

**ORAL ARGUMENT REQUESTED**

**NOS. 11-9552, 11-9557&11-9567**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

WILDEARTH GUARDIANS,  
*Petitioner,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and  
Lisa Jackson, Administrator, United States Environmental Protection Agency,  
*Respondents.*

PUBLIC SERVICE COMPANY OF NEW MEXICO,  
*Petitioner,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and  
Lisa Jackson, Administrator, United States Environmental Protection Agency,  
*Respondents.*

SUSANA MARTINEZ, GOVERNOR OF THE STATE OF NEW MEXICO, AND  
NEW MEXICO ENVIRONMENT DEPARTMENT,  
*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and  
Lisa Jackson, Administrator, United States Environmental Protection Agency,  
*Respondents.*

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ON PETITIONS FOR REVIEW OF FINAL ACTION OF THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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BRIEF OF *AMICUS CURIAE* AMERICAN COALITION FOR CLEAN COAL  
ELECTRICITY IN SUPPORT OF PETITIONER IN NO. 11-9557 PUBLIC SERVICE  
COMPANY OF NEW MEXICO AND PETITIONERS IN NO. 11-9567  
SUSANA MARTINEZ, GOVERNOR OF THE STATE OF NEW MEXICO,  
AND THE NEW MEXICO ENVIRONMENT DEPARTMENT  
(DEFERRED APPENDIX APPEAL)

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May 22, 2012

**RULE 26.1 DISCLOSURE STATEMENT  
OF THE AMERICAN COALITION FOR CLEAN COAL ELECTRICITY**

Pursuant to Fed. R. App. P. 26.1, *Amicus Curiae* the American Coalition for Clean Coal Electricity submits the following statement:

American Coalition for Clean Coal Electricity is a non-profit organization. American Coalition for Clean Coal Electricity has issued no stock.

**RULE 29(c)(5) DISCLOSURE STATEMENT  
OF THE AMERICAN COALITION FOR CLEAN COAL ELECTRICITY**

Pursuant to Fed. R. App. P. 29(c)(5), *Amicus Curiae* the American Coalition for Clean Coal Electricity submits the following statement:

In the preparation of its *amicus* brief, counsel to American Coalition for Clean Coal Electricity, Moye White LLP, has authored the brief and no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than the members of the American Coalition for Clean Coal Electricity, contributed money that was intended to fund preparing or submitting the brief.

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## STATEMENT OF INTEREST

The American Coalition for Clean Coal Electricity (“ACCCE”) is a non-profit organization formed by the nation’s coal-producing companies, railroads, a number of electricity generators, and related companies for the purpose of educating the public (including public-sector decision-makers) about the benefits of affordable, reliable and environmentally compatible coal-fueled electricity and advocating on behalf of public policies that are consistent with ACCCE’s mission. ACCCE, originally named the Center for Energy and Economic Development (“CEED”), was created in 1992. CEED combined with Americans for Balanced Energy Choices to become the American Coalition for Clean Coal Electricity “ACCCE” in 2008. On behalf of its members, ACCCE has long been an advocate of policies that advance environmental improvement, economic prosperity, and energy security. ACCCE is committed to continued and enhanced U.S. leadership in developing and deploying new, advanced clean coal technologies.

ACCCE members’ organizational and individual interests are adversely affected by the U.S. Environmental Protection Agency’s (“EPA”) final agency action in the “Approval and Promulgation of Implementation Plans; New Mexico; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determination,” 76 Federal Register 52,388 (August 2, 2011) (“Final Rule”). The Final Rule challenged in this

case raises a number of important legal and policy issues regarding the implementation of the federal Clean Air Act's ("CAA") visibility protection program. ACCCE has long been involved in air quality-related issues, including visibility (visual air quality) in national parks and wilderness areas<sup>1</sup>. The significant changes in EPA's policy under the Final Rule will likely have broad implications and significant impact for ACCCE's members.

Pursuant to this Court's March 23, 2012 Order, *amicus curiae* briefs filed in support of any of the petitioners must be filed on or before May 22, 2012 and must comply with F.R.A.P. 29. ACCCE certifies that its brief complies with F.R.A.P. 29 and is timely filed.

### STATEMENT OF FACTS

San Juan Generating Station ("SJGS") is a four-unit, coal-fueled electric generating facility with a generating capacity of 1,800 gross megawatts ("MW") in Waterflow, New Mexico. For nearly 40 years, SJGS has provided reliable and affordable energy to electricity consumers in the Southwest United States. SJGS supplies electricity to over two million consumers in New Mexico and other states and is a critical source of electricity in New Mexico.

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<sup>1</sup> *American Corn Growers v. EPA*, 291 F.3d 1 (D.C. Cir. 2002); *Center for Energy and Economic Development v. EPA*, 398 F.3d 653 (D.C. Cir. 2005); and *Utility Air Regulatory Group v. EPA*, 471 F. 3d 1333 (D.C. Cir. 2006).

In its Final Rule, EPA has elected to impose a Regional Haze federal implementation plan (“FIP”) for New Mexico and thereby disregard the state - federal partnership enshrined in the CAA. EPA’s Final Rule supplants the reasonable and lawful determinations made by the State of New Mexico.

New Mexico submitted its Regional Haze State Implementation Plan (“SIP”) to EPA on June 29, 2011. (JA\_\_\_\_ - \_\_\_\_). The New Mexico Environment Department had previously issued, on June 21, 2010, a draft Regional Haze SIP which was subsequently withdrawn and never acted upon. Several key differences existed between the June 2011 Regional Haze SIP and the draft June 2010 Regional Haze SIP. The most significant difference between the two SIPs is that the June 2011 SIP proposes to control and demonstrates that it will meet the necessary emission reductions at the SJGS through the installation of selective noncatalytic reduction (“SNCR”) technology, while the draft June 2010 SIP proposed meeting the emission reductions through a much more costly (and operationally uncertain) technology known as Selective Catalytic Reduction (“SCR”).

Under the Regional Haze program, States are to evaluate whether sources of air emissions within their borders are required to install best available retrofit technology (“BART”). BART is defined as “an emission limitation based on the

degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant which is emitted by an existing stationary facility.” 40 C.F.R. § 51.301. When Congress amended the CAA in 1977 and established in section 169A of the CAA visibility protection goals for Class I areas (national parks and wilderness areas), the States were directed to develop SIPs to ensure reasonable progress is made toward these goals, including requirements for BART. *See* 42 U.S.C. § 7491-7492. BART is determined on a case-by-case basis and takes into consideration “the technology available, the costs of compliance, the energy and nonair quality environmental impacts of compliance, any pollution control equipment in use or in existence 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.” 40 C.F.R. § 51.301.

Rather than accept New Mexico’s reasoned analysis and determination that SNCR (and not SCR) constitutes BART at the SJGS, EPA proceeded to essentially ignore New Mexico’s SNCR-based NO<sub>x</sub> limit of 0.23 lb/mmBtu and promulgated a FIP requiring SCR as BART and compliance with a 0.05 lb/mmBtu limit. EPA’s Final Rule requiring SCR is significantly more stringent and costly than New Mexico’s rule, 76 Fed. Reg. at 52,388/3, which meets EPA’s presumptive BART limit for the SJGS units. Regional Haze Regulations and Guidelines for Best

Available Retrofit Technology (BART) Determinations, 70 Fed. Reg. 39,104, 39,172 (July 6, 2005). Despite the data, analysis, careful consideration and planning that were undertaken by New Mexico in the preparation of its Regional Haze SIP, EPA chose to reject New Mexico's BART determinations for the SJGS and impose EPA's own preferences.

### SUMMARY OF ARGUMENT

States are charged with the primary responsibility of preventing and controlling air pollution at its source. *See* 42 U.S.C. § 7401(a)(3). Further, Section 169A of the CAA provides that States have the dominant role in deciding the extent to which sources within their borders should make emission reductions in order to improve visibility in Class I areas. Section 169A also provides that the States must exercise this discretion through a careful balancing, *inter alia*, of the cost of emission reductions against the visibility improvements those reductions will achieve.

ACCCE supports the relief sought by the Public Service Company of New Mexico ("PNM") and the State of New Mexico in this case because EPA's Final Rule and FIP for New Mexico are clearly contrary to the federal-state partnership under the CAA, in general, and, in particular, the CAA's Regional Haze program. The EPA Final Rule, if sustained, will not only significantly undermine New Mexico's strategy for improving air quality, but it will serve as a license for EPA

to also strip other States of the authority granted to them by Congress to address and implement the reasonable progress measures States feel meet their individual circumstances.

If sustained, EPA's Final Rule will significantly undermine the ability of New Mexico (and other States) to administer their air quality programs and, as a result, will harm the citizens of the States and the nation as a whole. Congress had a good (and clearly stated) reason for explicitly making the States, not EPA, responsible for determining BART: States simply are in a far better position to assess, analyze, and make determinations that impact their respective communities than EPA. This is not to say that EPA does not have an interest in the decisions that a State reaches. However, as Congress recognized, it is the State, not the EPA, that is best positioned to determine what is BART. The end-result sought by EPA in this case, if accepted, will be erroneous or ill informed decisions with attendant adverse economic consequences for little to no discernible environmental benefit.

## **ARGUMENT**

### **I. STATES HAVE PRIMARY AUTHORITY FOR IMPLEMENTING THE CAA'S VISIBILITY PROTECTION PROGRAM**

In 1999, EPA promulgated Regional Haze Rules that require all states to revise their federal CAA SIPs to address visibility in nearby national parks and wilderness areas known as Class I areas. Sections 169A and 169B of the CAA established goals for the Regional Haze Program and directed states to develop

SIPs to ensure “reasonable progress” is made toward these goals, including requirements for BART. *See* 42 U.S.C. § 7491-7492. EPA’s 1999 Regional Haze Rules were based upon a “group” approach with regard to the determination of BART for stationary sources, rather than attribution from the emissions source(s) to the affected Class I area. Those provisions were successfully challenged in the U.S. Court of Appeals for the D.C. Circuit by States and industry. In response to these Court of Appeals decisions, EPA revised its regional haze rules in 2005 and 2006. The D.C. Circuit cases, *American Corn Growers Ass’n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002), *Center for Energy and Economic Development v. EPA*, 398 F.3d 653 (D.C. Cir. 2005), and *Utility Air Regulatory Group v. EPA*, 471 F.3d 1333, 1338 (D.C. Cir. 2006), make clear that states have great discretion in setting reasonable progress goals and determining BART. The CAA’s “provisions give [] the States broad authority over BART determinations.” *American Corn Growers*, 291 F.3d 19.

Specifically, Section 169A of the CAA provides that the States shall have the dominant role in making the BART determination, with EPA having only a more limited role. Second, because visibility improvement is an aesthetic goal, the CAA does not make improving visibility conditions in Class I areas paramount above all other competing considerations. Instead, the States are given broad discretion to weigh public interest factors in determining (a) how much progress

towards improving visibility they deem to be reasonable and (b) whether particular BART controls, or any BART controls at all, should be imposed on a particular source, based on a balancing of the cost of controls and the visibility improvement benefits that such controls will produce. EPA may not second-guess those State judgments so long as the States' determinations are consistent with Section 169A of the CAA and are reasonable and rationally supported by the data and the analysis used to come to those determinations.

The statutory framework is built around the goal, set forth in Section 169A(a)(1) of the CAA, of the "prevent[ing] 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." Recognizing that visibility impairment does not rise to the same level of public policy concern as public health, Congress made visibility improvement in Class I areas a goal. Further, under Section 169A(f), for purposes of the citizens' suit provision of the statute, the national visibility goal "shall not be considered to be a 'non-discretionary duty' of the Administrator." This contrasts with other programs set forth in the CAA based on public health protection, such as the National Ambient Air Quality Standards ("NAAQS"), where EPA's obligation to promulgate and require implementation of the NAAQS is a non-discretionary duty that can be enforced with citizens' suits.

CAA § 169A(b)(2), requires EPA to issue regulations requiring States containing Class I areas, or States whose emissions may reasonably be anticipated to cause or contribute to visibility impairment in a Class I area, to submit SIPs containing “such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting” the national visibility goal. The amount of progress that is “reasonable” is not defined according to objective criteria, but instead involves a discretionary balancing by the State of public interest factors, specifically “the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements.” *See* CAA § 169A(g)(1).

Congress included BART among the “reasonable progress” measures States were required to consider. *See* CAA § 169A(b)(2)(A). Congress required States to make BART determinations for what EPA terms “BART-eligible” units—those that were in existence on August 7, 1977 (coinciding with the enactment of Section 169A as part of the 1977 CAA Amendments) but which had not been in operation for more than fifteen years prior to that date -- where those units may reasonably be anticipated to cause or contribute to visibility impairment in a Class I area. Under Section 169A(b)(2)(A), the BART process is divided into two parts. The first is the “attribution” process, in which States determine which of its BART-

eligible units “may reasonably be anticipated to cause or contribute to any impairment of visibility” in a Class I area. The second is the “BART determination” process, in which States require units meeting the first test to “procure, install, and operate, as expeditiously as practicable” BART. The phrase “as expeditiously as practicable” is defined in Section 169A(g)(4) to mean “as expeditiously as practicable but in no event later than five years” after the date the SIP is approved (or the date a FIP is imposed).

Like “reasonable progress,” BART is primarily a State determination that involves the weighing of public interest factors, specifically “the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology 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.” Thus, unlike other technology standards in the statute, (*cf* CAA § 112), BART is not the maximum feasible technology, but rather the technology that makes sense based on a weighing of the costs and benefits of installing (or not installing) that technology. And EPA may only reject a State’s BART determination when it finds that the State’s determination is not supported by the data or analysis or fails to comply with the Regional Haze program.

Notably, the CAA is clear that it is the States, not EPA, that make both the attribution and BART determination decisions. Section 169A(b)(2)(A) specifically provides that both the attribution and the BART determinations are “determined by the State.” Section 169A(g)(2) similarly provides that “in determining [BART], the State” shall weigh the BART factors. In fact, the requirement that States, rather than EPA, make the attribution and BART determination decisions was part of the key compromise that resulted in Section 169A being enacted. As introduced, the House bill (H.R. 6161) that became the vehicle for enactment of Section 169A in the 1977 CAA Amendments did not refer to States making the BART determinations. The references in Section 169A(b)(2)(A) to States making the attribution and BART determinations and the reference in Section 169A(g)(2) to States weighting the BART factors were included in the bill in the conference committee. As set forth in the Conference Report:

The Agreement clarifies that *the States*, rather than the Administrator *identifies the source* that impairs visibility in the federal class I areas identified and thereby fall within the requirements of this section.

\* \* \*

In establishing emission limitations for any source which impairs visibility, *the State shall determine what constitutes “best available retrofit technology”* (as defined in this section) in establishing emission limitations *on a source-by-source basis* to be included in the State implementation plan so as to carry out the requirements of this section.

(Emphasis supplied.) *See* A Legislative History of the Clean Air CAA Amendments of 1977, Sen. Comm. on Env't & Pub. Works, 95<sup>th</sup> Cong. at 535; *see also Moore v. District of Columbia*, 907 F.2d 165, 154 (D.C. Cir. 1990) (conference committee reports are “the most persuasive evidence of statutory intent’ after statutory text itself,” quoting *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981)).<sup>2</sup>

The only exception to State discretion in the BART process is that a fossil-fuel fired power plant whose capacity exceeds 750 MW shall determine BART “pursuant to Guidelines, promulgated by the Administrator under paragraph 1.” 42 U.S.C. §7491(b)(1)(B). But the authority provided to EPA to issue “Guidelines” under Section 169A(b)(1) provides only a limited exception to the rule of State primacy in the BART process. First, the Guidelines are mandatory only for BART determinations and not attribution determinations. Second, Section 169A(b)(1) provides that EPA can provide the States with guidelines only “on appropriate techniques and methods,” including “(A) methods for identifying, characterizing, determining, quantifying, and measuring visibility impairment in Federal areas referred to in paragraph (1), (B) modeling techniques (or other methods) for

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<sup>2</sup> Another critical change in the bill as reported from the House Committee and as reported from Conference Committee and enacted was the substitution of the provision for making “reasonable progress” for the originally introduced “maximum feasible progress,” further demonstrating Congress’ intent that progress towards improving visibility in federal Class I areas must be balanced against other public interest factors. Legislative History at 2089-90.

determining the extent to which manmade air pollution may reasonably be anticipated to cause or contribute to such impairment, and methods for preventing and remedying such manmade air pollution and resulting visibility impairment.” *See* cross-reference from CAA § 169A(b) (last paragraph) to CAA § 169A (b)(1) to CAA § 169A (a)(3). Thus, EPA’s role is to provide procedural and technical guidance to the States in making BART determinations; EPA cannot, however, dictate the substance of the States’ BART determinations in a way contrary to the States’ reasoned and rational analysis and BART determinations done in accord with Section 169A of the CAA.

## **II. EPA’S FINAL RULE IMPERMISSIBLY INTRUDES UPON NEW MEXICO’S AUTHORITY UNDER THE CAA’S VISIBILITY PROTECTION PROGRAM**

EPA’s Final Rule makes clear that it is substituting its preference for what BART should be at the SJGS, not because New Mexico’s decision was incorrect or failed to comply with the Regional Haze program or the CAA, but because EPA does not agree with New Mexico’s policy choice. Remarkably, EPA’s Final Rule states that the only way New Mexico can overcome EPA’s decision on BART at the SJGS is if it produces “significant new information that changes our analysis” in a way that would allow EPA to “make appropriate revisions” to its decision. 76 Fed. Reg. at 52,394 (JA\_\_). Elsewhere in the Final Plan, EPA states that New

Mexico's BART determinations are only "recommendations." *id.* at 52,393, 52,394.

EPA's Final Rule turns the CAA's state-federal partnership on its head. Rather than evaluate whether New Mexico's BART determinations comply with the CAA, the EPA seeks to require New Mexico to prove that the EPA's BART determinations set forth in the EPA Final Rule were incorrect. While EPA may wish that the CAA provided the agency such authority, the reality is it does not. In 1975, the Supreme Court in *Train v. Natural Res. Def. Council*, 421 U.S. 60 (1975) clearly stated:

The Act gives the [EPA] no authority to question the wisdom of a State's choices of emission limitations if they ... satisf[y] the standards of [CAA] § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards.

*Id.* at 79.

As was seen in a recent decision from the United States District Court for the District of North Dakota, EPA may not replace a State's reasonable determination concerning emission control technologies so long as those determinations meet the requirements of the CAA program. *See United States of America, State of North Dakota v. Minnkota Power Cooperative, Inc. and Square Butte Power Cooperative*, Civil Action No. 1:06-CV-034. In the North Dakota case, EPA rejected the State of North Dakota's reasonable best available control

technology (“BACT”) determinations, requiring that SCR be BACT and be installed at certain electric generating units. While the North Dakota case did not address BART determinations, which is at issue in this case, the Court’s decision in the matter caused EPA to withdraw its proposal to reject North Dakota’s Regional Haze BART determinations on the same grounds it had sought to reject the BACT determinations. In its final rule adopting in part North Dakota’s Regional Haze SIP, EPA stated

In light of the court’s decision and the views we have expressed in our BART guidelines on the relationship of BACT to BART, we have concluded that it would be inappropriate to proceed with our proposed disapproval of SNCR as BART and our proposed FIP to impose SCR.

77 Fed. Reg. 20,898/1 (April 6, 2012).

With the case of New Mexico, EPA’s view is that it has the final say over a State’s regional haze SIP (to which Section 110 applies), despite that Congress specifically allocated to the State primary authority to determine BART; despite that the D.C. Circuit has affirmed on more than one occasion the plain meaning of the CAA’s directive that the States have the primary authority for determining regional haze plans (including BART); despite that the particular issue calls for the exercise of discretion, an analysis by the State of specific environmental, economic, and other issues and that the CAA does not require one objectively-definable outcome. Rather, EPA plainly believes that if EPA disagrees with the

State's subjective analysis, it may override the State through the exercise of its "ultimate" authority. If EPA's position is accepted, the States' authority to determine BART, and likely other areas to which the States are granted primary authority under the CAA to oversee and implement, will be reduced to a nullity. Truly, EPA's position seeking to bootstrap a difference of opinion into a license to disregard a State's regional haze SIP (and BART determination) - turns the Clean Air Act on its head.

### **III. EPA'S FINAL RULE DOES NOT COMPORT WITH THE ACT OR EPA'S OWN RULES**

#### **A. EPA Has Not Properly Considered Estimated Visibility Improvement Associated With SCR Installation At The SJGS**

The CAA and EPA's own BART rules require consideration of the degree of improvement in visibility which may reasonably be anticipated to result from the use of the proposed technology on a BART source. 42 U.S.C. § 7491(b)(2)(A); 40 C.F.R. § 51.301. The purpose of a State's SIP developed pursuant to §169A of the CAA is to make "reasonable progress" towards the national visibility goal - 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." CAA § 169A(a)(1). (*Emphasis added.*) Visibility impairment "means any humanly perceptible change in visibility (light extinction,

visual range, contrast, coloration) from that which would have existed under natural conditions.” 40 C.F.R. § 51.301. (*Emphasis added.*)

EPA’s Final Rule relies upon calculations of cumulative visibility impacts that EPA asserts will result from the installation of SCR technology at the SJGS. 76 Fed. Reg. at 52,420; *see also* Approval and Promulgation of Implementation Plans; New Mexico; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determination, 76 Fed. Reg. 491, 503 (Jan. 5, 2011). Nothing in the CAA, or EPA’s own BART rules, supports EPA’s “cumulative impact” approach to visibility calculations. Rather EPA’s BART rules provide that modeling of impacts should be conducted at the nearest Class I area and at other nearby Class I areas so as “to determine whether effects at those areas may be greater than at the nearest Class I area.” 70 Fed. Reg. at 39,170.

EPA’s Final Rule does not rest on a properly supported determination that the installation of SCR at SJGS will, in fact, result in humanly perceptible improvements to visibility in any Class I area that might justify imposition of a stringent SCR-based NO<sub>x</sub> emission limit. In contrast, technical assessments, accepted by the State of New Mexico, concluded that EPA’s preferred approach would “impose exorbitant costs on the plant to achieve an imperceptible change in

visibility in the region.” Comments Prepared by Public Service Company of New Mexico, EPA Region 6 Draft Interstate Transport FIP and NO<sub>x</sub> BART Determination for the San Juan Generating Station, EPA-R06-OAR-2010-0846-0093 9, p. 1 (Apr. 4, 2011) (JA \_\_\_).

In addition, EPA rejects in its Final Rule PNM’s comments requesting that the NO<sub>x</sub> and sulfuric acid emission limits be applied to the facility as a whole rather than to the units individually. 76 Fed. Reg. at 52,439-40 (JA \_\_\_ - \_\_\_\_). PNM had requested that plant-wide averaging be applied at the SJGS, (PNM Comments at 23 (JA \_\_\_)), which under EPA’s own BART rules is permitted. *See* 70 Fed. Reg. at 39,115. EPA’s BART rules allow sources to average emissions across a set of BART-eligible emission units within a fence line, so long as the amount of emission reductions from each pollutant being controlled for BART would be at least equal to those reductions that would be obtained by simply controlling each unit. *Id.* at 39,172. However, EPA rejected PNM’s request and determined that each individual SJGS unit must meet a NO<sub>x</sub> emission limit of 0.05 (lb/MMBtu). 76 Fed. Reg. at 52,388/3; 76 Fed. Reg. at 504/3. Applying the 0.05 (lb/MMBtu) limit to the individual unit results in an overly stringent emission limit. Neither the CAA nor EPA’s Regional Haze regulations require that this overly stringent emission limit must be applied to each individual SJGS unit. EPA’s Final Rule provides no basis for differentiating SJGS and applying the

requirements which are outside of its established, standard BART rules. The Final Rule is arbitrary and capricious for this reason alone.

**B. EPA's Final Rule Ignores Source-Specific Cost Considerations and Is Unduly Expensive**

PNM's cost analysis submitted to EPA in the course of the EPA FIP rulemaking demonstrated that the EPA's preferred approach would require unprecedented capital expenditures at the SJGS, which could well exceed \$750 million. PNM Comment Letter to EPA re: the Proposed Rule p. 1 (Jan. 6, 2011); PNM News Release (December 21, 2010) (JA\_\_\_). Despite these excessive costs, EPA nevertheless adopted, based on its "refined cost and control effectiveness analysis", that SCR is "cost effective for all units of the SJGS." 76 Fed. Reg. at 503/1; *see also* 76 Fed. Reg. at 52,388/3. To reach its result, EPA relies upon several significant modifications to PNM's earlier cost calculations, explaining that such modifications addressed "errors" in need of correcting and "equipment" or "modifications" that needed to be excluded. 76 Fed. Reg. at 502/2.

In rejecting PNM's and the State of New Mexico's cost estimates, EPA incorrectly asserts that some of the costs it relied on are not consistent with EPA's Air Pollution Control Cost Manual ("Manual"). 76 Fed. Reg. at 52,395/1-2; 76 Fed. Reg. at 502/2. Site-specific costs must be considered, even when those costs are not included in EPA's Manual. *See Am. Corn Growers Ass'n v. EPA*, 291 F.3d

1, 6-7 (D.C. Cir. 2002); 70 Fed. Reg. 39,127, 39,166 & n.15 (July 6, 2005). As detailed in *American Corn Growers*, BART determinations must be made on a “source-specific basis,” which includes costs that are unique to the source undergoing the BART analysis. Moreover, EPA’s own BART rules recognize that, based upon site-specific elements, an available control technology may be eliminated from consideration. “[O]ne or more of the available control options may be eliminated from consideration because they are demonstrated to be technically infeasible **or to have unacceptable energy, cost, or non-air quality environmental impacts on a case-by-case (or site-specific) basis.**” *Id.* at 39,164 (*Emphasis Added*). The Final Rule is unlawful for this reason alone.

#### **IV. SUSTAINING EPA’S FINAL RULE WILL UNDULY HARM STATE AUTHORITY AND DISCRETION IN FUTURE ADMINISTRATION OF THE VISIBILITY PROTECTION PROGRAM**

The cooperative federalism embodied in the CAA, and specifically defined in the Visibility Protection/Regional Haze program is not merely what Congress mandated; it makes good sense. In the early years of the CAA, Professor Richard Stewart noted the “sobering fact . . . that environmental quality involves too many intricate, geographically variegated physical and institutional interrelations to be dictated from Washington.” Richard B. Stewart, *Pyramids of Sacrifice: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 *Yale L.J.* 1196, 1266 (1977).

A meaningful State role in implementation of the CAA's provisions is imperative for obvious reasons. Ours is a huge and diverse nation "with an astonishing range of environmental conditions and problems." John P. Dwyer, *Symposium: Environmental Federalism: The Practice of Federalism under the Clean Air Act*, 54 Md. L. Rev. 1183, 1218 (1995). To wit:

Differences in climate and weather (e.g., patterns of temperature, wind, rainfall, humidity), geography (e.g., deserts, mountains, plains, coastal regions), the relative importance of sources and types of pollution (e.g., cars, large utilities and factories, numerous small sources), environmental and public health risks (e.g., special need for visibility control, size of affected human population), and economic conditions confound attempts to have a successful, highly centralized regulatory program. . . . The practical need to tailor implementation and enforcement to local conditions requires decisionmakers who have, in addition to an adequate knowledge of these conditions, a sympathetic orientation toward local conditions. Effective implementation requires some consideration and accommodation of local concerns. Precisely because they are local, and locally accountable, state and local officials bring that knowledge and orientation to implementation and enforcement.

The events in New Mexico that gave rise to this case prove the wisdom of congressional delegation to the States of primary authority for making BART determinations. New Mexico took its responsibilities seriously. Rather than proceed with a Regional Haze SIP that did not meet the needs and unique circumstances of the State, New Mexico took the time necessary to reevaluate its initial draft BART determination and come to determinations that advance the goals of the Regional Haze program, while at the same time advancing the

environmental, economic and social needs of the State. Unlike EPA, New Mexico had a unique appreciation for the SJGS's actual operation and its importance to the State. Thus, New Mexico selected SNCR as BART at the SJGS because the State, after lengthy and due consideration, could not justify SCR as BART.

Moreover, beyond increasing the likelihood of out-of-touch and flawed judgments, EPA's intrusion into the State role of determining BART, if permitted, will inject a disturbing degree of uncertainty into the future administration of New Mexico's visibility protection programs, as well as the regional haze SIPs being prepared by other States.

### **CONCLUSION**

EPA's Final Rule goes a long way toward institutionalizing a feudal relationship between the States and EPA that is contrary to the Clean Air Act's Regional Haze program. The relationship EPA is attempting to establish is not what Congress intended in regards to the nation's Regional Haze program, does not comport with the Clean Air Act, and it is not good for the citizens of the States. Therefore, ACCCE urges this Court to vacate EPA's Final Rule.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(b), that this brief contains 4,948 words as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and therefore is within the word limit set by Federal Rule of Appellate Procedure 29 (d) and by Order of this Court dated March 23, 2012.

s/Marian C. Larsen

Marian C. Larsen

**CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY  
REDACTIONS**

The undersigned certifies that:

- (1) All required privacy redactions have been made;
- (2) The hard copies of this filing to be submitted to the Clerk's office will be exact copies of the ECF filing; and
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Dated: May 22, 2012

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