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December 5, 2012

VIA EMAIL AND U.S. MAIL

Attention: Filing Center
Public Utility Commission of Oregon
550 Capitol Street NE, #215
PO Box 2148
Salem, OR 97308-2148
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Re: *In the Matter of IDAHO POWER COMPANY Request for General Rate Revision*
PUC Docket No.: UE 233
DOJ File No.: 860115-GB0563-11

Enclosed for filing are an original and five copies of Staff's Final Brief in the above-captioned docket for filing with the PUC today.

Sincerely,

Stephanie S. Andrus
Senior Assistant Attorney General
Business Activities Section

Enclosures
SSA:jrs/#3803287
c: UE 233 Service List (electronic copy only)

1 installation of the Scrubber Upgrade in 2011 and continued operation of the plant to the closure
2 of Unit 3 on December 31, 2014, shows the Scrubber Upgrade had a very significant financial
3 benefit for customers compared to early retirement at the end of 2014.

4 In any event, any suggestion that Idaho Power could have obtained an economic benefit
5 for itself and customers simply by delaying installation of the Scrubber Upgrade to some period
6 beyond 2011 is not consistent with the regulatory scheme adopted by the State of Wyoming.
7 Idaho Power (and its co-owner PacifiCorp) installed the Scrubber Upgrade to avoid triggering
8 more stringent controls under the Western Trading Backstop Program. Staff concludes that in
9 light of this risk, Idaho Power's choice to go forward with the Scrubber Upgrade in 2011 to
10 ensure its emissions reductions were sufficient to allow the region to meet the SO₂ milestone was
11 an objectively reasonable decision.

12 **II. Regulatory context.**

13 **a. Clean Air Act and Regional Haze Rules.**

14 **1. Background.**

15 In 1977 Amendments to the Clean Air Act (CAA), Congress created a program to protect
16 visibility in national parks and wilderness areas, establishing as a national goal the "prevention
17 of any future, and the remedying of any existing, impairment of visibility in mandatory Class I
18 Federal areas which impairment results from man-made air pollution."³ Congress instructed the
19 Environmental Protection Agency ("EPA") to require covered states to submit state
20 implementation plans ("SIPs") that "contain such . . . measures as may be necessary to make
21 reasonable progress toward meeting the national goal."⁴ Congress directed the EPA to consider
22 four factors to determine reasonable progress—the costs of compliance, the time necessary for

23 cost investment; and (4) the company considered alternative investment only in the context of a turbine
24 upgrade), CUB/400, Feighner-Jenks/5 ("As CUB has demonstrated in its UE 246 Rebuttal Testimony, if
25 in 2009 PacifiCorp had examined its analysis it would have found that phasing out the plant sometime
between 2020 and 2025 would have been the least cost/least risk option.")

26 ³ Section 169A; 42 U.S.C. §7491(a)(1).

⁴ 42 U.S.C. 7491(b)(2).

1 compliance, the energy and non-air quality environmental impacts of compliance, and the
2 remaining useful life of any existing regulated source.⁵

3 In 1980, the EPA adopted rules addressing visibility impairment that is “reasonably
4 attributable” to one or a small group of sources, including coal plants that fit within certain
5 criteria.⁶ Although Congress had noted in the 1977 CAA amendments its concern with “hazes”
6 from “regionally distributed sources,” EPA deferred adopting regulations regarding “regional
7 haze” (visibility impairment caused by the cumulative air pollutant emissions from numerous
8 sources over a wide geographic area), noting the need for more information on how to monitor
9 and model regional haze and on the relationship between pollutants and visibility.

10 The 1980 regulations required the thirty-five states with “Class I areas”⁷ within their
11 borders to develop SIPs described in the 1977 CAA Amendments. The states were required to
12 determine which existing stationary facilities should install the best available retrofit technology
13 (BART) for controlling pollutants that impair visibility, develop and implement long-term
14 strategies for making reasonable progress toward the visibility goal, adopt measures regarding
15 new or modified major stationary sources, and conduct visibility monitoring in Class I areas.⁸

16 In 1990, Congress adopted additional amendments to the CAA addressing regional haze.⁹
17 Congress directed the EPA to “establish a visibility transport commission for the region affecting
18 the visibility of the Grand Canyon National Park” to provide the EPA recommendations on how
19 to remedy adverse impacts on visibility and address long-term strategies for protecting visibility
20 at 16 Class I areas on the Colorado Plateau.¹⁰ The amendments required the EPA to carry out the

21 ⁵ 42 U.S.C. 7491(g)(2).

22 ⁶ *Visibility Protection for Federal Class I Areas*, 45 FR 80086.

23 ⁷ Class I areas are national parks exceeding 6000 acres, wilderness areas and national memorial parks
24 exceeding 5000 acres, and all international parks that were in existence on August 7, 1977. 40 C.F.R.
§51.301(o).

25 ⁸ *Regional Haze Regulations*, 64 FR 35714, 35717, 1999 WL 438259.

26 ⁹ Section 169B of CAA.

¹⁰ Section 169B(d)(2)(C) of CAA; 42 U.S.C. §7492(f).

1 regulatory responsibilities under Section 169A within 18 months of receiving the commission's
2 report.¹¹ As directed, the EPA established the Grand Canyon Visibility Transport Commission
3 (GCVTC) in 1991, received GCVTC's statutorily-required report in 1996, and proposed
4 "Regional Haze Rules" (RHR) in 1997.¹² The EPA adopted the RHR in 1999.¹³

5 **2. Some requirements of Regional Haze Rules.**

6 **A. §308**

7 The RHR includes regulations applying to all states, not just the 35 states with Class I
8 areas.¹⁴ The RHR requires states to address regional haze under the provisions of 40 C.F.R.
9 §51.308 (§308). Under §308, states generally must require installation of BART on all sources
10 that meet certain criteria (aka are subject to BART)(*see* §308(e)(1)), or adopt alternative
11 measures that achieve greater reasonable progress than would be achieved through the
12 installation and operation of BART on all subject-to BART sources (*see* §308(e)(2)).

13 Whether a state chooses to address regional haze under §308(e)(1) or (e)(2), it must
14 identify sources within its borders that meet the definition of a "BART-eligible" source set forth
15 in 40 C.F.R §40.301. BART-eligible sources are sources that fall within one of 26 categories,
16 were built between 1962 and 1977, and have the potential to emit at least 250 tons per year of
17 any visibility-impairing air pollutant.¹⁵ Next, the state must determine which BART-eligible
18 sources "emit[] any air pollutant which may reasonably be anticipated to cause or contribute to
19 any impairment of visibility in any [mandatory Class I Federal area]." BART-eligible sources
20 that meet these criteria are "subject to BART."¹⁶

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22 ¹¹ Section 169B(e); 42 U.S.C. §7492(e).

23 ¹² *Regional Haze Regulations (NOPR)*, 62 FR 41138, 1997 WL 452017.

24 ¹³ *Regional Haze Regulations*, 64 FR 35714, 1999 WL 438259.

25 ¹⁴ 40 C.F.R. § 51.300(b)(3).

26 ¹⁵ 40 C.F.R. §51.301.

¹⁶ 40 C.F.R. §51.308(e)(1).

1 If a state elects to address emissions under §308(e)(1), it must conduct a statutorily-
2 prescribed analysis to determine BART for each source found to be subject to BART. This
3 analysis is based on the four factors of the reasonable progress determination described above,
4 but includes one additional factor. To determine BART for a BART-subject source, states must
5 evaluate costs of compliance, the energy and non-air quality environmental impacts of
6 compliance, any existing pollution technology in use at the source, the remaining useful life of
7 the source, and the degree of improvement in visibility that may reasonably be anticipated to
8 result from the use of such technology.¹⁷ Once a state has made its BART determination for a
9 BART-subject source, the BART controls must be installed and in operation as expeditiously as
10 practicable, but no later than five years after the date the EPA approves the state's RH SIP.¹⁸

11 States choosing to address regional haze by implementing alternative measures under
12 §308(e)(2) must show that the alternative measures would achieve better reasonable progress
13 than would be achieved through the installation and operation of BART.¹⁹ The "better-than-
14 BART" test codified in §308 specifies that if emissions anticipated under the alternative program
15 will have a geographic distribution that is similar to what would be found under BART, states
16 can determine whether the alternative program is better than BART based on emissions alone.²⁰
17 If the geographic distribution of emissions under the BART alternative will be different than
18 what would be expected under BART, states must conduct visibility modeling and use a two-
19 prong test to determine whether the BART alternative would achieve results that are better than
20 BART.

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23 ¹⁷ 40 C.F.R. §51.308(e)(1)(ii)(A). (Note: This description is based on EPA's current application of its
BART rule, not on the rule applied between 1999 and 2002.)

24 ¹⁸ CAA §169(g)(4); 40 C.F.R. §51.308(e)(1)(iv).

25 ¹⁹ 40 C.F.R. §51.308(e)(2).

26 ²⁰ 40 CFR §308(e)(3).

1 Under the first prong of the better-than-BART test, a state must show that the alternative
2 program will not result in a degradation of visibility at any affected Class I area. Under the
3 second prong, a state must show that the alternative program will result in greater visibility
4 improvement overall, based on an average across all affected Class I areas.²¹ The baseline for
5 comparison is the visibility conditions as they are expected to be at the time of program
6 implementation, but in absence of the program.

7 Under this two-prong test, a state could design an alternative program under which some
8 sources' emissions will continue at pre-program levels, as long as the overall visibility at all
9 Class I areas at issue improves on average. However, a state's ability under section 308(e)(2) (or
10 §309) of the RHR to allow sources to emit pollutants without controls is impacted by 40 C.F.R.
11 §51.302(c) addressing "reasonable attributable" emissions. More specifically, in areas in which
12 a part of the visibility impairment is reasonably attributable to a single source or small group of
13 sources, a state may require such sources to install BART controls under 40 C.F.R §51.302, even
14 if the state concludes that such controls are not required under §308(e)(2).²²

15 **B. §309**

16 Nine western states have the option under 40 C.F.R. § 51.309 to adopt an emissions
17 reduction strategy for SO₂ for the 16 Class I areas on the Colorado Plateau that is based on the
18 GCTVC recommendations submitted to the EPA. The D.C. Circuit Court has described this
19 program as follows:

20 The [program based on the GCVTC recommendations] doesn't directly impose
21 restrictions on any sources. Rather, it sets various emission limitation
22 "milestones" that steadily decline over time. If sources in aggregate fail to meet
23 these milestones "voluntarily," a backstop emissions trading program will come
24 into force. Under it, sources may not emit the relevant pollutants in amounts

24 ²¹ 40 CFR §51.308(e)(3).

25 ²² Under §308(e)(2)(v), a state may include a provision in its § 309 SIP that the SO₂ emissions milestones
26 and backstop trading program have a "geographic enhancement" to address the §51.302(c) requirement
for BART for *reasonably attributable* impairment from SO₂ emissions covered by the provisions
addressing *regional haze* in the regional SO₂ milestones and backstop trading program.

1 exceeding their entitlements—which they will have received either via allotment
2 from the state or via trading.²³

3 The version of §309 adopted by the EPA in 1999 specified that the voluntary
4 reductions/backstop trading program option based on the GCVTC recommendations would only
5 be available to the nine states if the EPA received and approved an “Annex” to the GCVTC’s
6 final recommendations that included specific recommendations needed to translate the GCVTC’s
7 general recommendations into an enforceable regulatory program. Such an Annex was
8 submitted to the EPA in 2000 and the EPA approved it in 2003.²⁴ The Annex included
9 qualitative emissions reductions milestones that states would have to meet under §309 to avoid
10 triggering the backstop emissions trading program.²⁵

11 **3. Interruption in implementation of RHR.**

12 In 2002, the U.S. Court of Appeals for the D.C. Circuit struck a portion of the RHR
13 relating to implementation of BART.²⁶ Specifically, the Court rejected the EPA’s requirement
14 that states find a source is subject to BART if the source’s emissions, when combined with
15 emissions from other sources, may impair visibility at Class I areas. The Court also struck the
16 provision of §308 requiring states to impose BART if the five-factor BART analysis showed that
17 installation of BART, when combined with emission reductions at other sources, would
18 collectively improve visibility at Class I areas.²⁷ The Court held that while a state may choose to
19 rely on this type of collective contribution analysis, the EPA could not override a state’s
20 discretion and mandate that it do so.²⁸

21 ²³ *Center for Energy and Economic Development v. EPA*, 398 F.3d 653, 656 (D.C. Cir. 2005), citing *Acid*
22 *Rain Program: General Provisions and Permits, Allowance System, Continuous Emissions Monitoring,*
23 *Excess Emissions and Administrative Appeals*, 58 Fed. Reg. 3590 (Jan. 11, 1993).

24 ²⁴ *Revisions to the Regional Haze Rule to Incorporate Sulfur Dioxide Milestones and Backstop Emissions*
25 *Trading Program for Nine Western States and Eligible Indian Tribes within that Geographic Area*, 68 FR
26 33764, 2003 WL 21280718.

27 ²⁵ *Id.*

28 ²⁶ *American Corn Growers v. EPA*, 291 F.3d 1 (D.C. Cir. 2002).

²⁷ *Id.* at 4-5.

²⁸ *Id.* at 6-9.

1 In a subsequent opinion, the D.C. Circuit Court rejected provisions §308(e)(2), §309, and
2 the Annex that incorporated the collective contribution flaw identified by the Court in its opinion
3 striking a portion of §308(e)(1).²⁹ These rejected provisions include the Annex’s quantitative
4 emissions milestones that had been incorporated into §309 SIPs submitted by Wyoming and four
5 other states in 2003.³⁰

6 **4. Regional Haze Rule revisions in 2005 and 2006.**

7 The EPA addressed the Court’s rulings in revisions to §308(e)(1) adopted in 2005 and
8 revisions to §308(e)(2) and §309 adopted in 2006.³¹ The 2005 revisions amended §308(e)(1)
9 and the EPA’s “BART Guidelines” to eliminate the requirement that states use the “collective
10 contribution analysis” and provide states additional guidance on how to perform the BART
11 analysis. In the EPA’s 2006 amendments to the rules regarding alternative programs found in
12 §308(e)(2) and §309, the EPA revised provisions describing the analysis that states must do to
13 determine emissions reductions achievable by BART for purposes of the better-than-BART
14 comparisons required for an alternative program.

15 Under the 2006 revisions, states have the option to determine the BART benchmark for
16 their alternative measures by conducting the source-by-source analysis required under
17 §308(e)(1). States may also establish BART benchmarks based on an analysis that includes
18 simplifying assumptions about BART control levels for sources within a source category. Those
19 simplifying assumptions can be based on the presumed emissions standards for BART for

21 ²⁹ *Center for Energy and Economic Development v. EPA, supra*, 398 F.3d at 659-60 (holding §309
22 compliance milestones intended to measure better-than-BART progress were impermissibly based on the
23 collective contribution BART analysis struck in *American Corn Growers, supra*, 291 F.3d at 7).

24 ³⁰ *Id.*

25 ³¹ See *Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART)*
26 *Determinations*, 70 FR 39104, 2005 WL 1551591; *Regional Haze Regulations; Revisions to*
Provisions Governing Alternative to Source-Specific Best Available Retrofit Technology (BART)
Determinations, 71 FR 60612, 2006 WL 2918149.

1 different source categories (“presumptive BART”) that the EPA adopted in its *Guidelines for*
2 *Best Available Retrofit Technology (BART) Determinations*.³² Presumptive BART for SO₂
3 emissions for coal-fired EGUs with a capacity greater than 200 MW at power plants with a total
4 generating capacity in excess of 750 MW that do not have existing controls is an emission rate of
5 0.15 lb SO₂/mmBtu.³³

6 **b. Reasonable progress goals.**

7 As discussed above, the CAA requires that states demonstrate reasonable progress
8 towards the national goal of achieving natural visibility conditions in Class I areas. Because the
9 national goal is expressed in terms of air quality (i.e., visibility), the EPA specifies that
10 quantitative tracking of visibility impairment is an integral element of measuring reasonable
11 progress. The EPA requires that visibility targets and tracking of visibility changes over time be
12 expressed in terms of “deciviews.” “The deciview is an atmospheric haze index that expresses
13 uniform changes in haziness in terms of common increments across the entire range of visibility
14 conditions, from pristine to extremely hazy conditions. Because each unit change in deciview
15 represents a common change in perception, the deciview scale is like the decibel scale for
16 sound.”³⁴ The EPA has also stated that tracking emissions reductions is an important component
17 of the regional haze program because tracking emissions will provide a good indicator of
18 whether adopted measures are reducing emissions and therefore, provide a useful indicator of
19 progress in reducing visibility impairment.³⁵

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23 ³² *Revisions to Provisions Governing Alternative to Source-Specific Best Available Retrofit Technology*
24 *(BART) Determinations, supra*, 71 FR at 60612, citing 40 C.F.R. §51, appendix Y.

25 ³³ *Regional Haze Guidelines for Best Available Retrofit Technology (BART) Determinations, supra*, 70
26 FR 39104, 2005 WL 1551591 at 48.

³⁴ *Regional Haze Regulations, supra*, 64 FR 35714, 35724 (citations omitted).

³⁵ *Id.*

1 c. **State implementation plans (SIPs).**

2 The vehicle for ensuring continuing progress towards achieving the natural visibility goal
3 is the states' submission of a series of regional haze SIPs that establish distinct reasonable
4 progress goals (RPGs) for improving visibility for the "best" and "worst" days for Class I areas.
5 In setting RPGs, States must consider the rate of progress needed to reach natural visibility
6 conditions by 2064 (referred to as the "uniform rate of progress" (URP) or the "glidepath") and
7 the emission reduction measures needed to achieve that rate of progress over the 10-year period
8 of the SIP. Uniform progress towards achievement of natural conditions by the year 2064
9 represents a rate of progress that states are to use for analytical comparison to the amount of
10 progress they expect to achieve. In setting RPGs, each state with one or more Class I areas must
11 consult with potentially contributing states that may affect visibility impairment at the state's
12 Class I area.³⁶

13 **§309 RH SIPs Requirements**

14 §309 SIPs must include a projection of the anticipated improvement in visibility
15 expressed in deciviews through the year 2018, based on the application of all §309 control
16 strategies.³⁷ A §309 SIP must include:

- 17 (1) Projection of visibility improvement obtained by the SIP by 2018 in each Class I area
18 within the state;
- 19 (2) Comprehensive tracking strategies for "clean-air corridors to ensure visibility does
20 not degrade on the least-impaired days at any of the 16 Class I areas;
- 21 (3) Provisions for stationary source SO₂ emissions reductions, including:
22 (a) Quantitative emission milestones for stationary source SO₂ emissions for
23 each year through 2018 that provide progress that would be better than
24 achieved by application of BART and that provide for steady and continuing
25 emissions reductions through 2018 consistent with the GCVTC's definition of

26 ³⁶ 40 C.F.R. §51.308(d)(1)(iv). *See e.g., Approval, Disapproval and Promulgate of
Implementation Plans; State of Wyoming; Regional Haze State Implementation Plan; Federal
Implementation Plan for Regional Haze (NOPR), 77 FR 33022, 2012 WL 1965273.*

27 ³⁷ 40 C.F.R. §51.309(d)(2).

1 reasonable progress and goal of 50 to 70 percent reduction in SO₂ emissions
from 1990 actual emission levels by 2040;

2 (b) Documentation of emissions calculation methods for SO₂;

3 (c) Monitoring, recordkeeping and reporting of SO₂ emissions that are sufficient
4 to allow the state to annually determine whether the milestone for each year
through 2018 is achieved;

5 (d) Criteria and procedures for a market trading program that is activated if an
6 annual milestone is not achieved; and

7 (e) Framework, including financial penalties for excess emissions based on the
8 2018 milestone sufficient to ensure that the 2018 milestone will be met even if
the implementation of the market trading program has not yet been triggered
9 or the source allowance compliance provision of the trading program is not in
effect in 2018;

10 (4) Provisions for stationary source emissions of NO_x and PM under either §308(e)(1)
11 (BART) or §308(e)(2) (BART alternative);

12 (5) Provisions related to mobile sources;

13 (6) Programs related to fire;

14 (7) Assessment of road dust and emission reduction strategy, if needed;

15 (8) Programs related to pollution prevention; and

16 (9) Implementation of any additional recommendations of the GCVTC that can be
17 practicably included as enforceable emissions limits to make reasonable progress
toward remedying existing and preventing future regional haze in the 16 Class I areas
on the Colorado Plateau.

18 States proceeding under §309 must create milestones that provide for steady and
19 continuing emissions reductions through 2018, consistent with the GCVTC's goal of 50-70
20 percent reduction in SO₂ emissions levels between 1990 and 2040, and achieve greater
21 reasonable progress than would be achieved by BART.³⁸ In comparison, states proceeding
22 under §308(e)(2) must show that their programs will obtain reasonable progress toward the
23 national goal of natural visibility conditions in Class I areas by 2064 and that their programs
24 achieve results that are better than BART.³⁹

25 _____
26 ³⁸ 40 C.F.R. §51.309(d)(4)(i).

³⁹ 40 C.F.R. §51.308(d).

1 In order to ensure consistency, the EPA requires that states opting to reduce emissions
2 under §309 must adopt rules that are substantively equivalent to the rules of the model backstop
3 trading program developed by the Western Regional Air Partnership (WRAP).⁴⁰ The trading
4 program must be implemented no later than 15 months after the end of the first year that the
5 milestone is exceeded, require that sources hold allowances to cover their emissions, and provide
6 a framework, including financial penalties, to ensure that the 2018 milestone is met.⁴¹

7 Under §309(d)(10), participating states must submit to the EPA progress reports in the
8 form of SIP revisions in 2013 and 2018. Each state's progress reports must include an
9 evaluation of Class I areas affected by the state's emissions. At the time the state submits its
10 progress reports to the EPA, it must also take an action based on the outcome of the assessment
11 in the report. If the assessment shows the SIP is adequate and requires no substantive revision,
12 the state must submit to EPA a "negative declaration" statement saying that no further SIP
13 revisions are necessary at this time. If the assessment shows that the SIP is or may be inadequate
14 to meet the 2018 milestone due to emissions within the state, the state must develop additional
15 strategies to address the deficiencies and revise the SIP within one year from the due date of the
16 progress report.⁴²

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⁴⁰ WRAP was formed to implement the 1996 GCVTC Report. *See e.g., Proposed Revisions to Regional*
22 *Haze Rule to Incorporate Sulfur Dioxide Milestones and Backstop Emissions Trading Program for Nine*
Western States (NOPR), 67 FR 30418, 2002 WL 848905.

23 ⁴¹*See e.g., Approval and Promulgation of State Implementation Plans; New Mexico; Regional*
24 *Haze Rule Requirements for Mandatory Class I Areas (NOPR)*, 77 FR 36044-01, 2012 WL
2152963.

25 ⁴² *See Approval and Promulgation of State Implementation Plans; State of Wyoming; Regional Haze Rule*
26 *Requirements for Mandatory Class I Areas (NOPR)*, 77 FR 30953, 2012 WL 1865152.

1 To the extent a state adopts a strategy that meets the requirements of §309, the EPA will
2 deem that the state's SIP meets the requirement under 42 U.S.C. §7491(b)(2) that it (the SIP)
3 contains measures necessary to make reasonable progress toward the national goal.⁴³

4 **d. Wyoming programs**

5 **1. Wyoming's §309 SIP**

6 In 2003, Wyoming submitted to the EPA a §309 RH SIP noting its adoption of the
7 Western Backstop (WEB) Sulfur Dioxide Trading Program. Wyoming submitted a revised
8 version in November 2008 in response to the EPA's invitation to resubmit RH SIPs after the
9 EPA revised the RHR to respond to the D.C. Circuit Court's 2002 and 2004 opinions striking
10 portions of the rule. After Wyoming submitted an additional revision in 2011, the EPA issued a
11 Notice of Proposed Rulemaking (on May 24, 2012) proposing to approve, with a few exceptions,
12 Wyoming's April 2011 and January 2012 SIP revisions relating to Emission Trading Program
13 Regulations relating to the 16 Class I areas. The EPA noted that these revisions replace and
14 supersede RH SIPS submitted on December 24, 2003, May 27, 2004, and November 21, 2008.⁴⁴
15 On November 13, 2012, the EPA issued its final rule adopting Wyoming's section 309 SIP. The
16 final rule will be effective 30 days after the rule is published in the federal register, which has not
17 yet occurred.

18 Wyoming's current §309 RH SIP includes a regional SO₂ milestone and backstop trading
19 program with the following elements:

20 ///

21 ///

22 _____
23 ⁴³ The "better-than-BART" showing is an element of a §309 RH SIP. A §309 SIP that makes this
24 showing, and that meets all the other requirements of §309, will be deemed to have measures necessary to
25 make reasonable progress toward the national goal. 40 C.F.R. §51.309(a).

26 ⁴⁴ *Approval and Promulgation of State Implementation Plans; State of Wyoming; Regional Haze Rule
Requirements for Mandatory Class I Areas (NOPR)*, 77 FR 30953, 2012 WL 1865152.

1 **A. SO₂ emissions reductions milestones**

- 2 • Regional year-by-year SO₂ emission milestones, from 2003 through 2018, for the three
3 participating states based on emissions for electric generating units (EGUs), non-EGUs,
4 and new sources;
- 5 • SO₂ milestone calculations based on the assumption that emissions of EGUs are no greater
6 than the presumptive BART limit established by the EPA (0.15 lb/MMBtu);
- 7 • Requirement that sources covered by the SIP monitor, record, report SO₂ emissions;
- 8 • Requirement that all sources have Title V permit that incorporates the pre- and post-
9 trigger requirements of the regional SO₂ milestone and backstop trading program;⁴⁵
- 10 • Requirement that the three participating states (Wyoming, New Mexico, and Utah)
11 perform pre-trigger tracking of total SO₂ emissions to measure performance against the
12 year-by-year milestones. This SO₂ emission tracking is for actual emissions, which
13 reflects impacts from the recession and other factors that weren't considered in the
14 estimates used to establish the milestones;
- 15 • Requirement that three participating states meet in March 2014 for Implementation
16 Assessment to review information regarding visibility improvement in Class I areas and
17 total emissions reductions to determine whether an early trigger of the backstop trading
18 program is needed to ensure the states will meet 2018 milestone. This "consensus trigger"
19 would cause the trading program to be in place in 2018;
- 20 • Special penalty provision to be applied to sources whose emissions exceed the 2018
21 milestone in 2018 (or in a subsequent year if a SIP revision addressing the period post-
22 2018 is not submitted). Any source whose emissions exceed the 2018 milestone in 2018
23 or any subsequent year, will be required to pay a penalty equal to \$5000 per ton of SO₂
24 emission for each ton the source exceeds its 2018 limit until the backstop trading program
25 is effective; and
- 26 • Requirement that the backstop trading program must be initiated within 15 months if
annual milestone is exceeded.

19 **B. Backstop trading program**

- 20 • Allocation of SO₂ emission allowances to each source that are placed in a "bank";

21 ⁴⁵ See page 37 of Wyoming's §309 RH SIP:

22 It is expected that all WEB sources will at least initially be subject to Wyoming's Title V
23 permitting requirements. Under Chapter 6, Section 3, Wyoming's approved Title V
24 permitting program, the pre- and post-trigger requirements of the market trading program
25 fall under the definition of "applicable requirements", and will be incorporated into each
26 source's Title V permit. Chapter 6, Section 3 requires that any source that for any reason
and at any time is not required to have a permit under Chapter 6, Section 3 must obtain a
New Source Review permit pursuant to Chapter 6, Section 2 et seq. that incorporates the
pre- and post-trigger requirements. Both types of permits are enforceable federally and
by citizens pursuant to Wyoming's SIP.

- Requirement that if the trading program is triggered, each source must have allowances to cover its SO₂ emissions each year; and
- Imposition of a penalty equal to three times the insufficient allowance if a source does not have enough allowances for SO₂ emissions in a given year.

2. Enforcement mechanisms related to regional SO₂ emissions milestones and backstop trading program.

As discussed above, the regional SO₂ milestones and backstop trading program is based on the assumption that sources will voluntarily reduce SO₂ emissions in order to avoid more stringent, and presumably more costly, mandatory emissions controls. In its final action partially approving Wyoming's §309 RH SIP, the EPA relies on this assumption to conclude that voluntary emissions reductions will obtain results that are better than BART. The EPA notes, [i]f the SO₂ milestone is exceeded, the trading program will be activated. Under this framework, sources that would otherwise be subject to the trading program have incentives to make independent reductions to avoid activation of the trading program."⁴⁶ EPA also notes in its final action partially approving Wyoming's §309 SIP that its "determination that the 2018 SO₂ milestone and other design features of the §309 SIP will achieve greater reasonable progress than would be achieved through BART is based on our understanding of how the SIP will promote and sustain emission reductions of SO₂ as measured against a milestone. Sources will be actively mindful of the participating states' emissions inventory and operating to avoid exceeding the milestone, not trying to maximize their emissions to be equivalent to the milestone[.]"⁴⁷

Because the SO₂ emissions reductions required to meet the milestones are voluntary, there are few penalty provisions incorporated into the regional SO₂ milestone phase of the milestone and backstop trading program, other than the triggering of the backstop trading

⁴⁶ *Approval and Promulgation of State Implementation Plans; State of Wyoming; Regional Haze Rule Requirements for Mandatory Class I Areas under 40 CFR 51.309; See Attachment at 16.*

⁴⁷ Attachment at 17.

1 program if the emissions milestones are exceeded.⁴⁸ One exception is that if the backstop trading
2 program is triggered by excess emissions in a year prior to 2018 or in 2018, and the first control
3 period of the backstop trading program is not in place in 2018, a source will receive monetary
4 penalties for 2018 emissions that exceed the source's allowance for 2018.⁴⁹ And finally, the
5 emissions monitoring, recordkeeping, and reporting requirements in the regional SO₂ milestones
6 and backstop trading program are federally enforceable requirements under Title V of the CAA.

7 **e. CCA Title V Permit Program**

8 Congress' 1990 amendments to the CAA included a comprehensive permitting program
9 under which all major sources of air pollution must obtain "operating permits" that contain
10 emission limitations and under conditions to ensure compliance with air quality control
11 standards.⁵⁰ Each permit is source specific and includes all the clean air requirements applicable
12 to that particular source.⁵¹

13 Under Title V, operating permits must include monitoring, record keeping, reporting, and
14 conditions that are necessary to ensure compliance with CAA requirements.⁵² To that end, each
15 permit must include a "schedule of compliance" and if a source is out of compliance when the
16

17
18 ⁴⁸ See 40 C.F.R. §51.308(e)(2)(i)(B)(States do not have impose federally enforceable emission
19 limitation on a BART-eligible source if the source is subject to the requirements of the state's
20 alternative program allowed under 40 C.F.R. §51.308(e)(2)).

21 ⁴⁹ See WAXSR Chapter 14, Section 2(l) "Special Penalty Provisions for the 2018 Milestone."
22 For purposes of assessing the special penalty provisions related to exceeding the 2018 milestone,
23 sources will receive "allowances" for 2018 and subsequent years until the backstop trading
24 program is in effect, or the regional 2018 milestone is met, and will receive monetary penalties
25 for violating these allowances.)

26 ⁵⁰ CAA Title V. See also 40 C.F.R §70, *Sierra Club v. Johnson*, 436 F.3d 1268, 1272 (11th Cir. 2006).

⁵¹ *Sierra Club v. Ga. Power Co.*, 443 F.3d 1346, 1348-49 (11th Cir. 2006), citing *Operating
Permit Program*, 57 Fed. Reg. at 32250 (codified at 40 C.F.R. §70).

⁵² 42 USC §7661c(a).

1 permit is issued, the permit must also include a “schedule of remedial measures, including an
2 enforceable sequence of actions. . . leading to compliance.”⁵³ 40 U.S.C. §7661c(a) specifies,

3
4 Each permit issued under this subchapter shall include enforceable emission
5 limitations and standards, a schedule of compliance, a requirement that the
6 permittee shall submit to the permitting authority, no less often than every 6
7 months, the results of any required monitoring, and such other conditions as are
8 necessary to assure compliance with applicable requirements of this chapter,
9 including the requirements of the applicable implementation plan.

10 In order to carry out Title V, Congress called on the states to design and enforce their
11 own permitting programs and submit these programs to the EPA for final approval.⁵⁴ Permits
12 issued under a state’s EPA-approved Operating Permit Programs are federally enforceable.
13 Enforcement of an operating permit can be initiated with an EPA-issued violation notice.⁵⁵ 42
14 U.S.C. §7413 authorizes the EPA to issue a violation notice,

15 [w]henever, on the basis of any information available to the Administrator, the
16 Administrator finds that any person has violated or is in violation of any
17 requirement or prohibition of an applicable implementation plan or permit, the
18 Administrator shall notify the person and the State in which the plan applies of
19 such finding. 42 U.S.C. §7413(a)(1). Thirty days after the issuance of a violation
20 notice, the statute authorizes the EPA to bring a civil action seeking injunctive
21 relief and the imposition of civil fines. cite: 7413(a)(1)(c), (b), or issue an
22 administrative penalty. 7413(a)(1)(cite)

23 Further, “any person” can bring a citizen suit against alleging a violation of “any
24 emission standard or limitation . . . any other standard, limitation, or schedule
25 established under any permit issued pursuant to title V, . . . and permit term or
26 condition, and any requirement to obtain a permit as a condition of operations.”⁵⁶

27 1. Wyoming Title V Operating Permit Program

28 In 1995, the EPA granted interim approval to Wyoming’s Title V Operating Permits
29 Program.⁵⁷ The EPA found that Wyoming’s Operating Permit Program, found in the Wyoming

30
31 _____
32 ⁵³ 40 C.F.R. §70.5(c)(8)(iii). See also 42 U.S.C. §7661(3), 40 C.F.R. §§70.6(c), (c)(3).

33 ⁵⁴ 42 U.S.C. §7661a.

34 ⁵⁵ 42 U.S.C. §7413

35 ⁵⁶ 42 U.S.C. §7604(f)(4).

36 ⁵⁷ *Clean Air Act Final Interim Approval of Operating Permits Program; State of Wyoming*, 60 FR 3766.

1 Environmental Quality Act (WEQA) and Section 30 of the Wyoming Air Quality Standards and
2 Regulations (WAQSR), substantially met the requirements of many, but not all, of the
3 requirements for permit program in 40 C.F.R. §70.⁵⁸ One of the requirements not met was that
4 corporate officers, directors or agency be held strictly liable for permit violations. The EPA
5 noted that 40 CFR §70.11(a)(3) provides that states Operating Permit Programs contain the
6 enforcement authority,

7 [t]o assess or sue to recover in civil court penalties * * * according to the
8 following: (1) Civil Penalties shall be recoverable for the violation of any
9 applicable requirement; any permit condition; any fee or filing requirement; any
10 duty to allow or carry out inspection, entry or monitoring activities or, any
11 regulations or orders issued by the permitting agency. These penalties shall be
12 recoverable in a maximum amount of \$10,000 per day per violation. State law
13 shall not include mental state as an element of proof for civil violations.

14 Wyoming revised its Operating Permit Program to address the infirmities identified by
15 the EPA, including the infirmity discussed above. The EPA's final approval of
16 Wyoming's Operating Permit Plan became effective on April 23, 1999.⁵⁹

17 **2. CAA permits for Jim Bridger Unit 3.**

18 *Operating Permit:* Wyoming issued an operating permit to PacifiCorp for the Jim
19 Bridger Coal Plant in 2006. The operating permit required PacifiCorp to limit emissions of SO2
20 to 0.3 lbs/mmBTU.

21 *BART Permit:* In 2006, Wyoming directed electric generating unit owners to submit a
22 BART analysis for each plant determined to be subject to BART. Wyoming ultimately issued a
23 BART Permit for the Jim Bridger Unit 3 that includes the following requirements:

24 PacifiCorp shall modify their Operating Permit in accordance with Chapter 6,
25 Section 9(e)(vi) and Chapter 6, Section 3 of the WAQSR. (DEQ Letter to
26 PacifiCorp December 31, 2009).

27 ⁵⁸ *Id.*

28 ⁵⁹ *Clean Air Act Full Approval of Operating Permit Program; Approval of Expansion of State Program
Under Section 112(I); State of Wyoming*, 64 FR 8523.

1 PacifiCorp shall comply with all requirements of the Regional SO₂ Milestone and
2 Backstop Trading Program in accordance with Chapter 14, Sections 2 and 3, of
3 the WAQSR.

4 As discussed above, any pre-trigger emissions reductions contemplated by Wyoming's
5 SIP are voluntary under the regional SO₂ milestone and backstop trading program and thus, are
6 not incorporated into Bridger's operating permit by virtue of the conditions excerpted above. In
7 contrast, the SO₂ monitoring, recordkeeping, and reporting requirements of the regional SO₂
8 milestones program are incorporated into the operating permit for Unit 3.

9 Notwithstanding, the operating permit for Bridger Unit 3 currently has an SO₂ emissions
10 limit of 0.15 lb/mmBTU as a consequence of installing the Scrubber Upgrade in 2011. This is
11 because this emissions limit was included as a condition of the construction permit that
12 PacifiCorp obtained to install the Scrubber Upgrade on Unit 3. If Bridger Unit 3's SO₂
13 emissions exceed this limit, the owners are subject to enforcement actions and penalties under
14 Title V of the CCA for violating the operating permit. The owners are also at risk that they will
15 be subject to more strict emissions controls under the regional SO₂ emissions milestones and
16 backstop trading program if the regional SO₂ milestone is triggered.

17 **f. Wyoming Section 309(g) SIP**

18 Wyoming submitted a §309(g) RH SIP on January 12, 2011. This SIP addresses
19 emission reduction for nitrous oxide NO_x emissions and direct PM (pollutants not covered by
20 Wyoming's compliance milestone and backstop trading program). The 309(g) RH SIP shows
21 that with respect to Jim Bridger Coal Plant Unit 3, Wyoming had concluded that the cost of a
22 Selective Catalytic Reduction catalyst (SCR) to comply with NO_x emissions reductions
23 requirements was high, and determined that "based on the cost of compliance and visibility
24 improvement presented by PacifiCorp in the BART applications for Jim Bridger Units 3 and 4
25 and taking into consideration the logistical challenge of managing multiple pollution control
26 installations within the regulatory time allotted for installation of BART for RHR, additional

1 controls would be required under the long term strategy (LTS) but not BART.”⁶⁰ Although
2 Wyoming did not conclude the SCR was BART for Unit 3 of Jim Bridger, Wyoming required
3 PacifiCorp to install SCR, or other NOx control systems, to achieve the necessary emission
4 reduction no later than December 31, 2015.⁶¹

5 On June 4, 2012, the EPA issued notice of a proposed rule proposing to partially approve
6 and partially disapprove Wyoming’s §309(g) SIP.⁶² The EPA disagreed with Wyoming’s
7 conclusion that a SCR is not BART for Jim Bridger Unit 3. The EPA found that Wyoming is
8 requiring PacifiCorp to install the LTS controls (the SCR) within the time line that BART
9 controls would have to be installed under 40 CFR §51.308(e)(iv), and proposed to approve
10 Wyoming’s compliance schedule and emission limit for Jim Bridger as meeting the BART
11 requirements for NOx emissions reductions.⁶³ With respect to PM, Wyoming determined that
12 the existing controls on Jim Bridger Unit 3 were reasonable for BART. The EPA agreed.

13 II. Argument.

14 a. Idaho Power’s investment in the Scrubber Upgrade is prudent.

15 As discussed in Staff testimony and the prehearing brief, Staff has concerns regarding
16 infirmities in the process Idaho Power used to decide to invest in the Scrubber Upgrade.
17 Nonetheless, Staff concludes that Idaho Power’s investment is prudent because an objectively
18 reasonable utility would have invested in the Scrubber Upgrade, given the information that was
19 known or knowable at the time the investment decision was made and at the time the Scrubber
20 Upgrade installed.

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22

23 ⁶⁰ Wyoming §309(g) SIP.

24 ⁶¹ *Id.*

25 ⁶² *Approval, Disapproval and Promulgation of Implementation Plans; State of Wyoming; Regional Haze*
26 *State Implementation Plan; Federal Implementation Plan for Regional Haze (NOPR) 77 FR 33022, 2012*
WL 1965273.

⁶³ *Id.*

1 CUB, opposes inclusion of the Scrubber Investment in rate base, asserting in its
2 prehearing brief that Idaho Power “was imprudent and that its imprudence stems from three
3 separate acts.” Specifically, CUB asserts that Idaho Power (1) delegated its management of the
4 plant to another utility and allowed the utility to make all the decisions regarding the Scrubber
5 Upgrade; (2) allowed clean-air investments to be made without consideration of the least-
6 cost/least-risk strategies known to Idaho Power through its experience with the Boardman plant;
7 and (3) delegated defense of this matter to the entity that failed to make the prudent decisions at
8 the unit.⁶⁴ As already discussed, the Commission applies an objective reasonableness standard to
9 determine the prudence of the Scrubber Upgrade investment. While Idaho Power’s alleged
10 delegation of its defense to PacifiCorp in this docket may be pertinent to whether Idaho Power
11 carries its burden of proof, it is not pertinent to whether the Scrubber Upgrade investment itself
12 is prudent.

13 In any event, Staff does not agree that Idaho Power delegated its defense of the
14 investment. Idaho Power submitted testimony regarding its pre-decision activities and the
15 rational for its decision.⁶⁵ Idaho Power does rely on analysis conducted by PacifiCorp,
16 particularly the PVR(d) analysis, to show what information was reasonably known at the time
17 of the investment. However, Staff does not agree that it was imprudent for Idaho Power to rely
18 on this analysis rather than do independent but identical analysis.

19 Like CUB, Staff identified infirmities in Idaho Power’s pre-investment decision-making
20 process. However, the evidence presented in this docket and in Docket No. UE 246 (and
21 incorporated in this docket) shows that analysis that was done prior to the time PacifiCorp and
22 Idaho Power decided to proceed with the Scrubber Upgrade established a large economic benefit
23 to ratepayers from the investment. This benefit leads to the conclusion that a reasonable utility
24 would have proceeded with the Scrubber Upgrade. Even though Idaho Power did not do this

25 _____
26 ⁶⁴ CUB Pre-Hearing Brief at 17.

⁶⁵ Idaho Power/1300, Carstensen/4-8.

1 analysis, or know about it, the investment is appropriately included in Idaho Power's ratebase
2 under the Commission's standard for determining prudence.

3 CUB's allegation regarding what it identifies as Idaho Power's third "imprudent act"—
4 Idaho Power's failure to consider the least-cost/least-risk strategy of asking regulators to
5 conclude that early closure of a plant can be BART—is not directly on point because Wyoming
6 implemented the RHR under a BART-alternative. To the extent that CUB's arguments can be
7 interpreted as arguments that Idaho Power's investment was imprudent because Idaho Power did
8 not explore whether Wyoming's RHR plan would allow a more economically beneficial
9 compliance option for Bridger Unit 3 than installation of the Scrubber Upgrade in 2011, Staff
10 does not think the arguments are well taken.

11 Under 40 C.F.R. §51.308(e)(2)(i), all BART-eligible sources must be subject to the
12 requirements of the regional SO₂ milestones and backstop trading program or be subject to
13 BART.⁶⁶ Accordingly, the emissions of each BART-eligible sources would either have been
14 included in the calculation of the regional SO₂ milestones or subject to BART under §308(e)(1).

15 Notably, it does appear that Wyoming had authority to establish an emissions level other
16 than presumptive BART for Bridger Unit 3 (for purposes of calculating the SO₂ milestones) if
17 Bridger Unit 3 was to be retired in a "short period of time." More specifically, in the preamble
18 to the RHR adopted in 1999, the EPA explained states' flexibility to arrive at an estimate of
19 emissions for purposes of showing that an alternative program would be better than BART:

20 To simplify the process of arriving at an estimate of emissions, EPA
21 believes that one approach that would be acceptable in place of a source by source
22 BART analysis would be to consider some of the BART factors on a category-
wide basis. * * *

23 ⁶⁶ The EPA explains in its 2006 preamble to revisions to §§308(2)(e) and 309 that §308(e)(2)(i)
24 is intended to address emissions shifting and explains the rule as follows: "We are therefore
25 finalizing in this rule that States must require that each BART-eligible source in the State either
26 participate in a BART alternative program, or alternatively, be subject to the case-by-case BART
requirements under section 51.308(e)(1). In other words, States are not required to include each
BART-eligible source in a source category in an alternative program; however, any BART-
eligible sources not included in the alternative program would remain subject to the general
requirements governing BART sources." 71 FR at 50512, 2006 WL 2918149 at p 15.

1 Alternatively, EPA believes it may be appropriate for the State to combine
2 a category-wide BART assessment with a source-specific assessment for certain
3 resources. For example, if a State can verify that a source will be retired within a
4 short period of time, it could take this into account in determining BART-level
5 emissions reductions for that facility while assessing the remaining sources
6 subject to BART on a category-wide basis.⁶⁷

7 However, even assuming that that Wyoming may have established an emissions limit for
8 Bridger Unit 3 (for purposes of calculating the regional SO₂ milestones) that was based on
9 PacifiCorp/Idaho Power's agreement to retire Bridger Unit 3 "a short period of time" from 2008-
10 09, the evidence in this record (the PVRR(d) analysis) shows that such an agreement would not
11 have benefitted customers.

12 As has been discussed extensively in this proceeding, prior to entering into the contract
13 for the Scrubber Upgrade, Idaho Power's co-owner of Jim Bridger Unit 3 compared the
14 economic benefit of installing the Scrubber Upgrade in 2011 to the economic benefit of
15 foregoing the upgrade and closing Unit 3 in 2008. This analysis included additional CAA
16 compliance costs associated with a SCR required by Wyoming's LTS for NO_x reductions. This
17 analysis established a very substantial economic benefit associated with continued operation of
18 the plant as opposed to early closure.⁶⁸ In response to CUB's concern that closure in 2008 was
19 an unrealistic assumption, PacifiCorp replicated the PVRR(d) analysis in its UE 246 ratecase,
20 assuming closure on December 2014, but otherwise using the data available in 2008. That
21 analysis showed a significant economic benefit from installing the clean air compliance
22 technology (Scrubber Upgrade and SCR) as opposed to idling the plant on December 31, 2014.⁶⁹

23 Furthermore, to the extent that PacifiCorp and Idaho Power may have asked Wyoming to
24 subject Jim Bridger Unit 3 to BART under §308(e)(1) and a proposal like PGE's Boardman

25 ⁶⁷ *Regional Haze Regulations*, 64 FR at 35742.

26 ⁶⁸ UE 246 PAC/500, Teply/85, lines 8-11 (Idaho Power has asked that the ALJ take official
notice of this confidential testimony).

⁶⁹ Staff/1200, Colville/4, line 15- /6, line 4.

1 proposal (meaning a closure sometime in 2020-2025), Staff does not think it is reasonable to
2 expect that a utility would have followed PGE's lead in Oregon vis-à-vis Boardman during the
3 time period when Wyoming was establishing the regional SO₂ milestones.

4 In any event, Idaho Power and PacifiCorp did not need Wyoming's authorization to not
5 install the SO₂ controls or delay installing them. Emissions reductions under the regional SO₂
6 milestones program and backstop trading program are voluntary until the backstop trading
7 program is triggered or the 2018 milestone is exceeded, or both. Notwithstanding, Staff
8 concludes that Idaho Power was prudent for going forward with the emissions reduction at
9 Bridger Unit 3 to help ensure the regional SO₂ milestones were met. This course of action
10 limited risk that the backstop trading program would be triggered, possibly made Bridger Unit 3
11 eligible for early reduction bonus allocations in the event the backstop trading program was
12 triggered, and thus was consistent with the underlying assumptions of Wyoming's §309 SIP.

13 In its rule adopting Wyoming's 309 SIP, the EPA rejected concerns that Wyoming's
14 program based on emissions reductions to presumptive BART would achieve results equal to
15 BART as opposed the statutorily-required better-than-BART results. The EPA noted, "[s]ources
16 will be actively mindful of the participating states' emissions inventory and operating to avoid
17 exceeding the milestone, not trying to maximize their emissions to be equivalent to the
18 milestone[.]"⁷⁰ The suggestion that Idaho Power and PacifiCorp should have attempted to
19 maximize their emissions to attempt to maximize economic benefit to customers is directly at
20 odds with what the EPA says is an underpinning of Wyoming's voluntary reduction program.

21 Further, the EPA concluded that emissions reductions under Wyoming's regional SO₂
22 milestones program would be better than emissions reductions achieved by BART in part
23 because the program incents early reductions. The EPA notes in its rule approving portions of
24 Wyoming's §309 SIP, "the trading program was designed to encourage early reductions by
25

26 ⁷⁰ *Approval and Promulgation of State Implementation Plans; State of Wyoming; Regional Haze Requirements for Mandatory Class I Areas under 40 CFR 51.309*; Attachment at 17.

1 providing extra allocations for sources that made reductions prior to the program trigger year.”⁷¹
2 Under Wyoming’s §309 SIP, “early reductions” are reductions that take place between 2008 and
3 the program trigger year and that reduce emissions to a level that is below best available control
4 technology.”⁷² According to the January 2007 BART analysis for Jim Bridger Unit 3 conducted
5 by CH2M Hill, the Scrubber Upgrade was BART (at that time) and would achieve SO₂ outlet
6 emissions rate of 0.10 lb/mmBTU.⁷³ In contrast, presumptive BART for Jim Bridger Unit 3 is
7 an emissions rate of 0.15 lb/mmBTU.⁷⁴

8 Finally, §309 and Wyoming’s SIP make clear that in 2013-14, the three participating
9 states will look at than total emissions to determine whether the backstop trading program should
10 be triggered. Wyoming’s SIP specifies that the three participating states will meet in 2014 for
11 an Implementation Review to evaluate their progress under the voluntary regional SO₂ milestone
12 program to determine whether the program is making “reasonable progress.”⁷⁵ In this
13 evaluation, Wyoming, Utah, and New Mexico will not only compare actual emissions with the
14 milestones, but will examine which sources have made voluntary emissions reductions, and will
15 evaluate the visibility conditions at the Class I areas.⁷⁶ The three participating states shall
16 decide through a consensus process whether an early trigger of the backstop trading program is
17 necessary to meet the SO₂ emissions reduction goals in 2018.⁷⁷

18 Given these underpinnings of Wyoming’s §309 SO₂ emissions reduction program, Staff
19 concludes that Idaho Power’s investment in the Scrubber Upgrade in 2011 to ensure that the SO₂

20

21 ⁷¹ *Approval and Promulgation of State Implementation Plans; State of Wyoming; Regional Haze Rule*
Requirements for Mandatory Class I Areas under 40 C.F.R. 51.309; Attachment at 17.

22 ⁷² WAQSR Chapter 14, Section 2(f)(v).

23 ⁷³ Staff/1000, Colville/3.

24 ⁷⁴ *Revisions to Provisions Governing Alternative to Source-Specific Best Available Retrofit Technology*
(BART) Determinations, supra, 71 FR at 60612, citing 40 C.F.R. §51, appendix Y.

25 ⁷⁵ Cite to Wyoming SIP.

26 ⁷⁶ 40 C.F.R. §51.309(10)(i).

⁷⁷ Wyoming SIP Section A4.3.

1 milestones are not exceeded was an investment a reasonable utility would make, based on the
2 information known or knowable at the time.

3 **b. The Scrubber Upgrade is used and useful.**

4 CUB asserts that the Scrubber Upgrade does not satisfy the requirements of ORS 757.355
5 because by itself, it does not bring Bridger Unit 3 into compliance with the CAA.⁷⁸ ORS
6 757.355 provides, in pertinent part:

7 [A] public utility may not, directly or indirectly, by any device, charge, demand,
8 collect or receive from any customer rates that include the costs of construction,
9 building, installation, or real or personal property not presently used for providing
utility service to the customer.

10 The Scrubber Upgrade at Bridger Unit 3 reduces its SO₂ emissions. The
11 emissions reductions helps Idaho Power to ensure that the regional SO₂ milestones
12 applicable in Wyoming and two other states are not exceeded, thus triggering the
13 possibility of more stringent emissions controls. Simply put, the Scrubber Upgrade is
14 reasonably necessary for the provision of utility service in that it helps to ensure
15 continued operation of Bridger Unit 3.

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⁷⁸ CUB Pre-Hearing Brief at 32-34.

The EPA Regional Administrator, James Martin, signed the following rule on 11/13/2012, and EPA is submitting it for publication in the Federal Register (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's FDSys website (<http://www.gpo.gov/fdsys/search/home.action>) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-R08-OAR-2011-0400. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52 -

EPA-R08-OAR-2011-0400; FRL-

Approval and Promulgation of State Implementation Plans; State of Wyoming; Regional Haze Rule Requirements for Mandatory Class I Areas under 40 CFR 51.309

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving Wyoming State Implementation Plan (SIP) revisions submitted on January 12, 2011 and April 19, 2012 that address regional haze. These SIP revisions were submitted to address the requirements of the Clean Air Act (CAA or Act) and our rules that require states to prevent any future and remedy any existing man-made impairment of visibility in mandatory Class I areas caused by emissions of air pollutants from numerous sources located over a wide geographic area (also referred to as the "regional haze program"). States are required to assure reasonable progress toward the national goal of achieving natural visibility conditions in Class I areas. EPA is taking this action pursuant to section 110 of the CAA.

DATES: This final rule is effective [insert date 30 days from the date of publication in the Federal Register]

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2011-0400. All documents in the docket are listed on the www.regulations.gov Web site. Publicly available docket materials are available either electronically through www.regulations.gov, or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129. EPA requests that if, at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the

docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Laurel Dygowski, Air Program, Mailcode 8P-AR, Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129, (303) 312-6144, dygowski.laurel@epa.gov

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

- i. The words or initials Act or CAA mean or refer to the Clean Air Act, unless the context indicates otherwise.
- ii. The initials BART mean or refer to Best Available Retrofit Technology.
- iii. The initials EGUs mean or refer to electric generating units.
- iv. The initials GCVTC mean or refer to the Grand Canyon Visibility Transport Commission.
- v. The initials NO_x mean or refer to nitrogen oxides.
- vi. The initials PM mean or refer to particulate matter.
- vii. The initials SIP mean or refer to State Implementation Plan.
- viii. The initials URP mean or refer to uniform rate of progress.
- ix. The initials WAQSR mean or refer to Wyoming Air Quality Standards and Regulations.

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- L. Background

The CAA requires each state to develop plans, referred to as SIPs, to meet various air quality requirements. A state must submit its SIPs and SIP revisions to us for approval. Once approved, a SIP is enforceable by the EPA and citizens under the CAA, also known as being federally enforceable. This action involves the requirement that states have SIPs that address regional haze.

A. Regional Haze

In 1990, Congress added section 169B to the CAA to address regional haze issues, and we promulgated regulations addressing regional haze in 1999. 64 FR 35714 (July 1, 1999), codified at 40 CFR part 51, subpart P. The requirements for regional haze, found at 40 CFR 51.308 and 51.309, are included in our visibility protection regulations at 40 CFR 51.300-309. The requirement to submit a regional haze SIP applies to all 50 states, the District of Columbia and the Virgin Islands. States were required to submit a SIP addressing regional haze visibility impairment no later than December 17, 2007. 40 CFR 51.308(b) and 40 CFR 51.309(c).

Wyoming submitted SIPs addressing regional haze on January 12, 2011 and April 19, 2012 (these superseded and replaced prior SIP submittals dated December 24, 2003, May 7, 2004, and November 21, 2008).

B. Lawsuits

In a lawsuit in the U.S. District Court for the District of Colorado, environmental groups sued us for our failure to take timely action with respect to the regional haze requirements of the CAA and our regulations for the State of Wyoming. As a result of this lawsuit, we entered into a consent decree. The consent decree requires that we sign a notice of final rulemaking addressing the regional haze requirements of 40 CFR 51.309 for Wyoming by November 14, 2012.¹ We are meeting that requirement with the signing of this notice of final rulemaking.

C. Our Proposal

We signed our notice of proposed rulemaking on May 9, 2012, and it was published in the federal register on May 24, 2012 (77 FR 30953). In that notice, we provided a detailed description of the various regional haze requirements. We are not repeating that description here; instead, the reader should refer to our notice of proposed rulemaking for further detail.

In our proposal, we proposed to approve Wyoming SIP revisions submitted on January 12, 2011 and April 19, 2012 that address the regional haze rule (RHR) for the mandatory Class I areas under 40 CFR 51.309. EPA proposed that the January 12, 2011 and April 19, 2012 SIPs meet the requirements of 40 CFR 51.309, with the exception of 40 CFR 51.309(d)(4)(vii), and 40 CFR 51.309(g), as explained below.

As part of the January 12, 2011 and April 19, 2012 SIPs, the State submitted revisions to the Wyoming Air Quality Standards and Regulations (WAQSR). The State submitted WAQSR

¹ The State submitted another SIP revision dated January 12, 2011 that addresses the requirements of 40 CFR 51.309(g) and 40 CFR 51.309(d)(4)(vii). We are under a consent decree deadline to take final action on this SIP by December 14, 2012. We will be taking final action on this SIP in a separate action.

Chapter 14, Sections 2 and 3 – *Emission Trading Program Regulations*. WAQSR Chapter 14, in conjunction with the SIP, implements the backstop trading program provisions in accordance with the applicable requirements of 40 CFR 51.308 and 40 CFR 51.309. We proposed to approve WAQSR Chapter 14, Section 2 and Section 3. The State also submitted WAQSR Chapter 10, Section 4 – *Smoke Management*. WAQSR Chapter 10, Section 4, in conjunction with the SIP, implements the requirements for smoke management under 40 CFR 51.309(d)(6). We proposed to approve WAQSR Chapter 10, Section 4.

The State's submitted another SIP revision dated January 12, 2011 that addresses the requirements under 40 CFR 51.309(d)(4)(vii) and 40 CFR 51.309(g) pertaining to best available retrofit technology (BART) for particulate matter (PM) and nitrogen oxides (NO_x) and additional Class I areas, respectively. EPA proposed action on this SIP in a separate notice (77 FR 33022). In addition, the January 12, 2011 and April 19, 2012 submittals we proposed to act on supersede and replace regional haze SIPs submitted on December 24, 2003, May 27, 2004, and November 21, 2008.

D. Public Participation

We requested comments on all aspects of our proposed action and provided a sixty-day comment period, with the comment period closing on July 23, 2012. We received comments on our proposed rule that supported our proposed action and that were critical of our proposed action. In this action, we are responding to the comments we have received, taking final rulemaking action, and explaining the bases for our action.

II. Final Action

In this action, EPA is approving Wyoming SIP revisions submitted on January 12, 2011 and April 19, 2012 that address the RHR requirements for the mandatory Class I areas under 40

CFR 51.309. EPA taking final action to find that the January 12, 2011 and April 19, 2012 SIPs meet the requirements of 40 CFR 51.309, with the exception of 40 CFR 51.309(d)(4)(vii), and 40 CFR 51.309(g).

As part of the January 12, 2011 submittal, the State submitted revisions to WAQSR. The State submitted WAQSR Chapter 14, Sections 2 and 3 – *Emission Trading Program Regulations*. We are approving WAQSR Chapter 14, Section 2 and Section 3. The State also submitted WAQSR Chapter 10, Section 4 – *Smoke Management*. We are approving WAQSR Chapter 10, Section 4. We are also approving Wyoming’s April 19, 2012 SIP submittal that contains the pre-trigger emission inventory requirements, which are covered by WAQSR Chapter 14, Section 3 – *Emission Inventory*.

III. Basis for Our Final Action

We have fully considered all significant comments on our proposal and have concluded that no changes from our proposal are warranted. Our action is based on an evaluation of Wyoming’s regional haze SIP submittal against the regional haze requirements at 40 CFR 51.300–51.309 and CAA sections 169A and 169B. All general SIP requirements contained in CAA section 110, other provisions of the CAA, and our regulations applicable to this action were also evaluated. The purpose of this action is to ensure compliance with these requirements. Our authority for action on Wyoming’s SIP submittal is based on CAA section 110(k).

We are approving the State’s regional haze SIP provisions because they meet the relevant regional haze requirements. The adverse comments we received concerning our proposed approval of the regional haze SIP pertained to our proposed approval of the SO₂ backstop trading program. However, the comments have not convinced us that the State did not meet the requirements of 40 CFR 51.309 that we proposed to approve.

IV. Issues Raised by Commenters and EPA's Responses

A. Backstop Trading Program

EPA has proposed to approve the SO₂ backstop trading program components of the RH SIPs for all participating states and has done so through four separate proposals: for the Bernalillo County proposal see 77 FR 24768 (April 25, 2012); for the Utah proposal see 77 FR 28825 (May 15, 2012); for the Wyoming proposal see 77 FR 30953 (May 24, 2012); finally, for the New Mexico proposal see 77 FR 36043 (June 15, 2012). National conservation organizations paired with organizations local to each state have together submitted very similar, if not identical, comments on various aspects of EPA's proposed approval of these common program components. These comment letters may be found in the docket for each proposal and are dated as follows: May 25, 2012 for Bernalillo County; July 16, 2012 for Utah; July 23, 2012 for Wyoming; and July 16, 2012 for New Mexico. Each of the comment letters has attached a consultant's report dated May 25, 2012, and titled: "Evaluation of Whether the SO₂ Backstop Trading Program Proposed by the States of New Mexico, Utah and Wyoming and Albuquerque-Bernalillo County Will Result in Lower SO₂ Emissions than Source-Specific BART." In this section, we address and respond to those comments we identified as being consistently submitted and specifically directed to the component of the published proposals dealing with the SO₂ backstop trading program. For our organizational purposes, any additional or unique comments found in the conservation organization letter that is applicable to this proposal (i.e., for the State of Wyoming) will be addressed in the next section where we also address all other comments received.

Comment: The commenter acknowledges that prior case law affirms EPA's regulatory basis for having "better than BART" alternative measures, but nevertheless asserts that it violates

Congress' mandate for an alternative trading program to rely on emissions reductions from non-BART sources and excuse electric generating units (EGUs) from compliance with BART.

Response: The CAA requires BART "as may be necessary to make reasonable progress toward meeting the national goal" of remedying existing impairment and preventing future impairment at mandatory Class I areas. See CAA Section 169A(b)(2) (emphasis added). In 1999, EPA issued regulations allowing for alternatives to BART based on a reading of the CAA that focused on the overarching goal of the statute of achieving progress. EPA's regulations provided states with the option of implementing an emissions trading program or other alternative measure in lieu of BART so long as the alternative would result in greater reasonable progress than BART. We note that this interpretation of CAA Section 169A(B)(2) was determined to be reasonable by the D.C. Circuit in *Center for Energy and Economic Development v. EPA*, 398 F.3d 653, 659-660 (D.C. Cir. 2005) in a challenge to the backstop market trading program under Section 309, and again found to be reasonable by the D.C. Circuit in *Utility Air Regulatory Group v. EPA*, 471 F.3d 1333, 1340 (D.C. Cir. 2006) ("...[W]e have already held in *CEED* that EPA may leave states free to implement BART-alternatives so long as those alternatives also ensure reasonable progress."). Our regulations for alternatives to BART, including the provisions for a backstop trading program under Section 309, are therefore consistent with the CAA and not in issue in this action approving a SIP submitted under those regulations. We have reviewed the submitted 309 trading program SIPs to determine whether each has the required backstop trading program (see 40 CFR 51.309(d)(4)(v)), and whether the features of the program satisfy the requirements for trading programs as alternatives to BART (see 40 CFR 51.308(e)(2)). Our regulations make clear that any market trading program as an alternative to BART contemplates market participation from a broader list of sources than merely those sources that are subject to BART.

See 40 CFR 51.308(e)(2)(i)(B).

Comment: The submitted 309 trading program is defective because only three of nine transport states remain in the program. The Grand Canyon Visibility Transport Commission (GCVTC) Report clearly stated that the program must be “comprehensive.” The program fails to include the other western states that account for the majority of sulfate contribution in the Class I areas of participating states, and therefore, Class I areas on the Colorado Plateau will see little or no visibility benefit. Non-participation by other transport region states compounds the program’s deficiencies.

Response: We disagree that the 309 trading program is defective because only three states remain in the program. EPA’s regulations do not require a minimum number of Transport Region States to participate in the 309 trading program, and there is no reason to believe that the limited participation by the 9 Transport Region States will limit the effectiveness of the program in the three states that have submitted 309 SIPs. The commenter’s argument is not supported by the regional haze regulations and is demonstrably inconsistent with the resource commitments of the Transport Region States that have worked for many years in the WRAP to develop and submit SIPs to satisfy 40 CFR 51.309. At the outset, our regulations affirm that “certain States...may choose” to comply with the 40 CFR 51.309 requirements and conversely that “[a]ny Transport Region State [may] elect not to submit an implementation plan” to meet the optional requirements. 40 CFR 51.309(a); see also 40 CFR 51.309(f). We have also previously observed how the WRAP, in the course of developing its technical analyses as the framework for a trading program, “understood that some States and Tribes may choose not to participate in the optional program provided by 40 CFR 51.309.” 68 FR 33,769 (June 5, 2003). Only five of nine Transport Region States initially opted to participate in the backstop trading program in 2003,

and of those initial participants only Oregon and Arizona later elected not to submit 309 SIPs.

We disagree with the commenter's assertion that Class I areas on the Colorado Plateau will see little or no visibility benefit. Non-participating states must account for sulfate contributions to visibility impairment at Class I areas by addressing all requirements that apply under 40 CFR 51.308. To the extent Wyoming, New Mexico and Utah sources "do not account for the majority of sulfate contribution" at the 16 class I areas on Colorado Plateau, there is no legal requirement that they account for SO₂ emissions originating from sources outside these participating states. Aside from this, the modeling results detailed in the proposed rulemaking show projected visibility improvement for the 20 percent worst days in 2018 and no degradation in visibility conditions on the 20 percent best days at all 16 of the mandatory Class I areas under the submitted 309 plan.

Finally, we do not agree with the commenter's characterization of the GCVTC Report, which used the term "comprehensive" only in stating the following: "It is the intent of [the recommendation for an incentive-based trading program] that [it] include as many source categories and species of pollutants as is feasible and technically defensible. This preference for a 'comprehensive' market is based upon the expectation that a comprehensive program would be more effective at improving visibility and would yield more cost-effective emission reduction strategies for the region as a whole."²

It is apparent that the GCVTC recommended comprehensive source coverage to optimize the market trading program. This does not necessitate or even necessarily correlate with geographic comprehensiveness as contemplated by the comment. We note that the submitted backstop trading program does in fact comprehensively include "many source categories," as

² The Grand Canyon Visibility Transport Commission, *Recommendations for Improving Western Vistas* at 32 (June 10, 1996).

may also be expected for any intrastate trading program that any state could choose to develop and submit under 40 CFR 51.308(e)(2). As was stated in our proposal, section 51.309 does not require the participation of a certain number of states to validate its effectiveness.

Comment: The submitted 309 trading program is defective because the pollutant reductions from participating states have little visibility benefit in each other's Class I areas. The states that have submitted 309 SIPs are "largely non-contiguous" in terms of their physical borders and their air shed impacts. Sulfate emissions from each of the participating states have little effect on Class I areas in other participating states.

Response: We disagree. The 309 program was designed to address visibility impairment for the sixteen Class I areas on the Colorado Plateau. New Mexico, Wyoming and Utah are identified as Transport Region States because the GCVTC had determined they could impact the Colorado Plateau class I areas. The submitted trading program has been designed by these transport region states to satisfy their requirements under 40 CFR 51.309 to address visibility impairment at the sixteen Class I areas. The strategies in these plans are directed toward a designated clean-air corridor that is defined by the placement of the 16 Class I areas, not the placement of state borders. "Air sheds" that do not relate to haze at these Class I areas or that relate to other Class I areas are similarly not relevant to whether the requirements for an approvable 309 trading program are met. As applicable, any transport region state, with Class I areas not on the Colorado Plateau, implementing the provisions of section 309 must also separately demonstrate reasonable progress for any additional mandatory Class I areas other than the 16 Class I areas located within the state. See 40 CFR 51.309(g). More broadly, the state must submit a long-term strategy to address these additional Class I areas as well as those Class I areas located outside the state, which may be affected by emissions from the state. 40 CFR 51.309(g) and

51.308(d)(2). In developing long-term strategies, the Transport Region States may take full credit for visibility improvements that would be achieved through implementation of the strategies required by 51.309(d). A state's satisfaction of the requirements of 51.309(d), and specifically the requirement for a backstop trading program, is evaluated independently from whether a state has satisfied the requirements of 51.309(g). In neither case, however, does the approvability inquiry center on the location or contiguousness of state borders.

Comment: The emission benchmark used in the submitted 309 trading program is inaccurate. The "better-than-BART" demonstration needs to analyze BART for each source subject to BART in order to evaluate the alternative program. The submitted 309 trading program has no BART analysis. The "better-than-BART" demonstration does not comply with the regional haze regulations when it relies on the presumptive SO₂ emission rate of 0.15 lb/MMBtu for most coal-fired EGUs. The presumptive SO₂ limits are inappropriate because EPA has elsewhere asserted that "presumptive limits represented control capabilities at the time the BART Rule was promulgated, and that [EPA] expected that scrubber technology would continue to improve and control costs would continue to decline." 77 FR 14614 (March 12, 2012).

Response: We disagree that the submitted 309 trading program requires an analysis that determines BART for each source subject to BART. Source specific BART determinations are not required to support the better-than-BART demonstration when the "alternative measure has been designed to meet a requirement other than BART." See 40 CFR 51.308(e)(2)(i)(C). The requirements of Section 309 are meant to implement the recommendations of the Grand Canyon Visibility Transport Commission and are regulatory requirements "other than BART" that are part of a long-term strategy to achieve reasonable progress. As such, in its analysis, the State may assume emission reductions "for similar types of sources within a source category based on

both source-specific and category-wide information, as appropriate.” See *id.* The 309 states used this approach in developing their emission benchmark, and we view it to be consistent with what we have previously stated regarding the establishment of a BART benchmark.

Specifically, we have explained that states designing alternative programs to meet requirements other than BART “may use simplifying assumptions in establishing a BART benchmark based on an analysis of what BART is likely to be for similar types of sources within a source category.” 71 FR 60619 (Oct. 13, 2006).

We also previously stated that “we believe that the presumptions for EGUs in the BART guidelines should be used for comparisons to a trading program or other alternative measure, unless the State determines that such presumptions are not appropriate.” *Id.* Our reasoning for this has also long been clear. While EPA recognizes that a case-by-case BART analysis may result in emission limits more stringent than the presumptive limits, the presumptive limits are reasonable and appropriate for use in assessing regional emissions reductions for the better than BART demonstration. See 71 FR 60619 (“the presumptions represent a reasonable estimate of a stringent case BART because they would be applied across the board, to a wide variety of units with varying impacts on visibility, at power plants of varying size and distance from Class I areas”). The submitted SIP revisions from the 309 states have accordingly and appropriately, followed our advice that the presumptions for EGUs in the BART guidelines, generally “should” be used for comparisons to the trading program unless the state determines otherwise.

EPA’s expectation that scrubber technology would continue to improve and that control costs would continue to decline is a basis for not regarding presumptive limits as a default or safe harbor BART determination when the BART Guidelines otherwise call for a complete, case-by-case analysis. We believe it was reasonable for the developers of the submitted trading program

to use the presumptive limits for EGUs in establishing the emission benchmark, particularly since the methodology used to establish the emission benchmark was established near in time to our promulgation of the presumptive limits as well as our guidance that they should be used. We do not think the assumptions used at the time the trading program was developed, including the use of presumptive limits, were unreasonable. Moreover, the commenter has not demonstrated how the use of presumptive limits as a simplifying assumption at that time, or even now, would be flawed merely because EPA expects that scrubber technology and costs will continue to improve.

Comment: The presumptive SO₂ emission rate overstates actual emissions from sources that were included in the BART benchmark calculation. In addition, states in the transport region have established or proposed significantly more stringent BART limits for SO₂. Using actual SO₂ emission data for EGUs, SO₂ emissions would be 130,601 tons per year (tpy), not the benchmark of 141,859 tpy submitted in the 309 trading program. Using a combination of actual emissions and unit-specific BART determinations, the SO₂ emissions would be lower still at 123,529 tpy. Finally, the same data EPA relied on to support its determination that reductions under the Cross State Air Pollution Rule are “better-than-BART” would translate to SO₂ emissions of 124,740 tpy. These analyses show the BART benchmark is higher than actual SO₂ emissions reductions achievable through BART. It follows that the submitted 309 trading program is flawed because it cannot be deemed to achieve “greater reasonable progress” than BART.

Response: The BART benchmark calculation does not overstate emissions because it was not intended to assess actual emissions at BART subject sources nor was it intended to assess the control capabilities of later installed controls. Instead, the presumptive SO₂ emission rate served

as a necessary simplifying assumption. When the states worked to develop the 309 trading program, they could not be expected to anticipate the future elements of case-by-case BART determinations made by other states (or EPA, in the case of a BART determination through any federal implementation plan), nor could they be expected to anticipate the details of later-installed SO₂ controls or the future application of enforceable emission limits to those controls. The emissions projections by the WRAP incorporated the best available information at the time from the states, and utilized the appropriate methods and models to provide a prediction of emissions from all source categories in this planning period. In developing a profile of planning period emissions to support each state's reasonable progress goals, as well as the submitted trading program, it was recognized that the final control decisions by all of the states were not yet complete, as decisions as they may pertain to emissions from BART eligible sources. Therefore, we believe it is appropriate that the analysis and demonstration is based on data that was available to the states at the time they worked to construct the SO₂ trading program. The states did make appropriate adjustments based on information that was available to them at the time. Notably, the WRAP appropriately adjusted its use of the presumptive limits in the case of Huntington Units 1 and 2 in Utah, because those units were already subject to federally enforceable SO₂ emission rates that were lower than the presumptive rate. The use of actual emissions data after the 2006 baseline is not relevant to the demonstration that has been submitted.

Comment: SO₂ emissions under the 309 trading program would be equivalent to the SO₂ emissions if presumptive BART were applied to each BART-subject source. Because the reductions are equivalent, the submitted 309 trading program does not show, by "the clear weight of the evidence," that the alternative measure will result in greater reasonable progress than

would be achieved by requiring BART. In view of the reductions being equivalent, it is not proper for EPA to rely on “non-quantitative factors” in finding that the SO₂ emissions trading program achieves greater reasonable progress.

Response: We recognize that the 2018 SO₂ milestone equals the BART benchmark and that the benchmark generally utilized the presumptive limits for EGUs, as was deemed appropriate by the states who worked together to develop the trading program. If the SO₂ milestone is exceeded, the trading program will be activated. Under this framework, sources that would otherwise be subject to the trading program have incentives to make independent reductions to avoid activation of the trading program. We cannot discount that the 2003 309 SIP submittal may have already influenced sources to upgrade their plants before any case-by-case BART determination under Section 308 may have required it. In addition, the trading program was designed to encourage early reductions by providing extra allocations for sources that made reductions prior to the program trigger year. Permitting authorities that would otherwise permit increases in SO₂ emissions for new sources would be equally conscious of the potential impacts on the achievement of the milestone. We note that the most recent emission report for the year 2010 shows a 35% reduction in emissions from 2003. The 309 trading program is designed as a backstop such that sources would work to accomplish emission reductions through 2018 that would be superior to the milestone and the BART benchmark. If instead the backstop trading program is triggered, the sources subject to the program would be expected to make any reductions necessary to achieve the emission levels consistent with each source’s allocation. We do not believe that the “clear weight of the evidence” determination referenced in 40 CFR 51.308(e)(2)(E)—in short, a determination that the alternative measure of the 309 trading program achieves greater reasonable progress than BART—should be understood to prohibit

setting the SO₂ milestone to equal the BART benchmark. Our determination that the 2018 SO₂ milestone and other design features of the 309 SIP will achieve greater reasonable progress than would be achieved through BART is based on our understanding of how the SIP will promote and sustain emission reductions of SO₂ as measured against a milestone. Sources will be actively mindful of the participating states' emissions inventory and operating to avoid exceeding the milestone, not trying to maximize their emissions to be equivalent to the milestone, as this comment suggests. We note the 2018 milestone constitutes an emissions cap that persists after 2018 unless the trading program can be replaced via future SIP revisions submitted for EPA approval that will meet the BART and reasonable progress requirements of 51.308. See 40 CFR 51.309(d)(4)(vi)(A).

Comment: In proposing to find that the SO₂ trading program achieves greater reasonable progress than BART, EPA's reliance on the following features of the 309 trading program is flawed: non-BART emission reductions, a cap on new growth, and a mass-based cap on emissions. The reliance on non-BART emission reductions is "a hollow promise" because there is no evidence that the trading program will be triggered for other particular emission sources, and if the program is never triggered there will be no emission reductions from smaller non-BART sources. The reliance on a cap on future source emissions is also faulty because there is no evidence the trading program will be triggered, and thus the cap may never be implemented. Existing programs that apply to new sources will already ensure that SO₂ emissions from new sources are reduced to the maximum extent. EPA's discussion of the advantages of a mass-based cap is unsupported and cannot be justified. EPA wrongly states that a mass-based cap based on actual emissions is more stringent than BART. There should not be a meaningful gap between actual and allowable emissions under a proper BART determination. A mass-based cap

does not effectively limit emissions when operating at lower loads and, as an annual cap, does not have restrictive compliance averaging. EPA's argument implies that BART limits do not apply during startup, shutdown or malfunction events, which is not correct. The established mass-based cap would allow sources to operate their SO₂ controls less efficiently, because some BART-subject EGUs already operate with lower emissions than the presumptive SO₂ emission rate of 0.15 lb/MMBtu and because some EGUs were assumed to be operating at 85% capacity when their capacity factor (and consequently their SO₂ emissions in tpy) was lower.

Response: We disagree that it is flawed to assess the benefits found in the distinguishing features of the trading program. The backstop trading program is not specifically designed so that it will be activated. Instead, sources that are covered by the program are on notice that it will be triggered if the regulatory milestones are not achieved. Therefore, the backstop trading program would be expected to garner reductions to avoid its activation. It also remains true that if the trading program is activated, all sources subject to the program, including smaller non-BART sources would be required to secure emission reductions as may be necessary to meet their emission allocations under the program.

We also disagree that the features of the 2018 milestone as a cap on future source emissions and as a mass-based cap has no significance. As detailed in our proposal, the submitted SIP is consistent with the requirement that the 2018 milestone does indeed continue as an emission cap for SO₂ unless the milestones are replaced by a different program approved by EPA as meeting the BART and reasonable progress requirements under 40 CFR 51.308. Future visibility impairment is prevented by capping emissions growth from those sources not eligible under the BART requirements, BART sources, and from entirely new sources in the region. The benefits of a milestone are therefore functionally distinct from the control efficiency

improvements that could be gained at a limited number of BART subject sources. While BART-subject sources may not be operating at 85% capacity today, we believe the WRAP's use of the capacity assumption in consideration of projected future energy demands in 2018 was reasonable for purposes of the submitted demonstration. While BART requires BART subject sources to operate SO₂ controls efficiently, this does not mean that an alternative to BART thereby allows, encourages, or causes sources to operate their controls less efficiently. On the contrary, we find that the SIP, consistent with the well-considered 309 program requirements, functions to the contrary. Sources will be operating their controls in consideration of the milestone and they also remain subject to any other existing or future requirements for operation of SO₂ controls.

We also disagree with the commenter's contention that existing programs are equivalent in effect to the emissions cap. EPA's new source review program is designed to permit, not cap, source growth, so long as the national ambient air quality standards and other requirements can be achieved. Moreover, we have not argued that BART does not apply at all times or that emission reductions under the cap are meant to function as emission limitations that are made to meet the definition of BART (40 CFR 51.301). The better-than-BART demonstration is not, as the comment would have it, based on issues of compliance averaging or how a BART limit operates in practice at an individual facility. Instead, it is based on whether the submitted SIP follows the regulatory requirements for the demonstration and evidences comparatively superior visibility improvements for the Class I areas it is designed to address.

Comment: The submitted 309 SIP will not achieve greater reasonable progress than would the requirement for BART on individual sources. The BART program "if adequately implemented" will promote greater reasonable progress, and EPA should require BART on all eligible air pollution sources in the state. EPA's proposed approval of the 309 trading program is

“particularly problematic” where the BART sources cause or contribute to impairment at Class I areas which are not on the Uniform Rate of Progress (URP) glide-path towards achieving natural conditions. EPA should require revisions to provide for greater SO₂ reductions in the 309 program, or it should require BART reductions on all sources subject to BART for SO₂.

Response: We disagree with the issues discussed in this comment. As discussed in other responses to comments, we have found that the State’s SIP submitted under the 309 program will achieve greater reasonable progress than source-by-source BART. As the regulations housed within section 309 make clear, states have an opportunity to submit regional haze SIPs that provide an alternative to source-by-source BART requirements. Therefore, the commenter’s assertion that we should require BART on all eligible air pollution sources in the state is fundamentally misplaced. The commenter’s use of the URP as a test that should apparently be applied to the adequacy of the 309 trading program as a BART alternative is also misplaced, as there is no requirement in the regional haze rule to do so.

Comment: The 309 trading program must be disapproved because it does not provide for “steady and continuing emissions reductions through 2018” as required by 40 CFR 51.309(d)(4)(ii). The program establishes its reductions through milestones that are set at three-year intervals. It would be arbitrary and capricious to conclude these reductions are “steady” or “continuous.”

Response: We disagree and find that the reductions required at each milestone demonstrate steady and continuing emissions reductions. The milestones do this by requiring regular decreases. These decreases occur in intervals ranging from one to three years and include administrative evaluation periods with the possibility of downward adjustments of the milestone, if warranted. The interval under which “steady and continuing emissions reductions through

2018” must occur is not defined in the regional haze rule. We find the milestone schedule and the remainder of the trading program submitted by Wyoming does in fact reasonably provide for “steady and continuing emissions reductions through 2018.”

Comment: The WRAP attempts to justify the SO₂ trading program because SO₂ emissions have decreased in the three transport region states relying on the alternative program by 33% between 1990-2000. The justification fails because the reductions were made prior to the regional haze rule. The reliance on reductions that predate the regional haze rule violates the requirement of 40 CFR 51.308(e)(2)(iv) that BART alternatives provide emission reductions that are “surplus” to those resulting from programs implemented to meet other CAA requirements.

Response: We did not focus on the WRAP’s discussion of early emission reductions in our proposal. However, we do not understand commenters claim or agree with this comment. The WRAP’s statements regarding past air quality improvements are not contrary to the requirement that reductions under a trading program be surplus. Instead, the WRAP was noting that forward-planning sources had already pursued emission reductions that could be partially credited to the design of the 309 SIP. We note that the most recent emission report for the year 2010 shows a 35% reduction in emissions from 2003. Sources that make early reductions prior to the program trigger year may acquire extra allocations should the program be triggered. This is an additional characteristic feature of the backstop trading program that suggests benefits that would be realized even without triggering of the program itself. The surplus emission reduction requirement for the trading program is not an issue, because the existence of surplus reductions is studied against other reductions that are realized “as of baseline date of the SIP.” The 1990-2000 period plainly falls earlier than the baseline date of the SIP, so we disagree that the WRAP’s discussion of that period was problematic or violates 40 CFR 51.308(e)(2)(iv), regarding surplus

reductions.

Comment: EPA must correct discrepancies between the data presented in the 309 SIPs.³ There are discrepancies in what has been presented as the results of WRAP photochemical modeling. The New Mexico regional haze SIP proposal shows, for example, that the 20% worst days at Grand Canyon National Park have visibility impairment of 11.1 deciviews, while the other proposals show 11.3 deciviews. The discrepancy appears to be due to the submittals being based on different modeling scenarios developed by the WRAP. EPA must explain and correct the discrepancies and “re-notice” a new proposed rule containing the correct information.

Response: We agree that there are discrepancies in the numbers in Table 1 of the proposed notices. The third column of the table below shows the modeling results presented in Table 1 of the Albuquerque, Wyoming and Utah proposals. The modeling results in the New Mexico proposal Table 1 are shown in the fourth column in the table below. The discrepancies come from New Mexico using different preliminary reasonable progress cases developed by the WRAP. The Wyoming, Utah and Albuquerque proposed notices incorrectly identify the Preliminary Reasonable Progress (PRP) case as the PRP18b emission inventory instead of correctly identifying the presented data as modeled visibility based on the “PRP18a” emission inventory. The PRP18a emission inventory is a predicted 2018 emission inventory with all known and expected controls as of March 2007. The preliminary reasonable progress case (“PRP18b”) used by New Mexico is the more updated version produced by the WRAP with all known and expected controls as of March 2009. Thus, we are correcting Table 1, column 5 in our proposed notices for Wyoming, Utah, and Albuquerque to include model results from the PRP18b emission inventory, consistent with the New Mexico proposed notice and the fourth

³This particular comment was not submitted in response to the proposal to approve Albuquerque’s 309 trading program, the earliest published proposal. It was consistently submitted in the comment periods for the proposals to approve the 309 trading programs for NM, WY and UT, which were later in time.

column in the table below. We are also correcting the description of the Preliminary Reasonable Progress Case (referred to as the PRP18b emission inventory and modeled projections) to reflect that this emission inventory includes all controls "on the books" as of March 2009.

Class I Area	State	2018 Preliminary Reasonable Progress PRP18a Case (deciview)	2018 Preliminary Reasonable Progress PRP18b case (deciview)
Grand Canyon National Park	AZ	11.3	11.1
Mount Baldy Wilderness	AZ	11.4	11.5
Petrified Forest National Park	AZ	12.9	12.8
Sycamore Canyon Wilderness	AZ	15.1	15.0
Black Canyon of the Gunnison National Park Wilderness	CO	9.9	9.8
Flat Tops Wilderness	CO	9.0	9.0
Maroon Bells Wilderness	CO	9.0	9.0
Mesa Verde National Park	CO	12.6	12.5
Weminuche Wilderness	CO	9.9	9.8
West Elk Wilderness	CO	9.0	9.0
San Pedro Parks Wilderness	NM	9.8	9.8
Arches National Park	UT	10.9	10.7
Bryce Canyon National Park	UT	11.2	11.1
Canyonlands National Park	UT	10.9	10.7
Capitol Reef	UT	10.5	10.4

National Park			
Zion National Park	UT	13.0	12.8

We are not re-noticing our proposed rulemaking as the discrepancies do not change our proposed conclusion that the SIP submitted by Wyoming contains reasonable projections of the visibility improvements expected at the 16 Class I areas at issue. The PRP18a modeling results show projected visibility improvement for the 20 percent worst days from the baseline period to 2018. The PRP18b modeling results show either the same or additional visibility improvement on the 20 percent worst days beyond the PRP18a modeling results. We also note there are two discrepancies in New Mexico's Table 1, column four compared to the other participating states' notices. The 2018 base case visibility projection in the New Mexico proposed notice for Black Canyon of the Gunnison National Park Wilderness and Weminuche Wilderness should be corrected to read 10.1 deciview rather than 10.0. Notwithstanding the discrepancies described above, we believe that Wyoming's SIP adequately projects the improvement in visibility for purposes of Section 309.

B. General Comments

Comment: We received comments from PacifiCorp and New Mexico Environment Department supporting our proposed approval of Wyoming's 309 SIP.

Response: We acknowledge the commenters' support of our proposed rulemaking.

V. Statutory and Executive Order Reviews

Under the Clean Air Act, 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 Clean Air Act. 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 Order 12866 (58 FR 51735, October 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, 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 USC 272 note) because application of those requirements would be inconsistent with the Clean Air Act; 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, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of this document 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).)

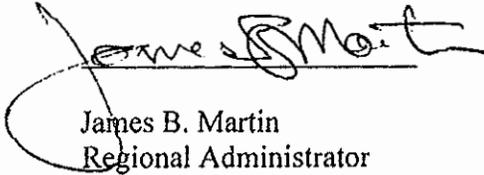
List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Sulfur oxides, Incorporation by

reference.

Nov. 13, 2012

Date



James B. Martin
Regional Administrator
Region 8

40 CFR part 52 is amended to read as follows:

PART 52 [AMENDED]

1. The authority citation for Part 52 continues to read as follows:

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

Subpart ZZ – Wyoming

2. Section 52.2620 is amended by:

- a. Amending the table in paragraph (c)(1) under Chapter 10 by adding an entry for Section 4.
- b. Amending the table in paragraph (c)(1) under Chapter 14 by adding entries for Section 2 and Section 3.
- c. Amending the table in paragraph (e) by adding an entry for “XX”, “Wyoming State Implementation Plan for Regional Haze for 309” at the end of the table.

§ 52.2620 Identification of Plan

* * * * *

(c) * * *

(1) * * *

State Citation	Title/Subject	State adopted and effective Date	EPA approval date and citation ¹	Explanation
* * * * *				
Chapter 10				
* * * * *				
Section 4	Smoke Management	2/17/2005, 4/5/2005	[Insert date of publication in the Federal Register and FR page number where document begins]	
* * * * *				
Chapter 14				

* * * * *				
Section 2	Western Backstop Sulfur Dioxide Trading Program	2/27/2008, 5/7/2008	[Insert date of publication in the Federal Register and FR page number where document begins]	
Section 3	Sulfur Dioxide Milestone Inventory	2/27/2008, 5/7/2008	[Insert date of publication in the Federal Register and FR page number where document begins]	

¹ In order to determine the EPA effective date for a specific provision listed in this table, consult the Federal Register notice cited in this column for the particular provision

(e) * * *

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/adopted date	EPA approval date and citation ³	Explanations
* * * * *				
XX. Wyoming State Implementation Plan for Regional Haze for 309	Statewide	Submitted: 1/12/2011	[Insert Federal Register date of publication], [Insert Federal Register page number where the document begins.]	

³ In order to determine the EPA effective date for a specific provision listed in this table, consult the Federal Register notice cited in this column for the particular provision

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2012, I served the foregoing STAFF FINAL BRIEF upon the persons named on the service list below who have waived such service by mail, by serving a full, true and correct copy thereof at their e-mail address as follows:

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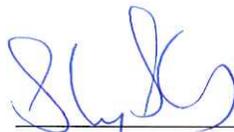
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