



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2023-0375; EPA-HQ-OAR-2021-0663; FRL-11233-02-R8]

Air Plan Approval; Wyoming; Interstate Transport of Air Pollution for the 2015 8-hour Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing approval of the portion of a Wyoming State Implementation Plan (SIP) submission addressing interstate transport for the 2015 8-hour ozone national ambient air quality standards (NAAQS). The “good neighbor” or “interstate transport” provision requires that each state’s SIP contain adequate provisions to prohibit emissions from within the state from significantly contributing to nonattainment or interfering with maintenance of the NAAQS in other states. This requirement is part of the broader set of “infrastructure” requirements, which are designed to ensure that the structural components of each state’s air quality management program are adequate to meet the state’s responsibilities under the Clean Air Act (CAA).

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

ADDRESSES: There are two dockets supporting this action, EPA-R08-OAR-2023-0375 and EPA-HQ-OAR-2021-0663. Docket No. EPA-R08-OAR-2023-0375 contains information specific to Wyoming, including the August 14, 2023 notice of proposed rulemaking that supports this final action. Docket No. EPA-HQ-OAR-2021-0663 contains additional modeling files, emissions inventory files, technical support documents, and other relevant supporting documentation regarding interstate transport of emissions for the 2015 8-hour ozone NAAQS which are being used to support this action. All documents in the docket are listed in the

<https://www.regulations.gov> index. Although listed in the docket, some information may not be publicly available, e.g., confidential business information (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 electronically in <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Uher, Office of Air Quality Planning and Standards, Air Quality Policy Division, Mail Code C539-04, 109 TW Alexander Drive, Research Triangle Park, NC 27711; telephone number: (919) 541-5534; email address: *uher.thomas@epa.gov*.

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

I. Background

On August 14, 2023 (88 FR 54998), the EPA proposed to approve the interstate transport prongs 1 and 2 portions of Wyoming’s January 3, 2019 submission. An explanation of the CAA requirements and the EPA’s reasons for proposing approval were provided in the notice of proposed rulemaking and will not be restated here. The public comment period for the proposed approval ended on September 13, 2023. The EPA received eight comment submissions on the proposed action, one of which was submitted in error as it pertains to a rulemaking by a different agency. Of the seven remaining submissions, six of the commenters were in support of our proposed action, and one commenter (Sierra Club) was opposed. A summary of the relevant comments and the EPA’s responses are provided below.

II. Response to Comments

Comment: Commenter PacifiCorp argued that the EPA lacks the authority to withdraw and re-propose action on Wyoming’s SIP, stating that “EPA does not have or need the authority to undertake the current re-proposal to solicit additional record evidence when the existing record is adequate and appropriate to approve Wyoming’s SIP.” The commenter asserts that,

because the information available to the EPA (specifically the 2016v3 modeling) was also available to us when we did not take final action on Wyoming’s SIP (citing 88 FR 9336; Feb. 13, 2023), the EPA “cannot artificially extend its action by deferral and then re-propose to obtain more information.” The commenter states that the EPA did not provide a reason why a new rulemaking for Wyoming was necessary when we were able to take final action on Minnesota and Wisconsin’s SIPs although our modeling-based determination had changed between proposal and final. The commenter also states that “EPA’s re-proposal unlawfully attempts to manipulate and unilaterally extend EPA’s statutorily-fixed deadlines for SIP actions” because the CAA deadline for final action on Wyoming’s SIP had passed when the commenter alleges we chose to not take final action on Wyoming’s SIP. Other commenters also noted that the EPA had exceeded our statutory deadline for final action on Wyoming’s SIP, and commenter Basin Electric urged the EPA to finalize our proposed approval as expeditiously as practicable because our delays had caused them regulatory uncertainty.

Response: These comments are not germane to the basis for the EPA’s action.

Commenters repeat arguments that have been raised in a challenge to the EPA’s separate final action disapproving 21 other states’ interstate transport SIP submissions for the 2015 ozone NAAQS (88 FR 9336; Feb. 13, 2023).¹ There is nothing unlawful or improper in providing an additional opportunity for public comment when the EPA finds, on the basis of updated modeling information, that a SIP submission on which it had proposed disapproval, may be approved. This is consistent with the EPA’s approach in numerous prior interstate transport SIP rulemakings.² The EPA has responded to commenters’ legal arguments against the separate disapproval action in the *Wyoming v. EPA* litigation.³

¹ See *Wyoming et. al. v U.S. EPA*, No. 23-9529, Doc. 0101108374342 (10th Cir. June 15, 2023).

² See, e.g., 84 FR 71854 (Dec. 30, 2019) and 87 FR 9545 (Feb. 22, 2022); 85 FR 12232 (Mar. 2, 2020) and 87 FR 9477 (Feb. 22, 2022).

³ *Wyoming et. al. v U.S. EPA*, No. 23-9529, Doc. 010110896632 (10th Cir. July 31, 2023).

Regarding comments that the EPA has exceeded our statutory deadlines, the EPA is subject to a consent decree in *Downwinders at Risk v. EPA*, No. 21-cv-03551 (N.D. Cal.) under which the EPA has a deadline to take this final action of December 15, 2023. The EPA is meeting that deadline.

Comment: Commenter Wyoming Department of Environmental Quality (WDEQ) requested that the EPA further expand the details of our analysis specific to Wyoming's plan, to be consistent with EPA action on other states' SIPs.

Response: The EPA does not consider it necessary to provide further detail on our analysis of Wyoming's SIP. A proposed analysis of Wyoming's submission was provided in our May 24, 2022 proposed disapproval.⁴ Because under the EPA's 2016v3 modeling Wyoming is not projected to be linked to any out of state receptors in the 2023 analytic year above the 1 percent of NAAQS contribution threshold, additional analysis is not necessary.

Comment: Commenter Basin Electric cited language from the EPA's August 14, 2023 proposed approval which stated that the EPA did "not assess the data and analysis in Wyoming's submission, as EPA's updated modeling corroborates Wyoming's conclusion that the State will not significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS in any other state." The commenter asserted that this served as an acknowledgement that the EPA ignored the contents of Wyoming's SIP. The commenter stated that in doing so, the EPA "is ultimately attempting to transform what is appropriately a state-specific assessment under the Good Neighbor Provision into a uniform rule that requires each state to conform to EPA's vision of how it believes states should address and analyze interstate ozone transport," which the commenter argues "exceeds the authority delegated to EPA by Congress in the CAA."

Several commenters stated that CAA section 110(a)(2)(D)(i)(I) and EPA guidance provided the states broad discretion in developing their interstate transport SIPs. Commenters Idaho Power Company (IPC) and Mountain Cement Company (MCC) both asserted that the

⁴ 87 FR 31495.

EPA has a more limited, secondary role in reviewing SIP submittals for consistency with the CAA, which explicitly states that the EPA “shall approve” a state’s plan so long as it is consistent with the statute. Commenters argued that, in performing this limited oversight role, the EPA cannot substitute its own judgment for that of the states, and in particular, cannot “force particular control measures on the states.”

Response: As set forth in our prior proposal to disapprove Wyoming’s submission, the EPA did not ignore its contents. However, the EPA need not address these issues in order to conclude that Wyoming’s SIP submission is approvable in light of the 2016v3 modeling. This is consistent with numerous other approval actions the EPA has taken for interstate transport obligations for the 2015 ozone NAAQS, where the available modeling indicated that a state was not linked above a 1 percent of the NAAQS threshold to any out of state receptor. See 88 FR 9362 (citing approval actions). As for the remainder of the comments, the EPA notes that they appear to be substantially at odds with the statute and applicable case law. For the EPA’s response to similar comments on the separate Disapproval action (which we are not reopening here), see 88 FR 9367-68.

Comment: Several commenters stated that Wyoming’s SIP had been approvable before the release of the 2016v3 modeling, and that the updated modeling only served to confirm the SIP’s approvability. Commenters MCC and IPC restated portions of the weight of evidence analysis WDEQ included in their SIP submission, and asserted that this analysis demonstrated that Wyoming met the 110(a)(2)(D)(i)(I) requirements for the 2015 ozone NAAQS and was in line with EPA guidance.

Response: The EPA takes no final position on whether Wyoming’s SIP submission would have been approved in a counter-factual scenario in which the 2016v3 modeling was not available. The EPA’s prior views on Wyoming’s submission are stated in our now withdrawn

May 24, 2022 proposal, and given the 2016v3 modeling, there is no need to finalize that analysis.⁵

Comment: Commenter Sierra Club requested that the EPA withdraw our proposed approval of Wyoming's SIP and instead finalize the prior (and now withdrawn) proposed disapproval of the same plan. The commenter asserted that the EPA should have identified Weld County (Site ID 81230009) as a violating monitor due to its 2022 design value of 72 ppb, and because the 2016v3 modeling indicates a Wyoming contribution of 0.72 ppb at this receptor in 2023, the EPA should consider this as significant contribution to nonattainment or interference with maintenance of the 2015 ozone NAAQS.

Response: The EPA disagrees that we should have identified the Weld County monitor as a violating-monitor maintenance-only receptor. The EPA considers monitoring sites with measured design values *and* 4th high maximum daily 8-hour average (MDA8) ozone that exceed the 2015 ozone NAAQS (i.e., greater than or equal to 71 ppb) based on certified 2021 *and* 2022 data to have the greatest risk of continuing to have a problem attaining the standard in 2023, even when the modeling projects these sites will attain. The Weld County site to which the commenter refers has a certified 2022 4th high MDA8 of 70, which does not exceed the 2015 ozone NAAQS.⁶ Therefore, the EPA continues to find that this monitor does not meet the criteria of a violating-monitor maintenance-only receptor.

Comment: One commenter urged the EPA to adopt and enforce the strongest possible rule to reduce air pollution in Wyoming that may threaten public health in Wyoming and other neighboring states.

Response: This comment lacks sufficient specificity for the EPA to respond.

Comment: Commenters WDEQ and PacifiCorp both asserted that the EPA's action on Wyoming's interstate transport SIP was a locally or regionally applicable action, rather than a

⁵ 87 FR 31495.

⁶ See "Official 2021_2022 DVs_4th Highs.xlsx" in the docket for this action.

nationally applicable action. Both commenters argued that under section 307(b)(1), the appropriate venue depends on whether the EPA's action is "nationally applicable" or "locally or regionally applicable," stating that the EPA Region 8's proposed action on Wyoming's SIP is a "purely local action" and an "indisputably regional action."

Response: The EPA agrees that this is a locally or regionally applicable action. However, under CAA section 307(b)(1), any locally or regionally applicable action that is based on one or more determinations of nationwide scope or effect made and published by the EPA may be challenged only in the D.C. Circuit. For the reasons provided in section IV. of this preamble, the Administrator finds that this action is based on multiple determinations of nationwide scope or effect within the meaning of CAA section 307(b)(1) and is hereby publishing that finding. While this final rule applies only to Wyoming, the EPA evaluated Wyoming's SIP based on a common core of nationwide policy judgments and technical analysis concerning the interstate transport of ozone, including the same determinations made in evaluating every other state's obligations under the Good Neighbor Provision for the 2015 Ozone Standard.⁷ Ozone transport presents a "collective contribution" challenge in which many smaller contributors across a broad region combine to generate a downwind air quality problem.⁸ Given the "interdependent nature of interstate pollution transport," the EPA finds it critically important to employ "a consistent set of policy judgments across all states for purposes of evaluating interstate transport obligations,"⁹ including Wyoming.

Section IV. identifies the specific determinations of nationwide scope or effect that underlie this action.

III. Final Action

Based on the EPA's evaluation of the impact of air emissions from Wyoming to downwind states using 2023 analytic year modeling as described in our August 14, 2023

⁷ 88 FR 9380.

⁸ Id. at 9342.

⁹ Id. at 9339, 9365.

proposed rulemaking, the EPA is approving Wyoming's January 3, 2019 SIP submission as meeting the interstate transport requirements of CAA section 110(a)(2)(D)(i)(I) for the 2015 ozone NAAQS.

IV. 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, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and

- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA.

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

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” The EPA further defines the term fair treatment to mean that “no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.” Wyoming did not evaluate environmental justice considerations as part of its SIP submission; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an EJ analysis and did not consider EJ in this action. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

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).

Section 307(b)(1) of the CAA governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the D.C. Circuit: (i) when the agency action consists of “nationally applicable regulations promulgated, or final actions taken, by the Administrator,” or (ii) when such action is locally or regionally applicable, if “such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.” For locally or regionally applicable final actions, the CAA reserves to the EPA complete discretion to decide whether to invoke the exception in (ii).¹⁰

The Administrator is exercising the complete discretion afforded to him under the CAA to make and publish a finding that this final action (to the extent a court finds the action to be locally or regionally applicable) is based on a determination of “nationwide scope or effect” within the meaning of CAA section 307(b)(1). Through this rulemaking action (in conjunction with a series of related actions on other SIP submissions for the same CAA obligations), the EPA interprets and applies section 110(a)(2)(D)(i)(I) of the CAA for the 2015 ozone NAAQS based

¹⁰ In deciding whether to invoke the exception by making and publishing a finding that an action is based on a determination of nationwide scope or effect, the Administrator takes into account a number of policy considerations, including his judgment balancing the benefit of obtaining the D.C. Circuit’s authoritative centralized review versus allowing development of the issue in other contexts and the best use of agency resources.

on a common core of nationwide policy judgments and technical analysis concerning the interstate transport of pollutants throughout the continental U.S. The EPA relies on a single set of updated, 2016-base year photochemical grid modeling results for the year 2023 as the primary basis for its assessment of air quality conditions and contributions at steps 1 and 2 of the EPA's 4-step framework for assessing good neighbor obligations. The EPA has selected nationally uniform analytic years for its analysis under the 4-step framework and is applying a nationally uniform approach to nonattainment and maintenance receptors and a nationally uniform approach to contribution threshold analysis.¹¹

Specifically, the Administrator finds that this action on the State of Wyoming's SIP submission is based on several determinations of nationwide scope or effect, including his determination: (1) that use of the same 2023 analytical year air quality modeling (2016v3) and monitoring data that were used to define all other states' good neighbor obligations for the 2015 ozone NAAQS is appropriate for evaluating Wyoming's contribution in this action; (2) that it is appropriate to use the EPA's nationwide methodology for identifying nonattainment and maintenance receptors, including "violating monitor" maintenance-only receptors, using the 2016v3 modeling and recent monitoring data; (3) that it is appropriate to use the EPA's nationwide methodology for calculating states' contribution levels to out of state receptors in calculating Wyoming's impact; and (4) that a conclusion that a state's impact on all out of state receptors is less than 1 percent of the NAAQS (using the data and methodologies described in items (1) through (3)) is sufficient to approve the state's good neighbor SIP submission for the 2015 ozone NAAQS, without further analysis.

These determinations lie at the core of this final action and ensure consistency and equity in the treatment of all states in addressing the multistate problem of interstate ozone pollution

¹¹ In the report on the 1977 Amendments that revised section 307(b)(1) of the CAA, Congress noted that the Administrator's determination that the "nationwide scope or effect" exception applies would be appropriate for any action that has a scope or effect beyond a single judicial circuit. *See* H.R. Rep. No. 95-294 at 323, 324, reprinted in 1977 U.S.C.C.A.N. 1402-03.

under the good neighbor provision for the 2015 ozone NAAQS. These determinations are not related to the particularities of the emissions sources in Wyoming or any specific state.

For these reasons, the Administrator is exercising the complete discretion afforded to him under the CAA and hereby makes and publishes a finding that this action is based on multiple determinations of nationwide scope or effect for purposes of CAA section 307(b)(1). Therefore, any petitions for review of this action must be filed in the D.C. Circuit Court of Appeals.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Ozone.

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

Michael S. Regan,
Administrator.

For the reasons stated in the preamble, the Environmental Protection Agency amends 40 CFR part 52 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 (e) is amended by adding the entry “(35) XXXV” in numerical order to read as follows:

§ 52.2620 Identification of plan.

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(e) * * *

Rule No.	Rule title	State effective date	EPA Effective date	Final rule citation/ date	Comments
(35) XXXV	Interstate transport SIP for section 110(a)(2)(D)(i)(I) prongs 1 and 2 for the 2015 Ozone NAAQS	1/3/2019	[insert date 30 days after date of publication in the Federal Register]	[insert Federal Register citation], [insert date of publication in the Federal Register]	