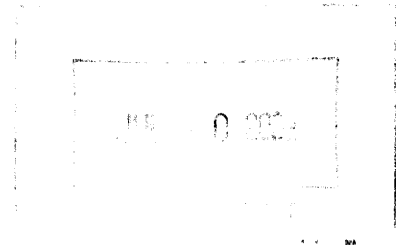




A-2000-51
IV-D-11

July 5, 2002

Air and Radiation Docket and Information Center (6 102)
Attention: Docket No. A-2000-5 1
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460



Re: 40 CFR Part 5 1, Proposed Revisions to Regional Haze Rule to Incorporate Sulfur Dioxide Milestones and Backstop Emissions Trading Program for Nine Western States and Eligible Indian Tribes Within That Geographic Area; Proposed Rule. 67 Federal Register 30418 (May 6, 2002).

To Whom It May Concern:

The Western Business Roundtable (WBRT) appreciates the opportunity to review and provide comments on the proposed revisions to the Environmental Protection Agency's Regional Haze Rule to incorporate the Western Regional Air Partnership backstop sulfur dioxide market trading program (hereinafter referred to as the Annex): 40 CFR Part 5 1, Proposed Revisions to Regional Haze Rule to Incorporate Sulfur Dioxide Milestones and Backstop Emissions Trading Program for Nine Western States and Eligible Indian Tribes Within That Geographic Area; Proposed Rule. 67 Federal Register 30418 (May 6, 2002).

WBRT is a coalition of CEOs and senior executives of corporations doing business in the western United States. The organization represents a broad cross-section of western business interests, including those engaged in construction, manufacturing, mining, electric power generation and oil and gas exploration and development. The purpose of the WBRT is to protect the quality of life in our region, recognizing the need for both a safe and clean environment and a healthy economy.

Because our companies and their employees live and work in the West, we understand the importance of sensible environmental policy in the western states. For this reason, WBRT (and its predecessor, the Western Regional Council) have devoted significant time and resources to visibility and air quality issues over the past 25 years.

WBRT has been actively involved in the development of the Western Regional Air Partnership Market Trading Program. WBRT is a strong supporter of the stakeholder process and its market-based approaches to solving environmental problems. WBRT believes that the WRAP process and other regional planning processes now underway offer real benefit in addressing regional haze.

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July 5, 2002

Comment on May 24, 2002 U.S. Appeals Court Decision Regarding Regional Haze Rule

EPA's Regional Haze Rule was finalized in August 1999 and the proposed revisions to the Regional Haze Rule to incorporate the Annex were published in the Federal Register on May 6, 2002.

Since the opening of the public comment period on the proposed revisions to the Rule, the Court of Appeals for the DC Circuit has decided in the case American Corn Growers Association, et. al. v. EPA, No. 99-1348 (D.C. Cir. May 24, 2002), that "the Haze Rule's BART provisions are contrary to the text, structure and history of Section 169A of the [Clean Air Act] ."

Section 309(f) of the Regional Haze Rule expressly provides an alternative means for States to comply with their obligations under the BART provisions of Section 308 of the Regional Haze Rule and under Section 169A of the Clean Air Act (CAA). In this regard, the BART requirements of RHR Section 308(e) apply to every State. Section 309(f)(1) of the Regional Haze Rule provides that "[a] Transport Region State may choose to comply with the provisions of this section and by doing so shall satisfy the requirements of section 5 1.308(b)-(e) . . ." through the Annex process. Section 309(f)(1)(i) provides that "[t]he emission reductions milestones [included in the Annex] must be shown to provide for greater reasonable progress than would be achieved by application of best available retrofit technology (BART) pursuant to section 5 1.038 and would be approvable in lieu of BART."

EPA Should Make Its Analysis of the Court Decision Available for Public Comment and Should Extend the Deadline for Comment on the Proposed Revisions to the Rule to Allow for Meaningful Public Input

The Court decision has raised questions about the form of the Regional Haze Rule that may emerge upon remand, particularly with respect to how the agency will determine BART under Section 308. There is also a great deal of uncertainty about the impact of the Court ruling on Section 309 of the Regional Haze Rule since the program is required to be 'better than BART.'

The Agency stated a view on the issue in a letter dated June 7, 2002, which was signed by the Director of EPA's Air Quality Strategies and Standards Division, Lydia Wegman. In the letter, Ms. Wegman states that the Agency does not believe Section 309 of the Rule has been impacted by American Corn Growers decision and that the Agency plans to move forward with finalizing the Rule. WBRT believes stakeholders need more detailed information about how and why the Agency came to that conclusion. We believe the Agency's analysis should be made part of the record, and that the public should be given an opportunity to review and comment on that analysis before the Rule becomes final. As we previously stated at the June public hearing in

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Phoenix, WBRT believes the comment deadline should be extended to allow for meaningful public input on the issues surrounding the Court decision.

EPA Should Extend the Deadline in Section 309 for the Submission of SIPs in Order to Allow Time for the Agency to Revise the Rule in Response to the Court's Decision

The uncertainty that has been raised by the American Corn Growers' decision means the States may feel the need to defer making their choices as to whether to submit SIPs under Section 308 or under Section 309 until after the Agency revises the Regional Haze Rule to address the Court decision. Therefore, WBRT believes the Agency should extend the deadline for submission of the 2003 SIP, required in Section 309, until a reasonable length of time after the Agency has revised the Rule.

Specific Issues on Which EPA Has Requested Comment

While WBRT is requesting additional time to comment on the Agency's analysis of the impact of the American Corn Growers' decision, we also recognize that the Agency is looking for input on a number of specific issues, which have been identified in the preamble to the proposed revisions to the Rule. The WBRT offers comment on the following issues:

1 *"Uncertainty" Term in Milestones*

EPA has requested comment on the WRAP's use of the 35,000 tons per year of "headroom/uncertainty" as an amount that is included in the calculation of a year 2018 milestone.

As you know, the WRAP's cap and trade program is based on actual emissions. However, sources have emission levels authorized under their operating permits (permitted levels) which are higher than their actual emissions.

WBRT supports the additional headroom built into the milestones because it provides flexibility in the program and allows sources to use the flexibility in their operations. WBRT would oppose any reduction in the amount of emissions built into the headroom.

2 *Satisfaction of "steady and Continuous" Reductions Requirement*

EPA has requested comment on the proposed finding that the milestones in the Annex fulfill all of the requirements for "steady and continuing" progress toward the national visibility goal.

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A. Use of 13 Percent Benchmark Rather Than 2000 Actual Emissions

EPA has requested comment on the WRAP's use of the 13 percent benchmark rather than 2000 actual emissions for showing steady and continuous reductions toward the national visibility goal.

The preamble to the proposed revisions to the Rule states that:

In its analysis of whether the milestones provide for "continuous" or "continuing" reductions for the 2003 to 2018 time period, the WRAP uses as its starting point, or frame of reference, the Commission's goal of achieving a 13 percent reduction in 1990 baseline emissions by the year 2000 rather than an estimate of actual emissions for 2000 . . . The EPA agrees that the WRAP may use the 13 percent level, rather than the current actual emissions, as the basis for determining that "steady" reductions are occurring.

WBRT supports the use of the 13 percent benchmark because it is consistent with the 1996 Grand Canyon Visibility Transport Commission (GCVTC) recommendations, which clearly intended the 13 percent reduction to be used as the benchmark to show continuous and steady reductions.

The region has already exceeded the goal and is closer to about a 26 or 27 percent reduction. WBRT believes sources should be commended for exceeding the goal and going well beyond the 13 percent reduction in emissions the Commission anticipated. According to information forwarded to our members from the Western Governors' Association, the actual 2000 emissions for six WRAP States (AZ, NM, UT, CO, WY, OR) are already 73,000 tons below the 2015 milestone.

B. Requirement to Reduce Emissions by 50-70 Percent by The Year 2040

The preamble to the proposed revisions to the Rule states:

Because the 1990 actual emissions of SO₂ for the region were 830,000 tons per year, the 2018 milestones proposed by the WRAP for 2018 represent a 39 to 43 percent reduction from 1990 baseline emissions . . . The EPA believes that the criterion for steady and continuing emissions reductions consistent with the long-term goal of 50-70 percent reduction in SO₂ emissions is clearly met.

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WBRT agrees with the EPA that the 50-70 percent reduction meets the criterion for steady and continuing emissions reductions. We support this provision because it is consistent with the recommendations of the GCVTC.

3. *Adjustment to Milestones*

The WRAP anticipated that there were a number of specific circumstances for which the milestones should be adjusted, and has identified seven possible adjustments. The EPA believes that each of these adjustments is consistent with the requirements of the Regional Haze Rule. EPA has requested comment on the appropriateness of these adjustments and whether additional adjustments to the milestones may be appropriate.

WBRT supports the WRAP decision to allow for certain adjustments to the milestones and would like to offer comment on the following three proposed adjustments:

A. **Future Operations of Copper Smelters**

The preamble to the proposed revisions to the Rule states,

The EPA has attempted to clarify the adjustments with a series of “if-then” tables consistent with EPA’s plain language guidelines. EPA requests comment on these adjustments, and whether these tables properly interpret the procedures in the Annex.

In addition, EPA has included in the proposed rule a requirement that any adjustments to the milestones made to reflect changes in smelter operating conditions, and the basis for those adjustments, must be clearly identified by the States and Tribes in the annual process to determine whether the milestone is exceeded.

WBRT supports the negotiated agreement that resulted in the proposed adjustments to the milestones for suspended copper smelters. The smelter set-aside was agreed to because the smelters have made significant reductions in last 10 years. In fact, their current emissions are below their 2018 forecast largely due to the suspensions. The set aside will only be used by the smelters when, and if, the smelters come back on line and will prevent the program from being triggered early.

It should be noted that since the Annex was developed, one additional smelter, the Phelps Dodge Chino Smelter, has also been placed on suspension. This should be recognized in the Regional Haze Rule without reopening the negotiated agreement. The Rule should

provide some assurance that when the Chino Smelter comes back on line again, its 16,000 allowances will be available to it without prematurely triggering the program. As with the other suspended smelters, the allowances reserved for the Chino Smelter should not be available for use by other source categories. If it comes back on line it would not affect other industrial sectors by triggering the program early.

WBRT believes the “if-then” tables EPA has included in the proposed revisions to the Rule, accurately reflect the procedures in the Annex.

B. Adjustments for Illegal Emissions

The preamble to the proposed Revisions to the Rule states that,

The Annex and the WRAP’s supplementary information include this provision without any further explanation of what should be considered as illegal emissions, who makes the determination, or what is the process for making this adjustment. The EPA is proposing the rule with the language consistent with the Annex, and [it] solicit[s] comments on whether the term “illegal emissions” should be further clarified in the final rule.

Under this provision, the WRAP has proposed that the SO₂ allowance baseline be reduced by the amount of any current emissions that are found to be illegal, i.e. emissions contained within the current source baseline that are the result of operations of a plant in violation of the law. WBRT believes that this illegal emissions provision is contrary to the requirements of the Clean Air Act and should be removed from the Annex.

The illegal emissions provision ignores the fact that the Clean Air Act requires that any emissions reduction requirement contained in a Regional Haze State Implementation Plan must serve one of two statutory authorities: it must either (1) meet the statutory requirement to install BART; or (2) allow the State to make reasonable further progress toward the national visibility goal. As the opinion in the American Corn Growers case makes clear, both of these authorities must ultimately serve the Clean Air Act’s mandate that the haze program improve visibility in Class I Areas. EPA has no authority to require emission reductions arbitrarily if the reductions are not demonstrated to improve visibility.

Nothing in the WRAP’s administrative record, and nothing in the preamble to the proposed rule implementing the Annex, supports the conclusion that the illegal emissions provision was analyzed in the context of visibility improvement. In fact, the illegal emissions provision is divorced from the findings of the GCVTC or the Clean Air Act’s mandate that emission reductions under the haze program must improve visibility. As

such, it is inconsistent with the CAA and as EPA points out in the preamble, needs to be further developed by the WRAP. If a State, after appropriate analysis, creates a regulation like the Annex that requires a plant to reduce emissions in order to improve visibility, the compliance status of that plant is irrelevant. It must reduce emissions, but only as far as required by the State's visibility analysis. Of course, States and EPA retain their powers of enforcement and, if authorized by law, may require additional reductions to remedy the noncompliance at the plant. Such additional reductions, however, cannot be ordered under the Haze program.

In an emissions trading program such as the Annex, the illegal emissions provision is especially bad policy. It will punish not only the "bad actor" but, by reducing the available supply of emissions allowances, may have an impact on other market participants. In effect, it may punish all industry in the West – including those that have never violated any law. Moreover, as EPA itself recognizes, most enforcement actions settle without an admission of liability. Often, settlements today include greater emission reductions than would have been required had the source agreed to EPA's terms at an earlier date. It is thus virtually impossible for EPA or the States to tell whether and to what degree a plant's past emissions were truly "illegal." In the preamble, EPA did not articulate a reliable method of making this determination; in almost every circumstance, any determination regarding the illegality of emissions would be arbitrary. For these reasons, EPA should exclude the illegal emissions provision from the Annex.

C. Adjustments For Changes in Emission Measurement Methods

The preamble to the proposed revisions to the Rule states that,

The EPA believes that any one of [the WRAP's proposed] three approaches would be acceptable, but that a specific approach needs to be selected for the final rule. The EPA also believes that these adjustments to the milestone or to the reported emissions would not necessarily require SIP or TIP revisions, because the precise method for making the adjustment, and the publicly available data elements that will be used for making the adjustment, could be specifically identified in the final rule.

WBRT recommends that if a State or Tribe notifies the EPA that an individual source's emission monitoring methodology changes the absolute amount of its emissions using a prior measurement methodology, then a corresponding up or down adjustment in the affected sources' and the State's or Tribe's total allocation should be made, as part of its SIP/TIP revision, and a corresponding adjustment of the milestones for the entire region should also be made as necessary and appropriate.

4. Critical Mass

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As the preamble to the proposed revisions to the Rule states,

The WRAP recognizes the issue of "critical mass " and has funded a study to review the results of a number of scenarios for possible participation in the program. The EPA requests comment on its proposal to defer to the WRAP's judgment on the issue of "critical mass. "

The WRAP study to determine critical mass is now complete and WBRT intends to analyze its findings. Time should be allowed for interested stakeholders to review the findings of the study and to provide comments to the Agency. WBRT supports this type of analysis because we want an effective, robust market and we believe the study is an important element to determine whether that will happen.

Trading Program Elements

EPA has requested comment on whether the agency has addressed the requirement for each of the program elements to an appropriate level of detail, and on whether the substance of the requirement is sufficient to ensure program integrity for the backstop market trading program.

1. Allowances

The allocation mechanism under the Annex allocates "floor" allowances (the minimum number of allowances a well controlled source needs to operate) by source, as well a reducible portion (that portion of a sources allocations that is reduced over time to meet the milestones) to be allocated across the region. Due to the complexity of the floor allocation for the non-utility sector, and in the interest of adding certainty to all industry sectors, WBRT would support changing that requirement so that the reducible portion is allocated to the utility sector and the non-utility sector based upon the entire contribution of each sector to the milestone.

2. Banking

WBRT supports banking of emission allowances. We believe it provides an incentive for making early emission reductions and adds flexibility to the program.

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Additional Issues

1. 2013 Checkpoint

The Annex calls for a 2013 checkpoint where the States and Tribes will determine whether or not to trigger the SO₂ Backstop Trading Program. The Annex leaves this decision to the States and Tribes without any definitive criteria for determining whether or not to trigger the program. WBRT believes criteria for determining whether or not to trigger the Backstop Trading Program in 2013 should be developed by the WRAP and should be included in the Rule. For example, the criteria may include an evaluation of the specific level of reductions achieved in 2013 or it could be the level of reduction yet to be achieved.

Conclusion

WBRT appreciates the opportunity to submit these comments on the proposed revisions to the Regional Haze Rule. If you have any questions about WBRT's position or comments on these issues, please contact Ruth McCormick of the WBRT staff at 703-549-1466.

Sincerely,



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**Statement of the Western Business Roundtable (WBRT)
Regarding 40 CFR Part 51**

**Proposed Revisions to the Regional Haze Rule to Incorporate Sulfur
Dioxide Milestones and Backstop Emissions Trading Program for Nine
Western States and Eligible Indian Tribes Within that Geographic
Area: Proposed Rule**

**Federal Register Vol. 67, No. 87
May 6, 2002, pp. 30418 - 30450**

Good afternoon. My name is Duane Yantorno, I am the Director of Environmental Services with ASARCO, Inc. in Tucson. I am here today representing the Western Business Roundtable or WBRT, where I serve as the Chairman of the Air Quality Committee.

WBRT, would like to thank EPA for the opportunity to comment on the proposed revisions to the Regional Haze Rule. The proposed revisions include specific changes to the Rule to incorporate the Western Regional Air Partnership's Annex to the 1996 Grand Canyon Visibility Transport Commission Recommendations.

Background

WBRT is a coalition of CEOs and senior executives of corporations doing business in the Western United States. including corporations engaged in construction, manufacturing, mining, electric power generation and oil and gas exploration and development.

Because our companies and their employees live and work in the West, we understand the importance of sensible environmental policy in the Western states. For this reason, WBRT (and its predecessor, the Western Regional Council) has devoted significant time and resources to visibility and air quality issues over the past 25 years. WBRT has been active in the WRAP process and in the development of the Annex.

WBRT Comments on Proposed Revisions to the Regional Haze Rule

WBRT encourages the Agency to consider recent events before it moves forward with the proposed revisions to the Regional Haze Rule.

As you know, the D.C. Circuit Court has recently struck down certain provisions of the Regional Haze Rule. WBRT believes the Court ruling deserves a thorough review to analyze its impact on both Section 308 and Section 309 of the Rule, Therefore, we would like to request at least a 30-day extension of the comment deadline to allow for a more detailed analysis. WBRT will provide our assessment of the Court ruling, as well as more detailed comments on other issues. when we submit our formal written comments to the Agency.

WBRT also encourages the Agency to address the following areas that are problematic with the Annex.

First, criteria for determining whether or not to trigger the Backstop Trading Program in 2013 should be developed by the WRAP and should be included in the Rule.

The Annex calls for a 2013 checkpoint where the States and Tribes will determine whether or not to trigger the Backstop Trading Program. The Annex leaves this decision to the States and Tribes without any definitive criteria for determining whether or not to trigger the program. WBRT believes the WRAP needs to develop criteria in making this determination. For example, the criteria may include an evaluation of the specific level of reductions achieved in 2013 or it could be the level of reduction yet to be achieved.

Second, parameters should be established before making adjustments to the milestone due to illegal emissions.

The Annex currently calls for an adjustment to the milestones due to a determination that illegal emissions were used in setting the milestone. WBRT believes that any adjustment to the milestone should be made only if a facility has knowingly misrepresented its sources or emissions.

WBRT would like to thank EPA again for an opportunity to offer these comments at today's hearing and we look forward to submitting additional written comments.