

The WRAP and other commenters recommended that EPA replace the penalty provisions in the proposal with the provisions that were recommended in the Annex, which were, in turn, based upon the acid rain program.

Final rule. The EPA has made a few changes to the final rule based upon public comments received. First, EPA has decided to include in the final rule the two specific types of automatic penalties listed in the Annex for excess emissions. The EPA believes that by including a requirement for these penalty provisions in the final rule, EPA can remove any ambiguity that may exist over whether the types of provisions envisioned by the WRAP would be acceptable to EPA for SIPs submitted under 40 CFR 51.309. The EPA agrees with the commenters that the program should establish sufficient penalties to deter non-compliance. The final rule includes a requirement to forfeit two allowances for each ton of excess emissions, and a requirement for monetary penalties. The EPA uses the WRAP's specific \$5000 per ton amount in the final rule. At the same time, EPA believes that because it will be a number of years before the onset of any backstop trading program, it is possible that the appropriate \$/ton figure could change over this time period, and that there may be additional factors that may need to be taken into account. The final rule provides for the development of an alternative to this amount, if the value is consistent across States and Tribes and the value substantially exceeds the expected costs of allowances, in order to provide a strong incentive for sources to hold allowances at least equal to their emissions.

The EPA believes that many commenters may have misunderstood the proposed regulatory language requiring that each day of the year be considered a separate violation and that each ton of excess emissions be considered a separate violation. The EPA wishes to clarify that we view these provisions as clarifying the *liabilities* that exist for violations under the CAA, and that these penalties are not automatic. The EPA believes that it is important to recognize that while the penalty structure devised by the WRAP will represent the principle way to deter violations, EPA believes that it is useful to clarify that the additional liabilities exist under the CAA. We believe this is consistent with the acid rain program. For example, under 40 CFR 77.1(b), EPA clarifies that the automatic penalties in the acid rain program do not negate other penalties under the CAA, as follows:

(b) Nothing in this part shall limit or otherwise affect the application of sections 112(r)(9), 113, 114, 120, 303, 304, or 306 of the Act, as amended. Any allowance deduction, excess emission penalty, or interest required under this part shall not affect the liability of the affected unit's and affected source's owners and operators for any additional fine, penalty, or assessment, or their obligation to comply with any other remedy, for the same violation, as ordered under the Act.

While EPA agrees with the WRAP that the penalty structure contained in the backstop trading program, which is patterned after the acid rain program, should be effective and should constitute the principal way penalties would be imposed, it is nonetheless useful and important to clarify that sources are potentially liable for other penalties under the CAA.

The EPA also clarifies in the final rule language, as noted on page 46 of the Annex (Annex section II.D.6.f.), that in addition to excess emissions, violations are possible with respect to other program requirements (such as monitoring and reporting requirements). We agree with the WRAP that CAA civil and criminal penalties would apply to such violations, including liability for each day as an individual violation.

4. Requirements for Periodic Evaluation

Proposed rule. The proposed rule required the backstop trading program to include a provision for periodic evaluations of the program. Such periodic evaluations are required as a means of determining whether the program, in its actual implementation, would need any mid-course corrections. The proposal included a list of nine questions that the program evaluations should address. These proposed questions, which were derived from EPA's guidance for EIP, section 5.3(b), were as follows:

(A) Whether the total actual emissions could exceed the milestones, even though sources comply with their allowances;

(B) Whether the program achieved the overall emission milestone it was intended to reach, and a discussion of the actions that have been necessary to reach the milestone;

(C) The effectiveness of the compliance, enforcement and penalty provisions;

(D) The administrative costs of the program to sources and to State and tribal regulators, including a discussion of whether States and Tribes have enough resources to implement the trading program;

(E) Whether the market trading program has likely led to decreased costs for reaching the milestone relative

to a non-market based approach, including a discussion of the market price of allowances relative to control costs that might have otherwise been incurred;

(F) Whether the trading program resulted in any unexpected beneficial effects, or any unintended detrimental effects;

(G) Whether the actions taken to reduce SO₂ have led to any unintended increases in other pollutants;

(H) Whether there are any changes needed in emissions monitoring and reporting protocols, or in the administrative procedures for program administration and tracking;

(I) The effectiveness of the provisions for interstate trading, and whether there are any procedural changes needed to make the interstate nature of the program more effective.

Public comments. The only comments on the periodic evaluation provision were from the WRAP. The WRAP, while supporting items (A), (C), (H) and (I) without changes, recommended changes to items (B) and (D) and recommended deletion of items (E), (F) and (G).

The WRAP's comments recommended deleting the phrase "and a discussion of the actions that have been necessary to reach the milestones" from the end of item (B). The WRAP noted that the backstop trading program is intended to provide incentives for long-term business planning. The program also allows other concerns, such as the need to meet the PM_{2.5} NAAQS, to bring about some of the emissions reductions needed to meet the regional haze goals. The WRAP stated that it could be difficult to determine what actions were required to achieve all of the emissions reductions in the region, because most of the reductions would follow from individual business decisions.

Accordingly, in its comments, the WRAP recommended that this provision not be mandated by the rule.

The WRAP comments recommended deletion of the phrase "the administrative costs of the program to sources and to State and tribal regulators" from item (D), such that this item would be modified to read "a discussion of whether States and Tribes have enough resources to implement the trading program." The WRAP stated that States and Tribes will be monitoring the costs of the program as part of their ongoing internal program review, but that this should not be mandated by EPA. Rather, the WRAP recommended that the rule should be focused on what is needed to meet the visibility improvement goals, and that the development of the most cost-effective