

**List of Subjects in 33 CFR Part 165**

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

**PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS**

■ 1. The authority citation for part 165 continues to read as follows:

**Authority:** 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.T08–0708 to read as follows:

**§ 165.T08–0708 Safety Zone; Green River, Calhoun, KY.**

(a) *Location.* The following area is a safety zone: All navigable waters of the Green River from Mile Marker 61 to 62.

(b) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the Captain of the Port Sector Ohio Valley (COTP) or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by VHF CH. 16. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(c) *Enforcement period.* This section will be subject to enforcement each day from 6 a.m. to 8 p.m. on August 5, 2024, through August 9, 2024.

Dated: August 1, 2024.

**M.D. Winland,**

*Commander, U.S. Coast Guard, Acting Captain of the Port Sector Ohio Valley.*

[FR Doc. 2024–17574 Filed 8–5–24; 11:15 am]

**BILLING CODE 9110–04–P**

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52**

[EPA–R07–OAR–2023–0582; FRL–11576–02–R7]

**Air Plan Approval; Kansas; Regional Haze**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final action.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking final action to

disapprove a revision to Kansas's State Implementation Plan (SIP) submitted on July 28, 2021, intended to satisfy applicable requirements under the Clean Air Act (CAA) and EPA's Regional Haze Rule (RHR) for the program's second planning period. As required by the CAA, the RHR calls for State and Federal agencies to work together to improve visibility, including by reducing or eliminating regional haze, in 156 national parks and wilderness areas. The rule requires the States, in coordination with the EPA, the National Park Service (NPS), U.S. Fish and Wildlife Service (FWS), the U.S. Forest Service (FS), and other interested parties, to develop and implement air quality protection plans in which States revise their long-term strategies (LTS) for making reasonable progress towards the national goal of preventing any future, and remedying any existing, anthropogenic impairment of visibility in these mandatory Class I Federal Areas. Disapproval does not trigger imposition of mandatory sanctions. The effective date of this action does trigger an obligation for the EPA to issue a Federal Implementation Plan (FIP) within two years.

**DATES:** This final action is effective on September 6, 2024.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–R07–OAR–2023–0582. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information may not be publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov> or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional information.

**FOR FURTHER INFORMATION CONTACT:** Jed D. Wolkins Environmental Protection Agency, Region 7 Office, Air Quality Planning Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219; telephone number: (913) 551–7588; email address: [wolkins.jed@epa.gov](mailto:wolkins.jed@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document “we,” “us,” and “our” refer to the EPA.

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**I. What is being addressed in this document?**

The EPA is disapproving Kansas's regional haze plan for the second planning period. As required by section 169A of the CAA, the Federal RHR calls for State and Federal agencies to work together to improve visibility in 156 national parks and wilderness areas. The rule requires the States, in coordination with the EPA, the NPS, FWS, the FS, and other interested parties, to develop and implement air quality protection plans to reduce the pollution that causes visibility impairment in mandatory Class I Federal areas. Visibility impairing pollutants include fine and coarse particulate matter (PM) (*e.g.*, sulfates, nitrates, organic carbon, elemental carbon, and soil dust) and their precursors (*e.g.*, sulfur dioxide (SO<sub>2</sub>), oxides of nitrogen (NO<sub>x</sub>), and, in some cases, volatile organic compounds (VOC) and ammonia (NH<sub>3</sub>)). As discussed in further detail in our Notice of Proposed Rulemaking (NPRM) and in this document, the EPA finds that Kansas submitted a regional haze SIP revision that does not meet the regional haze requirements for the second planning period. The State's submission and the NPRM can be found in the docket for this action.

**II. Background**

On July 28, 2021, Kansas submitted a revision to its SIP to address regional haze for the second implementation period. Kansas made this submission in order to satisfy the requirements of the CAA's regional haze program pursuant to CAA sections 169A and 169B and 40 Code of Federal Regulations (CFR) 51.308. The State's submission met the public notice requirements in accordance with 40 CFR 51.102. The submission also satisfied the completeness criteria of 40 CFR part 51, appendix V. The State provided public notice on its SIP revision from May 27, 2021, to June 28, 2021, and received comments from five parties, including the EPA. Kansas made some changes to its SIP revision based on some of the public comments. However, Kansas disagreed with most of the comments pointing out flaws in its SIP revision, and the State made no changes based on those comments.

On January 2, 2024 (89 FR 178), the EPA published the NPRM proposing a

disapproval of Kansas's July 28, 2021 SIP submission for not satisfying the regional haze requirements for the second planning period contained in the CAA and 40 CFR 51.308. The EPA is now determining that the Kansas SIP revision for the second RHR planning period does not meet the applicable statutory and regulatory requirements in CAA section 169A and 40 CFR 51.308 and is thus disapproving Kansas's submission.

### III. The EPA's Response to Comments

The purpose of the proposed rulemaking was to take public comment on the EPA's intent to disapprove Kansas's July 28, 2021 SIP submission because it does not satisfy regional haze requirements for the second planning period. In the NPRM, the EPA proposed to disapprove the submission for, *inter alia*, failing to consider the four statutorily required factors in CAA section 169A for developing the State's long-term strategy (LTS).<sup>1</sup> The public comment period on the EPA's proposed rule opened January 2, 2024, the date of its publication in the **Federal Register**, and closed on February 1, 2024. During this period, the EPA received three comment letters: (1) collective comments from the National Parks Conservation Association, Sierra Club, and the Coalition to Protect America's National Parks (collectively referred to as "the Conservation Groups" throughout this document); (2) comments from the Kansas Department of Health and Environment (KDHE); and (3) collective comments from the Kansas City Board of Public Utilities—Unified Government of Wyandotte County/Kansas City, Kansas (BPU), Evergy, Inc (Evergy), and Sunflower Electric Power Corporation (Sunflower) (collectively referred to as "the Kansas Utilities" throughout this document). All the public comments are available in the docket for this final action via Docket ID Number EPA-R07-OAR-2023-0582 on the <https://www.regulations.gov> website.

In the rest of this section, the EPA has summarized and provided responses to the adverse comments received on the NPRM. No response is necessary for the comments received in support of the NPRM or the comments that were not directly related to the NPRM. After carefully considering the comments received, the EPA is finalizing its disapproval of the Kansas SIP submission for the RHR second planning period.

<sup>1</sup> For more information on the RHR requirements, specifically the LTS requirements, see our NPRM in the docket for this action.

#### A. Conservation Groups Comments and Responses

*Conservation Groups Comment 1:* The Conservation Groups stated that executive orders, action plans, and commitments direct the Agency to consider environmental justice in Agency actions. The comment noted that the same pollutants that affect scenic views at national parks and wilderness areas also cause significant public health impacts.

The Conservation Groups commented that the EPA ignores the environmental justice impacts of our action on Kansas's SIP revision. The commenters acknowledged that requiring Kansas to correct the deficiencies in the SIP revision may result in the State identifying new emission control measures to reduce pollution that negatively impacts low-income communities and communities of color. The commenters then provided information from the EPA's EJScreen tool to state that there are overburdened communities exposed to pollution near some large stationary sources, including Kansas City-BPU's Nearman Creek Power Station, the Jeffrey Energy Center, and the Lawrence Energy Center. The Conservation Groups stated that the EPA must analyze the potential disparate impacts or environmental justice benefits of its action on Kansas's SIP revision.

*Response to Conservation Groups Comment 1:* The EPA disagrees with this comment but acknowledges the EJScreen information provided by the commenters. The CAA does not explicitly address considerations of environmental justice and neither do the regulatory requirements of the second planning period in 40 CFR 51.308(f), (g)(1) through (5), and (i). As explained in "EPA Legal Tools to Advance Environmental Justice,"<sup>2</sup> the CAA provides States with the discretion to consider environmental justice in developing rules and measures related to regional haze. While a State may consider environmental justice under the reasonable progress factors, neither the statute nor the regulations require States to conduct an environmental justice analysis as a condition of the EPA approving a SIP revision. Furthermore, the CAA and the RHR neither prohibit nor require such an evaluation of environmental justice with regard to a regional haze SIP revision. The EPA is not identifying

<sup>2</sup> See EPA Legal Tools to Advance Environmental Justice, p. 35–36 <https://www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf>. The EPA Office of General Counsel (May 2022).

environmental justice as a basis for its decision to disapprove Kansas's SIP revision.

The Conservation Group commenters provided additional information from multiple EJ Screen analyses. Without agreeing with the particular relevance or accuracy of this information, the EPA acknowledges the EJ Screen information provided as part of the comment, which identifies certain demographic and environmental information regarding communities near the Kansas City-BPU's Nearman Creek Power Station, the Jeffrey Energy Center, and the Lawrence Energy Center. As discussed in the NPRM and in this document, the EPA has evaluated Kansas's SIP submission against the statutory and regulatory regional haze requirements and determined that it has not satisfied those minimum requirements.

#### B. KDHE Comments and Responses

*KDHE Comment 1:* KDHE commented that Kansas adopted the LTS the State previously set out in its regional haze SIP revision for the first implementation period (2011 SIP), including enforceable emission limitations, compliance standards, and other measures that are necessary to make reasonable progress toward reducing visibility impairment at nearby Class I areas. The commenter suggested Kansas provided substantial data in support of this decision.

KDHE stated that per 40 CFR 51.308(f)(2), the 2021 SIP's LTS evaluated whether any emission reductions measures were "necessary to make reasonable progress" and determined no additional measures were necessary. KDHE stated that the CenSARA Area of Influence (AOI) results show that for the 20% most impaired days in base year 2016, no Kansas facility had an individual impact greater than 0.84% (nitrate and sulfate impacts combined) at any of the Class I areas studied. KDHE maintained that 0.84% is not a significant level of visibility impact. KDHE asserted that neither the EPA nor federal land manager (FLM) staff criticized the use of combined nitrates and sulfates, and Kansas was only notified of the EPA's preference to separate nitrates and sulfates in comments during the public comment period.

*Response to KDHE Comment 1:* The EPA disagrees with the commenter's statements that KDHE conducted an analysis that considered the four statutory factors or that meets regulatory requirements of 40 CFR 51.308(f) to determine what emission reduction measures are necessary to make reasonable progress in the second planning period. The EPA also disagrees

with the commenter's statement that KDHE's reliance on the CenSARA AOI results was appropriate, as this reliance resulted in KDHE producing an analysis that failed to consider the statutory and regulatory requirements. Finally, the EPA acknowledges the commenter's statement that the EPA did not provide feedback criticizing the use of combined nitrates and sulfates' impact on source selection criteria prior to Kansas's formal public comment period, but we do not agree that it has any bearing on the EPA's disapproval of the SIP revision.

As explained in the NPRM, the State must evaluate and determine the emission reduction measures that are necessary to make reasonable progress by considering the four statutory factors.<sup>3</sup> As part of its reasonable progress determinations for the second planning period, the State must describe the criteria used to determine which sources or group of sources were evaluated (*i.e.*, subjected to four-factor analysis) for the second implementation period and how the four factors were taken into consideration in selecting the emission reduction measures for inclusion in the LTS. 40 CFR 51.308(f)(2)(i). Since Kansas did not select sources, or groups of sources, for a four-factor analysis, it did not meet this requirement in developing a LTS for the second planning period.

The 1999 RHR established an iterative planning process that requires States that impact visibility at Class I areas to periodically submit SIP revisions to address such impairment. 64 FR 35714 (1999); CAA section 169A(b)(2). While the 1999 RHR outlined the regional haze requirements for the first planning period, the EPA revised the RHR in 2017 to establish the regional haze requirements for the second planning period. 82 FR 3078 (2017). For example, the LTS requirements for the first planning period are laid out in 40 CFR 51.308(d)(3), and the LTS requirements for the second planning period are laid out in 40 CFR 51.308(f)(2). This therefore necessitates separate analyses in line with the regulatory language dictating the requirements for the development of each planning period's LTS.<sup>4</sup> In its SIP revision, Kansas

<sup>3</sup> The amount of progress that is "reasonable progress" is based on applying the four statutory factors in CAA section 169A(g)(1) in an evaluation of potential control options for sources of visibility impairing pollutants, which is referred to as a "four-factor" analysis. The outcome of that analysis is the emission reduction measures that a particular source or group of sources needs to implement in order to make reasonable progress towards the national visibility goal. See 40 CFR 51.308(f)(2)(i).

<sup>4</sup> CAA section 169A(b)(2)(B) requires States to include in their SIP submissions a long-term (10–

included information on the emissions impacts of numerous sources on the Hercules Glades Wilderness Area, the Salt Creek Wilderness Area, the Upper Buffalo Wilderness Area, the Wheeler Peak Wilderness Area, the White Mountain Wilderness Area, and the Wichita Mountains National Wildlife Reserve, but did not select any sources for evaluation, did not conduct a four-factor analysis, and did not analyze possible efficiency improvements for sources' existing measures during this planning period. Thus, Kansas did not follow the regulatory requirements as outlined in 40 CFR 51.308(f). As stated in the NPRM, Kansas failed to consider the four statutory factors for any sources, thereby not providing the required analysis to support a conclusion that no additional measures are necessary for reasonable progress in its LTS for the second planning period.

Kansas also argues that the SO<sub>2</sub> reductions achieved by Kansas sources during the first planning period make Kansas's contribution to impairment of Class I areas insignificant in comparison to other States. The EPA acknowledges that Kansas made significant reductions in SO<sub>2</sub> emissions in the first planning period and that surrounding States may have a larger total of SO<sub>2</sub> emissions, but neither the RHR nor the CAA allow a State to not evaluate sources or consider the four factors in reliance on its previous planning period reductions or due to higher emissions in other States.<sup>5</sup>

KDHE's reliance on the CenSARA AOI results to determine reasonable progress is misplaced. CAA section 169A(g)(1) outlines that "in determining reasonable progress, there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements." Moreover, the RHR outlines that in order to evaluate and determine the emission reduction measures that are necessary to make reasonable progress, States must consider "the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected anthropogenic

15 year) strategy for making reasonable progress toward meeting the national goal of preventing future, and remedying existing, visibility impairment in Class I areas.

<sup>5</sup> 64 FR 35721 (1999) "EPA has concluded . . . that all States contain sources whose emissions are reasonably anticipated to contribute to regional haze in a Class I area and, therefore, must submit regional haze SIPs."

source of visibility impairment." 40 CFR 51.308(f)(2)(i). The individual impact of a State's sources on the Class I area and the significance of visibility impact should not undermine the role of the four-factor analysis when determining reasonable progress in accordance with the regulations.<sup>6</sup> Therefore, the EPA cannot approve Kansas's SIP submission because it did not meet the statutory and regulatory requirements.

While the EPA cannot speak for the FLMS as to why they did not address the use of combined nitrates and sulfates, the EPA choose to not address this issue in its initial comments to Kansas on the proposed SIP revision during early engagement (*i.e.*, prior to Kansas's formal SIP submittal). Rather the EPA choose to discuss the most glaring issue that would prevent approval, which was the failure to select sources for four-factor analysis or provide a reasoned explanation for why sources were not selected. When Kansas declined to amend its SIP revision following the EPA's comments, we were compelled to address the choice to combine nitrates and sulfates, specifically when Kansas claimed it did not need to select sources based upon other States' contributions to regional haze and the emission reductions achieved during the first planning period.<sup>7</sup> While we could have made this comment in early engagement, we did make it during KDHE's public comment period prior to the SIP revision being submitted to the EPA.

Kansas did not meet the statutory and regulatory requirements for the second planning period SIP revision, and therefore, the EPA cannot approve Kansas's SIP submission.

*KDHE Comment 2:* KDHE commented that it utilized a threshold methodology for selection of sources that reasonably considers the actual visibility impact and expectations for reasonable progress consistent with the CAA. KDHE stated that the EPA has failed to provide any quantifiable threshold for visibility impacts on Class I areas. KDHE

<sup>6</sup> "Under the RHR, each State has an obligation to submit a long-term strategy that addresses the regional haze visibility impairment resulting from emissions from within that State. 40 CFR 51.308(f)(2). This obligation is not discharged simply because another State's contributions to visibility impairment may be greater." Clarifications Regarding Regional Haze State Implementation Plans for the Second Implementation Period, p. 3 <https://www.epa.gov/system/files/documents/2021-07/clarifications-regarding-regional-haze-state-implementation-plans-for-the-second-implementation-period.pdf>. The EPA Office of Air Quality Planning and Standards, Research Triangle Park (July 8, 2021) ("2021 Clarifications Memo").

<sup>7</sup> Applying a combined sulfate and nitrate impact may exclude sources whose only or main impact may be from a sulfate or nitrate.

proposed that < 1.0% visibility impact is not significant impairment of visibility and does not warrant four-factor evaluation. KDHE contended that a significance threshold of 1.0% is not unreasonable and is very conservative, considering the large universe of Title V sources being analyzed using the AOI modeling method.

KDHE stated the language of CAA section 169A(b) requires a SIP to “contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal” and asserted that the trigger warranting evaluation of the four statutory factors is, by statute, whether it is first “necessary” to meet the national goal. KDHE asserted that Kansas sources’ de minimis impact to visibility and trending reduction of visibility impairment makes conducting four-factor analyses unnecessary to ensure reasonable progress. KDHE stated that the EPA’s insistence that every State carry out four-factor analysis despite having insignificant sources with respect to visibility impact is not justified. KDHE concluded that the threshold the EPA currently uses exceeds the statutory requirement, is inconsistent with legislative intent, and is arbitrary.

*Response to KDHE Comment 2:* The EPA disagrees with this comment. In order to meet the statutory and regulatory requirements, as stated in the EPA’s 2021 Clarifications Memo and discussed in the NPRM, States have discretion to choose any source selection threshold or methodology that is reasonable; however, whatever choices States make should be reasonably explained and produce a reasonable set of sources, or groups of sources, on which to apply the four statutory factors when evaluating potential control measures for inclusion in the LTS. 2021 Clarifications Memo at 3. Reasonableness will depend on the specific circumstances. Kansas’s chosen threshold of 1.0% is unreasonable for a number of reasons.

First, Kansas’s chosen source selection methodology analyzed visibility impacts from Kansas and compared those to visibility impacts to other States that impact the same Class I areas. In so doing, Kansas concluded that its in-state contribution to visibility impairment at the affected Class I area is insignificant and therefore, it was unnecessary to undertake an evaluation of control measures by applying the four statutory factors. This was improper. Under the RHR, each State has an obligation to submit a LTS that addresses the regional haze visibility

impairment resulting from emissions from within that State, and that obligation “is not discharged simply because another State’s contributions to visibility impairment may be greater.” *Id.* There is no exclusion in the CAA or RHR to support the contention that if a State can show emissions are “insignificant” or “de minimis”, then it does not have to comply with 40 CFR 51.308(f). Therefore, just because emissions from Kansas may not impact Class I areas as much as emissions from other States, Kansas still nonetheless has an obligation to evaluate a reasonable set of sources for additional controls, which it did not do.

KDHE provided information including graphs and tables showing the improving visibility impairment at Class I areas impacted by Kansas emissions, year over year of decreasing emissions, and Kansas’s low impact compared to other nearby States. While we agree that these are true, as stated throughout this document, these facts do not relieve Kansas from the requirement to have a LTS by considering the four statutory factors.

Secondly, Kansas’s chosen threshold of 1.0% is unreasonable because it excluded all of the State’s largest visibility impairing sources from selection. Generally, a threshold that captures only a small portion of a State’s contribution to visibility impairment in Class I areas is more likely to be unreasonable. *Id.* A State that relies on a visibility (or proxy for visibility impact) threshold to select sources for four-factor analysis should set the threshold at a level that captures a meaningful portion of the State’s total in-state contribution to visibility impairment to Class I areas.<sup>8</sup> Not only did Kansas not evaluate its largest sources for visibility impairment, it also opted not to evaluate groups of its smaller sources, which, especially as it relates to Kansas, was unreasonable.

CAA section 169A(b)(2)(B), requires each State having emissions that may affect visibility in a Class I area to include in its SIP emission limits, schedules of compliance, and other measures as may be necessary to make reasonable progress toward meeting the national goal. CAA section 169A(b)(2)(B). The national goal, as laid out in section 169A(a)(1) of the CAA is to prevent future, and to remedy

<sup>8</sup> Guidance on Regional Haze State Implementation Plans for the Second Implementation Period. p. 19 <https://www.epa.gov/visibility/guidance-regional-haze-state-implementation-plans-second-implementation-period>. The EPA Office of Air Quality Planning and Standards, Research Triangle Park (August 20, 2019) (“2019 Guidance”).

existing manmade impairment of visibility in Class I areas.

In the 1999 RHR, the EPA stated that the “prevention component of the national goal requires that States have the framework in place to address future growth in emissions. . . . For this reason, the EPA does not believe that it is appropriate to establish criteria for excluding States or geographic areas from consideration as potential contributors to regional haze.” 64 FR 35721 (1999). Then, in the 2017 RHR, the EPA “reiterat[ed] that the CAA requires States to consider the four statutory factors . . . in each implementation period to determine the rate of progress towards natural visibility conditions that is reasonable for each Class I area.” 82 FR 3080 (2017).

The 2017 RHR also recognized that, due to the nature of regional haze (visibility impairment that is caused by the emissions of air pollutants from numerous anthropogenic sources located over a wide geographic area), numerous and sometimes (relatively) smaller in-state sources may need to be selected and evaluated for control measures as part of the reasonable progress analysis. As stated in response to comments on the 2017 RHR, “[a] state should not fail to address its many relatively low-impact sources merely because it only has such sources and another state has even more low-impact sources and/or some high impact sources.”<sup>9</sup> However, despite acknowledging that emissions from Kansas impacted numerous Class I areas, Kansas did not select any sources, large or small, to evaluate for emission reduction measures.

Once a State has selected sources, or groups of sources, for evaluation, it then must consider the four statutory factors to evaluate the emission reduction measures that are necessary to make reasonable progress. CAA section 169A(g)(1); 40 CFR 51.308(f)(2). Control measures that are necessary to make reasonable progress toward the national goal of natural visibility conditions must be included in the State’s LTS in the SIP. CAA section 169A(b)(2)(B); 40 CFR 51.308(f)(2). Kansas did not select any sources to evaluate and did not apply the four statutory factors in order to determine what is necessary for reasonable progress, thus resulting in an unjustified LTS for the second planning period. The EPA therefore finds

<sup>9</sup> Responses to Comments on Protection of Visibility: Amendments to Requirements for States Plans; Proposed Rule (81 FR 26942, May 4, 2016) at 87–88, available at <https://www.regulations.gov/document/EPA-HQ-OAR-2015-0531-0635>; See 2021 Clarifications Memo p. 4.

Kansas's selected threshold to be unreasonable and not in accordance with the CAA or the RHR. We therefore find the chosen source selection threshold and the resulting lack of analysis of controls and application of the four statutory factors to be unreasonable.

In addition, Kansas's interpretation of the phrase "as may be necessary to make reasonable progress toward meeting the national goal" is incorrect. Kansas's statutory construction comment is inconsistent with the EPA's interpretation and explanation laid out in the 2017 RHR preamble. To achieve the national goal, it is "necessary" for all States to reduce or eliminate visibility-impairing emissions, which includes contributions from sources in Kansas. While the EPA has created an iterative planning process to achieve Congress' ambitious goal, that process will take many years. Thus, in the second planning period, it nonetheless remains "necessary" for States to consider the four statutory factors and evaluate potential control measures to ensure that they are making reasonable progress toward that goal.

Kansas's conclusion that a four-factor analysis should only be conducted if visibility impacts are significant (*i.e.*, not *de minimis*) is incorrect. The EPA acknowledges that for many States, including Kansas, there has been a reduction of visibility impairment since the first planning period. While the impact from the highest-emitting sources may be less than the first planning period, sources from Kansas, large or small, still emit visibility impairing pollutants and Kansas thus must comply with the RHR. While Kansas is correct that the EPA has not mandated a specific threshold, the EPA has provided States with guidance and flexibility on how to define a threshold in order to select a reasonable set of sources for analysis of control measures, as set out above.

The EPA also disagrees with KDHE's contention that it is not necessary for every State to take into consideration the four statutory factors when determining the control measures that are a part of their LTS for the second planning period. CAA section 169A(b)(2) requires each State whose emissions may reasonably contribute to visibility impairment to include in its regional haze SIP the measures that are necessary to make reasonable progress toward meeting the national goal of preventing future, and eliminating existing, visibility impairment in Class I areas. Within these SIPs, CAA section 169A(b)(2)(B) also requires long-term (10–15 year) strategies for making

reasonable progress. CAA 169A(g)(1) outlines that in determining reasonable progress, the four factors must be considered, which is also outlined in the RHR. As outlined in the 1999 RHR, the EPA concluded that "all States contain sources whose emissions are reasonably anticipated to contribute to regional haze in a Class I area and, therefore, must submit regional haze SIPs." 64 FR 35721 (1999). This determination did not change with the 2017 RHR.<sup>10</sup> Because the time period for Kansas to take issue with the second planning period regulations has passed, it is thus outside of the scope of this action.

Therefore, in the second planning period, just as with the first planning period, all States are required to submit SIPs to address regional haze and those SIPs must include a LTS for making reasonable progress, which considers the four statutory factors.<sup>11</sup>

In applying the requirements of the regional haze program, the EPA's disapproval is consistent with, and within, the bounds of the CAA and its legislative intent.

*KDHE Comment 3:* KDHE asserted that Kansas's 2021 SIP declined to select sources for four-factor analyses only after Kansas determined that the effect of existing measures employed during the first implementation period made conducting such analyses unnecessary to ensure reasonable progress with the national goal. To that point, KDHE further stated that it provided additional analyses of certain sources in its reply to the EPA comments. KDHE directed the EPA to review the 2021 SIP submission again and notice that each factor required by regulation to be discussed for an LTS was identified and commented on in the submission. The commenter suggested the SIP submission followed the 2019 Guidance by robustly discussing and considering the four statutory factors and concluding that further action was unnecessary to make reasonable progress.

*Response to KDHE Comment 3:* The EPA disagrees that Kansas's SIP submission included a robust demonstration, based on the four statutory factors, that no additional controls are necessary in the second

planning period. As stated in the RHR, the NPRM, and throughout this document, application of the four factors is required by the CAA for a second planning period SIP's LTS. Neither the CAA nor the RHR establish a visibility impact threshold in order for a State to conduct the analysis. As noted in the 2019 Regional Haze Guidance, it is reasonable for States to consider visibility alongside the four statutory factors when determining the emission reduction measures that are necessary to make reasonable progress. 2019 Guidance at 28. However, considering visibility as an additional factor must be done "in a reasonable way that does not undermine or nullify the role of the four statutory factors in determining what controls are necessary to make reasonable progress."<sup>12</sup>

As discussed above in Responses to KDHE Comments 1 and 2, the support proffered for Kansas' decision to decline to select sources included Kansas's mistaken belief that the surrounding States should match the level of control at Kansas sources before Kansas evaluates sources for further controls and that, in Kansas's interpretation of CAA section 169A(b)(1), the impacts from individual Kansas sources are so insignificant so as to not require controls. As stated above, the EPA does not find these assertions to be aligned with the statute or RHR, and thus we find that Kansas has not reasonably explained its decision to not select sources for analysis.

If KDHE wanted to rely upon its first planning period analysis and approach, the 2019 Guidance and 2021 Clarifications Memo explain that the State must support its conclusion with a sound analysis that no new significant information is available that changes the first planning period approach. 2019 Guidance at 36; 2021 Clarifications Memo at 5. Kansas's submission did not include an analysis of its first planning period source selection and four factor considerations. Instead, Kansas points to the SO<sub>2</sub> reductions achieved during the first planning period compared to other States. The EPA finds that this is not a reasonable analysis of Kansas's first planning period approach. The EPA acknowledged in its 2021 Clarifications Memo that many of the largest individual visibility impairing sources have either been controlled or retired and that visibility improvement has occurred in most Class I areas. 2021 Clarifications Memo at 14. Nonetheless,

<sup>10</sup> In the 2017 RHR, the EPA "reiterat[ed] that the CAA requires States to consider the four statutory factors . . . in each implementation period to determine the rate of progress towards natural visibility conditions that is reasonable for each Class I area." 82 FR 3080.

<sup>11</sup> See 64 FR 35721–35722 for additional explanation as to the EPA's determination that emissions from all States reasonably contribute to visibility impairment and thus are subject to the regional haze regulations.

<sup>12</sup> 2021 Clarifications Memo at 13 (quoting Response to Comments on Protection of Visibility: Amendments to Requirements for State Plans; Proposed Rule at 186).

the EPA emphasized that additional progress is needed to achieve the national goal set by Congress,<sup>13</sup> such as evaluating control measures for relatively smaller sources. 2021 Clarifications Memo at 14.

KDHE cites to the 2019 Guidance and the 2021 Clarifications Memo for how a State can reasonably explain its decision to not select sources. However, without conducting the proper analyses required by the rule, KDHE cannot determine that additional controls or optimization of current controls to reduce emissions and improve visibility would not be cost-effective or necessary for reasonable progress.

On June 28, 2021, the EPA submitted comments on the Kansas regional haze plan revision during the public comment period. After the State's public comment period closed, in the SIP's Responsiveness Summary, Kansas addressed the EPA's comment by providing "narrative analyses for the two most impactful facilities based on nitrates-only and sulfates-only AOI results" in order to satisfy the requirement of 40 CFR 51.308(f)(2)(i). The narrative analyses discussed NO<sub>x</sub> controls at Evergy—La Cygne and SO<sub>2</sub> controls at Sunflower Electric—Holcomb.

The EPA notes that Kansas did generally undertake an evaluation of emission reduction measures necessary to make reasonable progress for Evergy—La Cygne and Sunflower Electric—Holcomb. However, the EPA disagrees with Kansas's assertion in the Responsive Summary and its comment on the NPRM that the narrative analyses satisfy the requirement to consider the four statutory factors for two reasons, one substantive and the other procedural.

Substantively, Kansas's four-factor analysis for Evergy—La Cygne and Sunflower Electric—Holcomb is not sufficient. The EPA notes that the 2019 Guidance provides the opportunity for a State to forgo a full four-factor analysis for a particular source if it is already "effectively controlled," as long as the State explains why it is reasonable to assume that a four-factor analysis would likely result in the conclusion that no further controls are reasonable. 2019 Guidance at 22. Further, the EPA's 2021 Clarifications Memo guides that if a source can achieve, or is achieving, a lower emission rate using its existing measures than the rate assumed for the "effective control," a State should further analyze the lower emission rate(s) as a potential control option. 2021 Clarifications Memo at 5. In its

analysis, Kansas discusses the current control equipment, control efficiencies and current enforceable emission limitations for Evergy—La Cygne NO<sub>x</sub> and Sunflower Electric—Holcomb SO<sub>2</sub>. Kansas states that the recent actual emissions are below the current enforceable emission limits and did not analyze the actual emission rates as potential control options for the sources. While Kansas's analysis is informative, it is insufficient because the information provided was very cursory and did not evaluate a full range of control options.

Procedurally, the four-factor analysis of NO<sub>x</sub> controls at Evergy—La Cygne and SO<sub>2</sub> controls at Sunflower Electric—Holcomb was not part of Kansas's regional haze plan revision that went out for public comment from May 27, 2021, to June 22, 2021. 40 CFR 51.102(a) requires States to provide the opportunity to submit written comments on SIP submittals. 40 CFR 51.102(a). 40 CFR 51.104(c) states "EPA will approve revisions only after applicable hearing requirements of § 51.102 have been satisfied." 40 CFR 51.104(c). The public did not have an opportunity to submit written comments on the narrative four-factor analysis provided by Kansas in the Responsive Summary, thus resulting in a procedural defect.

A State that has emissions that may affect visibility in a Class I area must develop a LTS that includes the enforceable emission limitations, compliance schedules, and other measures that are necessary to make reasonable progress in such Class I areas. 40 CFR 51.308(f)(2). The State must evaluate and determine the emission reduction measures that are necessary to make reasonable progress by considering the four factors of CAA section 169A(g)(1). The outcome of that analysis is used to determine the emission reduction measures that a particular source or group of sources needs to implement in order to make reasonable progress towards the national visibility goal. The State must include in its implementation plan a description of the criteria it used to determine which sources or groups of sources it evaluated and how the four factors were taken into consideration in selecting the measures for inclusion in its LTS. In addition, emission reduction measures that are necessary to make reasonable progress may be either new, additional control measures for a source, or they may be the existing emission reduction measures that a source is already implementing, and those measures must be included in the SIP. 2019 Guidance at 45; 2021 Clarifications Memo at 8–10.

As stated in the NPRM, Kansas's submission identifies one hundred and twenty-eight (128) sources in Kansas that impact Class I areas. If Kansas had followed the RHR and properly analyzed a set of these sources, it could potentially have identified additional cost-effective control measures to achieve SO<sub>2</sub> or NO<sub>x</sub> emission reductions that would help make progress toward visibility goals in affected Class I areas. Instead, Kansas selected no sources for which to take into consideration the four factors. Consequently, Kansas did not, nor could not, describe the criteria it used to determine which sources or groups of sources it evaluated and how the four factors were applied in selecting the measures included in the LTS for the second planning period.

*KDHE Comment 4:* KDHE commented that it demonstrated that substantive revision of the existing implementation plan is unnecessary to achieve established goals. KDHE stated that per 40 CFR 51.308(f)(5), revisions of a SIP also serve as "a progress report" and that at the same time the State is "required to submit any progress report," the State is directed to determine the adequacy of the existing implementation plan. KDHE contended that the regulation clearly and unambiguously establishes that a State may determine that no substantive revision to the existing SIP is necessary, and that the 2021 SIP submission reasonably determined that such is the case. KDHE requested the EPA approve the SIP revision.

*Response to KDHE Comment 4:* The EPA disagrees with KDHE's interpretation of 40 CFR 51.308(f)(5). 40 CFR 51.308(a) "establishes requirements for implementation plans, plan revisions, and periodic progress reviews to address regional haze." 40 CFR 51.308(f) sets forth the requirements for the periodic State implementation plan revisions, which are to be submitted by July 31, 2021, July 31, 2028, and every 10 years thereafter. 40 CFR 51.308(f). These SIP revisions are referred to as the second planning period, third planning period, etc. 40 CFR 51.308(g) details the requirements for periodic reports describing progress towards reasonable progress goals, which are to be submitted by January 31, 2025, July 31, 2033, and every 10 years thereafter. 40 CFR 51.308(g).

The determination of adequacy for the existing implementation plan found under 40 CFR 51.308(h) is not applicable to the second planning period SIP revisions under 40 CFR 51.308(f)(2), as KDHE mistakenly asserts. Rather, the requirements for

<sup>13</sup> See CAA section 169A(a)(1).

States to submit a declaration of adequacy under 40 CFR 51.308(h) is triggered when a State is required to submit a progress report pursuant to the deadline requirements of 40 CFR 51.308(g). Under 40 CFR 51.308(g), States are required to submit a progress report containing a declaration of adequacy under 40 CFR 51.308(h) to the EPA by January 31, 2025, July 31, 2033, and every 10 years thereafter. The “progress report” submitted under Kansas’ second planning period SIP revision under 40 CFR 51.308(f)(2) was due to the EPA on July 21, 2021, and does not serve as a progress report as required under 40 CFR 51.308(g). The language under 40 CFR 51.308(h) is clear in that the determination of adequacy is only applicable “at the same time the State is required to submit any progress report to the EPA in accordance with [40 CFR 51.308](g).”

The EPA reiterates that KDHE did not submit a progress report in accordance with 40 CFR 51.308(g) when it submitted its second planning period SIP revision due July 21, 2021. Rather, the progress report provided in the second planning period SIP revision was to fulfill its 40 CFR 51.308(f)(5) requirements. The regulatory language under 40 CFR 51.308(f)(5) directs States *only* to consider the general progress report requirements under 40 CFR 51.308(g)(1) through 40 CFR 51.308(g)(5), and not the additional progress report requirements (such as 40 CFR 51.308(g)(6) or 40 CFR 51.308(g)(8)) that are contained under the entirety of 40 CFR 51.308(g). Furthermore, the established deadlines and timeframes under 40 CFR 51.308(g) ensure that a plan revision under 40 CFR 51.308(f) and a progress report under 40 CFR 51.308(g) will never overlap.

Thus, for the reasons described in this response, KDHE is mistaken that it can use a declaration of adequacy under 40 CFR 51.308(h) in order to avoid considering the four statutory factors to fulfill its LTS requirements for the second planning period under 40 CFR 51.308(f)(2). KDHE has *not* submitted a progress report under 40 CFR 51.308(g) to fulfill its requirements for the next regulatory due date for progress reports.<sup>14</sup> Rather, KDHE has submitted a progress report to meet its SIP revision obligations under 40 CFR 51.308(f)(2), which contains an obligation to meet the requirements of 40 CFR 51.308(f)(5). There is no regulatory option for KDHE to make a declaration of the existing plan when submitting a revision to meet

the requirements of 40 CFR 51.308(f)(2). Thus, Kansas cannot utilize 40 CFR 51.308(h)(1) to assert that Kansas does not need to revise its regional haze plan for the second planning period under 40 CFR 51.308(f)(2).

*KDHE Comment 5:* KDHE commented that Kansas used a reasonable threshold for source selection consistent with the CAA. KDHE asserted that the EPA arbitrarily concludes that any impairment of visibility greater than zero requires completely utilizing the four-factor analysis, and this conclusion unnecessarily saddles States with the overly burdensome endeavor of engaging in four factor analysis for sources whose impact to visibility is insignificant. KDHE argued that the EPA disregards the cost and futility associated with revision of the SIP and “proposes to disapprove the 2021 SIP for no other reason beyond requiring Kansas to complete arbitrary formalities established by regulations that are inconsistent with the [CAA] and exceed the authority granted to EPA.”

*Response to KDHE Comment 5:* The EPA disagrees with KDHE’s statement that Kansas used a threshold for source selection consistent with the requirements of the CAA and that the EPA’s conclusions are arbitrary. As discussed in the Responses to KDHE’s Comment 1 and 2, Kansas’s chosen threshold which resulted in no sources being selected for a four-factor analysis is not reasonable because it excluded all of the State’s largest visibility impairing sources and every State is required to include the LTS in the SIP revision.

The EPA disagrees that it is arbitrary for the Agency to require second planning period regional haze SIP submissions to develop a LTS that will make reasonable progress towards the national goal specified in CAA section 169A(a)(1), through consideration of the four factors specifically outlined in the CAA section 169A(g)(1). Kansas decided to not select any sources and, as stated in the NPRM, the EPA does not find its decision to be reasonable. Kansas’s own submission lists one hundred twenty-eight (128) sources in Kansas with some, albeit low, visibility impacts on at least one Class I area. When SO<sub>2</sub> and NO<sub>x</sub> emissions were considered together by Kansas, impacts from individual Kansas sources ranged from 0.01% to 0.84% of the total estimated visibility impact. As stated in the NPRM, Kansas did not provide any statutory or regulatory based explanation as to why it was reasonable not to select and analyze potential control options for any of these sources. Therefore, as submitted, the SIP revision did not include the statutorily and regulatorily required

consideration of the four statutory factors and a LTS for the second planning period.

The 2017 RHR Revision directed all States that impact Class I areas to evaluate major and minor emission sources and consider the four factors in the second planning period SIP revision. It is already established that Kansas emissions impact Class I areas. As mentioned previously, the EPA acknowledges that there has been visibility improvement and source retirements since the first planning period. However, the fact remains that there is no exclusion in the CAA or RHR to support the contention that if a State can show emissions are “insignificant” or “de minimis”, then it does not have to comply with 40 CFR 51.308(f). The EPA has long established that achieving the Congressional goal of natural visibility will take reductions from multiple sources, across all States, over multiple planning periods.

The EPA also disagrees that source selection and a four-factor analysis is a costly and futile formality of the RHR. The 2019 Guidance and 2021 Clarifications Memo provide States with latitude by which to formulate the LTS, so long as the result is reasonably supported. 2019 Guidance at 9; 2021 Clarifications Memo at 3. As stated in the NPRM, Kansas has not conducted a reasonably supported analysis to in developing its LTS for the second planning period. Had Kansas selected sources to analyze for a four-factor analysis or properly explained its decision not to, it is possible that there would be no new cost-effective controls. If that were the case, then Kansas’s existing controls would be necessary for reasonable progress and would need to be in the State’s LTS. However, Kansas did not demonstrate that with a proper analysis. 2021 Clarifications Memo at 10.

Additionally, as discussed in Response to KDHE Comment 3, the EPA also does not find KDHE’s narrative analyses for Every—La Cygne for NO<sub>x</sub> and Sunflower Energy for SO<sub>2</sub> in its Responsive Summary to properly analyze that these sources are effectively controlled. Therefore, the EPA proposed to disapprove the SIP revision and declines KDHE’s request to approve it.

### C. Kansas Utilities’ Comments and Responses

*Kansas Utilities’ Comment 1:* BPU stated that they submitted comments to KDHE on June 28, 2021, during the State’s public review and comment period. BPU’s comments to the State included modeling results performed by Trinity Consultants, which BPU

<sup>14</sup> The next regulatory deadline for the regional haze second planning period progress reports under 40 CFR 51.308(g) is January 31, 2025.

contended confirm KDHE's conclusion that Kansas's existing plan required no further revision to show reasonable progress toward achieving its LTS for reducing regional haze in affected Class I areas. BPU stated that Kansas has seen significant declines in visibility-impairing emissions due to substantial efforts taken by BPU and other Kansas utilities. BPU also provided a copy of BPU's comments as submitted to KDHE during its comment period on the proposed plan revision for the second planning period, dated June 28, 2021 and reiterated to the EPA the modeling results performed by Trinity consultants for BPU's Nearman Creek Power Station. These comments include a narrative discussion of costs and remaining useful life of the Nearman Creek Power Station regarding SO<sub>2</sub> emissions. BPU stated the dry scrubbers installed in 2017 achieve very high levels of SO<sub>2</sub> control. BPU states these levels are very near what a wet scrubber could do. BPU discussed how the dry scrubbers get better control of acids and are used for Mercury control to meet the Mercury and Air Toxics Standard. BPU concluded that additional controls, specifically new wet controls would be unreasonable.

*Response to Kansas Utilities'*

*Comment 1:* Generally, the EPA does not disagree with BPU's comment; however, the information provided by BPU in its public comment on the NPRM is a summary of Trinity Consultants' modeling results and a narrative discussion of costs and remaining useful life for Nearman Creek Power Station. The actual modeling was not provided to the EPA, the FLMs, or the public, and KDHE did not revise the SIP revision so it could properly rely on the information. We disagree with BPU's argument that the SIP submission is approvable.

As previously stated, in order to demonstrate that no additional controls were necessary for reasonable progress at sources in Kansas, KDHE was required by the CAA and the RHR to evaluate sources or groups of sources and determine the emission reduction measures that are necessary to make reasonable progress by considering the four statutory factors. Specifically, the Kansas SIP revision for the second planning period did not provide a substantive analysis related to the effectiveness of controls, nor did Kansas clarify that it determined that the existing controls were necessary for reasonable progress and thus a part of its LTS for the second planning period.<sup>15</sup> It is significant that Kansas jumped to the conclusion that no

controls were required for the second planning period without conducting a proper cost effectiveness analysis for those existing measures.

Further, the comment presented summaries from Trinity's modeling analysis and provided a copy of BPU's comment letter submitted to KDHE during the State's public review and comment period. Neither Kansas nor BPU provided the modeling files or documentation of Trinity's modeling analysis during the EPA's comment period. The 2019 Guidance provides a mechanism for a State to decline to select a source "if the source owner has recently made a significant expenditure that resulted in significant reductions of visibility impairing pollutants at an emissions unit, it may be reasonable for the State to assume that additional controls on the unit are unlikely to be reasonable for the upcoming implementation period." 2019 Guidance at 22–23. The Guidance directs the State to "explain why the decision is consistent with the requirement to make reasonable progress, *i.e.*, why it is reasonable to assume for the purposes of efficiency and prioritization that a full four-factor analysis would likely result in the conclusion that no further controls are necessary." *Id.* at 23. BPU and Kansas did no such analysis to justify the decision to not select sources, and thus cannot be considered by the EPA.

As BPU's discussion of costs and remaining useful life of Nearman Creek Power Station and its controls regarding SO<sub>2</sub> emissions, we acknowledge that a full cost analysis may confirm BPU's assertion. In other words, at sources like Nearman Creek Power Station, with highly effective air pollution controls, it may be cost prohibitive to replace or improve the efficiency of the controls. In recognition of these potential scenarios, the EPA included the option for States to not select effectively controlled sources in order to focus on other sources which may impact Class I areas in the 2019 Guidance. *Id.* at 22. The EPA guidance, though, is based upon the recognition that the highly effective control emission rates must be made Federally enforceable within the SIP. No emission control measures were submitted to the EPA for incorporation into the Kansas SIP.

The EPA understands that if KDHE was to select Nearman Creek Power Station and conduct a four-factor analysis, with full documentation and cost numbers, the result for SO<sub>2</sub> may be that the existing controls are all that is needed for reasonable progress and thus should be a part of its LTS for the second planning period. However,

without the proper analysis in Kansas's formal SIP revision, and without inclusion of any existing control measures for incorporation into the SIP, we cannot consider BPU's comment alone as Kansas's application of the four factors for SO<sub>2</sub> controls, or as an explanation as to why the Nearman Creek Power Station should not be selected for four-factor analysis for SO<sub>2</sub> controls. We are also not opining on what a four-factor analysis would show in regard to NO<sub>x</sub> emissions and controls, only that if Kansas selects Nearman Creek Power Station, we expect NO<sub>x</sub> to also be considered.

Furthermore, BPU's comment was not provided to the FLMs during the consultation process or included in the State's plan revision for public notice and comment. Therefore, the analysis does not satisfy the substantive or procedural requirements of the statute or regulations.<sup>16</sup> The EPA acknowledges that the information from BPU is informative, but from a technical perspective, the EPA cannot consider this as Kansas satisfying the requirement to evaluate major or minor emissions sources and consider the four statutory factors because KDHE did not modify its SIP revision to the EPA as a result of BPU's June 28, 2021, comment to include an analysis of the controls at Nearman Station.

*Kansas Utilities' Comment 2:* Evergy commented that the EPA's proposed disapproval is discouraging because Kansas sources have reduced contributions of NO<sub>x</sub> and SO<sub>2</sub> to Class I areas. Such large emission reductions have been achieved through investments making the energy grid smarter, cleaner, more dynamic, more flexible, and more secure while providing affordable and reliable service to customers. Evergy stated that emissions of NO<sub>x</sub> and SO<sub>2</sub> from Kansas electric generating units are down 85 and 97 percent, respectively, over the period from 2005 to 2022, and Evergy provided the specific reductions attributable to its emission sources during the first planning period. Evergy asserted that the "above and beyond" first planning period reductions made by Evergy would be utilized in the second planning period. Evergy commented that no neighboring State or FLM requested additional reductions from any Kansas emission sources, including Evergy sources, during the second planning period consultation process. Evergy further argued that instead of recognizing this, the EPA insists on continually burdening Kansas emissions sources by requiring analyses

<sup>15</sup> See Response to KDHE Comment 3.

<sup>16</sup> See Response to KDHE Comment 3.



that will result in no meaningful reduction in visibility impairing pollutants.

*Response to Kansas Utilities'*

*Comment 2:* As previously discussed in response to KDHE's comments, the EPA disagrees that previous emissions reductions achieved in prior planning periods relieves Kansas from its obligations to submit a second planning period SIP revision that meets the requirements of the CAA and RHR.<sup>17</sup> The EPA is guided by, and implements, the regional haze program as established in the CAA and the regulations, which do not provide a measurement by which States are excluded from the RHR requirements. CAA section 169A(a)(1); 40 CFR 51.308(f). Therefore, Kansas, like every other State, (and the District of Columbia and the U.S. Virgin Islands) regardless of what transpired in the first planning period, is required to submit a second planning period SIP that meets the requirements of the CAA, as established in the RHR.

If KDHE wanted to rely upon the emission reductions achieved by Evergy and other Kansas sources during the first planning period, then Kansas must document the technical basis on which it is relying to determine that those emissions reductions measures are necessary to make reasonable progress for the second planning period. 40 CFR 51.308(f)(2)(iii). Kansas's submission did not provide the requisite documentation, including a reasoned analysis of why it declined to select any sources; did not make a connection between the source selection step for the second planning period and the emissions controls implemented; and did not provide an analysis of its first planning period source selection and four factor considerations. Instead, Kansas simply points to the SO<sub>2</sub> reductions achieved during the first planning period compared to other States. The EPA finds that this is not a reasonable analysis when determining what measures are necessary for reasonable progress for the second planning period.

Additionally, the statute and rule require evaluation of emissions sources and consideration of the four statutory factors to be part of the State's SIP revision for the second planning period for regional haze regardless of the outcome of the required state-to-state consultation. During the consultation, a State may agree to certain measures necessary to make reasonable progress at a Class I area, and those measures must be included in the SIP revision. The state-to-state consultation also

allows States to share the emission reduction measures that have been identified to reduce emissions from their own sources. Therefore, the state-to-state consultation is just one facet, among many, in determining which emission reduction measures for selected sources, or groups of sources, should be included in a State's LTS.

Kansas's SIP submission included documentation of its consultations with Colorado and New Mexico, and neither State appeared to disagree with or comment on Kansas's LTS approach. However, the EPA disagrees with the assertion that, based on consultation, it was reasonable for Kansas to determine it did not have to select sources, apply the four statutory factors, or describe how the statutory factors were evaluated when selecting measures for inclusion in the LTS.

As far as the EPA "burdening Kansas emissions sources with even more analyses and financial obligations", the EPA is obligated to implement the mandate created by Congress to prevent future, and remedy existing visibility impairment by requiring States to submit SIP revisions that include a LTS to make reasonable progress. CAA section 169A(a)(1), (b)(2)(B). For the second planning period, the EPA conducted a rulemaking with public comment on how the States should be required to address the Congressional mandate. Notably, during that comment period, the EPA received no comments from Kansas or Kansas emission sources to this effect, nor any lawsuits from said parties. If Kansas or Kansas emissions sources have ideas on how to meet the Congressional mandate without further burden on States or sources, we encourage said parties to be involved in the public discourse with the EPA as it relates to the third planning period.

*Kansas Utilities' Comment 3:* Evergy and Sunflower commented that the EPA failed to consider Kansas's analyses of sources that KDHE included in its Responsiveness Summary. Evergy asserted that the analyses performed by KDHE demonstrate the current NO<sub>x</sub> controls at the Evergy—La Cygne facility satisfy the requirements to consider additional controls. Sunflower commented that the narrative analyses demonstrate that the current SO<sub>2</sub> controls at the Sunflower—Holcomb unit result in a reasonable conclusion that further analysis of this unit is not reasonable.

The commenters stated the EPA should review the 2021 SIP again and notice that each factor required to be discussed was identified and commented on in the 2021 SIP submission. Evergy and Sunflower

argued the EPA's statement that the 2021 SIP lacks a LTS is patently false.

*Response to Kansas Utilities'*

*Comment 3:* As similarly addressed in response to KDHE's Comment 3, the EPA disagrees with Evergy and Sunflowers that KDHE's narrative analyses satisfy the regulatory requirements.<sup>18</sup> The narrative analyses are insufficient because the analyses did not include an explanation of why it is reasonable to assume that the four-factor analysis would likely result in the conclusion that no further controls are reasonable for these two sources. Furthermore, Kansas did not analyze lower emission rate(s) as a potential control option for these sources. The narrative analyses states that the recent actual emissions for La Cygne and Holcomb are below the current enforceable emission limits, and therefore, Kansas failed to evaluate a full range of control options as required.

Additionally, the Responsiveness Summary fails to satisfy the procedural requirements for public notice and comment in 40 CFR part 51 because it was not part of Kansas's regional haze plan revision that went out for state-level public comment from May 27, 2021, to June 28, 2021. 40 CFR 51.102(a) requires States to provide the opportunity to submit written comments on SIP submittals. 40 CFR 51.102(a). 40 CFR 51.104(c) states "EPA will approve revisions only after applicable hearing requirements of § 51.102 have been satisfied." 40 CFR 51.104(c). The public did not have an opportunity to submit written comments on the analyses provided by Kansas in the Responsive Summary.

Due to the substantive and procedural defects surrounding the Responsiveness Summary, the EPA has determined that the narrative analyses do not meet the RHR requirements, and therefore, the EPA proposes disapproval of Kansas's SIP revision.<sup>19</sup>

*Kansas Utilities' Comment 4:* The Kansas Utilities stated the EPA is authorized to require by regulation that a SIP "contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal . . ." The commenters argued that the trigger warranting evaluation of those factors is, by statute, whether it is first "necessary" to meet the national goal, and an evaluation is unnecessary in instances where the visibility impact is <1.00%. The Kansas Utilities asserted that Kansas demonstrated that "substantive"

<sup>18</sup> See Response to KDHE Comment 3.

<sup>19</sup> See Response to KDHE comment 3.

<sup>17</sup> See Response to KDHE Comment 1.

revision of the existing SIP is unnecessary because the regulation clearly and unambiguously establishes that a State may determine that no substantive revision to the existing SIP is necessary. The Kansas Utilities concluded that Kansas reasonably determined that no substantive revision of the SIP is necessary based on all of the information provided in the 2021 SIP.

*Response to Kansas Utilities'*

*Comment 4:* As similarly addressed in Responses to KDHE Comments 2 and 4, the EPA disagrees with this comment. The Kansas Utilities makes the same arguments and provide similar data as KDHE regarding when evaluation of the four statutory factors is "necessary" under the CAA and RHR. As such, the EPA's Response to KDHE Comment 2 is applicable to this comment. To the extent that the Kansas Utilities assert KDHE's argument that, per 40 CFR 51.308(f)(5), Kansas has demonstrated a substantive revision of the existing plan is unnecessary, the EPA's Response to KDHE Comment 4 is applicable and conveys why this regulatory interpretation is incorrect.

*Kansas Utilities' Comment 5:* The commenters stated that the existing Kansas regional haze emission limits will continue to show reasonable progress towards achieving visibility gains in the affected Class I areas through the second planning period.

*Response to Kansas Utilities'*

*Comment 5:* As stated throughout this document, while the EPA recognizes the gains made at most of the Class I areas affected by Kansas sources, Kansas is nonetheless still required to comply with the regulatory requirements of analyzing sources, or groups of sources, via application of the four statutory factors, to determine if there are new or additional cost effective controls that would result in reasonable progress towards natural visibility.

If Kansas wanted to rely on an argument that their existing effective controls are necessary for reasonable progress in the second planning period, the EPA has provided guidance on how to analyze and provide the proper documentation to back up such a finding. However, Kansas did not properly analyze whether the Kansas sources' existing measures are necessary for reasonable progress and thus a part of their LTS for the second planning period. The 2021 Clarifications Memo states "the existence of an enforceable emission limit or other enforceable requirement reflecting a source's existing measures may also be evidence that the source will continue implementing those measures. . . .

States should provide information on any enforceable emission limits associated with sources' existing measures." 2021 Clarifications Memo at 9. The SIP should further identify the applicable permits and the relevant limits and provide a copy of the underlying permit with the SIP submission, if it is not publicly available. *Id.* at 9–10. Without this information, which is an integral part of the LTS, the SIP is deficient, and the EPA cannot approve the submission.

*Kansas Utilities' Comment 6:* The commenters stated that as Kansas was concluding the regional haze SIP revision process for the first planning period, it was recognized by all those involved that Evergy was going above and beyond the emission reductions required for the first regional haze planning period. Evergy asserted that there was recognition that these additional emission reductions or "reasonable progress emission reductions" would be utilized in the future to aid Kansas in complying with the second regional haze planning period.

*Response to Kansas Utilities'*

*Comment 6:* The EPA recognizes that Kansas made significant emissions reductions during the first planning period. However, beginning in 2015 and concluding in 2017, the EPA revised the RHR. As previously stated throughout this document, the revised rule clearly requires all States to have a LTS where the States evaluate and determine the emission reduction measures that are necessary for reasonable progress by considering the four statutory factors, and the emission reduction measures that are necessary for reasonable progress need to be Federally enforceable. The revised rule did not codify any exemption or use of early reductions for emission sources, or its predecessors or successors. Since Kansas did not select sources to evaluate for further controls, the EPA cannot evaluate any claims regarding certain sources, or groups of sources.

#### IV. What action is the EPA taking?

The EPA is taking final action to disapprove Kansas's SIP revision related to the regional haze requirements for the second planning period. Disapproval does not trigger imposition of mandatory sanctions. The effective date of this action does trigger an obligation for the EPA to issue a FIP within two years.

#### V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission

that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of the National Technology Transfer and Advancement Act (NTTA) because this action does not involve technical standards; and
- This action does not have Tribal implications as specified in Executive Order 13175. This action does not apply on any Indian reservation land, any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, or non-reservation areas of Indian country. Thus, Executive Order 13175 does not apply to this action.
- Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) and Executive Order 14096 (Revitalizing Our Nation's Commitment to Environmental Justice for All, 88 FR 25251, April 21, 2023) directs Federal agencies to identify and address "disproportionately high and adverse human health or environmental effects" of their actions on minority

populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” The EPA further defines the term fair treatment to mean that “no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.”

KDHE did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples. While the Conservation Groups did adversely comment that the EPA should consider EJ, they did not provide any different steps or outcomes the EPA should take or arrive at. See our response to comments document in the docket for this action.

This action is subject to the Congressional Review Act, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 7, 2024. 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: July 30, 2024.

**Meghan A. McCollister,**

*Regional Administrator, Region 7.*

[FR Doc. 2024–17182 Filed 8–6–24; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

#### 43 CFR Part 8360

[BLM\_HQ\_FRN\_MO4500179077]

RIN 1004–AE89

#### Temporary Closure and Restriction Orders

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Final rule.

**SUMMARY:** The Bureau of Land Management (BLM) is revising its regulations to modernize and streamline how the agency notifies the public of temporary closure and restriction orders; clarify that such orders may be issued to avoid conflicts among public land users and ensure the privacy of Tribal activities for traditional or cultural use; require that all orders specify the date and time that a temporary closure or restriction becomes effective and terminates; and harmonize the penalties for violating temporary closure and restriction orders consistent with current statutory authority.

**DATES:** This final rule is effective on September 6, 2024.

**FOR FURTHER INFORMATION CONTACT:** Kevin Oliver, Division Chief, BLM Headquarters Division of Recreation and Visitor Services at (801) 450–3134 or via email at [koliver@blm.gov](mailto:koliver@blm.gov). For questions relating to regulatory process issues, email Brittny D. Rodrigues at: [brodrigues@blm.gov](mailto:brodrigues@blm.gov). Individuals in the United States who are deaf, blind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-

contact in the United States. For a summary of the final rule, please see the final rule summary document in docket No. BLM–2023–0007 on <https://www.regulations.gov>.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

- II. Response to Comments on the Proposed Rule
- III. Discussion of the Final Rule
- IV. Procedural Matters

##### I. Background

The Federal Land Policy and Management Act (FLPMA) (43 U.S.C. 1701–1787) establishes the BLM’s multiple use and sustained yield mandate. In managing the public lands in accordance with FLPMA, the BLM occasionally issues temporary closure and restriction orders under 43 CFR 8364.1 to protect persons, property, public lands, and resources. The need to temporarily close or restrict the use of public land arises in various situations, including in response to an emergency or unplanned event such as a flood, fire, hazardous material incident, discovery of unexploded ordnance, public health emergency, or change in public land use that creates a public safety hazard. For example, the BLM has issued temporary closure or restriction orders to protect the public from unsafe conditions in a community rock pit in Doña Ana County, New Mexico (88 FR 42984 (July 5, 2023)); close 9 acres of public land near Rowley, Utah, that were inundated with a hydrochloric acid spill (79 FR 26265 (May 7, 2014)); close approximately 31,000 acres of public land in California to protect the public from exposure to airborne asbestos (73 FR 24087 (May 1, 2008)); and close a recreation site near Challis, Idaho, to protect the public from dangerous flooding and ice jams (87 FR 25523 (April 29, 2022)).

The BLM also occasionally issues temporary closures or restrictions to protect resources or avoid conflicts among visitor use activities. In such situations, the BLM may restrict an area to certain types of travel to facilitate resource restoration or close an area to public access to facilitate special recreation events, such as the Burning Man Project (88 FR 39863 (June 20, 2023)); the King of the Hammers off-road race (87 FR 69300 (November 11, 2022)); the Reno Air Races (84 FR 31337 (July 1, 2019)); the Mint 400 off-road race in Las Vegas (88 FR 7994 (February 7, 2023)); and the Desert Classic racecourse (87 FR 20457 (April 7, 2022)).

As resource uses and demands for access to public lands have increased,