



# Federal Register

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**Thursday,  
June 5, 2003**

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**Part II**

## **Environmental Protection Agency**

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**40 CFR Part 51**

**Revisions to Regional Haze Rule To  
Incorporate Sulfur Dioxide Milestones  
and Backstop Emissions Trading Program  
for Nine Western States and Eligible  
Indian Tribes Within That Geographic  
Area; Final Rule**

**ENVIRONMENTAL PROTECTION  
AGENCY**
**40 CFR Part 51**
**[FRL-7504-4]**
**Revisions to Regional Haze Rule To  
Incorporate Sulfur Dioxide Milestones  
and Backstop Emissions Trading  
Program for Nine Western States and  
Eligible Indian Tribes Within That  
Geographic Area**
**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The purpose of this rule is to revise EPA's regional haze rule to incorporate certain provisions for Western States and eligible Indian Tribes.

The Western Regional Air Partnership (WRAP) submitted an Annex to the 1996 report of the Grand Canyon Visibility Transport Commission (GCVTC) to EPA on September 29, 2000. This submittal was required under the regional haze rule in order for nine Western States (and Indian Tribes within the same geographic region) to have the option of submitting plans implementing the GCVTC recommendations. The Annex contains recommendations for implementing the regional haze rule in nine Western States, including a set of recommended regional emissions milestones. The milestones address, for the time period between 2003 and 2018, emissions of sulfur dioxide (SO<sub>2</sub>), a key precursor to the formation of fine particles and regional haze.

**DATES:** The regulatory amendments announced herein take effect on August 4, 2003.

**ADDRESSES:** The EPA has established an official public docket for this action under Docket No. OAR-2002-0076. The official public docket is the collection of materials that is available for public viewing at the Air Docket in the EPA Docket Center, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

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**SUPPLEMENTARY INFORMATION:**
**Table of Contents**

- I. General Information
  - A. Regulated Entities
  - B. How can I get copies of this document and other related information?
- II. Overview of the Stationary Source SO<sub>2</sub> Reduction Program Covered by this Rule
  - A. What is the regional haze rule?
  - B. What are the special provisions for Western States and eligible Indian Tribes in 40 CFR 51.309 of the regional haze rule?
  - C. What was required to be included in the Annex to the GCVTC report?
  - D. What are the next steps in implementing this program?
  - E. What topics were covered in EPA's May 6, 2002 proposal?
  - F. What public comments were received on the proposal?
  - G. What topics are covered in this preamble?
- III. Discussion of Issues Raised in Comments on the May 6, 2002 Proposal
  - A. General and Overarching Issues
  - B. Milestones
  - C. Annual Process for Determining Whether a Trading Program is Triggered
  - D. Requirements for the Backstop Trading Program
  - E. Provisions Related to Time Period After 2018
  - F. Provisions Related to Indian Tribes
- IV. Statutory and Executive Order Reviews
  - A. Executive Order 12866: Regulatory Planning and Review
  - B. Paperwork Reduction Act
  - C. Regulatory Flexibility Act
  - D. Unfunded Mandates Reform Act
  - E. Executive Order 13132: Federalism
  - F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
  - G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
  - H. Executive Order 13211: Actions that Significantly Affect Energy Supply, Distribution, or Use
  - I. National Technology Transfer Advancement Act
  - J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
  - K. Congressional Review Act

**I. General Information**
**A. Regulated Entities**

Entities potentially regulated by this action are nine States in the Western United States (Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah and Wyoming) and Indian Tribes within that same geographic area. This action, and an earlier action taken by EPA in 1999, provides these States and Tribes with an optional program to protect visibility in Federally protected scenic areas. The portion of the program addressed by today's action is a program for stationary sources of SO<sub>2</sub>, involving

a set of regional annual emissions milestones for the years between 2003 and 2018 that would apply to the total SO<sub>2</sub> emissions from all stationary sources emitting more than 100 tons of SO<sub>2</sub> per year. Examples of potentially affected sources currently emitting at this level are listed in the following table.

**Examples of Regulated Entities**

Coal-fired power plants  
Industrial boilers  
Petroleum refineries  
Natural gas processing facilities with sulfur recovery plants  
Cement kilns  
Paper mills

**B. How Can I Get Copies of This Document and Other Related Information?**

1. *Docket.* The EPA has established an official public docket for this action under Docket No. OAR-2002-0076. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include confidential business information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Air Docket in the EPA Docket Center, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742. A reasonable fee may be charged for copying.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at <http://www.epa.gov/fedrgstr/>. An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified above. Once in the system, select "search," then key in the

appropriate docket identification number.

## II. Overview of the Stationary Source SO<sub>2</sub> Reduction Program Covered by This Rule

The purpose of this rule is to revise 40 CFR 51.309 of the regional haze rule to incorporate additional provisions to address visibility impairment in 16 Class I areas on the Colorado Plateau.

### A. What Is the Regional Haze Rule?

Section 169A of the CAA establishes a national goal for protecting visibility in Federally-protected scenic areas. These "Class I" areas include national parks and wilderness areas. The national visibility goal is to remedy existing impairment and prevent future impairment in these Class I areas, consistent with the requirements of sections 169A and 169B of the CAA.

Regional haze is a type of visibility impairment caused by air pollutants emitted by numerous sources across a broad region. The EPA uses the term regional haze to distinguish this type of visibility problem from those which are more local in nature. In 1999, EPA issued a regional haze rule requiring States to develop implementation plans that will make "reasonable progress" toward the national visibility goal, (64 FR 35714, July 1, 1999). The first State plans for regional haze are due between 2003 and 2008. The regional haze rule provisions appear at 40 CFR 51.308 and 40 CFR 51.309.

### B. What Are the Special Provisions for Western States and Eligible Indian Tribes in 40 CFR 51.309 of the Regional Haze Rule?

The regional haze rule at 40 CFR 51.308 sets forth the requirements for State implementation plans (SIPs) under the regional haze program. The rule requires State plans to include visibility progress goals for each Class I area, as well as emissions reductions strategies and other measures needed to meet these goals. The rule also provides an optional approach, described in 40 CFR 51.309, that may be followed by the nine Western States (Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, and Wyoming) that comprise the transport region analyzed by the GCVTC during the 1990's. This optional approach is also available to eligible Indian Tribes within this geographic region. The regulatory provisions at 40 CFR 51.309 are based on the final report issued by the GCVTC in 1996,<sup>1</sup> which included a

number of recommended emissions reductions strategies designed to improve visibility in the 16 Class I areas on the Colorado Plateau.

In developing the regional haze rule, EPA received a number of comments on the proposed rule encouraging the Agency to recognize explicitly the work of the GCVTC. In addition, in June 1998, Governor Leavitt of Utah provided comments to EPA on behalf of the Western Governors Association (WGA), further emphasizing the commitment of Western States to implementing the GCVTC recommendations. The WGA's comments also suggested the translation of the GCVTC's recommendations into specific regulatory language. The EPA issued a Notice of Availability during the fall of 1998 requesting further comment on the WGA proposal and regulatory language based upon the WGA's recommendations. Based on the comments received on this **Federal Register** notice, EPA developed the provisions set forth in 40 CFR 51.309 that allow the nine Transport Region States and eligible Tribes within that geographic area to implement many of the GCVTC recommendations within the framework of the national regional haze rule.

The provisions in 40 CFR 51.309 comprise a comprehensive long-term strategy for addressing sources that contribute to visibility impairment within this geographic region. The strategy addresses the time period between the year 2003,<sup>2</sup> when the implementation plans are due, and the year 2018. The provisions address emissions from stationary sources, mobile sources, and area sources such as emissions from fires and windblown dust.

One element of the GCVTC's strategy to address regional haze is a program to reduce stationary source emissions of SO<sub>2</sub>. This program calls for setting a series of declining caps on emissions of SO<sub>2</sub>. These declining caps on emissions are referred to as emissions milestones and provide for a reduction in SO<sub>2</sub> emissions over time. In designing this program, the GCVTC intended for these milestones to be reduced through voluntary measures, but also included provisions for an enforceable market-based program that would serve as a "backstop" if voluntary measures did not succeed. At the time the regional haze rule was published, however, it was broadly recognized that the specific emission milestones, and the details of how both the voluntary and enforceable

phases of the program would be implemented, were necessary elements of a regulatory program. Accordingly, the regional haze rule, in 40 CFR 51.309(f), required the development of an "Annex" to the report of the GCVTC that would fill in these details. The regional haze rule provided that the option afforded by 40 CFR 51.309 would only be available if an Annex, addressing the specific requirements of 40 CFR 51.309(f), were submitted to EPA by October 1, 2000. The EPA required the submission of an Annex by this date to ensure that EPA would be able to act on it before the December 31, 2003 deadline for SIPs under 40 CFR 51.309(c).

### C. What Was Required To Be Included in the Annex to the GCVTC Report?

The regional haze rule required the GCVTC (or a regional planning body formed to implement the Commission recommendations, such as the Western Regional Air Partnership (WRAP) to provide recommendations to fill in the details for two main aspects of the program:

- Emissions reductions milestones for stationary source SO<sub>2</sub> emissions for the years 2003, 2008, 2013, and 2018. The milestones must provide for "steady and continuing emissions reductions" for the 2003–2018 time period. In addition, the milestones must ensure greater reasonable progress than would be achieved by application of best available retrofit technology (BART) pursuant to §51.308(e)(2).
- Documentation setting forth the details for how a market trading program would be implemented in the event that voluntary measures are not sufficient to meet the required milestones. This documentation must include model rules, memoranda of understanding, and other documentation describing in detail how emissions reductions progress will be monitored, what conditions will result in the activation of the market trading program, how allocations will be performed, and how the program will operate.

The EPA received the Annex from the WRAP in a timely manner, on September 29, 2000. The EPA recognizes the significant amount of work that was devoted to developing the Annex and we commend the WRAP participants for their efforts. Under 40 CFR 51.309(f)(3), if EPA finds that the Annex meets the requirements of the regional haze rule, EPA committed to revise the regional haze rule based on the Annex to incorporate provisions requiring compliance with the milestones and backstop trading program. Along with the existing elements of 40 CFR 51.309, these new

<sup>1</sup> *Recommendations for Improving Western Vistas*. GCVTC, June 10, 1996.

<sup>2</sup> Indian Tribes are given the flexibility under EPA regulations to submit implementation plans and opt into the program after the 2003 deadline.

provisions would also be addressed in the 2003 SIPs by the 9 Western States.

#### *D. What Are the Next Steps in Implementing This Program?*

Today's rule modifies the requirements in 40 CFR 51.309 of the regional haze rule. As a result, 40 CFR 51.309 provides a complete regulatory framework to be used by Western States and Tribes in developing regional haze implementation plans. The EPA will continue to work closely with the States and Tribes to support their efforts to develop plans that meet the applicable requirements of the regional haze rule. Once State and tribal plans that meet the applicable requirements of the regional haze rule are reviewed and approved by EPA, they will be federally enforceable.

#### *E. What Topics Were Covered in EPA's May 6, 2002 Proposal?*

The May 6, 2002 proposal addressed the following topics:

- The proposed regional SO<sub>2</sub> milestones and WRAP's determination that the milestones meet the criteria for approval in the regional haze rule. The EPA reviewed the WRAP's methodology for developing specific milestones for SO<sub>2</sub> for the years between 2003 and 2018. The EPA proposed to approve the milestones as satisfying the requirements of the regional haze rule. The EPA noted its conclusion that the milestones provide for "steady and continuing emissions reductions." The EPA also proposed to conclude that the milestones provide for "greater reasonable progress" than the BART emission limits that would otherwise be required by the regional haze rule.

- Ways in which the milestones may be adjusted in the future. The proposal discusses the limited circumstances under which the milestones may be adjusted in the future and the proposed administrative process for making those changes.

- The stationary sources of SO<sub>2</sub> that are included in the program. The proposal discussed the stationary sources of SO<sub>2</sub> that would be required to participate in the program, and whose cumulative emissions would be compared to the milestones.

- The annual process for determining whether a milestone is exceeded, thereby triggering the trading program. The proposal described the steps to be followed in evaluating emissions data at the State, tribal and regional levels. It also described a mechanism by which States and Tribes can activate the trading program in 2013 if evidence indicates that the 2018 milestone will not be reached without such action.

- Key trading program elements that are required in SIPs and tribal implementation plans (TIPs). The preamble discussed proposed requirements regarding the backstop trading program, and discussed trading program elements such as: Issuance of and compliance with allowances; emissions quantification protocols and tracking system; the annual reconciliation process; and penalty provisions.

- Status of the program after 2018. The proposal discussed EPA's understanding of what happens to the milestones and backstop trading program at the completion of the first implementation period, in 2018. The preamble to the May 6, 2002 proposal described each of these programmatic areas in detail, including EPA's review of the relevant portion of the WRAP submittal.

#### *F. What Public Comments Were Received on the Proposal?*

On May 6, 2002 (67 FR 30418), the proposed rule was published in the **Federal Register**. The EPA requested written comments on the proposal and held a public hearing. The public hearing was held in Phoenix, Arizona on June 4, 2002. A transcript for this public hearing is available in the public docket for the regulation (Docket OAR-2002-0076). The EPA received eleven written comments on the package, primarily from Western stakeholder groups.

#### *G. What Topics Are Covered in This Preamble?*

The EPA has made a number of changes to the proposed rule in response to the comments we received. The comments on the proposal were limited to a relatively small subset of the broad range of topics discussed in detail in the proposal. Accordingly, EPA believes that it is not necessary to repeat the comprehensive discussion contained in the preamble to the proposal. Instead, EPA has limited the discussion in this preamble to issues raised by commenters, and changes made to the final rule based on those issues.

### **III. Discussion of Issues Raised in Comments on the May 6, 2002 Proposal**

#### *A. General and Overarching Issues*

##### **1. Impact of May 24, 2002 American Corn Growers Decision**

On May 24, 2002, the U.S. Court of Appeals for the D.C. Circuit issued a decision in *American Corn Growers et al. v. EPA*, 291 F.3d 1 (D.C. Cir., 2002) that invalidated part of EPA's regional

haze rule. Because the WRAP Annex would be incorporated into the regional haze rule, a number of commenters asked whether the court's decision would have an impact on this rulemaking regarding the Annex. Some commenters recommended that EPA not proceed with the final rule until EPA has addressed the issues raised by the court regarding the regional haze rule in general. In contrast, a number of commenters agreed with the position that EPA took in a June 7 letter<sup>3</sup> that the Annex is fully consistent with the court's ruling. A number of commenters requested that EPA clarify its position and rationale on this issue. The EPA continues to believe that the decision in *American Corn Growers* does not in any way affect the WRAP Annex or EPA's ability to incorporate the Annex into its regional haze rule.

In order to better understand EPA's conclusion regarding the Annex, EPA believes it is helpful to review the history of the GCVTC and the WRAP. In its 1996 report to EPA, the GCVTC recommended a wide range of control strategies to address regional haze, including strategies to reduce emissions of SO<sub>2</sub> from large stationary sources. Thus, the GCVTC specifically recognized that stationary sources would need to be an important part of an overall visibility strategy and, in particular, that controlling sulfates from these sources was a key strategy for addressing haze. As part of this overall strategy, the GCVTC also concluded that interim targets that provided for "steady and continuing emission reductions" over the entirety of the planning period might also be needed.

In 1997, EPA proposed the regional haze rule, and in 1998, the WGA submitted comments to EPA requesting the addition of specific language to the rule to address the recommendations of the GCVTC. In these comments, the WGA reemphasized the commitment of the Western governors to the GCVTC recommendations. Following public notice and an opportunity to comment on the WGA's proposal, EPA issued the final regional haze rule (64 FR 35714, July 1, 1999). In 40 CFR 51.309 of the rule, EPA established a specific set of SIP requirements for the States and Tribes that participated in the GCVTC. As EPA noted in the preamble to the rule, these requirements acknowledged and gave effect to the substantial body of work already completed by the GCVTC and the WRAP.

<sup>3</sup> June 7, 2002 letter from Lydia Wegman, EPA, to Rick Sprott and Julie Simpson, co-chairs, WRAP Initiatives Oversight Committee.

One of the requirements in 40 CFR 51.309 addressed the GCVTC's recommendation that the States establish a cap on regional emissions of SO<sub>2</sub> from stationary sources. Under 40 CFR 51.309(f) of the regional haze rule, the WRAP was required to submit an annex to the GCVTC Report that would contain specific emission reduction milestones for the years 2003, 2008, 2013, and 2018. This provision explicitly references the recommendations of the GCVTC for "steady and continuing emissions reductions \* \* \* consistent with the Commission's definition of reasonable progress" and its goal of 50 to 70 percent reduction in emissions of SO<sub>2</sub> between 1990 and 2040. In the preamble to the final regional haze rule, EPA explained that the WRAP would have to take into account four specific factors in setting these milestones. The preamble specifically noted that "[t]he first factor affecting the selection of interim milestones is the GCVTC's definition of reasonable progress." (64 FR 35756). The other factors listed in the rule are: (1) The ultimate target in 2040 of a 50 to 70 percent reduction in emissions of SO<sub>2</sub> from stationary sources; (2) the requirement that the emissions cap provide for greater progress than would be achieved through source-specific BART requirements; and (3) the timing of progress assessment and the identification of mechanisms to address the cases where emissions exceed milestones.

In the regional haze rule, EPA concluded that the specific SIP requirements in 40 CFR 51.309 provide for reasonable progress toward the national visibility goal. The WRAP's plan for capping SO<sub>2</sub> emissions from stationary sources is a part of the Western States' and Tribes' long-term strategy for achieving reasonable progress. As described above, the SO<sub>2</sub> program grew out of the GCVTC's recommendations for measures to remedy adverse impacts on visibility.

Some commenters expressed concerns that the WRAP's program for controlling SO<sub>2</sub> emissions in the West, as further defined by the Annex to the GCVTC's Report, is a "BART provision" subject to the *American Corn Growers* court remand. For several reasons, EPA believes that this is not the case.

Under the CAA, the BART provisions require the installation of control technology on specific sources that were built between 1962 and 1977. Nothing in the Annex requires specific controls on any individual source. A key component of the Annex's SO<sub>2</sub> program is the goal that all reductions called for by the program remain voluntary. If the

reductions are achieved through voluntary measures, then there will be no requirements of any kind. Even if the SO<sub>2</sub> milestones are not achieved through voluntary actions, the Annex does not provide for source-specific controls. Rather, the failure to achieve these milestones would trigger a "backstop" emissions trading program. Such a program, by its very nature, does not dictate that any particular source install control technology or otherwise reduce its emissions.

The EPA also notes that the Annex covers all stationary sources that emit more than 100 tons per year of SO<sub>2</sub>—not just sources built between 1962 and 1977—and thus goes well beyond the scope of the statutory BART provisions. For this reason (and others noted above), EPA believes that the SO<sub>2</sub> program is a component of the WRAP's strategy for ensuring reasonable progress, an aspect of the regional haze program that was not addressed by the *American Corn Growers* decision.

The EPA approved the WRAP's long-term strategy for addressing visibility consistent with the broad discretion afforded States by section 169A and title I of the CAA in developing strategies to meet reasonable progress goals and national standards. See *Union Electric Co. v. EPA*, 427 U.S. 246 (1976); *Train v. NRDC*, 421 U.S. 60 (1975). The SO<sub>2</sub> program, which caps emissions of SO<sub>2</sub> from all large stationary sources, reflects the WRAP States' and Tribes' judgement as to one appropriate means for addressing haze and ensuring reasonable progress. The decision to limit emissions from this category of sources is well within the discretion of the States and Tribes. The court's decision in *American Corn Growers*, which addresses only the BART provisions, does not in any way limit the general authority of the States to choose appropriate control measures to ensure reasonable progress. Any suggestion that the decision requires States to undertake a source specific analysis of a source's contribution to the problem of regional haze before the State can subject a source to regulation would go far beyond the actual holding in the case.

As discussed above, 40 CFR 51.309 does not require participating States to assess and impose BART on individual sources. Best available retrofit technology is only relevant as one of four factors that the WRAP must consider in establishing the appropriate emission reduction milestones for SO<sub>2</sub>—*i.e.*, the level of the cap. The regional haze rule requires that the milestones in the Annex to the GCVTC Report "must be shown to provide for greater

reasonable progress than would be achieved by application of best available retrofit technology (BART) pursuant to § 51.308(e)(2)." 40 CFR 51.309(f)(1)(i). This is not a requirement for BART. The requirement that the milestones "provide for greater reasonable progress" than BART is based on the decision by EPA to provide States with the flexibility to adopt alternative measures in lieu of the BART requirements set forth in statute so long as these alternative measures were "better than BART." See 40 CFR 51.308(e)(2). In short, the SO<sub>2</sub> program described in the regional haze rule, as further defined by the Annex, does not impose controls on specific sources but rather ensures that greater reasonable progress is made than would be through installation of source specific controls on the BART sources. The regional haze rule accordingly authorizes States to achieve improvements in visibility through the most cost-effective measures available.

The *American Corn Growers* court decision did not address the provisions in the regional haze rule allowing States to adopt a trading program or other alternative measures in place of source specific control measures for BART sources. The EPA finds nothing in the court's decision that would invalidate the trading program alternative to BART, as provided for in 40 CFR 51.308(e)(2). In the preamble to the regional haze rule, EPA sets forth the basis for its decision to allow States this flexibility and describes the process for States to make a showing that the alternative measures provide for greater reasonable progress. Significantly, nothing in the D.C. Circuit's opinion suggests that such an alternative is in conflict with the requirements of the visibility provisions of the CAA. An approach that allows States to adopt alternative measures in lieu of BART fully comports with the court's view of the States' broad authority in this area. Accordingly, the Annex meets the requirements set out in 40 CFR 51.309(f), and EPA believes that it may approve the proposed revisions to the regional haze rule incorporating the emission reduction milestones and other measures set forth in the Annex.

## 2. Whether the December 31, 2003 SIP Deadline Should Be Extended

Under 40 CFR 51.309 of the regional haze rule, SIPs for the optional program for the nine Western States are due by December 31, 2003. The EPA received a number of comments on the proposed rule with respect to this deadline. Four commenters, including the State of Colorado and three industry trade

groups, requested that EPA extend the deadline for SIPs under 40 CFR 51.309. One commenter, representing an environmental organization, recommended that this deadline should not change.

The primary argument of those recommending an extension of the December 31, 2003 deadline, is that the *American Corn Growers* decision creates additional uncertainty for States deciding whether to submit regional haze SIPs under 40 CFR 51.309 or 40 CFR 51.308. Some commenters requested that EPA extend the deadline by the amount of time it takes to resolve the remanded portions of the regional haze rule. The environmental group commenter opposed to the extension stated that there is no legal or policy basis for an extension because the deadline is required by the rule. In addition, this commenter noted that States have had several years to prepare SIPs under 40 CFR 51.309, and that the market-based alternative to BART is unaffected by the court decision. Finally, this commenter believed that delays in the SIP submittals could undermine EPA's finding that the 40 CFR 51.309 program constitutes greater reasonable progress than BART.

In the final rule, EPA retains the December 31, 2003 deadline for a number of reasons. First, as noted above, EPA does not believe that the *American Corn Growers* decision affects the WRAP States' ability to move forward in implementing 40 CFR 51.309. While the court decision may affect a State's decision on whether to pursue the optional program under 40 CFR 51.309, EPA does not believe that this is an adequate justification for delaying the program. Second, EPA believes that the 2003 deadline is a fundamental element of the overall optional strategy provided by 40 CFR 51.309. The strategy was supportable under the regional haze rule in large part because it was an early strategy that would be in place well before SIPs under 40 CFR 51.308. The fact that it was received early and contained comprehensive strategies was an important part of the rationale for its acceptance. The EPA believes that the longer the strategy is delayed in its implementation, the less valid this rationale becomes.

### 3. Procedural Issues

One commenter stated that EPA cannot approve the Annex because of procedural flaws related to 40 CFR 51.309(f)(1) of the regional haze rule. The commenter asserted that EPA's rulemaking to approve the Annex is procedurally flawed because EPA did

not publish the Annex upon its receipt. Additionally, the commenter notes that EPA did not amend the regional haze rule within 1 year after receipt of the Annex.

The EPA disagrees with the assertions that this rulemaking is procedurally flawed. The EPA published a Notice of Availability in the **Federal Register** for the Annex on November 15, 2000 (65 FR 68999), indicating where the Annex could be found on EPA's Web site. The commenter is correct that EPA established a deadline for itself of 1 year for the Agency to incorporate the provisions of the Annex if EPA found that the Annex met the requirements of the rule. Although the statement that EPA "will act" within 1 year signaled EPA's intentions to act within that time period, nothing in the regional haze rule precludes EPA from acting after this self-imposed deadline. In particular, action within the 1-year deadline should not be interpreted as a prerequisite for approving the Annex or for incorporating the Annex into the regional haze rule. It is clear from the commenter's statements, however, that the statement that EPA will act within 1 year has created confusion as to the meaning of the provision. The EPA is clarifying this provision by removing the phrase "1 year" from section 309(f)(3).

### B. Milestones

A central feature of the program in the WRAP annex, and in EPA's proposed rule, is a set of emissions milestones for SO<sub>2</sub> from stationary sources for the time period between 2003 and 2018. In the proposed rule, EPA included the Annex milestones. In the final rule, EPA includes the same milestones as proposed.

In addition, the proposed rule included specific language to allow for future adjustments to the milestones. In the Annex, the WRAP described a limited set of future circumstances that would necessitate adjustments to the milestones. For each of these circumstances, the Annex included a detailed description of how the milestone would be adjusted, including a discussion of the administrative process for making each adjustment. In the proposed rule, EPA included regulatory language for each adjustment, closely following the provisions of the Annex. In the final rule, EPA has made a few changes to the adjustments based upon comments received.

In this unit of the preamble, we discuss comments received related to the milestones and the adjustments.

### 1. Whether Milestones Satisfy Requirements in the Regional Haze Rule

*Proposed rule.* In the proposal, EPA indicated its agreement with the WRAP's conclusion that the emissions milestones meet the requirements of the CAA and the regional haze rule. The EPA devoted a significant portion of the preamble of the proposed rule to a discussion of its rationale for this proposed finding, (67 FR 30420–30426). In this discussion, EPA concluded that the WRAP's program for SO<sub>2</sub> was appropriate in lieu of source specific BART limits because the milestone for the year 2018 provided for "greater reasonable progress" in visibility improvement than WRAP States would obtain by implementing the requirement for source-specific BART. In addition, the preamble to the proposal discusses EPA's finding that the milestones for the years between 2003 and 2017 provide for "steady and continuing" progress.

With respect to EPA's findings on BART, the preamble discussion for the proposed rule focused largely on the demonstration provided by the WRAP in Attachment C of the Annex. The EPA noted the WRAP used the following procedure to identify the year 2018 milestone:

- Developed an estimate of baseline SO<sub>2</sub> emissions for the year 2018, (*i.e.*, the predicted SO<sub>2</sub> emissions in the year 2018 in the absence of a program to reduce SO<sub>2</sub> emissions);
- Developed a list of BART-eligible sources in the region;
- Developed an estimate of the emissions reductions that BART sources could achieve, and
- Selected a year 2018 milestone that reduces the baseline emissions by an amount that would achieve greater reasonable progress in improving visibility than by requiring each BART-eligible source to install BART.

In the proposal, EPA discussed the data and methods relied on by the WRAP for each of these steps. The EPA agreed with the conclusion reached by the WRAP that the 2018 milestone meets the requirements of the regional haze rule, taking into account the uncertainties inherent in the calculations of predicted emissions in 2018.

*Public Comments.* Public comments, with one exception, were supportive of EPA's finding that the year 2018 milestone represented "greater reasonable progress" than BART. One commenter, representing the trucking industry, disagreed with this finding, citing a number of areas where it believed that the demonstration was lacking or inadequate.

The WRAP commented that EPA's preamble discussion did not completely capture the scope and methodology of the year 2018 milestone decision. In their comments, the WRAP agreed that EPA had correctly described the method the WRAP used to determine that the program achieved greater reasonable progress than BART. However, the WRAP's comments stress that while the milestones were informed by these calculations, the milestones were negotiated numbers reflecting a broader view of the backstop trading program and the relevant factors in the CAA. In addition, the WRAP notes that individual elements of the calculations do not represent a consensus position in isolation from the balanced package in the Annex.

The commenter from the trucking industry was critical of EPA's acceptance of the year 2018 milestones. The commenter noted that in the preamble EPA appeared to have concerns with: (1) How the WRAP identified BART-eligible sources, (2) how the WRAP calculated emissions reductions from those sources, and (3) the WRAP's inclusion of the 35,000 tons for "headroom and uncertainty." This commenter believed that taken overall, EPA should have considered the WRAP's milestone for year 2018 to be deficient. The commenter was also critical of the provision for a backstop trading program, arguing that such a program would allow for emissions reductions far away from the Colorado Plateau to be substituted for more effective reductions at a closer distance.

The comments, with one exception, supported EPA's proposed conclusion that the milestones for the years 2003 through 2017 represented "steady and continuing" progress. Comments from the trucking industry were critical of this finding. In their view, the milestones do not provide for steady and continuing progress because some of the early year milestones exceed year 2000 actual emissions levels.

*Final rule.* The final rule retains the milestones contained in the proposed rule. The EPA continues to believe that the milestones provide for "greater reasonable progress than BART" and for "steady and continuing progress." The EPA disagrees with comments that the milestones are deficient in this regard. The EPA agrees with stakeholders that it is a critical consideration that the WRAP's milestones provide a "cap" on emissions which may not be exceeded. Any program providing for case-by-case controls on a specific set of sources does not establish such a "cap" for the region. Moreover, this cap applies to a population of sources that includes all

sources in the region emitting more than 100 tons of SO<sub>2</sub>, which is a much broader population than if only the BART-eligible sources were included. The EPA continues to conclude that the WRAP milestones are reasonable in light of the inherent uncertainties that exist in any forecast to the year 2018. Modeling results showed predicted visibility improvements equivalent to, or greater than, those that would result from a "command and control" scenario.

The EPA disagrees with comments that the milestones cannot be considered to provide for "steady and continuing" reductions if actual emissions were allowed to increase in the early years. As noted in the proposal, EPA believes that the WRAP appropriately used the GCVTC goal of a 13 percent reduction in emissions between 1990 and 2000 as a starting point or frame of reference, rather than an estimate of actual emissions for the year 2000. Given that a greater than expected degree of reduction has already occurred, EPA agrees that the region should not be effectively penalized for achieving early reductions in emissions.

## 2. Adjustments for States and Tribes That Choose Not To Participate

*Proposed rule.* When developing the Annex, the WRAP understood that some States and Tribes may choose not to participate in the optional program provided by 40 CFR 51.309. Thus, the WRAP provided to EPA individual opt-out amounts for each State and Tribe and for each year from 2003 to 2018. These opt-out amounts represented the amount of emissions that would be deducted from the milestones for each State and Tribe that does not participate. The EPA included a table in the proposed rule (67 FR 30446, May 6, 2002) that shows these opt-out amounts for each State and Tribe. The proposed rule noted, as the WRAP recommended, that the emissions amounts budgeted in this table are only for the purpose of determining the milestones at the beginning of the program if some States and Tribes choose not to participate. The EPA cautioned that the amounts budgeted to each State and Tribe in this table are not necessarily the amounts that will be allocated to sources within the relevant State's or Tribe's jurisdiction if a trading program is triggered.

The proposal described the process by which the milestones would be adjusted to take into account the individual State and tribal opt-out amounts. For States, SIPs for all participating States are due by the December 31, 2003 deadline.

Accordingly, EPA assumed in the proposal that after this deadline has passed it will be known which States are participating and which are not. Thus, the proposal called for SIPs to provide for deducting the State-specific amounts in Table 2 (67 FR 30446, May 6, 2002) for "opt-out States" from the amounts in Table 1 (67 FR 30425, May 6, 2002) at the outset of the program. For Tribes, the proposed rule provides flexibility for opting into the program after the 2003 SIP submission deadline. Under the proposal, for Tribes that have not opted into the program by the 2003 deadline, the amounts in Table 2 (67 FR 30446, May 6, 2002) would be deducted from the amounts in Table 1 at the outset of the program. For Tribes that opt into the program at a later date, the proposal required these amounts to be automatically added to the amounts in Table 1 (67 FR 30425, May 6, 2002), beginning with the first year after a TIP implementing 40 CFR 51.309 is approved by EPA.

In the proposal, EPA stated that for the program under 40 CFR 51.309 to achieve the WRAP and GCVTC objectives, a sufficient number of States must participate in the program. The EPA proposed to defer to the WRAP's judgment on the issue of how many States would constitute a "critical mass" for the program, and we requested comment on this issue.

*Public Comments.* A few comments were received on issues related to the proposed opt-out amounts and discussion.

Two commenters agreed with EPA's clarification that the opt-out amounts did not necessarily represent the amount of allocations that a State's or Tribe's sources would receive if the backstop trading program were triggered. One commenter recommended that the State opt-out amounts *should* be treated as the amount of allocations for a given State, because: (1) The opt-out amounts represent the best estimate of emissions reductions for the BART-eligible sources in each State or Tribe, and (2) inclusion of the tables may create a perception that any State that issues fewer allocations than the opt-out amounts is treating the sources within the State inequitably.

Several commenters agreed with EPA's recommendation to defer judgments on "critical mass" issues to the WRAP. One environmental group commenter recommended that, in evaluating whether there are enough States and Tribes participating in 40 CFR 51.309, EPA must thoroughly consider the extent to which the SO<sub>2</sub> declining cap will effectively prevent

degradation from the visibility impairing emissions from new source growth across the region.

Subsequent to the comment period, the Western States Air Resources Council (WESTAR) Model Rule/MOU Working Group noted<sup>4</sup> that as States and Tribes follow their process for adopting SIPs and TIPs under 40 CFR 51.309, the States and Tribes will not necessarily be aware of which other States and Tribes will choose to participate in the program. Accordingly, the WESTAR Working Group believed that States and Tribes would need to include all of Table 2 and calculation procedures in their SIP/TIP submittals, such that the SIP/TIP submittal could account for all possibilities of participation by other States and Tribes. Further, the WESTAR Working Group noted that in the initial years of the program, EPA may not have approved the SIP for all participating States before the date of the annual determination of whether the milestone is exceeded. Lastly, Tribes are not required to submit a TIP by 2003 and can choose to participate in the program at anytime. Accordingly, the WESTAR Working Group recommended that EPA clarify whether the comparison of emissions to the milestones would take into account all States that have submitted SIPs, or only those with approved SIPs as of the date of the determination.

*Final Rule.* The final rule retains the opt-out tables from the proposal. The EPA continues to agree with the WRAP that the opt-out tables do not necessarily represent the amounts that would be allocated to a given State or Tribe under a trading program. The WRAP has developed a detailed methodology for determining and establishing trading program allocations for each source. This methodology is described in detail in sections II.D and III.D.7 of the Annex. It is this methodology that will result in allocations should the trading program be needed. The EPA believes that establishing the amounts in the opt-out tables as the amounts for trading program allocations would unnecessarily constrain the WRAP from implementing its methodology.

The EPA continues to believe, as discussed in the proposal, that judgments on the issue of "critical mass" are best left to the WRAP. Regarding the comment that the SO<sub>2</sub> declining cap may not effectively prevent degradation of visibility from new sources throughout the region if not enough States and Tribes participate, EPA notes that visibility progress issues

as a general matter will need to be addressed in SIPs submitted under 40 CFR 51.308. Accordingly, EPA does not believe that this comment warrants any change to the proposed rule language.

The EPA agrees with the WESTAR Working Group that States and Tribes submitting their SIPs and TIPs under 40 CFR 51.309 should include Table 2 and the calculation procedures in their SIP or TIP regulations in order to account for all possibilities of participation by other States and Tribes. The EPA also agrees with the WESTAR Working Group recommendation to add to the final rule clarification that the opt-out adjustment under 40 CFR 51.309(h)(1)(i) will include the States and Tribes for which SIPs and TIPs have not been approved by EPA as of the date of the determination.

### 3. Adjustments for Smelter Operations

*Proposed rule.* At the time the WRAP was submitted to EPA, two copper smelters in the region, the Phelps Dodge Hidalgo smelter and the BHP San Manuel smelter, had suspended operations. In the Annex, the WRAP recommended that the program specifically account for the possibility that these smelters could come back on line should economic conditions change. Accordingly, the Annex contained a specific set of complex decision criteria to adjust the milestones in the future for a number of specific scenarios related to the two smelters. The EPA in the proposal attempted to clarify the WRAP's adjustments with a series of "if-then" tables, and we requested comment on whether these tables accurately reflect the decision criteria in the Annex.

*Public comments.* Commenters agreed that the EPA's proposed table accurately reflected the Annex. Two commenters noted that subsequent to the development of the Annex, a third smelter, the Phelps Dodge Chino smelter, suspended operations. These two commenters recommended that the regional haze rule should recognize this without reopening the negotiated agreement on the milestones. Further, the commenters recommended that the regional haze rule should provide some assurance that when the Chino Smelter comes back on line again, its 16,000 allowances will be available to it without prematurely triggering the program.

*Final rule.* The final rule retains the smelter adjustment tables as proposed. The EPA considered whether the final rule should contain contingencies for the Chino Smelter similar to those for Hidalgo and San Manuel. For example, one approach would be to deduct the

amount from the Chino smelter from the milestones and to develop a series of adjustments to account for the possibility that it may come back on line, similar to the approach for the other two smelters. The EPA has not taken this approach, because of the complexity that would be added to the adjustments, and because this scenario was not specifically discussed as the WRAP was negotiating the Annex.

### 4. Adjustments for Utility Boilers Opting To Use More Refined Flow Rate Methods

*Proposed rule.* The proposed rule requested comment on the specific method and process for adjusting the milestones for sources using a refined method for measuring stack flow rates. This was seen as a significant issue, because the flow rate affects the determination of emissions rate from a continuous emissions monitoring system (CEMS).

In 1999, EPA adopted revisions to EPA's Reference Method 2, the standard method for measuring stack flow rates (64 FR 26484, May 14, 1999). The revisions provided three new procedures: Methods 2F, 2G, and 2H. The new procedures, if used for a given source, allow for a more detailed assessment of the stack flow rates to provide more accurate flow rate results. The changes addressed concerns raised by utilities that Reference Method 2 may over-estimate flow in certain cases, such as when the flow is not going straight up the stack. If the flow rate is over-estimated, this would also lead to the overestimation of SO<sub>2</sub> emissions because the facility's continuous flow rate monitor is calibrated to correspond to the flow test method. Facilities subject to the acid rain program under title IV of the CAA must perform these flow tests at least once a year to determine the accuracy of their continuous flow monitors. Facilities have an option to use either the old Method 2, or one or more of the new methods.

When the WRAP made its emission projections for purposes of developing the milestones, the new methods were not yet in place. Accordingly, if a source owner chooses to use the new flow methods, and if as expected it results in a reduced flow rate for the same level of operation, then there will be a corresponding decrease in the measured emissions. In the preamble to the proposal, EPA agreed with the WRAP that this would create the possibility of a "paper" decrease relative to the milestone if the milestone reflects the old method. As discussed in section III.A.5 of the Annex, the WRAP notes

<sup>4</sup> See memorandum from Lily Wong, EPA Region 9, to Docket OAR-2002-0076. March 2003.



that a protocol is needed for adjusting the milestones to reflect changes in the baseline emission for utility boilers any time that a source opts to change its CEMs method. The WRAP addressed this issue in greater detail in a supplemental paper entitled "Emissions Tracking Prior to Triggering the Backstop Trading Program," which was submitted to EPA on June 1, 2001.

The WRAP has identified three possible technical procedures for

developing an "adjustment factor" for the new flow method. The EPA agrees that any of these three procedures would be acceptable. Under the first procedure, there would be a side-by-side comparison of flow rates using both the new and the old flow reference methods. For example, if the new method measured 760,000 cubic feet per minute, and the old method measured 800,000 cubic feet per minute, the adjustment factor would be (760,000/

800,000), or 0.95. The second method would use annual average heat rate, which is reported to the Energy Information Administration (EIA), as a surrogate for the flow rate. Under this method, the flow adjustment factor would be calculated using the annual average heat rate using acid rain heat input data (MMBtu) and total generation (MWHrs) reported to EIA, calculated as the following ratio:

$$\frac{\text{Heat Input/MW-hrs for first full year of data using new flow rate method}}{\text{Heat Input/MW-hrs for last full year of data using old flow rate method}}$$

The third method would use data reported to EPA's acid rain program. Under this method, there would be a

comparison of the standard cubic feet per minute (CFM) per megawatt (MW) before and after the new flow reference

method based on CEMs data, calculated as the following ratio:

$$\frac{\text{SCF/Unit of Generation for first full year of data using new flow rate method}}{\text{SCF/Unit of Generation for last full year of data using old flow rate method}}$$

In the supplemental information paper, the WRAP identified three possible approaches for using the adjustment factors for making a correct comparison of emissions to the milestones. The WRAP did not indicate a preference for any single approach. The three options are as follows:

(a) Using one of the options described above for determining the flow adjustment factor, revise the source's baseline emissions forecast for 2003, 2008 and 2013. For each year following the adoption of the new flow reference method through 2017, reduce the interim milestone by the corresponding amount. To illustrate how this approach would work, the proposal used an example where the adjustment factor for a given stack is 0.95. As discussed above, this means that the emissions with the new method is deemed to be 0.95 times the emissions with the old method. For this example, for option (a) this means that the previous baseline emissions for that source would be multiplied by 0.95. The annual compliance check would then be done by comparing regional SO<sub>2</sub> emissions (unadjusted, as reported to EPA's acid rain program) to the revised milestone.

(b) Using one of the options described above for determining the flow adjustment factor, revise the source's reported emissions on an annual basis, and do not adjust the milestone. For the example noted above, under option (b) the emissions reported to EPA's acid rain program would be adjusted upward by multiplying the amount times (1/0.95). For each year following the

adoption of the new flow reference method through 2017, the annual compliance check would be done by comparing the adjusted regional SO<sub>2</sub> emissions to the unadjusted milestones.

(c) Use a combination of the two approaches. Under this approach, interim milestones would be adjusted only every 5 years (using option (a) above) and the reported emissions for additional sources making the change in the intervening years are adjusted for comparison to the milestones (using option (b) above).

In the proposal, EPA stated that any one of these three approaches would be acceptable, but that a specific approach needs to be selected for the final rule. The EPA also noted its view that these adjustments to the milestone or to the reported emissions would not necessarily require SIP or TIP revisions, because the precise method for making the adjustment, and the publicly available data elements that will be used for making the adjustment, could be specifically identified in the final rule.

*Public comments.* Commenters generally agreed with EPA's assessment that any of the three approaches for determining an adjustment factor would be acceptable.

The WRAP noted in its comments that the 2018 milestone already included assumptions about the effect of this flow rate adjustment. The WRAP recognized that the preamble to the rule implies this distinction but the WRAP recommended that this be reflected in the regulatory text as well.

Regarding the three options related to the process for using the adjustment factors, the WRAP recommended option (c) in its comments. That is, the milestones would be adjusted every 5 years with the periodic SIP revisions, and adjustments would be made to the reported emissions for the interim period. Other commenters, while supporting the concept of adjusting the milestones with the SIP revisions, did not address whether the reported emissions should be adjusted in the interim period. The EPA infers from these comments that these commenters are likely recommending that emission adjustments need not be made in the interim period.

*Final rule.* The final rule includes regulatory language agreeing with the WRAP's recommendations regarding the flow rate adjustment. States are required in the SIPs to provide for reporting of "adjusted" emission rates pending an update to the milestones, which would occur at the time of the plan revisions required under 40 CFR 51.309(d)(10).

##### 5. Adjustments for Enforcement Actions

*Proposed rule.* The proposed rule included a provision in the Annex for adjustments to the milestones for "illegal emissions." In developing the milestones, the WRAP identified the baseline emissions for each source during the base year, and "forecasted" emissions for the source during the 2003 to 2018 time period, taking into consideration growth, utilization, retirement, and the absence of any additional requirements. The

compilation of these source-specific baseline emissions resulted in the baseline emission inventory totals, which serve as a “starting point” for measuring progress from the program. The WRAP recognized in the Annex that if a source was in violation of applicable requirements during the base year when its emissions were determined, the baseline emissions during 2003–2018 would be overestimated.

In the proposal, EPA included this provision with general regulatory language providing for the adjustment of baseline emissions for illegal emissions, and we requested comment on possible ways of clarifying the provision in the final rule. The EPA noted in the preamble to the proposal that there are instances where it may be unclear whether under the approach in the Annex, emissions would be considered as “illegal,” for example where:

—Disputing parties resolve their differences through (1) A consent decree that is either entered through Federal or State courts, or (2) an administrative enforcement proceeding by either a State, Tribe, or EPA; or

—A State disagrees with EPA or a citizens’ group over whether or not a particular alleged violation occurred.

The EPA requested comment on how these situations should affect the milestones. Specifically, EPA requested comment on the following possible options:

*Option 1.* Under this option, the rule would require that if there is any resolution<sup>5</sup> to alleged illegal SO<sub>2</sub> emissions, then all of the reductions resulting from the resolution would be considered as “illegal emissions.” Taking into account these reductions, the State or Tribe would then “re-forecast” the source’s emissions and its effect on the milestone. “Re-forecast” means to re-apply the forecasting process, that is the process the WRAP originally used to project future emissions and develop the milestones, using the corrected baseline SO<sub>2</sub> emissions for the affected source. A comparison of this re-forecast of emissions with the previous forecast of emissions would determine the amount of the adjustment for each year up through 2018.

*Option 2.* Under this option, the rule would allow for case-by-case judgments on the appropriateness of adjusting baseline emissions following resolution of allegations of illegal SO<sub>2</sub> emissions.

<sup>5</sup> For option 1, the proposal used the broad term “resolution” to refer to all types of emissions reductions resulting from enforcement actions.

The rule would, however, clarify the entity responsible for deciding whether a case involves illegal emissions warranting an adjustment to the milestones. Under this option, we requested comment on which entity should be responsible for this determination, that is, whether the rule should clarify whether the parties entering into a settlement, the States, the Tribes, the WRAP, or EPA would determine the settlement’s impact on the milestones.

The EPA noted that under any of the proposed options, adjustments to the milestone would occur only after the source in the enforcement case has achieved the requisite reduction of SO<sub>2</sub> emissions. Consequently, adjustments to the milestones would have no effect on any other facility’s operation because all of the reductions would be achieved by the source subject to the enforcement action.

The EPA also solicited comments in the proposal on how to treat any extra SO<sub>2</sub> emissions reductions that a facility might achieve as a result of a settlement. The EPA will often allow a company that is settling through a consent decree or settlement agreement to perform a supplementary environmental project and allow the expenditures on this project to partially offset penalties that the company would otherwise be assessed. The EPA noted in the preamble to the proposal that if the milestones are not reduced by the amount of extra emissions reductions from this type of project, then the environment may see little benefit, since another company would be allowed more SO<sub>2</sub> emissions. Thus, in the proposal, EPA sought input on whether these “extra” emissions reductions should be considered part of this “illegal emission” adjustment and factored into a recalculation of the milestone.

*Public Comments.* The EPA received a number of comments on this provision.

A few commenters recommended that this provision be deleted from the rule entirely. Some commenters criticized this provision because it would lower the milestones and reduce the potential pool of allowances under the backstop trading program. Accordingly, these commenters believed that the provision would serve to punish the “non-violators” in the program at large. Another commenter believed that any adjustment for “illegal emissions” is not appropriate unless it has been demonstrated that the provision would improve visibility.

Other commenters supported the provision but recommended that the

term “adjustments for illegal emissions” be replaced with the term “adjustments due to enforcement actions.” Some commenters requested clarification on whether these adjustments would only apply to enforcement actions that would have affected the assumptions used in baseline emissions projections. One commenter recommended that the proposed adjustment for illegal emissions should apply only to emissions reductions resulting from consent decrees or administrative orders where the EPA or authorized State has commenced the enforcement action, and not where emissions reductions arise out of “voluntary settlements” initiated by the company.

Regarding the two options for clarifying this provision, the WRAP and other commenters recommended the second option. These commenters noted that case-by-case judgments will be needed to determine whether and the degree to which the milestones should be adjusted. Responding to EPA’s request to clarify the entity responsible for calculating the adjustment, the WRAP recommended that the entity responsible should be the parties entering into a settlement, in conjunction with the relevant State or Tribe. The commenters envisioned that EPA would have an oversight role in the SIP approval process to determine that the adjustment agreed to through the enforcement process is properly reflected in the milestone adjustment.

The WRAP comments recommended that specific language be added to the final rule requiring States and Tribes to document, and include in the administrative record,<sup>6</sup> a discussion of whether any adjustments to the milestones are appropriate based upon administrative or judicial enforcement actions, and to include an explanation of the basis for the State’s or Tribe’s decision.

Regarding EPA’s request for comment on how “extra” emissions reductions in enforcement actions should be treated, the WRAP and other commenters believed that these extra emissions reductions should also be treated on a case-by-case basis. The WRAP commenters recommended that EPA include a provision in the rule requiring States or Tribes to address in the periodic SIP revision whether SO<sub>2</sub> allowances should be retired or confiscated<sup>7</sup> as a result of an

<sup>6</sup> The EPA interprets the term “administrative record” in the WRAP’s comments to refer to information made available in support of the State’s or Tribe’s implementation plan submittal to EPA under 40 CFR 51.309(d)(10).

<sup>7</sup> This comment responded to EPA’s question on how the milestones should be adjusted with a

administrative or judicial enforcement action and the rationale for the State's or Tribe's decision.

*Final rule.* The EPA has retained this provision in the final rule. The EPA agrees with the WRAP that this provision is necessary to ensure that the "baseline," the starting point for the milestone calculations, reflects compliance with regulations. So long as the reductions to the milestones do not occur before the date a source comes back into compliance, EPA does not believe that this adjustment has the effect of "penalizing" the other sources. Regarding the comment that this provision is deficient due to a lack of demonstrated visibility improvements, EPA believes that the WRAP was not required to make a demonstration of the visibility improvements of this specific provision, which is part of the WRAP's overall program for SO<sub>2</sub> reductions from stationary sources.

The final rule reflects EPA's agreement with recommendations of commenters to replace the term "adjustments for illegal emissions" with the term "adjustments due to enforcement actions." The EPA agrees that this terminology better encompasses the types of situations that the provision would address. The EPA interprets the term "enforcement action" in these comments to be used broadly to include any type of enforcement action including administrative orders, settlements, consent decrees, court orders, and compliance schedules in title V permits.

As recommended by some commenters, we have added language consistent with Option 2. The EPA agrees with commenters that there will be case-by-case considerations in enforcement actions that could affect whether an adjustment to the milestones is appropriate. The EPA generally agrees with comments suggesting that the entity responsible for calculating the amount of the adjustment should be the parties entering into the settlement, and that where those parties do not include the State or Tribe, the State or Tribe should be consulted to assure that correct assumptions are used for the adjustment. Further, EPA believes that if the parties involved in the action are responsible for recommending the amount of the adjustment, or whether an adjustment is appropriate, this would allow a source entering a voluntary settlement to negotiate whether or not an adjustment should be made.

recommendation on whether allowances should be retired or confiscated. The EPA interprets this comment as addressing both the milestones and the allowances, which add up to the milestones.

The EPA believes it is useful to clarify a few points regarding actions where EPA or a citizens' group is the plaintiff in the enforcement action. Such cases would be brought to the U.S. District Court. Pursuant to longstanding Department of Justice policy, in any such case members of the public, including an interested State or Tribe, would have an opportunity to review and comment on the proposed consent decree settling the enforcement case. See 28 CFR 50.7. For any such case before the U.S. District Court, EPA intends to provide the State or Tribe an opportunity to review and comment on the proposed settlement. If a settlement or order from the U.S. District Court is issued and contains an adjustment to the milestones, such a settlement or order from the court is binding and the State and Tribe would be required to adjust the milestones as directed by the court. For instances where such court actions are silent on reforecasting the baseline emissions and adjusting the milestones, EPA believes the State or Tribe must determine whether such a reforecast and adjustment is appropriate.

The EPA agrees with the WRAP's recommendations that the State or Tribe should provide documentation of these adjustments for enforcement cases in the administrative record for the 5-year SIP or TIP revision. Specifically, the rule requires the following documentation:

- Identification of each source that has reduced SO<sub>2</sub> emissions under an administrative or judicial enforcement action,
- Whether the milestones were adjusted in response to the reduction in SO<sub>2</sub> emissions under the enforcement action,
- The rationale for the State's or Tribe's decision on the milestone adjustment,
- If extra SO<sub>2</sub> emissions reductions (over and above those reductions needed for compliance) were part of the settlement, whether those reductions resulted in any adjustment to the milestones or allowance allocations.

#### *C. Annual Process for Determining Whether a Trading Program Is Triggered*

The proposed rule describes an annual process to determine whether the emissions from participating States exceed the milestones and thus trigger the backstop trading program. This proposed process contained a number of deadlines for steps in the annual process, and contained special provisions for certain years. Only a few comments were received on these provisions.

#### 1. Date for the Annual Determination

*Proposed rule.* The proposed rule contained annual deadlines for determining whether the milestone is exceeded. This proposed schedule called for a draft determination not later than December 31 of each year, beginning with a draft determination for the year 2003 by December 31, 2004. The proposed schedule called for a final determination, taking into account public comments, by the end of the following March, beginning with a final determination by March 31, 2005 for calendar year 2003.

*Public comments.* In their comments on the proposal, the WRAP recommended that this annual deadline be extended by 1 year. For example, pursuant to this recommendation, EPA would extend the deadline for the final determination for calendar year 2003 from March 31, 2005 to March 31, 2006. Because certain States or Tribes may have more numerous or complex sources, the WRAP believed that additional time may be needed to collect, validate, and analyze emissions data. In support of this request for additional time, the WRAP notes that adding time for the annual determination would not affect the timing for implementing the backstop trading program. For example, even if the annual determination for calendar year 2003 were not made until 2006, this would not affect the date for the onset of the trading program. If the calendar year 2003 milestone were triggered, sources would still need to hold allowances for emissions in calendar year 2009.

*Final rule.* In the final rule, EPA has retained the deadline for the annual determination as proposed. The EPA recognizes that some States within the region may have more complex technical and administrative procedures for collecting annual emissions inventory data. The EPA's current judgment is that for States who have indicated possible participation in the program under 40 CFR 51.309, these obstacles do not exist. The EPA believes that it is not desirable to move the deadline forward in time unless it is absolutely necessary. While, as the WRAP correctly notes, this would not affect the deadlines for implementation of the backstop trading program, it would have the effect of reducing the amount of time for planning and implementation if the trading program were triggered. If the States needing more time do, in fact, decide to participate in the program, EPA believes that the regional haze rule could be

revised at a later date to reflect this need.

## 2. Option for Triggering the Trading Program in the Year 2013

*Proposed rule.* The proposed rule provided States and Tribes with the option at a specific point in time to consider emission projections for the year 2018, in addition to actual emissions inventory reports for previous years in deciding whether or not to trigger the backstop market trading program. For this option, if States and Tribes so choose, the emissions inventory reports for the year 2012—which are collected in calendar year 2013—may also contain emissions projections for the year 2018. If the projections indicate that the year 2018 milestone will be exceeded, then under the proposal, States and Tribes may choose to implement the market trading program beginning in the year 2018.

*Public comments.* One commenter representing Western business interests recommended that the WRAP develop, and the final rule contain, specific criteria for the option of triggering the trading program in 2013. The commenter recommended that, for example, the final rule should contain criteria for a specific emissions level in 2013, or a specific level of emissions reductions yet to be achieved between 2013 and 2018.

*Final rule.* In the final rule, EPA has retained the 2013 option as proposed. The EPA believes that the intent of this provision in the Annex is to provide broad flexibility to the States and Tribes for deciding whether this 2013 option should be exercised. The EPA does not believe that it is desirable or feasible to develop specific decision criteria for this purpose in the final rule.

## 3. Requirements for Recordkeeping

*Proposed rule.* The proposal, in 40 CFR 51.309(h)(iii), included a requirement for the retention of records relevant to the annual comparison of SO<sub>2</sub> emissions to the milestones for at least 5 years from the establishment of the record. For records that provided the basis for an adjustment to the milestone, the proposed rule required retention of records for at least 5 years after the date of the SIP revision.

*Final rule.* No public comments were received on this issue during the comment period. Following the close of the comment period, however, the WESTAR model rule working group<sup>8</sup> questioned whether this recordkeeping requirement would be adequate in all

cases, if EPA's intent were to retain the records for 5 years after they are relevant to the annual determination. Given the design of the program, 4 and ¼ years can elapse between the creation of a record and the use of the record in the annual comparison of regional SO<sub>2</sub> emissions against the milestone. This is because for all except the first 2 years of the program, the annual determination is based on a 3-year average of the regional SO<sub>2</sub> emissions for the preceding 3-year period. Additionally, the formal comparison with the milestone is not accomplished until 15 months after the end of this 3-year period. Thus, close to 5 years can pass from the establishment of a record to its use. The working group believed that the intent of the recordkeeping requirement was to maintain relevant records for 5 years after the determination of whether the milestone was exceeded for a given year, which could mean that some records relevant to the determination would be needed for approximately 10 years from the date they were generated. The EPA agrees that this was the intent of the recordkeeping requirement in 40 CFR 51.309(h)(iii) of the proposed rule; accordingly, the final rule extends the time period for the retention of records from 5 to 10 years.

### D. Requirements for the Backstop Trading Program

A fundamental feature of the Annex is a backstop market trading program that would be triggered if any annual milestone is exceeded. The Annex, as required by 40 CFR 51.309(f) of the regional haze rule, provided documentation and details for the backstop trading program. Attachment A to the annex was a draft model rule for use by States in implementing the backstop trading program. In the proposal, EPA included ten fundamental elements that SIPs under 40 CFR 51.309 must contain, and the basic requirements for those elements to help guide EPA's review of the SIPs. The fundamental elements described in the proposed rule were as follows:

- (1) Provisions for the allocation of allowances to each source in the program;
- (2) Emissions quantification protocols;
- (3) Provisions for the monitoring, recordkeeping and reporting of emissions;
- (4) Provisions for a centralized system to track allowances and emissions;
- (5) Provisions requiring the identification of an authorized account representative for each source in the program;

(6) Provisions requiring the account representative to demonstrate annual compliance with allowances;

(7) Provisions for the process of transferring allowances between parties;

(8) Provisions describing the "banking" of extra emissions reductions for use in future years, if the implementation plan allows for banked allowances;

(9) Provisions establishing enforcement penalties for noncompliance with the trading program; and

(10) Provisions for periodic evaluation of the trading program.

In the proposed rule, EPA included basic requirements for each of these 10 provisions, and we requested comment on whether we had addressed each requirement in an appropriate level of detail, and on whether the substance of the requirement was sufficient to ensure the integrity of the trading program.

The EPA did not receive any adverse comments regarding the level of detail of the proposed requirements for the trading program. We did receive comment on the substance of a few of the provisions that we discuss in this section of the preamble.

#### 1. Allowances

*Proposed rule.* The proposed rule required the backstop trading program to include allowances. An allowance authorizes a source included within a market trading program to emit one ton of SO<sub>2</sub> during a given year. At the end of the compliance period, which is a 12-month period ending with each calendar year, a source owner's allowances must exceed or equal its annual emissions.

The proposed rule would require States and Tribes to include initial source-specific allowances for each source included within the program. Under the proposal, these initial allocations must specify the tons per year allocated for each source for each year between 2009 and 2018. The Annex contains a detailed discussion of the methodology for distributing allowances to sources. The EPA proposed, however, that the details of this methodology were not needed in EPA's rule. If those allowances add up to the appropriate regional total, EPA proposed that the objectives of the program would be met. The EPA proposed one exception to this approach, a requirement that 20,000 tons of allowances be reserved as a "set-aside" for use by Tribes.

*Public comments.* The EPA received comments on three issues related to allowances. First, the WRAP and one electric utility commenter

<sup>8</sup> See note from Lily Wong, EPA Region 9, to docket OAR-2002-0076, March 2003.

recommended that the proposed rule be modified such that initial SIPs would not be required to have source-specific amounts for each source. Instead, these commenters recommended that EPA allow the initial SIPs to include a formula that will be used to calculate the allowances when the program is triggered.

Second, the WRAP and one environmental group commenter recommended specific regulatory language for reserving a portion of allowances for renewable energy resources such as wind, solar photovoltaic and solar thermal technologies, geothermal, landfill gas and biomass technologies, and hydropower projects meeting Low-impact Hydropower Institute criteria. This regulatory language consisted of a regulatory definition of "eligible energy resource." In addition, the recommendation included specific regulatory language for inclusion in 40 CFR 51.309(h)(4)(i) that would provide "eligible energy resources" with 2.5 tons of SO<sub>2</sub> allowances per megawatt of installed nameplate capacity per year.

*Final rule.* The EPA has amended the proposed rule as requested by the WRAP and other commenters. The EPA agrees that a clear and definitive formula for issuing source-specific allowances is an acceptable approach. The approach to distributing allowances described in the Annex provides for adjustments of the allocations over time, for example providing "bonus" allocations for early reductions. Because the allocations provide for adjustments over time, it is likely that individual source allocations could change between the date of the 2003 SIPs and the date a trading program would be triggered. Accordingly, EPA believes that re-calculation of the source-specific allowances when the program is triggered would be likely in any case. If the program is triggered, the subsequent SIP revision must include the source-specific allocations.

The EPA has also incorporated the WRAP's recommended provision regarding renewable energy credits. Given the WRAP's desire that this provision be a feature of the backstop trading program, EPA agrees that regulatory language is needed to ensure that this feature is included in SIPs. The EPA has incorporated the regulatory language recommended by the WRAP with two modifications. First, EPA includes only the first sentence of the WRAP's recommended definition ("Eligible renewable energy resource, for purposes of 40 CFR 51.309, means electricity generated by non-nuclear and non-fossil low or no air emission

technologies"). The EPA believes that it is not necessary to include, and would be difficult to interpret, the WRAP's recommended additional language limiting the definition to only those technologies "using resources that are virtually inexhaustible, reduce haze, and are environmentally beneficial." The EPA agrees with the WRAP that it is useful to clarify that this definition specifically includes:

- Electricity generated by wind energy technologies;
- Solar photovoltaic and solar thermal technologies;
- Geothermal technologies;
- Technologies based on landfill gas and biomass sources; and
- New low-impacts hydropower that meets the Low-Impact Hydropower Institute criteria.

Similarly, EPA agrees with the WRAP that it is useful to clarify that "biomass" includes agricultural, food and wood wastes, but does not include biomass from municipal solid waste, black liquor, or treated wood, and that for purposes of this definition, low-impacts hydropower does not include pumped storage. At the same time, EPA has concerns that the various lists in the WRAP's proposed definition may not be exhaustive, and that it would be preferable that the list be able to change without necessitating a change to 40 CFR 51.309.

The EPA has also included an amendment to 40 CFR 51.309(h)(4)(i) which requires that the backstop market trading program include the WRAP's recommended provision for renewable energy credits. This amendment requires SIPs under 40 CFR 51.309 to include a provision that eligible renewable energy resources that begin operation after October 1, 2000 will receive 2.5 tons of SO<sub>2</sub> allowances per megawatt of installed nameplate capacity per year. The rule also includes language consistent with the WRAP's recommendation that allowance allocations for renewable energy resources that begin operation prior to the program trigger will be retroactive to the time of initial operation. The EPA believes, however, that it is important for States to preserve flexibility over time with respect to implementing this provision. Accordingly, the final rule allows, but does not require, that implementation plans may provide for an upper limit on the number of allowances provided for eligible renewable energy resources.

## 2. Emissions Quantification Protocols

*Proposed rule.* The proposed rule required that implementation plans

under 40 CFR 51.309 must include specific emissions quantification protocols, that is, procedures for determining actual emissions. These procedures will be used to measure, or determine, annual emissions from each source in the trading program if the trading program is triggered. The proposed rule also required that States include the necessary monitoring, recordkeeping, and reporting provisions to measure and track results.

In the Annex, the WRAP recognized the need to have detailed and prescribed emission quantification protocols and recommended that the participating States and Tribes establish such provisions in the SIPs submitted under 40 CFR 51.309. The Annex describes the WRAP's approach to monitoring in section II, pages 39–41, in section III, item III.D.3 on page 64, and in Attachment A, Draft Model Rule section C.2.3 Monitoring Requirements, and section C9 Emissions Monitoring. In particular, the WRAP recognized the need for emission monitoring protocols which ensure that emissions estimates are accurate and comparable for participating sources. For the trading program, the emissions become a tradeable, fungible commodity. Accordingly, it is important to the integrity of the program to ensure that one ton of emissions from one source is equivalent to one ton of emissions from another source.

In the Annex, the WRAP proposed that sources subject to the acid rain program under title IV of the CAA would continue to follow the continuous emissions monitoring procedures in the acid rain program, which appear in 40 CFR part 75. Because continuous emissions monitoring represents the best available method for determining emissions, EPA would not require separate emission protocols for these sources as part of implementing 40 CFR 51.309.

For other categories of sources not covered by part 75, the WRAP in the Annex recognized the need to develop protocols based upon "best available" monitoring techniques for each source category. In the proposed rule, for source categories with sources in more than one State submitting an implementation plan under 40 CFR 51.309, EPA required each State to use the same protocol. Further, in the proposal, EPA included criteria for determining the acceptability of these protocols in the implementation plans. These criteria are the same criteria listed in section 5.2 and 5.3 of EPA's Economic Incentive Program (EIP) guidelines. These guidelines state that emission quantification protocols:

- Must ensure reliable results, and that they must ensure that repeated application of the protocol obtains results equivalent to EPA-approved test methods;
- Must be replicable, that is, the protocol ensures that different users will obtain the same or equivalent results in calculating the amount of emissions and/or emissions reductions.

These EIP guidelines also specify that trading programs need to include monitoring, recordkeeping, and reporting provisions to provide adequate information for determining a source's compliance with the program. Adequate monitoring, recordkeeping and reporting procedures have several key attributes, including representativeness (characteristic of the source category and available monitoring techniques), reliability, replicability, frequency (that is, the monitoring is sufficiently repeated within the compliance period), enforceability (that is, the monitoring is independently verifiable), and timeliness.

*Public comments.* Comments on this provision were generally supportive of the notion that stringent protocols are needed to ensure the integrity of the "currency" for the trading program. Consistent with this view, one commenter representing electric utilities recommended that non-utility sources need to employ emissions quantification protocols that are equivalent to those of electric utilities. In the WRAP's comments, a few changes to the regulatory language were recommended. Some comments expressed concerns that the proposal did not provide enough flexibility in the use of quantification protocols.

The WRAP comments recommended that the proposal be modified to state:

For source categories with sources in more than one State submitting an implementation plan under this section, each State must use protocols that are "sufficiently rigorous and comparable to ensure that emissions in the region are measured in a reliable and a consistent manner."

The WRAP believed that the terms "sufficiently rigorous and comparable" were preferable to the word requirement of the "same" methodology for each State. The WRAP also sought clarification that the proposed language in 40 CFR 51.309(h)(4)(iii) requiring that "the protocols must provide consistent approaches for all sources within a given source category" would not limit the WRAP States' and Tribes' ability to establish different monitoring requirements within source categories

based on established criteria such as the size of an emission unit. For example, the WRAP comments noted that it may be appropriate to require the use of a CEMS on a large industrial boiler while using emission factors for a smaller boiler that is used as a backup unit.

Finally, the WRAP expressed concerns that this provision should provide for the use of flexible monitoring options that make sense for this particular trading program. Because smaller sources are anticipated to have greater difficulty meeting stringent monitoring requirements, the WRAP's market trading forum (MTF) is considering adopting more flexible monitoring provisions for these smaller sources. For smaller sources, the MTF goals are:

- To provide assurances that the milestone goals will still be met,
- To ensure that data are sound and reliable,
- To obtain data that are consistent with the assumptions of the Annex, and
- To ensure the integrity of the trading program.

While these MTF discussions are still in the preliminary stages, the WRAP comments seek assurance from EPA that the final rule will allow consideration of different approaches.

Another commenter noted that emission quantification protocols are continually evolving and becoming more refined. This commenter expressed concerns that if improved protocols, different from those used to establish the baseline, are used to determine steady and continuing progress and if the program is triggered, this could have the effect of penalizing sources for developing and using improved protocols. This commenter noted that EPA should not create a disincentive to such innovation. The commenter believed that if the quantification protocols remain static for SO<sub>2</sub> measurements until the program is triggered, at which time sources will be required to implement different reduction programs, then sources will be better able to adapt to the more precise measurements resulting from new quantification protocols. This commenter also believed that as a result, the sources will be able to factor in the need, if any, for greater reductions resulting from improved quantification protocols.

*Final rule.* The EPA has retained the language as proposed. The EPA believes that it is important to retain the requirement that sources in similar categories use the same method for determining emissions under the trading program. The EPA wishes to

clarify that this does not preclude the MTF from making distinctions within a given category regarding the appropriate technique for determining emissions. However, we believe that it is important that any such distinctions be done consistently to ensure that the same methods are being used for similar sources.

The EPA does not believe that the proposed rule discourages innovation in the development of monitoring techniques. For the "pre-trigger" portion of the program, that is, the time period before a trading program, the program specifically provides for adjustments to the milestones to ensure that changes in monitoring techniques are appropriately considered.

### 3. Enforcement Penalties

*Proposed rule.* The proposed rule required that the backstop trading program include specific enforcement penalties to be applied if the emissions from a source exceed the allowances held by the source. In the preamble, EPA noted that the Annex provides for two types of automatic penalties when excess emissions occur:

- The automatic surrender of two future-year allowances for every ton of excess emissions, and
  - A financial penalty (\$5000 per ton, indexed to inflation from the year 2000) deemed to exceed the expected cost of allowances by a factor of three to four.
- In addition, the proposed rule required that in establishing enforcement penalties, the State or Tribes must ensure that:
- When emissions from a source in the program exceed the allowances held by the source, each day of the year is a separate violation, and
  - Each ton of excess emissions is a separate violation.

*Public comments.* The WRAP and a number of industry group commenters objected to the proposed requirements that when emissions from a source in the program exceed the allowances held by the source, each day of the year be considered a separate violation and that each ton of excess emissions be considered a separate violation. First, the WRAP and some industry comments asserted that the maximum penalty is punitive, and cannot be justified for a program that has been established to meet a welfare-based regional goal. Second, commenters believed that because this provision involved greater case-by-case judgments than the penalties in the Annex, the provision could lead to inconsistencies between the various State and tribal agencies.

The WRAP and other commenters recommended that EPA replace the penalty provisions in the proposal with the provisions that were recommended in the Annex, which were, in turn, based upon the acid rain program.

*Final rule.* The EPA has made a few changes to the final rule based upon public comments received. First, EPA has decided to include in the final rule the two specific types of automatic penalties listed in the Annex for excess emissions. The EPA believes that by including a requirement for these penalty provisions in the final rule, EPA can remove any ambiguity that may exist over whether the types of provisions envisioned by the WRAP would be acceptable to EPA for SIPs submitted under 40 CFR 51.309. The EPA agrees with the commenters that the program should establish sufficient penalties to deter non-compliance. The final rule includes a requirement to forfeit two allowances for each ton of excess emissions, and a requirement for monetary penalties. The EPA uses the WRAP's specific \$5000 per ton amount in the final rule. At the same time, EPA believes that because it will be a number of years before the onset of any backstop trading program, it is possible that the appropriate \$/ton figure could change over this time period, and that there may be additional factors that may need to be taken into account. The final rule provides for the development of an alternative to this amount, if the value is consistent across States and Tribes and the value substantially exceeds the expected costs of allowances, in order to provide a strong incentive for sources to hold allowances at least equal to their emissions.

The EPA believes that many commenters may have misunderstood the proposed regulatory language requiring that each day of the year be considered a separate violation and that each ton of excess emissions be considered a separate violation. The EPA wishes to clarify that we view these provisions as clarifying the *liabilities* that exist for violations under the CAA, and that these penalties are not automatic. The EPA believes that it is important to recognize that while the penalty structure devised by the WRAP will represent the principle way to deter violations, EPA believes that it is useful to clarify that the additional liabilities exist under the CAA. We believe this is consistent with the acid rain program. For example, under 40 CFR 77.1(b), EPA clarifies that the automatic penalties in the acid rain program do not negate other penalties under the CAA, as follows:

(b) Nothing in this part shall limit or otherwise affect the application of sections 112(r)(9), 113, 114, 120, 303, 304, or 306 of the Act, as amended. Any allowance deduction, excess emission penalty, or interest required under this part shall not affect the liability of the affected unit's and affected source's owners and operators for any additional fine, penalty, or assessment, or their obligation to comply with any other remedy, for the same violation, as ordered under the Act.

While EPA agrees with the WRAP that the penalty structure contained in the backstop trading program, which is patterned after the acid rain program, should be effective and should constitute the principal way penalties would be imposed, it is nonetheless useful and important to clarify that sources are potentially liable for other penalties under the CAA.

The EPA also clarifies in the final rule language, as noted on page 46 of the Annex (Annex section II.D.6.f.), that in addition to excess emissions, violations are possible with respect to other program requirements (such as monitoring and reporting requirements). We agree with the WRAP that CAA civil and criminal penalties would apply to such violations, including liability for each day as an individual violation.

#### 4. Requirements for Periodic Evaluation

*Proposed rule.* The proposed rule required the backstop trading program to include a provision for periodic evaluations of the program. Such periodic evaluations are required as a means of determining whether the program, in its actual implementation, would need any mid-course corrections. The proposal included a list of nine questions that the program evaluations should address. These proposed questions, which were derived from EPA's guidance for EIP, section 5.3(b), were as follows:

(A) Whether the total actual emissions could exceed the milestones, even though sources comply with their allowances;

(B) Whether the program achieved the overall emission milestone it was intended to reach, and a discussion of the actions that have been necessary to reach the milestone;

(C) The effectiveness of the compliance, enforcement and penalty provisions;

(D) The administrative costs of the program to sources and to State and tribal regulators, including a discussion of whether States and Tribes have enough resources to implement the trading program;

(E) Whether the market trading program has likely led to decreased costs for reaching the milestone relative

to a non-market based approach, including a discussion of the market price of allowances relative to control costs that might have otherwise been incurred;

(F) Whether the trading program resulted in any unexpected beneficial effects, or any unintended detrimental effects;

(G) Whether the actions taken to reduce SO<sub>2</sub> have led to any unintended increases in other pollutants;

(H) Whether there are any changes needed in emissions monitoring and reporting protocols, or in the administrative procedures for program administration and tracking;

(I) The effectiveness of the provisions for interstate trading, and whether there are any procedural changes needed to make the interstate nature of the program more effective.

*Public comments.* The only comments on the periodic evaluation provision were from the WRAP. The WRAP, while supporting items (A), (C), (H) and (I) without changes, recommended changes to items (B) and (D) and recommended deletion of items (E), (F) and (G).

The WRAP's comments recommended deleting the phrase "and a discussion of the actions that have been necessary to reach the milestones" from the end of item (B). The WRAP noted that the backstop trading program is intended to provide incentives for long-term business planning. The program also allows other concerns, such as the need to meet the PM<sub>2.5</sub> NAAQS, to bring about some of the emissions reductions needed to meet the regional haze goals. The WRAP stated that it could be difficult to determine what actions were required to achieve all of the emissions reductions in the region, because most of the reductions would follow from individual business decisions.

Accordingly, in its comments, the WRAP recommended that this provision not be mandated by the rule.

The WRAP comments recommended deletion of the phrase "the administrative costs of the program to sources and to State and tribal regulators" from item (D), such that this item would be modified to read "a discussion of whether States and Tribes have enough resources to implement the trading program." The WRAP stated that States and Tribes will be monitoring the costs of the program as part of their ongoing internal program review, but that this should not be mandated by EPA. Rather, the WRAP recommended that the rule should be focused on what is needed to meet the visibility improvement goals, and that the development of the most cost-effective

strategies to meet those goals should be left to the States and Tribes.

The WRAP's comments recommended deletion of item (E) from the rule. The WRAP indicated that while States and Tribes may choose to perform an analysis of the cost effectiveness of the program, this should not be mandated by EPA. The WRAP also recommended deletion of items (F) and (G) from the rule. In its comments, the WRAP explained its view that it could be very difficult to determine what changes in emissions in the region are due to the milestones because so many different factors will come into play in a backstop trading program. Moreover, the WRAP comments noted that the regional haze rule already includes provisions for a 5-year SIP review of the entire program under 40 CFR 51.309, and that new SIPS will be developed every 10 years. The WRAP stated that it believes that existing requirements in the rule are adequate to ensure that there are not any unintended consequences due to implementation of the backstop trading program, and that the additional audit requirements in (F) and (G) could prove to be difficult and expensive to analyze.

*Final rule.* The final rule incorporates the WRAP's recommended changes to items (B) and (D), and accepts the WRAP's recommendation to delete item (E). The EPA has, however, retained items (F) and (G). The EPA believes that it is important that a program evaluation of the trading program determine whether the trading program resulted in any unexpected beneficial effects, or any unintended detrimental effects and whether the actions taken to reduce SO<sub>2</sub> have led to any unintended increases in other pollutants. While the WRAP correctly notes that there are SIP reviews every 5 years, and new SIPS every 10 years, EPA believes that the program evaluations should be designed to provide information that indicate whether these SIP reviews should contain any mid-course corrections. The EPA does not believe that it will require a burdensome or exhaustive analysis to determine whether, qualitatively, such effects have occurred. If it is known that these detrimental effects have occurred, EPA believes that WRAP States should take this into account in the SIP revisions.

#### *E. Provisions Related to Time Period After 2018*

*Proposed rule.* In the proposal, EPA noted that the Annex did not attempt to address the fate of this program beyond calendar year 2018. In the proposal, EPA believed that it is reasonable for WRAP States and Tribes to defer until a later date any judgment on the specific

levels of SO<sub>2</sub> that can be achieved. Finally, in the proposal, EPA noted its belief that any actions that occur after 2018 should not be allowed to increase SO<sub>2</sub> emissions beyond the 2018 milestone. Accordingly, EPA proposed to indicate in the language in Table 1 of the proposed rule that any milestone developed for years after 2018 must not allow increases over and above those for the year 2018.

*Public comments.* One commenter, supported by two other commenters, believed that, because the WRAP Annex covers the period from 2003 to 2018, EPA's approval of the Annex should not be dependent on what occurs after 2018. The EPA interprets this comment as requesting that the final rule be silent on the time period after 2018. The WRAP's comments recommended that the language in Table 1 of the proposed rule be modified to read "no more than 510,000 tons (480,000 tons if suspended smelters do not resume operation) unless the milestones are replaced with a different program that meets any BART and 'reasonable progress' requirements established in this rule."

*Final rule.* The EPA has incorporated language similar to that requested by the WRAP into Table 1. This ensures that the progress made by participating States and Tribes in addressing the visibility impairment will not be eroded in the event that the SIP revisions due in 2018 are not in place at the beginning of 2019. At the same time, this provision clearly indicates that this SIP revision is the expected means of addressing visibility after that date.

#### *F. Provisions Related to Indian Tribes*

*Proposed Rule.* Western Indian Tribes have been directly involved during the development of the GCVTTC report and the subsequent development of the WRAP Annex report. Through this involvement, they have been able to ensure that unique issues of importance to Tribes have been carefully considered by all stakeholders. The Annex addresses issues of tribal interest, including a specific provision of the program for Tribes in the market trading program. The EPA believes that tribal participation is important for the success of the visibility protection program in the Western United States and reflected this in the proposed rule.

When developing the backstop trading program, the WRAP established a 20,000 ton allowance amount (called the "set-aside") to be allocated to Tribes. In the event that the backstop market trading program is triggered, the set-aside would be available to Tribes to either (1) allow for new source growth over and above the amounts allocated

for new sources by the Annex; (2) sell for revenue; or (3) retire. Note that this set-aside amount is in addition to any allocations to individual sources within Indian Country. For example, if the Navajo Nation participates in the program, there would be an allocation for the Four Corners Power Plant and for the Navajo Power Plant, which are located on the Navajo Reservation. The WRAP's backstop trading program includes within the overall milestones an amount for each such existing source in addition to the tribal set-aside. For more discussion of this issue, see 67 FR 30438, May 6, 2002.

In the proposal, EPA included the 20,000 ton tribal set-aside as a requirement of the backstop trading program. In addition, EPA discussed in the preamble its views of EPA's role with respect to allocation of the 20,000 ton set-aside. In this discussion, EPA stated its view that allocation of the 20,000 ton amount was not a critical short-term need, because the backstop trading program would be triggered, at the earliest, in the year 2009. The EPA indicated its expectation that Tribes will develop the method for allocating the 20,000 tons, but that EPA will seek to provide assistance as necessary to facilitate the process.

In the proposed rule, EPA reiterated its position that it will "pursue the principle of tribal 'self government' and will work with tribal governments on a 'government-to-government' basis." The CAA Amendments of 1990 added section 301(d) which authorizes EPA to "treat Tribes as States" for the purposes of administering CAA programs. The EPA promulgated regulations implementing section 301(d) in the Tribal Authority Rule, which elaborates on EPA's tribal policies, on February 12, 1998, (63 FR 7254). For a more detailed discussion of EPA's tribal policies, see the Tribal Authority Rule (63 FR 7254) and the proposed rule (67 FR 30418).

*Public Comments.* The EPA received several comments relating to tribal issues, including the set-aside for Tribes in the market trading program and the need for providing assistance (such as developing a model TIP) to Indian Tribes.

The WRAP's comments agreed with the proposed language in § 51.309(h)(4)(i) regarding the set-aside and added that the final rule should say that tribal participation in the market trading program would not be affected by States that do not choose to participate in the market trading program. The WRAP comments included an example: "if California opts out of the backstop trading program, all Tribes that are located in California may



still participate in the distribution of the tribal set-aside." The WRAP also suggested that EPA make assistance in developing a TIP a high priority, and that EPA should develop a model implementation plan which could be appropriately modified and used by any Tribe choosing to participate in the market trading program.

One commenter representing industrial sources located in Indian country expressed the concern that participation by Tribes with large stationary sources was important for the program to reach "critical mass." Additionally, this commenter believed that EPA should work to serve the interests of sources located in Indian country by assisting the Tribes in developing a program under 40 CFR 51.309.

The WRAP's comments agreed with EPA's assessment that allocation of the 20,000 ton tribal set-aside does not need to be completed in the near-term, and strongly agreed that the distribution of the set-aside should be determined by the Tribes and not EPA or the WRAP. However, the WRAP recommended that the final rule contain a provision that will require the determination of a method to allocate or manage the set-aside by no later than 1 year after the market trading program is triggered.

*Final Rule.* The EPA agrees with commenters regarding participation of Indian Tribes in the regional SO<sub>2</sub> emissions reductions program. The EPA agrees that Tribes should be allowed to participate in the program and their participation is not dependent on the participation of the States that surround them. As stated in the Tribal Authority Rule (63 FR 7271)

[t]ribes \* \* \* shall be treated in the same manner as states with respect to all provisions of the Clean Air Act and implementing regulations, except for those provisions identified in section 49.4 and the regulations that implement those provisions. (63 FR 7271).

Because the CAA provisions for the regional haze rule are not listed in section 49.4, Tribes should have the opportunity to be treated in the same manner as States for purposes of implementing 40 CFR 51.309. Accordingly, eligible Tribes may submit a plan regardless of the participation of neighboring States.

The EPA concurs with the comments regarding the importance of assisting Tribes in developing TIPs. As stated in the proposal, "For Tribes which choose to implement 40 CFR 51.309, EPA believes there are a number of ways that EPA can provide assistance." The EPA will help those Tribes with major SO<sub>2</sub> sources to comply with the pre-trigger

emissions tracking requirements, and to assist Tribes interested in participating in the backstop trading program. To this end, EPA has met, or plans to meet, with all Tribes that have major SO<sub>2</sub> sources. In these meetings, EPA is explaining the regional haze rules and options for participating in the SO<sub>2</sub> reduction program.

The EPA agrees with the WRAP's comments that a model TIP could serve to facilitate implementation of the program in Indian country. The EPA will work with Tribes to further assess the needs for such a model TIP. The EPA also agrees with the WRAP's recommendation to establish a 1-year deadline for allocation of the 20,000 ton set-aside, and we have added this language to the final rule.

EPA is committed to protecting tribal air resources, building tribal air program capacity, and working with Tribes on a government-to-government basis.

#### IV. Statutory and Executive Order Reviews

In preparing any final rule, EPA must meet the administrative requirements contained in a number of statutes and executive orders. In this section of the preamble, we discuss how the final rule addresses these administrative requirements. Except where EPA committed in the proposal to further efforts, these discussions reflect EPA's assessments for the proposed rule. No public comments were received regarding EPA's proposed treatment of these administrative requirements.

##### A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether the regulatory action is "significant" and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the

President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action." As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the public record.

Today's final rulemaking amends the regional haze rule by incorporating a specific set of SO<sub>2</sub> emission targets for regionwide stationary sources of SO<sub>2</sub> emissions for a nine-State region in the Western United States. The emission targets would affect and have potential economic impacts only for States choosing to participate in the optional program provided by 40 CFR 51.309 of the regional haze rule. The emissions reductions resulting from the program vary over the 2003 to 2018 time period. If all nine States participate in the program, the WRAP estimates that for the year 2018, SO<sub>2</sub> emissions would be reduced from a projected baseline of 612,000—642,200 tons to an enforceable milestone of 480,000—510,000 tons. If the milestones are not achieved through voluntary emissions reductions by the affected sources, then they will be achieved through an enforceable backstop market trading program.

In order to understand the possible regulatory impacts of this rule, it is necessary to review the previous analysis that EPA completed for the entire regional haze program. In 1999, EPA prepared a Regulatory Impact Analysis (RIA) for the regional haze rule (see regional haze rule docket (A-95-38)). In that RIA, EPA assessed the costs, economic impacts, and benefits for four illustrative progress goals, two sets of control strategies, two sets of assumptions for estimating benefits, and systems of nationally uniform progress goals versus regional varying progress goals (64 FR 35760, July 1, 1999). Because we had no way of predicting the visibility goals each State would pick under the regional haze rule requirements, we conducted an extensive analysis of eight "what if" scenarios. For each scenario, the RIA determined the control measures needed to achieve the given degree of visibility improvement and the associated costs. The RIA also presented results for six specific sub-regions, such as "Rocky Mountain," "West," and others. These emission reduction scenarios are provided in the RIA in Tables 6-7 and 6-8.

The EPA believes that some of the emissions reductions from the Annex provisions for stationary source SO<sub>2</sub>, assuming States choose this optional 40

CFR 51.309 approach, may result from environmental obligations under the CAA. To the extent this is the case, the emissions reductions required the WRAP's SO<sub>2</sub> milestones and backstop trading program may have already been addressed in other regulatory impact analyses for those programs.

The remainder of the emissions reductions resulting from the WRAP's program for stationary source SO<sub>2</sub> would be over and above those required to meet other environmental obligations. Where this is the case, we believe that the control costs and other potential economic consequences of achieving the reductions are reflected in the RIA for the 1999 regional haze rule. The range of results for the eight scenarios analyzed in the RIA resulted in predicted SO<sub>2</sub> emissions reductions that are within the range of emissions reductions included in the Annex. Two of the eight scenarios resulted in 284,000 tons of stationary source reductions in regions containing one or more of the WRAP Annex States. Five other scenarios include SO<sub>2</sub> emissions reductions ranging from 95,000 to 128,000 tons per year. Hence, the costs and benefits associated with the WRAP's program are captured in the RIA for the 1999 final regional haze rule.

The EPA received no public comments regarding Executive Order 12866.

#### B. Paperwork Reduction Act

The information collection requirements in today's rule have been submitted to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 1813.05) and a copy may be obtained from Susan Auby, by mail at Office of Environmental Information—Information Strategies Branch, U.S. EPA (2822T), 1200 Pennsylvania Avenue, NW., Washington, DC 20460, by e-mail at [auby.susan@epa.gov](mailto:auby.susan@epa.gov), or by calling (202) 566-1672. A copy may also be downloaded off the Internet at <http://www.epa.gov/icr>.

The EPA has prepared burden estimates for the specific burden impacts of today's rule. These burden estimates are calculated using the assumption that seven eligible States and four tribes would participate in the program. The results of the calculations indicate 16,100 hours to 19,990 hours for affected sources, 14,010 to 14,430 hours for States, 2,520 to 2,600 hours for Tribes, 1,305 to 1,375 hours for the Federal government, and 240 hours for regional planning organizations.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and use technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

The EPA sought comments on EPA's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden. The EPA received no comments regarding the burden or the Paperwork Reduction Act as it applies to today's rulemaking.

#### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rulemaking on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (as discussed on the SBA Web site at <http://www.sba.gov/size/indexableofsize.html>); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the potential for economic impacts of today's rule on

small entities, I certify that today's rule will not have a significant economic impact on a substantial number of small entities. Today's rule amends the requirements of the regional haze program to provide nine Western States and a number of Tribes with an optional method for complying with the requirements of the CAA. No State or Tribe is required to submit an implementation plan meeting its requirements. For States or Tribes that choose to submit an implementation plan under this optional program, however, today's rule requires those States and/or Tribes to meet a series of regional SO<sub>2</sub> emission milestones. The EPA will determine whether these milestones are met based on the actual emissions from stationary sources with SO<sub>2</sub> emissions of more than 100 tons per year. From data EPA obtained from the WRAP's Web site, it appears that there are 194 establishments meeting the 100 tons per year of SO<sub>2</sub> criterion for this program, including 39 utility power plants, and 155 non-utility sources.<sup>9</sup> The vast majority of these establishments—which include sources such as power plant boilers, copper smelters, chemical plants, petroleum refineries, natural gas production plants, large manufacturing operations, mills—are not small entities. The EPA estimates that 12 facilities are likely to be owned by small entities, and 164 are owned by entities that are not small. The EPA has been unable to determine the size of 16 entities that own 18 of the establishments.<sup>10</sup> Even if all 18 were determined to be owned by small entities, and all nine States and those Tribes with covered sources adopted the optional approach to complying with the visibility requirements of the CAA, less than 30 small entities would be potentially affected by this rule.

The goal of the WRAP is for the regional SO<sub>2</sub> milestones established by the rule to be met through voluntary measures and EPA believes that

<sup>9</sup> The number of power plants was obtained from "Data Worksheets from ICF Consulting Detailing Utility Emissions Projections," Item 3 in supplemental information transmitted to Tim Smith, EPA, from Patrick Cummins, WRAP, June 29, 2001. The non-utility estimate was obtained from: *Technical Support Documentation. Voluntary Emissions Reduction Program for Major Industrial Sources of Sulfur Dioxide in Nine Western States and a Backstop Market Trading Program*. Section 2.A. Revised Appendix A for the Pechan Report, table A-1.

<sup>10</sup> The EPA provides documentation of these estimates in a technical memorandum, "Size of Potentially Affected Entities Should the Western Regional Air Partnership States Choose to Adopt Regulations in Accordance with the Draft Proposed Rule Revising § 51.309(h)." Allen Basala, EPA, October 17, 2001. This memorandum is included in the docket for today's final rule.

participating States and Tribes may be able to meet the milestones through such measures. However, as a backstop in the event the milestones are not met in this manner, today's rule requires the implementation of a market trading program to ensure that emissions in the relevant region do not exceed the milestones. Today's rule gives the States and Tribes the discretion to allocate emissions credits to sources, as the States and Tribes determine appropriate. Ultimately, the impact on small entities will not be determined by this rule, but rather by how the relevant State or Tribe exercises its discretion in adopting the optional program and allocating emissions credits. We encourage States and Tribes to consider the impact of its market trading program on small entities. Nonetheless, EPA believes that no more than 28 small entities will be affected by this rule, and most likely less, given that EPA does not anticipate that all nine States with the option to participate in this program will do so. We did not receive any public comments regarding the RFA or the Small Business Regulatory Enforcement Fairness Act of 1996. The EPA continues to believe that today's rulemaking will not have a significant economic impact on a substantial number of small entities.

#### *D. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) (UMRA), establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, 2 U.S.C. 1532, EPA generally must prepare a written statement, including a cost-benefit analysis, for any proposed or final rule that "includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more \* \* \* in any one year." A "Federal mandate" is defined under section 421(6), 2 U.S.C. 658(6), to include a "Federal intergovernmental mandate" and a "Federal private sector mandate." A "Federal intergovernmental mandate," in turn, is defined to include a regulation that "would impose an enforceable duty upon State, local, or tribal governments," section 421(5)(A)(i), 2 U.S.C. 658(5)(A)(i), except for, among other things, a duty that is "a condition of Federal assistance," section 421(5)(A)(i)(I). A "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the

private sector," with certain exceptions, section 421(7)(A), 2 U.S.C. 658(7)(A).

Before promulgating an EPA rule for which a written statement is needed under section 202 of the UMRA, section 205, 2 U.S.C. 1535, of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule.

By incorporating into the regional haze rule the provisions of the Annex for a voluntary emissions reductions program and backstop trading program, EPA is not directly establishing any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments. The entire program under 40 CFR 51.309, including today's amendments, is an option that each of the States may choose to exercise. The program is not required and thus is clearly not a "mandate." Thus, EPA is not obligated to develop a small government agency plan, as required under section 203 of UMRA.

The EPA also believes that because today's rule provides those States potentially subject to the rule with substantial flexibility, today's rule meets the UMRA requirement in section 205 to select the least costly and burdensome alternative in light of the statutory mandate for SIPs for visibility protection that address BART. Today's rule provides States and sources with the flexibility to achieve regional SO<sub>2</sub> reductions in a way that is both cost and administratively effective. Sources are given the opportunity to achieve voluntary reductions. If such reductions do not occur, then the rule provides for the establishment of a trading program to achieve targeted emissions reductions. If a trading program is implemented, sources have the flexibility to buy and sell allowances in order to reach emissions reductions milestones in the most cost-effective way. Today's rule, therefore, inherently provides for adoption of the least costly, most-cost effective, and least-burdensome alternative that achieves the objective of this rule.

The EPA believes that this rulemaking is not subject to the requirements of UMRA. For regional haze SIPs overall, it is questionable whether a requirement to submit a SIP revision constitutes a Federal mandate, as discussed in the preamble to the regional haze rule, (64 FR 35761, July 1, 1999). However, today's rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for States, local, or tribal governments or

the private sector. The program contained in 40 CFR 51.309, including today's rule, is an optional program.

#### *E. Executive Order 13132: Federalism*

Executive Order 13132, entitled Federalism (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Under section 6(b) of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing a regulation. Under section 6(c) of Executive Order 13132, EPA may not issue a regulation that has federalism implications and that preempts State law, unless EPA consults with State and local officials early in the process of developing the regulation.

Today's rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. As an optional program, today's rule will not directly impose significant new requirements on State and local governments. In addition, even if today's rule did have federalism implications, it will not impose substantial direct compliance costs on State or local governments, nor will it preempt State law.

Consistent with EPA policy, we nonetheless consulted with State and local officials early in the process of developing this regulation, to provide them with an opportunity for meaningful and timely input into its development. These consultations included a working meeting with State and local officials and numerous discussions with committees and forums of the WRAP. In the spirit of Executive Order 13132 and consistent with EPA policy to promote

communications between EPA and State and local governments, EPA specifically solicited comment on today's rule from State and local officials. We received no comments regarding this executive order from State and local officials or any other public commenters.

As required by section 8(a) of Executive Order 13132, EPA included a certification from its Federalism Official stating that EPA had met the Executive Order's requirements in a meaningful and timely manner, when it sent the draft of this final rule to OMB for review pursuant to Executive Order 12866. A copy of this certification has been included in the public version of the official record for this final rule.

#### *F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to, among other things, ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the executive order to include regulations that have "substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes."

Under section 5(b) of Executive Order 13175, EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults tribal officials early in the process of developing today's regulation. Under section 5(c) of the Executive Order, EPA may not issue a regulation that has tribal implications and that preempts tribal law, unless EPA consults with tribal officials early in the process of developing today's regulation.

Today's rule may have tribal implications, but we believe that it will neither impose substantial direct compliance costs on the Tribes nor preempt tribal law. The EPA sought input from potentially affected Tribes before reaching a conclusion on whether this rule will have tribal implications. This was due, in a large part, to the voluntary nature of this program and the uncertainty of potential impacts on Tribes in the event a State or Tribe

chooses to participate in the program. Possible impacts on Tribes choosing to opt into this program are discussed above in unit III of this preamble.

The EPA notes that the WRAP consulted extensively with tribal representatives in the development of the Annex, the document which provided the basis for today's rulemaking. The Annex provides recognition of Tribes throughout the document and there is a specific discussion of tribal issues in Attachment F of the Annex. Today's rulemaking closely mirrors the recommendations of the WRAP and therefore reflects discussions between the WRAP and Western Tribes.

In keeping with EPA policies regarding Tribes and Executive Order 13175, prior to the issuance of the final rule, EPA provided additional opportunities for consultation with tribal officials or authorized representatives of tribal governments on the potential impacts of today's rule on Tribes. After consulting with a tribal representative, EPA provided Tribes with several opportunities to provide comments on today's rulemaking. During the public comment period, EPA met with tribal environmental staff at tribal environmental forums in Portland, Oregon and Sparks, Nevada. Also, during the public comment period, EPA sent letters to all Western Tribes describing the regional haze rules and, in particular, today's rule, alerting them to the public comment period and seeking their opinions on the rulemaking. Finally, EPA staff met with Tribes in the Western United States, that have sources located on their tribal lands, with sources potentially subject to BART requirements. Although EPA did receive public comments on Tribal issues, we did not receive any public comments specific to this executive order.

#### *G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks*

Executive Order 13045, "Protection of Children from Environmental Health and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the EPA must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective

and reasonably feasible alternatives considered by EPA. The EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under 5-501 of the Order has the potential to influence the regulation. Today's rule to codify the SO<sub>2</sub> emission reduction program is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risk. There were no public comments received pertaining to this executive order.

#### *H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use*

Executive Order 13211, "Actions That Significantly Affect Energy Supply, Distribution, or Use," (66 FR 28355, May 22, 2001), provides that agencies shall prepare and submit to the Administrator of the Office of Information and Regulatory Affairs, OMB, a Statement of Energy Effects for certain actions identified as "significant energy actions." Section 4(b) of Executive Order 13211 defines "significant energy actions" as "any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action." Under Executive Order 13211, a Statement of Energy Effects is a detailed statement by the agency responsible for the significant energy action relating to: (i) Any adverse effects on energy supply, distribution, or use including a shortfall in supply, price increases, and increased use of foreign supplies should the proposal or rule be implemented, and (ii) reasonable alternatives to the action with adverse energy effects and the expected effects of such alternatives on energy supply, distribution, and use.

While this rulemaking is a "significant regulatory action" under Executive Order 12866, EPA has determined that this rulemaking is not a significant energy action because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. In today's rule, if States chose to implement the option provided by 40

CFR 51.309, this would lead to a regional reduction in SO<sub>2</sub> emissions in order to meet the WRAP's SO<sub>2</sub> milestones for the 2003–2018 time period. The WRAP's analysis of the program's requirements results in the following projections:<sup>11</sup>

- No reduction in crude oil supply;
- No reduction in fuel production;
- 0.0 percent to 0.2 percent increase in wholesale electricity prices in 2018;
- Production cuts in coal in the Western States balanced by increases in coal production in the Appalachian region;
- No increase in energy distribution costs;
- No significantly increased dependence on foreign supplies of energy;
- Adverse impacts on employment, gross regional product, and real disposable incomes in the affected Western States of less than 0.05 percent in 2018;
- Room for new sources of electrical generating capacity within the target SO<sub>2</sub> emission levels.

Given the particular concern in the West regarding needed electrical generating capacity, EPA believes it important to note the WGA statement that “the conclusion [\* \* \* of their analysis \* \* \*] is that sulfur dioxide emissions reductions milestones should in no way impede the construction of new coal-fired power plants in the West<sup>12</sup> \* \* \*”

Furthermore, an assessment by WGA of the effects of the WRAP Annex indicates that it is possible to build 7000 megawatts or more of new coal-fired generation at any time between 2001 and 2018 without exceeding the SO<sub>2</sub> emission milestones in the Annex.<sup>13</sup> However, the amount of megawatts that could be built is affected by analytical assumptions regarding fuel mix and quality, capacity utilization, control levels, and the demarcation of fuel use regions. Additional scenarios included in the WGA analysis show that there could be room for 19,000 megawatts of generation capacity.

The EPA believes that the program contained in the Annex and in today's rule will not result in energy reduction

of 500 or more megawatts installed production capacity. Under this program, considerable flexibility is afforded to electricity generators on how to comply with the program. Even if the trading program is triggered and sources must comply with allowances, we believe that the least-cost solutions afforded by the trading program, and the ability to secure emissions reductions from other sources, will make it very unlikely that the program would lead to plant shutdowns. The EPA did not receive any public comments specifically addressing this executive order or EPA's findings.

#### *I. National Technology Transfer Advancement Act*

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (“NTTAA”), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

However, today's rule does not incorporate any requirements to use any particular technical standards, such as specific measurement or monitoring techniques. Therefore, EPA is not considering the use of any voluntary consensus standards in this rulemaking. Today's rule does require States to develop emissions quantification protocols and monitoring procedures for their SIPs as part of the market trading program. However, EPA generally defers to the choices the States make in their SIPs when the CAA does not prescribe requirements, so EPA is not requiring the use of specific, prescribed techniques, or methods in those SIPs. Nevertheless, while EPA believes that it is not necessary to consider the use of any voluntary consensus standards for this proposal, we will encourage States and Tribes to consider the use of such standards in the development of these protocols. The EPA did not receive any public comments concerning this executive order.

#### *J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations.

The EPA believes that today's rule should not raise any environmental justice issues. The overall result of the program is regional reductions in SO<sub>2</sub>. Because this program would likely reduce regional and local SO<sub>2</sub> levels in the air and because there are separate programs under the CAA to ensure that SO<sub>2</sub> levels do not exceed national ambient air quality standards, it appears unlikely that this program would permit any adverse effects on local populations. The EPA did not receive any public comments regarding this executive order.

#### *K. Congressional Review Act*

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 U.S. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the U.S. 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 a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective on August 4, 2003.

#### **List of Subjects in 40 CFR Part 51**

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Nitrogen oxides, Particulate matter, Sulfur dioxide, Volatile organic compounds.

Dated: May 21, 2003.

**Christine Todd Whitman,**  
*Administrator.*

■ For the reasons set forth in the preamble, part 51 of chapter I of title 40 of the Code of Federal Regulations is amended as follows:

<sup>11</sup> ICF consulting, Final Report on Regional Economic Impacts of Annex. Transmitted to Tim Smith, EPA/OAQPS by Patrick Cummins, WRAP Co-Project Manager, June 29, 2001.

<sup>12</sup> Memorandum from Jim Souby to Staff Council, State Environmental Directors and State Air Directors, “Energy and Air Quality Issues.” February 23, 2001.

<sup>13</sup> Technical Memorandum, “Analysis of New Coal-Fired Power Plants Under the Proposed Sulfur Dioxide Emission Reduction Milestones for the Nine-State Grand Canyon Visibility Transport Region.” February 22, 2001.

**PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS**

**Subpart P—Protection of Visibility**

■ 1. The authority citation for part 51 continues to read as follows:

**Authority:** 42 U.S.C. 7410–7671q.

■ 2. Section 51.309 is amended by:

- a. Revising paragraph (b)(5).
- b. Adding paragraphs (b)(8), (b)(9), (b)(10), (b)(11), (b)(12) and (b)(13).
- c. Revising paragraph (c).
- d. Revising paragraphs (d)(4)(i) through (d)(4)(iv).
- e. Revising paragraph (f)(1)(i) and (f)(3).
- f. Adding paragraph (h).

The revisions and additions read as follows:

**§ 51.309 Requirements related to the Grand Canyon Visibility Transport Commission.**

\* \* \* \* \*

(b) \* \* \*

(5) Milestone means the maximum level of annual regional sulfur dioxide emissions for a given year, assessed annually consistent with paragraph (h)(2) of this section beginning in the year 2003.

\* \* \* \* \*

(8) Base year means the year, generally a year between 1996 and 1998, for which data for a source included within the program were used by the WRAP to calculate base year emissions as a starting point for development of the Annex required by paragraph (f) of this section.

(9) Forecast means the process used by the WRAP to predict future emissions for purposes of developing the milestones required by paragraph (f) of this section.

(10) Reforecast means a corrected forecast, based upon reapplication of the forecasting process after correction of base year emissions estimates.

(11) BHP San Manuel means:

(i) the copper smelter located in San Manuel, Arizona which operated during 1990, but whose operations were suspended during the year 2000,

(ii) The same smelter in the event of a change of name or ownership.

(12) Phelps Dodge Hidalgo means:

(i) The copper smelter located in Hidalgo, New Mexico which operated during 1990, but whose operations were suspended during the year 2000,

(ii) the same smelter in the event of a change of name or ownership.

(13) Eligible renewable energy resource, for purposes of 40 CFR 51.309, means electricity generated by non-nuclear and non-fossil low or no air emission technologies.

*(c) Implementation Plan Schedule.*

Each Transport Region State may meet the requirements of § 51.308(b) through (e) by submitting an implementation plan that complies with the requirements of this section. Each Transport Region State must submit an implementation plan addressing regional haze visibility impairment in the 16 Class I areas no later than December 31, 2003. Indian Tribes may submit implementation plans after the December 31, 2003 deadline. A Transport Region State that does not submit an implementation plan that complies with the requirements of this section (or whose plan does not comply with all of the requirements of this section) is subject to the requirements of § 51.308 in the same manner and to the same extent as any State not included within the Transport Region.

\* \* \* \* \*

(d) \* \* \*

(4) \* \* \*

(i) Sulfur dioxide milestones consistent with paragraph (h)(1) of this section.

(ii) Monitoring and reporting of sulfur dioxide emissions. The plan submission must include provisions requiring the annual monitoring and reporting of actual stationary source sulfur dioxide emissions within the State. The monitoring and reporting data must be sufficient to determine whether a 13 percent reduction in actual emissions has occurred between the years 1990 and 2000, and for determining annually whether the milestone for each year between 2003 and 2018 is exceeded, consistent with paragraph (h) (2) of this section. The plan submission must provide for reporting of these data by the State to the Administrator and to the regional planning organization consistent with paragraph (h)(2) of this section.

(iii) Criteria and Procedures for a Market Trading Program. The plan must include the criteria and procedures for activating a market trading program consistent with paragraphs (h)(3) and (h)(4) of this section. The plan must also provide for implementation plan assessments of the program in the years 2008, 2013, and 2018.

(iv) Provisions for market trading program compliance reporting consistent with paragraph (h)(4) of this section.

\* \* \* \* \*

(f) \* \* \*

(1) \* \* \*

(i) The annex must contain quantitative emissions milestones for stationary source sulfur dioxide emissions for the reporting years 2003, 2008, 2013 and 2018. The milestones must provide for steady and continuing emissions reductions for the 2003–2018 time period consistent with the Commission’s definition of reasonable progress, its goal of 50 to 70 percent reduction in sulfur dioxide emissions from 1990 actual emission levels by 2040, applicable requirements under the CAA, and the timing of implementation plan assessments of progress and identification of deficiencies which will be due in the years 2008, 2013, and 2018. The milestones must be shown to provide for greater reasonable progress than would be achieved by application of best available retrofit technology (BART) pursuant to § 51.308(e)(2) and would be approvable in lieu of BART.

(2) \* \* \*

(3) The EPA will publish the annex upon receipt. If EPA finds that the annex meets the requirements of paragraph (f)(1) of this section and assures reasonable progress, then, after public notice and comment, EPA will amend the requirements of this section to incorporate the provisions of the annex. If EPA finds that the annex does not meet the requirements of paragraph (f)(1) of this section, or does not assure reasonable progress, or if EPA finds that the annex is not received, then each Transport Region State must submit an implementation plan for regional haze meeting all of the requirements of § 51.308.

\* \* \* \* \*

(h) *Emissions Reduction Program for Major Industrial Sources of Sulfur Dioxide.* The first implementation plan submission must include a stationary source emissions reductions program for major industrial sources of sulfur dioxide that meets the following requirements:

(1) *Regional sulfur dioxide milestones.* The plan must include the milestones in Table 1, and provide for the adjustments in paragraphs (h)(1)(i) through (iv) of this section. Table 1 follows:

TABLE 1.—SULFUR DIOXIDE EMISSIONS MILESTONES

Column 1	Column 2	Column 3	Column 4
For the year . . .	. . . if BHP San Manuel and Phelps Dodge Hidalgo resume operation, the maximum regional sulfur dioxide milestone is . . .	. . . if neither BHP San Manuel nor Phelps Dodge Hidalgo resumes operation, the maximum regional sulfur dioxide milestone is . . .	. . . and the emission inventories for these years will determine whether emissions are greater than or less than the milestone:
2003 .....	720,000 tons .....	682,000 tons .....	2003.
2004 .....	720,000 tons .....	682,000 tons .....	Average of 2003 and 2004.
2005 .....	720,000 tons .....	682,000 tons .....	Average of 2003, 2004 and 2005.
2006 .....	720,000 tons .....	682,000 tons .....	Average of 2004, 2005 and 2006.
2007 .....	720,000 tons .....	682,000 tons .....	Average of 2005, 2006 and 2007.
2008 .....	718,333 tons .....	680,333 tons .....	Average of 2006, 2007 and 2008.
2009 .....	716,667 tons .....	678,667 tons .....	Average of 2007, 2008 and 2009.
2010 .....	715,000 tons .....	677,000 tons .....	Average of 2008, 2009 and 2010.
2011 .....	715,000 tons .....	677,000 tons .....	Average of 2009, 2010 and 2011.
2012 .....	715,000 tons .....	677,000 tons .....	Average of 2010, 2011 and 2012.
2013 .....	695,000 tons .....	659,667 tons .....	Average of 2011, 2012 and 2013.
2014 .....	675,000 tons .....	642,333 tons .....	Average of 2012, 2013 and 2014.
2015 .....	655,000 tons .....	625,000 tons .....	Average of 2013, 2014 and 2015.
2016 .....	655,000 tons .....	625,000 tons .....	Average of 2014, 2015 and 2016.
2017 .....	655,000 tons .....	625,000 tons .....	Average of 2015, 2016 and 2017.
2018 .....	510,000 tons .....	480,000 tons .....	Year 2018 only.
Each year after 2018 .....	no more than 510,000 tons unless the milestones are replaced with a different program that meets any BART and reasonable progress requirements established in §51.309.	no more than 480,000 tons unless the milestones are replaced with a different program that meets any BART and reasonable progress requirements established in §51.309.	3-year average of the year and the two previous years, or any alternative provided in any future plan revisions under §51.308(f).

(i) Adjustment for States and Tribes Which Choose Not to Participate in the Program, and for Tribes that opt into the program after the 2003 deadline. If a State or Tribe chooses not to submit an implementation plan under the option provided in § 51.309, or if EPA has not approved a State or Tribe's implementation plan by the date of the draft determination required by

§ 51.309(h)(3)(ii), the amounts for that State or Tribe which are listed in Table 2 must be subtracted from the milestones that are included in the implementation plans for the remaining States and Tribes. For Tribes that opt into the program after 2003, the amounts in Table 2 or 4 will be automatically added to the milestones that are included in the implementation

plans for the participating States and Tribes, beginning with the first year after the tribal implementation plan implementing § 51.309 is approved by the Administrator. The amounts listed in Table 2 are for purposes of adjusting the milestones only, and they do not represent amounts that must be allocated under any future trading program. Table 2 follows:

TABLE 2.—AMOUNTS SUBTRACTED FROM THE MILESTONES FOR STATES AND TRIBES WHICH DO NOT EXERCISE THE OPTION PROVIDED BY § 51.309

State or tribe	2003	2004	2005	2006	2007	2008	2009	2010
1. Arizona .....	117,372	117,372	117,372	117,372	117,372	117,941	118,511	119,080
2. California .....	37,343	37,343	37,343	37,784	37,343	36,363	35,382	34,402
3. Colorado .....	98,897	98,897	98,897	98,897	98,897	98,443	97,991	97,537
4. Idaho .....	18,016	18,016	18,016	18,016	18,016	17,482	16,948	16,414
5. Nevada .....	20,187	20,187	20,187	20,187	20,187	20,282	20,379	20,474
6. New Mexico .....	84,624	84,624	84,624	84,624	84,624	84,143	83,663	83,182
7. Oregon .....	26,268	26,268	26,268	26,268	26,268	26,284	26,300	26,316
8. Utah .....	42,782	42,782	42,782	42,782	42,782	42,795	42,806	42,819
9. Wyoming .....	155,858	155,858	155,858	155,858	155,858	155,851	155,843	155,836
10. Navajo Nation .....	53,147	53,147	53,147	53,147	53,147	53,240	53,334	53,427
11. Shoshone-Bannock Tribe of the Fort Hall Reservation .....	4,994	4,994	4,994	4,994	4,994	4,994	4,994	4,994
12. Ute Indian Tribe of the Uintah and Ouray Reservation .....	1,129	1,129	1,129	1,129	1,129	1,131	1,133	1,135
13. Wind River Reservation .....	1,384	1,384	1,384	1,384	1,384	1,384	1,384	1,384
State or tribe	2011	2012	2013	2014	2015	2016	2017	2018
1. Arizona .....	119,080	119,080	116,053	113,025	109,998	109,998	109,998	82,302
2. California .....	34,402	34,402	33,265	32,128	30,991	30,991	30,991	27,491
3. Colorado .....	97,537	97,537	94,456	91,375	88,294	88,294	88,294	57,675
4. Idaho .....	16,414	16,414	15,805	15,197	14,588	14,588	14,588	13,227

State or tribe	2011	2012	2013	2014	2015	2016	2017	2018
5. Nevada .....	20,474	20,474	20,466	20,457	20,449	20,449	20,449	20,232
6. New Mexico .....	83,182	83,182	81,682	80,182	78,682	78,682	78,682	70,000
7. Oregon .....	26,316	26,316	24,796	23,277	21,757	21,757	21,757	8,281
8. Utah .....	42,819	42,819	41,692	40,563	39,436	39,436	39,436	30,746
9. Wyoming .....	155,836	155,836	151,232	146,629	142,025	142,025	142,025	97,758
10. Navajo Nation .....	53,427	53,427	52,707	51,986	51,266	51,266	51,266	44,772
11. Shoshone-Bannock Tribe of the Fort Hall Reservation .....	4,994	4,994	4,994	4,994	4,994	4,994	4,994	4,994
12. Ute Indian Tribe of the Uintahand Ouray Res- ervation .....	1,135	1,135	1,135	1,135	1,135	1,135	1,135	1,135
13. Northern Arapaho and Shoshone Tribes of the Wind River Reservation	1,384	1,384	1,384	1,384	1,384	1,384	1,384	1,384

(ii) Adjustment for Future Operation of Copper Smelters.

(A) The plan must provide for adjustments to the milestones in the event that Phelps Dodge Hidalgo and/or BHP San Manuel resume operations or that other smelters increase their operations.

(B) The plan must provide for adjustments to the milestones according to Tables 3a and 3b except that if either the Hidalgo or San Manuel smelters resumes operation and is required to obtain a permit under 40 CFR 52.21 or 40 CFR 51.166, the adjustment to the milestone must be based upon the levels allowed by the permit. In no instance

may the adjustment to the milestone be greater than 22,000 tons for the Phelps Dodge Hidalgo, greater than 16,000 tons for BHP San Manuel, or more than 30,000 tons for the combination of the Phelps Dodge Hidalgo and BHP San Manuel smelters for the years 2013 through 2018. Tables 3a and 3b follow:

TABLE 3A.—ADJUSTMENTS TO THE MILESTONES FOR FUTURE OPERATIONS OF COPPER SMELTERS

Scenario	If this happens . . .	and this happens . . .	. . . then you calculate the milestone by adding this amount to the value in column 3 of Table 1
1 .....	Phelps Dodge Hidalgo resumes operation, but BHP San Manuel does not.	Phelps Dodge Hidalgo resumes production consistent with past operations and emissions.	A. Beginning with the year that production resumes, and for each year up to the year 2012, the milestone increases by: (1) 22,000 tons PLUS (2) Any amounts identified in Table 3b. B. For the years 2013 through 2018, the milestone increases by this amount or by 30,000 tons, whichever is less.
2 .....	Phelps Dodge Hidalgo resumes operation, but BHP San Manuel does not.	Phelps Dodge Hidalgo resumes operation in a substantially different manner such that emissions will be less than for past operations (an example would be running only one portion of the plant to produce sulfur acid only).	A. Beginning with the year that production resumes, and for each year up to the year 2012, the milestone increases by: (1) Expected emissions for Phelps Dodge Hidalgo (not to exceed 22,000 tons), PLUS (2) Any amounts identified in Table 3b. B. For the years 2013 through 2018, the milestone increases by this amount or by 30,000 tons, whichever is less.
3 .....	BHP San Manuel resumes operation, but Phelps Dodge Hidalgo does not.	BHP San Manuel resumes production consistent with past operations and emissions.	A. 16,000 tons PLUS B. Any amounts identified in Table 3b.
4 .....	BHP San Manuel resumes operation, but Phelps Dodge Hidalgo does not.	BHP San Manuel resumes operations in a substantially different manner such that emissions will be less than for past operations (an example would be running only one portion of the plant to produce sulfur acid only).	A. Expected emissions for BHP (not to exceed 16,000 tons) PLUS B. Any amounts identified in Table 3b.
5 .....	Both Phelps Dodge Hidalgo and BHP San Manuel resume operations.	Both smelters resume production consistent with past operations and emissions.	A. Beginning with the year that production resumes, and for each year up to the year 2012, the milestone increase by 38,000 tons. B. For the years 2013 through 2018, the milestone increases by 30,000 tons.



TABLE 3A.—ADJUSTMENTS TO THE MILESTONES FOR FUTURE OPERATIONS OF COPPER SMELTERS—Continued

Scenario	If this happens . . .	and this happens . . .	. . . then you calculate the milestone by adding this amount to the value in column 3 of Table 1
6 .....	Both Phelps Dodge Hidalgo and BHP San Manuel resume operations.	Phelps Dodge Hidalgo resumes production consistent with past operations and emissions, but BHP San Manuel resumes operations in a substantially different manner such that emissions will be less than for past operations (an example would be running only one portion of the plant to produce sulfur acid only).	A. For the year that production resumes, and for each year up to the year 2012, the milestone increases by: (1) 22,000 PLUS (2) Expected emissions for San Manuel (not to exceed 16,000 tons). B. For the years 2013 through 2018, the milestone increases by this same amount, or by 30,000 tons, whichever is less.
7 .....	Both Phelps Dodge Hidalgo and BHP San Manuel resumes operations.	BHP San Manuel resume production consistent with the past operations and emissions, but Phelps Dodge Hidalgo resumes operations in a substantially different manner such that emissions will be less than for past operations (an example would be running only one portion of the plant to produce sulfur acid only).	A. For the year that production resumes, and for each year up to the year 2012, milestone increases by: (1) 16,000 PLUS (2) Expected Hidalgo emissions (not to exceed 22,000 tons). B. For the years 2013 through 2018, the milestone increases by this same amount, or by 30,000 tons, whichever is less.
8 .....	Both Phelps Dodge Hidalgo and BHP San Manuel do not resume operations.	.....	A. Any amounts identified in Table 3b.

TABLE 3B.—ADJUSTMENTS FOR CERTAIN COPPER SMELTERS WHICH OPERATE ABOVE BASELINE LEVELS

[In tons]

Where it applies in table 3a, if the following smelter . . .	complies with existing permits but has actual annual emissions that exceed the following baseline level . . .	. . . the milestone increases by the difference between actual emissions and the baseline level, or the following amount, whichever is less
Asarco Hayden .....	23,000	3,000
BHP San Manuel .....	16,000	1,500
Kennecott Salt Lake .....	1,000	100
Phelps Dodge Chino .....	16,000	3,000
Phelps Dodge Hidalgo .....	22,000	4,000
Phelps Dodge Miami .....	8,000	2,000

(iii) Adjustments for changes in emission monitoring or calculation methods. The plan must provide for adjustments to the milestones to reflect changes in sulfur dioxide emission monitoring or measurement methods for a source that is included in the program, including changes identified under paragraph (h)(2)(iii)(D) of this section. Any such adjustment based upon changes to emissions monitoring or measurement methods must be made in the form of an implementation plan revision that complies with the procedural requirements of § 51.102 and § 51.103. The implementation plan revision must be submitted to the Administrator no later than the first due date for a periodic report under paragraph (d)(10) of this section

following the change in emission monitoring or measurement method.  
(iv) Adjustments for changes in flow rate measurement methods for affected sources under 40 CFR 72.1. For the years between 2003 and 2017, the implementation plan must provide for adjustments to the milestones for sources using the methods contained in 40 CFR part 60, appendix A, Methods 2F, 2G, and 2H. For any year for which such an adjustment has not yet been made to the milestone, the implementation plan must provide for an adjustment to the emissions reporting to ensure consistency. The implementation plan must provide for adjustments to the milestones by no later than the date of the periodic plan revision required under § 51.309(d)(10).

(v) Adjustments due to enforcement actions arising from settlements. The implementation plan must provide for adjustments to the milestones, as specified in paragraph (h)(1)(vii) and (viii) of this section, if:  
(A) an agreement to settle an action, arising from allegations of a failure of an owner or operator of an emissions unit at a source in the program to comply with applicable regulations which were in effect during the base year, is reached between the parties to the action;  
(B) the alleged failure to comply with applicable regulations affects the assumptions that were used in calculating the source's base year and forecasted sulfur dioxide emissions; and  
(C) the settlement includes or recommends an adjustment to the milestones.

(vi) Adjustments due to enforcement actions arising from administrative or judicial orders. The implementation plan must also provide for adjustments to the milestones as directed by any final administrative or judicial order, as specified in paragraph (h)(1)(vii) and (viii) of this section. Where the final administrative or judicial order does not include a reforecast of the source's baseline, the State or Tribe shall evaluate whether a reforecast of the source's baseline emissions is appropriate.

(vii) Adjustments for enforcement actions. The plan must provide that, based on paragraph (h)(1)(v) and (vi) of this section, the milestone must be decreased by an appropriate amount based on a reforecast of the source's decreased sulfur dioxide emissions. The adjustments do not become effective until after the source has reduced its sulfur dioxide emissions as required in the settlement agreement, or administrative or judicial order. All adjustments based upon enforcement actions must be made in the form of an implementation plan revision that complies with the procedural requirements of §§ 51.102 and 51.103.

(viii) Documentation of adjustments for enforcement actions. In the periodic plan revision required under 51.309(d)(10), the State or Tribe shall include the following documentation of any adjustment due to an enforcement action:

(A) identification of each source under the State or Tribe's jurisdiction which has reduced sulfur dioxide emissions pursuant to a settlement agreement, or an administrative or judicial order;

(B) for each source identified, a statement indicating whether the milestones were adjusted in response to the enforcement action;

(C) discussion of the rationale for the State or Tribe's decision to adjust or not to adjust the milestones; and

(D) if extra SO<sub>2</sub> emissions reductions (over and above those reductions needed for compliance with the applicable regulations) were part of an agreement to settle an action, a statement indicating whether such reductions resulted in any adjustment to the milestones or allowance allocations, and a discussion of the rationale for the State or Tribe's decision on any such adjustment.

(ix) Adjustment based upon program audits. The plan must provide for appropriate adjustments to the milestones based upon the results of program audits. Any such adjustment based upon audits must be made in the form of an implementation plan revision

that complies with the procedural requirements of §§ 51.102 and 51.103. The implementation plan revision must be submitted to the Administrator no later than the first due date after the audit for a periodic report under paragraph (d)(10) of this section.

(x) Adjustment for individual sources opting into the program. The plan may provide for adjustments to the milestones for any source choosing to participate in the program even though the source does not meet the 100 tons per year criterion for inclusion. Any such adjustments must be made in the form of an implementation plan revision that complies with the procedural requirements of §§ 51.102 and 51.103.

(2) *Requirements for monitoring, recordkeeping and reporting of actual annual emissions of sulfur dioxide.*

(i) *Sources included in the program.* The implementation plan must provide for annual emission monitoring and reporting, beginning with calendar year 2003, for all sources with actual emissions of sulfur dioxide of 100 tons per year or more as of 2003, and all sources with actual emissions of 100 tons or more per year in any subsequent year. States and Tribes may include other sources in the program, if the implementation plan provides for the same procedures and monitoring as for other sources in a way that is federally enforceable.

(ii) *Documentation of emissions calculation methods.* The implementation plan must provide documentation of the specific methodology used to calculate emissions for each emitting unit included in the program during the base year. The implementation plan must also provide for documentation of any change to the specific methodology used to calculate emissions at any emitting unit for any year after the base year.

(iii) *Recordkeeping.* The implementation plan must provide for the retention of records for at least 10 years from the establishment of the record. If a record will be the basis for an adjustment to the milestone as provided for in paragraph (h)(1) of this section, that record must be retained for at least 10 years from the establishment of the record, or 5 years after the date of the implementation plan revision which reflects the adjustment, whichever is longer.

(iv) *Completion and submission of emissions reports.* The implementation plan must provide for the annual collection of emissions data for sources included within the program, quality assurance of the data, public review of the data, and submission of emissions reports to the Administrator and to each

State and Tribe which has submitted an implementation plan under this section. The implementation plan must provide for submission of the emission reports by no later than September 30 of each year, beginning with reports due September 30, 2004 for emissions from calendar year 2003. For sources for which changes in emission quantification methods require adjustments under paragraph (h)(1)(iii) of this section, the emissions reports must reflect the method in place before the change, for each year until the milestone has been adjusted. If each of the States which have submitted an implementation plan under this section have identified a regional planning organization to coordinate the annual comparison of regional SO<sub>2</sub> emissions against the appropriate milestone, the implementation plan must provide for reporting of this information to the regional planning body.

(v) *Exceptions reports.* The emissions report submitted by each State and Tribe under paragraph (h)(2)(ii) of this section must provide for exceptions reports containing the following:

(A) identification of any new or additional sulfur dioxide sources greater than 100 tons per year that were not contained in the previous year emissions report;

(B) identification of sources shut down or removed from the previous year emissions report;

(C) explanation for emissions variations at any covered source that exceed plus or minus 20 percent from the previous year's emissions report;

(D) identification and explanation of changed emissions monitoring and reporting methods at any source. The use of any changed emission monitoring or reporting methods requires an adjustment to the milestones according to paragraph (h)(1)(iii) of this section.

(vi) *Reporting of emissions for the Mohave Generating Station for the years 2003 through 2006.* For the years 2003, 2004, 2005, and for any part of the year 2006 before installation and operation of sulfur dioxide controls at the Mohave Generating Station, emissions from the Mohave Generating Station will be calculated using a sulfur dioxide emission factor of 0.15 pounds per million BTU.

(vii) *Special provision for the year 2013.* The implementation plan must provide that in the emissions report for calendar year 2012, which is due by September 30, 2013 under paragraph (h)(2)(iv) of this section, each State has the option of including calendar year 2018 emission projections for each source, in addition to the actual

emissions for each source for calendar year 2012.

(3) *Annual comparison of emissions to the milestone.*

(i) The implementation plan must provide for a comparison each year of annual SO<sub>2</sub> emissions for the region against the appropriate milestone. In making this comparison, the State or Tribe must make the comparison, using its annual emissions report and emissions reports from other States and Tribes reported under paragraph (h)(2)(iv) of this section.

(ii) The implementation plan must provide for the State or Tribe to make available to the public a draft report comparing annual emissions to the milestone by December 31 of each year. The first draft report, comparing annual emissions in 2003 to the year 2003 milestone will be due December 31, 2004.

(iii) The implementation plan must provide for the State or Tribe to submit to the Administrator a final determination of annual emissions by March 31 of the following year. The final determination must state whether or not the annual emissions for the year exceed the appropriate milestone.

(iv) A State or Tribe may delegate its responsibilities to prepare draft reports and reports supporting the final determinations under paragraphs (h)(3)(i) through (iii) of this section to a regional planning organization designated by each State or Tribe submitting an approvable plan under this section.

(v) Special considerations for year 2012 report. If each State or Tribe submitting an approvable plan under this section has included calendar year 2018 emission projections under paragraph (h)(2)(vii) of this section, then the report for the year 2012 milestone which is due by December 31, 2013

under paragraph (h)(3)(ii) of this section may also include a comparison of the regional year 2018 emissions projection with the milestone for calendar year 2018. If the report indicates that the year 2018 milestone will be exceeded, then the State or Tribe may choose to implement the market trading program beginning in the year 2018, if each State or Tribe submitting an approvable plan under this section agrees.

(vi) Independent review. The implementation plan must provide for reviews of the annual emissions reporting program by an independent third party. This independent review is not required if a determination has been made under paragraph (h)(3)(iii) of this section to implement the market trading program. The independent review shall be completed by the end of 2006, and every 5 years thereafter, and shall include an analysis of:

(A) the uncertainty of the reported emissions data;

(B) whether the uncertainty of the reported emissions data is likely to have an adverse impact on the annual determination of emissions relative to the milestone; and,

(C) whether there are any necessary improvements for the annual administrative process for collecting the emissions data, reporting the data, and obtaining public review of the data.

(4) *Market trading program.* The implementation plan must provide for implementation of a market trading program if the determination required by paragraph (h)(3)(iii) of this section indicates that a milestone has been exceeded. The implementation plan must provide for the option of implementation of a market trading program if a report under paragraph (h)(3)(v) of this section indicates that projected emissions for the year 2018 will exceed the year 2018 milestone.

The implementation plan must provide for a market trading program whose provisions are substantively the same for each State or Tribe submitting an approvable plan under this section. The implementation plan must include the following market trading program provisions:

(i) *Allowances.* For each source in the program, the implementation plan must either identify the specific allocation of allowances, on a tons per year basis, for each calendar year from 2009 to 2018 or the formula or methodology that will be used to calculate the allowances if the program is triggered. The implementation plan must provide that eligible renewable energy resources that begin operation after October 1, 2000 will receive 2.5 tons of SO<sub>2</sub> allowances per megawatt of installed nameplate capacity per year. Allowance allocations for renewable energy resources that begin operation prior to the program trigger will be retroactive to the time of initial operation. The implementation plan may provide for an upper limit on the number of allowances provided for eligible renewable energy resources. The total of the tons per year allowances across all participating States and Tribes, including the renewable energy allowances, may not exceed the amounts in Table 4 of this paragraph, less a 20,000 ton amount that must be set aside for use by Tribes. The implementation plan may include procedures for redistributing the allowances in future years, if as the amounts in Table 4 of this paragraph, less a 20,000 ton amount, are not exceeded. The implementation plan must provide that any adjustment for a calendar year applied to the milestones under paragraphs (h)(1)(i) through (vii) of this section must also be applied to the amounts in Table 4. Table 4 follows:

TABLE 4.—TOTAL AMOUNT OF ALLOWANCES BY YEAR

For this year:	If the two smelters re-sume operations, the total number of allowances issued by States and Tribes may not exceed this amount:	If the two smelters do not resume operations, the total number of allowances issued by States and Tribes may not exceed this amount:
2009 .....	715,000	677,000
2010 .....	715,000	677,000
2011 .....	715,000	677,000
2012 .....	715,000	677,000
2013 .....	655,000	625,000
2014 .....	655,000	625,000
2015 .....	655,000	625,000
2016 .....	655,000	625,000
2017 .....	655,000	625,000

TABLE 4.—TOTAL AMOUNT OF ALLOWANCES BY YEAR—Continued

For this year:	If the two smelters resume operations, the total number of allowances issued by States and Tribes may not exceed this amount:	If the two smelters do not resume operations, the total number of allowances issued by States and Tribes may not exceed this amount:
2018 .....	510,000	480,000

(ii) *Compliance with allowances.* The implementation plan must provide that, beginning with the compliance period 6 years following the calendar year for which emissions exceeded the milestone and for each compliance period thereafter, the owner or operator of each source in the program must hold allowances for each ton of sulfur dioxide emitted by the source.

(iii) *Emissions quantification protocols.* The implementation plan must include specific emissions quantification protocols for each source category included within the program, including the identification of sources subject to part 75 of this chapter. For sources subject to part 75 of this chapter, the implementation plan may rely on the emissions quantification protocol in part 75. For source categories with sources in more than one State or tribal area submitting an implementation plan under this section, each State or Tribe should use the same protocol to quantify emissions for sources in the source category. The protocols must provide for reliability (repeated application obtains results equivalent to EPA-approved test methods), and replicability (different users obtain the same or equivalent results that are independently verifiable). The protocols must include procedures for addressing missing data, which provide for conservative calculations of emissions and provide sufficient incentives for sources to comply with the monitoring provisions. If the protocols are not the same for sources within a given source category, and where the protocols are not based upon part 75 or equivalent methods, the State or Tribes must provide a demonstration that each such protocol meets all of the criteria of this paragraph.

(iv) *Monitoring and Recordkeeping.* The implementation plan must include monitoring provisions which are consistent with the emissions quantification protocol. Monitoring required by these provisions must be

timely and of sufficient frequency to ensure the enforceability of the program. The implementation plan must also include requirements that the owner or operator of each source in the program keep records consistent with the emissions quantification protocols, and keep all records used to determine compliance for at least 5 years. For source owners or operators which use banked allowances, all records relating to the banked allowance must be kept for at least 5 years after the banked allowances are used.

(v) *Tracking system.* The implementation plan must provide for submitting data to a centralized system for the tracking of allowances and emissions. The implementation plan must provide that all necessary information regarding emissions, allowances, and transactions is publicly available in a secure, centralized data base. In the system, each allowance must be uniquely identified. The system must allow for frequent updates and include enforceable procedures for recording data.

(vi) *Authorized account representative.* The implementation plan must include provisions requiring the owner or operator of each source in the program to identify an authorized account representative. The implementation plan must provide that all matters pertaining to the account, including, but not limited to, the deduction and transfer of allowances in the account, and certifications of the completeness and accuracy of emissions and allowances transactions required in the annual report under paragraph (h)(4)(vii) of this section shall be undertaken only by the authorized account representative.

(vii) *Annual report.* The implementation plan must include provisions requiring the authorized account representative for each source in the program to demonstrate and report within a specified time period following the end of each calendar year that the source holds allowances for

each ton per year of SO<sub>2</sub> emitted in that year. The implementation plan must require the authorized account representative to submit the report within 60 days after the end of each calendar year, unless an alternative deadline is specified consistent with emission monitoring and reporting procedures.

(viii) *Allowance transfers.* The implementation plan must include provisions detailing the process for transferring allowances between parties.

(ix) *Emissions banking.* The implementation plan may provide for the banking of unused allowances. Any such provisions must state whether unused allowances may be kept for use in future years and describe any restrictions on the use of any such allowances. Allowances kept for use in future years may be used in calendar year 2018 only if the implementation plan ensures that such allowances would not interfere with the achievement of the year 2018 amount in Table 4 in paragraph (c)(4)(i) of this section.

(x) *Penalties.* The implementation plan must:

(A) provide that if emissions from a source in the program exceed the allowances held by the source, the source's allowances will be reduced by an amount equal to two times the source's tons of excess emissions,

(B) provide for appropriate financial penalties for excess emissions, either \$5000 per ton (year 2000 dollars) or an alternative amount that is the same for each participating State and Tribe and that substantially exceeds the expected cost of allowances,

(C) ensure that failure to comply with any program requirements (including monitoring, recordkeeping, and reporting requirements) are violations which are subject to civil and criminal remedies provided under applicable State or tribal law and the Clean Air Act, that each day of the control period is a separate violation, and that each ton of excess emissions is a separate violation. Any allowance reduction or

penalty assessment required under paragraphs (h)(4)(x)(A) and (B) of this section shall not affect the liability of the source for remedies under this paragraph.

(xi) *Provisions for periodic evaluation of the trading program.* The implementation plan must provide for an evaluation of the trading program no later than 3 years following the first full year of the trading program, and at least every 5 years thereafter. Any changes warranted by the evaluation should be incorporated into the next periodic implementation plan revision required under paragraph (d)(10) of this section. The evaluation must be conducted by an independent third party and must include an analysis of:

(A) Whether the total actual emissions could exceed the values in § 51.309(h)(4)(i), even though sources comply with their allowances;

(B) Whether the program achieved the overall emission milestone it was intended to reach;

(C) The effectiveness of the compliance, enforcement and penalty provisions;

(D) A discussion of whether States and Tribes have enough resources to implement the trading program;

(E) Whether the trading program resulted in any unexpected beneficial effects, or any unintended detrimental effects;

(F) Whether the actions taken to reduce sulfur dioxide have led to any unintended increases in other pollutants;

(G) Whether there are any changes needed in emissions monitoring and reporting protocols, or in the administrative procedures for program administration and tracking; and

(H) The effectiveness of the provisions for interstate trading, and whether there are any procedural changes needed to make the interstate nature of the program more effective.

(5) *Other provisions.*

(i) *Permitting of affected sources.* The implementation plan must provide that for sources subject to part 70 or part 71 of this chapter, the implementation plan

requirements for emissions reporting and for the trading program under paragraph (h) of this section must be incorporated into the part 70 or part 71 permit. For sources not subject to part 70 or part 71 of this chapter, the requirements must be incorporated into a permit that is enforceable as a practical matter by the Administrator, and by citizens to the extent permitted under the Clean Air Act.

(ii) *Integration with other programs.* The implementation plan must provide that in addition to the requirements of paragraph (h) of this section, any applicable restrictions of Federal, State, and tribal law remain in place. No provision of paragraph (h) of this section should be interpreted as exempting any source from compliance with any other provision of Federal, State, tribal or local law, including an approved implementation plan, a Federally enforceable permit, or any other Federal regulations.

[FR Doc. 03-13255 Filed 6-4-03; 8:45 am]

BILLING CODE 6560-50-P