12-60672

U.S. COURT OF APPEALS
RECEIVED
SEP 4 2012
FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

The Louisiana Department of Environmental Quality Petitioner v. The United States Environmental Protection Agency, Respondent	)))))))))))	Judicial Review

PETITION FOR REVIEW

STATEMENT OF PROCEEDINGS BEFORE THE EPA

Pursuant to section 307(b)(l) of the Clean Air Act, 42 U.S.C. 5 7607(b)(l), (2011) and Rule 15(a) of the Federal Rules of Appellate Procedure, the Louisiana Department of Environmental Quality petitions the Court for review of the "Approval and Promulgation of Implementation Plans; Louisiana; Regional Haze State Implementation Plant" (the "Final Action"). The Final Action was published by the Environmental Protection Agency ("EPA") in the Federal Register at 77 Fed. Reg. 39,425 – 39,435 on July 3, 2012.

A copy of the Final Action is attached as Exhibit A.

VENUE AND JURISDICTION

Venue is appropriate in the 5th Circuit pursuant to 42 U.S.C. § 7607(b)(1) (2011), as the EPA action concerns the Louisiana State Implementation Plan pursuant to 42 U.S.C. § 7410 (2011).

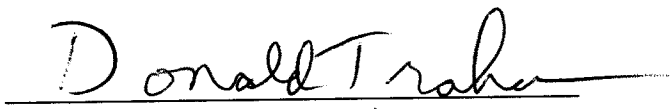
Jurisdiction exists pursuant to 42 U.S.C. § 7607(b)(1) (2011).

PRAYER FOR RELIEF

The Louisiana Department of Environmental Quality prays for the following relief:

1) That the court issue an order vacating the EPA decision above;
2) That the court order the EPA to review the Louisiana State Implementation Plan regarding Regional Haze pursuant to rules and regulations in place and effective at the time of the review and decision regarding the SIP.

Respectfully submitted:
LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY
Herman Robinson (#2077), Executive Counsel



By: Donald Trahan (#08493)
Dwana King (#20590)
Jackie Marve (#08241)
Kathy Wright (#30804)
Legal Division
Louisiana Department of Environmental Quality
P.O. Box 4302
Baton Rouge, LA 70821-4302
Telephone: (225) 219-3985
Facsimile: (225) 219-4068

Please Serve

Ms. Lisa P. Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

EXHIBIT A

petty officer who has been designated by the Captain of the Port Buffalo to act on his behalf.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Buffalo or his on-scene representative to obtain permission to do so. The Captain of the Port Buffalo or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port Buffalo, or his on-scene representative.

Dated: June 15, 2012.

S.M. Wischmann,

Captain, U.S. Coast Guard, Captain of the Port Buffalo.

[FR Doc. 2012–16243 Filed 7–2–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2008–0510; FRL–9692–3]

Approval and Promulgation of Implementation Plans; Louisiana; Regional Haze State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is finalizing a partial limited approval and a partial disapproval of a revision to the Louisiana State Implementation Plan (SIP) submitted by the State of Louisiana through the Louisiana Department of Environmental Quality (LDEQ), on June 13, 2008, that addresses regional haze (RH) for the first implementation period. This revision was submitted to address the requirements of the Clean Air Act (CAA) and the EPA's rules that require states to prevent any future and remedy any existing anthropogenic impairment of visibility in mandatory Class I areas (national parks and wilderness areas) caused by emissions of air pollutants from numerous sources located over a wide geographic area (also referred to as the "regional haze program"). States are required to assure reasonable progress toward the national goal of achieving natural visibility conditions in Class I areas. In a separate action, the EPA has finalized a limited disapproval of the Louisiana RH SIP, along with several other states' regional haze plans, because of deficiencies in the state's regional haze SIP submittal arising from the remand by the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) to the EPA of the Clean Air Interstate Rule (CAIR). In this action, the EPA is finalizing a partial disapproval because of deficiencies in Louisiana's RH SIP submittal that go beyond the issues addressed in the EPA's limited disapproval in that separate action. The EPA is also finalizing a partial limited approval of those elements of this SIP revision not addressed by our partial disapproval. The partial limited approval of the RH requirements for Louisiana is based on the conclusion that the revisions, as a whole, strengthen the Louisiana SIP. This action is being taken under section 110 and part C of the CAA.

DATES: This rule is effective August 6, 2012.

ADDRESSES: The EPA has established a docket for this action under Docket Identification No. EPA–R06–OAR–2008–0510. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section for further information. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Ellen Belk, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone 214–665–2164; fax number 214–665–6762; email address *belk.ellen@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us," and "our" means the EPA.

Table of Contents

I. Background
II. Final Action
III. Comments Received and Our Responses
IV. Statutory and Executive Order Reviews

I. Background

The EPA is taking action on a revision to Louisiana's SIP submitted on June 13, 2008, that addressed progress toward reducing regional haze for the first implementation period ending in 2018. This revision was submitted to address the requirements of the CAA and the EPA's rules to assure reasonable progress toward the national goal of achieving natural visibility conditions in mandatory Class I areas. As identified by Congress, there is one mandatory Class I area within the State of Louisiana, Breton National Wilderness Area.[1] The initial submittal from Louisiana was supplemented by a May 30, 2012, letter communicating that the State finalized its Smoke Management Plan (SMP). On February 28, 2012, the EPA published a proposed partial limited approval and partial disapproval of Louisiana's SIP revision to address RH. *See* 77 FR 11839.[2]

In that action, the EPA proposed a partial limited approval of Louisiana's June 13, 2008, SIP revision addressing RH under CAA sections 301(a) and 110(k)(3) because certain provisions of the revision strengthen the Louisiana (LA) SIP. The EPA also proposed a partial disapproval of the LA RH SIP submittal because the submittal includes several deficient provisions. The deficiencies identified in the proposal go beyond those identified in the limited disapproval proposed on December 30, 2011 (76 FR 82219) which addressed deficiencies in several states' regional haze plans caused by the remand of the CAIR. The EPA proposed that certain elements of the State's Best Available Retrofit Technology (BART)

[1] It is recognized that at the Breton National Wilderness Area (Breton or Breton NWA), some acres have at times been submerged. However, as a Class I area, Congress has declared as a national goal "the prevention of any future, and the remedying, of any existing, impairment of visibility" at the Breton NWA. 42 U.S.C. 7491. Breton was designated by Congress as a national wilderness area on June 3, 1975, under the Wilderness Act. Public Law 93–632 1(f); *see also* 16 U.S.C. 1132. In the August 7, 1977, Clean Air Act Amendment, national wilderness areas that exceeded 5,000 acres in size and were in existence at that time (August 7, 1977), were designated as mandatory Class I areas that may not be redesignated. 42 U.S.C. 7472(a). In accordance with section 169A of the CAA, the EPA, in consultation with the Department of Interior, promulgated a list of 156 areas where visibility is identified as an important value. *See*, 44 FR 69122, November 30, 1979. As required, the EPA lists Breton as a mandatory Class I federal area at 40 CFR 81.412.

[2] For additional details on the EPA's analysis and findings, the reader is referred to the proposal published in the February 28, 2012 **Federal Register** (77 FR 11839), and a more detailed discussion as contained in the Technical Support Document which is available on line at *http://www.regulations.gov*, Docket number EPA–R06–OAR–2008–0510.

evaluations and determinations are not fully adequate to meet the federal requirements. Additionally, as a result of the deficiencies related to BART, the EPA proposed that the Long-Term Strategy (LTS) is not fully adequate to meet federal requirements. Finally, because visibility impacts from smoke are significant in Louisiana, we proposed that Louisiana should finalize its SMP. The EPA proposed a limited approval for portions of the revision because those portions represent an improvement over the current SIP, and make considerable progress in fulfilling the applicable CAA RH program requirements.

The EPA received comments on the Agency's February 28, 2012 proposed action. See section III of this rulemaking for a summary of comments received and the EPA's responses to these comments. Also, the EPA received a final SMP from Louisiana on May 30, 2012.

Following the remand of CAIR, the EPA issued a new rule in 2011 to address the interstate transport of nitrogen oxides (NO_X) and sulfur dioxide (SO_2) in the eastern United States. *See* 76 FR 48208, August 8, 2011 ("the Transport Rule," also known as the Cross-State Air Pollution Rule (CSAPR)). On December 30, 2011, the EPA proposed to find that the trading programs in the Transport Rule would achieve greater reasonable progress towards the national visibility goal than would source-specific BART in the states in which the Transport Rule applies. *See* 76 FR 82219. The EPA finalized that rule on May 30, 2012 (77 FR 33642). Based on this finding, the EPA also revised the RH Rule (RHR) to allow states to substitute participation in the trading programs under the Transport Rule for source-specific BART.

Also on December 30, 2011, the U.S. Court of Appeals for the DC Circuit stayed the Transport Rule (including the provisions that would have sunset CAIR and the CAIR Federal Implementation Plans (FIPs)) and instructed the EPA to continue to administer CAIR pending the outcome of the court's decision on the petitions for review challenging the Transport Rule. *EME Homer City* v. *EPA*, No. 11–1302 (Order).

II. Final Action

In this action, the EPA is finalizing a partial limited approval and a partial disapproval of Louisiana's June 13, 2008 RH SIP revision. With one difference, we are finalizing our action as proposed. As discussed below, we are slightly adjusting our action on the LA RH SIP with respect to the LDEQ's BART determination for the Rhodia Sulfuric Acid Plant (Rhodia). We proposed to find the BART evaluation for Rhodia is deficient because the LDEQ's RH submittal does not analyze controls for the subject-to-BART unit using the factors required by 40 CFR 51.308(e). Having considered the public comments, we find that Rhodia's subject-to-BART unit meets the RH requirements specified in 40 CFR 51.308(e)(1)(ii)(A) for an adequate BART evaluation; however the Rhodia BART determination still fails to meet the requirement in 40 CFR 51.308(e) to include the emissions limits in the SIP. See our response to comment 6 in section III for further discussion of our findings for Rhodia. Also, this action acknowledges that Louisiana has satisfied the requirement to consider smoke management techniques, including plans, because Louisiana has finalized its SMP (see the docket for this action, Docket No. EPA–R06–OAR–2008–0510, for Louisiana's SMP).

The EPA is finalizing a partial limited approval of Louisiana's RH SIP revision. This partial limited approval results in approval of all of the remaining elements of Louisiana's RH SIP.[3] The EPA is taking this approach because Louisiana's SIP will be stronger and more protective of the environment with the implementation of those measures by the state and having federal approval and enforceability than it would without those measures being included in Louisiana's SIP.

The EPA is also finalizing a partial disapproval of Louisiana's RH SIP revision insofar as this SIP revision relies on deficient BART evaluations for four non-electric generating unit (non-EGU) subject-to-BART sources. The legal effect of the final partial disapproval for Louisiana's June 13, 2008, SIP revision is to provide the EPA authority to issue a FIP at any time, and to obligate the Agency to take such action no more than two years after the effective date of the EPA's final action. 42 USC 7410(c)(1); CAA 110(c)(1).

Note that in another action, signed May 30, 2012, the EPA finalized its finding that the trading programs in the Transport Rule would achieve greater reasonable progress towards the national goal than would BART in the states in which the Transport Rule applies. *See* 77 FR 33642. In that action, the EPA finalized a limited disapproval[4] of Louisiana's June 13, 2008, RH SIP revision insofar as those revisions rely on the CAIR to address the impact of emissions from the State's electric generating units (EGUs). However, that action did not finalize a FIP for Louisiana. The legal effect of that final limited disapproval for Louisiana's June 13, 2008, SIP revision is to provide the EPA authority to issue a FIP at any time, and to obligate the Agency to take such action no more than two years after the effective date of the EPA's final action.

Specifically, the EPA is finalizing a partial limited approval and a partial disapproval of a revision to the Louisiana SIP submitted by the State of Louisiana on June 13, 2008, as meeting some of the applicable regional haze requirements as set forth in sections 169A and 169B of the CAA and in 40 CFR 51.300–308. In this action, the EPA grants a partial limited approval of the LA RH SIP submittal for meeting the requirements of: 51.308(d), for the core requirements for regional haze SIPs, except for the requirements of 51.308(d)(3); 51.308(f), for the commitment to submit comprehensive periodic revisions of regional haze SIPs; 51.308(g), for the commitment to submit periodic reports describing progress towards the reasonable progress goals (RPGs); 51.308(h), for the commitment to conduct periodic determinations of the adequacy of the existing regional haze SIP; and 51.308(i), for coordination with state and Federal Land Managers. However, in this action the EPA is also partially disapproving the LA RH SIP submittal because it does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3), long-term strategy for regional haze as it relies on deficient non-EGU BART analyses; and 51.308(e), BART requirements for regional haze visibility impairment with respect to emissions of visibility impairing pollutants from four non-EGUs.

III. Comments Received and Our Responses

The EPA received four sets of comments on the February 28, 2012, rulemaking proposing a partial limited approval and a partial disapproval of Louisiana's June 13, 2008 SIP revision.

[3] Processing of State Implementation Plan (SIP) Revisions, EPA Memorandum from John Calcagni, Director, Air Quality Management Division, OAQPS, to Air Division Directors, EPA Regional Offices I–X (1992 Calcagni Memorandum) located at *http://www.epa.gov/ttn/caaa/t1/memoranda/siproc.pdf*.

[4] As explained in the 1992 Calcagni Memorandum, "[t]hrough a limited approval, the EPA [will] concurrently, or within a reasonable period of time thereafter, disapprove the rule * * * for not meeting all of the applicable requirements of the Act. * * * [T]he limited disapproval is a rulemaking action, and it is subject to notice and comment." Final limited disapproval of a SIP submittal does not affect the federal enforceability of the measures in the subject SIP revision nor prevent state implementation of these measures.

Specifically, the comments were received from the National Parks Service; the LDEQ; Exxon Mobil Corporation; and Tulane Environmental Law Clinic, on behalf of the Gulf Restoration Network. Full sets of the comments provided by all of the aforementioned entities (hereinafter referred to as "the Commenter") are provided in the docket for today's final action. The docket for this action is available at *www.regulations.gov* under Docket Identification No. EPA–R06–OAR–2008–0510. A summary of the comments and the EPA's responses are provided below.

Comment 1: The EPA does not have the authority under the CAA to issue a limited approval of Louisiana's RH SIP. The CAA provides that the EPA can approve a SIP submittal in whole or can approve part of a submittal and disapprove the other parts. CAA section 110(k)(3). But the CAA says nothing about allowing the EPA to grant a "limited approval."

Response 1: The EPA disagrees with the comment that the EPA lacks the authority to give limited approval of Louisiana's RH SIP. As discussed in the September 7, 1992, EPA memorandum cited in the proposed rulemaking,[5] although section 110(k) of the CAA may not expressly provide authority for limited approvals, the plain language of section 301(a) does provide "gap-filling" authority authorizing the Agency to "prescribe such regulations as are necessary to carry out" the EPA's CAA functions. The EPA may rely on section 301(a) in conjunction with the Agency's SIP approval authority in section 110(k)(3) to issue limited approvals where it has determined that a submittal strengthens a given state SIP and that the provisions meeting the applicable requirements of the CAA are not separable from the provisions that do not meet the CAA's requirements. The EPA has adopted the limited approval approach numerous times in SIP actions across the nation over the last twenty years. Limited approval is appropriate for part of the SIP submittal here because the EPA has determined that a portion of Louisiana's SIP revisions addressing regional haze, as a whole, strengthen the State's SIP and because the provisions in the SIP revisions that relate to BART for EGUs are not separable. Further, this limited approval complements the national "Better-than-BART" action, which proposed a limited disapproval for the LA RH SIP due to its reliance on the remanded CAIR for BART for EGUs. Adopting the Commenter's position would ignore CAA section 301 and violate the "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme'. * * * A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' * * * and 'fit, if possible, all parts into an harmonious whole.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (*quoting Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989), *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569 (1995), and *FTC* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959)).

Comment 2: The EPA cannot partially approve or partially disapprove a RH SIP without evaluating Louisiana's proposed SIP as a whole. The EPA has proposed to issue a FIP to address the deficiencies in Louisiana's SIP associated with the BART requirements for NO_X for EGUs, but did not propose a FIP for the EGU BART requirements for SO_2. Accordingly, Louisiana and the EPA must issue BART determinations for SO_2 at each source subject to BART, including those EGUs subject to the Transport Rule. Because of this bifurcated treatment, the proposed partial SIP violates the CAA and RHR because the EPA failed to evaluate, let alone determine, whether exempting Louisiana EGUs from BART complies with the CAA's reasonable progress mandate. To meet the 2064 goal, a regional haze plan must include two components: BART limits and a long-term strategy to achieve reasonable progress toward that goal. Because BART is a critical component to achieving reasonable progress, neither the states nor the EPA can exempt sources from the RHR's BART requirements without any consideration of how doing so will affect the overarching reasonable progress mandate. All required components of a RH SIP or FIP affect each other, are part of a "single administrative action," and must be evaluated together to determine compliance with the CAA and RHR. The EPA has failed to account for how, in the absence of relied upon SO_2 reductions anticipated under CAIR, it will maintain its uniform rate of progress. The EPA's failure to consider together the proposed alternative BART program, BART for SO_2, the LTS and RPGs in Louisiana's SIP violates the CAA and RHR and is arbitrary and capricious.

Response 2: We have evaluated the LA RH SIP submittal as a whole and at this time we are taking final action on all elements of the LA RH SIP submittal that were not addressed in the national Better-than-BART rule. Louisiana must consider whether EGUs previously covered by the CAIR, whether subject to BART or not, should be controlled to ensure reasonable progress to meet the State's long-term strategies. However, insofar as Louisiana's LTS and RPGs are affected by the remand of CAIR, those issues are addressed in the national Better-than-BART rulemaking and are outside the scope of this action on the remainder of the LA RH SIP. Also, the CAA expressly provides authority to the EPA to partially approve and partially disapprove a SIP revision. 42 U.S.C. 7410(k)(3). The EPA has adopted the partial approval approach numerous times in SIP actions across the nation over the last twenty years. Partial approval and partial disapproval is appropriate here because the EPA has determined that a portion of Louisiana's RH SIP meets regional haze requirements and a portion of it does not. Additionally, the EPA has discretion to issue an immediate FIP for all or part of the deficiencies in the LA RH SIP; however, the EPA is not under an obligation to promulgate a FIP for any part of the LA RH SIP at this time because the FIP clock has not begun yet. See Section II of this action for additional information about the FIP. While the EPA proposed a FIP for Louisiana for NO_X BART for EGUs, the final national Better-than-BART rule does not include a FIP for NO_X BART for EGUs.[6] Without a FIP, the Louisiana RH SIP contains a gap for NO_X BART for EGUs. Additionally, because no FIP was promulgated for SO_2 in Louisiana, the Louisiana RH SIP contains a gap for SO_2 BART for EGUs. Therefore, Louisiana must submit and the EPA must approve a revised SIP submittal to address both NO_X and SO_2 BART for EGUs to cure the deficiencies in the SIP resulting from the remand of CAIR. Louisiana may elect to rely on the Transport Rule for NO_X BART for EGUs in that submittal. However, because Louisiana is not covered under the Transport Rule for SO_2, the State must submit source-specific SO_2 BART evaluations for the subject-to-BART EGUs in Louisiana. As discussed further in our responses to several comments below, Louisiana must also submit revisions sufficient to cure the deficiencies in the non-EGU BART determinations.

Comment 3: The EPA should not finalize a limited disapproval of the LTS in the LA RH SIP based on the

[5] The EPA's 1992 Calcagni Memorandum.

[6] The national proposal proposed a NO_X BART EGU FIP for Louisiana, but as the State did not receive a finding of failure to timely submit a SIP and requested the allowable time to revise and resubmit a SIP, the final action did not include such a FIP.

Transport Rule. The Transport Rule is currently in litigation and has been stayed by the Court. The EPA cannot legally base a SIP action on a regulation that is not effective and that may be vacated and remanded. Limited disapproval of the LA RH SIP submittal will trigger the "two year sanction clock" imposed by the CAA. The State will be required to submit a SIP revision, with the EPA review and approval within two years of the denial when the "applicable standard" is still unknown at this time. Instead, the CAIR is currently effective and will continue to be implemented by the EPA, the States, and the regulated community indefinitely. Once the question of regional transport of particulate matter (PM) and PM precursors is resolved and a regulation replaces CAIR, the State will submit a SIP revision to implement BART for EGUs in accordance with provisions of the new program. However, until this question is resolved, Louisiana and its regulated entities are obligated to comply with the effective regulation and so is the EPA. The State and its regulated entities are entitled to rely upon the effective regulation as the basis for the EPA action concerning the Louisiana SIP. The EPA is compelled to approve the current LA RH SIP submittal that relies on CAIR and the EPA's prior determination that CAIR is equivalent to BART.

Response 3: In a separate action that revises the RHR and finds that the Transport Rule is better than BART we finalized a limited disapproval of Louisiana's long-term strategy. *See* 77 FR 33642. The docket for that rulemaking (Docket ID No. EPA–HQ–OAR–2011–0729) is available at www.regulations.gov. For that reason, we are not taking action on the long-term strategy in this action insofar as the LA RH SIP relied on the CAIR. Therefore, the comment that the EPA should not disapprove the LA RH LTS based on the State's reliance on the CAIR is outside the scope of this action. Additionally, we clarify that today's final action on the remainder of LA's RH SIP triggers a two-year FIP clock,[7] but does not start a sanctions clock for Louisiana.[8] See Section II of this action for additional information about the FIP.

While the comment is outside the scope of this action, we note that CAIR has been remanded and only remains in place temporarily; therefore, the EPA cannot fully approve the regional haze SIP revisions that have relied on the now-temporary reductions from CAIR. Although CAIR is currently in effect as a result of the December 30, 2011 Order by the U.S. Court of Appeals for the D.C. Circuit staying the Transport Rule, this does not affect the substance of the D.C. Circuit's ruling in 2008 remanding CAIR to the EPA. Additionally, in the Transport Rule, the EPA determined that Louisiana need not be covered for SO_2 controls to prevent impacts on PM nonattainment or maintenance in other states. As a result of the CAIR remand and the SO_2 finding for Louisiana in the Transport Rule, no national rule addresses SO_2 reductions in Louisiana. We recognize that the final outcome of the PM transport requirements that CAIR and the Transport Rule are designed to address is uncertain at this time. However, the applicable standard for BART is certain under the RHR. Thus, notwithstanding the uncertain status of the Transport Rule and the continued implementation of CAIR, Louisiana must address SO_2 BART in order to comply with the RHR. We believe that Louisiana should be working to address SO_2 BART on a source by source basis.

Comment 4: The Commenter opposes the EPA's December 30, 2011, proposed rulemaking to find that the Transport Rule is better than BART and to use the Transport Rule as an alternative to BART for Louisiana and other states subject to the Transport Rule. The Commenter incorporates its comments on that December 30, 2011, rulemaking by reference and outlines several of those comments, including its arguments that the Transport Rule is not better than BART, and that the EPA cannot rely on the Transport Rule as an alternative program or measure to displace BART requirements for those BART-eligible sources in Transport Rule states.

Response 4: These comments are beyond the scope of this rulemaking. In today's rule, the EPA is taking final action on the proposed partial limited approval and partial disapproval of Louisiana's RH SIP. The EPA did not propose to find that participation in the Transport Rule is an alternative to BART in this action. As noted above, EPA made that proposed finding in a separate action on December 30, 2011, and the Commenter is merely reiterating and incorporating its comments on that separate action. EPA addressed these comments concerning the Transport Rule as a BART alternative in a final action that was signed on May 30, 2012. *See* 77 FR 33642. The EPA's response to these comments can be found in Docket ID No. EPA–HQ–OAR–2011–0729 at *www.regulations.gov.*

Comment 5: The commenter objects to the EPA's limited approval of portions of LA's RH SIP because it replaces reliance on CAIR with reliance on the Transport Rule for NO_X emissions from EGUs. 77 FR 11839, 11840–41. The effect of this proposed rule is to exempt Louisiana EGUs from the RHR's requirements for case-by-case, source-specific analyses and installation and operation of BART to reduce NO_X and achieve the RHR's visibility mandates. This exemption is based on the EPA's proposed finding that the Transport Rule would be better than BART at making reasonable progress with regard to NO_X emissions toward achieving the RHR's goal of eliminating human caused visibility impairment at Class I areas by 2064. Id. at 11846; see also 40 CFR 51.308(e)(3) (criteria for determining if an alternative measure is better than BART). But the EPA's proposed Better-than-BART rule as applied to all 28 states covered under the Transport Rule, including Louisiana, is inconsistent with the CAA. The EPA has not complied with the CAA's statutory requirements for a BART exemption, has failed to make a state-by-state demonstration that the Transport Rule is better than BART, and has included fatal methodological flaws in its proposed determination. Additionally, the EPA's determination fails to account for the geographic and temporal uncertainties in emissions reductions under the Transport Rule—uncertainties inherent in a cap-and-trade program. Moreover, Louisiana cannot rely on the Transport Rule to exempt Louisiana's EGUs from the RHR's BART requirements because the D.C. Circuit has indefinitely stayed the rule. The Transport Rule's uncertainties and lack of year round emission reduction requirements make it unsuitable as a BART alternative in Louisiana. Moreover, the application of the Transport Rule as a substitute for source specific BART is uniquely and particularly problematic in Louisiana, and four other states (Florida, Oklahoma, Mississippi, and Arkansas) for which the EPA exempts sources from BART NO_X requirements, because NO_X emissions are only covered by the Transport Rule during the ozone season—less than half the year. Finally, the national rule expressly states that the EPA is taking no action on the RPGs, effectively making it impossible to determine whether the Transport Rule for an ozone season only state could achieve greater reasonable progress than an absent or unconfirmed goal. See 76 FR 82219, at 82221. Absent a uniform rate of progress calculation, LTS, or RPGs, the EPA has no rational basis to determine that the Transport Rule

[7] 42 U.S.C. 7410(c)(1); CAA 110(c)(1).
[8] *See* 42 U.S.C. 7509.

emissions controls are sufficient to comply with the RHR reasonable progress mandate. The commenter also incorporated by reference comments from Earthjustice on the national Better-than-BART proposed rule and comments from National Parks Conservation Association, et al. For the reasons stated above and the reasons provided in the national comments, the Transport Rule does not satisfy the requirements of the RHR, and cannot be approved as a substitute for BART as proposed. Instead, the EPA must promulgate a regional haze plan that contains all aspects of the State's regional haze plan including source-specific NO_X BART limits for the Louisiana EGUs.

Response 5: As discussed above, in today's rule, the EPA is taking final action on the proposed partial limited approval and partial disapproval of Louisiana's RH SIP. These comments are beyond the scope of this rulemaking. EPA addressed these comments concerning the Transport Rule as a BART alternative in a final action that was signed on May 30, 2012. *See* 77 FR 33642. The EPA's response to these comments can be found in Docket ID No. EPA–HQ–OAR–2011–0729 at *www.regulations.gov*. Additionally, insofar as this comment discusses regional haze actions for states other than Louisiana, the comments are outside the scope of this rulemaking.

Comment 6: The EPA proposed that the BART determination for Rhodia is deficient at this time. The SIP includes a BART analysis for Rhodia that the LDEQ feels is complete. The analysis takes into account all available control technologies for removing SO_2 at the affected units. All of the available control technologies provide a control efficiency of approximately 94%. Rhodia considered three abatement alternatives: double absorption, sodium scrubbing (caustic/soda ash), and ammonia scrubbing. Rhodia selected caustic scrubbing as the most effective control option that is also cost effective. This control strategy is currently in place for Unit 2 and will be in place for Unit 1 by May 2012. SO_2 emissions will be reduced from over 8,800 tons per year (tpy) to a permit limit of 1,075 tpy for the units combined. This control not only meets BART but surpasses the control for new facilities under New Source Performance Standards. Modeling results with the SO_2 controls show all impacts of Rhodia to the Breton and Caney Creek Wilderness Areas are below 0.5 deciviews. The LDEQ believes that this source has the most stringent control strategy available and no further BART analysis is necessary as allowed by 40 CFR Part 51 Appendix Y(IV)(D)(1)(9). The LDEQ anticipates that the controls will be installed for Unit 1 prior to the EPA approval of the LA RH SIP submittal. The controls will be required to be diligently maintained and are federally enforceable through Section 905 of the Louisiana Administrative Code (LAC), Title 33, Part III (denoted LAC 33:III.905), which has been approved as part of the Louisiana SIP. The EPA should approve this BART analysis as it fulfills the BART requirements.

Response 6: The LDEQ's RH SIP submittal properly identified Rhodia as a subject-to-BART source and provided information concerning the BART determination for Rhodia. We proposed to find that Rhodia's BART determination was deficient because it does not include a sufficient evaluation under 40 CFR 51.308(e)(1)(ii)(A). The LDEQ has determined that the control strategy selected for implementation by Rhodia is among the most stringent available. The LDEQ's determination is corroborated by the information provided in the LA RH SIP submittal, including a determination that Rhodia's units are subject-to-BART and the demonstration in the LA RH SIP Appendix G that the control strategies at Rhodia have approximately 94% control efficiency.[9] The EPA finds that with the control strategy selected, the Rhodia units meet the BART requirements at 40 CFR 51 Appendix Y.OV.D.1.9[10] with the exception of having enforceable emissions limits for regional haze in the SIP (see also response to Comment 11 in this action). Although the SIP submittal said that, post-control, Rhodia is no longer subject-to-BART, that determination is not approvable because once a unit is determined to be subject to BART, it must meet the requirements of 40 CFR 51.308(e)(1)(ii). However, the LDEQ's comment letter in part addresses this deficiency in its determination that with controls, Rhodia meets BART. As indicated in the proposal, the LDEQ did not submit a complete BART evaluation for the Rhodia units; the submittal did not analyze controls for the units using the factors as required by 40 CFR 51.308(e). However, with the LDEQ's finding that the controls at Rhodia are among the most stringent, the regional haze requirement for a BART analysis has been satisfied (however, the requirement for enforceable emissions limits is still not met).[11] The EPA finds that the LDEQ acted reasonably within its discretion in determining that the controls selected by Rhodia are among the most stringent because the control efficiency for the technology selected is 94%.

However, the emissions limits for Rhodia's subject-to-BART units were not included in the RH SIP, so the LDEQ must include the BART emission limits in the LA RH SIP through a SIP revision.[12] More information about this requirement is provided in response to Comment 7 in this action.

Comment 7: The EPA proposed that the state should have identified the Mosaic facility as being subject to BART and made a BART determination for the source. The LDEQ agrees that Mosaic should be identified as a BART facility. Mosaic has installed or is scheduled to install controls required by a Consent Decree (CD) for Sulfuric Acid Trains A, D, and E. Only Train A is subject to BART, but it should be noted that significant reductions have been made on Trains D and E also. The following is a summary of these controls:

—A scrubber system has been installed on Train A reducing SO_2 emissions by 9,490 tpy.
—SO_2 emissions from Train D have been reduced by 576 tpy.
—SO_2 emissions from Train E have been reduced by 942 tpy.

The LDEQ believes that this source has the most stringent control strategy available and no further BART analysis is necessary as allowed by 40 CFR Part 51 Appendix Y(IV)(D)(1)(9). The scrubber system has been installed on Train A. The controls are required to be diligently maintained and are federally enforceable through LAC 33:III.905, which has been approved by the EPA as

[9] LDEQ Comment Letter, received March 29, 2012.

[10] We acknowledge that compliance with the BART Guidelines in 40 CFR 51 Appendix Y is not mandatory for Rhodia because Rhodia is a non-EGU source. However, following these Guidelines is one option for subject-to-BART non-EGUs to ensure BART determinations are adequate.

[11] The EPA's finding is a logical outgrowth of the proposed rule. "[A] final rule will be deemed to be the logical outgrowth of a proposed rule if a new round of notice and comment would not provide commentators with their first occasion to offer new and different criticisms which the agency might find convincing." *Fertilizer Inst.* v. *EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (citation and internal quotation marks omitted). In our proposal, we note that "[t]he LDEQ may be able to find that the controls required under the CD are among the most stringent, and therefore, no additional controls would be required for these units to meet BART." As LDEQ has now provided this determination and the LA RH SIP submittal already contains sufficient technical information to support this determination, the controls at Rhodia are sufficient to meet BART, and are therefore approvable in accordance with our proposal. However, as stated in our response, the LA RH SIP for Rhodia is not fully approvable at this time because it does not contain enforceable emissions limits for regional haze.

[12] CAA 169A(b)(2); 40 CFR 51.308(e); and 64 FR 35714, at 35741.

part of the Louisianan SIP. The EPA should approve this BART analysis as it fulfills the BART requirements.

Response 7: The EPA acknowledges the LDEQ's agreement that Mosaic is a subject-to-BART source. However, we cannot approve the BART analysis at this time. The LDEQ did not identify Mosaic as being subject to BART in the submitted SIP and therefore did not perform a BART analysis. Consequently, the EPA cannot act today upon the information in the comments because there is no logical outgrowth. "A final rule is only a logical outgrowth of the proposed rule if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period. * * * Notice of the agency's intention is crucial to ensure that agency regulations are tested via exposure to diverse public comment * * * to ensure fairness to affected parties, and * * * to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers of America* v. *Mine Safety and Health Admin.*, 626 F.3d 84, 94–95 (D.C. Cir. 2010) (*citing Int'l Union, United Mine Workers of America* v. *Mine Safety and Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)) (internal quotations omitted). With regard to Mosaic, we proposed to disapprove the LA RH SIP submitted June 13, 2008 because the submittal failed to identify Mosaic as a subject-to-BART source. We noted that, once the LDEQ identifies Mosaic as subject to BART, the LDEQ needs to provide a BART evaluation for the EPA's review and action. The LDEQ has not completed the rulemaking and SIP revision process for the determination that Mosaic is subject to BART or for the Mosaic BART evaluation. Based on our proposal, the public could not have anticipated that the EPA would approve the state's identification of Mosaic as subject to BART and approve a BART evaluation for Mosaic. As a result, approval of Mosaic does not meet the standard for logical outgrowth for this final action. The LDEQ will need to revise its SIP after notice and comment to include Mosaic as a subject-to-BART source, and also to provide a determination of BART based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable for the facility.[13] Although the LDEQ provided a determination in its comment that the control strategies selected for implementation by Mosaic are among the most stringent available, as discussed previously for the EPA to be able to consider this determination, the SIP must be revised after notice and comment to include the identification of Mosaic as a subject-to-BART source, and include a BART evaluation for the facility and be submitted to the EPA. The BART evaluation may include relevant permit information if applicable.

For Mosaic, in addition to including the facility as a subject-to-BART source in the SIP, for the unit subject to BART for each pollutant, there must be sufficient information in the SIP to satisfy the requirement under 40 CFR 50.308(e)(1)(ii)(A): "The determination of BART must be based on an analysis of the best system of continuous emissions control technology available and associated emissions reductions achievable. In this analysis, the state must take into consideration the technology available, the cost of compliance, the energy and non-air quality environmental impacts of compliance, any pollution control equipment in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology."

Also, the emissions limits for Mosaic's controls are required to be included in the RH SIP, so the LDEQ must include the BART emission limits in the LA RH SIP through a SIP revision.[14] More information about this requirement is provided in response to Comment 8 in this action.

Comment 8: The EPA proposed that the BART determinations for Sid Richardson are deficient at this time. The LDEQ has determined that while SO_2 controls may be technically feasible, they are not economically feasible. Modeling results for Sid Richardson show that in only 1 of the 3 modeled years did the 98th percentile day show a visibility impact above 0.5 dv. Sid Richardson provided a detailed analysis of the cost associated with implementing the technically feasible control techniques. Because all of the possible controls were deemed economically infeasible, an evaluation of the controls on the visibility impact at Breton is unnecessary. Sid Richardson is currently controlling SO_2 by limiting sulfur content of the feed stock oil. The LDEQ has determined that this control is BART for this facility. The EPA should approve this BART analysis as it fulfills the BART requirements. The EPA is proposing that the NO_X BART determination for Sid Richardson is deficient at this time.

The LDEQ has determined that NO_X controls for Sid Richardson are technically infeasible. Sid Richardson presented detailed information in the BART analysis discussing the infeasibility of NO_X controls aside from good combustion practices. NO_X controls were determined to be infeasible for the following reasons: Reactors: combustion modifications would affect the reaction process and ultimately, the yield and quality of the carbon black produced; selective non-catalytic reduction (SNCR) is infeasible because the reagent (urea or ammonia) would affect the yield and quality of the carbon black produced; selective catalytic reduction (SCR) is infeasible because of particulate loading that could come in contact with the catalyst causing a fire hazard; Absorption control is already in use since the flue gases are already in direct contact with the carbon black; Wet chemical scrubbers are used in a limited number of industrial applications and have not been used in the carbon black industry. Flares: There are no NO_X control options available. Dryers: Combustion modifications would affect the yield and quality of the carbon black produced; SNCR is infeasible because the reagent (urea or ammonia) would affect the yield and quality of the carbon black produced; SCR is infeasible because of particulate loading that could come in contact with the catalyst causing a fire hazard; Absorption control is already in use since the flue gases are already in direct contact with the carbon black. The LDEQ stated that further BART analysis for NO_X control is unnecessary and that the EPA should approve this BART analysis as it fulfills the BART requirements.

Response 8: The EPA disagrees that the information provided in the SIP and comments for SO_2 BART for Sid Richardson satisfies the requirements for a BART determination. The BART Rule provides that for each unit subject to BART, the state must satisfy the requirements under 40 CFR 50.308(e)(1)(ii)(A) by providing a determination of BART which "must be based on an analysis of the best system of continuous emissions control technology available and associated emissions reductions achievable." In this analysis the state must take the following into consideration: "The technology available, the cost of compliance, the energy and non-air quality environmental impacts of

[13] 40 CFR 51.308(e)(1)(ii)(A).

[14] CAA 169A(b)(2); 40 CFR 51.308(e); and 64 FR 35714, at 35741.

compliance, any pollution control equipment in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology." A determination of economic infeasibility is not sufficient information to meet these requirements. States have a duty to evaluate the statutory factors cited above.[15] It is important that, in analyzing the technology, states take into account the most stringent emission control level that the technology is capable of achieving. States should consider the level of control that is currently achievable at the time the BART analysis is conducted.[16] The CAA gives states discretion to make BART determinations; and the BART regulations and the preambles to the proposed and final BART Rule contain examples showing that a state has discretion to choose an alternative control level after considering the five statutory factors. However, section 169A(g) of the CAA requires States to consider these statutory factors in determining BART for affected sources. If a proper evaluation of the five statutory factors demonstrates that an emission limit is BART for the subject-to-BART source in question, then the State must require the source to comply with such emission limit. The EPA agrees that states have considerable discretion in making BART determinations, but in doing so the State must conduct a proper evaluation of the five statutory factors, as required by 40 CFR 51.308(e)(1)(ii)(A) and section 169A(g) of the CAA.

Also, the LDEQ states in the comment that Sid Richardson is currently controlling SO_2 by limiting sulfur content of the feed stock oil, and as indicated in the LA RH SIP Appendix G, the limitation is already reflected in the Addis Plant's emission limits;[17] however, the record does not provide material that supports this conclusion. No enforceable permit conditions or similar restrictions were provided, nor is there an analysis demonstrating that limiting of the sulfur content of the feed stock oil meets BART requirements.

The EPA agrees with the comment that the modeling results show that the Sid Richardson facility has a visibility impact greater than the State's established BART threshold of 0.5 dv in one of the three years considered. As such, Sid Richardson is subject to BART, and a full BART analysis is required. Consistent with 40 CFR 51.308(e)(1)(i) and (ii), the LDEQ chose a 0.5 dv threshold for BART (LA RH SIP Chapter 9); included Sid Richardson in its list of BART-eligible sources within the State, and provided a determination of BART for the facility as required for each source in the State "that emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal Area. All such sources are subject to BART."[18] The LDEQ determined that Sid Richardson is subject-to-BART because it is a BART-eligible source with visibility impacts on the 98th percentile day above the state's chosen threshold, LA RH SIP Chapter 9, page 53.[19] The EPA disagrees with the comment that an evaluation of the visibility benefits is not necessary. "CAA section 169A(g)(2) clearly requires an evaluation of the expected degree of improvement in visibility from BART controls. All five statutory factors [required under CAA 169A(g)(2)], including cost-effectiveness and expected visibility improvement, should be reflected in the level of BART control that the State implements." 70 FR 39104, at 39129. Sid Richardson was determined to be subject-to-BART and a full BART analysis is required under 40 CFR 51.308(e)(1)(ii)(A).

The EPA disagrees that the information provided in the SIP and comments for NO_X BART for Sid Richardson satisfies the requirements for a BART determination. For Sid Richardson for NO_X, the LDEQ states in its comments that all controls are infeasible, which is consistent with the SIP submittal (LA RH SIP Chapter 9 states that the Sid Richardson engineering analyses included the potential installation of NO_X add-on controls, but it determined that all were infeasible—there were no demonstrated NO_X scrubbing technologies at any carbon black plants). However, there is not sufficient information in the comment letter or in the LA RH SIP submittal to support this conclusion. In particular, we note that SCR has been discounted as technically infeasible because of the potential for particulate matter to contact the catalyst. We believe there are a number of applications where SCR has been used in situations with high particulate loading such as Fluidized Bed Catalytic Cracking Units (FCCU). In fact, as discussed in the Louisiana SIP and in other sections of this action, ConocoPhillips is a subject-to-BART source that has installed SCR on an FCCU. It is not apparent why this technology would not be applicable to carbon black plants, as well, given the similar high particulate matter situations. We do not believe Louisiana provided a sufficient record to justify that SCR is infeasible for the Carbon Black Industry. Therefore, the state must satisfy the requirement for NO_X for Sid Richardson for an "analysis of the best system of continuous emission control technology available and associated emissions reductions achievable" as required under 40 CFR 50.308(e)(1)(ii)(A).

Also, the emission limits for Sid Richardson's controls are required to be included in the RH SIP, so the LDEQ must include the BART emission limits in the LA RH SIP through a SIP revision.[20] In addition, we encourage Sid Richardson and the LDEQ to consider achievable emissions reductions in determining emissions limits for this unit to include in the SIP, as required under 40 CFR 50.308(e)(1)(ii)(A). More information about this requirement is provided in response to Comment 9 in this action.

Comment 9: The EPA proposed that the BART determination for ConocoPhillips is deficient at this time. The SIP includes a BART analysis for ConocoPhillips that the LDEQ feels is complete. Conoco has installed or is scheduled to install controls required by a consent decree with the EPA[21] for the FCCU, process refinery flares and the crude unit heater. The following is a summary of these controls.

- A wet gas scrubber was installed on the FCCU in 2009 that reduced SO_2 emissions by 2,500 tpy and PM emissions by 220 tpy. SCR is scheduled to be installed by 2015 that will reduce NO_X emissions by 760 tpy.
- SCR and a NO_X CEMS were installed on the crude unit heater in 2009 that reduced NO_X emissions by 700 tpy.
- Flare gas recovery was installed for the process refinery flares in 2011 that reduced NO_X emissions by 16 tpy and SO_2 emissions by 330 tpy.

The LDEQ believes that the most stringent controls available have been installed or are scheduled to be installed

[15] CAA 169A(g)(2); 40 CFR 51.308(e)(1)(ii)(A).

[16] 70 FR 39104, at 39170–71.

[17] LDEQ Comment Letter, received March 29, 2012.

[18] 40 CFR 51.308(e)(1)(ii).

[19] Note that the use of the 98th percentile of modeled visibility values is appropriate because it excludes roughly seven days per year from consideration. This approach captures "the sources that contribute to visibility impairment in a Class I area, while minimizing the likelihood that the highest modeled visibility impacts might be caused by unusual meteorology or conservative assumptions in the model." 70 FR 39104, at 39121.

[20] CAA 169A(b)(2); 40 CFR 51.308(e); and 64 FR 35714, at 35741.

[21] Civil Action No. H–05–0285, Federal District Court for the Southern District of Texas.

on these sources. According to 40 CFR Part 51 Appendix Y(IV)(D)(1)(9) because the source will have the most stringent controls available, it is not necessary to comprehensively complete each step of the BART analysis. The EPA should approve this BART analysis as it fulfills the BART requirements.

The EPA proposed to accept the BART analysis for remaining sources at the facility. However, most of these sources have a "D" which represents proposed disapproval in Table 10 of the TSD. The LDEQ feels that no further BART analysis is necessary for ConocoPhillips and requests that the "D" be changed to "NA."

Response 9: We disagree with the comment that the BART evaluation for ConocoPhillips is complete for the subject-to-BART units that were included in the 2005 CD. Although some emissions reduction information was provided for some of the units and controls, without information about the year or baseline emissions, the EPA is unable to verify the determination that the control technologies and emission limits for SO_2, NO_X, and PM selected for the crude unit heater, the CO boilers, and the flares are among the most stringent. The submittal did not analyze controls for the units using the factors as required by 40 CFR 51.308(e). Although the LDEQ provided a determination in its comment that the control strategies selected for implementation by ConocoPhillips are among the most stringent available, the record does not provide sufficient material to support the LDEQ's conclusion. The BART evaluation may include relevant permit information if applicable, and also may include a demonstration of emissions reductions achieved by the selected technologies. It is expected that emissions reductions for control technologies which are among the most stringent will be high unless the LDEQ can demonstrate that lower efficiency rates are sufficient to meet BART requirements.

For ConocoPhillips, for the five units under the CD that are subject to BART, for each pollutant, there is not sufficient information in the SIP nor in the comments to satisfy the requirement under 40 CFR 50.308(e)(1)(ii)(A): "The determination of BART must be based on an analysis of the best system of continuous emissions control technology available and associated emissions reductions achievable. In this analysis the state must take into consideration the technology available, the cost of compliance, the energy and non-air quality environmental impacts of compliance, any pollution control equipment in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology."

Also, the emissions limits for ConocoPhillips's controls are required to be included in the RH SIP, so the LDEQ must include the BART emission limits in the LA RH SIP through a SIP revision.[22] In addition, we encourage ConocoPhillips and the LDEQ to consider achievable emissions reductions in determining emissions limits for this unit to include in the SIP, as required under 40 CFR 50.308(e)(1)(ii)(A). More information about this requirement is provided in response to Comment 10 in this action.

For the ConocoPhillips units which were not part of the CD, the Commenter is correct that the EPA proposed to accept the BART analysis for those units, and that Table 10 of the TSD is in error for those units. Accordingly, the EPA has revised the table and an updated Table 10 is provided in the docket associated with this action as an amendment to the TSD.

Comment 10: The EPA should provide clarification that the CAA and the RHR both allow states the discretion to make BART determinations for non-EGUs, and states are not required to use the "5-step" analysis that is specifically required only for 750 MW+ EGUs. The proposal contains statements such as: "* * * all subject to BART sources are required to comply with the five BART factors (or steps). 40 CFR 51.308(e)(1)(ii)(A)." Additionally, the commenter is concerned that the EPA proposed to find that Louisiana's RPGs and LTS contain deficiencies because they are based on BART determinations that are not fully approvable. Louisiana has met the obligation to determine BART for Louisiana refineries if they have documented the rationale for the BART determinations using their state authority. CAA section 169(b)(2)(A); 77 FR 3966, at 3969. Some of the subject-to-BART determinations with a proposed disapproval are not EGUs. Therefore, the LDEQ has the discretion to make BART determinations in a fashion reasonable in the judgment of the LDEQ and supply the rationale to the EPA. The EPA has accepted states' BART determinations for non-EGUs not subject to the "5-step" analysis. For example, the EPA proposed to approve Illinois's BART determinations for two petroleum refineries on the basis that the Illinois Environmental Protection Agency found that the emissions limits for the subject-to-BART units established by CDs to meet BACT also satisfy BART. That proposal further states that the CDs are federally enforceable and the emissions limits at issue must be incorporated into federally enforceable permits. 77 FR 3966, at 3973. Therefore, the EPA should approve Louisiana's non-EGU BART determinations, especially the ConocoPhillips Refinery, that rely on emissions limits established by CDs.

Response 10: We agree with the commenter that the five steps in the BART guidelines at 40 CFR 51 Appendix Y.IV.D[23] are mandatory only for subject-to-BART EGUs with a total generating capacity greater than 750 MWs. However, "all BART determinations must be based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each BART-eligible source that is subject to BART within the state." For all BART determinations, including those for non-EGUs, 40 CFR 51.308(e)(1)(ii)(A) requires states to consider the following factors: the technology available; the costs of compliance; the energy and non-air quality environmental impacts of compliance; any pollution control equipment in use at the source; the remaining useful life of the source; and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. *See also,* 42 USC 7941(g)(2); CAA 169A(g)(2). The submitted BART analyses should address all of these factors or provide some other basis for ensuring subject-to-BART units meet BART in order to be approvable. The commenter contends that the LDEQ has the discretion to make BART determinations in a fashion reasonable in the judgment of the LDEQ. To clarify, states are free to determine the weight and significance of each of the factors listed above, but they must arrive at a reasoned determination that is supported by an adequate record. We acknowledge that BART-determining authorities presented with equivalent facts and circumstances may arrive at different, but reasoned, BART determinations. For additional information about our final action on these non-EGU BART determinations, please see our discussion of the non-EGU BART determinations and enforceable emissions limits for those

[22] CAA 169A(b)(2); 40 CFR 51.308(e); and 64 FR 35714, at 35741.

[23] Step 1: Identify All Available Retrofit Control Technologies, Step 2: Eliminate Technically Infeasible Options, Step 3: Evaluate Control Effectiveness of Remaining Control Technologies, Step 4: Evaluate Impacts and Document the Results, and Step 5: Evaluate Visibility Impacts. 40 CFR 51 Appendix Y.IV.D.

subject-to-BART units addressed in our responses to Comments 6, 7, 8, and 9 in this action. Finally, we disagree with the comment that the EPA should approve Louisiana's non-EGU BART determinations that rely on emissions limits established by CDs. See the following response to Comment 11.

Comment 11: Emission limits for the subject-to-BART units should not be required to be included in the SIP. The emissions limitations are contained in the permits and are enforceable as required. Furthermore, the LDEQ will rely on the SIP approved provision contained in LAC. 33:111.905, which specifies that "* * * when facilities have been installed on a property, they shall be used and diligently maintained in proper working order whenever any emissions are being made which can be controlled by the facilities, even though the ambient air quality standards in affected areas are not exceeded." If necessary, the LDEQ will include the CDs affected between the EPA and Rhodia, Mosaic and ConocoPhillips, respectively, as evidence of enforceable emissions limitation. However, the LDEQ will not attach the operating permits that are the result of these CDs.

Response 11: We disagree with the comment that emission limits for the subject-to-BART units should not be required to be included in the SIP. 40 CFR 51.308(e) requires the state to "submit an implementation plan containing emissions limits representing BART" for each subject-to-BART unit in the state. For an emissions limit contained in a federal CD to be a federally enforceable component of a RH SIP, the emissions limit itself must be incorporated into the SIP. States do have some flexibility in how this incorporation occurs. For example, a state could list the specific emissions limit for each subject-to-BART unit as part of the regulatory text in the SIP submittal or a state could incorporate these limits into its SIP submittal's regulatory text by referencing the federally enforceable Title I permit that contains the emissions limits for the subject-to-BART units at a facility. *See e.g.*, 77 FR 19, January 3, 2012; 76 FR 80754, December 27, 2011; 76 FR 36329, June 22, 2011; and 76 FR 38997, July 5, 2011. If the state chooses to incorporate emissions limits from a Title I permit into the SIP, the permit conditions must require a RH SIP revision in order for the BART emissions limits to be revised. However, the CDs themselves are not adequate to ensure enforceable emissions limits remain in place for purposes of BART for several reasons. Courts and parties to the litigation can change the terms of CDs without revising the RH SIP or notifying the public that a BART requirement is being altered. Additionally, CDs are not effective forever. The terms of a CD are subsumed into a permit, which could be altered during the permitting process without revising the RH SIP or notifying the public that a BART requirement is being altered. Absent some express correlation to the LA RH SIP, the emissions limits required under the CDs are not adequately enforceable to ensure continued compliance with BART. Moreover, if the emissions limits in a CD are relied upon to meet BART, the RH SIP must contain sufficient technical information to ensure compliance with BART.

Comment 12: The commenter agrees that the LA RH SIP is deficient because elements of the State's BART evaluations and determinations are not fully adequate to meet the federal requirements. Additionally, as a result of the deficiencies related to BART, the LTS and RPGs are not fully adequate to meet federal requirements.

Response 12: We acknowledge the commenter's support for those aspects of this action. We note that, as indicated in the above responses to comments from the LDEQ regarding Rhodia, some but not all of the deficiencies were addressed by the LDEQ's comments although the emissions limits for Rhodia must be included in the SIP.

Comment 13: Insofar as the EPA proposed to find that elements of the SIP submittal fully satisfy the RHR requirements, the commenter supports the EPA's proposal.

Response 13: We acknowledge the commenter's support for those aspects of this action.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to act on state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law.

A. Executive Order 12866: Regulatory Planning and Review and 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. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, because this SIP action under section 110 of the CAA will not in-and-of itself create any new information collection burdens but simply approves or disapproves certain State requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This SIP action under section 110 of the CAA will not in-and-of itself create any new requirements but simply approves or disapproves certain State requirements for inclusion into the SIP. 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. The fact that the CAA prescribes that various consequences (*i.e.*, emission limitations) may or will flow from this action does not mean that the EPA either can or must conduct a regulatory flexibility analysis for this action. Therefore, this action will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. The EPA has determined that the disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This action merely approves or disapproves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires the EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that 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."

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, as specified in Executive Order 13132, because it merely approves or disapproves certain State requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175, Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP submittals the EPA is approving or disapproving would not apply in Indian country located in the state, and the EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 . This SIP action under section 110 of the CAA will not in-and-of itself create any new regulations but simply approves or disapproves certain State requirements for inclusion into the SIP.

H. 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.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the CAA.

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

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA lacks the discretionary authority to address environmental justice in this action. In reviewing SIP submissions, the EPA's role is to approve or disapprove state choices, based on the criteria of the CAA. Accordingly, this action merely approves or disapproves certain State requirements for inclusion into the SIP under section 110 of the CAA and will not in-and-of itself create any new requirements. Accordingly, it does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective on August 6, 2012.

L. Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 4, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See CAA section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Regional haze, Reporting and recordkeeping requirements, Sulfur oxides, Visibility.

Dated: June 15, 2012.

Samuel Coleman,

Acting Regional Administrator, Region 6.

Therefore, 40 CFR part 52, as amended June 7, 2012, at 77 FR 33657 and effective August 6, 2012, is further amended as follows:

PART 52—[AMENDED]

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

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

■ 2. Amend § 52.985 by adding paragraphs (b) and (c) to read as follows:

§ 52.985 Visibility protection.

* * * * *

(b) The regional haze plan submitted by Louisiana on June 13, 2008, includes measures for meeting the requirements of: 40 CFR 51.308(d), for the core requirements for regional haze plans, except for the requirements of 40 CFR 51.308(d)(3); 40 CFR 51.308(f), for the commitment to submit comprehensive periodic revisions of regional haze plans; 40 CFR 51.308(g), for the commitment to submit periodic reports describing progress towards the reasonable progress goals; 40 CFR 51.308(h), for the commitment to conduct periodic determinations of the adequacy of the existing regional haze plan; and 40 CFR 51.308(i), for coordination with state and Federal Land Managers. EPA has given partial limited approval to the plan provisions addressing these requirements.

(c) The regional haze plan submitted by Louisiana on June 13, 2008, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3), long-term strategy for regional haze as it relies on deficient non-electric generating units Best Available Retrofit

Technology (BART) analyses; and 40 CFR 51.308(e), BART requirements for regional haze visibility impairment with respect to emissions of visibility impairing pollutants from four non-electric generating units. EPA has given partial disapproval to the plan provisions addressing these requirements.

[FR Doc. 2012–15729 Filed 7–2–12; 8:45 am]
BILLING CODE P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket Nos. 10–90, 07–135, 05–337, 03–109; GN Docket No. 09–51; CC Docket Nos. 01–92, 96–45; WT Docket No. 10–208; FCC 12–70]

Connect America Fund, A National Broadband Plan for Our Future, Universal Service Reform—Mobility Fund

AGENCY: Federal Communications Commission.

ACTION: Final rule: limited forbearance.

SUMMARY: In this document, the Federal Communications Commission (Commission) adopts a limited forbearance from requiring that the service area of an eligible telecommunications carrier (ETC) conform to the service area of any rural telephone company serving the same area for the Mobility Fund Phase I auction 901. This forbearance applies only with respect to conditional ETC designations for participating in Auction 901.

DATES: Effective July 3, 2012.

FOR FURTHER INFORMATION CONTACT: *Wireless Telecommunications Bureau, Auctions and Spectrum Access Division;* call Sayuri Rajapakse, Scott Mackoul or Stephen Johnson at (202) 418–0660.

SUPPLEMENTARY INFORMATION: This is a summary of the *CAF/ICC Second Report and Order* released on June 27, 2012. The *CAF/ICC Second Report and Order* and related Commission documents may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, fax 202–488–5563, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com.* When ordering documents from BCPI, please provide the appropriate FCC document number, for example, FCC 12–70. The *CAF/ICC Second Report and Order* and related documents also are available on the Internet at the Commission's Web site: *http://wireless.fcc.gov* or by using the search function for WT Docket No. 10–208 on the Commission's Electronic Comment Filing System (ECFS) Web page at *http://www.fcc.gov/cgb/ecfs/.*

I. Introduction

1. The Commission adopts a limited forbearance pursuant to section 10 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. 160, from requiring that the service area of an eligible telecommunications carrier (ETC) conform to the service area of any rural telephone company serving the same area, pursuant to 47 U.S.C. 214(e)(5) and 47 CFR 54.207(b). In particular, this forbearance applies only with respect to conditional ETC designations for participating in the Mobility Fund Phase I auction, ETC designations conditioned on receipt of Mobility Fund Phase I support. Such conditional ETC designations, and thus this forbearance, are also limited to the specific areas in which such an ETC becomes authorized to receive Mobility Fund Phase I support.

2. The Commission concludes that forbearance in these limited circumstances furthers the public interest, advancing the Act's and the Commission's goals of promoting access to mobile service over current and next generation wireless networks in areas currently without such service by reducing barriers to participation in Phase I of the Mobility Fund. The Commission finds that application of the service area conformance requirements set forth in 47 U.S.C. 214(e)(5) and 47 CFR 54.207(b) in these limited circumstances is not necessary to ensure that rates remain just and reasonable or to protect consumers. The Commission emphasizes that the forbearance it is granting is limited to petitioners seeking conditional designation as ETCs in areas eligible for Mobility Fund Phase I support in order to participate in the Mobility Fund Phase I auction and receive support. Parties petitioning for designation as an ETC for this purpose must satisfy all of the other statutory requirements applicable to ETCs under the Act. The forbearance order does not apply with respect to petitions for designation as an ETC for other purposes. In light of the requirement that, with one exception for Tribal entities, an applicant for the Mobility Fund Phase I auction, Auction 901, must be designated as an ETC in every geographic area on which it wishes to bid by the time it applies to participate and in light of the short time remaining before the July 11, 2012 deadline for filing Auction 901 applications, the Commission finds that case-by-case forbearance is not feasible and grant blanket forbearance for this limited purpose.

II. Background

3. In the recent *USF/ICC Transformation Order,* 76 FR 73830, November 29, 2011 and 76 FR 81562, December 28, 2011, the Commission comprehensively reformed and modernized the universal service system to ensure that robust, affordable voice and broadband service, both fixed

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

September 04, 2012

Mr. Scott Fulton
Environmental Protection Agency
1200 Pennsylvania Avenue, N. W.
Ariel Rios North Building
Washington, DC 20460

Ms. Lisa P. Jackson
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Ariel Rios Building
Room 4000
Washington, DC 20460-0000

No. 12-60672, LA Dept. of Env. Quality v. EPA
Agency No. Fed. Reg. 39,425 - 39,435

You are served with the following document(s) under Fed. R. App. P.15:

Petition for Review.

See Fed. R. App. P.16 and 17 as to the composition and time for the filing of the record.

Counsel who desire to appear in this case must electronically file a "Form for Appearance of Counsel" within 14 days from this date. You must name each party you represent, see FED. R. APP. P. 12(b) and 5TH CIR. R. 12. The form is available from the Fifth Circuit web site, www.ca5.uscourts.gov. If you fail to electronically file the form we will remove your name from the docket. Also, we cannot release official records on appeal unless an appearance has been entered. Pro se parties do not need to file an appearance form.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Shawn D. Henderson, Deputy Clerk
504-310-7668

Enclosure(s)

cc w/encl:
Mr. Donald James Trahan