

One of the requirements in 40 CFR 51.309 addressed the GCVTC's recommendation that the States establish a cap on regional emissions of SO<sub>2</sub> from stationary sources. Under 40 CFR 51.309(f) of the regional haze rule, the WRAP was required to submit an annex to the GCVTC Report that would contain specific emission reduction milestones for the years 2003, 2008, 2013, and 2018. This provision explicitly references the recommendations of the GCVTC for "steady and continuing emissions reductions \* \* \* consistent with the Commission's definition of reasonable progress" and its goal of 50 to 70 percent reduction in emissions of SO<sub>2</sub> between 1990 and 2040. In the preamble to the final regional haze rule, EPA explained that the WRAP would have to take into account four specific factors in setting these milestones. The preamble specifically noted that "[t]he first factor affecting the selection of interim milestones is the GCVTC's definition of reasonable progress." (64 FR 35756). The other factors listed in the rule are: (1) The ultimate target in 2040 of a 50 to 70 percent reduction in emissions of SO<sub>2</sub> from stationary sources; (2) the requirement that the emissions cap provide for greater progress than would be achieved through source-specific BART requirements; and (3) the timing of progress assessment and the identification of mechanisms to address the cases where emissions exceed milestones.

In the regional haze rule, EPA concluded that the specific SIP requirements in 40 CFR 51.309 provide for reasonable progress toward the national visibility goal. The WRAP's plan for capping SO<sub>2</sub> emissions from stationary sources is a part of the Western States' and Tribes' long-term strategy for achieving reasonable progress. As described above, the SO<sub>2</sub> program grew out of the GCVTC's recommendations for measures to remedy adverse impacts on visibility.

Some commenters expressed concerns that the WRAP's program for controlling SO<sub>2</sub> emissions in the West, as further defined by the Annex to the GCVTC's Report, is a "BART provision" subject to the *American Corn Growers* court remand. For several reasons, EPA believes that this is not the case.

Under the CAA, the BART provisions require the installation of control technology on specific sources that were built between 1962 and 1977. Nothing in the Annex requires specific controls on any individual source. A key component of the Annex's SO<sub>2</sub> program is the goal that all reductions called for by the program remain voluntary. If the

reductions are achieved through voluntary measures, then there will be no requirements of any kind. Even if the SO<sub>2</sub> milestones are not achieved through voluntary actions, the Annex does not provide for source-specific controls. Rather, the failure to achieve these milestones would trigger a "backstop" emissions trading program. Such a program, by its very nature, does not dictate that any particular source install control technology or otherwise reduce its emissions.

The EPA also notes that the Annex covers all stationary sources that emit more than 100 tons per year of SO<sub>2</sub>—not just sources built between 1962 and 1977—and thus goes well beyond the scope of the statutory BART provisions. For this reason (and others noted above), EPA believes that the SO<sub>2</sub> program is a component of the WRAP's strategy for ensuring reasonable progress, an aspect of the regional haze program that was not addressed by the *American Corn Growers* decision.

The EPA approved the WRAP's long-term strategy for addressing visibility consistent with the broad discretion afforded States by section 169A and title I of the CAA in developing strategies to meet reasonable progress goals and national standards. See *Union Electric Co. v. EPA*, 427 U.S. 246 (1976); *Train v. NRDC*, 421 U.S. 60 (1975). The SO<sub>2</sub> program, which caps emissions of SO<sub>2</sub> from all large stationary sources, reflects the WRAP States' and Tribes' judgement as to one appropriate means for addressing haze and ensuring reasonable progress. The decision to limit emissions from this category of sources is well within the discretion of the States and Tribes. The court's decision in *American Corn Growers*, which addresses only the BART provisions, does not in any way limit the general authority of the States to choose appropriate control measures to ensure reasonable progress. Any suggestion that the decision requires States to undertake a source specific analysis of a source's contribution to the problem of regional haze before the State can subject a source to regulation would go far beyond the actual holding in the case.

As discussed above, 40 CFR 51.309 does not require participating States to assess and impose BART on individual sources. Best available retrofit technology is only relevant as one of four factors that the WRAP must consider in establishing the appropriate emission reduction milestones for SO<sub>2</sub>—i.e., the level of the cap. The regional haze rule requires that the milestones in the Annex to the GCVTC Report "must be shown to provide for greater

reasonable progress than would be achieved by application of best available retrofit technology (BART) pursuant to § 51.308(e)(2)." 40 CFR 51.309(f)(1)(i). This is not a requirement for BART. The requirement that the milestones "provide for greater reasonable progress" than BART is based on the decision by EPA to provide States with the flexibility to adopt alternative measures in lieu of the BART requirements set forth in statute so long as these alternative measures were "better than BART." See 40 CFR 51.308(e)(2). In short, the SO<sub>2</sub> program described in the regional haze rule, as further defined by the Annex, does not impose controls on specific sources but rather ensures that greater reasonable progress is made than would be through installation of source specific controls on the BART sources. The regional haze rule accordingly authorizes States to achieve improvements in visibility through the most cost-effective measures available.

The *American Corn Growers* court decision did not address the provisions in the regional haze rule allowing States to adopt a trading program or other alternative measures in place of source specific control measures for BART sources. The EPA finds nothing in the court's decision that would invalidate the trading program alternative to BART, as provided for in 40 CFR 51.308(e)(2). In the preamble to the regional haze rule, EPA sets forth the basis for its decision to allow States this flexibility and describes the process for States to make a showing that the alternative measures provide for greater reasonable progress. Significantly, nothing in the D.C. Circuit's opinion suggests that such an alternative is in conflict with the requirements of the visibility provisions of the CAA. An approach that allows States to adopt alternative measures in lieu of BART fully comports with the court's view of the States' broad authority in this area. Accordingly, the Annex meets the requirements set out in 40 CFR 51.309(f), and EPA believes that it may approve the proposed revisions to the regional haze rule incorporating the emission reduction milestones and other measures set forth in the Annex.

## 2. Whether the December 31, 2003 SIP Deadline Should Be Extended

Under 40 CFR 51.309 of the regional haze rule, SIPs for the optional program for the nine Western States are due by December 31, 2003. The EPA received a number of comments on the proposed rule with respect to this deadline. Four commenters, including the State of Colorado and three industry trade