



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2013-0423; FRL-9928-78-Region 3]

Approval and Promulgation of Implementation Plans; West Virginia; Regional Haze Five-Year Progress Report State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) revision submitted by the State of West Virginia (West Virginia) through the West Virginia Department of Environmental Protection (WVDEP). West Virginia's SIP revision addresses requirements of the Clean Air Act (CAA) and EPA's rules that require states to submit periodic reports describing progress towards reasonable progress goals (RPGs) established for regional haze and a determination of the adequacy of the state's existing implementation plan addressing regional haze (regional haze SIP). EPA is approving West Virginia's SIP revision on the basis that it addresses the progress report and adequacy determination requirements for the first implementation period for regional haze.

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

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2013-0423. All documents in the docket are listed in the www.regulations.gov

website. Although listed in the electronic docket, some information is not publicly available, i.e., 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 www.regulations.gov or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of West Virginia's submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE, Charleston, West Virginia 25304.

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SUPPLEMENTARY INFORMATION:

I. Background

On March 14, 2014 (79 FR 14460), EPA published a notice of proposed rulemaking (NPR) for West Virginia. In the NPR, EPA proposed approval of West Virginia's progress report SIP, a report on progress made in the first implementation period towards RPGs for Class I areas in and outside West Virginia that are affected by emissions from West Virginia's sources. This progress report SIP and accompanying cover letter also included a determination that West Virginia's existing regional haze SIP requires no substantive revision to achieve the established regional haze visibility improvement and emissions reduction goals for 2018. On March 10, 2015 (80 FR 12607), EPA published a supplemental NPR (SNPR) to address the potential effects

on EPA's proposed approval from the April 29, 2014 decision of the United States Supreme Court in *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), remanding to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) EPA's Cross-State Air Pollution Rule (CSAPR) for further proceedings and the D.C. Circuit's decision to lift the stay of CSAPR.

States are required to submit a progress report in the form of a SIP revision every five years that evaluates progress towards the RPGs for each mandatory Class I Federal area¹ within the state and in each mandatory Class I Federal area outside the state which may be affected by emissions from within the state. *See* 40 CFR 51.308(g). In addition, the provisions under 40 CFR 51.308(h) require states to submit, at the same time as the 40 CFR 51.308(g) progress report, a determination of the adequacy of the state's existing regional haze SIP. The first progress report SIP is due five years after submittal of the initial regional haze SIP. On June 18, 2008, WVDEP

¹ Areas designated as mandatory Class I Federal areas consist of national parks exceeding 6000 acres, wilderness areas and national memorial parks exceeding 5000 acres, and all international parks that were in existence on August 7, 1977. *42 U.S.C. 7472(a)*. In accordance with section 169A of the CAA, EPA, in consultation with the Department of Interior, promulgated a list of 156 areas where visibility is identified as an important value. 44 FR 69122 (November 30, 1979). The extent of a mandatory Class I area includes subsequent changes in boundaries, such as park expansions. *42 U.S.C. 7472(a)*. Although states and tribes may designate as Class I additional areas which they consider to have visibility as an important value, the requirements of the visibility program set forth in section 169A of the CAA apply only to "mandatory Class I Federal areas." Each mandatory Class I Federal area is the responsibility of a "Federal Land Manager." *42 U.S.C. 7602(i)*. When we use the term "Class I area" in this action, we mean a "mandatory Class I Federal area."

submitted its regional haze SIP in accordance with the requirements of 40 CFR 51.308.² The progress report SIP revision was submitted by West Virginia on April 30, 2013 and EPA finds that it satisfies the requirements of 40 CFR 51.308(g) and (h).

II. Summary of SIP Revision

On April 30, 2013, West Virginia submitted a SIP revision to describe the progress made towards the RPGs of Class I areas in and outside West Virginia that are affected by emissions from West Virginia's sources. This progress report SIP also includes a determination of the adequacy of West Virginia's existing regional haze SIP to achieve these RPGs.

West Virginia has two Class I areas within its borders: Dolly Sods Wilderness Area (Dolly Sods) and Otter Creek Wilderness Area (Otter Creek). West Virginia notes in its progress report SIP that West Virginia sources were also identified, through an area of influence modeling analysis based on back trajectories, as potentially impacting nine Class I areas in five neighboring states: Brigantine Wilderness in New Jersey; Great Smoky Mountains National Park in North Carolina and Tennessee; James River Face Wilderness in Virginia; Linville Gorge Wilderness in North Carolina; Monmouth Cave National Park in Kentucky; and Shenandoah

² On March 23, 2012 (77 FR 16937), EPA finalized a limited approval and limited disapproval of West Virginia's June 18, 2008 regional haze SIP to address the first implementation period for regional haze. The limited disapproval of this SIP was a result of West Virginia's reliance on the Clean Air Interstate Rule (CAIR) to meet certain regional haze requirements. EPA addressed the deficiency identified in its limited disapproval with a federal implementation plan (FIP) in June 2012 that replaced West Virginia's reliance upon CAIR for certain regional haze requirements with reliance on CSAPR, a rule that EPA had issued in August 2011 to replace CAIR. 77 FR 33642 (final action on FIP to address certain West Virginia regional haze requirements). See also 76 FR 48208 (August 8, 2011) (promulgation of CSAPR). The D.C. Circuit initially vacated CSAPR in *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), cert. granted 133 U.S. 2857 (2013); however, the United States Supreme Court vacated that decision and remanded CSAPR to the D.C. Circuit for further proceedings. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014). EPA began implementing CSAPR on January 1, 2015 after the D.C. Circuit lifted its stay of CSAPR. Order of Dec.30, 2011, in *EME Homer City Generation, L.P. v. EPA*, D.C. Cir. No. 11-1302. See 79 FR 71663 (December 3, 2014) (interim final rulemaking clarifying how EPA will implement CSAPR).

National Park in Virginia.

The provisions in 40 CFR 51.308(g) require a progress report SIP to address seven elements. EPA finds that West Virginia's progress report SIP addressed each element under 40 CFR 51.308(g). The seven elements and EPA's conclusion are briefly summarized in this rulemaking action.

The provisions in 40 CFR 51.308(g) require progress report SIPs to include a description of the status of measures in the approved regional haze SIP; a summary of emissions reductions achieved; an assessment of visibility conditions for each Class I area in the state; an analysis of changes in emissions from sources and activities within the state; an assessment of any significant changes in anthropogenic emissions within or outside the state that have limited or impeded progress in Class I areas impacted by the state's sources; an assessment of the sufficiency of the approved regional haze SIP; and a review of the state's visibility monitoring strategy. As explained in detail in the NPR and SNPR, EPA finds that West Virginia's progress report SIP addressed each element and has therefore satisfied the requirements under 40 CFR 51.308(g).

In addition, pursuant to 40 CFR 51.308(h), states are required to submit, at the same time as the progress report SIP, a determination of the adequacy of their existing regional haze SIP and to take one of four possible actions based on information in the progress report. One possible action is submission of a negative declaration to EPA that no further substantive revision to the state's existing regional haze SIP is needed. In its progress report SIP, West Virginia submitted

a negative declaration that it had determined that its existing regional haze SIP requires no further substantive revision to achieve the RPGs for the Class I areas that are affected by emissions from West Virginia's sources. As explained in detail in the NPR and SNPR, EPA concludes West Virginia has adequately addressed 40 CFR 51.308(h) because the visibility data trends at the Class I areas impacted by West Virginia's sources and the emissions trends of the largest emitters of visibility-impairing pollutants both indicate that the RPGs for 2018 will be met or exceeded. Therefore, EPA concludes West Virginia's progress report SIP meets the requirements of 40 CFR 51.308(h).

III. Summary of Public Comments and EPA Response

EPA received comments on the proposed rulemaking from the National Parks Conservation Association (Commenter). EPA received one additional comment on the SNPR from the Utility Air Regulatory Group (SNPR Commenter) in support of our proposed approval of West Virginia's progress report SIP. A full set of the comments are provided in the docket for today's final rulemaking action. A summary of the significant comments and the EPA's response is provided in this section.

Comment 1: The Commenter stated that EPA should not approve the West Virginia progress report SIP revision because the report does not meet the requirements of 40 CFR 51.308(g)(2). The Commenter stated that the West Virginia progress report describes emission reductions in West Virginia but fails to detail specific reductions achieved through implementation of specific measures in the West Virginia regional haze SIP. The Commenter claimed that the report neither demonstrates that regional haze SIP measures are working nor that emission reductions or

visibility improvement has resulted from enforceable requirements in the regional haze SIP and not from “outside forces.” More specifically, the Commenter claimed that reductions in sulfur dioxide (SO₂) emissions from electric generating units (EGUs) from shutdowns, fuel switches, addition of controls, shifting to the use of cleaner units, and a decrease in demand were reversible if not enforceable. The Commenter stated that emission reductions cannot be relied upon if not enforceable and requested EPA provide the reductions achieved through West Virginia’s regional haze SIP and revise its assessment of the SIP revision.

Response 1: EPA disagrees with the Commenter’s assertion that West Virginia has not adequately addressed 40 CFR 51.308(g)(2) and that EPA cannot accordingly approve West Virginia’s progress report SIP revision. While the regulations at 40 CFR 51.308(g)(2) require a summary of the emissions reductions achieved in the State through the measures in its regional haze SIP, there is nothing in this provision requiring a detailed, causal analysis pinpointing or linking specific emission reductions to specific regional haze SIP measures.

The Commenter’s argument that West Virginia must specifically link specific measures in the regional haze SIP to changes in emissions inventories appears to be based on a misunderstanding of the design of the regional haze program and the purpose of the mid-course progress reports. The Regional Haze Rule,³ which was promulgated not long after the 1997 revisions to the ozone and fine particulate matter (PM_{2.5}) National Ambient Air Quality Standards (NAAQS), was

³ EPA promulgated a rule to address regional haze on July 1, 1999 (64 FR 35713) known as the Regional Haze Rule. The Regional Haze Rule revised the existing visibility regulations to integrate into the regulation provisions addressing regional haze impairment and established a comprehensive visibility protection program for Class I areas. The requirements for regional haze, are included in the EPA’s visibility protection regulations at 40 CFR 51.300-309.

explicitly designed to facilitate the coordination of emissions management strategies for regional haze with those needed to implement the NAAQS. *See* 64 FR 35713, 35719-35720 (July 1, 1999). More generally, the Regional Haze Rule requires states to include all air quality improvements that will be achieved by other CAA programs and state air pollution control requirements when assessing changes in emissions and visibility to be expected during the period of their regional haze SIP. 64 FR at 35733. This is made clear in the haze regulations which prohibit states from adopting RPGs that represent less visibility improvement than is expected to result from the implementation of other CAA requirements during the planning period. 40 CFR 51.308(d)(1)(vi). Given this requirement, states included in their regional haze SIPs a number of Federal regulations for mobile and stationary sources that had or were expected to come into effect after the baseline period and that were anticipated to result in reductions of visibility impairing pollutants. These regulations included NAAQS implementation measures as well as other CAA requirements, such as mobile source rules or Maximum Achievable Control Technology (MACT) standards issued under section 112 of the CAA. As one example, West Virginia included the 2007 Heavy-Duty Highway Rule (40 CFR part 86, subpart P) in its regional haze SIP. In short, West Virginia, like other states, included in its regional haze SIP anticipated reductions in emissions during the baseline period arising from a number of Federal CAA measures, as required by the Regional Haze Rule.

Thus, states took into account the anticipated emission reductions from a wide range of measures in setting RPGs. To model the visibility conditions in 2018, states used projected emission inventories based on the best information before them. Given the significance of emissions from EGUs to haze, these projections were based, among other things, on expected changes in energy

demand affecting capacity utilization of power plants. States also sometimes included an emissions buffer to account for the possible construction of new power plants or other types of facilities. States also took into account, as described above, anticipated reductions in emissions resulting from recent Federal rules addressing non-visibility-related requirements, as well as consent decrees, significant measures adopted by nearby states, and specific measures to address the requirements of the visibility program. Thus, in forecasting future visibility conditions, states by design took into account to the extent possible “outside forces” and a host of overlapping requirements.

The type of analysis underlying the RPGs established in regional haze SIPs involves a fair degree of uncertainty. Changes in economic conditions, fluctuations in the prices of fuels, the remand of a CAA requirement by the courts, or the passage of new regulations are some of the factors that may occur and can impact emissions inventories and monitored visibility conditions. Because each planning period requires states to forecast conditions ten or more years into the future, EPA required a mid-course evaluation of the regional haze SIP. The purpose of this progress report is to “check in” with the state to determine whether its predictions regarding future visibility remain reasonable. The purpose of summarizing the emission reductions throughout the state from the measures in the regional haze SIP is to ensure that no dramatic or unexpected changes in emissions inventories have rendered unreliable the earlier projections of emissions in 2018.

In West Virginia’s progress report SIP, EPA believes that West Virginia provided a reasonable summary of the emissions reductions achieved through the measures in the regional haze SIP by

focusing on those sources of pollution in West Virginia with the biggest impact on haze. Because SO₂ reductions from West Virginia's EGUs are the key element of the State's regional haze strategy, West Virginia discussed in its progress report SIP the significant SO₂ emission reductions from EGUs since submittal of its regional haze SIP. West Virginia also assessed the downward trend in SO₂ emissions and emission rates in comparison to heat input at these units and concluded that overall the data was indicative of the fact that the reductions were the result of the installation of controls and the use of cleaner burning fuels. *See* West Virginia State Implementation Plan Revision: Regional Haze 5-Year Periodic Report (Covering 2008-2013), Section 3.1 (April 30, 2013).⁴ Although West Virginia did not link the specific reductions in the emission inventory to specific measures in the regional haze SIP, the State did provide source-specific information on its coal-fired EGUs. For each of these units, the State identified the current status of SO₂ controls and shutdowns as well as the projected controls and shutdowns that were included in the regional haze SIP and the estimated and actual SO₂ reductions in 2009. *Id.* at p. 50-54 (Table 16). Taken together, West Virginia's summary of the SO₂ emissions reductions is sufficient for the State to evaluate whether a mid-course correction in its regional haze SIP is needed. As West Virginia's progress report shows, emissions from these facilities are far below what was projected in its regional haze SIP.

In sum, EPA believes West Virginia sufficiently discussed in its progress report SIP revision the emission reductions which resulted from numerous enforceable requirements found in West Virginia's regional haze SIP. West Virginia's progress report discussed numerous Federal and state enforceable measures which are responsible for emissions reductions in West Virginia and

⁴ The April 30, 2013 West Virginia State Implementation Plan Revision: Regional Haze 5-Year Periodic Report (Covering 2008-2013) is available in the docket for this action under Docket ID Number EPA-R03-OAR-2013-0423 at www.regulations.gov.

which correlate to improved visibility, including the Clean Air Interstate Rule (CAIR), the MACT programs, the 2007 Heavy-Duty Highway Rule, the Tier 2 Vehicle and Gasoline Sulfur Program, the Nonroad Diesel Emissions Program, Federal consent decrees resolving enforcement actions against EGUs and non-EGUs, and best available retrofit technology (BART) determinations for sources located within West Virginia and sources within a 300 kilometer radius of Dolly Sods or Otter Creek. West Virginia also discussed measures from other states which may have led to improvements in visibility in West Virginia including the North Carolina Clean Smokestacks Act, Georgia Multipollutant Control for Electric Utility Steam Generating Units, and the Maryland Health Air Act. Additionally, in the progress report SIP revision, West Virginia compared emissions inventories prior to and after the implementation of the West Virginia regional haze SIP, a comparison which show substantial reductions of visibility impairing pollutants such as SO₂. Because West Virginia demonstrated that these Federal and state enforceable measures contributed to the reduction of visibility impairing pollutants, EPA concluded West Virginia adequately addressed 40 CFR 51.308(g)(2) requirements for a summary of emission reductions in its progress report. Therefore, EPA disagrees with the Commenter that EPA should disapprove the West Virginia progress report SIP and disagrees that any further information or analysis is required.

Comment 2: The Commenter claimed that West Virginia's progress report SIP revision did not meet the requirements of 40 CFR 51.308(g)(3) because the visibility data presented by West Virginia appeared within a graph and was not quantified in a clear, tabular manner. Additionally, the Commenter alleged that West Virginia confused the State's meeting the uniform rate of progress for Dolly Sods with meeting its RPGs for Dolly Sods.

Response 2: EPA disagrees with the Commenter that West Virginia’s progress report is lacking the required visibility monitoring information. 40 CFR 51.308(g)(3) only requires the following visibility information measured in deciviews for the most impaired and least impaired days for each area, with values expressed in terms of five-year averages of these annual values: (1) current visibility conditions; (2) the difference between current visibility conditions and baseline visibility conditions; and (3) the change in visibility impairment over the past five years. Nothing in 40 CFR 51.308(g)(3) requires the visibility data to be provided in a tabular format versus the graphical format used in West Virginia’s progress report, even though a tabular format may facilitate easier review of the data. As stated in our NPR, EPA believes West Virginia provided the required information regarding visibility conditions and changes to meet the requirements under 40 CFR 51.308(g)(3), specifically providing current conditions based on the latest available Interagency Monitoring of Protected Visual Environments (IMPROVE) monitoring data, the difference between current visibility conditions and baseline visibility conditions, and the change in visibility impairment over the most recent five-year period for which data were available at the time of the progress report SIP development. EPA believes the fact that West Virginia presented this required information in graphical versus tabular format is irrelevant to our conclusion that West Virginia adequately addressed requirements in 40 CFR 51.308(g)(3).

While EPA agrees with the Commenter that West Virginia did inadvertently state in its progress report on one page that it was “meeting its RPG” for Dolly Sods, EPA disagrees with the Commenter that this inadvertent misstatement has any relevance to the approvability of West

Virginia's progress report generally or to EPA's conclusion that West Virginia has adequately addressed 40 CFR 51.308(g)(3) specifically, as discussed above and in the NPR. In particular, West Virginia appropriately discussed in its progress report on pages 59-60 that an analysis of emission reductions in West Virginia indicates the State is "on track to achieve" its RPGs in 2018 at Dolly Sods and that visibility at Dolly Sods had significantly improved since 2000. West Virginia's progress report also graphically displayed the State's progress towards its RPGs at Dolly Sods for 2018. Therefore, EPA views West Virginia's statement on one page that it is "meeting its RPG" as inadvertent as West Virginia otherwise correctly indicates in its progress report that the State is making reasonable progress towards achieving its RPGs at Dolly Sods by 2018. While EPA agrees with the Commenter that further emission reductions are needed for West Virginia to meet fully its RPGs in 2018 at Dolly Sods, EPA concludes West Virginia has appropriately addressed requirements of 40 CFR 51.308(g)(3) through its presentation of visibility data. For the reasons discussed herein and discussed more fully in our NPR, EPA believes West Virginia has demonstrated it is making reasonable progress towards its RPGs for 2018 and that its regional haze SIP is adequate, requiring no further revisions to the regional haze SIP at this time for any additional emission reduction requirements for West Virginia to achieve its RPGs in 2018.

Comment 3: The Commenter alleged that West Virginia's progress report SIP revision does not meet the requirements of 40 CFR 51.308(g)(6). The Commenter stated EPA's proposed approval of the West Virginia progress report SIP left unexamined West Virginia's assertion it was on track to meet its RPGs in 2018 and did not quantify how West Virginia's emission reductions would continue. The Commenter claimed projected emission reductions from Federal

programs like the Mercury Air Toxics Standards (MATS) for EGUs and the 2010 SO₂ NAAQS are neither quantified nor necessarily enforceable at this time. Additionally, the Commenter claimed none of the annual visibility values for Dolly Sods have yet achieved the RPGs and therefore more emission reductions are necessary. The Commenter stated EPA and West Virginia have avoided review of additional controls on non-EGUs. The Commenter claimed West Virginia committed in its regional haze SIP to review the need for additional controls at non-EGUs in its five-year progress report and therefore inappropriately concluded in its progress report that additional controls on non-EGUs were not necessary as the State was making progress towards its RPGs. The Commenter asserted some initial emission reductions in West Virginia resulted from controls, fuel switches, and shutdowns and as such are not necessarily enforceable. The Commenter claimed these reductions must be maintained and additional enforceable reductions from other source categories will be needed for West Virginia to meet its RPGs by 2018.

Response 3: EPA disagrees with the Commenter's allegation that West Virginia's progress report SIP revision does not meet the requirements of 40 CFR 51.308(g)(6). EPA views this requirement as a qualitative assessment, in light of emissions and visibility trends and other readily available information, as to whether Class I areas affected by emissions from a state are on track to meet their 2018 RPGs. *See Progress Report General Principles* at 16. In the NPR, EPA has described in detail how West Virginia's progress report provides such a qualitative assessment that Class I areas impacted by emissions from sources within West Virginia are on track to achieve their RPGs by 2018. EPA believes that the enforceable measures taken into consideration in West Virginia's regional haze SIP have contributed to the significant emissions

reductions in West Virginia as discussed in the progress report, particularly in the visibility impairing pollutant SO₂. West Virginia's progress report included visibility monitoring data which clearly demonstrated visibility improvement in the Class I areas impacted by West Virginia sources. Even though the emissions reductions are not specifically linked causally to specific measures in the State's regional haze SIP, EPA believes the enforceable measures in the SIP do and will continue to contribute to reductions in emissions and that these measures have led to the visibility improvement indicated by monitored data contained in West Virginia's progress report SIP revision submittal. While West Virginia in its progress report did identify several factors not in the West Virginia regional haze SIP such as shutdowns and fuel switches that have reduced emissions from sources within the State, West Virginia did not rely on these to demonstrate that the implementation plan for the State is sufficient for purposes of this review. West Virginia included a discussion of these factors in the progress report to make clear that additional factors beyond the measures in the SIP and federal implementation plan (FIP) have contributed to the large emissions reductions seen throughout the state, particularly in SO₂ emissions which have been identified as the primary contributor to visibility impairment in West Virginia and in the Visibility Improvement State and Tribal Association of the Southeast (VISTAS) region. West Virginia did not account for these factors in its original regional haze SIP as the shutdowns and fuel switches occurred after the development of the regional haze SIP and in many cases are not enforceable, as noted by the commenter. However, for this progress report SIP revision and to address requirements in 40 CFR 51.308(g)(1)-(7), including 40 CFR 51.308(g)(6) specifically, West Virginia only needed to show that it is on track to achieve its RPGs in 2018. According to the monitored visibility data presented in the State's progress report SIP submittal, West Virginia is on the glidepath to meeting its RPGs by 2018, and the Class I

areas impacted by West Virginia sources are also on track to meet their RPGs by 2018. In addition, as discussed in the West Virginia progress report SIP submittal, many of the Federal and state measures in West Virginia's regional haze SIP are just beginning to be implemented and as such further emission reductions, particularly in SO₂ emissions, can be expected which will enable West Virginia to continue to make further progress towards its RPGs for 2018.⁵ Therefore, EPA disagrees with the commenters' assertion that more emissions reduction measures particularly from non-EGUs are needed for West Virginia's regional haze SIP for Dolly Sods and Otter Creek (or other Class I areas impacted by West Virginia emissions) to meet RPGs.

Comment 4: The Commenter stated that EPA cannot approve West Virginia's progress report as it relies on CAIR. The Commenter stated CAIR was "struck down" by the D.C. Circuit as fundamentally flawed. The Commenter also generally challenged the legality of using CAIR to meet any regional haze requirements. The Commenter "reiterated" its prior comments that CAIR is ill-suited to address regional haze and that EPA cannot use a "cap-and-trade" program with yearly averaging to address sources with hourly effects on Class I areas. The Commenter stated the lack of source-specific BART is an impediment to the implementation of the regional haze program. In addition, the Commenter stated that EPA had previously issued a limited

⁵ Specifically, EPA notes that additional SO₂ reductions will likely result from full implementation of MATS at West Virginia EGUs during this first implementation period, from additional implementation and restrictions from full implementation of CSAPR which EPA promulgated to replace CAIR and is expected to lead to further EGU emission reductions, and from West Virginia's implementation of the 2010 SO₂ NAAQS. Many coal-fired EGUs have also announced plans to deactivate in 2015 including several plants in West Virginia, including Albright, Kammer, Kanawha River, Phillip Sporn and Rivesville, as well as plants or individual units at plants in states neighboring West Virginia including Glen Lynn, Walter C. Beckjord, Muskingum River, Elrama, Clinch River, Eastlake, Ashtabula, and Big Sandy. Additional SO₂ reductions will likely result from the deactivations of these coal-fired EGUs. For a listing of EGUs planning to deactivate in the states which are part of PJM Interconnection, L.L.C., a regional transmission organization which coordinates the movement of wholesale electricity within states including West Virginia, see <http://www.pjm.com/planning/generation-deactivation/gd-summaries.aspx>.

disapproval of West Virginia's regional haze SIP due to reliance on CAIR. The Commenter stated EPA had also previously said in a rulemaking on Florida's regional haze SIP that the five year progress report would be the appropriate time to address any necessary changes to reasonable progress goal demonstrations and long term strategies. The Commenter mentioned both West Virginia's regional haze SIP and progress report SIP rely heavily on CAIR for modeling assumptions, controls, emission estimates, and as an alternative to source-specific BART requirements for EGUs. The Commenter mentioned EPA only addressed CAIR in the proposed approval of the progress report when discussing the limited disapproval of West Virginia's regional haze SIP and stated EPA's approval of the West Virginia progress report was inconsistent with prior EPA positions, unsupported by the facts and arbitrary and capricious as a matter of law.

Response 4: EPA disagrees with the Commenter that EPA cannot approve West Virginia's five year progress report because the progress report relies on emission reductions from CAIR or because portions of West Virginia's regional haze SIP relied on CAIR.⁶ On March 23, 2012 (77 FR 16937), EPA finalized a limited approval and limited disapproval of West Virginia's June 18,

⁶ To address interstate transport of air pollution, CAIR required certain states like West Virginia to reduce emissions of SO₂ and nitrogen oxides (NO_x) that significantly contribute to downwind nonattainment of the 1997 NAAQS for PM_{2.5} and ozone. *See* 70 FR 25162 (May 12, 2005). CAIR relied upon cap-and-trade programs to reduce SO₂ and NO_x emissions and applied to 27 eastern states, including West Virginia. EPA approved West Virginia's regulations implementing CAIR as part of the Federally enforceable West Virginia SIP on August 4, 2009. 74 FR 38536.

2008 regional haze SIP to address the first implementation period for regional haze.⁷ There was a limited disapproval of this SIP because of West Virginia's reliance on CAIR to meet certain regional haze requirements.⁸ In our SNPR, EPA described the litigation history and status of CAIR in great detail, including the fact that CAIR was replaced with CSAPR (76 FR 48208 (August 8, 2011)) after West Virginia had developed and submitted its regional haze SIP. CSAPR requires substantial reductions of SO₂ and NO_x emissions from EGUs in 28 states in the Eastern United States that significantly contribute to downwind nonattainment of the 1997 PM_{2.5} and ozone NAAQS and 2006 PM_{2.5} NAAQS. On January 1, 2015, EPA sunset CAIR and began implementing CSAPR after the D.C. Circuit lifted the stay on CSAPR following the Supreme Court's decision upholding CSAPR.

As explained in detail in the SNPR and here in summary fashion, EPA does not believe that the status of CAIR or CSAPR affects the approvability of West Virginia's progress report SIP for several reasons. First, CAIR was in effect for the period of time addressed by West Virginia's progress report (2008-2013). Therefore, West Virginia appropriately evaluated and relied on CAIR reductions from EGUs of significant emissions of NO_x and SO₂ to demonstrate the State's

⁷ Although EPA gave limited approval to West Virginia's regional haze SIP (77 FR 16932) due to West Virginia's reliance on CAIR, a limited approval results in approval of the entire SIP submittal, even of those parts that are deficient and prevent EPA from granting a full approval pursuant to sections 301(a) and 110(k)(6) of the CAA and EPA's long-standing guidance. See Processing of State Implementation Plan (SIP) Revisions, EPA Memorandum from John Calcagni, Director, Air Quality Management Division, OAQPS, to Air Division Directors, EPA Regional Offices I-X, September 7, 1992, (1992 Calcagni Memorandum) located at <http://www.epa.gov/ttn/caaa/t1/memoranda/siproc.pdf>. Thus, the limited approval status of West Virginia's regional haze SIP does not impact EPA's approval of this five year progress report SIP in any way.

⁸ In 2008, the United States Court of Appeals for the District of Columbia Circuit initially vacated CAIR, *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), but ultimately remanded the rule to EPA without vacatur to preserve the environmental benefits provided by CAIR, *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008). Therefore, EPA disagrees with the Commenter's characterization that CAIR was "struck down" by the Court as the D.C. Circuit has only remanded CAIR to EPA without vacatur. After much litigation on CAIR and its replacement CSAPR as discussed in our SNPR, EPA sunset CAIR in December 2014 and began implementing CSAPR on January 1, 2015. See 79 FR 71663 (December 3, 2014) (interim final rulemaking EPA issued an interim final rule to clarify how EPA will implement CSAPR consistent with the Order from D.C. Circuit order lifting the stay of CSAPR and tolling the rule's deadlines).

progress towards meeting its RPGs.⁹ EPA's intention in requiring the progress reports pursuant to 40 CFR 51.308(g) was for the states to demonstrate progress achieved during the *current implementation period* addressed by the regional haze SIP. Thus, West Virginia appropriately relied upon CAIR reductions for demonstrating progress towards its RPGs from 2008-2013. And as explained in the SNPR, given that CAIR was in place until recently, it is appropriate to rely on CAIR emission reductions during this period for purposes of assessing the adequacy of West Virginia's progress report pursuant to 40 CFR 51.308(g) and (h).

Second, the State's regional haze program now includes reliance on CSAPR for SO₂ and NO_x reductions, at least throughout the remainder of this first implementation period until 2018. EPA's June 7, 2012 FIP replaced West Virginia's reliance on CAIR with reliance on CSAPR to meet certain regional haze requirements. Because the Regional Haze Rule discusses requirements for "implementation plans" which are defined in the visibility program to include approved SIPs or FIPs, EPA considered measures in its June 7, 2012 regional haze FIP as well as in the State's regional haze SIP in assessing the State's progress report for 40 CFR 51.308(g) and (h). EPA explained in the SNPR that the requirements of the regional haze program are fully addressed in West Virginia through its SIP and the FIP issued by EPA. As also discussed in the SNPR, EPA expects the SO₂ and NO_x emissions reductions at EGUs in West Virginia to continue through the remainder of the first implementation period in 2018 due to implementation of CSAPR.

Finally, the Regional Haze Rule provides for continual evaluation and assessment of a state's

⁹ EPA discussed in the NPR the significance of reductions in SO₂ as West Virginia and VISTAS identified SO₂ as the largest contributor pollutant to visibility impairment in West Virginia specifically and in the VISTAS region generally.

reasonable progress towards achieving the national goal of natural visibility conditions. West Virginia has the opportunity to reassess its RPGs and the adequacy of its regional haze SIP, including reliance upon CSAPR for emission reductions from EGUs, when it prepares and submits its second regional haze SIP to cover the implementation period from 2018 through 2028 or when the State prepares its next periodic progress report. However, as evaluated for this progress report, emissions of SO₂ from EGUs are presently far below original projections for 2018, visibility data provided by West Virginia show the Federal Class I areas impacted by West Virginia sources are all on track to achieve their RPGs, and EPA expects SO₂ emission reductions in West Virginia to continue through CSAPR and MATS and through expected EGU deactivations scheduled for 2015. These continued emission reductions will assist West Virginia in making reasonable progress towards natural visibility conditions in 2064. As further measures will be needed to make continued progress towards the national goal, West Virginia has the opportunity to include such measures in subsequent SIPs for future implementation periods. *See Commonwealth of Virginia, et al., v. EPA*, 108 F.3d 1397, 1410 (D.C. Cir. 1997) (citing *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C.Cir.1995)) (discussing that states have primary responsibility for determining an emission reductions program for its areas subject to EPA approval).

Thus, neither the status of CAIR (which has now sunset) nor CSAPR (which is being implemented) impacts our decision to approve West Virginia's progress report SIP. This SIP includes an adequate discussion of the implementation of regional haze SIP measures --including CAIR -- and of the significant emission reductions achieved.

In addition, EPA disagrees with Commenter that EPA's approval of West Virginia's progress report which relies on CAIR reductions is inconsistent with EPA's prior actions. In fact, EPA has approved redesignations of areas to attainment of the 1997 PM_{2.5} NAAQS in which states relied on CAIR as an "enforceable measure." *See* 77 FR 76415 (December 28, 2012); 78 FR 59841 (September 30, 2013); and 78 FR 56168 (September 12, 2013).

Because EPA expects SO₂ and NO_x emissions from EGUs to continue through CSAPR and other measures and because future West Virginia regional haze SIP submissions due pursuant to 40 CFR 51.308(f) and (g) will continue to evaluate West Virginia's progress towards natural conditions, EPA believes it is appropriate to approve fully West Virginia's progress report as meeting requirements of 40 CFR 51.308(g)(1)-(7) and (h) at this time. Thus, EPA disagrees with the Commenter that EPA's approval of the West Virginia progress report is inconsistent with EPA's prior position, unsupported by the facts, or arbitrary and capricious as a matter of law.

Further, EPA disagrees with the Commenter's "reiterated" statements concerning the validity of using an emissions trading program, such as CAIR or CSAPR, to meet regional haze requirements such as BART. As EPA's 2012 review of the West Virginia regional haze SIP explains, the State relied on CAIR to achieve significant reductions in emissions to meet both the BART requirements and to address impacts from West Virginia sources in Class I areas. 77 FR 16932. West Virginia's reliance upon CAIR as an alternative to source-specific BART at the time of the submittal of West Virginia's regional haze SIP in 2008 to EPA was supported by precedent from the D.C. Circuit as well as EPA's regulations at 40 CFR 51.308(e). CAIR was specifically upheld as an alternative to BART in accordance with the requirements of section

169A of the CAA by the D.C. Circuit in *Utility Air Regulatory Group v. EPA*. 471 F.3d 1333 (D.C. Cir. 2006). The D.C. Circuit concluded that the EPA's two-pronged test for determining whether an alternative program achieves greater reasonable progress was a reasonable one and also agreed with EPA that nothing in the CAA required the EPA to "impose a separate technology mandate for sources whose emissions affect Class I areas, rather than piggy-backing on solutions devised under other statutory categories, where such solutions meet the statutory requirements." *Id.* at 1340. *See also Center for Energy and Economic Development v. EPA*, 398 F.3d 653, 660 (D.C. Cir. 2005) (finding reasonable EPA's interpretation of section 169A(b)(2) of the CAA as requiring BART only as necessary to make reasonable progress). Thus, EPA disagrees with the Commenter that EPA cannot use cap-and-trade programs to address effects of sources in Class I areas and disagrees that the use of alternatives to source-specific BART is an impediment to states achieving reasonable progress as required by section 169A of the CAA.

EPA also notes in general that the comments regarding CAIR as adequate for regional haze requirements are beyond the scope of this rulemaking action. In this rulemaking action, EPA is finalizing approval of West Virginia's progress report SIP and did not propose to find that participation in CSAPR or CAIR is an alternative to BART in this rulemaking action. Moreover, EPA did not reopen discussions on the CAIR or CSAPR provisions as they relate to BART in assessing the progress report.¹⁰

Finally, EPA also generally disagrees with the Commenter that EPA did not discuss CAIR in EPA's NPR. EPA discussed CAIR, as well as emission reductions from CAIR, when assessing

¹⁰ In a separate action, EPA found CSAPR is "Better than BART." *See* 76 FR 82219 (December 30, 2011) (proposal of CSAPR as "Better than BART") and 77 FR 33641 (June 7, 2012) (addressing comments concerning CSAPR as a BART alternative in the final action). EPA's responses to these comments can be found in Docket ID No. EPA-HQ-OAR-2011-0729 at www.regulations.gov.

West Virginia's five year progress report as meeting requirements in 40 CFR 51.308(g)(1) and (2). CAIR, as an EGU control strategy, was one measure from West Virginia's regional haze SIP discussed in EPA's analysis of implementation of SIP measures for 40 CFR 51.308(g)(1), and emission reductions of SO₂ and NO_x from EGUs generally resulting from implementation of CAIR are discussed in EPA's analysis of West Virginia's progress report for 40 CFR 51.308(g)(2). *See* 79 FR at 11462-11463. In addition, in EPA's SNPR, EPA discussed the litigation history and status of CAIR and CSAPR and the effects of those programs on West Virginia's regional haze SIP in detail and provided an opportunity for comment on these issues. 80 FR at 12609-12611.

In summary, EPA does not view West Virginia's reliance through December 2014 upon CAIR for BART or for any other part of the regional haze SIP as a reason to disapprove the West Virginia progress report.

Comment 5: The Commenter expressed support for the maintenance of the IMPROVE visibility monitoring network. The Commenter stated it would like funding to continue for this monitoring network and would like EPA to advocate for funding of this network. The Commenter also stated its support for continuing funding for VISTAS' work for additional "understanding of source contributions to PM_{2.5} mass and visibility impairment or continued operation of VISTAS website."

Response 5: EPA thanks the Commenter for expressing its support for the IMPROVE monitoring network and for the work by VISTAS. In its progress report SIP, West Virginia

summarized the existing visibility monitoring network at Dolly Sods and Otter Creek and discussed the State's intended continued reliance on the IMPROVE monitoring network for its visibility planning. West Virginia concluded that the existing network is adequate and that no modifications to visibility monitoring strategy were necessary. In EPA's NPR, EPA concluded that West Virginia adequately addressed the sufficiency of its monitoring strategy as required by 40 CFR 51.308(g)(7), and EPA accordingly proposed approval of the West Virginia progress report. Additional funding concerns for VISTAS as raised by the Commenter are beyond the scope of this rulemaking.

Comment 6: The SNPR Commenter stated that EPA's reasons to approve the progress report are sound and stated it supported approval of the progress report SIP. The SNPR Commenter stated that CAIR was in the West Virginia SIP and in effect and enforceable throughout the period relevant to West Virginia's assessment of progress. The SNPR Commenter also agreed with EPA that EPA may consider a FIP as well as a SIP in evaluating a regional haze program under 40 CFR 51.308(g)(6) and (h). Finally, the SNPR Commenter stated EPA had a sound basis to approve the West Virginia progress report SIP based on the status of CAIR and CSAPR and stated reliance on CSAPR for further progress toward applicable RPGs in West Virginia and other affected states was appropriate as CSAPR has taken effect. The SNPR Commenter noted, however, that EPA had no valid basis for its limited disapproval of West Virginia's regional haze SIP based on West Virginia's reliance upon CAIR as a BART alternative.

Response 6: EPA appreciates the supportive comments from the SNPR Commenter and its agreement with EPA's analysis in the NPR and SNPR. The SNPR Commenter's statement

regarding EPA's prior limited approval of West Virginia's regional haze SIP is beyond the scope of this rulemaking and therefore no further response is provided.

IV. Final Action

EPA is approving West Virginia's regional haze five-year progress report SIP revision, submitted on April 30, 2013, as meeting the applicable regional haze requirements as set forth in 40 CFR 51.308(g) and 51.308(h).

V. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);

- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory

Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. 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 date of 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 to approve West Virginia’s regional haze five-year progress report SIP revision 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 oxides, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

Dated: May 26, 2015.

William C. Early, Acting
Regional Administrator,
Region III.

40 CFR part 52 is amended as follows:

PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart XX—West Virginia

2. In §52.2520, the table in paragraph (e) is amended by adding an entry for Regional Haze Five-Year Progress Report at the end of the table to read as follows:

§52.2520 Identification of plan.

* * * * *

(e) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
* * * * *				
Regional Haze Five-Year Progress Report	Statewide	4/30/13	[<u>Insert Federal Register publication date</u>] [<u>Insert Federal Register Citation</u>]	

[FR Doc. 2015-13801 Filed: 6/4/2015 08:45 am; Publication Date: 6/5/2015]