6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2010-0406; FRL-9922-80-OAR]

Approval and Promulgation of Implementation Plans; North Dakota; Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Regional Haze; Reconsideration

AGENCY: Environmental Protection Agency.

ACTION: Notice of final action on reconsideration.

SUMMARY: On April 6, 2012, Environmental Protection Agency (EPA) published a final rule partially approving and partially disapproving a North Dakota State Implementation Plan (SIP) submittal addressing regional haze submitted by the Governor of North Dakota on March 3, 2010, along with North Dakota's SIP Supplement No. 1 submitted on July 27, 2010, and SIP Amendment No. 1 submitted on July 28, 2011. The Administrator subsequently received a petition requesting EPA to reconsider its approval of certain elements of North Dakota's regional haze SIP. Specifically, the petition raised several objections to EPA's approval of the State's best available retrofit technology (BART) emission limits for nitrogen oxides (NO_x) for Milton R. Young Station (MRYS) Units 1 and 2 and Leland Olds Station (LOS) Unit 2. On March 15, 2013, EPA announced its decision to reconsider its approval of the State's NO_x BART limits for these facilities. In the same action, EPA proposed to affirm its prior approval of these elements of North Dakota's SIP. As a result of this reconsideration process, EPA has concluded that no changes are warranted to its 2012 approval of the NO_x BART limits for these units.

DATES: This final action is effective **[insert date 30 days after publication in the Federal Register]**.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2010-0406. All documents in the docket are listed in the http://www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard-copy form. Publicly available docket materials are available either electronically through http://www.regulations.gov or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop St., Denver, Colorado 80202-1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Gail Fallon, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado, 80202-1129, (303) 312-6281, Fallon.Gail@epa.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

- The word Act or initials CAA mean or refer to the Clean Air Act, unless the context indicates otherwise.
- The initials ASOFA mean or refer to advanced separated overfire air.
- The initials BACT mean or refer to best available control technology.
- The initials BART mean or refer to best available retrofit technology.
- The initials EPA or the words we, us or our mean or refer to the United States Environmental Protection Agency.

- The initials FIP mean or refer to Federal Implementation Plan.
- The initials LOS mean or refer to Leland Olds Station.
- The initials MRYS mean or refer to Milton R. Young Station.
- The initials NDDH mean or refer to the North Dakota Department of Health.
- The words North Dakota and State mean the State of North Dakota unless the context indicates otherwise.
- The initials NO_x mean or refer to nitrogen oxides.
- The initials NPS mean or refer to the National Park Service.
- The initials NSR mean or refer to new source review.
- The initials PRB mean or refer to the Powder River Basin.
- The initials PSD mean or refer to prevention of signification deterioration.
- The initials SCR mean or refer to selective catalytic reduction.
- The initials SIP mean or refer to State Implementation Plan.
- The initials SNCR mean or refer to selective non-catalytic reduction.
- The initials TIFI mean or refer to targeted in-furnace injection

I. Background

On April 6, 2012, EPA published a final rule partially approving and partially disapproving a North Dakota SIP submittal addressing regional haze submitted by the Governor of North Dakota on March 3, 2010, along with North Dakota's SIP Supplement No. 1 submitted on July 27, 2010, and SIP Amendment No. 1 submitted on July 28, 2011.[1] 77 FR 20894. We

[1] Although in the April 6, 2012 final rule we characterized our action as being an approval of part of SIP Amendment No. 1, on further review EPA's position is that we acted on the entirety of SIP Amendment No. 1 in our April 2012 final rule. This submittal included regional haze plan revisions for Coyote Station, additions to SIP Appendix C.4 for MRYS,

gave the history of the North Dakota regional haze rulemaking process that preceded today's final action in the April 6, 2012 rule. 77 FR at 20895 – 20897. Following our April 6, 2012 final rule, the Administrator received petitions for reconsideration from North Dakota, Great River Energy (the owner of Coal Creek Station), and Earthjustice on behalf of environmental groups. Parallel lawsuits were also filed by these parties.

On March 15, 2013, EPA published a notice of proposed rulemaking initiating the reconsideration of our approval of the State's NO_x BART determination and limits for MRYS Units 1 and 2 and LOS Unit 2. In that notice, we proposed to affirm our prior approval of the determination and limits. We did not grant reconsideration of, or request comment on, any other provisions of the final rule.

Our action was prompted by a June 4, 2012 petition for reconsideration submitted by Earthjustice on behalf of the National Parks Conservation Association and the Sierra Club. The petition requested that EPA reconsider its approval of the State's NO_x BART determinations for MRYS Units 1 and 2 and LOS Unit 2. The petition asserted that the environmental groups were unable to raise their objections to EPA's reliance on a December 21, 2011 U.S. District Court decision[2] during the comment period because of the timing of that decision, and that their objections are of central relevance to EPA's final rule because EPA relied on the district court decision in explaining the basis for its final rule.

Issues raised in the other two petitions for reconsideration from North Dakota and Great River Energy were addressed in a decision on the parallel lawsuits issued by the United States

---

and documentation pertaining to the State's public participation process and consultation with the Federal Land Managers. The materials that North Dakota submitted for incorporation into Appendix C.4 constitute supporting documentation relevant to its NO_x BACT determination for MRYS and related litigation. Therefore, EPA took the only appropriate action on Appendix C.4: to incorporate the provided information as supporting documentation relevant to the State's NO_x BART determinations for MRYS and LOS.

[2] *United States v. Minnkota Power Cooperative, Inc.*, 831 F. Supp. 2d 1109 (D.N.D. 2012).

Court of Appeals for the Eighth Circuit on September 23, 2013.[3] The court set aside the issues raised in the Earthjustice lawsuit, pending EPA's action on the June 2012 petition for reconsideration.

We requested comments on our March 15, 2013 proposed reconsideration and provided a two-month comment period, which closed on May 14, 2013. At the request of the North Dakota Department of Health (NDDH), we provided a public hearing on May 15, 2013. To allow for a full 30-day public comment period for the submission of additional comments following the public hearing, we extended the comment period to June 17, 2013.

We received a significant number of comments on our proposed reconsideration action. Many comments, primarily from state and city agencies, rural power cooperatives, and industrial facilities and groups, supported our proposed affirmation of our approval of the State's determinations for the units in question. Many comments from citizens and environmental groups were critical of our proposed action.

In this action, we are responding to the timely comments we have received, taking final action on our reconsideration, and explaining the bases for our action. We did not consider and are not responding to any comments received after the close of the extended comment period on June 17, 2013. Our March 15, 2013 proposed rule provides additional background information on the December 21, 2011 district court decision and on our rationale for this reconsideration.

II. Today's Action

A. *Issue for Which Reconsideration Was Granted*

EPA granted the petition to reconsider our approval of the State's NO_x BART emission

[3] *North Dakota v. EPA*, 730 F.3d 750 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2662 (2014). The court's ruling mostly upheld EPA's final decisions, including our disapproval for Coal Creek Station, but vacated our Coal Creek Federal Implementation Plan (FIP) on the grounds that we failed to consider existing controls. EPA remains obligated to promulgate a FIP or approve a SIP revision for Coal Creek.

limits for MRYS Units 1 and 2 and LOS Unit 2. After reconsideration of these matters, we are finalizing our approval of the emission limits. We did not reconsider or request comment on any other provisions of our final rule issued on April 6, 2012, in which we partially approved and partially disapproved the North Dakota regional haze SIP.

B. ***Basis for Today's Final Action***

We have fully considered all significant comments on our proposal and have concluded that no changes from our proposal are warranted. Our action is based on an evaluation of North Dakota's SIP submittals against the regional haze requirements at 40 CFR 51.300-51.309 and Clean Air Act (CAA) sections 169A and 169B. All general SIP requirements contained in CAA section 110, other provisions of the CAA, and our regulations applicable to this action were also evaluated. The purpose of this action is to ensure compliance with these requirements. Our authority for action on North Dakota's SIP submittals is based on CAA section 110(k).

As discussed in our rationale for our proposed decision to affirm our prior approval, two critical principles from our BART Guidelines are relevant to this situation. *See* 78 FR at 16454 – 16455. The first is that as part of a BART analysis, states may eliminate technically infeasible control options from further review. The second is that states generally may rely on a recent best available control technology (BACT) determination for a source for purposes of determining BART for that source.[4] Considered in light of the facts of this matter, those principles support our decision to affirm our prior approval.

Our BART Guidelines indicate that states may generally consider recent BACT

[4] Among other things, EPA's BART Guidelines, codified at 40 CFR part 51, appendix Y, describe a set of steps for determining BART. CAA section 169A(b)(2) requires that BART be determined pursuant to the BART Guidelines for power plants with a total generating capacity over 750 megawatts. With respect to other BART sources, the BART Guidelines reflect EPA's interpretations regarding certain key principles related to BART, including the two principles described in the text. For reference, the generating capacities for MRYS and LOS are 794 megawatts and 656 megawatts, respectively.

determinations to be BART without further analysis. Here, as discussed below in more detail, the State's BART determinations were developed at approximately the same time as its BACT determination for one of the facilities, a decision which was upheld by a U.S. district court. Based on these facts, we consider it appropriate to approve the State's selection of selective non-catalytic reduction (SNCR) plus advanced separated overfire air (ASOFA) controls as BART at MRYS Units 1 and 2 and LOS Unit 2.[5] As we noted in our proposal, evaluations of technical feasibility often change over time. In the future, North Dakota may reach a different conclusion about the technical feasibility of selective catalytic reduction (SCR) controls at these plants as part of, for example, a reasonable progress analysis. The regional haze program requires additional reasonable progress reviews every ten years to ensure that states make progress toward the visibility goal of the CAA.[6] Therefore, we expect that North Dakota will reassess the technical feasibility of SCR controls at these plants as part of a future reasonable progress analysis.

III. Issues Raised by Commenters and EPA's Responses

A. *Comments on Technical Feasibility of SCR*

We received numerous comments on our proposal regarding the technical feasibility of SCR for cyclone boilers burning North Dakota lignite. Many of the comments supported the conclusion that SCR is technically feasible for these types of boilers. Regardless of EPA's position regarding the technical feasibility of SCR for the units in question, the *Minnkota Power* court's ruling in our challenge to the State's BACT determination suggests that this is an issue

[5] The associated BART limits are 0.36 lb/MMBtu for MRYS Unit 1, 0.35 lb/MMBtu for MRYS Unit 2, and 0.35 lb/MMBtu for LOS Unit 2, on a 30-day rolling average basis. The SIP contains separate limits for MRYS Units 1 and 2 during startup of 2070.1 and 3995.6 pounds per hour, respectively, on a 24-hour rolling average basis. *See* SIP section 7.4.2, p. 74.

[6] *See* 40 CFR 51.308(f) requirements for comprehensive periodic revisions of implementation plans for regional haze.

on which reasonable minds may differ. Based on the terms of an April 24, 2006 consent decree settling an enforcement case for MRYS, if EPA disagreed with the State's BACT determination, EPA had the burden of demonstrating to the court that North Dakota's BACT determination was unreasonable. EPA did disagree with North Dakota's BACT determination and challenged that determination in federal district court. In its December 21, 2011 decision, however, the court concluded that EPA had not shown that North Dakota's determination was unreasonable. Because the criteria for determining the technical feasibility of a control technology are essentially identical for both BART and BACT, as discussed in our prior final rule at 77 FR 20897, we consider it appropriate to take the federal district court's ruling on that BACT determination into account in our assessment of North Dakota's regional haze SIP.

In our review of a BART determination in a regional haze SIP, EPA's task is to determine whether the State acted reasonably and in accordance with the requirements of the CAA and our regulations. We have accordingly reviewed North Dakota's SIP based on the record before the State at the time of its decision to determine whether it acted reasonably in concluding that SCR is technically infeasible for MRYS and LOS. As noted above, the December 21, 2011 *Minnkota Power* ruling suggests that North Dakota was not clearly unreasonable in deciding that SCR could not be used on these units. This decision, along with the discussion in the BART Guidelines indicating that technically infeasible options may be eliminated and that states may generally rely on recent BACT determinations in making their BART decisions, forms the basis for our approval of North Dakota's BART determinations for these two facilities. Were EPA making the BART determination in the absence of the factors present here, we would not eliminate SCR from consideration based on technical infeasibility. Given the basis for our decision, however, we do not consider comments regarding the technical

feasibility of SCR to be relevant to our decision regarding the reasonableness of North Dakota's BART determination. Therefore, we generally are not summarizing or responding to these comments. However, we are responding to comments that may be relevant to other aspects of this action.

Comment: Environmental groups commented that EPA should consider SCR's technical feasibility in light of more recent developments such as the Electric Power Research Institute's (EPRI) research and operating experience gained with Texas lignite. The EPRI research described by the commenters relates to work simulating catalyst fouling using chemical kinetic modeling. Preliminary results from this research were presented at conferences in 2012 and 2013. The commenters also noted that SCR has been successfully used at Oak Grove Units 1 and 2 and Sandow Unit 4, which burn Texas lignite. While there was very little experience with SCR at the Texas plants at the time of North Dakota's BACT determination for MRYS, the commenters note that the technology has now been in operation for about three years at the Texas plants, exceeding the catalyst's guaranteed lifetime. The Texas plants' catalyst was supplied by Johnson Matthey Catalysts, the same company that (after the State's BART determination) offered to guarantee SCR on North Dakota lignite with standard industry performance and lifetime catalyst guarantees.[7] Commenters point to EPA's BART Guidelines to assert that "technical feasibility changes over time as technologies evolve," and that EPA therefore cannot rely on the *Minnkota Power* decision given more recent technological developments.

Response: We do not agree that EPA should take these recent developments into account at this late date. In this matter the BACT and BART determinations by the state occurred relatively

[7] February 27, 2012 letter from Ken Jeffers, Johnson Matthey to Callie Videtich, EPA Region 8. *See* docket EPA-R08-OAR-2010-0406-0322.

close to each other in time: North Dakota's regional haze public comment period closed in January 2010, while the BACT determination was finalized in November 2010, and North Dakota's public comment period on its SIP Amendment No. 1 ended on March 12, 2011. Therefore, the State could reasonably assert that at the time of its BART determination, no material new technologies would have arisen since its BACT determination. Similarly, our review of the BART determination was made at close to the same time that the district court reached its decision, on much the same record. And while (as noted elsewhere in this notice) we do not view the *Minnkota Power* decision as binding or determinative, we do view it as relevant to our consideration of this matter.

It is true that the EPA generally has discretion, in its CAA rulemaking decisions, to take advantage of the greater knowledge that may result from receiving additional information. *See Michigan v. Thomas*, 805 F.2d 176, 185 (6th Cir. 1986) ("At no time should an agency be estopped from using its increased expertise."). But EPA also has the legal responsibility to complete CAA actions without unreasonable delay. *See* CAA section 304(a). Here, the developments cited by the commenters occurred after the state's BACT and regional haze decision processes, and for the most part after the *Minnkota* decision as well. As a general matter, the Agency does not consider it appropriate to perpetually restart the BART rulemaking process to consider late-breaking technological developments, or else we would seldom be able to finalize an action.

Accordingly, under the facts present here, and in light of the district court's *Minnkota* decision, in our judgment there is no need to alter our decision in light of these recent developments.

Comment: Commenters stated that EPA should consider a performance guarantee for SCR

catalysts on units burning North Dakota lignite provided by Johnson Matthey Catalysts, LLC. Commenters argued that since the district court relied heavily on the absence of vendor guarantees in upholding the State's determination of technical infeasibility, EPA cannot rely on the court's reasoning since a guarantee is now available.

Response: Regardless of EPA's position on the technical feasibility of SCR for MRYS Units 1 and 2 and LOS Unit 2, we acknowledge that throughout the development of the BACT and BART determinations for these units, other parties contested the feasibility of SCR on these high-temperature cyclone boiler units burning high-sodium North Dakota lignite. The State gave great weight to the fact that it did not receive any catalyst vendor guarantees. As noted by commenters on our reconsideration action, however, no catalyst vendors have stated that SCR would be technically infeasible at these units,[8] and one (Johnson Matthey Catalysts, LLC) would offer "SCR catalyst designs with reasonable operating lifetime performance guarantees for service in a low-dust or tail-end SCR configuration"[9] absent additional field testing. Most of this information, with the exception of the Johnson Matthey offer, was in the BACT record and thus was before the court at the time of the December 21, 2011 court decision. And while the Johnson Mathey offer is interesting, it is hardly decisive. Considering the abundance of information that was already in the BACT record in December 2011, it is unlikely that the court

---

[8] Two companies, Haldor Topsoe, Inc. and CERAM Environmental, Inc. would require pilot-scale testing in order to offer any guarantee regarding SCR catalyst life. *See* SIP Appendix C.4 (EPA-R08-OAR-2010-0406-0013, pdf pp. 388 and p. 392), January 13, 2010 letter from Wayne Jones to Robert Blakley, and January 13, 2010 email from Noel Rosha, CERAM to Robert Blakley. Another vendor, Alstom Power, stated that despite many challenges a properly designed system fueled by North Dakota lignite could employ SCR. *See* SIP Appendix C.4 (EPA-R08-OAR-2010-0406-0011, pdf p. 159), May 30, 2007 letter from Michael G. Phillips, Alstom, to Robert Blakley, Burns and McDonnell. In our view this statement was so overlaid with conditions and qualifications that it was not unreasonable for the State to choose not to rely on it.

[9] The Johnson Matthey offer came after the close of the State's comment period and thus was not available to the State when it made its BACT and BART decisions.

would have reached a different conclusion based only on the addition of the Johnson Matthey offer, particularly in light of the fact that two other equally reputable vendors would not provide guarantees. As noted in our BART Guidelines, "we do not consider a vendor guarantee alone to be sufficient justification that a control option will work." *Id.* 40 CFR part 51, appendix Y, section IV.D, step 2.

Accordingly, based on the unique circumstances here, and taking into consideration the district court's decision, we are affirming our approval of the State's MRYS and LOS BART decisions, which are based on a recent BACT decision. In finalizing our approval, we note that North Dakota provided an explanation for its conclusions that a federal court found reasonable. We will continue to foster efforts among the interested parties for additional testing to resolve any outstanding uncertainty regarding the feasibility of SCR technology for these units. In a December 20, 2011 letter,[10] North Dakota expressed openness to continuing discussions with EPA concerning further testing and evaluation of SCR technology involving North Dakota lignite coal. Such testing in the field would analyze the technical feasibility of SCR for North Dakota lignite at these cyclone units in a low-dust or tail-end configuration. The existing installation of SNCR should not preclude such efforts. We acknowledge that in a subsequent letter on July 18, 2014, North Dakota stated that based on the *Minnkota Power* ruling it no longer believes testing is a reasonable approach. However, technological advances elsewhere may yet provide compelling information to drive further testing on North Dakota lignite or negate the need for such testing. As noted above, we expect that North Dakota will reassess the technical feasibility of SCR controls at these plants as part of a future reasonable progress analysis.

B. *Comments on Emission Limits for SNCR*

Comment: Commenters stated that MRYS and LOS can achieve more stringent emission limits

[10] *See* docket EPA-R08-OAR-2010-0406-0364.

with SNCR and ASOFA than those approved by EPA. The commenters assert that, in combination with SNCR and ASOFA, technologies currently in use at MRYS and LOS, namely CyClean and Targeted In-Furnace Injection (TIFI) technology, respectively, allow these units to achieve emission limits much lower than the BART emission limit previously approved by EPA. The commenters also suggested that PerNOxide[11] and hybrid SCR-SNCR are other feasible technology options that should be considered to improve on the performance of NO_x emissions controls at MRYS and LOS. Commenters assert that if EPA had a valid basis for rejecting conventional SCR as BART, it would have to consider the emission reductions that SNCR can achieve in conjunction with other cost-effective controls.

Response: CyClean and TIFI were not identified as technically feasible NO_x control options in the State's SIP. Nor were they the subject of comments during EPA's review, and ultimate approval, of the BART determinations for MRYS and LOS. As detailed above in response to another comment, EPA is assessing the reasonableness of the State's determination based on the record before the State at the time. Accordingly, we do not find that a review of these technologies is appropriate for this reconsideration action. Moreover, we note that these technologies are intended primarily to provide operational benefits, such as improved efficiency and reduced slagging and fouling, and that NO_x emissions reductions are only sometimes a co-benefit of these operational changes. In particular, there is some question whether CyClean at MRYS is consistently effective in reducing NOx emissions. [12]

---

[11] PerNOxide is a technology involving a two-step process. Hydrogen peroxide is injected between the economizer and air preheater to oxidize nitrogen oxide in flue gas to nitrogen dioxide and higher-order oxides. These oxides are then removed in downstream wet scrubbers, such as those installed on MRYS and LOS. *See* docket EPA-R08-OAR-2010-0406-0415, attachment 3, Technical Comments of Bill Powers, P.E. 2013-06-17, p. 30.

[12] Prairie Public News, *Minnkota says new method of reducing emissions 'promising,'* Dave Thompson, August 12, 2013. http://news.prairiepublic.org/post/minnkota-says-new-method-reducing-emissions-promising.

Furthermore, as the commenters point out, PerNOxide was not commercially available at the time of the BACT or BART determinations. It would therefore not be reasonable for EPA to now disapprove the SIP in this reconsideration on the basis that the State did not select the PerNOxide technology. It may, however, be appropriate for North Dakota to consider this technology in the next planning period as a reasonable progress measure.

Regarding hybrid SCR-SNCR, this technology too was not previously identified, and so its review is not appropriate for this reconsideration action. Even so, there is no evidence that the technical feasibility of hybrid SCR-SNCR in relation to catalyst poisons would be any greater than that of conventional SCR. This is particularly true because in the hybrid system, in order to take advantage of the ammonia slip from the SNCR, the in-duct SCR is located in the high-dust position, where it is most vulnerable to catalyst poisoning. We also note that the installation of the SCR-SNCR technology is rare, and we are not aware of any cyclone boilers that are currently employing this technology.

C. *Comments on Application of MRYS BACT Court Ruling to Other Units*

1. Application of MRYS BACT to LOS Unit 2

Comment: Commenters argued that the BACT limits for MRYS units should not apply to LOS Unit 2. The commenters highlighted their disagreement with EPA's position as stated in the final rule, "it [LOS] is the same type of boiler burning North Dakota lignite coal [as MRYS], and North Dakota's views regarding technical infeasibility that the U.S. district court upheld in the MRYS BACT case apply to it as well." 78 FR 16455. The commenters contended that EPA cannot rely on the BACT determination for MRYS to determine BART for LOS Unit 2 given critical differences between the two facilities. The commenters claimed that these critical differences include the facts that LOS Unit 2 co-fires Powder River Basin (PRB) coal and lignite

coal with lesser amounts of alleged SCR catalyst poisons; has been increasing the amount of PRB coal that it fires over time; can be modified to fire even greater quantities of PRB coal, up to 100%, completely eliminating the lignite fuel quality claims; and, unlike MRYS, is equipped with TIFI to reduce slagging and NO_x emissions.

Response: EPA disagrees that there are critical differences between the units in question at MRYS and LOS that would have a material bearing on the technical feasibility of SCR. These units have much in common. They are of the same design (cyclone firing) and similar size (in particular, MRYS Unit 2 at 517 MW and LOS Unit 2 at 440 MW). MRYS and LOS both burn primarily North Dakota lignite coal, which produces ash high in catalyst poisons (principally, sodium and potassium oxides). While MRYS burns lignite coal from the Center Mine, and LOS burns lignite coal from the Freedom Mine, these mines are located within about 40 miles of one another and produce lignite coals of similar quality.

Regarding catalyst poisons, the commenters cited average amounts of sodium and potassium oxides in the MRYS ash of 5.6% and 1.0%, respectively.[13] Similarly, the commenters cited average amounts of sodium and potassium oxides in the LOS ash of 2.94% and 0.73%, respectively.[14] However, the sodium and potassium oxides amounts in the LOS ash given in the State's SIP, 7.55% and 1.20%, respectively,[15] are higher than that suggested by the commenters, and even higher than that for MRYS, thus undermining the commenters' argument that there is a critical difference in the amount of catalyst poisons involved.

---

[13] North Dakota Department of Health, Preliminary Best Available Control Technology Determination for Control of Nitrogen Oxides for M.R. Young Station Units 1 and 2, Table 1, page 18, June 2008, SIP Amendment No. 1. *See* docket EPA-R08-OAR-2010-0406-0039.

[14] Les Allery et al., Demonstrated Performance Improvements on Large Lignite-Fired Boiler with Targeted In-Furnace Injection Technology at 7, presented at COAL-GEN 2010, Aug. 10-12, 2010, Pittsburg, PA, *available at* http://www.ftek.com/media/en-US/pdfs/TPP-592.pdf. *See* docket EPA-R08-OAR-2010-0406-0419, attachment 6.

[15] SIP, Appendix C.1, BART Determination Study for Leland Olds Station Unit 1 and 2, Basin Electric Power Cooperative, Final Draft, Table 1.2-2 – Coal Parameters, p. 8.

On the matter of the ability of LOS to co-fire PRB sub-bituminous coal, though PRB coal does contain lesser amounts of catalyst poisons, there is no evidence that it has been, or will be, fired in quantities significant enough to alter North Dakota's determination of the feasibility of SCR at LOS. As noted in comments submitted by NDDH, the amount of PRB coal fired at LOS averaged 11.3% between 2003 and 2012, with a minimum of 6.5% in 2004 and a maximum of 16.5% in 2005. These levels of PRB coal would only marginally lower the amount of catalyst poisons in the fuel fired at LOS. Also, when considering this ten-year history, there is no indication that the percentage of PRB coal burned at LOS is trending upward. Indeed, the highest proportion of PRB coal burned at LOS occurred in 2005. In addition, because MRYS and LOS are of similar design, there is no reason to conclude that the ability to co-fire PRB coal is wholly unique to LOS. That is, the ability of LOS to burn PRB coal does not present a critical difference between the units.

Finally, the commenters have not established how the application of TIFI is pertinent in relation to SCR feasibility. The commenters do not present any evidence regarding how TIFI may affect the amount of catalyst poisons in the ash, or any other parameter, that relates to SCR feasibility.

In short, the commenters have not identified any critical differences between the coal fired at LOS and that fired at MRYS as it pertains to the technical feasibility of SCR as assessed by the State. To the extent that differences do exist, the commenters have not shown that these differences are extensive enough to alter the assessment of SCR feasibility at LOS. If, as found by the district court, it was reasonable for the State to conclude that catalyst poisons in the ash at MRYS cause SCR to be technically infeasible, then undoubtedly the same reasoning extends to LOS, where the State's SIP record indicates that even higher amounts of poisons were present.

2. Application of MRYS BACT to Coyote

Comment: One commenter stated that EPA should conduct additional evaluation of NO_x emissions for Coyote Station. The commenter noted that because Coyote is equipped with a lime spray dryer and fabric filter, even fewer fine aerosol particles, including sodium fumes, would be emitted into a potential tail-end SCR, and the potential for catalyst poisoning would be even less than for LOS and MRYS. The commenter argued that EPA based its conclusion in favor of approving the State's selection of only SNCR for Coyote on the incorrect premise that Coyote is so similar to LOS and MRYS that the BACT decision for MRYS supersedes a determination of what appropriate controls would be under the reasonable progress provisions of the regional haze rule.

Response: This comment is outside the scope of this reconsideration action, as it pertains to a facility other than MRYS or LOS.

D. *Comments on Visibility Benefits*

Comment: We received several comments discussing the greater visibility benefit of SCR compared to SNCR and asserting that this justified disapproving the State's BART determinations for SNCR at MRYS Units 1 and 2 and LOS Unit 2.

Response: As noted in other responses, technical comments addressing the merits of SCR over SNCR are essentially irrelevant since we are basing our decision on the fact that the State's BART determination is supported by its BACT determination for MRYS, and on our view that it is appropriate to consider a federal court's ruling on our challenge to the State's BACT determination. We nonetheless agree with commenters that SCR is a more effective control technology for achieving visibility benefit, and we also acknowledge that in conducting modeling according to its visibility modeling protocol, North Dakota considered the visibility

benefit of SCR in an incorrect manner.[16] However, as clarified by the State's comments submitted for this reconsideration action,[17] the State's BART determination was based on its recent BACT decision for MRYS and its conclusions that SCR is not technically feasible due to unique design characteristics at these units. The State rejected SCR on technical feasibility grounds rather than on the degree of visibility improvement, making North Dakota's erroneous visibility benefit analysis irrelevant. In any case, because technically infeasible control options are eliminated from further analysis in the BART determination process, any consideration of the visibility benefits of SCR is precluded.

Comment: The National Park Service (NPS) noted that EPA only discussed visibility impacts and improvements at Theodore Roosevelt National Park (North Dakota) in the BART analyses and should have also included two other Class I areas, Medicine Lake Wilderness (Montana) and Lostwood Wilderness Area (North Dakota), as these areas are also within 300 km of MRYS and LOS. The NPS stated that it was impossible to determine whether or how EPA considered impacts at the other two Class I areas, and that it is appropriate to consider both the degree of visibility improvement in a given Class I area as well as the cumulative effects of improving visibility across all of the Class I areas affected. The NPS also noted that EPA did not mention the visibility impacts at Medicine Lake in either the Federal Register notice or in the Technical Support Document.

Response: The commenter's concern is immaterial in this instance. The technical feasibility review precedes the analysis of visibility impacts in the review process. Since our reconsideration action applies only to MRYS Units 1 and 2 and LOS Unit 2, where the State

[16] North Dakota also conducted modeling according to the BART Guidelines, which provides the visibility benefit information that EPA used in our original proposal analyses.
[17] *See* docket EPA-R08-OAR-2010-0406-0418.

selected what it determined to be the most stringent technically feasible control option,[18] per the BART Guidelines, we do not reach the issue of visibility impacts.

E. ***Comments on Legal Issues***

1. BACT versus BART Determinations

Comment: One commenter supporting our proposal stated that it would be incongruous to make BART more stringent than BACT at the same facility. The commenter went on to assert that the procedures set forth in the New Source Review (NSR) Manual and BART Guidelines result in BART determinations that are less stringent than BACT. The commenter noted that unlike the NSR Manual, the BART Guidelines do not call for a top-down analysis. Therefore, according to the commenter, in its BART analysis North Dakota is not required to select the most effective control technology that has not been eliminated. Instead, North Dakota has "discretion to determine the order in which [it] should evaluate control options for BART," and must provide a justification for the technology it selects as "best." 40 CFR 51, appendix Y, section IV.E.2. The commenter believes that because North Dakota has discretion to select something other than the technology that achieves the greatest reduction in emissions, and can forego a control technology based on a lack of visibility improvement, BART controls are less stringent than BACT controls.

Another commenter challenging our proposal stated that a BACT decision, which does not consider the degree of visibility improvement, cannot substitute for BART.

Response: We acknowledge that in many instances BACT determinations will be more stringent than BART determinations, or identical to them. However, there are exceptions. First, the timing of the determinations, particularly in regard to when a control technology becomes commercially available, may yield different BART and BACT determinations. Secondly, the

[18] Since SCR is eliminated from consideration based on technical infeasibility, SNCR becomes the most stringent technically feasible control option.

degree of visibility improvement, a factor considered under BART but not BACT, might result in different determinations.

We disagree in this particular situation that the predicted visibility benefits attributable to SCR at MRYS and LOS were small enough, as a sole consideration, to have justified the selection of SNCR over SCR. The State's own modeling identified greater visibility benefits when comparing SCR over SNCR of more than 0.5 deciviews per unit at the highest impacted Class I area, Theodore Roosevelt National Park. However, taking into consideration the December 21, 2011 court decision, in addition to the information the State submitted in SIP Amendment No. 1 and the State's comments on our reconsideration action, we view the State's BART determinations as a rejection of SCR on grounds of technical feasibility rather than low visibility benefits. Accordingly, the visibility factor in the BART analysis does not affect the outcome here.[19]

Comment: One commenter noted that the BART Guidelines do not automatically authorize reliance on a BACT limit. The commenter stated that where there is any indication that the BACT limit is outdated or does not reflect the best available controls, it cannot substitute for BART. It is uncontested that SCR has the highest control efficiency of all control options. Thus, the commenter argued that SCR is indisputably the best, most stringent control, and EPA cannot settle for less under the CAA or the implementing BART Guidelines.

Response: As discussed previously, EPA agrees that BART analyses should not rely on outdated determinations reached under other CAA standards, but we also do not consider it appropriate to perpetually restart the BART rulemaking process to consider late-breaking technological

[19] In making BART determinations, section 169A(g)(2) of the CAA requires that states consider the following factors: (1) the costs of compliance; (2) the energy and non-air quality environmental impacts of compliance; (3) any existing pollution control technology in use at the source; (4) the remaining useful life of the source; and (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

developments. Here, the State could reasonably assert that at the time of its BART determination, no material new technologies would have arisen since its BACT determination. In light of the *Minnkota Power* court's finding that the state reached a reasonable conclusion, the Agency does not believe it appropriate to disregard the BACT determination and require SCR.

Comment: One commenter argued that the court never addressed the question of whether EPA's own BACT analysis was itself reasonable, let alone more persuasive than North Dakota's conclusions regarding feasibility. The commenter stated that similarly, the court did not consider many of EPA's reasons for concluding that SCR is a feasible technology that should be designated as BART. Nor did the court address EPA's view that vendor willingness or unwillingness to provide a catalyst life guarantee had no relation to whether SCR was commercially available or feasible but rather related to the cost of using SCR according to the commenter.

Response: Giving appropriate consideration to the district court's decision does not depend on whether the court addressed every potential argument that EPA made or could have made based on the record of that case. *Minnkota Power* remains a final decision of a federal court with jurisdiction over the subject matter before it, a ruling that addressed issues relevant to this action. Further, as discussed above, EPA finds it appropriate to look to North Dakota's recent BACT determination as indicative of the appropriate BART outcome in this matter.

Comment: One commenter stated that EPA's BART determination is entitled to deference and evaluated under a different standard of review than that applicable to the district court in the *Minnkota Power* case. The commenter noted that EPA is not bound by *Minnkota Power* given EPA's authority when making BART determinations under a FIP, or ensuring that a state's submission complies with the CAA, and the deference given to those decisions. While the

definition of technical feasibility is substantially the same for the BACT and BART programs, the legal standard that governed the district court's review of North Dakota's BACT decision is not the same legal standard that applies to review of EPA's decision in promulgating a FIP or reviewing the adequacy of a state regional haze plan, such that the district court decision cannot govern here according to the commenter.

Response: EPA does not view *Minnkota Power* as directly governing the outcome of this matter, but the Agency has taken into consideration this federal court ruling in assessing North Dakota's BART determinations for MRYS and LOS. In reviewing the State's determinations, EPA considered whether North Dakota acted reasonably. The decision in *Minnkota Power* was one factor EPA took into account in deciding not to disapprove North Dakota's SIP. As noted above, this was not the only factor. EPA also took into account the BART Guidelines and North Dakota's contemporaneous BACT determination. We agree that different legal standards govern the district court's review of North Dakota's BACT determination and EPA's review of its decision regarding the adequacy of the SIP.

2. Consideration of the Presumptive NO_x BART Emissions Limit

Comment: Commenters stated that the BACT determination does not fulfill BART requirements for either MRYS or LOS since it contains an emissions limit higher than presumptive BART, and EPA has not conducted a five-factor BART analysis justifying an emission limit above presumptive BART. The BART Guidelines provide that presumptive BART for all lignite-fired cyclone boilers is a NO_x emissions limit of 0.10 lb/MMBtu, based upon the installation of SCR control technology. 40 CFR 51, appendix Y, section IV.E.5. The commenters note that EPA specifically evaluated the use of SCR on both MRYS and LOS in determining the presumptive

NO_x BART level and found it feasible and cost effective.[20] The commenters argued that EPA has not refuted the presumptive determination in this case.

Response: We disagree with the commenters. EPA is reaffirming our approval of three BART determinations that included five-factor analyses conducted by the State of North Dakota for MRYS Units 1 and 2 and LOS Unit 2. Thus, it was not necessary for EPA to conduct its own five-factor analyses or to refute the EPA analysis done in 2005 in support of the development of the NO_x presumptive limits. The emissions limits for SNCR in the State's analyses were based on a careful consideration of the statutory factors. While EPA did not agree with all aspects of the State's analyses, the deciding factor was that of technical feasibility. As discussed in the "Basis for Today's Final Action" section above, there are two principles from our BART Guidelines that are relevant to this situation. The first is that as part of a BART analysis, states may eliminate technically infeasible control options from further review. The second is that states generally may rely on a recent BACT determination for a source for purposes of determining BART for that source. North Dakota's BART determination for MRYS was developed at approximately the same time as its BACT determination for this facility, and was upheld by a U.S. district court. EPA finds it appropriate to approve the emissions limits for SNCR (above the presumptive emissions limits of 0.10 lb/MMBtu for lignite-fired cyclone boilers, based upon installation of SCR control technology) predicated on the State's analyses and its determination that SCR is eliminated from consideration based upon grounds of technical infeasibility.

Comment: Commenters stated that EPA did not consider non-air quality benefits in rejecting a

---

[20] *See* EPA, Technical Support Document: Methodology for Developing BART NO_X Presumptive Limits (June 15, 2005), docket EPA-R08-OAR-2010-0406-0092; Technical Support Document for BART NO_x Limits for Electric Generating Units Excel Spreadsheet (June 15, 2005), docket EPA-HQ-OAR-2002-0076-0446.

presumptive NO_x BART limit of 0.10 lb/MMBtu or lower, which is based on installation of SCR for cyclone boilers. The commenters noted that impacts are much more severe with SNCR than SCR as much more ammonia is used and released. The commenters list non-air-quality impacts regarding transportation, storage and use of ammonia including safety concerns, and potential fly ash contamination in addition to potential visibility impacts of emissions of unreacted ammonia ("ammonia slip") that offset the claimed visibility improvement by SNCR compared to SCR.

Response: We disagree with the commenters. They asserted that the ammonia slip from SNCR would be greater than from SCR, but this difference is not pertinent because SCR was eliminated from consideration based on technical infeasibility. (As discussed in our responses elsewhere, in approving BART determinations that are above the presumptive limit at MRYS and LOS, EPA has taken into consideration North Dakota's five-factor analyses, the State's reliance on a recent BACT determination, and a federal court ruling that addressed issues relevant to this action.) The commenters did not assert that SNCR should be eliminated from consideration based on ammonia slip. With SCR an unavailable option, SNCR is the most stringent technically feasible control option, and a comparison of the non-air-quality impacts between the eliminated technology (SCR) and the remaining most stringent technology (SNCR) is immaterial.

3. Collateral Estoppel

Comment: Commenters expressed differing opinions on whether collateral estoppel binds EPA to the *Minnkota Power* decision. The doctrine of collateral estoppel, also known as issue preclusion, provides that "once a court has decided an issue of fact or law necessary to its judgment that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Air Line Pilots Ass'n Int'l v. Trans States Airlines*, 638

F.3d 572, 579 (8th Cir. 2011) (citations and punctuation omitted); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

Response: Collateral estoppel does not govern EPA's decision in this matter. The district court in *Minnkota Power* decided the case under a standard of review outlined in a consent decree that settled an enforcement matter. Under the standard derived from the enforcement consent decree, EPA had the burden of proving that the State's BACT determination was unreasonable. On the other hand, when courts review EPA action on a state's BART determination, an altogether different standard applies: courts defer to EPA's technical expertise, and the petitioning party must show that EPA's action was arbitrary and capricious. Thus, because EPA had a much higher burden of proof in the district court than it would have on review of a SIP approval, collateral estoppel does not apply here. "Failure of one party to carry the burden of persuasion on an issue should not establish the issue in favor of an adversary who otherwise would have the burden of persuasion on that issue in later litigation." 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4422 at 592 (2002), *quoted in Cobb v. Pozzi*, 352 F.3d 79, 101-102 (2d Cir. N.Y. 2003).

As to LOS Unit 2, an additional reason that EPA is not collaterally estopped with respect to this action is that *Minnkota Power* only involved MRYS, not LOS. Because the case did not specifically address the latter station, collateral estoppel cannot be invoked with respect to it. For these reasons, the Agency's decision in this proceeding is not constrained by the district court's *Minnkota Power* decision. That is not to say, however, that the district court's decision is irrelevant. *Minnkota Power* remains a final decision of a federal court with jurisdiction over the subject matter before it, a ruling that addressed some issues relevant to this action. EPA has reviewed and considered the court's opinion, and views it as relevant to but not decisive of the

questions presented in this matter.

Finally, although EPA does not agree that collateral estoppel applies here, our final action is the same as if we had accepted as persuasive the comments asserting that it does.

4. EPA versus State Authority

Comment: Several commenters in supporting our proposal highlighted that in approving the State's BART determinations, EPA appropriately respected the State of North Dakota's statutory role in establishing BART limits and implied that EPA lacked authority to pursue another course.

Response: Courts have rejected state primacy arguments in several rulings that have occurred since the close of EPA's public comment period for this action. EPA's role in regional haze planning includes examining the rationale for and the reasonableness of states' underlying decisions.

5. Scope of Reconsideration Action

Comment: One commenter stated that there was no need to grant petitioners an opportunity to comment on the *Minnkota Power* ruling because EPA had no choice but to follow it.

Response: We disagree that EPA had no choice but to follow the *Minnkota Power* ruling. Section 307(d)(7)(B) of the CAA prohibits a party from seeking judicial review of objections to a rule that were not raised with reasonable specificity during the comment period. The CAA provides a two-part exception to this general ban on judicial review of newly raised objections. The EPA Administrator must convene a reconsideration proceeding if the petitioner can demonstrate that:

1. It was impracticable to raise such an objection during the comment period or the information became available after the period for public comment; and
2. The objection is of central relevance to the outcome of the rule.

The significant consideration that EPA has given to the district court decision, which was made 30 days after the close of our public comment period, meets the criteria for convening a reconsideration proceeding.

Further, the premise of the comment is incorrect. The comment is built on an assertion that EPA had "no choice" but to follow the *Minnkota Power* holding. For the Agency to have no choice, either collateral estoppel or res judicata would have to apply. Neither doctrine does. The district court in *Minnkota Power* decided the case under a standard of review outlined in a consent decree that settled an enforcement matter. There is no possibility of res judicata, because EPA's regional haze rulemaking action was not before the court for decision. And as described above, EPA's action in this proceeding is not constrained by collateral estoppel based on *Minnkota Power*. Therefore, there is no reason to conclude that the *Minnkota Power* decision left EPA "no choice" with respect to this rulemaking action.

Comment: One commenter stated that issues involving the technical feasibility, cost effectiveness, and visibility impact of potential control technologies are beyond the scope of this reconsideration action.

Response: EPA initiated the reconsideration of our final rule based on our approval of the State's NO_x BART determination and limits for MRYS Units 1 and 2 and LOS Unit 2. At the time of our proposed reconsideration, to allow for broad public comment, we decided not to limit the relevant scope of comments, other than requiring that they address one or more of these units.

F. *Comments Generally in Favor of Our Proposal*

Comment: We received more than 1,200 comment letters in support of our rulemaking from concerned citizens and members representing rural power cooperatives. These comments were received at the public hearings in Bismarck, North Dakota, by internet, and through the mail.

Each of these commenters was generally in favor of our proposed decision to approve North Dakota's NO_x BART determinations for MRYS Units 1 and 2 and LOS Unit 2. These comments generally stated that SCR is an unproven technology for these type of units and would not noticeably improve visibility. They also expressed concern about increasing electricity costs.

Response: We acknowledge these general comments that supported our proposed action. While we disagree with some of the commenters' reasoning on the points of technical feasibility, visibility benefits, and cost, these points are largely no longer relevant, because we have decided to finalize our approval of North Dakota's NO_x BART determinations for MRYS Units 1 and 2 and LOS Unit 2 on grounds explained elsewhere.

G. *Comments Generally Against Our Proposal*

Comment: We received over 650 comment letters that urged us to require SCR at MRYS Units 1 and 2 and LOS Unit 2 based on our original rigorous technical analyses that showed SCR was cost effective and a commonly used technology with more than 400 plants using the technology in the United States. Commenters stated that SCR technology would reduce pollution by 90% at these plants. Some commenters generally requested that EPA lower the emission limits for LOS Unit 1. Some commenters also generally discussed health effects and health costs related to regional haze pollutants. Some commenters also stated that rapid oil and gas development makes it more critical to install the best pollution controls at these plants.

Response: Because we have decided to finalize our approval of North Dakota's NO_x BART determinations for MRYS Units 1 and 2 and LOS Unit 2 on the grounds explained elsewhere in this document, it would not be appropriate to require SCR solely based on our original technical analyses.

We appreciate the commenters' concerns regarding the negative health impacts of

pollutants that contribute to regional haze. We agree that these pollutants can have effects on human health, but such effects are not taken into account in setting BART limits under the regional haze program. The next phase of the regional haze program will, as appropriate, lead to further emission reductions.

Regarding the commenters' concerns about rapid oil and gas development in North Dakota, while that is beyond the scope of this reconsideration action, EPA will be closely reviewing North Dakota's plans in future planning periods regarding potential impacts from oil and gas development as well as other anthropogenic emissions on regional haze.

Finally, emission limits at LOS Unit 1 are outside the scope of this reconsideration action; we only reconsidered the NO_x BART determinations for MRYS Units 1 and 2 and LOS Unit 2.

IV. Statutory and Executive Order Reviews

A. *Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is exempt from review by the Office of Management and Budget because it merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. In this reconsideration, EPA is affirming its prior approval of North Dakota SIP requirements for two sources in North Dakota.

B. *Paperwork Reduction Act*

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act. This action is not imposing any additional burden on the public.

C. *Regulatory Flexibility Act*

I certify that this action will not have a significant economic impact on a substantial

number of small entities under the Regulatory and Flexibility Act. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. In this reconsideration, EPA is affirming its prior approval of North Dakota SIP requirements for two sources in North Dakota. The action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. We have therefore concluded that this action will have no net regulatory burden for all directly regulated small entities.

Unfunded Mandates Reform Act

This action does not contain any unfunded mandate as described in the Unfunded Mandates Reform Act, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

D. ***Executive Order 13132: Federalism***

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

E. ***Executive Order 13175: Consultation and Coordination With Indian Tribal Governments***

This action does not have tribal implications, as specified in Executive Order 13175 because it does not impose substantial direct compliance costs and does not preempt tribal law. In this reconsideration, EPA is affirming its prior approval of North Dakota SIP requirements for

two sources in North Dakota. The action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. Thus, Executive Order 13175 does not apply to this rule.

F. ***Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks***

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it affirms a prior approval of a state action implementing a federal standard.

G. ***Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use***

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

H. ***National Technology Transfer and Advancement Act***

This rulemaking does not involve technical standards.

I. ***Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations***

EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. In this reconsideration, EPA is affirming its prior approval of North Dakota SIP requirements for two sources in North Dakota which increase environmental protection for the general population. The action merely approves state

law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. This regulatory option was selected as the preferable regulatory option for the reasons summarized in section II.B of this action. EPA provided meaningful participation opportunities for minority, low-income or indigenous populations or tribes in the development of this rule by conducting a public hearing on May 15, 2013 and by providing a three-month public comment period as described in section I of this action.

As part of this environmental justice assessment, EPA also reviewed 2013 U.S. Census Bureau data for Mercer and Oliver counties[21] where the two sources involved in this reconsideration action are located. Both counties have small minority populations with the white, non-minority populations comprising over 95% of the whole. Both counties are also below the 2013 national official poverty rate of 14.5% and the Midwest poverty rate of 12.9%.[22] The 2013 poverty rates for Mercer and Oliver counties are 7.2% and 11.4%, respectively. For comparison, the poverty rate for the State of North Dakota is 12.1%. Supporting documentation is included in the docket.

EPA's policy on environmental justice is to ensure the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Our review here for this reconsideration action is consistent with EPA's policy. This section, along with the supporting documentation in the docket, constitute EPA's full analysis of environmental justice for this action.

J. *Congressional Review Act*

[21] Mercer County, http://quickfacts.census.gov/qfd/states/38/38057.html, Oliver County, http://quickfacts.census.gov/qfd/states/38/38065.html.

[22] Income and Poverty in the United States: 2013, Current Population Reports, DeNavas-Walt and Proctor, Issued September 2014, P60-249, pp. 1 and 15. Available at https://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf.

This action is subject to the Congressional Review Act, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

K. ***Petitions for Judicial Review***

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[insert date 60 days after publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxides, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

Dated: February 6, 2015.

Gina McCarthy,

Administrator.

[FR Doc. 2015-03177 Filed 02/17/2015 at 8:45 am; Publication Date: 02/18/2015]