

**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 PETITIONER IN NO. 11-9557  
PUBLIC SERVICE COMPANY OF NEW MEXICO  
(DEFERRED APPENDIX APPEAL)

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April 30, 2012

**RULE 26.1 DISCLOSURE STATEMENT**  
**OF PUBLIC SERVICE COMPANY OF NEW MEXICO**

Pursuant to Fed. R. App. P. 26.1, Petitioner Public Service Company of New Mexico submits the following statement:

Public Service Company of New Mexico is a wholly-owned subsidiary of its parent corporation, PNM Resources, Inc. No publicly held corporation other than PNM Resources, Inc., owns 10% or more of the stock of Public Service Company of New Mexico.

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**STATEMENT AS TO RELATED CASES**

There are no prior appeals, and there are no pending appeals related to Nos. 11-9552, 11-9557, and 11-9567.

**GLOSSARY OF TERMS**

<b>Act:</b>	Clean Air Act
<b>B&amp;V:</b>	Black & Veatch
<b>BART:</b>	Best Available Retrofit Technology
<b>CAA:</b>	Clean Air Act
<b>Cost Manual:</b>	EPA Air Pollution Control Cost Manual, Sixth Edition, EPA/452/B-02-001, Jan. 2002
<b>Final Rule:</b>	EPA, "Approval and Promulgation of Implementation Plans; New Mexico; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determination, Final Rule." 76 Fed. Reg. 52,388 (Aug. 22, 2011)
<b>FIP:</b>	Federal Implementation Plan
<b>FOP:</b>	Federal Operating Permit
<b>Interstate Transport Guidance:</b>	"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 <sub>2.5</sub> National Ambient Air Quality Standards"
<b>JA:</b>	Joint Appendix
<b>lb/mmBtu:</b>	Pound Per Million British Thermal Units
<b>MW:</b>	Megawatts
<b>NAAQS:</b>	National Ambient Air Quality Standards
<b>NMED:</b>	New Mexico Environment Department

**NO<sub>x</sub>:** Nitrogen Oxides

**Part C:** Part C of Title I of the Clean Air Act, 42 U.S.C. § 7470-7492

**PM:** Particulate Matter

**PM<sub>2.5</sub>:** Fine Particulate Matter

**PNM:** Public Service Company of New Mexico

**PNM Comments:** Comments Prepared by Public Service Company of New Mexico, EPA Regional 6 Draft Interstate Transport FIP and NO<sub>x</sub> BART Determination for the San Juan Generating Station

**PNM Stay Motion:** Motion of Petitioner Public Service Company of New Mexico for Stay of Agency Rule, Public Service Company of New Mexico v/ EPA, No. 11-9557 (10th Cir., Nov. 25, 2012)

**Proposed Rule:** EPA “Approval and Promulgation of Implementation Plans; New Mexico; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determination, Proposed Rule,” 76 Fed. Reg. 491, 494 (Jan. 5, 2011)

**RMB:** RMB Consulting & Research, Inc.

**S&L:** Sargent & Lundy

**San Juan:** San Juan Generation Station

**SCR:** Selective Catalytic Reduction

**SIP:** State Implementation Plan

**SJGS:** San Juan Generation Station

**SNCR:** Selective Noncatalytic Reduction

**SO<sub>2</sub>:** Sulfur Dioxide

**SOP:** State Operating Permit

**SSM:** Start-up, Shut-down, and Malfunction

**WRAP:** Western Regional Air Partnership

**JURISDICTIONAL STATEMENT**

The following final action of the United States Environmental Protection Agency (“EPA” or “Agency”) is under review in this case: “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”) (Joint Appendix (“JA”) \_\_). Public Service Company of New Mexico (“PNM”) filed its petition for review of the Final Rule on September 16, 2011, within the 60-day period following Federal Register publication of the Final Rule, as prescribed by section 307(b)(1) of the Clean Air Act (“CAA” or “Act”), 42 U.S.C. § 7607(b)(1). Because the Final Rule applies only to New Mexico, this Court is “the United States Court of Appeals for the appropriate circuit” within the meaning of section 307(b)(1) that has jurisdiction. *Id.*

EPA’s Final Rule imposes obligations on PNM to further control emissions at San Juan Generating Station (“San Juan” or “SJGS”), a facility it operates and in which it has an ownership interest. PNM therefore has standing as a result of concrete and particularized injury that is fairly traceable to the Final Rule and as to which there is a substantial probability of redress by a decision that holds that rule invalid. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

**STATEMENT OF ISSUES**

1. Whether EPA's promulgation of a federal implementation plan ("FIP") for New Mexico imposing "best available retrofit technology" ("BART") and "interstate transport" requirements for SJGS while New Mexico's state implementation plans ("SIPs") were awaiting EPA review and approval violated the CAA's provisions giving states the primary regulatory authority to implement regional haze requirements and goals.
2. Whether EPA violated the CAA and acted arbitrarily and capriciously or otherwise contrary to law by making a BART determination for SJGS under EPA's CAA regional haze rules that failed properly to take the statutory BART factors – including costs and visibility impacts – into account and that failed to justify departure from the presumptive BART emission limit established by EPA in a binding legislative rule.
3. Whether EPA acted arbitrarily and capriciously or otherwise contrary to law by imposing on SJGS an interstate transport FIP with an emission limit that is far more stringent than EPA had announced was necessary to address New Mexico's interstate transport obligations under the CAA, and by imposing a FIP despite New Mexico's submittal to EPA of fully approvable SIP revisions, pending before EPA, that address the state's obligations under the CAA's interstate transport provision.

**STATUTES AND REGULATIONS**

Pertinent statutes and regulations are reproduced in the Statutory and Regulatory Addendum to this brief.

**STATEMENT OF THE CASE**

PNM adopts and incorporates by reference the Statement of the Case in the Brief of Petitioners Governor Susana Martinez and the New Mexico Environment Department (“NMED”). EPA’s Final Rule imposes a 0.05 pound per million British thermal units (“lb/mmBtu”) emission limit for nitrogen oxides (“NO<sub>x</sub>”) at SJGS, an electric generating facility operated and partly owned by PNM. EPA imposed this emission limit in the Final Rule through a FIP that purports to implement the CAA’s interstate transport provisions and one aspect (BART) of the Act’s regional haze provisions. EPA took this action even though the State of New Mexico had prepared and submitted to EPA for review and approval its own comprehensive regional haze SIP, which established a different BART NO<sub>x</sub> emission limit for SJGS, and an interstate transport SIP that imposed the same limit as New Mexico’s regional haze SIP. EPA promulgated the Final Rule without acting on those SIPs.

PNM challenges EPA’s promulgation of the Final Rule as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” pursuant to section 307(d)(9)(A) of the CAA, 42 U.S.C. § 7607(d)(9)(A).

## STATEMENT OF FACTS

### **I. San Juan Generating Station**

This litigation involves the interaction of several key provisions of the CAA and their application to SJGS and New Mexico. SJGS is a four-unit, coal-fired electric generating facility with a generating capacity of 1,800 gross megawatts (“MW”) in Waterflow, New Mexico.<sup>1</sup> PNM is the operator of SJGS and holds an approximate 46% ownership interest in it.

For nearly 40 years, SJGS has provided reliable and affordable energy to electricity consumers in the Southwest. SJGS supplies electricity to over two million consumers in New Mexico and other states and is a critical source of electricity in New Mexico, as there are no readily available baseload generation alternatives for PNM’s customers.

During a four-year period from 2006 through 2009, SJGS completed significant upgrades of its extensive equipment to control air emissions, including NOx (the emissions that are the principal subject of the Final Rule). In that period alone, PNM and San Juan’s other owners invested more than \$320 million in state-of-the-art environmental control equipment, including newly installed fabric-filter

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<sup>1</sup> This description of SJGS and its ownership is drawn from PNM’s comments in EPA’s rulemaking. Comments Prepared by Public Service Company of New Mexico, EPA Region 6 Draft Interstate Transport FIP and NOx BART Determination for the San Juan Generating Station, EPA-R06-OAR-2010-0846-0093 at 1-2 (Apr. 4, 2011) (JA \_\_ - \_\_) (“PNM Comments”).

baghouses to achieve additional control of particulate matter (“PM”) emissions, “low-NOx” combustion controls, and improvements to the flue-gas-desulfurization “scrubbers” for each unit. The upgrades dramatically reduced the plant’s emissions of NOx (by 44%), sulfur dioxide (“SO<sub>2</sub>”) (by 71%), and PM (by 72% percent), and SJGS currently achieves high removal efficiencies for all these emissions. In addition, SJGS was one of the first power plants in the nation to install mercury-removal equipment and is achieving a 99% mercury-emissions removal rate.

## **II. Statutory and Regulatory Background**

EPA’s Final Rule requires installation, or “retrofit,” of additional NOx emission control technology at SJGS – selective catalytic reduction (“SCR”) – and imposes a NOx emission rate limit of 0.05 lb/mmBtu, one of the most stringent NOx limits for a coal-fired electric generating facility in the nation, particularly for a retrofit facility, especially as this limit must be achieved at all times, including periods of start-up, shut-down, and malfunction (“SSM”) conditions. 76 Fed. Reg. at 52,404-06. EPA’s Final Rule based these requirements and its asserted authority to impose them on EPA’s interpretation and application of several CAA provisions: (1) sections 169A and 169B, 42 U.S.C. §§ 7491, 7492, the provisions that address regional haze and that, as discussed below, include the BART requirement; (2) section 110(a)(2)(D)(i)(II), 42 U.S.C. § 7410(a)(2)(D)(i)(II), a

provision that addresses interstate transport of potentially visibility-impairing pollutants; and (3) sections 110(k) and 110(c), 42 U.S.C. § 7410(k), (c), the provisions that, respectively, govern EPA's obligation to review and approve SIPs for implementing the CAA (section 110(k)), and establish EPA's narrowly circumscribed authority to issue its own plans – FIPs – to implement the CAA where states do not submit approvable SIPs (section 110(c)).

The CAA visibility-protection provisions require “reasonable progress” toward a “national goal” of eliminating visibility impairment that is caused by manmade air pollution and that occurs in statutorily protected “Class I areas,” *i.e.*, specified national parks and wilderness areas. CAA § 169A(a)(1), (4), (b)(2), 42 U.S.C. § 7491(a)(1), (4), (b)(2). One statutory and regulatory mechanism for achieving reasonable progress toward this goal is BART. Under the BART provisions of the CAA and EPA rules, states determine – by applying a five-factor analysis<sup>2</sup> on a case-by-case, site-specific basis – emission limits reflecting BART for certain individual facilities, such as SJGS, that emit air pollutants that may reasonably be anticipated to cause or contribute to visibility impairment in Class I areas. CAA § 169A(g)(2), (7), 42 U.S.C. § 7491(g)(2), (7). As EPA has

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<sup>2</sup> The five BART factors are: compliance costs; energy and non-air quality environmental impacts of compliance; the source's existing pollution controls; the source's remaining useful life; and the degree of visibility improvement expected from BART. CAA § 169A(g)(2), 42 U.S.C. § 7491(g)(2).

recognized, “[s]tates are free to determine the weight and significance to be assigned to each [BART] factor.” 77 Fed. Reg. 24,768, 24,774 (Apr. 25, 2012).

EPA’s BART Guidelines, 70 Fed. Reg. 39,104, 39,156-72 (July 6, 2005) (codified at 40 C.F.R. Part 51 Appendix Y) (JA\_\_ - \_\_), were adopted following notice-and-comment rulemaking under CAA section 307(d), 42 U.S.C. § 7607(d). The Guidelines describe how BART analyses should be undertaken, specify the categories of information that should be considered, and establish specific presumptive BART limits for emissions of NO<sub>x</sub> and SO<sub>2</sub> from various types of electric generating units, including those at SJGS. The presumptive NO<sub>x</sub> limit deemed applicable to the type of units at SJGS is 0.23 lb/mmBtu, *id.* at 39,135, 39,172 (JA\_\_, \_\_),<sup>3</sup> more than four times higher than the limit EPA’s Final Rule imposed on SJGS. This presumptive limit is based on “combustion controls” and may also be met using selective noncatalytic reduction (“SNCR”) technology; both combustion controls and SNCR are much less expensive than SCR, a post-combustion “add-on” technology that is significantly more complex than the other

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<sup>3</sup> San Juan’s units are “dry-bottom wall-fired” units. EPA’s BART Guidelines assign that type of unit a presumptive NO<sub>x</sub> BART limit of 0.23 lb/mmBtu if the unit uses sub-bituminous coal and 0.39 lb/mmBtu if the unit uses bituminous coal. 70 Fed. Reg. at 39,135, 39,172 (JA\_\_, \_\_). New Mexico has determined that the presumptive limit applicable to SJGS is 0.23 lb/mmBtu. *Cf.* PNM Comments at 13-14 (JA\_\_ - \_\_) (commenting that the coal used at SJGS “does not fall neatly into either the bituminous or sub-bituminous categories” and “behaves more like bituminous coal with respect to its NO<sub>x</sub> emission characteristics”).

NOx control technology options and that is required by EPA's Final Rule. In promulgating the BART Guidelines, EPA rejected SCR as the "presumptive" BART technology for all boiler types, including those at SJGS, except for "cyclone" boilers. *See id.* at 39,134-35, 39,171-72 (JA \_\_ - \_\_, \_\_ - \_\_).

After considering and balancing the BART factors, states submit BART determinations to EPA for approval as a part of their regional haze SIPs. CAA § 169A(b)(2), 42 U.S.C. § 7491(b)(2); CAA § 110(a), (k), 42 U.S.C. § 7410(a), (k); *see Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 5-9 (D.C. Cir. 2002). Only if a state does not meet its Regional Haze SIP-submittal obligations, including establishment of BART, may EPA proceed to set BART limits by promulgating a FIP. CAA § 169A(b)(2); CAA § 110(c). Section 110(c) provides that the EPA Administrator shall promulgate a FIP within two years after she either "finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria [for SIPs] established [by EPA] under subsection (k)(1)(A) of this section," CAA § 110(k)(1)(B), 42 U.S.C. § 7410(k)(1)(A), or "disapproves a State implementation plan submission in whole or in part." CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1). If the state corrects any deficiency, and the Administrator approves the state's plan before the Administrator promulgates a FIP, EPA's FIP authority expires. CAA § (k)(1)(B), 42 U.S.C. § 6410(k)(1)(B).

Section 110(a)(2)(D)(i)(II) establishes a separate requirement for SIPs concerning visibility. That provision states, in relevant part, that “[e]ach implementation plan submitted by a State ... shall”

(D) contain adequate provisions—

(i) prohibiting ... 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<sup>[4]</sup> ... to *protect visibility*.

42 U.S.C. § 7410(a)(2)(D)(i)(II) (emphases added).

In a 2006 interstate transport guidance document,<sup>5</sup> EPA said that its 1997 promulgation of national ambient air quality standards (“NAAQS”) under CAA section 109, 42 U.S.C. § 7409, for ozone and fine particulate matter (“PM<sub>2.5</sub>”) had given rise to an obligation by each state to develop and submit an “Interstate Transport” SIP to implement, *inter alia*, the visibility-related clause in § 110(a)(2)(D)(i)(II) with respect to emissions in that state. EPA’s Interstate Transport Guidance interprets that provision. EPA explains that, although states

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<sup>4</sup> “Part C” is Part C of Title I of the CAA, 42 U.S.C. § 7470-7492, which includes the regional haze provisions.

<sup>5</sup> 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<sub>2.5</sub> National Ambient Air Quality Standards,” EPA-R06-OAR-2010-0845-0005 (Aug. 15, 2006) (the “Interstate Transport Guidance”) (JA\_\_).

were “under an obligation to submit SIPs that contain measures to address regional haze,” these regional haze SIP submittals were not due until December 17, 2007, and, until these SIPs were in place, it would be “premature to determine whether or not State SIPs for ... ozone or PM<sub>2.5</sub> contain adequate provisions to prohibit emissions that interfere with measures in other States’ SIPs designed to address regional haze.” Interstate Transport Guidance at 9 (JA\_\_).

EPA reasoned that one could not determine whether emissions from within a state “*will .... interfere with measures required to be included*” in the SIP “for any other State .... to protect visibility,” CAA § 110(a)(2)(D)(i)(II) (emphases added), before such “required” SIP measures have been adopted by states and approved by EPA. Consequently, EPA directed that states could properly “make a simple SIP submission confirming that it is not possible at this time to assess whether there is any interference with measures in the applicable SIP” of any other state that is “designed to ‘protect visibility.’” Interstate Transport Guidance at 9-10 (JA\_\_ - \_\_).

Thus, until states neighboring New Mexico had EPA-approved SIPs in place that include required regional haze measures – and no state that might be affected by SJGS emissions had such a SIP when EPA promulgated the Final Rule – no new emission limits for SJGS to satisfy the “interfere[nce] with measures” requirement in section 110(a)(2)(D)(i)(II) could be determined.

In September 2007, New Mexico submitted a SIP revision that conformed to EPA's Interstate Transport Guidance interpreting CAA section 110(a)(2)(D)(i)(II).<sup>6</sup> Pursuant to CAA section 110(k)(1), EPA was required to take final action on New Mexico's 2007 Interstate Transport SIP – *i.e.*, approve it or disapprove it – within 18 months, *i.e.*, by March 17, 2009.<sup>7</sup> That deadline expired without any EPA action.

In 2009, WildEarth Guardians sued the EPA Administrator under CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2), to compel EPA action on pending Interstate Transport SIPs (but not on Regional Haze SIPs) for New Mexico and six other states. *WildEarth Guardians v. Jackson*, No. 09-cv-02453 (N.D. Cal. June 3, 2009). A consent decree (JA \_\_) in that case required (after extensions to the decree's original deadlines) proposed EPA action to approve or disapprove New Mexico's 2007 Interstate Transport SIP by December 22, 2010, and final EPA

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<sup>6</sup> New Mexico State Interstate Transport SIP to Satisfy the Requirements of Clean Air Act Section 110(a)(2)(D)(i) for the 1997 8-hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards, EPA-R06-OAR-2010-0846-0002 (Sept. 17, 2007) (“2007 Interstate Transport SIP”) (JA \_\_).

<sup>7</sup> CAA § 110(k) requires that EPA take final action on a submitted SIP revision within 12 months of determining the submittal is “complete,” 42 U.S.C. § 7410(k)(2), and provides that a SIP revision “shall ... be deemed by operation of law” to be complete six months after EPA receives it *unless* EPA by then has expressly made a determination that the SIP revision is incomplete, CAA § 7410(k)(1)(B). Therefore, absent such an express finding, EPA must take final action to approve or disapprove a SIP revision no later than 18 months after receiving it.

approval or disapproval by August 5, 2011. *WildEarth Guardians v. Jackson*, No. 09-cv-02453, Notice of Stipulated Extension to Consent Decree Deadline (N.D. Cal. Nov. 5, 2010), ECF No. 29 (JA\_\_); *WildEarth Guardians v. Jackson*, No. 09-cv-02453, Notice of Stipulated Extensions to Consent Decree Deadlines (N.D. Cal. Apr. 28, 2011), ECF No. 33 (JA\_\_). On December 20, 2010, EPA signed a proposed rule to disapprove the 2007 Interstate Transport SIP, 76 Fed. Reg. 491, 506 (Jan. 5, 2011) (JA\_\_, \_\_), and, in its August 2011 Final Rule under review here, EPA took final action disapproving that SIP.

In addition to calling for Interstate Transport SIPs that address visibility, the CAA and EPA's implementing regulations required states to develop regional Haze SIPs that would include BART emission limits for sources subject to BART, and to submit those regional haze SIPs to EPA for review by December 17, 2007. 40 C.F.R. § 51.308(b) (submission date); § 51.308(d), (e) (requirements for regional haze SIPs). On January 15, 2009, EPA published a finding that numerous states, including New Mexico, failed to submit regional haze SIPs for EPA review and approval by the December 2007 deadline. 74 Fed. Reg. 2392 (Jan. 15, 2009). That EPA finding noted that, pursuant to CAA section 110(c), the deadline for EPA promulgation of regional haze FIPs for those states became January 15, 2011. *Id.* at 2392-93.

On June 29, 2011, New Mexico submitted to EPA (and on July 5, 2011, EPA received) the state's Regional Haze SIP, (JA\_\_-\_\_), which addresses not only NO<sub>x</sub> BART for SJGS but also all other elements required to be included in a regional haze plan. New Mexico submitted this complete Regional Haze SIP to EPA after EPA's January 2011 BART FIP proposed rule for NO<sub>x</sub> emissions from SJGS, but before EPA's August 2011 final action on that proposed rule. New Mexico's Regional Haze SIP establishes a 0.23 lb/mmBtu NO<sub>x</sub> emission rate limit for BART for San Juan's units, which, as noted above, is EPA's presumptive BART limit for those units. New Mexico based the Regional Haze SIP's BART NO<sub>x</sub> limit for SJGS on application of SNCR. Unlike New Mexico's Regional Haze SIP, EPA's rulemaking at issue here addressed only BART for San Juan's NO<sub>x</sub> emissions and addressing neither BART for any other pollutant nor any of the other elements required to be in a Regional Haze SIP. Indeed, EPA expressly deferred any action on BART for other pollutants and on all other elements that a Regional Haze plan must address. *See* 76 Fed. Reg. at 498, 504 (JA\_\_, \_\_); 76 Fed. Reg. at 52,389 (JA\_\_).

### **III. EPA's Final Rule**

Rather than engage the merits of New Mexico's Regional Haze SIP, EPA in the Final Rule disapproved the 2007 Interstate Transport SIP and promulgated its FIP for SJGS NO<sub>x</sub> emissions, establishing (as it had proposed to do) its

exceedingly stringent 0.05 lb/mmBtu limit based on SCR. EPA made this decision notwithstanding the fact that it had previously rejected in its BART Guidelines any presumption in favor of SCR for electric generating units of the type at San Juan. *See* 70 Fed. Reg. at 39,134-36, 39,171-72 (JA \_\_ - \_\_, \_\_ - \_\_).

In reaching its NO<sub>x</sub> BART determination for SJGS, EPA rejected commenters' arguments challenging EPA's consideration of the BART factors. In taking final action, EPA refused to consider significant portions of PNM's cost assessment for retrofitting SCR at SJGS, concluding that certain costs were disallowed under EPA's Air Pollution Control Cost Manual<sup>8</sup> ("Cost Manual"), unless significant "documentation" supported departures from the Cost Manual's general assumptions. 76 Fed. Reg. at 52,392 (JA \_\_). In addition, EPA rejected key aspects of PNM's visibility modeling, including PNM's use of actual measured background ammonia concentrations rather than assumed concentrations. PNM's use of the most recent version of the CALPUFF air modeling program was also rejected by EPA, notwithstanding comments showing that the older CALPUFF version used by EPA overpredicted potential visibility improvements from use of SCR emission controls. *Id.* at 52,426-27 (JA \_\_ - \_\_).

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<sup>8</sup> EPA Air Pollution Control Cost Manual, EPA/452/B-02-001, (Sixth Edition Jan. 2002) (JA \_\_ - \_\_).

Rather than perform a complete BART analysis of its own, EPA “drew heavily upon the NO<sub>x</sub> BART portion” of an earlier NMED *draft* BART evaluation that had been conducted to support a draft SIP that New Mexico withdrew from further state consideration in December 2010 – a draft that was never adopted by New Mexico and never submitted to EPA for approval. 76 Fed. Reg. at 498 (JA\_\_). In contrast, EPA ignored the SIP that New Mexico had begun preparing in January 2011 and formally submitted to EPA for approval approximately six months later.

While EPA did recalculate SCR costs, re-modeled SCR-related projected visibility benefits, and made certain cost-effectiveness assessments for SCR, EPA did not undertake any calculation of the costs of other control technologies like SNCR, even though EPA had rejected SCR on cost grounds in establishing the presumptive BART limits applicable to San Juan’s units. *See, e.g.*, 70 Fed. Reg. at 39,135-36 (JA\_\_ - \_\_). Similarly, EPA failed to engage in any evaluation of the visibility benefits of control technologies apart from SCR. And the record is without evidence that EPA conducted an assessment of incremental cost-effectiveness that compared EPA cost estimates for each potential control-technology option to costs for the other control options.<sup>9</sup>

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<sup>9</sup> EPA’s BART Guidelines provide that, in conducting a BART analysis, the BART-determining authority “should ... calculate incremental cost effectiveness”;

The Final Rule also established an emission limit for sulfuric acid of  $2.6 \times 10^{-4}$  lb/mmBtu applicable to each SJGS unit on an hourly-average basis, 76 Fed. Reg. at 52,389, 52,391, 52,440 (JA \_\_, \_\_, \_\_), despite EPA's acknowledgement that that very low limit "challenge[s] the detection limits" available for such emissions, 76 Fed. Reg. at 504 (JA \_\_). PNM's rulemaking comments demonstrated that the sulfuric acid limit was not technically justified or necessary. PNM Comments at 14-15 (JA \_\_ - \_\_).

In the Final Rule, EPA imposed its NOx and sulfuric acid emission limits on a unit-by-unit basis, disallowing plantwide averaging and the flexibility associated with that approach. *See* 76 Fed. Reg. at 52,405, 52,439-40 (JA \_\_, \_\_ - \_\_). EPA did so notwithstanding its BART Guidelines' statement that the agency determining BART for a facility

should consider allowing sources to "average" emissions across any set of BART-eligible emission units within a fenceline, so long as the emission reductions from each pollutant being controlled for BART would be equal to those reductions that would be obtained by simply controlling each of the BART-eligible units that constitute [the] BART-eligible source.

70 Fed. Reg. at 39,172 (JA \_\_).

EPA also based the Final Rule, in part, on the CAA's interstate transport provision. EPA in the Final Rule disapproved New Mexico's 2007 Interstate

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such calculations are to "compare[] the costs and performance level of a control option to those of the next most stringent option." 70 Fed. Reg. at 39,167 (JA \_\_).

Transport SIP and ignored a supplemental Interstate Transport SIP that New Mexico submitted in June 2011 in conjunction with its Regional Haze SIP. That supplemental Interstate Transport SIP establishes the same 0.23 lb/mmBtu NO<sub>x</sub> emission limit for SJGS that the Regional Haze SIP establishes for BART. In the rulemaking, EPA had relied on modeling by the Western Regional Air Partnership (“WRAP”) in concluding that NO<sub>x</sub> limits could be imposed to implement the Interstate Transport provision and that a NO<sub>x</sub> emission limit of 0.28 lb/mmBtu for two units at SJGS and 0.27 lb/mmBtu for the other two units would satisfy the Interstate Transport requirements. 76 Fed. Reg. at 497-98 (JA \_\_ - \_\_); 76 Fed. Reg. at 52,424-25, 52,428-29 (JA \_\_ - \_\_, \_\_ - \_\_). Although EPA was only subject to an August 5, 2011 deadline to address New Mexico’s Interstate Transport SIP obligations, EPA elected to take final action pursuant to the CAA’s BART provisions at the same time, even though no court deadline had been imposed on EPA to address New Mexico’s regional haze SIP obligations, including BART requirements.<sup>10</sup>

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<sup>10</sup> On August 29, 2011, after the Final Rule was published, several environmental organizations sued EPA in the U.S. District Court for the District of Columbia under CAA section 304(a)(2) on claims regarding EPA’s failure to propose and promulgate action on regional haze SIPs or FIPs for numerous states, including New Mexico. EPA and the plaintiffs later agreed on, and the court entered, a consent decree setting deadlines for such EPA action, with final action required for some states by late 2012. *Nat’l Parks Conservation Ass’n v. Jackson*, No. 1:11-cv-01548 (D.D.C. Mar. 30, 2012), Partial Consent Decree, ECF No. 21 (JA \_\_). One of the consent decree’s deadlines applicable to regional haze plan

EPA promulgated the BART FIP in August 2011 rather than review New Mexico's Regional Haze SIP with its distinct NO<sub>x</sub> BART limit for SJGS. EPA used the court-imposed August 5, 2011 deadline for final action on Interstate Transport plan requirements to justify promulgating the SCR BART limit for NO<sub>x</sub> and an Interstate Transport limit for NO<sub>x</sub> as well, on the theory that doing so would assist San Juan's operator, PNM – whose rulemaking comments to EPA objected to this very course of action – by providing PNM with “certainty.” 76 Fed. Reg. at 52,388, 52,419 (JA \_\_, \_\_). EPA's approach resulted in a Final Rule that imposes an SCR-based 0.05 lb/mmBtu NO<sub>x</sub> emission limit that is substantially more stringent and costly than the NO<sub>x</sub> limits (0.27 and 0.28 lb/mmBtu) that EPA had determined in the rulemaking were adequate to satisfy the CAA's Interstate Transport provision.

#### **STANDARD OF REVIEW**

The Court sets aside final EPA action, like promulgation of a FIP, that is subject to CAA § 307(d), 42 U.S.C. § 7607(d), if such action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or “without observance of procedure required by law.” CAA § 307(d)(9), 42 U.S.C.

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requirements for New Mexico has been extended. *Nat'l Parks Conservation Ass'n v. Jackson*, No. 1:11-cv-01548, (D.D.C. Apr. 13, 2012), Stipulation To Amend Consent Decree, ECF No. 25 (JA \_\_). EPA must sign a proposed rule for New Mexico by May 16, 2012 (originally April 16, 2012), and a final rule, unless the deadline is extended, by August 15, 2012. *Id.*

§ 7607(d)(9); *see* CAA § 307(d)(1)(B) (making promulgation of FIPs subject to CAA § 307(d)), 42 U.S.C. § 7607(d)(1)(B).

#### SUMMARY OF ARGUMENT

EPA's Final Rule promulgates a BART FIP and an Interstate Transport FIP imposing a single NO<sub>x</sub> emission limit that is much more stringent than the BART limit in New Mexico's Regional Haze SIP. EPA lacked authority to promulgate the Final Rule under either the BART or the Interstate Transport provisions of the CAA. EPA's decision to promulgate a BART FIP was unauthorized because EPA failed to provide New Mexico's pending Regional Haze SIP, including a different BART limit, the consideration it was entitled under the Act. EPA's rationale for promulgating a BART FIP when it did – *i.e.*, that doing so was necessary to provide business "certainty" to SJGS – lacks any statutory basis or grounding in common sense. Moreover, that rationale ignores that EPA's approach *created and perpetuated* uncertainty by leaving unaddressed the pending and fully approvable – and significantly different – BART limit in the pending Regional Haze SIP.

Even if EPA had authority to impose a BART limit through a Regional Haze FIP at the time it did, EPA's failure to follow its own, binding BART Guidelines in assessing and determining BART for SJGS would render its action unlawful and arbitrary.

Specifically, EPA departed without justification or explanation from its own presumptive BART limit for NO<sub>x</sub>, in contradiction of its own BART rules.

Moreover, EPA's assessment of emission control costs was inadequate, and EPA failed to provide notice of, and opportunity for comment on, critical aspects of that assessment. EPA announced – after closing the public comment period – a new standard that it asserted source owners must meet to “document” BART control costs, but EPA failed to apply that standard to the Agency's own cost assessment. EPA improperly disregarded site-specific costs, contrary to its own BART rules. And EPA failed to conduct – or, if it did conduct, failed to disclose for public review and comment – an analysis of incremental cost-effectiveness to support its BART determination, again contravening its rules.

Further, EPA's assessment of visibility impacts impermissibly and arbitrarily relied on assessment of “cumulative” visibility impacts and resulted from use of an outdated model using flawed assumptions, while EPA rejected results from an updated modeling tool. Additionally, EPA failed to show its emission limits are feasible as required by its BART rules, and rejected, without a substantive rationale, use of plantwide emission averaging that EPA's rules not only authorize but encourage.

Finally, EPA's action under the CAA's Interstate Transport provision was unlawful. EPA had an obligation to approve New Mexico's 2007 Interstate

Transport SIP and thus had no authority to promulgate a FIP to address New Mexico's Interstate Transport obligations. Because EPA lacked authority to promulgate an Interstate Transport FIP, it had no legal or policy justification for imposing a joint NOx BART and Interstate Transport FIP emission limit. Even if there had been some legal basis for disapproving the 2007 Interstate Transport SIP and issuing an Interstate Transport FIP, EPA had no basis for imposing a 0.05 lb/mmBtu limit in such a FIP when EPA itself had announced that an emission rate no more stringent than 0.27 lb/mmBtu would satisfy New Mexico's interstate transport obligations with respect to SJGS.

For these reasons, and as explained below, EPA's Final Rule must be vacated.

#### ARGUMENT

##### **I. State Primacy Under the CAA's Regional Haze Program Renders EPA's Final Action Arbitrary, Capricious, and Contrary to Law.**

Three days after the outgoing gubernatorial administration in New Mexico withdrew its draft Regional Haze SIP – a draft that included a NOx BART limit based on SCR – EPA on December 20, 2010, signed a proposed NOx BART FIP for SJGS based on SCR. EPA deferred action on all other elements of a Regional Haze plan for New Mexico, including BART limits for SO<sub>2</sub> and PM emissions at San Juan. This singular focus on NOx BART reflected EPA's commitment to pursue the SCR retrofit policy abandoned by New Mexico in the wake of the

state's November 2010 gubernatorial election. Between signing its proposed NOx BART FIP in December 2010 and promulgating it in final form in August 2011, EPA never wavered, even though New Mexico throughout this period pursued a very different policy choice – NOx BART based on SNCR.

When it promulgated its Final Rule, EPA made clear its view that the primary responsibility to make the policy choices inherent in determining NOx BART for SJGS was EPA's, and EPA's alone, notwithstanding New Mexico's submittal in June 2011 of a comprehensive Regional Haze SIP that incorporated a very different NOx BART policy decision. Not only did EPA ignore the policy choice made by New Mexico, it announced that EPA's BART FIP would not change *unless* New Mexico was able to produce "significant new information that changes our analysis" in a way that would allow EPA to "make appropriate revisions" to its FIP decision. 76 Fed. Reg. at 52,394 (JA\_\_); *see also id.* at 52,393, 52,394 (treating New Mexico's SNCR-based SIP as making a mere "recommendation for BART determinations") (JA\_\_, \_\_). In other words, EPA said New Mexico had to *prove to EPA*, with "*significant new*" information, that EPA's policy choice was wrong, rather than simply show that the state's policy choice was within the lawful discretion given states under CAA § 110 and the Act's visibility program. EPA's action unlawfully abrogated state primacy and must be vacated.

The legal standard governing review of EPA-promulgated FIP limits, and EPA's authority to reject (or ignore) submitted SIPs, was announced by the Supreme Court in 1975 and remains unchanged today:

*The Act gives the Agency 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), [42 U.S.C. § 7410(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.*

*Train v. Natural Res. Def. Council*, 421 U.S. 60, 79 (1975) (emphases added).<sup>11</sup>

Under this governing legal standard, EPA lacks authority to ignore or disregard a complete, facially valid SIP submitted to EPA. The scope of EPA's discretion regarding the Regional Haze SIP that New Mexico submitted to EPA in 2011, and that SIP's BART determination, must be considered in light of the congressional intent reflected in the CAA visibility provisions and the purposes and design of the CAA as a whole. That congressional intent was to have state authority and discretion at the center of the Regional Haze SIP program, and especially that program's BART element.

As the Brief of Petitioners Governor Martinez and NMED explain in greater detail,<sup>12</sup> state discretion in developing and adopting measures to implement the

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<sup>11</sup> Although *Train* interpreted the version of § 110 of the CAA enacted in 1970, later CAA amendments "did not modify the 'division of responsibilities' *Train* had discerned in the Act" between the states and EPA. *Virginia v. EPA*, 108 F.3d 1397, 1408 (D.C. Cir. 1997) (citing *Train*, 421 U.S. at 79).

CAA is very broad, and that discretion is at its broadest under the Act's BART provision. *See Corn Growers*, 291 F.3d at 5-9. Deference to state BART determinations is especially great when a state has considered all of the statutory BART factors and has selected the BART presumptive limit prescribed in EPA's own regulations. *Cf.* 70 Fed. Reg. at 39,171 (any departure from the EPA-determined BART presumptive limits must be explained "based on a careful consideration" of the BART factors) (JA \_\_). Indeed, EPA determined in the BART Guidelines that the presumptive limits "are extremely likely to be appropriate" for plants such as SJGS.<sup>13</sup> *Id.* at 39,131. New Mexico's Regional Haze SIP, which is based on consideration of all of the BART factors and implements the presumptive BART limit, satisfies each of the BART Guidelines' conditions. Accordingly, EPA had no authority to disregard the SIP and impose its own NOx BART determination.

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<sup>12</sup> PNM adopts by reference that Brief's arguments.

<sup>13</sup> EPA's BART Guidelines, including their presumptive BART limits, apply to any facility, including SJGS, that is subject to BART and is a "fossil fuel-fired generating powerplant having a total generating capacity in excess of 750 megawatts." CAA § 169A(b)(2)(B); *see* 40 C.F.R. § 51.308(e)(1)(ii)(B); 70 Fed. Reg. at 39,158 (JA \_\_); *id.* at 39,131 (states generally "must" apply the presumptive limits to covered sources) (JA \_\_). The presumptive limits specifically apply to electric generating units that are "greater than 200 MW located at greater than 750 MW power plants." *Id.* at 39,171 (JA \_\_). Each of San Juan's four units is greater than 200 MW, and, as noted above, the plant as a whole is greater than 750 MW. The presumptive limits therefore apply to SJGS.

The limits of EPA's authority were recently confirmed in *Luminant Generation Co., LLC v. EPA*, \_\_\_ F.3d \_\_\_, 2012 WL 999435 (5th Cir. Mar. 26, 2012) (unpublished), in which the Fifth Circuit vacated EPA's disapproval of Texas SIP provisions. The court explained that the CAA "confines the EPA to the ministerial function of reviewing SIPs for consistency with the Act's requirements." *Id.* at \*1. EPA, accordingly, lacks authority to second-guess the reasonableness of a state's policy determinations reflected in a SIP and to disapprove or disregard that SIP because of a policy disagreement between EPA and the state or because EPA prefers a different outcome than the state chose. Here, an EPA preference for a different policy outcome is precisely what drove EPA's BART FIP.

In *Luminant*, where EPA imposed its own views and supplanted the state's exercise of discretion in formulating its SIP, just as EPA did here, the court held that EPA had thereby violated the CAA: "EPA does not possess any 'discretionary authority' in [the SIP-approval] process.... *Only the states enjoy discretion in implementing the dictates of the CAA.*" *Id.* at \*7 n.8 (emphasis added) (citing *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976) ("Each State is given wide discretion in formulating its [SIP].")). Here too, EPA impermissibly crossed the line drawn by Congress in defining CAA section 110 responsibilities.

The D.C. Circuit conducted a similar analysis in reviewing EPA rules governing EPA's jurisdiction to impose a federal operating permit ("FOP") program on a state. *Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001). Under Title V of the CAA, 42 U.S.C. §§ 7661-7661f, states may adopt state operating permit ("SOP") programs for all lands within a state except lands within Indian country. In the rule reviewed in *Michigan*, EPA asserted jurisdiction to adopt a FOP where EPA found that the jurisdictional – *i.e.*, state or tribal – status of the land was "in question" and that EPA had no obligation to resolve that jurisdictional question. *Id.* at 1081, 1084. The court responded that, if a *bona fide* question of Indian-country status existed, EPA had to resolve that question before proceeding with any FOP. *Id.* To hold otherwise, the court stated, would create a situation in which "EPA would effectively have a blank check to expand its own jurisdiction by *not deciding* jurisdictional questions. The [CAA] does not confer such authority." *Id.* (emphasis in original).

Similarly, here, if EPA is permitted to adopt a BART FIP where there is a *bona fide* argument that a BART SIP is approvable, *i.e.*, where the SIP is not plainly unapprovable, EPA would be able to impermissibly expand the "jurisdictional" scope of its authority beyond statutory bounds simply by refusing, as it did here, to engage – *before EPA adopts a final FIP* – the question whether a SIP submittal fills the gap that would be addressed in that FIP. This conclusion

flows directly from the CAA definition of a “Federal implementation plan”: a plan “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. CAA § 302(y), 42 U.S.C. § 7602(y) (emphasis added).

Although the CAA broadly constrains EPA’s discretion to ignore the will of the states when states have adopted CAA § 110 SIPs, EPA’s authority is especially limited under the CAA with respect to implementation plans called for by the visibility provisions. The terms and structure of the CAA’s regional haze program require EPA to defer to states’ policy judgments concerning visibility-protection implementation. *Corn Growers*, 291 F.3d at 2 (Congress intended the states to “play the lead role in designing and implementing regional haze programs”). This required deference to the states is heightened further for BART decisions. Congress deliberately gave states “broad authority over BART determinations” by adopting legislative language “to make it clear that the states – not EPA – would make ... BART determinations.” *Id.* at 8. The position EPA adopted here – that EPA is authorized, or even compelled, to disregard a submitted SIP, 76 Fed. Reg. at 52,416 (JA \_\_) (“we have the statutory authority and *the obligation* to promulgate a FIP”) (emphasis added) – contradicts every indicator of congressional intent regarding state authority under the visibility program.

“To ignore or not to ignore” is therefore not a decision committed to EPA’s discretion. Only where there is no law for a court to apply, *i.e.*, where the governing “statutes are drawn in such broad terms” that there is no discernible standard by which to judge the legality of agency action, is a regulatory decision “committed to agency discretion.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99, 105 (1977)); *see also* 5 U.S.C. § 701(a)(2). In this case, there is law to apply, law that imposed a legal obligation on EPA to evaluate the New Mexico SIP before promulgating a FIP.

Indeed, EPA did not question the approvability of New Mexico’s Regional Haze SIP. New Mexico’s public hearings on its 2011 proposed SIP establish that EPA had reviewed the SIP and, in its comments to the state, did not even suggest the SNCR BART limit in the proposal was legally deficient under the CAA.<sup>14</sup> EPA did not question at that stage or subsequently, after formal SIP submittal, that the SIP satisfies EPA’s “minimum criteria” that a SIP “must meet before the [EPA]

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<sup>14</sup> *See* NMED’s Supplemental Notice of Intent to Present Technical Testimony (May 20, 2011), Exhibit 15, Comments from EPA Region 6, available at [http://www.nmenv.state.nm.us/aqb/reghaz/documents/NMED\\_Ex15.pdf](http://www.nmenv.state.nm.us/aqb/reghaz/documents/NMED_Ex15.pdf) (last visited April 30, 2012)). As noted above, under CAA § 110(k)(1), the Regional Haze SIP that included New Mexico’s SJGS BART limit (and New Mexico’s supplemental Interstate Transport SIP) were received by EPA on July 5, 2011, and deemed “complete” by operation of law as of January 5, 2012, due to the absence of any EPA finding of incompleteness.

Administrator is *required* to act on such submission.” CAA § 110(k)(1)(A) (emphasis added). Because EPA made no finding of incompleteness, the SIP was deemed by operation of law to meet those “minimum criteria.” CAA § 110(k)(1)(B), (A).

EPA did not (and could not) claim it was compelled by court order to promulgate a regional haze FIP for New Mexico by the August 2011 deadline for EPA action on New Mexico’s Interstate Transport SIP requirements. Under CAA section 110(c), EPA had been subject to a two-year deadline (which had expired in January 2011) to promulgate Regional Haze FIPs, including BART limits, for New Mexico and other states in the absence of approvable SIP submittals, but EPA failed to meet that deadline. Once that FIP-promulgation deadline passed for New Mexico, section 110(c)’s language establishing a FIP “clock” no longer applied. After the clock expired, the only FIP-promulgation deadline that could be imposed would be one established by a court in a “citizen suit” brought against EPA under CAA section 304(a)(2), and any court-imposed schedule would allow EPA time to fulfill its procedural and substantive obligations under CAA §§ 110 and 169A. As noted above, no such schedule existed for EPA’s BART FIP at the time it promulgated that FIP.

EPA’s own actions confirm that it should have deferred, and had clear authority to defer, action on a *partial* Regional Haze FIP imposing only a NOx

BART limit, allowing it time to act on the *complete* Regional Haze SIP submitted by New Mexico. In particular, this conclusion is confirmed by the fact that EPA's FIP *expressly* deferred action on any BART limit on emissions of SO<sub>2</sub> from SJGS (not to mention all of the other elements required of a Regional Haze SIP). *See* 76 Fed. Reg. at 52,389, 52,406 (JA \_\_, \_\_). EPA had discretion, and an obligation under *Train*, to refrain from any final action on the NO<sub>x</sub> BART FIP unless and until EPA determined that the Regional Haze SIP, with its NO<sub>x</sub> BART limit, was unapprovable – a determination EPA did not make and has not made.

Consequently, EPA had no obligation or authority to promulgate any NO<sub>x</sub> FIP limit in August 2011.

Absent an applicable statutory or court-imposed deadline constraining EPA's choice as to the timing of a specific EPA action under the CAA, EPA has discretion over the timing of its CAA actions. *Cf. Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (absent a "readily-ascertainable deadline," it is "almost impossible to conclude" that an agency is "deprive[d] ... of all discretion over the timing of its work" with respect to any "particular agency action"). In this case, EPA was under no statutory or judicial deadline to adopt a final BART FIP in August 2011. EPA simply chose to promulgate a FIP because EPA wanted to impose a fundamentally different BART policy choice than that made by New Mexico.

In the absence of any constraint on EPA's timing, EPA had an obligation to address on the merits the SIP submittals it had received before promulgating a FIP. This conclusion is confirmed by a recent decision in *WildEarth Guardians v. Jackson*, 2011 WL 4485964 (D. Colo. Sept. 27, 2011) (unpublished). There, the court characterized intervenor-respondent North Dakota's argument as follows:

[B]efore the EPA can proceed in promulgating a regional haze FIP, the CAA requires the EPA to assess the submitted SIP, develop a proposed rule to approve or disapprove of that SIP, solicit public comment, and then take final action on whether to approve that SIP.

*Id.* at \*7. The court did not determine that North Dakota misinterpreted the CAA's requirements. To the contrary, the court held that North Dakota's claim failed because "EPA is proceeding *as North Dakota contends [EPA] should proceed.*" *Id.* (emphasis added). Thus, in that case, EPA evaluated on the merits the submitted SIP that was pending before it and proposed action on that SIP at the same time it proposed its FIP. *Id.*

EPA's actions with respect to New Mexico's SIP were entirely different. Here, EPA promulgated a final FIP before it even considered, much less took action on, a submitted and complete SIP. Even though EPA had time and had discretion to coordinate its actions on the Regional Haze SIP (which includes BART) and the EPA BART FIP for New Mexico, as it did with respect to North Dakota, EPA relied on a consent decree deadline in district court litigation in California requiring EPA to act on New Mexico's 2007 Interstate Transport SIP

(or to promulgate an Interstate Transport FIP) as an asserted justification for ignoring New Mexico's 2011 Regional Haze SIP. 76 Fed. Reg. at 52,390 (JA\_\_).

EPA's explanation was simple, albeit unconvincing. According to EPA, the consent decree deadline required EPA to adopt Interstate Transport limits on NOx emissions that were much less stringent than EPA's BART preference. To avoid inconsistent BART and Interstate Transport limits, EPA reasoned, the EPA BART limit must be promulgated to address both BART and Interstate Transport in order to give PNM "certainty." Imposition of the 0.05 lb/mmBtu BART limit as the Interstate Transport limit would, EPA explained, ensure that PNM would not be subjected to consecutive, inconsistent emission reduction requirements. 76 Fed. Reg. at 52,390 (JA\_\_).

In reality, PNM was deprived of "certainty" by EPA's failure to coordinate action on its 0.05 lb/mmBtu FIP limit with the very different 0.23 lb/mmBtu BART limit in New Mexico's Regional Haze SIP. Instead, it was the provision of "certainty" to EPA – not to PNM or New Mexico – that EPA's Final Rule embraced. Finally, even if EPA's actions had produced certainty (they did not), the objective of providing "certainty" to regulated businesses – however laudable a policy goal in appropriate circumstances – is not the legal standard that governs EPA's exercise of its narrowly circumscribed FIP authority under CAA section 110 and the Act's visibility provisions.

EPA had no lawful basis for promulgating its NO<sub>x</sub> BART FIP. That action must therefore be vacated.

**II. EPA's BART Determination for SJGS Is Contrary to the Requirements of the CAA and EPA's Own Regulations and Is Arbitrary and Capricious.**

Even if EPA were free to disregard New Mexico's submitted Regional Haze SIP and were authorized to promulgate an inconsistent BART determination – which EPA is not, for the reasons discussed above – EPA's BART determination is fatally flawed in critical respects and would have to be vacated. The Final Rule's critical deficiencies include EPA's failure *to abide by its own rules governing BART determinations*. It is axiomatic that agencies are bound by their own regulations as long as those regulations are in effect. *See, e.g., United States v. Nixon*, 418 U.S. 683, 695 (1974) (“So long as [a] regulation is extant it has the force of law” and binds the agency that promulgated it) (citing *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)).

Most fundamentally, EPA deviated from its own codified presumptive BART limit without even addressing its applicability to SJGS, much less providing any explanation that could justify abandoning the presumptive limit for SJGS. Further, EPA failed to conduct and present an incremental cost-effectiveness analysis called for under the BART rules. EPA also rejected cost estimates

submitted by PNM based upon an asserted “documentation” standard that is untethered to anything in the statute or EPA’s regulations and that EPA itself did not satisfy.

EPA’s errors did not end there. EPA improperly estimated visibility improvements projected to result from using SCR at SJGS and ignored evidence in the rulemaking record, and disregarded findings made in other proceedings, that showed that the BART limits were not “achievable.” Finally, EPA failed to justify rejection of comments urging use of the plantwide emission-limit averaging that its BART Guidelines authorize and encourage.

**A. EPA Arbitrarily and Unlawfully Departed from the Presumptive BART Limit that Applied to SJGS, Without Providing Any Valid Rationale for Doing So.**

As discussed above, when EPA promulgated its BART rules in 2005, it codified mandatory BART Guidelines to guide state BART determinations. A key component of the BART Guidelines are the presumptive BART limits that EPA promulgated following notice-and-comment rulemaking. As noted above, the presumptive NO<sub>x</sub> limit for SJGS’s units is 0.23 lb/mmBtu. EPA rejected SCR as presumptive BART for any unit type except cyclones. Nevertheless, EPA imposed in the Final Rule a 0.05 lb/mmBtu BART limit for SJGS based on SCR. This SCR-based limit is more than four times as stringent as the applicable presumptive

limit and relies on a technology that must be justified, on a case-by-case basis, as BART for units such as those at SJGS.<sup>15</sup>

In promulgating the BART rules, EPA explained that it based the presumptive limits on analyses of control costs and visibility-improvement benefits that could be expected from emission controls meeting the presumptive limits, 70 Fed. Reg. at 39,131-36 (JA\_\_ - \_\_), including a “comprehensive modeling analysis of the anticipated visibility impacts of controlling large [electric generating units].” *Id.* at 39,132 (JA\_\_). EPA concluded that, “[b]ased on our analysis of emissions from power plants, we believe that applying these highly cost-effective controls at the large power plants covered by the [BART] guidelines would result in significant improvements in visibility and help to ensure reasonable progress toward the national visibility goal.” *Id.* at 39,131 (JA\_\_). Thus, EPA explained, the presumptive limits would apply except where a departure was specifically justified:

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<sup>15</sup> Further, EPA in the BART Guidelines determined that where “current combustion control technology” would be insufficient to meet the NO<sub>x</sub> presumptive limit, it would be appropriate to “consider whether advanced combustion control technologies such as rotating opposed fire air should be used to meet these [presumptive] limits.” 70 Fed Reg. at 39,172 (JA\_\_); *accord id.* at 39,135 (JA\_\_). Thus, EPA explained, even where the presumptive NO<sub>x</sub> limit cannot be met through more conventional combustion controls, the appropriate BART analysis would be to determine what limit could be met using “advanced” combustion controls, not the far more demanding “post-combustion” technology of SCR, *see id.* at 39,134 (JA\_\_).

States, as a general matter, must require owners and operators of greater than 750 MW power plants to meet these [presumptive] BART emission limits. We are establishing these requirements based on the consideration of certain factors discussed [by EPA in explaining its cost and visibility impact analyses].

*Id.* EPA emphasized that the presumptive limits reflect “controls [that] are likely to be among the most cost-effective controls for any source subject to BART, and that they are likely to result in a significant degree of visibility improvement.” *Id.* Thus, EPA concluded, the presumptive BART limits are “extremely likely to be appropriate for all greater than 750 MW power plants subject to BART.” *Id.*<sup>16</sup>

Consequently, before EPA could justify imposition of SCR as BART at SJGS, which would be a departure from the presumptive BART limits, EPA was required to evaluate each of the BART factors with respect to each available control technology option, including SNCR, and prepare a reasoned and complete analysis that demonstrated specifically why SNCR was inappropriate for each of the SJGS units and why SCR was necessary. EPA did not do that, but instead ignored its own rules.

Rather than conduct a full BART analysis and attempt to justify its deviation from the presumptive limit, EPA put on blinders and performed a far more limited

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<sup>16</sup> Although certain aspects of EPA’s 2005 BART rules were judicially challenged, no one challenged the presumptive limits. *See Utility Air Regulatory Group v. EPA*, 471 F.3d 1333, 1337-38 (D.C. Cir. 2006) (denying petitions for review of EPA’s 2005 BART rules).

analysis, conducting a full assessment of *only* the single option it preferred – SCR – and then proceeded to select that option as BART. EPA “drew heavily” on the draft analysis prepared by New Mexico in 2010 (and later withdrawn by the state) to support SCR. 76 Fed. Reg. at 498, 499 (JA \_\_, \_\_). EPA’s proposed rule did not compare SCR to any other technology, much less to SNCR and other technologies assumed to meet the presumptive limit, in light of the BART factors as the BART Guidelines require. *See* 70 Fed. Reg. at 39,164-66 (JA \_\_ - \_\_) (explaining the requirement to identify and evaluate an appropriate range of potential BART controls). Indeed, the proposed rule did not even mention the NO<sub>x</sub> presumptive limit. And the Final Rule mentions it only in summarizing an adverse comment. *See* 76 Fed. Reg. at 52,393-94 (JA \_\_ - \_\_); *see also* EPA Response to Comments, EPA-R06-OAR-2010-0846-0127 at 10-11 (JA \_\_ - \_\_).

In other words, EPA never undertook a reasoned analysis of the presumptive limit, the available technologies, and the BART factors in light of the presumptive limit. EPA did not engage in the “careful consideration” of each of the statutory BART factors that – as its own rules made clear – would be necessary before a departure from the presumptive limit could be justified. To the contrary, EPA, for all practical purposes, simply ignored its own presumptive limit, even in the face of rulemaking comments emphasizing the importance of EPA adhering to that limit absent compelling justification. *See, e.g.*, PNM Comments at 12-14 (JA \_\_ - \_\_).

EPA's action, thus, is contrary to the governing regulations and is not premised on consideration of all the relevant factors. As a result, the BART FIP must be set aside as unlawful, arbitrary, and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

**B. EPA's Control-Cost Assessment Did Not Satisfy EPA's Own Rules and Was Therefore Arbitrary and Unlawful.**

In evaluating control costs, as it is required to do in making any BART determination, *see* CAA § 169A(g)(2), EPA must consider site-specific factors. *Corn Growers*, 291 F.3d at 6-7; 70 Fed. Reg. at 39,127, 39,166 & n.15 (JA \_\_, \_\_). EPA's BART rules reflect the site-specific nature of BART analyses. *See, e.g.*, 70 Fed. Reg. at 39,164-65, 39,166 (JA \_\_, \_\_). Yet EPA's BART cost assessment for SJGS rejected consideration of site-specific costs. By not evaluating site-specific costs, EPA failed to comply with its own rules and acted arbitrarily.

EPA excluded significant costs identified by PNM and its consultant, Black & Veatch ("B&V"), in reaching the Final Rule's SCR BART determination. In its Final Rule, EPA rejected any consideration of those costs, claiming PNM did not meet a "documentation" standard that, EPA announced for the first time in the Final Rule, was required by EPA's Cost Manual. 76 Fed. Reg. at 52,392 (JA \_\_).<sup>17</sup>

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<sup>17</sup> PNM in fact did provide significant documentation and information to EPA on costs, including in conferences with EPA's consultant to explain the basis for cost estimates. *See, e.g.*, PNM Comments at 41 (JA \_\_). Moreover, as described in detail in PNM's Petition for Reconsideration and Stay of EPA's Final

The level of documentation EPA called for in the Final Rule is so extensive and detailed that it would require, as part of a BART *evaluation*, the type of engineering analysis that, following selection of control equipment, is undertaken to enable installation of the technology at the site. *See id.* 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.

Unsurprisingly, EPA's own cost assessment for its BART FIP contains nothing approaching the level of documentation EPA asserted was required of PNM. EPA cannot rely on its Cost Manual to exempt itself from an asserted documentation standard that it requires others to meet. The Cost Manual is not a legislative rule. It only provides, according to EPA's BART rules, a *starting point* for assessing costs. 70 Fed. Reg. at 39,127, 39,166 n.15 (JA \_\_, \_\_). If the culmination of the assessment must satisfy the documentation standard that EPA applied to PNM, then EPA's BART analysis is fatally flawed.

Furthermore, EPA itself deviated from its Cost Manual without adequate explanation. In its Final Rule, EPA acknowledged that it selected a 30-year

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Rule (JA \_\_), email correspondence in the docket for this rulemaking between PNM and EPA demonstrates that PNM offered to provide more documentation during the rulemaking proceedings but that EPA requested none. PNM Email File List, EPA-R06-OAR-2010-0846-0017 (JA \_\_).

lifetime<sup>18</sup> for evaluating SCR's costs. 76 Fed. Reg. at 52,401-02 (JA\_\_ - \_\_).

PNM's comments had argued for use of the Cost Manual's 20-year-lifetime recommendation for SCR. PNM Comments at 43-44 (JA\_\_ - \_\_). In response, EPA claimed the Cost Manual's 20-year lifetime is only a "calculation example" and not a general recommendation. 76 Fed. Reg. at 52,401 (JA\_\_). Hence, EPA argued it was not deviating from the Cost Manual and that a 30-year-lifetime assumption could be justified by citing two facilities that used a longer-than-20-year lifetime in such assessments. *Id.* at 52,402 (JA\_\_).

Although EPA's Cost Manual sets forth a calculation example using a 20-year lifetime for SCR, Cost Manual Section 4.2 at 2-50 (JA\_\_), the Cost Manual also states, independent of the calculation example, that "[a]n economic lifetime of 20 years is assumed for the SCR system."<sup>19</sup> EPA's Final Rule therefore mischaracterizes the nature of the Cost Manual's treatment of SCR lifetime;

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<sup>18</sup> The length of control equipment lifetime affects the cost-effectiveness of a BART option by defining the time available for capital recovery of control costs. The longer the time over which costs are spread, the more cost-effective a technology appears to be.

<sup>19</sup> Cost Manual, Section 4.2, Chapter 2.4.1 at 2-48 (JA\_\_). The Cost Manual observes that "[t]he remaining life of the boiler may also be a determining factor for the [SCR] system lifetime." *Id.* But EPA conceded "[t]he record is silent on the remaining useful life of the SJGS units." 76 Fed. Reg. at 52,402 (JA\_\_). EPA therefore had no basis for assuming an SCR lifetime longer than 20 years for SJGS.

because the Cost Manual generally recommends that 20 years is the assumed SCR lifetime, EPA, under its own standard, was required to “document” SJGS-specific reasons for departing from that recommendation. EPA did not do this. A statement of EPA’s “belie[f]” that “a 30 year lifetime is justified” does not suffice. *See Id.*

Subsequent analysis has also confirmed that EPA’s cost assessment was flawed. In developing a request for proposals that would be sent to potential SCR vendors for SJGS, PNM contracted with Sargent & Lundy (“S&L”) to undertake a detailed cost assessment meeting the documentation criteria EPA used to reject B&V’s study. The S&L analysis confirms B&V’s estimate and demonstrates that EPA greatly understated SCR costs for San Juan in its analysis. *See* PNM’s Petition for Reconsideration and Stay of EPA’s Final Rule at 26-32 and Attachments 5 & 6 (Exhibit 4 to Motion of Petitioner Public Service Company of New Mexico for Stay of Agency Rule (“PNM Stay Motion”)) (JA \_\_-\_\_, \_\_, \_\_).

In addition to failing to properly consider SCR costs for SJGS, EPA failed to support selection of BART from a range of technologies by undertaking an incremental cost-effectiveness analysis. *See* 76 Fed. Reg. at 502-03 (showing EPA cost-effectiveness (and visibility-impact) analysis for SCR alone, rather than in comparison with other control options such as SNCR) (JA \_\_-\_\_). As noted above,

the BART Guidelines require an incremental cost-effectiveness analysis as part of the BART selection process. 70 Fed. Reg. at 39,167 (JA\_\_). This analysis is an integral step in reaching a proper BART determination because it allows for a comparison of costs and benefits of the available control options, in the context of the five statutory BART consideration factors. In failing to support its BART selection with an incremental cost-effectiveness analysis, EPA violated the BART Guidelines.

In the Final Rule, EPA claims that an incremental cost-effectiveness analysis was conducted for NO<sub>x</sub> BART at SJGS. 76 Fed. Reg. at 52,394 (JA\_\_). Regrettably, no such EPA analysis appears in the record. EPA's proposed rule, as noted above, does not describe an EPA incremental cost-effectiveness analysis. The Final Rule does not present such an EPA analysis. The docket for this rulemaking is devoid of any such analysis conducted by EPA. Because no EPA incremental cost-effectiveness analysis is in the record, and because EPA rules mandate that a BART determination be supported by such an analysis, EPA lacks an adequate cost basis for its rule. Moreover, even if such an analysis were prepared by EPA, it was never presented to commenters, an omission that violated EPA's obligations under CAA § 307(d)(3)<sup>20</sup> and deprived PNM and other

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<sup>20</sup> CAA § 307(d)(3) requires that a proposed FIP rule "be accompanied by a statement of [the rule's] basis and purpose," which

commenters of their right to review and comment on a key element of any BART determination.

**C. EPA's Visibility-Impact Findings Were Arbitrary and Capricious and Contrary to Law.**

As noted above, an analysis of the visibility impacts of BART control options is a prerequisite to a lawful BART determination. CAA § 169A(g)(2). The Final Rule is premised on visibility benefits findings that are based on visibility-change calculations that conflict with EPA's own BART rules.

First, EPA relied on a projection of "cumulative" changes estimated to result from SCR at SJGS. EPA derived this cumulative figure by estimating numerical visibility changes (in "deciviews") that EPA projected to occur at 16 different Class I areas at different times of the year, and then aggregating those numerical changes to produce a large projected theoretical "cumulative improvement" that no one will actually experience anywhere. *See* 76 Fed. Reg. at 52,420 (JA \_\_). The BART Guidelines do not support this cumulative-impact method but instead call for analysis of improvements that people may actually perceive. The Guidelines,

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shall include a summary of – (A) the factual data on which the proposed rule is based; (B) the methodology used in obtaining the data and in analyzing the data; and (C) the major legal interpretations and policy considerations underlying the proposed rule.

42 U.S.C. § 7607(d)(3).

therefore, focus on the single area that experiences the largest impact. *See* 70 Fed. Reg. at 39,170 (JA\_\_).

The BART Guidelines provide that states are to identify and analyze visibility impacts at the most heavily affected Class I area, which presumably will be “the nearest Class I area.” *Id.* With respect to “other Class I areas in relatively close proximity to [the] source,” the state

may model a few strategic receptors to determine whether effects at those areas may be greater than at the nearest Class I area.... If the highest modeled effects are observed at the nearest Class I area, you may choose not to analyze the other Class I areas any further as additional analyses might be unwarranted.

*Id.* Thus, the objective as stated in EPA’s BART Guidelines is to determine which individual Class I area receives the greatest impact from the source’s emissions and then model effects of controls on that most-impacted area. Nothing in the BART Guidelines describes or contemplates anything like the cumulative analysis on which EPA based its BART determination for SJGS.

The approach underlying the Final Rule, relying on cumulative visibility impacts at multiple areas, has no relationship with reality, is inherently arbitrary, and artificially inflates any actual perceived improvement in visibility. If, for instance, the Class I areas for which EPA aggregated visibility improvements were subdivided into additional parks and wilderness areas, visibility impacts from a source’s existing emissions – and, likewise, visibility benefits from emission

reductions projected to occur from a control option such as SCR – would appear to multiply, even though in reality they would be unchanged. Thus, EPA’s approach would, for example, convert a small (and humanly imperceptible) 0.5-deciview visibility improvement at a single park into 1.0 deciview of improvement simply by dividing that park into two Class I areas. That transforms, through an arithmetical exercise, what is regarded as an imperceptible change in visibility (0.5 deciview) to one EPA characterizes as at the threshold of human perceptibility (1.0 deciview), *see* 70 Fed. Reg. at 39,120 (JA\_\_\_), but without basis in fact. EPA’s cumulative-impact approach is akin to tabulating, by city block, trace amounts of precipitation in a metropolitan area and then aggregating those amounts to conclude that the city is experiencing monsoon conditions.

EPA’s cumulative-impact approach is also contrary to Agency practice. In proposing action on a Nevada regional haze SIP, EPA accepted the state’s analysis of visibility impacts – and, indeed, conducted its own analysis – that was based exclusively on visibility effects on “the Class I area with the highest impact,”<sup>21</sup> even though at least three other Class I areas were potentially affected as well.<sup>22</sup>

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<sup>21</sup> 77 Fed. Reg. 21,896, 21,904 (Apr. 12, 2012); *see id.* at 21,899 n.9 (referring to “our [EPA’s] analysis”); *id.* at 21,902 & n.16.

<sup>22</sup> *Id.* at 21,899.

*See Catawba Cnty. v. EPA*, 571 F.3d 20, 51 (D.C. Cir. 2009) (inconsistent agency actions are “the hallmark of arbitrary agency action”).<sup>23</sup>

EPA’s visibility analysis supporting the BART FIP also rests on flawed modeling. PNM and New Mexico used recent versions of EPA’s preferred visibility model, CALPUFF, to project anticipated visibility improvements from available controls. *See* PNM Comments at 52-53 (JA\_\_ - \_\_). EPA, however, rejected this modeling, instead relying on an older version of CALPUFF that a developer of the model found significantly overstates visibility improvements from emission controls.<sup>24</sup> None of EPA’s explanations for rejecting newer versions of CALPUFF adequately responded to PNM’s objections. *See, e.g.*, PNM Comments to EPA at 57-58 (JA\_\_ - \_\_) (describing the greater accuracy of the revised

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<sup>23</sup> EPA administers and enforces its regulatory obligations by dividing the country into geographic “Regions,” each of which has EPA responsibility for sources located within that region, subject to the CAA’s cooperative federalism scheme. New Mexico is in EPA’s Region 6, as is Texas, which is the state affected by the EPA action held unlawful by the Fifth Circuit in *Luminant*. Nevada is in Region 9.

<sup>24</sup> *See* PNM Stay Motion, Exhibit 7 ¶ 15. Studies have, for instance, shown that CALPUFF version 5.8, which EPA insisted on using, can overpredict particulate nitrate formation – a critical component of modeling visibility impacts – by a factor of 2 to 4 when factors such as ammonia-limiting conditions and proper ammonia background are not accurately accounted for. *Id.* ¶ 6. As described in the text above, EPA failed to address such factors in an adequate manner. EPA’s modeling also arbitrarily used a coarse-grid resolution in the areas that it modeled, including areas of complex terrain. Using a finer grid in areas of complex terrain more accurately characterizes land use and terrain variations in the modeling, with significant effects on projected visibility changes. *Id.* ¶ 15.

CALPUFF model); Joseph S. Scire, CCM, "Analysis of the Issues related to the BART Determination of the San Juan Generating Station in New Mexico" (March 2011) (Attachment E to PNM Comments) (JA\_\_ - \_\_) (explaining reasons why older CALPUFF versions overpredict visibility impacts).

EPA's Final Rule also impermissibly rejected PNM's use of variable monthly background ammonia concentrations in its visibility modeling. Background levels of ammonia concentrations in the ambient air are important because chemical reactions with ammonia and NO<sub>x</sub> can form PM that can contribute to regional haze. As Joseph S. Scire demonstrated, the background ammonia concentrations used by PNM – and rejected by EPA – were appropriate, conservative, and consistent with current modeling practice. *See* Joseph S. Scire, CCM, "Analysis of Ammonia in the Four Corners Area" (Mar. 2011), Attachment D to PNM Comments (JA\_\_ - \_\_). PNM's modeling also took into account variable measured seasonal conditions that have considerable effects on ammonia formation. EPA's modeling, in contrast, assumed a theoretical constant background ammonia concentration of 1 part per billion throughout all 12 months of the year. As the comments showed, when actual and seasonally adjusted values are used, projections of visibility improvement attributed to installation and operation of SCR are much lower than in EPA's predictions. Due in part to EPA's failure to account for actual background ammonia concentrations, EPA overstated

the projected visibility improvements on which it based its improper determination that SCR is BART for SJGS.

**D. EPA Failed To Demonstrate that the Final Rule's Emission Limits Are Feasible.**

By law, any BART emission limit must be determined to be “achievable” – at the individual facility being reviewed – using “available” technology. 40 C.F.R. § 51.301 (definition of “BART”); *id.* § 51.308(e)(1)(ii)(A); *see also* 70 Fed. Reg. at 39,166 (JA \_\_) (BART analysis must ensure that the selected control option “will achieve the level of emission control being evaluated”). EPA’s Final Rule imposes an exceptionally stringent 0.05 lb/mmBtu NO<sub>x</sub> limit that includes emissions during periods of SSM. PNM made clear in its comments on the proposed rule that a 0.05 lb/mmBtu limit could not be achieved continuously at SJGS as the rule required, and noted that this limit, unprecedented for a retrofit facility, was derived from emission rates achieved at newly constructed facilities and only achieved intermittently at certain existing units. PNM Comments at 49 (JA \_\_). In addition to being contrary to the BART rules because of the limit’s unachievability, EPA’s selection of this infeasible limit had the effect of (a) overstating the EPA-projected visibility benefits that would result from SCR at SJGS and (b) making SCR appear more cost-effective than it actually is because (on a dollars-per-ton-reduced basis) the emissions eliminated by SCR were unrealistically inflated in EPA’s calculations. *Id.* at 50 (JA \_\_).

EPA did not determine that a 0.05 lb/mmBtu limit was achievable on a continuous basis at SJGS in light of the characteristics of its units. Instead, EPA simply considered emission rates achieved at a small sampling of other facilities and assumed the same rate could be achieved at San Juan. *See* 76 Fed. Reg. at 52,403-04 (JA\_\_ -\_\_); *see also* PNM Comments at 18 & n.37 (JA\_\_) (discussing EPA's technical support documents, which indicate that EPA's consultant was told to assume a 0.05 lb/mmBtu limit, and that such a limit was not developed through objective analysis).

Moreover, contemporaneously with EPA's proposal of the New Mexico FIP, EPA concluded, in separate rulemaking, that a NO<sub>x</sub> limit below 0.06 lb/mmBtu is not achievable through retrofit of SCR on coal-fired electric generating units. 76 Fed. Reg. 1109, 1115 (Jan. 7, 2011); EPA, "Transport Rule Engineering Feasibility Response to Comments," EPA-HQ-OAR-2009-0491-4529, at 13 (July 12, 2011) (JA\_\_). EPA in fact stated that this "well-controlled emission rate[] of 0.06 lbs/mmBtu for ... NO<sub>x</sub> represent[s] the lowest annual emission rate[] assumed achievable when state-of-the-art pollution control technologies are installed at coal units" such as San Juan, and that rate is "based on the floor rates used in [EPA] modeling and [is] intended to reflect the lower bound of emission rates that suppliers are willing to guarantee when installing state-of-the-art pollution control equipment (selective catalytic reduction (SCR))." 76 Fed. Reg. at 1115 & n.3.

EPA effectively also recognized that a continuous 0.05 lb/mmBtu rate limit is unachievable when it took action on NOx BART requirements for electric generating facilities in North and South Dakota. In evaluating BART for two facilities in North Dakota, EPA examined visibility impacts of an SCR-based 0.05 lb/mmBtu NOx emission rate at those facilities assuming that “SCR technology, by itself, can achieve 90% control efficiency and ... the overall NOx reduction would be even greater (93.8%) with the use of [advanced] combustion controls in combination with SCR.” 76 Fed. Reg. 58,570, 58,605, 58,610, 58,613-14 (Sept. 21, 2011). Despite EPA’s view that SCR (in combination with advanced combustion controls) could achieve a 0.05 lb/mmBtu emission rate, EPA proposed for North Dakota a less stringent BART limit of 0.07 lb/mmBtu. As EPA explained, “[i]n proposing a BART emission limit of 0.07 lb/MMBtu, we adjusted the annual design rate of 0.05 lb/MMBtu upwards *to allow for a sufficient margin of compliance* for a 30-day rolling average limit that would apply at all times, *including startup, shutdown, and malfunction.*” *Id.* at 58,610 (emphasis added) (footnote omitted); *see also id.* at 58,613; *id.* at 58,619.<sup>25</sup> And in a final rule

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<sup>25</sup>North Dakota is in Region 8. EPA ultimately did not finalize its proposed BART FIP emission limits for these North Dakota facilities, determining instead to approve the limits specified for those units in North Dakota’s SIP, which did not rely on SCR at all. *See* 77 Fed. Reg. 20,894, 20,897 (Apr. 6, 2012). It took this action in light of an intervening district court ruling that North Dakota’s selection of SNCR as “best available control technology” (“BACT”) for the affected facilities under the CAA’s “prevention of significant deterioration” program was

approving South Dakota's regional haze SIP and the state's SCR-based BART determination setting the NO<sub>x</sub> limit at 0.10 lb/mmBtu for an electric generating plant – twice the limit EPA imposed on SJGS – EPA recognized again that “BART emission limits, which apply at all times, including during startup and shutdown[,] must allow an adequate margin for compliance.” 77 Fed. Reg. 24,845, 24,847, 24,849 (Apr. 26, 2012). EPA failed to follow this practice for SJGS, making no allowance for SSM conditions and setting a limit that cannot be shown to be achievable at that facility. PNM Comments at 19 (JA\_\_).

Finally, an analysis by RMB Consulting & Research, Inc. (“RMB”), explains that the Final Rule's NO<sub>x</sub> limit appears to be the lowest for any similar facility and is unachievable at San Juan.<sup>26</sup> It also concludes that, by virtue of EPA applying that limit to SSM-related emissions, SJGS will not be able to comply with EPA's BART FIP. Similarly, PNM's comments showed that EPA's sulfuric acid limit could not be achieved at SJGS. PNM Comments at 15 (JA\_\_); *see also id.* (noting that sulfuric acid is not even “listed in EPA's [BART] Guidelines as a pollutant subject to the regional haze program” – a point to which EPA did not

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appropriate and justified. *Id.* at 20,898. EPA's final BART rulemaking action for North Dakota states that, in light of the district court's decision with respect to BACT, it would be inappropriate for EPA to disapprove the state's similar BART determination. *Id.*

<sup>26</sup> PNM Stay Motion, Exhibit 8.

respond in the Final Rule). Because EPA's achievability findings are unsupported and indeed contradicted by "substantial evidence" in the record, EPA's BART FIP is arbitrary and capricious. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520 (D.C. Cir. 1983).

In sum, because EPA's FIP emission limits are not "achievable" as EPA's BART regulations require, are inconsistent with EPA's own findings in other proceedings, and are unsupported by the evidence presented to EPA, EPA's establishment of these limits is arbitrary and contrary to law.

**E. EPA Acted Arbitrarily by Imposing, Without Valid Reason, Unit-by-Unit Emission Limits Rather than Allowing the Plantwide Averaging that Its Rules Authorize and Encourage.**

The Final Rule applies its 0.05 lb/mmBtu NO<sub>x</sub> limit and its sulfuric acid emission limit for SJGS to each of the facility's four units *individually*. EPA refused to apply the limits to the facility as a whole and to permit plantwide averaging for the four units to meet the applicable numerical limits. 76 Fed. Reg. at 52,439-40 (JA \_\_ - \_\_).

PNM's comments requested plantwide averaging. PNM Comments at 23 (JA \_\_). EPA's BART rules expressly authorize and encourage such plantwide averaging. *See* 70 Fed. Reg. at 39,172 (JA \_\_) (the BART-determining authority "should consider allowing sources to 'average' emissions across any set of BART-eligible emission units within a fenceline, so long as the emission reductions from

each pollutant being controlled for BART would be equal to those reductions that would be obtained by simply controlling each of the BART-eligible units that constitute [the] BART-eligible source”); *id.* at 39,115 (JA\_\_). The Final Rule acknowledged that EPA’s BART rules allow plantwide averaging. 76 Fed. Reg. at 52,405 (JA\_\_). Moreover, EPA has approved plantwide averaging of BART limits for other units. *See, e.g.*, 77 Fed. Reg. at 20,918 (allowing plantwide averaging for North Dakota units). Nevertheless, EPA rejected plantwide averaging for SJGS BART without presenting any legal or policy reason for that position. EPA’s only explanation was that “due to our consent decree deadline [for action on New Mexico’s *Interstate Transport SIP*], we do not have the time to construct the algorithm that could be used to guarantee practical enforceability” of a limit that averages emissions on a “boiler operating day” basis plantwide over 30-day periods. 76 Fed. Reg. at 52,405 (JA\_\_). But that consent decree deadline did not apply to EPA’s proposed BART FIP and, therefore, could not constrain EPA’s time to construct a “boiler-operating-day” averaging algorithm. Indeed, EPA’s own BART Guidelines, in the very same section that authorizes plantwide averaging, *call* for use of “boiler operating day,” 70 Fed. Reg. at 39,172 (JA\_\_), and EPA had over seven months from the time of its proposed rule to implement its own guidelines on this issue. For this reason as well, EPA’s Final Rule is arbitrary and capricious.

**III. EPA's Promulgation of an Interstate Transport FIP with a 0.05 lb/mmBtu NO<sub>x</sub> Limit for SJGS Was Contrary to the Act and Arbitrary and Capricious.**

As discussed above, EPA's Final Rule and its emission limit for NO<sub>x</sub> at SJGS is also premised on the CAA's Interstate Transport Provision, CAA § 110(a)(2)(D)(i)(II). EPA, however, lacked any valid basis for promulgating an Interstate Transport FIP because it had before it New Mexico's Interstate Transport SIP, which had been pending before EPA for nearly four years. That 2007 SIP was fully approvable; it could and should have been approved by EPA in August 2011, an action that would have discharged EPA's obligation with respect to New Mexico under the *WildEarth Guardians v. Jackson* consent decree.

In its Final Rule, EPA claimed for the first time – thereby unlawfully depriving commenters of their right to comment on this key aspect of EPA's rulemaking rationale – that changed circumstances rendered the 2006 EPA Guidance Document, which New Mexico had followed in preparing and submitting its 2007 SIP, inapposite by the time of the FIP rulemaking. 76 Fed. Reg. at 52,418 (JA \_\_). But EPA had no basis for this newly-minted position. EPA's 2006 guidance called on states to prepare and submit Interstate Transport SIPs before states submitted (and before EPA approved) SIPs to address regional haze, including BART, requirements. EPA thus instructed states that they may make a simple [Interstate Transport] SIP submission confirming 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” ... *until regional haze SIPs are submitted [by states] and approved [by EPA]*.

Interstate Transport Guidance at 9-10 (JA\_\_ - \_\_) (emphasis added). New Mexico complied with this guidance and submitted just such an Interstate Transport SIP in 2007. Then, and in August 2011, no state that could be affected by potentially visibility-impairing emission from SJGS had EPA-approved Regional Haze SIPs.<sup>27</sup> See 76 Fed. Reg. at 494 (JA\_\_).

As discussed above, EPA failed to act on the 2007 Interstate Transport SIP within the time required by the CAA. CAA § 110(k)(1), (2) (requiring EPA to approve or disapprove a SIP no later than 18 months after its receipt by EPA). New Mexico submitted a supplemental Interstate Transport SIP in June 2011 consistent with EPA’s WRAP modeling interpretation.<sup>28</sup> EPA had no proper

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<sup>27</sup> EPA’s Final Rule asserted – again, without prior notice to commenters – that New Mexico’s 2007 Interstate Transport SIP failed to satisfy EPA’s Interstate Transport Guidance, see 76 Fed. Reg. at 52,418 (JA\_\_), but that argument is without merit. The Interstate Transport SIP did precisely what EPA’s Guidance called for: it stated it was not possible to determine whether emissions from New Mexico sources would interfere with any CAA-required measure of another state’s regional haze SIP, and it articulated New Mexico’s intention to comply with any interstate transport-related visibility obligations through eventual submission, approval, and implementation of a regional haze SIP for the state. Nothing more was or reasonably could have been required of the state.

<sup>28</sup> New Mexico’s 2011 supplemental Interstate Transport SIP updated the state’s 2007 submittal to make clear that New Mexico relies on its 2011 Regional Haze SIP to satisfy its visibility-related obligations under CAA section 110(a)(2)(D)(i)(II).

course available to it but to approve the 2007 Interstate Transport SIP submittal. EPA cannot issue a FIP if a state has submitted a SIP that “satisfies the standards of § 110(a)(2)” of the Act, *Train*, 421 U.S. at 79, and New Mexico has submitted *two* successive and complementary plans that meet the standards of section 110(a)(2)(D)(i)(II) as interpreted by EPA itself. Accordingly, it was unlawful for EPA to disapprove the first of these state plans, to disregard the second, and to impose its own, far different plan.

EPA’s claim that it can now discern the emission limits required by section 110(a)(2)(D)(i)(II) is also without merit. That provision requires Interstate Transport SIPs to include emission limits that will preclude emissions from one state from “interfer[ing]” with the “measures required” by the CAA in any other state to protect visibility, *i.e.*, from interfering with the EPA-approved and statutorily-required visibility-related provisions of that other state’s SIP. Because those SIPs were not in place in neighboring states when EPA promulgated the Final Rule and disapproved the 2007 Interstate Transport SIP, EPA did not and could not find (or even evaluate whether) *any specific* emission limit or other “measure[]” is (a) required of other states under section 110(a)(2)(D)(i)(II) and (b) threatened with interference by New Mexico emissions.

Because the 2007 SIP was and remained approvable, and no grounds existed on which EPA could properly determine that a FIP emission limit to satisfy section

110(a)(2)(D)(i)(II) was required, EPA lacked authority to impose *any* emission limit in a FIP under the CAA's Interstate Transport provision. Because it lacked that authority, EPA could not validly base its action on its claim that it sought to avoid imposing inconsistent Interstate Transport and Regional Haze emission limits and emission control technology requirements. Concomitantly, *approving* the 2007 Interstate Transport SIP (and declining to impose any FIP emission limit under § 110(a)(2)(D)(i)(II)), as EPA should have done, would have avoided *any* inconsistency with *any* emission limit.

EPA had no remotely legitimate justification for imposing the 0.05 lb/mmBtu Interstate Transport FIP limit that it did, even accepting for the sake of argument *both* EPA's theory that the 2007 SIP was unapprovable *and* that an Interstate Transport emission limit was needed to satisfy CAA section 110(a)(2)(D)(i)(II), PNM was fully capable of figuring out that a 0.05 lb/mmBtu limit for BART (if such a limit were imposed) was more stringent than a 0.27/0.28 lb/mmBtu limit derived from WRAP's modeling assumptions and that the former would govern its conduct. EPA did not need to impose, and had no lawful basis for imposing, a 0.05 lb/mmBtu limit for transport to provide "certainty" or to avoid putative confusion by PNM, which is was EPA's only asserted excuse for imposing a limit that is indisputably without factual or record support.

Accordingly, EPA lacked any lawful basis for its Interstate Transport FIP, which should be vacated along with EPA's disapproval of the 2007 Interstate Transport SIP and EPA's promulgation of the BART FIP.

**CONCLUSION**

For the foregoing reasons and those stated in the brief of Petitioners Governor Martinez and NMED, this Court should vacate EPA's Final Rule.

Respectfully submitted,

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**STATEMENT WITH RESPECT TO ORAL ARGUMENT**

Oral argument in these cases is necessary because of the exceptional importance of the issues presented by EPA's actions under review and the prospect of significant impacts on the citizens of New Mexico that this case presents. In their briefing proposal filed on March 21, 2012, Petitioners Governor Martinez, NMED, and PNM requested that oral argument be scheduled for a special session in October 2012. In its Order of March 23, 2012, the Court stated that it anticipates scheduling oral argument in these cases for a special session in October 2012.

**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 13,774 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 14,000-word limit set by Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and by Order of this Court dated March 23, 2012.

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**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: April 30, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of April, 2012 (in the time zone of the principal office of the Clerk of the U.S. Court of Appeals for the Tenth Circuit, Fed. R. App. P. 26(a)(4)(B)), the foregoing Brief of Petitioner in No. 11-9557, Public Service Company of New Mexico, was served electronically on all counsel of record through the Court's CM/ECF system.

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## **Statutory and Regulatory Addendum**

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**1. Clean Air Act § 110, 42 U.S.C. § 7410**

1. §7410. State implementation plans for national primary and secondary ambient air quality standards

**(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems**

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator—

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan—

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

**(I)** in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

**(J)** meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

**(K)** provide for—

**(i)** the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

**(ii)** the submission, upon request, of data related to such air quality modeling to the Administrator;

**(L)** require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover—

**(i)** the reasonable costs of reviewing and acting upon any application for such a permit, and

**(ii)** if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

**(M)** provide for consultation and participation by local political subdivisions affected by the plan.

**(3)(A)** Repealed. Pub. L. 101-549, title I, §101(d)(1), Nov. 15, 1990, 104 Stat. 2409.

**(B)** As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e) of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed. Pub. L. 101-549, title I, §101(d)(2), Nov. 15, 1990, 104 Stat. 2409.

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

- (i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or
- (ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term “transportation control measure” does not include any measure which is an “indirect source review program”.

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

**(b) Extension of period for submission of plans**

The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

**(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation**

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

(2)(A) Repealed. Pub. L. 101-549, title I, §101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from

approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) Repealed. Pub. L. 101-549, title I, §101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409.

(D) For purposes of this paragraph—

(i) The term “parking surcharge regulation” means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term “management of parking supply” shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term “preferential bus/carpool lane” shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub. L. 101-549, title I, §101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409.

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards, and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

**(d), (e) Repealed. Pub. L. 101-549, title I, §101(d)(4), (5), Nov. 15, 1990, 104 Stat. 2409**

**(f) National or regional energy emergencies; determination by President**

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that—

(A) a temporary suspension of any part of the applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and

(B) other means of responding to the energy emergency may be inadequate. Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that—

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title, as in effect before August 7, 1977, or section 7413(d) of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

**(g) Governor's authority to issue temporary emergency suspensions**

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title as in effect before August 7, 1977, or under section 7413(d) of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

**(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan**

(1) Not later than 5 years after November 15, 1990, and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

**(i) Modification of requirements prohibited**

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section; no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

**(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards**

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used at such source will enable it to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

**(k) Environmental Protection Agency action on plan submissions**

**(1) Completeness of plan submissions**

**(A) Completeness criteria**

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

**(B) Completeness finding**

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

**(C) Effect of finding of incompleteness**

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

**(2) Deadline for action**

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

**(3) Full and partial approval and disapproval**

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

**(4) Conditional approval**

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after

the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

**(5) Calls for plan revisions**

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

**(6) Corrections**

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

**(l) Plan revisions**

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

**(m) Sanctions**

The Administrator may apply any of the sanctions listed in section 7509(b) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 7509(a) of this title in relation to any plan or plan item (as that term is defined by the Administrator)

required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 7509(a) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 7509(a) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

**(n) Savings clauses**

**(1) Existing plan provisions**

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

**(2) Attainment dates**

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State—

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of November 15, 1990, or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

**(3) Retention of construction moratorium in certain areas**

In the case of an area to which, immediately before November 15, 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) of this section (as in effect immediately before November 15, 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 7502(b)(6) of this title (relating to establishment of a permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect immediately before November 15, 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section 7502(c)(5) of

this title (relating to permit programs) or subpart 5 of part D of this subchapter (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

**(o) Indian tribes**

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

**(p) Reports**

Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the development effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

**2. Clean Air Act § 169A, 42 U.S.C. § 7491**

2. §7491. Visibility protection for Federal class I areas

**(a) Impairment of visibility; list of areas; study and report**

(1) Congress hereby declares as a national 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.

(2) Not later than six months after August 7, 1977, the Secretary of the Interior in consultation with other Federal land managers shall review all mandatory class I Federal areas and identify those where visibility is an important value of the area. From time to time the Secretary of the Interior may revise such identifications. Not later than one year after August 7, 1977, the Administrator shall, after consultation with the Secretary of the Interior, promulgate a list of mandatory class I Federal areas in which he determines visibility is an important value.

(3) Not later than eighteen months after August 7, 1977, the Administrator shall complete a study and report to Congress on available methods for implementing the national goal set forth in paragraph (1). Such report shall include recommendations for—

(A) methods for identifying, characterizing, determining, quantifying, and measuring visibility impairment in Federal areas referred to in paragraph (1), and

(B) modeling techniques (or other methods) for determining the extent to which manmade air pollution may reasonably be anticipated to cause or contribute to such impairment, and

(C) methods for preventing and remedying such manmade air pollution and resulting visibility impairment.

Such report shall also identify the classes or categories of sources and the types of air pollutants which, alone or in conjunction with other sources or pollutants, may reasonably be anticipated to cause or contribute significantly to impairment of visibility.

(4) Not later than twenty-four months after August 7, 1977, and after notice and public hearing, the Administrator shall promulgate regulations to assure (A) reasonable progress toward meeting the national goal specified in paragraph (1), and (B) compliance with the requirements of this section.

**(b) Regulations**

Regulations under subsection (a)(4) of this section shall—

(1) provide guidelines to the States, taking into account the recommendations under subsection (a)(3) of this section on appropriate techniques and methods for implementing this section (as provided in subparagraphs (A) through (C) of such subsection (a)(3)), and

(2) require each applicable implementation plan for a State in which any area listed by the Administrator under subsection (a)(2) of this section is located (or for a State the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area) to contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal specified in subsection (a) of this section, including—

(A) except as otherwise provided pursuant to subsection (c) of this section, a requirement that each major stationary source which is in existence on August 7, 1977, but which has not been in operation for more than fifteen years as of such date, and which, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area, shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) for controlling emissions from such source for the purpose of eliminating or reducing any such impairment, and

(B) a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal specified in subsection (a) of this section.

In the case of a fossil-fuel fired generating powerplant having a total generating capacity in excess of 750 megawatts, the emission limitations required under this paragraph shall be determined pursuant to guidelines, promulgated by the Administrator under paragraph (1).

### **(c) Exemptions**

(1) The Administrator may, by rule, after notice and opportunity for public hearing, exempt any major stationary source from the requirement of subsection (b)(2)(A) of this section, upon his determination that such source does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to a significant impairment of visibility in any mandatory class I Federal area.

(2) Paragraph (1) of this subsection shall not be applicable to any fossil-fuel fired powerplant with total design capacity of 750 megawatts or more, unless the owner or operator of any such plant demonstrates to the satisfaction of the Administrator that such powerplant is located at such distance from all areas listed by the Administrator under subsection (a)(2) of this section that such powerplant does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to significant impairment of visibility in any such area.

**(3)** An exemption under this subsection shall be effective only upon concurrence by the appropriate Federal land manager or managers with the Administrator's determination under this subsection.

**(d) Consultations with appropriate Federal land managers**

Before holding the public hearing on the proposed revision of an applicable implementation plan to meet the requirements of this section, the State (or the Administrator, in the case of a plan promulgated under section 7410(c) of this title) shall consult in person with the appropriate Federal land manager or managers and shall include a summary of the conclusions and recommendations of the Federal land managers in the notice to the public.

**(e) Buffer zones**

In promulgating regulations under this section, the Administrator shall not require the use of any automatic or uniform buffer zone or zones.

**(f) Nondiscretionary duty**

For purposes of section 7604(a)(2) of this title, the meeting of the national goal specified in subsection (a)(1) of this section by any specific date or dates shall not be considered a "nondiscretionary duty" of the Administrator.

**(g) Definitions**

For the purpose of this section—

**(1)** in determining reasonable progress there shall be taken into consideration 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;

**(2)** in determining best available retrofit technology the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration 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;

**(3)** the term "manmade air pollution" means air pollution which results directly or indirectly from human activities;

(4) the term “as expeditiously as practicable” means as expeditiously as practicable but in no event later than five years after the date of approval of a plan revision under this section (or the date of promulgation of such a plan revision in the case of action by the Administrator under section 7410(c) of this title for purposes of this section);

(5) the term “mandatory class I Federal areas” means Federal areas which may not be designated as other than class I under this part;

(6) the terms “visibility impairment” and “impairment of visibility” shall include reduction in visual range and atmospheric discoloration; and

(7) the term “major stationary source” means the following types of stationary sources with the potential to emit 250 tons or more of any pollutant: fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than 250 million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities.

**3. Clean Air Act § 169B, 42 U.S.C. § 7492**

3. §7492. Visibility

**(a) Studies**

(1) The Administrator, in conjunction with the National Park Service and other appropriate Federal agencies, shall conduct research to identify and evaluate sources and source regions of both visibility impairment and regions that provide predominantly clean air in class I areas. A total of \$8,000,000 per year for 5 years is authorized to be appropriated for the Environmental Protection Agency and the other Federal agencies to conduct this research. The research shall include—

- (A) expansion of current visibility related monitoring in class I areas;
- (B) assessment of current sources of visibility impairing pollution and clean air corridors;
- (C) adaptation of regional air quality models for the assessment of visibility;
- (D) studies of atmospheric chemistry and physics of visibility.

(2) Based on the findings available from the research required in subsection (a)(1) of this section as well as other available scientific and technical data, studies, and other available information pertaining to visibility source-receptor relationships, the Administrator shall conduct an assessment and evaluation that identifies, to the extent possible, sources and source regions of visibility impairment including natural sources as well as source regions of clear air for class I areas. The Administrator shall produce interim findings from this study within 3 years after November 15, 1990.

**(b) Impacts of other provisions**

Within 24 months after November 15, 1990, the Administrator shall conduct an assessment of the progress and improvements in visibility in class I areas that are likely to result from the implementation of the provisions of the Clean Air Act Amendments of 1990 other than the provisions of this section. Every 5 years thereafter the Administrator shall conduct an assessment of actual progress and improvement in visibility in class I areas. The Administrator shall prepare a written report on each assessment and transmit copies of these reports to the appropriate committees of Congress.

**(c) Establishment of visibility transport regions and commissions**

**(1) Authority to establish visibility transport regions**

Whenever, upon the Administrator's motion or by petition from the Governors of at least two affected States, the Administrator has reason to believe that the current or projected interstate transport of air pollutants from one or more States contributes significantly to visibility impairment in class I areas located in the affected States, the

Administrator may establish a transport region for such pollutants that includes such States. The Administrator, upon the Administrator's own motion or upon petition from the Governor of any affected State, or upon the recommendations of a transport commission established under subsection (b) of this section may—

(A) add any State or portion of a State to a visibility transport region when the Administrator determines that the interstate transport of air pollutants from such State significantly contributes to visibility impairment in a class I area located within the transport region, or

(B) remove any State or portion of a State from the region whenever the Administrator has reason to believe that the control of emissions in that State or portion of the State pursuant to this section will not significantly contribute to the protection or enhancement of visibility in any class I area in the region.

**(2) Visibility transport commissions**

Whenever the Administrator establishes a transport region under subsection (c)(1) of this section, the Administrator shall establish a transport commission comprised of (as a minimum) each of the following members:

(A) the Governor of each State in the Visibility Transport Region, or the Governor's designee;

(B) The Administrator or the Administrator's designee; and

(C) A representative of each Federal agency charged with the direct management of each class I area or areas within the Visibility Transport Region.

**(3) Ex officio members**

All representatives of the Federal Government shall be ex officio members.

**(4) Federal Advisory Committee Act**

The visibility transport commissions shall be exempt from the requirements of the Federal Advisory Committee Act [5 U.S.C. App.].

**(d) Duties of visibility transport commissions**

A Visibility Transport Commission—

(1) shall assess the scientific and technical data, studies, and other currently available information, including studies conducted pursuant to subsection (a)(1) of this section, pertaining to adverse impacts on visibility from potential or projected growth in emissions from sources located in the Visibility Transport Region; and

(2) shall, within 4 years of establishment, issue a report to the Administrator recommending what measures, if any, should be taken under this chapter to remedy such adverse impacts. The report required by this subsection shall address at least the following measures:

(A) the establishment of clean air corridors, in which additional restrictions on increases in emissions may be appropriate to protect visibility in affected class I areas;

(B) the imposition of the requirements of part D of this subchapter affecting the construction of new major stationary sources or major modifications to existing sources in such clean air corridors specifically including the alternative siting analysis provisions of section 7503(a)(5) of this title; and

(C) the promulgation of regulations under section 7491 of this title to address long range strategies for addressing regional haze which impairs visibility in affected class I areas.

**(e) Duties of Administrator**

(1) The Administrator shall, taking into account the studies pursuant to subsection (a)(1) of this section and the reports pursuant to subsection (d)(2) of this section and any other relevant information, within eighteen months of receipt of the report referred to in subsection (d)(2) of this section, carry out the Administrator's regulatory responsibilities under section 7491 of this title, including criteria for measuring "reasonable progress" toward the national goal.

(2) Any regulations promulgated under section 7491 of this title pursuant to this subsection shall require affected States to revise within 12 months their implementation plans under section 7410 of this title to contain such emission limits, schedules of compliance, and other measures as may be necessary to carry out regulations promulgated pursuant to this subsection.

**(f) Grand Canyon visibility transport commission**

The Administrator pursuant to subsection (c)(1) of this section shall, within 12 months, establish a visibility transport commission for the region affecting the visibility of the Grand Canyon National Park.

4. **Clean Air Act § 302(y), 42 U.S.C. § 7602(y)**

4. § 7602. Definitions

When used in this chapter—

\* \* \* \* \*

**(y) Federal Implementation Plan.**—The term “Federal implementation plan” 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 State implementation plan, and which includes enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

**5. Clean Air Act § 307(b)(1) and (d), 42 U.S.C. § 7607(b)(1) and (d)**

5. §7607. Administrative proceedings and judicial review

\* \* \* \* \*

**(b) Judicial review**

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

\* \* \* \* \*

**(d) Rulemaking**

**(1)** This subsection applies to—

**(A)** the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

**(B)** the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

**(C)** the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

**(D)** the promulgation of any requirement for solid waste combustion under section 7429 of this title,

**(E)** the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

**(F)** the promulgation or revision of any aircraft emission standard under section 7571 of this title,

**(G)** the promulgation or revision of any regulation under subchapter IV–A of this chapter (relating to control of acid deposition),

**(H)** promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

**(I)** promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

**(J)** promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

**(K)** promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

**(L)** promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

**(M)** promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

**(N)** action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

**(O)** the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

**(P)** the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV–A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a “rule”). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the “comment period”). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

**(4)(A)** The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

**(B)(i)** Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

**(ii)** The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

**(5)** In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

**(6)(A)** The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

**(B)** The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

**(C)** The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

**(7)(A)** The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

**(B)** Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

**(8)** The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

**(9)** In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

**(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

**(B)** contrary to constitutional right, power, privilege, or immunity;

**(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

**(D)** without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

**(10)** Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a

determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

**(11)** The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

6. 40 C.F.R. § 51.301

§ 51.301 Definitions.

For purposes of this subpart:

*Adverse impact on visibility* means, for purposes of section 307, visibility impairment which interferes with the management, protection, preservation, or enjoyment of the visitor's visual experience of the Federal Class I area. This determination must be made on a case-by-case basis taking into account the geographic extent, intensity, duration, frequency and time of visibility impairments, and how these factors correlate with (1) times of visitor use of the Federal Class I area, and (2) the frequency and timing of natural conditions that reduce visibility. This term does not include effects on integral vistas.

*Agency* means the U.S. Environmental Protection Agency.

*BART-eligible source* means an *existing stationary facility* as defined in this section.

*Best Available Retrofit Technology (BART)* means 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. The emission limitation must be established, on a case-by-case basis, taking 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.

*Building, structure, or facility* means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities must be considered as part of the same industrial grouping if they belong to the same *Major Group* (i.e., which have the same two-digit code) as described in the *Standard Industrial Classification Manual, 1972* as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0 respectively).

*Deciview* means a measurement of visibility impairment. A deciview is a haze index derived from calculated light extinction, such that uniform changes in haziness correspond to uniform incremental changes in perception across the entire range of conditions, from pristine to highly impaired. The deciview haze index is calculated based on the following equation (for the purposes of calculating deciview, the atmospheric light extinction coefficient must be calculated from aerosol measurements):

Deciview haze index =  $10 \ln_e (b_{\text{ext}}/10 \text{ Mm}^{-1})$ .

Where  $b_{\text{ext}}$  = the atmospheric light extinction coefficient, expressed in inverse megameters ( $\text{Mm}^{-1}$ ).

*Existing stationary facility* means any of the following stationary sources of air pollutants, including any reconstructed source, which was not in operation prior to August 7, 1962, and was in existence on August 7, 1977, and has the potential to emit 250 tons per year or more of any air pollutant. In determining potential to emit, fugitive emissions, to the extent quantifiable, must be counted.

Fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input,

Coal cleaning plants (thermal dryers),

Kraft pulp mills,

Portland cement plants,

Primary zinc smelters,

Iron and steel mill plants,

Primary aluminum ore reduction plants,

Primary copper smelters,

Municipal incinerators capable of charging more than 250 tons of refuse per day,

Hydrofluoric, sulfuric, and nitric acid plants,

Petroleum refineries,

Lime plants,

Phosphate rock processing plants,

Coke oven batteries,

Sulfur recovery plants,

Carbon black plants (furnace process),

Primary lead smelters,

Fuel conversion plants,

Sintering plants,

Secondary metal production facilities,

Chemical process plants,

Fossil-fuel boilers of more than 250 million British thermal units per hour heat input,

Petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels,

Taconite ore processing facilities,

Glass fiber processing plants, and

Charcoal production facilities.

*Federal Class I area* means any Federal land that is classified or reclassified *Class I*.

*Federal Land Manager* means the Secretary of the department with authority over the Federal Class I area (or the Secretary's designee) or, with respect to Roosevelt-Campobello International Park, the Chairman of the Roosevelt-Campobello International Park Commission.

*Federally enforceable* means all limitations and conditions which are enforceable by the Administrator under the Clean Air Act including those requirements developed pursuant to parts 60 and 61 of this title, requirements within any applicable State Implementation Plan, and any permit requirements established pursuant to § 52.21 of this chapter or under regulations approved pursuant to part 51, 52, or 60 of this title.

*Fixed capital cost* means the capital needed to provide all of the depreciable components.

*Fugitive Emissions* means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

*Geographic enhancement for the purpose of § 51.308* means a method, procedure, or process to allow a broad regional strategy, such as an emissions trading program designed to achieve greater reasonable progress than BART for regional haze, to accommodate BART for reasonably attributable impairment.

*Implementation plan* means, for the purposes of this part, any State Implementation Plan, Federal Implementation Plan, or Tribal Implementation Plan.

*Indian tribe* or *tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*In existence* means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (1) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (2) entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed in a reasonable time.

*In operation* means engaged in activity related to the primary design function of the source.

*Installation* means an identifiable piece of process equipment.

*Integral vista* means a view perceived from within the mandatory Class I Federal area of a specific landmark or panorama located outside the boundary of the mandatory Class I Federal area.

*Least impaired days* means the average visibility impairment (measured in deciviews) for the twenty percent of monitored days in a calendar year with the lowest amount of visibility impairment.

*Major stationary source* and *major modification* mean major stationary source and major modification, respectively, as defined in § 51.166.

*Mandatory Class I Federal Area* means any area identified in part 81, subpart D of this title.

*Most impaired days* means the average visibility impairment (measured in deciviews) for the twenty percent of monitored days in a calendar year with the highest amount of visibility impairment.

*Natural conditions* includes naturally occurring phenomena that reduce visibility as measured in terms of light extinction, visual range, contrast, or coloration.

*Potential to emit* means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted,

stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

*Reasonably attributable* means attributable by visual observation or any other technique the State deems appropriate.

*Reasonably attributable visibility impairment* means visibility impairment that is caused by the emission of air pollutants from one, or a small number of sources.

*Reconstruction* will be presumed to have taken place where the fixed capital cost of the new component exceeds 50 percent of the fixed capital cost of a comparable entirely new source. Any final decision as to whether reconstruction has occurred must be made in accordance with the provisions of § 60.15 (f) (1) through (3) of this title.

*Regional haze* means visibility impairment that is caused by the emission of air pollutants from numerous sources located over a wide geographic area. Such sources include, but are not limited to, major and minor stationary sources, mobile sources, and area sources.

*Secondary emissions* means emissions which occur as a result of the construction or operation of an existing stationary facility but do not come from the existing stationary facility. Secondary emissions may include, but are not limited to, emissions from ships or trains coming to or from the existing stationary facility.

*Significant impairment* means, for purposes of § 51.303, visibility impairment which, in the judgment of the Administrator, interferes with the management, protection, preservation, or enjoyment of the visitor's visual experience of the mandatory Class I Federal area. This determination must be made on a case-by-case basis taking into account the geographic extent, intensity, duration, frequency and time of the visibility impairment, and how these factors correlate with (1) times of visitor use of the mandatory Class I Federal area, and (2) the frequency and timing of natural conditions that reduce visibility.

*State* means "State" as defined in section 302(d) of the CAA.

*Stationary Source* means any building, structure, facility, or installation which emits or may emit any air pollutant.

*Visibility impairment* means any humanly perceptible change in visibility (light extinction, visual range, contrast, coloration) from that which would have existed under natural conditions.

*Visibility in any mandatory Class I Federal area* includes any integral vista associated with that area.

7. 40 C.F.R. § 51.308(b), (d), and (e)

§ 51.308 Regional haze program requirements.

\* \* \* \* \*

(b) *When are the first implementation plans due under the regional haze program?* Except as provided in § 51.309(c), each State identified in § 51.300(b)(3) must submit, for the entire State, an implementation plan for regional haze meeting the requirements of paragraphs (d) and (e) of this section no later than December 17, 2007.

\* \* \* \* \*

(d) *What are the core requirements for the implementation plan for regional haze?* The State must address regional haze in each mandatory Class I Federal area located within the State and in each mandatory Class I Federal area located outside the State which may be affected by emissions from within the State. To meet the core requirements for regional haze for these areas, the State must submit an implementation plan containing the following plan elements and supporting documentation for all required analyses:

(1) *Reasonable progress goals.* For each mandatory Class I Federal area located within the State, the State must establish goals (expressed in deciviews) that provide for reasonable progress towards achieving natural visibility conditions. The reasonable progress goals must provide for an improvement in visibility for the most impaired days over the period of the implementation plan and ensure no degradation in visibility for the least impaired days over the same period.

(i) In establishing a reasonable progress goal for any mandatory Class I Federal area within the State, the State must:

(A) Consider the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected sources, and include a demonstration showing how these factors were taken into consideration in selecting the goal.

(B) Analyze and determine the rate of progress needed to attain natural visibility conditions by the year 2064. To calculate this rate of progress, the State must compare baseline visibility conditions to natural visibility conditions in the mandatory Federal Class I area and determine the uniform rate of visibility improvement (measured in deciviews) that would need to be maintained during each implementation period in order to attain natural visibility conditions by 2064. In establishing the reasonable progress goal, the State must consider the uniform rate of improvement in visibility and the emission reduction measures needed to achieve it for the period covered by the implementation plan.

(ii) For the period of the implementation plan, if the State establishes a reasonable progress goal that provides for a slower rate of improvement in visibility than the rate that would be needed to attain natural conditions by 2064, the State must demonstrate,

based on the factors in paragraph (d)(1)(i)(A) of this section, that the rate of progress for the implementation plan to attain natural conditions by 2064 is not reasonable; and that the progress goal adopted by the State is reasonable. The State must provide to the public for review as part of its implementation plan an assessment of the number of years it would take to attain natural conditions if visibility improvement continues at the rate of progress selected by the State as reasonable.

(iii) In determining whether the State's goal for visibility improvement provides for reasonable progress towards natural visibility conditions, the Administrator will evaluate the demonstrations developed by the State pursuant to paragraphs (d)(1)(i) and (d)(1)(ii) of this section.

(iv) In developing each reasonable progress goal, the State must consult with those States which may reasonably be anticipated to cause or contribute to visibility impairment in the mandatory Class I Federal area. In any situation in which 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. In 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.

(v) The reasonable progress goals established by the State are not directly enforceable but will be considered by the Administrator in evaluating the adequacy of the measures in the implementation plan to achieve the progress goal adopted by the State.

(vi) The State may not adopt a reasonable progress goal that represents less visibility improvement than is expected to result from implementation of other requirements of the CAA during the applicable planning period.

(2) *Calculations of baseline and natural visibility conditions.* For each mandatory Class I Federal area located within the State, the State must determine the following visibility conditions (expressed in deciviews):

(i) Baseline visibility conditions for the most impaired and least impaired days. The period for establishing baseline visibility conditions is 2000 to 2004. Baseline visibility conditions must be calculated, using available monitoring data, by establishing the average degree of visibility impairment for the most and least impaired days for each calendar year from 2000 to 2004. The baseline visibility conditions are the average of these annual values. For mandatory Class I Federal areas without onsite monitoring data for 2000–2004, the State must establish baseline values using the most representative available monitoring data for 2000–2004, in consultation with the Administrator or his or her designee;

(ii) For an implementation plan that is submitted by 2003, the period for establishing baseline visibility conditions for the period of the first long-term strategy is the most recent 5-year period for which visibility monitoring data are available for the mandatory Class I Federal areas addressed by the plan. For mandatory Class I Federal areas without onsite monitoring data, the State must establish baseline values using the most