Nos. 11-9552, 11-9557, and 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

BRIEF OF AMICUS CURIAE UTILITY AIR REGULATORY GROUP IN SUPPORT OF PETITIONERS PUBLIC SERVICE COMPANY OF NEW MEXICO, GOVERNOR SUSANA MARTINEZ OF THE STATE OF NEW MEXICO, AND THE NEW MEXICO ENVIRONMENT DEPARTMENT

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CORPORATE DISCLOSURE STATEMENT

The Utility Air Regulatory Group ("UARG") is a not-for-profit association of individual electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

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GLOSSARY

Act	Clean Air Act
Agency	U.S. Environmental Protection Agency
BART	Best Available Retrofit Technology
CAA	Clean Air Act
EPA	U.S. Environmental Protection Agency
FIP(s)	Federal Implementation Plan(s)
lb/mmBTU	Pounds Per Million British Thermal Units
NAAQS	National Ambient Air Quality Standards
NMED	New Mexico Environment Department
NOx	Nitrogen Oxides
$PM_{2.5}$	Fine Particulate Matter
PNM	Public Service Company of New Mexico
SIP(s)	State Implementation Plan(s)
UARG	Utility Air Regulatory Group

STATEMENT AS TO THE IDENTITY OF THE AMICUS, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE

This brief is filed on behalf of the Utility Air Regulatory Group ("UARG"), a voluntary, not-for-profit, unincorporated association of individual electric generating companies and electric utilities located throughout the country, including Public Service Company of New Mexico ("PNM") and other member utilities doing business in states within the Tenth Circuit, and of national trade associations. The electric utilities and other electric generating companies that are members of UARG own and operate power plants and other facilities that generate electricity for residential, commercial, industrial, and institutional customers. UARG's purpose is to participate on behalf of its members collectively in rulemakings and other Clean Air Act ("CAA" or "Act") proceedings that affect the interests of electric generators, and in litigation arising from those proceedings.

Pursuant to sections 110, 169A, and 169B of the CAA, 42 U.S.C. §§ 7410, 7491, 7492, states must adopt, after public notice and hearing, and submit for approval by the U.S. Environmental Protection Agency ("EPA" or "Agency"), state implementations plans ("SIPs") that address the CAA's visibility provisions. In the event that a state fails to submit a plan that is adequate under the terms of the CAA, EPA may be authorized to promulgate a federal implementation plan ("FIP") to take the place of a state's SIP. For the State of New Mexico, EPA published a proposed FIP purporting to address parts of the Act's regional haze and

other visibility provisions, ignored a submitted and pending complete SIP that implements those requirements, and promulgated a final FIP that imposes unjustified and exceptionally stringent and expensive regulatory burdens on the New Mexico source that is the subject of the FIP – the San Juan Generating Station. 76 Fed. Reg. 52,388 (Aug. 22, 2011).

Members of UARG are now, or will be, subject to regulation under regional haze SIPs or FIPs. This case raises legal issues that bear on EPA's authority to disapprove SIPs and to promulgate FIPs pursuant to the CAA in general and under the Act's visibility provisions in particular. A decision on the merits in favor of EPA would create the prospect that the interests of UARG members doing business in states within the Tenth Circuit, and potentially other states, could be adversely affected. UARG thus has an interest in the resolution of this litigation.

STATEMENT AS TO AUTHORSHIP AND FUNDING OF THE BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), undersigned counsel hereby represent the following:

(i) None of the counsel for the parties in this case authored this brief in whole or in part.

(ii) UARG, through its general funds obtained through member dues, funded the preparation and submittal of this brief. Neither any party nor any party's counsel contributed money to fund the preparation or submittal of this brief.

(iii) No other person contributed money that was intended to fund the preparation or submittal of this brief.

STATEMENT OF ISSUES

Whether EPA can justify a FIP to require the San Juan Generating Station to install best available retrofit technology ("BART") to control emissions of nitrogen oxides ("NOx") on the grounds that a consent decree compelled EPA to take action under the CAA's interstate transport visibility provision.

ARGUMENT

This brief addresses the relationship between a state's obligation, under the CAA, to develop a complete SIP to address regional haze and a state's obligation, under section 110(a)(2)(D)(i)(II) of the CAA, 42 U.S.C. § 7410(a)(2)(D)(i)(II), to include in its SIP adequate provisions to address emissions that "interfere with measures required to be included" by the CAA in the SIP of another state "to protect visibility." Briefly stated, a regional haze SIP for a given state is to include the measures that address emissions that, if left unaddressed, would interfere with required measures in another state's regional haze SIP. Until regional haze SIPs are in place throughout a region, a state in that region is under no obligation to limit emissions that might affect visibility in "Class I areas" in another state. In this case, as discussed in the brief of Petitioner PNM and the brief of Petitioners Susana Martinez, Governor of the State of New Mexico ("Governor Martinez"),

and the New Mexico Environment Department ("NMED"), EPA disapproved a 2007 New Mexico SIP revision that was consistent with New Mexico's interstate visibility obligations then and now and, at the same time, justified promulgation of a partial regional haze FIP that was premised upon that unlawful disapproval.

The relevant EPA guidance to the states confirmed what the CAA interstate provision says: until visibility "measures" (in this case, regional haze measures) are included in an EPA-approved SIP for a downwind state, all that is required is that the upwind state's SIP be revised to include a provision noting that future action will be taken in conformance with EPA's regulatory requirements for regional haze SIPs.[1] New Mexico submitted a SIP in 2007 that satisfied the 2006 Guidance and the requirements of section 110(a)(2)(D)(i)(II) of the CAA, 42 U.S.C. § 7410(a)(2)(D)(i)(II), for visibility. New Mexico then submitted a complete regional haze SIP in June 2011, pursuant to sections 169A and 169B of the CAA, *id.* §§ 7491, 7492, and EPA's regulations governing regional haze SIPs. EPA responded to these submittals in August 2011 by disapproving New Mexico's 2007 SIP, disregarding the complete 2011 regional haze SIP, and promulgating a partial regional haze FIP that did not contain the interstate measures required under

[1] EPA, Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards, EPA-R06-OAR-2010-0845-0005 (Aug. 15, 2006), *available at* http://www.epa.gov/ttncaaa1/t1/memoranda/section110a2di_sip_guidance.pdf (the "2006 Guidance").

the CAA and EPA's own regulations. These actions were improper. Instead, EPA was obligated to approve New Mexico's 2007 SIP and to make a determination whether New Mexico's 2011 SIP contained the interstate measures required for approval of a regional haze SIP.

As discussed in the briefs of Petitioner PNM, PNM Br. at 3-18, and Petitioners Governor Martinez and NMED, Gov. Martinez/NMED Br. at 3, 23-28, EPA imposed a NOx emission limit of 0.05 pounds per million British thermal units ("lb/mmBtu") on the four units located at the San Juan Generating Station in the FIP that EPA promulgated in August 2011 and that is at issue in this case. In taking that action at that time, EPA stated that it was satisfying the terms of a consent decree that required action on an implementation plan for New Mexico under section 110(a)(2)(D)(i)(II) of the CAA, 42 U.S.C. § 7410(a)(2)(D)(i)(II).[2] That provision addresses "interstate transport" of pollutants regulated under the Act, *i.e.*, emissions that originate in one state but that impair air quality in another state. Section 110(a)(2)(D)(i)(II) states, in relevant part, that each state's SIP must "contain adequate provisions" that:

[2] 76 Fed. Reg. at 52,388. EPA was subject to an August 5, 2011 consent decree deadline to act on New Mexico's interstate transport SIP. EPA effectively applied that deadline to its authority to take action under the regional haze BART provisions of the Act, codified at CAA sections 169A and 169B, 42 U.S.C. §§ 7491, 7492, as well. *See* Notice of Stipulated Extension to Consent Decree Deadline, *WildEarth Guardians v. Jackson,* No. 09-cv-02453 (N.D. Cal. Nov. 5, 2010); Notice of Stipulated Extensions to Consent Decree Deadlines, *WildEarth Guardians v. Jackson,* No. 09-cv-02453 (N.D. Cal. Apr. 28, 2011).

> (i) prohibit[] ... any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will–
>
> ....
>
> (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C [of Title I of the CAA] ... to protect visibility.

Id. § 7410(a)(2)(D)(i)(II). The provisions of Part C of Title I of the CAA that "protect visibility" are sections 169A and 169B, *id.* §§ 7491, 7492.

Sections 169A and 169B of the Act direct EPA to promulgate regulations that require states to include in SIPs certain types of "measures" as may be needed to achieve "reasonable progress" toward meeting a national goal of the "prevention of any future, and … remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution." *Id.* § 7491(a)(1), (b)(2). Required measures include, among other things: (1) a requirement that certain existing sources "procure, install, and operate" BART, *id.* § 7491(b)(2)(A); (2) determination of "reasonable progress" goals to ensure visibility improvement in Class I areas over time, *id.* § 7491(b)(2); and (3) the establishment of a "long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal," *id.* § 7491(b)(2)(B).

The visibility transport provisions of section 110(a)(2)(D)(i)(II) of the CAA and the visibility protection provisions of CAA section 169A and 169B are together implemented through EPA's visibility regulations, codified at 40 C.F.R.

Part 51, Subpart P (40 C.F.R. §§ 51.300-51.309).[3] These EPA visibility regulations establish, among other things, procedures and requirements that states must meet in developing SIPs to satisfy the regional haze provisions of the Act.

These regulations do not address only intrastate contributions to visibility impairment but also require that interstate contributions to visibility impairment be taken into account and integrated with the various SIP provisions that define each state's regional haze SIP obligations. For instance, in developing reasonable progress goals for Class I areas located within its borders, a state "must consult with those States which may reasonably be anticipated to cause or contribute to visibility impairment in the … Class I … area." 40 C.F.R. § 51.308(d)(1)(iv). After interstate consultation regarding reasonable progress goals, if "the State cannot agree with another such State or group of States that a goal provides for reasonable progress, the State must describe in its submittal the actions taken to resolve the disagreement." *Id.* The rules provide further that, "[i]n reviewing the State's implementation plan submittal, the Administrator will take this information into account in determining whether the State's goal for visibility improvement provides for reasonable progress towards natural visibility conditions." *Id*.

Similar interstate consultation requirements apply to the provisions of EPA's regulations that address state development of long-term strategies for addressing

[3] Subpart P cites CAA sections 110 and 169A (42 U.S.C. §§ 7410, 7491), *inter alia*, as sources of authority for these regulations.

regional haze. EPA's regional haze regulations require interstate consultation in developing such a strategy where the state preparing the SIP "has emissions that are reasonably anticipated to contribute to visibility impairment in any mandatory Class I Federal area located in another State or States." *Id.* § 51.308(d)(3)(i). Likewise, the regulations require that a state preparing the SIP "must consult with any other State having emissions that are reasonably anticipated to contribute to visibility impairment in any mandatory Class I Federal area within the State." *Id.* Moreover, under EPA's rules addressing the long-term strategy element of regional haze SIPs:

> Where other States cause or contribute to impairment in a mandatory Class I Federal area, the State must demonstrate that it has included in its implementation plan all measures necessary to obtain its share of the emission reductions needed to meet the progress goal for the area. If the State has participated in a regional planning process, the State must ensure it has included all measures needed to achieve its apportionment of emission reduction obligations agreed upon through that process.

Id. § 51.308(d)(3)(ii). The state must, in addition, "document the technical basis, including modeling, monitoring and emissions information, on which the State is relying to determine its apportionment of emission reduction obligations." *Id.* § 51.308(d)(3)(iii).

These and other provisions of EPA's regional haze regulations[4] demonstrate that each state is to develop a comprehensive regional haze SIP to protect visibility that incorporates and satisfies interstate transport requirements. EPA reflected that conclusion in its 2006 Guidance. In the absence of EPA-approved regional haze SIPs, EPA determined that "it is not possible at this time to assess whether there is any interference with measures in the applicable SIP for another State designed to 'protect visibility.'" 2006 Guidance at 9-10. In compliance with the 2006 Guidance and EPA's visibility regulations, in September 2007, New Mexico submitted a SIP addressing the non-visibility components of the CAA's interstate transport provision[5] that also indicated that New Mexico would address any CAA section 110(a)(2)(D)(i)(II) visibility obligations through its regional haze SIP.

New Mexico followed that SIP submittal by developing a comprehensive regional haze SIP that incorporated all of the elements required of such SIPs under EPA's visibility regulations. New Mexico submitted that SIP to EPA in June

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[4] *See, e.g.*, 40 C.F.R. § 51.308(d)(4)(ii), (iii), (g)(6), (h)(2).

[5] The primary focus of section 110(a)(2)(D)(i) of the Act, 42 U.S.C. § 7410(a)(2)(D)(i), is ensuring that emissions from one state do not interfere with another state's ability to attain and maintain compliance with the national ambient air quality standards ("NAAQS"). NAAQS are intended to protect public health and welfare by establishing the maximum acceptable concentrations of designated air pollutants in the ambient air. *Id.* § 7409. Accordingly, the interstate transport provision requires each state to review and, if necessary, revise its SIP to prevent emissions from interfering with another state's ability to attain and maintain NAAQS, *id.* § 7410(a)(2)(D)(i)(I), and "to prevent significant deterioration of air quality" in areas that already meet the NAAQS, *id.* § 7410(a)(2)(D)(i)(II).

2011. Instead of acting on that SIP, EPA chose to claim that it could discern an independent interstate transport limit for NOx emissions for the San Juan Generating Station, outside the SIP development process that its own rules describe. On that basis, EPA disapproved the 2007 SIP, promulgated an "interstate transport" FIP, and used a consent decree deadline applicable only to interstate transport as an excuse simultaneously to impose a partial regional haze FIP implementing only the BART provision of the rule, only for NOx emissions at the San Juan Generating Station.

In sum, EPA chose not to act on a comprehensive visibility plan that fully implements the CAA's regional haze requirements, including the interstate transport requirements of the regional haze regulations. Instead, EPA imposed a partial FIP in order to advance its policy objective, in derogation of the authority of the State of New Mexico. That action was unlawful and must be set aside.

CONCLUSION

For the foregoing reasons and the reasons presented in the briefs of Petitioner PNM and Petitioners Governor Martinez and NMED, the Court should vacate EPA's rule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that this brief contains 2,404 words as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the 7,000-word limit set by Fed. R. App. P. 29(d) and 32(a)(7)(B).

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

The undersigned certifies that:

(1) All required privacy redactions have been made;

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2012, the foregoing corrected version of the Brief of Amicus Curiae Utility Air Regulatory Group in Support of Petitioners Public Service Company of New Mexico, Governor Susana Martinez 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.

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