



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA-R03-OAR-2020-0171; FRL-10015-34-Region 3]

Air Plan Approval; West Virginia; Redesignation of the Marshall Sulfur Dioxide Nonattainment Area to Attainment and Approval of the Area's Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a redesignation request and state implementation plan (SIP) revisions submitted by the State of West Virginia related to the 2010 primary national ambient air quality standard (NAAQS or Standard) for sulfur dioxide (SO₂) (2010 SO₂ NAAQS). Emissions of SO₂ in the Marshall, West Virginia Area have been permanently reduced, a maintenance plan has been adopted that includes limits that assure continued attainment and monitored ambient SO₂ readings in the nonattainment area are currently well below the 2010 SO₂ NAAQS. The effect of this action changes the designation of the Marshall Area from nonattainment to attainment of the 2010 SO₂ NAAQS. This action is being taken under the Clean Air Act (CAA).

DATES: This final rule is effective on **[insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2020-0171. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose

disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **For Further Information Contact** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Megan Goold, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2027. Ms. Megan Goold can also be reached via electronic mail at goold.megan@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Marshall Area is comprised of the Clay, Franklin, and Washington Tax Districts of Marshall County, West Virginia. On March 18, 2020, West Virginia, through the West Virginia Department of Environmental Protection (WVDEP), submitted a redesignation request for the Marshall, West Virginia SO₂ Nonattainment Area (Marshall Area or Area). In conjunction with its request, WVDEP submitted SIP revisions comprised of a maintenance plan for the Area, SO₂ emissions limits for the Mitchell Power Plant (Mitchell), and a modeling analysis demonstrating that the Mitchell limits provide for attainment in the Area.

The Marshall Area was designated nonattainment for the 2010 SO₂ NAAQS in the first round of designations for the NAAQS published on August 5, 2013, which became effective on October 4, 2013. Under CAA section 191(a), attainment plan SIPs were due for areas designated nonattainment in round one 18 months after the effective date of designation, or April 4, 2015. Such SIPs were required by CAA section 192(a) to provide for attainment of the NAAQS as

expeditiously as practicable, but no later than five years from the effective date of nonattainment designation, or October 4, 2018. West Virginia submitted an attainment SIP on March 17, 2017 (2017 SIP).¹ The SIP addressed the required elements of an attainment SIP under CAA section 172(c), including an attainment demonstration that the State asserted showed attainment of the 2010 SO₂ NAAQS, SO₂ emissions limits for the Mitchell Power Plant, reasonably available control measures including reasonably available control technology (RACM/RACT), reasonable further progress (RFP), contingency measures, and certification that nonattainment new source review (NNSR) permit program requirements were being met. The 2017 SIP included a West Virginia Compliance Order on Consent (2016 consent order) that required Kentucky Power Company, the operator of American Electric Power's (AEP) Mitchell Power Plant, to comply with an SO₂ maximum emissions limit from Units 1 and 2, of 6,175 pounds per hour (lbs/hr) on a 30-day rolling average, along with associated monitoring, recordkeeping, and reporting requirements, starting on January 1, 2017. The March 18, 2020 submittal requesting redesignation included a demonstration showing the area is in attainment, a maintenance plan, contingency measures, and a December 2, 2019 consent order (2019 consent order) with Kentucky Power for Mitchell with lower SO₂ emissions limits based on modeling with a changed stack height. Specifically, the 2019 consent order establishes an SO₂ emissions limit for Mitchell Units 1 and 2 as a maximum of 3,149 lbs/hr on a 30-day rolling average, with compliance parameters including continuous emissions monitoring, recordkeeping including a calculation of the daily 30-day average, reporting of deviations from the requirements and semi-annual compliance reporting. Compliance with the limits and other provisions in the 2019 consent order

¹ On March 18, 2016, EPA made a finding of failure to submit nonattainment area SIPs for 19 nonattainment areas, including the Marshall Area. EPA's letter to West Virginia dated September 27, 2017 confirmed that West Virginia's March 17, 2017 submittal corrected the deficiency identified in the finding.

were required starting on January 1, 2020.

Under CAA section 110(k)(2) through (4), EPA was required to take action to approve or disapprove West Virginia's 2017 SIP within 12 months of determining it to be complete, but EPA did not take timely action. Subsequently, the Center for Biological Diversity and other plaintiffs (CBD) sued EPA in the U.S. District Court for the Northern District of California seeking a court order to compel EPA's action on West Virginia's 2017 SIP and several other SIPs for other areas in the nation. *Center for Biological Diversity, et al., v. Wheeler*, No. 4:18-cv-03544-YGR. That lawsuit resulted in the plaintiffs and EPA agreeing to a schedule, entered by the court as an order, for EPA to take action on the covered SIPs by certain deadlines. The court ordered deadline for EPA to take action on West Virginia's 2017 SIP is October 30, 2020. The order also provided that if EPA issues a redesignation to attainment for any area for which the order required EPA action on a submitted SIP covered by the order, then EPA's obligation to take action on that SIP's CAA section 172(c) elements would be automatically terminated. As noted in the proposal, this action to redesignate the Marshall, West Virginia nonattainment area to attainment and approve the submitted maintenance plan with a lower emissions limit than that contained in the 2017 SIP submission will moot EPA's requirement under the consent order to take action on the 2017 SIP.

II. Summary of SIP Revision and EPA Analysis

West Virginia's March 18, 2020 redesignation request included a maintenance plan providing for continued attainment of the SO₂ NAAQS for a period of ten years following redesignation of the Area, SO₂ emissions limits for Mitchell, and a modeling analysis demonstrating that the Mitchell limits provide for attainment in the Area. West Virginia also requested that EPA incorporate the 2019 consent order into the SIP.

Under CAA section 107(d)(3)(E), there are five criteria which must be met before a nonattainment area may be redesignated to attainment:

1. EPA has determined that the relevant NAAQS has been attained in the area;
2. The applicable implementation plan has been fully approved by EPA under section 110(k);
3. EPA has determined that improvement in air quality is due to permanent and enforceable reductions in emissions resulting from the SIP, Federal regulations, and other permanent and enforceable reductions;
4. EPA has fully approved a maintenance plan, including a contingency plan, for the area under section 175A of the CAA; and,
5. The state has met all applicable requirements for the area under section 110 and part D.

The June 30, 2020 proposal (85 FR 39505) provides a detailed discussion of each requirement and EPA's analysis of how each requirement was met and is not repeated here. To summarize the analysis in the notice of proposed rulemaking (NPRM), EPA determined that the modeling submitted as part of the maintenance plan for the redesignation request submitted on March 18, 2020 shows that the Marshall Area is attaining the 2010 SO₂ NAAQS, that the air quality improvement in the Area is attributable to permanent and enforceable emission reductions at Mitchell, that the maintenance plan assures that the area will continue to attain the 2010 SO₂ NAAQS, and that West Virginia has met all applicable requirements under section 110 (general SIP requirements) and part D of title I of the CAA (SIP requirements for nonattainment areas) for purposes of this redesignation. On this basis, EPA finds that West Virginia has adequately addressed the five basic components necessary to redesignate the Marshall Area to attainment.

EPA received one adverse comment on the proposal. To review the full comment

received, refer to the Docket for this rule, as identified in the **ADDRESSES** section of this document. A summary of the comment received, and EPA's response are provided below.

III. Public Comment and EPA Response

Comment: The commenter asserts that EPA needs to do more to guarantee that the Mitchell plant will not violate the NAAQS. Specifically, the commenter expresses concern that the result of the modeling for Mitchell Plant of 196.2 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) is too close to 196.4 $\mu\text{g}/\text{m}^3$ (corresponding to the level of the NAAQS, which is 75 parts per billion (ppb)), and therefore does not provide an adequate margin of safety to protect public health. Also, that EPA improperly "rounded up" to obtain the value of 196.4 $\mu\text{g}/\text{m}^3$, and that 196.4 $\mu\text{g}/\text{m}^3$ is not equivalent to the NAAQS, which is expressed as 75 ppb. In addition, the commenter believes that if the AERMOD model was run with a finer grid, the results would show NAAQS violations, and questions the margin of error of the AERMOD model. Finally, the commenter asks how EPA expects the modeled areas to maintain the NAAQS and suggests that a monitor is needed near the Mitchell plant.

Response: EPA disagrees with the commenter's assertion that more is needed to guarantee that the Mitchell plant will not cause a violation of the NAAQS. First, the 2010 SO₂ NAAQS was set at a level which already provides for an adequate margin of safety, as required by CAA Section 109(b)(1). Section 109(b)(1) defines a primary standard as one where "the attainment and maintenance of which, in the judgment of the Administrator, based on [the air quality] criteria and allowing an adequate margin of safety, are requisite to protect the public health." CAA section 109(b)(1). As noted when EPA set the SO₂ standard, "[t]hus, in selecting primary standards that include an adequate margin of safety, the Administrator is seeking not only to prevent pollution levels that have been demonstrated to be harmful but also to prevent

lower pollutant levels that may pose an unacceptable risk of harm, even if the risk is not precisely identified as to nature or degree.” 75 FR 35520, 35521 (June 22, 2010). Because the NAAQS already includes a margin of safety, the fact that the 99th percentile of maximum daily one-hour modeled concentrations averaged over five years is below the NAAQS of 196.4 $\mu\text{g}/\text{m}^3$ ensures that public health is protected.

EPA also disagrees that EPA improperly “rounded up” to develop the 196.4 $\mu\text{g}/\text{m}^3$ value that is equivalent to the 75 ppb NAAQS standard. The commenter does not identify the number that was supposedly rounded up, so EPA cannot directly address that claim. EPA recognized the need to identify and apply a consistent value expressed in $\mu\text{g}/\text{m}^3$ that EPA considers equivalent to 75 ppb, so in the Round 3 intended designations (82 FR 41903), published September 5, 2017, EPA determined a value of 196.4 $\mu\text{g}/\text{m}^3$ (based on calculations using all available significant figures) to be equivalent to 75 ppb. To avoid confusion, EPA is expecting attainment and redesignation demonstrations to show achievement with concentrations at or below precisely 196.4 $\mu\text{g}/\text{m}^3$.² EPA concludes that the Marshall modeling results of 196.2 $\mu\text{g}/\text{m}^3$ demonstrate that the area meets the standard. Because monitoring data was also available for this area, EPA analyzed that data, which showed a design value for the most recent three-year period (2017 through 2019) of 8 ppb. This monitored data, which is from the same previously violating monitor that caused this area to be designated nonattainment in 2013 based on 2009-2011 data, provides further evidence that SO₂ emissions concentrations have greatly improved in this area and supports EPA’s redesignation of the area to attainment.

² While some Round 3 designation TSDs explained that this value was “equivalent... using a 2.619 $\mu\text{g}/\text{m}^3$ conversion factor” (more precisely, using a conversion factor of approximately 2.6187), in fact EPA here was determining the concentration value in $\mu\text{g}/\text{m}^3$ that is to be considered equivalent to 75 ppb, rather than the precise value of the conversion factor.

Regarding the commenter's question about the margin of error for AERMOD, EPA notes that AERMOD is a refined, steady-state (both emissions and meteorology over a 1-hour time step), multiple source, air-dispersion model that was originally promulgated by the EPA as part of its December 2005 revision to the Guideline on Air Quality Models, and is the preferred model to use for industrial sources in this type of air quality analysis. Furthermore, AERMOD predicts concentrations in many areas within the nonattainment area, rather than just at the monitor location, and therefore provides a more robust set of concentration data to assess attainment within the area than would be provided by a few SO₂ monitors. EPA believes that the use of AERMOD in this Redesignation Request and Maintenance Plan was an appropriate choice regardless of any potential "margin of error" in the model.

EPA also disagrees with the commenter's assertion that a finer modeling grid resolution should have been used. EPA's Guidance for the 1-hour SO₂ Nonattainment SIP Submissions states, "Receptor placement should be of sufficient density to provide resolution needed to detect significant gradients in the concentrations with receptors placed closer together near the source to detect local gradients and placed farther apart away from the source" (page A-9).³ The area of maximum concentration in this modeling analysis had a 100 meter spaced receptor grid, which is the finest scale in the modeling domain. One of the reasons which would call for a finer grid is if there were large elevation differences between the facility and the area of maximum concentration, and that is not the case here. The facility is 0.67 kilometers (km) from the modeled maximum concentration and the elevation differences are minimal.

Regarding the commenter's question regarding how the Mitchell plant will maintain the standard, as stipulated by CAA 175A, the state must submit a maintenance plan which

³ https://www.epa.gov/sites/production/files/2016-06/documents/20140423guidance_nonattainment_sip.pdf

demonstrates how the source within the Marshall Area will provide for maintenance of the standard for the next ten years. Eight years after the redesignation, the state must submit a revised maintenance plan demonstrating that attainment will continue to be maintained for the ten years following the initial ten-year period. To address the possibility of future NAAQS violations, the maintenance plan must also contain contingency measures to assure prompt correction of any future violations. Specifically, the maintenance plan should address five requirements: 1) an attainment emissions inventory; 2) a maintenance demonstration; 3) a commitment for continued air quality monitoring; 4) the verification of continued attainment; and 5) a contingency plan.⁴ As detailed in the NPRM for this action, WV submitted a maintenance plan adequately addressing these five components necessary to maintain the SO₂ NAAQS in the Marshall Area.

IV. Final Action

EPA is making a finding that the Marshall Area has attained the 2010 SO₂ NAAQS, as demonstrated by a modeling analysis reflecting a new SO₂ emission limit for the Mitchell Power Plant and reflecting evidence (described in the notice of proposed rulemaking) that the Mitchell Power Plant is meeting this limit. EPA is also determining that West Virginia has met the planning requirements necessary for EPA to redesignate the Marshall Area from nonattainment to attainment of the 2010 SO₂ NAAQS, including the requirements for permanent and enforceable measures, submission of an approvable maintenance plan that will assure attainment for ten years after redesignation, and that all other applicable CAA requirements under section 110 and part D, as discussed in the NPRM for this rule, have been met. Therefore, EPA is

⁴ See Memorandum from John Calcagni, Director, Air Quality Management Division, EPA, "Procedures for Processing Requests to Redesignate Areas to Attainment," September 4, 1992.

approving the Marshall Area redesignation request, maintenance plan, SO₂ emission limits and associated compliance parameters for Mitchell in a 2019 consent order, and the modeling demonstration showing that the limits provide for maintenance. EPA is taking these actions under the CAA.

IV. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of West Virginia's 2010 SO₂ Maintenance Plan for the Marshall Area and the Mitchell Power Plant Consent Order CO-SIP-C-2019-13 described in the amendments to 40 CFR part 52 set forth below. EPA has made, and will continue to make, these materials generally available through <https://www.regulations.gov> and at the EPA Region III Office (please contact the person identified in the **For Further Information Contact** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully Federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rule of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.⁵

V. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, redesignation of an area to attainment and the accompanying approval of the maintenance plan under CAA section 107(d)(3)(E) are actions that affect the status of a 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

⁵ 62 FR 27968 (May 22, 1997).

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 Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided 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 these reasons, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because it is not a significant regulatory action under Executive Order 12866.
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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 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).

B. Submission to Congress and the Comptroller General

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

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action approving the redesignation of the West Virginia Marshall Nonattainment Area and associated maintenance plan may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b)(2).)

List of Subjects

40 CFR Part 52

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

40 CFR Part 81

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

Dated: September 28, 2020

Cosmo Servidio,
Regional Administrator,
Region III.

For the reasons stated in the preamble, the EPA amends 40 CFR parts 52 and 81 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

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

Subpart XX—West Virginia

2. Section 52.2520 is amended:

a. In the table in paragraph (d), by adding the entry “Mitchell Power Plant” at the end of the table; and

b. In the table in paragraph (e) by adding an entry for “2010 Sulfur Dioxide Maintenance Plan – Marshall Area” at the end of the table.

The additions read as follows:

§ 52.2520 Identification of plan.

* * * * *

(d) * * *

EPA—APPROVED SOURCE SPECIFIC REQUIREMENTS

Source name	Permit/order or registration number	State effective date	EPA approval date	Additional explanation/citation at 40 52.2565
* * * * *				
Mitchell Power Plant	Consent Order CO-SIP-C-2019-13	01/01/2020	[insert date of publication in the Federal Register], [insert Federal Register citation]	Established SO ₂ emission limit.

(e) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
* * * * *				
2010 Sulfur Dioxide Maintenance Plan	Marshall Area (Clay, Franklin, and Washington Tax Districts of Marshall County)	03/18/20	[insert date of publication in the Federal Register], [insert Federal Register citation]	Docket No. EPA-R03-OAR-2020-0171.

3. Section 52.2525 is amended by adding paragraph (e) to read as follows:

§ 52.2525 Control strategy: Sulfur dioxide.

* * * * *

(e) EPA approves the maintenance plan for Clay, Franklin, and Washington Tax Districts, West Virginia, submitted by the Department of Environmental Protection on March 18, 2020.

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

4. The authority citation for part 81 continues to read as follows:

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

Subpart C—Section 107 Attainment Status Designations

5. In § 81.349 amend the table “West Virginia—2010 Sulfur Dioxide NAAQS [Primary]” by revising the entry for “Marshall, WV” to read as follows:

§ 81.349 West Virginia.

* * * * *

WEST VIRGINIA—2010 SULFUR DIOXIDE NAAQS

Designated area ^{1 3}	[Primary] Designation	
	Date ²	Type

Marshall, WV		
Marshall County (part)	[insert date 30 days after date of publication in the Federal Register]	Attainment.
Area consisting of Clay Tax District, Franklin Tax District, and Washington Tax District.		
* * *	* * *	* *

¹ Includes any Indian country in each county or area, unless otherwise specified. EPA is not determining the boundaries of any area of Indian country in this table, including any area of Indian country located in the larger designation area. The inclusion of any Indian country in the designation area is not a determination that the state has regulatory authority under the Clean Air Act for such Indian country.

² This date is April 9, 2018, unless otherwise noted.

³ Mineral County will be designated by December 31, 2020.

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[FR Doc. 2020-21757 Filed: 10/23/2020 8:45 am; Publication Date: 10/26/2020]