



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2016-0014; FRL-9943-01-Region 8]

Approval and Promulgation of Air Quality Implementation Plans; Wyoming; Revisions to Wyoming Air Quality Standards and Regulations; Chapter 6, Permitting Requirements, Section 13, Nonattainment New Source Review Permit Requirements, and Section 14, Incorporation By Reference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve State Implementation Plan (SIP) revisions submitted by the State of Wyoming on November 6, 2015. 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. This action is being taken under section 110 of the Clean Air Act (CAA).

DATES: Written comments must be received on or before **[Insert date 30 days after publication in the Federal Register]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R08-OAR-2016-0014 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The 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. The 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, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Kevin Leone, Air Program, U.S.

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SUPPLEMENTARY INFORMATION:

I. General Information

What should I consider as I prepare my comments for EPA?

1. Submitting Confidential Business Information (CBI). Do not submit CBI to EPA through <http://www.regulations.gov> or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.
2. Tips for preparing your comments. When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register volume, date, and page number);
- Follow directions and organize your comments;
- Explain why you agree or disagree;
- Suggest alternatives and substitute language for your requested changes;
- Describe any assumptions and provide any technical information and/or data that you used;
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced;
- Provide specific examples to illustrate your concerns, and suggest alternatives;
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats; and,
- Make sure to submit your comments by the comment period deadline identified.

II. Background

In this proposed rulemaking, we are proposing to take action to approve the addition of Chapter 6, Section 13, Nonattainment permit requirements, and updated Section 14, Incorporation by reference, WAQSR to the Wyoming SIP. These provisions were submitted by the Wyoming Department of Environmental Quality (WDEQ) on November 6, 2015, to address certain CAA requirements related to ozone nonattainment areas.

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”). Effective July 20, 2012, EPA designated the Upper Green River Basin

(UGRB) 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 UGRB area as nonattainment for the 8-Hour Ozone NAAQS, the WDEQ submitted a nonattainment new source review (NSR) permitting program SIP revision to EPA. 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 February 20, 2015 (80 FR 9194), EPA took final action to disapprove the portion of Wyoming’s May 10, 2011 submittal that added this new section to the permitting requirements in WAQSR Chapter 6. As explained in 80 FR 9194, the method Wyoming used to create a nonattainment NSR program was not consistent with the CAA and EPA regulations.

Our final disapproval started 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 we approve a SIP revision addressing the deficiency in Wyoming’s nonattainment NSR permitting requirements.

The SIP revisions submitted by the WDEQ on November 6, 2015, involve Chapter 6, Permitting Requirements, Section 13, Nonattainment new source review permit requirements, and Section 14, Incorporation by reference. Chapter 6, Section 13, Nonattainment new source review permit requirements, establishes specific nonattainment new source review permitting

requirements. In this revision, the WDEQ has incorporated federal regulatory language – establishing permitting requirements for new and modified major stationary sources in a nonattainment area – from 40 CFR 51.165 and reformatted it into state-specific language that effectively imposes requirements on sources in Wyoming. Additionally, the WDEQ has revised language within the rule to maintain consistency with the State’s Prevention of Significant Deterioration (PSD) regulations (WAQSR Chapter 6, Section 4). In addition to the revisions to Chapter 6, Section 13, the November 6, 2015, submittal also updates Chapter 6, Section 14, Incorporation by reference, to adopt by reference from the July 1, 2014, CFR. The State previously submitted SIP revisions for Chapter 6, Section 14 on May 28, 2015 that requested adoption by reference of the CFR that came after July 1, 2013. This action requests an update to those revisions.

III. What is the State Process to Submit These Materials to EPA?

Section 110(k) of the CAA addresses EPA’s actions on submissions of revisions to the SIP. The CAA requires states to observe certain procedural requirements in developing SIP revisions for submittal to EPA. Sections 110(a)(2) and 110(l) of the CAA requires that each SIP revision be adopted after reasonable notice and public hearing. This must occur prior to the revision being submitted by the state to EPA.

For the November 6, 2015, submittal, the Wyoming Environmental Quality Council (WEQC) conducted a public hearing on September 9, 2015 to hear proposed revisions to the WAQSR from the WDEQ, including the addition of Chapter 6, Section 13, Nonattainment new source review permitting requirements, and Section 14, Incorporation by reference. A notice for submitting written comments on the WDEQ proposed revisions was published on July 14, 2015

and the public comment period ended on August 31, 2015. After reviewing comments received, the WEQC approved the proposed revisions on September 9, 2015. The State has met the procedural requirements for submittal of this SIP revision.

IV. What are the Changes that EPA is Proposing to Approve?

EPA is proposing to approve the portion of Wyoming's November 6, 2015 submittal that adds a new section to the permitting requirements in WAQSR Chapter 6. As mentioned in Section I of this rulemaking, Wyoming's new Chapter 6, Section 13, incorporated federal regulatory language – establishing permitting requirements for new and modified major stationary sources in a nonattainment area – from 40 CFR 51.165 and reformatted it into state-specific language that effectively imposes requirements on sources in Wyoming. The submittal also updated Chapter 6, Section 14, Incorporation by reference.

Section 51.165 in title 40 of the CFR (Permit Requirements) sets out the minimum plan requirements states are to use in developing nonattainment NSR permitting programs. Generally, 40 CFR 51.165 consists of a set of definitions for use in state programs, minimum plan requirements for procedures for determining applicability of nonattainment new source review and for the use of offsets, and minimum plan requirements regarding other source obligations, such as recordkeeping.

Specifically, subparagraphs 51.165(a)(1)(i) through (xlvi) enumerate a set of definitions which states must either use or replace with definitions that a state demonstrates are more stringent or at least as stringent in all respects. Subparagraph 51.165(a)(2) sets minimum plan requirements for procedures to determine the applicability of the nonattainment new source review program to new and modified sources. Subparagraph 51.165(a)(3), (a)(9) and (a)(11) set

minimum plan requirements for the use of offsets by sources subject to nonattainment new source review requirements. Subparagraphs (a)(8) and (a)(10) regard precursors, and subparagraphs (a)(6) and (a)(7) regard recordkeeping obligations. Subparagraph 51.165(a)(4) allows nonattainment new source review programs to treat fugitive emissions in certain ways. Subparagraph 51.165(b) sets minimum plan requirements for new major stationary sources and major modifications in attainment and unclassifiable areas that would cause or contribute to violations of the NAAQS. Finally, subparagraph 51.165(f) sets minimum plan requirements for the use of plant-wide applicability limitations. Please refer to the docket to view a cross-walk table which outlines how Wyoming's Chapter 6, Section 13 rules correlate with the requirements of 40 CFR 51.165.

As explained in detail in our prior disapproval, the May 10, 2011 submittal, by directly incorporating by reference in its entirety 40 CFR 51.165, incorporated language such as “the plan shall provide” and “the plan may provide.” As a result, the May 10, 2011 submittal did not clearly and unambiguously create obligations for the sources that should be subject to nonattainment NSR requirements. In addition, the May 10, 2011 submittal incorporated language from 40 CFR 51.165 such as “the plan shall include enforceable procedures”; incorporating this language left the procedures unspecified. Finally, the May 10, 2011 submittal created some inconsistencies with Wyoming's existing approved minor NSR and PSD programs. First, some exemptions for specific source categories that have been approved for the minor NSR program became applicable to nonattainment NSR, which is not allowed. Second, the requirement for best available control technology (BACT) in the minor NSR program became applicable to the nonattainment NSR program instead of the appropriate requirement for lowest achievable

emission rate (LAER). Third, the submittal did not clearly specify whether the existing construction ban in the Sheridan course particulate matter (PM₁₀) nonattainment area, adopted by Wyoming to meet nonattainment NSR requirements for that area, continued to apply.

Instead of incorporating 40 CFR 51.165 by reference, the November 6, 2015 submittal adapts the language in 40 CFR 51.165 to remove phrases such as “the plan shall provide” and “the plan may provide,” and specifies the procedures to be used. In addition, the submittal revises language in 40 CFR 51.165 to specify that the WDEQ is the reviewing authority. In one place, the submittal modifies the term “building, structure, facility, or installation” to “structure, building, facility, equipment, installation, or operation,” without modifying the substance of the definition of the term, which is permissible. These changes are consistent with the CAA and EPA regulations. Specifically:

1. CAA section 110(a)(2)(C), 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), 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].” By removing language such as “the plan shall provide,” the submittal avoids any ambiguity as to whether permits are required.
3. CAA section 173, lays out the requirements for obtaining a permit that must be included in a state’s SIP-approved permit program. Wyoming’s Chapter 6, Section 13 rules impose

these requirements on sources, and the State's proposed plan clearly satisfies the requirements of these statutory provisions.

4. CAA section 110(a)(2)(A), 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. Chapter 6, Section 13 creates enforceable obligations for sources by removing phrases such as "the plan shall provide" and "the plan may provide."
5. CAA section 110(i), (with certain limited exceptions) prohibits states from modifying SIP requirements for stationary sources except through the SIP revision process. By eliminating unspecified procedures that were referenced in the May 10, 2011 submittal, the November 6, 2015 submittal addresses this issue.
6. CAA section 172(c)(7), requires that nonattainment plans, including nonattainment NSR programs required by section 172(c)(5), 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), provides that EPA cannot approve a SIP revision that interferes with any applicable requirement of the Act. As described above, the addition of Chapter 6, Section 13 to the Wyoming SIP would not interfere with sections 110(a)(2) and 110(i) of the Act.
8. Wyoming's SIP revision complies with the requirements of 40 CFR 51.165 as the plan imposes the regulatory requirements on individual sources, as required by the regulatory provisions. The crosswalk table in the docket details how the submittal addresses specific

requirements in 40 CFR 51.165.

Wyoming's submittal also addresses the potential conflicts with the State's approved minor NSR and PSD programs that existed in the May 5, 2011 submittal. First, Section 13(c)(i) provides that the exemptions in the minor NSR program (Section 2(k)) shall not apply with regards to applicability of the nonattainment NSR program. Second, Section 13(d)(iv) states that LAER, not BACT, applies to sources subject to nonattainment NSR. Finally, Section 13(f)(iii) clarifies that Section 13 does not apply in the Sheridan PM₁₀ nonattainment area; instead the construction ban in Section 2(c)(ii)(B) continues to apply.

We note that the submittal contains provisions relevant to nonattainment NSR programs for PM_{2.5} nonattainment areas. Specifically, in the definition of "regulated NSR pollutant," the submittal provides that sulfur dioxide (SO₂) is a PM_{2.5} precursor, nitrogen oxide (NO_x) is presumed to be a PM_{2.5} precursor, and volatile organic compounds (VOCs) and ammonia are presumed to not be PM_{2.5} precursors. This provision is consistent with the nonattainment NSR regulations promulgated in EPA's May 16, 2008 PM_{2.5} NSR Implementation Rule (73 FR 28321). However, on January 4, 2013, the U.S. Court of Appeals for the District of Columbia Circuit, in *Natural Resources Defense Council v. EPA*, 706 F.3d 428 (D.C. Cir. 2013), issued a decision that remanded the EPA's 2008 PM_{2.5} NSR Implementation Rule. The court found that EPA erred in implementing the PM_{2.5} NAAQS in these rules solely pursuant to the general implementation provisions of subpart 1 of part D of title I of the CAA, rather than pursuant to the additional implementation provisions specific to particulate matter nonattainment areas in subpart 4. In particular, subpart 4 includes section 189(e) of the CAA, which requires the control of major stationary sources of PM₁₀ precursors (and hence under the court decision, PM_{2.5}

precursors) “except where the Administrator determines that such sources do not contribute significantly to PM₁₀ levels which exceed the standard in the area.” Accordingly, nonattainment NSR programs that are submitted for PM_{2.5} nonattainment areas must regulate all PM_{2.5} precursors, i.e., SO₂, NO_x, VOC, and ammonia, unless the Administrator determines that such sources of a particular precursor do not contribute significantly to nonattainment in the nonattainment area.

Although the State’s submittal only requires regulation of SO₂ and NO_x as PM_{2.5} precursors, the State of Wyoming has no nonattainment areas for the PM_{2.5} standards. Accordingly, the EPA finds it reasonable to conclude that major sources of VOCs and ammonia do not contribute significantly to PM_{2.5} nonattainment within the State. Thus, there is no need at this time for the State to regulate VOCs or ammonia as PM_{2.5} precursors in its nonattainment NSR permitting program,¹ and so we are proposing to approve the submittal’s PM_{2.5} precursor provisions. Should EPA in the future designate an area in Wyoming as nonattainment for PM_{2.5}, the State would have the obligation to ensure that the nonattainment NSR program met all applicable requirements for PM_{2.5}, including appropriate control of precursors. See CAA sections 172(c)(5) and 189(a)(1)(A).

V. What Action is EPA Proposing Today?

For the reasons described in section IV, the EPA is proposing to approve Wyoming’s November 6, 2015 submittal which adds Chapter 6, Section 13 and updates Chapter 6, Section 14. Our action is based on an evaluation of Wyoming’s rules against the requirements of CAA sections 110(a)(2)(A), 110(a)(2)(C), 110(l) 172(c)(5), 173, 110(i), 172(c)(7), regulations at 40

¹ The submittal does properly regulate VOCs as an ozone precursor, as intended by the State to address nonattainment NSR requirements for the UGRB ozone nonattainment area.

CFR 51.165, and other requirements.

VI. Incorporation by Reference

In this rule, 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 WAQSR that pertain to the issuance of Wyoming air quality permits for major sources in nonattainment areas as described in section IV of this preamble. The EPA has made, and will continue to make, these documents generally available electronically through www.regulations.gov and/or in hard copy at the appropriate EPA office (see the ADDRESSES section of this rule's preamble for more information).

VII. Statutory and Executive Orders Review

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations (42 USC 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 proposed action merely approves some state law as meeting federal requirements and disapproves other state law because it does not meet federal requirements; this proposed action does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, Oct. 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 USC 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 USC 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, Aug. 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 USC 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, Feb. 16, 1994).

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).

List of Subjects in 40 CFR Part 52

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

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

Dated: February 11, 2016.

Shaun L. McGrath,
Regional Administrator,
Region 8.

[FR Doc. 2016-04403 Filed: 2/29/2016 8:45 am; Publication Date: 3/1/2016]