BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In re:

Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan; Final Rule	)	Docket No. EPA-R06-OAR-2015-0189

PETITION FOR RECONSIDERATION AND REQUEST FOR ADMINISTRATIVE STAY

I. Introduction

Pursuant to Section 307 of the Clean Air Act ("CAA"),[1] the Arkansas Department of Environmental Quality ("ADEQ") submits this Petition for Reconsideration requesting that the Administrator of the U.S. Environmental Protection Agency ("EPA") convene a proceeding for reconsideration of the final rule, "Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan; Final Rule" ("Regional Haze FIP").[2] The ADEQ also requests that the agency immediately stay the Arkansas Regional Haze FIP pending completion of its reconsideration of the final rule. Absent a stay, implementation of the rule will

[1] 42 U.S.C. § 7607(d)(7)(B).
[2] 81 Fed. Reg. 66332 (Sept. 27, 2016) (hereinafter "Arkansas Regional Haze FIP" or "FIP").

require expensive and unnecessary expenditures by utilities within Arkansas which will, ultimately, be borne by electric consumers.

Given the important issues raised by this petition, the EPA should immediately contact the ADEQ to discuss an appropriate schedule and process for reconsideration with an administrative stay in place. In the event the EPA has neither granted the petition nor made alternative arrangements with the consent of the ADEQ to establish a schedule for reconsideration within seventy (70) days of receipt of this request, such inaction will be deemed a denial of the petition.

II. The State raises objections that support reconsideration of the Regional Haze FIP.

The Clean Air Act requires the EPA to convene an administrative proceeding for reconsideration of a rule if a party raising an objection to the rule demonstrates to the EPA that: 1) it was impracticable to raise the objection during the comment period, or that the grounds for such objection arose after the comment period but within the time specified for judicial review; and 2) the objection is of central relevance to the outcome of the rule.[3] The objections raised in the sections below are of central relevance to the outcome of the final Regional Haze FIP. Considering the new information presented below, the EPA should reach a different outcome in the rulemaking. This new information provides substantial support for revision of the Regional Haze FIP.

[3] 42 U.S.C. § 7607(d)(7)(B).

a. The EPA should reconsider emission controls on Independence in light of recent IMPROVE monitoring data which shows that Arkansas has already achieved the amount of progress required for this planning period.

The EPA believes that the reasonable progress four-factor analysis requires additional controls for the Entergy Independence Power Plant ("Independence").[4] However, the EPA should reconsider whether controls on Independence are necessary under the Clean Air Act because 2015 monitoring data shows that Arkansas is currently meeting the reasonable progress goals set in the FIP and will continue to meet those goals for remainder of the first planning period.[5] Therefore, further controls on Independence are not necessary to achieve reasonable progress.

It was impracticable to raise this objection during the public comment period for two reasons. First, the 2015 monitoring data were not available at the time the draft rule was released. Since the close of the comment period for the proposed Regional Haze FIP on April 8, 2015, measured concentration data for January 2015 through September 2015 from the IMPROVE network of Class I Federal area monitors became available.[6] This monitoring data is the most recent available and shows that visibility values for both Caney Creek and Upper Buffalo are not only well below the Uniform Rate of Progress but also well below the reasonable progress goals set by the EPA in the Regional Haze FIP.

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[4] 81 Fed. Reg. 66332, 66350.
[5] Interagency Monitoring of Protected Visibility Environment, accessed at http://vista.cira.colostate.edu/Improve/.
[6] The public comment period was reopened twice in 2016 but each instance was limited to specific portions of the proposal not related to this data.

Second, EPA revised the final reasonable progress goals for this planning period downwards so that it would not have been possible to raise an objection during the comment period regarding actual visibility conditions being below the final reasonable progress goals because both visibility conditions and goals are components of that objection.

Wilderness Area	Disapproved 2008 RH SIP RPG	Proposed FIP RPG	Final RH FIP RPG	2015 Actual Conditions
Caney Creek	22.48	22.27	22.47	20.41
Upper Buffalo	22.52	22.33	22.51	19.96

The Clean Air Act requires each implementation plan to "contain such emission limits, schedules of compliance and other measures as may be *necessary to make reasonable progress.*"[7] Thus, because the 2015 monitoring data indicates that Arkansas has already achieved the FIP's reasonable progress goals without additional controls, the controls placed on Independence are not necessary. Additional controls simply cannot be necessary to achieve an amount of progress that has already occurred. The EPA exceeds its statutory authority by including controls on Independence despite evidence that such requirements are necessary to make reasonable progress.

Given the current visibility conditions and final reasonable progress goals, the EPA's methodology may not accurately predict the visibility improvement

[7] 42 U.S.C. § 7491 (emphasis added).

resulting from the installation of those controls on Independence even though these controls are purportedly required to meet those reasonable progress goals. EPA used the CALPUFF model to predict the visibility improvement. The EPA's CALPUFF results overstate the visibility improvements to be obtained by reductions in SO_x and NO_x emissions. The margins of error show that the calculations by CALPUFF are sufficiently unreliable to decide whether the controls result in visibility improvement. In Appendix A attached to this petition, the ADEQ includes Comments on the Use of the CALPUFF Model.

b. The EPA should reconsider compliance with the Transport Rule as an alternative acceptable method of compliance with BART for NO_x as a result of a recent rulemaking that increased the stringency of the Transport Rule.

The ADEQ requests that the EPA reconsider NO_x limitations placed on BART-eligible facilities and determine that compliance with the Transport Rule[8] is acceptable for compliance with NO_x BART. The implementing regulations for the regional haze program allow the State to consider compliance with the Transport Rule as an alternative to controls on BART-eligible facilities.[9] As this option is available to the states, the EPA should also include this BART-alternative in the Regional Haze FIP for NO_x controls.

This request is particularly compelling in light of the recent update to the Transport Rule because the revised NO_x budget for Arkansas is now lower than it was when the "better than BART" regulation was initially promulgated. However,

[8] Also known as the Cross-State Air Pollution Rule, or "CSAPR."
[9] 40 C.F.R. 51.308(e).

it was impracticable for the ADEQ to raise this issue before the end of the comment period because the final rule regarding Transport Rule NO_x budgets was not published until October 26, 2016.[10] As discussed below, this issue is of central relevance to the outcome of EPA's decision in Arkansas's Regional Haze FIP and would likely lead to a different outcome in the rule; therefore, the EPA should open a proceeding to reconsider this issue.

In a letter to the ADEQ dated October 13, 2016, the EPA indicates that it will most likely consider compliance with the Transport Rule as a viable alternative for NO_x under the Regional Haze Rule and will issue a national rule to that effect.[11] However, the EPA is not required to wait until an updated national rule goes into effect; the current rule allowing compliance with the Transport Rule as a BART-alternative is still in effect and has withstood legal scrutiny. Indeed, the Eighth Circuit Court of Appeals has upheld the EPA's reliance on this alternative.[12] In *National Parks*, the court found that it was not an abuse of discretion for the EPA to rely on its expertise and determine that compliance with the Transport Rule met the requirements of the regional haze program.[13] The court agreed with the D.C. Circuit that reliance on BART-alternatives is measured on their ability to ensure

[10] 81 Fed. Reg. 74504 (Oct. 26, 2016).
[11] The letter from EPA is attached as Appendix B to this petition.
[12] *National Parks Conservation Ass'n. v. McCarthy*, 816 F.3d 989 (8th Cir. 2016) ("*National Parks*").
[13] *Id.* at 996.

"reasonable progress."[14] As stated above, recent monitoring data show that Arkansas is meeting the reasonable progress goals set by the EPA and will continue to do so for the rest of the first compliance period.

Allowing facilities subject to the Transport Rule to comply with that rule in satisfaction of NO_x controls for BART in Arkansas will not sacrifice stringency. The EPA has already determined that the Transport Rule—also known as the Cross-State Air Pollution Rule ("CSAPR")—is "better than BART."[15] According to the EPA, the Transport Rule achieves "greater reasonable progress towards the national goal of achieving natural visibility conditions in Class I areas than source-specific…BART in those states covered by the Transport Rule."[16] The EPA recently finalized a rulemaking which updated the Transport Rule, entitled the CSAPR Update Rule.[17] The CSAPR Update Rule provides a small and more stringent NOx trading budget than the original CSAPR trading program that the EPA considered to be "better than BART."

If compliance with the earlier CSAPR trading program in Arkansas achieved greater reasonable progress than BART for NOx, then the CSAPR Update Rule

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[14] *Id*. at 995, citing *Utility Air Regulatory Group v. EPA*, 471 F.3d 1333, 1341 (D.C. Cir. 2006), which reviewed the earlier version of the Transport Rule, the Clean Air Interstate Rule ("CAIR").

[15] Regional Haze: Alternatives to Source-Specific Best Available Retrofit Technology (BART) Determinations, 77 Fed. Reg. 33,642, 33,648 (June 7, 2012) ("Better than BART Rule").

[16] *Id.* at 33,643.

[17] Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed Reg. 74504 (Oct. 26, 2016)

must also achieve greater NOx emissions reductions than necessary for NOx for BART because the updated NOx budgets are reduced and more stringent.[18]

Thus, based on previous determinations of the EPA, judicial precedent and the increased stringency of the Transport Rule, the agency should open a proceeding to reconsider compliance with the Transport Rule as an acceptable BART-alternative in a program-specific manner for Arkansas. More specifically, the EPA should consider both the original Transport Rule and the CSAPR Update Rule as acceptable methods of compliance with BART for NO_x.

c. The EPA should reconsider the use of low-sulfur coal as BART for SO_2 for White Bluff in light of its recent letter requesting additional information on BART determinations after the close of the comment period.

Since the Regional Haze FIP was published, the EPA authored a letter dated October 13, 2016, which calls into question the agency's decision not to analyze other available control technologies - including existing control technologies - in its BART determinations for the White Bluff and Flint Creek facilities.[19] BART determinations are a central mechanism by which controls are required under the Regional Haze program for this planning period. As a result, the SO_2 BART determination for White Bluff is central to the Regional Haze FIP and, therefore, reconsideration is appropriate.

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[18] *Compare* 81 Fed. Reg. 74504 at 74508 (showing a "12,048" 2017 ozone season NOx trading budget and "9,210" NOx trading budget for 2018 and thereafter) *with* 40 CFR 97.340 (showing a "11,515" 2009-2014 ozone season NOx trading budget and "9,597" budget for 2015 and thereafter).

[19] See Appendix B.

In its letter of October 13, 2016, the EPA addresses its "preliminary views on supplemental comments regarding a proposed alternative strategy for their White Bluff facility."[20] The letter sets forth the EPA's official position on additional information necessary to address a five factor analysis for White Bluff based on Entergy's comments. Among the information requested, the EPA asks for an "Evaluation of DSI as Interim Control." The EPA appropriately points out that the "BART guidelines require that a subject-to-BART source install and operate the best available emission reduction technology based on the five statutory factors" and states that "it is necessary to consider whether there are additional SO_2 control measures [for White Bluff]. . . that constitute BART."[21] Although the EPA's request is regarding a specific proposal outside of the comment period, the EPA's position that Arkansas must perform an additional analysis needed for controls that were not considered by the EPA, calls into question whether the EPA, which steps into the shoes of the state, was also legally required to perform a wider range of analysis of possible emissions controls for its own SO_2 BART determination for White Bluff. The EPA's request for additional information related to SO_2 controls for White Bluff outside of the comment period should necessitate the reconsideration of low-sulfur coal as BART.

In particular, this new information about the EPA's position on SO_2 for White Bluff should lead the EPA to reconsider other options that include the EPA's stated criteria for possible controls for SO_2 for White Bluff including having "a relatively

[20] See Appendix B at 1.
[21] *Id.* at 2.

low capital cost" and whether the controls would "be effective if operated for a short period of time," which is appropriate due to the short remaining time in the first planning period.

The ADEQ requests the EPA reconsider its SO_2 BART determination for White Bluff and include an analysis for controls that would also have a "low capital cost" and would be effective "for a short period of time" – the use of low sulfur content coal tied to an appropriate corresponding emission rate. The ADEQ urges the EPA to undertake a thorough reconsideration of low sulfur content coal using the five factors resulting in a determination of that emission control as BART. In Appendix D attached to this petition, the ADEQ includes considerations for a five-factor analysis that supports a BART determination for low-sulfur coal when taking into consideration the remaining time in this planning period, as well as certain errors in the EPA's BART determination for White Bluff.

III. Basis for Immediate Administrative Stay

a. The request meets the standard for an administrative stay.

The EPA Administrator is authorized to stay the effective date of its actions "when justice so requires."[22] The Administrator makes this determination by considering the same factors applied to a request for judicial stay. Those factors are: 1) whether the petitioner is likely to prevail on the merits of the appeal; 2) whether the petitioner is likely to suffer irreparable harm in the absence of a stay; 3) whether it is in the public interest to stay the rule; and 4) whether a stay will

[22] 5 U.S.C. § 705.

cause harm to other parties. As proven by the analysis below, justice compels the Administrator to stay the Regional Haze FIP.

b. The State is likely to succeed on the merits of a challenge to the Regional Haze FIP.

Much of the Regional Haze FIP is arbitrary, capricious and without a basis in the law and the State has a strong likelihood of success on the merits of a challenge. The ADEQ does not waive any arguments not raised in this section. The following is not an exhaustive list of the legal flaws in the Regional Haze FIP but, rather, an example of some of the most glaring errors in the rule.

1. The EPA is arbitrary, capricious and without a basis in the law in applying emissions controls to BART-eligible facilities. Some of the emissions controls will not be implemented until after the end of the first planning period[23], a requirement that was questioned by the Fifth Circuit in reviewing a stay request for the Texas Regional Haze FIP.[24] In addition, the EPA reduces the time for compliance for other controls without any basis in the record.[25]

2. The EPA ignored the fact that Arkansas is below the Uniform Rate of Progress ("URP") in meeting background visibility by 2064. EPA does not explain why it chose to ignore the facts and insisted additional controls were necessary to achieve "reasonable progress." In combination with the IMPROVE monitoring data discussed above, the ADEQ is very likely to succeed in arguing that additional controls are not necessary to achieve reasonable progress toward background visibility.

3. The EPA has not justified the alleged benefits of the Regional Haze FIP in relation to the costs of compliance. The data in the record demonstrate that the required controls offer no appreciable visibility improvement. Without perceptible visibility improvement,

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[23] For example, compliance with SO2 controls for White Bluff Units 1 and 2 must be met three (3) years after the effective date of the rule, which will be after the end of the first planning period in 2018. See 81 Fed. Reg. 66332, 66335 (Sept. 27, 2016).
[24] *Texas v. EPA*, 829 F.3d 405, 429-30 (5th Cir. 2016)
[25] See 81 Fed. Reg. 66332, 66342 (Sept. 27, 2016).

the EPA cannot justify the significant costs of compliance – costs that will be passed on to electric ratepayers in Arkansas. The EPA clearly ignores the Supreme Court's ruling in *Michigan v. EPA*[26].

c. An administrative stay will prevent irreparable harm to ratepayers of Arkansas and is in the public interest.

Without an administrative stay of the Regional Haze FIP, the rule will mandate controls that are both unnecessary and costly, imposing billions of dollars in total economic costs without the requisite evaluation of the impact of the controls on visibility improvement in Class I federal areas.

Implementation of the rule as written will inflict irreparable harm upon the Arkansas ratepayers who will ultimately pay for the controls required by the facilities regulated by the rule under the FIP. Entergy Arkansas filed comments estimating that the installation of scrubbers on Independence and White Bluff will cost roughly $1 billion each.[27] Under Arkansas law, the capital costs such as those for installation of emissions controls required by federal law may be passed on to ratepayers.[28]

The public interest favors the granting of stay because Arkansas has already achieved the reasonable progress goal for this period and excess controls would not further the purpose of the regional haze program. The Regional Haze program grants the EPA the authority to promulgate regulations, including FIPs, that

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[26] 576 U.S. ___, 135 S.Ct. 2699 (2015).
[27] *See* Entergy comments of August 7, 2015 at p.4; Exhibit B (For White Bluff, the "total capital investment to install dry [scrubbers] was estimated to be "$1,072,370,000."), found at https://www.regulations.gov/document?D=EPA-R06-OAR-2015-0189-0166.
[28] See Ark. Code Ann. § 23-4-501 *et seq*.

"contain such emission limits, schedules of compliance and other measures as may be *necessary to make reasonable progress*."[29] As has been demonstrated by the recent IMPROVE monitoring data, the EPA has no legal basis for mandating additional controls because reasonable progress, as measured by the reasonable progress goals for this planning period, has already been achieved. Therefore, the imposition of emissions controls in excess of this statutory authority are unnecessary and will burden the state's ratepayers with costs passed on from impacted utilities for the installation of controls that are wholly without a basis in law or fact. It is in the public interest to stay the rulemaking because the high costs of the FIP would unduly burden Arkansas ratepayers without providing an appreciable benefit and in a manner that exceeds the EPA's authority under the Clean Air Act.

d. An administrative stay will not cause harm to other parties.

A stay of the Regional Haze FIP will not cause harm to the EPA or other parties. As stated above, Arkansas is currently making reasonable progress toward background visibility conditions in its two Class I Federal areas–without any additional controls. Additionally, this progress is projected to continue through 2018 and likely beyond. An administrative stay of the Regional Haze FIP will not slow this progress and will not negatively impact visibility within Class I Federal areas affected by Arkansas sources.

[29] 42 U.S.C. § 7491.

IV. Conclusion

For the foregoing reasons, the EPA should open a proceeding to reconsider its decision regarding the Arkansas Regional Haze FIP and should immediately stay the rule.

Date: November 22, 2016

Respectfully submitted by:

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