

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.

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

**AMICUS CURIAE BRIEF OF PACIFICORP IN SUPPORT OF
PETITIONERS PUBLIC SERVICE COMPANY OF NEW MEXICO,
SUSANA MARTINEZ AS GOVERNOR OF THE STATE OF NEW
MEXICO, AND THE NEW MEXICO ENVIRONMENT DEPARTMENT**

(List of Counsel Appears on Next Page)

Michael G. Jenkins
Assistant General Counsel
PacifiCorp Energy
1407 North Temple, Suite 310
Salt Lake City, Utah 84116
michael.jenkins@pacificorp.com
(801) 220-2233

Attorneys for Amicus Curiae PacifiCorp

E. Blaine Rawson
Ray Quinney & Nebeker, P.C.
36 South State Street, Suite 1400
Salt Lake City, UT 84111
brawson@rqn.com
(801) 532-1500

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, PacifiCorp submits the following statement:

PacifiCorp's parent corporation is MidAmerican Energy Holdings Company. In addition, the following publicly held corporations own 10% or more of PacifiCorp's stock: MidAmerican Energy Holdings Company.

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**IDENTITY OF AMICUS CURIAE AND
STATEMENT OF INTEREST**

PacifiCorp is an electrical utility company that operates nineteen coal-fired electric generating units in Utah and Wyoming. Among those, fourteen units are subject to the Best Available Retrofit Technology (“BART”) requirements under the regional haze provisions of the Clean Air Act (“CAA”).¹ This makes PacifiCorp the single largest owner of units subject to BART (“BART-eligible units”) in the western United States. The Environmental Protection Agency (“EPA”) and the respective States regulate all of PacifiCorp’s electric generating units in part by interpreting and applying the CAA. This requires that EPA and the respective States interpret and apply to PacifiCorp’s electric generating units the same statutes, regulations, and guidance addressing regional haze that EPA has interpreted and applied to New Mexico’s San Juan Generating Station (“SJGS”).

An *amicus* brief is desirable in this case and the matters asserted in this brief are relevant to the disposition of this case for a number of reasons. At the outset, PacifiCorp is uniquely positioned to provide relevant input for the Court’s review of EPA’s regional haze determination for SJGS, and has a direct interest in this action, because EPA has recently, or will soon, be making “regional haze” determinations affecting all of PacifiCorp’s BART-eligible units. For example, in

¹ In addition, PacifiCorp has an ownership interest in seven additional units in three other western states (none in New Mexico), some of which are subject to BART requirements.

a May 16, 2012 proposed rulemaking, EPA proposed to disapprove portions of Utah's state implementation plan addressing regional haze. This proposed rulemaking directly affects four of PacifiCorp's Utah electric generating units and involves many of the same issues involved in the Court's review of EPA's Federal Implementation Plan for SJGS. Similarly, EPA has recently proposed to disapprove portions of Wyoming's state implementation plan addressing regional haze. As part of that proposal, EPA rejects certain of Wyoming's BART determination and requires much more complex and expensive BART pollution control equipment, just as it did in New Mexico. The Wyoming proposed rulemaking directly affects eight of PacifiCorp's Wyoming electric generating units and involves the same issues before the Court in this review.

In each of these cases, EPA's interpretation of the regional haze statutes, regulations, and guidance has required or may require PacifiCorp to modify or upgrade its BART-eligible units at costs in excess of one billion dollars. Relevant here, several of EPA's interpretations of the regional haze requirements in this case are inconsistent with EPA's own guidance, fail to afford the proper deference to New Mexico's discretionary decisions, and are contrary to EPA determinations in other states. Depending on the Court's decision here, EPA could continue to assert these inconsistent, unsupported positions in other states, including Utah and Wyoming. As a result, PacifiCorp is uniquely positioned to provide relevant input

for the Court's review of EPA's Federal Implementation Plan for New Mexico's SJGS. PacifiCorp's authority to file this *amicus* brief is based on its Motion for Leave to File Amicus Brief, filed concurrently.

This brief was not authored in whole or in part by any party's counsel. No party, party's counsel, or any other person contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, PacifiCorp files this *amicus curiae* brief in support of Petitioner Public Service Company of New Mexico ("PNM") and Petitioners Governor Susana Martinez and the New Mexico Environment Department (collectively, "NMED") in their petitions for review of final agency action taken by EPA.

In summary, EPA failed to afford the State of New Mexico's discretionary regional haze determinations the proper deference required under the CAA. In its regional haze state implementation plan, New Mexico properly and adequately conducted the required analysis, including exercising its discretion when analyzing the factors in its BART determinations. EPA criticized and rejected a number of New Mexico's determinations, even though these decisions were within New Mexico's proper discretion, and even though EPA had issued guidance supportive of New Mexico's decisions and/or itself accepted similar or identical

determinations in other states. In so doing, EPA acted outside of its statutory authority, arbitrarily and capriciously, and contrary to law.

ARGUMENT

I. EPA’S FINAL RULE SHOULD BE VACATED BECAUSE IT EXCEEDED EPA’S STATUTORY AUTHORITY, IS ARBITRARY AND CAPRICIOUS, AND WAS NOT IN ACCORDANCE WITH LAW

EPA has significantly overstepped its statutory authority, and has acted in an arbitrary and capricious manner, in its decision to disregard New Mexico’s discretionary findings and analyses contained in its regional haze state implementation plan. As a result, not only does EPA’s decision expose SJGS to excessive and unjustified costs and compliance requirements, but the rationale and interpretations underlying this decision also potentially expose all other BART-eligible units, including those owned and/or operated by PacifiCorp, to similar excessive and unjustified costs in other states. The CAA explicitly grants discretion to the States to make the very determinations that New Mexico made here. This includes the determination of BART for BART-eligible units. The role of EPA, on the other hand, is to create guidelines for States to follow and to review state implementation plans to determine whether they fall within the prescribed guidelines and meet other CAA requirements.

Here, EPA acted “in excess of statutory jurisdiction, authority, or limitations” and its Final Rule was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” when it did not afford the statutorily required deference mandated to the States under the CAA. 42 U.S.C.

§ 7607(d)(9)(A), (C). Likewise, EPA’s determinations run contrary to its own guidance and its decisions in other states. For these reasons, PacifiCorp contends the Court should vacate EPA’s “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. 52,388 (Aug. 22, 2011) (“Final Rule”).

A. The CAA and Regional Haze Rules Grant Significant Discretion to the States

In 1977, Congress added § 169A to the CAA, which “established as a national goal the ‘prevention of any future, and the remedying of any existing, impairment in visibility in mandatory class I areas which impairment results from man-made air pollution.’” *Am. Corn Growers Ass’n v. EPA*, 291 F.3d 1, 3 (D.C. Cir. 2002) (citation omitted); *see also* 42 U.S.C. § 7491(a)(1). The CAA contemplates that the States are to have the primary role in developing plans to protect visibility in Class I areas, known as regional haze state implementation plans (“RH SIPs”), including determining those stationary sources within their borders that emit “any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility.” 42 U.S.C. § 7491(b)(2)(A). Key to this case, States are also specifically empowered to make BART determinations in order to “control[] emissions” from these stationary sources on a site-specific basis. *Id.*

In particular, the CAA specifically mandates that BART is to be “determined by the State.” 42 U.S.C. § 7491(b)(2)(A). Likewise, the CAA makes clear that it is the “State” that is to “take into consideration” the five statutory factors that are included in a BART analysis. 42 U.S.C. § 7491(g)(2).² In contrast, EPA is simply tasked with developing certain “guidelines” for the States to use in implementing the CAA. 42 U.S.C. § 7491(b)(1). Therefore, the CAA anticipates EPA will create guidance and that the States, using their discretion, will make BART determinations for their stationary sources using this guidance.

Likewise, the relevant regional haze regulations, 40 C.F.R. §§ 51.308 and 51.309 (“Regional Haze Rules”), make clear that it is a State responsibility to create and implement a RH SIP. Specifically, these regulations mandate that States “must,” following the criteria and guidelines identified in the federal regulations, make reasonable progress goals, BART determinations, and a long-term strategy as part of a RH SIP. *See, e.g.*, 40 C.F.R. § 51.308(e) (“The State must submit an implementation plan containing emission limitations representing BART”); 40 C.F.R. § 51.308(e)(1)(ii)(A) (explaining that in completing a

² The BART factors are “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.” 42 U.S.C. § 7491(g)(2).

BART analysis, “the State must take into consideration” the regulatory BART factors).³

Moreover, EPA, in issuing guidance on regional haze, has recognized the broad discretion granted to the States by the CAA. Specifically, EPA has adopted guidance to address BART determinations for certain large electrical generating facilities, referred to as Appendix Y,⁴ as well as the federal register notice responding to comments concerning Appendix Y, referred to as the Preamble. EPA recognized in the Preamble that “how *states* make BART determinations or how they determine which sources are subject to BART” are among the issues “where the Act and legislative history indicate that *Congress evinced a special concern with insuring that States would be the decision makers.*” 70 Fed. Reg. 39,104, 39,137 (July 6, 2005) (emphasis added). Likewise, in analyzing the applicability of certain executive orders, EPA stated that “*ultimately States will determine the sources subject to BART and the appropriate level of control for*

³ EPA may only create a federal implementation plan for a state, known as a “FIP,” if a state fails to take the necessary actions required under the CAA. *See* 42 U.S.C. § 7602(y) (explaining a FIP “means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a [SIP].”). However, for the reasons comprehensively set forth in PNM’s and NMED’s briefs, the issuance of a FIP was not appropriate here.

⁴ “Guidelines for BART Determinations Under the Regional Haze Rule,” 40 C.F.R. Part 51 Appendix Y.

such sources” and that “States will accordingly exercise substantial intervening discretion in implementing the final rule.” Id. at 39,155 (emphasis added).

Finally, when discussing visibility improvement in the Preamble, EPA made it clear that States are to determine the “weight and significance” of each of the five BART factors. EPA noted an estimate of visibility improvement

does not by itself dictate the level of control a State would impose on a source; “the degree of improvement in visibility which may reasonably be anticipated to result from the use of [BART]” is only one of five criteria that the State must consider together in making a BART determination. *The State makes a BART determination based on the estimates available for each criterion, and as the CAA does not specify how the State should take these factors into account, the States are free to determine the weight and significance to be assigned to each factor.*

Id. at 39,123 (emphasis added); *see also* 77 Fed. Reg. 24,768, 24,774 (Apr. 25, 2012) (“States are free to determine the weight and significance to be assigned to each [BART] factor.”).

In sum, based on the language in the CAA, the Regional Haze Rules, and EPA’s own guidance, the States are afforded significant discretion when creating their RH SIPs, including the determination of the weight and significance of each BART factor and BART control equipment and related emission limits. Further, EPA itself has recognized that it is required to grant such RH SIPs appropriate deference under the CAA, including the discretionary determinations made by States in conducting the BART analysis.

B. The Relevant Case Law Likewise Mandates that EPA Must Afford Deference to States' RH SIP Analysis and Determinations

It is also well settled under the relevant case law that EPA must recognize the substantial discretion the CAA grants to the States. As the Supreme Court has explained, EPA “is relegated by the [CAA] to a *secondary* role in the process of determining ... the specific, source-by-source emission limitations.” *Train v. EPA*, 421 U.S. 60, 79 (1975) (emphasis added). In the related context of State plans for ambient air standards, EPA “is required to approve a state plan” when the plan provides for the timely attainment and subsequent maintenance of these standards and satisfies other general requirements. *Id.* Significantly, the Supreme Court explained that the CAA “gives [EPA] no authority to question the wisdom of a State’s choices of emission limitations if they are part of a plan which satisfies” the statutory standards, and that EPA “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.* (emphasis added). This deference applies even more so to States’ RH SIPs, as federal law requires the States create these plans in the first instance. *See, e.g.*, 42 U.S.C. § 7491(b)(2); 40 C.F.R. § 51.308(d). Accordingly, where, as here, a State follows the correct procedural steps in creating its RH SIP, EPA is required to treat the State’s discretionary determinations with the deference mandated by the CAA.

Likewise, federal courts addressing the Regional Haze provisions of the CAA have recognized that the States have “broad authority over BART determinations.” *Am. Corn Growers Ass’n v. EPA*, 291 F.3d 1, 8 (D.C. Cir. 2002). As the D.C. Circuit Court recognized, Congressional history indicates the CAA was written to “make it clear that the states—not EPA—would make these BART determinations” and that “Congress intended the states to decide which sources impair visibility and what BART controls should apply to those sources.” *Id.* The court further stated:

All five § 169A(g)(2) factors inform the *states’ inquiries* into what BART controls are appropriate for particular sources. Although no weights were assigned, *the factors were meant to be considered together by the states*. The language of § 169A(g)(2) can be read in no other way.

Id. at 6 (emphasis added). As this decision further demonstrates, the CAA requires BART determinations to be performed by the States and EPA must afford those determinations substantial deference.

C. By Failing to Recognize the Discretion Afforded to New Mexico’s BART Analysis and Determinations, EPA Has Exceeded Its Statutory Authority and Has Acted Arbitrarily and Capriciously

EPA, in its Final Rule, exceeded its statutory authority and acted arbitrarily and capriciously in several respects. Specifically, EPA promulgated a federal implementation plan (“FIP”) for New Mexico imposing BART requirements for SJGS while the most current version of New Mexico’s RH SIP was awaiting

EPA's review and approval. In taking this course of action, EPA not only violated the CAA's provisions giving States the primary regulatory authority over regional haze determinations, but also implicitly rejected and otherwise criticized New Mexico's discretionary decisions included in its RH SIP, including its BART determinations and analysis. While the briefs filed by PNM and New Mexico comprehensively address many of these issues, PacifiCorp offers additional background and analysis on several of them here.

1. Presumptive BART Limits

First, EPA exceeded its statutory authority and acted arbitrarily and capriciously when it made a BART determination for SJGS that failed to justify its departure from the presumptive BART emission limit. EPA's BART Guidelines, found in Appendix Y, established specific presumptive BART limits for emissions of NO_x⁵ from various types of electric generating units. The presumptive NO_x limit applicable to the type of units at SJGS is 0.23 lb/mmBtu. *See* EPA's BART Guidelines, 70 Fed. Reg. 39,104, 39,135, 39,172 (July 6, 2005) (codified at 40 C.F.R. Part 51 Appendix Y). Appendix Y further provides that the presumptive limits "are extremely likely to be appropriate" for plants such as SJGS and that any departure from the presumptive limit must be explained "based on a careful consideration of the [BART] factors." *Id.* at 39,131, 39,171. Notably, Appendix Y

⁵ Nitrogen oxides.

became law after notice-and-comment rulemaking, and States are justified in relying on these presumptive limits and guidance when crafting their RH SIPs.

Even though New Mexico adopted this presumptive BART limit for the SJGS units in its RH SIP, however, EPA chose to entirely disregard the State's determination and EPA's own presumptive limit and instead imposed a NO_x limit that is over four times stricter: 0.05 lb/mmBtu. 76 Fed. Reg. at 52,402-03. Moreover, it imposed this limit by selecting NO_x emissions reduction equipment known as Selective Catalytic Reduction ("SCR") even though Appendix Y specifically rejected SCR as presumptive BART for the type of unit found at SJGS. 70 Fed. Reg. at 39,134-36, 39,171-72. In doing so, EPA not only failed to afford the proper deference that should be afforded to New Mexico's determination, but also acted contrary to its own binding guidance. *See, e.g., Edwards v. Califano*, 619 F.2d 865, 869 (10th Cir. 1980) (explaining agency is bound by its own regulations and cannot ignore them).⁶ This action was therefore outside EPA's statutory authority, contrary to law, and arbitrary and capricious. *See Am. Corn*

⁶ Moreover, as set forth more fully in PNM's brief, EPA failed to conduct the requisite comparison of SCR to other technologies assumed to meet the presumptive limit, which was necessary in order for EPA to justify its departure from the presumptive BART limits. (*See* PNM Brief at 33-38.) In addition, although EPA's BART Guidelines provide that "incremental cost effectiveness," which compares the costs and performance levels of different control options, must be calculated in a BART analysis, 70 Fed. Reg. at 39,167, there is no evidence that EPA ever performed this required assessment in this case. (*See* PNM Brief at 15-16, 41-43.)

Growers Ass'n, 291 F.3d at 8-9 (holding EPA's regional haze rule was "contrary to the text, structure and history" of the CAA in part because it "constrains authority Congress conferred on the states" and thus was "impermissible"); *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011) ("Reasoned decisionmaking requires an agency to 'examine the relevant data and articulate a satisfactory explanation for its action[s].'" (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))); *Catawba Cnty. v. EPA*, 571 F.3d 20, 51 (D.C. Cir. 2009) (explaining "inconsistent treatment is the hallmark of arbitrary agency action"); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987) (finding agency action arbitrary and capricious because it was "internally inconsistent and inadequately explained").

2. Costs of Compliance

As set forth above, States are entitled to determine the weight and significance of each BART factor. One BART factor is "the costs of compliance." 42 U.S.C. § 7491(g)(2). New Mexico appropriately exercised its CAA-mandated discretion when it analyzed this factor by employing reliable cost information commonly used in the industry which was tailored to site-specific conditions present at SJGS. However, EPA failed to grant this analysis the proper deference.

At numerous points in the Final Rule, EPA criticized New Mexico's reliance on current cost information provided by utility equipment vendor Black & Veatch

(“B&V”), which was based on site-specific information. Instead, EPA adopted a different cost analysis based on EPA’s generalized Control Cost Manual which was last updated in 2002.⁷ However, in its own guidance, EPA has clearly provided that States have significant discretion in determining pollution control equipment costs:

States have flexibility in how they calculate costs. We believe that the Control Cost Manual provides a good reference tool for cost calculations, but if there are elements or sources that are not addressed by the Control Cost Manual or there are additional cost methods that could be used, we believe that these could serve as useful supplemental information.

70 Fed. Reg. at 39,127 (emphasis added). In fact, Appendix Y specifically provides that States may rely upon the very type of information criticized by the EPA in the Final Rule:

The basis for equipment cost estimates also should be documented, *either with data supplied by an equipment vendor (i.e. budget estimates or bids), or by a referenced source . . . such as the . . . Control Cost Manual . . .* The cost analysis should also take into account any site-specific design or other conditions . . . that affect the cost of a particular BART technology option.

70 Fed. Reg. at 39,166 (emphasis added). Accordingly, New Mexico’s reliance on B&V’s cost estimates, which specifically accounted for variances from the Control Cost Manual and elaborated on the site-specific elements necessary for implementation at SJGS, was entirely proper under EPA’s own guidance.

⁷ EPA Air Pollution Control Cost Manual, EPA/452/B-02-001 (6th ed. Jan. 2002).

Moreover, EPA repeatedly criticized B&V's analysis and excluded significant costs because these estimates lacked "documentation" EPA deemed necessary under the Control Cost Manual. This criticism was unfounded, however, not only because EPA was provided with significant documentation and information on costs sufficient to satisfy the site-specific estimates made by B&V, but also because the level of documentation EPA claims is necessary would in fact first require an extensive, expensive engineering analysis to be undertaken, of the type that would only occur once a particular control had been selected.⁸ As PNM correctly points out, "The BART rules focus on *selecting* a technology for BART, not complete engineering of its retrofit. Nothing in the BART rules requires the level of documentation the Final Rule demanded of PNM." (PNM Brief at 39.)

In rejecting New Mexico's reliance on vendor-supplied cost information, EPA also repeatedly took an overly restrictive view of the role of the Control Cost Manual. As set forth above, this manual is not the only standard by which States can calculate costs; Appendix Y explicitly provides that it is only one of several reference sources that may be used. Nowhere in Appendix Y or the Regional Haze Rules does it state that EPA can ignore "vendor supplied" information and instead

⁸ For example, EPA objected that New Mexico had not provided "plot plans or design drawings," "arrangement diagrams" for the facility, or a construction schedule. 76 Fed. Reg. at 52,398-52,399.

rely solely on a ten-year-old Control Cost Manual.⁹ For this reason, EPA's narrow and restrictive view in dismissing New Mexico's analysis because it was not based on the Control Cost Manual, was improper and inconsistent with Appendix Y.¹⁰

In short, EPA's reliance on the generic Control Cost Manual to the exclusion of more reliable and current site-specific information sources, and its imposition of an unattainable "documentation" standard, ignores the right and duty of States to exercise their discretion to rely on "real world" cost data and vendor-supplied information and quotes. Because, as noted above, "*States have flexibility in how they calculate costs,*" EPA's substitution of its cost estimates for the state's valid and supported cost estimates exceeded EPA's statutory authority, was arbitrary and capricious, and not in accordance with law. 42 U.S.C. § 7607(d)(9)(A), (C).

3. Life Span for SCR Analysis

In the Final Rule, EPA criticized and rejected New Mexico's decision to utilize a twenty-year life span for its analysis of SCR and insisted that a thirty-year

⁹ As EPA well knows, the 2002 Control Cost Manual is limited because it is outdated, despite representations in Appendix Y that EPA would update the Control Cost Manual from time to time. *See* 70 Fed. Reg. at 39,166 n.14

¹⁰ In addition, EPA's exclusive reliance on the Control Cost Manual in analyzing New Mexico's cost estimates is inconsistent with the cost methodology EPA has adopted or accepted in other states. For example, in its Montana FIP, EPA relied on both the Control Cost Manual and the Integrated Planning Model ("IPM") version 4.10. 77 Fed. Reg. 23,988, 24,024 (Apr. 20, 2012). In selecting the IPM, EPA emphasized "IPM control costs are based on databases of actual control project costs and account for project specifics such as coal type, boiler type, and reduction efficiency." *Id.*

life span must be used, stating that “[w]e conclude there is nothing in the record to support a 20 year lifetime for the SCR and believe a 30 year lifetime is justified.” 76 Fed. Reg. at 52,402. As one commenter pointed out, the use of a thirty-year life span results in a reduction of the estimated cost of SCR by \$15,268,000, making SCR appear more affordable under EPA’s method of calculation. *Id.* at 52,401.

EPA’s action in this regard was arbitrary and capricious and outside its statutory authority for several reasons. First, EPA itself has recently applied a twenty-year standard in Montana when it determined SCR for similar facilities, calling it the “default.” 77 Fed. Reg. 23,988, 24,026 (Colstrip 1); 24,034 (Colstrip 2) (Apr. 20, 2012).¹¹ Likewise, in Alaska, EPA recently respected Alaska’s discretion in using a fifteen-year lifespan when determining whether SCR was reasonable. 77 Fed. Reg. 11,022, 11,034 (Feb. 24, 2012). In addition, the Control Cost Manual itself uses a twenty-year life span. Cost Manual, Section 2.4, Chapter 2.4.1 at 2-48; 76 Fed. Reg. at 52,401.¹² Finally, EPA’s rationale for using a thirty-

¹¹ Because Montana declined to submit a RH SIP, EPA was required to conduct a BART analysis and issue a FIP.

¹² In rejecting a comment pointing out this fact, EPA argued that “the Cost Manual does not recommend a lifetime for an SCR, but rather sets out a calculation example that uses a lifetime of 20 years.” 76 Fed. Reg. at 52,401. This argument, however, does not take into account the fact that the Control Cost Manual, apart from any example, specifically provides that “[a]n *economic lifetime of 20 years is assumed for the SCR system.*” Cost Manual, Section 2.4, Chapter 2.4.1 at 2-48 (emphasis added). As PNM explains, although the remaining life of the boiler may also be a factor in determining an SCR system lifetime, EPA has conceded that there is no evidence in the record on this issue for SJGS, and therefore EPA had no

year life for SJGS was solely based on the fact that a few other facilities had used a lifetime longer than twenty years in making such assessments, 76 Fed. Reg. at 52,402, and not on any analysis comparing circumstances at those facilities to circumstances at SJGS.

Accordingly, because EPA itself has recently used a twenty-year standard, has approved the use of a fifteen-year standard, and its own Control Cost Manual contains a twenty-year presumption, its failure to give deference to New Mexico's use of a twenty-year standard, and its decision to ignore its own guidance, were both outside its statutory authority and arbitrary and capricious. *See Am. Corn Growers Ass'n*, 291 F.3d at 8-9; *Portland Cement Ass'n*, 665 F.3d at 187; *Catawba Cnty.*, 571 F.3d at 51; *Gen. Chem. Corp.*, 817 F.2d at 846.¹³

4. Selection of NO_x Rate for SCR Analysis

EPA's rejection of New Mexico's reliance on a 0.07 lb/MMBtu rate for BART NO_x for its SCR analysis, and its insistence on applying a 0.05 lb/MMBtu rate, was also arbitrary and capricious and in excess of its statutory authority.

At the outset, EPA claims it selected the 0.05 rate based on a comparison of what other units had used, not because the five-factor BART analysis indicated that

basis for assuming an SCR lifetime longer than twenty years. (PNM Brief at 40 & n.19.)

¹³ As PNM points out, EPA's action also violates its standard that "documentation" is required to depart from the twenty-year assumption contained in the Cost Manual. (PNM Brief at 40-41.)

this should be the rate. *See* 76 Fed. Reg. at 52,403-04. But more importantly, EPA's rejection of the 0.07 rate was arbitrary and capricious, and failed to afford the proper deference afforded to the State, because EPA recently *has approved* of other RH SIPs that have used the 0.07 rate and even higher rates when analyzing SCR.

For example, in Colorado, EPA recently accepted Colorado's discretionary selection of NO_x emission rates of 0.07 lb/MMBtu and 0.08 lb/MMBtu in its SCR analyses. 77 Fed. Reg. 18,052, 18,072 Tbl. 24 (Mar. 26, 2012). In South Dakota, EPA recently accepted South Dakota's even higher rate of 0.10 lb/MMBtu for NO_x emission rates in its SCR analysis. 76 Fed. Reg. 76,646, 76,658 (Dec. 8, 2011); 77 Fed. Reg. 24,845, 24,849 (Apr. 26, 2012).

For this reason, EPA's statement in its Final Rule that "[t]he basis for this [0.07 lb/MMBtu] limit has been questioned by ... us since July 2007," 76 Fed. Reg. at 52,403, is directly contrary to other recent EPA decisions. The same is true for EPA's assertion that "we believe the statement that a retrofit SCR would only be capable of achieving 0.07 lb/MMBtu on a continuous basis, is factually incorrect," *id.*; that assertion is entirely inconsistent with, and undercut by, its recent decisions in other states. Accordingly, EPA's failure to afford the proper deference to New Mexico's use of the 0.07 rate, despite the fact that EPA has accepted this same rate, and even higher rates, in other areas, was arbitrary and

capricious and in excess of its statutory authority. *See Am. Corn Growers Ass'n*, 291 F.3d at 8-9; *Portland Cement Ass'n*, 665 F.3d at 187; *Catawba Cnty.*, 571 F.3d at 51; *Gen. Chem. Corp.*, 817 F.2d at 846.

5. Visibility Modeling and Analysis

The CAA provides that the States are to conduct the five-factor BART analysis of their stationary sources, which includes the determination of “the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.” 42 U.S.C. § 7491(g)(2). EPA has explained that “we must permit States to take into account the degree of improvement in visibility that would result from imposition of BART on each individual source when deciding on particular controls.” 70 Fed. Reg. at 39,107, 39,129.

Additionally, EPA has stated that because “each Class I area is unique, . . . *States should have flexibility to assess visibility improvements due to BART controls by one or more methods*, or by a combination of methods,” and that “*States should have flexibility when evaluating the fifth statutory factor.*” 70 Fed. Reg. at 39,107. New Mexico exercised that discretion here, but, once again, EPA failed to grant it the proper deference.

a. *Use of More Recent Version of CALPUFF*

Computer modeling is used to predict the degree of visibility improvement resulting from proposed BART controls and limits. New Mexico properly

exercised its significant discretion in its analysis of this BART factor when it reasonably used an updated computer model, known as CALPUFF 6.4. EPA, on the other hand, used an older version, CALPUFF 5.8, *see* 76 Fed. Reg. 52,431-34, despite comments from one of the computer model developers and others demonstrating that version 5.8 is outdated and has been shown to over-predict the effectiveness of visibility improvement from use of SCR emission controls, *see id.* at 52,426-27, 52,431. Significantly, CALPUFF 5.8 was last updated in 2007. Although it is arguable that EPA itself should be using the more recent model, at a minimum, EPA should have recognized that New Mexico had the discretion to use the more recent model if it so elected.

In fact, States are not only given great discretion in relation to modeling, they are encouraged in EPA guidance to apply the most realistic models.

Appendix W, EPA's modeling guidance,¹⁴ demands that the "best" model should always be used:

- Although Appendix W recognizes some "[m]odels are identified for some specific applications," EPA followed up by stating, "[I]n all cases, the model applied to a given situation should be the one that provides the most accurate representation of atmospheric transport, dispersion, and chemical transformations in the area of interest." Appx. W.1.0.e.
- "[A]ssuming the data are adequate, the greater the detail with which a model considers the spatial and temporal variations in emissions and meteorological conditions, the greater the ability to evaluate the source

¹⁴ "Guideline on Air Quality Models," 40 C.F.R. Part 51 Appendix W.

impact and to distinguish the effects of various control strategies.”
Appx. W.2.1.a.

- “It should not be construed that the preferred models identified here are to be permanently used to the exclusion of all others or that they are the only models available for relating emissions to air quality.” Appx. W.3.0.c.
- “*The model that most accurately estimates concentrations in the area of interest is always sought.*” Appx. W. 1.0.d (emphasis added).

These statements demonstrate the discretion given to States when conducting visibility modeling as long as they are using the “best” model available.

Here, New Mexico appropriately exercised its discretion to select and rely upon CALPUFF 6.4 modeling because, as Appendix W specifically allows, it gave the state a “greater ... ability to evaluate the source impact and to distinguish the effects of various control strategies.” Appx. W. 2.1.a. Moreover, as set forth in the comments presented on this issue, the newer version of CALPUFF better addresses the issue of chemical transformations. 76 Fed. Reg. at 52,431-32. This is significant because, as set forth above, Appendix W provides that “the model applied to a given situation should be the one that provides the most accurate representation of ... chemical transformations in the area of interest.” Appx. W.1.0.e.

Contrary to EPA’s assertions in the Final Rule, using the “best” model does not necessarily mean using the model EPA has approved. In fact, EPA previously has explained that it “understand[s] the concerns of commenters that the chemistry

modules of the CALPUFF model are less advanced than some of the more recent atmospheric chemistry simulations” and that “[t]o date, no other modeling applications with updated chemistry have been approved by EPA,” but that “*as the Guideline makes clear, States are free to make their own judgments about which of these or other alternative approaches are valid and appropriate for their intended applications.*” 70 Fed. Reg. at 39,123 (emphasis added).¹⁵

In sum, EPA improperly rejected New Mexico’s discretion and right to rely on this improved modeling, which accounted for the admitted overestimation of the prior version of CALPUFF and deficiencies with regard to chemical transformation. As EPA itself has stated, New Mexico should be free to make its own judgment about which “alternative approaches,” such as using a more updated computer model, are valid and appropriate. 70 Fed. Reg. at 39,123. As a result, EPA’s failure to recognize New Mexico’s modeling discretion and accept its modeling results exceeded its statutory authorization and was arbitrary and capricious.

b. *Use of Variable Ammonia Levels*

EPA also failed to afford New Mexico the proper discretion when it rejected New Mexico’s reliance on variable ammonia inputs in its visibility modeling. As

¹⁵ Moreover, as PNM points out, EPA’s explanations for rejecting newer versions of CALPUFF do not adequately respond to PNM’s comments on the issue. (PNM Brief at 46-47.)

part of its RH SIP, New Mexico used inputs in its computer model that were “state of the science” concerning ammonia levels, specifically by using variable background ammonia levels that reflected actual environmental conditions. Importantly, New Mexico’s analysis was based on the comprehensive work of Joseph S. Scire, who determined that these variable levels were appropriate and consistent with current modeling practice. (See PNM Brief at 47.) EPA, on the other hand, chose to employ a constant, theoretical background ammonia concentration level in its visibility analysis. 76 Fed. Reg. at 52,434.

In rejecting New Mexico’s decision to utilize variable background ammonia levels, EPA explained that the constant value it had selected for ammonia was “more appropriate to use as a background level,” 76 Fed. Reg. at 52,434, despite the fact that it did not take into account any actual and seasonal adjusted values, which resulted in overstated projected visibility improvements. EPA’s rejection, however, is contrary to its own guidance, which provides:

We do, however, understand and agree that States have flexibility developing a modeling protocol. Moreover, the diversity of the nation’s topography and climate, and variations in source configurations and operating characteristics, dictate against a strict modeling “cookbook.” A State may need to address site-specific circumstances at individual sources potentially affecting a specific Class I area. . . . We agree that we have only an advisory role in development of the protocol as the States better understand the BART-eligible source configurations and the geophysical and meteorological data affecting their particular Class I area(s).

70 Fed. Reg. at 39,126 (emphasis added).

In this instance, New Mexico did nothing more than exercise its allowable discretion when using the variable ammonia levels in its visibility modeling, which was entirely proper due to the actual conditions present at the area and seasonal variances. EPA's failure to afford this determination the proper deference exceeded its statutory authority and was arbitrary and capricious.

4. Summary

Because the Final Rule fails to afford the proper deference granted to the States under the CAA, as well as contradicts EPA's own guidance and actions taken in other states, it exceeds EPA's statutory authority, is arbitrary and capricious, and is contrary to law. "The importance of reasoned decision making in an agency action cannot be overemphasized. When an agency ... is vested with discretion to impose restrictions on an entity's freedom to conduct its business, the agency must exercise that discretion in a well-reasoned, consistent, and evenhanded manner.'" *Portland Cement Ass'n*, 665 F.3d at 188 (citation omitted).

For these reasons, and those presented in the briefs filed by PNM and NMED, the Court should set the Final Rule aside. *See* 42 U.S.C. § 7607(d)(9)(A), (C); *Am. Corn Growers Ass'n*, 291 F.3d at 8-9; *Portland Cement Ass'n*, 665 F.3d at 187; *Catawba Cnty.*, 571 F.3d at 51; *Gen. Chem. Corp.*, 817 F.2d at 846.

CONCLUSION

Based on the foregoing discussion and the arguments presented in the briefs of Petitioners NMED and PNM, PacifiCorp respectfully requests that this Court vacate EPA's Final Rule.

DATED this 22nd day of May, 2012.

/s/ E. Blaine Rawson

E. Blaine Rawson
Ray Quinney & Nebeker P.C.
36 South State Street, Suite 1400
Salt Lake City, UT 84111
brawson@rqn.com
(801) 532-1500

Michael G. Jenkins
Assistant General Counsel
PacifiCorp Energy
1407 North Temple, Suite 310
Salt Lake City, Utah 84116
michael.jenkins@pacificorp.com
(801) 220-2233

Attorneys for Amicus Curiae PacifiCorp

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of May, 2012, the foregoing **AMICUS CURIAE BRIEF OF PACIFICORP IN NOS. 11-9552, 11-9557, & 11-9567 IN SUPPORT OF PETITIONERS PUBLIC SERVICE COMPANY OF NEW MEXICO, SUSANA MARTINEZ AS GOVERNOR OF THE STATE OF NEW MEXICO, AND THE NEW MEXICO ENVIRONMENT DEPARTMENT** was served electronically on all counsel of record through the Court's CM/ECF system.

/s/ E. Blaine Rawson

E. Blaine Rawson
Ray Quinney & Nebeker P.C.
36 South State Street, Suite 1400
Salt Lake City, UT 84111
brawson@rqn.com
(801) 532-1500

Michael G. Jenkins
Assistant General Counsel
PacifiCorp Energy
1407 North Temple, Suite 310
Salt Lake City, Utah 84116
michael.jenkins@pacificorp.com
(801) 220-2233

Attorneys for Amicus Curiae PacifiCorp

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/s/ E. Blaine Rawson

E. Blaine Rawson
Ray Quinney & Nebeker P.C.
36 South State Street, Suite 1400
Salt Lake City, UT 84111
brawson@rqn.com
(801) 532-1500

Michael G. Jenkins
Assistant General Counsel
PacifiCorp Energy
1407 North Temple, Suite 310
Salt Lake City, Utah 84116
michael.jenkins@pacificorp.com
(801) 220-2233

Attorneys for Amicus Curiae PacifiCorp

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/s/ E. Blaine Rawson

E. Blaine Rawson
Ray Quinney & Nebeker P.C.
36 South State Street, Suite 1400
Salt Lake City, UT 84111
brawson@rqn.com
(801) 532-1500

Michael G. Jenkins
Assistant General Counsel
PacifiCorp Energy
1407 North Temple, Suite 310
Salt Lake City, Utah 84116
michael.jenkins@pacificorp.com
(801) 220-2233

Attorneys for Amicus Curiae PacifiCorp