any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

V. Incorporation by Reference

In this document, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the VADEQ regulation amending 9VAC5–20–204 to add a new sulfur dioxide nonattainment area and two other minor changes as discussed in section II of this document, ''Summary of SIP Revision and EPA Analysis.'' The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 3 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

VI. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- 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); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act;

The SIP is not approved to apply on any Indian reservation land as defined in 18 U.S.C. 1151 or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule amending the list of Virginia nonattainment areas to include a newly designated sulfur dioxide (SO_2) nonattainment area does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' The EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The VADEQ did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an EJ analysis and did not consider EJ in this action. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of Executive Order 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

List of Subjects in 40 CFR Part 52

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

Adam Ortiz,

Regional Administrator, Region III.

[FR Doc. 2024–03616 Filed 2–21–24; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2020–0055; FRL–11687–01–R5]

Air Plan Approval; Ohio; Withdrawal of Technical Amendment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to correct the November 19, 2020, removal of the Air Nuisance Rule (ANR) from the Ohio State Implementation Plan (SIP). This action is in response to a February 10, 2023, decision by the United States Court of Appeals for the Sixth Circuit to remand without vacatur EPA's removal of the ANR from the Ohio SIP. Because the Court did not vacate EPA's removal of the ANR, the ANR is currently not in Ohio's SIP. After reevaluating EPA's November 19, 2020, rulemaking, as directed by the Court, EPA is proposing to determine that its November 2020 final action was in error, and to correct that action by reinstating the ANR as part of the Ohio SIP.

DATES: Comments must be received on or before March 25, 2024.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2020–0055 at *https://www.regulations.gov,* or via email to *arra.sarah@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any

information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Christos Panos, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8328, *panos.christos@epa.gov.* The EPA Region 5 office is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19.

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

I. Background

A. Procedural History

Until EPA's November 2020 removal action, a version of the ANR had been part of the Ohio SIP since 1974. EPA approved Ohio rule AP–2–07, ''Air pollution nuisances prohibited,'' into the Ohio SIP on April 15, 1974 (39 FR 13542). Subsequently, Ohio made minor changes to the rule and submitted the amended rule, renumbered as Ohio Administrative Code (OAC) 3745–15–07, as a SIP revision. EPA approved the amended rule into the SIP on August 13, 1984 (49 FR 32182). OAC 3745–15–07 prohibits the ''emission or escape into the open air from any source or sources whatsoever, of smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, odors, or any other substances or combinations of substances, in such manner or in such amounts as to endanger the health, safety or welfare of the public, or cause unreasonable injury or damage to property.''

In a proposed rule published on March 23, 2020 (85 FR 16309), EPA proposed to conclude that it had erred in originally approving the ANR into Ohio's SIP. In its justification, EPA noted that it had no information indicating that Ohio had relied on, or ever intended to rely on, the ANR for attainment or maintenance of any National Ambient Air Quality Standards (NAAQS). Further, in response to EPA's inquiry, Ohio informed EPA that it had not relied on the ANR for the purposes of planning, nonattainment designations, redesignation requests, maintenance plans, or determination of nonattainment areas or their boundaries under the Clean Air Act (CAA). Therefore, in the final rule published on November 19, 2020 (85 FR 73636), EPA concluded it had erred by including the ANR in Ohio's SIP and removed the ANR using the error-correction mechanism under the authority of section 110(k)(6) of the CAA, 42 U.S.C. 7410(k)(6).

On January 19, 2021, environmental groups and private citizens petitioned the Sixth Circuit for review of EPA's November 19, 2020, removal of the ANR (*Sierra Club* v. *EPA,* No. 21–3057). In briefing this matter before the Court, EPA argued that Petitioners did not have standing to bring this challenge. *See* Brief for Respondents at 1, *Sierra Club* v. *EPA,* No. 21–3057 (6th Cir. Apr. 25, 2022). However, in the event that the Court found Petitioners did have standing, EPA requested a voluntary remand of the final rule, which was granted by the Court on February 10, 2023. EPA represented to the Court that such a remand would allow the Agency to consider: (1) whether the section 110(k)(6) error-correction mechanism was the most appropriate vehicle for removing the ANR from Ohio's SIP; and (2) whether EPA should have considered performing an ''anti-backsliding'' analysis under section 193 of the CAA, 42 U.S.C. 7515, concerning the removal of the nuisance rule from Ohio's SIP. *Id.* at 23–24. In a declaration filed in the Sixth Circuit, EPA represented that, in the course of this reevaluation, it could supplement the administrative record with additional information and analysis, take and consider additional public comment, and provide additional explanation of its assessment of the challenged aspects of the final rule. *See* ''Declaration in Support of Request for Voluntary Remand'' at para. 9, Brief for Respondents, *Sierra Club* v. *EPA,* No. 21–3057 (6th Cir. Apr. 25, 2022). EPA stated that, upon remand, it could also evaluate whether any aspects of the ANR could be included in the SIP if they met applicable requirements for the implementation, maintenance, and enforcement of the NAAQS. *Id.* EPA committed to completing its reevaluation within 12 months. *Id.* at para. 10.

B. Public Comments on EPA's Proposal To Remove the ANR

During the public comment period for the March 23, 2020, proposed rule removing the ANR, EPA received comments presenting several opposing arguments.[1] Commenters questioned whether EPA's section 110(k)(6) error-correction action was an appropriate mechanism to remove the ANR from the Ohio SIP. *See* footnote 1, supra. The commenters asserted that EPA's approval of the ANR as part of the SIP was not an error and that EPA's use of error correction authority to remove the ANR from Ohio's SIP was unlawful. *Id.* Commenters further asserted that EPA was required to adhere to the SIP revision process to remove the ANR from Ohio's SIP, which would include providing a demonstration pursuant to section 193 of the CAA that no backsliding would result from this change. *Id.*

Commenters also asserted that EPA had failed to consider the impact of eliminating the only available pathway for Ohio residents to enforce the ANR on air quality and enforcement in Ohio. Therefore, the commenters maintained, the removal of the ANR from the SIP prevented local governments and non-governmental organizations, as well as affected Ohio communities, from directly enforcing the ANR where necessary to protect Ohioans' health, welfare, and property. The commenters further contended that individual Ohioans (as well as local governments) had relied, and were relying at the time of the error correction rulemaking, on the nuisance provision for Federal enforcement citizen suits under the CAA, and that the continued availability of such citizen suits was important for achieving environmental justice in the context of highly localized emissions in low-income areas and communities of color. *See* footnote 1, supra.

C. The Sixth Circuit Opinion

In its decision remanding EPA's removal of the ANR back to the Agency for further review, the Sixth Circuit cited several cases in which parties authorized to enforce Ohio's SIP provisions could and did bring enforcement actions for violations of the

[1] The public comments are found in the rulemaking docket for EPA's proposed and final action removing the ANR from the Ohio SIP. Docket ID: EPA–R05–OAR–2020–0055, available at *https://www.regulations.gov/docket/EPA-R05-OAR-2020-0055.*

ANR (prior to EPA removing the rule from Ohio's SIP). *E.g., Fisher* v. *Perma-Fix of Dayton, Inc.* Np. 3:04–C–V–418, 2006 WL 212076 (S.D. Ohio Jan. 27, 2006); *Sampson* v. *SunCoke Energy,* No. 1:17–cv–00658 (S.D. Ohio). Slip op. at 5. The Court also noted Petitioners' past reliance on the ANR apart from actually bringing CAA litigation (*i.e.,* filing notices of intent to sue under the CAA). Slip op. at 5. For support, the Court cited public comments opposing the proposed rulemaking that argued the ANR was an ''important regulatory tool in achieving and maintaining the NAAQS,'' and that its removal from the SIP ''ignored the role of citizen suits in CAA enforcement.'' Slip op. at 7.

In addition, during the litigation in the Sixth Circuit, the state of Ohio submitted a letter to the Court [2] acknowledging that it had relied on the ANR as recently as July 2021, when it brought a lawsuit against an iron and steel manufacturing facility for violating the ANR and lead NAAQS based on excess lead emissions. *See State of Ohio* v. *Republic Steel,* Case No. 2021VC00949 (Stark County, Ohio July 2, 2021). While the Court acknowledged EPA's statement in its proposal that it had found ''no information'' indicating the State had relied or intended to rely on the ANR for attainment or maintenance of the NAAQS, the Court noted that there was nothing in EPA's proposal or EPA's January 2020 email exchange with the Ohio EPA official that discussed whether the ANR had a role in NAAQS *enforcement.* Slip op. at 6.

D. Legal Authority for Proposed Action

Section 110(k)(6) of the CAA authorizes EPA to revise a state's SIP when it ''determines that [its] action approving, disapproving, or promulgating any plan or plan revision (or part thereof) . . . was in error.'' Once EPA has made the determination that it erred, it ''may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State.'' *Ala. Envtl. Council* v. *EPA,* 711 F.3d 1277, 1286 (11th Cir. 2013). Section 110(k)(6) of the CAA has been interpreted by courts as a ''broad provision [that] was enacted to provide the EPA with an avenue to correct its own erroneous actions and grant the EPA the discretion to decide when to act pursuant to the provision.'' *Miss. Comm'n on Envtl. Quality* v. *EPA,* 790 F.3d 138, 150 (D.C. Cir. 2015). EPA can take action under section 110(k)(6) to correct an error only if the error existed at the time the SIP was originally approved. *See Texas* v. *EPA,* 726 F.3d 180, 204 (D.C. Cir. 2013) (Kavanaugh, J., dissenting).

Additionally, EPA has inherent authority to reconsider, repeal, or revise past decisions to the extent permitted by law so long as the Agency provides a reasoned explanation. *See FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502 (2009) (an agency may revise its policy, but must demonstrate that the new policy is permissible under the statute and is supported by good reasons, taking into account the record of the previous rule). An agency's authority to reconsider past decisions derives from its statutory authority to make those decisions in the first instance. *See Trujillo* v. *General Electric Co.,* 621 F.2d 1084, 1086 (10th Cir. 1980) (''Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider.'') *(citing Albertson* v. *FCC,* 182 F.2d 397, 399 (D.C. Cir. 1950)). *See* 621 F.2d at 1088 (''The authority to reconsider may result in some instances, as it did here, in a totally new and different determination.''). The CAA complements EPA's inherent authority to reconsider prior rulemakings by providing the Agency with broad authority to prescribe regulations as necessary. 42 U.S.C. 7601(a); *see also* Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 81 FR 59276, 59277–59278 (August 29, 2016).

Section 110(a)(1) of the CAA imposes an obligation upon states to submit SIPs that provide for the ''implementation, maintenance, and enforcement'' of a new or revised NAAQS within three years following the promulgation of that NAAQS. 42 U.S.C. 7410(a)(1). The importance of enforcement in the statutory scheme is evident in section 110(a)(2), as the list of required SIP elements under 110(a)(2)(A) includes enforceable emission limitations and other control measures, means, or techniques as may be necessary or appropriate to meet the applicable requirements of the CAA. Section 110(a)(2) ''sets only a minimum standard that the States may exceed in their discretion.'' *Union Elec. Co.* v. *EPA,* 427 U.S. 246, 260 (1976). The CAA provides that the Administrator must approve the proposed plan if it has been adopted after public notice and hearing and if it meets the specified criteria in section 110(a)(2). *See also Train* v. *Nat. Res. Def. Council, Inc.,* 421 U.S. 60, 79 (1975). In addition, section 116 of the CAA provides that States may adopt emission standards that are stricter than the NAAQS. *See Union Electric* at 263–64.

Additionally, section 113 of the CAA establishes EPA's Federal authority to enforce SIP provisions, and section 304 of the CAA provides for citizen enforcement authority of the same. 42 U.S.C. 7413, 7604. Thus, the CAA contemplates multiple mechanisms for enforcement of SIP provisions, and taken together with the requirement under section 110(a)(1) that SIPs provide for the ''implementation, maintenance, and enforcement'' of the NAAQS, 42 U.S.C. 7410(a)(1), a state provision that provides for enforcement of the NAAQS is appropriate for inclusion in a SIP.

II. Reevaluation in Response to Remand

EPA's November 2020 removal of the ANR from Ohio's SIP was based on a determination that the ANR's original inclusion in the Ohio SIP was erroneous because the ANR had no nexus to the implementation, maintenance, or enforcement of the NAAQS. *See* 85 FR 73636–73638. EPA has reviewed its November 2020 removal of the ANR from the Ohio SIP and reconsidered whether its determination that the ANR was approved in error was legally sufficient. Based on its reconsideration, EPA is proposing to conclude that its original determination was deficient for two reasons: (1) because EPA failed to adequately consider the ANR's use in enforcement of the NAAQS, and (2) because EPA failed to conduct an anti-backsliding analysis pursuant to section 193 of the CAA. As such, EPA is proposing to use both its error correction authority under CAA section 110(k)(6), and inherent reconsideration authority, to reverse its removal of the ANR and reinstate the provision back into the Ohio SIP.

A. Enforcement of the ANR

In response to the remand, EPA has carefully considered the cases cited by the Sixth Circuit indicating that the ANR had been used as a tool to enforce the NAAQS, many of which were also submitted to EPA during the public comment period for the proposed action to remove the ANR. Upon further review, EPA is proposing to determine that its November 2020 action failed to adequately consider the role the ANR plays in the enforcement of the NAAQS in Ohio.

During the public comment period for the proposed action removing the ANR,

[2] *See* ''Notice of additional information in *Sierra Club, et al.* v. *United States Environmental Protection Agency,* No. 21–3057,'' *Sierra Club, et al.* v. *EPA et al.,* No. 21–3057 (6th Cir. Oct. 18, 2022).

EPA failed to adequately consider comments about citizen suits relying on the ANR as a tool to enforce the NAAQS. *See* footnote 1, *supra. See also Fisher* v. *Perma-Fix of Dayton, Inc.,* No. 3:04–CV–418, 2006 WL 212076 (S.D. Ohio Jan. 27, 2006) and *City of Ashtabula* v. *Norfolk S. Corp.,* 633 F. Supp. 2d 519, 528–29 (N.D. Ohio 2009) (holding that the ANR is an enforceable emissions limitation within the meaning of the CAA); *Sampson, et al.* v. *SunCoke Energy et al.,* 1:17–cv–00658–MRB (S.D. Ohio) (citizen suit alleging violations of the ANR at a coke production facility and which was pending at the time of EPA's removal of the ANR). EPA also received public comments opposing the proposed rulemaking that argued that the ANR was an ''important regulatory tool in achieving and maintaining the NAAQS,'' and that its removal from the SIP ''ignored the role of citizen suits in CAA enforcement.'' Slip op. at 7. *See also* 85 FR 73636, 73637–73639 (November 19, 2020).

Further, the state of Ohio acknowledged relying on the ANR as recently as July 2021, when it brought a lawsuit against an iron and steel manufacturing facility for violating the ANR based on lead emissions exceeding the NAAQS. See *State of Ohio* v. *Republic Steel,* Case No. 2021VC00949 (Stark County, Ohio July 2, 2021). *See also* footnote 2, *supra.* While this information came to light after EPA had taken final action to remove the ANR from Ohio's SIP, and thus EPA could not have considered it at the time of its original action to remove the ANR, it supports EPA's current analysis that the Ohio ANR is indeed used to enforce the NAAQS.

The types of air pollution identified in the ANR—smoke, ashes, dust, dirt, grime, acids, fumes, gases, and vapors—could have a nexus to a number of NAAQS, including particulate matter, sulfur dioxide, and lead.[3] The CAA requires that SIPs provide for the implementation, maintenance, and enforcement of the NAAQS. *See* 42 U.S.C. 7410(a)(1). In the original action approving the ANR into the SIP, the ANR had been adopted by the State after public notice and hearing, and EPA had determined that it met the specific criteria in section 110(a)(2). Under *Union Electric, supra,* EPA was required to approve the ANR into the SIP—even if such approval resulted in emission standards that were stricter than those required to attain or maintain the NAAQS.

The examples cited by the Sierra Club, other commenters, and the Sixth Circuit highlight the importance of the ANR as a regulatory tool for achieving, maintaining, and enforcing the NAAQS consistent with section 110(a)(1) of the CAA. EPA's removal of the ANR from the Ohio SIP failed to consider the evidence in the record of the ANR's role in citizen suit enforcement of the NAAQS under the CAA. EPA is proposing to conclude that EPA's prior determination that inclusion of the ANR in the Ohio SIP was ''erroneous'' was flawed, as the evidence in the record before the Agency at the time that decision was made indicated that the ANR has a clear nexus to the enforcement of the NAAQS under section 110(a)(1) of the CAA. As such, EPA is proposing to use its error correction authority under CAA section 110(k)(6) to reverse its November 2020 rule and reinstate the ANR into the Ohio SIP.

B. Section 193 ''Anti-Backsliding'' Analysis

On remand, EPA has also evaluated whether it should have performed an ''anti-backsliding'' analysis under section 193 of the CAA, 42 U.S.C. 7515, as part of the Agency's November 2020 action removing the ANR from the Ohio SIP. Upon further review, EPA is proposing to determine that its original action was deficient because it should have performed an anti-backsliding analysis in taking this final action.

Section 193 provides that, for SIP control requirements in effect before November 15, 1990, any ''modification'' thereof must ''insure[ ] equivalent or greater emissions reductions'' of the air pollutant for which the area is in nonattainment. 42 U.S.C. 7515. As a general matter, this ''anti-backsliding'' analysis is required when modifying SIP control requirements, whether through section 110(k)(6) or otherwise, if the modification impacts pre-1990 control requirements in a nonattainment area.

Because the ANR was a pre-1990 SIP control requirement that was in effect in Ohio's nonattainment areas, EPA is proposing to determine that it was required to conduct an anti-backsliding analysis pursuant to section 193 when it removed the ANR in November 2020. Because EPA failed to conduct the required analysis under section 193, the Agency's November 2020 removal of the ANR was deficient.

Through this action, EPA is proposing to determine its November 2020 removal of the ANR was in error and reinstate the ANR into the Ohio SIP. Section 193 does not apply to this proposed action because the anti-backsliding analysis is required only when there is modification of a ''control requirement in effect . . . before November 15, 1990, in any area which is a nonattainment area for any air pollutant.'' *See* section 193 of the CAA, 42 U.S.C. 7515. EPA is not proposing to modify a control requirement currently in effect in Ohio's SIP. Rather, EPA is proposing to determine its prior removal of the ANR was in error, and to correct that error by reinstating the ANR into Ohio's SIP.

C. EPA's Use of Section 110(k)(6)

On remand, EPA has also evaluated whether the section 110(k)(6) error-correction mechanism was an appropriate vehicle for removing the ANR from Ohio's SIP. As discussed throughout this proposal, EPA has reevaluated its removal of the ANR and is proposing to determine that its November 2020 final action was in error, and to correct that action by reinstating the ANR as part of the Ohio SIP. Notwithstanding the deficiencies in EPA's November 2020 action, as a general legal matter, section 110(k)(6) can be an appropriate mechanism to revise a prior action on a SIP revision that was in error. As the Sixth Circuit noted in its order remanding this matter back to EPA, ''[i]f EPA determines that its prior approval of a SIP was in error, the EPA can revise the plan using the Clean Air Act's error-correction provision, 42 U.S.C. 7410(k)(6).'' Slip op. at 1. ''The claimed error can be used to revise a SIP only if the error existed at the time of the SIP's prior approval.'' Slip op. at 4, citing A*la. Env't Council* v. *EPA,* 711 F.3d 1277, 1287–88 (11th Cir. 2013); *Texas* v. *EPA,* 726 F.3d 180, 204 (D.C. Cir. 2013). While section 110(k)(6) can be an appropriate vehicle to revise a prior action on a SIP provision, EPA's November 2020 use of section 110(k)(6) was deficient on a number of bases.

EPA's November 2020 removal of the ANR from the Ohio SIP was based on a determination that the ANR's inclusion in the Ohio SIP was erroneous because it had no nexus to the implementation, maintenance, or enforcement of the NAAQS, and that Ohio did not rely on the ANR to meet these statutorily prescribed requirements. *See* 85 FR 73636–73638. As discussed above, EPA failed to consider the ANR's role as a NAAQS enforcement tool under the CAA. Consequently, we are now proposing to determine that the ANR has a clear nexus to the enforcement of the NAAQS under section 110(a)(1) of the CAA, and

[3] Notably, in *State of Ohio* v. *Republic Steel,* Case No. 2021VC00949 (Stark County, Ohio July 2, 2021), the State of Ohio sought to enforce the ANR based on lead emissions exceeding the NAAQS. *See also* footnote 2, *supra.*

that EPA's prior determination that inclusion of the ANR in the Ohio SIP was ''erroneous'' was flawed. As discussed above, EPA failed to consider public comments demonstrating the ANR's use as a NAAQS enforcement tool. Further, EPA failed to conduct an ''anti-backsliding'' analysis pursuant to section 193 of the CAA. As such, EPA is proposing that its November 2020 removal of the ANR using section 110(k)(6) was improper.

Because the ANR's inclusion in the Ohio SIP was not erroneous, there was no ''error'' to correct. In other words, EPA erred in using section 110(k)(6) to remove the ANR because the ANR was appropriate for inclusion in the Ohio SIP at the time the SIP was originally approved. See *Texas* v. *EPA,* 726 F,3d 180, 204 (D.C. Cir. 2013) (Kavanaugh, J. dissenting). EPA is now proposing to correct its erroneous November 2020 action removing the ANR from the Ohio SIP, and to therefore reinstate the ANR into the Ohio SIP.

III. What action is EPA taking?

EPA is proposing to determine that its prior action removing OAC 3745–15–07 from the Ohio SIP was deficient. Consequently, EPA is proposing to reverse its removal and reinstate OAC 3745–15–07 into the Ohio SIP, recodifying this reinstatement by revising the appropriate paragraph under 40 CFR part 52, subpart KK, 52.1870 (Identification of Plan).

IV. Incorporation by Reference

In this action, EPA is proposing to include final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference Ohio rule OAC 3745–15–07, as effective on May 17, 1982, discussed in section II of this preamble. EPA has made, and will continue to make, these documents generally available through *www.regulations.gov* and at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993), and 14094 (88 FR 21879, April 11, 2023);
- 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 subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- 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.

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

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

EPA did not perform an EJ analysis and did not consider EJ in this action. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

List of Subjects in 40 CFR Part 52

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

Dated: February 14, 2024.

Debra Shore,

Regional Administrator, Region 5.

[FR Doc. 2024–03555 Filed 2–21–24; 8:45 am]

BILLING CODE 6560–50–P