminate the sports blackout rules. Elimination of the sports blackout rules alone likely would not end sports blackouts, but it would leave sports carriage issues to private solutions negotiated by the interested parties in light of current market conditions and eliminate unnecessary regulation.

**DATES:** Comments for this proceeding are due on or before February 24, 2014; reply comments are due on or before March 25, 2014.

**ADDRESSES:** You may submit comments, identified by MB Docket No. 12-3, by any of the following methods:

- Federal Communications Commission's Web site: <http://www.fcc.gov/cgb/ecfs/>. Follow the instructions for submitting comments.

- Mail: Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: [FCC504@fcc.gov](mailto:FCC504@fcc.gov) or phone: (202) 418-0530 or TTY: (202) 418-0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** For additional information, contact Kathy Berthot, [Kathy.Berthot@fcc.gov](mailto:Kathy.Berthot@fcc.gov), of the

Media Bureau, Policy Division, (202) 418-7454.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Notice of Proposed Rulemaking*, FCC 13-162, adopted on December 17, 2013 and released on December 18, 2013. The full text is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW., CY-A257, Washington, DC 20554. This document will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat. The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY-B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

This document contains no proposed information collection requirements.

#### Summary of the Notice of Proposed Rulemaking

##### I. Introduction

1. In this *Notice of Proposed Rulemaking*, we propose to eliminate the Commission's sports blackout rules, which prohibit certain multichannel video programming distributors (MVPDs) from retransmitting, within a protected local blackout zone, the signal of a distant broadcast station carrying a live sporting event if the event is not available live on a local television broadcast station.<sup>1</sup> The sports blackout rules were originally adopted nearly 40 years ago when game ticket sales were the main source of revenue for sports leagues. These rules were intended to address concerns that MVPDs' importation of a distant signal carrying a blacked-out sports event could result in lost revenue from ticket sales, which might cause sports leagues to expand the reach of blackouts by refusing to sell their rights to sports events to all distant stations. The rationale underpinning the rules was to ensure to the greatest extent possible the continued availability of sports telecasts to the public. Changes in the sports industry in the last four decades have called into question whether the sports blackout rules remain necessary to ensure the overall availability of sports programming to

the general public. In this proceeding, we will determine whether the sports blackout rules have become outdated due to marketplace changes since their adoption, and whether modification or elimination of those rules is appropriate. We recognize that elimination of our sports blackout rules alone might not end sports blackouts, but it would leave sports carriage issues to private solutions negotiated by the interested parties in light of current market conditions and eliminate unnecessary regulation.

##### II. Background

###### A. History of the Sports Blackout Rules

2. Prior to 1953, National Football League (NFL) bylaws prohibited member teams from, among other things, (i) telecasting their games into the home territory of another team that was playing at home, and (ii) telecasting their games into the home territory of another team that was playing away from home and was telecasting its game into its home territory. In 1953, a federal court held that the NFL's prohibition on the telecast of outside games into the home territory of a team that was playing at home was a reasonable method of protecting the home team's gate receipts and was not illegal under the antitrust laws. The court found, however, that restricting the telecast of outside games into the home territory of a team not playing at home was an unreasonable restraint on trade because, when the home team was playing away, there was no gate to protect.

3. In 1961, the NFL entered into an agreement with the CBS television network under which the NFL's member teams pooled the television rights to their games and authorized the league to sell the rights to the network as a package, with the revenue from the league sales to be distributed equally among the member teams. Under this agreement, CBS was permitted to determine which games would be televised and where the games would be televised. The NFL then petitioned the court for a ruling on whether the terms of its contract with CBS violated the court's 1953 final judgment. The court concluded that the provision giving CBS the power to determine which games would be televised and where was contrary to the final judgment and that execution and performance of the contract was therefore prohibited. This ruling did not, however, apply to a similar contract between the newly formed American Football League (AFL) and the ABC television network, because the AFL was not a party to the court's 1953 final judgment. Concerned

<sup>1</sup> See 47 CFR 76.111 (cable operators), 76.127 (satellite providers), 76.128 (application of sports blackout rules), 76.1506(m) (open video systems).