Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

Matthew H. Mead, Governor

Todd Parfitt, Director

December 4, 2014

Carl Daly
Air Program Director
Environmental Protection Agency, Region 8
Mailcode 8P-AR
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Submitted electronically via www.regulations.gov
Attn: **Docket ID No. EPA-R08-OAR-2014-0761**

Re: 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

Dear Director Daly:

On November 4, 2014, the Environmental Protection Agency Region 8 Administrator Shaun L. McGrath proposed to partially disapprove State Implementation Plan (SIP) revisions, submitted by the State of Wyoming on May 11, 2011, and to approve SIP revisions submitted by the State of Wyoming on February 13, 2013, and February 10, 2014. I am writing to provide comments in regards to the proposed disapproval and to request that EPA fully approve our May 11, 2011, SIP submission. The proposed disapproval is improper because: (1) EPA disapproval of Wyoming's plan would be arbitrary and capricious given EPA's approval of identical language in SIPs submitted by other states; and (2) EPA's interpretation of Wyoming's SIP submission is incorrect.

Background

On March 27, 2008, EPA promulgated a revised national ambient air quality standard for ozone. National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436 (Mar. 27, 2008). Four years later, EPA designated Wyoming's Upper Green River Basin as nonattainment for the new ozone standard. Air Quality Designations for the 2008 Ozone National Ambient Air Quality Standards, 77 Fed. Reg. 30,088 (May 21, 2012) (codified at 40 C.F.R. § 81.351). On May 11, 2011, more than one year before the effective date of this nonattainment designation, the Wyoming Department of Environmental Quality (DEQ) submitted nonattainment new source review SIP revisions to EPA (hereinafter referred to as "Wyoming's plan"). Wyoming's plan included a newly promulgated Chapter 6, Section 13 of the Wyoming Air Quality Standards and Regulations, entitled, "Nonattainment permit requirements." The chapter incorporated by reference the federal guidelines for minimal plan requirements for state nonattainment new source review permit programs. *See* 40 C.F.R. § 51.165. DEQ directly incorporated federal regulations to streamline EPA's review process so that Wyoming would be able to maintain continual permitting primacy in the Upper Green River Basin after the nonattainment designation.

EPA failed to determine whether Wyoming's plan was complete within six months of receiving it, as required by the Clean Air Act, so the plan became complete by operation of law on November 11, 2011. *See* 42 U.S.C. § 7410(k)(1)(B). EPA subsequently failed to take final action on Wyoming's plan within twelve months of the completeness determination, as was required by the Clean Air Act. *See* 42 U.S.C. § 7410(k)(2) and (3). EPA's failure to timely approve Wyoming's plan effectively transferred new source permitting authority in the non-attainment area of the Upper Green River Basin from Wyoming to EPA Region 8. In the absence of EPA-approved nonattainment permitting SIP revisions, DEQ has remained unable to permit new sources in the Upper Green River Basin. On February 25, 2014, almost three years after Wyoming submitted its plan to EPA, Wyoming sued the EPA Administrator for failing to carry out her non-discretionary duties under the Clean Air Act. (*Wyoming v. McCarthy,* No. 14-CV-42-F (D. Wyo. 2014)). On September 29, 2014, Wyoming and EPA entered into a Consent Decree, in which EPA agreed it would take one of four final actions on Wyoming's plan on or before December 12, 2014.

On November 4, 2014, EPA proposed to disapprove Wyoming's plan. 79 Fed. Reg. 65,362 (Nov. 4, 2014). In the proposed action, EPA asserted that Wyoming's plan is insufficient because it fails to satisfy the Section 110(a)(2) requirement of enforceable emission limitations. EPA claims that Wyoming's plan is not enforceable because it incorporates language referencing what plans must include. 79 Fed. Reg. 65,365 ("The language prefaced by phrases such as 'the plan shall provide' or 'the plan shall require' does not create unambiguous and enforceable obligations for sources that would be subject to the nonattainment NSR 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[.]") Essentially, EPA has taken the position that isolated phrases referring to the plan render unenforceable the detailed descriptions of the plan itself. EPA further stated that final action to disapprove Wyoming's plan will start the eighteen-month clock for levying Section 179 sanctions. 79 Fed. Reg. 65,366.

EPA's proposed disapproval of Wyoming's plan is arbitrary and capricious

EPA may not take action that is arbitrary, capricious, or an abuse of its discretion. 5 U.S.C. § 706(2)(A); 42 U.S.C. § 7607(d)(9). It is arbitrary and capricious for an agency to respond to the same situation in a different way without any rational explanation. *Brady Campaign to Prevent Gun Violence v. Salazar*. 612 F. Supp. 2d 1, 18 (D.C. Cir. 2009) ("The D.C. Circuit has repeatedly explained that an agency's unexplained 180 degree turn away from [precedent is] arbitrary and capricious, and that an agency's decision to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious.") (internal citations omitted).

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 Administrators of Regions 7 and 10.[1] In fact, the Region 10 Administrator published a proposed notice to approve Alaska's analogous nonattainment new source review permitting regulations on the very same page of the same issue of the Federal Register in which the Region 8 Administrator proposed to disapprove Wyoming's plan. *Compare*

[1] *See*, Approval and Promulgation of Implementation Plans; Idaho, 79 Fed. Reg. 11,711 (March 3, 2014) (codified at 40 C.F.R. § 52) (approving portions of Idaho's plan that incorporated 40 C.F.R. § 51.165 by reference, without excluding any of the language referring to "the plan"); Approval and Promulgation of Implementation Plans; State of Iowa, 79 Fed. Reg. 27,763 (May 15, 2014) (codified at 40 C.F.R. § 52) (approving portions of Iowa's SIP revisions that incorporate language from 40 C.F.R. § 51.165, including the phrase "plan shall provide" three times and the phrase "plan shall require" five times); Approval and Promulgation of Implementation Plans; Alaska Nonattainment New Source Review, 79 Fed. Reg. 65,366 (Nov. 4, 2014) (proposing to approve Alaska's SIP revisions that incorporates portions of 40 C.F.R. § 51.165 by reference, including the phrase "plan shall provide that" two times and the phrase "all plans shall use" one time.)

79 Fed. Reg. 65,362 (Nov. 4, 2014) *with* 79 Fed. Reg. 65,366 (Nov. 4, 2014). Moreover, the Region 7 Administrator approved Iowa's plan as a direct final rule because "the Agency views [it] as a noncontroversial revision amendment." 79 Fed. Reg. 27,834 (May 15, 2014). 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. *ANR Pipeline Co. v. FERC,* 71 F.3d 897, 901 (D.C. Cir. 1995) ("Where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.")

EPA's proposed action depends on a strained interpretation of the Clean Air Act

Section 110(a)(2) of the Clean Air Act lays out requirements for SIP submissions. 42 U.S.C. § 4710(a)(2). 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). 42 U.S.C. § 4710(k)(3) and (4); *Luminant Generation Co. LLC v. EPA*. 714 F.3d 841, 846 (5th Cir. 2012) ("The Act confines EPA to the ministerial function of reviewing SIPs for consistency with the Act's requirements."). EPA may not substitute its own judgment for that of the State. *Train v. Natural Res. Def. Council*. 421 U.S. 60, 79 (1975) ("The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of 110(a)(2).").

Here, 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." 79 Fed. Reg. 65,365. 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 emission limitations" requirement of Section 110(a)(2)(A). *Id.* 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. 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. A handful of introductory clauses referring to a state plan in the future tense do not render meaningless the remaining technical, specific guidance. Wyoming's plan is enforceable because of, and not in spite of, the fact that it has incorporated the federal regulations by reference.

EPA is wrong to threaten highway sanctions on such weak grounds

EPA further threatens the State of Wyoming with the loss of tens of millions of dollars of highway funds if Wyoming does not submit an approvable SIP revision. 79 Fed. Reg. 65,366. This is an extreme response to a disagreement over the proper method of incorporation by reference of federal regulations. Wyoming asked EPA to approve adoption of EPA's own clean air standards in compliance with the timeline established under the Clean Air Act. EPA agreed that it needed to act to comply with the law. Now, in response to its earlier commitment in a settlement agreement, EPA threatens Wyoming with highway sanctions. These sanctions will degrade the quality of heavily-travelled interstate highways in Wyoming, used by Wyoming residents, interstate industry, and tourists from around the world. Forcing Wyoming to forego highway repairs will likely decrease highway safety on these routes. This appears to be a departure from EPA's more measured response throughout the country when disagreements have arisen in the past. EPA should work with Wyoming in a cooperative manner to approve the state's plan promptly, prior to the expiration of EPA's new eighteen-month sanctions clock, instead of threatening to withhold federal highway funds.

Thank you for taking the time to consider my comments. I strongly encourage EPA to act consistently with its past practice and the cooperative federalism Congress intended to guide Clean Air Act implementation. In accord with Regions 7 and 10, Region 8 should approve Wyoming's plan.

Sincerely,

Todd Parfitt
Director

cc: Governor Matthew H. Mead
Peter Michael, Attorney General
Steven Dietrich, Air Quality Division Administrator