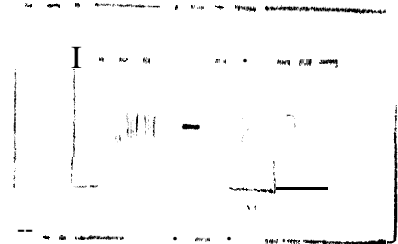




A-2000-51
IV-D-08

July 3, 2002

Air and Radiation Docket and Information Center (6102)
Attention: Docket No. A-2000-5 1
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460



The Western Regional Air Partnership (WRAP) is pleased to submit the attached comments on the Environmental Protection Agency's proposal to incorporate into the regional haze rule the WRAP's Annex to the Report of the Grand Canyon Visibility Transport Commission (GCVTC) that was submitted to the Environmental Protection Agency (EPA) on September 29, 2000. The WRAP supports the EPA's proposal, with the revisions discussed in the attached comments, which will allow nine Western states and tribes within those states to implement a critical portion of Commission's strategy to reduce regional haze in the West. By incorporating the Annex into the Regional Haze Rule, EPA not only builds upon many years of hard work by the Commission and the WRAP, but also fosters constructive governmental partnerships to protect environmental resources.

The WRAP would like to thank EPA for its assistance in this collaborative process, first through the GCVTC and later through the numerous Forums and Committees of the WRAP that have been working to address regional haze issues in the West. EPA's on-going participation in the WRAP is critical to ensure that the work of the WRAP can be adopted into state and tribal implementation plans.

The WRAP requests that EPA consider the attached comments on the proposed revisions to the Regional Haze Rule to ensure that the proposal is consistent with the Annex.

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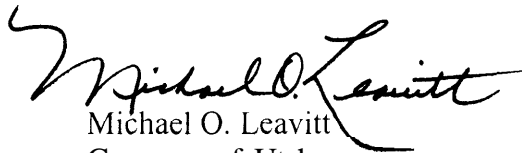
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In addition, it would be helpful if in the near future EPA would provide the WRAP and other interested parties with a more detailed explanation regarding why the Agency believes the recent U.S. Circuit Court of Appeals decision does not impact the ability of Western states and tribes to move ahead with implementation of the Annex and the Section 309 provisions of the Regional Haze Rule (per June 7 letter from Lydia Wegman).

Also, in recent conversations with Western state and tribal officials, EPA has indicated that it will accept and consider comments regarding the court decision and its impact on the Regional Haze Rule after the July 5, 2002 deadline for comments on the Annex rulemaking. We appreciate this opportunity, as there will undoubtedly be ongoing discussions within the WRAP and in other forums on this topic. However, we do not believe that this should prevent EPA from moving forward with final approval of the Annex.

Sincerely,



Michael O. Leavitt
Governor of Utah
WRAP Co-Chair



Cyrus J. Chino
Governor of Pueblo of Acoma
WRAP Co-Chair

WRAP Comments on Proposed Revisions to Regional Haze Rule to Incorporate Sulfur Dioxide Milestones and Backstop Emissions Trading Program for Nine Western States and Eligible Indian Tribes Within that Geographic Region – July 3, 2002

1. Milestone for the Year 2018.

In the preamble to EPA's proposed approval of the Annex, EPA discusses the process that was used to develop the 2018 milestone (p. 3042-1):

To identify the year 2018 milestone, the WRAP:

- Estimated the baseline SO₂ emissions for the year 2018, (e.g., the predicted SO₂ emissions in the year 2018 in the absence of a program to reduce SO₂ emissions);
- Developed a list of BART-eligible sources in the region;
- Estimated the emissions reductions that BART sources could achieve, and
- Selected a year 2018 milestone that reduces the baseline emissions by an amount that would achieve greater reasonable progress in improving visibility than be requiring each BART-eligible source to install BART.

This language does not completely capture the scope and methodology of the milestone decision. The process that is outlined in the preamble is a correct description of the methodology that the WRAP used to determine if the backstop trading program achieved greater reasonable progress than BART. However, while the milestones were informed by the formula and data that are described in the preamble, the milestones were negotiated numbers that reflected a broader view of the entire backstop trading program and the relevant statutory factors. In addition, the individual elements of the formula do not represent a consensus position outside of the balanced package of the Annex. The following discussion of this issue was included on page 15 of the Annex:

Attachment C contains a detailed demonstration of how the milestones developed by the WRAP provide for greater reasonable progress than BART for regional haze. . . . The demonstration is included as an attachment in part to emphasize that the 2018 milestone is a negotiated, policy-driven number, and is not directly derived from the emission inventory formulas. The WRAP's Committees and Forums have expended considerable effort over the last year to improve the emission inventory projections and to estimate the impacts of future control requirements. The data have informed the debate, and the intense effort to improve and understand the data was necessary for the stakeholders involved in the process to understand the impacts of various proposed milestone levels. However, there was also the recognition that the data will never be perfect, and that the question of greater reasonable progress than BART is a broader question that is also informed by other policy considerations.

2. What Happens After 2018.

Table 1 in §5 1.309(h), Sulfur Dioxide Milestones, states that sulfur dioxide emission milestones for each year after 2018 shall be no more than 5 10,000 tons (480,000 tons if suspended smelters do not resume operation). As noted in the preamble, the Annex did not attempt to address the fate of this program beyond calendar year 2018.

The WRAP Market Trading Forum has discussed this issue, and determined that it is premature to determine what will be needed to maintain reasonable progress after the year 2018. It is not the WRAP's expectation that the emissions cap will be relaxed in the next long-term strategy submission or that backsliding will occur. Indeed, the WRAP recognizes that our innovative program is essential to address the BART and reasonable progress requirements. Nevertheless, the proposal, as written, would limit the flexibility of states and tribes to develop future plans to show continued progress towards meeting the visibility goals of the Clean Air Act.

The WRAP recommends that the language regarding SO₂ milestones after the year 2018 be modified to read, "no more than 5 10,000 tons (480,000 tons if suspended smelters do not resume operation) unless the milestones are replaced with a different program that meets any BART and "reasonable progress" requirements established in this rule".

3. Tribal Set-Aside.

The proposal specifically highlights the 20,000-ton tribal set-aside to ensure that this important element of the allocation is implemented. The WRAP agrees that this set-aside needs to be assured and agrees with the proposed language regarding the set-aside in 5 1.309(h)(4)(i). In addition, EPA should emphasize in the final rule that tribal participation in the trading program, either through development of a tribal implementation plan (TIP) that includes full trading program elements or participation through the tribal set-aside, shall not be affected by the decision of states to opt out of the program. For example, if California opts out of the backstop trading program, all tribes that are located in California may still participate in the distribution of the tribal set-aside.

The preamble of the rule states that:

EPA also sees a possible need to help facilitate allocation of the 20,000 tons allocated to Tribes under the backstop market trading program. The EPA believes, however, that the critical need for the allocation does not exist until a trading program is triggered. As discussed above in unit II.D of this preamble, the earliest year for compliance with the allowances is the year 2009. While it is preferable to have any allowances in place well in advance of this date, EPA does not see the distribution of the tribal set-aside as a critical issue for EPA involvement in the near term. The EPA will seek to provide assistance as necessary to facilitate the process.

The WRAP agrees with EPA that distribution of the tribal set-aside does not need to be addressed in the near term. The WRAP recognizes that the tribal set aside was established for multiple purposes -- including use for tribal industrial or energy development; sale for revenue to fund tribal environmental capacity or other goals; and retirement for the benefit of the environment. Determining an equitable and effective basis for the use of the set-aside will consume significant human resources and could be divisive, thus it should only be undertaken when it is certain that the market will in fact come into existence. The WRAP thus strongly believes that the distribution of the set-aside should be determined by the tribes and not by EPA or the WRAP.

At the same time, because the tribal set-aside will be an important part of the market, the WRAP sees the need to provide states and tribes with a greater certainty that there *will* be a methodology for utilizing the tribal set-aside in time for market implementation. This certainty is needed to evaluate the cost effectiveness of the program and thus the desirability of opting-in to §309 -- a decision that states must make by the end of 2003.

Therefore, the WRAP recommends that the final rule contain a provision that will require the determination of a method to allocate or manage the tribal set-aside by no later than one year after the market trading program is triggered. This will allow tribes to track emissions trends over time and prioritize the allocation methodology decision according to the likelihood of the program being triggered. We expect that EPA will fulfill its commitment to consult with tribes in the intervening years to determine the methodology, and the WRAP will facilitate and assist in that process.

4. Model Tribal Implementation Plan.

The preamble (p. 30439) correctly notes that under the interplay of the Tribal Authority Rule and the Regional Haze Rule, tribes may opt-in to the program by submitting TIPs even after 2003, and that EPA will promulgate Federal Implementation Plans (FIPs) within reasonable timeframes as necessary and appropriate to protect air quality in Indian Country.

Additionally, the preamble addresses EPA's current thinking on tribal program assistance and notes that there are a number of ways EPA can provide assistance. On the same page, EPA encourages tribes that choose to participate in the program to make every effort to submit a plan by the deadlines to ensure that the plans are integrated and coordinated with regional planning efforts.

The WRAP encourages EPA to make assistance to tribes a priority. In the West, tribal participation in regional planning and the implementation of regional solutions is essential. One valuable form of assistance would be for EPA to develop a model implementation plan which could be appropriately modified and utilized by any tribe choosing to participate in the market trading program.

More specifically, this model implementation plan could be used by individual tribes to develop a TIP, or it could serve as the starting point for a FIP developed in consultation

with a tribe that desires to join the program but does not have the resources to implement a TIP.

In any case, we believe it is important that EPA devote sufficient resources to ensure that any tribe that wishes to opt-in to the program will be able to do so in a timely manner whether not the tribe itself has the capacity to develop a TIP. Obviously, it is critical for EPA to consult with potentially affected tribes in the course of developing model TIP/FIPs.

5. Adjustments for Utility Boilers Opting to Use More Refined Flow Rate Methods.

The supplementary submittal to the Annex outlined why an adjustment to the milestones was needed to account for changes in the flow rate methodology for utilities, and outlined several options for making this adjustment. The preamble to the proposed rule states that a specific approach needs to be selected for the final rule. The WRAP has three comments to make on the proposed language:

A. The rule needs to clarify that the adjustment for utility boilers using a different flow rate method will only apply to the interim milestones of 2003 through 2017. The 2018 milestone already included assumptions about the effect of this adjustment. The preamble to the rule implies this distinction but it needs to be included in the regulatory text. The WRAP recommends that the regulation be revised as follows:

“5 1.309(h)(1)(iv) Adjustments for changes in flow rate measurement methods. The implementation plan must provide for adjustments to the interim milestones of 2003 through 2017 for sources using the methods contained in 40 CFR part 60, appendix A, Methods 2F, 2G, and 2H. No adjustments are required for the 2018 milestone for changes in the flow rate measurement methods.”

B. The proposal outlines three technical procedures that sources could use to calculate the adjustment: a side-by-side comparison of flow rates using the old and new methods; use of the annual average heat rate to calculate the change; and finally a comparison of the standard cubic feet per minute per megawatt before and after the change. All three of these methods are valid, and the WRAP does not believe that one method should be chosen over the others. The methodology that will work in one situation may not be appropriate in another situation, and the ability to choose among three equally valid methodologies will provide needed flexibility in the program. The WRAP recommends that EPA include an option to use any one of the three methods for quantifying the effects of a new flow rate measurement methodology.

C. The proposal also outlines three possible approaches for using the adjustment factors for making a correct comparison of emissions to the milestones. The WRAP recommends that EPA use option (c) in the final rule. Under this approach, interim milestones would be adjusted every 5 years as part of the periodic SIP update. The changes to the milestones would be calculated by re-forecasting the baseline emissions for all of the utilities that had changed their flow rate measurement method since the last SIP revision. Allocations for the affected sources would also be changed as part of this

SIP revision to reflect the new methodology. During the interim period between SIP revisions, the source's reported emissions would be revised on an annual basis using one of the options described above for determining the flow adjustment factor. The annual compliance check will be done by comparing the adjusted regional SO₂ emissions to the unadjusted milestones. An equivalent adjustment will also be made to the source's allocation for the purposes of trading under the program. Allocations for other sources in the program will not be affected. This option will ensure that paper increases or decreases due solely to changes in measurement techniques will not affect compliance with the milestones.

The WRAP outlined the process that will be used to incorporate milestone adjustments in future SIP revisions in the Supplementary Submittal that was submitted to EPA in May, 2001. As outlined in that document, changes that occur during the interim period will be included in the annual regional emission report and will be available for public review and comment. The WRAP will then compile all changes that occur during the interim period and make these changes available to states and tribes to include in their 5-year implementation plan revisions.

6. Milestone Changes Due to Enforcement Actions.

The proposed rule includes a requirement to adjust the milestones due to illegal emissions:

§5 1.309(h)(1)(v) Adjustments for illegal emissions. The implementation plan must provide for adjustments to the milestones if any source in the program decreases its sulfur dioxide emissions in order to comply with applicable regulations which were in effect prior to the calculation of the source's baseline sulfur dioxide emissions. The plan must provide that the milestone must be decreased by an appropriate amount based on a reforecasted calculation of the source's decreased sulfur dioxide emissions. Any such adjustment based upon illegal emissions must be made in the form of an implementation plan revision that complies with the procedural requirements of §§5 1.102 and 5 1.103.

There is also a discussion in the preamble to the rule that outlines additional options for providing specificity to this paragraph. The Annex includes a similar adjustment, and the WRAP believes that it is important to address this issue in the rule. The following comments clarify the language of the Annex:

A. Both the Annex and the proposed rule use the term "illegal emissions." The WRAP believes that the term "adjustments due to enforcement actions" would be more appropriate in this case. The term "illegal emissions" implies a conclusion that the law has been broken, and this does not reflect the possibility of settlement agreements or consent decrees where there is no admission that a violation has occurred.

B. EPA should clarify in the final rule that the milestone adjustments would only apply to enforcement actions that would have affected the assumptions used in the baseline emission projections. The rule as written refers to “applicable regulations that were in effect prior to the calculation of the source’s baseline sulfur dioxide emissions.” There may be cases where a future violation of a long-standing requirement occurs. For example, if a source was in compliance with a state’s SO₂ SIP in 1998 (the base year that was used for projections for non-utility sources), but then violates a SIP provision in 2010, the milestones should not be adjusted due to the resulting enforcement action. On the other hand, if the source was operating in violation in 1998, then the milestone should be adjusted.

C. The preamble to the rule asks for comment on two options for determining the adjustment that is needed for the milestone (p. 30430 – 30431):

Option 1: under this option, the rule would require that if there is any resolution to an alleged illegal SO₂ emission,, then all of the reductions would be considered as “illegal emissions.”

Option 2: under this option, the rule would allow for case-by-case judgements on the appropriateness of the adjustment, and would clarify the entity responsible for deciding whether a case involved illegal emissions warranting an adjustment to the milestones. Under this option we also seek comment on the entity responsible for this determination.

The WRAP believes that option 2 is the best approach for addressing enforcement actions because there is such variability and complexity inherent in individual situations that do not readily lend themselves to bright-line rules. Option 1 could have the unintended effect of creating a disincentive to resolve enforcement issues in a manner that could produce broader environmental benefits. Indeed, a source may have many reasons for resolving an enforcement issue even though they do not believe that a violation has occurred.

Option 2 would allow consideration of the individual circumstances of each case. As an initial matter, the entity responsible for this determination should be the parties entering into a settlement, in conjunction with the affected state or tribe. It is important to include the state or tribe in this decision because, as outlined in the rule, the milestone adjustment would need to occur through a revision to the implementation plan. EPA would then have the oversight role in their review of the SIP to determine that the adjustment agreed to through the settlement process is properly reflected in the milestone adjustment. EPA also has the ability to independently enforce federal requirements, including requirements in an approved state or tribal implementation plan.

While we do not believe that a “bright line” rule is appropriate given the inherently unique factors presented in any enforcement action, we do believe it is important that the implications of the enforcement action on the milestones and any allowances (assuming the program is triggered) be thoroughly considered and addressed. This concern is

heightened under the long planning horizons in the regional haze rule and the likelihood that years from now others may not think to address the implications. Accordingly, we recommend that EPA add a provision to the regulation that requires states and tribes to address the impacts of an enforcement action that is sulfur dioxide related in the periodic implementation plan revisions under the haze rule. Such language should clearly require that states and tribes indicate on the administrative record whether adjustments to the milestones are appropriate if any source in the program decreases its sulfur dioxide emissions under an administrative or judicial enforcement action and explain the basis for the states or tribes decision.

D. The proposal asks for comments on how to treat any extra SO₂ emissions reductions that a facility might achieve as a result of a settlement. The WRAP believes that these extra emission reductions should likewise be addressed on a case by-case basis with a provision that requires states and tribes to address in the periodic implementation plan revision whether sulfur dioxide allowances should be retired or confiscated as a result of an administrative or judicial enforcement action and the rationale for the state's or tribe's decision.

7. Annual Determination of Compliance with the Milestones.

The proposed language in §5 1.309(h)(3)(ii) requires that the annual determination of compliance “must be submitted to the Administrator by the end of March of the year following issuance of the initial public review draft report. The first final determination will be due to the Administrator on March 31, 2005.”

One of the goals of the Annex was to rely on the current emission inventory process to track progress with the milestones. As such, it is important to recognize that some of the transport region states cannot provide the needed information on the timetable suggested under this section of the Annex. While the deadline of “the end of March of the year following issuance of the initial public review draft report” can be met by most states and tribes who plan to submit a §309 SIP, the WRAP recommended in its supplementary submittal that the determination of compliance should allow flexibility in the schedule of up to a year to account for possible delays in the compilation of emission inventory data. The WRAP also recommended that this increased reporting flexibility should not affect any compliance dates of the program.

Therefore, the WRAP recommends that EPA extend the date for the annual determination of compliance to March 31, 2006 for the 2003 milestone and then every year thereafter in order to encourage the broadest regional participation, particularly by those states and tribes who, due to the number and complexity of their sources, may require additional time to collect, validate, and analyze emissions data. This increased reporting flexibility would not affect the schedule for meeting the emission targets for the program in the event that the milestones are triggered.

8. Allowances.

The methodology for determining allocations to sources in the region is established in the Annex. This methodology identifies three key portions of the allocation process. The first is the regional set-asides for tribes and for new sources. The second is a floor allocation that would be established for each existing source. The third piece is the reducible allocation that is needed to ensure that total allocations remain under the emission cap. This third piece contains several elements that will not be known until the program is triggered, primarily the “source-specific early reduction bonus allocation” and the “renewable energy source” allocation. In addition, as outlined in the model rule sources that shut down prior to the program trigger are not subject to the program and will not receive an allocation. For this reason, the Annex recommends distributing allowances in 5-year increments, beginning one year after the program has been triggered. Subsequent allocations will occur every five years.

The intention of the Annex was that the regional set-asides and the floor allocation for each existing source would be specified in the SIP or TIP. The reducible allocation would then be estimated for each source based on currently available information. It is not anticipated that the reducible allocation will change significantly when the program is triggered, but there would likely be small differences between the estimates and the final allocation that would occur after the program trigger.

The proposed rule states:

§51.309(h)(4)(i) For each source in the program, the implementation plan must identify the specific allocation of allowances, on a tons per year basis, for each calendar year from 2009 to 2018. The total of the tons per year allowances across all participating States and Tribes may not exceed the amounts in Table 4 of this paragraph, less a 20,000 ton amount that must be set aside for use by the Tribes. The implementation plan may include procedures for redistributing the allowances in future years, so long as the amounts in Table 4 of this paragraph, less a 20,000 ton amount, are not exceeded. . .”

The language in the proposal does not allow the flexibility that the WRAP envisioned in the Annex because it requires states and tribes to specify the allocation of allowances for each year between 2009 and 2018. The WRAP recommends that §51.309(h)(4)(i) be modified to read as follows (*new language underlined and bold italics*):

§51.309(h)(4)(i) For each source in the program, the implementation plan must **either** identify the specific allocation of allowances, on a tons per year basis, for each calendar year from 2009 to 2018 **or a formula that will be used to calculate the allowances when the program is triggered.** The total of the tons per year allowances across all participating States and Tribes may not exceed the amounts in Table 4 of this paragraph, less a

20,000 ton amount that must be set aside for use by the Tribes. The implementation plan may include procedures for redistributing the allowances in future years, so long as the amounts in Table 4 of this paragraph, less a 20,000 ton amount, are not exceeded..

9. Set-Aside for Renewable Energy Sources.

EPA proposes to not include the details of the allocation methodology in §309 of the rule with the exception of the tribal set-aside. The WRAP agrees with EPA that it is not necessary to include these provisions in the rule. However, the WRAP would like to ensure that the renewable energy set-aside that was included in the Annex is specifically addressed in the rule to ensure that this important part of the Annex agreement is assured in the final rule. The renewable set-aside has linkages to the pollution-prevention goals established in §309(d)(8) and needs to be addressed in the final rule.

The WRAP recommends that EPA modify the proposed language in §309(h)(4)(i) as follows (*new language underlined and bold italics*):

- (i) *Allowances.* For each source in the program, the implementation plan must identify the specific allocation of allowances, on a tons per year basis, for each calendar year from 2009 to 20 18. **Eligible renewable energy resources that begin operation after October 1, 2000 will receive 2.5 tons of SO₂ allowances per MW of installed nameplate capacity per year. Allowance allocations for renewable energy resources that begin operation prior to the program trigger will be retroactive to the time of initial operation.** The total of the tons per year allowances across all participating States and Tribes, **including the renewable energy allowances,** may not exceed the amounts in Table 4 of this paragraph, less a 20,000 ton amount that must be set aside for use by Tribes. The implementation plan may include procedures for redistributing the allowances in future years, so long as the amounts in Table 4 of this paragraph, less a 20,000 ton amount, are not exceeded.

In addition, the following definition should be added to §309(b):

An eligible renewable energy resource is defined to mean electricity generated by non-nuclear and non-fossil low or no air emission technologies using resources that are virtually inexhaustible, reduce haze, and are environmentally beneficial. The term includes electricity generated by wind energy technologies; solar photovoltaic and solar thermal technologies; geothermal technologies; technologies based on landfill gas and biomass sources, and new low-impacts hydropower that meets the Low-Impact Hydropower Institute criteria. Biomass includes agricultural, food and wood wastes. The term does not include pumped storage or biomass from municipal solid waste, black liquor, or treated wood.

10. Emission Quantification Protocols.

The WRAP recognizes the importance of developing standard emission protocols that ensure comparable measurements across source categories. A ton of SO₂ measured at a power plant needs to be comparable to a ton of SO₂ measured at a copper smelter. The Annex establishes the need for emission quantification protocols for sources that are not subject to 40 CFR Part 75 and the WRAP Market Trading Forum is in the process of developing these protocols for the wide variety of source categories that would be subject to this program. The proposed rule needs to provide flexibility so that these protocols can meet the goals of the program without imposing unnecessary burdens on the sources that are subject to the backstop trading program.

The preamble to the proposed rule states, “The EPA proposes that the criteria for acceptability of these [emission monitoring] protocols in the implementation plans are the same criteria as listed in section 5.2 and 5.3 of the EIP guidelines.” (page 30435) This statement is followed by some specific elements that are drawn from these sections of the guidelines. Sections 5.2 and 5.3 of the EIP guidelines are long and detailed, and include a number of provisions that may not be applicable to the backstop trading program. EPA should clarify that the EIP guidelines are not a rule and that these sections of the guidelines should be viewed as options for meeting the requirements that are established in §5 1.309(h). For this reason, the WRAP has focused on the specific provisions proposed in §5 1.309(h)(4)(iii) and (iv) regarding monitoring protocols and is not commenting on the lengthy provisions of the EIP guidelines.

A. The proposal states, “§5 1.309(h)(4)(iii). . . For source categories with sources in more than one State submitting an implementation plan under this section, each State must use the same protocol.” The WRAP agrees with this concept, but is concerned that this language could be construed to mean that the protocols must be identical. Different states have regulations that are structured differently and do not currently have identical monitoring requirements, and tribal implementation plans may also be constructed in a different manner. These existing requirements will affect how a state or tribe incorporates protocols into its SIP/TIP. In addition, states and tribes will need to take these protocols through their rulemaking process and it is likely that changes to a regionally-drafted protocol will occur in response to comments during the rulemaking process. The WRAP recommends that the proposal be modified to state, “For source categories with sources in more than one State submitting an implementation plan under this section, each State must use protocols that are sufficiently rigorous and comparable to ensure that emissions in the region are measured in reliable and a consistent manner.”

B. The proposal states, “§5 1.309(h)(4)(iii). . . The protocols must provide consistent approaches for all sources within a given source category.” Once again, the WRAP agrees with this concept but would like to ensure that this language will not limit the ability to establish different monitoring requirements

within source categories based on established criteria such as the size of an emission unit. For example, it may be appropriate to require the use of a continuous emission monitoring system on a large industrial boiler while using emission factors for a smaller boiler that is used as a backup unit.

C. Finally, the WRAP would like to ensure that the specific language of the rule does not prevent the use of flexible monitoring options that make sense for this particular trading program. Flexible monitoring is primarily an issue for smaller sources in the program, or for small emission units within a larger source. The WRAP Emissions Forum analyzed the 1990 inventory data for the Market Trading Forum to help the MTF establish a size cutoff for program applicability.

Cutoff (tons)	Total Tons	Total # of Sources	Percentage	Incremental Tons	Incremental # of Sources
10,000	476,000	20	59.3%	476,000	20
5,000	605,000	39	75.5%	129,000	19
1,000	732,000	96	91.2%	127,000	57
500	761,000	136	94.9%	39,000	40
250	779,000	186	97.1%	18,000	50
100	789,000	247	98.4%	10,000	61
50	794,000	312	99.0%	5,000	65
25	n a	n a	n a	n a	n a
0	n a	n a	100%	n a	n a

As can be seen from this table, there were 176 sources (312 minus 136) in the region in 1990 with emissions below 500 tons. Emissions from these sources were approximately 5.1% of the total emissions in the region. Because smaller sources are anticipated to have greater difficulty meeting stringent monitoring requirements, the MTF is considering adopting more flexible monitoring provisions for these smaller sources. The discussions are still in the preliminary stages, and so it is premature to make specific recommendations, however, EPA needs to ensure that the final rule will allow consideration of different approaches.

The monitoring provisions for smaller sources in the region must still provide assurances that the milestone goals will still be met; be based on data that are sound and reliable; be consistent with the assumptions of the Annex; and ensure the integrity of the trading program.

11. Audit Provisions.

The proposed rule language in 5 1.309(h)(4)(xi) contains a number of specific questions about the effectiveness of the trading program that must be analyzed in periodic audits by an independent auditor. Some of these questions could require extensive analysis by the States and Tribes to develop an appropriate answer. For example, regional economic modeling would be required to determine “whether the market trading program has likely led to decreased costs for reaching the milestone relative to a non-market based approach, including a discussion of the market price of allowances relative to control costs that might have otherwise been incurred.” Regional economic modeling is time-consuming and expensive and should not be mandated by EPA.

The required audit provisions should be limited to those provisions that are needed to verify that the program is working. Provisions that address costs or more indirect effects of the program should not be mandated. These types of provisions could be recommended in the preamble to the final rule but the decision about the type and level of analysis should be left to the States and Tribes. The WRAP recommends changes to the audit provisions in 5 1.309(h)(4)(xi) as outlined below:

(A) No changes recommended

(B) The rule language should be modified to delete the phrase indicated below:

~~“Whether the program achieved the overall emission milestone it was intended to reach; and a discussion of the actions that have been necessary to reach the milestones ”~~

The backstop trading program is intended to provide incentives for long-term business planning. The program also allows other drivers, such as the need to meet the PM_{2.5} NAAQS, to bring about some of the emission reductions needed to meet the regional haze goals. It could be very difficult to try to determine what actions were required to achieve all of the emission reductions in the region as opposed to business decisions by sources in the region. While this provision is a good suggestion, it should not be mandated by the rule.

(C) No changes recommended

(D) The rule language should be modified to delete the phrase indicated below:

~~“The administrative costs of the program to sources and to State and tribal regulators, including a discussion of whether States and Tribes have enough resources to implement the program.”~~

States and Tribes will be monitoring the costs of the program as part of their on-going internal program review, but this should not be mandated by EPA. The rule should be focused on what is needed to meet the visibility improvement goals. The development of

the most cost-effective strategies to meet those goals should be left to the States and Tribes.

(E) This entire provision should be removed from the rule. States and Tribes may choose to perform an analysis of the cost-effectiveness of the program, but this should not be mandated by EPA.

(F) and (G) Both of these provisions should be removed from the rule. As mentioned earlier, it could be very difficult to determine what changes in emissions in the region are due to the milestones because so many different factors will come into play in a backstop trading program. The regional haze rule already includes provisions for a 5-year SIP review of the entire 309 program. In addition, new SIPs will be developed every 10 years to meet the reasonable progress goals of the rule. The existing requirements in the rule are adequate to ensure that there are not any unintended consequences due to implementation of the backstop trading program. The additional audit requirements in (F) and (G) could prove to be difficult and expensive to analyze and should not be mandated by EPA.

(H) No changes recommended.

(I) No changes recommended.

12. Penalty Provisions.

The Annex recognized the critical nature of the incorporation of automatic and stringent penalties to provide sufficient disincentives for noncompliance in the trading program. Therefore, the Annex recommended two penalty provisions to address excess emissions. First, the source would be required to surrender two future year allowances for every ton of excess emissions. Secondly, the source would also be required to pay a penalty of \$5,000 per ton of excess emissions (indexed to inflation). This means that a source that emitted 10 tons of excess emissions would surrender 20 allowances from their allocation for the following year and would pay a penalty of \$50,000. The Annex also recognized that there could be other potential violations associated with this program, such as monitoring or record keeping violations. The Annex recommended treating these kinds of violations under standard penalty provisions where violations could potentially be established for every day of the year and the state or tribe would then use discretion to determine the appropriate penalties for a specific case.

The proposed language in the rule requires much more stringent penalties for excess emissions. The proposal states, "The implementation plan must include specific enforcement penalties to be applied if emissions from a source in the program exceed the allowances held by the source. In establishing specific-enforcement penalties, the State or Tribe must ensure that: (A) When emissions from a source in the program exceed the allowances held by the source, each day of the year is a separate violation; and (B) Each ton of excess emissions is a separate violation."

State SIPs usually contain a maximum penalty of \$10,000/day per violation. Therefore, as outlined in the proposed rule, a source that has 10 tons of excess emissions could be facing a possible penalty of \$36.5 million.

The WRAP objects to this proposal on two levels. First, the maximum penalty is punitive, and cannot be justified for a program that has been established to meet a welfare-based regional goal. States and tribes will not be able to justify the need for excessive penalties for a program that is intended to address haze and is not directly linked to public health. Second, the effect of this provision is that it will be impossible to ensure consistency between state and tribal programs. The excessive penalties will require that each case be viewed independently and enforcement discretion will have to be used to reduce these penalties to a reasonable level. Different jurisdictions will apply discretion in different ways, leading to an inconsistent application of penalties.

The WRAP recommends that EPA replace the penalty provisions in the proposal with the provisions that were recommended in the Annex. These provisions were based on the acid rain program, and the WRAP believes that these penalties will provide the needed incentive to achieve compliance with the emission reduction goals of the program.