

A-2000-51
IV-D-04



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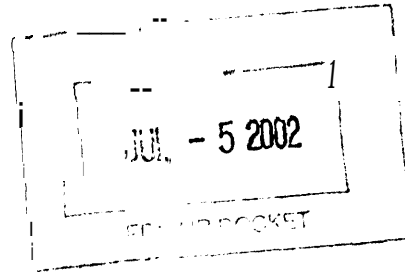
Subject: Attached are the comments of WEST Associates....

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Please respond to
davidss

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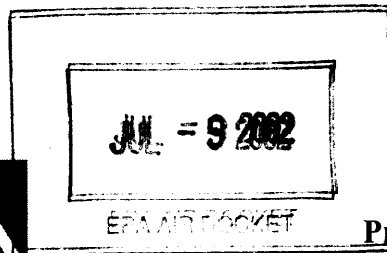
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A-2000-51

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**Comments of WEST Associates
Proposed Revisions to 40 CFR 51.309
Docket Number A-2000-51
July 3, 2002**

Below are the comments of WEST Associates on the proposed revisions to 40 CFR 51.309 of the Regional Haze Rule to incorporate the provisions of the "Annex" document submitted to the EPA on September 29, 2000 (hereinafter referred to as the proposed rule). As stated by the EPA, the Annex contains a number of recommendations for implementing the Regional Haze Rule in the West, including a set of milestones for sulfur dioxide reductions, as well as provisions for a "backstop" emissions trading program should the milestones not be met.

As a stakeholder who was directly involved in the development of these recommendations, both in the Western Regional Air Partnership (WRAP) and its predecessor organization, the Grand Canyon Visibility Transport Committee, we are pleased to provide these comments.

Background on WEST Associates and its participation in the WRAP:

WEST Associates was established over 30 years ago as a venue for western electric utilities to plan and develop generation and transmission facilities throughout this region. Today, WEST Associates is composed of 17 public and private utilities throughout the western United States that together serve over 25 million customers. As mentioned previously, WEST Associates is a key industry participant in the WRAP and was a participant in the Grand Canyon Visibility Transport Commission since its inception.

WEST Associates believes that participation in regional stakeholder policy-making efforts is beneficial for primarily two reasons. First, they provide the affected stakeholders the opportunity to collaboratively develop solutions to regional environmental challenges such as regional haze. We support the view of Western Governor's that, for issues such as regional haze, collaboration among the affected stakeholders is a much more effective policy-making mechanism than top down mandates from Washington, DC.

Our air quality issues are much different than in other regions of the country. While it is understandable and acceptable to have consistent air quality standards relating to health nationally, secondary impacts such as visibility are much different region-by-region. Nowhere is that difference more evident than the issue of visibility. As mentioned in the proposed rule, our air quality and resulting visibility is much better than in other regions of the country. As a result, strategies that may work in the Great Smoky Mountains National Park are not necessarily the best ones for the Grand Canyon National Park.

The second reason WEST Associates has participated in regional stakeholder policymaking processes such as the WRAP is that it has the opportunity to provide sources the regulatory certainty that is critical to making sound business decisions to

meet the growth in energy demand in our region. We need to know what will be required of us and when. If a source knows that it will be required to make capital investments in their facilities to meet an environmental objective at a date certain, there will be less resistance to making that investment if that source knows it is coupled with some degree of future regulatory certainty. The WRAP is a good example of this. It set specific regional SO₂ emission milestones for stationary sources. This is an excellent example of why we believe that regional stakeholder-based collaboration is much more effective – businesses are provided some degree of certainty and the environment is protected.

It is within this context that we offer our comments on the proposed rule.

Decision of the Washington, D.C. Circuit Court of Appeal in the American Corn Growers Association litigation:

While comment on this issue is not specifically requested in the federal register notice on the proposed rule, the potential significance of this issue warrants it being raised. At the outset, it needs to be clear that WEST Associates supports the WRAP's Annex and efforts to implement it under Section 309 of the Regional Haze Rule. We believe it should remain a viable regulatory option for states to use in complying with the Regional Haze Rule.

However, EPA's June 7, 2002 letter to the WRAP notwithstanding, we believe that the WRAP's Annex could be in jeopardy if the issues raised in the Corn Growers case are not addressed. In this letter, the EPA states that it "believes strongly that the State-initiated WRAP process is fully consistent with the Court's ruling." We believe that notwithstanding this assertion, without additional work to develop the basis for this assertion, the Annex will be vulnerable.

It is our view that both the Regional Haze Rule and the WRAP's Annex are clearly linked to the issues raised in the Corn Growers litigation. Consider that Section 5 1.309 (f)(1) says that, [T]o be satisfactory, the Annex [to the Commission Report] must contain the following elements:

“(i) The annex must contain quantitative emission reduction milestones for stationary source sulfur dioxide emissions . . . [that are] shown to provide for greater reasonable progress than would be achieved by application of best available retrofit technology (BART) pursuant to §51.308(e)(2) and would be approvable in lieu of BART.” [Emphasis added]

Additionally, Section 5 1.308(e)(2) of the regional haze rule states that “A State may opt to implement an emissions trading program . . . rather than to require sources subject to BART to install, operate, and maintain BART. To do so, the State must demonstrate that this emissions trading program . . . will achieve m-eater reasonable progress than would be achieved through the installation and operation of BART.” [Emphasis added]

Section 5 1.308(e)(2)(i) clearly spells out the basis for the demonstration of greater reasonable progress. It says that this ***'demonstration must be based on the following [group BART approach].'*** [Emphasis added]

In addition, the WRAP's Annex makes it abundantly clear that "group BART" is the basis for the 2018 milestone. Consider:

"The emission reduction milestones must be shown to provide for greater reasonable progress than would be achieved by application of best available retrofit technology (BART) pursuant to section 5 1.308(e)(2) and would be approvable in lieu of BART."

Attachment D of the Annex contains a detailed demonstration of how the milestones developed by the WRAP provide for greater reasonable progress than BART for regional haze." p. 15

Also, the Annex makes the following point as well:

"1. Greater Reasonable Progress than BART. The supporting documentation that is submitted with the Annex demonstrates that the regional milestones provide greater reasonable progress than BART, and therefore meet the RH Rule requirement to address BART for regional haze." p. 60

The D.C. Circuit vacated the group BART approach included in the Regional Haze Rule as it applies to BOTH Sec. 308 and Sec. 309 of the regional haze rule. Moreover, there was at least some reliance on it in the development of the Annex.

In light of the potential significance of this litigation on the Annex, WEST Associates believes that the comment period on this Federal Register notice should be extended to provide opportunity to assess the full impact of this decision and develop a strategy to preserve the WRAP's Annex. If an extension is not possible, then we would then recommend that the EPA accept and consider comments on this issue after the close of the comment period so as to permit further dialogue and resolution if necessary.

Additionally, as indicated above, Section 309 and the Annex are based in great part on the BART requirement of Section 308. Because of the Corn Growers litigation, EPA will have to make changes to the Section 308 BART requirement to conform it to the requirements of the Clean Air Act. The WRAP and Western States will then need to develop and submit SIPs (under either Section 308 or Section 309) that incorporate EPA's response to the D.C. Circuit's decision. Given the amount of time necessary under state processes to develop and submit SIPs, the Western states cannot submit Section 309 SIPs that comply with the Clean Air Act and the Corn Growers decision in time to meet the 2003 deadline. Therefore, the Section 309 SIP submittal deadline should be extended accordingly.

WEST Associates believes that this is the most prudent course to keep the Annex viable. Too much is at stake to act hastily. Taking the time now to address this matter could

strengthen the long-term viability of the Annex and its ability to address regional haze in the western U.S.

List of BART Eligible Sources:

In the proposed rule, EPA requests comment on methods used to determine BART eligible units. The WRAP in its Annex identified sources that have a potential to emit more than 250 tons per year as BART eligible. EPA has proposed “a slightly different approach” which is manifested in the BART Guidelines proposed in July 2001. In comments submitted on the BART Guidelines, WEST Associates specifically addressed the issue of the aggregation of smaller units to derive BART eligible sources. Those comments said:

As previously noted, the Guidelines go far beyond the mandate of § 169A of the Act regarding the size of units that are subject to BART analysis. The Act specifies that large coal-fired utility boilers greater than 750MW be subject to BART if certain eligibility requirements are met. There is clearly no authority for EPA to extend the Guidelines to smaller units or sources. This view is supported by the fact that § 169A(c)(2) exempts plants greater than 750 MW from BART requirements if the owner can demonstrate that such power plant, by itself, or in combination with other sources, does not cause or contribute to “significant impairment of visibility in any such area.”

Had Congress intended smaller plants to be included in the BART requirement, a similar exemption would have been granted for these smaller facilities.

Even more disturbing is the fact that the Guidelines propose to include small emission units other than utility boilers in the BART eligibility evaluation. These small ancillary emission sources, such as auxiliary boilers and diesel startup generators, were never the focus of Congress in adopting regional haze requirements. These sources should not be singled out for control in such a manner; rather, they should be treated as any other small source may be treated in the state implementation plan for regional haze.’

Consequently, WEST Associates believes that the manner in which the WRAP determined BART eligibility is appropriate for the purposes of implementing the Annex and Section 309 of the Regional Haze Rule notwithstanding how significant or insignificant the emissions difference may be.

Emissions Reductions from BART Eligible Sources:

¹ WEST Associates Comments, Proposed Guidelines --- Best Available Retrofit Technology Determination (BART), Docket Number A-2000-28, October 4, 2001

While not specifically requesting comment, the EPA indicates in the proposed rule that, during WRAP deliberations on setting the milestones, it provided the WRAP with a “technical review of the control technology judgments made by the WRAP for the utility boilers.” The proposed rule indicates that this review would result in 15,000 to 35,000 tons in greater reductions. It is unclear as to why this is in the preamble. The WRAP considered this information and did not change its control technology judgments. Moreover, the EPA indicates earlier in the proposed rule that it “agrees with the WRAP’s conclusions that these milestones meet the requirements of the CAA and the Regional Haze Rule. . . ”

As mentioned previously, WEST Associates supports the WRAP’s milestones as the product of consensus. There are certainly issues with which WEST Associates disagreed in the development of the milestones. Yet WEST Associates does not continue to rehash these issues. Consequently, we believe this language is not appropriate in the proposed rule and should be removed particularly when the same proposed rule finds that the milestones meet “the requirements of the CAA and the Regional Haze Rule.”

WRAP’s use of the 35,000 tons per year of “headroom/uncertainty” as an amount that is included in the calculation of a year 2018 milestone:

In the proposed rule, the EPA requests comment on this issue. For the reasons indicated in the proposed rule, WEST Associates believes that the inclusion of a headroom/uncertainty increment in the milestones is appropriate. The amount -- 35,000 tons was established as part of the consensus and is acceptable.

EPA’s finding that the milestones fulfill all of the requirements for “steady and continuing progress”:

WEST Associates agrees with EPA’s finding that the emission milestones contained in the Annex fulfill all of the requirements for “steady and continuing, progress.”

Adjustments to the Milestones for Utility Boilers Opting to Use More Refined Flow Rate Methods:

As mentioned in the proposed rule, some utilities have changed the methods by which they calculate the flow rate of emissions. This change in flow rate measurement could have the effect of reducing reported emissions from some utility boilers. However, these new flow rate measurement methods were not available when the milestones were established. Consequently, there were some concerns from some WRAP stakeholders that the milestones were overstated. To address this issue, the WRAP identified three possible methods for calculating the change in emissions resulting from changes in flow rate methods. Those methods were developed in consultation with the utility stakeholders and consequently WEST Associates agrees with the EPA that any one of these methods is acceptable depending on the specific situation.

With respect to applying those changes to the milestones, the methods laid out in the proposed rule appear to unnecessarily complicate matters. Rather WEST Associates suggests that if a State or Tribe notifies the EPA that an individual source's emission monitoring methodology has been modified resulting in a change in its reported emissions, a corresponding up or down adjustment in the affected sources' emission and the State's/Tribe's total allocation would be made, as part of its SIP/TIP revision. Also a corresponding adjustment of the milestones for the entire region would also be made consistent with the respective State or Tribe's recommendation.

Adjustment in the Milestones for Illegal Emissions:

In the preamble, the EPA requests comments on two options to adjust the milestones based on the outcome of enforcement actions against specific sources. Option 1 states that irrespective of the type of enforcement action and settlement, there would be an automatic re-forecast of the milestones reflecting a reduction of that source's "illegal emissions." Option 2 says that milestone adjustments would be evaluated on a case-by-case basis, by a yet to be determined entity.

In addition, EPA proposes specific rule language that seems to indicate that Option 1 is its preferred course of action.

WEST Associates believes that the illegal emission provision is not appropriate in the context of the proposed regional emissions trading program and should be removed from the proposed rule. As noted earlier, the proposed rule finds that the regional milestones meet "the requirements of the CAA and the Regional Haze Rule." It is unclear as to why that finding would change as a result of an enforcement action against a particular source.

Moreover, adjusting the regional milestones would not only punish the offending source, but the other participating sources as well. Industry stakeholders, including WEST Associates, agreed to the milestones in the Annex based on the expectation that some degree of regulatory certainty would be provided. However, permitting the milestones to be reduced as a result of an unclear and arbitrary definition of "illegal" significantly compromises the business certainty industrial sources were expecting.

Adding further to the ambiguity, most enforcement actions are resolved without an admission or determination of guilt. Also, settlements often include greater emissions reductions than would have been required under the existing regulatory requirements. It is not clear as to how those additional emissions reduction would be quantified in the context of "illegal emissions."

Therefore, WEST Associates believes that in the course of fulfilling its enforcement responsibilities, the EPA should exercise these responsibilities independent of the WRAP's regional haze program. If however, EPA compels further regional emission

reductions as a result of an enforcement action, it should do so only after demonstrating that those reductions will result in a perceptible visibility benefit.²

Emissions Quantification Protocol:

The proposed rule requires states to “develop emission quantification protocol for determining actual emissions from sources” and that states include necessary monitoring, record keeping, and reporting provisions to measure and track results. For sources covered by Title IV of CAA, the reporting, monitoring and tracking provisions of Title IV would continue to be utilized in the implementation of the Section 309 of the Regional Haze Rule. No additional protocol would be required for these sources.

With respect to other sources, the EPA proposes that the criteria listed in “Section 5.2 and 5.3 of the EIP guidelines” be used to determine the sufficiency of the protocol.

WEST Associates supports this provision of the proposed rule. In order for sources to participate in the market envisioned by the WRAP, there needs to be an accurate and transparent quantification of emissions. These emissions will be the currency of the market and, like any other market, sufficient accounting safeguards are needed to ensure the value of the currency. Consequently, we believe that other sources need to employ quantification protocols that are equivalent to those required of electric utilities.

Enforcement Penalties:

With respect to this provision of the proposed rule, WEST Associates aligns itself with the comments that the WRAP will be submitting. The proposed rule recommends a more stringent penalty provision that is disproportionate to the nature of the possible violations. As the WRAP suggests in its comments, visibility is a welfare issue and not a public health issue. Consequently, the penalties the WRAP proposes in the Annex are appropriate and should be included in the final rule.

What happens to the program after the year 2018:

It is clear that Sec. 309 and the WRAP’s Annex covers the period from 2003 to 2018. Therefore, EPA’s approval of the Annex should not be dependent of what occurs after 2018. This issue is best left to the visibility SIP revisions at that time.

²This speaks to issues raised by the Corn Growers litigation and the need to reconcile the issues raised in it with Sec. 309. This decision clearly states that emission reduction must either 1) meet the statutory requirement to install BART; or (2) allow the state to make reasonable further progress toward the national visibility goal. In either case, there must be a demonstration of visibility improvement.