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March 5, 2015

VIA FEDEX OVERNIGHT MAIL

Gina McCarthy
Administrator
United States Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Shaun McGrath
Region 8 Administrator
United States Environmental Protection Agency
1595 Wynkoop Street
Denver, Colorado 80202-1129

Re: Petition to Reconsider and Stay the EPA's Disapproval of Wyoming's Non-Attainment New Source Review Implementation Plan, 80 Fed. Reg. 9194 (Feb. 20, 2015)

Dear Administrators McCarthy and McGrath:

The State of Wyoming hereby petitions the EPA to reconsider and stay its decision disapproving Wyoming's plan for implementing the Clean Air Act's non-attainment new source review permitting requirements. *See* Disapproval of Wyoming Air Quality Implementation Plan, 80 Fed. Reg. 9194 (Feb. 20, 2015). Wyoming's plan incorporated the EPA's regulation by reference. Because the EPA

has approved this approach for several other state plans, the EPA's disapproval of Wyoming's plan is arbitrary and capricious. In addition, the EPA asserts that Wyoming's federal highway funding must be withheld unless Wyoming quickly complies with this new interpretation created just for Wyoming. As a result, Wyoming intends to seek judicial review of the EPA's unlawful action.

However, in the interest of conserving public resources, Wyoming petitions the EPA to reconsider its action and conditionally approve Wyoming's plan based on Wyoming's demonstrated commitment to revise its plan to comport with the EPA's expectations. Should the EPA refuse this approach, Wyoming petitions the EPA to stay the effect of its disapproval pending judicial review, including stopping the clock on the EPA's threat to withhold Wyoming's federal highway funding.

I. Background

The Clean Air Act requires state implementation plans to include provisions for permitting the construction and operation of stationary sources of air pollution in areas that do not meet National Ambient Air Quality Standards. *See* 42 U.S.C. §§ 7410(a)(2)(C), 7502. In 2010, the Wyoming Department of Environmental Quality revised its air quality regulations to incorporate 40 C.F.R. § 51.165, the EPA's rule on non-attainment new source review permitting plan requirements. *See* Rules Wyo. Dep't Env'tl. Quality, Air Quality Div., Ch. 6, § 13.

On May 10, 2011, Wyoming submitted that regulatory change to the EPA as a revision to Wyoming's implementation plan under Section 110 of the Clean Air Act, 42 U.S.C. § 7410. *See* 80 Fed. Reg. at 9194. However, the EPA failed to take action on that plan revision within the Clean Air Act's mandatory eighteen-month period for action. *See* 42 U.S.C. § 7410(k)(2), (3). As a result, on November 27, 2013, more than a year after the deadline for the EPA to take action on Wyoming's plan, Wyoming provided the EPA with a sixty-day notice of its intent to sue the EPA for failing to carry out mandatory duties under the Clean Air Act. *See Wyoming v. McCarthy*, 14-CV-00042-F, Consent Decree at 2, ¶ G, (D. Wyo. filed Jan. 16, 2015).

Faced with the risk that a non-governmental entity would sue and settle with the EPA—without ever involving Wyoming—for EPA's failure to fulfill this mandatory duty, Wyoming sued the EPA on February 25, 2014. *Id.* at 2, ¶ H. Wyoming and the EPA agreed to settle Wyoming's claims through a consent

decree that required the EPA to take action on Wyoming's plan by January 30, 2015. *Id.* at 4, ¶ 4.

On November 4, 2014, the EPA proposed to disapprove Wyoming's implementation plan for two reasons. *See* Disapproval of Wyoming Air Quality Implementation Plan, 79 Fed. Reg. 65,362 (proposed Nov. 4, 2014). First, the EPA asserted that Wyoming's plan revision does not create "unambiguous and enforceable obligations for sources" because the requirements in the EPA regulation Wyoming incorporated are "prefaced by phrases such as 'the plan shall provide' or 'the plan shall require'[" *Id.* at 65,365. Second, the EPA asserted that, because "[i]n certain places 40 C.F.R. 51.165 requires states to adopt procedures that meet certain standards, but do[es] not specify the content of those procedures," Wyoming's incorporation of the federal rule "leaves those procedures unspecified." *Id.*¹

Wyoming commented in opposition to the EPA's proposal to disapprove Wyoming's plan. Wyoming explained that it would be arbitrary and capricious for the EPA to disapprove Wyoming's plan because other EPA regional offices had approved other state plans that incorporated 40 C.F.R. § 51.165. For example, Wyoming noted that the EPA had approved Iowa's non-attainment new source review implementation plan, which incorporated the same federal regulation, including both of the phrases the EPA alleged required disapproval of Wyoming's plan. *See* Approval of Iowa Implementation Plan, 79 Fed. Reg. 27,763 (May 10, 2014) (approving Iowa plan that incorporated the EPA rules using the phrase "plan shall provide" three times and the phrase "plan shall require" five times). Indeed, Wyoming pointed out that on the very same page of the same issue of the *Federal Register* on which the EPA Region 8 Office proposed to disapprove Wyoming's plan, the EPA Region 10 Office proposed to approve Alaska's incorporation of 40 C.F.R. § 51.165 by reference.

Notwithstanding these inconsistencies, the EPA disapproved Wyoming's implementation plan. *See* Disapproval of Wyoming Air Quality Implementation Plan, 80 Fed. Reg. 9194 (Feb. 20, 2015). In response to Wyoming's comment

¹ Contrary to the EPA's claim, Wyoming does have those procedures in place, a fact of which the EPA is fully aware. *See* U.S. Environmental Protection Agency, Ozone Advance Program Participants, <http://epa.gov/ozoneadvance/participants.html#WY> (Dec. 10, 2014) (select "Path Forward" under "Wyoming: Upper Green River Basin").

demonstrating the arbitrariness of the disapproval, the EPA merely stated that “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.” *Id.* at 9197. While the EPA now claims its other plan approvals were in error, it has taken no action to withdraw those approvals. To top off the inconsistent treatment, the EPA has threatened to sanction Wyoming by taking away federal highway funding. *Id.* at 9195.

II. The EPA should reconsider its decision to disapprove Wyoming’s plan, stay the effect of the disapproval during reconsideration, and conditionally approve Wyoming’s plan.

The Clean Air Act authorizes the EPA to reconsider its action on a state implementation plan and, during reconsideration, to stay the effect of the action for up to three months. *See* 42 U.S.C. § 7607(d)(7)(B). Because the EPA’s disapproval of Wyoming’s plan was arbitrary, Wyoming urges the EPA to reconsider its decision and to stay the effect of the disapproval during reconsideration.

Rather than disapprove Wyoming’s plan, the EPA should conditionally approve Wyoming’s plan based on Wyoming’s ongoing efforts to revise its plan to conform to the EPA’s expectations. *See* 42 U.S.C. § 7410(k)(4). Those ongoing efforts include the following tentative schedule for submitting a revised state implementation plan:

March 27, 2015: providing public notice of the revised non-attainment new source review permitting regulations.

April 29, 2015: presenting the revised regulations to the Wyoming Air Quality Advisory Board.

June 5, 2015: providing public notice of a hearing on the revised regulations before the Wyoming Environmental Quality Council.

August 5, 2015: holding a public hearing on the revised regulations before the Wyoming Environmental Quality Council.

October 29, 2015: submitting the revised regulations and state implementation plan to the EPA.

Wyoming advocated for such an approach in its comments on the EPA's proposal, but the EPA did not respond to this request. Conditionally approving Wyoming's plan while Wyoming revises its non-attainment new source review regulations will avoid unnecessary litigation and protect the public against the harms that will result from the federal highway funding sanctions the EPA has committed to impose on Wyoming.

III. If the EPA does not reconsider its disapproval of Wyoming's plan, the EPA should stay its action pending judicial review.

The Administrative Procedure Act authorizes the EPA to stay the effect of its actions pending judicial review. *See* 5 U.S.C. § 705; *see also* *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 24-25 (D.D.C. 2012). Absent reconsideration of this decision by the EPA, Wyoming will seek judicial review of the EPA's arbitrary disapproval of Wyoming's implementation plan.

During the pendency of judicial review, the eighteen-month clock for highway funding sanctions will continue to run, even though litigation will not likely be resolved before expiration of that period. As a result, notwithstanding Wyoming's likely success on the merits of a challenge to the EPA's arbitrary action, both Wyoming and the public will be harmed absent a stay. Wyoming will suffer direct injuries both to its financial interests in federal highway funding and to its sovereign interests as the primary regulator of air quality within its borders. *See* 42 U.S.C. § 7401(a)(3). But this is about more than just financial and sovereignty issues, it is also about public safety. Everyone who travels on Wyoming's highways will unnecessarily suffer the risk of increased danger should Wyoming be forced to forego needed upgrades and repairs because of the EPA's federal highway funding sanctions.

In light of these facts, the public interests would best be served by staying the effect of the EPA's disapproval of Wyoming's implementation plan. Wyoming, therefore, asks the EPA to grant such a stay.

IV. Conclusion

The EPA was mistaken when it disapproved Wyoming's incorporation of 40 C.F.R. § 51.165 into its implementation plan on the bases of alleged problems so insignificant that other EPA regions did not even identify them in similar, approved plans. Notwithstanding the unlawfulness of the EPA's action, Wyoming

is committed to revising its implementation plan to conform to the EPA's newly pronounced expectations. Based on this commitment, the EPA should conditionally approve Wyoming's plan, which will avoid unnecessary litigation and expenditure of limited government resources. Should the EPA refuse this course of action, Wyoming asks the EPA to stay the effect of its decision pending judicial review, thereby mitigating the harms that will befall Wyoming and the public as a result of the EPA's commitment to sanctioning Wyoming by withholding federal highway funding.

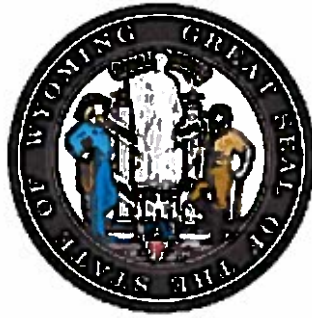
Submitted this 5th day of March, 2015.

FOR THE STATE OF WYOMING

A handwritten signature in blue ink that reads "Peter K. Michael". The signature is written in a cursive style and is positioned above a horizontal line.

Peter K. Michael

Wyoming Attorney General



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Submitted this 5th day of March, 2015.

FOR THE STATE OF WYOMING



Peter K. Michael

Wyoming Attorney General