Billing Code: 6560-50

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[**EPA-R08-OAR-2014-0761**; **FRL 9922-94-Region 8]**

Partial Approval and Partial Disapproval and Promulgation of Air Quality Implementation Plans; Wyoming; Revisions to Wyoming Air Quality Standards and Regulations; Nonattainment Permitting Requirements and Chapter 3, General Emission Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to disapprove a portion of State Implementation Plan (SIP) revisions submitted by the State of Wyoming on May 10, 2011. This submittal revises the Wyoming Air Quality Standards and Regulations (WAQSR) that pertain to the issuance of Wyoming air quality permits for major sources in nonattainment areas. Also in this action, EPA is approving SIP revisions submitted by the State of Wyoming on February 13, 2013, and on February 10, 2014. These submittals revise the WAQSR with respect to sulfur dioxide (SO_2) limits and dates of incorporation by reference (IBR). This action is being taken under section 110 of the Clean Air Act (CAA).

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2014-0761. All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other

information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129. EPA requests you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Kevin Leone, Air Program, Mailcode 8P-AR, Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129, (303) 312-6227, or leone.kevin@epa.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

II. What are the Changes that EPA is Taking Final Action to Approve?

III. What are the Changes that EPA is Taking Final Action to Disapprove?

IV. Response to Comments

V. What Action is EPA Taking Today?

VI. Statutory and Executive Orders Review

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials Act or CAA mean or refer to the Clean Air Act, unless the context

indicates otherwise.

(ii) The initials BACT mean or refer to Best Available Control Technology.

(iii) The initials CFR mean or refer to Code of Federal Regulations.

(iv) The words EPA, we, us or our mean or refer to the United States Environmental Protection Agency.

(v) The initials FIP mean or refer to Federal Implementation Plan.

(vi) The initials IBR mean or refer to incorporation by reference.

(vii) The initials IAC mean or refer to the Iowa Administrative Code.

(viii) The initials LAER mean or refer to Lowest Achievable Emissions Rate.

(ix) The initials NAAQS mean or refer to National Ambient Air Quality Standards.

(x) The initials NOx mean or refer to nitrogen oxides.

(xi) The initials NSR mean or refer to New Source Review.

(xii) The initials PM_{10} mean or refer to particulate matter with an aerodynamic diameter of less than or equal to 10 micrometers (coarse particulate matter).

(xiii) The initials PSD mean or refer to Prevention of Significant Deterioration.

(xiv) The initials SIP mean or refer to State Implementation Plan.

(xv) The initials SO_2 mean or refer to sulfur dioxide.

(xvi) The words State or Wyoming mean the State of Wyoming, unless the context indicates otherwise.

(xvii) The initials UGRB mean or refer to the Upper Green River Basin.

(xviii) The initials VOC mean or refer to volatile organic compound.

(xix) The initials WAQSR mean or refer to the Wyoming Air Quality Standards and Regulations.

(xx) The initials WDEQ mean or refer to the Wyoming Department of Environmental Quality.

I. Background

In this final rulemaking, we are taking final action to disapprove the addition of Chapter 6, Section 13, Nonattainment permit requirements, to the WAQSR submitted by the State of Wyoming on May 10, 2011. This new section incorporated by reference 40 Code of Federal Regulations (CFR) section 51.165 in its entirety, with the exception of paragraphs (a) and (a)(1), into Wyoming's Chapter 6 Permitting Requirements.

On March 27, 2008, EPA promulgated a revised National Ambient Air Quality Standard (NAAQS) for ozone with an 8-hour concentration limit of 0.075 parts per million ("8-Hour Ozone NAAQS"), and effective July 20, 2012, EPA designated the Upper Green River Basin area of Wyoming as "nonattainment" for the 8-Hour Ozone NAAQS. For nonattainment areas, states are required to submit SIP revisions, including a nonattainment NSR permitting program for the construction and operation of new or modified major stationary sources located in the nonattainment area. On May 10, 2011, before the formal designation of the Green River Basin Area as nonattainment for the 8-Hour Ozone NAAQS, Wyoming submitted a nonattainment new source review (NSR) permitting program SIP revision to EPA.

Our final disapproval will start a two-year clock under CAA section 110(c)(1) for our obligation to promulgate a federal implementation plan (FIP) to correct the deficiency and the 18-month clock for sanctions, as required by CAA section 179(a)(2). These deadlines will be removed when Wyoming submits and we approve a SIP revision addressing the deficiency.

In this final rulemaking action, we are also taking final action to approve revisions submitted by Wyoming on February 13, 2013, and on February 10, 2014. These revisions to the

WAQSR include portions of rulemakings R-20 and R-22(b), respectively, as revisions to Wyoming's SIP. Specifically, Wyoming revised Chapter 3, General Emissions Standards, Section 4, Emission standards for sulfur oxides and Section 9, Incorporation by reference in rulemaking R-20; and then again revised Section 9, Incorporation by reference in rulemaking R-22(b).

II. What are the Changes that EPA is Taking Final Action to Approve?

With respect to Wyoming's February 13, 2013, and February 10, 2014 submittals, EPA is taking final action to approve revisions to WASQR Chapter 3, General Emissions Standards, Section 4, Emission standards for sulfur oxides, and Section 9, Incorporation by reference. Section 4 covers only sulfur oxide emissions from specific sulfuric acid production processes. These WAQSR changes and additions are consistent with the CAA and EPA regulations.

In our November 4, 2014 proposed action (79 FR 65362), we proposed to approve the following revisions to the WASQR: Chapter 3, General Emissions Standards, section 4, Emission standards for sulfur oxides (in R-20); then subsequently amended (in R-22(b)), section 9, Incorporation by reference.

III. What are the Changes that EPA is Taking Final Action to Disapprove?

EPA is taking final action to disapprove the portion of Wyoming's May 10, 2011 submittal that adds a new section to the permitting requirements in WAQSR Chapter 6. The new Chapter 6 Section 13, Nonattainment permit requirements, consists of one sentence: "40 CFR part 51.165 is herein incorporated by reference, in its entirety, with the exception of paragraph (a) and paragraph (a)(1)."

As explained in 79 FR 65362, these changes are not consistent with CAA and EPA

regulations. Specifically:

1. CAA section 110(a)(2)(C), which requires each state plan to include "a program to provide for … the regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that the [NAAQS] are achieved, including a permit program as required in parts C and D of this subchapter."
2. CAA section 172(c)(5), which provides that the plan "shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section [173]."
3. CAA section 173, which lays out the requirements for obtaining a permit that must be included in the state's SIP-approved permit program. Because language prefaced by phrases such as "the plan shall provide" or "the plan shall require" does not itself impose requirements on sources, the State's proposed plan revision does not clearly satisfy the requirements of these statutory provisions.
4. CAA section 110(a)(2)(A), which requires that SIPs contain enforceable emissions limitations and other control measures. Under section CAA section 110(a)(2), the enforceability requirement in section 110(a)(2)(A) applies to all plans submitted by a state.
5. CAA section 110(i), which (with certain limited exceptions) prohibits States from modifying SIP requirements for stationary sources except through the SIP revision process.
6. CAA section 172(c)(7), which requires that nonattainment plans – including nonattainment NSR programs required by section 172(c)(5) - are required to meet the

applicable provisions of section 110(a)(2), including the requirement in section 110(a)(2)(A) for enforceable emission limitations and other control measures.

7. CAA section 110(l), which provides that EPA cannot approve a SIP revision that interferes with any applicable requirement of the Act. As explained above, the addition of Chapter 6, Section 13 to the Wyoming SIP would interfere with section 110(a)(2) and 110(i) of the Act.
8. Nor does the SIP revision comply with the requirements of 40 CFR 51.165 as the plan fails to impose the regulatory requirements on individual sources, as required by the regulatory provisions.

We provided a detailed explanation of the basis of approval and disapproval in our proposed rulemaking (see 79 FR 65362). We invited comment on all aspects of our proposal and provided a 30-day comment period. The comment period ended on December 4, 2014.

IV. Response to Comments

We received two comment letters during the public comment period. One comment letter was submitted by Bruce Pendery of the Wyoming Outdoor Council and one was submitted by Todd Parfitt, Director of the Wyoming Department of Environmental Quality.

Bruce Pendery of the Wyoming Outdoor Council

Comment:

The comment was in reference to WAQSR Chapter 6 Section 13, nonattainment NSR permits for major sources locating in nonattainment areas. The comment stated that "…the State's proposed SIP revision is deficient because while it establishes requirements for plans it does not establish unambiguous and enforceable emission limits on sources that would be subject

to the regulation. These shortcomings fail to meet the regulatory requirement to impose emission requirements for sources and also does not meet the requirements of section 110(a)(2)(A) of the Clean Air Act. In addition, the State's submission does not specify the procedures it will use to reduce emissions from major sources in nonattainment areas, bringing into question the enforceability of offset requirements. This violates section 110(i) of the Clean Air Act."

Response:

For the reasons explained in 79 FR 65362, we agree with the commenter that the addition of the sentence "40 CFR part 51.165 is herein incorporated by reference, in its entirety, with the exception of paragraph (a) and paragraph (a)(1)" in Chapter 6 Section 13, Nonattainment permit requirements, does not meet the requirements of CAA section 110(a)(2)(A) and CAA section 110(i).

Todd Parfitt, Director of the Wyoming Department of Environmental Quality

Comment:

EPA's failure to timely approve Wyoming's plan effectively transferred new source permitting authority in the Upper Green River Basin (UGRB) nonattainment area from Wyoming to Region 8. In the absence of EPA-approved provisions, the Wyoming Department of Environmental Quality (WDEQ) has remained unable to permit new sources in the UGRB area.

Response: We disagree. First, Wyoming has a SIP-approved minor NSR permit program and under that program can issue minor NSR permits within the UGRB, so we presume that the comment is intended to refer only to new major sources and major modifications locating in the UGRB. Second, Wyoming has a SIP-approved Prevention of Significant Deterioration (PSD)

program and under that program can issue permits in the UGRB ozone nonattainment area for new major sources of pollutants other than nitrogen oxides (NOx) and volatile organic compounds (VOCs), as ozone precursors, and modifications that are major for pollutants other than NOx or VOCs, as ozone precursors, so we also presume that the comment is intended to refer only to new major sources of NOx and VOCs and modifications that are major with respect to NOx and VOCs in the UGRB nonattainment area.

Given this, EPA Region 8 has not assumed authority to permit new major sources of NOx and VOCs and modifications that are major with respect to NOx and VOCs in the UGRB nonattainment area. For EPA to have that authority, we would have had to issue a FIP under section 110(c)(1) of the CAA, and we have not done so or even proposed to do so; in fact, our proposal notice stated that the disapproval would *start* the two-year clock for EPA's obligation to promulgate a FIP.

Under 40 CFR 52.21(k), it is expected that the State will issue permits in accordance with Appendix S to 40 CFR part 51 until EPA has approved a SIP submittal meeting the requirements of part D of title I of the CAA (in particular, a SIP submittal meeting the plan requirements that are set out in 40 CFR 51.165 as applicable to ozone nonattainment areas). If WDEQ has not been granted sufficient authority by the Wyoming legislature to issue permits under Appendix S prior to approval of a SIP revision, this would be a serious concern that should be addressed by the legislature, and this concern would exist in the period after designation regardless of how long it would take EPA to approve a nonattainment NSR program into the SIP. However, the comment did not provide any information to cause us to think that WDEQ lacks such authority. Even if it did, section 110(l) does not have an exception that allows EPA to approve a SIP

revision that interferes with applicable requirements of the Act solely on the grounds that the State has been granted insufficient authority by its legislature to act in the interim prior to SIP approval.

Finally, the comment did not identify any owners or operators that have been unable to construct a new major source or major modification in the UGRB nonattainment area due to WDEQ's alleged lack of authority to issue permits. Nor did any owners or operators comment on our proposed disapproval. We also note that in order to meet nonattainment NSR requirements in the Sheridan coarse particulate matter (PM_{10}) nonattainment area, Wyoming has had a construction ban in place and approved into the SIP for over twenty years (See WAQSR, Chapter 6, Section 2(c)(ii)(B)). While the facts and circumstances of the UGRB ozone nonattainment area may be different than those of the Sheridan PM_{10} nonattainment area, the comment does not explain why the State has a concern in the UGRB that it does not in Sheridan.

Comment:

EPA's disapproval of Wyoming's plan is arbitrary and capricious. It is arbitrary and capricious for an agency to respond to the same situation in a different way without any rational explanation. "Here, the Region 8 Administrator proposes to disapprove Wyoming's plan for including language that was already approved, and has been proposed to be approved, by the administrator of Regions 7 and 10."

The commenter references: Approval and Promulgation of Implementation Plans; Idaho, 79 FR 11711 (March 3, 2014) (approving portions of Idaho's plan that incorporated 40 CFR 51.165 by reference, without excluding any of the language referring to "the plan"); Approval and Promulgation of Implementation Plans; Iowa, 79 FR 27763 (May 15, 2014) (approving

portions of Iowa's SIP revisions that incorporate language from 40 CFR 51.165, including the phrase "plan shall provide" three times and the phrase "the plan shall require" five times); Approval and Promulgation of Implementation Plans; Alaska Nonattainment New Source Review, 79 FR 65366 (November 4, 2014) (proposing to approve Alaska's SIP revisions that incorporate portions of 40 CFR 51.165 by reference, including the phrase "plan shall provide that" two times and the phrase "all plans shall use" one time). The commenter states that the Region 7 Administrator approved Iowa's plan as a direct final rule because "the Agency views [it] as a noncontroversial revision amendment.

The commenter states EPA may not declare that its own regulations, when incorporated by states in Region 7 and 10, are approvable for use in a SIP, but, when incorporated by a state in Region 8, are ambiguous, and therefore, do not contain enforceable emission limitations. The commenter concludes that EPA should approve Wyoming's submittal in accordance with these previous actions.

Response:

We disagree that Wyoming's submittal is approvable and with the commenter's contention that disapproval of Wyoming's submittal is inconsistent with EPA's approval of other SIP submissions. With respect to approval of the submittal, we noted in our proposal that, under section 110(l), EPA cannot approve any SIP revision that would interfere with any applicable requirement of the CAA. The comment does not dispute this basis for disapproval. We also noted in our proposal that certain provisions incorporated by Wyoming fail to specify procedures for determining the location of offsets and therefore violate section 110(i) of the CAA, because the provisions as incorporated would allow Wyoming to define and modify those procedures

without going through the SIP revision process. The comment does not dispute this basis for disapproval, either. Furthermore, we noted that the State's incorporation by reference of language stating "the plan *may* provide" failed to create an enforceable obligation and also created ambiguity as to whether the SIP would actually include the provisions, thus violating the requirements in 110(a)(2)(A) regarding enforceability and the requirement in 110(a)(2)(C) to have a nonattainment NSR permit program as specified in part D of Title I, specifically sections 172(c)(5) and 173. The comment does not dispute the ambiguity of the language stating "the plan *may* provide." Finally, we stated that the violation of sections 110(a)(2) (specifically 110(a)(2)(A) and (C)) and 110(i)) would interfere with applicable requirements of the Act and therefore we could not approve the submittal. The comment does not dispute that 110(a)(2)(A), 110(a)(2)(C), and 110(i) are applicable requirements and that approval of Wyoming's submittal would interfere with those requirements with respect to the language regarding the permissible location of offsets and the optional provisions prefaced by "the plan may provide." Therefore, even if we agreed that our approval of other SIP submittals was inconsistent with our disapproval of Wyoming's submittal—which we do not—the deficiencies identified above would not allow us to approve the Wyoming submittal.

Second, EPA notes that we take numerous actions every year on SIP submittals, each of which by itself can be voluminous and contain many technical and legal issues. On occasion, it is possible that EPA may have approved portions of SIP submittals that do not meet all the requirements of the Act because EPA did not notice that a particular issue was implicated by the SIP submittal.[1] That this unfortunately and occasionally happens does not require that EPA must

[1] With respect to the particular notices cited by the commenter, none of them discuss the issues identified in our

subsequently approve all SIP submittals that contain the same issue. To the contrary, section 110(l) contains no exception that allows EPA to approve a SIP revision that interferes with applicable requirements of the CAA merely because in some other action EPA has failed to notice a similar issue with a similar SIP revision. Thus, even if the comment has characterized the other notices correctly – which EPA does not agree it has –, EPA cannot approve Wyoming's SIP revision on the basis of those actions. If Wyoming is concerned about EPA's approval of those submittals, the State could have commented on those EPA actions or petitioned EPA to address any alleged errors in EPA's approval. However, it is not a remedy to the alleged inconsistencies to violate 110(l) and approve a SIP revision that interferes with applicable requirements of the Act. In other words, the comment's request that we approve the Wyoming submittal in fact requests that EPA take an action that is arbitrary and capricious.

Generally speaking, EPA's requirements for SIPs with respect to construction of new and modified sources, including the Part D nonattainment NSR permit program, are contained in 40 CFR part 51, subpart I, and specifically, in 40 CFR 51.160 through 51.166. The requirements for SIPs for nonattainment areas are found in 51.165, but this section does not stand alone and is part of a series of sections that together, comprise the requirements for approvable SIP provisions (e.g., 51.161 spells out the requirements for public notice and comment; 51.164 the requirements for stack heights and dispersion techniques). The provisions of subpart I are not written in the form of an implementable permitting rule which applies to the owner or operator of sources who wish to construct or modify, but rather they are requirements that a state must meet in order to get its permitting rules approved as part of the SIP. In contrast to the requirements for

---

proposal notice.

nonattainment NSR, there are both SIP PSD requirements in 40 CFR 51.166 and a federal PSD program in 40 CFR 52.21, the latter being a permitting rule with enforceable source obligations that meets the requirements of 40 CFR 51.166. For a variety of reasons, many states incorporate 40 CFR 52.21 into state rules as the state PSD program. However, EPA does not have a similar implementable nonattainment NSR permitting rule that can be directly incorporated by reference into state rules. As a result, some states have incorporated by reference all or parts of 40 CFR 51.165 into state rules for purposes of nonattainment NSR, but such states generally integrate the portions of 51.165 into the states' existing permit program in such a way that there is a nonattainment NSR permitting program with enforceable provisions. In particular, the permit programs for Alaska, Idaho, and Iowa cited by the commenter take this approach, as we detail below.

In the case of Wyoming's submittal, the submittal fails to integrate the incorporation by reference of 51.165 into the State's permit program. Under Wyoming's SIP, the general construction permit program (i.e. minor NSR and certain procedures and requirements that are common to minor NSR and PSD) is set forth in WAQSR, Chapter 6, Section 2, and the PSD program is set forth in WAQSR, Chapter 6, Section 4. Notably, Wyoming's submittal containing the incorporation by reference of 51.165 did not even modify Section 2. Thus, there is no indication in Wyoming's permit program in Section 2 that any permit should be governed by the federal rules in 40 CFR 51.165. This creates several specific issues that we next discuss, but the overarching problem is that Wyoming's permit program fails, because it lacks any connection to Section 13, to impose nonattainment NSR requirements in the UGRB.

First, WAQSR, Chapter 6, Section 2(c)(v) provides that approval to construct cannot be granted until the permit applicant demonstrates that the facility will employ best available control technology (BACT). This conflicts with the requirement for nonattainment NSR that the facility be subject to the lowest achievable emission rate (LAER), which is determined by a different and generally speaking more stringent standard than BACT. Section 2 does not contain any provision stating that LAER instead of BACT should apply in the UGRB as to ozone precursor emissions. Thus, the submittal's incorporation by reference of 51.165 without corresponding updates to Section 2 fails to impose an enforceable obligation to meet the LAER requirement.

Second, in the case of the Sheridan PM_{10} nonattainment area, which was designated after the 1990 CAA Amendments, the State met nonattainment NSR requirements by imposing a construction ban on new major sources of PM_{10} and modifications that are major with respect to PM_{10}. See 59 FR 60902 (Nov. 29, 1994). This is imposed in the SIP and integrated into the permit program through Section 2(c)(ii)(B), which contains the details of the construction ban. In contrast, Section 2 is devoid of any mention that different requirements should apply in the UGRB. This creates two conflicts. First, there is no enforceable obligation in the permit program to satisfy nonattainment NSR requirements in the UGRB. In fact, under Section 2 the only requirements that apply in the UGRB are minor NSR or PSD, depending on applicability. Second, even if the State's incorporation by reference of 51.165 could be understood to create a permit program, 51.165 contains generally applicable requirements that on their face apply in all nonattainment areas and are not limited to the UGRB. Thus there would be two conflicting sets

of requirements in the Sheridan PM_{10} nonattainment area: one a construction ban and the other a permission to construct if certain requirements (LAER, offsets, etc.) are met.

Third, Chapter 6, Section 2(k) sets forth certain categories of sources that are entirely exempt from the obligation to get approval for construction. However, Section 2(k) correctly recognizes that the PSD program does not allow for source category-based exemptions and therefore states that, notwithstanding these exemptions: "any facility which is a major emitting facility pursuant to the definition in Chapter 6, Section 4 [i.e. PSD] shall comply with the requirements of both Chapter 6, Sections 2 and 4." There is no corresponding provision for the incorporation by reference of 51.165 in Section 13. However, like PSD, the nonattainment NSR program does not allow for source category-based exemptions. Furthermore, Chapter 6, Section 2(k) states that any facility which is major under a state's definition must comply with the PSD program. There is no mention that certain facilities in the UGRB must comply with the provisions of Section 13.

The nonattainment NSR programs cited by the commenter do not contain the same approvability issues in Wyoming's May 10, 2011 SIP submittal discussed above. In 79 FR 65366 (November 4, 2014), EPA Region 10 proposed to approve the Alaska Part D nonattainment NSR rules based on a finding that the Alaska nonattainment NSR rules in 18 AAC 50, Article 3, Section 311 "Nonattainment area major stationary source permits" and 18 AAC 50.040(i) (incorporating by reference text from 40 CFR 51.165) met the requirements of the CAA and EPA's regulations for SIP nonattainment NSR rules. 79 FR 65366. EPA Region 10 noted that 18 AAC 50.311 had previously been approved into the Alaska SIP on August 14, 2007 (72 FR45378) and had not been revised since that time. EPA further explained that the primary

changes proposed for approval in the SIP revision were updating the effective dates of the federal regulations previously adopted by reference in the Alaska SIP for purposes of Alaska's Part D nonattainment NSR program.

Unlike the Wyoming rule, which simply incorporates by reference the planning requirements of 40 CFR 51.165 and does not link the federal permitting requirements directly to Wyoming's existing state permitting rules, Alaska has adopted a complete state permitting rule that includes provisions that are specifically applicable to sources locating in nonattainment areas, including state provisions specifying the permissible location of offsets (see 18 AAC 50.311).[2] This provision makes clear that no source may commence construction of a major stationary source, a major modification, or a "PAL" major modification of a nonattainment pollutant in a nonattainment area without obtaining a construction permit from the Alaska Department of Environmental Conservation. 18 AAC 50.311 also specifies what must be included in an application for a Part D nonattainment NSR permit, such as a demonstration that emissions of the nonattainment pollutant will be controlled to a rate that represents the LAER, and documentation that proposed emission offsets will be sufficient, enforceable, and occur by the time the new or modified source begins operation. Finally, that provision also specifies that the permit can only be issued if the applicant demonstrates to the Alaska Department of Environmental Conservation that the permitting requirements of 40 CFR 51.165 that have been incorporated by reference in Alaska's rules will be met. The Alaska incorporation by reference provision at 18 AAC 50.040(i) explicitly states that it is adopting the text of the identified provisions of 40 CFR 51.165 "setting out provisions that a state implementation plan shall or

2 A memorandum with details of the Alaska program is provided in the docket for this action.

may contain." This makes clear that the incorporated provisions of 40 CFR 51.165, including those specifying that a "state plan may contain…", are requirements of Alaska's Part D nonattainment NSR permitting program.

Because Alaska's reliance on 40 CFR 51.165 as part of its Part D nonattainment NSR program is part of an overall construction permitting program that imposes additional requirements on new and modified major sources located in nonattainment areas, and because Alaska's incorporation by reference of text from 40 CFR 51.165 is clear with respect to the intent of Alaska to adopt the permitting requirements as Alaska law applicable to sources locating in nonattainment areas, the Alaska program does not contain the issues identified above for Wyoming's incorporation by reference of 40 CFR 51.165.

Idaho's SIP approved Part D nonattainment NSR rules currently incorporate by reference 40 CFR 51.165 (as well as all of 40 CFR part 51, subpart I) into IDAPA 58.01.01.107.03.3. As was the case in 79 FR 11711 (March 3, 2014), Idaho annually updates its adoption by reference of these EPA rules and EPA Region 10 has proposed to approve the State's July 1, 2013, update to this incorporation by reference.

Idaho has adopted a complete state permitting rule that includes provisions that are specifically applicable to sources locating in nonattainment areas, including state provisions specifying the permissible location of offsets (see IDAPA 58.01.01.200 through 228 and specifically 204 (PERMIT REQUIREMENTS FOR NEW MAJOR FACILITIES OR MAJOR MODIFICATIONS IN NONATTAINMENT AREAS). These provisions make clear that no source may commence construction of a new major facility or a major modification in a

3 A memorandum with details of the Idaho program is provided in the docket for this action.

nonattainment area without obtaining a construction permit from the Idaho Department of Environmental Quality. IDAPA 58.01.01.204 also points to IDAPA 58.01.01.202 for application requirements and to IDAPA 58.01.01.209 for administrative processing requirements. In addition, IDAPA 58.01.01.204 clearly states that "The intent of Section 204 is to incorporate the federal nonattainment NSR rule requirements." IDAPA 58.01.01.204 then goes on in subsection .01 to specify exactly which provisions from 40 CFR 51.165 are incorporated by reference for the purposes of Section 204. The effect of the statement of intent and the identification of specific provisions makes clear that these provisions of 40 CFR 51.165 are requirements of Idaho's Part D nonattainment NSR permitting program.

Because Idaho's reliance on 40 CFR 51.165 as part of its Part D nonattainment NSR program is part of an overall construction permitting program that imposes additional requirements on new and modified major sources located in nonattainment areas, and because Idaho's incorporation by reference of specific provisions from 40 CFR 51.165 at IDAPA 58.01.01.204 is clear with respect to the intent of Idaho to adopt the permitting requirements as state law applicable to sources locating in nonattainment areas, the Idaho program does not contain the issues identified above for Wyoming's incorporation by reference of 40 CFR 51.165.

Iowa's SIP approved Part D nonattainment NSR rules were previously adopted by rule into Iowa Administrative Code (IAC) 567-22.5(455B). In an effort to streamline administrative rules and make them more user-friendly, Iowa consolidated the nonattainment NSR provisions into IAC 567.31 (Chapter 31, Nonattainment Areas) in its submittal acted on by EPA in 79 FR 27763 (May 15, 2014). In that submittal, the provisions of the previous approved rule were retained by the Iowa Department of Natural Resources, and were simply relocated to Chapter 31.

The relocated rules for the most part mirror language in 40 CFR 51.165, with some modifications by the State. In fact, the public notice for Iowa's rulemaking states: "The federal regulations include many instructions to the states that could be confusing for businesses if the federal regulations were adopted by directly referencing the federal regulations."

Iowa has adopted a complete state permitting rule that includes provisions that are specifically applicable to sources locating in nonattainment areas. Specifically, IAC 567-22.5(455B) (as revised in 79 FR 27763) and 567-31.1(455B) clearly state that no source may commence construction of a new major facility or a major modification in a nonattainment area without obtaining a construction permit from the Iowa Department of Natural Resources. IAC 567-22.1(1)(455B) (Permits Required for New or Existing Stationary Sources) also requires compliance with 567-22.5(455B) and IAC 567-31.3(455B) for permits prior to construction in nonattainment areas, and IAC 567-20.1 (Scope of Title – Definitions – Forms – Rules of Practice) is linked to requirements for areas designated as nonattainment.

Because Iowa's language mirroring that in 40 CFR 51.165 is part of an overall construction permitting program that imposes additional requirements on new and modified major sources located in nonattainment areas, the Iowa program does not contain the issues identified above for Wyoming's incorporation by reference of 40 CFR 51.165.

EPA has reviewed the SIPs cited by the commenter. While some of them may have instances of language that are problematic, none of them appear to have the same approvability flaws that we have identified with Wyoming's submittal.[4] In particular, none of them fail to create an enforceable nonattainment NSR permitting program that we have described here. And

4 As we did not propose any action on the SIPs cited by commenter, we are not making any determination in this final action with regards to those SIPs.

in any case, under section 110(k)(3) we must either approve or disapprove Wyoming's submittal, and under section 110(l) we cannot approve it. Therefore we must disapprove.

Comment:

EPA's proposed action depends on a strained interpretation of the CAA. The commenter states that once a state submits its SIP to EPA, EPA's reviewing authority is limited to determining whether the SIP includes the requirements specified in Section 110(a)(2), and that EPA may not substitute its own judgment for that of the state. The commenter states that EPA proposes to find that Wyoming's plan is not enforceable because Wyoming's incorporation by reference of federal regulations includes language such as "the plan shall provide" and "the plan shall require". The commenter states that EPA claims that this imbues Wyoming's plan with such ambiguity that it fails to create enforceable obligations for sources in contravention of the "enforceable emissions limitations" requirement of Section 110(a)(2)(A), and that this is a strained and illogical interpretation of carefully drafted federal regulations that were meant to provide specific guidance to states in issuing permits in nonattainment areas. According to the commenter, any member of the regulated community who sees that Wyoming's regulations fully incorporate the federal regulations will understand that their operations are subject to the limits and restrictions imposed by the federal regulations.

Response:

We disagree. First, the commenter incorrectly characterizes 40 CFR 51.165 as "federal regulations that were meant to provide specific guidance to States in issuing permits in nonattainment areas." Instead, 40 CFR 51.165 contains the minimum *requirements* (not "guidance") for states to meet *in plan provisions* (not "in issuing permits") for nonattainment

areas. See 40 CFR 51.165(a). To use the commenter's words, 51.165 is "carefully drafted" to define these minimum requirements while allowing state plans to vary from them so long as the minimum requirements are met. For example, 51.165(a)(1) provides that states may vary from the specific definitions in 51.165(a)(1) if the state demonstrates that the replacement definitions will be at least as stringent as all respects.

We also disagree that the distinction between the minimum plan requirements for a permitting program and the permitting program itself is "illogical." The actual program that a state adopts may meet the minimum plan requirements in any number of ways. Wyoming should be familiar with this distinction: as discussed above, the State chose to impose a construction ban in the Sheridan PM_{10} nonattainment area instead of creating a full nonattainment NSR permit program. And for the State's PSD program, the State properly did not incorporate by reference 51.166, but instead adopted language from federal rules. See WAQSR, Chapter 6, Section 4.

The commenter inaccurately describes phrases such as "the plan shall provide" or "the plan shall require" as "isolated." In fact, virtually every source obligation in 51.165(b) is prefaced by such a phrase. These are not "isolated" instances; they are ubiquitous.

We also disagree that it is "strained" to be concerned with the enforceability of the language that was incorporated. Faced with a lawsuit for violation of nonattainment NSR requirements, an owner or operator would naturally defend themselves by pointing out that the language literally does not impose requirements on owners and operators; instead it imposes requirements on state plans. While perhaps that defense would not always be successful, we do not think that Congress intended "enforceable" in section 110(a)(2)(A) to mean "potentially enforceable depending on whether a court will agree with the plaintiff's theory that the provision

should not be read to mean what it literally says." In other words, SIP provisions should not unnecessarily create defenses that make enforceability a matter of chance. Furthermore, we note that violations of nonattainment NSR program requirements can expose owners and operators to civil and criminal penalties. In such cases, courts have applied higher standards and resolved ambiguities in favor of defendants. With respect to the comment's unsupported argument that any member of the regulated community would necessarily understand the state's intent to impose obligations on owners and operators, our response is first, that the literal language of the rule as incorporated does not support that intent. Second, the failure to integrate nonattainment NSR requirements into the permitting program, as detailed above, could create confusion.

Finally, we are not "substituting our judgment for that of the state." The State has not provided any binding interpretation of the provisions that would render them enforceable. If that were possible to do and the State had done so, this interpretation could have been incorporated into the plan and potentially resolved at least some of the issues. In response to the comment regarding our limited review authority, we reiterate: "The EPA may not approve any plan revision 'if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement of [the Clean Air Act].'" *Oklahoma v. EPA*, 723 F.3d 1201, 1207 (10th Cir. 2013) (quoting section 110(l) of the Act). We note that the commenter is also mistaken in asserting that EPA is limited to review for compliance specifically with section 110(a)(2) of the Act[5] – instead under 110(l) EPA must ensure compliance with all applicable requirements of the Act. In addition, the SIP revision

5 The dicta quoted by the commenter from *Train v. NRDC*, 421 U.S. 60 (1975) referring to 110(a)(2) was discussing the 1970 version of the Clean Air Act. Section 110(l) was added in the 1990 Amendments. The applicable requirement in section 110(i) was added in the 1977 Amendments. Applicable requirements for nonattainment NSR programs were added in the 1977 Amendments and revised in the 1990 Amendments.

interferes with sections 110(a)(2)(A) and 110(a)(2)(C).

Comment:

The commenter states that EPA should not threaten the State of Wyoming with the loss of tens of millions of dollars in highway funding. According to the commenter, this is an extreme response to a disagreement over the proper method of incorporation by reference of federal regulations. The commenter states that, in response to its earlier commitment in a settlement, EPA now threatens Wyoming with highway sanctions. The commenter then details a number of serious concerns with highways.

Response:

We disagree that starting the sanctions clock is inappropriate. We noted in our proposal that, under section 179(a) of the CAA, our proposed disapproval would, if finalized, trigger the sanctions clock. The conditions that trigger the sanctions clock are set out in sections 179(a)(1) through (4). In this case, finalizing our disapproval creates the condition in 179(a)(2): disapproval under section 110(k) of a submission for an area designated nonattainment (in this case the UGRB) based on the submission's failure to meet one or more of the elements required by the Act that are applicable to the area (in this case, nonattainment NSR provisions identified above). When this condition is met, 179(a) requires the Administrator to apply one of the sanctions in 179(b) (highway and offset sanctions) unless the deficiency has been corrected within 18 months, and to apply the other sanction in 179(b) if the deficiency is not corrected within the following six months. EPA's approach to the sequencing of sanctions is set forth in the Order of Sanctions Rule. See 40 CFR 52.31. Despite its tone, the comment does not dispute this point about the nondiscretionary operation of the Act and therefore provides no relevant

reason that the sanctions clock should not be started by our disapproval. With respect to the comment's concerns with the state highways, we recognize those as serious. However, Congress decided that certain means of highway funding should be contingent on avoiding the circumstances in section 179(a), which Wyoming can do by developing an approvable submittal.

We also disagree with the comment's characterization of EPA's action. First, the comment inaccurately characterizes EPA as "threatening" highway sanctions. As explained above, section 179(a) of the Act requires that the sanctions clock start after EPA's disapproval of a required element of a nonattainment plan. As a simple matter of proper notice to the public, EPA had the responsibility in our proposal to inform the public of this potential consequence of our proposed disapproval. There was no "threat" involved in stating the basic nondiscretionary operation of the CAA. The comment also without any basis characterizes EPA's action as a "departure from EPA's more measured response throughout the country when disagreements have arisen in the past." The comment did not identify any actions where EPA disapproved a required nonattainment plan element and failed to start the sanctions clock, and in any case the Act requires that the clock be started.

In general, EPA would prefer to work with states to develop approvable submittals instead of disapproving flawed submittals and (in the case of nonattainment plans) triggering clocks for sanctions and FIP obligations. In this case, we were subject to a court-ordered deadline to finalize action on the submittal. We are still happy to work with the State to develop an approvable submittal, and we note that, under the Order of Sanctions Rule, in certain circumstances EPA can stay sanctions if the State has done so even before EPA takes final action on the approvable submittal. See 40 CFR 52.31(d).

V. What Action is EPA Taking Today?

We have fully considered the comments we received, and have concluded that no changes from our proposed rule are warranted. As discussed in our proposal and this notice, our action is based on an evaluation of Wyoming's rules against the requirements of CAA sections 110(a)(2)(C), 110(a)(2)(A), 110(i), 110(l), 172(c)(5), 172(c)(7), 173, regulations at 40 CFR 51.165, and other requirements discussed in section III of this action.

As described in our proposed rulemaking, and in Section II of this notice, EPA is approving the SIP revisions submitted by Wyoming on February 13, 2013 and February 10, 2014.

As described in our proposed rulemaking, and in Section III of this notice, EPA is disapproving the portion of the SIP revisions submitted by Wyoming on May 10, 2011 that adds Chapter 6, Section 13 to the Wyoming SIP.

We are sensitive to the concerns expressed in the State's comments. We also understand the State's goals in promulgating Chapter 6, Section 13, to have a SIP-approved permit program for sources located in nonattainment areas. We intend to work with the State to develop revised rules that are consistent with the State goals and consistent with the CAA and implementing regulations.

VI. Statutory and Executive Orders Review

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely

approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive 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 in a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of this document 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 may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

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

Dated: January 30, 2015.

Debra H. Thomas,
Acting Regional Administrator,
Region 8.

40 CFR part 52 is amended as follows:

PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart ZZ - Wyoming

2. In §52.2620, the table in paragraph (c)(1) is amended under Chapter 3 by removing the entry for Section 4 and by adding the entry for Section 9 to read as follows:

§52.2620 Identification of plan.

* * * * *

(c) * * *

(1) * * *

State citation	Title/subject	State adopted and effective date	EPA approval date and citation[1]	Explanations
* * * * * * *				
Chapter 3				
* * * * * * *				
Section 9	Incorporation by reference.	9/12/2013, 11/22/2013	[insert date of publication in the Federal Register], [insert Federal Register citation]	
* * * * * * *				

[1] In order to determine the EPA effective date for a specific provision that is listed in this table, consult the Federal Register cited in this column for that particular provision.

* * * * *

[FR Doc. 2015-03180 Filed 02/19/2015 at 8:45 am; Publication Date: 02/20/2015]