

compilation of these source-specific baseline emissions resulted in the baseline emission inventory totals, which serve as a “starting point” for measuring progress from the program. The WRAP recognized in the Annex that if a source was in violation of applicable requirements during the base year when its emissions were determined, the baseline emissions during 2003–2018 would be overestimated.

In the proposal, EPA included this provision with general regulatory language providing for the adjustment of baseline emissions for illegal emissions, and we requested comment on possible ways of clarifying the provision in the final rule. The EPA noted in the preamble to the proposal that there are instances where it may be unclear whether under the approach in the Annex, emissions would be considered as “illegal,” for example where:

- Disputing parties resolve their differences through (1) A consent decree that is either entered through Federal or State courts, or (2) an administrative enforcement proceeding by either a State, Tribe, or EPA; or
- A State disagrees with EPA or a citizens’ group over whether or not a particular alleged violation occurred.

The EPA requested comment on how these situations should affect the milestones. Specifically, EPA requested comment on the following possible options:

Option 1. Under this option, the rule would require that if there is any resolution⁵ to alleged illegal SO₂ emissions, then all of the reductions resulting from the resolution would be considered as “illegal emissions.” Taking into account these reductions, the State or Tribe would then “re-forecast” the source’s emissions and its effect on the milestone. “Re-forecast” means to re-apply the forecasting process, that is the process the WRAP originally used to project future emissions and develop the milestones, using the corrected baseline SO₂ emissions for the affected source. A comparison of this re-forecast of emissions with the previous forecast of emissions would determine the amount of the adjustment for each year up through 2018.

Option 2. Under this option, the rule would allow for case-by-case judgments on the appropriateness of adjusting baseline emissions following resolution of allegations of illegal SO₂ emissions.

The rule would, however, clarify the entity responsible for deciding whether a case involves illegal emissions warranting an adjustment to the milestones. Under this option, we requested comment on which entity should be responsible for this determination, that is, whether the rule should clarify whether the parties entering into a settlement, the States, the Tribes, the WRAP, or EPA would determine the settlement’s impact on the milestones.

The EPA noted that under any of the proposed options, adjustments to the milestone would occur only after the source in the enforcement case has achieved the requisite reduction of SO₂ emissions. Consequently, adjustments to the milestones would have no effect on any other facility’s operation because all of the reductions would be achieved by the source subject to the enforcement action.

The EPA also solicited comments in the proposal on how to treat any extra SO₂ emissions reductions that a facility might achieve as a result of a settlement. The EPA will often allow a company that is settling through a consent decree or settlement agreement to perform a supplementary environmental project and allow the expenditures on this project to partially offset penalties that the company would otherwise be assessed. The EPA noted in the preamble to the proposal that if the milestones are not reduced by the amount of extra emissions reductions from this type of project, then the environment may see little benefit, since another company would be allowed more SO₂ emissions. Thus, in the proposal, EPA sought input on whether these “extra” emissions reductions should be considered part of this “illegal emission” adjustment and factored into a recalculation of the milestone.

Public Comments. The EPA received a number of comments on this provision.

A few commenters recommended that this provision be deleted from the rule entirely. Some commenters criticized this provision because it would lower the milestones and reduce the potential pool of allowances under the backstop trading program. Accordingly, these commenters believed that the provision would serve to punish the “non-violators” in the program at large. Another commenter believed that any adjustment for “illegal emissions” is not appropriate unless it has been demonstrated that the provision would improve visibility.

Other commenters supported the provision but recommended that the

term “adjustments for illegal emissions” be replaced with the term “adjustments due to enforcement actions.” Some commenters requested clarification on whether these adjustments would only apply to enforcement actions that would have affected the assumptions used in baseline emissions projections. One commenter recommended that the proposed adjustment for illegal emissions should apply only to emissions reductions resulting from consent decrees or administrative orders where the EPA or authorized State has commenced the enforcement action, and not where emissions reductions arise out of “voluntary settlements” initiated by the company.

Regarding the two options for clarifying this provision, the WRAP and other commenters recommended the second option. These commenters noted that case-by-case judgments will be needed to determine whether and the degree to which the milestones should be adjusted. Responding to EPA’s request to clarify the entity responsible for calculating the adjustment, the WRAP recommended that the entity responsible should be the parties entering into a settlement, in conjunction with the relevant State or Tribe. The commenters envisioned that EPA would have an oversight role in the SIP approval process to determine that the adjustment agreed to through the enforcement process is properly reflected in the milestone adjustment.

The WRAP comments recommended that specific language be added to the final rule requiring States and Tribes to document, and include in the administrative record,⁶ a discussion of whether any adjustments to the milestones are appropriate based upon administrative or judicial enforcement actions, and to include an explanation of the basis for the State’s or Tribe’s decision.

Regarding EPA’s request for comment on how “extra” emissions reductions in enforcement actions should be treated, the WRAP and other commenters believed that these extra emissions reductions should also be treated on a case-by-case basis. The WRAP commenters recommended that EPA include a provision in the rule requiring States or Tribes to address in the periodic SIP revision whether SO₂ allowances should be retired or confiscated⁷ as a result of an

⁶ The EPA interprets the term “administrative record” in the WRAP’s comments to refer to information made available in support of the State’s or Tribe’s implementation plan submittal to EPA under 40 CFR 51.309(d)(10).

⁷ This comment responded to EPA’s question on how the milestones should be adjusted with a

⁵ For option 1, the proposal used the broad term “resolution” to refer to all types of emissions reductions resulting from enforcement actions.