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

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[FRL–7944–6]

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: Proposed rule.

SUMMARY: On July 1, 1999, EPA promulgated regulations to address regional haze (64 FR 35714). These regulations were 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. *American Corn Growers Ass'n* v. *EPA*, 291 F.3d 1 (D.C. Cir. 2002). On June 15, 2005, we finalized a rule addressing the court's ruling in that case. On February 18, 2005, the U.S. Court of Appeals for the District of Columbia Circuit issued another ruling vacating the regional haze rule in part and sustaining it in part. *Center for Energy and Economic Development* v. *EPA*, No. 03–1222, (D.C. Cir. Feb. 18, 2005) ("CEED v. EPA"). In this case, the court granted a petition challenging provisions of the regional haze rule governing the optional emissions trading program for certain western States and Tribes (the "WRAP Annex Rule"). Today's proposed rule would revise the provisions of the regional haze rule governing alternative trading programs, and would provide additional guidance that is needed.

DATES: Comments must be received on or before September 17, 2005. A public hearing will be held on August 17, 2005, in Denver, Colorado. Please refer to the section on **SUPPLEMENTARY INFORMATION** for more information on the comment period and the public hearing.

ADDRESSES: Submit your comments, identified by Docket ID No. OAR–2002–0076 by one of the following methods:

Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

Agency Web site: *http://www.epa.gov/edocket*. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.

E-mail: *http://www.epa.gov/edocket*.

Fax: 202–566–1741.

Mail: OAR Docket, Environmental Protection Agency, Mailcode: B102, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of 2 copies.

Hand Delivery: EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. OAR–2002–0076. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the federal regulations.gov Web sites are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).

For additional instructions on submitting comments, go to unit II of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET 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 OAR Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Kathy Kaufman at 919–541–0102 or by e-mail at *kaufman.kathy@epa.gov* or Todd Hawes at 919–541–5591 or by e-mail at *hawes.todd@epa.gov*.

SUPPLEMENTARY INFORMATION: *Regulated Entities.* This proposed 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 Part 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.

What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through EDOCKET, regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

A. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

B. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

C. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

D. Describe any assumptions and provide any technical information and/or data that you used.

E. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

F. Provide specific examples to illustrate your concerns, and suggest alternatives.

G. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

H. Make sure to submit your comments by the comment period deadline identified.

Public Hearing

The EPA will hold one public hearing on today's proposal. The hearing will be on August 17, 2005, at the EPA Region 8 Office Conference Center (second floor), 999–18th St. Suite 300, Denver, CO 80202–2466. Because the hearing is being held at U.S. government facilities, everyone planning to attend the hearing should be prepared to show valid picture identification to the security staff in order to gain access to the meeting room. The public hearings will begin at 8 a.m. and continue until 12 p.m. Oral testimony will be limited to 5 minutes per commenter. The EPA encourages commenters to provide written versions of their oral testimonies either electronically (on computer disk or CD–ROM) or in paper copy. Verbatim transcripts and written statements will be included in the rulemaking docket. If you would like to present oral testimony at the hearing, please notify Kathy Kaufman at 919–541–0102 or by e-mail at *kaufman.kathy@epa.gov* or Todd Hawes at 919–541–5591 or by e-mail at *hawes.todd@epa.gov* by August 7. Persons wishing to present oral testimony that have not made arrangements in advance should register by 9 a.m. the day of the hearing. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning the proposed rules. The EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations or comments at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at a public hearing.

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

I. Overview and Background
II. Revisions to Regional Haze Rule § 51.308(e)(2)
  A. Revisions Related to the Demonstration That an Alternative Program Makes Greater Reasonable Progress than BART
  B. State Options for Complying with § 51.308(e)(2)(i) as Proposed
  C. Analysis under § 51.308(e)(2) when an independent requirement determines the level of emission reductions needed
  D. Revisions to § 51.308(e)(2) to standardize and clarify the minimum elements of emissions trading programs in lieu of BART
III. Revisions to Regional Haze Rule § 51.309
  A. Background
  B. Proposed Regulatory Framework for States choosing to implement the GCVTC/WRAP Strategies
IV. Statutory and Executive Order Reviews
  A. Executive Order 12866: Regulatory Planning and Review
  B. Paperwork Reduction Act
  C. Regulatory Flexibility Act
  D. Unfunded Mandates Reform Act
  E. Executive Order 13132: Federalism
  F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
  G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks
  H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use.
  I. National Technology Transfer Advancement Act
  J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

I. Overview and Background

Today's rulemaking provides the following changes to the regional haze regulations:

(1) revised regulatory text in § 51.308(e)(2)(i) in response to the CEED 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, including the application of BART presumptions for EGUs as contained in Appendix Y to 40 CFR 51.

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

(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* decision.

How This Preamble Is Structured. Section I provides background on the Clean Air Act (CAA) BART requirements as codified in the regional haze rule, on the DC Circuit Court decision which remanded parts of the rule, and on the June 2005 BART rule. Section II discusses specific issues relating to the proposed 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 proposed 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 a final rule to address a type of visibility impairment known as regional haze (64 FR 35714, July 1, 1999). The regional haze rule requires States to submit implementation plans (SIPs) to address regional haze visibility impairment in 156 Federally-protected parks and wilderness areas. These 156 scenic areas are called "mandatory Class I Federal areas" in the Clean Air Act (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 40 CFR 51.308(e), and in definitions that appear in 40 CFR 51.301.

In the preamble to the regional haze rule, we committed to issuing further guidelines to clarify the requirements of the BART provision. We announced

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

these final guidelines on June 15, 2005.[2] 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 controls in light of the statutory factors listed above ("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 a Class I area]," shall install the best available retrofit technology for controlling emissions.[3] 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.

The regional haze rule addresses visibility impairment resulting from emissions from a multitude of sources located across a wide geographic area. 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 adopted 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. 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. Similarly, we 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.[4]

The 1999 regional haze rule also included § 51.309, containing the strategies developed by the Grand Canyon Visibility Transport Commission (GCVTC). Certain western States and Tribes were eligible to submit implementation plans under § 51.309 as an alternative method of achieving reasonable progress for Class I areas which were 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 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 §§ 51.309(d)(4) and 51.309(f).

American Corn Growers v. EPA

In *American Corn Growers* v. *EPA*, 291 F.3d 1 (DC Cir. 2002), 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 Act. 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 signed on June 15, 2005 responded to the *American Corn Growers* court's decision on the BART provisions by amending the regional haze rule at 40 CFR 51.308 and by finalizing changes to the BART guidelines at 40 CFR part 51, appendix Y.[5] 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 § 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.

The Annex Rule

In a rule dated June 5, 2003, EPA approved the WRAP's Annex to the GCVTC report, which had been submitted by the WRAP prior to October 1, 2000, in accordance with § 51.309(f). 68 FR 33764, June 5, 2003. 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 § 51.309(f). EPA therefore codified the Annex provisions in § 51.309(h). Subsequently, five States and one local agency submitted SIPs developed to comply with all of § 51.309, including the Annex provisions at § 51.309(h). In accordance with § 51.309(c) these SIPs were submitted prior to December 31, 2003.

[2] See *http://www.epa.gov/visibility/actions.html#bart1.*

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

[4] See 66 FR 35737–35743 for a discussion of the rationale for the BART requirements in the 1999 regional haze rule.

[5] *http://www.epa.gov/visibility/actions.html#bart1.*

Center for Energy and Economic Development v. EPA

After the May 2004 reproposal of the BART guidelines, the DC Circuit decided another case where BART provisions were at issue, *Center for Energy and Economic Development* v. *EPA*, No. 03–1222, (D.C. Cir. Feb. 18, 2005) ("CEED v. EPA"). In this case, the court granted a petition challenging provisions of the regional haze rule governing the optional emissions trading program for certain western States and Tribes (the "WRAP Annex Rule").

The court in *CEED* affirmed our interpretation of CAA 169A(b)(2) as allowing for non-BART alternatives where those alternatives are demonstrated to make greater progress than BART. (CEED, slip. op. at 13). The court, however, took issue with provisions of the regional haze rule governing the methodology of that demonstration. Specifically, 40 CFR 51.308(e)(2) 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 40 CFR 51.309(f)). The court held that we 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 40 CFR 51.308(e)(2). This guidance included criteria for demonstrating that the alternative program achieves greater progress towards eliminating visibility impairment than would BART.

In light of the DC Circuit's decision in CEED, we did not address alternative programs in the rulemaking finalizing the BART guidelines. However we note that our authority to address BART through alternative means was upheld in CEED, and we remain committed to providing States with that flexibility. Today's proposed revisions to the Regional Haze Rule, which responds to the holding in CEED, would provide that flexibility that States need to implement alternatives to BART.

Overview of Proposed 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 accomplish the requirements of the regional haze rule, including BART. We believe such strategies have the potential to achieve greater progress towards the national visibility goals, and to do so in the most cost effective manner practicable. Therefore, we are proposing the following amendments to the regional haze rule at §§ 51.308(e)(2) and 51.309 to enable States to continue to develop and implement such programs. We request comment on all of the provisions in this proposed rule.

First, we are proposing amending the generally applicable provisions in § 51.308(e)(2) prescribing the type of analysis used to determine emissions reductions achievable from source-by-source BART, for purposes of comparing to the alternative program. The proposed amendments would: reconcile the methodology with the court's decision in *CEED* v. *EPA;* provide additional guidance to States and Tribes regarding the minimum elements of an acceptable cap and trade program; and provide for consistent application of the BART guidelines for EGUs between source-by-source programs and alternative cap and trade programs.

Second, we are proposing amendments to § 51.309 to enable certain western States and Tribes to continue to utilize the strategies contained in this section as an optional means to satisfy reasonable progress requirements for certain Class I areas, for the first long-term planning period. These changes would provide States and Tribes with an opportunity to revisit the details of the backstop SO_2 emissions trading program without being required to assess visibility on a cumulative basis when determining emissions reductions achievable by source-by-source BART.

II. Revisions to Regional Haze Rule Section § 51.308(e)(2)

A. Revisions Related to the Demonstration That an Alternative Program Makes Greater Reasonable Progress Than BART

The DC Circuit's decision in *CEED* v. *EPA* prohibits the Agency from requiring that a BART alternative trading program be compared to a source-by-source BART program by assessing the effect on visibility of the source-by-source BART program on a cumulative basis.

The general provision in the regional haze rule authorizing alternative programs in lieu of BART had required such an approach. See 40 CFR 51.308(e)(2)(2004). The general provision, § 51.308(e)(2), was incorporated by reference into the WRAP-specific section of the rule at § 51.309(f)(1)(I).

Section 51.308(e)(2)(i) specified the methodology for comparing a BART alternative trading program against source-by-source BART. This provision required States to demonstrate that a "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." The methodology consisted of three steps, quoted here in full:

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

(B) 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. In this analysis, the State must take into consideration the technology available, the costs of compliance, the energy and nonair quality environmental impacts of compliance, any pollution control equipment in use at the source, and the remaining useful life of the source. The best system of continuous emission control technology and the above factors may be determined on a source category basis. The State may elect to consider both source-specific and category-wide information, as appropriate, in conducting its analysis.

(C) An analysis of the degree of visibility improvement that would be achieved in each mandatory Class I Federal area as a result of the emission reductions achievable from all such sources subject to BART located within the region that contributes to visibility impairment in the Class I area, based on the analysis conducted under § 51.308(e)(2)(i)(B).

Although the DC Circuit had found this methodology to be inconsistent with the statutory requirements for source-by-source BART, when EPA revised the regional haze rule to incorporate the WRAP Annex in 2003, we did not believe that the decision in *American Corn Growers* in any way affected our ability to approve alternative measures such as trading programs. In reviewing our approval of the Annex submitted by the WRAP, however, the *CEED* court stated that EPA could not "under section 309 require states to exceed invalid emission reductions." The court granted the petition challenging the Annex because, consistently with § 51.308(e)(2)(i), EPA's regulations had required States to consider "the impact of all emissions reductions to estimate visibility progress."

Based on our review of the *CEED* court's ruling, we believe that our regulations, which required an analysis of emissions reductions achievable for each source that was bifurcated into an individual source assessment for the first four of the five BART factors identified in the CAA for States to consider in BART determinations,[6] and a cumulative source assessment for the fifth factor of visibility improvement, must be revised.

Revision to § 51.308(e)(2)(i) To Address CEED

We propose to revise § 51.308(e)(2)(i) to provide that BART determinations be made in the trading program context in the same manner as in the source-by-source context. This would be accomplished by a cross reference to § 51.308(e)(1) in proposed § 51.308(e)(2)(i)(C). Section 51.308(e)(1)(A), as contained in the recent action finalizing the BART guidelines, provides that the degree of visibility improvement be considered along with the other statutory factors when making BART determinations. Appendix Y to part 51 sets forth the process by which States should assess visibility improvement in BART determinations. Thus, with this amendment, the regional haze rule would not impose a bifurcated methodology for defining the level of emission reductions needed by an alternative program in lieu of BART. We believe this revision is the only regulatory change necessary to comply with the court's decision in CEED.[7] The potential range of options States would have for performing analyses in compliance with this provision is discussed in section B below.

Revisions to Demonstration Framework

The other proposed changes to § 51.308(e)(2)(i) are intended to provide a clearer framework for the demonstration that an alternative program provides greater reasonable progress than BART. Specifically, we propose revising paragraph (D) to require States to project visibility improvements resulting from the alternative program, and adding a new paragraph (E) to require that States compare the visibility results from source by source BART and the alternative program, using the test criteria in § 51.308(e)(3).

We are also clarifying the requirement in existing § 51.308(e)(2)(i)(C) that a State analyze "the degree of visibility improvement that would be achieved in each mandatory Class I Federal area as a result of the emissions reductions achievable from all such sources subject to BART located within the region that contributes to visibility impairment in the Class I area, based on the analysis conducted under [§ 51.308(e)(2)(i)(B)]." We believe this language is somewhat ambiguous, as it could be read to require an analysis for every Federal mandatory Class I area nationwide, regardless of the scope of the program at issue. Moreover, it seems to demand a determination of what region, which could be a subregion of the trading area, contributes to impairment at each Class I area. We anticipate that modeling will be conducted on a regionwide basis, based on emissions reductions achievable by BART at all sources subject to BART within the program area, rather than as a series of groupings of areas of contribution with impacted Class I areas.

To clarify that every program need not address every Class I area nationwide, we propose adding the term "affected" to modify "class I areas" in paragraph (C). As noted in the preamble discussion of the finalization in § 51.308(e)(3) of the criteria for determining whether an alternative program makes greater reasonable progress than BART, states have some discretion in defining "affected" Class I areas. See part IV.B. of final BART guideline preamble.[8] We also propose eliminating the ambiguous clause formerly in paragraph (C).

In addition, we propose to clarify (in revised paragraph (B)) that the alternative program need not cover every BART category, but must cover every BART-eligible source within an affected category. The rationale for this is discussed below in the discussion of "Minimum Universe of Affected Sources."

Finally, we propose to add a paragraph (E) which would direct the State to compare the expected visibility improvement under the alternative program and under BART according to the criteria established in § 51.308(e)(3).

With these changes, paragraphs within § 51.308(e)(2)(i) would read as follows:

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

(B) A list of all BART source categories covered by the alternative program. The State is not required to include every BART source category in the program, but for each source category covered, the State must include each BART-eligible source within that category in the analysis required by paragraph (C) below.

(C) An analysis of the degree of visibility improvement that would be achieved in each affected mandatory Class I Federal area as a result of the emission reductions projected from the installation and operation of BART controls under paragraph (e)(1) of this section at each source subject to BART in each source category covered by the program.

(D) An analysis of the emissions reductions, and associated visibility improvement anticipated at each Class I area within the State, under the trading program or other alternative measure.

(E) A determination that the emission reductions and associated visibility improvement projected under (D) above (i.e., the trading program or other alternative measure) comprise greater reasonable progress, as defined in paragraph (e)(3) of this section, than those projected under (C) above (i.e., BART).

The new § 51.308(e)(3), cross referenced in proposed § 51.308(e)(2)(i)(E) above, was finalized in the June 15, 2005 notice of final rule making for the BART guidelines. In that action, we noted that we would seek comment in this rulemaking on whether compliance with the two-pronged visibility test contained in § 51.308(e)(3) should be the only means of demonstrating greater reasonable progress than BART, or whether other means, including qualitative factors, should also be allowed. Consequently, we seek comment in this proposal on whether it would be reasonable to allow States to use a weight-of-evidence approach to evaluate both air quality modeling results and other policy considerations. Such an approach might be reasonable, for example, where (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. Regarding the last point above, we are cognizant of the fact that

[6] These four factors are the costs of compliance, the energy and non-air environmental impacts of compliance, any controls already in use, and the remaining useful life of the source.

[7] It is important to note that existing paragraph (C) does not, in and of itself, necessarily indicate a group BART approach. That is, if BART-equivalent reductions are estimated in an appropriate manner under paragraph (B) (i.e., a manner that takes into account the degree of visibility improvement anticipated from controls), nothing in paragraph (C)'s requirement to analyze the degree of improvement expected from all sources subject to BART would run afoul of the court's prohibition of a group-BART requirement. In other words, it is the absence of visibility improvement as a factor in the BART determination under paragraph (B) which is problematic, not its inclusion in paragraph (C) as an indicator of the overall improvement achievable from BART.

[8] *http://www.epa.gov/visibility/actions.html#bart1.*

there may not be methods available to accurately project the distribution of emission reductions for source categories other than EGUs. Modeling tools such as the Integrated Planning Model, which enables projections of emission control decisions at EGUs based on regulatory requirements with a reasonable degree of confidence, do not exist for other source categories. We therefore seek comment on the extent to which other, non-modeled factors may be taken into consideration. We note that we are not soliciting comments on the terms of § 51.308(e)(3), as that provision is final.

Role of BART Guidelines for EGUs

The BART guidelines establish certain control levels or emission rates as presumptive standards for EGUs of greater than 200 MW capacity at plants with total generating capacity in excess of 750 MW. These presumptive levels were developed pursuant to EPA's duty under CAA section 169A(b)(2) to develop the guidelines under which States are required to make BART determinations for EGUs. The presumptive standards were developed through a formal rulemaking process, including extensive public comment and full analysis of costs and economic impacts, and apply to certain EGUs on a mandatory basis in the context of § 51.308(e)(1). Because they have been developed for application on a source-specific basis, we believe it is all the more appropriate to apply them in a trading context where the burden to meet BART-equivalent reductions may be shared among non-BART eligible sources as well. We therefore propose to make the presumptive standards guidelines applicable to alternative programs through a cross reference to § 51.308(e)(1) within § 51.308(e)(2)(i)(C). Thus, when States are estimating emissions reductions achievable from source-by-source BART, they must assume that all EGUs which would otherwise be subject to BART will control at the presumptive level, unless they demonstrate such presumptions are not appropriate at particular units. This demonstration should be guided by the same criteria discussed in the BART guidelines. We request comment on this proposed requirement.

Minimum Universe of Affected Sources

Section 51.308(e)(2)(ii) currently provides that, where a State opts to implement an alternative strategy to BART, the program must apply, at a minimum, to all BART-eligible sources within the State. Since the promulgation of the regional haze rule in 1999, EPA has had occasion to consider BART alternative programs in more detail, including the WRAP Annex and the Clean Air Interstate Rule, or CAIR.[9] We now believe that this "all or nothing" requirement is unduly restrictive and could pose an unnecessary barrier to the development of BART alternatives. The reason for this is that some BART-eligible source categories might not be suitable for participation in a trading program. For example, for some source categories there may be difficulty in quantifying emissions with sufficient accuracy and precision to guarantee fungibility of emission allowances. Because of these considerations, we believe States should have the opportunity to pursue source-by-source BART for one or more categories which are more appropriately addressed in that manner and a trading program for other source categories. Once a source category is selected for inclusion in the alternative program, however, all BART sources within the effected categories must be covered. Therefore, we are proposing to revise §§ 51.308(e)(2)(i)(B) and 51.308(e)(2)(ii) to this effect.

B. State Options for Complying With § 51.308(e)(2)(i) as Proposed

Under the framework provided by CAA sections 169A and 169B, there are several different contexts in which visibility impact analysis could be conducted. The development of a BART-alternative program could entail separate visibility analysis 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 or source category subject to BART, and (3) determining the overall visibility improvement anticipated from the application of BART to all sources subject to BART. In addition, the first two stages, if conducted on a source-by-source basis, could involve hundreds of separate modeling runs in each State. This could impose a tremendous burden on State air agency resources, and eliminate the administrative efficiency advantages provided by emission-trading alternatives. The EPA therefore seeks to allow States to combine modeling stages or use simplifying assumptions to the extent allowed by the CAA and controlling case law.

Before discussing the first two stages, we note that an individualized analysis is never required at the third stage—determining the overall improvement anticipated from source-by-source BART applied to all sources. By definition, visibility modeling at this stage must be done on a cumulative basis. This does not make it a prohibited approach under *CEED* v. *EPA*, because at this stage of the analysis, relevant aspects of the BART benchmark and the alternative program have already been determined. For example, if the emissions reductions anticipated from source-by-source BART were determined by conducting a full-scale BART analysis in accordance with § 51.308(e)(1) on each source, including the use of individualized modeling analysis for each source, it would then be appropriate to determine the overall visibility improvement expected from the application of this BART to all sources subject to BART.[10] We now turn to the discussion of the potential for providing flexibility to States in assessing visibility in the first two stages listed above.

1. Determination of Which BART-Eligible Sources Are Subject to BART

In the BART guidelines, announced on June 15, 2005,[11] we provide States with guidance on how to determine which BART-eligible sources are "reasonably anticipated to cause or contribute to any visibility impairment at any Class I area." Such sources are "subject to BART," meaning that the State must perform a BART determination based on the five statutory factors. Under the guidelines, States have considerable discretion to determine which BART-eligible sources are subject to BART, as the court emphasized in *American Corn Growers*.

In providing States with the guidance for these determinations, we note that States may choose to make BART determinations for all BART-eligible sources.[12] Alternatively, States could determine which BART-eligible sources are subject to BART using any of the options provided in the BART guidelines. States opting to develop a trading program or other alternative measure may wish to exercise their discretion to determine that all BART-eligible sources within affected categories are reasonably anticipated to cause or contribute to visibility impairment and therefore should be

[9] In the case of the CAIR, EPA adopted separate provisions that allow the use of an alternative trading program for a subset of BART-eligible sources.

[10] This is the stage of the analysis prescribed by existing § 51.308(e)(2)(i)(C), as noted in the section II.A above.

[11] *http://www.epa.gov/visibility/actions.html#bart1.*

[12] As noted in the preamble to the BART guidelines, States choosing this approach should use the data being developed by the regional planning organizations, or on their own, as part of the regional haze SIP development process to make a showing that the State contributes to visibility impairment in one or more Class I areas.

included in the analysis of emissions reductions achievable by BART. While this might eliminate the need for visibility modeling for each BART eligible source(reducing the administrative burden on the State), it also maximizes the number of BART-eligible sources included in this step of the analysis of an alternative strategy. At the next stage of the process, the BART determination (i.e., a determination of emissions reductions that would be achievable under source-by-source BART), a visibility impact analysis of some sort (discussed in next section below) would still be required. Therefore, States would have the opportunity to consider the anticipated visibility improvement from imposing controls on a single source against cost of control and other factors.

2. Determination of What Constitutes BART for Each BART Eligible Source

Source-by-Source Visibility Impact Analysis

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 visibility improvement expected from each BART source under various control scenarios, as described in the BART guidelines. Such an approach would comport with the court's decision in *CEED* v. *EPA*, as it would completely avoid any taint of a "group BART" approach.

However, such an approach, when used in the context of an alternative program, could impose a significant resource burden upon the States, especially if the State is modeling a large number of BART-eligible sources over a broad regional area (i.e. multiple States). For example, a State could potentially need to conduct hundreds of model runs to isolate individual source contributions to multiple Class I areas across multiple States, and assess several sets of meteorological and terrain data to appropriately simulate the geophysical conditions influencing visibility. We seek comments, particularly from States and interested Tribes, regarding the feasibility of such an approach and other recommendations for the alternative program analysis. Although such an analysis is appropriate in the § 51.308(e)(1) source-by-source context, there may be more streamlined approaches that would be appropriate for BART determinations within an alternative program.

One area of consideration might be the type of model used. The BART guidelines provide that CALPUFF is the preferred model for the visibility improvement analysis in the source-by-source (§ 51.308(e)(1)) context but note that other appropriate models may be used. A regional modeling approach, using a photochemical grid model, may be more appropriate for an alternative program. In many cases, regional planning organizations (RPOs) have already prepared data sets that are "model ready" for a regional modeling application; this could significantly reduce the resource burden on States. We request comment on a preferred modeling methodology and whether the use of other models, including regional scale models such as the Community Multiscale Air Quality model (CMAQ) and the Comprehensive Air quality Model with extensions (CAMX), would be appropriate for BART determinations in the alternative-program context[13], and whether their use would significantly ease the burden on States.

Potentially Permissible Uses of Cumulative Approach

Today's proposed revisions would require States to consider anticipated visibility improvement along with the other statutory factors when determining BART for each source subject to BART in a source-by-source program. The analysis would then be used to compare BART to the alternative program. A State that complied with this requirement by performing a full-scale individualized visibility impact determination for each source would clearly satisfy the American Corn Growers and CEED decisions.

What is less clear from the decisions is whether a State may, in exercising its discretion, employ some type of cumulative approach or simplifying assumptions in the process of considering visibility improvement when estimating emissions reductions achievable by source-by-source BART. The EPA believes that States retain such discretion, and that the holding of *CEED* v. *EPA* is limited to circumstances where the EPA attempts to require or induce States to adopt cumulative approaches. The EPA is not requiring such a cumulative approach.

The court did not specifically discuss the relationship between the invalid "group BART" approach contained in the Annex (and approved in the Annex rule) and the requirements of the regional haze rule which governed the development of the Annex in the first place (*i.e.*, §§ 51.308(e)(2) and 51.309(f)). However, the idea that the EPA apparently forced this methodology upon the States appears to be central to the Court's reasoning in invalidating the Annex Rule. This is most clearly demonstrated in the court's discussion of the preliminary issue of whether the petitioner had standing to bring the suit. In that discussion, the court held that neither the fact that the States had a choice between the GCVTC provisions (§ 51.309) and the nationally applicable provisions (§ 51.308), nor the fact that States had taken the initiative in designing the Annex, was sufficient to "undermine the inference that EPA's pressure has been decisive." *CEED* v. *EPA* at 8–9. The issue here was whether the petitioner's current "injury in fact" (compliance with reporting requirements necessitated by the Annex) was fairly traceable to EPA's regulatory scheme, not whether the "group BART" provision per se was forced upon the States. However, since the "group BART" methodology was prescribed by the regulations which governed the Annex, to the extent EPA induced or "pressured" States into accepting § 51.309, it also must have pressured them into accepting group BART. Therefore, the CEED decision did not address the situation where a State exercises its discretion to use a cumulative approach to visibility modeling, absent any "pressure" from the EPA.

This reading of the case is not inconsistent with the court's statement that group BART is "invalid in any 169A context,"—a statement made in the context of EPA's ripeness claim. The EPA had argued the claims brought by the petitioner in *CEED* v. *EPA* had been ripe for review in 1999 at the time the action in *American Corn Growers* was brought and were thus precluded from being raised several years later. Petitioner CEED argued that *American Corn Growers* had either invalidated §§ 51.308(e)(2) and 51.309(f) (providing the States with the opportunity to submit the Annex), or regarded those issues as unripe at the time. *CEED*, Slip. Op. at 11. The court determined that *American Corn Growers* had not addressed "better than BART in the 309 context," and that the prior court's

[13] To reiterate, the comments we seek in this part of the preamble are with respect to the use of other models for use in the course of estimating the BART "benchmark" through the determination of BART control levels at sources subject to BART. For example, regional scale models might be used to inform BART determinations at many sources simultaneously through the use of techniques which can track multiple single source contributions. This type of modeling is different from the use of regional scale models to assess the cumulative impact on visibility after BART determinations have been made. There is no question that the use of regional scale models is appropriate for the latter purpose, as with our use of CMAQ to assess the visibility effects of CAIR and of the most-stringent-case BART for EGUs.

hesitation to do so was "reasonably based on the possibility that the BART benchmark used to calculate "better-than-BART" might in the end differ materially from the original BART." Finally, the court stated that "either way *American Corn Growers* is read, it plainly forbade use of the original BART methodology in any 169A context." *Id.*

We read the prohibition of group BART in "any 169A context" to mean that, in exercising its duty under CAA section 169A to promulgate BART regulations, EPA may not prescribe group BART in either the context of source specific BART or the context of a trading alternative. In both cases, it is EPA that is barred from prescribing such a methodology. Nothing in this decision appears to bar a State exercising its own discretion under CAA section 169A to define the BART benchmark using some approach that employs a cumulative analysis of visibility impairment.

For the reasons above, the EPA believes that although EPA may not require a cumulative visibility approach to estimating emissions reductions achievable from BART, States are not barred from using such approaches if they so choose

C. Reliance on Emissions Reductions Required for Other Purposes

In some cases, emissions reductions required to fulfill CAA requirements other than BART (or to fulfill requirements of a State law or regulation not required by the CAA) may also apply to some or all BART eligible sources. In such a situation, a State may wish to determine whether the reductions thus obtained would result in greater reasonable progress than would the installation and operation of BART at all sources subject to BART which are covered by the program.

One prominent example of an independent requirement which would satisfy BART for affected sources in affected States is the CAIR. (70 FR 25162, May 12, 2005). The emissions reductions required by the CAIR are for the purpose of addressing significant interstate contributions to PM and ozone nonattainment. The level of emissions reductions required was determined by an analysis of highly cost effective controls at EGUs. The CAIR establishes an EPA-administered cap and trade program for SO_2 and NO_X from EGUs, in which affected States may participate as a way of meeting their emission reduction requirements. (States can also choose to meet their emission reduction requirements in other ways, subject to certain limitations).

Because the CAIR trading program would cover BART-eligible EGUs, and because the CAIR would result in emission reductions surplus to CAA requirements as of the baseline date of the SIP (defined as 2002 for regional haze purposes), we determined that it was appropriate to treat participation in this program as a potential means of satisfying BART requirements for that source sector. See section IV of the preamble to the final BART rule.[14]

The fact that the CAIR reductions were required in order to assist in attainment of the NAAQS, rather than for the purpose of satisfying BART, significantly alters the consideration of what type of analysis is permissible to show greater reasonable progress than BART. At the heart of the court's decision in *CEED* v. *EPA* was the concern that by requiring States to use a group-BART approach in developing the benchmark by which an alternative program would be measured, the regional haze rule would require States to adopt an unduly stringent alternative approach. No basis for such a concern exists when an independent requirement determines the level of reductions required by an alternative program covering a universe of sources (including BART eligible sources). In such a case, the better-than-BART demonstration is clearly an after-the-fact analysis, used simply for comparison of the programs, and not to define the alternative program. In the CAIR example, the emission reduction levels were not based on the invalid "group-BART" approach or any other assumptions regarding BART, but were developed for other reasons. Specifically, the CAIR emission reductions were developed to assist with attainment of the NAAQS for $PM_{2.5}$ and ozone. Had EPA not performed the comparison of CAIR to BART for visibility progress purposes, the CAIR emission reduction requirements would remain unchanged. Therefore, EPA could not be construed as imposing an invalid BART requirement on States but rather is simply allowing States, at their option, to utilize the CAIR cap and trade program as a means to satisfy BART for affected EGUs. This same reasoning would be applicable whenever any requirement other than BART defines the emission reductions required by the alternative program.

Reasonable Progress as an Independent Requirement

The EPA believes that the requirement to 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 CAIR. Therefore, where a State designs a program to meet reasonable progress goals, the "better-than-BART" demonstration would not be used to define the alternative programs, and the concerns of the DC Circuit in *American Corn Growers and CEED* v. *EPA* would not be applicable.

A State may choose to exercise its discretion under CAA section 169A and section 169B to achieve a larger portion of its reasonable progress requirements by use of an alternative program that affects non-BART eligible sources (including future sources) as well as BART-eligible sources. The fact that the CAA establishes a minimum reasonable progress requirement in the form of BART for a certain subset of sources, based on category, size, and age, does not restrict the States' authority to establish a more ambitious reasonable progress program. The emission reduction requirements of such a program could be based on a number of different approaches not driven by a requirement to demonstrate greater reasonable progress than BART. In such a case, the better-than-BART test would serve simply as a check that the program had in fact met the minimum requirement of achieving more progress than BART. Because the BART estimation would not be defining the emission reductions required, the State would be free to use its discretion to begin the analysis with the simplifying assumption of a most-stringent-case BART scenario (similar to our application of the presumptive BART EGU standards to all-BART eligible sources in our CAIR analysis). If the program made greater reasonable progress than the most-stringent-case BART, the State could end its analysis there. In such a case, the program would obviously make greater reasonable progress than BART defined in any less stringent manner. If the program is not shown to make greater progress than most-stringent-case BART, the State could use its discretion to perform additional analysis to determine what progress would be achievable by BART after taking into account visibility on a source-by-source basis.

To summarize, the EPA believes that where a State develops a program that include BART sources with the purpose of satisfying reasonable progress requirements for a larger universe of sources, the State's use of a most-stringent-case BART benchmark to satisfy the better than BART test would not run afoul of the D.C. Circuit's

[14] *http://www.epa.gov/visibility/actions.html#bart1.*

decisions, as long as EPA does not attempt to require or otherwise impose such a benchmark.

D. Revisions to § 51.308(e)(2) To Standardize and Clarify the Minimum Elements of Emissions Trading Programs in Lieu of BART

EPA is proposing to add provisions that list fundamental elements that any cap and trade program adopted under § 51.308(e)(2) in lieu of BART must contain. A cap and trade program, for the purposes of this section, means a program that establishes a cap on total annual emissions from the sources in the program, issues allowances with a total tonnage value equal to the tonnage of the cap, requires each source in the program to hold an amount of allowances after the end of the year with a tonnage value at least equal to the tonnage of the source's emissions during the year, and allows the purchase and sale of allowances by sources or other parties.

EPA is adding these elements in order to provide the States with the crucial requirements they need to adopt into their SIPs for a cap and trade program and also to help guide EPA's review of the SIPs. For a cap and trade program to function properly, States will need to adopt a number of specific provisions into their SIPs, but these fundamental elements are the ones EPA deems as necessary to ensure the integrity of any cap and trade program adopted in a SIP under § 51.308(e)(2)in lieu of BART. The elements listed below are consistent with the provisions of EPA's guidance for economic incentive programs titled "Improving Air Quality with Economic Incentive Programs" (EIP) (EPA–452/R–01–001, January 2001).

The following is a description of each of the trading program requirements that are included in proposed § 51.308(e)(2)(vi). For each of these proposed requirements, EPA requests comment on whether we have addressed the requirement to an appropriate level of detail and on whether the substance of the requirement is sufficient to ensure program integrity for the cap and trade program.

Applicability Provisions

EPA is proposing that States and Tribes must include applicability provisions specifically defining which sources are subject to the program. Applicability, or the group of sources that the cap and trade program will affect, must be essentially the same from state to state, or across a state, to minimize confusion and administrative burdens. For a cap and trade program, some of the factors States and Tribes may want to consider when defining the group of sources subject to the program include contribution to total emissions from each source within a given source category, and the ability to reliably measure emissions from the source. We encourage States and Tribes to design trading programs to be as inclusive as practicable, in order to maximize the efficiency of the market.

The emission cap of a cap and trade program may be compromised if a State or Tribe defines the population of sources in a way that allows production and emissions from sources covered under the program to shift to those that are not covered under the program. EPA is proposing that States and Tribes must demonstrate in their SIPs/TIPs that the applicability provisions are designed to prevent any significant, potential shifting of production and emissions from sources in the program to sources outside the program. For programs covering a single State, the demonstration should address potential shifting within the State, while multi-state programs must address shifting among those states covered under the program.

States and Tribes can demonstrate that the applicability provisions in the program will not result in significant shifting of emissions or production to sources outside the program by: (1) Showing that all the sources providing a product in the trading region are included in the cap and no sources outside the cap can pick up production from the capped source; or (2) otherwise showing that significant shifting of production and emissions is unlikely to occur, due to the nature of the program and the sources in the surrounding area.

Allowances

Allowances are a key feature of a cap and trade program. An allowance is a limited authorization for a source to emit a specified amount of a pollutant, as defined by the specific trading program, during a specified period of time. While allowances are frequently denominated at one ton, an allowance could be valued at more than or less than one ton, depending on the needs of the specific trading program or the monitoring method. At the end of the compliance period, a source owner's total tonnage value of allowances held must exceed or equal its annual actual total tonnage of emissions. For example, if an allowance was valued at one ton, a source that emits 1,000 tons of a pollutant in a given year must hold at least 1,000 allowances for that same pollutant.

Allowances are fully marketable commodities. Once allocated, allowances may be bought, sold, traded, or (where allowed) banked for use in future years.[15] Allowances are the currency used to achieve compliance with the emission limitation requirements. A cap and trade program provides compliance flexibility because each covered source has four compliance options: (1) Emit at its allowance allocation; (2) emit less than its allocated allowances and transfer extra allowances to other sources; (3) emit less than its allocated allowances and (if banking is allowed) save unused allowances for a later compliance period; and (4) obtain allowances from other sources and emit more than its allocation.

EPA proposes not to include the detailed requirements on how States and Tribes will allocate allowances for a cap and trade program adopted under § 51.308(e)(2) in lieu of BART. A State or Tribe can determine how to allocate allowances as long as the SIPs/TIPs require that the allocation of the tonnage value of allowances not exceed the total number of tons of emissions capped by the budget. For example, if the emissions budget is capped at 100,000 tons of emissions, and each allowance is valued at one ton, the SIP/TIP must prohibit the allocation of more than 100,000 allowances in any year.

Monitoring, Recordkeeping, and Reporting

Monitoring, recordkeeping, and reporting of a source's emissions are integral parts of any cap and trade program. Consistent and accurate measurement of emissions ensures that each allowance actually represents its specified tonnage value of emissions and that one ton of reported emissions from one source is equivalent to one ton of reported emissions at another source. This establishes the integrity of the allowance and instills confidence in the market mechanisms designed to provide sources with flexibility in achieving compliance. EPA is proposing that the monitoring, recordkeeping, and reporting provisions for boilers, combustion turbines, and cement kilns comply with 40 CFR Part 75, and that other sources include monitoring, recordkeeping, and reporting provisions

[15] Allowances are typically defined as not constituting property rights. See e.g. CAA section 403(f): "An allowance allocated under this title is a limited authorization to emit sulfur dioxide in accordance with the provision of this title. Such allowance does not constitute a property right. Nothing in this title or in any other provision of law shall be construed to limit the authority of the United States to terminate or limit such authorization." 42 U.S.C. 7651b(f).

that result in information of the same precision, reliability, accessibility and timeliness as provided for under 40 CFR Part 75.[16] Under certain circumstances, there may be some cap and trade programs that prevent certain sources from selling any allowances. EPA is expressly providing that such sources are not subject to the requirement that the monitoring, recordkeeping, and reporting provisions be consistent with, or equivalent to, 40 CFR Part 75.

Tracking System

A properly designed and implemented tracking system is critical to the functioning of a cap and trade program as allowance transfers, allocations, compliance, penalties, and banking are all components of the system. The tracking system must be accurate and efficient to allow for proper operation of an emissions trading market. The tracking system must also be transparent, allowing all interested parties access to the information contained in the accounting system. Transparency of the system increases the accountability for regulated sources and contributes to reduced transaction costs of transferring allowances by minimizing confusion and making allowance information readily available. The tracking system functions as the official record for the trading program. States, Tribes, and sources participating in the cap and trade program need to obtain accurate information about program activities, including information that allows them to track generation and use of allowance allocations and to ensure compliance. The allowance accounts in the tracking system are the official records for compliance purposes.

The proposed rule requires that the SIPs/TIPs must include provisions identifying a specific tracking process to track allowances and emissions. The proposed rule requires that the implementation plans must provide that emissions, allowance, and transaction information is transparent and publicly available in a secure, centralized data base that allows for frequent updates. The SIPs/TIPs must also provide for a tracking system that provides a unique way to identify each allowance, enforceable procedures for recording data, and enforceable time frames for submitting information and balancing accounts. If the trading program covers more than one State, the tracking system should be coordinated among all participating States and consistent for all sources and other participants.

Account Representative

EPA believes it is important that each source owner or operator designate an individual (account representative) who is authorized to represent the owner or operator in all matters pertaining to the trading program and who is responsible for the data reported for that source. The account representative will be responsible for, among other things, permit, compliance, and allowance related actions. In addition to designating an account representative, the SIP/TIP must provide that all matters pertaining to the account shall be undertaken only by the designated account representative. The proposed rule includes a requirement that the SIPs/TIPs must include such provisions.

Allowance Transfer

The proposed rule requires that SIPs/TIPs contain provisions detailing a uniform process for transferring allowances among all sources covered by the program and other possible participants. The provisions must provide procedures for sources to request an allowance transfer, for the request and transfer to be recorded in the allowance tracking system, for notification to the source that the transfer has occurred, and for notification to the public of each transfer and request. The provisions must allow timely transfer and recording of allowances and minimize administrative barriers to the operation of the allowance market.

Compliance

The proposed rule requires that cap and trade programs include a compliance provision that prohibits a source from emitting more emissions than the total tonnage value of allowances the source holds for that year. The proposed rule also requires that the cap and trade program specify the methods and procedures for determining on an annual basis whether a source holds sufficient allowances, by total tonnage value, for its emissions.

Penalty

In order to provide sources with a strong incentive to comply with the requirement to hold sufficient allowances for their emissions on an annual basis and to establish an immediate minimum economic consequence for non-compliance, the program must include a system for mandatory allowance deductions. We are proposing that if a source has excess emissions in a given year, allowances allocated for the subsequent year will be deducted from the source's account in an amount at least equal to three times the excess emissions. For example, if a source had 10 tons of excess emissions in the year 2014, and one allowance is valued at one ton, 30 allowances allocated for the year 2015 will be deducted from the source's account. This is consistent with existing trading programs such as the CAIR and the NO_X SIP call, and is designed to ensure that the penalty is a sufficient deterrent to non-compliance.

While we are proposing that the allowance deduction would be mandatory, a source would have the right to seek administrative or judicial review of the State's or Tribe's determination that the source had excess emissions in a given year. For example, the regulations would not limit the ability of the source to appeal the following determinations made by the State or Tribe: The number of allowances held by the source as of the deadline for transferring allowances and available for compliance, the amount of the source's emissions, and 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. If the State or Tribe determines that the source's emissions exceed the source's total tonnage value of allowances for the year, we are proposing that at least three times the tonnage of excess emissions for the year be automatically deducted from the source's allowance holdings for the next year, even if an appeal is pending. The allowance deduction can be reversed to the extent the source prevails on appeal, but we believe that certain and immediate penalties are necessary to ensure the integrity of the market for allowances. The mandatory allowance deduction penalty provision will not limit the ability of the State, Tribe, or EPA to take enforcement action under State or Tribal law or the CAA.

Banking Provisions

The banking of allowances occurs when allowances that have not been used for compliance are set aside for use

[16] Part 75 establishes requirements for continuous emissions monitoring systems (CEMS), as well as other types of monitoring (e.g., low mass emissions monitoring under 40 CFR 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. Under today's proposed rule, a unit that meets the requirements for, and uses, monitoring specifically provided under part 75 (e.g., a CEMS or low mass emissions monitoring) or that meets the requirements for, and uses, an alternative monitoring system approved under subpart E of part 75 could be included in a cap-and-trade program and could sell allowances.

in a later compliance period. Banking provides compliance flexibility to sources, encourages early reductions, and encourages early application of innovative technology. However, banking also carries an associated risk of delayed or impaired achievement of air quality goals due to the use of banked allowances. The proposed rule allows trading programs to include provisions for banked allowances, so long as the SIPs/TIPs clearly identify how unused allowances may be kept for use in future years and whether there are any restrictions on the use of any such banked allowances.

Periodic Assessment of the Trading Program

The proposed rule requires the trading program to include provisions for periodic assessment of the program. Such periodic assessments are a way to retrospectively assess the performance of the trading program in meeting the goals of the regional haze program and determining whether the trading program needs any adjustments or changes. At a minimum, the program evaluation must be conducted every five years to coincide with the periodic report describing progress towards the reasonable progress goals required under § 51.308(g) and must be submitted to EPA. The information needed to perform the program should be collected through the monitoring, recordkeeping, and reporting requirements for the program. SIPs/TIPs should also provide procedures to make the public aware the program is being assessed and to give the public an opportunity to comment on the assessment.

Section 5.3(b) of the EIP contains a list of performance measures that States or Tribes should consider including in the program assessment. The performance measures needed by States/Tribes will depend upon the type of trading program, the amount of emissions covered by the program, the sources covered by the program, or public comments received during rulemaking. EPA suggests that States and Tribes work closely with their EPA Regional Office when developing the program assessment procedures.

III. Revisions to Regional Haze Rule § 51.309

A. Background

The previous section discussed the proposed changes to our regulations at § 51.308(e)(2) governing alternative programs to BART, in general. In this section, we discuss the implications of the CEED decision on the particular program at issue in that case—the WRAP Annex—and our proposed revisions in the section of the haze rule which specifically addresses the optional approach for certain western states (§ 51.309).

What Portion of the WRAP's Regional Haze Strategies Were Affected by the Court's Decision?

The petition for review granted by the court in *CEED* v. *EPA* requested that the "Annex Rule" be vacated and remanded. The "Annex Rule" refers to the June 2003 rule approving and codifying the "Annex" to the Grand Canyon Visibility Transport Commission (GCVTC) Recommendations. (68 FR 33764, June 5, 2003). The Annex contained SO_2 emission reduction milestones and the detailed provisions of a cap and trade program to be implemented automatically if voluntary measures failed to achieve the milestones. The Annex Rule codified these provisions in § 51.309(h)

The Annex was developed to implement the recommendations of the GCVTC for stationary sources. The court's decision in *CEED* v. *EPA* invalidated EPA's approval of the Annex, but did not question the validity of the GCVTC recommendations for a backstop trading program.[17]

How Is the "WRAP Annex" Related to Other Strategies Contained in Regional Haze Rule § 51.309?

As noted, the WRAP Annex was designed to implement one of the recommendations of the GCVTC. This commission, the creation of which was expressly required by CAA section 169B(f), also made numerous other recommendations. Other important provisions of the GCVTC report include: Strategies for addressing smoke emissions from wildland fires and agricultural burning; provisions to prevent pollution by encouraging renewable energy development; and provisions regarding clean air corridors, mobile sources, and wind-blown dust, among other things. The backstop cap and trade program which eventually became the Annex thus comprised only one component—albeit a central one—of a suite of strategies developed by the GCVTC.

The requirement that Western States submit an Annex to the GCVTC report in order to complete the GCVTC recommendations as an alternative means of regional haze compliance was contained in the 1999 Regional Haze Rule. In that rulemaking, we determined that the GCVTC strategies would provide for reasonable progress when supplemented by an Annex containing quantitative emission reduction milestones and documentation of the trading program or other alternative measure. See 64 FR 35749 and 35756–57. We therefore provided that the States' ability to comply with regional haze rule requirements through implementation of the provisions of § 51.309 was contingent upon EPA receiving the Annex meeting certain requirements no later than October 1, 2000. See § 51.309(f).

Five of the nine eligible States and one local agency (Bernalillo county, NM) opted to submit SIPs under section 51.309 prior to the 2003 deadline in 51.309(c). Doing so was not simply a matter of codifying those recommendations into State law but required the production, through a consensus process, of numerous subsidiary policy and technical tools. These included emissions inventories for stationary, mobile, area, fire, and road dusts sources; policy agreements on various issues such as annual emissions goals for wild land fires and incentives to increase renewable energy production (to name just a few of many); development of numerous technical support documents, and, of course, the development of the actual model rules for the backstop trading program. See the "Section 309 implementation Material" page of the WRAP's Web site at *http://www.wrapair.org/309/index.html* for a more complete listing.

The EPA believes the dedication of the WRAP States and Tribes to move forward with regional haze implementation in an expeditious manner is commendable and we want to continue to support these efforts. The substantial investment in time and resources (including millions of dollars of Congressionally allocated funding) made over a period of more than a decade has tremendously advanced the scientific understanding of the causes of visibility impairment in the West. In addition, the GCVTC, and the WRAP after it, have been extraordinarily successful in forging consensus on a large number of policy measures among a wide variety of States, Tribal governments, environmental advocates, and industry interests. As a result, EPA believes there are compelling policy reasons to continue to recognize the GCVTC/WRAP strategies and to provide a regulatory framework in the regional

[17] Subsequent to the *CEED* decision, the WRAP States expressed their disappointment with the decision and their desire to continue working with EPA to reconcile the WRAP's program to the court's decision. See WRAP State's statment at *http://www.wrapair.org/news/releases/PR_Holmstead_ltr.pdf.*

haze rule that allows for expedited implementation by interested States and Tribes.

The EPA also has the authority to promulgate regulations which are responsive to the GCVTC recommendations for addressing visibility impairment. In addition to requiring EPA to establish the GCVTC, Congress also imposed a duty upon EPA to promulgate regulations pursuant to CAA section 169A within 18 months of receipt of the report from the GCVTC, and to take that report into account in doing so. See CAA section 169B(e). Congress clearly intended EPA's regional haze regulations to be informed by the knowledge and information developed by the GCVTC.

The EPA is committed to fulfilling its obligation to further the work of the GCVTC by permitting the western states and tribes to move forward with the regional haze program recommended by the GCVTC. Therefore, in order to provide GCVTC States and Tribes an opportunity to revisit the program without being constrained by the invalid group BART methodology, we propose to amend the regional haze rule to allow states to submit (or resubmit) implementation plans under § 51.309, in conjunction with the first regional haze SIPs otherwise required under 51.308. This will provide time for States to revisit the SO_2 milestones and backstop emission trading program.

With respect to the other strategies contained 51.309, although these other provisions of § 51.309 were not affected by the decision in *CEED* v. *EPA* and may remain effective as a matter of State law in each State, the EPA cannot approve implementation plans under § 51.309 as meeting reasonable progress until the plans contain valid provisions for addressing stationary sources. The backstop SO_2 emissions trading program was a key element of the GCVTC recommendations, as evidenced by the fact that the use of the § 51.309 strategies to satisfy reasonable progress requirements was made contingent upon EPA receiving a satisfactory Annex. Because the Annex has been invalidated, States must have an opportunity to resubmit the details of the backstop trading program, before EPA can take action to determine whether reasonable progress requirements will be satisfied by § 51.309 SIPs.

The regulatory structure proposed to provide States and Tribes with this opportunity is discussed in more detail below.

B. Proposed Regulatory Framework for States and Tribes Choosing To Implement the GCVTC/WRAP Strategies

We interpret the court's decision in *CEED* v. *EPA* as having vacated the provisions in § 51.309(h) which were promulgated in 2003. (68 FR 33764, June 5, 2003.) The vacature of these provisions returns § 51.309 to the status quo ante as of that rulemaking. This included certain provisions for stationary sources contained in § 51.309(d)(4) and the provision calling for the submission of the Annex in the first place in § 51.309(f). For the reasons discussed below, we are not proposing to require States to resubmit another "Annex" to the GCVTC report, and are therefore repealing § 51.309(f); we are also proposing to retain the general stationary source requirements at § 51.309(d)(4), with certain modifications.

Will States Be Required To Submit a Revised Annex?

Section 51.309(f) made the approvability of § 51.309 SIPs contingent upon EPA receiving from the GCVTC (or other regional planning organization) an "annex" to the GCVTC report no later than October 1, 2000. The Annex was required to contain: quantitative emissions milestones for the years 2003, 2008, 2103, and 2018, which would provide for steady and continuing emissions reductions for the 2003–2018 period and satisfy the GCVTC goal of 50–70 percent reductions from 1990 emissions by 2040. The milestones were also required to show greater reasonable progress than would be achieved by the application of BART per § 51.308(e)(2) and be approvable in lieu of BART. In addition to quantitative milestones meeting these criteria, the Annex was required to contain documentation of the "backstop" market trading program, including model rules, monitoring provisions, provisions for the "triggering" of the trading program, and operational details. See § 51.309(f)(1)(i)–(ii).

Section 51.309(f) further provided procedures by which EPA would incorporate the provisions of the Annex into the regional haze rule (if an acceptable Annex were received). This in fact occurred, with the Annex being incorporated at § 51.309(h). Section 51.309 in its totality, including the new § 51.309(h), then governed the content of the SIPs which were due no later than December 31, 2003, per § 51.309(c).

The EPA believes the substantive requirements of § 51.309(f) remain valid. However, we do not believe the unusual procedural approach required by that section—wherein States submit provisions for EPA to codify in federal regulation for the purpose of governing subsequent SIP content—is either necessary or appropriate at this time. Therefore, we are proposing to import those substantive provisions of § 51.309(f) which are still relevant into § 51.309(d)(4), and to repeal the § 51.309(f) mechanism requiring an Annex. We are also proposing to import into § 51.309(d)(4) a few selected substantive provisions from the repealed Annex rule (§ 51.309(h)) for reasons explained later in this section of the preamble.

In 1999, EPA included § 51.309 in response to the western States' and Tribes' comments calling for recognition of the policy development efforts of the GCVTC. The Western Governors' Association in particular requested that EPA issue a final rule that explicitly described the content of SIPs that would assure reasonable progress in addressing visibility impairment on the Colorado Plateau based on the technical work and policy recommendations of the GCVTC. At that time, however, the GCVTC's recommendations did not address the requirements for BART, or provide sufficient detail to allow EPA to ascertain whether the backstop market trading program that was a central element of the Commission's recommendations would provide greater reasonable progress than BART. The purpose of the requirement in the 1999 rule that an Annex to the GCVTC report be submitted by October of 2000 was to insure that the GCVTC stationary source recommendations were developed and refined in sufficient detail to enable EPA to make an up-front determination that SIPs based on the work of the GCVTC would meet the requirements of the CAA. The decision to utilize an intermediate step of requiring States and Tribes to submit the details of the stationary source provisions in an "Annex", rather than directly in their SIPs (or TIPs), was a policy decision on EPA's part to accommodate the western State's request for endorsement of the substantial work of the GCVTC. In light of the facts as they exist now, six years later, the EPA does not believe that an "Annex" type approach is appropriate going forward.

One reason that an Annex approach would not be appropriate is that it would not be practicable to repeat such an approach at this time given that all regional haze SIPs, whether under § 51.309 or § 51.308, are due at the end of 2007, or about 18 months after

today's proposal.[18] The 1999 rule provided that EPA would promulgate regulations incorporating the Annex provisions within one year of receipt of the Annex. If a similar approach were followed today, there would not be sufficient time for States to follow their internal processes for SIP revisions, even if a new Annex were made due immediately upon finalization of this rule.

In addition, we are proposing that States submit § 51.309 SIPs at the same time as § 51.308 SIPs. These § 51.308 SIPS will establish reasonable progress goals for all Class I areas in the region. It is expected that some States will wish to build on the § 51.309 strategies in developing § 51.308 SIPs. Because both types of SIPs will be reviewed concurrently, it is a better policy in terms of both administrative efficiency and environmental progress to review both §§ 51.308 and 51.309 SIPs under the same overarching criteria, rather than providing prescriptive requirements for § 51.309 which may interfere in unforeseen ways with the integration of §§ 51.308 and 51.309 SIPs without providing any environmental benefits.

Finally, in 1999, the GCVTC had discharged its duties and the WRAP had not yet established a track record for producing consensus decisions on difficult policy issues such as the design of the backstop market trading program. Six years later, the WRAP has built up considerable institutional capacity, with EPA's support, and is well positioned to facilitate consensus and coordinate SIP development to insure inter-state consistency, without the need for prescriptive requirements at the level of detail formerly contained in the Annex Rule.

Therefore, we propose to amend § 51.309(d)(4) to provide that the major substantive requirements formerly required to be submitted in the form of an Annex to the GCVTC report will instead now be required in the § 51.309 SIP itself. These major substantive requirements include quantitative emissions milestones for the years 2008, 2013, and 2018 which provide for steady and continuing emissions reductions, satisfy the GCVTC goal of 50–70 percent reductions from 1990 emissions by 2040, and achieve greater reasonable progress than would be achieved by the application of BART per § 51.308(e)(2).

[18] See 42 U.S.C. 7407(d)(7)(A).

Which States and Tribes May Submit Implementation Plans Under § 51.309 as Proposed for Revision?

Because the WRAP Annex was invalidated due to its reliance on a group-BART methodology, the EPA cannot condition future participation in the § 51.309 program upon the submission and implementation of SIPs under the Annex rule (i.e., the SIPs that were due in 2003). Doing so would have the effect of continuing to impose upon the four states that did not opt for § 51.309 the choice between a § 51.309 program defined by an invalid methodology and § 51.308. Therefore, States in the 9-state visibility transport region that did not submit a SIP in 2003 under § 51.309 are not precluded from submitting a SIP under § 51.309 in 2007. Tribes in the transport region, as determined in earlier rulemakings, are not subject to the same deadlines and may submit a TIP under § 51.309 at a later date. In addition, nothing precludes States outside of the 9-state transport region from incorporating elements of the GCVTC strategies into their SIPs (under § 51.308), provided they demonstrate that such strategies meet the reasonable progress requirements of § 51.308.

What Is the Proposed Implementation Plan Schedule?

We are proposing that SIPs under § 51.309 will be due at the same time as those under § 51.308. The implementation plan deadlines for regional haze were amended by Congress to provide that regional haze SIPs for the entire State shall be submitted no later than three years after the promulgation of designations for the PM2.5 NAAQS.[19] Those designations were promulgated by EPA on December 17, 2004. Therefore regional haze SIPs are due no later than December 17, 2007. CAA 107(d)(7)(A).

CAA 107(d)(7)(B) provides that the above requirement does not preclude implementation plan revisions by the GCVTC States in 2003. However, as portions of the haze rule that governed the 2003 SIPs have been invalidated, States opting for § 51.309 will be required to resubmit SIPs some time after those portions have been rectified through finalization of today's proposed rule. As a practical matter it would be difficult for States to complete this process any time appreciably sooner than the end of 2007. The EPA sees no environmental advantage to requiring § 51.309 SIPs to be submitted on a different schedule than under § 51.308.

[19] See Consolidated Appropriations Act for Fiscal Year 2004, Public Law 108–199, January 23, 2004.

Moreover, simultaneous deadlines will allow States and participating Tribes to more effectively integrate the technical work and policy development under the two sections. Therefore, we propose amending § 51.309(c) to replace the December 31, 2003 deadline with December 17, 2007.

In addition, we are proposing to delete certain language included in the SIP schedule provision in § 51.309(c) and replace it with similar provisions in the purpose provisions in § 51.309(a). Specifically, § 51.309(c) currently provides that "A Transport Region State that does not submit an implementation plan that complies with the requirements of this section (or whose plan does not comply with all of the requirements of this section) is subject to the requirements of § 51.308 in the same manner and to the same extent as any State not included within the Transport Region." This language was formerly included in the SIP schedule section to clarify that, under the former bifurcated schedule, the final date for a State to make a decision between §§ 51.308 and 51.309 was at the time the § 51.309 SIP was due, in 2003. Now that we are proposing the same deadline for both sections, it is not necessary to specify that § 51.308 will come into effect if a GCVTC State misses the § 51.309 deadline. Each State in the GCVTC may choose between submitting a SIP under §§ 51.308 and 51.309 as it's regional haze strategy for the Colorado Plateau Class I areas; in either case the State must submit its SIP by the same deadline. Moreover, all GCVTC States will also be required to submit SIPs under § 51.308 whether or not they submit § 51.309 SIPs, in order to cover at a minimum any non-Colorado Plateau Class I areas within or affected by the States, unless those Class I areas have been covered under § 51.309(g) (additional Class I areas).

Finally, § 51.309(d)(1) currently requires that § 51.309 SIPs must be effective for the entire time between December 31, 2003, and December 31, 2018. We propose striking the reference to beginning in 2003, but maintaining the requirement to be effective through 2018. We also propose adding a clause to clarify that § 51.309 SIPs shall continue in effect until an implementation plan revision is approved by EPA in accordance with § 51.308(f). This will provide for continuity of visibility protection during the transition to the next long-term strategy period.

What Stationary Source Provisions Must § 51.309 SIPs Contain?

The 1999 regional haze rule, in addition to providing in § 51.309(h) for the submission of an Annex containing further elaboration of the GCVTC stationary source recommendations, also included certain fundamental requirements in § 51.309(d)(4) for a market trading program addressing stationary sources. These § 51.309(d)(4) requirements established the basic framework of the backstop trading approach, which were to be given more detailed form through the Annex provisions. Specifically, this section called for monitoring and reporting of SO_2 emissions, criteria and procedures for activation and operation of the backstop trading program, and provisions for compliance reporting. The section also called for a report on the necessity of adding stationary source provisions for NO_X and PM in the next SIP (due in 2008). See § 51.309(d)(4)(i)–(v). Upon the finalization of the Annex rule, these provisions were amended to add cross references as appropriate to the new Annex rule at § 51.309(h).

The EPA believes it is appropriate to retain these provisions in § 51.309(d)(4), in order to provide for the broad contours of a backstop cap and trade program consistent with the GCVTC recommendations. Nothing in these very general requirements imposes any invalid constraints upon the program in violation of *CEED* v. *EPA*. In addition, in the process of working over the past several years on the development of the detailed provisions of the Annex backstop trading program, EPA and the States have identified several specific areas where regulatory guidance is desirable. Therefore, certain provisions codified as part of the Annex rule in § 51.309(h) have been retained as SIP requirements in § 51.309(d)(4). By specifying EPA's expectations clearly in the rule provisions, we will promote consistency between States and provide greater certainty for the SIP review process. In doing so, EPA is cognizant of the need to avoid importing into § 51.309(d)(4) any provisions of the Annex rule that were directly or indirectly dependent on or related to the specific quantitative milestones contained in the Annex. Therefore, we have retained only those provisions we believe are critical to any conceivable variation on the GCVTC's backstop trading program recommendation. These are described in the following sections.

Provisions for Stationary Sources of Sulfur Dioxide

One of the critical components of the GCVTC's recommendations was the establishment of a series of declining caps on regional sulfur dioxide emissions from stationary sources. These declining caps on emissions are referred to as emissions milestones and must provide for steady and continuing reductions in sulfur dioxide emissions over time. While EPA is not specifying what the milestones must be, this provision requires the States to submit milestones for the period through 2018 that are consistent with the GCVTC's definition of reasonable progress and its goal of reducing sulfur dioxide emissions by 2040 to 50–70 percent of 1990 actual levels. We are proposing that the milestones be defined on an annual basis. However, we do not interpret the GCVTC's recommendation for steady and continuing reduction as requiring the milestones to decline each year. Rather, as was the case in the annex, the milestone may remain the same for more than one year as long as they provide for steady and continuing reductions over the course of long term planning period.

States must also show that the milestones provide for greater reasonable progress than would be achieved by application of BART in accordance with § 51.308(e)(2) and be approvable in lieu of BART. Because the § 51.308(e)(2) is proposed to be amended to remove the group BART requirement, there is no longer the concern that the § 51.309 option might be defined by an invalid condition. Instead, the § 51.308(e)(2) demonstration simply insures that the backstop trading program is approvable in lieu of BART, an approach based on our interpretation of CAA 169A(b)(2) which was upheld by the D.C. Circuit.

Documentation of Emissions Calculation Methods [(§ 51.309(d)(4)(ii)]

EPA is proposing that States must include documentation of the specific methodology used to calculate emissions in the base year for each source included in the program. EPA is also proposing that States must provide for the documentation of the specific emission calculation methods used for determining emissions from stationary sources for each of the subsequent years after the base year. This requirement was originally included in § 51.309(h)(2)(ii), and EPA is proposing to include it in § 51.309(d)(4)(ii). This provision is necessary because in establishing the baseline emissions for stationary sources, States will be using emissions data that reflect the emission calculation methodology the source was using at that time. It is likely that some facilities that have relied on emission factors and other less accurate methods for determining the emissions will improve the accuracy of the emission estimates. In order to ensure the determination of emissions and emission reductions are a true measure of progress and not a change in emission calculation methods, the rule requires States to provide documentation of the emission calculation methods that were used for affected sources. This information will be relied upon by the States and EPA to ensure that the comparison of emissions at the beginning of the program to the current reporting year takes into account changes in emissions calculation methods and ensures that comparisons do not provide for "paper" increases or decreases in emissions.

Monitoring, Recordkeeping, and Reporting of Sulfur Dioxide Emissions [§ 51.309(d)(4)(iii)]

EPA is proposing to revise § 51.309(d)(4)(ii) to incorporate necessary changes reflecting the new date of SIP submittals, to address the implications of the court's decision in *CEED* v. *EPA* as it affects the Annex, and to add a recordkeeping requirement. In addition, we are renumbering § 51.309(d)(4)(ii) through (d)(4)(iii). Under the revised language, a State must require monitoring and annual reporting of sulfur dioxide emissions within the State, and require that records be retained for a minimum of 10 years from the establishment of the record in order to ensure the enforceability of the program. EPA believes that requiring records to be retained for 10 years is reasonable because of the long duration of each planning period (*i.e.*, the first planning period for the § 51.309 program extends to the year 2018). In addition, by requiring records to be maintained for 10 years, States will ensure that any lag between the first phase of the program and full implementation of the backstop trading program will not hamper the enforceability of the program. EPA has determined these provisions are necessary to assess compliance with the sulfur dioxide milestones each year of the program. The monitoring, recordkeeping and reporting data required by each State must be sufficient to determine whether the milestones are achieved for each year through 2018.

Criteria and Procedures for a Market Trading Program [§ 51.309(d)(4)(iv)]

The approach to addressing stationary source SO_2 emissions recommended by the GCVTC was to establish a declining cap on emissions that would be met through voluntary measures. If voluntary measures did not succeed, however, the GCVTC recommended that States implement an enforceable market-based program that would serve as the "backstop" to the voluntary measures. EPA is proposing to require States to include in their SIPs the criteria and procedures for implementing the voluntary phase of the program and for triggering and activating the backstop phase of their programs if the voluntary measures do not succeed. The main elements of this requirement were originally included under § 51.309(h)(2)(iv), (v), and (vii), and § 51.309(h)(3). EPA is proposing to include these elements under § 51.309(d)(4)(iv). This provision requires the States annually to compare regional sulfur dioxide emissions to the milestone to determine whether the milestone was achieved for that year. The States must complete a draft annual evaluation report no later than 12 months after the milestone year. The Annex had provided that the annual compliance check be based on a three-year rolling average of actual emissions versus the corresponding three-year rolling average of the milestone, except for the first two years and the last year (2018) of the program. While we do not think it is appropriate to require the use of three-year average,we continue to believe that such an approach would be acceptable. We therefore propose to allow for this approach in § 51.308(d)(4)(i). If the comparison shows the milestone has been achieved, the plan must include procedures to activate the backstop trading program. This provisions also requires that the plans provide for program assessments in the years 2013 and 2018.

Market Trading Program [§ 51.309(d)(4)(v)]

As a backstop to voluntary measures, the implementation of the market trading program must be akin to a "turn-key" operation. EPA proposes to require that the plan include a complete and fully developed backstop market trading program sufficient to achieve the 2018 milestone that is consistent with the criteria for cap and trade program in § 51.308(e)(2)(vi). In the event a milestone has not been achieved, the States will be required to make this final determination no later than 15 months after the end of the first year in which the milestone was not achieved. The final determination that the milestone has not been achieved will trigger (*i.e.*, activate) the trading program. After the market trading program has been triggered, some time will be required before the full implementation of the trading program can be accomplished, but the trading program should come into effect as soon as practicable.

Provision for 2018 Milestone [§ 51.309(d)(4)(vi)]

We are proposing new provisions governing the period beginning in 2018. The § 51.309 program generally focuses on setting and achieving milestones for the period of 2003 through 2018. States participating in the § 51.309 program will eventually need to prepare additional plans to address visibility beyond 2018. See § 51.308(f). These plans will need to meet the requirements of § 51.308 or other alternate regulations EPA may adopt in the future. The proposed language in § 51.309(d)(4)(vi) is intended to bridge any potential gaps between the § 51.309 plan and these future plans and to ensure the milestone for 2018 is achieved by the § 51.309 plans and maintained in future plans. Section 51.309(d)(4)(vi)(A) requires that § 51.309 plans clearly prohibit emissions beginning in 2018 in excess of the 2018 milestone unless and until a new plan covering the period after 2018 is approved by EPA.

Section 51.309(d)(4)(vi)(B) requires that § 51.309 plans include special provisions for ensuring the 2018 milestone is achieved beginning in 2018. Specifically, this provision requires § 51.309 plans to address the potential gap created by any lag between the date the backstop trading program is triggered and the date the trading program is fully implemented and source compliance is required. Under the backstop trading program, sources have an incentive to voluntarily achieve the milestones to avoid triggering an enforceable trading program. Because the § 51.309 plans are designed generally to cover the period between the initial submission in 2007 and 2018, the deterrent incentives of the backstop trading program are diminished where enforceable requirements do not begin until after the end of the covered period or where such enforceable requirements may never be implemented because they will be replaced by a different planning approach. Thus, a special regulatory provision is necessary to address the possible situation where a milestone is exceeded close to, in, or after 2018 such that any delay in the implementation of the trading program could undercut the necessary incentives to meet the 2018 milestone.

To satisfy the requirements of § 51.309(d)(4)(vi), States will need to address both the situation where milestones are exceeded in or after 2018, and the situation where milestones are exceeded before 2018 but the backstop emissions trading program will not be fully implemented and enforceable until after 2018. In both situations, the § 51.309 plan must include special provisions, including financial penalties, to prohibit and enforce against any exceedances of the 2018 milestone beginning in 2018 and continuing until the § 51.309 program is replaced with a plan covering the period after 2018.[20]

With respect to the financial penalty provisions to be included in the SIPs, it is important that the mechanism for assessing and collecting penalties be sufficiently immediate to provide the proper incentives for the cap and trade program. Penalties that are negotiated and require potentially drawn out litigation to enforce may not ensure that sources have a clear, known cost associated with a given amount of excess emissions. One option to create the proper incentives is for States to require automatic penalties or, for States lacking authority for such automatic penalties, to create a streamlined penalty approach that encourages timely payment. Specifically, EPA believes States could adopt an approach that sets a fixed penalty (*e.g.*; $5,000 per ton of excess emissions) that sources can volunteer to pay to quickly settle an excess emissions violation. The States would commit to take formal enforcement action and seek higher penalties as authorized by law against any source that has excess emissions and does not agree to the streamlined settlement. Such an enforcement strategy, if consistently and aggressively administered, should result in a penalty scheme that is sufficiently immediate to create the proper cap and trade incentives. EPA will review State implementation of any such streamlined

[20] This special penalty provision for 2018 is distinct from the requirement for automatic allowance deductions in § 51.308(e)(2)(vi)(J), which is also applicable to the WRAP's program per the cross reference to § 51.308(e)(2) in § 51.309(d)(4)(v). In the Annex rule, SIPs were required to provide for automatic allowance deductions at a 2:1 ratio, and for automatic financial penalties of $5000/ton or an alternative amount that substantially exceeds the cost of allowances. See § 51.309(h)(x) and preamble discussion at 68 FR 33776–33777. Because some States subsequently determined that they lack authority to impose automatic financial penalties, we are proposing to instead utilize the 3:1 ratio for automatic allowance deductions as provided in § 51.308(e)(2)(vi)(J) in order to insure there is a sufficient incentive for compliance.

settlement approaches and will consider taking separate federal enforcement action in the event a State fails to pursue adequate enforcement against a source declining the streamlined settlement. In such cases, EPA will pursue penalties up to the maximum allowed under the CAA (currently $32,500 per day per violation). In addition, if EPA finds a pattern of State failure to obtain appropriate penalties, EPA could use its authority under CAA section 110 to call for a SIP revision to address the deficiency.

Provisions for NO_X and PM BART Requirements [§ 51.309(d)(4)(vii)]

In the 1999 rule § 51.309(d)(4)(v) required States to submit a report assessing emission control strategies for stationary source NO_X and PM. The report was required to include an evaluation of the need to establish milestones for NO_X and PM to avoid any net increases in these pollutants from Stationary Sources within the Transport region. The report was also intended to support the potential development and implementation of a multipollutant market based program. The initial § 51.309 SIPs (submitted by 12/31/2003) were required to provide for SIP revisions no later than 12/31/2008, containing any long term strategies and BART requirements for stationary source PM and NO_X.

The WRAP developed the report required by this section.[21] The development of the report provided much useful information on the role of PM and NO_X in visibility impairment at western Class I areas, and the contribution of stationary source emissions to impairment caused by these pollutants. However, the report concluded that currently available computer models could not replicate the chemical interactions of NO_X with other atmospheric constituents with sufficient accuracy to support regulatory decisions. For this and other reasons, the WRAP States have not yet determined appropriate control strategies for NO_X and PM, but are continuing to work on these issues.

Therefore, we propose amending the stationary source NO_X and PM provision within § 51.309 (now numbered § 51.309(d)(4)(vii)) to specify that States submitting § 51.309 SIPs must address BART for PM and NO_X. This proposed provision is intended to clarify that if EPA determines that the SO_2 emission reductions milestones and backstop trading program submitted in the § 51.309 SIPs makes greater reasonable progress than BART for SO_2, this will not constitute a determination that BART for PM or NO_X is satisfied for any sources which would otherwise be subject to BART for those pollutants.[22] Proposed § 51.309(d)(4)(vii) would allow States the flexibility to address these BART provisions either on a source-by-source basis under § 51.308(e)(1), or through an alternative strategy under § 51.308(e)(2). The determination of which strategy to use is separate for each pollutant. For example, a State could choose to address PM through a source-by-source BART program, while addressing NO_X by use of a trading program or other alternative measure. Moreover, such an alternative measure could build upon the backstop SO_2 program under § 51.309 and employ a similar approach for PM and/or NO_X, or the alternative measure could be completely different than the SO_2 approach. For example, a State (or group of States) could decide to implement a NO_X cap and trade program from the outset, rather than employ a "backstop" approach.

Projection of Visibility Improvement (§ 51.309(d)(2) and Periodic SIP Updates (§ 51.309(d)(10)

Section 51.309(d)(10), as promulgated in 1999, required periodic SIP revisions in 2008, 2013, and 2018. Among other things, these revisions were to include an assessment of whether current SIP elements and strategies are sufficient to enable the State (and other States affected by its emissions) to meet "all established reasonable progress goals." § 51.309(d)(10)(i)(G). Section 51.309(d)(10) also required that if the State determines that existing measures were inadequate to meet reasonable progress goals, the State must revise its SIP to contain additional strategies within one year, or take certain other specified actions in the event that emission sources in other jurisdictions threaten reasonable progress. See § 51.309(d)(10)(ii)(A)–(D).

Because implementation of § 51.309 SIPs has been delayed by the CEED decision and the consequent need to revise § 51.309 in this rulemaking, a SIP revision in 2008 will no longer be appropriate. Under today's proposed revisions to § 51.309, SIPs will not be due until December 2007, and therefore will not have been in effect long enough to permit assessment in 2008. Given these facts, we believe that the visibility projection called for by § 51.309(d)(2) should serve as a demonstration that the complete strategies contained in § 51.309 SIPs comprise reasonable progress for the 16 mandatory federal areas on the Colorado Plateau.

This also points to a need for clarification of what that reasonable progress test entails. Section 51.309(d)(10) refers to strategies which meet "established reasonable progress goals." As the preamble notes, the language of § 51.309(d) is virtually identical to the periodic SIP review provisions in §§ 51.308(g) and 51.308(h). 64 FR 35755. In the § 51.308 context, the meaning of that term is clear, as § 51.308(d)(1) calls for the establishment of reasonable progress, in deciviews, for each federal mandatory Class I area, based upon a uniform rate of progress to natural conditions in 2064 and the application of the statutory reasonable progress factors. See 64 FR 35731. Section 51.308(d)(1) also provides that reasonable progress goals must "ensure no degradation of visibility for the least impaired days." In the § 51.309 context, however, it is less clear what yardstick should be used against the visibility projections because by definition reasonable progress under § 51.309 is defined as compliance with all the provisions of § 51.309.

In our *Guidance for Tracking Progress Under the Regional Haze Rule*, we explained:

> Section 169A(a)(4) and other subsections of the Clean Air Act call for reasonable progress "toward meeting the national goal" of eliminating man-made impairment of visibility. Since any progress goal calling for degradation of visibility, even at a modest rate, would not be progress toward the goal, it is unlikely that EPA could propose to approve any demonstrations that purport to show further visibility degradation as reasonable progress, (*e.g.*, in situations where visibility would be expected to degrade, and such projected degradations would be lessened but not reversed thru proposed emission control strategies). EPA–454/B–03–004, September 2003, at p. 1–9.

Therefore, although reasonable progress for the 16 Class 1 areas on the Colorado Plateau is not defined by the "glide path" methodology in § 51.308, we propose establishing as a minimum criterion of reasonable progress for these areas a requirement of no degradation from baseline conditions, for both the 20 percent most impaired and 20 percent least impaired days. These criteria should be used in the visibility

[21] "Stationary Source NO_X and PM Emissions in the WRAP Region: An Initial Assessment of Emissions, Controls, and Air Quality Impacts" *http://www.wrapair.org/forums/mtf/nox-pm.html.*

[22] In limited circumstances, it may be possible for a State to demonstrate that an alternative program which controls only emissions of SO_2 could achieve greater visibility improvement than application of source-specific BART controls on emissions of SO_2, NO_X and/or PM. We nevertheless believe that such a showing will be quite difficult to make in most geographic areas, given that controls on SO_2 emissions alone in most cases will result in increased formation of ammonium nitrate particles.

projection under § 51.309(d)(2) and in the progress reports under § 51.309(d)(10). Furthermore, the assessment required in § 51.309(d)(10)(i)(C) should be conducted as described in the *Tracking Progress* guidelines. Baseline conditions, as defined in that document, should be based on monitoring data from the 2000–2004 period.

We also wish to clarify that a projection of visibility conditions is not necessarily limited to the output of air quality simulation models. Under § 51.309(d)(2), the State could use the same methods to project visibility improvement that a State could use under § 51.308(d)(3)(ii) and (iii) to demonstrate how its long term strategy will satisfy its contribution to achieving the reasonable progress goals established for each Class I area the State may affect. Examples of such methods are described in the EPA's *Draft Guidance for Demonstrating Attainment of Air Quality Goals for $PM_{2.5}$ and Regional Haze* (January 2, 2001).

Additional Class I Areas [§ 51.309(g)]

In the 1999 rule, § 51.309(g) provided that a State could satisfy reasonable progress requirements for mandatory Class I Federal areas in addition to the 16 Class I areas on the Colorado plateau by implementing the strategies in § 51.309. To do so, a State was required to establish reasonable progress goals for the additional Class I areas and adopt additional measures if necessary, in accordance with § 51.308(d)(1) through (4) (*i.e.*, the generally applicable requirements for reasonable progress). States were also required to declare in the SIP submitted no later than December 31, 2003 whether their other Class I areas would be addressed under § 51.308 or under § 51.309(g). Section 51.309(g)(4)(i) clarified that States could build upon and take credit for the strategies under § 51.309 in developing long term strategies for additional Class I areas. Section 51.309(g)(4)(ii) clarified that the SO_2 backstop emissions trading program could satisfy BART for additional Class I areas, subject to a demonstration that greater reasonable progress would be achieved at such Class I areas.

We are proposing to retain the substance of the additional Class I area provisions in § 51.309(g), but to eliminate the requirement that States make a declaration in the SIP due in 2003 as to which section of the rule would be used to address additional Class I areas. This change is to conform with our determination, discussed earlier in this preamble, that it is no longer appropriate to impose a 2003 deadline or to condition future participation in § 51.309 strategies upon the submission of SIPs in 2003. Other administrative changes in the structure of § 51.309 are proposed to accommodate this change (*i.e.*, renumbering of paragraphs and corrections of cross references).

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

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

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order."

Pursuant to the terms of Executive Order 12866, we have determined that this proposed rule is a significant regulatory action. We have therefore provided it to OMB for review.

Today's proposed rule would provide States and interested Tribes with optional means, such as emissions trading programs, to comply with CAA requirements for BART. The proposed rule would require 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 proposed rule would achieve at least as a 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.* 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).

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 40 CFR part 9 and 48 CFR chapter 15.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*, 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 that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (as discussed on the SBA Web site at *http://www.sba.gov/size/indextableofsize.html*); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities. This proposed rule would revise the provisions of the regional haze rule governing alternative trading programs, and provide additional guidance to States, which are not defined as small entities. We continue to be interested in the potential impacts of our rules on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) (UMRA), establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, 2 U.S.C. 1532, EPA generally must prepare a written statement, including a cost-benefit analysis, for any proposed or final rule that "includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more * * * in any one year." A "Federal mandate" is defined under section 421(6), 2 U.S.C. 658(6), to include a "Federal intergovernmental mandate" and a "Federal private sector mandate." A "Federal intergovernmental mandate," in turn, is defined to include a regulation that "would impose an enforceable duty upon State, local, or tribal governments," section 421(5)(A)(i), 2 U.S.C. 658(5)(A)(i), except for, among other things, a duty that is "a condition of Federal assistance," section 421(5)(A)(i)(I). A "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector," with certain exceptions, section 421(7)(A), 2 U.S.C. 658(7)(A).

Before promulgating an EPA rule for which a written statement is needed under section 202 of the UMRA, section 205, 2 U.S.C. 1535, of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. 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 proposed 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 40 CFR 51.309, including today's revisions, is an optional program. Because the alternative trading programs under 40 CFR 51.308 and 40 CFR 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 proposed 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.

This proposed rule does not have federalism implications. It would 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 proposed rule contains revisions to §§ 51.308 and 51.309 of the

regional haze rule which would reduce any regulatory burden on the States. In addition, these are optional programs for States. These revisions to §§ 51.308 and 51.309, accordingly, would not directly impose significant new requirements on State and local governments. Moreover, even if today's proposed revisions did have federalism implications, these proposed 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 proposed rule.

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

In the spirit of Executive Order 13132 and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits 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."

This proposed rule will overall reduce any regulatory burden on the Tribes. Moreover, the §§ 51.308 and 51.309 programs are optional programs for Tribes. Accordingly, this proposed rule would not have tribal implications. In addition, this proposed rule would directly implement specific recommendations from the Western Regional Air Partnership (WRAP), which includes representatives of Tribal governments. Thus, although this proposed rule would 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 proposed rule is not subject to Executive Order 13045 because it does not establish an environmental standard based on health or safety risks. Therefore this proposed rule does not involve decisions on environmental health or safety risks that may disproportionately affect children. The EPA believes 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 proposed 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 proposed 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 proposed rule contains provisions governing these alternative measures, which will provide 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 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 proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards. We welcome comments on this aspect of the proposed rulemaking and, specifically, invite the public to identify potentially-applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

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 Regulatory Impact Analysis (RIA) for the regional

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

IV. Statutory Provisions and Legal Authority

Statutory authority for today's proposed rule comes from sections 169(a) and 169(b) of the CAA (42 U.S.C. 7545(c) and (k)). 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 169(A).

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: July 21, 2005.

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 proposed to be 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 by revising paragraphs (e)(2)(i)(A), (e)(2)(i)(B), (e)(2)(i)(C), and (e)(2)(ii), and adding paragraphs (e)(2)(i)(D), (e)(2)(i)(E), and (e)(2)(vi) to read as follows:

§ 51.308 Regional haze program requirements.

* * * * *

(e) * * *

(2) * * *

(i) * * *

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

(B) A list of all BART source categories covered by the alternative program. The State is not required to include every BART source category in the program, but for each source category covered, the State must include each BART-eligible source within that category in the analysis required by paragraph (e)(2)(i)(C) of this section.

(C) An analysis of the degree of visibility improvement that would be achieved in each affected mandatory Class I Federal area as a result of the emission reductions projected from the installation and operation of BART controls under paragraph (e)(1) of this section at each source subject to BART in each source category covered by the program.

(D) An analysis of the emissions reductions, and associated visibility improvement anticipated at each Class I area within the State, under the trading program or other alternative measure.

(E) A determination that the emission reductions and associated visibility improvement projected under paragraph (e)(2)(i)(D) of this section (i.e., the trading program or other alternative measure) comprise greater reasonable progress, as defined in paragraph (e)(3) of this section, than those projected under paragraph (e)(2)(i)(C) of this section (i.e., BART).

(ii) A demonstration that the emissions trading program or alternative measures will apply, at a minimum, to all BART-eligible sources within the covered source categories within the State. Those sources having 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 do not need to meet the requirements of the emissions trading program or alternative measure, but may choose to participate if they meet the requirements of the emissions trading program or alternative measure.

* * * * *

(vi) A cap and trade program adopted by a State in lieu of BART must include the following elements:

(A) Applicability provisions defining which sources are 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 programs including multiple states, the states must demonstrate that the applicability provisions cover essentially the same size facilities and, if source categories are specified, 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 tonnage value of allowances issued each year under the program will never exceed the total number of tons of the emissions cap established by the budget or milestone.

(C) Monitoring provisions providing for consistent and accurate emissions measurements 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 allowed to sell allowances comply with part 75 of this chapter. The monitoring provisions for other sources allowed to sell allowances must require that such sources 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 sources allowed to sell allowances comply with the recordkeeping provisions of part 75 of this chapter.

(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 sources allowed to sell allowances 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 the Administrator.

(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 a source owner or operator designates one individual who is authorized to represent the owner or operator 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 and 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 deduction 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.

3. 51.309 is amended as follows:

a. Revising paragraph (a).

b. Revising paragraphs (b)(5) and (b)(7).

c. Revising paragraph (c).

d. Revising paragraphs (d)(1), (d)(4)(i) through (v) and (d)(10).

e. Revising paragraph (f).

f. Revising paragraphs (g) introductory text and paragraphs (g)(1) and (2).

g. Removing paragraphs (g)(3) and (g)(4).

h. Adding paragraphs (d)(vi)(A), (d)(vi)(B) and (d)(vii).

i. 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 sulfur dioxide emissions, in tons per year, for a given year, assessed annually, through the year 2018, consistent with paragraph (d)(4) of this section.

* * * * *

(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.

* * * * *

(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 shall continue in effect until an implementation plan revision is approved by EPA in accordance with § 51.308(f).

* * * * *

(4) * * *

(i) Provisions for stationary source sulfur dioxide. The plan submission must include a sulfur dioxide program that contains quantitative emissions milestones for stationary source sulfur dioxide emissions for each year through 2018. 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. 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 sulfur dioxide emissions from 1990 actual emission levels by 2040, applicable requirements under the CAA, and the timing of implementation plan assessments of progress and identification of deficiencies which will be due in the years 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) and approvable in lieu of BART.

(ii) Documentation of emissions calculation methods. The plan submission must include documentation of the specific methodology used to calculate 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 sulfur dioxide emissions. The plan submission must include provisions requiring the monitoring, recordkeeping, and annual reporting of actual stationary source sulfur dioxide 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 of 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 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).

(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 that is less stringent than the 2018 milestone, unless the milestones are replaced by a different program that meets BART and reasonable progress requirements established in § 51.308, and is approved by EPA.

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

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(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.

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(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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