ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[EPA–HQ–OAR–2002–0076; FRL–8230–4]

RIN 2060–AN22

Regional Haze Regulations; Revisions to Provisions Governing Alternative to Source-Specific Best Available Retrofit Technology (BART) Determinations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA promulgated regulations to address a type of visibility impairment known as regional haze in 1999. These regulations have been judicially challenged twice. On May 24, 2002, the U.S. Court of Appeals for the District of Columbia Circuit issued a ruling vacating the Regional Haze Rule in part and sustaining it in part, based on a finding that EPA's prescribed methods for determining best available retrofit technology (BART) were inconsistent with the Clean Air Act (CAA). *American Corn Growers Ass'n* v. *EPA*, 291 F.3d 1 (DC Cir. 2002). We finalized a rule on July 6, 2005 addressing the court's ruling in this case. On February 18, 2005, the U.S. Court of Appeals for the District of Columbia Circuit issued another ruling, in *Center for Energy and Economic Development* v. *EPA*, 398 F.3d 653(DC Cir. 2005), granting a petition challenging provisions of the Regional Haze Rule governing an optional emissions trading program for certain western States and Tribes (the Western Regional Air Partnership (WRAP) Annex Rule). We published proposed regulations to revise the provisions of the Regional Haze Rule governing alternative trading programs, and to provide additional guidance on such programs in August 2005. We received several comments on the August 2005 proposal. This final rule finalizes the proposed revisions, including changes in response to the public comments.

DATES: This rule is effective December 12, 2006.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2002–0076. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the OAR Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The 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 Public Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket and Information Center is (202) 566–1742. NOTE: The EPA Docket Center suffered damage due to flooding during the last week of June 2006. The Docket Center is continuing to operate. However, during the cleanup, there will be temporary changes to Docket Center telephone numbers, addresses, and hours of operation for people who wish to visit the Public Reading Room to view documents. Consult EPA's **Federal Register** notice at 71 FR 38147 (July 5, 2006) or the EPA Web site at *www.epa.gov/epahome/dockets.htm* for current information on docket status, locations and telephone numbers.

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SUPPLEMENTARY INFORMATION:

Regulated Entities. This final rule will affect the following: State and local permitting authorities and Indian Tribes containing major stationary sources of pollution affecting visibility in federally-protected scenic areas.

This list is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This list gives examples of the types of entities EPA is now aware could potentially be regulated by this action. Other types of entities not listed could also be affected. To determine whether your facility, company, business, organization, etc., is regulated by this action, you should examine the applicability criteria in section II of this preamble. If you have any questions regarding the applicability of this action to a particular entity, consult the people listed in the preceding section.

Outline. The contents of today's preamble are listed in the following outline.

I. Overview and Background

This rulemaking provides the following changes to the regional haze regulations:

(1) Revised regulatory text in section 51.308(e)(2)(i) in response to the *Center for Energy and Economic Development (CEED)* v. *EPA* court's remand, to remove the requirement that the determination of the BART ''benchmark'' be based on cumulative visibility analyses and to clarify the process for making such determinations;

(2) New regulatory text in § 51.308(e)(2)(vi), to provide minimum elements for cap and trade programs adopted in lieu of BART; and

(3) Revised regulatory text in § 51.309, to reconcile the optional framework for certain western States and Tribes to implement the recommendations of the Grand Canyon Visibility Transport Commission (GCVTC) with the *CEED* v. *EPA* decision.

How This Preamble Is Structured

Section I provides background on the BART requirements of the CAA as codified in the Regional Haze Rule, on the decision in American Corn Growers in which the DC Circuit vacated and remanded parts of the rule addressing the BART requirements, on the June 2005 BART rule, and on the EPA's approval of the WRAP Annex and the

subsequent litigation. Section II discusses specific issues relating to the revisions to § 51.308(e)(2) of the Regional Haze Rule governing alternatives to source-by-source BART. Section III discusses specific issues relating to the revisions to § 51.309 of the Regional Haze Rule pertaining to the optional emissions trading program for certain western States and Tribes. Section IV provides a discussion of how this rulemaking complies with the requirements of Statutory and Executive Order Reviews.

The Regional Haze Rule and BART Guidelines

In 1999, we published the Regional Haze Rule to address visibility impairment produced by a multitude of sources and activities which emit fine particles and their precursors and which are located across a broad geographic area (64 FR 35714). The Regional Haze Rule requires States to submit State implementation plans (SIPs) to address regional haze visibility impairment in 156 federally-protected parks and wilderness areas, such as the Grand Canyon and Yosemite. These 156 scenic areas are called ''mandatory Class I Federal areas'' in the CAA [1] but are referred to simply as ''Class I areas'' in today's rulemaking. The 1999 rule was issued to fulfill a long-standing EPA commitment to address regional haze under the authority and requirements of sections 169A and 169B of the CAA.

As required by the CAA, we included in the final Regional Haze Rule a requirement for BART for certain large stationary sources that were put in place between 1962 and 1977. We discussed these requirements in detail in the preamble to the final rule (64 FR 35737–35743). The regulatory requirements for BART were codified at section 51.308(e) and in definitions that appear in section 51.301.

In the preamble to the Regional Haze Rule, we committed to issuing further guidelines to clarify the requirements of the BART provision. These guidelines were issued on July 6, 2005 in a final rule entitled ''Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations' (''the BART Rule'') (70 FR 39104). The purpose of the BART guidelines is to assist States as they identify which of their BART-eligible sources should undergo a BART analysis (i.e., which are ''sources subject to BART'') and select appropriate controls (''the BART determination'').

We explained in the preamble to the 1999 Regional Haze Rule that the BART requirements in section 169A(b)(2)(A) of the CAA demonstrate Congress' intent to focus attention directly on the problem of pollution from a specific set of existing sources (64 FR 35737). The CAA requires that any of these existing sources ''which, as determined by the State, emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility [in any Class I area],'' shall install the best available retrofit technology for controlling emissions.[2] In determining BART, the CAA requires the State to consider several factors that are set forth in section 169A(g)(2) of the CAA, including the degree of improvement in visibility which may reasonably result from the use of such technology.

Because the problem of regional haze is caused in large part by the long-range transport of emissions from multiple sources, and for certain technical and other reasons explained in that rulemaking, we had adopted in the 1999 rule an approach that required States to look at the contribution of all BART sources to the problem of regional haze in determining both applicability and the appropriate level of control for BART. Specifically, we had concluded that if a source potentially subject to BART is located in an area from which pollutants may be transported to a Class I area, that source ''may reasonably be anticipated to cause or contribute'' to visibility impairment in the Class I area. We had also concluded that in weighing the factors set forth in the statute for determining BART, the States should consider the collective impact of BART sources on visibility. In particular, in considering the degree of visibility improvement that could reasonably be anticipated to result from the use of such technology, we stated that the State should consider the degree of improvement in visibility that would result from the cumulative impact of applying controls to all sources subject to BART. We concluded that the States should use this analysis to determine the appropriate BART emission limitations for specific sources.[3]

The 1999 Regional Haze Rule also included provisions in section 51.309 based on the strategies developed by the GCVTC. Certain western States and Tribes were eligible to submit implementation plans under section 51.309 as an alternative method of achieving reasonable progress for those Class I areas covered by the GCVTC's analysis—i.e., the 16 Class I areas on the Colorado Plateau. In order for States and Tribes to be able to utilize this section, however, the rule provided that EPA must receive an ''Annex'' to the GCVTC's final recommendations. The purpose of the Annex was to provide the specific provisions needed to translate the GCVTC's general recommendations for stationary source sulfur dioxide (SO_2) reductions into an enforceable regulatory program. The rule provided that such an Annex, meeting certain requirements, be submitted to EPA no later than October 1, 2000. *See* section 51.309(d)(4) and (f)(2000).

American Corn Growers v. EPA

In *American Corn Growers*, industry petitioners challenged EPA's interpretation of the BART determination process and raised other challenges to the rule. The court in *American Corn Growers* concluded that the BART provisions in the 1999 Regional Haze Rule were inconsistent with the provisions in the CAA ''giving the states broad authority over BART determinations.'' 291 F.3d at 8. Specifically, with respect to the test for determining whether a source is subject to BART, the court held that the method EPA had prescribed for determining which eligible sources are subject to BART illegally constrained the authority Congress had conferred on the States. Id. The court did not decide whether the general collective contribution approach to determining BART applicability was necessarily inconsistent with the CAA. Id. at 9. Rather, the court stated that

> ''[i]f the [Regional Haze Rule] contained some kind of a mechanism by which a state could exempt a BART-eligible source on the basis of an individualized contribution determination, then perhaps the plain meaning of the Act would not be violated. But the [Regional Haze Rule] contains no such mechanism.''

Id. at 12.

The court in *American Corn Growers* also found that our interpretation of the CAA requiring the States to consider the degree of improvement in visibility that would result from the cumulative impact of applying controls in determining BART was inconsistent with the language of the CAA. 291 F.3d at 8. Based on its review of the statute, the court concluded that the five statutory factors in section 169A(g)(2) ''were meant to be considered together by the states.'' Id. at 6.

The final rule promulgated on July 6, 2005 responded to the *American Corn Growers* court's decision on the BART provisions by amending the Regional Haze Rule at § 51.308 and by finalizing

[1] *See*, e.g. CAA section 169(a)(1).

[2] CAA sections 169A(b)(2) and (g)(7).

[3] *See* 66 FR 35737–35743 for a discussion of the rationale for the BART requirements in the 1999 Regional Haze Rule.

changes to the BART guidelines at part 51, appendix Y (70 FR 39104). These changes eliminate the previous constraint on State discretion and provide States with appropriate techniques and methods for determining which BART-eligible sources ''may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area.'' In addition, the revised regulations list the visibility improvement factor with the other statutory BART determination factors in section 51.308(e)(1)(A), so that States will be required to consider all five factors, including visibility impacts, on an individual source basis when making each individual source BART determination, rather than considering the cumulative impacts of all BART sources on visibility (''group BART'').

The Annex Rule

In a rule dated June 5, 2003, EPA approved the WRAP's Annex to the GCVTC report (68 FR 33764). In this action, referred to as the ''Annex rule,'' EPA approved the quantitative SO_2 emission reduction milestones and the detailed provisions of the backstop market trading program developed by the WRAP as meeting the requirements of section 51.309(f), and therefore codified the Annex provisions in section 51.309(h). Subsequently, five States and one local agency submitted SIPs developed to comply with all of section 51.309, including the Annex provisions at section 51.309(h). In accordance with section 51.309(c) these SIPs were submitted prior to December 31, 2003.

Center for Energy and Economic Development v. EPA

The EPA's approval of the Annex rule was challenged by CEED on, among other grounds, that the CAA prohibits EPA from allowing States to adopt alternative measures, such as a trading program, in lieu of BART. The court, in *CEED* v. *EPA*, affirmed our interpretation of section 169A(b)(2) of the CAA as allowing for alternatives to BART where those alternatives are demonstrated to make greater progress than BART. *CEED* v. *EPA*, 398 F.3d at 659–660. The court, however, took issue with the methodology that EPA had required the States to use in that demonstration, pursuant to certain provisions of the Regional Haze Rule. As noted above, § 51.308(e)(2) of the 1999 Regional Haze Rule required that visibility improvements under source-specific BART—the benchmark for comparison to the alternative program—must be estimated based on the application of BART controls to all sources subject to BART. This section was incorporated into the WRAP Annex rule by reference at § 51.309(f). The court held that EPA could not require this type of ''group BART'' approach, which was vacated in *American Corn Growers* in a source-specific BART context, even in an alternative trading program in which State participation was wholly optional.

The BART guidelines as proposed in May 2004 contained a section offering guidance to States choosing to address their BART-eligible sources under the alternative strategy provided for in § 51.308(e)(2). This guidance included a broad overview of the steps in developing an emissions trading program and criteria for demonstrating that such a trading program would achieve greater progress towards eliminating visibility impairment than would BART. In light of the D.C. Circuit's decision in *CEED* v. *EPA* in 2005, we did not include the overview of emissions trading programs in the final BART guidelines. We did note, however, that our authority to address BART through alternative means was upheld in *CEED* v. *EPA* and that we remained committed to providing States with that flexibility. Today's revisions to the Regional Haze Rule, which responds to the holding in *CEED* v. *EPA*, provide the flexibility that States need to implement alternatives to BART.

Overview of Changes to §§ 51.308(e)(2) and 51.309 of the Regional Haze Rule

The EPA continues to support State efforts to develop trading programs and other alternative strategies to fulfill the goals of the CAA. We believe such strategies have the potential to achieve greater progress towards the national visibility goals than more traditional approaches to regulation, and to do so in the most cost-effective manner practicable. In August 2005, we proposed amendments to the Regional Haze Rule to enable States to continue to develop and implement such programs (70 FR 44154, August 1, 2005). Today's rule finalizes these amendments, including changes in response to comments on the proposal.

First, we are amending the generally applicable provisions at § 51.308(e)(2), which prescribe the type of analysis used to determine emissions reductions achievable from source-by-source BART, for purposes of comparing to the alternative program. These amendments reconcile the methodology for determining whether an alternative program is approvable with the court's decision in *CEED* v. *EPA*. Today's rule also establishes the minimum elements of an acceptable cap and trade program and provides for consistent application of the BART guidelines for electric generating units (EGUs) between source-by-source programs and alternative cap and trade programs.

Second, we are amending section 51.309 to enable certain western States and Tribes to continue to utilize the strategies contained in the GCVTC report as an optional means to satisfy reasonable progress requirements for certain Class I areas, for the first long-term planning period. These changes provide States and Tribes with an opportunity to revise and resubmit the backstop SO_2 emissions trading program absent any requirement to assess visibility on a cumulative basis when determining the emissions reductions achievable by source-by-source BART.

II. Revisions to Regional Haze Rule § 51.308(e)(2) Governing Alternatives to Source-by-Source BART

In this section of the preamble, we discuss changes or clarifications to the provisions proposed in August, 2005. Where relevant, we also respond to significant comments received during the comment periods on our earlier BART proposals. For each provision that we are changing or clarifying, where relevant, we provide discussion of comments received on the proposal(s), changes or clarifications we are finalizing, and the reasons for these changes or clarifications.

A. Establishing a BART Benchmark and Demonstrating Greater Reasonable Progress Than BART

The Regional Haze Rule provides States with the authority to implement an emissions trading program or other alternative measures in lieu of meeting the requirements for source-by-source BART. Under this provision of the Regional Haze Rule, States have the flexibility to design programs to reduce emissions from stationary sources in a more cost-effective manner so long as they can demonstrate that the alternative approach will achieve greater reasonable progress towards improving visibility than would have been achieved by implementation of the BART requirements.

As described in the preamble to the August proposal, the 1999 Regional Haze Rule had specified a methodology for comparing an alternative trading or other type program against source-by-source BART. These regulations were challenged following a rulemaking by EPA to revise the Regional Haze Rule to incorporate an optional emissions trading program for certain Western States and Tribes (the Annex rule). The

court in *CEED* v. *EPA*, granted petitioner's challenge to the Annex rule because EPA's regional haze regulations had required the States submitting the Annex to consider ''the impact of all emissions reductions to estimate visibility progress'' in establishing a BART benchmark against which to compare their BART alternative program. In the August proposal, we proposed to revise the method for comparing an alternative trading or other type program against source-by-source BART. Specifically, we proposed to amend the regional haze regulations to provide that States estimate the emission reductions that could be achieved by BART in the same manner as in making source-by-source BART determinations.

Today's final rule revises section 51.308(e)(2) to make clear that the emissions reductions that could be achieved through implementation of the BART provisions at section 51.308(e)(1) serve as the benchmark against which States can compare an alternative program. In short, to demonstrate that a trading program or other alternative program makes greater reasonable progress than BART, the State can develop an estimate of BART emissions reductions using the same approach that it would use to establish source-by-source BART emissions limitations under the BART guidelines. As discussed in more detail below, today's rule also makes clear that where a trading program or other similar alternative program has been designed primarily to meet a Federal or State requirement other than BART, the State can use a more simplified approach to demonstrating that the alternative program will make greater reasonable progress than BART. Such an approach may be appropriate where the State believes the alternative program is clearly superior to BART and a detailed BART analysis is not necessary to assure that the alternative program will result in greater reasonable progress than BART.

Framework for Demonstrating That an Alternative Program Provides for Greater Reasonable Progress

The development of a BART benchmark using the approach for source-by-source BART determinations will require States to identify those existing sources which are BART-eligible, to determine which of those sources are subject to BART, and to then determine the level of control that would be BART for these sources. Once the State has established a BART benchmark, it can then compare the benchmark against the alternative program it has developed. This approach could entail separate visibility analyses in as many as three distinct stages: (1) Determining which BART-eligible sources are subject to BART; (2) determining what BART is for each source subject to BART; and (3) determining the overall visibility improvement anticipated from the application of BART to all sources subject to BART. The following sections discuss the comments received on the visibility analyses in the first two steps, as well as comments on additional issues for determining which sources are subject to BART and the determination of BART for such sources.

Sources Subject to BART

Proposal. In the proposal, we noted that the BART guidelines finalized on July 6, 2005 provide States with guidance on how to determine which BART-eligible sources are reasonably anticipated to cause or contribute to visibility. The Guidelines explain that States may consider all BART-eligible sources to meet this threshold and therefore subject all these sources to review, or, alternatively, that States may determine which BART-eligible sources are subject to BART using the methods for modeling source specific impacts on visibility discussed in the guidance. We noted that by considering all BART-eligible sources to be subject to BART in the context of setting the BART benchmark, States could ease their administrative burden and maximize the number of BART-eligible sources included in the benchmark analysis. Where a State takes this approach, the opportunity for assessing source-by-source visibility impact would still remain at the next step of setting the benchmark—the BART determination analysis.

Comments. Several commenters stated that allowing States to consider all BART-eligible sources to be ''subject to BART'' (*i.e.*, subject to a BART determination analysis) is contrary to the CAA as interpreted by the D.C. Circuit in *American Corn Growers*. Two commenters have indicated that they plan to challenge this provision of the BART guidelines in a petition for review before the D.C. Circuit and are opposed to it in the context of BART alternative programs as well. One of these commenters also stated that it is unclear from the preamble discussion where in the proposed revisions to the regulations this option is authorized.

Final Rule. We are reiterating here, as we pointed out in the proposal, that the language in section 169A(b)(2) of the CAA establishing the threshold for BART review provides a State with the discretion to consider all BART-eligible sources to be subject to BART and to make BART determinations for all its BART-eligible sources. In other words, as noted in the BART guidelines, once a State has identified its BART-eligible sources, it must decide whether (1) to make BART determinations for all of them, or (2) to consider exempting some of them from BART because they may not reasonably be anticipated to cause or contribute to any visibility impairment in any Class I area. As explained in the 1999 Regional Haze Rule, given the nature of regional haze, it would be reasonable for a State to determine that where the State as a whole contributes to visibility impairment at a Class I area, any large stationary source in the State that emits SO_2 or other visibility-impairing pollutants would emit air pollutants that would ''reasonably be anticipated to cause or contribute to any impairment of visibility in [any Class I area].'' CAA Section 169A(b)(2).

This approach is authorized by the regulations through the cross reference to § 51.308(e)(1) in § 51.308(e)(2). By providing that the BART-benchmark should be established by conducting BART determinations in accordance with § 51.308(e)(1), we provide the State with the same options as are available in those provisions for determining source-by-source BART. In the context of subject-to-BART determinations, this includes either considering all BART-eligible sources to be subject to BART or, using the methods described in the BART guidelines or other reasonable approaches, to exempt sources which the State determines are not reasonably anticipated to cause or contribute to any visibility impairment.[4]

The BART Determination

Proposal. The CAA identifies five factors that States are to consider in making BART determinations. One of these factors is ''the degree of improvement in visibility which may reasonably be anticipated to result from

[4] We are also clarifying an unintended ambiguity in the regulatory provisions pertaining to BART determinations under 51.308(e)(1). Specifically, as discussed in the preamble to the BART Rule, consistent with our proposal in 2004, we revised the regional haze regulations to allow States to ''exclude from the BART determination process potential emissions from a source of less than forty tons per year for SO_2 or NO_X, or 15 tons per year for PM_{10}.'' 70 FR at 39117 (emphasis added). The regulatory text at 51.308(e)(1)(ii)(C), however, did not clearly state that the *de minimis* level for PM_{10} should be based on a source's potential to emit. In this rulemaking we are clarifying that States are not required to determine BART for BART-eligible sources with a *potential to emit* less than 15 tons per year of PM_{10}.

the use of [BART].'' Today's rulemaking, in large part, is focused on how States should handle consideration of this factor in establishing a BART benchmark.

In the proposal, we stated that one way to handle the visibility improvement element of the BART determination for all BART sources covered by the program would be to conduct individualized assessments of the visibility improvement expected from each BART source under various control scenarios, as described in the BART guidelines. We noted that such an approach could impose significant resource burdens on the States and solicited recommendations on more streamlined approaches for estimating BART sources' individual impacts that might be appropriate in the context of assessing alternative programs. One area of consideration that we identified is the type of model used. We requested comment on whether regional scale models might be used to consolidate individual source impact analyses into one or a few model runs, and whether this would significantly ease the burden on States.

In the proposal, we also made clear our belief that in determining whether an alternative program provides for greater reasonable progress than would source-by-source BART, States have the discretion to employ a cumulative visibility analysis for purposes of estimating the potential visibility impacts of BART. Based on our analysis of *American Corn Growers and CEED*, we stated that although EPA may not require States to use a cumulative visibility approach to estimating the improvement achievable from BART, States are not barred from using such an approach if they so choose.

Finally, in the proposal preamble, we discussed the situation where emissions reductions at BART-eligible sources are required by CAA requirements other than BART (or to fulfill requirements of a State law or regulation not required by the CAA). We noted that in such cases, a State may wish to evaluate whether the emissions reductions from the program would result in greater reasonable progress towards the national visibility goal than would the installation of BART. We noted that EPA had made such a determination with respect to the Clean Air Interstate Rule (CAIR) for EGUs in States which participate in the CAIR cap and trade program.

We noted that such a situation affects the type of analysis that is permissible to show that the alternative program makes greater reasonable progress than BART. Specifically, where a requirement other than BART determines the level of emissions reductions required from BART-eligible sources (along with other sources), a most-stringent case BART may be used as the BART benchmark. (This most-stringent case BART is essentially a form of ''group BART,'' because is assumes that every BART-eligible source will apply controls). The reason for this is that if it is shown that implementation of another requirement results in greater progress than would the most stringent BART for all the BART-eligible sources, then it can safely be said that this most-stringent-BART benchmark is not the determinative factor in establishing the emission reductions requirement. Therefore, there can be no concern that the group-BART analysis would lead States to adopt an unduly stringent alternative approach.

(1) Types of Models

Comments. The comments submitted supported EPA's proposal that States could use the approach in the Guidelines in making individualized visibility assessments for BART determinations. In response to our request for recommendations for more streamlined approaches to assessing source specific visibility impacts, we received several comments supporting regulations that would allow for this.

One commenter pointed out that streamlined approaches, such as the use of photochemical grid models, would significantly ease the burden on States and Tribes. The commenter also pointed out that § 51.308(e)(1), cross-referenced as the guiding provision for BART determinations in proposed § 51.308(e)(2)(i)(C), does not explicitly recognize streamlined approaches for determining BART. Thus, the commenter believes, EPA should ''take care to ensure that a streamlined approach for the purpose of determining [the BART benchmark] is clear, permissible, and not legally unsound in the final rule.''

Another commenter said that a streamlined approach ''is an appropriate option that should be explicitly recognized and more fully developed in the final rule.'' According to the commenter, either the CMAQ or CAMx regional photochemical models would be suitable for streamlined visibility assessments for BART determinations, but also stated that none of the models is capable of consistently producing unbiased results for all chemical constituents responsible for haze. One State commenter said that States in EPA Region 5 are using the CALPUFF model and it would prefer to continue doing so. The State would not object to allowing other models to be used so long as they are optional.

Another commenter submitted comments detailing the reasons it believes CALPUFF is superior to photochemical grid models for purposes of source-by-source BART analysis. In brief, commenter explained that with grid models, the concentration of pollutants from a point source is automatically diluted evenly across the grid in which the source is located. This dilution effect can be partially redressed by employing smaller grid sizes or by using a hybrid model which employs Lagrangian methods (as used in CALPUFF) close to the source and switches to a grid method farther downstream. However, both of these methods are resource intensive. The commenter therefore believed that CALPUFF, which can use meteorological data bases developed for CMAQ and CAMx, should be the preferred option.

Final Rule. Section 308(e)(1)(ii)(B) requires that, for fossil fuel-fired power plants with a total generating capacity of greater than 750MW, BART determinations be made pursuant to the BART guidelines. With respect to the type of air quality model used for the BART determination, the guidelines instruct States to use CALPUFF or another appropriate dispersion model to determine the visibility improvement expected at a Class I area from the BART control technology being evaluated (70 FR 39170).

We maintain that CALPUFF is the best model currently available for predicting visibility impacts from single sources. The use of regional scale photochemical grid models may have merit, but to date, such models have not been evaluated for single source applications (70 FR 39123). As the science and structure of regional photochemical grid models are improved and demonstrated to successfully predict impacts from single sources (*e.g.* plume in grid or source tagging techniques) at least as well as CALPUFF, such models may become more useful in streamlining the BART benchmark determination. All modeling applications in making BART determinations call for the development of a modeling protocol for all modeling, and States should consult with EPA and the relevant regional planning organization (RPO) before conducting any modeling.

(2) State Discretion to Consider Cumulative Visibility Impacts

Comments. Several commenters said that the Agency's position described in the preamble to the proposed rule—that

States have the discretion to require a cumulative visibility approach in setting the BART benchmark—violates the *American Corn Growers* decision. Most commenters opposed to EPA's proposed interpretation, however, were also careful to point out that this did not indicate opposition to the policy of allowing a ''group BART'' benchmark to be used in the special case of evaluating emissions reductions required by other CAA or State law requirements.

Commenters that objected to EPA's statement that States have the discretion to use ''group BART'' in setting the BART benchmark referenced the courts' opinions in *American Corn Growers* and *CEED* v. *EPA* to argue that such a statement was inconsistent with the CAA. Several commenters cited the *American Corn Growers* court's statement that ''the state must consider the degree of improvement in visibility in national parks and wilderness areas that would result from the source's installing and operating the retrofit technology [in making a BART determination].'' *See American Corn Growers,* 291 F.3d at 7. One commenter emphasized that the court had used the singular noun (''the source's'') rather than the plural as a clear indication that the visibility factor must be assessed on a source-by-source basis. Another commenter pointed to the court's statement, in regard to the approach in the 1999 Regional Haze Rule which separated the visibility factor from the other BART factors, that ''[t]o treat one of the five statutory factors in such a dramatically different fashion distorts the judgment Congress directed the states to make for each BART-eligible source.'' (291 F.3d at 6). No comments were received that explicitly supported EPA's proposed interpretation of the DC Circuit's decisions on this point. Several commenters also claimed that the flexibility to use ''group BART,'' described in the preamble, was not actually provided for in the proposed regulatory text, which cross-referenced to the source-by-source BART determinations prescribed in § 51.308(e)(1). One commenter that strongly opposed EPA's proposed position on this issue noted that ''it is nevertheless true that states can use simplifying assumptions or even apply some type of ''weight of evidence'' test in determining the amount of emissions reductions that BART-eligible sources may be required to undertake as part of a regional trading program'' The commenter did not elaborate on examples of appropriate simplifying assumptions or methods by which weight of evidence could be taken into account.

Where an independent requirement determines the emissions reductions required of BART sources in a trading program or other type of similar program, however, commenters appeared to agree that a BART benchmark can be used that does not depend on source specific visibility assessments. In other words, for BART alternatives that are required by or that satisfy another CAA provision, the BART benchmark to be used in a ''better-than-BART'' test may be established using a group BART approach. In particular, several commenters representing electric utilities and other industries submitted comments agreeing with our interpretation of section 169A of the CAA as allowing other programs to substitute for BART, and agreeing that where an independent requirement determines the emissions reductions required of BART sources, a most-stringent BART benchmark could be used without raising the concerns at issue in the *American Corn Growers* and *CEED* v. *EPA* cases. These commenters particularly agreed with and supported the application of this rationale to the CAIR, as was finalized in the July 6 BART Guidelines rulemaking. One commenter urged EPA to adopt specific regulatory language, as was done in the case of the CAIR, to implement this option both with respect to the WRAP's program and to other programs which may be developed elsewhere.

Final Rule. We have carefully considered the comments on the discussion in the NPRM addressing the discretion of the States in establishing a BART benchmark and concluded that this rulemaking should focus on the type of alternative program that we anticipate that some States may submit in lieu of BART. In providing States with the flexibility to adopt an alternative program, EPA has assumed that States would adopt trading programs, or other substantially similar programs—such as the WRAP's backstop market trading program—as alternatives to source-by-source BART. While it is possible that a State could design a trading program under the authority of section 169A(b)(2)(A) of the CAA (the BART provision), we believe that it is far more likely that a State designing its regional haze plan would adopt a trading program under the broader authority of section 169A(b)(2)(B) (the long-term strategy for making reasonable progress). As such, the regulations promulgated today provide a basic framework for States to demonstrate that any type of alternative program provides greater reasonable progress than BART, but provide greater detail as to how that demonstration might be done for a trading program (or other substantially similar program) designed to fulfill requirements other than BART.

Generally, the comments received criticizing the statement that States have discretion to consider visibility in a cumulative manner in determining whether or not an alternative makes greater reasonable progress than would BART appear to be premised on the argument that any type of program that could be characterized as a BART program—even an alternative program—is bounded by the requirements in section 169A(b)(2)(A). Thus, for example, several commenters cited the *American Corn Growers* court's statement interpreting the definition of BART as grounds for limiting a State's ability to take a different approach in developing an alternative program. In other words, in determining the amount of emissions reductions that sources in a trading program alternative must achieve to demonstrate that the trading program is ''better'' than source-by-source BART, these commenters argued that the States are limited to designing a program that begins with source specific visibility analyses. Applying the same logic, however, States would need to undertake source specific assessments of the other four factors in the BART definition: the costs of control, the energy and nonair quality environmental impacts, any existing pollution control technology in use at the source, and the remaining useful life of the source. Only once the State had ascertained what BART would be at each source subject to BART—based on a thorough source specific analysis of these five factors—could the State then show that its trading program achieves greater reasonable progress. Although the States may certainly adopt such an approach under this final rule, we think it unlikely that States would conduct such an extensive assessment only to then go through the additional, resource intensive steps of establishing a trading program.

The concern underlying these comments appears to be that EPA should not explicitly authorize States to design a program more stringent than required for BART in establishing a BART alternative program under section 169A(b)(2)(A) of the CAA.[5] Obviously,

[5] The comments criticizing the statement by EPA that States have the discretion to require a cumulative visibility analysis do not appear to challenge the general principle that a State may adopt measures in a SIP more stringent than

Continued

under EPA's interpretation of the CAA, upheld by the *CEED* v. *EPA* court, the alternative program must achieve greater reasonable progress than would BART, presumably in most cases by achieving greater emissions reductions over time. However, the commenters opposed to what they label a ''group BART'' approach argue that States must consider source-specific visibility impacts to avoid setting too high a bar for the program. Although the commenters have not suggested that the other simplifying approaches that we have suggested in the past for assessing the costs of control were an inappropriate form of ''group-BART,'' if the CAA requires visibility impacts to be considered on a case-by-case basis, then it would also seem to require that the costs of control and other factors be considered on a case-by-case basis. In other words, these commenters argue that the BART benchmark for an alternative program under section 169A(b)(2)(A) must be based on a case-by-case analysis of what BART would be for each source subject to BART.

The DC Circuit in *CEED* v. *EPA* was not absolutely clear as to whether its decision was based solely on the fact that EPA had required a ''group BART'' approach, or whether the fact the Annex contained such an analysis was in itself a sufficient reason to invalidate the Annex approval. As EPA explained in the proposed rule, we believe that the *CEED* v. *EPA* decision is limited to circumstances where EPA requires or induces States to adopt cumulative approaches that result in programs more stringent than required by the CAA. However, we did not receive comments from any States explicitly supporting our interpretation of the court's holdings, and as we do not anticipate that States will submit plans with trading programs designed only to meet the requirements of section 169A(b)(2), we have concluded that the issue of whether the CAA provides States with the discretion in designing such programs to employ some type of cumulative approach or simplifying assumptions in the process of estimating emissions reductions achievable by source-by-source BART is not relevant to today's rulemaking.

The regulations finalized today provide that as a general matter, States must undertake source specific BART analyses under § 51.308(e)(1) for each source subject to BART in order to estimate the emissions reductions achievable under the source-by-source BART requirements. The use of such a BART benchmark enables a State to design an alternative program that is ''better than BART'' based on a precise estimation of the emissions reductions that could be achieved under BART.

For trading programs where the emissions reductions are required to fulfill CAA requirements other than BART (or to fulfill requirements of a State law or regulation not required by the CAA), we are amending the regulations to make clear that States may establish a BART benchmark based on a simplified BART analysis in such a situation. We agree with commenters that a BART benchmark based on such an analysis raises none of the concerns that were at issue in the *American Corn Growers* and *CEED* v. *EPA* cases. Where a trading program is designed to fulfill other requirements, including the requirement to make reasonable progress, an independent requirement determines the level of reductions achieved and the BART analysis serves only to ensure that the program meets the requirement that a BART alternative make greater reasonable progress than BART. In other words, there is no need to develop a precise estimate of the emissions reductions that could be achieved by BART in order simply to compare two programs. As EPA did in the CAIR, States should have the ability to develop a BART benchmark based on simplifying assumptions as to what the most-stringent BART is likely to achieve. The regulations finalized today therefore provide that where an emissions trading program has been designed to meet a requirement other than BART, including the reasonable progress requirement, the State may establish a BART benchmark based on an analysis that includes simplifying assumptions about BART control levels for sources within a source category.

We do agree with commenters that EPA should issue regulatory language expressly allowing for the use of a BART benchmark based on a simplified BART analysis for demonstrating that emissions reductions required by other provisions also make greater reasonable progress than BART and may be used to substitute for BART. We have finalized such a provision at § 51.308(E)(2)(i)(C). This will help clarify that in such cases, the BART benchmark is not the ''driver'' of emissions reductions and is therefore not subject to the concerns on which the DC Circuit decided *American Corn Growers* and *CEED*.

Role of BART Guidelines for EGUs in Determinations Proposal

The BART guidelines establish control levels or emission rates as presumptive standards for EGUs greater than 200 MW capacity at plants with a total generating capacity in excess of 750 MW. We proposed that the States apply these presumptive standards contained in the final BART guidelines in developing a BART benchmark for a trading program or other alternative that includes such EGUs. In other words, when States are estimating emission reductions achievable from source-by-source BART, they must assume that the EGUs which would otherwise be subject to BART will control at the presumptive level, unless the State demonstrates that such presumptions are not appropriate at particular units. The preamble to the proposed rule explained that this would be accomplished by the cross reference to § 51.308(e)(1) within proposed § 51.308(e)(2)(i)(C), the provision prescribing the method of setting the BART benchmark. Section 51.308(e)(1), in turn, provides that BART determinations for EGUs of greater than 200 MW capacity at plants with a total generating capacity greater than 750 MW must be done in accordance with the BART guidelines in appendix Y to part 51.

Comments. One commenter said that the presumptive standards for EGUs are too lenient and should be lowered before EPA allows States to use them for purposes of a ''better than BART'' demonstration. Another commenter supported the use of the presumptive standards in this context, but contested the preamble statement that the presumptive standards ''apply to certain EGUs on a mandatory basis'' because, according to the commenter, the presumptions are not mandatory in that they are rebuttable. Another commenter argued that the use of presumptive standards would make the installation of controls more likely, without regard to the visibility benefit expected. The commenter believes EPA use of presumptions is incompatible with CAA section 169A as interpreted in American Corn Growers and incompatible with EPA's authority to issue BART guidance for EGUs of 750 MW or greater.

Final Rule. The final rule promulgated on July 6, 2005, addresses the authority of EPA to establish the presumptions in the BART guidelines for certain EGUs, as well as the level of control reflected by those presumptions. In the NPRM, EPA did not request comment on the presumptions established in the Guidelines, but rather whether these presumptions should be

required under the CAA, except where explicitly prohibited. *See Union Electric Co.* v. *EPA,* 427 U.S. 246, 263–264 (1976); *see also Summary of Comments on the Revisions to Provisions Governing Alternative to Source-specific Best Available Retrofit Technology (BART) Determinations,* Docket ID No. EPA–HQ–OAR–2002–0076, *www.regulations.gov.*

used in establishing a BART benchmark for comparing an alternative program to BART.

In today's final rule, the regulations make clear that, with one exception, States must follow the approach for making BART determinations under section 51.308(e)(1) in establishing a BART benchmark. This includes the requirement for States to use the BART guidelines in making BART determinations for EGUs at power plants of a certain size. As discussed above, the one exception to this general approach is where the alternative program has been designed to meet requirements other than BART; in this case, States are not required to make BART determinations under § 51.308(e)(1) and may use simplifying assumptions in establishing a BART benchmark based on an analysis of what BART is likely to be for similar types of sources within a source category. Under either approach to establishing a BART benchmark, we believe that the presumptions for EGUs in the BART guidelines should be used for comparison to a trading program or other alternative measure, unless the State determines that such presumptions are not appropriate for particular EGUs. We note that this limitation on the use of the presumptions is most likely to apply only in a source-by-source determination under § 51.308(e)(1). States establishing a BART benchmark based on simplifying assumptions as to the most-stringent BART for EGUs may rely on the presumptions, as EPA did in the CAIR rule. For States considering the appropriateness of the presumptions in specific cases, the same criteria discussed in the BART guidelines should guide them in reaching a conclusion. Thus, the presumptive standards are ''mandatory'' for the identified EGUs, in that the presumption must be applied to the specified class of EGUs; but the presumptive standards are rebuttable, as explained in the BART guidelines.

We do not agree that EPA should revise the presumptive standards before allowing States to use them for purposes of establishing a BART benchmark. We believe it is appropriate for the States to use the same presumptions in developing the BART benchmark that they would use in making BART determinations.

We determined in the BART final rule that the limits represented by the presumptions are cost effective for large EGUs at the largest power plants. We believe that the presumptions represent a reasonable estimate of a stringent case BART, particularly because in developing a BART benchmark they would be applied across the board to a wide variety of units with varying impacts on visibility, at power plants of varying size and distance from Class I areas.

We do not agree that the use of presumptive standards ignores the visibility benefits to be expected from the control of the EGUs covered by the presumption. In the final BART guidelines establishing the presumptions, EPA took into account the degree of improvement in visibility that would result from the installation of the presumptive level of controls in finding that such controls should generally be found to be BART. As explained in the preamble to the BART guidelines, controlling the type of sources covered by the presumptions at the level of the presumptive standards is likely to result in a substantial degree of visibility improvement based on EPA's modeling analyses.

Minimum Universe of Sources Covered

Proposal. In the 1999 Regional Haze Rule, the provisions for alternative programs to BART at section 51.308(e)(2) contained a requirement that such a program must include, at a minimum, each BART-eligible source within the State. In the August 1, 2005 proposal, we noted that having had the occasion to consider BART alternative programs in more detail, we believed that some categories of BART eligible sources might not be appropriate for inclusion in a cap and trade program. We provided the example of the difficulty in quantifying emissions with sufficient accuracy to participate in a trading program for some source categories. We therefore proposed to allow States to use a trading program or alternative measure to substitute for BART for some source categories, while requiring source-by-source BART for BART-eligible sources in any source categories not covered by the alternative program. We further proposed that for any categories which were included in the alternative program, we would retain the requirement that all BART-eligible sources in the State within that source category must be subject to the program. *See* proposed section 51.308(e)(2)(ii). One reason for this proposed provision was to prevent any shifting of emissions from covered to non-covered BART eligible sources, which could potentially undermine the effectiveness of the emissions cap. In a related provision we proposed, as one of the minimum elements of a cap and trade program, that the applicability provisions must be designed to prevent any significant potential shifting of production and emissions within the State or multi-State region. See proposed section 51.308(e)(2)(vi)(A).

Comments. Several commenters opposed the requirement to include in the alternative program all BART-eligible sources within a source category. Several of these commenters argued that such a requirement is a form of ''group BART'' invalidated by the DC Circuit because it would impose requirements on BART eligible sources without a demonstration that those sources are reasonably anticipated to cause or contribute to visibility impairment. One commenter argued that the requirement was unjustified as a practical matter, at least in the case of the forest products industry, because in order to be economically viable mills must be operated at near capacity. This would leave no leeway for production and emissions shifting. The commenter also argued that the provision is conceptually unjustified, considering that under a conventional source-by-source program, emissions shifting theoretically could occur to BART-eligible sources which were determined to be exempt from BART because they do not cause or contribute to visibility impairment. The commenter argued that it would be illegal to impose ''compensating costs'' on such sources outside the trading program context. The implication of this comment is that it would also be illegal to impose such costs on these BART-eligible sources by requiring them to participate in the alternative program.

In contrast, one State commented that allowing some source categories to add controls while others may avoid controls by buying reductions elsewhere would be contrary to its management principles. This commenter thought that the use of a trading program to address haze for some but not all sources subject to BART might be counter-productive. Similarly, another commenter noted that ''carving out source categories would only shrink the universe of potential participants, the opposite of what is needed for a successful trading program.''

Final Rule. Having carefully considered the comments and the relationship between the requirement for category-wide participation of BART-eligible sources and the requirements for the State to address emissions shifting, we are adopting final provisions that maximize the flexibility of the States while insuring that the BART-eligible sources are addressed in some fashion by the States. As we noted in 1999 in establishing the criteria governing BART alternative trading programs, the legislative history of the

CAA demonstrates Congress' recognition of the need to control emissions from a specific set of sources. We are therefore finalizing in this rule that States must require that each BART-eligible source in the State either participate in a BART alternative program or, alternatively, be subject to the case-by-case BART requirements under section 51.308(e)(1). In other words, States are not required to include each BART-eligible source in a source category in an alternative program; however, any BART-eligible sources not included in an alternative program would remain subject to the general requirements governing BART sources.

For most trading programs, we do not anticipate that this requirement will have a significant impact on the scope of the program. Because trading programs generally include all sources within a source category in a trading region, trading programs designed to meet either reasonable progress goals or other requirements of the CAA are likely to have broad applicability provisions that encompass all BART-eligible sources in the trading region (or at least all BART-eligible sources within certain categories of sources for some trading programs). States have the inherent authority to determine the applicability of their regulations for programs such as those designed to meet reasonable progress requirements, or to attain the National Ambient Air Quality Standard (NAAQS), and are most likely to design programs with applicability provisions that are not dependent on factors such as the age of sources covered by the program. For example, States in the WRAP designed their program to apply to all stationary sources with actual emissions of 100 tons per year or more, regardless of the type of source or the age of the facility.

We disagree that the requirement that States either require BART-eligible sources to participate in a trading program or go through a BART analysis is a form of ''group BART'' that would illegally impose requirements on such sources without a demonstration that those sources emit a pollutant that may reasonably be anticipated to cause or contribute to visibility impairment. As noted above, for programs designed to meet other requirements of the CAA, we would expect that the States would design programs that apply broadly, and nothing in the BART provisions of the CAA limits a States' ability to regulate BART-eligible sources under other provisions in the CAA. Thus, for example, a State need not demonstrate that an EGU built between 1962 and 1977 has a certain measurable impact on visibility before regulating it under the CAIR. Rather, the BART sources would be treated in the same manner as other sources in the State.[6]

In the case of programs designed solely to satisfy BART requirements, which may arguably be limited to BART sources only, the approach set forth in the final rule provides the opportunity for an individual source not to be regulated by a trading program. In particular, rather than participate in a trading program, a source may demonstrate that it does not meet the ''subject to BART'' test or that BART should be ''no control'' in its particular case, seek an exemption from the Administrator under section 51.308(e)(4), or install BART controls. This approach therefore avoids any potential problems involving BART-eligible sources which are not reasonably anticipated to cause or contribute to visibility impairment being illegally subject to program requirements. Rather, section 51.308(e)(2) provides BART-eligible sources which are reasonably anticipated to cause or contribute to visibility the opportunity to participate in a trading program instead of meeting source specific control limits.

Our concerns with emissions shifting will be addressed under the more general requirements applicable to trading programs. These provisions require States to demonstrate that the applicability provisions are designed to prevent any significant, potential shifting within the State of production and emissions from sources in the program to sources outside the program. This provision addresses emissions shifting from sources in the program to those outside the program, irrespective of the BART-eligibility status of the sources. Moreover, this demonstration will enable States to take into account the type of practical and economic factors raised by commenters which may obviate theoretical concerns with emission shifting. We also note that the periodic SIP updates required under § 51.308(g) of the regional haze rule will provide an opportunity to assess whether emissions shifting is in fact a problem.

Comparison of BART and Alternative Scenarios

Proposal. In the NPRM, we proposed several changes to § 51.308(e)(2)(i). As explained in the preamble, the critical revision to that section to bring it into compliance with the decision of the DC Circuit in CEED v. EPA was to remove the requirement of a bifurcated approach to establishing the BART benchmark. We also proposed additional changes in the section which were intended to establish a clear ''framework'' or step-by-step procedure for comparing an alternative program to source-by-source BART. This consisted of a five-step procedure in proposed paragraphs (A)–(E) within § 51.308(e)(2)(i). In brief, those steps were: (A) List all BART-eligible sources, (B) list all BART source categories covered by the program, (C) analyze the degree of visibility improvement at each affected Class I area expected as a result of the application of BART pursuant to paragraph (e)(1) at each source subject to BART in each source category covered by the program, (D) analyze the emissions reductions and associated visibility improvement expected under the trading program or other alternative measure, and (E) compare the results of the steps in paragraphs (C) and (D) using the method prescribed under § 51.308(e)(3).

Section 51.308(e)(3), which was finalized in the BART guidelines rulemaking, establishes criteria for determining whether an alternative program makes greater reasonable progress than source-by-source BART. First, if the distribution of emissions is similar between the two scenarios, the comparison may be made on the basis of emissions alone. In that case, the alternative program may be deemed to make greater reasonable progress than BART if it results in greater emissions reductions than source-by-source BART. If, however, the geographic distribution of emissions reductions is significantly different under the two alternatives, the State must conduct visibility modeling and evaluate the alternative program under a two-pronged test. The first prong is that the alternative program must not cause a decline in visibility at any Class I area. The second prong is that there is an overall improvement in visibility under the alternative program, ''determined by comparing the average differences between BART and the alternative over all affected Class I areas.'' See section 51.308(e)(3).

In proposing the above-described structure of section 51.308(e)(2), we noted that we were proposing to add the term ''affected'' to modify the term ''Class I areas'' in paragraph (C). The purpose of this was to clarify that a State need not evaluate visibility improvement at every Class I area nationwide. We also noted that, as

[6] In theory, a State could design a program to meet the reasonable progress or other requirements of the CAA that does not have sufficiently broad applicability provisions to encompass all BART sources. For example, a State could adopt a program that covers all sources with SO_2 emissions greater than 1000 tons per year. In such a case, the BART sources not subject to the trading program would be subject to the requirements of section 308(e)(1).

described in the preamble to the final BART guidelines, States have discretion in defining an ''affected'' Class I area.

Finally, while noting that section 51.308(e)(3) had been finalized, we sought comment on whether EPA should allow other means of demonstrating that an alternative program makes greater reasonable progress than would BART. Specifically, we solicited comments on whether a weight of evidence approach would be appropriate. We gave the following scenario as an example of a situation where such an approach might be appropriate: ''(1) The alternative program achieves emissions reductions that are within the range believed achievable from source-by-source BART at affected sources, (2) the program imposes a firm cap on emissions that represents meaningful reductions from current levels and, in contrast to BART, would prevent emissions growth from new sources, and (3) the State is unable to perform a sufficiently robust assessment of the programs using the two pronged visibility test due to technical or data limitations.''

Comments. One commenter noted that there was a contradiction between the terms of § 51.308(e)(3) as finalized and § 51.308(e)(2) as proposed. Specifically, whereas under § 51.308(e)(3), dispersion modeling is required only if the distribution of emissions distribution is significantly different, under the alternative measure, in proposed section 51.308(e)(2), dispersion modeling is required as a matter of course in developing the two scenarios to be compared.

Several commenters also supported the ''weight of evidence'' approach to demonstrate that an alterantive makes greater reasonable progress than BART. One commenter specified that the ''regulation should require a weight of evidence demonstration to include emission inventory, monitoring data, meteorology, and various data analysis studies,'' and that modeling should not necessarily be weighted more heavily than the other factors listed.

With respect to the definition of an ''affected'' Class I area, one commenter pointed to possible inconsistent application among States and uncertainty as to which States should make the determination (i.e., only the State which contains the Class I area, or other States as well). The commenter therefore requested that EPA clarify when a Class I area is affected by emissions and the radius from a source within which an analysis should be done.

Another commenter claimed that our discussion of section 51.308(e)(3) re-opened that provision for comment in this rulemaking and created a renewed opportunity for judicial review. The commenter then raised several arguments regarding the legality of section 51.308(e)(3) under the CAA. The commenter argued that the proposed rule was overly broad in failing to specify that only sources participating in a trading program or other alternative measure may satisfy BART for those sources and the specific visibility-impairing pollutant at issue. The commenter also argued that the test is impermissibly vague in providing for dispersion modeling if the distribution of emission is ''substantially different.'' The commenter also claimed that by allowing States to compare ''average differences'' between BART and the alternative over all affected Class I areas was inconsistent with the CAA. Finally, the commenter responded to our request for comment on a weight of evidence test, stating that allowing unspecified ''qualitative factors'' to trump other, more quantitative assessments would dramatically weaken the rule.

Final Rule. We agree with commenters who pointed to the inconsistency between the proposed provisions of section 51.308(e)(2) and the existing terms of section 51.308(e)(3). This conflict was the result of inadvertent error, and we are correcting it in the final rule. Specifically, we have eliminated the clauses within section 51.308(e)(2)(C) and section 51.308(e)(2)(D) which required that visibility improvement be projected at those steps in the process. Instead, these paragraphs call only for an assessment of emissions reductions under BART and alternative scenarios, respectively. We have also clarified in section 51.308(e)(2)(E) that visibility projections are required only if necessary, pursuant to section 51.308(e)(3).

Because we have eliminated the requirement for visibility projections within the analysis prescribed in section 51.308(e)(2), there is no longer a need to define an affected Class I area in the context of this section. Instead, that term is defined in the context of section 51.308(e)(3), at the States' discretion as discussed in the preamble to the final BART rule. *See* 70 FR 39138. The EPA continues to believe that it is not necessary to bound the terms of that discretion upfront through Federal regulation. Any potential problems due to inconsistent application among States can be addressed through the RPO and inter-RPO processes already in place and ultimately through the SIP process. This will allow consideration of the potential effects of local conditions and of particular trading programs as they are developed. It should, therefore, produce more reasoned results than would the establishment of a nationwide, one-size-fits-all radius of influence criterion.

We disagree with comments that EPA reopened section 51.308(e)(3) by discussing the provisions of this section of the rule in the proposal, or that today's rule has impacted the meaning of section 51.308(e)(3).

Notwithstanding the fact that this provision was not reopened, we note that EPA disagrees with the substance of the comments claiming that section 51.308(e)(3) is overly broad and vague. The commenter's concerns regarding the failure of section 51.308(e)(3) to specify that only those sources participating in a trading program may satisfy BART for those sources is addressed in the regulations under section 51.308(e)(2)(i)(B), which provides that each BART-eligible source in a State must be included in an alternative program, have a BART emission limit, or otherwise be addressed under the BART provisions. The commenter's concerns regarding the ''impermissibly vague'' language used in section 51.308(e)(3) that would allow a State to approve alternative measures that are less protective than BART ignore the SIP process. The State's discretion in this area is subject to the condition that it must be reasonably exercised and that its decisions be supported by adequate documentation of its analyses.

We also disagree with the comments criticizing the test finalized in section 51.308(e)(3) for allowing States to consider the average differences between BART and the alternative in determining whether the alternative makes greater reasonable progress. In short, as explained in the response to comments to the BART Guideline rulemaking, EPA believes the test in section 51.308(e)(3) is an appropriate one:

> In addition, within a regional haze context, not every measure taken is required to achieve a visibility improvement at every class I area. BART is one component of long term strategies to make reasonable progress, but it is not the only component. The requirement that the alternative achieves greater progress based on the average improvement at all Class I areas assures that, by definition, the alternative will achieve greater progress overall. Though there may be cases where BART could produce greater improvement at one or more class I areas, the no-degradation prong assures that the alternative will not result in worsened conditions anywhere than would otherwise exist, and the possibility of BART for reasonably attributable visibility protects against any potential ''hot spots.'' Taken

together, the EPA believes these factors make a compelling case that the proposed test properly defines ''greater reasonable progress.'' The EPA anticipates that regional haze implementation plans will also contain measures addressing other sources as necessary to make progress at every mandatory federal Class I area.[7]

With respect to the use of a ''weight of evidence'' approach as an alternative to the methodology of section 51.308(e)(3), we support the use of such a test as an alternative to the methodology set forth in section 51.308(e)(3). ''Weight of evidence'' demonstrations attempt to make use of all available information and data which can inform a decision while recognizing the relative strengths and weaknesses of that information in arriving at the soundest decision possible. Factors which can be used in a weight of evidence determination in this context may include, but not be limited to, future projected emissions levels under the program as compared to under BART, future projected visibility conditions under the two scenarios, the geographic distribution of sources likely to reduce or increase emissions under the program as compared to BART sources, monitoring data and emissions inventories, and sensitivity analyses of any models used. This array of information and other relevant data may be of sufficient quality to inform the comparison of visibility impacts between BART and the alternative program. In showing that an alternative program is better than BART and when there is confidence that the difference in visibility impacts between BART and the alternative scenarios are expected to be large enough, a weight of evidence comparison may be warranted in making the comparison. The EPA will carefully consider the evidence before us in evaluating any SIPs submitted by States employing such an approach.

B. Comments Relating to the Final Determination That CAIR Makes Greater Reasonable Progress Than BART in the July 6, 2005 BART Guideline Rule

In the final BART guidelines rulemaking on July 6, 2005, EPA determined that the CAIR makes greater reasonable progress than BART for certain EGUs and pollutants (70 FR 39138–39143). We did not seek comment on this determination, but we nonetheless received comments related to this final rule.

Comments. Several organizations submitted comments regarding BART relief for non-EGUs in the CAIR region. They assert that the CAIR will achieve more reasonable progress than would BART for all BART-eligible sources in the CAIR region, including non-EGUs. Therefore, they urge EPA to amend its final determination to include BART relief for non-EGUs and to provide supporting analysis for this demonstration.

In contrast, another commenter disagreed with our previous determination that the CAIR will make greater reasonable progress than BART. The commenter acknowledged that that determination was not at issue in this rulemaking. However, this commenter was concerned that there would not be enough BART-eligible sources in non-CAIR States to support an effective BART trading program outside the CAIR region. The commenter was also concerned about the administrative costs that a trading program would impose on non-CAIR States. The commenter therefore urged EPA to establish an alternative mechanism, such as ''an exchange ratio for Acid Rain allowances held, or 'BART' allowances generated by sources located in CAIR states'' in order to allow participation in an effective trading program by sources in non-CAIR States.

One commenter urged EPA to clarify that where another program requires controls of one pollutant at BART-eligible sources, BART applicability for other pollutants is not affected.

One commenter said that it does not believe EPA has the authority to ''circumvent'' CAA requirements for controlling specific BART sources that affect visibility in a Class I area. They believe that EPA should require States to show that all BART sources will be controlled first as part of any showing that an alternative program is ''better than BART.'' This commenter also requested clarification as to which CAA requirements could be included in SIPs to make a ''better than BART'' showing.

Final Rule. The DC Circuit in *CEED* v. *EPA* upheld EPA's interpretation of section 169A of the CAA as allowing for an alternative program, such as an emissions trading program, to be adopted in lieu of source-by-source BART controls. It is EPA's view that emissions reductions required by CAA (or State) provisions other than BART may be used to satisfy BART, so long as the program achieves greater reasonable progress than would BART at the BART-eligible sources affected. The preponderance of comments also supported this position, and the comments in opposition did not raise any arguments that were not addressed either in the course of the CAIR rulemaking or in the final determination that the CAIR may substitute for BART for EGUs in affected States made in the July 6, 2005 rule. As previously explained, ''EPA does not believe that anything in the CAA or relevant case law prohibits a State from considering emissions reductions required to meet other CAA requirements when determining whether source-by-source BART controls are necessary to make reasonable progress.'' (70 FR 39143; *see* also 70 FR 25300–302).

With respect to those comments specifically directed at whether the CAIR makes greater reasonable progress than BART and, if so, what the scope of BART relief should be (i.e., whether it should extend to non-EGUs), it is important to emphasize that the determination that the CAIR makes greater reasonable progress than BART for SO_2 and nitrogen oxides (NO_x) at EGUs in the CAIR region, and thus may substitute for BART for those pollutants and those sources, was finalized in the July 2005 BART rule. Our supporting technical analysis for the determination that the CAIR is ''better than BART'' addressed only the comparative visibility impacts of the CAIR trading programs with respect to EGUs versus BART for EGUs. A determination at this time that the CAIR trading programs for EGUs could substitute for BART at non-EGUs as well as for EGUs is beyond the scope of this rulemaking.

With respect to the request that we clarify that where another program requires controls of one pollutant at BART-eligible sources, BART-eligibility for other pollutants is not affected, we note that EPA agrees with this interpretation of the BART requirements.[8] As a general matter, if a program exists for the control of one pollutant at BART-eligible sources, emissions of other visibility-impairing pollutants merit analysis to determine if visibility impairment is such that additional controls would or would not be warranted. However, it is possible that a State could demonstrate that a trading program that addresses one or two visibility-impairing pollutants under an alternative program would provide greater reasonable progress than would case-by-case BART applied to all visibility-impairing pollutants. With respect to EPA's determination that the CAIR provides for greater reasonable progress than BART for EGUs, EPA found that CAIR States which participate in the EPA-administered

[7] *Summary of Comments and Responses on the 2004 and 2001 Proposed Guidelines for Best Available Retrofit Technology (''BART'') Determinations under the Regional Haze Rule,* Docket Number EPA–HQ–OAR–2002–0076, at 253.

[8] The final BART Guidelines address this general question of applicability. 70 FR at 39161.

CAIR cap-and-trade programs for SO_2 and NO_X would be allowed to treat the participation of EGUs in this program as a substitute for the application of BART controls for these pollutants at affected EGUs. EPA further explained in the preamble to the July 2005 BART rule that a CAIR State that participates in the EPA-administered CAIR seasonal NO_X trading program only, would still need to address BART for SO_2 emissions from EGUs. 70 FR at 39143. In short, EPA's determination that the EPA-administered CAIR trading programs provide for greater reasonable progress than BART was limited to the pollutants covered by the EPA-administered CAIR trading programs in which the State chooses to participate.

Finally, we agree with the comment that EPA should clarify those CAA requirements that a State should include in its implementation plan if it intends to rely on its participation in the CAIR trading programs rather than to require BART for its EGUs. In our July 2005 BART rule, EPA promulgated regulations effectuating our determination that States which adopt the CAIR model trading rules for SO_2 and NO_X would be allowed to treat the participation of EGUs in these programs as a substitute for application of BART controls for these pollutants at affected EGUs. The regulations at 40 CFR 51.308(e)(4) (as established in the July 6, 2005 BART rule) provide the following:

> A State that opts to participate in the Clean Air Interstate Rule cap-and-trade and trade [sic] program under part 96 AAA–EEE need not require affected BART-eligible EGU's [sic] to install, operate, and maintain BART. A State that chooses this option may also include provisions for a geographic enhancement to the program to address the requirement under § 51.302(c) related to BART for reasonably attributable impairment from the pollutants covered by the CAIR cap-and-trade program.

70 FR at 39156. Subparts AAA–EEE of part 96 set forth a portion of the model trading rules (which comprise subparts AAA–III of part 96) that States must incorporate, with some allowed modifications, into their SIPs to participate in the EPA-administered CAIR SO_2 cap-and-trade program. Although the regulations do not specifically address participation in the NO_X cap-and-trade program, EPA fully anticipated that any State choosing to adopt the annual SO_2 model trading rules would also choose to adopt the annual NO_X model trading rules. In addition to numerous practical considerations that would lead States to adopt the model rules for and thus choose to participate in both annual trading programs (as opposed to the SO_2 program only), as noted above, the CAIR substitutes for BART only for those pollutants covered by the EPA-administered CAIR trading programs in which the State chooses to participate. EPA agrees, however, with the comment that the BART requirements for SIPs should be clarified and is revising the regulatory text of the regional haze rule to more closely align with the determination regarding the relationship between CAIR and BART made by EPA in 2005. We are revising the regulations accordingly to make clear that participation in either the annual or seasonal CAIR NO_X cap-and-trade program is a necessary condition for relying on EPA's determination that States can substitute CAIR for BART for NO_X. We are also revising the regulations to clarify that a State that participates only in the ozone season NO_X cap-and-trade program may rely on EPA's determination that CAIR makes greater reasonable progress than BART for NO_X, but, as discussed above, such a State would still need to address BART for SO_2. As noted above, EPA anticipates that all States opting to participate in the annual NO_X cap-and-trade program will also participate in the SO_2 cap-and-trade program.

In addition to clarifying the applicable SIP requirements, we are also revising the regulatory text to account for the rule signed by the Administrator on March 15, 2006 promulgating Federal implementation plans (FIPs) for all jurisdictions covered by the CAIR. These FIPs adopt the model cap-and-trade programs that EPA proposed in the CAIR as a control option for States, with minor adjustments to account for Federal rather than state implementation. Each jurisdiction in the CAIR region will be subject to the requirements set forth in these FIPs when they became effective on June 27, 2006. The EPA intends to withdraw the FIP in a State in coordination with EPA's approval of a SIP for that State that meets the CAIR requirements. However, EPA anticipates that some States may choose to remain subject to the CAIR FIP and either not submit any SIP revisions or submit abbreviated SIP revisions that modify certain limited provisions of the CAIR FIP trading programs. The EPA's determination in the 2005 BART rule that States which adopt the CAIR model trading rules could treat this as a substitute for BART for EGUs was based on our finding that, if the CAIR reductions are achieved through implementation of the EPA-administered trading programs in the model trading rules, CAIR makes greater reasonable progress than BART for these sources. This finding holds true whether a State chooses to submit a SIP under part 96, remain subject to a FIP under part 97, or adopt some combination of the two.

C. Minimum Elements of Cap and Trade Programs

The August proposal discussed a set of minimum elements that any cap and trade program should contain, in order that it be workable and enforceable. We received very little comment on most of the proposed minimum elements. The discussion below focuses only on those provisions on which we received comment. Other elements on which we did not receive comments are finalized as they were proposed, and are not discussed further below.

Penalty Provisions

Proposal. We proposed that the minimum program element for excess emission penalties would be a mandatory deduction, from a source's allowance account, of at least three times the excess emissions. We explained that this allowance deduction must occur automatically upon the State's or Tribe's determination of excess emissions, though it may be reversed if the source successfully appeals that determination. The appeal could be based on the determination of the number of allowances held by the source as of the allowance transfer deadline and available for compliance, the amount of the source's emissions, or the comparison of the amount of the source's emissions and the total tonnage value of the source's allowances held and available for compliance.

Comments. A commenter said that in order to effectively and clearly deter noncompliance and preserve consistency with other cap and trade programs and EPA's economic incentive policies, EPA must require as a minimum element of all cap and trade programs the imposition of monetary penalties for noncompliance, in addition to the automatic allowance deductions prescribed. No other comments were received on this specific issue.

Final Rule. The EPA agrees that cap and trade programs need to have swift and unambiguous penalties to deter noncompliance and to ensure the integrity of the market for allowances. The EPA believes that an automatic allowance deduction penalty of at least three times the amount of excess emissions, which is required under section 51.308(e)(2)(vi)(J), is an effective deterrent for noncompliance. And given that allowances have monetary value, such a deduction would result in an

automatic monetary loss to the entity in question.

The commenter asserted that EPA must require in section 51.308(e)(2)(vi)(J) that a cap and trade program provide for both an automatic offset of any excess emissions (i.e., the automatic deduction of one allowance for each ton of emissions for which an allowance was not held by the source) and an automatic monetary penalty (i.e., the automatic requirement to pay a specified amount of money for each ton of excess emissions). In the proposed regulation, EPA instead took the approach of requiring an automatic allowance deduction of at least three allowances for each ton of excess emissions. This deduction includes both an automatic one-to-one offset and an automatic allowance penalty of at least two-to-one. The commenter failed to explain why giving up allowances in addition to a one-for-one offset provides any less deterrence for noncompliance than paying money in addition to a one-for-one offset. Each allowance has a monetary value on the allowance market, and the source is penalized for noncompliance by having to give up assets whether the assets are in the form of allowances or in the form of money. In short, there is nothing inherent in the nature of an automatic allowance deduction that would make such a deduction any less effective a deterrent than an automatic monetary penalty.

Further, EPA believes that the cost, to a source, of a penalty for excess emissions should be significantly greater than the cost, to a source, of purchasing allowances to be in compliance. The most straight-forward way of ensuring a consistent relationship between the cost of noncompliance (i.e., the excess emissions penalty) and the cost of compliance is to impose an excess emissions penalty in the form of an automatic allowance deductions that are a fixed multiple of the amount of excess emissions. Here, the automatic penalty consists of at least a three-to-one allowance deduction, which includes the one-for-one offset plus an additional two-for-one allowance surrender. The EPA notes that the commenter did not object to this level of penalty, but simply claimed that the penalty should have a portion in the form of money. The EPA believes that the level of the penalty, as well as the form of the penalty, specified in section 51.308(e)(2)(vi)(J) are reasonable.

Finally, the commenter errs in its assertion that EPA's approach in section 51.308(e)(2)(vi)(J) deviates from ''long-standing'' policies in requiring automatic allowance deductions rather than automatic monetary penalties for cap and trade programs. In fact, EPA took the same approach in the NO_X Budget Trading Program regulations promulgated in 1998 (63 FR 57356, 57528) (section 96.54(d)(1))) and in the CAIR trading program regulations recently promulgated in 2005 (70 FR 25162, 25353, 25373–74, and 25396)(section 96.154(d)(1), section 96.254(d)(1), and section 96.354(d)(1)) and Clean Air Mercury Rule (CAMR) trading program regulations promulgated in 2005 (70 FR 28606, 28669) (section 60.4154(d)(1)). The EPA notes that, for any trading program established under the CAA, a source with excess emissions is subject to discretionary monetary penalties under section 113 of the CAA, in addition to the automatic penalties established by the respective trading program. *See*, e.g., 63 FR 57528 (section 96.64(d)(3) (stating that the automatic penalty under NO_X Budget Trading Program does not affect liability for any other penalty under the CAA).

Emissions Monitoring

Proposal. In the NPRM, we proposed a requirement that the monitoring, recordkeeping, and reporting provisions for boilers, combustion turbines, and cement kilns participating in a trading program comply with part 75, and that other sources in the program include monitoring, recordkeeping, and reporting provisions that result in information of the same precision, reliability, accessibility and timeliness as provided for under part 75. This proposed requirement was based on the need for consistent and accurate measurement of emissions to ensure that each allowance actually represents its specified tonnage value of emissions and that reported emissions are fungible across different sources. We also proposed that any sources that are subject to the cap and trade program but prohibited from selling emissions allowances would not be subject to the requirement that the monitoring, recordkeeping, and reporting provisions be consistent with, or equivalent to, part 75.

Comments. Several commenters expressed concerned that the emissions monitoring requirement would be unduly burdensome for small sources which are not currently subject to monitoring requirements. One commenter stated that because the cost of operating continuous emissions monitors (CEMs) tends not to decline proportionally with emissions or output, the costs of CEMs for small industrial sources is much higher than for large EGUs on a per-ton basis. The commenter also argued that the superior accuracy of CEMs compared to other methods such as emission factors, on a percentage basis, was not worth the cost when applied to the total emissions from small sources. The commenter therefore suggested that EPA should allow States to assume, when establishing the BART benchmark, that individual emissions units with annual emission levels less than the *de minimis* levels would not be controlled, and to the extent that such sources are required to participate in a BART trading program, that they not be required to use CEMs. Another commenter, citing similar concerns, suggested that EPA could establish a threshold source size for each affected source category, and provide alternatives to Part 75 monitoring for sources below the threshold. The commmenter also suggested allowing alternatives such as parametric monitoring or periodic sources test, possibly with the use of a conservative adjustment factor to compensate for the greater uncertainty of those methods.

Final Rule. The EPA is aware of the need to balance considerations of the accuracy and reliability of emissions monitoring and reporting with costs considerations, particularly as applicable to small sources. We believe the approach contained in the proposal strikes the proper balance and provides States with adequate flexibility to address sources' concerns with the cost of CEMs monitoring. First, the requirement to comply with part 75 only applies to boilers, combustion turbines and cement kilns. For all other sources, the requirement is that the sources ''provide information with the same precision, reliability, accessibility, and timeliness'' as provided by part 75. Any sources which are prohibited from selling allowances (including boilers, combustion turbines, or cement kilns) are not required either to comply with, or be consistent with, part 75.

Second, even within part 75, there are alternatives to CEMs in appropriate circumstances. As explained in a footnote in the proposal, part 75 establishes requirements for CEMS, as well as other types of monitoring (*e.g.*, low mass emissions monitoring under section 75.19) that may be used in lieu of CEMS under certain circumstances. Part 75 also establishes a process for proposal by owners and operators, and approval by the Administrator, of alternative monitoring systems (under subpart E of part 75) that meet requirements concerning precision, reliability, accessibility, and timeliness. We continue to believe that it is essential to the integrity of any

emissions trading program that those sources that are allowed to sell allowances must either comply with or be consistent with the requirements of part 75 (depending on the source category). Therefore, we are finalizing those requirements as proposed.

Finally, we believe there is some merit to the commenter's point that States should be allowed to assume, when establishing the BART benchmark, that individual emissions units with annual emission levels less than the *de minimis* levels would not be controlled. In the BART Guidelines we indicated that States may choose to set *de minimis* levels for individual pollutants at BART-eligible sources, so long as those *de minimis* levels are set at or below PSD applicability levels for those pollutants. We said that sources with emissions of an individual pollutant below *de minimis* levels could be excluded from BART-eligibility. Similarly, we believe that for the purposes of an alternative program, *de minimis* levels set at or below PSD applicability levels for those pollutants would be appropriate. In other words, States could assume, when establishing the BART benchmark, that they need not include emissions that total less than *de minimis* amounts of an individual pollutant at a BART-eligible source.

III. Revisions to Regional Haze Rule § 51.309

Support for the WRAP Program

Comments. We received very few comments addressing our proposed revisions to section 51.309. One commenter stated that it agreed with EPA's proposed changes to this section of the Regional Haze Rule, but asked for clarification on several points. At the public hearing on the proposed rule, representatives of the WRAP and the State of Utah Division of Air Quality expressed general support for the proposal and appreciation of EPA's efforts to provide an opportunity for affected States and tribes to continue to utilize the extensive work of the GCVTC and the WRAP. The representative of Utah added:

> Any suggestion that EPA has forced Utah into protecting visibility in Utah's protected areas or that EPA is forcing Utah to participate in alternatives to BART is simply untrue * * * Statements that claim this rule usurps state authority are absolutely not true * * * In fact, Section 309 has always been, and continues to be, a state-driven regulation.[9]

[9] *See* Docket EPA–HQ–OAR–2002–0076.

Another commenter requested clarification of the potential geographic scope of the program in § 51.309.

Final Rule. The EPA remains committed to allowing States and Tribes the flexibility to use innovative approaches such as market-based emissions trading programs to meet CAA requirements where appropriate, and agrees that EPA has never attempted to coerce States and Tribes into adopting such alternative programs in lieu of BART. The provisions in the Regional Haze Rule allowing for alternatives to BART generally, and the WRAP backstop trading program in particular, were originally included at the request of the States.[10]

As was the case in 1999 when EPA added section 51.309 to the Regional Haze Rule to recognize to work of the GCVTC, the option set out in section 51.309 is applicable to the States and Tribes of the GCVTC transport region: Arizona, California, Colorado, Oregon, Idaho, Nevada, New Mexico, Utah, and Wyoming, and all federally-recognized Tribes within the exterior boundaries of those States. Section 51.309 establishes the requirements for the first regional haze plans for the 16 Class I areas covered by the GCVTC Report, listed in section 51.309(b)(1). The geographic scope of the program, in terms of the Class I areas for which reasonable progress goals are satisfied, may be expanded upon adequate demonstrations pursuant to section 51.309(g).

The WRAP Program as a Reasonable Progress Measure

Proposal. The requirement in the CAA that States make reasonable progress towards the national visibility goal, while related to the BART requirement, is a separate requirement analogous to the NAAQS-based requirements in the CAIR. For the reasons presented above in this preamble in the discussion of ''independent requirements'' in general, we proposed that for a program designed to meet reasonable progress requirements, the BART benchmark may be based on simplifying assumptions without running afoul of the DC Circuit's decision in *CEED* v. *EPA.* We characterized such a program as one that includes BART sources and has the purpose of satisfying reasonable progress requirements for a larger universe of sources.

Comments. Although the preamble discussion of this issue was not limited to or expressly directed towards the WRAP's program, most of the comments received were in regard to the application of this concept to the WRAP. The WRAP itself submitted comments in agreement with our interpretation and supporting the inclusion of this option in the final rule. In addition, another commenter explicitly supported the use of this approach. In its comments, the UARG stated that the ''[u]se of the group-BART approach for justifying the WRAP Annex would be appropriate because the WRAP Annex would be the SO_2 portion of the section 169A reasonable progress program for the 16 Colorado Plateau Class I areas, and thus would be a BART alternative program that is required under another CAA provision.'' As noted previously in this preamble, this commenter urged EPA to include language within the rule itself, in addition to the preamble discussion, to allow States to use a ''group BART'' approach to derive the BART benchmark when the BART alternative program is required by another provision of law. This commenter also requested that EPA make it clear in regulatory language that this provision applies to the WRAP.

Another commenter said that through the proposed rule, EPA was essentially proposing to repromulgate the WRAP Annex. The commenter, while not disputing the proposition that a program designed to meet reasonable progress could be evaluated against a group-BART benchmark, argued that the previous Annex milestones could not be ''recycled'' under this rationale because they were not developed as reasonable progress measures. Instead, the commenter argued, the milestones were derived directly from BART by the WRAP. The commenter also argued that the milestones cannot be justified as a reasonable progress measure because the modeling submitted with the Annex showed that the stationary source program for SO_2 would achieve no humanly perceptible visibility improvement. Finally, the commenter argued that the milestones cannot be ''restored'' because there is no ''coherent reasonable progress rationale'' underlying them.

After the comment period closed, a commenter submitted supplemental comments which directly responded to the CEED's comments on the WRAP program. The commenter stated that in its view, ''the fact that the WRAP Annex (or, more precisely, its SO_2 milestones) were established based on a group-BART approach does not taint the Annex, *so long as the Annex is required by or satisfies (in whole or in part) the CAA's reasonable progress requirements*

[10] *See* legacy EPA Docket A–95–38, Item number VII–G–76.

(or some other CAA or State requirement.'' (Emphasis in original).

The commenter also opined on the manner in which the WRAP program could be shown to satisfy reasonable progress requirements. First, the commenter cited the EPA's discussion of the purpose of section 309 in the preamble to the 1999 Regional Haze Rule, as meeting the reasonable progress requirements for the 16 Class I areas addressed by the GCVTC (*See* 64 FR 35749–51). Second, the commenter notes that it is the States'', not EPA's, obligation to demonstrate that the program satisfy reasonable progress requirements. In support of this, the commenter points to the provision in the proposed provision at section 51.309(d)(2), requiring a visibility improvement projection in order to demonstrate that section 51.309 as a whole comprises reasonable progress for the 16 Class I areas on the Colorado Plateau. Therefore, the commenter asserts, if a ''State demonstrates to EPA, as part of its section 51.309 SIP submittal, that the WRAP annex satisfies part or all of the reasonable progress requirement, the source-specific BART benchmark to be used in the 'better than BART' test can be established using a group BART approach.''

Final Rule. Today's rule does not ''re-promulgate'' or ''pre-approve'' the stationary source SO_2 trading program addressed by the WRAP Annex. Rather, we are amending the Regional Haze Rule to remove the requirement that States use a ''group BART'' benchmark for evaluating alternative programs and providing western States and tribes the opportunity to reconsider the milestones absent that invalid analytical requirement. The Regional Haze Rule makes clear that the WRAP States have the option of using source-by-source BART determinations to develop a BART benchmark against which to compare their backstop market trading program. Alternatively, if a WRAP State were to demonstrate as part of its SIP submittal that the backstop market trading program satisfies part or all of its reasonable progress requirement for the Class I areas at issue, then the regulations provide that the WRAP States could use a BART benchmark based on category-wide assumptions about control levels which could be expected to result from BART to demonstrate that the trading program makes greater reasonable progress than BART. In either case, a new demonstration is required, based on regulatory requirements and control technology factors as they currently exist, not as they were in 2000. Therefore the ''Annex'' milestones are not being ''recycled.''

We do agree that regulatory certainty and clarity are best served by specifying within the regulatory provisions the circumstances in which a State, including a State submitting a SIP under section 51.309, may use simplifying assumptions to estimate BART emissions reductions in establishing a BART benchmark. As discussed in section II of the preamble, we have amended section 51.308(e)(2)(i)(C) to clarify the methodologies for determining the BART benchmark. The new language codifies the approach, discussed in the proposal preamble, which may be used in the case of an emissions trading or other alternative program designed to meet a Federal or State requirement other than BART. The paragraph specifies that the CAA section 169A requirement to make reasonable progress may be considered such a requirement.

Although a commenter argues that we are ''recycling'' the WRAP Annex, we are not determining at this time that a SIP with a backstop market trading program identical to that approved by EPA in 2003 would meet the requirements of the amended Regional Haze Rule. In other words, it is unnecessary at this time to address the CEED's central argument that the backstop market trading program in the WRAP Annex cannot qualify as a BART alternative program designed to meet another CAA provision. If any SIPs are submitted under section 51.309, EPA will review the plans at that time based on the State's submittal and any additional information adduced during the public comment period.

We do note that EPA disagrees with the commenter that a WRAP State could not show that a stationary source market trading program similar to that in the WRAP Annex was designed to satisfy the reasonable progress requirements. Although, as the commenter pointed out, EPA did not provide an analysis in the proposal of how the milestones from 2003 could contribute to reasonable progress should any States submit SIPs containing a trading program based on these milestones, the history of the program authorized under § 51.309 of the Regional Haze Rule suggests strongly that the stationary source program for SO2 was designed by the States and others in the GCVTC as a measure for obtaining reasonable progress. In the preamble to the 1999 Regional Haze Rule, we stated:

''The EPA finds that the GCVTC actions to date address, or provide a mechanism to address, the statutory factors for assessing reasonable progress required by the CAA. The EPA is satisfied that the GCVTC's strategies as set forth in section 51.309, when supplemented by the annex process discussed below, will provide for 'reasonable progress' toward the national visibility goal for the 16 parks and wilderness areas addressed by the GCVTC.'' [64 FR 35749 emphasis added].

In elaborating on the Annex process, we noted that the haze rule contained a provision calling for the submission of an Annex to the GCVTC report ''for the purpose of completing the program requirements to meet reasonable progress under the CAA, including submission of a complete long-term strategy and addressing the BART requirement for the 16 Class I areas on the Colorado Plateau.'' [64 FR 35756 emphasis added]. Thus, from the beginning of the process, it is clear that EPA believed that satisfying the BART requirement was a subsidiary component of the reasonable progress requirement, but that the purpose of the Annex and of section 309 generally was to satisfy the overall reasonable progress requirements of western States and Tribes with respect to the 16 Class 1 areas on the Colorado Plateau.[11] Based on this, in EPA's opinion, a WRAP State could demonstrate in a SIP submittal that a stationary source program similar to the WRAP Annex was designed to make reasonable progress. However, as one commenter noted, such an obligation belongs to the State, ''and the time for the State to provide that justification is when the State submits a section 51.309 SIP that contains the WRAP Annex's provisions.'' In short, whether any SIPs submitted several years from now under section 51.309 by the WRAP States meet the minimum requirements set forth in EPA's regulations will depend on the submission made by the States at that time.

We also disagree with the comments that EPA's approval of the WRAP Annex in 2003 was not rational as the trading program had not been shown to produce a ''humanly perceptible'' degree of visibility improvement. We determined in the 1999 rule that the analysis conducted by the GCVTC was the functional equivalent of the reasonable progress analysis required under section 51.308. Under section 308, States must establish reasonable progress goals by considering the uniform rate of progress

[11] Section 51.309(a) of the Regional Haze Rule, in requiring submission of an implementation plan for the 16 Class I areas covered by the GCTVC report, states that ''[i]f a transport region State submits an implementation plan which is approved by EPA as meeting the requirements of this section, it will be deemed to comply with the requirements for reasonable progress for the period from approval of the plan to 2018.'' (64 FR 35769).

(in deciviews) to natural conditions in 2064 (*i.e.* the ''glide path''), and the statutory reasonable progress factors contained in CAA 169A(g)(1). If the state adopts a slower rate of progress than the glide path, it must demonstrate that this slower rate is justified based on the statutory factors. In approving the GCVTC analysis as comparable to such an analysis, we found that the GCVTC had demonstrated that a faster rate of progress was not feasible, considering the costs and other factors. This determination does not necessarily reflect what would be expected in other parts of the country, as it is unique to the situation of the Colorado Plateau, in terms of air quality, pollutant concentrations, source location, and meteorology.

In addition, the commenter's argument ignores the fact that there are two elements of national visibility goals established by Congress in CAA 169A(a)(1): Preventing future impairment as well as remedying existing impairment. It cannot be disputed that a program that prevents degradation for the first long-term planning period constitutes reasonable progress towards the goal of preventing any future impairment. In other words, holding the line against visibility degradation for the first 10-year strategy period is reasonable progress towards holding the line indefinitely.

Geographic Enhancements

Proposal. The proposed rule made no mention of ''geographic enhancements'' because no changes were intended for the relevant provisions. The term geographic enhancement refers to a ''method, procedure, or process to allow a broad regional strategy, such as a milestone or backstop market trading program designed to achieve greater reasonable progress than BART for regional haze, to accommodate BART for reasonably attributable impairment.'' *See* 40 CFR 51.301 and 51.309(b)(7). As explained in the preamble to the 1999 Regional Haze Rules, the purpose of this provision is to allow a market-based system to accommodate actions taken under the ''reasonably attributable'' BART provisions at section 51.302 to address ''hot spot'' issues. Section 51.308(e)(2)(v) provides that States may, at their option, include geographic enhancements in an emissions trading program or other alternative measure. We proposed changes to § 51.308(e)(2)(i), (ii), and (vi), but not to paragraph (e)(2)(v). In addition, § 51.309(f)(4) had contained a provision for optional geographic enhancements, similar to that in § 51.308(e)(2)(v). However, as explained in the preamble of the August 1 proposal, the ''Annex'' mechanism embodied in § 309(f) is no longer necessary or appropriate. We therefore proposed to repeal section 309(f), while incorporating certain still-relevant provisions into § 309(d)(4).

Comments. One commenter requested a clarification that the option of geographic enhancements is preserved for the WRAP program through the cross-reference to § 51.308(e)(2) that appeared in proposed § 51.309(d)(4)(i).

Final Rule. We agree with the commenter that geographic enhancements are retained as an option under the WRAP program. The geographic enhancement provision is contained within § 51.308(e)(2), the general requirements for trading programs or other alternative measures in lieu of BART. The geographic enhancement provision within § 51.308(e)(2) provides a mechanism which could affect the milestones. The proposed rule relied upon the fact that § 51.309(d)(4) would require that the WRAP stationary source milestones comply with the provisions of § 51.308(e)(2), which include the geographic enhancement provision. However, for additional clarity, we have added a geographic enhancement provision specific to the WRAP program in § 51.309(d)(4)(v).

Tribal Issues

Proposal. Throughout the preamble to the proposed rule, we referred to Tribes along with States in recognition that tribes may be delegated authority to implement CAA programs, as provided in section 301(d) of the CAA and the Tribal Authority Rule (§§ 49.1 through 49.11). We proposed to retain, in the text of the rule at proposed § 51.309(c), the provision that Indian Tribes may submit implementation plans after the proposed deadline of December 17, 2007.

Comments. One commenter included two issues related to Tribes. First, the commenter stated that participation in a program under this rule would not be ''a trivial exercise for any Tribal program to accomplish given most tribal programs lack the staff and expertise of state air programs,'' and requested that EPA recognize this reality. The second comment was specifically focused on the Tribal allowance set-aside provision of the former ''Annex'' program. The commenter noted that the rule as proposed did not contain a specific requirement for a Tribal set-aside, presumably due to the fact that the Annex rule had been vacated and that EPA was therefore aware of the need to avoid the inclusions of ''provisions of the Annex rule that were directly or indirectly dependent or related to the specific quantitative milestones contained in the Annex.'' The commenter noted that in the 2003 approval of the WRAP Annex, EPA had specified that the Tribal set-aside provision was the one element of the allocation methodology that was appropriate for treatment in the Federal regulation (rather than in SIPs and Tribal implementation plans (TIPs)). The commenter therefore requested that EPA clarify ''what expectations it has regarding the consistency of tribal set aside provisions between the section 309 SIPs submitted by various states, and what role, if any, EPA would play in assuring implementation of such provisions.''

Final Rule. The EPA agrees that regulatory activities such as BART determinations and the development of trading programs is not by any means trivial and would be difficult to perform or participate in with the small staffs and limited resources typical of many nascent Tribal air programs. Fortunately, there are few BART-eligible sources within Indian country across the nation. Also, EPA has provided funding as well as technical and other forms of support to the five RPOs established to serve both State and Tribal needs in regional haze planning. EPA has an ongoing commitment to insure that tribal interests are addressed within the RPO process. Also, EPA is committed to fulfilling its responsibility to implement CAA provisions in Indian country as necessary and appropriate, in consultation with any affected Tribes.

The EPA agrees with the commenter's assessment that the reason a tribal allowance set-aside was not included in the proposal was that the set-aside provision in the Annex was integrally related to the milestones previously submitted. The Tribal set-aside was developed voluntarily by the WRAP and not in response to any CAA requirement. Having been so developed, EPA determined at the time of the Annex rule approval that it was appropriate for inclusion within section 309, in order to provide an efficient mechanism to implement the set-aside. Given that the *CEED* v. *EPA* decision necessitates that States and Tribes be given the opportunity to revisit the milestones, that there is no CAA provision that requires a Tribal set-aside, and that the details of the WRAP's emissions trading program will be developed directly in SIPs and TIPs without the intermediary step of codifying detailed requirements in an Annex-like Federal rule, the EPA believes it would be inappropriate to attempt to mandate a Tribal allowance

set-aside at this time. However, the EPA does continue to encourage States and Tribes in the WRAP as well as elsewhere to develop mechanisms to address Tribal interests and concerns, such as allowance set-asides. We will review SIPs and TIPs submitted under section 309 to insure that the allocation methodologies, including any Tribal provisions, are consistent among jurisdictions and will provide the certainty and regularity necessary for a functioning market. What other role, if any, the EPA will play in assuring the implementation of any Tribal set-aside provisions is dependent in large part upon the nature of the program developed by participating states and Tribes—for example, whether the program would be administered by the EPA, States and Tribes, or a third-party contractor.

Other Comments and Responses

One commenter requested that EPA make explicit in the final rule that backstop trading programs are permissible under both §§ 51.309 and 51.308 for SO_2 and NO_X. The commenter noted that the proposal preamble stated only that ''nothing precludes states outside the 9-state region from incorporating elements of the GCVTC strategies into their SIPs.'' While this would indicate that the section 309 program (including the backstop trading program) could be expanded geographically, it does not address the question of whether the backstop approach could be utilized, either inside or outside the GCVTC region, for NO_X as well as SO_2.

We wish to clarify here that a backstop trading program (i.e., a system of voluntary milestones backed by an automatically required cap and trade program in the event the milestones are exceeded) could qualify as an ''other alternative measure'' under § 51.308(e)(2) as a BART substitute. This could be accomplished for any visibility impairing pollutant, on a pollutant-by-pollutant basis. The key distinction between programs under §§ 51.308 and 51.309 is that under § 51.309, the reasonable progress requirements for SO_2, with respect to the 16 Class I areas on the Colorado plateau, have already been defined by the GCVTC. With respect to SO_2 reductions to meet reasonable progress requirements at other Class I areas, and with respect to other pollutants such as NO_X, the emission reductions requirements remain to be determined. This could be accomplished either according to the reasonable progress requirements of § 51.308(d)(1), in the case of a program designed to meet reasonable progress goals; or through source-by-source BART determinations as described in this rule, for programs designed only to satisfy BART. Provided these requirements are met, it is acceptable for a State to use a backstop trading program under § 51.308.

Finally, we note that there was an obvious omission in the proposed provisions regarding the comparison of actual emissions to the emissions milestones. Specifically, proposed § 51.309(d)(4)(i) provided for the use of a 3-year rolling average of actual emissions for this purpose. This does not account for the fact that it is not possible to generate a 3-year average during the first two years of emission tracking. Therefore, the final rule provides that for the first 2 years, compliance with the milestones may be measured by a methodology of the States' choosing, so long as all States in the program use the same methodology. After the first 2 years of the program, compliance with the annual milestones may be measured by comparing a 3-year rolling average of actual emissions with a rolling average of the emissions milestones for the same 3 years.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the EO. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

Today's rule provides States and interested Tribes with optional means, such as emissions trading programs, to comply with CAA requirements for BART. The rule requires that alternatives achieve greater ''reasonable progress'' towards CAA visibility goals than would source-by-source BART. By their nature, emissions trading programs are designed to achieve a given level of environmental improvement in the most cost-effective manner possible. Therefore, today's rule will achieve at least as great a societal benefit as source-by-source BART, at a social cost that is likely to be less than, or at worst equal to, the social costs of source-by-source BART.

In the Regulatory Impact Analysis (RIA) for our recent promulgation of the source-by-source BART guidelines, we determined that the social costs of source-by-source BART for both EGUs and non-EGUs nationwide was between $0.3 and $2.9 billion (1999 dollars), depending on the level of stringency implemented by States and on the interest rate used. The human health benefits of BART, in contrast, ranged from $1.9 to $12 billion (1999 dollars), depending on the same variables. These figures do not include many other human health benefits that could not be quantified or monetized, including all benefits attributable to ozone reduction (the benefits were based on reductions in PM only). In addition, economic benefits due to visibility improvement in the southeastern and southwestern U.S. were estimated to be from $80 million to $420 million. Finally, BART would also produce visibility benefits in other parts of the country, and non-visibility ecosystem benefits, which were also not quantified. Therefore, the social benefits of BART far outweigh the social costs.

It is not possible to perform an economic analysis of today's rule because the actual parameters of any trading programs in lieu of BART will be determined by States and Tribes. However, because trading program alternatives would produce comparable overall benefits (in the course of satisfying the requirement to achieve greater ''reasonable progress'' towards visibility goals) and use market forces to reduce costs, the benefits of today's rule would also far outweigh the costs.

B. Paperwork Reduction Act

This action does not add any new requirements involving the collection of information as defined by the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* This action does not impose any new collections that would require an amendment to the existing approved Information Collection Request (ICR). The OMB has approved the information collection requirements contained in the final Regional Haze regulations (64 FR 35714, July 1, 1999) and has assigned OMB control number 2060–0421 (EPA ICR No. 1813.04). A copy of the OMB approved ICR may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672.

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 utilize 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 part 9 and 48 CFR chapter 15.

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 Procedure 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 proposed rulemaking on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (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 economic impacts of today's rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This rule will not impose any requirements on small entities. This rule revises the provisions of the Regional Haze Rule governing alternative trading programs, and provides additional guidance to States, which are not defined as small entities. In addition, we did not receive any comments relating to potential impacts on small entities as a result of this rulemaking.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Public Law 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. In addition, before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We believe 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 State, local or Tribal governments or the private sector. In addition, the program contained in section 51.309, including today's revisions, is an optional program. Because the alternative trading programs under §§ 51.308 and 51.309 are options that each of the States may choose to exercise, these revisions to §§ 51.308 and 51.309 do not establish any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments. The program is not required and, thus is clearly not a ''mandate.'' Moreover, as explained above, today's rule would reduce any regulatory burdens. Accordingly, this rule will not result in expenditures to State, local, and Tribal governments, in the aggregate, or the private sector, of $100 million or more in any given year. Thus, EPA is not obligated, under section 203 of UMRA, to develop a small government agency plan.

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.

We have concluded that today's rule does not have federalism implications. It does 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 described above, this rule contains revisions to sections 51.308 and 51.309 of the Regional Haze Rule which will reduce any regulatory burden on the States. In addition, these are optional programs for States. These revisions to sections 51.308 and 51.309, accordingly, will not directly impose significant new requirements on State and local governments. Moreover, even if today's revisions did have federalism implications, these revisions would not impose substantial direct compliance costs on State or local governments, nor would they preempt State law. Thus, Executive Order 13132 does not apply to this rule.

Consistent with EPA policy, we nonetheless did consult with representatives of State and local governments in developing this final rule. This rule directly implements specific recommendations from the WRAP, which includes representatives from all the affected States.

In addition, 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.

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 develop an accountable process to 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 the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

Tribes who participate in this rule will experience an overall reduction in regulatory burden. Moreover, the §§ 51.308 (e)(2) and 51.309 programs are optional programs for Tribes. Accordingly, this rule would not have Tribal implications. In addition, this rule directly implements specific recommendations from the WRAP, which includes representatives of Tribal governments. Thus, although this rule does not have Tribal implications, representatives of Tribal governments have had the opportunity to provide input into development of the recommendations forming its basis.

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 Agency 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 the Agency.

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 section 5–501 of the Order has the potential to influence the regulation. Similarly to the recently finalized source-specific BART revisions (70 FR 39104, July 6, 2005), this rule is not subject to Executive Order 13045 because it does not establish an environmental standard based on health or safety risks. Therefore, this rule does not involve decisions on environmental health or safety risks that may disproportionately affect children. We believe that the emissions reductions from the control strategies considered in this rulemaking will further improve air quality and will further improve children's health.

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

This rule is not subject to Executive Order 13211, ''Actions that Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This rule is not a ''significant energy action,'' because it will have less than a 1 percent impact on the cost of energy production and does not exceed other factors described by OMB that may indicate a significant adverse effect. (See, ''Guidance for Implementing E.O. 13211,'' OMB Memorandum 01–27 (July 13, 2001) *www.whitehouse.gov/omb/memoranda/m01–27.html*.)

This rule provides an optional cost-effective and less burdensome alternative to source-by-source BART as recently finalized (70 FR 39104, July 6, 2005); we have already found that source-by-source BART is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The 1999 Regional Haze Rule provides substantial flexibility to the States, allowing them to adopt alternative measures such as a trading program in lieu of requiring the installation and operation of BART on a source-by-source basis. This rule contains provisions governing these alternative measures, which provides an alternative to BART that reduces the overall cost of the regulation and its impact on the energy supply.

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 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.

This rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards. We specifically invited commenters to identify potentially-applicable voluntary consensus standards and to explain why such standards should be used in this regulation; no commenters responded.

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 requirements of Executive Order 12898 have been previously addressed to the extent practicable in the RIA for the Regional Haze Rule (cited above),

particularly in chapters 2 and 9 of the RIA. This rule makes no changes that would have a disproportionately high and adverse human health or environmental effect on minorities and low-income populations.

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 United States. We 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 United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective December 12, 2006.

IV. Statutory Provisions and Legal Authority

Statutory authority for today's rule comes from sections 169A and 169B of the CAA (42 U.S.C. 7491 and 7492). These sections require EPA to issue regulations that will require States to revise their SIPs to ensure that reasonable progress is made toward the national visibility goals specified in section 169A.

List of Subjects in 40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: October 5, 2006.

Stephen L. Johnson,

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:

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

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

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

Subpart P—Protection of Visibility

■ 2. Section 51.308 is amended as follows:

■ a. By revising paragraph (e)(1)(ii)(C).

■ b. By revising paragraphs (e)(2) introductory text and (e)(2)(i).

■ c. By removing and reserving paragraph (e)(1)(ii).

■ d. By adding paragraph (e)(2)(vi).

■ e. By revising paragraph (e)(4).

§ 51.308 Regional haze program requirements.

* * * * *

(e) * * *

(1) * * *

(ii) * * *

(C) Exception. A State is not required to make a determination of BART for SO_2 or for NO_X if a BART-eligible source has the potential to emit less than 40 tons per year of such pollutant(s), or for PM_{10} if a BART-eligible source has the potential to emit less than 15 tons per year of such pollutant.

* * * * *

(2) A State may opt to implement or require participation in an emissions trading program or other alternative measure rather than to require sources subject to BART to install, operate, and maintain BART. Such an emissions trading program or other alternative measure must achieve greater reasonable progress than would be achieved through the installation and operation of BART. For all such emission trading programs or other alternative measures, the State must submit an implementation plan containing the following plan elements and include documentation for all required analyses:

(i) A demonstration that the emissions trading program or other alternative measure will achieve greater reasonable progress than would have resulted from the installation and operation of BART at all sources subject to BART in the State and covered by the alternative program. This demonstration must be based on the following:

(A) A list of all BART-eligible sources within the State.

(B) A list of all BART-eligible sources and all BART source categories covered by the alternative program. The State is not required to include every BART source category or every BART-eligible source within a BART source category in an alternative program, but each BART-eligible source in the State must be subject to the requirements of the alternative program, have a federally enforceable emission limitation determined by the State and approved by EPA as meeting BART in accordance with section 302(c) or paragraph (e)(1) of this section, or otherwise addressed under paragraphs (e)(1) or (e)(4)of this section.

(C) An analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each source within the State subject to BART and covered by the alternative program. This analysis must be conducted by making a determination of BART for each source subject to BART and covered by the alternative program as provided for in paragraph (e)(1) of this section, unless the emissions trading program or other alternative measure has been designed to meet a requirement other than BART (such as the core requirement to have a long-term strategy to achieve the reasonable progress goals established by States). In this case, the State may determine the best system of continuous emission control technology and associated emission reductions for similar types of sources within a source category based on both source-specific and category-wide information, as appropriate.

(D) An analysis of the projected emissions reductions achievable through the trading program or other alternative measure.

(E) A determination under paragraph (e)(3) of this section or otherwise based on the clear weight of evidence that the trading program or other alternative measure achieves greater reasonable progress than would be achieved through the installation and operation of BART at the covered sources.

(ii) [Reserved]

* * * * *

(vi) For plans that include an emissions trading program that establishes a cap on total annual emissions of SO_2 or NO_X from sources subject to the program, requires the owners and operators of sources to hold allowances or authorizations to emit equal to emissions, and allows the owners and operators of sources and other entities to purchase, sell, and transfer allowances, the following elements are required concerning the emissions covered by the cap:

(A) Applicability provisions defining the sources subject to the program. The State must demonstrate that the applicability provisions (including the size criteria for including sources in the program) are designed to prevent any significant potential shifting within the State of production and emissions from sources in the program to sources outside the program. In the case of a program covering sources in multiple States, the States must demonstrate that

the applicability provisions in each State cover essentially the same size facilities and, if source categories are specified, cover the same source categories and prevent any significant, potential shifting within such States of production and emissions to sources outside the program.

(B) Allowance provisions ensuring that the total value of allowances (in tons) issued each year under the program will not exceed the emissions cap (in tons) on total annual emissions from the sources in the program.

(C) Monitoring provisions providing for consistent and accurate measurements of emissions from sources in the program to ensure that each allowance actually represents the same specified tonnage of emissions and that emissions are measured with similar accuracy at all sources in the program. The monitoring provisions must require that boilers, combustion turbines, and cement kilns in the program allowed to sell or transfer allowances must comply with the requirements of part 75 of this chapter. The monitoring provisions must require that other sources in the program allowed to sell or transfer allowances must provide emissions information with the same precision, reliability, accessibility, and timeliness as information provided under part 75 of this chapter.

(D) Recordkeeping provisions that ensure the enforceability of the emissions monitoring provisions and other program requirements. The recordkeeping provisions must require that boilers, combustion turbines, and cement kilns in the program allowed to sell or transfer allowances must comply with the recordkeeping provisions of part 75 of this chapter. The recordkeeping provisions must require that other sources in the program allowed to sell or transfer allowances must comply with recordkeeping requirements that, as compared with the recordkeeping provisions under part 75 of this chapter, are of comparable stringency and require recording of comparable types of information and retention of the records for comparable periods of time.

(E) Reporting provisions requiring timely reporting of monitoring data with sufficient frequency to ensure the enforceability of the emissions monitoring provisions and other program requirements and the ability to audit the program. The reporting provisions must require that boilers, combustion turbines, and cement kilns in the program allowed to sell or transfer allowances must comply with the reporting provisions of part 75 of this chapter, except that, if the Administrator is not the tracking system administrator for the program, emissions may be reported to the tracking system administrator, rather than to the Administrator. The reporting provisions must require that other sources in the program allowed to sell or transfer allowances must comply with reporting requirements that, as compared with the reporting provisions under part 75 of this chapter, are of comparable stringency and require reporting of comparable types of information and require comparable timeliness and frequency of reporting.

(F) Tracking system provisions which provide for a tracking system that is publicly available in a secure, centralized database to track in a consistent manner all allowances and emissions in the program.

(G) Authorized account representative provisions ensuring that the owners and operators of a source designate one individual who is authorized to represent the owners and operators in all matters pertaining to the trading program.

(H) Allowance transfer provisions providing procedures that allow timely transfer and recording of allowances, minimize administrative barriers to the operation of the allowance market, and ensure that such procedures apply uniformly to all sources and other potential participants in the allowance market.

(I) Compliance provisions prohibiting a source from emitting a total tonnage of a pollutant that exceeds the tonnage value of its allowance holdings, including the methods and procedures for determining whether emissions exceed allowance holdings. Such method and procedures shall apply consistently from source to source.

(J) Penalty provisions providing for mandatory allowance deductions for excess emissions that apply consistently from source to source. The tonnage value of the allowances deducted shall equal at least three times the tonnage of the excess emissions.

(K) For a trading program that allows banking of allowances, provisions clarifying any restrictions on the use of these banked allowances.

(L) Program assessment provisions providing for periodic program evaluation to assess whether the program is accomplishing its goals and whether modifications to the program are needed to enhance performance of the program.

* * * * *

(4) A State that chooses to meet the emission reduction requirements of the Clean Air Interstate Rule (CAIR) by participating in one or more of the EPA-administered CAIR trading programs for SO_2 and NO_X need not require BART—eligible EGUs subject to such trading programs in the State to install, operate, and maintain BART for the pollutants covered by such trading programs in the State. A State may choose to participate in the EPA-administered CAIR trading programs either by submitting a State implementation plan that incorporates the CAIR model trading rules in part 96 of this chapter, and is approved, in accordance with § 51.123(o)(1) or (2) (for the NO_X annual program) and (aa)(1) or (2) (for the NO_X ozone season program) and § 51.124(o)(1) or (2) (for the SO_2 program) or by remaining subject to the Federal implementation plan in part 97 of this chapter (which may be modified by a State implementation plan approved in accordance with §§ 51.123(p) and (ee) and 51.124(r)). A State that chooses to participate in such trading programs may also adopt provisions, consistent with such trading programs, for a geographic enhancement to the program to address the requirement under § 51.302(c) related to BART for reasonably attributable impairment from the pollutants covered by the CAIR cap-and-trade programs.

* * * * *

■ 3. 51.309 is amended as follows:
■ a. By revising paragraph (a).
■ b. By revising paragraphs (b)(5) and (b)(7).
■ c. By removing and reserving paragraphs (b)(9) through (b)(12).
■ d. By revising paragraph (c).
■ e. By revising paragraphs (d)(1) and (d)(4)(i) through (d)(4)(v).
■ f. By adding paragraphs (d)(4)(vi) and (d)(4)(vii).
■ g. By revising paragraph (d)(10) introductory text.
■ h. By removing and reserving paragraph (f).
■ i. By revising paragraph (g).
■ j. By removing paragraph (h).

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

(a) What is the purpose of this section? This section establishes the requirements for the first regional haze implementation plan to address regional haze visibility impairment in the 16 Class I areas covered by the Grand Canyon Visibility Transport Commission Report. For the period through 2018, certain States (defined in paragraph (b) of this section as Transport Region States) may choose to implement the Commission's recommendations within the framework of the national regional haze program

and applicable requirements of the Act by complying with the provisions of this section. If a Transport Region State submits an implementation plan which is approved by EPA as meeting the requirements of this section, it will be deemed to comply with the requirements for reasonable progress with respect to the 16 Class I areas for the period from approval of the plan through 2018. Any Transport Region State electing not to submit an implementation plan under 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. Except as provided in paragraph (g) of this section, each Transport Region State is also subject to the requirements of § 51.308 with respect to any other Federal mandatory Class I areas within the State or affected by emissions from the State.

(b) * * *

(5) Milestone means the maximum level of annual regional SO_2 emissions, in tons per year, for a given year, assessed annually, through the year 2018, consistent with paragraph (d)(4) of this section.

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(7) Base year means the year for which data for a source included within the program were used by the WRAP to calculate emissions as a starting point for development of the milestone required by paragraph (d)(4)(i) of this section.

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(c) Implementation Plan Schedule. Each Transport Region State electing to submit an implementation plan under this section must submit such a plan no later than December 17, 2007. Indian Tribes may submit implementation plans after this deadline.

(d) * * *

(1) Time period covered. The implementation plan must be effective through December 31, 2018 and continue in effect until an implementation plan revision is approved by EPA in accordance with § 51.308(f).

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(4) * * *

(i) Provisions for stationary source emissions of SO_2. The plan submission must include a SO_2 program that contains quantitative emissions milestones for stationary source SO_2 emissions for each year through 2018. After the first two years of the program, compliance with the annual milestones may be measured by comparing a three-year rolling average of actual emissions with a rolling average of the emissions milestones for the same three years. During the first two years of the program, compliance with the milestones may be measured by a methodology of the States' choosing, so long as all States in the program use the same methodology. Compliance with the 2018 milestone shall be measured by comparing actual emissions from the year 2018 with the 2018 milestone. The milestones must provide for steady and continuing emissions reductions through 2018 consistent with the Commission's definition of reasonable progress, its goal of 50 to 70 percent reduction in SO_2 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 any deficiencies which will be due in the years 2013 and 2018. The milestones must be shown to provide for greater reasonable progress than would be achieved by application of BART pursuant to § 51.308(e)(2).

(ii) Documentation of emissions calculation methods for SO_2. The plan submission must include documentation of the specific methodology used to calculate SO_2 emissions during the base year for each emitting unit included in the program. 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) Monitoring, recordkeeping, and reporting of SO_2 emissions. The plan submission must include provisions requiring the monitoring, recordkeeping, and annual reporting of actual stationary source SO_2 emissions within the State. The monitoring, recordkeeping, and reporting data must be sufficient to determine annually whether the milestone for each year through 2018 is achieved. The plan submission must provide for reporting of these data by the State to the Administrator and to the regional planning organization. The plan must provide for retention of records for at least 10 years from the establishment of the record.

(iv) Criteria and Procedures for a Market Trading Program. The plan must include the criteria and procedures for conducting an annual evaluation of whether the milestone is achieved and, in accordance with paragraph (d)(4)(v) of this section, for activating a market trading program in the event the milestone is not achieved. A draft of the annual report evaluating whether the milestone for each year is achieved shall be completed no later than 12 months from the end of each milestone year. The plan must also provide for assessments of the program in the years 2013 and 2018.

(v) Market Trading Program. The implementation plan must include requirements for a market trading program to be implemented in the event that a milestone is not achieved. The plan shall require that the market trading program be activated beginning no later than 15 months after the end of the first year in which the milestone is not achieved. The plan shall also require that sources comply, as soon as practicable, with the requirement to hold allowances covering their emissions. Such market trading program must be sufficient to achieve the milestones in paragraph (d)(4)(i) of this section, and must be consistent with the elements for such programs outlined in § 51.308(e)(2)(vi). Such a program may include a geographic enhancement to the program to address the requirement under § 51.302(c) related to BART for reasonably attributable impairment from the pollutants covered under the program.

(vi) Provision for the 2018 milestone.

(A) Unless and until a revised implementation plan is submitted in accordance with § 51.308(f) and approved by EPA, the implementation plan shall prohibit emissions from covered stationary sources in any year beginning in 2018 that exceed the year 2018 milestone. In no event shall a market-based program approved under § 51.308(f) allow an emissions cap for SO_2 that is less stringent than the 2018 milestone, unless the milestones are replaced by a different program approved by EPA as meeting the BART and reasonable progress requirements established in § 51.308.

(B) The implementation plan must provide a framework, including financial penalties for excess emissions based on the 2018 milestone, sufficient to ensure that the 2018 milestone will be met even if the implementation of the market trading program in paragraph (d)(4)(v) of this section has not yet been triggered, or the source allowance compliance provision of the trading program is not yet in effect.

(vii) Provisions for stationary source emissions of NO_X and PM. The implementation plan must contain any necessary long term strategies and BART requirements for stationary source PM and NO_X emissions. Any such BART provisions may be submitted pursuant to either § 51.308(e)(1) or '51.308(e)(2).

* * * * *

(10) Periodic implementation plan revisions. Each Transport Region State

must submit to the Administrator periodic reports in the years 2013 and 2018. The progress reports must be in the form of implementation plan revisions that comply with the procedural requirements of §§ 51.102 and 51.103.

* * * * *

(f) [Reserved]

(g) Additional Class I areas. Each Transport Region State implementing the provisions of this section as the basis for demonstrating reasonable progress for mandatory Class I Federal areas other than the 16 Class I areas must include the following provisions in its implementation plan. If a Transport Region State submits an implementation plan which is approved by EPA as meeting the requirements of this section, it will be deemed to comply with the requirements for reasonable progress for the period from approval of the plan to 2018.

(1) A demonstration of expected visibility conditions for the most impaired and least impaired days at the additional mandatory Class I Federal area(s) based on emissions projections from the long-term strategies in the implementation plan. This demonstration may be based on assessments conducted by the States and/or a regional planning body.

(2) Provisions establishing reasonable progress goals and implementing any additional measures necessary to demonstrate reasonable progress for the additional mandatory Federal Class I areas. These provisions must comply with the provisions of § 51.308(d)(1) through (4).

(i) In developing long-term strategies pursuant to § 51.308(d)(3), the State may build upon the strategies implemented under paragraph (d) of this section, and take full credit for the visibility improvement achieved through these strategies.

(ii) The requirement under § 51.308(e) related to Best Available Retrofit Technology for regional haze is deemed to be satisfied for pollutants addressed by the milestones and backstop trading program if, in establishing the emission reductions milestones under paragraph (d)(4) of this section, it is shown that greater reasonable progress will be achieved for these additional Class I areas than would be achieved through the application of source-specific BART emission limitations under § 51.308(e)(1).

(iii) The Transport Region State may consider whether any strategies necessary to achieve the reasonable progress goals required by paragraph (g)(2) of this section are incompatible with the strategies implemented under paragraph (d) of this section to the extent the State adequately demonstrates that the incompatibility is related to the costs of the compliance, the time necessary for compliance, the energy and no air quality environmental impacts of compliance, or the remaining useful life of any existing source subject to such requirements.

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