

administrative or judicial enforcement action and the rationale for the State's or Tribe's decision.

*Final rule.* The EPA has retained this provision in the final rule. The EPA agrees with the WRAP that this provision is necessary to ensure that the "baseline," the starting point for the milestone calculations, reflects compliance with regulations. So long as the reductions to the milestones do not occur before the date a source comes back into compliance, EPA does not believe that this adjustment has the effect of "penalizing" the other sources. Regarding the comment that this provision is deficient due to a lack of demonstrated visibility improvements, EPA believes that the WRAP was not required to make a demonstration of the visibility improvements of this specific provision, which is part of the WRAP's overall program for SO<sub>2</sub> reductions from stationary sources.

The final rule reflects EPA's agreement with recommendations of commenters to replace the term "adjustments for illegal emissions" with the term "adjustments due to enforcement actions." The EPA agrees that this terminology better encompasses the types of situations that the provision would address. The EPA interprets the term "enforcement action" in these comments to be used broadly to include any type of enforcement action including administrative orders, settlements, consent decrees, court orders, and compliance schedules in title V permits.

As recommended by some commenters, we have added language consistent with Option 2. The EPA agrees with commenters that there will be case-by-case considerations in enforcement actions that could affect whether an adjustment to the milestones is appropriate. The EPA generally agrees with comments suggesting that the entity responsible for calculating the amount of the adjustment should be the parties entering into the settlement, and that where those parties do not include the State or Tribe, the State or Tribe should be consulted to assure that correct assumptions are used for the adjustment. Further, EPA believes that if the parties involved in the action are responsible for recommending the amount of the adjustment, or whether an adjustment is appropriate, this would allow a source entering a voluntary settlement to negotiate whether or not an adjustment should be made.

The EPA believes it is useful to clarify a few points regarding actions where EPA or a citizens' group is the plaintiff in the enforcement action. Such cases would be brought to the U.S. District Court. Pursuant to longstanding Department of Justice policy, in any such case members of the public, including an interested State or Tribe, would have an opportunity to review and comment on the proposed consent decree settling the enforcement case. See 28 CFR 50.7. For any such case before the U.S. District Court, EPA intends to provide the State or Tribe an opportunity to review and comment on the proposed settlement. If a settlement or order from the U.S. District Court is issued and contains an adjustment to the milestones, such a settlement or order from the court is binding and the State and Tribe would be required to adjust the milestones as directed by the court. For instances where such court actions are silent on reforecasting the baseline emissions and adjusting the milestones, EPA believes the State or Tribe must determine whether such a reforecast and adjustment is appropriate.

The EPA agrees with the WRAP's recommendations that the State or Tribe should provide documentation of these adjustments for enforcement cases in the administrative record for the 5-year SIP or TIP revision. Specifically, the rule requires the following documentation:

- Identification of each source that has reduced SO<sub>2</sub> emissions under an administrative or judicial enforcement action,
- Whether the milestones were adjusted in response to the reduction in SO<sub>2</sub> emissions under the enforcement action,
- The rationale for the State's or Tribe's decision on the milestone adjustment,
- If extra SO<sub>2</sub> emissions reductions (over and above those reductions needed for compliance) were part of the settlement, whether those reductions resulted in any adjustment to the milestones or allowance allocations.

#### *C. Annual Process for Determining Whether a Trading Program Is Triggered*

The proposed rule describes an annual process to determine whether the emissions from participating States exceed the milestones and thus trigger the backstop trading program. This proposed process contained a number of deadlines for steps in the annual process, and contained special provisions for certain years. Only a few comments were received on these provisions.

#### 1. Date for the Annual Determination

*Proposed rule.* The proposed rule contained annual deadlines for determining whether the milestone is exceeded. This proposed schedule called for a draft determination not later than December 31 of each year, beginning with a draft determination for the year 2003 by December 31, 2004. The proposed schedule called for a final determination, taking into account public comments, by the end of the following March, beginning with a final determination by March 31, 2005 for calendar year 2003.

*Public comments.* In their comments on the proposal, the WRAP recommended that this annual deadline be extended by 1 year. For example, pursuant to this recommendation, EPA would extend the deadline for the final determination for calendar year 2003 from March 31, 2005 to March 31, 2006. Because certain States or Tribes may have more numerous or complex sources, the WRAP believed that additional time may be needed to collect, validate, and analyze emissions data. In support of this request for additional time, the WRAP notes that adding time for the annual determination would not affect the timing for implementing the backstop trading program. For example, even if the annual determination for calendar year 2003 were not made until 2006, this would not affect the date for the onset of the trading program. If the calendar year 2003 milestone were triggered, sources would still need to hold allowances for emissions in calendar year 2009.

*Final rule.* In the final rule, EPA has retained the deadline for the annual determination as proposed. The EPA recognizes that some States within the region may have more complex technical and administrative procedures for collecting annual emissions inventory data. The EPA's current judgment is that for States who have indicated possible participation in the program under 40 CFR 51.309, these obstacles do not exist. The EPA believes that it is not desirable to move the deadline forward in time unless it is absolutely necessary. While, as the WRAP correctly notes, this would not affect the deadlines for implementation of the backstop trading program, it would have the effect of reducing the amount of time for planning and implementation if the trading program were triggered. If the States needing more time do, in fact, decide to participate in the program, EPA believes that the regional haze rule could be

recommendation on whether allowances should be retired or confiscated. The EPA interprets this comment as addressing both the milestones and the allowances, which add up to the milestones.