



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R07-OAR-2017-0386; FRL-9979-85-Region 7]

Approval of Nebraska Air Quality Implementation Plans; Adoption of a New Chapter under the Nebraska Administrative Code

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve the State Implementation Plan (SIP) revision submitted by the state of Nebraska on November 14, 2011. Nebraska is adding a new chapter titled "Visibility Protection" which provides Nebraska authority to implement Federal regulations relating to Regional Haze and Best Available Retrofit Technology (BART). The new chapter incorporates EPA's Guidelines for BART Determinations under the Regional Haze Rule. The revision to the SIP meets the visibility component of 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 No. EPA-R07-OAR-2017-0386. All documents in the docket are listed on the <https://www.regulations.gov> web site. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov> or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional information.

FOR FURTHER INFORMATION CONTACT: Greg Crable, Environmental Protection Agency, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219 at (913) 551-7391, or by email at crable.gregory@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document "we," "us," and "our" refer to EPA. This section provides additional information by addressing the following:

- I. Background
- II. What is Being Addressed in this Document?
- III. Have the Requirements for Approval of a SIP Revision Been Met?
- IV. EPA's Response to Comments
- V. What Action is EPA Taking?
- VI. Incorporation by Reference
- VII. Statutory and Executive Order Reviews

I. Background

EPA received Nebraska's November 8, 2011, SIP submission. On October 5, 2017, EPA proposed to approve the SIP submission from the State of Nebraska. See 82 FR 46433. In conjunction with the October 5, 2017 notice of proposed rulemaking (NPR), EPA issued a direct final rule (DFR) approving the same SIP submission. See 82 FR 46415. However, in the DFR, EPA stated that if EPA received adverse comments by November 6, 2017, the action would be withdrawn and not take effect. EPA received one set of adverse comments prior to the close of the comment period. EPA withdrew the DFR on November 27, 2017. See 82 FR 55951.

The revision to title 129, adding chapter 43, Visibility Protection, addressed in this action was originally proposed and approved during the September 8, 2006, Environmental Quality Council (EQC) meeting. However, the revision was not approved by Attorney General's office. On August 17, 2007, an amended package was re-submitted to the EQC, at which time it was approved by both the EQC and the Attorney General's office. After the Governor's signature, the revision adding chapter 43 became effective on February 6, 2008. Chapter 43 was submitted to the EPA, as part of a larger SIP package on November 8, 2011. Some of the revisions submitted in November 2011, were withdrawn by the State for various reasons. The remaining revisions to

title 129, except for revisions adding chapter 43, were approved on October 7, 2016, (81 FR 69693). Chapter 43 is being addressed with this action.

This final rule action will include the updated docket, address comments received, and finalize the approval of Nebraska's SIP submission.

II. What is Being Addressed in this Document?

EPA is taking action to approve revisions to Nebraska's SIP that will amend title 129 of the Nebraska Administrative Code to include a rule addressing certain requirements related to regional haze rule of 1999¹. This proposed revision adds a new chapter, chapter 43, entitled "Visibility Protection", to title 129 which incorporates a portion of EPA Code of Federal Regulations under title 40 part 51 of EPA's Guidelines for BART determinations under the Regional Haze Rule. This new chapter provides the Nebraska Department of Environmental Quality (NDEQ) the authority to require sources to conduct BART determinations for the purpose of issuing BART permits. This revision to title 129 is consistent with Federal regulations related to Regional Haze and BART, adopting by reference the definitions for the Federal Regional Haze rule at 40 CFR 51.301 and adopting by reference, appendix Y to 40 CFR part 51, "Guidelines for BART

¹ Title 40 Code of Federal Regulation (CFR) 51.308

Determinations under the Regional Haze Rule.” The revision to the SIP also meets the visibility component of the CAA section 110(a)(2)(J). Approval of these revisions will not impact air quality and will ensure consistency between the State and federally approved rules.

III. Have the Requirements for Approval of a SIP Revision Been Met?

The state submission has met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submission also satisfied the completeness criteria of 40 CFR part 51, appendix V. The revised chapter was placed on public notice and a public hearing was held by the State on July 13, 2007, where no comments were received. In addition, the revision meets the substantive SIP requirements of the CAA, including section 110 and implementing regulations.

IV. EPA's Response to Comments

The public comment period on EPA's proposed rule opened October 5, 2017 the date of its publication in the **Federal Register**, and closed on November 6, 2017. During this period, EPA received one set of adverse comments, which are addressed below.

Comment 1: The commenter stated that the EPA has improperly titled this action. The commenter elaborated by stating that if EPA is acting on a Regional Haze SIP from Nebraska, then it should not be calling this 'New Chapter under Nebraska Code'. The commenter's concern was that the title was not descriptive or transparent. Finally, the commenter stated that the EPA's titling of this action could very well violate the administrative procedures act (APA), or at least the spirit of the APA.

Response 1: By this action, EPA is not acting on a regional haze SIP. This rule gives NDEQ the authority to issue permits for best available retrofit technology or "BART." EPA retained the title used by the state in describing its SIP, and that title accurately describes the action - addition of the new chapter 43.

The Administrative Procedure Act at 5 U.S.C. 553(b)(1)-(3) states that the notification of the rule be published in the **Federal Register** and that the document shall include the time, place, and nature of the public rule making proceedings, the legal authority for the proposed rule, and either the terms or substance of the proposed rule or a description of the subjects and issues involved. This action meets the procedures outlined in the APA. The proposal document was published in the **Federal Register**. See 82 FR 46433. It provided a summary that clearly

described that substance of the proposed rule, explaining that the addition of the new chapter provides Nebraska with “authority to implement Federal regulations relating to Regional Haze and Best Available Retrofit Technology (BART)...[and] meets the visibility component of the Clean Air Act (CAA).” *Id.* In addition, the document provided information on the process for submitting comments and explained the general rulemaking process EPA was using (i.e., the direct final rule with an accompany parallel proposal). That document also clearly stated that EPA “explained our reasons for this action in the preamble to the direct final rule,” *id.*, thereby incorporating the information provided in the accompanying direct final rule preamble, and directing the reader where to find the document for the direct final rule within the **Federal Register**. In turn, the document for the direct final rule provided more detail on the substance of the SIP submittal and the legal authority for both Nebraska’s submission and EPA’s action on it. See 82 FR 46415 (which includes a section describing how the state’s submission met various statutory and regulatory requirements and explaining that EPA could approve the submission because it is consistent with Federal Regional Haze regulations in 40 CFR part 51 and CAA section 110(a)(2)(j)).

Comment 2: The commenter stated that EPA needs to repropose this action. The commenter stated that multiple documents in the

docket were incomplete, specifically citing: "1) the memo from NE that details the regional haze changes to chapter 43 has been cutoff, see docket document ending in 2017-0386-0012, page 4 - this page ends in the middle of a sentence and does not include important information allowing me to evaluate and provide comment. 2) Document ending in 2017-0386-0016, page 5 is corrupt and page 6 is nonexistent [sic]." The commenter was concerned that information was not able to be reviewed or commented on.

Response 2: After review of the comments received and the EPA's docket for this action, the EPA agrees that the pages outlined by the commenter were missing. However, the missing pages highlighted by the commenter were not provided by the state as part of the state's SIP submission, was an administrative error, and were not used to support the EPA's action. To verify this statement, the EPA has followed up with the state of Nebraska. The state determined that the documents in the docket were the same as what was placed on review for public comment in Nebraska during the state's comment period. The referenced memorandum was a request for approval. It is not evidence of the governor's approval and therefore, is not relied upon for the approval of

the SIP action. The attachment listed in the docket as 2017-0386-0016 is a proposed SIP revision for chapter 5 of Nebraska's SIP. EPA took action on this portion of the submission on October 7, 2016 (see 81 FR 69693). Therefore, attachment 2017-0386-0016 of the docket for this action is not relied upon to support this action.

Additionally, the state's submission included additional revisions that are not being acted upon in this action². When the EPA uploaded the docket for this action, additional attachments were included. For this action, the EPA relied upon the following specific pages of the outlined attachments:

- EPA-R07-OAR-2017-0386-0003 - pages 1 through 3;
- EPA-R07-OAR-2017-0386-0004 - page 1;
- EPA-R07-OAR-2017-0386-0006 - pages 1 through 12;
- EPA-R07-OAR-2017-0386-0010 - pages 5 through 6;
- EPA-R07-OAR-2017-0386-0011 - page 2;
- EPA-R07-OAR-2017-0386-0013 - page 2;
- EPA-R07-OAR-2017-0386-0015 - page 3; and
- EPA-R07-OAR-2017-0386-0019 - pages 1 through 4.

All the documents EPA relied on were included in the docket at the time the **Federal Register** document was published.

² September 12, 2016, letter in the docket

Comment 3: The commenter stated that the EPA failed to evaluate this action in regard to the March 27, 2017, executive order on energy independence and economic growth. EPA's requirement for states to adopt regional haze SIPs, and thus including chapter 43 in the SIP, will cause a significant impact on coal EGUs and eventually closure of coal EGUs in the state, causing economic hardship on the local communities. Nebraska's fiscal impact statement says, "There is a substantial cost to BART-eligible sources for the required modeling under the BART program. As of now, it is unknown whether and what controls any source in Nebraska may have to install to comply with BART, but the cost of controls would be substantial." The requirement to comply with chapter 43 is significant.

Response 3: 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 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state actions, provided that they meet the criteria of the CAA. The EPA cannot consider disapproving a SIP submission or require any changes based on the March 27, 2017, executive order.

Comment 4: The commenter stated that it is unclear from the action whether EPA is approving the other chapters and revisions to other chapters into the SIP. EPA included multiple other

rules in the docket; however, the rule making action only discusses chapter 43, which is merely three provisions long.

Response 4: EPA acknowledges that the state's submittal referenced multiple additional chapters and revisions to the state's rules. Within the proposal for this action, the EPA clearly stated that it was proposing "to take action to add chapter 43, 'Visibility Protection.'" 82 FR 46433. Within the EPA's proposal, no additional chapters were referenced for approval. This action finalizes the proposed action³ and does not include any additional chapters beyond chapter 43. As the EPA stated earlier, additional portions of the state's submittal were included in the docket for the proposed rule. As outlined in Nebraska's September 12, 2016, letter, portions of the state's submission were withdrawn. However, the EPA has kept the docket intact and added the September 12, 2016, letter to provide additional clarity on which portions of the submission that the EPA was requested to approve. However, in response to comment number 2, the EPA has provided specific pages of the docket on which the EPA relied for this action.

Comment 5: The commenter stated that the EPA did not evaluate the new regulation against the EPA's Regional Haze Rule nor did EPA show that this new rule meets the regional haze

³ 82 FR 46433

requirements. EPA also did not say whether or not approving this new rule means that Nebraska has an approved Regional Haze SIP.

Response 5: This action is not specifically a Regional Haze SIP. This action is designed to show that NDEQ has the authority to implement BART procedures. This action was not required as part of Nebraska's Regional Haze SIP. The EPA partially approved and partially disapproved Nebraska's Regional Haze SIP on July 6, 2012. The full docket for that rulemaking can be found at EPA-R07-2012-0158-0051.

Comment 6: The commenter stated that assuming this new rule is not a Regional Haze SIP and does not meet the requirements of the Regional Haze rule, EPA needs to require Nebraska to submit any permits issued to address BART under this new rule as source-specific SIP revisions as this rule is merely a generic-type rule that lays out a process by which sources will address BART related requirements.

Response 6: As explained above, this action is not specifically a Regional Haze SIP, so the assumptions alleged in the comment are not relevant. This action is designed to show that NDEQ has the authority to implement BART procedures and it has been approved for that purposes. This action was not required as part of Nebraska's Regional Haze SIP, which the EPA partially approved and partially disapproved on July 6, 2012 (see rulemaking docket EPA-R07-2012-0158-0051).

Comment 7: The commenter stated that the new chapter 43 and the revised chapter 1 do not include any Regional Haze related definitions such as the definition of BART, or the types of emission limitations or work practices which constitute BART for a given source. The commenter also stated that there was confusion on if EPA was acting on chapter 1 as part of this action.

Response 7: As the EPA outlined in its proposed rule and explained above in response to comment 4, the EPA is only acting on chapter 43 in this action. EPA is not acting on revisions to chapter 1 in this action. Chapter 43 references the Federal BART requirements. The state is incorporating a portion of the Federal requirements, including definitions related to BART.

V. What Action is EPA Taking?

EPA is taking final action to revise the Nebraska SIP to add a new chapter, chapter 43.

VI. Incorporation by Reference

In this rule, 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 the Nebraska Regulations 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 www.regulations.gov and at the EPA Region 7 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 State implementation plan, 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 rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.⁴

VII. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders

⁴ 62 FR 27968 (May 22, 1997).

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 SIP approvals are exempted 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).

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

The Congressional Review Act, 5 U.S.C. section 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 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 may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Best available retrofit technology, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Particulate matter, Regional haze, Reporting and recordkeeping requirements, Sulfur dioxide, Visibility, Volatile organic compounds.

Dated: June 13, 2018.

James B. Gulliford,
Regional Administrator,
Region 7.

For the reasons stated in the preamble, EPA amends 40 CFR part 52 as set forth below:

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 CC-Nebraska

2. In §52.1420, the table in paragraph (c) is amended by revising the entry "129-43" to read as follows:

§52.1420 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED NEBRASKA REGULATIONS

Nebraska citation	Title	State effective date	EPA Approval date	Explanation
STATE OF NEBRASKA				
Department of Environmental Quality				
Title 129-Nebraska Air Quality Regulations				
* * * * *				
129-43	Visibility Protection	2/6/08	[insert date of publication in the Federal Register], [insert Federal Register citation]	
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