6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52, 97

[EPA-R06-OAR-2016-0611; FRL-10010-52-Region 6]

Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to the federal Clean Air Act (CAA or Act), the Environmental Protection Agency (EPA) is finalizing its affirmation, with amendments, of an intrastate sulfur dioxide (SO_2) trading program as an alternative to best available retrofit technology (BART) requirements for certain sources in Texas. This action finalizes the August 2018 proposed affirmation and November 2019 supplemental notice of proposed rulemaking (SNPRM) concerning certain aspects of a final rule published on October 17, 2017, partially approving the 2009 Texas Regional Haze State Implementation Plan (SIP) submission and promulgating a Federal Implementation Plan (FIP) for Texas to address certain outstanding CAA regional haze requirements for the first implementation period. Specifically, the EPA is finalizing its conclusion that the intrastate trading program, which caps emissions of SO_2 from certain electric generating units (EGUs) in Texas, meets the requirements of 40 CFR 51.308(e)(2) for an alternative to BART for SO_2. We are also making the following amendments to the program as proposed in our November 14, 2019 supplemental notice: (1) the addition of assurance provisions; (2) revisions to the Supplemental Allowance Pool allocation provisions; (3) termination of the opt-in provisions; and (4) revision of the allowance recordation provisions.

Additionally, EPA is finalizing our proposed affirmation of our prior approval of Texas' SIP determination that no Texas sources are subject to BART for particulate matter (PM). EPA is also finalizing our proposed affirmation that the BART alternatives in the October 2017 rulemaking to address the BART requirements for SO_2 and nitrogen oxides (NO_X) at Texas EGUs result in emission reductions adequate to satisfy the requirements of CAA section 110(a)(2)(D)(i)(II) with respect to interstate visibility transport for six national ambient air quality standards (NAAQS) issued between 1997 and 2010.

DATES: This final rule is effective on [**INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R06-OAR-2016-0611. All documents in the docket are listed on the *http://www.regulations.gov* web site. 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 therefore is not posted to regulations.gov. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at EPA Region 6, 1201 Elm Street, Suite 500, Dallas, Texas 75270.

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SUPPLEMENTARY INFORMATION: Throughout this document wherever "we," "us," or "our" is used, we mean the EPA.

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A. Regional Haze

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I. Background

A. Regional Haze

Regional haze is visibility impairment that is produced by a multitude of sources and activities that are located across a broad geographic area. These sources—both human-caused (anthropogenic) and naturally occurring—emit or otherwise introduce into the atmosphere PM, including fine PM ($PM_{2.5}$) (e.g., sulfates, nitrates, organic carbon (OC), elemental carbon (EC), and soil dust), or pollutants that are precursors to the formation of $PM_{2.5}$ (e.g., SO_2, NO_X, and, in

some cases, ammonia (NH_3) and volatile organic compounds (VOCs)). Fine-particle precursors react in the atmosphere to form $PM_{2.5}$, which impairs visibility by scattering and absorbing light. Visibility impairment limits visual distance and reduces color, clarity, and contrast of view. Reducing $PM_{2.5}$ and its precursor gases in the atmosphere is an effective method of improving visibility. $PM_{2.5}$ can also cause serious health effects and mortality in humans and contributes to environmental effects, such as acid deposition and eutrophication.

Data from the existing visibility monitoring network, the "Interagency Monitoring of Protected Visual Environments" (IMPROVE) monitoring network, show that visibility impairment caused by air pollution occurs virtually all the time at most national parks and wilderness areas. In 1999, the average visual range[1] in many mandatory Class I areas[2] (i.e., national parks and memorial parks, wilderness areas, and international parks meeting certain size criteria) in the western United States was 100-150 kilometers, or about one-half to two-thirds of the visual range that would exist without anthropogenic air pollution. In most of the eastern Class I areas of the United States, the average visual range was less than 30 kilometers, or about one-fifth of the visual range that would exist under estimated natural conditions.[3] Since the promulgation of the original Regional Haze Rule in 1999, CAA programs have reduced

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[1] Visual range is the greatest distance, in kilometers or miles, at which a dark object can be viewed against the sky.
[2] Areas designated as mandatory Class I Federal areas consist of National Parks exceeding 6,000 acres, wilderness areas and national memorial parks exceeding 5,000 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."
[3] 64 FR 35714 (July 1, 1999).

emissions of haze-causing pollution, lessening visibility impairment and resulting in improved average visual ranges.[4]

In Section 169A of the 1977 Amendments to the CAA, Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section of the CAA establishes as a national goal the prevention of any future, and the remedying of any existing, man-made impairment of visibility in 156 national parks and wilderness areas designated as mandatory Class I Federal areas. On December 2, 1980, EPA promulgated regulations to address visibility impairment in Class I areas that is "reasonably attributable" to a single source or small group of sources, i.e., "reasonably attributable visibility impairment."[5] These regulations represented the first phase in addressing visibility impairment. EPA deferred action on regional haze that emanates from a variety of sources until monitoring, modeling, and scientific knowledge about the relationships between pollutants and visibility impairment were improved.

Congress added section 169B to the CAA in 1990 to address regional haze issues, and we promulgated regulations addressing regional haze in 1999.[6] The Regional Haze Rule revised the existing visibility regulations to integrate into the regulations provisions addressing regional haze impairment and established a comprehensive visibility protection program for Class I areas. EPA's focus, following congressional direction, continued to be on three important visibility-impairing pollutants from relatively uncontrolled anthropogenic sources: oxides of nitrogen (NO_X), sulfur dioxide (SO_2), and particulate matter (PM).[7] The requirements for regional haze, found at 40 CFR 51.308 and 51.309, are included in our visibility protection regulations at 40

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[4] An interactive "story map" depicting efforts and recent progress by EPA and states to improve visibility at national parks and wilderness areas may be visited at: http://arcg.is/29tAbS3.
[5] 45 FR 80084 (Dec. 2, 1980).
[6] 64 FR 35714 (July 1, 1999), codified at 40 CFR part 51, subpart P (Regional Haze Rule).
[7] *Id.* 35715.

CFR 51.300–309. The requirement to submit a regional haze SIP applies to all 50 states, the District of Columbia, and the Virgin Islands (referred to collectively hereafter as "states"). States were required to submit their first SIP addressing regional haze visibility impairment no later than December 17, 2007.[8]

Section 169A(b)(2)(A) of the CAA directs states to evaluate the use of retrofit controls at certain larger, often under-controlled, older stationary sources in order to address visibility impacts from these sources. Specifically, section 169A(b)(2)(A) of the CAA requires states to revise their SIPs to contain such measures as may be necessary to make reasonable progress toward the natural visibility goal, including a requirement that certain categories of existing major stationary sources[9] built between 1962 and 1977 procure, install and operate best available retrofit technology (BART). Larger "fossil-fuel fired steam electric plants" are included among the statutory list of BART source categories at section 169A(g)(7). Under the Regional Haze Rule, states are directed to conduct BART determinations for "BART-eligible" sources that may be anticipated to cause or contribute to any visibility impairment in a Class I area. The evaluation of BART for EGUs that are located at fossil-fuel-fired power plants having a generating capacity in excess of 750 megawatts must follow the "Guidelines for BART Determinations Under the Regional Haze Rule" at appendix Y to 40 CFR Part 51 (hereinafter referred to as the "BART Guidelines"). States are required to identify the level of control representing BART after considering the five statutory factors set out in section 169A(g)(2).[10] States must establish

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[8] *See* 40 CFR 51.308(b). EPA's regional haze regulations require subsequent updates to the regional haze SIPs. 40 CFR 51.308(g)–(i).

[9] *See* 42 U.S.C. 7491(g)(7) (listing the set of "major stationary sources" potentially subject-to-BART).

[10] The State must take into consideration the five statutory factors: (1) the costs of compliance, (2) the energy and non-air quality environmental impacts of compliance, (3) any existing control technology in use at the source, (4) the remaining useful life of the source, and (5) the degree of visibility improvement which may reasonably be anticipated to result.

emission limits, a schedule of compliance, and other measures consistent with the BART determination process for each source subject-to-BART.

Rather than requiring source-specific BART controls, states also have the flexibility to adopt an emissions trading program or alternative program as long as the alternative provides greater reasonable progress towards improving visibility than BART. 40 CFR 51.308(e)(2) specifies how a state must conduct the demonstration to show that an alternative program will achieve greater reasonable progress than the installation and operation of BART. 40 CFR 51.308(e)(2)(i)(E) requires a determination under 40 CFR 51.308(e)(3) or otherwise based on the clear weight of evidence that the trading program or other alternative measure achieves greater reasonable progress than would be achieved through the installation and operation of BART at the covered sources. Specific criteria for determining if an alternative measure achieves greater reasonable progress than source-specific BART are set out in 40 CFR 51.308(e)(3); however, as noted above, under 40 CFR 51.308(e)(2)(i)(E) states have the flexibility to develop their own criteria to establish greater reasonable progress based on the "clear weight of the evidence." Finally, 40 CFR 51.308(e)(4) provides that states whose sources participate in the Cross-State Air Pollution Rule (CSAPR) trading programs need not require the BART-eligible fossil fuel-fired steam electric plants subject to those programs to install, operate, and maintain BART for the pollutant covered by the CSAPR trading program.

Regional haze requirements are generally implemented through the cooperative-federalism framework of section 110 of the Act, in which states are given the primary opportunity to meet the requirements through state implementation plans (SIPs). Under section 110(c) of the CAA, whenever we disapprove a mandatory SIP submission in whole or in part, or make a finding that a state has failed to make such a submission, we are required to promulgate a

federal implementation plan (FIP) within two years unless the state corrects the deficiency and we approve the new SIP submittal.

B. Interstate Transport of Pollutants that Affect Visibility

Section 110(a) of the CAA directs states to submit a SIP that provides for the implementation, maintenance, and enforcement of each NAAQS. This is commonly referred to as an "infrastructure SIP." CAA section 110(a)(2)(D)(i)(II) requires that infrastructure SIPs contain adequate provisions to prohibit interference with measures required to protect visibility in other states. This is referred to as "interstate visibility transport" (or "prong 4" of the four requirements or "prongs" found in section 110(a)(2)(D)(i)). Infrastructure SIPs are due to the EPA within three years after the promulgation of a new or revised NAAQS (or within such shorter period as we may prescribe). A state's failure to submit a complete, approvable infrastructure SIP, including one that meets the requirements for interstate visibility transport, creates an obligation for the EPA to address this requirement pursuant to section 110(c).

C. Previous Actions Related to Texas Regional Haze

On March 31, 2009, Texas submitted a regional haze SIP (the 2009 Regional Haze SIP) to the EPA that included reliance on Texas' participation in trading programs under the Clean Air Interstate Rule (CAIR) as an alternative to BART for SO_2 and NO_X emissions from EGUs.[11] This reliance was consistent with the EPA's regulations at the time that Texas developed its 2009

[11] CAIR required certain states, including Texas, to reduce emissions of SO_2 and NO_X that significantly contribute to downwind nonattainment of the 1997 NAAQS for fine particulate matter and ozone. See 70 FR 25152 (May 12, 2005).

Regional Haze SIP.[12] However, at the time that Texas submitted this SIP to the EPA, the D.C. Circuit had remanded CAIR (without vacatur).[13] The court left CAIR and our CAIR FIPs in place in order to "temporarily preserve the environmental values covered by CAIR" until we could, by rulemaking, replace CAIR consistent with the court's opinion. The EPA promulgated the Cross-State Air Pollution Rule (CSAPR) to replace CAIR in 2011[14] (and revised it in 2012).[15] CSAPR established FIP requirements for sources in a number of states, including Texas, to address the states' interstate transport obligation under CAA section 110(a)(2)(D)(i)(I). CSAPR addresses interstate transport of fine particulate matter and ozone by requiring affected EGUs in these states to participate in one or more of the CSAPR trading programs, which establish emissions budgets that apply to the EGUs' collective annual emissions of SO_2 and NO_X, as well as emissions of NO_X during ozone season.[16]

Following issuance of CSAPR, the EPA determined that CSAPR would achieve greater reasonable progress towards improving visibility than would source-specific BART in CSAPR states (a determination often referred to as "CSAPR Better-than-BART").[17] In the same action, we revised the Regional Haze Rule to allow states whose sources participate in the CSAPR trading programs to rely on such participation in lieu of requiring BART-eligible EGUs in the state to install BART controls as to the relevant pollutant.

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[12] *See* 70 FR 39104 (July 6, 2005).
[13] *See North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), *as modified*, 550 F.3d 1176 (D.C. Cir. 2008).
[14] 76 FR 48207 (Aug. 8, 2011).
[15] CSAPR was amended three times in 2011 and 2012 to add five states to the seasonal NO_X program and to increase certain state budgets. 76 FR 80760 (December 27, 2011); 77 FR 10324 (February 21, 2012); 77 FR 34830 (June 12, 2012).
[16] The ozone season for CSAPR purposes is May 1 through September 30.
[17] 77 FR 33641 (June 7, 2012). This determination was recently upheld by the D.C. Circuit. *See Util. Air Regulatory Grp. v. EPA*, 885 F.3d 714 (D.C. Cir. 2018).

In the same action that EPA determined that states could rely on CSAPR to address the BART requirements for EGUs, EPA issued a limited disapproval of a number of states' regional haze SIPs, including the 2009 Regional Haze SIP submittal from Texas, due to the states' reliance on CAIR, which had been replaced by CSAPR.[18] The EPA did not immediately promulgate a FIP to address those aspects of the 2009 Regional Haze SIP submittal subject to the limited disapproval of Texas' regional haze SIP to allow more time for the EPA to assess the remaining elements of the 2009 Texas SIP submittal.

In December 2014, we proposed an action to address the remaining regional haze obligations for Texas.[19] In that action, we proposed, among other things, to rely on our CSAPR FIP requiring Texas sources' participation in the CSAPR trading programs to satisfy the NO_X and SO_2 BART requirements for Texas' BART-eligible EGUs; we also proposed to approve the portions of the 2009 Regional Haze SIP addressing PM BART requirements for the state's EGUs. Before that rule was finalized, however, the D.C. Circuit issued a decision on a number of challenges to CSAPR, denying most claims, but remanding the CSAPR SO_2 and/or seasonal NO_X emissions budgets of several states to the EPA for reconsideration, including the Phase 2 SO_2 and seasonal NO_X budgets for Texas.[20] Due to the uncertainty arising from the remand of Texas' CSAPR budgets, we did not finalize our December 2014 proposal to rely on CSAPR to satisfy the SO_2 and NO_X BART requirements for Texas EGUs.[21] Additionally, because our proposed action on the PM BART provisions for EGUs was dependent on how SO_2 and NO_X BART were satisfied, we did not take final action on the PM BART elements of the 2009 Texas'

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[18] *Id.*
[19] 79 FR 74818 (Dec. 16, 2014).
[20] EME Homer City Generation, L.P. v. EPA (EME Homer City II), 795 F.3d 118, 132 (D.C. Cir. 2015).
[21] *See* 81 FR 296, 301-02 (Jan. 5, 2016).

Regional Haze SIP.[22] In January 2016, we finalized action on the remaining aspects of the December 2014 proposal.[23] This final action disapproved, among other things, Texas' Reasonable Progress Goals for the Big Bend and Guadalupe Mountains Class I areas in Texas, Texas's reasonable progress analysis and Texas's long-term strategy. EPA promulgated a FIP establishing a new long-term strategy that consisted of SO_2 emission limits for 15 coal-fired EGUs at eight power plants. That rulemaking was judicially challenged, however, and in July 2016, the Fifth Circuit granted the petitioners' motion to stay the rule pending review.[24] On March 22, 2017, following the submittal of a request by the EPA for a voluntary remand of the parts of the rule under challenge, the Fifth Circuit Court of Appeals remanded the rule in its entirety.[25]

On October 26, 2016, the EPA finalized an update to CSAPR to address the interstate transport requirements of CAA section 110(a)(2)(D)(i)(I) with respect to the 2008 ozone NAAQS (CSAPR Update).[26] The EPA also responded to the D.C. Circuit's remand in *EME Homer City II* of certain CSAPR seasonal NO_X budgets in that action. As to Texas, the EPA withdrew Texas' seasonal NO_X budget finalized in CSAPR to address the 1997 ozone NAAQS. However, in that same action, the EPA promulgated a FIP with a revised seasonal NO_X budget for Texas to address the 2008 ozone NAAQS.[27] Accordingly, Texas sources remain subject to CSAPR seasonal NO_X requirements.

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[22] Id.
[23] 81 FR 296 (Jan. 5, 2016).
[24] *Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016).
[25] Order, *Texas v. EPA*, 16-60118 (5th Cir. Mar. 22, 2017).
[26] 81 FR 74504 (Oct. 26, 2016).
[27] *Id.* 74524-25.

On November 10, 2016, in response to the D.C. Circuit's remand of Texas's CSAPR SO_2 budget, we proposed to withdraw the FIP provisions that required EGUs in Texas to participate in the CSAPR trading programs for annual emissions of SO_2 and NO_X.[28] We also proposed to reaffirm the EPA's 2012 analytical demonstration that CSAPR provides greater reasonable progress than BART, despite changes in CSAPR's geographic scope to address the *EME Homer City II* remand, including removal of Texas' EGUs from the CSAPR trading program for SO_2 emissions. On September 29, 2017, we finalized the withdrawal of the FIP provisions for annual emissions of SO_2 and NO_X for EGUs in Texas[29] and affirmed our proposed finding that the EPA's 2012 analytical demonstration remains valid and that participation in the CSAPR trading programs as they now exist meets the Regional Haze Rule's criteria for an alternative to BART. (We refer to this as the "2017 CSAPR Better-than-BART affirmation finding" throughout this notice.) As discussed in Section I.D below, certain environmental organizations filed a petition for reconsideration of this finding in November 2017.

On January 4, 2017, we proposed a FIP to address the EGU BART requirements for Texas' EGUs. With respect to NO_X, we proposed to replace the 2009 Regional Haze SIP's reliance on CAIR with reliance on our CSAPR FIP to address the NO_X BART requirements for EGUs.[30] This portion of our proposal was based on the CSAPR Update and our separate November 10, 2016 proposed finding, described above, that the EPA's actions in response to the D.C. Circuit's remand would not adversely impact our 2012 demonstration that participation in the CSAPR trading programs meets the Regional Haze Rule's criteria for alternatives to BART.

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[28] 81 FR 78954 (Nov. 10, 2016).
[29] 82 FR 45481 (Sept. 29, 2017). As explained above, Texas sources continue to be subject to the CSAPR Update FIP, under which they participate in a CSAPR trading program for ozone season NO_X.
[30] 82 FR 912, 914-15 (Jan. 4, 2017).

We noted that we could not finalize this portion of our proposed FIP to address the NO_X BART requirements for EGUs unless and until we finalized our proposed finding that CSAPR was still better than BART.[31] (This predicate finding was finalized on September 29, 2017, as described above.)

With respect to SO_2, our January 4, 2017 proposed action addressing the BART requirements for Texas EGUs acknowledged that because Texas sources would no longer be participating in the CSAPR program for SO_2, Texas would no longer be eligible to rely on participation in CSAPR as an alternative to source-specific EGU BART for SO_2 under 40 CFR 51.308(e)(4). As a result, there were BART requirements that were left unfulfilled with respect to Texas's BART-eligible EGU emissions of SO_2 that would need to be fulfilled by either an approved SIP or an EPA-issued FIP that satisfied the BART requirements under 40 CFR 51.308(e)(1) or constituted a viable BART alternative under 40 CFR 51.308(e)(2) for those emissions. EPA proposed to satisfy these requirements through a BART FIP, entailing the identification of BART-eligible EGU sources, screening to identify which BART-eligible sources are "subject-to-BART" (i.e., may reasonably be anticipated to cause or contribute to any impairment of visibility in any Class I area), and source-by-source determinations of SO_2 BART controls as appropriate. For those EGU sources we proposed to find subject to BART, we proposed to promulgate source-specific SO_2 requirements. We proposed SO_2 emission limits on 29 EGUs located at 14 facilities.

With respect to PM, in the January 2017 proposal, we proposed to disapprove the portion of the 2009 Regional Haze SIP that made BART determinations for PM from EGUs, on the grounds that the demonstration in the 2009 Texas Regional Haze SIP relied on underlying

[31] *Id.* 915.

assumptions as to how the SO_2 and NO_X BART requirements for EGUs were being met that were no longer valid with the proposed source-specific SO_2 requirements.[32] In place of these determinations, we proposed to promulgate source-specific PM BART requirements based on existing practices and control capabilities for those EGUs that we proposed to find subject to BART. Previously, we had proposed to approve the EGU BART determinations for PM in the 2009 Texas Regional Haze SIP, and this proposal had never been withdrawn.[33] At that time, CSAPR was an appropriate alternative for SO_2 and NO_X BART for EGUs. The 2009 Texas Regional Haze SIP included a pollutant-specific screening analysis for PM to demonstrate that Texas EGUs were not subject to BART for PM. In a 2006 guidance document,[34] the EPA stated that pollutant-specific screening can be appropriate where a state is relying on a BART alternative to address both NO_X and SO_2 BART. However, in the January 2017 proposal, we proposed to disapprove the PM BART determination since SO_2 BART was no longer addressed by a BART alternative. For coal-fired units, we proposed PM BART limits consistent with PM emission limits in the Mercury and Air Toxics Standards (MATS) rule; for gas-fired units, we proposed PM BART would be satisfied by making burning pipeline-quality gas federally enforceable; and for oil-fired units, we proposed that fuel-content requirements for SO_2 BART would also satisfy PM BART.[35]

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[32] In the 2009 Regional Haze Texas SIP, for EGU BART, Texas' BART-eligible EGUs' emissions of both SO_2 and NO_X were covered by participation in trading programs, which allowed Texas to conduct a screening analysis of the visibility impacts from PM emissions from such units in isolation. However, modeling on a pollutant-specific basis for PM is appropriate only in the narrow circumstance of reliance on BART alternatives to satisfy both NO_X and SO_2 BART. Due to the complexity and nonlinear nature of atmospheric chemistry and chemical transformation among pollutants, EPA has not recommended performing modeling on a pollutant-specific basis to determine whether a source is subject to BART, except in the unique situation described above. See discussion in Memorandum from Joseph Paisie to Kay Prince, "Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations," July 19, 2006.
[33] 79 FR 74817, 74853-54 (Dec. 16, 2014).
[34] *See* discussion in Memorandum from Joseph Paisie to Kay Prince, "Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations," July 19, 2006.
[35] 82 FR 936.

In our final action addressing BART for Texas published on October 17, 2017, we finalized our January 2017 proposed determination that Texas' participation in CSAPR's trading program for ozone-season NO_X qualifies as an alternative to source-specific NO_X BART. We determined that the SO_2 BART requirements for all BART-eligible coal-fired units and a number of BART-eligible gas- or gas/fuel oil-fired units are satisfied by a BART alternative for SO_2—specifically, a new intrastate trading program that we established addressing emissions of SO_2 from certain EGUs in Texas. The remaining BART-eligible EGUs not covered by the SO_2 BART alternative were previously determined to be not subject to BART based on screening methods using model plants and CALPUFF[36] modeling as described in our proposed rule and BART Screening technical support document (TSD).[37] Finally, because both NO_X and SO_2 were now being addressed by a BART alternative, we approved the 2009 Regional Haze SIP's determination, based on a pollutant-specific screening analysis, that Texas' EGUs are not subject to BART for PM. With respect to visibility transport obligations, we determined that the BART alternative to address SO_2 and Texas sources' participation in CSAPR's trading program for ozone-season NO_X to address NO_X BART at Texas' EGUs fully addresses Texas' obligations for six NAAQS.

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[36] CALPUFF (California Puff Model) is a multi-layer, multi-species non-steady-state puff dispersion modeling system that simulates the effects of time- and space-varying meteorological conditions on pollutant transport, transformation, and removal. CALPUFF is intended for use in assessing pollutant impacts at distances greater than 50 kilometers to several hundreds of kilometers. It includes algorithms for calculating visibility effects from long range transport of pollutants and their impacts on Federal Class I areas. EPA previously approved the use of the CALPUFF model in BART related analyses (40 CFR Part 51 Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations; Final Rule; 70 FR 39104 – 39172; July 6, 2005). For instructions on how to download the appropriate model code and documentation that are available from Exponent (Model Developer/Owner) at no cost for download, see EPA's website:
[HYPERLINK "https://www.epa.gov/scram/air-quality-dispersion-modeling-preferred-and-recommended-models" \l "calpuff"].

[37] See document at docket identification number EPA-R06-OAR-0611-0005.

D. EPA's Denial of the Petition for Reconsideration of CSAPR as a BART Alternative and its Relationship to this Final Action

As explained in the section above, on September 29, 2017, we finalized the withdrawal of the CSAPR FIP provisions for annual emissions of SO_2 and NO_X for EGUs in Texas.[38] We also finalized our November 2016 proposed finding affirming that the EPA's 2012 analytical demonstration remains valid and that participation in the CSAPR trading programs continues to meet the Regional Haze Rule's criteria for an alternative to BART. In our October 17, 2017, action promulgating the Texas intrastate SO_2 trading program, we relied on that determination and the fact that the Texas program would achieve SO_2 emission reductions similar to what CSAPR would have achieved in Texas to conclude that the Texas program satisfies the requirements for a BART alternative under 40 CFR 51.308(e)(2).[39]

On November 28, 2017, Sierra Club and the National Parks Conservation Association submitted a petition for partial reconsideration of our September 2017 finding affirming that CSAPR continues to satisfy requirements as a BART alternative.[40] Among other things, these petitioners alleged that our analysis was materially flawed and must be reconsidered to the extent that it rested on an assumption that EGU BART sources in Texas would be subject to source-specific BART controls for SO_2 rather than the intrastate SO_2 trading program.[41] Petitioners alleged in particular that EPA's emissions shifting analysis accounted for potential increases in

[38] 82 FR 45481 (Sept. 29, 2017).
[39] 82 FR 48324, 48330, 48357 (Oct. 17, 2017).
[40] Sierra Club and National Parks Conservation Association, Petition for Partial Reconsideration of Interstate Transport of Fine Particulate Matter: Revision of Federal Implementation Plan Requirements for Texas; Final Rule; 82 Fed. Reg. 45,481 (Sept. 29, 2017); EPA-HQ-OAR-2016-0598; FRL-9968-46-OAR (Nov. 28, 2017).
[41] *See, e.g., id.* 6 (citing 82 FR 45494).

emissions in remaining CSAPR states of between 22,300 to 53,0000 tons by assuming these emissions would be offset by an estimated 127,300 tons of SO_2 emission reductions in Texas due to source-specific BART controls.[42] However, these petitioners alleged that this assumption was proven false when EPA promulgated the Texas intrastate trading program rather than source-specific BART.[43] On this basis, among other things, petitioners sought mandatory reconsideration of the September 29, 2017 action under CAA section 307(d)(7)(B).

In a separate action, EPA is denying this petition for reconsideration. [INSERT CITATION TO DENIAL]. That action, and the basis for that action as it relates to the determination that CSAPR remains a valid BART alternative, are beyond the scope of this action. With the denial of the petition for reconsideration of our 2017 affirmation in that separate action, EPA has made a final determination that the objections raised by the petitioners on the 2017 affirmation of CSAPR as a BART alternative are not of central relevance.[INSERT CITATION TO DENIAL] As such, there is no longer any outstanding question whether CSAPR is a satisfactory BART alternative. Therefore, as discussed in Section III.A.2 below, in this action EPA is finalizing its affirmation that it may rely on the CSAPR BART-alternative analysis as a part of its "clear weight of the evidence" demonstration that the Texas intrastate trading program achieves greater reasonable progress than BART.

II. Our Proposed Actions

A. Proposed Rule Affirming the October 2017 Final Action

On December 15, 2017, EPA received a petition for reconsideration of the October 2017 final rule addressing BART in Texas requesting that the Administrator reconsider certain aspects

[42] *Id.* 13-14 (citing 82 FR 45493-94).
[43] Id.

of the FIP related to the intrastate trading program promulgated to address the SO_2 BART requirement for Texas EGUs. In our April 30, 2018 letter in response to that petition, we stated that we believed that certain aspects of the federal plan could benefit from further public comment. Accordingly, in a notice published on August 27, 2018, we proposed to affirm certain aspects of our SIP approval and of the FIP, and we provided the public with an opportunity to comment on those aspects, as well as other specified related issues.[44] Specifically, we took comment on the following elements, which effectively covered all of petitioners' central objections: 1) the proposal to affirm the October 2017 FIP establishing an intrastate trading program addressing emissions of SO_2 from certain EGUs in Texas as a BART alternative and the determination that this program satisfies the requirements for BART alternatives; 2) the proposal to affirm the finding that the BART alternatives in the October 2017 rulemaking to address SO_2 and NO_X BART at Texas' EGUs result in emission reductions adequate to satisfy the requirements of CAA section 110(a)(2)(D)(i)(II) with respect to visibility for the following NAAQS: 1997 8-hour ozone, 1997 $PM_{2.5}$ (annual and 24-hour), 2006 $PM_{2.5}$ (24-hour), 2008 8-hour ozone, 2010 1-hour NO_2, and 2010 1-hour SO_2 NAAQS; and 3) the proposal to affirm our October 2017 approval of Texas' SIP determination that no sources are subject to BART for PM. The August 2018 affirmation proposed rule also solicited comment on the specific issues of whether recent shutdowns of sources included in the trading program and the merger of two owners of affected EGUs should impact the allocation methodology for certain SO_2 allowances. In addition to soliciting comment on the above elements and aforementioned specific issues, the August 2018 affirmation proposal also invited comment on additional issues that could inform our decision making with regard to the SO_2 BART obligations for Texas. First, we sought input

[44] 83 FR 43586.

on whether SO_2 BART would be better addressed through a source-by-source approach (source-specific BART), the October 2017 SO_2 trading program, or some other appropriate BART alternative. Second, EPA requested comment on whether a SIP-based program would serve Texas better than a FIP. Third, we requested public input on whether and how the SO_2 trading program finalized in the October 2017 final rule addresses the long-term strategy and reasonable progress requirements for Texas.

B. Supplemental Notice of Proposed Rulemaking

In response to certain comments received during the public comment period for the August 2018 proposal to affirm the October 2017 FIP, we proposed revisions to the Texas SO_2 Trading Program in a supplemental proposal published on November 14, 2019.[45] In the supplemental proposal, we proposed to make four sets of amendments to the Texas SO_2 Trading Program: (1) the addition of assurance provisions; (2) revisions to the Supplemental Allowance Pool allocation provisions; (3) termination of the opt-in provisions; and (4) revision of the allowance recordation provisions.

(1) Addition of Assurance Provisions. The Texas SO_2 Trading Program, as promulgated in October 2017, did not include an assurance level. In contrast to CSAPR, the Texas SO_2 Trading Program does not allow for sources to purchase allowances from sources in other states. Therefore, the number of allowances available to the Texas sources under the SO_2 trading program, as promulgated in October 2017, is limited by the total number of allowances allocated under the program. While this limits the average annual emissions under the program, we recognized that the potential use of banked allowances and allowances allocated from the

[45] 84 FR 61850.

Supplemental Allowance Pool could allow for potentially significant year-to-year variability in emissions. In each of the CSAPR trading programs, EPA set an assurance level for each state in order to ensure that, despite the broad, interstate trading region, emissions reductions would be achieved appropriately in a geographically distributed way commensurate with states' "good neighbor" obligations as determined by EPA through its analysis under CAA section 110(a)(2)(D)(i)(I).[46] In order to maintain consistency with the CSAPR program and to provide additional support for our determination that SO_2 emissions under the Texas SO_2 Trading Program will remain below the requisite level on an annual basis, the EPA proposed to add assurance provisions to the Texas SO_2 Trading Program in the November 2019 supplemental proposal, setting the assurance level by relying on the same analysis and methodology that were used to set assurance levels in the original CSAPR rulemaking while accounting for the fact that the Texas SO_2 Trading Program is intrastate-only (*i.e.,* does not permit interstate trading). EPA proposed to set an assurance level for the Texas SO_2 Trading Program of 255,081 tons and proposed to impose a penalty surrender ratio of three allowances for each ton of emissions in any year in excess of the 255,081-ton assurance level.

EPA further proposed that this assurance level would strengthen our determination that the Texas program compares favorably to CSAPR in terms of stringency. EPA noted that its previous CSAPR Better-than-BART analysis relied on assuming annual SO_2 emissions from Texas EGUs of 317,100 tons. For certain EGUs not covered by the Texas program but that would have been subject to CSAPR, EPA made a conservative estimate of 35,000 tons of annual emissions. Adding this to the 255,081 ton assurance level produced an upper bound estimate of

[46] 76 FR 48208, 48265-66 (Aug. 8, 2011).

290,081 tons of emissions, which EPA noted is below the 317,100 ton assumption used for CSAPR.[47]

(2) *Revisions to the Supplemental Allowance Pool Allocation Provisions*. 40 CFR § 97.912 of the existing Texas SO_2 Trading Program regulations establishes how allowances are allocated from the Supplemental Allowance Pool to sources (collections of participating units at a facility) that have reported total emissions for that control period exceeding the total amounts of allowances allocated to the participating units at the source for that control period (before any allocation from the Supplemental Allowance Pool). While all other sources required to participate in the trading program have flexibility to transfer allowances among multiple participating units under the same owner/operator when planning operations, Coleto Creek consists of only one coal-fired unit, and at the time of our October 2017 FIP, was the only coal-fired unit in Texas owned and operated by Dynegy. To provide this source additional flexibility, in the trading program as it was promulgated in October 2017, Coleto Creek was allocated its maximum supplemental allocation from the Supplemental Allowance Pool as long as there are sufficient allowances in the Supplemental Allowance Pool available for allocation, and its actual allocation would not be reduced in proportion with any reductions made to the supplemental allocations to other sources. In our August 2018 proposal, we noted that Dynegy has merged with Vistra, which owns other units that are subject to the trading program. In the August 2018 proposal, we solicited comment on eliminating this additional flexibility for Coleto Creek in light of the recent change in ownership, and we received no adverse comments on such a change.

[47] 84 FR 61850, 61853.

Therefore, in the November 2019 supplemental proposal, we proposed to make this change to the regulations.[48]

Some comments on our August 2018 proposal also expressed the view that it would be more equitable to make allocations from the Supplemental Allowance Pool in proportion to each owner's total emissions in excess of the owner's total base allowance allocations instead of in proportion to each individual source's emissions in excess of the individual source's base allowance allocation. In the November 2019 supplemental proposal, EPA proposed to agree that this change would be equitable and noted that it would also be consistent with the rationale for proposing to eliminate the special flexibility in the existing regulations for Coleto Creek. Accordingly, EPA proposed to amend the Supplemental Allowance Pool allocation provisions to reflect this further change in the allocation methodology. EPA specifically requested comment on the proposed revisions to the Supplemental Allowance Pool allocation provisions.[49]

(3) Termination of the Opt-in Provisions. In response to a comment on the August 2018 proposal that asserted that the opt-in provisions weakened the functional equivalence of the Texas SO_2 Trading Program to CSAPR, EPA proposed to terminate the opt-in provisions in the Texas SO_2 Trading Program in the November 2019 supplemental proposal. We noted that our proposal to terminate the opt-in provisions is consistent with the supplemental proposal's overall objective of strengthening our finding that the Texas SO_2 Trading Program will result in SO_2 emission levels from Texas EGUs that are similar to or less than the emission levels from Texas EGUs that would have been realized from participation in the SO_2 trading program under CSAPR. EPA also specifically requested comment on the proposed termination of the opt-in

[48] *Id.* 61855.
[49] Id.

provisions and solicited comment as to what other relevant provisions in the Texas SO_2 Trading Program may offset the commenter's concerns with the opt-in provisions.[50]

(4) *Revision of the Allowance Recordation Provisions*. In the November 2019 supplemental proposal, we also proposed to amend the language in the recordation provisions such that the Administrator can delay recordation of Texas SO_2 Trading Program allowances for the specified control periods only in the event that Texas submits a SIP revision *and EPA takes final action to approve it*. Under 40 CFR § 97.921(a) of the Texas SO_2 Trading Program regulations as originally promulgated in October 2017, "[t]he Administrator may delay recordation of Texas SO_2 Trading Program allowances for the specified control periods if the State of Texas submits a SIP revision before the recordation deadline." Similarly, under § 97.921(b), "[t]he Administrator may delay recordation of the Texas SO_2 Trading Program allowances for the applicable control periods if the State of Texas submits a SIP revision by May 1 of the year of the applicable recordation deadline under this paragraph." The revisions we proposed in the November 2019 supplemental proposal are necessary to ensure that the program remains fully operational unless it is replaced by a SIP revision that is approved by EPA as meeting the SO_2 BART requirements for the covered units. EPA specifically requested comment on the proposed revisions to the allowance recordation provisions.[51]

Finally, the EPA noted that the proposed revisions to the Texas SO_2 Trading Program would strengthen the program in a manner that provides further support that it will achieve greater emission reductions than Texas had agreed to in consultations with other states in setting reasonable progress goals for Class I areas outside Texas for the first implementation period of

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[50] *Id.* 61855-56.
[51] *Id.* 61856.

the Regional Haze Rule. As a result, the EPA believed the proposed changes strengthened its conclusion that the Texas trading program, in conjunction with Texas' participation in the CSAPR ozone-season NO_X trading program, satisfies interstate visibility transport obligations under section 110(a)(2)(D)(i)(II) as to the six NAAQS identified above. The EPA solicited comment on this relationship.[52]

III. Summary of Our Final Decisions

A. Regional Haze

After carefully considering the comments we received on our August 27, 2018 proposed rule and our November 14, 2019 supplemental proposal, we are taking final action to affirm our determination that our October 2017 FIP that established an intrastate trading program addressing emissions of SO_2 from certain EGUs in Texas, as amended in this final action as described in section III.A.1 below, satisfies the Regional Haze Rule requirements for a BART alternative under 40 CFR 51.308(e)(2). We are taking final action to affirm our determination that the BART alternatives addressing SO_2 BART, as amended in this final action, and NO_X BART at Texas' EGUs are adequate to satisfy the interstate visibility transport requirements for six NAAQS. We are also taking final action to affirm our October 2017 approval of Texas' SIP determination that no sources are subject to BART for PM. A discussion of the amendments to the Texas SO_2 Trading Program we are finalizing in today's final action and explanation of how the trading program satisfies the regulatory requirements for BART alternatives are discussed below in sections III.A.1 and III.A.2, respectively. This final rule is promulgated pursuant to CAA section 307(d). This includes our affirmation of the several aspects of the FIP promulgating the Texas SO_2 Trading Program, amendments to certain provisions of the FIP, which are 307(d)-

[52] *Id.* 61856-57.

listed actions, *see* 307(d)(1)(B). In addition, EPA exercises its discretion under 307(d)(1)(V) to treat the affirmation of our approval of parts of the 2009 Texas Regional Haze SIP as also an action subject to 307(d) requirements and procedural protections.

1. Amendments to the Texas SO_2 Trading Program

In response to certain comments we received during the public comment period for the August 2018 proposal to affirm the October 2017 FIP, we proposed revisions to the Texas SO_2 Trading Program in a supplemental proposal published on November 14, 2019.[53] We proposed to make four sets of amendments to the Texas SO_2 Trading Program: (1) the addition of assurance provisions; (2) revisions to the Supplemental Allowance Pool allocation provisions; (3) termination of the opt-in provisions; and (4) revision of the allowance recordation provisions. We are finalizing these amendments to the Texas SO_2 Trading Program, with certain modifications. We are also correcting a 2-ton error we made in the allowance allocation for El Paso Electric's Newman Plant due to a unit-identification error, thereby increasing the trading program budget from 238,393 tons to 238,395 tons. The amendments we are finalizing in today's action strengthen the Texas SO_2 Trading Program and increase its consistency with CSAPR. These amendments are discussed in the paragraphs that follow.

Addition of Assurance Provisions. In order to maintain consistency with the CSAPR program and to provide additional support for our determination that SO_2 emissions under the Texas SO_2 Trading Program will remain below the requisite level on an annual basis, we are taking final action to add assurance provisions to the Texas SO_2 Trading Program. To set the assurance level, we are relying on the same analysis and methodology that were used to set

[53] 84 FR 61850 (Nov. 14, 2019).

assurance levels in the original CSAPR rulemaking while accounting for the fact that the Texas SO_2 Trading Program is intrastate-only (*i.e.,* does not permit interstate trading). As discussed in our supplemental proposal, EPA determined in the CSAPR rulemaking that, on a state-specific basis for Texas, the statistical percentage measure representing the maximum expected one-year deviation from the state's average annual fossil fuel consumption for electricity generation was seven percent.[54] Applying that same percentage to the current Texas SO_2 Trading Program budget, EPA is finalizing a variability limit for Texas at 16,688 tons, which is seven percent of the corrected trading budget of 238,395 tons. The assurance level we are finalizing is the sum of the budget and the variability limit, or 255,083 tons, and we are making this assurance level effective beginning with the 2021 compliance period and for each period thereafter. We are also taking final action to amend the Texas SO_2 Trading Program's regulations to impose a penalty surrender ratio of three allowances for each ton of emissions in any year in excess of the 255,083-ton assurance level. We are taking final action to impose the penalty proportionately to emissions from those groups of sources represented by a common designated representative that emit in excess of the groups' annual allocations of allowances. Thus, if the total emissions of all sources in the program in any year exceed the annual program budget by more than a variability limit of 16,688 tons, the emissions over the assurance level will trigger a requirement for some sources to surrender three allowances for each ton of emissions over the assurance level, providing a strong disincentive against emissions exceeding the assurance level.

We are taking final action to add new provisions at multiple locations in the Texas SO_2 Trading Program regulations at 40 CFR part 97, subpart FFFFF (40 CFR 97.901 through 97.935) to add these assurance provisions. In § 97.902, new definitions of several terms used in the

[54] *Id.* 61853.

assurance provisions ("assurance account," "common designated representative," "common designated representative's assurance level," and "common designated representative's share") are being added in this final action. New § 97.906(c)(2) and(c)(3)(ii) set forth the central requirement of the assurance provisions – namely, that if SO_2 emissions from all covered sources in 2021 or any subsequent year collectively exceed the program's assurance level, then the owners and operators of the groups of sources determined to be responsible for the collective exceedance would be required to surrender allowances totaling twice the amount of the exceedance by a specified deadline, in addition to the allowances surrendered to account for the sources' total emissions. New § 97.910(b) and (c) establish the variability limit that would be added to the trading program budget to determine the amount of the assurance level. New § 97.920(b) provides for the establishment of assurance accounts, when appropriate, to hold the additional allowances to be surrendered. New § 97.925 sets forth additional procedures for EPA's administration of and sources' compliance with the assurance provisions. In addition to adding the provisions discussed above, in §§ 97.906 and 97.920, we are also taking final action to renumber and update internal cross-references to reflect the added and renumbered paragraphs. Finally, we are making revisions to existing language at §§ 97.902 (definitions of "general account" and "Texas SO_2 Trading Program allowance deduction"), 97.906(b)(2), 97.913(c), 97.926(b), 97.928(b), and renumbered 97.906(c)(4)(ii) to integrate the new assurance provisions with various existing provisions of the Texas program regulations.

As discussed in our November 2019 supplemental proposal, in addition to being consistent with the original CSAPR methodology for setting assurance levels, an assurance level set at 255,083 tons is appropriate for the Texas SO_2 Trading Program because it provides further support for our October 2017 finding that the Texas SO_2 Trading Program will result in SO_2

emission levels from Texas EGUs that are similar to or less than the emission levels from Texas EGUs that would have been realized from participation in the SO_2 trading program under CSAPR. Additionally, at an assurance level of 255,083 tons of emissions annually, EPA has high confidence that emissions will be below the amount assumed in the BART-alternative sensitivity analysis utilized for the 2012 CSAPR Better than BART determination (*i.e.*, 317,100 tons), and thus visibility levels at Class I areas impacted by sources in Texas are anticipated to be at least as good as the levels projected in the 2012 analysis that assumed Texas would be in the larger CSAPR SO_2 trading program.[55]

The language of the revisions to the Texas SO_2 Trading Program regulations we are finalizing in this final rulemaking would generally parallel the analogous language from the CSAPR regulations at 40 CFR part 97, subparts AAAAA through EEEEE, streamlined to reflect the Texas program's narrower applicability (*i.e.*, specific units located only in Texas, excluding any new units built either in Texas or in Indian country within Texas' borders). The only substantive differences from the analogous CSAPR assurance provisions concern the approach used to impute allocation amounts – for use in apportioning responsibility for any collective exceedance of the assurance level – to any units that do not receive actual allowance allocations from the trading program budget. Under CSAPR, the only units potentially in this situation are new units that do not receive allowance allocations from the CSAPR new unit set-asides. The CSAPR regulations include a methodology for computing unit-specific imputed allocation amounts based on several data elements relating to the new units' design and potential operation.[56] In contrast, under the Texas SO_2 Trading Program, the only units potentially in this

[55] Id.
[56] *See, e.g.*, paragraph (3) of the definition of "common designated representative's share" at 40 CFR 97.702.

situation would be existing units that have ceased operation for an extended period, thereby losing their allocations from the trading budget under § 97.911(a), and that subsequently resume operation.[57] Because the Texas SO_2 Trading Program regulations already identify the unit-specific allowance allocations that these units would formerly have received from the trading budget, the Texas SO_2 Trading Program assurance provisions we are finalizing in this final rulemaking would use these previously established amounts for purposes of assurance provision calculations instead of requiring new imputed allocation amounts to be computed according to the more complex methodology in the CSAPR assurance provisions. The simpler approach we are finalizing for the Texas SO_2 Trading Program assurance provisions appears at paragraph (2) of the new definition of "common designated representative's assurance level" we are finalizing in § 97.902.

Revisions to the Supplemental Allowance Pool Allocation Provisions. All sources required to participate in the Texas SO_2 Trading Program have the flexibility to transfer allowances among multiple participating units under the same owner/operator when planning operations. As discussed in section II.B of this final action, the October 2017 final rule included additional flexibility to transfer allowances for Coleto Creek, but given the subsequent merger of Dynegy with Vistra, which owns other units that are subject to the trading program, Coleto Creek now has the same flexibility as other sources required to participate in the trading program to transfer allowances among multiple participating units under the same ownership when

[57] Although the owners and operators of a unit in this situation might receive an allocation of allowances from the Supplemental Allowance Pool under § 97.912 based in part on the unit's emissions following resumption of operations, under the Texas program assurance provisions, any allocations of allowances from the Supplemental Allowance Pool would not be considered when apportioning responsibility for a collective exceedance of the assurance level.

planning operations. In light of this, we are taking final action to eliminate the additional flexibility originally offered under the trading program for Coleto Creek.

We are also finalizing amendments to the methodology for allocating allowances from the Supplemental Allowance Pool such that allowance allocations are in proportion to each owner's total emissions in excess of the owner's total base allowance allocations instead of in proportion to each individual source's emissions in excess of the individual source's base allowance allocation. Comments we received on our August 2018 proposal and our November 2019 supplemental proposal generally indicated support for this change.[58] We find that this change would make the methodology for allocating allowances more equitable and is also consistent with the rationale for eliminating the special flexibility in the existing regulations for Coleto Creek. For consistency with the new variability limit of 16,688 tons, we are also reducing the number of allowances that can be allocated from the Supplemental Allowance Pool in any year to 16,688 tons plus any allowances added to the pool in that year from retired units. The effect of this revision is that the total number of allowances that can be issued in any year, considering both initial allocations and allowances issued from the Supplemental Allowance Pool, will not exceed the program's assurance level of 255,083 tons. This revision to the Supplemental Allowance Pool provisions is consistent with and reinforces the disincentive created by the assurance provisions against emissions exceeding the assurance level.

To implement these modifications to the Supplemental Allowance Pool, we are finalizing several revisions to §§ 97.911 and 97.912. In § 97.912, we are editing paragraph (a) to limit

[58] Supportive comments were submitted by most of the sources covered by the Texas SO_2 Trading Program, except for LCRA who did not specifically comment on the reduction in the number of allowances that can be allocated from the Supplemental Allowance Pool. Supportive comments can be found in the docket for this action at Document IDs EPA-R06-OAR-2016-0611-0157, EPA-R06-OAR-2016-0611-0127, EPA-R06-OAR-2016-0611-0163, EPA-R06-OAR-2016-0611-0156.

applicability of the current allocation methodology to the 2019 and 2020 control periods, and we are adding a new paragraph (b) that sets forth the revised allocation methodology for the control periods in 2021 and subsequent years. We are also renumbering two existing paragraphs of the section to accommodate the new paragraph (b) and are updating internal cross-references to reflect the renumbering and to integrate the provisions of the revised allocation methodology with other existing provisions. We are adding new § 97.912(b)(1) that addresses the revised allocation methodology and sets forth a procedure for assigning units into groups under common ownership called "affiliated ownership groups." Under the new procedure, the group assignments will remain constant unless and until revised by EPA to reflect an ownership transfer. The initial group assignments for all covered units are specified in a new column that we are adding to the existing allowance allocation table in § 97.911(a)(1). Renumbered § 97.912(d) is revised to reduce the cap on the number of allowances that can be allocated from the Supplemental Allowance Pool for any given control period starting in 2021 to 16,688 tons plus any allowances added to the pool in that year from retired units. Existing § 97.912(a)(3)(ii)(B) is revised to add the same procedure included in new § 97.912(b)(4)(i)(C) for adjusting allocation amounts up or down by one allowance as needed to address rounding errors. Finally, we are finalizing non-substantive revisions to § 97.911(a)(2) and (c)(5) that clarify that allowances from the trading budget that are transferred to the Supplemental Allowance Pool are not necessarily "allocated under" § 97.912, but instead are made available for "potential allocation in accordance with" § 97.912.

Termination of Opt-in Provisions. To address concerns that the opt-in provisions weakened the functional equivalence of the Texas SO_2 Trading Program to CSAPR and to be consistent with EPA's determination not to include opt-in provisions in the CSAPR trading

programs on the basis that opt-in provisions would undermine achievement of the CSAPR program's emission reduction objectives, we are taking final action to terminate the opt-in provisions in the Texas SO_2 Trading Program. As we discuss in the response to comments below, we find that this termination of the opt-in provisions will address concerns about the difficulty of distinguishing new emission reductions from reductions that opt-in sources would have made anyway, and the consequent likelihood that the amounts of allowances allocated to the sources would exceed their starting emissions levels and thus introduce "extra" allowances available to be traded to other sources. Our final action to terminate the opt-in provisions strengthens our finding that the Texas SO_2 Trading Program will result in SO_2 emission levels from Texas EGUs that are similar to or less than the emission levels from Texas EGUs that would have been realized from participation in the SO_2 trading program under CSAPR.

Because no units opted into the Texas SO_2 Trading Program for the 2019 or 2020 control periods and opting in is not allowed for any future control period, we are implementing our final action to terminate the opt-in provisions by removing the provisions from the regulations in their entirety. Specifically, §§ 97.904(b), 97.911(b), and 97.921(d), which concerned the procedure for opting in, allowance allocations for opt-in units, and recordation for opt-in units, respectively, are being removed. In addition, conforming revisions to reflect removal of the opt-in provisions are being made to the existing provisions at §§ 97.911(c)(5), 97.915(d), 97.930(b), 97.934(d)(1), and renumbered § 97.906(c)(3)(i).

Revision of Allowance Recordation Provisions. We are taking final action to condition any exceptions to scheduled allowance recordation activities on Texas' submission *and* EPA's approval of a SIP revision, rather than just on Texas' submission of a SIP revision. This revision will ensure that the program remains fully operational unless it is replaced by a SIP revision that

is approved by EPA as meeting the SO_2 BART requirements for the covered units. To implement our final revision to the allowance recordation provisions, we are amending three paragraphs of § 97.921. In § 97.921(a), we are deleting without replacement the language providing for a possible delay of recordation activities scheduled for November 1, 2018; the language is moot because the recordation date has already passed. In § 97.921(b), which governs future recordation of allowances allocated from the trading budget under § 97.911(a), we are revising the existing language to provide that future recordation activities will take place as scheduled unless provided otherwise in EPA's approval of a SIP revision replacing the provisions of subpart FFFFF. We are also adding the same revised condition to § 97.921(c), which governs future recordation of allowances allocated from the Supplemental Allowance Pool under § 97.912.

Error Correction Adjusting the Allocation for El Paso Electric's Newman Plant. Our last amendment to the Texas SO_2 Trading Program regulations in this action corrects a small error in the allowance allocations and budget established in the October 2017 FIP. In our October 2017 action, we determined that several units at El Paso Electric's Newman plant (ORIS 3456) should be included in the Texas SO_2 Trading Program, including "Newman unit 4." This "unit" is actually a multi-unit combined cycle system consisting of two gas- and oil-fired combustion turbine units serving a common steam turbine-generator. The combustion turbine units are identified in the databases used for the CSAPR SO_2 program as "Newman unit **4" and "Newman unit **5." Both of these combustion turbine units are BART-eligible and both are properly included in the Texas SO_2 Trading Program pursuant to the evaluation of "Newman unit

4" set forth in our October 2017 action.[59] However, in establishing the allowance allocations and budgets in our October 2017 action, while we correctly accounted for the 2-ton CSAPR allocation to Newman unit **4, we mistakenly omitted the 2-ton CSAPR allocation to Newman unit **5. We are correcting our omission in this action. Specifically, in Table 1 in § 97.911(a)(1), we are relabeling the existing entry for "Newman unit 4" as "Newman unit **4" and adding a new entry for "Newman unit **5" with an additional 2-ton allocation, and in § 97.910(a)(1), we are increasing the Texas SO_2 Trading Program budget by 2 tons to 238,395 tons.[60] We find that these corrections are entirely consistent with the methodology and rationale we set forth when establishing the allocations and budget in our October 2017 action. Because the otherwise applicable recordation deadlines for the allowances allocated to Newman unit **5 for the control periods from 2019 through 2024 will have already passed by the effective date of this action, new § 97.921(f) establishes December 31, 2020 as the delayed recordation deadline for these allocations. Finally, language is added to § 97.912(a)(1) and (2) clarifying that allocations under § 97.911 are not considered in determining a source's eligibility to receive allocations from the Supplemental Allowance Pool unless the allocations have actually been recorded in the source's compliance account under § 97.921.

2. Analysis of Texas SO_2 Trading Program as a BART Alternative

We are taking final action to affirm our October 17, 2017 final action promulgating the Texas SO_2 Trading Program under 40 CFR 52.2312 and subpart FFFFF of part 97 as a BART

[59] See 82 FR at 48354-57, where we identify "Newman unit 4" as a BART-eligible source and discuss our evaluation for determining the inclusion of units in the Texas SO_2 Trading Program.
[60] Both Newman unit **4 and Newman unit **5 have participated in the Texas SO_2 Trading Program since January 1, 2019. El Paso Electric has monitored and reported the SO_2 emissions for both units under the program.

alternative, with the amendments discussed in Section III.A.1. We are affirming our determination that the Texas SO_2 Trading Program, including the addition of the assurance provisions and other amendments to the program we are finalizing in this action, will result in future EGU emissions in Texas that will be less than the SO_2 emission levels used in the 2012 Better than BART demonstration for Texas EGU emissions assuming CSAPR participation.[61] Additionally, the aggregate visibility impact from Texas EGU emissions under the trading program will be similar to or less than what would have been realized from Texas participation in the CSAPR SO_2 trading program.[62] Further, on the basis of the denial of a petition for reconsideration in a separate action[INSERT FN WITH CITATION TO DENIAL], EPA can now affirm that it has fully accounted for the stringency of the Texas program in the CSAPR Better-than-BART analysis (including accounting for the effects of Texas no longer being a part of the interstate trading region of CSAPR). We are taking final action to affirm our determination that the Texas SO_2 Trading Program satisfies the Regional Haze Rule requirements for BART alternatives, and therefore satisfies the SO_2 BART requirements for the BART-eligible coal-fired EGUs and gas- and gas/fuel oil-fired EGUs identified in the table below.

Table 1. Texas EGUs Subject to the FIP SO_2 Trading Program

Owner/Operator	Units	BART-Eligible
AEP	Welsh Power Plant Unit 1	Yes
	Welsh Power Plant Unit 2	Yes
	Welsh Power Plant Unit 3	No
	H W Pirkey Power Plant Unit 1	No

[61] 83 FR 43586, 43591 (Aug. 27, 2018).
[62] *Id.* 43592.

	Wilkes Unit 1†	Yes
	Wilkes Unit 2†	Yes
	Wilkes Unit 3†	Yes
CPS Energy	JT Deely Unit 1	Yes
	JT Deely Unit 2	Yes
	Sommers Unit 1†	Yes
	Sommers Unit 2†	Yes
LCRA	Fayette / Sam Seymour Unit 1	Yes
	Fayette / Sam Seymour Unit 2	Yes
Vistra	Big Brown Unit 1	Yes
	Big Brown Unit 2	Yes
	Coleto Creek Unit 1	Yes
	Martin Lake Unit 1	Yes
	Martin Lake Unit 2	Yes
	Martin Lake Unit 3	Yes
	Monticello Unit 1	Yes
	Monticello Unit 2	Yes
	Monticello Unit 3	Yes
	Sandow Unit 4	No
	Stryker Unit ST2†	Yes
	Graham Unit 2†	Yes
NRG	Limestone Unit 1	No
	Limestone Unit 2	No
	WA Parish Unit WAP4†	Yes
	WA Parish Unit WAP5	Yes
	WA Parish Unit WAP6	Yes
	WA Parish Unit WAP7	No
Xcel	Tolk Station Unit 171B	No
	Tolk Station Unit 172B	No
	Harrington Unit 061B	Yes
	Harrington Unit 062B	Yes
	Harrington Unit 063B	No
El Paso Electric	Newman Unit 2†	Yes
	Newman Unit 3†	Yes
	Newman Unit **4†	Yes
	Newman Unit **5†	Yes

†Gas-fired or gas/fuel oil-fired units

Under 40 CFR 51.308(e)(2), a State may opt to implement or require participation in an emissions trading program or other alternative measure rather than to require sources subject to BART to install, operate, and maintain BART. Among other things, such an emissions trading program or other alternative measure must achieve greater reasonable progress than would be achieved through the installation and operation of BART. In the paragraphs that follow, we summarize the BART alternative requirements under section 51.308(e)(2) and explain how the Texas SO_2 Trading Program satisfies each requirement.

Section 51.308(e)(2)(i) requires a demonstration that the emissions trading program or other alternative measure will achieve greater reasonable progress than would have resulted from the installation and operation of BART at all sources subject to BART in the State and covered by the alternative program. This demonstration must be based on the criteria listed under section 51.308(e)(2)(i)(A)-(E).

Section 51.308(e)(2)(i)(A). As part of the demonstration that the emissions trading program or other alternative measure will achieve greater reasonable progress than BART, the Regional Haze Rule requires that a list of all BART-eligible sources within the state be provided. In our October 2017 final action, we finalized our list of all BART-eligible sources in Texas,[63] which serves to satisfy 51.308(e)(2)(i)(A). As explained in our August 27, 2018 affirmation proposal,[64] we did not reopen the identification of BART-eligible sources and thus did not request comment on this element.

Section 51.308(e)(2)(i)(B). This provision requires that a list of all BART-eligible sources and all BART source categories covered by the alternative program be provided. The regulations

[63] See 82 FR at 48356 (final action) and 82 FR at 918 (proposed action).
[64] 83 FR at 43598.

do not require inclusion of every BART source category or every BART-eligible source within a BART source category in an alternative program, but each BART-eligible source in the state must be subject to the requirements of the alternative program, have a federally enforceable emission limitation determined by the state and approved by EPA as meeting BART in accordance with section 302(c) or section 51.308(e)(1), or be otherwise addressed under section 51.308(e)(1) or (e)(4). Our October 2017 final action and our August 2018 affirmation proposal included a list of all EGUs covered by the trading program. We are finalizing our affirmation of the list of BART-eligible EGUs in Texas covered by the alternative program with one minor non-substantive change,[65] satisfying the first requirement of 51.308(e)(2)(i)(B). Table 1 above lists all participating units and identification of BART-eligible participating units. All BART-eligible coal-fired units, some additional coal-fired EGUs, and some BART-eligible gas-fired and oil-and-gas-fired units are covered by the alternative program. This coverage and our determination in a previous final action that the BART-eligible gas-fired and oil-and-gas-fired EGUs not covered by the program are not subject-to-BART for NO_X, SO_2 and PM satisfy the second requirement of 51.308(e)(2)(i)(B). We note that EPA's determination that these EGU units not covered by the program are not subject to BART was finalized in our October 2017 final action,[66] and we did not reopen that determination in the August 2018 proposal.[67]

[65] As discussed in section III.A.2, "Newman unit 4" at the El Paso Electric Newman plant (ORIS 3456), which is included in the Texas SO_2 Trading Program, is actually a multi-unit combined cycle system consisting of two gas- and oil-fired combustion turbine units (Newman unit **4 and Newman unit **5) serving a common steam turbine-generator. Both of these combustion turbine units are BART-eligible, and both are properly included in the Texas SO_2 Trading Program. In this final action, we are not identifying any new units as BART-eligible, we are merely relabeling the already-identified BART-eligible "Newman unit 4" as its components: "Newman unit **4" and "Newman unit **5." Thus, we do not consider this change to be substantive.
[66] 82 FR at 48328.
[67] 83 FR at 43598, footnote 80.

Section 51.308(e)(2)(i)(C). This provision requires an analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each source within the state subject to BART and covered by the alternative program. This analysis must be conducted by making a determination of BART for each source subject to BART and covered by the alternative program as provided for under section 51.308(e)(1), unless the emissions trading program or other alternative measure has been designed to meet a requirement other than BART. In such a case, the state may determine the best system of continuous emission control technology and associated emission reductions for similar types of sources within a source category based on both source-specific and category-wide information, as appropriate. As discussed in our August 2018 proposal, we considered the question of whether, in applying this portion of the Regional Haze Rule, we should take as the baseline the application of source-specific BART at the covered sources.[68] We have determined not to take this approach here, given that 51.308(e)(2)(i)(C) provides for an exception (which we are exercising) to the requirement for source-specific BART determinations for the covered sources. The regulations allow for the BART "benchmark" to be set using "category-wide" information when the alternative measure "has been designed to meet a requirement other than BART (such as the core requirement to have a long-term strategy to achieve the reasonable progress goals established by States)." *See* 40 CFR 51.308(e)(2)(i)(C). As discussed below, category-wide information may include, for example, the use of "presumptive" BART emission limits for a particular source category, such as coal-fired EGUs. The Texas SO_2 Trading Program meets the conditions of the exception allowed under section 51.308(e)(2)(i)(C), as discussed in sections III.B and V.B of this final notice, because it has been designed to meet Texas' interstate visibility

[68] 83 FR at 43599.

transport requirements under CAA section 110(a)(2)(D)(i)(II). This BART alternative extends beyond all BART-eligible coal-fired units to include a number of additional coal-fired EGUs, and some BART-eligible gas-fired and oil-and-gas-fired units, capturing the majority of emissions from EGUs in the state, and is designed to provide the measures that are needed to address interstate visibility transport requirements for several NAAQS. This is because for all sources covered by the Texas SO_2 Trading Program, those sources' CSAPR allocations for SO_2 are incorporated into the BART alternative, and the Texas SO_2 Trading Program ensures more emission reductions of SO_2 than the level of emissions reductions relied upon by other states during consultation and assumed by other states in their own regional haze SIPs, including their reasonable progress goals for their Class I areas.

As allowed under section 51.308(e)(2)(i)(C), rather than using source-specific BART at the covered sources, we are relying on the determinations of BART and associated emission reductions for EGUs that were used in our 2012 determination that showed that CSAPR as finalized and amended in 2011 and 2012 achieves more reasonable progress than BART ("CSAPR Better than BART"). This analysis establishes by the clear weight of evidence that the Texas SO_2 Trading Program, which is modeled on the CSAPR trading programs, will provide for greater reasonable progress than BART in Texas. These determinations of the best system of continuous emission control technology and associated emission reductions for EGUs that were used in our 2012 CSAPR Better-than-BART demonstration were based largely on category-wide information, including the use of "presumptive" BART limits.[69] EPA finds that reliance on the category-wide BART analysis from the 2012 CSAPR Better than BART demonstration is appropriate here and that the BART determinations derived from that CSAPR Better-than-BART

[69] 77 FR at 33649-50.

demonstration are an appropriate BART benchmark for comparison against the Texas SO_2 Trading Program given that the Texas SO_2 Trading Program is modeled on the CSAPR trading programs.

We note that in our August 2018 proposal, we proposed to affirm our finding that the Texas SO_2 trading program is also designed to be part of the long-term strategy needed to meet the reasonable progress requirements of the Regional Haze Rule, which remain outstanding after the remand of our January 2016 FIP addressing Texas' reasonable progress obligations by the Fifth Circuit Court of Appeals. After consideration of the comments we received addressing this issue during the public comment period for our August 2018 proposal, we are not finalizing our affirmation of the finding that the Texas SO_2 trading program is also designed to be part of the long-term strategy needed to meet the reasonable progress requirements of the Regional Haze Rule at this time. While the Texas SO_2 trading program certainly contributes to reasonable progress toward meeting the visibility goals of the regional haze program through enforceable reductions of a visibility pollutant from baseline emission levels, EPA has made clear that it intends to address the specific regulatory requirements for the long-term strategy for Texas through a separate action.[70] However, this does not impact our determination that the Texas SO_2 trading program satisfies the requirements of section 51.308(e)(2)(i)(C) given that the trading program is designed to provide the measures that are needed to address interstate visibility transport requirements for several NAAQS, and this sufficiently meets the criteria under section 51.308(e)(2)(i)(C) allowing us to exercise the exception allowed under the provision. Thus, we have met the requirements of section 51.308(e)(2)(i)(C).

[70] 83 FR at 43596 n.63.

Section 51.308(e)(2)(i)(D). This provision requires an analysis of the projected emissions reductions achievable through the trading program or other alternative measure. Our analysis is that the Texas trading program will effectively limit the aggregate annual SO_2 emissions of the covered EGUs to be no higher than the assurance level of 255,083 tons. The Texas SO_2 Trading Program is an intrastate cap-and-trade program for listed covered sources in the State of Texas modeled after the EPA's CSAPR SO_2 Group 2 Trading Program. Authorizations to emit SO_2, known as allowances, are allocated to the affected units as listed in Table 1 above. As discussed elsewhere, the program includes a Supplemental Allowance Pool, as revised in this final action, with additional allowances that may be allocated to subject units and sources to provide compliance assistance. The average total annual allowance allocation for all covered sources is 238,395 tons, with an additional 10,000 tons allocated to the Supplemental Allowance Pool. In addition, while the Supplemental Allowance Pool may grow over time as unused supplemental allowances remain available and allocations from retired units are placed in the pool, the total number of allowances that can be allocated to sources in a control period from the supplemental pool beginning with the 2021 compliance period and for each period thereafter is limited to a maximum 16,688 tons plus the amount of any allowances placed in the pool that year from retired units and corrections. Therefore, the total annual average emissions for the covered sources will be less than or equal to 248,395 tons. Although there will be some year-to-year variability, that variability will be constrained by the addition of an assurance level in this final action. We are finalizing an assurance level of 255,083 tons per year for the Texas SO_2 Trading Program, which, in light of the three-for-one penalty surrender ratio imposed on emissions exceeding that level, represents the highest annual SO_2 emissions anticipated from units subject

to the Texas program. In reality, there is no reasonable expectation that actual emissions would even approach this level in light of ongoing changes in the electric-generating sector in Texas.

Further, the projected average SO_2 emission reduction that will be achieved by the program in any given year, relative to any selected historical baseline year, would be the difference between the aggregate historical baseline emissions of the covered units and the average total annual allocation of 238,395 SO_2 tons plus a Supplemental Allowance Pool budget of 10,000 tons, or 248,395. As detailed in our October 2017 final rule, for the purpose of this analysis, we selected 2014 as the baseline year.[71] The aggregate 2014 SO_2 emissions of the covered EGUs were 309,298 tons per year, while the average total annual allocation for the covered EGUs is 238,395 SO_2 tons plus a Supplemental Allowance Pool budget of 10,000 tons, or 248,395 tons per year. Therefore, compared to 2014 emissions, the Texas trading program is projected to achieve an average reduction of approximately 60,903 tons per year from the covered units.[72] (We note that with the termination of the opt-in provisions in this final action, there is no need for this comparison to include consideration of the 2014 emissions from those units formerly eligible to opt into the trading program.)

We also note that the Regional Haze Rule provides that the baseline period for the first planning period is 2000-2004.[73] The Texas SO_2 Trading Program, with the assurance level we

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[71] Texas sources were subject to the CSAPR SO_2 trading program in 2015 and 2016 but are no longer subject to that program. We therefore select 2014 as the appropriate most recent year for comparing the aggregate historical baseline emissions of the covered units to the average total annual allocation for purposes of estimating the SO_2 emission reduction that will be achieved by the program.

[72] We note that for other types of alternative programs that might be adopted under 40 CFR 51.308(e)(2), the analysis of achievable emission reductions could be more complicated. For example, a program that involved economic incentives instead of allowances or that involved interstate allowance trading would present a more complex situation in which achievable emission reductions could not be calculated simply by comparing aggregate baseline emissions to aggregate allowances.

[73] See 40 CFR 51.308(d)(2)(i)

are finalizing in this action, achieves significantly lower emissions relative to the baseline period using 2002 as the baseline. As shown in Table 2, the total combined SO_2 emissions from Texas EGUs participating in the Texas SO_2 Trading Program were 515,526 tons in 2002. The combined actual SO_2 emissions from all Texas EGUs (both those in the Texas SO_2 Trading Program and those not in the program) were 562,516 tons in 2002.[74] By comparison, the Texas SO_2 Trading Program budget is 238,395 SO_2 tons (plus a Supplemental Allowance Pool budget of 10,000 tons). Thus for the covered units, the program achieves average annual emissions from the covered units of 248,395 tons. Compared with the 2002 baseline for these units, the program achieves 267,131 tons of reductions.

When we account for Texas units that were in CSAPR but not in the current program, we see a similar result using a conservative assumption about those units' emissions going forward. (As we explained in our supplemental proposal, our comparison of the Texas program to CSAPR should take account of emissions from these units.[75]) For illustrative purposes, in this comparison we will also use the higher figure of the assurance level for the Texas program rather than the average annual allocation. When our conservative assumption of 35,000 tons as the future combined SO_2 emissions for units that were in the CSAPR program but not covered by the Texas SO_2 Trading Program is added to the highest annual SO_2 emissions anticipated from units under the Texas SO_2 Trading Program, 255,083 tons per year (i.e., the assurance level for the program), the total figure is 290,083 tons per year. A comparison of these figures reveals that the combined actual SO_2 emissions from all Texas EGUs in 2002 during the baseline period (562,516 tons) were considerably higher than the highest annual SO_2 emissions anticipated from

[74] See Excel spreadsheet file "Texas EGU 2002 SO2 Emissions.xlsx," which is available in the docket for this action.
[75] 84 FR at 61853.

all Texas EGUs anticipated from operation of the Texas SO_2 Trading Program (290,083 tons), including the CSAPR units not included in that program – a difference of 272,433 tons. The emission reductions that are secured by the Trading Program contribute to improvements in visibility from the baseline period and are permanent and enforceable as part of the long-term strategy for the State of Texas.

Table 2. 2002 SO_2 Emissions from Texas EGUs Subject to the FIP SO_2 Trading Program†

Owner/Operator	Units	SO_2 Emissions (tons)
AEP	Welsh Power Plant Unit 1	12,259
	Welsh Power Plant Unit 2	11,937
	Welsh Power Plant Unit 3	11,584
	H W Pirkey Power Plant Unit 1	19,476
	Wilkes Unit 1	1
	Wilkes Unit 2	2
	Wilkes Unit 3	3
CPS Energy	J T Deely Unit 1	9,936
	J T Deely Unit 2	11,577
	Sommers Unit 1	1
	Sommers Unit 2	2
LCRA	Fayette/Sam Seymour Unit 1	13,617
	Fayette/Sam Seymour Unit 2	16,401
Vistra	Coleto Creek Unit 1	14,288
	Big Brown Unit 1	43,413
	Big Brown Unit 2	34,448
	Martin Lake Unit 1	24,837
	Martin Lake Unit 2	22,539
	Martin Lake Unit 3	19,023
	Monticello Unit 1	28,643
	Monticello Unit 2	34,700
	Monticello Unit 3	22,976
	Sandow Unit 4	23,330
	Stryker ST2	43
	Graham Unit 2	23
NRG	Limestone Unit 1	17,009
	Limestone Unit 2	13,830

	W A Parish Unit WAP4	4
	W A Parish Unit WAP5	21,310
	W A Parish Unit WAP6	18,006
	W A Parish Unit WAP7	18,459
Xcel	Tolk Station Unit 171B	12,703
	Tolk Station Unit 172B	12,171
	Harrington Station Unit 061B	9,197
	Harrington Station Unit 062B	8,927
	Harrington Station Unit 063B	8,844
El Paso Electric	Newman Unit 2	1
	Newman Unit 3	1
	Newman Unit **4	1
	Newman Unit **5	1
Total Combined 2002 SO_2 Emissions		515,526

† Based on 2002 Clean Air Markets Division (CAMD) data.

Section 51.308(e)(2)(i)(E). This provision requires a determination, under the specific criteria laid out at 40 CFR 51.308(e)(3) or otherwise based on the clear weight of evidence, that the trading program or other alternative measure achieves greater reasonable progress than would be achieved through the installation and operation of BART at the covered sources. The BART alternative EPA is taking final action to affirm here is supported by the clear weight of the evidence. Specifically, with respect to SO_2 emissions from the covered BART-eligible units, because the Texas SO_2 trading program, as amended, is designed to ensure that emissions levels in each year under the trading program are similar to or less than what would have been realized from Texas EGUs from participation in the SO_2 trading program under CSAPR, EPA can rely on the 2012 and 2017 findings that CSAPR achieves greater reasonable progress than BART as evidence that the Texas program achieves greater reasonable progress than BART, in the context of the continued operation of the CSAPR ozone-season NO_X trading program (to which units in

Texas remain subject) and the CSAPR annual NO_X and SO_2 trading programs.[76] As used in our 51.308(e)(2)(i)(D) analysis above and laid out in more detail below, a conservative estimate for the maximum total annual emissions from all EGUs in Texas that can be anticipated with the Texas program in place is 290,083 tons. As explained below, this is less than the maximum total annual emissions assumed for Texas under CSAPR in the CSAPR Better than BART analysis, which is 317,100 tons. Thus, we are relying on the demonstration in the 2012 and 2017 CSAPR Better than BART rules (as reaffirmed in the separate denial of petition for reconsideration of the 2017 rule) to show that the clear weight of evidence demonstrates that the Texas SO_2 Trading Program, which is modeled on the CSAPR trading programs, provides for greater reasonable progress than BART in Texas.

Because the Texas program is designed to achieve greater SO_2 emission reductions than CSAPR in Texas, we are finalizing our affirmation that it is appropriate to continue to rely on the 2012 CSAPR Better-than-BART demonstration, which includes the treatment of Texas as a CSAPR state, as reaffirmed in September 2017 (and again affirmed in EPA's denial of the November 28, 2017 petition for reconsideration, as discussed under section I.D of this final action [INSERT CITATION]). That analysis compared CSAPR in Texas and elsewhere in the country to presumptive BART emission limits for the sources in Texas (as elsewhere) and is described in greater detail in our August 2018 proposed affirmation. *See* 83 FR 43586, at 43594-95. While Texas is no longer in the CSAPR trading program for SO_2 itself, we find that it is appropriate for us to continue relying here on the CSAPR Better-than-BART analysis for Texas given that the Texas SO_2 Trading Program is specifically designed to mimic the CSAPR program

[76] EPA's determination that Texas' participation in CSAPR for ozone-season NO_X satisfies NO_X BART for EGUs is final and we did not reopen that determination in our August 2018 proposal or our November 2019 supplemental proposal.

and the amendments to the Texas trading program EPA is finalizing in this action allow EPA to affirm that the Texas program is similar to or more stringent than CSAPR in Texas. As such, the stringency of the Texas program is sufficient to allow for the continued use of the CSAPR Better-than-BART analysis for Texas.

Although it is not within the scope of this action, EPA notes that the 2017 CSAPR Better than BART finding has been reaffirmed through the denial of a petition for reconsideration (cite). In our response to the petition for reconsideration, EPA explains that it has fully accounted for the stringency of the Texas trading program as well as the potential for emission shifting back into the remaining CSAPR region with the removal of Texas into its own intrastate trading region.(cite) To the extent that this potential for emission shifting posed any concern that the CSAPR Better than BART analysis could not be relied upon by Texas or other states, this issue has been resolved through the analysis set forth in that denial.

We are finalizing our determination that anticipated maximum potential SO_2 emissions in Texas under the Texas SO_2 Trading Program BART alternative are less than the SO_2 emission levels from Texas EGUs that were forecast in the CSAPR Better than BART demonstration assuming their participation in the CSAPR SO_2 trading program.[77] In our October 2017 final rule and the August 2018 proposal to affirm that rule, we noted the results of the sensitivity analysis[78] for the 2012 final "CSAPR Better than BART" rulemaking, namely that CSAPR was expected to provide for greater reasonable progress than BART nationwide even with potential SO_2 emissions from Texas EGUs under CSAPR as high as 317,100 tons.[79] In our October 2017 final

[77] *See* Technical Support Document for Demonstration of the Transport Rule as a BART Alternative, Docket ID No. EPA-HQ-OAR-2011- 0729-0014 (December 2011), available in the docket for this action.
[78] *See* Sensitivity Analysis Accounting for Increases in Texas and Georgia Transport Rule State Emissions Budgets, Docket ID No. EPA-HQ-OAR-2011-0729-0323 (May 29, 2012), available in the docket for this action.
[79] 83 FR at 43595.

rule and the August 2018 proposal to affirm that rule, EPA used this benchmark (317,100 tons of SO_2 emissions per year) to gauge whether the Texas SO_2 Trading Program was sufficiently stringent for EPA to continue to rely on the BART-alternative analysis we conducted in the 2012 "CSAPR Better than BART" rulemaking. In the August 2018 proposal, EPA proposed to affirm that the weight of evidence supported the conclusion that the Texas SO_2 Trading Program met the requirements of a BART alternative.[80] Informed by comments we received on the August 2018 proposal, we issued a supplemental proposal in November 2019 that proposed to amend a number of provisions of the Texas SO_2 Trading Program, including the addition of an assurance level. EPA's proposed analysis in November of 2019 accompanying those amendments, updates in certain respects and replaces the analysis of the Texas program's stringency for purposes of determining the appropriateness of relying on the CSAPR Better than BART findings for the Texas BART-alternative program.

As explained in the November 2019 supplemental proposal and in Section III.A.I above, an assurance level represents the total level of annual emissions above which units participating in the program will be penalized with a higher allowance surrender ratio than the one-to-one ratio that applies to emissions below the assurance level. The assurance level we proposed was determined by relying on the same analysis and methodology that were used to set assurance levels in the original CSAPR rulemaking.[81] Using this methodology, EPA proposed a variability limit for Texas set at 16,688 tons, which is seven percent of the original trading budget of 238,393 tons. We are finalizing the variability limits set at 16,688 tons with no change from

[80] 83 FR at 43602.
[81] *See* Power Sector Variability Final Rule TSD (July 2011), available at [HYPERLINK "https://www.epa.gov/csapr/power-sector-variability-final-rule-tsd"] and in the docket for this action.

proposal and in light of the minor correction to the trading program budget, as discussed in section III.A.1, we are finalizing an assurance level of 255,083 tons rather than the 255,081-ton assurance level we proposed in the November 2019 supplemental proposal. This 255,083-ton assurance level represents the highest annual SO_2 emissions anticipated from units subject to the Texas program.

In addition to being consistent with the original CSAPR methodology for setting assurance levels, EPA also believes that an assurance level set at 255,083 tons is appropriate for the Texas SO_2 Trading Program because it will strengthen the stringency of the Texas SO_2 Trading Program in terms of ensuring that annual emissions from participating units will remain below that level. This allows EPA to project with confidence emissions under the Texas SO_2 Trading Program for purposes of determining whether the trading program meets the requirements of a BART alternative.

In the modeling conducted for the proposed CSAPR Better-than-BART determination in 2011, projected SO_2 emissions from Texas' EGUs under CSAPR were 266,600 tons. Subsequent to performance of that modeling, the CSAPR SO_2 budget for Texas was increased by 50,517 tons. In the BART-alternative sensitivity analysis utilized for the final 2012 CSAPR Better-than-BART determination, EPA made the conservative assumption that SO_2 emissions from Texas EGUs under CSAPR could potentially increase by the full amount of the Texas budget increase, or up to 317,100 tons per year (266,600 + 50,517). (While this level of emissions would have exceeded Texas' CSAPR budget, it would not have been in excess of Texas' amended assurance level under the CSAPR program of 347,476 tons. In any case, the figure was solely intended to represent a conservative assumption that all allowances allocated under Texas' amended CSAPR budget would be emitted.) In that BART-alternative sensitivity analysis, EPA demonstrated that

CSAPR was expected to provide for greater reasonable progress than BART nationwide even with potential SO_2 emissions from Texas EGUs under CSAPR as high as 317,100 tons.[82] By comparison, the Texas SO_2 Trading Program has a budget of 238,395 SO_2 tons (plus 10,000 tons in the Supplemental Allowance Pool), and we are finalizing an assurance level of 255,083 tons in this final action.

In determining that the Texas program will perform at least as stringently as CSAPR would have, EPA also must account for the emissions from certain EGUs that would have been subject to CSAPR but are not included in the Texas program. Even with these emissions factored in, the Texas program is designed to ensure reductions similar to or greater than CSAPR. In our analysis in this final action, we are finalizing the more conservative emissions assumptions for these units provided in our November 2019 supplemental proposal. In our August 2018 proposal, we had used an assumption that emissions from these units could be as high as 27,500 tons per year.[83] As proposed in our November 2019 supplemental proposal,[84] we are updating our analysis by adjusting this assumption to 35,000 tons per year. Given that Texas units that were in the CSAPR program but not covered by the Texas SO_2 Trading Program had a combined maximum annual emission level of 34,129 tons over the past five years (2014–2018) and considering that several of these units have recently shut down or have been announced for shutdown in the near future,[85] EPA regards this as a conservative assumption for emissions performance from these units. Even when this conservative figure is added to the highest annual

[82] 83 FR at 43595.
[83] 83 FR 43602.
[84] 84 FR at 61853.
[85] *See* "Texas EGU SO2 emissions, 2014–2018.xlsx", available in the docket for this action. Sandow Station units 5A and 5B have been permanently retired. AEP has announced retirement of Oklaunion by September 2020. Gibbons Creek is currently not operating although it has not been officially retired.

SO_2 emissions anticipated from units under the Texas program, 255,083 tons per year (i.e., the assurance level for the program), the total figure is 290,083 tons per year. This figure is still 27,017 tons below the 317,100 ton per year emissions level EPA had used in the CSAPR Better-than-BART analysis.

In addition to finding that the differences in source coverage between the two trading programs do not affect EPA's determination, we also find that the relative stringency of the Texas SO_2 Trading Program as compared to CSAPR is further demonstrated in the following points, as discussed in our August 27, 2018 affirmation proposal:

- This BART alternative includes all BART-eligible coal-fired units in Texas, additional coal-fired EGUs, and some additional BART-eligible gas and gas/fuel oil-fired units.
- Covered sources under the Texas SO_2 Trading Program we are taking final action to affirm represent 89%[86] of all SO_2 emissions from all Texas EGUs in both 2016 and 2017, and approximately 85% of CSAPR allocations for existing units in Texas.
- The remaining 11% (100 minus 89) of 2016 and 2017 emissions from sources not covered by the Texas SO_2 Trading Program come from gas units that rarely burn fuel oil or from coal-fired units that on average are better controlled for SO_2 than the covered sources and generally are less relevant to visibility impairment. As such, any shifting of generation to non-covered sources, as might occur if a covered source were to reduce its operation in order to remain within its SO_2 emissions allowance allocation, would result in fewer emissions to generate the same amount of electricity.

[86] In 2016, EGUs included in the program emitted 218,292 tons of SO_2, and other EGUs emitted 27,507 tons (11.2% of the total emitted by Texas EGUs). In 2017, sources included in the program emitted 245,871 tons of SO_2, and other EGUs emitted 30,122 (10.9%).

- Furthermore, the non-inclusion of a large number of gas-fired units that rarely burn fuel oil reduces the amount of available allowances for such units that would typically and collectively be expected to use only a fraction of their CSAPR emissions allowances. Many of these sources typically emit at levels much lower than their allocation level.
- The BART alternative does not allow purchasing of allowances from out-of-state sources. Emission projections under CAIR and CSAPR showed that Texas sources were anticipated to purchase allowances from out-of-state sources.[87,88]

Based on our quantitative and qualitative assessment of the operation of the BART alternative as presented here, we are taking final action to affirm our determination that the Texas SO_2 Trading Program as amended in this final action through the addition of the 255,083-ton assurance level and other amendments discussed in section III.A.1, will result in annual emissions from the covered EGUs and other EGUs in Texas that are lower than what was required under Texas participation in CSAPR's SO_2 trading program. Because this is the case, EPA can rely on the CSAPR Better-than-BART analysis to demonstrate, by the clear weight of the evidence, that the Texas SO_2 Trading Program, in conjunction with continued implementation of CSAPR in other states, provides greater reasonable progress than BART. Accordingly, we are taking final action to affirm that the Texas SO_2 Trading Program, as

[87] See section 10 of the 2009 Texas Regional Haze SIP. Table 10-7 shows CAIR 2018 emission projections of approximately 350,000 tons SO_2 emitted from Texas EGUs compared to CAIR budget for Texas of 225,000 tons. Thus, Texas was projected to purchase 125,000 tons of allowances (350,000 – 225,000) from out-of-state sources. The SIP submittal can be found in Regulations.gov docket ID EPA-R06-OAR-2016-0611, document EPA-R06-OAR-2016-0611-0002.

[88] For the projected annual SO_2 emissions from Texas EGUs under CSAPR, see Technical Support Document for Demonstration of the Transport Rule as a BART Alternative, Docket ID No. EPA–HQ–OAR–2011– 0729–0014 (December 2011) (2011 CSAPR/BART Technical Support Document), available in the docket for this action at table 2–4.

amended in today's final action, satisfies the requirements for a BART alternative under 40 CFR 51.308(e)(2)(i)(E).

Section 51.308(e)(2)(iii). This provision requires that the emission reductions from BART alternatives occur "during the period of the first long-term strategy for regional haze." The Texas SO_2 BART alternative was implemented beginning in January 2019, and thus emission reductions needed to comply with the BART alternative were required to take place by the end of 2019. In our August 2018 proposal,[89] we proposed to affirm our determination that for the purpose of evaluating Texas' BART alternative, the end of the period of the first long-term strategy for Texas is 2021, consistent with the requirement that states submit revisions to their long-term strategy to address the second planning period by July 31, 2021.[90] We also proposed to affirm our determination that because the emission reductions from the Texas SO_2 Trading Program will be realized prior to that date, the necessary emission reductions will take place within the period of Texas' first long-term strategy for regional haze. We received a comment raising the concern that this determination we proposed to affirm would be at odds with the national finding in the January 2017 action that our amendments there "do not affect the development and review of state plans for the first implementation period . . . ." 82 FR at 3080. After further review of our discussion in the January 2017 final rule making amendments to the Regional Haze Rule and consideration of the comments we received pertaining to this issue, we are not finalizing a position in this action that the first planning period has been extended to July 31, 2021.

[89] 83 FR 43592.
[90] 40 CFR 51.308(f).

Nonetheless, we are finalizing our determination that the Texas SO_2 Trading Program satisfies the timing requirements of 51.308(e)(2)(iii), because the level of emissions achieved by the covered Texas units was below the budget of the Texas program prior to the end of 2018 and the program took effect immediately at the beginning of 2019. This meets the requirement at (e)(2)(iii) that the emission reductions called for by the BART alternative occur before the end of the period for the first long-term strategy. As discussed in our November 2019 supplemental proposal, the combined SO_2 emissions from Texas EGUs participating in the intrastate trading program were 179,630 SO_2 tons in 2018, which is well below the Texas SO_2 Trading Program budget of 238,395 tons (as well as the assurance level of 255,083 tons we are finalizing in this action).[91] Therefore, the emissions reductions secured under the Texas SO_2 Trading Program occurred prior to the end of the period of the first long-term strategy for regional haze. EPA has previously proposed a view that where emission reductions required by a BART alternative are already achieved in practice during the first planning period, even though the enforceable requirement was not mandated until after the planning period, this can satisfy 40 CFR 51.308(e)(2)(iii). This was our position in our action proposing to approve a SIP revision from the State of Arkansas establishing a BART-alternative for the Domtar Ashdown Mill.[92] There, we explained that even though the BART alternative emission limits for the Domtar Ashdown Mill became enforceable by the State on February 28, 2019, the SIP revision submitted by Arkansas provided adequate documentation demonstrating that the two subject-to-BART units at the Domtar Ashdown Mill have actually been operating at emission levels below the BART alternative emission limits since December 2016.[93] Based on the documentation provided in the

[91] 84 FR 61853.
[92] See 85 FR 14847 (March 16, 2020).
[93] 85 FR 14861.

Arkansas SIP revision, we proposed to find that the subject-to-BART units at the Domtar Ashdown Mill satisfy the timing requirements of 40 CFR 51.308(e) that the necessary emission reductions associated with the BART alternative occur during the first long-term strategy for regional haze.[94] Consistent with that proposed action, we do not interpret section 51.308(e)(2)(iii) as requiring that all enforceable limits on annual emissions under the Texas SO_2 Trading Program be in place by December 31, 2018, or that the Trading Program itself must be implemented by December 31, 2018, if the emission levels called for by the BART alternative are achieved prior to that date and remain at or below that level until the alternative becomes enforceable (which in this case, is immediately following 2018). We are taking final action that the Trading Program satisfies the timing requirements of section 51.308(e)(2)(iii).

Section 51.308(e)(2)(iv). This provision requires a demonstration that the emission reductions resulting from the emissions trading program or other alternative measure will be surplus to those reductions resulting from measures adopted to meet requirements of the CAA as of the baseline date of the SIP. When promulgating this requirement in 1999, the EPA explained that emission reductions must be "surplus to other Federal requirements as of the baseline date of the SIP, that is, the date of the emission inventories on which the SIP relies."[95] The baseline date for the 2009 Texas Regional Haze SIP emission inventory was previously established as 2002 during SIP planning stages for the first implementation period.[96] The emission reductions secured under the Texas SO_2 Trading Program are additional and will not result in double-counting of reductions from other Federal requirements since they will occur after the original

[94] 85 FR 14861.
[95] *See* 64 FR 35714, 35742 (July 1, 1999); *see also* 70 FR 39104, 39143 (July 6, 2005).
[96] *See* Memorandum from Lydia Wegman and Peter Tsirigotis, 2002 Base Year Emission Inventory SIP Planning: 8-hr Ozone, PM2.5, and Regional Haze Programs, November 8, 2002.

2002 emission inventory. Thus, this BART alternative satisfies the requirements of section 51.308(e)(2)(iv).

Section 51.308(e)(2)(vi). For plans that include an emissions trading program that establishes a cap on total annual emissions of SO_2 or NO_X from sources subject to the program, this provision requires the owners and operators of sources to hold allowances or authorizations to emit equal to emissions, and allows the owners and operators of sources and other entities to purchase, sell, and transfer allowances. The Texas SO_2 Trading Program is modeled after the EPA's CSAPR SO_2 Group 2 Trading Program, and we are taking final action to affirm that the Program satisfies the requirements of 51.308(e)(2)(vi). Similar to the CSAPR SO_2 Group 2 Trading Program, the Texas SO_2 Trading Program sets an SO_2 emission budget for affected units and sources in the State of Texas. Authorizations to emit SO_2, known as allowances, are allocated to affected units. The Texas SO_2 Trading Program provides flexibility to affected units and sources by allowing units and sources to determine their own compliance path; this includes adding or operating control technologies, upgrading or improving controls, switching fuels, and using allowances. Sources can buy and sell allowances and bank (save) allowances for future use so long as each source holds enough allowances to account for its emissions of SO_2 by the allowance transfer deadline shortly after the end of the compliance period.

Section 51.308(e)(2)(vi)(A). This provision requires applicability provisions defining the sources subject to the program. The State (or EPA) must demonstrate that the applicability provisions (including the size criteria for including sources in the program) are designed to prevent any significant potential shifting within the State of production and emissions from sources in the program to sources outside the program. The October 2017 final rule and the August 2018 proposal affirming that rule discuss the provisions of the Texas SO_2 Trading

Program that satisfy section 51.308(e)(2)(vi)(A).[97] In this final action, we are making amendments to some of these provisions, as discussed in section III.A.1. We are terminating the opt-in provisions by removing sections 97.904(b), 97.911(b), and 97.921(d) from the regulations, and we are making a minor correction to the Texas SO_2 Trading Program to relabel "Newman unit 4," which is already participating in the Texas SO_2 Trading Program, as its components: "Newman unit **4" and "Newman unit **5." We are taking final action to find that with these amendments, the Texas SO_2 Trading Program continues to have applicability provisions that satisfy section 51.308(e)(2)(vi)(A).

Section 51.308(e)(2)(vi)(B). This provision requires allowance provisions ensuring that the total value of allowances (in tons) issued each year under the program will not exceed the emissions cap (in tons) on total annual emissions from the sources in the program. 40 CFR Section 97.921 establishes how the Administrator will record the allowances for the Texas SO_2 Trading Program and ensures that the Administrator will not record more allowances than are available under the program consistent with 40 CFR 51.308(e)(2)(vi)(B).

Sections 51.308(e)(2)(vi)(C) – (E). The provisions of sections 51.308(e)(2)(vi)(C) – (E) require monitoring provisions providing for consistent and accurate measurements of emissions from sources in the program to ensure that each allowance actually represents the same specified tonnage of emissions and that emissions are measured with similar accuracy at all sources in the program; recordkeeping provisions that ensure the enforceability of the emissions monitoring provisions and other program requirements; and reporting provisions requiring timely reporting of monitoring data with sufficient frequency to ensure the enforceability of the emissions monitoring provisions and other program requirements and the ability to audit the program. The

[97] *See* 82 FR at 48360 and 83 FR at 43602.

monitoring, recordkeeping, and reporting provisions for the Texas SO_2 Trading Program at 40 CFR 97.930 – 97.935 are consistent with those requirements in the CSAPR SO_2 Group 2 Trading Program. The provisions in 40 CFR 97.930 – 97.935 require the subject units to comply with the monitoring, recordkeeping, and reporting requirements for SO_2 emissions in 40 CFR part 75, thereby satisfying the requirements of 51.308(e)(2)(vi)(C) – (E).

Section 51.308(e)(2)(vi)(F). This provision requires tracking system provisions which provide for a tracking system that is publicly available in a secure, centralized database to track in a consistent manner all allowances and emissions in the program. The EPA is implementing the Texas SO_2 Trading Program using the Allowance Management System, which provides a consistent approach to implementation and tracking of allowances and emissions for the EPA, subject sources, and the public consistent with the requirements of 40 CFR 51.308(e)(2)(vi)(F).

Section 51.308(e)(2)(vi)(G). This provision requires authorized account representative provisions ensuring that the owners and operators of a source designate one individual who is authorized to represent the owners and operators in all matters pertaining to the trading program. The requirements at 40 CFR 97.913 – 97.918 for designated and alternate designated representatives are consistent with the requirements of 40 CFR 51.308(e)(2)(vi)(G) and are also consistent with the EPA's other trading programs under 40 CFR part 97.

Section 51.308(e)(2)(vi)(H). This provision requires allowance transfer provisions providing procedures that allow timely transfer and recording of allowances, minimize administrative barriers to the operation of the allowance market, and ensure that such procedures apply uniformly to all sources and other potential participants in the allowance market. Allowance transfer provisions for the Texas SO_2 Trading Program at 40 CFR 97.922 and 97.923 provide procedures that allow timely transfer and recording of allowances; these provisions will

minimize administrative barriers to the operation of the allowance market and ensure that such procedures apply uniformly to all sources and other potential participants in the allowance market, consistent with 40 CFR 51.308(e)(2)(vi)(H).

Section 51.308(e)(2)(vi)(I). This provision requires compliance provisions prohibiting a source from emitting a total tonnage of a pollutant that exceeds the tonnage value of its allowance holdings, including the methods and procedures for determining whether emissions exceed allowance holdings. The provision requires that such method and procedures apply consistently from source to source. Compliance provisions for the Texas SO_2 Trading Program at 40 CFR 97.924 prohibit a source from emitting a total tonnage of SO_2 that exceeds the tonnage value of its SO_2 allowance holdings as required by 40 CFR 51.308(e)(2)(vi)(I).

Section 51.308(e)(2)(vi)(J). This provision requires penalty provisions providing for mandatory allowance deductions for excess emissions that apply consistently from source to source. Additionally, the tonnage value of the allowances deducted must equal at least three times the tonnage of the excess emissions. The Texas SO_2 Trading Program includes automatic allowance surrender provisions at 40 CFR 97.924(d) that apply consistently from source to source and the tonnage value of the allowances deducted shall equal at least three times the tonnage of the excess emissions, consistent with the penalty provisions at 40 CFR 51.308(e)(2)(vi)(J).

Section 51.308(e)(2)(vi)(K). For a trading program that allows banking of allowances, this provision requires provisions clarifying any restrictions on the use of these banked allowances. The Texas SO_2 Trading Program provides for banking of allowances under 40 CFR 97.926; Texas SO_2 Trading Program allowances are valid for compliance in the control period of

issuance or may be banked for use in future control periods, consistent with 40 CFR 51.308(e)(2)(vi)(K).

Section 51.308(e)(2)(vi)(L). This provision requires program assessment provisions providing for periodic program evaluation to assess whether the program is accomplishing its goals and whether modifications to the program are needed to enhance performance of the program. The CAA and EPA's implementing regulations require comprehensive periodic revisions of implementation plans for regional haze under 40 CFR 51.308(f) and periodic review of the state's regional haze approach under 40 CFR 51.308(g) to evaluate progress towards the reasonable progress goals for Class I areas located within the state and Class I areas located outside the State affected by emissions from within the state. Because the Texas SO_2 Trading Program is a BART-alternative and part of the long-term strategy for Texas' Regional Haze obligations, this program will be reviewed in each comprehensive periodic revision and progress report. We anticipate these revisions and progress reports will provide the information needed to assess program performance, as required by 40 CFR 51.308(e)(2)(vi)(L).

Based on the analysis presented here, EPA is taking final action to affirm our determination that the Texas SO_2 Trading Program, as amended in this final action, meets the requirements of 40 CFR 51.308(e)(2) as a BART alternative for SO_2 to satisfy Texas' Regional Haze obligations.

3. PM BART

We are taking final action to affirm our October 2017 approval of the portion of the Texas Regional Haze SIP that determined that PM BART emission limits are not required for any Texas EGUs. The majority of Texas' BART-eligible EGUs rely on BART alternatives for

both SO_2 and NO_X emissions (or have otherwise been determined to be not subject to BART). We approved Texas' pollutant-specific screening analysis for PM as appropriate and consistent with a 2006 guidance document in which the EPA stated that pollutant-specific screening can be appropriate where a state is relying on a trading program as a BART alternative to address both NO_X and SO_2 BART.[98] All of the BART-eligible sources participating in the SO_2 intrastate trading program have visibility impacts from PM alone below the subject-to-BART threshold of 0.5 deciviews (dv).[99,100] Furthermore, the BART-eligible sources not participating in the intrastate trading program were screened out of BART for all visibility impairing pollutants. Therefore, we are finalizing our affirmation of our prior approval that no Texas EGUs are subject to PM BART and that PM BART emission limits are not required for any Texas EGUs under EPA's 2006 guidance.

4. Reasonable Progress

This final action addressing the BART requirements is part of the long-term strategy for Texas and will contribute to making reasonable progress toward the goal of natural visibility conditions at Texas' and downwind Class I areas. However, the EPA is not determining at this

[98] *See* discussion in Memorandum from Joseph Paisie to Kay Prince, "Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations," July 19, 2006.
[99] Our technical evaluation of Texas' PM screening approach in the 2009 Texas Regional Haze SIP submittal was originally presented in a December 16, 2014 proposal. See 79 FR 74817, 74848-49 (Dec. 16, 2014). As noted in our August 2018 proposal, the basis of our affirmation of our approval of Texas' PM screening approach remains consistent with the technical evaluation we provided at the time. See 83 FR 43586, at 43593.
[100] Stryker Creek Unit ST2 is covered by CSAPR for NO_X and by the SO_2 trading program but was not included in the 2009 Regional Haze SIP. In our August 2018 proposal, we explained that based on our own evaluation in the January 2017 proposal and October 2017 final rule, we determined that the visibility impact attributable to PM emissions from Stryker Creek Unit ST2 is a small fraction (roughly 1%) of the 0.786 dv aggregate impact of the unit's emissions from all pollutants. This is well below the subject-to-BART threshold of 0.5 dv. See 83 FR 43586, at 43593.

time that this final action fully resolves the EPA's outstanding obligations with respect to reasonable progress that resulted from the Fifth Circuit's remand of our reasonable progress FIP.[101] We intend to take a separate, future action to address the Fifth Circuit's remand.

B. Interstate Transport of Pollutants that Affect Visibility

We are taking final action to affirm our finding that Texas' participation in CSAPR to satisfy NO_X BART and our SO_2 intrastate trading program, as amended in today's final action, fully addresses Texas' interstate visibility transport obligations for the following six NAAQS: (1) 1997 8-hour ozone; (2) 1997 $PM_{2.5}$ (annual and 24 hour); (3) 2006 $PM_{2.5}$ (24-hour); (4) 2008 8-hour ozone; (5) 2010 1-hour NO_2; and (6) 2010 1-hour SO_2. The basis for this final action is our determination in the October 2017 FIP that the regional haze measures in place for Texas are adequate to ensure that emissions from the State do not interfere with measures to protect visibility in nearby states, because the emission reductions are consistent with the level of emissions reductions relied upon by other states during interstate consultation under 40 CFR 51.308(d)(3)(i)-(iii) and when setting their reasonable progress goals.[102] As discussed in our August 2018 affirmation proposal, the 2009 Texas Regional Haze SIP relied on participation in CAIR to meet SO_2 and NO_X BART requirements for Texas EGUs. Under CAIR, Texas EGU sources were projected to emit approximately 350,000 tons of SO_2 annually.[103] These are the 2018 EGU emission projections used by CENRAP for Texas that other states potentially

[101] Order, *Texas v. EPA*, 16-60118 (5th Cir. Mar. 22, 2017).
[102] See 2009 Texas Regional Haze SIP, section 4.3 titled "Consultations On Class I Areas In Other States." The submittal can be found at www.regulations.gov, Docket ID EPA-R06-OAR-2016-0611, Document ID EPA-R06-OAR-2016-0611-0002.
[103] See section 10 of the 2009 Texas Regional Haze SIP. Table 10-7 shows that under CAIR, the 2018 emission from Texas EGUs were projected to be approximately 350,000 tons SO_2. The SIP submittal can be found in www.regulations.gov, Docket ID EPA-R06-OAR-2016-0611, Document ID EPA-R06-OAR-2016-0611-0002.

impacted by emissions from Texas sources agreed upon during interstate consultation and relied on in their regional haze SIPs. In today's final action, we are finalizing four revisions to strengthen the Texas SO_2 Trading Program and increase its consistency with CSAPR, including the addition of an assurance level consistent with the 2012 CSAPR demonstration. As discussed elsewhere in today's final action, Texas EGU annual SO_2 emissions for sources covered by the trading program will be constrained by the assurance level of 255,083 tons. Including an estimated 35,000 tons per year of emissions from units not covered by the Texas SO_2 Trading Program yields 290,083 tons of SO_2, which is well below the 350,000-ton emissions projection for 2018 for Texas sources under CAIR or the 317,100-ton emissions level assumed for Texas sources under CSAPR participation in the BART-alternative sensitivity analysis utilized for the 2012 CSAPR Better-than-BART determination. Additionally, the October 2017 FIP relies on CSAPR for ozone season NO_X as an alternative to EGU BART for NO_X, which exceeds the NO_X emission reductions that would have been realized from Texas EGUs under CAIR and that other states relied upon during interstate consultation for the first planning period.[104] Because the revisions to the Texas SO_2 Trading Program we are finalizing in today's final action ensure emission reductions consistent with and below the emission levels relied upon by other states during interstate consultation, we find that these revisions provide further support for our earlier finding that the BART alternative in the October 2017 FIP results in emission reductions

[104] Under CAIR, Texas had an annual 2009 CAIR Phase 1 budget of 181,017 tons of NO_X and an annual 2015 CAIR Phase 2 budget of 150,845 tons of NO_X. See Section 11, Table 11-15 of the 2009 Texas Regional Haze SIP. The SIP submittal can be found at www.regulations.gov, Docket ID EPA-R06-OAR-2016-0611, document ID EPA-R06-OAR-2016-0611-0002. The 2018 EGU emission projections for NO_X used by CENRAP for Texas, which other states potentially impacted by emissions from Texas sources agreed upon during interstate consultation and relied on in their regional haze SIPs, were approximately 160,000 tons. In contrast, under the CSAPR ozone season NO_X trading program, Texas' 2017 NO_X ozone season budget is 52,301 tons of NO_X. See 81 FR 74504, 74508 (Oct. 26, 2016).

adequate to satisfy the requirements of CAA section 110(a)(2)(D)(i)(II) with respect to visibility for the six identified NAAQS.

IV. Summary and Responses to Significant Issues Raised by Commenters

We received both written and oral comments at the public hearings we held in Austin and Dallas. We also received written comments on the August 27, 2018 affirmation proposed action and the November 14, 2019 supplemental proposed action. The full text of comments received is included in the publicly posted docket associated with this action at www.regulations.gov. We reviewed all public comments that we received. Below we provide a summary of the most significant comments and our responses. A complete summary of all of the comments we received, and our responses thereto are contained in a separate document titled Response to Comments, which is found in the docket associated with this final action.

A. Texas SO_2 Trading Program as a BART Alternative

Comment: We received one comment asserting that in promulgating the Texas SO_2 Trading Program as a BART alternative in our October 2017 FIP and in affirming the trading program in our August 2018 proposal, EPA did not properly demonstrate that the trading program meets the requirements for an alternative to BART for SO_2 because EPA did not compare the alternative to source-specific BART in Texas. The commenter asserted that the Regional Haze Rule at 40 CFR § 51.308(e)(2) specifies that BART and associated emission reductions achievable for each source within the State subject to BART and covered by the alternative program must be evaluated first for the purpose of comparing to the BART alternative and determining whether the alternative makes greater reasonable progress than BART. The

commenter also noted that the Regional Haze Rule at §51.308(e)(2)(i)(C) provides that the only exception to this requirement is when the emissions trading program or other alternative measure has been designed to meet a requirement other than BART and that in such cases, EPA may analyze BART for similar types of sources within a source category instead of on a source-specific basis. The commenter asserted that in promulgating the Texas SO_2 Trading Program, EPA did not properly demonstrate that the trading program is better than BART and meets the requirements for an alternative to BART because EPA has not determined which units are subject to BART, and did not provide an analysis of BART at each source subject to BART and covered by the trading program to compare against the trading program. According to the commenter, even if presumptive BART levels were an appropriate assumption that is not outdated, EPA would still be required to compare the trading program directly to presumptive BART, which it has not done. The commenter also contended that EPA's approach of comparing the intrastate trading program to Texas' participation in the SO_2 trading program under CSAPR is not appropriate because EPA withdrew Texas from the CSAPR program for SO_2 and thus CSAPR cannot lawfully be BART for SO_2 for Texas EGUs.

The commenter also disagreed with EPA's position that the trading program was designed to meet requirements other than BART, namely the interstate transport requirements and the long-term strategy provisions. The commenter asserted that even if the trading program had indeed been designed to meet requirements other than BART, this would still not authorize EPA to completely forego analyzing BART for the sources subject to BART and covered by the trading program.

Response: As explained in our August 27, 2018 proposal, in addition to being a sufficient alternative to BART, the trading program is designed to secure reductions consistent with

visibility transport requirements.[105] As allowed by the requirements for a BART alternative in § 51.308(e)(2)(i)(C), we are exercising the exception allowed when the alternative measure "has been designed to meet a requirement other than BART (such as the core requirement to have a long-term strategy to achieve the reasonable progress goals established by States)." See 40 CFR 51.308(e)(2)(i)(C). In such circumstances, BART and associated emission reductions may be analyzed for similar sources "based on both source-specific and category-wide information, as appropriate." When promulgating the 2012 CSAPR Better than BART rule, the EPA relied on an analysis of BART in CSAPR states and a demonstration showing that CSAPR would result in greater reasonable progress than BART under the test in 40 CFR 51.308(e)(3). In that analysis, EPA utilized simplified assumptions regarding "presumptive" BART limits at BART-eligible sources. This analysis was conducted on a category-wide basis (all fossil fuel-fired EGUs). See 77 FR 33642, 33649-50 (June 7, 2012). This analysis satisfied 51.308(e)(2)(i)(C) because CSAPR was designed to meet the requirements of CAA section 110(a)(2)(D)(i)(I) (sometimes referred to as "good neighbor" obligations) for certain NAAQS pollutants. EPA finds that reliance on the category-wide BART analysis from the 2012 CSAPR Better than BART demonstration is appropriate here, because, although the Texas program is not designed to meet good neighbor obligations under section 110(a)(2)(D)(i)(I), it is designed to meet separate CAA requirements for interstate visibility transport, as explained in section III.B above. This satisfies the condition in 51.308(e)(2)(i)(C) for using category-wide information such as presumptive BART limits in analyzing the Texas SO_2 Trading Program. Thus, the BART determinations derived from that CSAPR Better than BART demonstration are an appropriate BART benchmark for comparison against the Texas SO_2 Trading Program given that the Texas SO_2 Trading

[105] 83 FR 43586, at 43597.

Program is modeled on the CSAPR trading programs. In this action, we are relying, in part, on that same 2012 CSAPR Better than BART demonstration to show that the clear weight of evidence demonstrates that the Texas SO_2 Trading Program, which is modeled on the CSAPR trading programs, will provide for greater reasonable progress than BART in Texas. Indeed, the anticipated maximum potential SO_2 emissions in Texas under the Texas SO_2 Trading Program BART alternative are less than the SO_2 emission levels from Texas EGUs that were forecast in the demonstration for Texas EGU emissions assuming their participation in the CSAPR SO_2 trading program. Under CSAPR, the total allocations for all existing EGUs in Texas were 279,740 SO_2 tons, the total state budget including the amounts of allowances set aside for potential allocation to new units was 294,471 tons, and the assurance level was 347,476 tons. The level of emissions assumed for Texas EGUs in the BART alternative sensitivity analysis utilized for the 2012 CSAPR Better than BART determination is 317,100 SO_2 tons.[106] By comparison, the Texas SO_2 Trading Program has a budget of 238,395 SO_2 tons, and we are finalizing an assurance level of 255,083 tons in this action. In light of the three-for-one penalty surrender ratio imposed on emissions exceeding the 255,083-ton assurance level, the assurance level represents the highest annual SO_2 emissions anticipated from units subject to the Texas program. In reality, in light of ongoing changes in the electric-generating sector in Texas, there is a reasonable expectation that actual emissions under the Texas program would remain well

[106] For the projected annual SO_2 emissions from Texas EGUs, *see* Technical Support Document for Demonstration of the Transport Rule as a BART Alternative, Docket ID No. EPA–HQ–OAR–2011– 0729–0014 (December 2011) (2011 CSAPR/BART Technical Support Document at Table 2-4,), available in the docket for this action. Certain CSAPR budgets were increased after promulgation of the CSAPR final rule (and the increases were addressed in the 2012 CSAPR/BART sensitivity analysis memo. See memo entitled "Sensitivity Analysis Accounting for Increases in Texas and Georgia Transport Rule State Emissions Budgets," Docket ID No. EPA–HQ–OAR–2011–0729–0323 (May 29, 2012), available in the docket for this action. The increase in the Texas SO_2 budget was 50,517 tons which, when added to the Texas SO_2 emissions projected in the CSAPR + BART-elsewhere scenario of 266,600 tons, yields total potential SO_2 emissions from Texas EGUs of approximately 317,100 tons.

below the assurance level. We are also finalizing a more conservative (i.e., higher) estimate of 35,000 annual SO_2 tons as the projected emissions from Texas units that would have been in the CSAPR program but are not in the Texas SO_2 Trading Program. This more conservative estimate is based on these units' maximum annual emission level of 34,129 tons over the past five years (2014–2018) and taking into consideration that several of these units have recently shut down or have been announced for shutdown in the near future.[107] Adding that amount to the Texas SO_2 Trading Program's assurance level of 255,083 tons yields 290,083 tons. Assuming this figure represents a firm upper bound on annual SO_2 emissions from the relevant EGUs in Texas under the Texas SO_2 Trading Program, this is less than the 317,100-ton figure EPA had demonstrated was acceptable in the original 2012 CSAPR Better than BART analysis.

Comment: The commenter asserted that it was not appropriate for EPA to conclude that because CSAPR achieves greater reasonable progress than BART when averaged across all affected states that this necessarily means that CSAPR achieves greater reasonable progress than BART in Texas. The commenter asserted that the legal test that EPA used during the original "CSAPR Better than BART" rulemaking is fundamentally different than the test EPA must use in assessing whether the Texas SO_2 Trading Program is better than BART. The commenter asserted that in making its determination that CSAPR achieves greater reasonable progress than BART under 40 C.F.R. § 51.308(e)(3), EPA was required to demonstrate that visibility does not decline in any Class I area and that there is an overall improvement in visibility, determined by *comparing the average differences* between BART and the alternative over all affected Class I areas. The commenter argued that since EPA averaged the visibility improvement from CSAPR over all the affected Class I areas in the eastern half of the country in the CSAPR Better than

[107] 84 FR 61853.

BART determination, Texas was able to take advantage of reductions from other states without having to reduce its SO_2 emissions as much as it would have had to do under source-by-source BART. The commenter argued that in contrast to the CSAPR Better than BART determination, the legal test required under §§ 51.308(e)(2)(i) and 51.308(e)(3) to demonstrate that the Texas SO_2 Trading Program is better than BART cannot rest on improvements from CSAPR in other states. The commenter argued that EPA must instead demonstrate that the Texas SO_2 Trading Program is better than BART in Texas alone by examining the visibility improvement at only the Class I areas affected by Texas sources.

Response: We disagree that EPA must demonstrate that the Texas SO_2 Trading Program is better than BART by examining visibility improvement at only Class I areas in Texas and Class I areas in other states affected by Texas sources. As explained in our proposal affirming the Texas SO_2 Trading Program, the 2012 demonstration that CSAPR, as finalized and amended in 2011 and 2012, meets the Regional Haze Rule's criteria for a demonstration of greater reasonable progress than BART is also the primary evidence that the Texas trading program achieves greater reasonable progress than BART.[108] In the 2012 CSAPR Better than BART rule, the EPA relied on an analytic demonstration that included an air quality modeling study showing that CSAPR results in greater improvements in average visibility across all affected Class I areas as compared to adopting source-specific BART. Our finding with respect to the Texas program relies on the demonstration underlying our CSAPR Better than BART Rule and our 2017 CSAPR Better-than-BART affirmation (including the basis for our denial of a petition for reconsideration in the latter[CITATION TO BE ADDED], as discussed in section I.D of the preamble). Thus, we find that given the particular circumstances in this case, we are not required

[108] 83 FR 43586, at 43599.

to focus only on Class I areas in Texas and Class I areas in other states affected by Texas sources. Rather, we are assessing the Texas program in the context of the larger CSAPR Better than BART analysis. We find that due to the specific circumstances in this case, as described above, it is reasonable and appropriate to consider improvements in average visibility across all affected Class I areas in our assessment of the Texas SO_2 Trading Program to demonstrate that it is better than BART. The amendments to the Texas SO_2 Trading Program we are finalizing in this action ensure that EGU emissions under the Texas program will remain well below the amount assumed in the BART-alternative sensitivity analysis utilized for the 2012 CSAPR-better-than-BART determination (*i.e.*, 317,100 tons), and thus visibility levels at Class I areas impacted by sources in Texas are anticipated to be at least as good as (and likely better than) the levels projected under Texas participation in the larger CSAPR SO_2 trading program.

Comment: We received one comment that asserted that EPA's reliance on CSAPR to design the Texas SO_2 Trading Program as a BART alternative is not appropriate because in doing so, EPA did not account for new circumstances or update emissions and other data, which the commenter claimed EPA typically does when evaluating BART. The commenter asserted that if EPA had taken the same technical approach it has taken in other regional haze actions of using the most up-to-date data, this would have changed the allowance distribution of the Texas SO_2 Trading Program. For instance, the commenter argued that in developing the Texas SO_2 Trading Program, EPA should have taken into account the retirements of Welsh 2, Big Brown Units 1 and 2, Monticello Units 1, 2, and 3, and Sandow 4 and 5. Similarly, the commenter asserted the Texas SO_2 Trading Program should have included rule provisions for properly dealing with the impending retirement of the two JT Deely units instead of the current method of addressing retired allowances, which the commenter claimed provides no incentive to reduce

SO_2 emissions. Additionally, the commenter noted that EPA assigned allocations under CSAPR on the basis of a unit's heat input from 2006-2010 and its emissions from 2003-2010 utilizing a detailed ten-step approach based on the heat input and emissions from those periods. The commenter claimed that EPA should have re-applied the same allocation methodology it used for CSAPR using updated information, and that if EPA had done so, the allocations in many instances would have changed significantly. In support of this argument, the commenter performed this analysis using the same number of years as in the original CSAPR methodology but shifted the year ranges forward to include updated information. The commenter asserted that two cases were analyzed. In the first case, the commenter did not remove retired units and used the original CSAPR methodology to revise the CSAPR allocations while using updated data. In this case, because none of the retired units were removed, the total allocations remained at 238,393 tons. However, the commenter asserted that because the emissions and heat inputs changed with the updated data, almost every unit's allocations changed, in some cases by more than 3,000 tons. In the second case, the commenter asserted that retired units were removed, but the JT Deely units were retained. The commenter asserted that because of the removal of retired units and because of the updated emissions and heat inputs, almost every unit's allocations changed, resulting in a reduction of allocations from 238,393 tons to 176,332 tons. The commenter noted that these additional 62,061 tons in unit allocations that resulted from EPA not using the most updated data in the allocation methodology and not removing retired units should not be moved into the Supplemental Allowance Pool as Section 97.911(a)(2) of the Texas SO_2 Trading Program provides. The commenter argued that these allowances should never have been in the allowance pool in the first place. The commenter concluded that the analysis performed by the commenter demonstrates that if EPA had updated the emissions data and heat input data

using the original CSAPR methodology and removed the retired units' allocations, the Texas SO_2 Trading Program would not include excess allowances, which the commenter claimed disincentivizes SO_2 emissions reductions.

Response: As stated in responses to several other comments in this final action and in our Response to Comments document found in the docket for this action, we disagree that in developing a specific trading program, EPA must incorporate new design features, particularly when other legal and policy considerations weigh in favor of making the program similar in design to a specific previous program that does not include those design features. Likewise, EPA is not required to incorporate new design features that may be suggested by a commenter and is not required to update every data element used in the rulemaking. In this instance, the Texas SO_2 Trading Program was designed to qualify as a BART alternative in light of EPA's previous determinations regarding permissible BART alternatives, and for that reason was designed to be as similar as possible to the CSAPR SO_2 program. Both the amounts of the initial allocations to units under the Texas SO_2 Trading Program and the treatment of the allocations to units that have been retired for at least five years are directly based on the analogous provisions in the CSAPR SO_2 program. As discussed in response to another comment on the Texas SO_2 Trading Program's Supplemental Allowance Pool, in those aspects of the overall allocation methodology where the Texas SO_2 Trading Program allowance allocation provisions deviate from the CSAPR SO_2 program allowance allocation provisions, the Texas SO_2 Trading Program is generally more, not less, stringent.

With respect to the commenter's point that the amount of the CSAPR SO_2 program budget for Texas was initially determined based on our assessments of the state's interstate transport obligations at the time of the CSAPR rulemaking, we agree with the statement but do

not consider the point relevant to this final action. The origins of the CSAPR budgets are immaterial to this action. Along with certain budget adjustments that were addressed through sensitivity analyses, the CSAPR budgets were used in our 2012 CSAPR Better than BART determination and therefore remain relevant for purposes of our determination in this action that the Texas SO_2 Trading Program qualifies as a BART alternative in the context of the 2012 CSAPR Better than BART determination.

With respect to the commenter's identification of alternative possible distributions of allowances among the units covered by the program, we do not believe that altering the distribution of allowances while leaving the total number of allowances the same would change the stringency of the program, although it could address concerns regarding whether the distribution among the sources is equitable. As none of the sources covered by the program have raised equity concerns about the initial allocations, and given that we do not understand the commenter to be raising such concerns, we see no reason to redistribute the initial allocations. We address the comments regarding the stringency of the program cap elsewhere.

With regard to the commenter's position that allowances allocated to units that retire should be eliminated from the budget instead of being reallocated, that is of course an option in designing a trading program, but it is not a requirement, and it is not a feature of the CSAPR SO_2 program on which the Texas SO_2 Trading Program was modeled. We were not required and did not find it necessary to take such an approach in the Texas SO_2 Trading Program in order to ensure that the program qualifies as a BART alternative in the context of the 2012 and 2017 CSAPR Better than BART determinations.

Comment: We received comments from the State and affected sources in support of our affirmation that the October 2017 Regional Haze FIP satisfies Texas' obligations for BART and

in support of our determination that the intrastate SO_2 trading program for certain EGUs in Texas is an appropriate BART alternative and satisfies all SO_2 BART requirements. Several affected sources also provided comments in support of the October 2017 SO_2 trading program over the adoption of a source-by-source approach to address the BART requirements for units subject to BART in Texas. One affected source asserted that the trading program will allow operational flexibility in complying with BART obligations and another affected source asserted that it is appropriate for EPA to respect Texas' preference to meet BART compliance through a BART alternative rather than source-specific BART.

Response: We appreciate the commenter's support of our FIP that establishes an intrastate trading program that caps emissions of SO_2 from certain EGUs in Texas and includes the determination that this program meets the requirements for an alternative to BART for SO_2.

Comment: We received one comment that argued that EPA's reliance on the CSAPR Better-than-BART demonstration is based on the false premise that the Texas SO_2 Trading Program is functionally equivalent to CSAPR. The commenter asserted that the Texas SO_2 Trading Program is not sufficiently similar to CSAPR for a comparison between Texas' overall emissions under the Texas SO_2 Trading Program versus CSAPR to suffice for a weight of evidence determination. In support of the claim that the Texas SO_2 Trading Program and CSAPR are not sufficiently similar, the commenter pointed to the exclusion from the Texas SO_2 Trading Program of a number of Texas EGUs that were covered under CSAPR and argued that EPA presented no real analysis of the visibility impacts of these excluded units. The commenter asserted that for some of these excluded units that have existing scrubbers or other types of SO_2 control, such as Oklaunion, W. A. Parish 8, Oak Grove Units 1 and 2,

Twin Oaks Units 1 and 2, and Sandy Creek, EPA should have evaluated possible upgrades to existing SO_2 controls.

The commenter also argued that there are flaws in how EPA performed its Q/d analysis that constitute arbitrary deviations from EPA's Q/d testing methodology in past regional haze actions and claimed that the deviations were made in order to exclude certain units from the Texas SO_2 Trading Program. For instance, the commenter asserted that EPA's decision to base the Q/d analysis on 2009 emissions was arbitrary and claimed that no rationale was provided for selecting that year of data other than EPA noting that it already had this emissions data available from a previous analysis. The commenter asserted that in contrast to the Q/d analysis EPA used to identify sources to include in the Texas SO_2 Trading Program, in past regional haze actions, EPA has typically considered a 3-5 year range of data to account for data variability from year to year. The commenter also asserted that the Twin Oaks facility had a Q/d greater than EPA's stated threshold of 10 but it was nonetheless excluded on the basis that EPA estimated that the Q/d of each of its individual units were likely less than 10. The commenter claimed that EPA's decision to deviate from its approach is arbitrary and was made in order to exclude the Twin Oaks facility from the trading program. Similarly, the commenter asserted that EPA's decision to exclude Oklaunion from the trading program even though its Q/d was 85, which is much higher than the EPA's stated threshold of 10, is arbitrary. The commenter asserted that EPA's decision to exclude units that came online after 2009 on the basis that these units would be permitted and constructed using emission control technology determined under either BACT or LAER review, was inappropriate given that EPA made no comparison between the levels of control under BACT or LAER versus BART for these units. The commenter argued that this comparison was necessary given that, according to the commenter, BART has been demonstrably more stringent

than either BACT or LAER. The commenter also asserted that the opt-in provision is yet another feature of the Texas SO_2 Trading Program that makes the trading program not functionally equivalent to CSAPR, as EPA removed the opt-in provision in CSAPR.

Response: We continue to believe that the Texas SO_2 Trading Program will achieve SO_2 emission levels that are functionally equivalent to those that had been previously projected for Texas' participation in the original CSAPR program and that our reliance on the original CSAPR Better than BART determination for the clear weight of evidence demonstration required under section 51.308(e)(2)(i)(E) was thus appropriate in this case. What we mean by the phrase "functionally equivalent" is that while the two programs are not identical, the differences between the Texas SO_2 Trading Program and CSAPR are either not significant or work to demonstrate the relatively greater stringency of the Texas SO_2 Trading Program as compared to CSAPR. As the commenter notes, in our August 27, 2018 proposal affirming the Texas SO_2 Trading Program, we listed several points that help demonstrate the relative stringency of the Texas SO_2 Trading Program as compared to CSAPR.[109] These points are summarized below:

- Covered sources under the Texas SO_2 Trading Program represent approximately 85% of CSAPR allocations for existing units in Texas. Covered sources under the Texas SO_2 Trading Program represent 89% of all SO_2 emissions from all Texas EGUs in both 2016 and 2017.
- The remaining 11% of 2016 and 2017 emissions from Texas EGUs not covered by the BART alternative come from gas units that rarely burn fuel oil or from coal-fired units that on average are better controlled for SO_2 than the covered sources and generally are less

[109] 83 FR 43586, at 43591.

relevant to visibility impairment.[110] As a result, any shifting of generation to non-covered sources, as might occur if a covered source were to reduce its operation in order to remain within its SO_2 emissions allowance allocation, is expected to result in fewer emissions to generate the same amount of electricity.

- We also noted that the non-inclusion of a large number of gas-fired units that rarely burn fuel oil reduces the amount of available allowances for such units that would typically and collectively be expected to use only a fraction of their CSAPR allowance allocations. Many of these sources typically emit at levels much lower than their allocation level.
- Emissions projections under CAIR and CSAPR showed that Texas sources were anticipated to purchase allowances from out-of-state sources. In contrast to CSAPR, the Texas SO_2 Trading Program does not allow purchasing of allowances from out-of-state sources. This will ensure that emissions reductions resulting from implementation of the Texas SO_2 Trading Program will take place in Texas instead of a neighboring state. In this respect, implementation of the Texas SO_2 Trading Program can be expected to result in greater visibility benefits at Texas Class I areas than CSAPR.

Furthermore, in the final analysis for this action, we have updated our emissions assumptions to be even more conservative (i.e., we assume the potential for higher emissions) for units that were in the CSAPR program but not covered by the Texas SO_2 Trading Program. In the August 2018 proposal, we had used an assumption that emissions from these units could be as high as 27,500 tons per year.[111] However, in the updated analysis presented for comment in the November 2019 SNPRM, we adjusted this assumption to 35,000 tons per year. This number

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[110] *Id.*
[111] 83 FR 43586, at 43602.

reflects emissions for the past five years (2014-2018), which EPA regards as a conservative assumption for emissions performance from these units. Even when this conservative figure is added to the highest annual emissions anticipated from units under the Texas program, 255,083 tons per year (i.e., the assurance level for the program), the total figure is 290,083 tons per year. As EPA explains in section III.A.2 of the preamble for this action, that figure is still 27,019 tons below the 317,100 ton per year emissions level for Texas that EPA assumed in the BART-alternative sensitivity analysis utilized for the 2012 CSAPR Better-than BART determination.

Based on the above points and the fact that the combination of (1) the source coverage for the Texas SO_2 Trading Program, (2) the total allocations for EGUs covered by the program, and (3) recent and foreseeable emissions trends from those EGUs both covered and not covered by the program will result in future EGU emissions in Texas that are less than the SO_2 emission levels forecast in the 2012 Better than BART demonstration for Texas EGU emissions assuming CSAPR participation,[112] it is not reasonable to expect that the Texas SO_2 Trading Program would result in less visibility benefit in Texas Class I areas compared to Texas' participation in CSAPR. Thus, we continue to believe that we have sufficiently demonstrated that differences in source coverage between the Texas SO_2 Trading Program as amended in this final action and CSAPR are either not significant or work to demonstrate the relative stringency of the Texas SO_2 Trading Program as compared to CSAPR.

Our decision to exclude from the Texas SO_2 Trading Program certain units that were covered under CSAPR was not arbitrary as the commenter contends, but rather was generally based on both the results of a Q/d analysis as well as the units' potential to impact visibility at Class I areas based on our consideration of certain circumstances specific to each unit. Based on

[112] 83 FR 43586, at 43591.

our consideration of the above, we found it appropriate to exclude certain units that were previously covered under CSAPR from the Texas SO_2 Trading Program. For example, some units are already operating SO_2 controls and we thus do not consider the potential visibility impacts from these units to be significant relative to those coal-fired EGUs participating in the program, and we therefore excluded them from the Texas SO_2 Trading Program. In some cases, relatively new units that began operation after 2009 and have been permitted and constructed using emission control technology determined under either Best Available Control Technology (BACT) or Lowest Achievable Emission Rate (LAER) review, as applicable. As we explained in our proposal affirming the Texas SO_2 Trading Program, because these newer units are already operating BACT or LAER controls, we do not consider the potential visibility impacts from these units to be significant relative to those coal-fired EGUs participating in the program. The commenter contends that in these cases, we should have compared the levels of control under BACT or LAER versus BART for these units because BART can in some cases be more stringent than either BACT or LAER. However, given the much greater anticipated visibility impact from uncontrolled coal-fired EGUs participating in the program, we continue to believe that it is reasonable for us to focus our efforts on these uncontrolled coal-fired EGUs while excluding the newer, already controlled EGUs from the Texas SO_2 Trading Program.

The commenter specifically identifies Oklaunion, W.A. Parish Unit 8, Oak Grove Units 1 and 2, Sandy Creek Unit 1, and the Twin Oaks facility as units that were covered under CSAPR, but which were excluded from the Texas SO_2 Trading Program. Although Oklaunion has a Q/d greater than 10, we ultimately excluded Oklaunion from the Texas SO_2 Trading Program based on our consideration that the facility consists of one coal-fired unit that is not BART-eligible; annual emissions of SO_2 in 2016 from this source were 1,530 tons, which is less than 1% of the

total annual emissions for EGUs in the state; and annual SO_2 emissions were only 933 tons in 2017. In short, the most recent emissions from this facility are small relative to other non-BART units included in the program.[113] And as noted in our November 2019 supplemental proposal, American Electric Power announced in 2018 its plans to shut down the Oklaunion Power Plant by September 2020.[114] With regard to W.A. Parish Unit 8, this unit is not BART-eligible, but is co-located with BART-eligible units. Although we decided to include most coal-fired units that are not BART-eligible but are co-located with BART-eligible EGUs in the Texas SO_2 Trading Program to prevent any significant shifting of generation and SO_2 emissions from participating sources to non-participating sources within the same facility, we decided not to include W.A. Parish Unit 8 because this unit has a scrubber installed that maintains an SO_2 emission rate four to five times lower than the emission rate of the other coal-fired units at the facility that are uncontrolled and are participating in the Texas SO_2 Trading Program (Parish Units 5, 6, and 7).[115] Therefore, we expect that any shifting of generation from the participating units at the Parish facility to Parish Unit 8 would not present a problem, and instead would result in a decrease in overall emissions from the source. Similarly, with regard to Oak Grove Units 1 and 2, and Sandy Creek Unit 1, these are relatively newer coal fired units that began operation in late 2009 or after, are not BART eligible and have scrubbers installed that maintain SO_2 emission rates much lower than the uncontrolled units included in the program.[116] Thus, we did not include Oak Grove Units 1 and 2, and Sandy Creek Unit 1 for participation in the Texas SO_2 Trading Program. Although the Twin Oaks facility was identified as having a Q/d greater than

[113] 83 FR 43597.
[114] See 84 FR at 61853, footnote 20.
[115] 83 FR 43596.
[116] *Id.* 43601.

10, we did not include it in the trading program based on its relatively low potential to impact visibility at Class I areas. For instance, the facility does not include any BART-eligible EGUs; the Q/d for this facility is 14.2, which is significantly lower than that of other Texas facilities on our list with a Q/d value over 10;[117] and the estimated Q/d for each individual unit (Units 1 and 2) is less than 10. Considering the above, we do not consider the potential visibility impacts from Twin Oaks Units 1 and 2 to be significant relative to the other coal-fired EGUs in Texas with Q/d's much greater than 10 and therefore did not include them in the program.[118] We also note that annual SO_2 emissions from Twin Oaks Units 1 and 2 in 2017 – 2019, which are the three most recent years for which annual emissions data are available, have been well below the 2009 emissions level of 4,707 tons of SO_2.[119] Thus, we believe the results of the Q/d analysis as well as our consideration of unique circumstances specific to each unit are sufficient information to justify excluding certain units from the Texas SO_2 Trading Program that were included under CSAPR, without necessitating a quantitative examination of the visibility impact of excluding these units.

With regard to the comment contending that we arbitrarily selected 2009 as the emissions year in our Q/d analysis, we note that to identify facilities that may impact visibility at Class I areas in our October 2017 final rule, we relied on an already existing Q/d analysis that we

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[117] *Id.* FR 43596-97. As discussed in our August 2018 proposal, after identifying the BART-eligible sources included in the Texas SO_2 Trading Program, we evaluated additional sources for potential inclusion in the trading program based on their potential to impact visibility at Class I areas. We used a Q/d value of 10 as a threshold for identification of facilities that may impact visibility at Class I areas and could be included in the trading program. We identified a total of 17 facilities in Texas with Q/d values greater than 10, some of which are not BART-eligible and had not already been identified for inclusion in the program. The Q/d values for these 17 facilities range from 14.2 (for Twin Oaks) to 425.4 (for Monticello).

[118] *Id.* FR 43597.

[119] Annual SO_2 emissions from Twin Oaks Units 1 and 2 were 2,519 tons in 2017; 2,530 tons in 2018; and 2,354 tons in 2019. See excel spreadsheet "Twin Oaks- SO_2 annual emissions_2009 and 2017-2019.xlsx," available in the docket for this action. [Add to Docket].

prepared as part of the December 2014 proposal to address Texas' reasonable progress requirements, and which was based on 2009 emissions.[120] In that proposed action, we also reviewed 2010 and 2011 emission data that became available as we were developing that proposed rule. We determined that the only EGU facility that was above the Q/d for 2010 and 2011 compared to the 2009 analysis was the Oak Grove facility, which came online in late 2009. As we discuss above, this is a new facility that is equipped with scrubbers and we determined it was not necessary to include them in the Trading Program. The Regional Haze Rule does not require us to select a range of years for the emissions data for our Q/d analysis nor does it identify a particular year that must be used for the emissions data. We have the discretion to select the emissions data year as long as we provide a reasonable justification for our selection, as we have done in this case.[121]

With regard to the comment regarding the opt-in provision, we appreciate the commenter's input on whether that provision differs from the provisions of the CSAPR SO_2 program in a manner that could decrease the relative overall stringency of the Texas SO_2 Trading Program. In our November 2019 supplemental proposal, we proposed to modify the regulations to terminate the opt-in provision, and we are adopting that proposed modification in this final action.

Comment: One commenter asserted that the Texas SO_2 Trading Program is arbitrary, capricious, and unlawful because EPA did not follow its own policies and regulations in the "clear weight of evidence" approach taken under section 51.308(e)(2)(i)(E) to demonstrate that

[120] See the TX RH FIP TSD that accompanied our December 2014 proposal to address reasonable progress requirements for Texas (79 FR 74818 (Dec 16, 2014)), and the Excel file "2009statesum_Q_D.xlsx." These files are available in Docket ID EPA-R06-OAR-2014-0754, see Document ID EPA-R06-OAR-2014-0754-0007 and EPA-R06-OAR-2014-0754-0007-05.
[121] 83 FR 43597.

the trading program achieves greater reasonable progress than BART. The commenter pointed to EPA's action on the Utah Regional Haze SIP, in which EPA stated that pursuant to the Regional Haze Rule requirements for a BART alternative, the clear weight-of-evidence test requires three steps that can generally be summarized as follows: (1) Use information and data that can inform the decision…; (2) Evaluate the information and recognize the relative strengths and weaknesses of the metrics used, including assigning weights to each piece of information that indicate the degree to which it supports a finding that the alternative program will achieve greater visibility benefits; and (3) Collectively consider the weights assigned to the individual pieces of information and consider the total weight of all the information to determine whether the proposed BART alternative will clearly provide for greater reasonable progress than BART at the impacted Class I areas. The commenter asserted that in contrast to our evaluation of Utah's BART alternative, EPA did not follow the three-step process for making a clear weight of the evidence demonstration under 40 CFR § 51.308(e)(2) to demonstrate that the Texas SO_2 Trading Program achieves greater reasonable progress than BART. The commenter asserted that EPA should have identified, weighed and carefully considered certain information the commenter considers to be relevant and easily available to inform EPA's clear weight of evidence approach and decision regarding the Texas SO_2 Trading Program, including EPA's January 2017 Texas BART proposal, recent emissions data, presumptive BART emission rates and emission reductions, the weaknesses of the outdated CSAPR evaluations, significant differences between the Texas SO_2 Trading Program and CSAPR, and EPA's own previous evaluation when withdrawing Texas from CSAPR showing greater emission reductions under BART.

The commenter further asserted that the clear weight of evidence demonstrates that the trading program will not make greater reasonable progress than BART based on EPA's prior

determination that CSAPR would achieve lower emissions reductions than source-specific BART for Texas EGUs. The commenter cited to three prior rulemakings in which, according to the commenter, the EPA has concluded that CSAPR would achieve less reasonable progress than source-specific BART in Texas: (1) the January 2017 BART proposal; (2) the original CSAPR Better than BART rulemaking; and (3) the 2017 rulemaking to remove Texas from CSAPR's SO_2 trading program. The commenter asserted that since the Texas SO_2 Trading Program is intended to mimic the effect of CSAPR, and CSAPR would achieve less reasonable progress than BART in Texas, it follows that the Texas SO_2 Trading Program would also achieve less reasonable progress than BART, and therefore would not satisfy the requirements of the Regional Haze Rule at 40 C.F.R. § 51.308(e)(2), (e)(2)(i)(E), and (e)(3).

Response: EPA disagrees that we are applying a different standard for "clear weight of evidence" than we have in other cases. The specific circumstances of Texas as compared to Utah are readily distinguishable. Specifically, the Better-than-BART demonstration for our Texas SO_2 Trading Program relies on the quantitative modeling, analyses and demonstrations supporting our June 2012 "CSAPR Better-than-BART" determination and September 2017 "CSAPR Better-than-BART affirmation finding" (as recently reaffirmed by our denial of a petition for reconsideration on the latter). This analysis follows the two-part quantitative test of section 51.308(e)(3), and in our weight of evidence approach, we rely on that technical analysis, as supplemented by additional evidence that the Texas intrastate trading program achieves at least the same amount of emission reductions as were projected for Texas in the CSAPR analysis (including accounting for potential shifting in emissions to CSAPR states with the removal of Texas from the program). The commenter attempts to elevate EPA's general guidance on conducting a clear weight of evidence analysis, set forth in a separate regional action, into a

mandatory test that states or the agency must always adhere to. However, the evidence-based inquiry called for under section 51.308(e)(2)(i)(E) is inherently fact-specific, and EPA has set forth why information in this record supports its findings. The State of Utah, in a far different context, had attempted to show by a series of metrics (many of which were novel and unique to that SIP submittal) that a BART alternative achieved greater reasonable progress than BART, but the state failed to explain how it weighed these metrics, and EPA found that one of the most important metrics in that instance (visibility impact on the 98th percentile day) did not actually support the alternative.[122] Here, rather than setting out a list of factors to evaluate, EPA is primarily relying on the CSAPR Better-than-BART analysis under the quantitative test of section 51.308(e)(3) (in addition to showing that other section 51.308(e)(2) requirements are met), as explained elsewhere in the record.

Comment: One commenter asserted that the Texas SO_2 Trading Program is not an adequate SO_2 BART alternative because it is not a cap and trade program that might actually reduce SO_2 emissions beyond the overall cap. Further, the commenter argues that the cap set by EPA in the trading program is too high and actually allows the participating units to increase their SO_2 emissions. The commenter stated that in upholding EPA's authority to select an alternative to source-specific BART, the D.C. Circuit has held that the overriding requirement for each regional haze plan is that it make reasonable progress toward eliminating haze pollution. The commenter asserted that the Texas SO_2 Trading Program does not satisfy this overriding requirement since, according to the commenter, it would not result in any progress because it does not require any emissions reductions relative to actual emissions from covered sources in 2015, 2016, and 2017. The commenter argued that the Texas SO_2 Trading Program actually

[122] 81 Fed. Reg. at 43,898.

authorizes covered sources to increase emissions relative to actual emissions in 2015, 2016, and 2017, and that it therefore does not achieve greater reasonable progress than source-specific BART and is not an appropriate BART alternative. The commenter also claimed that by authorizing even higher emissions than seen in 2015-2017, the Texas SO_2 Trading Program would likely further erode whatever gains were made post-2014. The commenter asserted that the Texas SO_2 Trading Program authorizes sources to emit as much as 293,104 SO_2 tons considering that the Supplemental Allowance Pool may grow over time, which would equate to a 47,234 ton increase over 2017 emissions, and a 74,813 ton increase over 2016 emissions. The commenter argued that even if the potential growth in the Supplemental Allowance Pool (from an initial 10,000 tons to 54,711 tons) is ignored, and one uses 248,393 tons as the total number of allowances, the Texas SO_2 Trading Program would still authorize an increase in emissions over actual emissions in 2015, 2016, and 2017. The commenter asserted that the Texas SO_2 Trading Program would thus fail to require greater reasonable progress than BART and would actually authorize greater pollution than the status quo. Furthermore, the commenter asserted that source-specific BART is the only option EPA has proposed that is consistent with statutory requirements and goals. According to the commenter, the January 2017 source-specific BART proposal, or even presumptive BART, would reduce emissions and improve visibility far more than the Texas SO_2 Trading Program, and should be finalized in place of the trading program.

Additionally, the commenter argued that in EPA's determination that the Texas SO_2 Trading Program will decrease SO_2 emissions relative to 2014 emission levels, EPA's selection of 2014 as the baseline year for determining whether the Texas SO_2 Trading Program would reduce emissions and improve visibility was arbitrary. The commenter asserted that EPA should have instead selected 2017 as the baseline year because that is the most recent year for which

annual emissions data is available and in which Texas sources were not part of CSAPR for SO_2. The commenter claimed that the Texas SO_2 Trading Program will result in no progress toward the goal of eliminating haze pollution and will therefore be in direct violation of the Clean Air Act's visibility mandate.

Response: We do not agree that addressing Texas' SO_2 BART requirements through a source-specific BART FIP is the only option that meets the regulatory and statutory requirements. Our October 2017 final rule fulfilled our mandatory duty to address the BART requirements for Texas EGUs through the promulgation of a FIP containing a BART alternative in the form of an intrastate trading program. The Texas SO_2 Trading Program, as amended in this final action through the addition of the 255,083-ton assurance level and other amendments discussed in section III.A.1 of this final action, will result in annual emissions from the covered EGUs and other EGUs in Texas that are lower than what was required under Texas participation in CSAPR's SO_2 trading program. Thus, the clear weight of evidence is that, overall, the Texas trading program (considered in the larger context of CSAPR) will provide greater reasonable progress than BART at the covered sources and satisfies the requirements for a BART alternative under 40 CFR 51.308(e)(2)(i)(E).

The comment contending that we arbitrarily elected not to use 2017 as the baseline emissions year for comparing the Texas SO_2 Trading Program to BART is incorrect. We considered 2014 as the appropriate most recent year for comparing the Texas SO_2 Trading Program to BART for the purposes of meeting the requirement of 40 CFR 51.308(e)(2)(i)(D) given that Texas sources were subject to the CSAPR SO_2 trading program in 2015 and 2016 but are no longer subject to that program.[123] This analysis was included in our October 2017 final

[123] 83 FR 43598.

rule, at a time when 2017 emissions data were not yet available. The Regional Haze Rule does not require us to select 2017 or any specific year as the baseline year for our assessment under 40 CFR 51.308(e)(2)(i)(D) of emission reductions achievable by the trading program, and commenter establishes no basis why we should have been required to update this analysis in our August 2018 proposal to affirm the rule. Our BART alternative analysis for Texas relied on 2014 data to be consistent with the CSAPR Better-than-BART analysis given that we are relying on the demonstration in the 2012 CSAPR Better-than-BART rule (as affirmed in 2017) to show that the clear weight of evidence demonstrates that the Texas SO_2 Trading Program, which is modeled on the CSAPR trading programs, will provide for greater reasonable progress than BART in Texas as required under 40 CFR 51.308(e)(2)(i)(E).[124] We have provided a reasonable explanation for our selection of 2014 as the historical baseline year for the purposes of meeting the requirement of 40 CFR 51.308(e)(2)(i)(D).

The commenter's suggestion that the Texas SO_2 Trading Program should be structured to achieve additional emission reductions beyond the cap is effectively similar to other comments advocating for a lower cap or a more stringent program generally. As discussed elsewhere in this document, we continue to believe that the Texas SO_2 Trading Program is sufficiently stringent to meet the requirements to qualify as a BART alternative in the context of the 2012 CSAPR Better-than-BART rule and the 2017 CSAPR Better-than-BART affirmation finding. The comment contending that the Texas SO_2 Trading Program authorizes sources to increase emissions relative to actual emissions in 2015, 2016, and 2017, and authorizes greater pollution than the status quo mischaracterizes the Texas SO_2 Trading Program and reflects a

[124] Note that the year 2014 is not relevant to the question of whether emissions achieved by the program are surplus to the baseline date for purposes of 40 CFR 51.308(e)(2)(iv). For purposes of meeting the requirements of 40 CFR 51.308(e)(2)(iv), the baseline date is 2000-2004.

misunderstanding of its purpose. First, we note that the Texas SO_2 Trading Program will achieve an average reduction of at least 54,213 tons per year over the 2014 emissions, which is the difference between the aggregate 2014 SO_2 emissions of the covered Texas EGUs (309,296 tons per year)[125] and the assurance level of 255,083 tons we are finalizing in this action. The assurance level represents the highest annual SO_2 emissions anticipated from units subject to the Texas SO_2 Trading Program in light of the three-for-one penalty surrender ratio imposed on emissions exceeding that level, and is therefore a conservatively high figure to compare against 2014 actual emissions levels. Second, and notwithstanding our position that we appropriately selected 2014 as the baseline year for the purpose of this analysis, we note that even if we had selected 2017 as the baseline year, we disagree that the Texas SO_2 Trading Program would authorize greater pollution than the status quo given that the trading program now contains an assurance level limiting SO_2 emissions from Texas EGUs participating in the trading program where no prior SO_2 emission limits under the regional haze program existed for these sources. Therefore, we disagree that the Texas SO_2 Trading Program authorizes greater pollution than the status quo even under the assumption of 2017 as the baseline year for comparison against the Texas SO_2 Trading Program as the status quo "authorizes" much higher emissions (due to there being no enforceable program at all and the only limitations being the facilities' current permit limits), even if actual emissions happened to be below that level. As discussed in section III.A.2 of this final action, we note that the Texas SO_2 Trading Program with the added assurance level we are finalizing in this action, also achieves significantly lower emissions relative to the year 2002.[126] These emission reductions that are secured by the Trading Program contribute to

[125] 84 FR at 61854.
[126] The Regional Haze Rule provides that the baseline period for the first planning period is 2000-2004. *See* 40 CFR

improvements in visibility from the baseline period for the first planning period and are permanent and enforceable as part of the long-term strategy for the State of Texas.

Further, the purpose of the program is not to achieve some particular quantum, much less a maximum quantum, of emission reductions as compared to some reference point for "current" emission levels. In fact, whether the Texas SO_2 Trading Program allows for a potential increase in emissions from recent or current emission levels is not the relevant question under the BART alternative provisions of the Regional Haze Rule. In order to satisfy the BART alternative test of 40 CFR 51.308(e)(2)(i)(E), the alternative must, on the clear weight of evidence, achieve greater reasonable progress in visibility improvements than would be achieved through the installation and operation of BART at the covered sources. This test calls for a comparison in stringency between two regulatory regimes, BART and the BART alternative. The Texas SO_2 Trading Program is modeled on and set at a stringency level comparable to CSAPR in Texas, such that the CSAPR Better-than-BART analysis may be relied upon in determining the adequacy of this program. As discussed in section III.A.2, we find that we have satisfied the BART alternative test of 40 CFR 51.308(e)(2)(i)(E). Whether actual emissions may increase or decrease from some particular historical level under the program is immaterial so long as emissions remain below the level requisite to make the "greater reasonable progress" showing.

To the extent the commenter is asserting that certain aspects of the program, such as allocations to retired units, the availability of banking, and allocations from the Supplemental Allowance Pool, pose a risk that the program will fail to achieve the emission levels assumed in our analysis, this theoretical concern is addressed by amendments to the program finalized in this

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51.308(d)(2)(i).

action. To address concerns regarding potentially higher SO_2 emissions in individual years from Texas EGUs participating in the trading program, on November 1, 2019, we signed a supplemental notice of proposed rulemaking that proposed to add assurance provisions to the Texas SO_2 Trading Program. Under the assurance provisions, if the total emissions of the sources in the program in any year exceed the annual program budget by more than a variability limit of 16,688 tons, the emissions over that "assurance level" will trigger a requirement for some sources to surrender three allowances for each ton of emissions, providing a strong disincentive against emissions exceeding the assurance level. We are finalizing that supplemental proposal in this action.[127] As we explained in the supplemental proposal, the assurance level effectively moots any concerns regarding annual emission performance under the program by establishing a cap implemented via the penalty surrender ratio. This is because when a mass-based trading program includes a "cap" on overall annual emissions, as the Texas SO_2 Trading Program now does with the addition of the assurance provisions, that overall "cap" on emissions set by the program (here, the assurance level) effectively determines the stringency of the program in each year. With the addition of an assurance level, the potential risk of an undue relaxation of the annual stringency in the program is minimized given that sources will remain strongly incentivized to keep annual emissions below the level at which the three-for-one surrender penalty is imposed. Thus, how allowances are allocated or banked within that cap does not affect the overall stringency of the program.[128]

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[127] The final "assurance level" is 255,083 tons, which is the sum of the revised annual program budget of 238,395 tons plus the variability limit of 16,688 tons. As discussed in section III.A.1 of the preamble for this action, for consistency with the assurance provisions, EPA is also making revisions to the Supplemental Allowance Pool provisions that will limit the combined total quantity of allowances issued in any year from the program budget and the Supplemental Allowance Pool to this same level of 255,083 tons.
[128] *See* 84 FR 61854.

Comment: The commenter asserted that even a "successful" cap and trade program cannot avoid localized impacts to particular Class I Areas, much less to local communities most impacted by large pollution sources, and that the Trading Program is therefore not an adequate BART alternative.

Response: The Regional Haze Rule does not require that a BART alternative achieve greater visibility improvements than BART at each particular Class I area, and only requires that a BART alternative does not result in declines in visibility compared to the baseline in any class I area. EPA's decision to authorize alternative measures, including emissions trading programs, subject to those requirements, in the original 1999 Regional Haze Rule is beyond the scope of this action. Further, the test EPA devised under 51.308(e)(3) for evaluating whether a BART alternative makes greater reasonable progress calls for an evaluation of whether there could be unacceptable localized visibility impacts under a BART alternative. In particular, the analysis asks whether visibility will decline in any class I area under the BART alternative as compared with the baseline scenario. This evaluation was done as part of the 2012 CSAPR Better-than-BART analytic demonstration, which was relied upon in developing the Texas SO_2 Trading Program. That analysis showed no decline in visibility in any Class I area compared to the baseline emissions scenario.

B. PM BART

Comment: We received one comment raising several objections to EPA's proposal to affirm approval of Texas' finding that no PM BART controls are necessary for EGUs based on Texas' pollutant-specific screening analysis for PM. The commenter asserted that the Regional Haze Rule and the BART Guidelines require that the BART screening analysis evaluate the

impacts of all pollutants together, not just PM, and that a source-specific, five-factor analysis of PM BART must then be conducted for each EGU found to be subject to BART. The commenter asserted that Texas' pollutant-specific screening analysis did not meet these requirements and that EPA's proposed approval of Texas' finding that its sources are exempt from PM BART is thus inappropriate. The commenter also argued that EPA's proposal to affirm approval of Texas' pollutant-specific screening analysis for PM BART is arbitrary and capricious for several reasons, including the following: (1) approval of Texas' screening approach is contrary to the plain language of the Clean Air Act; (2) Texas' screening approach is directly contrary to the agency's regional haze regulations and mandatory BART guidelines; (3) EPA's approval of a pollutant-specific screening approach arbitrarily departs from the agency's past practice; and (4) EPA failed to provide a rational explanation for proposing to approve Texas' application of a pollutant-specific screening analysis in this case.

Specifically, the commenter claimed that approval of Texas' screening approach is contrary to the plain language of the Clean Air Act because the commenter believes this effectively exempts sources from installing PM BART controls without going through the statutory exemption process Congress prescribed. The commenter asserted that Congress specifically provided that sources could be exempted from the BART requirements only if the Administrator determines that a *source* does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to a significant impairment of visibility in any Class I area, and that the FLMs must concur with any proposed exemption. The commenter argued that EPA has not demonstrated that any of the BART-eligible Texas EGUs meet the statutory requirements for an exemption and EPA has not obtained the concurrence of federal land managers for exempting sources for PM BART.

The commenter asserted that Texas' screening approach is directly contrary to the agency's regional haze regulations and mandatory BART guidelines. The commenter asserted that the Regional Haze Rule and BART guidelines do not provide for any exemptions from a five-factor BART analysis for specific pollutant, with the exception of a de minimis exemption under §308(e)(1)(ii)(C) for sources that emit less than 15 tons per year of particulate matter. The commenter argued that neither EPA nor Texas attempted to demonstrate that this de minimis exemption applies to any of Texas' EGUs.

The commenter also argued that EPA's approval of a pollutant-specific screening approach arbitrarily departs from the agency's past practice. Specifically, the commenter claimed that EPA has rejected similar pollutant-specific approaches to BART determinations in past regional haze actions. For instance, the commenter asserted that in a prior regional haze action where EPA partially disapproved the Arizona Regional Haze SIP (78 FR 46142 (July 30, 2013)), EPA stated that under the Regional Haze Rule, the determination of whether a source causes or contributes to visibility impairment is *not* made on a pollutant-by-pollutant basis and that once a source is determined to be subject to BART, the Regional Haze Rule allows for the exemption of specific pollutants from a BART analysis only if they are below specified de minimis levels.

The commenter also raised an objection to EPA's reliance on a 2006 guidance document in proposing to approve Texas' application of a pollutant-specific screening analysis for PM BART. The commenter argued that the EPA's 2006 guidance document on which EPA based its proposed approval of Texas' pollutant-specific screening analysis was never subject to notice and comment and is therefore not binding. Furthermore, the commenter asserted that EPA did not explain how the 2006 guidance document is applicable in this case given that the guidance document does not contain an analysis or rationale and does not cite or incorporate any technical

justification for allowing the use of a pollutant-specific screening approach. The commenter also argued that the guidance document contemplates the use of a pollutant-specific screening analysis in situations where a state is subject to both SO_2 and NO_X emission reductions under the Clean Air Interstate Rule, not CSAPR or some other trading program as in this case. The commenter also argued that reliance on the 2006 guidance document is not appropriate in this case because Texas participates in CSAPR for ozone season NO_X and is therefore not subject to annual NO_X emission limits.

The commenter also asserted that in its screening analysis, Texas did not provide a rationale or justification for its selection of 0.5 dv as the threshold for contribution to visibility impairment. The commenter argued that EPA's BART Guidelines do not authorize states or EPA automatically to use a 0.5 dv contribution threshold, but instead provide that any threshold states use for determining whether a source contributes to visibility impairment should not be higher than 0.5 dv. The commenter claimed that given the number of Texas sources and the magnitude of their impact at affected Class I areas, a contribution threshold lower than 0.5 dv may be appropriate.

Response: We are affirming our approval of Texas' pollutant-specific PM screening analysis and determination that PM BART emission limits are not required for any Texas EGUs as in accordance with EPA guidance and the Regional Haze Rule. As we explained in our August 27, 2018 affirmation proposal, in a 2006 EPA memorandum titled "Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations," EPA stated that pollutant-specific screening can be appropriate where a state is relying on a

trading program as a BART alternative to address both NO_X and SO_2 BART.[129] As discussed in the 2006 guidance, for EGU sources that are addressing the NO_X and SO_2 BART requirements by participation in a trading program as a BART alternative, such as CAIR, the state must still determine whether its BART-eligible EGUs are subject to review under BART for PM. In this situation, as this is the only determination that remains and because the task of predicting the impacts of PM on visibility is a relatively straight-forward exercise, unlike predicting the impacts of the non-linear reacting pollutants SO_2 and NO_X, a pollutant-specific basis to model only the impact of PM emissions on visibility is recommended to determine whether a source is subject to BART for PM. We note that the 2006 memorandum is consistent with the BART Guidelines, which provide that a state "may choose to perform an initial examination to determine whether a particular BART-eligible source or group of sources causes or contributes to visibility impairment in nearby Class I areas. If your analysis, or information submitted by the sources, shows that an individual source or group of sources (or certain pollutants from those sources) is not reasonably anticipated to cause or contribute to any visibility impairment in a Class I area, then you do not need to make BART determinations for that source or group of sources (or for certain pollutants from those sources)."[130] In sum, the 2006 EPA memorandum is consistent with the BART Guidelines and clearly states that a pollutant-specific analysis for PM emissions is an appropriate approach in certain carefully circumscribed circumstances, such as are present here.

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[129] *See* discussion in Memorandum from Joseph Paisie to Kay Prince, "Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations," July 19, 2006. While the memorandum specifies that pollutant-specific screening is appropriate for states relying on CAIR, it is reasonable to infer that other trading programs, such as CSAPR and the Texas SO_2 Trading Program, also qualify to use this approach.
[130] 40 CFR part 51 Appendix Y, Section III.

While the commenter is correct that in our January 4, 2017 BART FIP proposal,[131] we initially proposed to disapprove Texas' technical evaluation and determination in the 2009 Regional Haze SIP that PM BART emission limits are not required for any of Texas' EGUs, this was because Texas was not participating in CSAPR for SO_2 or in any other SO_2 emissions trading program or BART alternative at the time and thus did not meet the criteria described in our 2006 guidance. In our October 2017 final action, we addressed the SO_2 BART requirements for Texas EGUs under a BART alternative consisting of an intrastate trading program. Given that Texas is relying on participation in the CSAPR ozone season trading program for NO_X to satisfy NO_X BART for Texas EGUs and is now also subject to a BART alternative consisting of an SO_2 intrastate trading program to satisfy the SO_2 BART requirements for Texas EGUs, Texas is relying on a trading program as a BART alternative to address both NO_X and SO_2 BART. Thus, pollutant-specific screening for PM as performed by Texas in its 2009 SIP submittal was appropriate, consistent with the BART Guidelines[132] and the 2006 EPA memorandum.[133]

We disagree with the commenter's assertion that EPA's approval of a pollutant-specific screening approach arbitrarily departs from the agency's past practice. EPA has previously determined that this approach is appropriate for EGUs where a State relied on CAIR or CSAPR to satisfy the BART requirements for SO_2 and NO_X and has approved SIPs where the State required its BART-eligible EGUs to only evaluate PM emissions for determining whether they are subject to BART, and, if applicable, for performing a BART control assessment. We also

[131] 82 FR 912.
[132] 40 CFR part 51 Appendix Y, Section III.
[133] *See* Memorandum from Joseph Paisie to Kay Prince, "Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations," July 19, 2006.

note that in these analyses EPA approved a threshold of 0.5 dv for determining which sources were subject to BART.[134]

With regard to the commenter's assertion that our approval of Texas' selection of 0.5 dv as the threshold for visibility impairment for PM was improper, as an initial matter, as explained in our August 2018 proposal to affirm the October 2017 final rule promulgating the Texas SO_2 Trading Program, we did not reopen the subject-to-BART determinations for sources not covered by the trading program, which screened out of the BART program based on consideration of all visibility pollutants.[135] With respect to the BART sources included in the trading program, EPA requested comment on its PM-specific screening analysis.[136] EPA's basis for approving the 0.5 dv value for screening purposes was that EPA's BART Guidelines allow states conducting source-by-source BART determinations to exempt sources with visibility impacts as high as 0.5 dv.[137,138] Further, the BART Guidelines provide that in setting a contribution threshold, states should "consider the number of emissions sources affecting the Class I areas at issue and the magnitude of the individual sources' impacts." States have the discretion within the Clean Air Act, Regional Haze Rule, and BART Guidelines to set an appropriate contribution threshold and are free to use a threshold lower than 0.5 dv if they conclude that the location of a large number of BART-eligible sources in proximity of a Class I area justifies this approach. Texas did not determine in its 2009 Regional Haze SIP that there were circumstances in this case to justify the selection of a lower threshold. EPA continues to

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[134] See for example the approval of Regional haze SIPs for Georgia (77 FR 11452 for proposed rule and 77 FR 38501 for final rule), South Carolina (77 FR 11894 for proposed rule and 77 FR 38509 for final rule), and Kentucky (76 FR 78194 for proposed rule and 77 FR 19098 for final rule).
[135] 83 FR 43598 n. 80.
[136] *Id.* 43592-93.
[137] 70 FR 39104, 39161 (July 6, 2005) and 40 CFR part 51 Appendix Y, Section III.A.1.
[138] 82 FR at 48346 and 79 FR at 74848.

find that Texas was within its discretion to select a threshold of 0.5 dv in its BART screening analysis. In light of the above-referenced 2006 memorandum recognizing the availability of a pollutant-specific approach to BART where BART sources are already separately controlled for SO_2 and NO_X by one or more BART alternative trading programs, we are finalizing our proposed affirmation that no BART-eligible source in Texas is subject to BART for PM on a pollutant-specific basis. In finalizing an affirmation of our approval of Texas' determinations regarding PM BART, we offer one additional note. We originally proposed to approve Texas' screening approach in 2014,[139] and our October 2017 final action again relied on our technical evaluation in that proposal for the basis of our approval. We therefore incorporate by reference the technical evaluation regarding this issue from our 2014 proposal into the record for this action. (cite)

Comment: We received a comment asserting that the 2006 intra-agency memorandum on which EPA relies to propose approval of Texas' pollutant-specific screening approach is inconsistent with the Clean Air Act and the Regional Haze Rule, and EPA's interpretation of its regulations is therefore not entitled to deference. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (agency interpretation of its regulation is not controlling where "it is plainly erroneous or inconsistent with the regulation"); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (same). The commenter further asserted that courts have repeatedly criticized agency use of guidance documents in the form of interpretive rules and policy statements to reinterpret regulations, recognizing the potential problem that "[l]aw is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations." *Decker v. Northwest Envtl. Def. Ctr.*, 133 S.Ct. 1326, 1341 (2013); *Perez*

[139] *See* 79 FR 74817, 74848 (Dec. 16, 2014).

v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1213–14 (Mar. 9, 2015); *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (criticizing agency use of guidance documents in the form of interpretive rules and policy statements, recognizing the potential problem that "[l]aw is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.").

Response: EPA has the authority to develop and implement policies and guidance. EPA sometimes issues policy or guidance to encourage compliance with environmental requirements. Policy documents may represent EPA's official interpretation or view of specific issues. However, ultimately, EPA's actions with regards to guidance documents must be consistent with applicable statutory and regulatory requirements. The EPA disagrees that its reference to the 2006 guidance is inconsistent with the CAA or constitutes a legislative or interpretive rule, and we have reasonably relied, in part, on this guidance document in our approval of Texas' determination that no BART-eligible sources in Texas are subject to BART for PM on a pollutant-specific basis. As explained in response to similar comments above, application of pollutant-specific screening for PM is appropriate in Texas and is not inconsistent or at odds with either the CAA statute or applicable EPA regulations, for the reasons explained in response to those comments. We, therefore, disagree that our interpretation of the 2006 memorandum here is inconsistent with the Clean Air Act regarding a pollutant-specific screening approach for PM BART.

C. Appropriateness of the Texas SO_2 Trading Program vs. Source-Specific BART FIP

Comment: One commenter raised objections to EPA's finalization of the October 17, 2017 final rule promulgating the Texas SO_2 Trading Program, asserting that EPA provided no

rational basis for finalizing a FIP promulgating an intrastate trading program in place of the source-specific BART FIP proposal that was proposed by EPA in January 2017. The commenter asserted that the January 2017 BART FIP proposal was supported by detailed, source-specific analyses of the cost of SO_2 controls, the level of control achievable by different technologies, estimated emissions reductions, and projected visibility improvement from operation of such controls, and that this administrative record demonstrated that the 2017 BART FIP proposal meets the requirements of the Regional Haze Rule and CAA and should have been finalized by EPA.

Response: While EPA proposed source-specific BART emission limits in the January 2017 proposal, under the notice and comment rulemaking process, EPA may decline to finalize a proposed rule or may finalize a rule with changes from proposal based on consideration of additional information received during the comment period. Additionally, EPA may also propose a rule and rationale that differs from its original proposal and does not have an obligation to finalize the initial proposed rule as is the case here. We also note that the Regional Haze Rule does not require source-specific BART determinations, as the regulations at 40 CFR 51.308(e)(2)-(5) allow states, or EPA if promulgating a FIP, to adopt a BART alternative in place of source-specific BART provided that all applicable regulatory requirements related to the BART alternative are satisfied. EPA's obligations are to promulgate a final rule that meets the requirements of the CAA and the Regional Haze Rule, consider and respond to all relevant comments to the final rule, and provide a record of decision-making for its action that is not arbitrary and capricious. In this case, informed by comments we received during the public comment period for the January 2017 proposal from the Texas Commission on Environmental Quality (TCEQ), the Public Utility Commission of Texas (PUC), Luminant, and American

Electric Power (AEP), urging us to consider as a BART alternative the concept of emission caps using CSAPR allocations,[140] and based on our independent determination that a BART alternative approach under 40 CFR 51.308(e)(2) would meet all statutory and regulatory requirements and thus be viable for Texas, we did not finalize the source-specific BART emission limits we had proposed and instead we addressed the SO_2 BART requirement for Texas EGUs under a BART alternative consisting of an intrastate trading program in our October 2017 final rule. Having made the determination (in part through reliance on the analysis of CSAPR as a BART alternative as explained elsewhere in the record) that the BART-alternative program satisfies 40 CFR 51.308(e)(2) under the clear weight of evidence test of 40 CFR 51.308(e)(2)(i)(E), EPA need not further explain or justify the program based on a comparison of emission reductions, costs, or visibility improvements that may have been potentially achieved had EPA finalized the source-specific controls we proposed in January 2017. The statute and applicable regulations do not mandate that states, or EPA when it is promulgating a FIP, reach a particular conclusion or outcome regarding cost-effectiveness or emission reductions when applying the five-factor BART analysis, or in designing a BART-alternative program under 40 CFR 51.308(e).

Comment: We received one comment asserting that EPA never identified any errors in the January 2017 BART FIP proposal and that EPA never responded to certain comments submitted on that proposal. The commenter claimed that EPA did not demonstrate that the intrastate trading program would achieve greater reasonable progress than the January 2017 source-specific BART proposal to justify finalizing the intrastate trading program in place of the

[140] 82 FR 48324 at 48327.

source-specific BART FIP and that EPA cannot ignore the findings it previously made in the January 2017 BART FIP proposal.

Response: Under the notice and comment rulemaking process, EPA may decline to finalize a proposed rule or may finalize a rule with changes from the proposal based on consideration of additional information received during the comment period. As a general matter, EPA may publish a new proposed rule that supersedes a previously proposed rule in order to take into account newly available information or changes in circumstances that would affect the outcome of the final rule, with no obligation to finalize the originally proposed rule. EPA's obligations are to promulgate a final rule that meets the requirements of the Clean Air Act and the Regional Haze Rule, consider and respond to all relevant comments that are germane to the final rule, and provide a record of decision-making for its action that is not arbitrary and capricious. In this case, informed by comments we received during the public comment period for the January 2017 proposal, and based on our independent determination that this BART alternative approach under 40 CFR 51.308(e)(2) would meet all regulatory requirements and thus be a viable approach for Texas, we addressed the SO_2 BART requirement for Texas EGUs under a BART alternative consisting of an intrastate trading program in our October 2017 final rule instead of finalizing the source-specific BART emission limits we had proposed. In the October 2017 final rule, EPA considered and responded to all comments germane to the final rule and provided a record of decision-making for the final action. We note that some of the comments we received on the January 2017 proposal raised specific issues related to the analyses for the source-specific BART emission limits we proposed, and those comments were no longer relevant once we determined not to promulgate the proposed source-specific BART emission limits in our final action. Therefore, a response to those comments was unnecessary. While in

this case, EPA did not publish a new proposal before issuing the October 2017 final rule, we explained the basis for our finalization of the BART alternative in that final action, and we subsequently published a proposal in August 2018 to affirm our October 2017 final rule and solicited comment on important aspects of the rule, as discussed in section II.A of this final action. Informed by comments we received on the August 2018 proposed rule, we issued a supplemental proposal that proposed changes to the Texas SO_2 Trading Program, as discussed in section II.B of this final action. Having made the determination in the October 2017 final action, as further affirmed in today's final action, that the BART-alternative program, as amended in this final action, satisfies 40 CFR 51.308(e)(2) under the clear weight of evidence test of 40 CFR 51.308(e)(2)(i)(E), EPA need not further explain or justify the Texas SO_2 Trading Program based on a comparison of emission reductions, costs, or visibility improvements that may have been potentially achieved had EPA finalized the source-specific controls we proposed in January 2017. Further, in response to the statement contending that EPA cannot ignore the findings it previously made in the January 2017 proposed rule, we note that those proposed source-specific BART analyses and control determinations do not constitute final findings or final Agency action, as they were proposed by EPA but not finalized.

Comment: We received one comment asserting that the only justification EPA provided for finalizing the intrastate trading program in place of the source-specific BART FIP is that the state made this request during the public comment period for the January 2017 BART FIP proposal, and that this justification is inappropriate. The commenter claimed that while the CAA does establish a cooperative state-federal framework, this does not justify EPA deferring to a State's expressed preferences without providing a valid justification.

Response: This comment mischaracterizes the basis for our finalization of the Texas SO_2 Trading Program in place of source-specific BART controls in the October 2017 final action. While we did explain in the October 2017 final action that we received comments during the public comment period for the January 2017 proposal from the Texas Commission on Environmental Quality (TCEQ), the Public Utility Commission of Texas (PUC), Luminant, and American Electric Power (AEP), urging us to consider as a BART alternative, the concept of emission caps using CSAPR allocations,[141] this was not the sole basis for our finalization of the Texas SO_2 Trading Program in place of source-specific BART controls. Our October 2017 final action promulgating the Texas SO_2 Trading Program was informed by comments we received during the public comment period for the January 2017 proposal, and was based on our independent determination that a BART-alternative approach under 40 CFR 51.308(e)(2) meets all statutory and regulatory requirements and is thus an appropriate approach for addressing the SO_2 BART requirement for Texas EGUs. In addition to meeting all Clean Air Act and Regional Haze Rule requirements, we also explained in the October 2017 final action that the Texas SO_2 Trading Program would result in lower costs and added flexibility for affected sources compared to source-specific SO_2 BART controls.

D. Statutory Requirements for FIP Promulgation and Implementation

Comment: We received one comment asserting that the FIP promulgating the Texas SO_2 Trading Program is arbitrary, capricious, and unlawful because it allows EPA to suspend key provisions of the intrastate trading program if Texas submits a SIP revision, without the need for EPA to approve the SIP before those key provisions of the trading program are suspended.

[141] 82 FR 48324 at 48327.

Specifically, the commenter referred to a provision of the Texas SO_2 Trading Program that provides that the "Administrator may delay recordation of Texas SO_2 Trading Program allowances for the specified control periods if the State of Texas submits a SIP revision before the recordation deadline." 40 CFR § 97.921(a). Similarly, the trading program includes a provision that provides that the "Administrator may delay recordation of the Texas SO_2 Trading Program allowances for the applicable control periods if the State of Texas submits a SIP revision by May 1 of the year of the applicable recordation deadline under this paragraph." *Id.* § 97.921(b). The commenter claimed that these provisions at 40 CFR § 97.921(a) and (b) are arbitrary and capricious and otherwise unlawful because they are counter to the CAA's rulemaking requirements given that no provision of the CAA allows the submission of a SIP to suspend implementation of a FIP. The commenter also asserted that these provisions of the trading program violate the CAA and the Regional Haze Rule because suspension of the trading program would mean that there is no functioning BART alternative in place in the interim period between state submission of the SIP and EPA approval of that SIP. Furthermore, the commenter expressed concern that the Texas SO_2 Trading Program does not include any provision that would resume the intrastate trading program if the submitted SIP was subsequently found to be deficient.

Response: After considering this comment, we proposed in our November 2019 supplemental proposal to modify the Texas SO_2 Trading Program recordation provisions at 40 CFR 97.921 to make clear that submission of a SIP revision by the state does not cause any change in implementation of those provisions unless and until the SIP revision is approved by EPA. We are adopting that proposed modification in this final action. As explained in section III.A.1 of this final notice, we are taking final action to revise 40 CFR 97.921(a), (b), and (c) of

the Texas SO_2 Trading Program to condition any exceptions to scheduled allowance recordation activities on Texas' submission *and* EPA's approval of a SIP revision, rather than just on Texas' submission of a SIP revision. This revision will ensure that the program remains fully operational unless it is replaced by a SIP revision that is approved by EPA as meeting SO_2 BART requirements for the covered BART-eligible units.

E. Timing of the Plan for the First Implementation Period

Comment: We received a comment that asserted that the first planning period for regional haze ends in 2018 and given that the Texas SO_2 Trading Program would not be implemented until the beginning of 2019, it followed that the Texas SO_2 Trading Program and any other BART alternative for Texas would not meet the timing requirement for a BART alternative at 40 CFR § 51.308(e)(2)(iii). The commenter also argued that EPA's position in the October 2017 final rule that the end of the first planning period of the first long-term strategy for Texas is 2021 and thus the Texas SO_2 Trading Program meets the timing requirement for a BART alternative is unsupported and is inconsistent with EPA's prior statements identifying 2018 as the close of the first planning period. The commenter asserted that EPA's position that the January 2017 revisions to the Regional Haze Rule extended the first planning period contradicts EPA's statements in the January 2017 rulemaking that the revisions to the Regional Haze Rule did not alter the requirements for the first planning period. Additionally, the commenter later asserted, in response to our supplemental proposal to add an assurance level to the Texas SO_2 Trading Program, that EPA cannot guarantee the trading program will actually achieve emissions reductions until the addition of the assurance provisions becomes effective and that given that the limitations imposed by the assurance level would not be implemented until the 2021 compliance

period, EPA cannot guarantee that emission reductions under the trading program will actually take place during the first planning period.

A similar comment submitted by New Jersey asserted that the 2017 Regional Haze Rule revisions extended the time to submit Regional Haze plan revisions for the second planning period from 2018 to 2021, but did not extend the date for implementation of BART requirements associated with the first planning period. New Jersey asserted that under the Regional Haze Rule, emission reductions needed in the first planning period are still due by December 31, 2018 and that allowing Texas to obtain the reductions by the end of 2019, as allowed under the Texas SO_2 Trading Program, negates the intent of the CAA (specifically the 10-year planning period to assure incremental progress) and puts additional burden on other contributing states to maintain progress.

Response: After reviewing the Agency's position in the January 2017 final rule making amendments to the Regional Haze Rule, we are not finalizing a position in this action that the first planning period has been extended to July 31, 2021. We agree with the commenter that this position would be at odds with the national finding in the January 2017 action that our amendments there "do not affect the development and review of state plans for the first implementation period . . . ." 82 FR at 3080. Nonetheless, the Texas SO_2 Trading Program satisfies the requirement of 51.308(e)(2)(iii), because, as discussed in section III.A.2 above, the program ensures that emission reductions that were achieved prior to the end of 2018, sufficient to meet the requirements of the BART alternative, will be maintained through an enforceable program.

Actual emission levels from the sources covered by the BART alternative were below the levels mandated by the alternative by the end of the first planning period. In the case of the

Texas SO_2 Trading Program, sources subject to the trading program were already emitting SO_2 at levels below the program budget prior to December 31, 2018. As discussed in our November 2019 supplemental proposal, the combined SO_2 emissions from Texas EGUs participating in the intrastate trading program were 179,630 SO_2 tons in 2018, which is well below the Texas SO_2 Trading Program budget of 238,395 tons (as well as the assurance level of 255,083 tons we are finalizing in this action).[142] Therefore, the emissions reductions secured under the trading program occurred prior to the end of the period of the first long-term strategy for regional haze. With the trading program taking effect with the start of the 2019 calendar year, actual emissions were never allowed to exceed the amounts called for by the BART alternative. This issue is further discussed above in section III.A.2. We also note that we have never stated and do not agree that the existing Texas SO_2 Trading Program fails to ensure that all necessary emission reductions will occur by the end of the first planning period even without the addition of the assurance provisions. Our purpose in proposing to add the assurance provisions was merely to further ensure that the program's design is at least as stringent as the CSAPR SO_2 program as applied to Texas, not only on an average annual basis but also in individual years. Given that actual emission levels from the sources covered by the BART alternative were below the levels mandated by the alternative by the end of the first planning period, even before the addition of the assurance level, we are determining that the Texas SO_2 Trading Program meets the timing requirement for a BART alternative at 40 CFR 51.308(e)(2)(iii).

F. Notice and Comment Requirements

[142] 84 FR 61853.

Comment: We received a comment that the FIP promulgating the Texas SO_2 Trading Program did not follow the Clean Air Act's procedural requirements for promulgating a FIP. The commenter claimed that EPA promulgated the FIP without following the public notice and comment procedures set forth in 42 U.S.C. § 7607(d)(1)(B), (d)(2)-(6), which the commenter contended violates the Clean Air Act. The commenter contended that the Clean Air Act's public notice and comment procedures at U.S.C. § 7607(d)(3) require that EPA first publish in the Federal Register a proposed rule that includes a statement of basis and purpose and specifies a comment period. The commenter claimed that this statement of basis and purpose must include a summary of the factual data on which the proposed rule is based, the methodology used in obtaining and analyzing the data, and the major legal interpretations and policy considerations underlying the proposed rule, and that EPA must allow any person to submit comments as well as give interested persons an opportunity for the oral presentation of data, views, or arguments. The commenter asserted that these and other public participation requirements in § 7607(d) build on those in the Administrative Procedure Act and are even more protective of the public's right to notice and comment. The commenter asserted that EPA's January 2017 proposed rule "established" source-specific SO_2 emission limits that would have required the installation and operation of modern SO_2 controls or upgraded controls for subject to BART Texas EGUs, and that in contrast to this, the Trading Program in the final rule consisted of an intrastate emissions trading program that was not presented in the proposal. The commenter contended that EPA did not follow the rulemaking procedures required by the CAA given that EPA never proposed the adoption of a trading program nor did it discuss that it might consider adopting an intrastate trading program for Texas in lieu of the source-specific retrofit controls proposed in the January 2017 proposal. Additionally, the commenter asserted that the FIP promulgating the Texas SO_2

Trading Program does not qualify as a logical outgrowth of the January 2017 proposal. The commenter contended that the logical outgrowth doctrine applies where a rule merely clarifies its proposal, or where the agency put commenters on notice that it was considering approaches different from the proposal. According to the commenter, the logical outgrowth doctrine does not apply in this case because (i) the intrastate trading scheme is different than the January 2017 BART proposal, and (ii) EPA did not provide notice that it was considering an intrastate trading program instead of source specific SO_2 emission limits.

Response: We explained in our October 17, 2017 final rule that during the comment period for our January 2017 proposed rule, we received a comment letter from the Texas Commission on Environmental Quality (TCEQ) and the Public Utility Commission of Texas (PUC),[143] urging us to consider as a BART alternative the concept of emission caps using CSAPR allocations. We also received similar comments from Luminant and American Electric Power (AEP). Based on our consideration of these comments and our independent determination that a BART alternative approach under 40 CFR 51.308(e)(2) would meet all regulatory requirements and thus be a viable approach for Texas, we proceeded to address the SO_2 BART requirement for Texas EGUs under a BART alternative consisting of an intrastate trading program in our October 2017 final rule. In response to a petition for reconsideration of the October 2017 final rule requesting that the Administrator reconsider certain aspects of the FIP related to the Texas SO_2 Trading Program, we decided that the October 2017 federal plan could benefit from further public comment.[144] As a result, in our August 27, 2018 proposed rule, we proposed to affirm our October 2017 final rule that approved a portion of the 2009 Texas

[143] 82 FR 48324 at 48327.
[144] 83 FR 43586.

Regional Haze SIP and promulgated the intrastate trading program FIP. In doing so, we provided the public with an opportunity to comment on all centrally relevant aspects of our Texas SIP approval and of the FIP that promulgated the Texas SO_2 Trading Program, including our proposal to affirm the October 2017 FIP establishing an intrastate trading program capping emissions of SO_2 from certain EGUs in Texas as a BART alternative and our determination that this program satisfies the requirements for a BART alternative. We provided a 60-day public comment period that ended on October 26, 2018, and held a public hearing on September 26, 2018. Following that notice and comment opportunity, the EPA determined that certain additional changes to the program not included in the August 2018 proposal could be warranted. Therefore, we issued a supplemental notice of proposed rulemaking on November 14, 2019, providing a 60-day comment period and a public hearing on December 9, 2019. In the November 2019 supplemental proposal,[145] we proposed to amend several provisions of the Texas SO_2 Trading Program with the overall objective of strengthening our finding in the October 2017 final rule,[146] which we proposed to affirm in August 2018,[147] that the Texas SO_2 Trading Program will result in SO_2 emission levels from Texas EGUs that are similar to or less than the emission levels from Texas EGUs that would have been realized had Texas continued to participate in the SO_2 trading program under CSAPR.[148] The amendments to the Texas SO_2 Trading Program we are finalizing in this action are designed to ensure that emission levels in each year under the intrastate trading program, and their aggregate impact on visibility, will be similar to or less than what would have been realized from Texas EGUs from participation in the

[145] 84 FR 61850, 61851.
[146] 82 FR 48324, 48329.
[147] 83 FR 43591.
[148] *See* 83 FR at 43599.

SO_2 trading program under CSAPR,[149] thus providing further support to our determination that the trading program meets the requirements for a BART alternative. In finalizing our action affirming the intrastate trading program as amended in this final action, the EPA is addressing all in-scope comments we have received on both the August 2018 and November 2019 proposal notices, including, as discussed elsewhere in this final action and in our separate Response to Comments document, comments regarding the lawfulness and basis for the intrastate trading program under the CAA and the Regional Haze Rule, and other related comments. Therefore, to the extent the commenter is alleging that the intrastate trading program in our October 2017 FIP was promulgated without following the public notice and comment procedures and public participation requirements set forth in 42 U.S.C. § 7607(d), the agency has cured any such alleged procedural defect.

Comment: We received one comment asserting that EPA cannot claim that the October 2017 trading program was a clarification of the January 2017 proposed rule. The commenter asserted that the Texas SO_2 Trading Program finalized by EPA in the October 2017 final rule differs in substance from the BART proposal, which the commenter claimed is evidenced by EPA's addition in the final action of dozens of pages of regulatory and explanatory text that was not included in the 2017 BART proposal.

Response: We agree that our October 17, 2017 final rule that promulgated an intrastate trading program to address the SO_2 BART requirement for Texas EGUs cannot be characterized as merely a clarification of our January 4, 2017 proposed rule, nor has the Agency made this claim. Based on our consideration of comments we received on the January 2017 proposal urging us to consider as a BART alternative the concept of emission caps using CSAPR

[149] 83 FR 43592.

allocations, and based on our independent determination that a BART alternative approach under 40 CFR 51.308(e)(2) would meet all regulatory requirements and thus be a viable approach for Texas, we proceeded to address the SO_2 BART requirement for Texas EGUs under a BART alternative consisting of an intrastate trading program in our October 2017 final rule. In that final rule, EPA considered and responded to all relevant comments germane to the final rule and provided a record of decision-making for the final action. We note that some of the comments we received on the January 2017 proposal raised specific issues related to our proposed analyses for the source-specific BART emission limits we proposed. Given that those source-specific emission limits were not part of our final action, providing substantive responses to such comments was not required as they were no longer relevant. As discussed in several places throughout this final action, in response to a petition for reconsideration of the October 2017 final rule requesting that the Administrator reconsider certain aspects of the FIP related to the Texas SO_2 Trading Program, we provided an opportunity for further public comment on all centrally relevant aspects of the Trading Program in a proposal published on August 27, 2018, and provided an opportunity for public comment on proposed amendments to certain provisions of the Trading Program in a supplemental proposal published on November 14, 2019. The amendments to the Texas SO_2 Trading Program we are finalizing in this final action, which include minor changes from what we proposed in the November 2019 proposal, are designed to ensure that emission levels in each year under the intrastate trading program, and their aggregate impact on visibility, will be similar to or less than what would have been realized from Texas EGUs from participation in the SO_2 trading program under CSAPR,[150] thus providing further support to our determination that the Texas SO_2 Trading Program meets the regulatory

[150] 83 FR 43592.

requirements for a BART alternative and is an appropriate approach for addressing Texas' SO_2 BART obligations.

Comment: We received one comment contending that the Texas SO_2 Trading Program cannot be characterized as a logical outgrowth of the December 2014 proposed rule given that the BART provisions in the December 2014 proposed rule were abandoned due to *Homer City II*, and that EPA otherwise took final action on that proposed rule in a final action published in January 2016. The commenter also asserted that further confirmation that the December 2014 proposal was part of a different rulemaking process is provided by the fact that in the January 2017 BART proposal, EPA did not invite comments on the December 2014 proposal and also that EPA did not include the December 2014 proposal or any of the supporting technical analysis for the December 2014 proposal in the docket for the January 2017 proposal on the date of the publication of the proposed rule, as required by the CAA at 42 U.S.C. § 7607(d)(3).

Response: This commenter is referring to our December 16, 2014 proposed rule in which we proposed, among other things, to rely on our CSAPR FIP requiring Texas sources' participation in the CSAPR trading programs to satisfy the NO_X and SO_2 BART requirements for Texas' BART-eligible EGUs.[151] Due to the uncertainty arising from the D.C. Circuit's remand of Texas' CSAPR budgets, when we finalized the December 2014 proposal in an action published in January 2016, we did not finalize our proposal to rely on CSAPR to satisfy the SO_2 and NO_X BART requirements for Texas EGUs.[152] We note that we did not attempt to characterize the Texas SO_2 Trading Program as a logical outgrowth of the December 2014 proposed rule. We agree that the December 2014 proposed rule was a part of a different rulemaking process, which

[151] 79 FR 74818.
[152] *See* 81 FR 296, 301-02 (Jan. 5, 2016).

is supported by the fact that we did not reference that proposed rule in developing the intrastate trading program that was finalized in October 2017. We also did not reference the December 2014 proposal in our August 2018 proposal to affirm the October 2017 final rule.

Comment: We received a comment from environmental groups asserting that the fact that Texas state agencies and industry submitted comments in support of a trading program does not make the October 2017 final rule promulgating the Texas SO_2 Trading Program a "logical outgrowth" of EPA's 2014 proposal given that EPA did not provide notice to the public that it was proposing or even considering a trading program. The commenter asserted that the D.C. Circuit has "made clear that the fact that some commenters actually submitted comments addressing the final rule is of little significance. The agency must itself provide notice of a regulatory proposal," citing *Ass'n of Private Sector Colls. v. Duncan*, 681 F.3d 427, 462 (D.C. Cir. 2012) (citation omitted) (internal quotation marks omitted). The same environmental groups asserted that they did not have an opportunity to comment on information that arose in the October 2017 final rule promulgating the Trading Program, including the consideration of a trading program as a BART alternative to satisfy BART, the specifics of EPA's intrastate trading program, or the rationale for adopting that program. The environmental groups asserted that while they submitted comments on BART alternatives in response to the comments submitted by industry—those comments were not based on, or responding to, any actual or implied proposal by EPA to adopt such an alternative. The environmental groups contended that their response to industry comments about industry's desire for a trading program is not a substitute for having notice and opportunity to comment on EPA's decision to promulgate a trading program.

Response: We do not take the position that any comments on the January 2017 proposal could have or did provide a basis for treating the October 2017 final rule as a "logical

outgrowth" of the December 2014 proposal, so the premise of this comment is incorrect. Furthermore, the case cited by commenter is inapposite as it does not arise under the CAA. The CAA contemplates circumstances in which the Agency may finalize rules under section 307(d) that reflect changes from proposal that a commenter is unable to comment on. The appropriate remedy, when circumstances warrant, is administrative reconsideration, so that the agency is able to provide the public the opportunity to comment on those matters (or "objections") that are of "central relevance" to the outcome of the rule. *See Wisconsin v. EPA*, 938 F.3d 303, 331-32 (D.C. Cir. 2019). The commenter's concerns regarding logical outgrowth have now been addressed by our August 27, 2018 proposal that specifically solicited comment on all key aspects of the Texas SO_2 Trading Program. We are finalizing that proposal with amendments to certain provisions of the Trading Program after considering and responding to all comments within scope that we received during the public comment periods for the August 2018 proposal and the November 2019 supplemental proposal.

Comment: We received comments from environmental groups asserting that EPA did not provide responses to certain comments they submitted during the public comment period for our January 2017 proposal. Those particular comments submitted by the environmental groups were a reaction to comments submitted by industry to EPA—also during the public comment period for our January 2017 proposal—urging us to consider as a BART alternative the concept of emission caps using CSAPR allocations in place of source-specific SO_2 BART controls. Specifically, the comments the environmental groups claim EPA did not respond to asserted that CSAPR is not better than BART. The commenters contended that EPA had an obligation to respond to those comments given EPA's reliance on CSAPR to justify the Texas SO_2 Trading Program, and that in not providing a response, EPA violated the CAA's requirement that a rule

"be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period." 42 U.S.C. § 7607(d)(6)(B).

Response: We provided responses in the October 2017 final rule to each of the in-scope significant comments, criticisms, and new data submitted in written or oral presentations during the comment period. We continue to hold the position that comments alleging that CSAPR is not better than BART were beyond the scope of our January 4, 2017 proposed rule, and they are beyond the scope of our final action now. We continue to believe that such comments raise issues that are appropriately addressed in the record of the 2012 CSAPR Better-than-BART rule[153] and our 2017 affirmation of CSAPR Better-than-BART.[154] In this action, the EPA is relying on the conclusion reached in those actions, without reopening them or having any intention to reopen them, that CSAPR remains a valid BART-alternative, including after taking account of geographic changes in the scope of CSAPR's coverage since 2012. In particular, because the Texas SO_2 Trading Program, as amended in this final action, has been designed to achieve SO_2 emission levels from Texas EGUs that are similar to or less than what would have been realized from Texas EGUs' participation in the CSAPR SO_2 trading program, we are making the determination that the Texas SO_2 Trading Program is an appropriate BART alternative for addressing Texas' SO_2 BART obligations. Because the Texas SO_2 Trading Program will result in SO_2 emissions from Texas EGUs similar to or less than emissions anticipated under CSAPR, this alternative is an appropriate approach for addressing Texas' SO_2 BART obligations and, in the context of the operation of the CSAPR ozone-season NO_X trading

[153] 77 FR 33641.
[154] 81 FR 74504.

program and the operation of the CSAPR annual NO_X and SO_2 trading programs, will achieve greater reasonable progress than BART towards restoring visibility, consistent with the June 2012 "CSAPR Better-than-BART" determination and September 2017 "CSAPR Better-than-BART affirmation finding." As discussed in section I.D of this final action, EPA has denied a petition for reconsideration of the 2017 CSAPR Better-than-BART affirmation that was based in part on an objection that the Texas program is not of sufficient stringency to satisfy the analysis for CSAPR. Although our determination in that action is also beyond the scope of this action here, it means that EPA here can continue to rely on the CSAPR "Better-than-BART" finding in conducting its analysis of whether the Texas intrastate trading program satisfies the requirements of 40 CFR 51.308(e)(2).

Comment: One commenter asserted that EPA's August 2018 proposal affirming the October 2017 final rule promulgating the Texas SO_2 Trading Program and solicitation of comments on only some elements of the Texas SO_2 Trading Program cannot cure the rule's procedural deficiencies in finalizing the trading program because the opportunity for public comment is both insufficient and too late. The commenter contended that based on case law, the purpose of notice and comment is to provide the public with an opportunity to influence agency rulemaking, citing *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 215 (5th Cir. 1979); *Nat'l Tour Brokers Ass'n v. U.S.*, 591 F.2d 896, 902 (D.C. Cir. 1978). The commenter claimed that this opportunity to influence agency rulemaking is meaningful only when rules remain in the formative stage and agencies are more likely to give real consideration to alternative ideas. Furthermore, the commenter asserted that agencies do not provide an adequate opportunity to influence the rulemaking process when they solicit public comment on rules that they have already labeled as final, as in the case of the Texas SO_2 Trading Program. The commenters stated

that the October 2017 FIP promulgating the Texas SO_2 Trading Program remained in effect even while it was open to public comment, thus not providing the public with a meaningful opportunity to influence the trading program. Additionally, the commenter noted that EPA has not yet rescinded or withdrawn the FIP promulgating the Texas SO_2 Trading Program even though environmental groups filed a petition for reconsideration arguing that the Texas SO_2 Trading Program did not follow notice and comment requirements. According to the commenters, in having the Texas SO_2 Trading Program remain in effect, EPA has continued to violate the CAA's notice and comment provisions.

The commenter asserted that the D.C. Circuit explained in *Nat'l Tour Brokers Ass'n*, 591 F.2d at 902, that agencies are likely to become more close-minded and defensive once they put their credibility on the line in the form of final rules. Furthermore, the commenter argued that agencies cannot cure notice and comment defects by merely soliciting comments after the promulgation of a final rule. The commenter asserted that when an agency seeks to save a rule that suffers from a notice and comment violation, that agency bears the burden of proving that the violation did not prejudice the public and that the absence of such prejudice must be clear for the violation to be considered "harmless" and the rule to be upheld. The commenter claimed that at this point, the only legal remedy is for EPA to withdraw the Texas SO_2 Trading Program and replace it with a FIP that satisfies the statutory and regulatory requirements.

Response: In response to the petition for reconsideration referenced by the commenters, we decided that the October 2017 final rule could benefit from further public comment.[155] As a result, in our August 2018 proposed rule, we proposed to affirm our FIP promulgating the Texas SO_2 Trading Program and in doing so, we provided the public with an opportunity to comment

[155] 83 FR 43586.

on all centrally relevant aspects of the October 2017 final rule, including our promulgation of the Texas SO_2 Trading Program and our determination that this program satisfies the requirements for a BART alternative.[156] We disagree with the commenter that the opportunity for public comment provided by our August 27, 2018 proposed rule is insufficient and too late. While the October 2017 final rule remained in effect when we proposed the August 27, 2018 proposal, in that proposal we also sought input on whether SO_2 BART would be better addressed through a source-by-source approach (source-specific BART), the October 2017 SO_2 trading program, or some other appropriate BART alternative. We stated in the August 27, 2018 proposal that if we were to decide to act pursuant to any comments we receive, we may initiate a new rulemaking process with a new proposed rule.[157] We provided a 60-day public comment period that ended on October 26, 2018 and held a public hearing on September 26, 2018, to receive public comment on our August 27, 2018 proposed rule. As a result of comments received during that comment period, we subsequently published and took further comment on a supplemental proposal in November 2019 to make changes to certain provisions of the Texas SO_2 Trading Program. Our November 2019 supplemental proposal and the amendments to the trading program we are finalizing in this action are evidence that our intent was to be open to further comment and that we ultimately gave real consideration and were influenced by the comments we received. Therefore, we disagree that we have not provided the public a fully adequate opportunity to influence the agency's rulemaking or that the public notice and opportunity to comment on our proposals was not meaningful.

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[156] 83 FR 43586 at 43590.
[157] 83 FR at 43587.

In this respect, our actions are consistent with the requirements of the CAA under section 307(d). The CAA contemplates that in some circumstances the public may not be able to comment on important aspects of a final rule. The appropriate remedy is reconsideration to afford that opportunity for comment, and thus provide for administrative exhaustion prior to judicial review, with respect to all "centrally relevant" objections to the final rule. The August 2018 proposal afforded the opportunity to comment on all such objections with respect to the October 2017 final action.

The CAA also contemplates that a final rule may remain in effect while the EPA undertakes that reconsideration. Even when the EPA is undertaking a mandatory reconsideration process under section 307(d)(7)(B), the statute provides that the rule "*may* be stayed" (emphasis added) by the Administrator or a court for a period not to exceed three months. The fact that the Texas SO_2 Trading Program remained in effect and went into operation during the pendency of the public notice and comment periods in this instance does not in any manner establish that the agency's notice and comment process on the August 2018 proposal to reaffirm the final rule is somehow infirm, or that any alleged defects in the procedure for the October 2017 final rule are somehow incurable.

Further, the cases cited by commenter are inapposite because they were not subject to the provisions of CAA section 307(d). In *U.S. Steel Corp. v. EPA*, 595 F.2d 207 (5th Cir. 1979), for instance, the court reviewed EPA's designation of nonattainment areas under section 107 of the Act. Designations under section 107 are not amongst the enumerated actions in section 307(d) of the Act that are governed by the administrative rulemaking procedures of subsection (d), including the provision for mandatory reconsideration under section 307(d)(7)(B). Thus, the court in *U.S. Steel Corp.* was reviewing EPA's action under the

Administrative Procedure Act. *See* 595 F.2d at 210. The Texas SO_2 Trading Program is a federal implementation plan promulgated under section 110(c) of the CAA, and thus subject to section 307(d), pursuant to section 307(d)(1)(B). The court in *U.S. Steel* was not confronted with a circumstance in which the agency promulgated a final rule subject to the provisions of CAA section 307(d) that was substantially different from the proposal, but then took the necessary steps to provide the opportunity for comment on all centrally relevant issues, consistent with the process contemplated in section 307(d)(7)(B). Thus, the *U.S. Steel Corp.* case cited by the commenter is not relevant to our final action on the Texas SO_2 Trading Program here.

Comment: One commenter expressed general concern that EPA proposed to affirm the October 2017 final rule that promulgated the Texas SO_2 Trading Program in the August 2018 proposal without soliciting comments on certain sections of the final rule.

Response: In response to a petition for reconsideration of the October 2017 final rule requesting that the Administrator reconsider certain aspects of the FIP related to the Texas SO_2 Trading Program, we decided that important aspects of the October 2017 federal plan could benefit from further public comment.[158] Accordingly, in a notice published on August 27, 2018, we proposed to affirm certain aspects of the October 2017 final rule, and thus opened for comment the following elements, which effectively covered all of the central objections in the petition for reconsideration: 1) the proposal to affirm the October 2017 FIP establishing an intrastate trading program addressing emissions of SO_2 from certain EGUs in Texas as a BART alternative and the determination that this program satisfies the requirements for BART alternatives; 2) the proposal to affirm the finding that the BART alternatives in the October 2017 rulemaking to address SO_2 and NO_X BART at Texas' EGUs result in emission reductions

[158] 83 FR 43586.

adequate to satisfy the requirements of CAA section 110(a)(2)(D)(i)(II) with respect to visibility for the following NAAQS: 1997 8-hour ozone, 1997 $PM_{2.5}$ (annual and 24-hour), 2006 $PM_{2.5}$ (24-hour), 2008 8-hour ozone, 2010 1-hour NO_2, and 2010 1-hour SO_2 NAAQS; and 3) the proposal to affirm our October 2017 approval of Texas' SIP determination that no sources are subject to BART for PM. The August 2018 affirmation proposed rule also solicited comment on the specific issues of whether recent shutdowns of sources included in the trading program and the merger of two owners of affected EGUs should impact the allocation methodology for certain SO_2 allowances. In addition to soliciting comment on the above elements and aforementioned specific issues, the August 2018 affirmation proposal also invited comment on additional issues that could inform our decision making with regard to the SO_2 BART obligations for Texas. First, we sought input on whether SO_2 BART would be better addressed through a source-by-source approach (source-specific BART), the October 2017 SO_2 trading program, or some other appropriate BART alternative. Second, EPA requested comment on whether a SIP-based program would serve Texas better than a FIP. Third, we requested public input on whether and how the SO_2 trading program finalized in the October 2017 final rule addresses the long-term strategy and reasonable progress requirements for Texas. We find that the issues that EPA enumerated for reconsideration and solicitation of public comment covered all centrally relevant aspects of the October 2017 rule. *See* 83 FR at 43587. As noted by the commenter, we recognize that there were certain aspects of our October 2017 final rule that we did not reopen and thus did not solicit further comment on in our August 2018 proposal. We did not reopen or solicit comment on the following: our October 2017 final determination that CSAPR addresses the NO_X BART requirements for EGUs in Texas; identification of BART-eligible sources; and our determination that the BART-eligible EGUs not participating in the Texas SO_2 Trading Program

were not causing or contributing to visibility impairment, and were therefore not subject to BART. We did not reopen and solicit further comment on these determinations made in the October 2017 final rule because these aspects of our final rule were finalized as proposed in the January 2017 proposal after carefully considering and responding to all comments within scope that we received during the public comment period.

G. Subject-to-BART Determinations

Comment: We received a comment from Lower Colorado River Authority (LCRA) stating their Fayette Power Plant Units 1 & 2 (FPP U1 & U2) are not subject to BART, contrary to the determination made by EPA in the January 2017 FIP proposal. The commenter asserted that EPA improperly used data from 2000-2004, which pre-dated the installation of wet flue gas desulfurization scrubbers at the units, to assess visibility impacts of FPP U1 & U2. Although the commenter did not request that EPA remove FPP U1 & U2 from the Texas SO_2 Trading Program at this time, and actually expressed support of the Texas FIP and the inclusions of FPP U1 & U2 in the trading program, the commenter requested that EPA concur that the most currently available data must be used for visibility impact determinations under the regional haze program.

Response: We appreciate LCRA's concerns regarding Fayette Power Plant Units 1 and 2, and we agree that Fayette Units 1 and 2 are currently equipped with high performing wet FGDs. We note that, as discussed in our October 2017 final rule and as affirmed in this rulemaking, we are not making a subject-to-BART determination for those sources covered by the Texas SO_2 Trading Program. The relevant BART requirement for the participating BART-eligible units are encompassed by BART alternatives for NO_X and SO_2 such that we did not deem it necessary to finalize subject-to-BART findings for these EGUs. In addition, we are affirming our approval of

the determination in the 2009 Texas Regional Haze SIP that none of these sources are subject to BART for PM. Therefore, comments concerning the emissions utilized in our subject-to-BART modeling for the sources participating in the SO_2 trading program are no longer relevant.

H. Visibility Transport

Comment: One commenter asserted that EPA's reliance on the Texas SO_2 Trading Program to satisfy section 110(a)(2)(D)(i)(II) is arbitrary and capricious both because the Texas SO_2 Trading Program itself is unlawful and because EPA's reliance on the Texas SO_2 Trading Program here is based on EPA's claims that the Texas SO_2 Trading Program reduces emissions as much as CAIR would have. According to the commenter, this is problematic because EPA cannot use CAIR, given that CAIR was invalidated years ago by the D.C. Circuit, citing *North Carolina*, 531 F.3d at 903, and has been replaced by CSAPR. Thus, the commenter contended that EPA cannot use CAIR as the benchmark for whether the interstate visibility transport requirements are met. The commenter also asserted that EPA disapproved Texas' regional haze plan precisely because it relied on CAIR and that it is arbitrary and capricious for EPA to now turn around and claim that interstate visibility transport requirements are satisfied because the emissions reductions in CAIR will be achieved.

The commenter also asserted that EPA's new rationale of relying on the emission levels assumed in the CENRAP modeling as a basis for finding that Texas' emissions will not interfere with other states' visibility plans is not appropriate given that there is no demonstration provided to show that the emission assumptions used by CENRAP in its visibility modeling are in fact sufficient to assure that Texas emissions do not interfere with measures required to protect visibility in other states. The commenter also expressed concern that certain states, such as New

Mexico and Colorado, impacted by Texas emissions are not members of CENRAP, and therefore, the CENRAP process could not have determined what emissions limits were necessary to satisfy Texas' visibility transport obligations with respect to New Mexico and Colorado.

Response: First, we address comments regarding the Texas SO_2 Trading Program as being unlawful, arbitrary, or capricious, elsewhere in this document. Second, the Texas SO_2 Trading Program, as promulgated in October 2017 and with the amendments promulgated in this final rule, results in emission reductions that are adequate to satisfy Texas' visibility transport obligations under CAA section 110(a)(2)(D)(i)(II) for the following six NAAQS: (1) 1997 8-hour ozone; (2) 1997 $PM_{2.5}$ (annual and 24 hour); (3) 2006 $PM_{2.5}$ (24-hour); (4) 2008 8-hour ozone; (5) 2010 1-hour NO_2; and (6) 2010 1-hour SO_2. The 2009 Texas Regional Haze SIP relied on participation in CAIR to meet the SO_2 BART requirements for Texas EGUs, and this level of emissions reductions from Texas is what other states relied upon and assumed during interstate consultation and in the development of their long-term strategies and reasonable progress goals for their own Class I areas in their regional haze SIPs. As discussed in section III.B of this notice, Texas EGU sources were projected to emit approximately 350,000 tons of SO_2 annually under CAIR participation. By comparison, Texas EGUs are anticipated to emit no more than approximately 290,083 tons of SO_2 annually under the Texas SO_2 Trading Program (i.e., 255,083-ton assurance level + estimated 35,000 tons per year of emissions from units not covered by the Texas SO_2 Trading Program), which is well below the 350,000-ton emissions projection for Texas sources under CAIR and well below the maximum total annual SO_2 emissions assumed for Texas under CSAPR (i.e., 317,000 tons) in the CSAPR Better-than-BART analysis. Thus, the Texas SO_2 Trading Program as amended in this final action, ensures SO_2 emission reductions from Texas that are consistent with, and indeed greater than, the level

of emission reductions relied upon by other states during interstate consultation and thus this level of emissions reductions is adequate to satisfy the requirements of CAA section 110(a)(2)(D)(i)(II) with respect to visibility for the six identified NAAQS.[159]

The commenter makes the claim that CENRAP's modeling of emission assumptions does not necessarily demonstrate that those assumptions were in fact sufficient to assure non-interference by Texas' emissions with measures required to protect visibility in other states. We note that our 2013 infrastructure-SIP guidance addressing the interstate visibility transport requirements of the Act (also sometimes referred to as "prong 4") lays out two ways in which a state's infrastructure SIP submittal may satisfy these requirements.[160] One way is through a state's confirmation in its infrastructure SIP submittal that it has an EPA-approved regional haze SIP in place. In the absence of a fully approved regional haze SIP, the second method to meet these requirements is a demonstration that emissions within a state's jurisdiction do not interfere with other states' plans to protect visibility. Such a demonstration should point to measures that limit visibility-impairing pollutants and ensure that the resulting reductions conform with any mutually agreed emission reductions under the relevant regional haze regional planning organization (RPO) process.[161] Given that the emissions under the Texas SO_2 Trading Program – including the assurance provisions - are less than the level of Texas emissions reductions agreed upon by Texas and other states during consultation and assumed and relied upon in those other

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[159] 83 FR 43605.
[160] *See* "Guidance on Infrastructure State Implementation Plan (SIP) Elements under CAA sections 110(a)(1) and 110(a)(2)" (September 13, 2013).
[161] *See id.* "Guidance on Infrastructure State Implementation Plan (SIP) Elements under CAA sections 110(a)(1) and 110(a)(2)," at 34 (September 13, 2013). *See also* 76 FR 22036 (April 20, 2011) (containing EPA's approval of the visibility requirement of 110(a)(2)(D)(i)(II) based on a demonstration by Colorado that did not rely on the Colorado Regional Haze SIP).

states' regional haze SIPs, we continue to find that the FIP is adequate to ensure that emissions from Texas do not interfere with measures to protect visibility in nearby states.

The commenter also makes the claim that there is no rational basis for EPA's reliance on the emission levels assumed in CENRAP modeling as a basis for finding that Texas' emissions will not interfere with other states' visibility plans given that there are states whose visibility is impacted by Texas that are not members of CENRAP. Our basis for determining that the FIP is adequate to ensure that emissions from Texas do not interfere with measures to protect visibility in nearby states is that the emissions reductions secured under the Texas SO_2 Trading Program are consistent with the level of emissions reductions relied upon by other states during consultation, which is not limited to consultation amongst CENRAP states.[162] The Regional Haze Rule requires that "Where a state has emissions that are reasonably anticipated to contribute to visibility impairment in any mandatory Class I Federal area located in another State or States, the State must consult with the other State(s) in order to develop coordinated emission management strategies."[163] Clearly, this requirement applies regardless of whether the impacted states are members of the same regional planning organization (RPO) or not. Thus, Texas had an obligation to consult with states, both in and outside of CENRAP, whose Class I areas are potentially impacted by Texas emissions. As documented in the 2009 Texas Regional Haze SIP,[164] Texas participated in inter-regional planning organization calls during the SIP development process for the first planning period. Texas also sent consultation letters to

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[162] See CFR 51.308(d)(3)(i)-(iii) addressing the requirements for consultation with other states.
[163] 40 CFR 51.308(d)(3)(i).
[164] See 2009 Texas Regional Haze SIP, section 4.3 titled "Consultations On Class I Areas In Other States." The submittal can be found in Regulations.gov docket ID EPA-R06-OAR-2016-0611, document EPA-R06-OAR-2016-0611-0002.
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Oklahoma, Louisiana, Missouri, Arkansas, Colorado and New Mexico. Included with each letter was a discussion of the CENRAP Particulate Matter Source Apportionment Technology (PSAT) modeling determining the contribution from each Texas source area to visibility impairment at Class I areas in the given state. In the 2009 SIP, Texas asserted that it participated fully in the analysis of this data, including estimation of the base period visibility impairment, natural visibility condition estimates, and 2018 projections based on current (at that time) and anticipated future state and federal controls. For states outside of CENRAP, Texas documented in its 2009 SIP that Colorado's Department of Public Health and Environment confirmed in a letter dated June 24, 2008, that no further emissions reductions were requested of Texas at that time. Texas also documented that as of December 2008, shortly before its submission of the final SIP to EPA on March 19, 2009, New Mexico had not responded to Texas' letter to confirm whether or not New Mexico was expecting any additional emission reductions from Texas sources. Furthermore, New Mexico did not include in its Regional Haze SIP any additional emission reductions expected from Texas sources. The Texas emissions reductions that will result from the Texas SO_2 Trading Program and Texas' participation in CSAPR for ozone season NO_X are consistent with the level of Texas emissions reductions relied upon by other states both in and outside CENRAP during consultation with Texas.

It is incorrect to claim that because CAIR was invalidated, EPA and the states can no longer use the anticipated emissions and reasonable progress goals established through the consultation process for the first planning period. Those goals may have been established in part based on expectations of emissions performance under CAIR, but the anticipated emissions reductions and the goals for regional haze purposes remain in effect (though we note that reasonable progress goals are not binding). Thus, this level of emissions provides an appropriate

benchmark for assessing whether states are adequately addressing interstate visibility transport (when such a demonstration is necessary). We note that this is different than situations in which states have attempted to rely on CAIR as a BART alternative despite the fact that CAIR is no longer in operation. Here, the fact that CAIR no longer exists and has been replaced by CSAPR does not impact the legitimacy of the level of emission reductions agreed upon through the consultation process among states, particularly given that CSAPR is generally more stringent than CAIR. And here, the Texas program is designed to be more stringent than CSAPR would have been for SO_2 emissions in Texas. See section III.B where we provided detailed analysis of anticipated emissions under CAIR and the Texas program. Therefore, we find that Texas' visibility transport obligations under CAA section 110(a)(2)(D)(i)(II) for the six NAAQS listed above are satisfied.

Comment: We received one comment asserting that since EPA has not made any determination of the trading program's visibility impacts on other states, we cannot make the claim that the Texas SO_2 Trading Program was designed to meet the CAA's visibility transport requirements. The commenter claimed that EPA cannot lawfully claim that the Texas SO_2 Trading Program was designed to meet the visibility transport requirements of the CAA because the CAA's visibility good neighbor provision requires and authorizes EPA to prohibit only those upwind emissions that interfere with measures required to be included in the applicable implementation plan for any other State. The commenter cited 42 U.S.C. § 7410(a)(2)(D)(i)(II), as well as *E.P.A. v. EME Homer City Generation, L.P.*, 134 S.Ct. 1584, 1604 (2014) and *EME Homer City II*, 795 F.3d at 127. The commenter asserted that if one applies to this case the Supreme Court's precedent interpreting the analogous good neighbor provision under Section 7410(a)(2)(D)(i)(I), EPA is not required and does not have authority to regulate upwind

emissions unless it first makes the predicate finding that those upwind emissions interfere with downwind visibility. The commenter further asserted that if the EPA makes that finding, even then it may only regulate upwind emissions up to the amounts of pollution that actually interfere with downwind visibility, again citing *EPA v. EME Homer City Generation, L.P.*, 134 S.Ct. 1584, 1603 (U.S. 2014) and *EME Homer City II*, 795 F.3d at 127. The commenter contended that in affirming its October 2017 final rule that promulgated the Texas SO_2 Trading Program, EPA failed to make the predicate finding that emissions from Texas are interfering with downwind states' attainment of the NAAQS and that EPA, therefore, cannot properly claim that the Texas SO_2 Trading Program was designed to meet the agency's good neighbor "requirement" to protect downwind visibility from "interfere[nce]."

Response: We disagree that the Texas SO_2 Trading Program cannot be viewed as a program "designed to meet a requirement other than BART" for purposes of the BART alternative analysis under 40 CFR 51.308(e)(2)(i)(C). As relevant to this comment, the Texas program is designed, among other things, to ensure reductions of SO_2 emissions from EGU sources in Texas that meet (and indeed are more stringent than) the reductions agreed to in the interstate consultation process for setting RPGs for Class I areas in other states. See section III.B of this notice, where we explain that the Texas SO_2 Trading Program as amended in today's final action ensures emission reductions in Texas that are adequate to satisfy the requirements of CAA section 110(a)(2)(D)(i)(II) with respect to visibility for six NAAQS.

We disagree with the commenter that EPA has not made allegedly necessary predicate findings under prong 4 in order to claim that the Texas program is designed to meet prong 4 requirements. The commenter incorrectly attempts to import into the interstate visibility transport analysis under prong 4 the policy determinations, regulatory design, and associated case law of

the "good neighbor provision" at 110(a)(2)(D)(i)(I), related to addressing significant contribution to nonattainment and interference with maintenance of the NAAQS in other states, which we commonly refer to as prongs 1 and 2. Those precedents are not necessarily applicable given that the agency has long had a different framework for analysis under prong 4, with an entirely different set of policy guidance and administrative precedents. As explained above, our interpretation of section 110(a)(2)(D)(i)(II) with respect to visibility transport is that one of the pathways by which a state can meet its visibility transport obligations is through a demonstration that emissions within a state's jurisdiction do not interfere with other states' plans to protect visibility. EPA's September 13, 2013 guidance explains that such a demonstration should point to measures that limit visibility-impairing pollutants and ensure that the resulting reductions conform with any mutually agreed emission reductions under the relevant regional haze regional planning organization (RPO) process.[165] This has been EPA's long-standing interpretation of how a state's visibility transport obligations can be satisfied, and we have since approved many SIPs and promulgated FIPs that address CAA section 110(a)(2)(D)(i)(II) with respect to visibility transport through this pathway. Texas participated in the CENRAP process in developing its SIP for the first planning period and relying on the technical work developed through that process, Texas identified states with Class I areas impacted by Texas emissions and those states agreed that they are being impacted by emissions from Texas sources. Furthermore, through the consultation process, Texas made a commitment to states with Class I areas impacted by emissions from Texas sources that it would implement CAIR to satisfy its BART requirements

[165] See "Guidance on Infrastructure State Implementation Plan (SIP) Elements under CAA sections 110(a)(1) and 110(a)(2)," at 34 (September 13, 2013). See also 76 FR 22036 (April 20, 2011) containing EPA's approval of the visibility requirement of 110(a)(2)(D)(i)(II) based on a demonstration by Colorado that did not rely on the Colorado Regional Haze SIP.

and those states agreed with Texas that anticipated emission reductions due to the implementation of CAIR would be sufficient to address Texas' impacts at their Class I areas. The impacted states relied on this level of emission reductions from Texas sources in developing their SIPs and establishing their RPGs. As discussed in section III.B. of this action, given that the revisions to the Texas SO_2 Trading Program we are finalizing in today's final action ensure emission reductions consistent with and below the emission levels agreed upon by all states during interstate consultation under 40 CFR 51.308(d)(3)(i)-(iii) and relied upon by states impacted by Texas emissions, we find that these revisions provide further support for our earlier finding that the BART alternative in the October 2017 FIP results in emission reductions adequate to satisfy the requirements of CAA section 110(a)(2)(D)(i)(II) with respect to visibility for the six identified NAAQS.[166]

Further, EPA has requisite FIP authority under CAA section 110(c) to address prong 4 for the six NAAQS for Texas, given our disapproval of the state's prong 4 submittals. *See* 82 FR at 48332. Thus, our position is that we have the obligation and authority to address Texas' interstate visibility transport obligations. With the emission levels established by the Texas SO_2 Trading Program, as promulgated in October 2017 and amended by this final rule, we affirm our finding that the emission levels assumed in the CENRAP modeling are in fact sufficient to assure that Texas' emissions do not interfere with other states' visibility plans, and that Texas is achieving emission reductions that satisfy prong 4 obligations with respect to the six aforementioned NAAQS. For the reasons just discussed, we can also determine that the intrastate

[166] See 2009 Texas Regional Haze SIP, section 4.3 titled "Consultations On Class I Areas In Other States." The submittal can be found at www.regulations.gov, Docket ID EPA-R06-OAR-2016-0611, Document ID EPA-R06-OAR-2016-0611-0002.

program is "designed to meet a requirement other than BART" for purposes of 51.308(e)(2)(i)(C).

We also disagree with the comment that EPA does not have the authority to regulate Texas' emissions with respect to visibility without first making the finding that emissions from Texas are interfering with downwind states' attainment of the NAAQS. The visibility prong (or "prong 4") of CAA section 110(a)(2)(D)(i)(II) requires that the implementation plan submitted by a state contain adequate provisions prohibiting any source or other type of emissions activity within the State from emitting any air pollutant in amounts that will interfere with measures required to be included in the applicable implementation plan for any other state to protect visibility. Prong 4 is concerned with visibility and there is no requirement that EPA first make a finding that a state is interfering with downwind states' attainment of the NAAQS before approving a SIP or promulgating a FIP that addresses CAA section 110(a)(2)(D)(i)(II) with respect to visibility transport.

While the commenter is correct that the regional planning process by which Texas and surrounding states developed their regional haze SIPs took place more than a decade ago and in the interim CAIR has been invalidated and replaced by CSAPR, given that the implementation of CAIR in Texas is what Texas committed to and what impacted states agreed with and relied upon in developing their own regional haze SIPs, we continue to find that it is appropriate to compare the emissions reductions anticipated from CAIR to the Texas SO_2 Trading Program to determine whether the FIP is adequate to ensure that emissions from Texas do not interfere with measures to protect visibility in nearby states as required under CAA section 110(a)(2)(D)(i)(II). We recognize that the process of taking action on certain SIPs related to regional haze for the first planning period and interstate visibility transport has taken longer than EPA originally

anticipated when it first promulgated the Regional Haze Rule in 1999. Notwithstanding this delay, we do not believe it would be reasonable or practical at this time to require states with outstanding visibility transport obligations to revisit and/or update their emission reduction commitments to impacted states for the first implementation period. Such a process could potentially be time and resource intensive at a time when states are currently focusing their attention on developing regional haze implementation plans for the second implementation period. Thus, we do not believe it would not be reasonable or practical at this time to require Texas to revisit its emission reduction commitments to states with Class I areas impacted by Texas emissions for the first implementation period.

We address other comments that EPA must analyze BART on a source-by-source basis elsewhere in this document.

I. Reasonable Progress

Comment: We received a comment asserting that the Texas SO_2 Trading Program cannot possibly be designed to satisfy the reasonable progress requirements for several reasons. As an initial matter, the commenter claimed that EPA was attempting to bypass the source-specific analyses required under section 51.308(e)(2)(i)(C) by simply asserting that the trading program was designed to be part of the long-term strategy to meet reasonable progress requirements. Additionally, the commenter asserted that EPA's claim that the Texas SO_2 Trading Program is somehow designed to meet the reasonable progress requirements is contradicted by EPA's statement elsewhere in the August 2018 affirmation proposal that it is not taking action on the reasonable progress elements that the Fifth Circuit remanded to the agency. The commenter also claimed that setting aside this inconsistency, the Texas SO_2 Trading Program cannot be designed

to satisfy the reasonable progress requirements given that it makes no progress at all as the allowances available under the trading program exceed the covered sources' emissions in 2015, 2016, and 2017, and thus the Texas SO_2 Trading Program will not reduce emissions or improve visibility. Furthermore, the commenter asserted that the Texas SO_2 Trading Program cannot possibly be designed to satisfy the reasonable progress requirements because EPA did not consider the four statutory factors for reasonable progress. The commenter asserted that EPA must conduct a four-factor analysis of whether pollution controls are needed at individual sources—whether subject to BART or not—to make reasonable progress and that the Texas SO_2 Trading Program and the Q/d analysis that helped inform the trading program cannot act as a substitute for a four-factor reasonable progress analysis given that there are no statutory or regulatory exemptions that authorize EPA to forego conducting a separate reasonable progress analysis or that authorize a reasonable progress alternative program comparable to a BART alternative.

Response: As discussed in Section III.A.2 above, we are not finalizing a position that the Texas SO_2 Trading Program is designed to meet reasonable progress requirements. While the program will contribute to meeting Texas' reasonable progress requirements, the necessary analysis, and potentially, emission controls, to fully address reasonable progress for Texas will take place in a separate, future action.

J. Coleto Creek

Comment: We received comments in support of our proposed removal of the special provisions in the Supplemental Allowance Pool for Coleto Creek.[167] We also received a comment stating that the Supplemental Allowance Pool's treatment of Coleto Creek is unlawful, arbitrary, and capricious because this provision would allow SO_2 emissions to increase over time. Under § 97.912(a)(3)(i), if Coleto Creek requires more allowances to be in compliance, those allowances will be provided up to the amount held in the Supplemental Allowance Pool. Because that pool's starting balance is 10,000 tons and given that Coleto Creek's 2016 SO_2 emissions totaled 8,231 tons, § 97.912(a)(3)(i) would allow this unit to more than double its 2016 SO_2 emissions. Nothing in the Texas SO_2 Trading Program would prevent Coleto Creek from increasing its SO_2 emissions to even higher levels, if and when the Supplemental Allowance Pool has accumulated allowances in excess of 10,000 tons.

The commenter further asserts that because Vistra and Dynegy have merged, the rationale for having special provisions for Coleto Creek are longer true, with the combined Dynegy-Vistra company owning several units other than Coleto Creek covered by the Texas SO_2 Trading Program. Given that the factual basis for this provision concerning Coleto Creek is no longer true, the commenter suggests that EPA must eliminate 40 C.F.R. § 97.912(a)(3)(i).

We also received comments suggesting that we should eliminate the additional flexibility afforded to Coleto Creek's owner in the Supplemental Allowance Pool of the SO_2 trading program FIP because Coleto Creek is no longer an isolated unit in the program. Given the recent merger between Dynegy and Vistra Energy, which owns or operates several other Texas EGUs

[167] We note that TCEQ commented in support of removing the special provisions for Coleto Creek but suggested that implementing changes to the program is a potential concern given that the program began in January 2019. TCEQ encourages the EPA to discuss with program stakeholders appropriate timing for making a change to the Supplemental Allowance Pool. Our final rule sets the effective date of the rule changes for program year 2021.

that are subject to the Texas intrastate trading program for SO_2, Coleto Creek will now be part of a larger set of participating units under the same owner/operator. Because Coleto Creek is no longer at a disadvantage as it was before, the flexibility afforded to Coleto Creek under the Supplemental Allowance Pool is no longer necessary. Vistra Energy will be able to transfer allowances among the multiple participating units should any one source require additional allowances during any control period greater than its allocation, including Coleto Creek. Eliminating the flexibility directly afforded to Coleto Creek under 40 CFR §97.912(a)(3) as a result of the merger will provide an equal opportunity among the participating sources for access to the Supplemental Allowance Pool.

Response: When we finalized our Texas SO_2 Trading Program FIP in October 2017, all sources required to participate in the trading program had the flexibility to transfer allowances among multiple participating units under the same owner/operator when planning operations, with the exception of Coleto Creek, which consists of only one coal-fired unit, and at the time of our October 2017 FIP, this was the only coal-fired unit in Texas owned and operated by Dynegy. In light of this, in our October 2017 FIP, we provided Coleto Creek with additional flexibility by allocating its maximum supplemental allocation from the Supplemental Allowance Pool as long as there were sufficient allowances in the Supplemental Allowance Pool available for allocation, and its actual allocation would not be reduced in proportion with any reductions made to the supplemental allocations to other sources. In our August 2018 proposal, we noted that Dynegy had merged with Vistra, which owns other units that are subject to the trading program. In the August 2018 proposal, we solicited comment on eliminating this additional flexibility for Coleto Creek in light of the recent change in ownership, and we received no adverse comments on such a change. Therefore, on November 14, 2019, we published a supplemental notice of proposed

rulemaking that proposed to make this change to the regulations.[168] After considering all comments we received on our supplemental proposal, we are finalizing the removal of the special provisions for Coleto Creek, thus making moot the comments concerning Coleto Creek's treatment under the Supplemental Allowance Pool.

We disagree with the commenter's additional statements that, aside from the treatment of Coleto Creek just discussed, the Supplemental Allowance Pool is arbitrary and capricious because it would allow emissions to increase over time. We have responded elsewhere to the commenter's similar assertion that the Supplemental Allowance Pool would "inflate the cap" in sections IV.A and IV.K of this final action.

Comment: We also received comments from AEP, NRG Texas, SPS, and Vistra that side with eliminating the additional flexibility to Coleto Creek due to the recent change in ownership. The additional flexibility would give Coleto Creek priority for allocations from the Supplemental Allowance Pool. AEP states that retaining this flexibility would place Coleto Creek and its owner in a favorable position in comparison to other utilities operating in the ERCOT, which would unfairly impact other EGUs. NRG Texas similarly states this additional flexibility would significantly reduce the allowances available to other sources. SPS explains that eliminating the additional flexibility will ensure a more equitable distribution of allowances for EGUs needing compliance assistance. Vistra submitted comments on both the August 2018 proposal and the November 2019 supplemental proposal in support of eliminating the priority given in the October 2017 final rule to Coleto Creek for allocations from the Supplemental Allowance Pool given that this priority is no longer necessary in light of the facility's change in ownership.

[168] 84 FR 61850.

Response: As explained elsewhere in this document, in our August 2018 proposal, we solicited comment on eliminating the additional flexibility for Coleto Creek in light of the recent change in ownership, and we received no adverse comments on such a change. Thereafter, on November 14, 2019, we published a supplemental notice of proposed rulemaking that proposed to make this change to the regulations.[169] After considering all comments we received, we are finalizing the removal of the special provisions for Coleto Creek, thus addressing the comments concerning Coleto Creek's treatment under the Supplemental Allowance Pool.

K. Assurance Provisions and the Variability Limit

Comment: One commenter asserted that EPA's proposed assurance provisions are arbitrary and capricious. Assurance levels, like those established in CSAPR, are designed to account for year-to-year variability in each state's EGU emissions. EPA concluded that these emissions could vary from year to year due to normal fluctuations in electricity demand, weather, economic considerations, etc., and in an interstate trading program, state-level budgets would not necessarily ensure emissions outcomes commensurate with each state's good neighbor obligations. To address this issue, EPA added "variability limits", which provide additional headroom in the states' budgets. In CSAPR, these variability limits were based on the maximum historical percentage coal usage (heat input) variability during 2000-2010 experienced by any CSAPR state. The state budget plus the variability limit equals the "state assurance level."[170]

The commenter asserted that EPA states that the addition of an assurance limit was the result of comments that EPA's Texas SO_2 Trading Program would (1) not provide any regulatory

[169] 84 FR 61850.
[170] *See generally* 76 FR 42866 (July 19, 2011).

pressure on EGUs to reduce their emissions and would actually allow emissions to increase, and (2) would undermine the stringency of the program based on the availability of supplemental allowances, the issuance of allocations to already-retired units, the general method of allocating allowances, and the availability of unlimited allowance banking.[171] The commenter asserted that to address these concerns, EPA proposed to add an assurance level using the same methodology the agency used in CSAPR. EPA claims, "to the extent that commenters claimed the program would be inadequately stringent due to the allowance allocation methodology, including allocations to retired units, or due to the Supplemental Allowance Pool or allowance banking, these concerns are effectively rendered moot by the addition of the assurance level."[172] The commenter contends, however, that a cap on the Texas SO_2 Trading Program does not mitigate the errors concerning EPA's rules governing its Supplemental Allowance Pool, banking, and related issues. Were that the case, EPA could simply promulgate any trading program rule it desired, using any reasoning or allocation methodology, as long as the end result equaled some desired total emissions goal.

The commenter further asserts that none of the references pointing to the CSAPR Update Final Rule to support the notion that allocations to retired units and the availability of banking are important to ensure market stability provide any rationale or support for allocating emission credits to already retired EGUs. Allocating allowances to already retired units only serves to inflate the SO_2 budget, thereby reducing the value of the allowances, which disincentivizes SO_2 reduction. Moreover, the commenter asserts that the Texas SO_2 Trading Program arbitrarily creates a windfall to operators that have independently chosen to cease operations or relinquish

[171] 84 FR at 61852.
[172] 84 FR at 61854.

their permit rights to emit any pollution. Giving permanently-retired sources and their operators a free pass to emit more haze-causing pollution than they are legally allowed to emit under the Clean Air Act cannot comply with the Regional Haze Rule's requirement that any trading program "achieve greater reasonable progress" than source-specific BART. 40 C.F.R. §§ 51.308(e), (e)(2); see also 40 C.F.R. § 51.308(d)(vi). In a comment submitted following the supplemental proposal adding an assurance level to the Texas SO_2 Trading Program, the commenter further emphasized that the agency proposed to give the owners of those already-retired sources an even bigger emissions "variability" cushion, effectively ensuring that those companies will have no incentive or need to reduce emissions at any other source. The commenter goes further stating that the assurance level and variability limit virtually ensure that certain utilities holding emission credits for already-retired sources will be allowed to continue polluting at the same or greater levels than before.

Response: As an initial matter, this action does not reopen any aspect of the CSAPR regulations. However, in order to facilitate our response to comments on the proposed amendments to the Texas SO_2 Trading Program, we first respond to the commenter's statements concerning the CSAPR programs as necessary to correct errors in the commenter's statements that may also implicate the commenter's statements concerning the Texas SO_2 Trading Program. Contrary to the commenter's statements, the CSAPR variability limits do not "provide headroom in" or otherwise alter the CSAPR state budgets, which are fixed amounts for all years from 2017 forward. Rather, a state's CSAPR variability limit is a defined increment by which the state's total emissions in a given year may exceed the underlying fixed CSAPR state budget before any incremental emissions trigger requirements to surrender more than one allowance per ton of emissions. Also, the amounts of the CSAPR variability limits were determined based on an

analysis of historical variability in states' consumption of all fossil fuels for electricity generation, not states' consumption of only coal for electricity generation.

Turning to the substance of these comments, we continue to believe that the addition of assurance provisions to the Texas SO_2 Trading Program will provide further support for our determination that the Texas SO_2 Trading Program is at least as stringent as the CSAPR SO_2 trading program as applied to Texas and for that reason is sufficiently stringent to meet the requirements for a BART alternative under 40 CFR 51.308(e)(2). When promulgating the Texas SO_2 Trading Program, we found that the average annual emissions authorized by the program's design would be similar to the emissions authorized under CSAPR and well below the 317,100 tons-per-year benchmark established by the sensitivity analysis performed in the 2012 "CSAPR better than BART" rulemaking. In the supplemental proposal for this action, in response to comments raising concerns that the program as originally promulgated in fact might not constrain emissions in individual years as effectively as CSAPR, we reiterated these conclusions regarding the program's average annual emissions but also acknowledged that the program's design might not constrain emissions in individual years as effectively as CSAPR because of the lack of provisions comparable to CSAPR's "assurance provisions." We therefore proposed and in this action are now finalizing the addition of assurance provisions to the Texas SO_2 Trading Program in order to further ensure that the program's design is at least as stringent as the CSAPR SO_2 program as applied to Texas, not only on an average annual basis but also in individual years.

The commenter suggests that even where revisions to a trading program have been specifically designed to achieve a desired total emissions goal – in this instance, ensuring that statewide emissions levels in individual years do not exceed the 317,100 tons-per-year

benchmark – the ability of the revisions to in fact achieve that goal is not the relevant criterion by which we should evaluate the appropriateness of the revisions, and that we should instead evaluate the revisions (and the program as a whole) based on whether or not the revised program also addresses other concerns raised by the commenter. We disagree with this suggestion. In noting the list of program design features that the commenter considers problematic, we did not endorse the full set of concerns that the commenter asserts these design features raise. Rather, we acknowledged the specific concern as to whether the program is or is not at least as stringent in individual years as the CSAPR SO_2 trading program, and we proposed amendments to address that specific concern. While the commenter asserts that the identified design features raise additional concerns and believes that we should evaluate the program according to different criteria, we do not agree. We have addressed the commenter's assertions regarding the identified design features and additional evaluation criteria in response to other comments. In general, the commenter provides no cogent explanation why the addition of an assurance level (which effectively functions as a "cap" as their own language concedes) would not ensure emissions performance of the program on an annual basis below that level. Nor has the commenter explained why, if that is the case, the other objections they raise with respect to allocations or banking of allowances are of relevance to EPA's determination that the program achieves the necessary level of stringency for a BART alternative under 51.308(e)(2).

The commenter's criticism of the discussion in the supplemental proposal concerning our general rationale for not immediately discontinuing allocations to retired units has no relevance to the proposed addition of assurance provisions to the Texas SO_2 Trading Program or any of the other proposed amendments in the supplemental proposal. We have addressed the commenter's

assertions regarding the permissibility of allocating allowances to retired units in response to other comments.

Comment: One commenter asserts that EPA's calculation of its proposed variability limit uses out-of-date data, rather than the most recent data as used in CSAPR. In promulgating CSAPR, EPA's original stated reasoning for the need for a variability limit was to account for "weather, economic activity, the portion of electric generation that is fossil fuel fired, and the length and number of outages at power generation units, which vary over time."[173] The commenter asserts that in its supplemental proposal for its Texas SO_2 Trading Program, EPA simply adopts the variability for Texas (7%) that was calculated in the CSAPR rulemaking, instead of updating it to account for more recent data and the units that are actually participating in the Texas SO_2 Trading Program. The CSAPR heat input data from 2000-2010 are now eight years out of date. Thus, this data set is no longer suitable for its originally intended purpose—to account for variations in weather, economic activity, etc., that influence electricity generation.

The commenter asserts that EPA must, at a minimum, update the technical analysis underlying its variability limits, as the agency has done in other contexts, such as its recent update to CSAPR, for example, where EPA relied on updated Integrated Planning Model data to analyze the impact of the updated Transport Rule on the U.S. electric power sector, as well as its preliminary transport modeling data for the 2015 ozone NAAQS. In so doing, EPA recognized the many changes to the distribution and magnitude of electric sector emissions, including the significant expansion of renewable energy generation resources, recent EGU retirements and

[173] *See* 76 Fed. Reg. 48,208, 48,265 (Aug. 8, 2011). EPA specifically notes that the factors that contribute to power sector variability change with time. Also, note that EPA updated its previous variability calculations, based on 2002-2008, in part to utilize the more recent data available to it. EPA should have taken the same approach in its supplemental proposal.

control additions, changes in the cost and efficacy of pollution control technologies, reductions in electricity demand, electric system transmission changes, and persistently low natural gas prices.[174] In the supplemental proposal for its Texas SO_2 Trading Program, EPA arbitrarily fails to acknowledge—let alone address—the numerous changes to the electric sector since the agency adopted its CSAPR variability limits in 2011.[175]

The commenter states that in addition, the obsoleteness of the heat input data aside, given the EGU retirements that have occurred since 2010, that data set is much different than what would be calculated based on the units that would actually participate in EPA's Texas SO_2 Trading Program. The commenter purported to illustrate this via a table comparing historical heat inputs from 2000-2010 for units under original CSAPR, units in the Texas trading program, and units in the Texas program minus retired units. Comparing the columns showing these heat inputs, commenter asserts that the magnitudes of the data sets indicate that despite being of the same years, they are composed of different units. In fact, the heat input data set composed of only the unretired units that would actually participate in the Texas SO_2 trading program is approximately one third the size of the data set that EPA is basing its variability analysis on. In its continued strained attempt to justify its inadequate Texas SO_2 trading program by comparison

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[174] *See generally* Ex. 1, EPA, *Documentation for EPA's Power Sector Modeling Platform v6 - November 2018 Reference Case*, *available at* [HYPERLINK "https://www.epa.gov/airmarkets/documentation-epas-power-sector-modeling-platform-v6-november-2018-reference-case" \h][HYPERLINK "https://www.epa.gov/airmarkets/documentation-epas-power-sector-modeling-platform-v6-november-2018-reference-case" \h]

[175] *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"); *Sierra Club v. EPA*, 671 F.3d 955, 967 (9th Cir. 2012) ("[I]f new information indicates to EPA that [a proposed rule] awaiting approval is inaccurate or not current, . . . EPA should properly evaluate the new information and may not simply ignore it without reasoned explanation of its choice.").

to CSAPR, commenter claims EPA ignores its earlier decision to base its variability calculation on only the units that actually participate in the trading program.

Response: In the supplemental proposal, we proposed to adopt a variability limit of 7% for the Texas SO_2 Trading Program, where the proposed limit was calculated based on the annual heat input values for Texas in the same overall data set used to calculate the analogous variability limit of 18% for the CSAPR SO_2 program. In most respects, the Texas SO_2 Trading Program has been designed to replicate relevant aspects of the CSAPR SO_2 program. We do not dispute that the Texas electricity sector has evolved in the years since the CSAPR rulemaking and we agree with the general principle that the most current data of sufficient quality and representativeness should be used when conducting new rulemaking activities. However, we do not believe that acceptance of the general principle in favor of using more recent data when available necessarily requires that the principle be applied to every detail of a rulemaking, such as this one, that is being conducted with an overall purpose of closely replicating the structure of a previous rulemaking.

Nevertheless, in order to assess the potential impacts of using more recent data instead of the CSAPR rulemaking data set specifically for purposes of establishing the amount of the variability limit for the Texas SO_2 Trading Program, we have calculated what the variability limit would be if it were calculated using the more recent data set suggested by the commenter. In the following comment, the commenter states that this calculation would result in a variability limit of 2%, but as discussed in greater detail in our response to that comment, the commenter did not actually use the more recent data set and furthermore made a material error in the calculation procedure. When the calculation procedure is applied to the more recent data set and the procedural error is corrected, the result would be a higher variability limit than we proposed

– specifically, 12% instead of 7%. Because neither this commenter nor any other commenter advocates using a variability limit higher than 7%, and some other commenters specifically support use of the variability limit and resulting assurance level calculated based on values for Texas in the data set used in the CSAPR rulemaking, we do not find it necessary to use an updated data set in this instance.

Comment: We received a comment that disagreed with the computational methodology EPA used to calculate the variability limit of 7%, arguing that the limit should instead be 2%. The commenter purported to recalculate what a Texas SO_2 Trading Program variability limit would be if it were based on EPA's original methodology used in CSAPR. The commenter purported to follow the CSAPR methodology and use up-to-date data and include *only* those units that are expected to be covered by the program.

Response: In this proceeding, we did not seek comment on or reopen any aspect of the CSAPR regulations. However, in order to facilitate our response to comments on the proposed amendments to the Texas SO_2 Trading Program, we are responding to the commenter's statements concerning the CSAPR programs as necessary to correct errors in the commenter's statements that may also implicate the commenter's statements concerning the Texas SO_2 Trading Program.

We disagree with the commenter's assertions that we made an error in the statistical procedure for calculating the variability limits used in the CSAPR trading programs and the variability limit proposed for the Texas SO_2 Trading Program. In fact, the commenter made a mistake in the calculation of the variability limits. We have added to the docket for this action a spreadsheet that is a modified version of the spreadsheet the commenter submitted to the docket

as Exhibit 3 to the comments on the supplemental proposal.[176] See the spreadsheet and the Response to Comments document found in the docket associated with this final action for a detailed explanation of the calculation and discussion of how correction of one of the values in the spreadsheet submitted by the commenter yields values that confirm the correctness of our calculations.

The results of the calculations in this section confirm a CSAPR SO_2 variability limit of 18%. The CSAPR SO_2 5% variability limit asserted by the commenter results only from using the incorrect value of 11 for the "size" variable in the CONFIDENCE function.

Comment: We received a comment stating that EPA's proposed assurance level is incorrect because the assurance level EPA borrows from CSAPR is simply the sum of the SO_2 budget and the variability limit. Because the EPA incorrectly incorporated the Texas variability limit from CSAPR into its Texas SO_2 trading program, and because EPA's trading budget of 238,393 tons itself is based on out-of-date and inappropriate data, consequently, EPA's calculation of its variability limit, which is simply a percentage of this budget, is flawed. The commenter argues that had EPA re-applied the original CSAPR allocation methodology using updated information, and removed retired units, it would have discovered that the individual allocations in many instances would have changed significantly and the overall budget would have been reduced significantly. The commenter asserts that the trading budget would have been reduced from 238,393 tons to 176,332 tons. This represents a decrease of 62,061 tons or an approximately 26% change. Adding a 2% variability to the revised trading budget of 176,332 tons would result in an assurance limit of 179,859 tons.

[176] See "EPA modified version of commenters Ex_3_-_Recalculate_TX_SO2_Trading _Variability.xlsx," available in the docket for this action. ADD TO DOCKET

Furthermore, the commenter asserts that even at this lower emissions level, the Texas SO_2 Trading Program will not serve to place any regulatory pressure on Texas SO_2 sources to reduce their emissions because the 2018 SO_2 emissions of the participating non-retired units—which should be the only units participating in the program—total 157,119 tons. These emissions are already below the reduced assurance limit of 179,859 tons commenter calculated above.

Finally, the commenter states that because the Texas SO_2 Trading Program does not provide for a declining cap over time, in comparison to actual source-by-source BART, even if corrected to remove retired units it merely preserves the status quo. As such, it violates the primary objective of the national goal of the visibility program, which is "the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution."

Response: We disagree with this comment. The commenter correctly notes that the proposed assurance level for the Texas SO_2 Trading Program is derived from the proposed 7% variability limit and the existing budget for the Texas SO_2 Trading Program. Based on the commenter's beliefs that the variability limit should be 2% and that the existing budget is unlawfully high, the commenter asserts that the proposed assurance level is consequently also too high. We disagree both that the variability limit should be 2% and that the existing budget is unlawfully high. Accordingly, we also disagree with the commenter's resulting assertion that the proposed assurance level is too high. We have addressed the commenter's assertions regarding the proposed variability limit in response to other comments. As indicated in those responses, we continue to believe that 7% is an appropriate value to establish as the variability limit for the Texas SO_2 Trading Program. Likewise, we have also addressed the commenter's assertions regarding the lawfulness of the existing budget for the Texas SO_2 Trading Program in response

to other comments, and the commenter offers no new criticism of the existing budget that was not already raised in those previous comments and addressed in our responses to those comments.

L. Venue

Comment: We received a comment asserting that if EPA retains the intrastate trading program, the agency must publish a finding that the Texas SO_2 Trading Program "is based on a determination of nationwide scope or effect." 42 USC § 7607(b)(1). The commenter asserted that such a finding is necessary because the Texas SO_2 Trading Program is plainly based on such a determination and should be reviewed in the United States Court of Appeals for the District of Columbia. The commenter claimed that this is for two reasons. First, in comparing the Texas SO_2 Trading Program to the Better-than-BART rule to satisfy the requirements of 40 CFR § 51.308(e), EPA reinterpreted an established and nationally applicable law. Second, the commenter claimed that EPA's unlawful interpretation of 40 CFR § 51.308(e) amounts to a revision of a nationally applicable regulation. The commenter noted that in this comment, the commenter does not challenge CSAPR itself or EPA's CSAPR Better than BART determination, but is instead asserting that the Texas SO_2 Trading Program is based on those rules, which are nationally applicable and contain determinations of nationwide scope and effect. The commenter asserted that even if EPA does not publish a finding that the Texas SO_2 Trading Program is based on a determination of nationwide scope or effect (and does not withdraw the FIP promulgating the Texas SO_2 Trading Program), subsequent legal challenges will still be properly venued in the D.C. Circuit pursuant to 42 USC § 7607(b)(1).

Response: To the extent commenter is asserting that this action is "nationally applicable" for purposes of section 307(b), that claim is clearly incorrect. As the D.C. Circuit has recently explained, "[t]he court need look only to the face of the agency action, not its practical effects, to determine whether an action is nationally applicable."[177] On its face, this action is locally applicable because it applies in only a single state, Texas. This action has immediate, legal effect only for certain sources within Texas. Furthermore, EPA is not adopting a new interpretation of its regulations at 40 CFR 51.308(e)(2); nor is it correct to characterize EPA's application of those regulations as a revision necessitating national rulemaking.

EPA also disagrees that this action must be challenged in the D.C. Circuit under the "nationwide scope or effect" portion of the venue provision of CAA section 307(b). In general under section 307(b), an EPA action "which is locally or regionally applicable" may be filed "*only* in the United States Court of Appeals" covering that area.[178] The only exception to this mandate is where the Administrator expressly finds that the locally or regionally applicable action is based on a determination of nationwide scope or effect and publishes such a finding. The requirement that the Administrator find and publish that an otherwise locally or regionally applicable action is based on a determination of nationwide scope or effect is an express statutory requirement for application of this venue exception; this exception is not being invoked by EPA in this action. EPA has made no finding in this action and is not publishing any finding that this action is based on a determination of nationwide scope or effect. The absence of either such a finding or publication of such a finding makes this venue exception in CAA section

[177] *Sierra Club v. EPA*, 926 F.3d 844, 849 (D.C. Cir. 2019) (citing *Dalton Trucking*, 808 F.3d 875, 881 (D.C. Cir. 2015) and *Am. Road & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013)).
[178] *See* 42 U.S.C. 7607(b)(1) (emphasis added).

307(b) inapplicable. Absent an express statement – and publication – that such a finding has been made, thus invoking the venue exception, there can be no application of that exception.[179] CAA section 307 expressly provides the Agency full discretion to make its own determination of whether to invoke the exception in the Congressionally-dictated venue provision.[180]

Even assuming that a court could review the lack of such a finding, and lack of publication of such a finding, under the arbitrary and capricious standard,[181] the EPA's decision not to do so is not unreasonable in this case. As an initial matter, this action does not apply to any sources other than those covered by the program in the State of Texas. By the same token, the applicability of the action does not span multiple federal judicial circuits. Further, EPA is not proposing or adopting a new or different interpretation of its regulations at 40 CFR 51.308(e)(2), nor is it correct to characterize EPA's application of those regulations as a revision necessitating national rulemaking. The commenter's characterization of EPA's analysis as conducting a novel comparison of the Texas program to CSAPR as a BART alternative is incorrect. In the final action, EPA is making no such interpretation that 51.308(e)(2) authorizes a comparison between two BART alternatives. Rather, in this final action, EPA has determined it is acceptable to continue to rely on the CSAPR-Better-than-BART analysis (which included Texas) under the unique, state-specific circumstances presented here: that the intrastate trading program in Texas

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[179] *See, e.g.*, *Lion Oil v. EPA*, 792 F.3d 978, 984 n.1 (8th Cir. 2015) (even where EPA, unlike here, made the necessary finding, the court found no need to decide application of the venue exception absent publication of that finding); *Texas v. EPA*, 829 F.3d 405, 419 (5th Cir. 2016) ("This finding is an independent, post hoc, conclusion by the agency about the nature of the determinations; the finding is not, itself, the determination."). *See also Dalton Trucking v. EPA*, 808 F.3d 875 (D.C. Cir. 2015).

[180] *See, e.g.*, *Texas v. EPA*, 829 F.3d at 419–20 (the venue exception "gives the Administrator the *discretion* to move venue to the D.C. Circuit by publishing a finding declaring the *Administrator's belief* that the action is based on a determination of nationwide scope or effect.") (emphasis added).

[181] *Cf. Sierra Club v. EPA*, 926 F.3d 844, 850 (D.C. Cir. 2019) (declining to resolve whether failure to make a finding is reviewable but concluding the absence of such a finding was not arbitrary and capricious under the facts of the case).

achieves the same or better emissions outcomes as the CSAPR program would have. The CSAPR-Better-than-BART analysis on which EPA is relying uses presumptive BART limits—in compliance with 51.308(e)(2)(i)(C)—to demonstrate greater reasonable progress.

Further, the *application* of the nationally applicable 2012 and 2017 CSAPR findings in Texas is a "locally or regionally applicable" action; that application does not in itself make the lack of EPA invoking the exception unreasonable. While the 2012 finding was appropriately reviewed (and upheld) in the D.C. Circuit, and the 2017 finding is currently being reviewed in the D.C. Circuit, *see NPCA v. EPA*, 17-1253 (D.C. Cir.), the *application* of those findings in Texas is merely one aspect of this "locally or regionally applicable" action. In any future action that may raise similar circumstances as Texas (and EPA is aware of no such situation at this time), EPA's determination whether to promulgate an intrastate trading program as a BART alternative would be based on a record and analysis specific to the sources in that state at that time. EPA has announced no national policy or interpretation that the decisions in this action are, or would necessarily be, applicable in any future action. Thus, EPA has not reinterpreted or revised its Regional Haze Rule regulations in this action, and it is inaccurate to characterize the mere application of regulations in a case-specific circumstance as a revision of those regulations. Under such circumstances, EPA's lack of a finding or publication of such a finding here is hardly unreasonable.

Finally, we note that EPA did not make a finding in the October 17, 2017 final action originally promulgating the Texas SO_2 Trading Program that such action was based on a determination of nationwide scope or effect. This action merely affirms the 2017 action with certain amendments. Petitioners seeking judicial review of that action correctly filed for review in the Fifth Circuit, *see NPCA v. EPA*, No. 17-60828 (5th Cir.), and that case is being held in

abeyance pending the completion of this action. No petitions for review of the original FIP action were filed in the D.C. Circuit, nor would it have been appropriate to do so.

M. Other

Comment: One commenter, while appreciative of the revisions made to the program by the EPA, expressed concern that without decreasing emissions assurance limitations or source-specific SO_2 limits, improved visibility in protected areas such as the Wichita Mountains National Wildlife Refuge and Guadalupe Mountains National Park will not come to fruition as a result of more concentrated emissions, even if they come from fewer sources.

The commenter also expressed concern for potential impacts to local air quality. While SO_2 emissions from individual sources may technically meet state-wide air quality targets, there remains a potential to negatively impact local air quality, damaging both visibility and human health. The commenter proposed two potential options that the EPA might consider. The first is to examine historic emissions by source and define new limits on a per-facility basis informed by historic emissions that met CSAPR for SO_2. This would ensure that even if some facilities closed, those that remained operational would not be able to increase their SO_2 emissions. The second suggested option would be to implement emission limits that decline annually. Under a declining emissions-limit scenario, if plants did close, operational facilities would potentially still be able to emit more, but to a lesser extent than if the cap stayed constant. If all regulated facilities stayed open, each polluter would have to find additional methods to decrease SO_2 emissions, further improving visibility and human health.

The commenter also expressed concern in consideration of units not participating in the program and their contribution to the total assurance provisions. The Texas SO_2 Trading Program will allot 35,000 tons per year to non-participating sources, effectively increasing the assurance provision to 290,081 tons per year. While SO_2 emissions in Texas have steadily declined, the Texas SO_2 Trading Program would nearly allow emissions to return to 2014 levels. The commenter asserts that it is nonsensical to place a limit on SO_2 emissions that does not pressure polluters to reduce emissions. Previously discussed comments argue that unlike source-specific BART control requirements, the Texas SO_2 Trading Program allows for emission to increase compared to recent emission levels. The state of Texas has clearly made great strides in decreasing sulfur emissions from coal-fired powerplants and the EPA has a responsibility to Texans and residents of neighboring states to maintain that progress, not reverse it.

Response: We appreciate the commenter's concerns and suggestions. With regards to localized impacts, as previously discussed in response to other comments, the analysis EPA is relying on does not show visibility declines compared to the baseline in any Class I area under the BART alternative. Under the Regional Haze Rule, states are directed to conduct BART determinations for "BART-eligible" sources that may be anticipated to cause or contribute to any visibility impairment in a Class I area. States are required to identify the level of control representing BART after considering the five statutory factors set out in section 169A(g)(2) for each source subject-to-BART.[182] However, the Regional Haze Rule also gives states the flexibility to adopt an emissions trading program or alternative program in place of requiring

[182] The State must take into consideration the five statutory factors: (1) the costs of compliance, (2) the energy and non-air quality environmental impacts of compliance, (3) any existing control technology in use at the source, (4) the remaining useful life of the source, and (5) the degree of visibility improvement which may reasonably be anticipated to result.

source-specific BART controls, as long as the alternative provides greater reasonable progress towards improving visibility than BART. As discussed in section I.A. of this final action, 40 CFR 51.308(e)(2) specifies how a state must conduct the demonstration to show that an alternative program will achieve greater reasonable progress than the installation and operation of BART. As discussed in section III.A.2, we are taking final action to affirm our determination that the Texas SO_2 Trading Program, as amended in this final action, meets the requirements of 40 CFR 51.308(e)(2) as a BART alternative for SO_2 to satisfy Texas' Regional Haze obligations. Comments on EPA's decision to authorize alternative measures, including emissions trading programs, in the original 1999 Regional Haze Rule are beyond the scope of this action.

The comment that we have "allotted" 35,000 tons to non-participating units is incorrect. The Texas SO_2 Trading Program only pertains to the particular set of EGUs specified in Table 1 of this final rule. The estimate of emissions from non-participating units is used as a conservative assumption to allow for a comparison of SO_2 emissions from EGUs in Texas under the Texas program with emissions under CSAPR.

V. Final Action

A. Regional Haze

We are taking final action to affirm our October 2017 FIP that established the Texas SO_2 intrastate trading program addressing emissions of SO_2 from certain EGUs in Texas as a BART alternative, with certain amendments to the trading program. These amendments consist of (1) the addition of assurance provisions; (2) revisions to the Supplemental Allowance Pool allocation provisions, including amendments to the allocation methodology such that allowance allocations are in proportion to each owner's total emissions in excess of the owner's total base

allowance allocations, elimination of the additional flexibility to transfer allowances originally offered under the trading program for Coleto Creek, and reduction in the number of allowances that can be allocated from the Supplemental Allowance Pool in any year to 16,688 tons plus any allowances added to the pool in that year from retired units; (3) termination of the opt-in provisions; and (4) revision of the allowance recordation provisions. We are also correcting a 2-ton error we made in the allowance allocation for El Paso Electric's Newman Plant due to a unit-identification error, thereby increasing the trading program budget from 238,393 tons to 238,395 tons. We are taking final action to affirm our determination that the Texas SO_2 intrastate trading program, as amended in this final rulemaking, satisfies the Regional Haze Rule requirements for BART alternatives at 40 CFR 51.308(e)(2). We are also taking final action to affirm our October 2017 approval of Texas' SIP determination that no Texas sources are subject to BART for PM.

B. Interstate Visibility Transport

We are taking final action to affirm our finding that Texas' participation in CSAPR to satisfy NO_X BART and our SO_2 intrastate trading program, as amended in this final rulemaking, fully address Texas' interstate visibility transport obligations for the following six NAAQS: (1) 1997 8-hour ozone; (2) 1997 $PM_{2.5}$ (annual and 24 hour); (3) 2006 $PM_{2.5}$ (24-hour); (4) 2008 8-hour ozone; (5) 2010 1-hour NO_2; and (6) 2010 1-hour SO_2. Texas' SO_2 emission reductions under the Texas SO2 intrastate trading program, as amended in today's final rulemaking, are consistent with the level of emission reductions relied upon by other states during Regional Haze consultation, and the intrastate trading program is therefore adequate to ensure that emissions from Texas do not interfere with measures to protect visibility in nearby states in accordance with CAA section 110(a)(2)(D)(i)(II).

VI. Statutory and Executive Order Reviews

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

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act

This action does not impose any new information collection burden under the PRA. The Office of Management and Budget (OMB) has previously approved the information collection activities contained in the existing Texas SO_2 Trading Program regulations as part of the most recent information collection request (ICR) renewal for the CSAPR trading programs and has assigned OMB control number 2060-0667. The revisions approved in this action do not alter the information collection activities contained in the existing regulations.

D. Regulatory Flexibility Act

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

small entities. 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. This rule does not impose any requirements or create impacts on small entities. This FIP action under Section 110 of the CAA will not create any new requirement with which small entities must comply. Accordingly, it affords no opportunity for the EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. We have therefore concluded that, this action will have no net regulatory burden for all directly regulated small entities.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments.

F. 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.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This rule does not have tribal implications, as specified in Executive Order 13175. It will

not have substantial direct effects on tribal governments. Thus, Executive Order 13175 does not apply to this rule.

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

Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks[183] applies to any rule that: (1) Is determined to be economically significant as defined under Executive Order 12866; and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. EPA interprets EO 13045 as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under Section 5-501 of the EO has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action is not subject to EO 13045 because it implements specific standards established by Congress in statutes. However, to the extent this rule will limit emissions of SO_2, the rule will have a beneficial effect on children's health by reducing air pollution.

I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

[183] 62 FR 19885 (Apr. 23, 1997).

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes that this action does **not** have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). We have determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. The rule limits emissions of SO_2 from certain facilities in Texas.

L. Congressional Review Act (CRA)

This rule is exempt from the CRA because it is a rule of particular applicability.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Visibility, Interstate transport of pollution, Regional haze, Best available retrofit technology.

List of Subjects in 40 CFR Part 97

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Nitrogen dioxide, Reporting and recordkeeping requirements, Sulfur oxides.

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

Dated: [Site owner will add digital signature date in advance of signature].

Andrew Wheeler,

Administrator

For the reasons stated in the preamble, part 97 of chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 97—FEDERAL NO_X BUDGET TRADING PROGRAM, CAIR NO_X AND SO_2 TRADING PROGRAMS, CSAPR NO_X AND SO_2 TRADING PROGRAMS, AND TEXAS SO_2 TRADING PROGRAM

1. The authority citation for part 97 is revised to read as follows:

Authority: 42 U.S.C. 7401, 7403, 7410, 7426, 7491, 7601, and 7651, *et seq*.

Subpart FFFFF—TEXAS SO_2 TRADING PROGRAM

2. Amend § 97.902 by:

a. In the definitions of "Acid Rain Program", "Allowance Management System", and "Allowance Management System account", capitalizing the first three words;

b. Adding in alphabetical order a definition of "Assurance account";

c. In the definition of "Authorized account representative", capitalizing the word "trading" the first time it appears;

d. Adding in alphabetical order definitions of "Common designated representative", "Common designated representative's assurance level", and "Common designated representative's share"; and

e. Revising the definitions of "General account" and "Texas SO_2 Trading Program allowance deduction".

The additions and revisions read as follows:

§ 97.902 Definitions.

* * * * *

Assurance account means an Allowance Management System account, established by the Administrator under § 97.925(b)(3) for certain owners and operators of a group of one or more Texas SO_2 Trading Program sources and units, in which are held Texas SO_2 Trading Program allowances available for use for a control period in a given year in complying with the Texas SO_2 Trading Program assurance provisions in accordance with §§ 97.906 and 97.925.

* * * * *

Common designated representative means, with regard to a control period in a given year, a designated representative where, as of April 1 immediately after the allowance transfer deadline for such control period, the same natural person is authorized under §§ 97.913(a) and 97.915(a) as the designated representative for a group of one or more Texas SO_2 Trading Program sources and units.

Common designated representative's assurance level means, with regard to a specific common designated representative and control period in a given year for which the State assurance level is exceeded as described in § 97.906(c)(2)(iii):

(1) The amount (rounded to the nearest allowance) equal to the sum of the total amount of Texas SO_2 Trading Program allowances allocated for such control period under § 97.911, or deemed to have been allocated under paragraph (2) of this definition, to the group of one or more Texas SO_2 Trading Program units having the common designated representative for such control period multiplied by the sum for such control period of the Texas SO_2 Trading Program budget under § 97.910(a)(1) and the variability limit under § 97.910(b) and divided by the sum of the total amount of Texas SO_2 Trading Program allowances allocated for such control period under § 97.911, or deemed to have been allocated under paragraph (2) of this definition, to all Texas SO_2 Trading Program units;

(2) Provided that, in the case of a Texas SO_2 Trading Program unit that operates during, but has no amount of Texas SO_2 Trading Program allowances allocated under § 97.911 for, such control period, the unit shall be treated, solely for purposes of this definition, as being allocated the amount of Texas SO_2 Trading Program allowances shown for the unit in § 97.911(a)(1).

Common designated representative's share means, with regard to a specific common designated representative for a control period in a given year and the total amount of SO_2 emissions from all Texas SO_2 Trading Program units during such control period, the total tonnage of SO_2 emissions during such control period from the group of one or more Texas SO_2 Trading Program units having the common designated representative for such control period.

* * * * *

General account means an Allowance Management System account, established under this subpart, that is not a compliance account or an assurance account.

* * * * *

Texas SO_2 Trading Program allowance deduction or *deduct Texas SO_2 Trading Program allowances* means the permanent withdrawal of Texas SO_2 Trading Program allowances by the Administrator from a compliance account (*e. g.* , in order to account for compliance with the Texas SO_2 Trading Program emissions limitation) or from an assurance account (*e. g.,* in order to account for compliance with the assurance provisions under §§ 97.906 and 97.925).

* * * * *

§ 97.904 [Amended]

3. Amend § 97.904 by removing and reserving paragraph (b).

4. Amend § 97.906 by:

a. In paragraph (b)(2), adding after the text "emissions limitation" the text "and assurance provisions";

b. Redesignating paragraphs (c)(2) through (6) as paragraphs (c)(3) through (7) and adding a new paragraph (c)(2);

c. Revising newly redesignated paragraph (c)(3); and

d. In newly redesignated paragraph (c)(4)(ii), removing the text "paragraph (c)(1)(ii)(A)" and adding in its place the text "paragraphs (c)(1)(ii)(A) and (c)(2)(i) through (iii)".

The additions and revision read as follows:

§ 97.906 General provisions.

* * * * *

(c) * * *

(2) *Texas SO_2 Trading Program assurance provisions*. (i) If total SO_2 emissions during a control period in a given year from all Texas SO_2 Trading Program units at Texas SO_2 Trading Program sources exceed the State assurance level, then the owners and operators of such sources and units in each group of one or more sources and units having a common designated representative for such control period, where the common designated representative's share of such SO_2 emissions during such control period exceeds the common designated representative's assurance level for such control period, shall hold (in the assurance account established for the owners and operators of such group) Texas SO_2 Trading Program allowances available for deduction for such control period under § 97.925(a) in an amount equal to two times the product (rounded to the nearest whole number), as determined by the Administrator in accordance with § 97.925(b), of multiplying—

(A) The quotient of the amount by which the common designated representative's share of such SO_2 emissions exceeds the common designated representative's assurance level divided by the sum of the amounts, determined for all common designated representatives for such sources and units for such control period, by which each common designated representative's share of such SO_2 emissions exceeds the respective common designated representative's assurance level; and

(B) The amount by which total SO_2 emissions from all Texas SO_2 Trading Program units at Texas SO_2 Trading Program sources for such control period exceed the State assurance level.

(ii) The owners and operators shall hold the Texas SO_2 Trading Program allowances required under paragraph (c)(2)(i) of this section, as of midnight of November 1 (if it is a business day), or midnight of the first business day thereafter (if November 1 is not a business day), immediately after the year of such control period.

(iii) Total SO_2 emissions from all Texas SO_2 Trading Program units at Texas SO_2 Trading Program sources during a control period in a given year exceed the State assurance level if such total SO_2 emissions exceed the sum, for such control period, of the Texas SO_2 Trading Program budget under § 97.910(a)(1) and the variability limit under § 97.910(b).

(iv) It shall not be a violation of this subpart or of the Clean Air Act if total SO_2 emissions from all Texas SO_2 Trading Program units at Texas SO_2 Trading Program sources during a control period exceed the State assurance level or if a common designated representative's share of total SO_2 emissions from the Texas SO_2 Trading Program units at Texas SO_2 Trading Program sources during a control period exceeds the common designated representative's assurance level.

(v) To the extent the owners and operators fail to hold Texas SO_2 Trading Program allowances for a control period in a given year in accordance with paragraphs (c)(2)(i) through (iii) of this section,

(A) The owners and operators shall pay any fine, penalty, or assessment or comply with any other remedy imposed under the Clean Air Act; and

(B) Each Texas SO_2 Trading Program allowance that the owners and operators fail to hold for such control period in accordance with paragraphs (c)(2)(i) through (iii) of this section and each day of such control period shall constitute a separate violation of this subpart and the Clean Air Act.

(3) *Compliance periods*. (i) A Texas SO_2 Trading Program unit shall be subject to the requirements under paragraph (c)(1) of this section for the control period starting on January 1, 2019 and for each control period thereafter.

(ii) A Texas SO_2 Trading Program unit shall be subject to the requirements under paragraph (c)(2) of this section for the control period starting on January 1, 2021 and for each control period thereafter.

* * * * *

5. Amend § 97.910 by:

a. Revising the section heading;

b. In paragraph (a)(1), removing the text "238,393" and adding in its place the text "238,395"; and

c. Adding paragraphs (b) and (c).

The revision and additions read as follows:

§ 97.910 Texas SO_2 Trading Program budget, Supplemental Allowance Pool budget, and variability limit.

* * * * *

(b) The variability limit for the Texas SO_2 Trading Program budget for the control periods in 2021 and thereafter is 16,688 tons.

(c) The Texas SO_2 Trading Program budget in paragraph (a)(1) of this section does not include any tons in the Supplemental Allowance Pool budget in paragraph (a)(2) of this section or the variability limit in paragraph (b) of this section.

6. Amend § 97.911 by:

a. Revising paragraph (a)(1);

b. In paragraph (a)(2), removing the text "allocated under the Texas Supplemental Allowance Pool under 40 CFR 97.912." and adding in its place the text "transferred to the Supplemental Allowance Pool for potential allocation in accordance with § 97.912.";

c. Removing and reserving paragraph (b);

d. In paragraph (c)(2), removing the text "paragraph (a) or (b)" and adding in its place the text "paragraph (a)"; and

e. Revising paragraph (c)(5).

The revisions read as follows:

§ 97.911 Texas SO_2 Trading Program allowance allocations.

(a)(1) Except as provided in paragraph (a)(2) of this section, Texas SO_2 Trading Program allowances from the Texas SO_2 Trading Program budget will be allocated, for the control periods in 2019 and each year thereafter, as provided in Table 1 to this paragraph (a)(1):

TABLE 1 TO PARAGRAPH (a)(1)—TEXAS SO_2 TRADING PROGRAM ALLOCATIONS

Texas SO_2 Trading Program units	ORIS code	Texas SO_2 Trading Program allocation (tons)	Affiliated ownership group
Big Brown Unit 1	3497	8,473	Vistra Energy
Big Brown Unit 2	3497	8,559	Vistra Energy
Coleto Creek Unit 1	6178	9,057	Vistra Energy
Fayette (Sam Seymour) Unit 1	6179	7,979	Lower Colorado River Authority / City of Austin

Fayette (Sam Seymour) Unit 2	6179	8,019	Lower Colorado River Authority / City of Austin
Graham Unit 2	3490	226	Vistra Energy
HW Pirkey Unit 1	7902	8,882	American Electric Power
Harrington Unit 061B	6193	5,361	Xcel Energy
Harrington Unit 062B	6193	5,255	Xcel Energy
Harrington Unit 063B	6193	5,055	Xcel Energy
JT Deely Unit 1	6181	6,170	City of San Antonio
JT Deely Unit 2	6181	6,082	City of San Antonio
Limestone Unit 1	298	12,081	NRG Energy
Limestone Unit 2	298	12,293	NRG Energy
Martin Lake Unit 1	6146	12,024	Vistra Energy
Martin Lake Unit 2	6146	11,580	Vistra Energy
Martin Lake Unit 3	6146	12,236	Vistra Energy
Monticello Unit 1	6147	8,598	Vistra Energy
Monticello Unit 2	6147	8,795	Vistra Energy
Monticello Unit 3	6147	12,216	Vistra Energy
Newman Unit 2	3456	1	El Paso Electric
Newman Unit 3	3456	1	El Paso Electric
Newman Unit **4	3456	2	El Paso Electric
Newman Unit **5	3456	2	El Paso Electric
Sandow Unit 4	6648	8,370	Vistra Energy
Sommers Unit 1	3611	55	City of San Antonio
Sommers Unit 2	3611	7	City of San Antonio
Stryker Unit ST2	3504	145	Vistra Energy
Tolk Unit 171B	6194	6,900	Xcel Energy
Tolk Unit 172B	6194	7,062	Xcel Energy
WA Parish Unit WAP4	3470	3	NRG Energy
WA Parish Unit WAP5	3470	9,580	NRG Energy
WA Parish Unit WAP6	3470	8,900	NRG Energy
WA Parish Unit WAP7	3470	7,653	NRG Energy
Welsh Unit 1	6139	6,496	American Electric Power
Welsh Unit 2	6139	7,050	American Electric Power
Welsh Unit 3	6139	7,208	American Electric Power
Wilkes Unit 1	3478	14	American Electric Power

Wilkes Unit 2	3478	2	American Electric Power
Wilkes Unit 3	3478	3	American Electric Power

* * * * *

(c) * * *

(5) With regard to the Texas SO_2 Trading Program allowances that are not recorded, or that are deducted as an incorrect allocation, in accordance with paragraphs (c)(2) and (3) of this section, the Administrator will transfer such Texas SO_2 Trading Program allowances to the Supplemental Allowance Pool for potential allocation in accordance with § 97.912.

7. Amend § 97.912 by:

a. In paragraph (a) introductory text, removing the text "each control period in 2019 and thereafter," and adding in its place the text "the control periods in 2019 and 2020,";

b. In paragraph (a)(1), removing the text "each subsequent February 15," and adding in its place the text "February 15, 2021,", and removing the second period and adding in its place the text "and recorded under § 97.921.";

c. In paragraph (a)(2), removing the period and adding in its place the text "and recorded under § 97.921.";

d. In paragraph (a)(3)(ii)(A), removing the text "paragraph (b)" and adding in its place the text "paragraph (d)";

e. In paragraph (a)(3)(ii)(B), removing the text "paragraph (b)" wherever it appears and adding in its place the text "paragraph (d)", and adding a new sentence between the existing first and second sentences;

f. In paragraph (a)(3)(iii), removing the text "paragraph (b)" and adding in its place the text "paragraph (d)";

g. Redesignating paragraphs (a)(4) and (b) as paragraphs (c) and (d) and adding a new paragraph (b); and

h. Revising newly redesignated paragraph (d).

The addition reads as follows:

§ 97.912 Texas SO_2 Trading Program Supplemental Allowance Pool.

(a) * * *

(3) * * *

(ii) * * *

(B) * * * The Administrator will adjust the sources' allocations up or down by one allowance, starting with the largest allocation and continuing in descending order, as necessary to cause the sum of the sources' allocations to equal the total number of allowances in the Supplemental Allowance Pool available for allocation under paragraph (d) of this section that remain after any allocation under paragraph (a)(3)(i) of this section. * * *

* * * * *

(b) For each control period in 2021 and thereafter, the Administrator will allocate Texas SO_2 Trading Program allowances from the Texas SO_2 Trading Program Supplemental Allowance Pool as follows:

(1) For each control period, the Administrator will assign each Texas SO_2 Trading Program unit to an affiliated ownership group reflecting the unit's ownership as of December 31 of the control period. The affiliated ownership group assignments for each control period will be as shown in § 97.911(a)(1) except that the Administrator will revise the assignments, based on the information required to be submitted in accordance with § 97.915(c) and any other information available to the Administrator, as necessary to reflect any ownership transfer resulting in a 50% or greater ownership share of a unit being held by a new owner that the Administrator determines is not affiliated with the previous holder of a 50% or greater ownership share of the unit.

(2) No later than February 15, 2022 and each subsequent February 15, the Administrator will review all the quarterly SO_2 emissions reports provided under § 97.934(d) for each Texas SO_2 Trading Program unit for the previous control period. The Administrator will identify each affiliated ownership group of Texas SO_2 Trading Program units as of December 31 of such control period for which the total amount of emissions reported for the units in the group for that control period exceeds the total amount of allowances allocated to the units in the group for that control period under § 97.911 and recorded under § 97.921.

(3) For each affiliated ownership group of Texas SO_2 Trading Program units identified under paragraph (b)(2) of this section, the Administrator will calculate the amount by which the total amount of reported emissions for that control period exceeds the total amount of allowances allocated for that control period under § 97.911 and recorded under § 97.921.

(4)(i) The Administrator will allocate and record allowances from the Supplemental Allowance Pool as follows:

(A) If the total for all such affiliated ownership groups of the amounts calculated under paragraph (b)(3) of this section is less than or equal to the total number of allowances in the Supplemental Allowance Pool available for allocation under paragraph (d) of this section, then each such group's allocation of allowances from the Supplemental Allowance Pool shall equal to the amount calculated for the group under paragraph (b)(3) of this section.

(B) If the total for all such affiliated ownership groups of the amounts calculated under paragraph (b)(3) of this section is greater than the total number of allowances in the Supplemental Allowance Pool available for allocation under paragraph (d) of this section, then the Administrator will calculate each such group's allocation of allowances from the Supplemental Allowance Pool by dividing the amount calculated under paragraph (b)(3) of this section for the group by the sum of the amounts calculated under paragraph (b)(3) of this section for all such groups, then multiplying by the number of allowances in the Supplemental Allowance Pool available for allocation under paragraph (d) of this section and rounding to the nearest allowance. The Administrator will adjust the groups' allocations up or down by one allowance, starting with the largest allocation and continuing in descending order, as necessary to cause the sum of the groups' allocations to equal the total number of allowances in the Supplemental Allowance Pool available for allocation under paragraph (d) of this section.

(C) When an affiliated ownership group receives an allocation of allowances under paragraph (b)(4)(i)(A) or (B) of this section, each source in the group whose emissions during the control period for which allowances are being allocated exceed the amount of allowances allocated to

the source under § 97.911 and recorded under § 97.921 will receive a share of the group's allocation. The Administrator will compute each such source's share by dividing the amount of the source's emissions during the control period exceeding the source's allocation under § 97.911 by the sum for all such sources of the amounts of the sources' emissions during the control period exceeding the sources' allocations under § 97.911, then multiplying by the group's allocation under paragraph (b)(4)(i)(A) or (B) of this section and rounding to the nearest allowance. The Administrator will adjust the sources' allocations up or down by one allowance, starting with the largest allocation and continuing in descending order, as necessary to cause the sum of the sources' allocations to equal the group's allocation. The Administrator will then record the calculated allocations of allowances in the applicable sources' compliance accounts.

(ii) Any unallocated allowances remaining in the Supplemental Allowance Pool after the allocations determined under paragraph (b)(4)(i) of this section will be maintained in the Supplemental Allowance Pool. These allowances will be available for allocation by the Administrator in subsequent control periods to the extent consistent with paragraph (d) of this section.

* * * * *

(d) The total amount of allowances in the Supplemental Allowance Pool available for allocation for a control period is equal to the sum of the Supplemental Allowance Pool budget under § 97.910(a)(2), any allowances from retired units pursuant to § 97.911(a)(2) and from corrections pursuant to § 97.911(c)(5), and any allowances maintained in the Supplemental Allowance Pool pursuant to paragraph (a)(3)(iii) or (b)(4)(ii) of this section, provided that if the number of allowances in the Supplemental Allowance Pool exceeds the applicable limit for the

control period under paragraph (d)(1) or (d)(2) of this section, then the Administrator may only allocate allowances up to such applicable limit.

(1) For the control periods in 2019 and 2020, the total amount of allowances allocated from the Supplemental Allowance Pool for a control period may not exceed by more than 44,711 tons the sum of the Supplemental Allowance Pool budget under § 97.910(a)(2) and any portion of the Texas SO_2 Trading Program budget under § 97.910(a)(1) not otherwise allocated for that control period under § 97.911(a)(1).

(2) For each control period in 2021 and thereafter, the total amount of allowances allocated from the Supplemental Allowance Pool for a control period may not exceed the sum of the variability limit under § 97.910(b) and any portion of the Texas SO_2 Trading Program budget under § 97.910(a)(1) not otherwise allocated for that control period under § 97.911(a)(1).

8. Amend § 97.913 by revising paragraph (c) to read as follows:

§ 97.913 Authorization of designated representative and alternate designated representative.

* * * * *

(c) Except in this section, § 97.902, and §§ 97.914 through 97.918, whenever the term "designated representative" (as distinguished from the term "common designated representative") is used in this subpart, the term shall be construed to include the designated representative or any alternate designated representative.

§ 97.915 [Amended]

9. Amend § 97.915 paragraph (d) introductory text and paragraph (d)(1) by removing the text "(see § 97.904(b))".

10. Amend § 97.920 by:

a. Revising the section heading;

b. Redesignating paragraphs (b) through (d) as paragraphs (c) through (e) and adding a new paragraph (b);

c. In newly redesignated paragraph (c)(2)(i) introductory text, removing the text "paragraph (b)(1)" and adding in its place the text "paragraph (c)(1)";

d. In newly redesignated paragraph (c)(2)(ii), removing the text "paragraph (b)(5)" and adding in its place the text "paragraph (c)(5)";

e. In newly redesignated paragraphs (c)(3)(i) and (ii), removing the text "paragraph (b)(1)" and adding in its place the text "paragraph (c)(1)";

f. In newly redesignated paragraph (c)(4)(i), removing the text "paragraph (b)(1)" wherever it appears and adding in its place the text "paragraph (c)(1)";

g. In newly redesignated paragraph (c)(4)(ii), removing the text "paragraph (b)(4)(i)" and adding in its place the text "paragraph (c)(4)(i)";

h. In newly redesignated paragraph (c)(5)(iii) introductory text and paragraph (c)(5)(iii)(C), removing the text "paragraph (b)(5)(i)" and adding in its place the text "paragraph (c)(5)(i)";

i. In newly redesignated paragraph (c)(5)(iii)(D), removing the text "97.920(b)(5)(iv)" and adding in its place the text "97.920(c)(5)(iv)";

j. In newly redesignated paragraph (c)(5)(iii)(E), removing the text "97.920(b)(5)(iv)," and adding in its place the text "97.920(c)(5)(iv),", and removing the text "97.920(b)(5)" and adding in its place the text "97.920(c)(5)";

k. In newly redesignated paragraph (c)(5)(iv), removing the text "paragraph (b)(5)(iii)" and adding in its place the text "paragraph (c)(5)(iii)";

l. In newly redesignated paragraph (c)(5)(v), removing the text "paragraph (b)(5)(iii)(D)" and adding in its place the text "paragraph (c)(5)(iii)(D)", and removing the text "paragraph (b)(5)(iv)" and adding in its place the text "paragraph (c)(5)(iv)";

m. In newly redesignated paragraph (d), removing the text "paragraphs (a) and (b)" and adding in its place the text "paragraphs (a), (b), and (c)"; and

n. In newly redesignated paragraph (e), removing the text "paragraphs (b)(2)(ii) and (b)(5)" and adding in its place the text "paragraphs (c)(2)(ii) and (c)(5)".

The revision and addition read as follows:

§ 97.920 Establishment of compliance accounts, assurance accounts, and general accounts.

* * * * *

(b) *Assurance accounts*. The Administrator will establish assurance accounts for certain owners and operators and States in accordance with § 97.925(b)(3).

* * * * *

11. Amend § 97.921 by:

a. In paragraph (a), removing the second sentence;

b. Revising paragraphs (b) and (c);

c. Removing and reserving paragraph (d); and

d. Adding paragraph (f).

The revisions and addition read as follows:

§ 97.921 Recordation of Texas SO_2 Trading Program allowance allocations.

* * * * *

(b) By July 1, 2019, the Administrator will record in each Texas SO_2 Trading Program source's compliance account the Texas SO_2 Trading Program allowances allocated to the Texas SO_2 Trading Program units at the source in accordance with § 97.911(a) for the control period in the fourth year after the year of the applicable recordation deadline under this paragraph, unless provided otherwise in the Administrator's approval of a SIP revision replacing the provisions of this subpart.

(c) By February 15, 2020, and February 15 of each year thereafter, the Administrator will record in each Texas SO_2 Trading Program source's compliance account the allowances allocated from the Texas SO_2 Trading Program Supplemental Allowance Pool in accordance with § 97.912 for the control period in the year of the applicable recordation deadline under this paragraph, unless provided otherwise in the Administrator's approval of a SIP revision replacing the provisions of this subpart.

* * * * *

(f) Notwithstanding paragraphs (a) and (b) of this section, with respect to the Texas SO_2 Trading Program allowances allocated to Newman Unit **5 in accordance with § 97.911(a) for

the control periods in 2019, 2020, 2021, 2022, 2023, and 2024, the Administrator will record the allowances in the source's compliance account by December 31, 2020, unless provided otherwise in the Administrator's approval of a SIP revision replacing the provisions of this subpart.

12. Add § 97.925 to read as follows:

§ 97.925 Compliance with Texas SO_2 Trading Program assurance provisions.

(a) *Availability for deduction*. Texas SO_2 Trading Program allowances are available to be deducted for compliance with the Texas SO_2 Trading Program assurance provisions for a control period in a given year by the owners and operators of a group of one or more Texas SO_2 Trading Program sources and units only if the Texas SO_2 Trading Program allowances:

(1) Were allocated for a control period in a prior year or the control period in the given year or in the immediately following year; and

(2) Are held in the assurance account, established by the Administrator for such owners and operators of such group of Texas SO_2 Trading Program sources and units under paragraph (b)(3) of this section, as of the deadline established in paragraph (b)(4) of this section.

(b) *Deductions for compliance*. The Administrator will deduct Texas SO_2 Trading Program allowances available under paragraph (a) of this section for compliance with the Texas SO_2 Trading Program assurance provisions for a control period in a given year in accordance with the following procedures:

(1) By June 1, 2022 and June 1 of each year thereafter, the Administrator will:

(i) Calculate the total SO_2 emissions from all Texas SO_2 Trading Program units at Texas SO_2 Trading Program sources during the control period in the year before the year of this calculation deadline and the amount, if any, by which such total SO_2 emissions exceed the State assurance level as described in § 97.906(c)(2)(iii).

(ii) [Reserved]

(2) If the calculations under paragraph (b)(1)(i) of this section indicate that the total SO_2 emissions from all Texas SO_2 Trading Program units at Texas SO_2 Trading Program sources during such control period exceed the State assurance level as described in § 97.906(c)(2)(iii):

(i) [Reserved]

(ii) By August 1 immediately after the deadline for the calculations under paragraph (b)(1)(i) of this section, the Administrator will calculate, for such control period and each common designated representative for such control period for a group of one or more Texas SO_2 Trading Program sources and units, the common designated representative's share of the total SO_2 emissions from all Texas SO_2 Trading Program units at Texas SO_2 Trading Program sources, the common designated representative's assurance level, and the amount (if any) of Texas SO_2 Trading Program allowances that the owners and operators of such group of sources and units must hold in accordance with the calculation formula in § 97.906(c)(2)(i). By each such August 1, the Administrator will promulgate a notice of data availability of the results of the calculations under this paragraph and paragraph (b)(1)(i) of this section, including separate calculations of the SO_2 emissions from each Texas SO_2 Trading Program source.

(iii) The Administrator will provide an opportunity for submission of objections to the calculations referenced by the notice of data availability required in paragraph (b)(2)(ii) of this section.

(A) Objections shall be submitted by the deadline specified in such notice and shall be limited to addressing whether the calculations referenced in the notice required under paragraph (b)(2)(ii) of this section are in accordance with § 97.906(c)(2)(iii), §§ 97.906(b) and 97.930 through 97.935, the definitions of "common designated representative", "common designated representative's assurance level", and "common designated representative's share" in § 97.902, and the calculation formula in § 97.906(c)(2)(i).

(B) The Administrator will adjust the calculations to the extent necessary to ensure that they are in accordance with the provisions referenced in paragraph (b)(2)(iii)(A) of this section. By October 1 immediately after the promulgation of such notice, the Administrator will promulgate a notice of data availability of the calculations incorporating any adjustments that the Administrator determines to be necessary and the reasons for accepting or rejecting any objections submitted in accordance with paragraph (b)(2)(iii)(A) of this section.

(3) The Administrator will establish one assurance account for each set of owners and operators referenced, in the notice of data availability required under paragraph (b)(2)(iii)(B) of this section, as all of the owners and operators of a group of Texas SO_2 Trading Program sources and units having a common designated representative for such control period and as being required to hold Texas SO_2 Trading Program allowances.

(4)(i) As of midnight of November 1 immediately after the promulgation of each notice of data availability required in paragraph (b)(2)(iii)(B) of this section, the owners and operators

described in paragraph (b)(3) of this section shall hold in the assurance account established for them and for the appropriate Texas SO_2 Trading Program sources and Texas SO_2 Trading Program units under paragraph (b)(3) of this section a total amount of Texas SO_2 Trading Program allowances, available for deduction under paragraph (a) of this section, equal to the amount such owners and operators are required to hold with regard to such sources and units as calculated by the Administrator and referenced in such notice.

(ii) Notwithstanding the allowance-holding deadline specified in paragraph (b)(4)(i) of this section, if November 1 is not a business day, then such allowance-holding deadline shall be midnight of the first business day thereafter.

(5) After November 1 (or the date described in paragraph (b)(4)(ii) of this section) immediately after the promulgation of each notice of data availability required in paragraph (b)(2)(iii)(B) of this section and after the recordation, in accordance with § 97.923, of Texas SO_2 Trading Program allowance transfers submitted by midnight of such date, the Administrator will determine whether the owners and operators described in paragraph (b)(3) of this section hold, in the assurance account for the appropriate Texas SO_2 Trading Program sources and Texas SO_2 Trading Program units established under paragraph (b)(3) of this section, the amount of Texas SO_2 Trading Program allowances available under paragraph (a) of this section that the owners and operators are required to hold with regard to such sources and units as calculated by the Administrator and referenced in the notice required in paragraph (b)(2)(iii)(B) of this section.

(6) Notwithstanding any other provision of this subpart and any revision, made by or submitted to the Administrator after the promulgation of the notice of data availability required in paragraph (b)(2)(iii)(B) of this section for a control period in a given year, of any data used in

making the calculations referenced in such notice, the amounts of Texas SO_2 Trading Program allowances that the owners and operators are required to hold in accordance with

§ 97.906(c)(2)(i) for such control period shall continue to be such amounts as calculated by the Administrator and referenced in such notice required in paragraph (b)(2)(iii)(B) of this section, except as follows:

(i) If any such data are revised by the Administrator as a result of a decision in or settlement of litigation concerning such data on appeal under part 78 of this chapter of such notice, or on appeal under section 307 of the Clean Air Act of a decision rendered under part 78 of this chapter on appeal of such notice, then the Administrator will use the data as so revised to recalculate the amounts of Texas SO_2 Trading Program allowances that owners and operators are required to hold in accordance with the calculation formula in § 97.906(c)(2)(i) for such control period with regard to the Texas SO_2 Trading Program sources and Texas SO_2 Trading Program units involved, provided that such litigation under part 78 of this chapter, or the proceeding under part 78 of this chapter that resulted in the decision appealed in such litigation under section 307 of the Clean Air Act, was initiated no later than 30 days after promulgation of such notice required in paragraph (b)(2)(iii)(B) of this section.

(ii) [Reserved]

(iii) If the revised data are used to recalculate, in accordance with paragraph (b)(6)(i) of this section, the amount of Texas SO_2 Trading Program allowances that the owners and operators are required to hold for such control period with regard to the Texas SO_2 Trading Program sources and Texas SO_2 Trading Program units involved—

(A) Where the amount of Texas SO_2 Trading Program allowances that the owners and operators are required to hold increases as a result of the use of all such revised data, the Administrator will establish a new, reasonable deadline on which the owners and operators shall hold the additional amount of Texas SO_2 Trading Program allowances in the assurance account established by the Administrator for the appropriate Texas SO_2 Trading Program sources and Texas SO_2 Trading Program units under paragraph (b)(3) of this section. The owners' and operators' failure to hold such additional amount, as required, before the new deadline shall not be a violation of the Clean Air Act. The owners' and operators' failure to hold such additional amount, as required, as of the new deadline shall be a violation of the Clean Air Act. Each Texas SO_2 Trading Program allowance that the owners and operators fail to hold as required as of the new deadline, and each day in such control period, shall be a separate violation of the Clean Air Act.

(B) For the owners and operators for which the amount of Texas SO_2 Trading Program allowances required to be held decreases as a result of the use of all such revised data, the Administrator will record, in all accounts from which Texas SO_2 Trading Program allowances were transferred by such owners and operators for such control period to the assurance account established by the Administrator for the appropriate Texas SO_2 Trading Program sources and Texas SO_2 Trading Program units under paragraph (b)(3) of this section, a total amount of the Texas SO_2 Trading Program allowances held in such assurance account equal to the amount of the decrease. If Texas SO_2 Trading Program allowances were transferred to such assurance account from more than one account, the amount of Texas SO_2 Trading Program allowances recorded in each such transferor account will be in proportion to the percentage of the total

amount of Texas SO_2 Trading Program allowances transferred to such assurance account for such control period from such transferor account.

(C) Each Texas SO_2 Trading Program allowance held under paragraph (b)(6)(iii)(A) of this section as a result of recalculation of requirements under the Texas SO_2 Trading Program assurance provisions for such control period must be a Texas SO_2 Trading Program allowance allocated for a control period in a year before or the year immediately following, or in the same year as, the year of such control period.

§ 97.926 [Amended]

13. Amend § 97.926 paragraph (b) by adding after the text "§ 97.924," the text "§ 97.925,".

§ 97.928 [Amended]

14. Amend § 97.928 paragraph (b) by removing the text "a compliance account," and adding in its place the text "a compliance account or an assurance account,".

§ 97.930 [Amended]

15. Amend § 97.930 by:

a. In paragraph (b) introductory text, removing the colon and adding in its place the text "January 1, 2019.";

b. Removing and reserving paragraphs (b)(1) and (2); and

c. In paragraph (b)(3), removing the text "the applicable deadline under paragraph (b)(1) or (2) of this section" and adding in its place the text "January 1, 2019".

§ 97.931 [Amended]

16. Amend § 97.931 paragraph (d)(3) introductory text by removing after the text "is replaced by" the text "with".

§ 97.934 [Amended]

17. Amend § 97.934 by:

a. In paragraph (d)(1) introductory text, removing the text "the later of" and adding in its place the text "the calendar quarter covering January 1, 2019 through March 31, 2019."; and

b. Removing paragraphs (d)(1)(i) and (ii).