

The EPA Administrator, Lisa P. Jackson, signed the following notice on 5/30/2012, and EPA is submitting it for publication in the *Federal Register* (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's FDSys website (<http://fdsys.gpo.gov/fdsys/search/home.action>) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-HQ-OAR-2011-0729. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA-HQ-OAR-2011-0729; FRL – 9672-9]

RIN 2060-AR05

Regional Haze: Revisions to Provisions Governing Alternatives to Source-Specific Best Available Retrofit Technology (BART) Determinations, Limited SIP Disapprovals, and Federal Implementation Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is finalizing revisions to our rules pertaining to the regional haze program. In this action, the EPA is finalizing our finding that the trading programs in the Transport Rule, also known as the Cross-State Air Pollution Rule (CSAPR), achieve greater reasonable progress towards the national goal of achieving natural visibility conditions in Class I areas than source-specific Best Available Retrofit Technology (BART) in those states covered by the Transport Rule. In this action, the EPA is also finalizing a limited disapproval of the regional haze State Implementation Plans (SIPs) that have been submitted by Alabama, Georgia, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia and Texas because these states relied on requirements of the Clean Air Interstate Rule (CAIR) to satisfy certain regional haze requirements. To address deficiencies in CAIR-dependent regional haze SIPs, in this action the EPA is promulgating Federal Implementation Plans (FIPs) to replace reliance on CAIR with reliance on the Transport Rule in

the regional haze SIPs of Georgia, Indiana, Iowa, Kentucky, Michigan, Missouri, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia and West Virginia.

DATES: This final rule is effective on **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES:

Docket. The EPA has established a docket for this action under docket ID No. EPA-HQ-OAR-2011-0729. All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW, Washington, D.C. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: Ms. Martha Keating, Office of Air Quality Planning and Standards, Air Quality Policy Division, Mail code C539-04, Research Triangle Park, NC 27711, telephone (919) 541-9407; fax number: 919-541-0824; email address: keating.martha@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action affects state and local air pollution control agencies located within the geographic areas covered by the Transport Rule¹ and whose regional haze SIP relied on CAIR² as an alternative to BART for sulfur dioxide (SO₂) and/or nitrogen oxide (NO_x) for electric generating units (EGUs) subject to BART requirements, or whose regional haze SIP relied on the Transport Rule. Some of the EGUs located in such geographic areas may also be affected by this action in that affected states now have the option of not requiring such EGUs to meet source-specific BART emission limits to which these EGUs otherwise could be subject.

These sources are in the following groups:

Industry group	SIC ^a	NAICS ^b
Electric Services	492	221111, 221112, 221113, 221119, 221121, 221122

^a Standard Industrial Classification.

^b North American Industry Classification System.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this notice will be posted at <http://www.epa.gov/ttn/oarpg/new.html> under “Recent Actions.”

C. How is this notice organized?

The information presented in this notice is organized as follows:

I. General Information

A. Does this action apply to me?

B. Where can I get a copy of this document and other related information?

C. How is this notice organized?

II. Background and General Legal Considerations for the EPA’s Final Acton

¹ See Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 76 FR 48208 (August 8, 2011).

² See Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call; Final Rule, 70 FR 25162 (May 12, 2005).

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- I. National Technology Transfer and Advancement Act
- J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
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IX. Statutory Authority

II. Background and General Legal Considerations for the EPA's Final Action

A. Background

Section 169A(b)(2)(A) of the CAA requires states to revise their SIPs to contain such measures as may be necessary to make reasonable progress towards the natural visibility goal, including a requirement that certain categories of existing major stationary sources built between 1962 and 1977 procure, install, and operate BART as determined by the state.³ Under the Regional Haze Rule, states are directed to conduct BART determinations for such “BART-eligible” sources that may be anticipated to cause or contribute to any visibility impairment in a Class I area. Rather than requiring source-specific BART controls, states also have the flexibility to adopt an emissions trading program or other alternative program as long as the alternative provides greater reasonable progress towards improving visibility than BART. 40 CFR §51.308(e)(2). The EPA provided states with this flexibility in the Regional Haze Rule, adopted in 1999, and further refined the criteria for assessing whether an alternative program provides for greater reasonable progress in three subsequent rulemakings. 64 FR 35714 (July 1, 1999); 70 FR 39104 (July 6, 2005); 71 FR 60612 (October 13, 2006). These criteria are described below.

1. Criteria for Developing an Alternative Program to BART

Specific criteria for determining if an alternative measure achieves greater reasonable progress than source-specific BART are set out in the Regional Haze Rule at §51.308(e)(3).⁴ The “better-than-

³ The preamble to the proposed rule provides additional background on the visibility requirements of the Clean Air Act and the EPA's Regional Haze Rule. 76 FR 82221-22.

⁴ The Regional Haze Rule also allows for a demonstration that an alternative program provides for greater reasonable progress to be based on the clear weight of evidence. 40 CFR § 51.308(e)(2)(E). We concluded that a more general test may be appropriate in certain circumstances, such as where, for This document is a prepublication version, signed by EPA Administrator, Lisa P. Jackson on 5/30/2012. We have taken steps to ensure the accuracy of this version, but it is not the official version.

BART” test may be satisfied as follows: If the distribution of emissions is not substantially different than under BART, and the alternative measure results in greater emission reductions, then the alternative measure may be deemed to achieve greater reasonable progress. If the distribution of emissions is significantly different, then states are directed to conduct an air quality modeling study to determine

example, technical or data limitations limit the ability of a state (or the EPA) to undertake a robust comparison using the test set out in 40 CFR § 51.308(e)(3).

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differences in visibility between BART and the alternative program for each impacted Class I area for the worst and best 20 percent of days.⁵ A test with the following two criteria (the “two-pronged visibility test”) would demonstrate “greater reasonable progress” under the alternative program if both prongs of the test are met:

- Visibility does not decline in any Class I area⁶, and
- There is an overall improvement in visibility, determined by comparing the average differences between BART and the alternative over all affected Class I areas.

2. What is the relationship between BART and CAIR?

In May 2005, the EPA published CAIR, which required 28 states and the District of Columbia to reduce emissions of SO₂ and NO_x that significantly contribute to, or interfere with maintenance of, the 1997 national ambient air quality standards (NAAQS) for fine particulates and/or ozone in any downwind state. The CAIR established emission budgets for SO₂ and NO_x for states that contribute significantly to nonattainment in downwind states and required the significantly contributing states to submit SIP revisions that implemented these budgets. Because such SIP revisions were already overdue, the EPA subsequently promulgated CAIR FIPs for the affected states establishing cap and trade programs for EGUs with opt-in provisions for other sources. States had the flexibility to subsequently adopt SIP revisions mirroring CAIR requirements or otherwise providing emission reductions sufficient to address emissions that significantly contribute to nonattainment or interfere with maintenance of the NAAQS in other states. Many affected states adopted CAIR-mirroring SIPs, while others chose to remain under CAIR FIPs.

⁵ While the Regional Haze Rule directs the state to conduct the air quality modeling study, as described in section III.C.2, the EPA itself conducted such a study for CAIR and through a notice-and-comment rulemaking codified the conclusion that the stated criteria were met by adding specific provisions allowing the use of CAIR in lieu of source-specific BART. We have now done the same for the Transport Rule.

⁶ The “decline” is relative to modeled future baseline visibility conditions in the absence of any BART or alternative program control requirements.

As noted above, the Regional Haze Rule allows states to implement an alternative program in lieu of BART so long as the alternative program has been demonstrated to achieve greater reasonable progress toward the national visibility goal than would BART. The EPA made just such a demonstration for CAIR in revisions to the regional haze program made in 2005. 70 FR 39104. In those revisions, we amended our regulations to provide that states participating in the CAIR cap-and-trade programs under 40 CFR part 96 pursuant to an EPA-approved CAIR SIP or states that remain subject to a CAIR FIP in 40 CFR part 97 need not require affected BART-eligible EGUs to install, operate and maintain BART for emissions of SO₂ and NO_x. 40 CFR 51.308(e)(4).

As a result of our determination that CAIR was “better-than-BART,” a number of states in the CAIR region, fully consistent with our regulations, relied on the CAIR cap-and-trade programs as an alternative to BART for EGU emissions of SO₂ and NO_x in designing their regional haze implementation plans. These states also relied on CAIR as an element of a long-term strategy for achieving their reasonable progress goals for their regional haze programs.

3. Remand of CAIR and Implications for State Regional Haze Implementation Plans

Following our determination in 2005 that CAIR was “better-than-BART,” the D.C. Circuit Court ruled on several petitions for review challenging CAIR on various grounds. As a result of this litigation, the D.C. Circuit Court remanded CAIR to the EPA but later decided not to vacate the rule.⁷ The court thereby left CAIR and CAIR FIPs in place in order to “temporarily preserve the environmental values covered by CAIR” until the EPA replaced it with a rule consistent with the court's opinion. 550 F.3d at 1178. On August 8, 2011, EPA promulgated the Transport Rule, which was to replace CAIR.⁸ As promulgated, the Transport Rule would have addressed emissions in 2012 and later years and would

⁷ See North Carolina v. EPA, 531 F.3d 896; modified by 550 F.3d 1176 (D.C. Cir. 2008).

⁸ See Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone. 76 FR 48208.

have left the requirements of CAIR and the CAIR FIPs in place to address emissions through the end of 2011. The D.C. Circuit, however, on December 30, 2011, stayed the Transport Rule (including the provisions that would have sunset CAIR and the CAIR FIPs) and instructed the EPA to continue to administer CAIR pending the outcome of the court's decision on the petitions for review challenging the Transport Rule. EME Homer City v. EPA, No. 11-1302 (Order).

Many states relied on CAIR as an alternative to BART for SO₂ and NO_x for subject EGUs, as allowed under the then-current BART provisions at 40 CFR 51.308(e)(4). These states also relied on the improvement in visibility expected to result from controls planned or already installed on sources in order to meet CAIR provisions in developing their long-term visibility strategy. In addition, many states relied upon their own CAIR SIPs or the CAIR FIPs for their states as legal justification for these planned controls and consequently did not include separate enforceable measures in their long-term strategies (a required element of a regional haze SIP submission) to ensure these EGU reductions. These states also submitted demonstrations showing that no additional controls on EGUs beyond CAIR would be reasonable for the first 10-year implementation period of the regional haze program.

In summary, many of the states in the CAIR-affected region have based a number of required elements of their regional haze programs on CAIR. However, as CAIR has been remanded and only remains in place temporarily, we cannot fully approve these regional haze SIP revisions that have relied on the now-temporary reductions from CAIR. Although CAIR is currently in effect as a result of the December 30, 2011 Order by the U.S. Court of Appeals for the D.C. Circuit staying the Transport Rule, this does not affect the substance of the D.C. Circuit's ruling in 2008 remanding CAIR to the EPA.

4. The Transport Rule and Regional Haze SIPs

The Transport Rule as promulgated would establish Transport Rule trading programs to replace the CAIR trading programs and would sunset the requirements of CAIR and the CAIR FIPs. The Transport Rule, as promulgated, requires 28 states in the eastern half of the United States to significantly

improve air quality by reducing EGU SO₂ and NO_x emissions that cross state lines and significantly contribute to ground-level ozone and/or fine particle pollution in other states. The rule allows allowance trading among covered sources, utilizing an allowance market infrastructure modeled after existing allowance trading programs. The Transport Rule allows sources to trade emissions allowances with other sources within the same program (e.g., ozone season NO_x) in the same or different states, while firmly constraining any emissions shifting that may occur by establishing an emission ceiling for each state.

In our proposal, we described a technical analysis that we conducted to determine whether compliance with the Transport Rule would satisfy regional haze BART-related requirements. This technical analysis is the basis of this final action in which we are finalizing our determination that the Transport Rule achieves greater reasonable progress towards the national goal of achieving natural visibility conditions than source-specific BART. For this final rule, an updated sensitivity analysis was conducted to account for subsequent revisions to certain state budgets in the Transport Rule. This analysis is described in section III.B.4 of this notice.

B. Summary of the EPA Response to General and Legal Issues Raised in Public Comments

The EPA has based its determination that the Transport Rule will achieve greater reasonable progress than BART on the approach used by the EPA in evaluating whether a similar program, CAIR, would satisfy the regional haze BART-related requirements. As noted above, the Regional Haze Rule, promulgated in 1999, provides states with the flexibility to adopt an emissions trading program rather than requiring source-by-source BART. 40 CFR § 51.308(e)(2). Some commenters supported our general approach and agreed that the Transport Rule will provide for greater reasonable progress. Other commenters, however, disagreed with our conclusion that the Transport Rule can be used as an alternative to BART. These commenters argued that we lack authority to make such a determination and that we cannot rely on the Transport Rule because of the current stay of that rule, and that the Transport

Rule does not meet the necessary regulatory requirements for an alternative program in lieu of BART. Some commenters argued that we could not conclude that the Transport Rule provides for greater reasonable progress without considering each state's reasonable progress goals. Other commenters took the position that we should fully approve the regional haze SIPs that relied on CAIR to satisfy certain regional haze requirements and that our proposed limited disapproval of the regional haze SIPs was unnecessary.

1. Authority for an Alternative Trading Program

As described above, in 2005 (70 FR 39104) the EPA amended its Regional Haze Rule to provide that states participating in the CAIR cap-and-trade programs need not require affected BART-eligible EGUs to install, operate and maintain BART for emissions of SO₂ and NO_x. 40 CFR 51.308(e)(4). As EPA noted in explaining its reasons for adopting this approach, “[nothing] in the CAA or relevant case law prohibits a State from considering emissions reductions required to meet other CAA requirements when determining whether source-by-source BART controls are necessary to make reasonable progress. Whatever the origin of the emission reduction requirement, the relevant question for BART purposes is whether the alternative program makes greater reasonable progress.” 70 FR at 39143.

The EPA's authority to establish non-BART alternatives in the regional haze program and the specific methodology outlined above for assessing such alternatives have been previously challenged and upheld by the D.C. Circuit. In the first case challenging the provisions in the Regional Haze Rule allowing for states to adopt alternative programs in lieu of BART, the court affirmed our interpretation of CAA section 169A(b)(2) as allowing for alternatives to BART where those alternatives will result in greater reasonable progress than BART. Center for Energy and Economic Development v. EPA, 398 F.3d 653, 660 (D.C. Cir. 2005) (“CEED”) (finding reasonable the EPA's interpretation of CAA section 169(a)(2) as requiring BART only as necessary to make reasonable progress). In the second case, Utility Air Regulatory Group v. EPA, 471 F.3d 1333 (D.C. Cir. 2006) (“UARG”), the court specifically upheld

our determination that states could rely on CAIR as an alternative program to BART for EGUs in the CAIR-affected states. The court concluded that the EPA's two-pronged test for determining whether an alternative program achieves greater reasonable progress was a reasonable one and also agreed with EPA that nothing in the CAA required the EPA to "impose a separate technology mandate for sources whose emissions affect Class I areas, rather than piggy-backing on solutions devised under other statutory categories, where such solutions meet the statutory requirements." *Id.* at 1340.

Notwithstanding the decisions of the D.C. Circuit, several commenters argued that the plain language of the CAA precludes the EPA from allowing an alternative to BART. In their comments, these groups claimed that there is no statutory authority to exempt a source from BART, except as provided for in CAA §169A(c). Under the interpretation of the CAA urged by these commenters, BART must be required at each BART source that causes or contributes to visibility impairment at any Class I area. The commenters point to recent decisions post-dating CEED and UARG in support of their arguments.

The commenters' arguments that the plain language of the CAA precludes reliance on the Transport Rule to satisfy the BART requirements were raised in UARG v. EPA and rejected by the D.C. Circuit when it denied the petitions for review of the EPA's determination that CAIR provided for greater reasonable progress than BART. While the commenter argues that the court's decision "has been undermined by subsequent D.C. Circuit decisions," we disagree. The decisions cited by the commenter, North Carolina v. EPA, 531 F.3d 896, 906-08 (D.C. Cir. 2008) and NRDC v. EPA, 571 F.3d 1245, 1255-58 (D.C. Cir. 2009) address the requirements of sections 110(a)(2)(D)(i)(I) and 172(c)(1), respectively. Given the differences between the language of these statutory provisions and that of section 169A(b)(2), the courts' interpretation of these other provisions of the CAA do not undermine the two previous rulings of the D.C. Circuit interpreting the visibility provisions of the Act. Similarly, the Supreme Court's conclusions in Massachusetts v. EPA, 549 U.S. 497, 528-29 (2007) regarding the

meanings of “each” and “any” do not conflict with or impact the EPA’s reading of section 169A(b)(2) of the CAA or the D.C. Circuit’s conclusion that the agency’s interpretation of the statute is a reasonable one. As the CEED court explained, the EPA interprets this provision to mean that “each SIP’s ‘emission limits, schedules of compliance, and other measures’ must ‘include’ BART only ‘as may be necessary to make reasonable progress toward’ national visibility goals.” 398 F.3d 653, quoting 42 U.S.C. § 7491(b)(2); see also Central Arizona Water Conservation District v. EPA, 990 F.2d 1531, 1543 (9th Cir. 1993)(upholding the same interpretation of section 169A(b)(2)). We do not agree, therefore, that the EPA’s regulations allowing for the adoption of a trading program that provides for greater reasonable progress than BART in place of source-specific BART are inconsistent with the CAA.

These commenters also argue that the EPA can exempt sources from BART only if the EPA complies with the requirements of CAA § 169A(c)(1). This provision of the CAA allows the EPA to exempt a source from the BART requirements, by rule, upon a determination that the source is not reasonably anticipated to cause or contribute to significant visibility impairment. As the commenters note, the appropriate Federal Land Manager(s) must agree with the exemption before it can go into effect.

We do not agree that the provisions governing exemptions to BART apply to our determination that the Transport Rule will make greater reasonable progress than BART. Section 169A(b)(2) of the CAA requires each visibility SIP to contain “such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward the national goal...including...a requirement that [certain major stationary sources]...procure, install, and operate...[BART].” Based on this language, in 1999, the EPA concluded that if an alternative program can be shown to make greater reasonable progress toward eliminating or reducing visibility impairment, then installing BART for the purpose of making reasonable progress toward the national goal is no longer necessary. This

interpretation of the visibility provisions of the CAA has been upheld three times by the courts, as noted above.

We also received comments arguing that the EPA cannot rely on the Transport Rule as an alternative to BART because the emission reductions do not meet the requirement of 40 CFR 51.308(e)(2)(iv) which provides that “the emission reductions resulting from the emissions trading program ... will be surplus to those reductions resulting from measures adopted to meet requirements of the CAA as of the baseline date of the SIP.”

We do not agree with the comments that the emissions reductions resulting from the Transport Rule must be “surplus to those measures adopted to meet requirements of the CAA as of the baseline date of the SIP.” We note that the requirements of 40 CFR 51.308(e)(2) are not directly applicable to this action, as the special provisions in the Regional Haze Rule addressing the Transport Rule are codified at 40 CFR 51.308(e)(4). Nonetheless, our determination that the Transport Rule will result in greater visibility improvement than BART is fully consistent with the requirement in 308(e)(2)(iv). In promulgating the Regional Haze Rule in 1999, the EPA explained that the “baseline date of the SIP” in this context means “the date of the emissions inventories on which the SIP relies,” 64 FR 35742, which is “defined as 2002 for regional haze purposes,” 70 FR 39143. Any measure adopted after 2002 is accordingly “surplus” under 40 CFR 51.308(e)(2)(iv). This is consistent with the discussion in the preamble to the 1999 Regional Haze Rule indicating that the regional haze program “is being promulgated in a manner that facilitates integration of emission management strategies for regional haze with the implementation of programs for [the 1997 ozone and PM_{2.5}] NAAQS.” 64 FR 35719. The EPA took this approach in the Regional Haze Rule to allow measures needed to attain the then new NAAQS to be “counted” as making “reasonable progress” toward the visibility goal. The Transport Rule was adopted to help areas come into attainment with and maintain the 1997 ozone and PM NAAQS, as well as the 2006 24-hour PM_{2.5} NAAQS. The EPA accordingly does not view the requirement in

308(e)(2)(iv) as limiting our ability to demonstrate that the Transport Rule reductions are surplus, as defined in the Regional Haze Rule.

2. Effect of the Transport Rule Stay

Several commenters contended that the EPA cannot rely on the Transport Rule as a BART alternative because implementation of the rule has been stayed. These commenters argue that an alternative program in place of BART must constitute a “requirement,” and be enforceable, and that as long as the Transport Rule is stayed, it cannot qualify as a “requirement” nor can it be enforced. These commenters also claim that because the rule may change if affirmed only in part, the EPA cannot find that the Transport Rule will make greater reasonable progress than BART.

We do not agree that the EPA cannot rely on the Transport Rule because of the stay imposed by the D.C. Circuit. We base this conclusion on both the structure of 40 CFR 51.308(e)(4) and on the long-term focus of our analysis underlying today’s rule.

Neither our regulations in 2005 addressing CAIR, nor our regulations in this rule addressing the Transport Rule, require states to participate in or implement these programs or to otherwise include enforceable measures in their regional haze SIPs. In 2005, having determined that CAIR would provide for greater reasonable progress toward the national goal than would BART, the EPA promulgated regulations providing that a state participating in the one of the CAIR trading programs “need not require” EGUs to put on BART controls. Similarly, our regulations in this rule provide that a state subject to a Transport Rule FIP (or approved Transport Rule SIP) need not require BART controls on its EGUs. Accordingly, today’s regulations addressing the Transport Rule are not “requirements” that a state participate in the interstate transport trading programs. Similarly, a regional haze SIP or FIP that relies on 308(e)(4) does not impose enforceable requirements on EGUs. However, a state may take advantage of this provision only if it is subject to an underlying Transport Rule FIP (or SIP approved as meeting the requirements of the trading program). We note that the underlying Transport Rule FIP or

SIP does contain the applicable requirements that will ensure that the emissions reductions from the Transport Rule will occur.

We also note that while the Transport Rule is not currently enforceable, the air quality modeling analysis underlying our determination that the Transport Rule will provide for greater reasonable progress than BART is based on a forward-looking projection of emissions in 2014. However, any year up until 2018 (the end of the first regional haze planning period) would have been an acceptable basis for comparing the two programs under the Regional Haze Rule. See 40 CFR 51.308(e)(2)(iii). We anticipate that requirements addressing all significant contribution and interference with maintenance identified in the Transport Rule will be implemented prior to 2018.

We do not agree with the comment that because the Transport Rule is subject to review by the D.C. Circuit, we cannot move ahead with our determination that it provides for greater reasonable progress than BART. We do not view the stay imposed by the D.C. Circuit pending review of the underlying rule as undermining our conclusion that the Transport Rule will have a greater overall positive impact on visibility than BART both during the period of the first long-term strategy for regional haze and going forward into the future. We recognize, as one commenter suggests, that we may be obliged to revisit the regional haze plans that rely on the Transport Rule if the rule is not upheld, or if it is remanded and subsequently revised. However, we do not consider it appropriate to await the outcome of the D.C. Circuit's decision on the Transport Rule before moving forward with the regional haze program as we believe the Transport Rule has a strong legal basis, and given the judicial decree requiring the EPA to meet its statutory obligations to have a FIP or an approved SIP meeting the Regional Haze Rule requirements in place for most states before the end of 2012.

3. Rationale for Disapproval of SIPs Based on CAIR

We received comments that our proposed limited disapproval of the regional haze SIPs that rely on CAIR and the proposed FIPs is not necessary. Commenters noted that CAIR remains in place and

that SIPs that rely on CAIR are fully consistent with our existing regulations. Some commenters suggested that we revise the Regional Haze Rule to allow states to rely on either CAIR or the Transport Rule to meet the BART requirements.

While the regional haze program is a long-term program that requires states to submit SIPs every 10 years to assure continued reasonable progress toward natural background conditions, the BART requirements or alternatives to BART must be fully implemented by 2018. The required establishment of BART limits, or an alternative to BART, is accordingly undertaken only once. Although CAIR is currently in place as a result of the D.C. Circuit's stay of the Transport Rule, we do not anticipate that CAIR will continue in effect indefinitely. As a result, our determination that CAIR provides for greater reasonable progress than BART is no longer valid. This is because, as a general matter, any source required to install BART controls must maintain the BART control equipment and meet the BART emission limit established in the SIP so long as the source continues to operate. See 40 CFR 51.308(e). As BART would result in emission reductions going forward beyond 2018, our determination that CAIR provides for greater reasonable progress than BART was based on the assumption that the reductions required by CAIR would be enforceable requirements that would also apply going forward to 2018 and beyond. That assumption is no longer appropriate. We are issuing a limited disapproval rather than a full disapproval, however, to allow the states to rely on the emission reductions from CAIR for so long as CAIR is in place.

4. The Relationship between a Better-than-BART Determination and Reasonable Progress

Each state with a Class I area is required to set goals for each Class I area that provide for reasonable progress towards improving visibility. There must be one goal for the 20 percent best visibility days and one goal for the 20 percent worst visibility days. States take into account a number of factors in establishing reasonable progress targets, including in some cases an analysis of the measures

needed to achieve the “uniform rate of progress”⁹ over the 10-year period of the SIP and a determination of the reasonableness of such measures. 40 CFR 51.308(d)(1). The Regional Haze Rule does not mandate specific milestones or rates of progress, but instead calls for states to establish goals that provide for “reasonable progress” toward achieving natural background conditions.

Several commenters argued that our determination that the Transport Rule provides for greater reasonable progress than BART is improper because it considers BART in isolation, without reference to the consideration of the reasonable progress goals in the regional haze plans. These commenters contend that BART is critical to the state’s ability to reach its reasonable progress goals and that the EPA should have considered the impact of our proposed determination in instances where the states relied on emissions reductions consistent with presumptive BART to meet reasonable progress goals.

The EPA disagrees with the argument that we cannot compare the visibility improvements from Transport Rule against those from BART without considering the reasonable progress goals of each affected regional haze SIP. BART is one measure for addressing visibility impairment, but it is not “the mandatory vehicle of choice.” CEED, 398 F.3d at 660. As such, BART is not a required element of the regional haze SIPs so long as an appropriate alternative achieves greater reasonable progress.

The commenters’ suggestion that reasonable progress goals are defined and that each regional haze SIP must accordingly ensure a certain rate of progress toward natural visibility also mischaracterizes the regional haze program. As noted above, the reasonable progress goals for each Class I area are set by the states. States, both in and out of the CAIR region, set their reasonable progress goals based, in part, on anticipated reductions in emissions due to CAIR. In setting reasonable progress goals, these states estimated future emissions in 2018 from a number of sources and source categories, including emissions from EGUs. For sources in the CAIR region, states relied on emissions reductions

⁹ For each Class I area, the uniform rate of progress is based on the calculation of the steady rate of improvement in visibility needed to achieve natural background conditions by 2064.

from CAIR - not BART - to estimate future EGU emissions. As a result, source-specific BART across the CAIR region is clearly not critical to the states' ability to meet the goals in their SIPs. For the small handful of states that were not subject to CAIR but are now subject to the Transport Rule, today's determination that the Transport Rule provides for greater reasonable progress than BART gives those states the opportunity to consider revising their regional haze SIPs to substitute participation in the Transport Rule for source-specific BART. Whether such a revision meets the requirements of the Regional Haze Rule, including the requirement that a plan include such measures as may be necessary to make reasonable progress toward the national goal, would be addressed in a notice and comment rulemaking that would provide an opportunity for review of the adequacy of such an approach. We disagree with the commenters' statement, however, that source-specific BART as a general matter is necessary to ensure reasonable progress.

III. Technical Analysis Supporting the Determination of the Transport Rule as an Alternative to BART

A. What analysis did we rely on for our proposed determination?

The technical analysis that the EPA relied on for our proposed and now final determination that the Transport Rule is better than BART is described in detail in the preamble of the proposed rule and in the Technical Support Document (TSD).¹⁰ To provide context for the summary of the public comments and our responses to them, we are providing a summary of the technical analysis in the following sections.

1. Application of the Two-Pronged Test

The two-pronged test for determining if an alternative program achieves greater reasonable progress than source-specific BART is set out in the Regional Haze Rule at 40 CFR 51.308(e)(3). The

¹⁰ Technical Support Document for Demonstration of the Transport Rule as a BART Alternative, Docket EPA-HQ-OAR-2011-0729.

underlying purpose of both prongs of the test is to assess whether visibility at Class I areas would be better with the alternative program in place than without it. Under the first prong, visibility must not decline at any affected Class I area on either the best 20 percent or the worst 20 percent days as a result of implementing the Transport Rule; and, under the second prong the 20 percent best and 20 percent worst days should be considered in determining whether the alternative program under consideration (in the case of this rulemaking, the Transport Rule) produces greater average improvement than source-specific BART over all affected Class I areas. Together, these tests ensure that the alternative program provides for greater reasonable progress than would source-specific BART.

In applying the two-pronged test to the Transport Rule control scenario and the source-specific BART control scenario, we used a future (2014) projected baseline. The 2014 baseline does not include the Transport Rule, BART, or CAIR control programs. As described in the preamble to the proposed rule, the 2014 baseline allows a comparison of visibility conditions as they are expected to be at the time of the program implementation, but in the absence of the program. This ensures that the visibility improvement or possible degradation is due to the programs being compared – source-specific BART and the Transport Rule alternative – and not to other extrinsic factors. Also, under the Regional Haze Rule any program adopted after 2002 is considered “surplus” and eligible to be counted as all or part of an alternative program in place of BART.

2. Identification of Affected Class I Areas

As described above, under the second prong of the test, the visibility comparison is over all “affected” Class I areas. The EPA added the term “affected” to clarify that visibility need not be evaluated nationwide. 71 FR 60620. We considered two approaches to identify the Class I areas “affected” by the Transport Rule as an alternative control program to source-specific BART. First, we identified 140 Class I areas represented by 96 Interagency Monitoring of Protected Visual Environments (IMPROVE) monitors in the 48 contiguous states with sufficiently complete monitoring data available to

support the analysis. In the first “eastern” approach, we identified as affected Class I areas the 60 Class I areas contained in the eastern portion of the Transport Rule modeling domain. The second approach we considered was a “national” approach in which visibility impacts on 140 Class I areas across the 48 contiguous states were evaluated (including the 60 contained within the Transport Rule region).

Consideration of this national region accounted for the possibility that the Transport Rule might have the effect of increasing EGU emissions in the most western portion of the United States due to shifts in electricity generation or other market effects. We noted that the “eastern” Transport Rule modeling grid used a horizontal resolution of 12 km (all 60 “eastern” Class I areas were contained within the 12 km grid). The modeling grid for areas outside of the eastern Transport Rule region used a more coarse horizontal resolution of 36 km.

We requested comment on whether the “affected Class I areas” should be considered to be the 60 Class I areas located in the Transport Rule eastern modeling domain, the larger set of 140 Class I areas in the larger national domain, or some other set. We noted that given the modeling results, the choice between the 60 Class I areas or the 140 Class I areas did not affect our proposed conclusion that both prongs of the two-pronged test are met.

3. Control Scenarios Examined

The Transport Rule requires 28 states in the eastern half of the United States to reduce EGU SO₂ and NO_x emissions that cross state lines and contribute to ground-level ozone and fine particle pollution in other states. BART, on the other hand, is applicable nationwide and covers 26 industrial categories, including EGUs, of a certain vintage. In our comparison, we sought to determine whether the Transport Rule cap-and-trade program for EGUs will achieve greater reasonable progress than would BART for EGUs only. Therefore, we examined two relevant control scenarios. The first control scenario examined SO₂ and NO_x emissions from all EGUs nationwide after the application of BART controls to all BART-eligible EGUs (“Nationwide BART”). In the second scenario, EGU SO₂ and NO_x emissions reductions

attributable to the Transport Rule were applied in the Transport Rule region and BART controls were applied to all BART-eligible EGUS outside the Transport Rule region (“Transport Rule + BART elsewhere”). For the first prong of the test, the “Transport Rule + BART elsewhere” scenario was compared to the 2014 future year base case. The comparison to the 2014 future year “Base Case” allows the EPA to ensure that the Transport Rule would not cause degradation in visibility from conditions predicted for the year 2014 in the absence of the Transport Rule, BART and CAIR.

For both the “Nationwide BART” scenario and the “Transport Rule + BART elsewhere” scenario, we modeled the presumptive EGU BART limits for SO₂ and NO_x emission rates as specified in the BART Guidelines (Guidelines for BART Determinations Under the Regional Haze Rule, 70 FR 39104, July 6, 2005), unless an actual emission rate at a given unit with existing controls is lower. In the latter case, we modeled the lower emission rates. Our analysis assumed that all BART-eligible EGUs were actually subject to BART requirements and that presumptive BART limits would be applied to 100 megawatt (MW) EGUs for SO₂ and 25 MW EGUs for NO_x, regardless of the magnitude of their annual total emissions. In our analysis, in both scenarios we constrained certain EGUs by emission limits other than presumptive limits due to a proposed or final regional haze SIP, a proposed or final regional haze FIP, a final consent decree, or state rules. Where we had evidence of more stringent emission limits than the presumptive BART limits, we used them. These units and their emission limits are detailed in the TSD.

There are five states that are subject to the Transport Rule requirements during the ozone season only (Oklahoma, Arkansas, Louisiana, Mississippi and Florida). For these states, in the “Transport Rule + BART elsewhere” scenario post-combustion NO_x controls were assumed to operate outside of the ozone season only when required to do so for a reason other than Transport Rule requirements, e.g., a permit condition or a provision of a consent decree. In the “National BART” scenario, BART NO_x controls were assumed to operate year-round.

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4. Emission Projections

To estimate emissions expected from the scenarios described in section IV, we used the Integrated Planning Model (IPM).¹¹ The IPM was used in this case to evaluate the emissions impacts of the described scenarios limiting the emissions of SO₂ and NO_x from EGUs. The IPM projections of annual NO_x and SO₂ emissions from EGUs for the “Transport Rule + BART elsewhere” control scenario were used as inputs to the air quality model to assess the visibility impacts of the emission changes. The IPM projections were based on the state budgets prescribed in the final Transport Rule published on August 8, 2011, and the supplemental proposal published on July 11, 2011.¹² We noted that on October 14, 2011, the EPA issued a proposed notice that would increase NO_x and SO₂ budgets for certain states in accordance with revisions to certain unit-level input data. 76 FR 63860. We requested comment on the potential effect of the proposed increases to state budgets. We noted that even with the proposed increases to certain state budgets, we believed that the two-pronged test is satisfied given the still-substantial reductions in emissions under the Transport Rule.

5. Air Quality Modeling Results

To assess the air quality metrics that are part of the two-pronged test, we used the IPM emission projections as inputs, to an air quality model to determine the impact of “Transport Rule + BART elsewhere” and “Nationwide BART” controls on visibility in the affected Class I areas. To project air quality impacts we used the Comprehensive Air Quality Model with Extension (CAMx) version 5.3. The air quality modeling analysis and related analyses to project visibility improvement are described in

¹¹ Extensive documentation of the IPM platform may be found at <http://www.epa.gov/airmarkets/progsregs/epa-ipm/transport.html>.

¹² See Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone 76 FR 48208 (August 8, 2011). The ozone season state budgets for the states affected by the supplemental proposal published on July 11, 2011 (76 FR 40662) are included in the “Transport Rule + BART elsewhere” control scenario.

more detail in the TSD for the Transport Rule.¹³ The visibility projections for each Class I area are presented in the TSD for our proposed action.

We proposed that the “Transport Rule + BART elsewhere” control scenario passed the first prong of the visibility test considering affected Class I areas located in both the “eastern” region of 60 Class I areas) and the “national” region of 140 Class I areas. We also proposed our determination that the “Transport Rule + BART elsewhere” alternative measure passed the second prong of the test that assesses whether the alternative results in greater average visibility improvement at affected Class I areas compared to the “Nationwide BART” scenario. The “Transport Rule + BART elsewhere” alternative passed the second prong of the test, regardless of which way affected Class I areas are identified.

B. Summary of the EPA Responses to Comments on the Technical Analysis

Many comments supported the EPA’s technical analysis and our determination that the Transport Rule satisfies the requirements for an alternative to source-specific BART. Other commenters raised objections to the EPA’s determination. Some of these were general legal objections related to the EPA’s legal authority for its action and its interpretation of authorizing regulations and statutes. The EPA’s response to those general legal objections is discussed above in section III.A. Other objections raised technical issues related to the EPA’s emissions and air quality modeling scenarios that were used to compare the results of the Transport Rule control scenario with the source-specific BART control scenario. In this section of the preamble we provide an overview of the EPA’s review of these technical comments. Our responses are discussed in detail in the Response to Comments document, which is included in the docket for this rulemaking.

1. Comments Related to the Emissions Scenarios Used in the EPA’s Analysis

¹³ See Air Quality Modeling Final Rule Technical Support Document, U.S. EPA, June 2011, which is found at: <http://www.epa.gov/airtransport/pdfs/AQModeling.pdf>.

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As noted above, the EPA developed two emissions scenarios: a 2014 “Nationwide BART” scenario and a 2014 “Transport Rule + BART elsewhere” scenario. Nationwide emissions were substantially lower under the “Transport Rule + BART elsewhere” scenario. Some commenters asserted that the emissions results for these two scenarios were skewed in favor of the Transport Rule. These commenters asserted that the EPA underestimated the emissions reductions from BART, and overestimated the emission reductions from the Transport Rule. These commenters raise issues generally with the use of presumptive BART limits in the “Nationwide BART” scenario and questioned whether the EPA correctly applied the presumptive BART limits.

The EPA disagrees with commenters asserting that the presumptive BART limits were inappropriate for use in this analysis. While the EPA recognizes that a case-by-case BART analysis may, in some source-specific assessments, result in emission limits more stringent than the presumptive limits, these limits are reasonable and appropriate for use in assessing regional emissions reductions from the BART scenario. This has been the EPA position since 2005. 71 FR 60619 (“the presumptions represent a reasonable estimate of a stringent case BART...because...they would be applied across the board to a wide variety of units with varying impacts on visibility, at power plants of varying size and distance from Class I areas”). Moreover, as discussed in detail in the Response to Comment document, the EPA believes that these comments overestimate the emissions reductions that would be associated with case-by-case BART because the commenters’ assertions of “best” technology for BART ignore other factors, including cost of control and resulting visibility improvement, that are critical components of a source-specific BART analysis.

The EPA also received numerous comments concerning specific units for which the commenters believed the BART limits for SO₂ had been incorrectly applied in IPM. Our review of these comments, which is presented in detail in the Response to Comments document, shows that (with minor exceptions) the EPA correctly applied these presumptive limits. After reviewing these comments and the IPM

outputs, we conclude that many of these comments stemmed from an apparent misunderstanding of the EPA's application of the presumptive limits in IPM. Some of the unit-level comments pertained to units less than 100 MW for which the presumptive limits did not apply. Other comments pertained to units that did not meet both the 95 percent removal efficiency and the 0.15 lb/MMBtu rate. For BART-affected units greater than or equal to 100 MW, the EPA's IPM modeling required that they meet a SO₂ emission rate limit of 0.15 lbs/MMBtu or a removal efficiency of 95 percent. As sources are only required to comply with one of these metrics (emission rate or percent removal), the IPM correctly determined that some BART sources could comply with an emission rate higher than 0.15 lb/MMBtu (while meeting the 95 percent FGD removal efficiency requirement) and some could comply with a removal efficiency less than 95 percent (while meeting the emission rate requirement).

The EPA also disagrees with the commenters' assertion that our application of presumptive limits for NO_x should have provided for the installation of add-on equipment such as selective catalytic reduction (SCR). For all types of boilers other than cyclone units, the presumptive NO_x limits in the EPA's BART guidelines are based only on the use of current combustion control technology including

low NO_x burners, over-fire air, and coal reburning.¹⁴ 70 FR 39134.

Finally, the EPA disagrees with commenters who expressed concerns that the “no-CAIR” base case was inappropriate for use in this analysis. The EPA agrees with commenters’ observation that the 2014 base case leads to emission increases relative to current emissions. However, as explained in detail in the preamble to the final Transport Rule, the EPA believes this is a reasonable and appropriate case to use for estimating emissions reductions that are attributable to the Transport Rule, and for estimating air quality concentrations in absence of the Transport Rule. 76 FR 48223.

2. Identification of Affected Class I Areas

Under the Regional Haze Rule, the reasonable progress achieved by an alternative program in “affected Class I areas” is compared to the reasonable progress achieved by source-specific BART. In our proposal, the EPA requested comment on whether the “affected Class I areas” should be considered to be (1) the 60 Class I areas located in the Transport Rule eastern modeling domain, (2) the larger set of 140 Class I areas, or (3) some other set. We noted that our air quality modeling results showed that the choice between the 60 Class I areas or the 140 Class I areas did not affect our proposed conclusion that both prongs of the two-pronged test are met.

Some commenters agreed that the EPA can properly rely on an assessment of the 60 Class I areas without referring to the results of the additional 80 Class I areas. These commenters noted, as did the EPA, that because both assessment approaches support the Transport Rule as a lawful and reasonable BART alternative, the EPA may appropriately confirm its determination based on either approach. Other commenters argued that the EPA improperly averaged across all Class I areas. These commenters argued that both the 60 Class I area region and the 140 Class I area region are too broad.

¹⁴ The EPA notes that a BART determination made under the regional haze program is distinct from a best available control technology (BACT) determination made under the prevention of significant deterioration (PSD) program. 42 U.S.C. Section 7475. The fact that a control technology has been determined to be BART does not mean that the same controls would be found to meet the requirements for BACT.

These commenters presented information illustrating the “Nationwide BART” scenario to be superior to the Transport Rule alternative if the EPA averaged visibility improvement at the 27 Class I areas west of the Mississippi River but east of the Rocky Mountains. These commenters asserted that the EPA should not average across states, but rather should assume Transport Rule changes in one state at a time, and average the results for areas in (and nearby) that state.

The EPA agrees with comments supporting our approach to identifying the “affected” Class I areas. The EPA agrees that in either case, the analysis shows that the two-pronged test for determining a BART alternative is satisfied. The EPA does not agree that it is necessary to evaluate results for a sub-region such as the 27 Class I areas suggested by some commenters. Given that the Transport Rule affects emissions and air quality over a large region, the EPA believes it is reasonable to consider that entire region in evaluating the Class I areas that are also “affected” by this rule. The possibility of greater visibility improvement due to source-specific BART in specific Class I areas within the region of “affected Class I areas” is inherent to the two-pronged test that has been upheld by the D.C. Circuit Court. As long as the average visibility improves over the entire region and no Class I area experiences degradation, the alternative is an appropriate and approvable alternative to source-specific BART. See 471 F.3d 1333 (D.C. Cir. 2006) (“UARG”) (“nothing in §169A(b)’s ‘reasonable progress’ language requires as least as much improvement in each and every individual area as BART itself would achieve”).

3. Ozone Season-Only Transport Rule States

Some commenters noted that five states – Arkansas, Florida, Louisiana, Mississippi and Oklahoma – are covered by the Transport Rule ozone season only, and thus these states are only required to hold allowances and limit statewide NO_x emissions during May through September. Commenters expressed concerns that while imposition of BART would require year-round operation of NO_x controls, under the Transport Rule there would be no assurance that NO_x emission controls would

operate during the remaining 7 months of the year. Accordingly, the commenters asserted that for these states the Transport Rule is not “better than BART” because it would allow for a potential degradation during these months, and thus the EPA should consider the Transport Rule to fail the first prong of the two-pronged test.

The EPA carefully considered this comment, and we reviewed the results of our technical analysis to evaluate whether such seasonal differences could occur. For programs which regulate ozone season NO_x only, seasonal differences in the emissions rate (lb/MMBtu) can be seen where a source installs post-combustion controls such as selective catalytic reduction (SCR) or selective non-catalytic reduction (SNCR). It is probable that source owners would not operate the controls in non-ozone season months to avoid the extra cost of control. These effects are indeed seen in the data reported to the EPA. However, where a program results in the imposition of combustion controls such as low-NO_x burners and overfire air, the controls are an integral part of the operational design of the EGU. Accordingly, where combustion controls are installed in response to an ozone season-only requirement, the EPA does not expect to see seasonal differences in the lb/MMBtu NO_x emission rate.

Our review of the IPM predictions of how EGUs are likely to comply with the Transport Rule indicated that in the “Transport Rule + BART elsewhere” scenario, NO_x control in the five ozone season-only states is achieved predominantly by combustion controls rather than post-combustion controls. In the Transport Rule scenario, for four of the five states (Arkansas, Louisiana, Mississippi and Oklahoma), the EPA projects that any additional NO_x controls resulting from the Transport Rule would be combustion controls only. Furthermore, as explained above, for the “Nationwide BART” control scenario we applied the presumptive NO_x limits to all BART-eligible sources nationwide that were not already equipped with post-combustion controls. According to the EPA’s BART guidelines, for all types of boilers other than cyclone units the presumptive BART limits for NO_x are based on the use of current

combustion control technology.¹⁵ 70 FR 39134. For BART sources already equipped with post-combustion controls, we assumed under BART those controls would operate year-round. Therefore, the “Nationwide BART” scenario would result in generally uniform emission rates throughout the year in the five ozone season-only states. As a result, with the exception of Florida, there is no seasonal difference in NO_x emission rates between the “Transport Rule + BART-elsewhere” scenario and the “Nationwide BART” scenario. In Florida, the one instance where IPM indicates a season-dependent difference between the two control scenarios, there are some EGUs with existing post-combustion controls (SCR) that the EPA projects would not operate at all unless incentivized to do so by either a source-specific BART requirement or by the Transport Rule, and under the Transport Rule would operate only during the ozone season. Our analysis of the two scenarios appropriately considered this seasonal difference by accounting for higher NO_x emissions from those Florida units outside of the ozone season when these controls are projected not to operate in the “Transport Rule + BART elsewhere” scenario. That is, our analysis assumed that post-combustion NO_x controls would operate year-round under the “Nationwide BART” scenario and only during May through September in the “Transport Rule + BART elsewhere” scenario. When we analyzed the overall regional emissions reductions under the two scenarios, this did not affect our conclusion that the two-pronged test was satisfied. This outcome is very understandable because over a geographic region this small relative decrease during part of the year in emissions of NO_x in the “Transport Rule + BART elsewhere” scenario compared to the “Nationwide BART” scenario has much less effect than the visibility improvement attributable to the very large relative decrease in SO₂ emissions between the two scenarios.

Finally, the EPA notes that in a previous rulemaking that established that CAIR was “better-than-BART” it was also the case that some states subject to CAIR were subject only to ozone-season

¹⁵ There are no coal-fired cyclone units located in any of the five ozone season-only states so the presumptive limits for cyclone units do not apply.

NO_x budgets. In that rulemaking, our air quality analysis had similar results and our final rule established that the CAIR could be relied upon as an alternative to source-specific BART for those states.

4. Comments Asserting that the EPA Needs to Re-do the Analysis

Some commenters asserted that the EPA could not issue a final determination that the Transport Rule achieves greater reasonable progress than BART without conducting a new modeling analysis that would correct an error in the emissions for the “Nationwide BART” scenario and that would take into account certain adjustments that the EPA made to some state budgets under the Transport Rule after the air quality modeling runs were completed. Specifically, the commenters noted that the EPA acknowledged in the TSD for the proposal that the emissions analysis for the “Nationwide BART” scenario should have, but did not, apply presumptive BART controls on BART-eligible Gerald Gentleman Unit 2 and that the EPA acknowledged that the Transport Rule scenario in the analysis did not take into account budget revisions for a number of states that were published or proposed subsequent to the promulgation of the Transport Rule in August 2011. The commenters believe that because of these two acknowledged discrepancies in the emissions values used in the air quality modeling for the two scenarios, in combination with additional alleged errors, the EPA cannot issue a final determination unless and until a new analysis is conducted that takes these discrepancies into account.

The EPA disagrees that a re-analysis of the two-pronged test using new air quality modeling is necessary. As noted in the TSD, the EPA does not believe that the omission of Gerald Gentleman Unit 2 from the BART-eligible inventory of 489 units would affect the outcome of our national analysis.¹⁶ This is because the emission reductions from a single EGU in the BART control scenario would not change the average visibility improvement across all affected Class I areas, which is the basis for our

¹⁶ Technical Support Document for Demonstration of the Transport Rule as a BART Alternative, Docket EPA-HQ-OAR-2011-0729. p. 10.

determination. The SO₂ emission reduction in question (roughly 12,000 tons of SO₂ per year) represents a relatively small emission change compared to the emissions from the area encompassed by Nebraska and the surrounding six states. Our response to other alleged errors in the BART inventory is presented in the Response to Comment document.

With respect to revisions in state budgets, as we discussed in the TSD accompanying the December 30, 2011 proposal, the post-analysis increases in the state budgets under the Transport Rule had a relatively small impact on the emissions comparison between the two scenarios. 76 FR 8227. We note that in addition to the Transport Rule revisions we discussed in the proposed rule, there have been proposed subsequent adjustments to state budgets. On February 21, 2012, based on comments received on its previous rulemaking proposal, the EPA published revisions to 2012 and 2014 state budgets in Arkansas, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, New York, Nebraska, Ohio, Oklahoma, South Carolina and Texas, along with revisions to new unit set-asides in Arkansas, Louisiana and Missouri. 77 FR 10342 and 77 FR 10350.¹⁷ While individual state adjustments vary, overall, the total budget increase over the entire Transport Rule region is very small. The EPA believes it is a reasonable expectation that these adjustments would lead to very small impacts on annual and 24-hour PM_{2.5} concentrations and, as a consequence, would not have a meaningful impact on the two-pronged test satisfied by the analysis conducted for this rule. A technical analysis of these adjustments may be found in the docket (Docket ID No. EPA-HQ-OAR-2011-0729: Sensitivity Analysis Accounting for Increases in Texas and Georgia Transport Rule State Budgets).

¹⁷ These revisions were originally published in a direct final rule on February 21, 2012. 77 FR 10342. The EPA published a parallel proposal simultaneously with the direct final rule and indicated it would withdraw the direct final rule if it received adverse comment. The EPA received adverse comments and on May 16, 2012 published a notice withdrawing the direct final rule before it went into effect. 77 FR 28785. As indicated in the parallel proposal, the EPA intends to take final action on the parallel proposal without providing an additional opportunity for public comment. 77 FR 10350.

After reviewing the public comments on the proposed rule, the EPA is finalizing its finding that the Transport Rule trading programs will provide greater progress towards regional haze goals than source-specific BART. This finding is based on the results of the two-pronged test for an alternative program. In this case, our analysis demonstrated that the trading programs of the Transport Rule do not cause degradation in any affected Class I area, thus passing the first prong of the test. The second prong of the test assesses whether the “Transport Rule + BART elsewhere” scenario results in greater average visibility improvement at affected Class I areas compared to the “Nationwide BART” scenario. The average visibility improvement of the “Transport Rule + BART elsewhere” alternative was greater than “Nationwide BART” on both the 20 percent best and 20 percent worst days, thus passing the second prong of the test. The determination that the Transport Rule trading programs will provide greater progress towards regional haze goals than source-specific BART applies only to EGUs in the Transport Rule trading programs and only for pollutants covered by the programs in each state. Accordingly, we are revising 40 CFR 51.308(e)(4) by essentially replacing the name of the CAIR with the name of the Transport Rule.

We are also finalizing our proposal that a state that chooses to meet the emissions reduction requirements of the Transport Rule by submitting a complete SIP revision that is approved as meeting the requirements of 40 CFR §§ 52.38 and/or 52.39 also need not require BART-eligible EGUs in the state to install, operate and maintain BART for the pollutants covered by such a trading program in the state.

The results of the “Transport Rule + BART elsewhere” control scenario analysis demonstrate that the use of NO_x controls during ozone season only, in the states for which this Transport Rule requirement applies, results in greater visibility improvement than source-specific BART for NO_x. Thus, we are finalizing our proposal that a state in the Transport Rule region whose EGUs are subject to the requirements of the Transport Rule trading program only for ozone season NO_x is allowed to rely on

our determination that the Transport Rule makes greater reasonable progress than source-specific BART for NO_x. The states to which this aspect of our final rule applies are Arkansas, Florida, Louisiana, Mississippi and Oklahoma.

IV. Reasonably Attributable Visibility Impairment (RAVI)

A. What did the EPA propose?

We proposed to preserve the language in the regional haze regulations at 40 CFR 51.308(e)(4) that allows states to include in their SIPs geographic enhancements to the trading program to address a situation where BART is required based on RAVI at a Class I area.¹⁸

B. Public Comments Related to RAVI

We received comments recommending that we explicitly state that the Transport Rule as an alternative to BART does not replace the BART analysis that is required to address RAVI certification. The commenter contends that the BART determination for RAVI needs to address the impairment at the specific Class I area or areas, a requirement that is not addressed by the demonstration of regionally-averaged visibility improvement. Other commenters agreed that RAVI BART is critical to remedying existing impairment and must be implemented. This commenter also pointed out that RAVI BART is reactive as it requires FLM to voluntarily take action to address an existing problem. As such, RAVI BART will not result in proactive permitting to avoid degradation and it cannot be relied on to prevent hot spots. Furthermore, according to this commenter, the EPA in its finding that CAIR was better-than-BART explained that even under a BART alternative "...CAA section 169A(b)(2)'s trigger for BART based on impairment at any Class I area remains in effect, because a source may become subject to BART based on 'reasonably attributable visibility impairment' at any area" (citing 40 C.F.R. § 51.302)).

¹⁸ A geographic enhancement is a method, procedure, or process to allow a broad regional strategy, such as the Transport Rule cap-and-trade program, to satisfy BART for reasonable attributable impairment. For example, it could consist of a methodology for adjusting allowance allocations at a source which is required to install BART controls.

The EPA proposed to leave unchanged the existing regulatory language regarding geographic enhancements. The purpose of this language is to allow a market-based system to accommodate actions taken under the RAVI provisions. The EPA first adopted such language in the 1999 Regional Haze Rule, 64 FR 35757, and used it again in issuing regulations addressing our determination that CAIR provides for greater reasonable progress than BART, 70 FR 39156, and again in issuing regulations addressing trading program alternatives to BART in general, 71 FR 60612, 60627. In light of the fact that our proposal did not request comment on the interplay of the RAVI requirements in 40 CFR 51.302-306 with the requirements of the Regional Haze Rule, we are not adopting any clarifying interpretation at this time. As a result, this rulemaking alters neither the authority of a federal land manager to certify reasonably attributable visibility impairment nor the obligation of states (or EPA) to respond to a RAVI certification under 40 CFR Part 51 Subpart P (Protection of Visibility). We expect at a later date to clarify the scope of the RAVI requirements through a rule amendment, general guidance, or action on a SIP or FIP in the context of a specific RAVI case.¹⁹ Whatever the form, we intend to provide an opportunity for public comment before applying a new interpretation.

C. Final Action on RAVI

In this final action we are preserving the language in the regional haze regulations at 40 CFR 51.308(e)(4) that allows states to include in their SIPs geographic enhancements to the trading program to accommodate a situation where BART is required based on RAVI at a Class I area. We are not adopting any clarifying interpretation of this language at this time, but we expect at a later date to clarify the scope of the RAVI requirements through a rule amendment, general guidance, or action on a SIP or FIP in the context of a specific RAVI case.

V. Limited Disapproval of Certain States' Regional Haze SIPs

¹⁹ A RAVI certification has been made for the Sherbourne County Generating Station (Sherco) in Minnesota, by the Department of the Interior on October 21, 2009.

A. What did the EPA Propose?

We proposed a limited disapproval of the regional haze SIPs that have been submitted by Alabama, Florida, Georgia, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina and Texas. In separate notices, the EPA also has proposed a limited disapproval of the regional haze SIP submitted by Virginia that relied on CAIR (77 FR 3691), and has finalized a limited disapproval of the regional haze SIPs submitted by Kentucky (77 FR 19098), Tennessee (77 FR 24392), and West Virginia (77 FR 16937). These states, fully consistent with the EPA's regulations at the time, relied on CAIR requirements to satisfy the BART requirement and the requirement for a long-term strategy sufficient to achieve the state-adopted reasonable progress goals.

We did not propose to disapprove the reasonable progress targets for 2018 that have been set by the states in their SIPs. The reasonable progress goals in the SIPs were set based on modeled projections of future conditions that were developed using the best available information at the time the analysis was done. Given the requirement in 40 CFR 51.308(d)(1)(vi) that states must take into account the visibility improvement that is expected to result from the implementation of other Clean Air Act requirements, states set their reasonable progress goals based, in part, on the emission reductions expected to be achieved by CAIR. As CAIR has now been remanded by the D.C. Circuit, the assumptions underlying the development of the reasonable progress targets have changed; however, because the overall EGU emission reductions from the Transport Rule are larger than the EGU emission reductions that would have been achieved by CAIR, we expect the Transport Rule to provide similar or greater benefits than CAIR. In addition, unlike the enforceable emissions limitations and other enforceable measures in the long-term strategy, see 64 FR 35733, reasonable progress goals are not enforceable measures. Given these considerations, we concluded not to propose disapproval of the reasonable progress goals in any of the regional haze SIPs that relied on CAIR. We noted our intent to act on the remaining elements of the SIP for each state in a separate notice.

B. Public Comments Related to Limited Disapprovals

Several commenters seem to have interpreted our statement that the EPA was not proposing to disapprove the reasonable progress goals set by affected states to mean that the EPA had proposed to determine that these reasonable progress goals meet the requirements of the Regional Haze Rule. The commenters stated that the EPA cannot reasonably conclude that the Transport Rule achieves reasonable progress. As noted in the proposal, we intend to evaluate the reasonable progress goals for each state when taking action on the remaining elements of their regional haze SIPs. As explained above, we do not consider the remand of CAIR to provide a basis for disapproving the reasonable progress goals set by the states. That determination, however, does not indicate that we intend to approve the targets set by the states without any further consideration. In addition, while we have concluded that the Transport Rule achieves greater reasonable progress than BART, we have not determined, as the commenters suggest, that the Transport Rule alone achieves reasonable progress towards the natural visibility goal.

C. Final Action on Limited Disapprovals

This action includes a final limited disapproval of the regional haze SIPs submitted by Alabama, Georgia, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia and Texas. We are not finalizing the limited disapproval for Florida at this time because the state has requested additional time to modify its SIP to address the change in applicability of the Transport Rule to Florida in the final rule published on August 8, 2011, (76 FR 48208) and is actively preparing SIP revisions.²⁰ The EPA included Florida in the proposed Transport Rule for coverage under both the SO₂ and NO_x trading programs, but removed Florida from the SO₂ trading program in the final Transport Rule. Florida was unaware of this modification until publication of the final rule. The EPA has decided to postpone action on Florida's regional haze SIP

²⁰ On May 15, 2012, the EPA proposed limited approval of three revisions to the Florida SIP, including BART determinations for five facilities.

given this extenuating circumstance, Florida's request for additional time to modify its SIP to address the change in coverage under the Transport Rule, and Florida's continued progress toward submitting a SIP revision.

VI. FIPs

A. What did the EPA propose?

We proposed FIPs to replace reliance on CAIR requirements with reliance on the trading programs of the Transport Rule as an alternative to BART for SO₂ and NO_x emissions from EGUs in the following states' regional haze SIPs: Alabama, Georgia, Indiana, Iowa, Kentucky, Michigan, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia and West Virginia. We proposed FIPs to replace reliance on CAIR requirements with reliance on the Transport Rule as an alternative to BART for NO_x emissions from EGUs in the following states' regional haze SIPs: Florida, Louisiana and Mississippi.

We proposed that these limited FIPs would satisfy the BART requirement and be a part of satisfying the requirement for a long-term strategy sufficient to achieve the state-adopted reasonable progress goals. The FIPs would apply only to EGUs in the affected states and only to pollutants covered by the Transport Rule program in those states. The proposed FIPs would not alter states' reasonable progress goals or replace these goals.

B. Public Comments on Proposed FIPs

Similar to the comments received regarding our proposed limited disapprovals, numerous commenters argued that the EPA should not finalize FIPs because, according to the commenters, we cannot rely on the Transport Rule because of the current stay of that rule. Other commenters took the position that we should fully approve the regional haze SIPs that relied on CAIR to satisfy certain regional haze requirements and that our proposed FIPs substituting the Transport Rule as an alternative to source-specific BART in regional haze SIPs are unnecessary.

As explained above in section II.B.2, we do not agree that the EPA cannot rely on the Transport Rule because of the temporary stay imposed by the D.C. Circuit. With respect to reliance on CAIR, as explained in section II.A.3, CAIR has been remanded and only remains in place temporarily; consequently, we cannot fully approve those regional haze SIP revisions that have relied on the now-temporary reductions from CAIR. Although CAIR is currently in place, as a result of the December 30, 2011, Order from the U.S. Court of Appeals for the D.C. Circuit staying the Transport Rule, this does not affect the earlier court ruling remanding CAIR to the EPA. A number of states objected to the EPA's proposed FIP as these states did not receive a finding of failure to timely submit a regional haze SIP. These states requested the allowable time to revise and resubmit their SIP. Other states which also did not receive a finding of failure to timely submit a regional haze SIP did not object to the EPA's proposed FIP. As explained in section VI.C, we have responded to this comment by granting additional time to those states that prefer to revise and resubmit their SIP to the EPA for approval and did not receive a finding of failure to timely submit their regional haze SIP.

C. Final Action on FIPs

In this action, the EPA is finalizing FIPs to replace reliance on CAIR with reliance on the Transport Rule as an alternative to BART in regional haze SIPs of Georgia, Indiana, Iowa, Kentucky, Michigan, Missouri, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia and West Virginia. Regional haze SIPs were due in December 2007. Under the CAA, the EPA is required to promulgate a FIP within 2 years after finding that a state has failed to make a required submission or after disapproving a SIP in whole or in part, unless the state first adopts and we have fully approved a SIP. CAA § 110(c)(1). We made a finding on January 15, 2009, that Georgia, Indiana, Michigan, Ohio, Pennsylvania, Texas and Virginia had failed to timely submit a regional haze SIP. We are finalizing the FIPs for Iowa, Missouri, South Carolina, Tennessee and West Virginia, even though we are not required by the CAA to do so at this time, because of our understanding based on communications with state

officials that this action on our part is their preference. Our adoption of these FIPs at this time avoids the near-term need for additional administrative steps on the part of these states. That is, these states do not have to take any further action on their regional haze SIPs until SIP revisions are due in 2018. However, at any time, states may, and are encouraged to, submit a revision to their regional haze SIP incorporating the requirements of the Transport Rule. At that time, we will withdraw the FIP being finalized in this action.

We are not finalizing FIPs, as proposed, for Alabama, Florida, Louisiana, Mississippi or North Carolina. Rather than a FIP, Alabama, Louisiana, Mississippi and North Carolina have requested additional time to correct the deficiencies in their SIPs and submit a SIP revision. As these states did not receive a finding of failure to submit a regional haze SIP, the EPA is not required to promulgate a FIP at this time. The EPA will be required to issue a FIP for each state that does not submit an approvable SIP revision that corrects the deficiencies related to reliance on CAIR in time for the EPA to review and approve it within 2 years of this final limited disapproval action. We are not finalizing a FIP, as proposed, for Texas in order to allow more time for the EPA to assess the current Texas SIP submittal. Additional time is required due to the variety and number of BART-eligible sources and the complexity of the SIP. The EPA is also deferring action on the proposed FIP for Florida for the reasons discussed in section V.C.

VII. Regulatory Text

A. What did the EPA propose?

Based on our finding that the “Transport Rule + BART elsewhere” control scenario passes the two-pronged test, we proposed to determine that the Transport Rule trading program will provide greater progress towards Regional Haze goals than source-specific BART. We noted that the proposed determination would apply only to EGUs in the Transport Rule trading programs and only for the

pollutants covered by the programs in each state. Accordingly, we proposed to revise 40 CFR 51.308(e)(4) by essentially replacing the name of CAIR with the name of the Transport Rule.

We also proposed that a state that chooses to meet the emission reduction requirements of the Transport Rule by submitting a complete SIP revision substantively identical to the provisions of the EPA trading program that is approved as meeting the requirements of §52.38 and/or §52.39 also need not require BART-eligible EGUs in the state to install, operate, and maintain BART for the pollutants covered by such a trading program in the state.

B. Clarification of Final Regulatory Text

A number of the states for which we proposed a FIP had previously failed to either submit a visibility SIP or had failed to submit a SIP that could be fully approved under the visibility regulations issued in 1980. See 45 FR 80084 (December 2, 1980). The final regulatory text takes account of this and is not intended to change the findings that have been made in the past with respect to the relevant states' compliance with the requirements of visibility regulations found at 40 CFR 51.302-51.307.

The regulatory text also accounts for final limited approval of the regional haze SIPs of Indiana, Ohio and Virginia that the EPA is finalizing separately, on or about the same day as this action. Including regulatory text that accounts for the final limited approval in this action avoids the need for additional overlapping revisions to the CFR for these states. To ensure that the relevant regulatory text is appropriately revised, we are amending certain regulatory provisions for these states in this action only.²¹

We are also making conforming changes to the regulatory text for the regional haze SIPs of Kentucky, Tennessee and West Virginia as the EPA has previously promulgated a final limited approval and final limited disapproval of these SIPs. For Kentucky, in this action we are making conforming

²¹ The regulatory text at issue addressing limited approvals and limited disapprovals can be found at 40 CFR 52.791(a), 40 CFR 52.1886(a) and 40 CFR 52.2452(d).

changes to the regulatory text in 40 CFR 52.936(a) regarding the limited approval and limited disapproval of Kentucky's SIP. These conforming changes do not affect the substance of the EPA's final action on Kentucky on March 30, 2012 (77 FR 19098). For Tennessee, in this action we are making conforming changes to the regulatory text in 40 CFR 52.2234(a) regarding the limited approval and limited disapproval of Tennessee's SIP. These conforming changes do not affect the substance of EPA's final action on April 24, 2012 (77 FR 24392). For West Virginia, in this action we are making conforming changes to the regulatory text in 40 CFR 52.2533(d) regarding the limited approval and limited disapproval of West Virginia's SIP. These conforming changes do not affect the substance of the EPA's final action on West Virginia on March 23, 2012 (77 FR 16937).

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action" because some may view it as raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Burden is defined at 5 CFR 1320.3(b). This action does not include or require any information collection.

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined by the U.S. Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) A 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 this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities. Rather, this rule would allow states to avoid regulating EGUs in new ways based on the current requirements of the Transport Rule and as such does not impose any new requirements on small entities.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, 2 U.S.C. 1531 – 1538) for state, local, or tribal governments or the private sector. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action merely interprets the statutory requirements that apply to states in preparing their SIPs.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action does not impose any new mandates on state or local governments. Thus, Executive Order 13132 does not apply to this rule. In the spirit of Executive Order 13132 and consistent with EPA policy to promote communications between the EPA and state and local governments, the EPA specifically solicited comments on the proposed rule from state and local officials. We received comments from seven states. These comments are addressed in the final action and in the Response to Comment document.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This rule does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). The rule does not have a substantial direct effect on one or more Indian tribes, since there are no BART-eligible EGU sources on tribal lands in the Transport Rule region. In addition, the CAA does not provide for the inclusion of any tribal areas as mandatory Class I federal areas; thus, tribal areas are not subject to the requirements of the Regional Haze Rule. Furthermore, this rule does not affect the relationship or distribution of power and responsibilities between the federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this action. The EPA specifically solicited additional comment on the proposed action from tribal officials and we received none.

G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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

This action is not a “significant energy action” as defined in Executive Order 13211 (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 action does not establish requirements that directly affect the general public and private sectors. Rather, this rule will allow states to avoid regulating EGUs in new ways based on the current requirements of the Transport Rule, and thus may avoid adverse effects that conceivably might result from such additional regulation of EGUs by states.

I. National Technology Transfer and 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 the 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 the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, the EPA did not consider the use of any voluntary consensus standards.

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

Executive Order 12898 (EO) (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has concluded that it is not practicable to determine whether there would be disproportionately high and adverse human health or environmental effects on minority and/or low income populations from this final rule. The PM_{2.5} air quality improvements that might be expected under implementation of source-specific BART may differ from the Transport Rule in terms of the emission reductions required at any given source. However, our analysis of the Transport Rule suggests that the regional Transport Rule approach provides widespread health benefits especially among populations most vulnerable to PM_{2.5} impacts. This analysis is presented in detail in the Regulatory Impact Analysis for the Transport Rule which is available in the Transport Rule docket EPA-HQ-OAR-2009-0491 and from the main EPA webpage for the Transport Rule available at www.epa.gov/airtransport.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the

Comptroller General of the United States prior to publication of the rule in the Federal Register. A Major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. .

IX. Statutory Authority

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

List of Subjects

40 CFR part 51

Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Regional haze, Reporting and recordkeeping requirements, Sulfur dioxide.

Page 45 of 57 - Regional Haze: Revisions to Provisions Governing Alternatives to Source-Specific Best Available Retrofit Technology (BART) Determinations, Limited SIP Disapprovals, and Federal Implementation Plans

40 CFR Part 52

Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Regional haze, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated:

Lisa P. Jackson,
Administrator.

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

PART 51 - [AMENDED]

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

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

2. Section 51.308 is amended by revising paragraph (e)(4) to read as follows:

§51.308 Regional haze program requirements.

(e) *****

(4) A State subject to a trading program established in accordance with §52.38 or §52.39 under a Transport Rule Federal Implementation Plan need not require BART-eligible fossil fuel-fired steam electric plants in the State to install, operate, and maintain BART for the pollutant covered by such trading program in the State. A State that chooses to meet the emission reduction requirements of the Transport Rule by submitting a SIP revision that establishes a trading program and is approved as meeting the requirements of §52.38 or §52.39 also need not require BART-eligible fossil fuel-fired steam electric plants in the State to install, operate, and maintain BART for the pollutant covered by such trading program in the State. A State may adopt provisions, consistent with the requirements applicable to the State for a trading program established in accordance with §52.38 or §52.39 under the Transport Rule Federal Implementation Plan or established under a SIP revision that is approved as meeting the requirements of §52.38 or §52.39, for a geographic enhancement to the program to address the requirement under §51.302(c) related to BART for reasonably attributable impairment from the pollutant covered by such trading program in that State.

PART 52-[AMENDED]

3. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, et seq.

Subpart B-Alabama

4. Section 52.61 is amended by revising paragraph (a) and adding a new paragraph (c) to read as follows:

§52.61 Visibility protection.

(a) *Reasonably Attributable Visibility Impairment.* The requirements of section 169A of the Clean Air Act are not met because the plan does not include approvable measures for meeting the requirements of 40 CFR 51.306 for protection of visibility in mandatory Class I Federal areas.

(c) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Alabama on July 15, 2008, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x and SO₂ from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

Subpart L-Georgia

5. Section 52.580 is added to read as follows:

§52.580 Visibility protection.

(a) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Georgia on February 11, 2010, and supplemented on November 19, 2010, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x and SO₂ from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

(b) *Measures Addressing Limited Disapproval Associated with NO_x*. The deficiencies associated with NO_x identified in EPA's limited disapproval of the regional haze plan submitted by Georgia on February 11, 2010, and supplemented on November 19, 2010, are satisfied by §52.584.

(c) *Measures Addressing Limited Disapproval Associated with SO₂*. The deficiencies associated with SO₂ identified in EPA's limited disapproval of the regional haze plan submitted by Georgia on February 11, 2010, and supplemented on November 19, 2010, are satisfied by §52.585.

Subpart P-Indiana

6. Section 52.791 is added to read as follows:

§52.791 Visibility protection.

(a) *Regional Haze*. The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Indiana on January 14, 2011, and supplemented on March 10, 2011, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x and SO₂ from electric generating units. EPA has given limited approval and limited disapproval to the plan provisions addressing these requirements.

(b) *Measures Addressing Limited Disapproval Associated with NO_x*. The deficiencies associated with NO_x identified in EPA's limited disapproval of the regional haze plan submitted by Indiana on January 14, 2011, and supplemented on March 10, 2011, are satisfied by §52.789.

(c) *Measures Addressing Limited Disapproval Associated with SO₂*. The deficiencies associated with SO₂ identified in EPA's limited disapproval of the regional haze plan submitted by Indiana on January 14, 2011 and supplemented on March 10, 2011 are satisfied by §52.790.

Subpart Q-Iowa

7. Section 52.842 is added to read as follows:

§52.842 Visibility protection.

(a) *Regional Haze*. The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Iowa on March 25, 2008, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x and SO₂ from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

(b) *Measures Addressing Limited Disapproval Associated with NO_x*. The deficiencies associated with NO_x identified in EPA's limited disapproval of the regional haze plan submitted by Iowa on March 25, 2008, are satisfied by §52.840.

(c) *Measures Addressing Limited Disapproval Associated with SO₂*. The deficiencies associated with SO₂ identified in EPA's limited disapproval of the regional haze plan submitted by Iowa on March 25, 2008, are satisfied by §52.841.

Subpart S-Kentucky

8. Section 52.936 is amended by revising paragraph (a) and by adding new paragraphs (b) and (c) to read as follows:

§52.936 Visibility protection.

(a) *Regional Haze*. The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Kentucky on June 25, 2008, and amended on May 28, 2010, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x and SO₂ from electric generating units. EPA has given limited approval and limited disapproval to the plan provisions addressing these requirements.

(b) *Measures Addressing Limited Disapproval Associated with NO_x*. The deficiencies associated with NO_x identified in EPA's limited disapproval of the regional haze plan submitted by Kentucky on June 25, 2008, and amended on May 28, 2010, are satisfied by §52.940.

(c) *Measures Addressing Limited Disapproval Associated with SO₂*. The deficiencies associated with SO₂ identified in EPA's limited disapproval of the regional haze plan submitted by Kentucky on June 25, 2008, and amended on May 28, 2010, are satisfied by §52.941.

Subpart T-Louisiana

9. Section 52.985 is added to read as follows:

§52.985 Visibility protection.

(a) *Regional Haze*. The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Louisiana on June 13, 2008, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x and SO₂ from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

Subpart X-Michigan

10. Section 52.1183 is amended by revising paragraph (a) and adding new paragraphs (d), (e), and (f) to read as follows:

§52.1183 Visibility protection.

(a) *Reasonably Attributable Visibility Impairment*. The requirements of section 169A of the Clean Air Act are not met because the plan does not include approvable measures for meeting the requirements of 40 CFR 51.302, 51.305, and 51.307 for protection of visibility in mandatory Class I Federal areas.

(d) *Regional Haze*. The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Michigan on November 5, 2010, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x and SO₂ from electric generating units. EPA has given limited approval and limited disapproval to the plan provisions addressing these requirements.

(e) *Measures Addressing Limited Disapproval Associated with NO_x*. The deficiencies associated with NO_x identified in EPA's limited disapproval of the regional haze plan submitted by Michigan on November 5, 2010, are satisfied by §52.1186.

(f) *Measures Addressing Limited Disapproval Associated with SO₂*. The deficiencies associated with SO₂ identified in EPA's limited disapproval of the regional haze plan submitted by Michigan on November 5, 2010, are satisfied by §52.1187.

Subpart Z-Mississippi

11. Section 52.1279 is added to read as follows:

§52.1279 Visibility protection.

(a) *Regional Haze*. The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Mississippi on September 22, 2008, and supplemented on May 9, 2011, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x and SO₂ from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

Subpart AA-Missouri

12. Section 52.1339 is amended by revising paragraph (a) and adding new paragraphs (c), (d), and (e) to read as follows:

§52.1339 Visibility protection.

(a) *Reasonably Attributable Visibility Impairment*. The requirements of section 169A of the Clean Air Act are not met because the plan does not include approvable measures for meeting the requirements of 40 CFR 51.306 for protection of visibility in mandatory Class I Federal areas.

(c) *Regional Haze*. The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Missouri on August 5, 2009, and supplemented on January 30, 2012,

does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x and SO₂ from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

(d) *Measures Addressing Limited Disapproval Associated with NO_x*. The deficiencies associated with NO_x identified in EPA's limited disapproval of the regional haze plan submitted by Missouri on August 5, 2009, and supplemented on January 30, 2012, are satisfied by §52.1326.

(e) *Measures Addressing Limited Disapproval Associated with SO₂*. The deficiencies associated with SO₂ identified in EPA's limited disapproval of the regional haze plan submitted by Missouri on August 5, 2009, and supplemented on January 30, 2012, are satisfied by §52.1327.

Subpart II-North Carolina

13. Section 52.1776 is added to read as follows:

§52.1177 Visibility protection.

(a) *Regional Haze*. The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by North Carolina on December 17, 2007, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x and SO₂ from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

Subpart KK-Ohio

14. Section 52.1886 is added to read as follows:

§52.1886 Visibility protection.

(a) *Regional Haze*. The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Ohio on March 11, 2011, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x

and SO₂ from electric generating units. EPA has given limited approval and limited disapproval to the plan provisions addressing these requirements.

(b) *Measures Addressing Limited Disapproval Associated with NO_x*. The deficiencies associated with NO_x identified in EPA's limited disapproval of the regional haze plan submitted by Ohio on March 11, 2011, are satisfied §52.1882.

(c) *Measures Addressing Limited Disapproval Associated with SO₂*. The deficiencies associated with SO₂ identified in EPA's limited disapproval of the regional haze plan submitted by Ohio on March 11, 2011, are satisfied by §52.1883.

Subpart NN-Pennsylvania

15. Section 52.2042 is added to read as follows:

§52.2042 Visibility protection.

(a) *Regional Haze*. The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Pennsylvania on December 20, 2010, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x and SO₂ from electric generating units. EPA has given limited approval and limited disapproval to the plan provisions addressing these requirements.

(b) *Measures Addressing Limited Disapproval Associated with NO_x*. The deficiencies associated with NO_x identified in EPA's limited disapproval of the regional haze plan submitted by Pennsylvania on December 20, 2010, are satisfied §52.2040.

(c) *Measures Addressing Limited Disapproval Associated with SO₂*. The deficiencies associated with SO₂ identified in EPA's limited disapproval of the regional haze plan submitted by Pennsylvania on December 20, 2010, are satisfied by §52.2041.

Subpart PP-South Carolina

16. Section 52.2132 is amended by revising paragraph (a) and adding new paragraphs (d), (e), and (f) to read as follows:

§52.2132 Visibility protection.

(a) *Reasonably Attributable Visibility Impairment.* The requirements of section 169A of the Clean Air Act are not met because the plan does not include approvable measures for meeting the requirements of 40 CFR 51.305 and 51.306 for protection of visibility in mandatory Class I Federal areas.

(d) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by South Carolina on December 17, 2007, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x and SO₂ from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

(e) *Measures Addressing Limited Disapproval Associated with NO_x.* The deficiencies associated with NO_x identified in EPA's limited disapproval of the regional haze plan submitted by South Carolina on December 17, 2007, are satisfied by §52.2140.

(f) *Measures Addressing Limited Disapproval Associated with SO₂.* The deficiencies associated with SO₂ identified in EPA's limited disapproval of the regional haze plan submitted by South Carolina on December 17, 2007, are satisfied by §52.2141.

Subpart RR-Tennessee

17. Section 52.2234 is amended by revising paragraph (a) and adding new paragraphs (c) and (d) to read as follows:

§52.2234 Visibility protection.

(a) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Tennessee on April 4, 2008, does not include fully approvable measures

for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x and SO₂ from electric generating units. EPA has given limited approval and limited disapproval to the plan provisions addressing these requirements.

(c) *Measures Addressing Limited Disapproval Associated with NO_x*. The deficiencies associated with NO_x identified in EPA's limited disapproval of the regional haze plan submitted by Tennessee on April 4, 2008, are satisfied by §52.2240.

(d) *Measures Addressing Limited Disapproval Associated with SO₂*. The deficiencies associated with SO₂ identified in EPA's limited disapproval of the regional haze plan submitted by Tennessee on April 4, 2008, are satisfied by §52.2241.

Subpart SS-Texas

18. Section 52.2304 is amended by revising paragraph (a) and adding new paragraphs (c) to read as follows:

§52.2304 Visibility protection.

(a) *Reasonably Attributable Visibility Impairment*. The requirements of section 169A of the Clean Air Act are not met because the plan does not include fully approvable measures for meeting the requirements of 40 CFR 51.305 for protection of visibility in mandatory Class I Federal areas.

(c) *Regional Haze*. The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Texas on March 31, 2009, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x and SO₂ from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

Subpart VV-Virginia

19. Section 52.2452 is amended by revising paragraph (a) and adding new paragraphs (d), (e), and (f) to read as follows:

§52.2452 Visibility protection.

(a) *Reasonably Attributable Visibility Impairment.* The requirements of section 169A of the Clean Air Act are not met because the plan does not include approvable measures for meeting the requirements of 40 CFR 51.305 and 51.306 for protection of visibility in mandatory Class I Federal areas.

(d) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Virginia on July 17, 2008, March 6, 2009, January 14, 2010, October 4, 2010, November 19, 2010, and May 6, 2011, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x and SO₂ from electric generating units. EPA has given limited approval and limited disapproval to the plan provisions addressing these requirements.

(e) *Measures Addressing Limited Disapproval Associated with NO_x.* The deficiencies associated with NO_x identified in EPA's limited disapproval of the regional haze plan submitted by Virginia on July 17, 2008, March 6, 2009, January 14, 2010, October 4, 2010, November 19, 2010, and May 6, 2011, are satisfied by §52.2440.

(f) *Measures Addressing Limited Disapproval Associated with SO₂.* The deficiencies associated with SO₂ identified in EPA's limited disapproval of the regional haze plan submitted by Virginia on July 17, 2008, March 6, 2009, January 14, 2010, October 4, 2010, November 19, 2010, and May 6, 2011, are satisfied by §52.2441.

Subpart XX-West Virginia

20. Section 52.2533 is amended by revising paragraphs (a) and (d) and adding new paragraphs (e) and (f) to read as follows:

§52.2533 Visibility protection.

(a) *Reasonably Attributable Visibility Impairment.* The requirements of section 169A of the Clean Air Act are not met because the plan does not include approvable measures for meeting the requirements of 40 CFR 51.305, 51.306, and 51.307 for protection of visibility in mandatory Class I Federal areas.

(d) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by West Virginia on June 18, 2008, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_x and SO₂ from electric generating units. EPA has given limited approval and limited disapproval to the plan provisions addressing these requirements.

(e) *Measures Addressing Limited Disapproval Associated with NO_x.* The deficiencies associated with NO_x identified in EPA's limited disapproval of the regional haze plan submitted by West Virginia on June 18, 2008, are satisfied by §52.2540.

(f) *Measures Addressing Limited Disapproval Associated with SO₂.* The deficiencies associated with SO₂ identified in EPA's limited disapproval of the regional haze plan submitted by West Virginia on June 18, 2008, are satisfied by §52.2541.