

EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs



Which view is worth \$282 million?



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EPA imposed \$282 million per year in costs to achieve this “improvement” in visibility.

State's Controls



EPA's Controls



Wichita Mountains Wildlife Refuge, Oklahoma

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Introduction

William L. Kovacs



Regulatory reform is a key component of the U.S. Chamber's 2012 Jobs Agenda. Over the last several years, an avalanche of new economically significant regulations has had an adverse impact on almost every sector of the economy. The permitting system

has become so calcified that the private sector is prevented from investing billions of dollars in new projects because it cannot obtain the environmental permits needed to begin construction. The Chamber's *Project No-Project* study found that in March 2010, 351 proposed new power plant projects were unable to secure permits. These projects alone, if constructed, would have resulted in a direct investment in our economy of \$577 billion and would have created 1.9 million jobs per year during the seven years of construction. The Chamber focused on electric power generation projects for hard data from which to make the analysis; however, we could have chosen oil and gas projects, big box stores, cell towers, pipelines, or almost any project that is in need of construction since all these types of projects are subject to the same difficulties in obtaining permits.

To address this regulatory avalanche and to make the permitting process more efficient and faster, the Chamber supported reforming the rulemaking process and streamlining the permitting process.

While researching this broken regulatory process, the Chamber discovered that many of the new rulemakings and the unreasonable delays in permitting resulted from what appear to be numerous friendly

lawsuits that result in Consent Decrees in which the EPA agrees to bind itself to issue new regulations on a specific timetable; i.e., "We can now tell Congress the court made us do it." This process has been coined "Sue and Settle Rulemaking."

Specifically, Sue and Settle Rulemaking occurs when an organization sues a federal agency to initiate a rulemaking, only to have the agency settle the lawsuit behind closed doors, with no notice to, or input from, the parties affected by the ensuing rulemaking. The only recourse for those affected is to participate in the agency's public comment period *after* the settlement has been agreed to by the agency—in essence, after the damage has been done. Then, after the rule is final, impacted parties can challenge it. This is of little value, though, since the court typically gives great deference to the agency's decision and upholds it unless the party challenging can establish that the agency's action was arbitrary and capricious, a very difficult standard to meet. When questioned about the scope or rationale for the rulemaking by Congress, the agency simply explains that it is bound by a court order to move forward with the regulation. What is missing from the story is the fact that the agency *voluntarily* agreed to the court order.

Sue and Settle Rulemaking is responsible for many of EPA's most controversial, economically significant regulations that have plagued the business community for the past few years: regulations on power plants, refineries, mining operations, cement plants, chemical manufacturers, and a host of other industries. Nevertheless, one of the most successful Sue and Settle strategies has been on an issue few in Washington or around the nation are paying attention to: regional haze requirements under the Clean Air Act.

The Chamber learned about regional haze from our members in North Dakota. The state government

was fighting with the EPA over proposed new haze requirements that arose from a settlement and Consent Decree between EPA and several environmental groups in federal court in Oakland, California. Yes, the implementation of North Dakota's regional haze plan was the subject of a lawsuit brought in Oakland. Neither EPA, nor the environmental groups, nor the court provided North Dakota with notice of the lawsuit or the settlement. It was only after the settlement was announced that the state had a chance to provide input. Worst of all, the new requirements that EPA was insisting on, which came out of this mysterious settlement, were threatening to make power generation in North Dakota so expensive that several power and cement plants were in danger of shutting down.

As the Chamber studied the North Dakota situation, we discovered that the same plaintiffs in that case had filed similar lawsuits against a number of other states across the country. Governors found themselves in the same situation as North Dakota—bound by a federal court-approved settlement and Consent Decree between EPA and environmental groups that impacted their states, and they had no clue of what was happening. Once entered, the Consent Decree allowed EPA to claim that it had no choice but to impose these new federal haze controls as a substitute for the state haze program because of the court order in these states.

While researching the North Dakota situation, the Chamber learned that William Yeatman, an energy policy analyst at the Competitive Enterprise Institute, was conducting similar research on New Mexico and a few other states. The Chamber retained Yeatman to help decipher the nationwide puzzle of lawsuits, Consent Decrees, and regulations that make up EPA's Regional Haze program. What he found is startling: Through Sue and Settle Rulemaking, the plaintiffs have converted a state visibility program for public

parks into a major new set of federal regulations that, if successful, could force existing coal-fired power plants and other industrial facilities to shut down.

The Chamber believes that this issue deserves more attention in Washington. For this reason, we asked Yeatman to write this report and the state one-pagers to help policymakers understand this complex and potentially disastrous set of federal regulations that will take over what Congress clearly determined to be a state environmental responsibility. We look forward to working with Congress to address the many challenges presented by Sue and Settle Rulemaking and EPA's new regional haze regulations.

William L. Kovacs is the U.S. Chamber's senior vice president for Environment, Technology & Regulatory Affairs.

EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs

William Yeatman

Overview

The stated mission of the Environmental Protection Agency (EPA) is to protect human health and the environment.¹ EPA has for the past four years cited this mission as it wages a multi-front battle against fossil fuels, imposing a series of increasingly large, costly regulations designed to limit fossil fuels' extraction, use, emissions, and waste disposal. These regulations, which among other things, seek to reduce hazardous air pollutant emissions, the interstate movement of air pollutants, greenhouse gases, solid waste disposal, and water pollution, have been the focus of intense congressional and public scrutiny. In the end, EPA finalized some regulations, revised some, delayed others, and in a few instances was forced to start over. But the impact of these regulations is unmistakable and has led to—and will continue to—cause early retirement of a long list of energy facilities, chief among them coal-fired power plants.

Despite all the publicity for other regulations, one of EPA's more dubious, and arguably illegal regulatory efforts remains below the radar to many: the Regional Haze rule.

EPA's Regional Haze program, established decades ago by the Clean Air Act, seeks to remedy visibility impairment at federal National Parks and Wilderness Areas. Because Regional Haze is an aesthetic regulation, and not a public health standard, Congress emphasized that states, and not EPA, should be the lead decision makers. However, EPA—with some help from its friends at special interest groups and the controversial "Sue and Settle" Rulemaking process—has devised a loophole to usurp state authority and federally impose a strict new set of emissions controls that cost 10 to 20 times more than the technology the states would otherwise have used. Here's how it works: In five Consent Decrees (see Appendix C) negotiated with environmental groups, EPA has willingly committed itself to deadlines to act on

the states' Regional Haze strategies. On the eve of any given deadline the agency, due to the Consent Decree, determines that it cannot approve a state's strategy to reduce haze due to alleged procedural inadequacies. Then, EPA claims that it has no choice but to impose its preferred controls through a Federal Implementation Plan (FIP) in order to comply with the Consent Decree.

Already, EPA has used this pretextual rationale to impose almost \$375 million in annual costs on six coal-fired power plants in New Mexico, Oklahoma, and North Dakota. It has similarly proposed \$24 million in annual costs on a coal-fired power plant in Nebraska. Unfortunately, the agency is only getting started. In the near term, EPA is poised to act in Wyoming, Minnesota, Arizona, Utah, and Arkansas. Its real goal is to impose another costly regulation on electric utilities and force them to shut down their coal-fired generating units. Ultimately, all states could be subject to EPA's Regional Haze power grab.

Regional Haze Regulation: The Basics

In the 1977 amendments to the Clean Air Act, Congress created a regulatory program to improve visibility, known as Regional Haze.² According to EPA, "Haze is caused when sunlight encounters tiny pollution particles in the air. Some light is absorbed by particles. Other light is scattered away before it reaches an observer. More pollutants mean more absorption and scattering of light, which reduce the clarity and color of what we see. Some types of particles, such as sulfates, scatter more light, particularly during humid conditions."³ The "national goal" of EPA's Regional Haze program, as defined by the statute, is the "remedying of any existing, impairment of visibility" at 156 federal National Parks and Wilderness Areas known as Class I Areas.⁴ EPA maintains a map of Class I Areas.

Mandatory Class I Areas



Source: Environmental Protection Agency⁵

A defining characteristic of the Regional Haze law is that states, not EPA, are the lead decision makers. In floor debate in 1977, Congress unequivocally said that states would have the authority to decide how much value to assign to an aesthetic benefit,⁶ and the resulting language of the Clean Air Act reflects this fact.⁷ According to the D.C. Circuit, this “confirms that Congress intended the states to decide which sources impair visibility and what BART [Best Available Retrofit Technology] controls should apply to those sources.”⁸ Such discretion to states is notable given the Clean Air Act’s approach to other air quality programs. For public health air quality regulations created by the statute, like the National Ambient Air Quality Standards program, EPA sets nationwide emissions standards, regardless of cost, and then states must submit plans to meet these standards. For Regional Haze, by contrast, the Clean Air Act calls for states to determine both the emissions standards

and the appropriate controls. EPA’s primary role in the Regional Haze program is to provide procedural and technical support.⁹

The mandate that states have primacy over visibility improvement policy is also established in the *Code of Federal Regulations* and even in EPA’s own implementation guidance for Regional Haze.¹⁰ Moreover, the judiciary has affirmed state precedence: Federal courts have twice remanded EPA’s Regional Haze rules for inadequately preserving the authority of state governments.¹¹

In spite of the aforementioned legal and regulatory history, which demonstrates that Congress wanted states to call the shots on Regional Haze, EPA is now implementing a program that tramples over the states’ authority. EPA’s approach to Regional Haze appears to be less about cleaning up haze and more

about furthering EPA's agenda to shut down coal-fired power plants.

Using Sue and Settle to Shut Down Industry

The heart of the matter is that the states, after years of deliberation, selected specific emissions controls to comply with the Regional Haze regulation. In each of these states, EPA prefers different, more stringent, and more costly controls. And EPA is determined to force the states to implement these more costly controls over any and all objections. The problem is that the law provides primacy for the states—not EPA—to address regional haze within the states' borders.

Enter Sue and Settle. Beginning in 2009, a group of nonprofit environmental advocacy organizations—Sierra Club, WildEarth Guardians, Environmental Defense Fund, National Parks Conservation Association, Montana Environmental Information Center, Grand Canyon Trust, San Juan Citizens Alliance, Our Children's Earth Foundation, Plains Justice, and Powder River Basin Resource Council—filed lawsuits against EPA alleging that the agency had failed to perform its nondiscretionary duty to act on state submissions for regional haze. Rather than defend these cases, EPA simply chose to settle. In five Consent Decrees negotiated with environmental groups¹²—and, importantly, without notice to the states that would be affected¹³—EPA agreed to commit itself to various deadlines to act on all states' visibility improvement plans.

What EPA did next is Washington politics at its worst. On the eve of the deadlines that EPA had set for itself in the Consent Decrees, the agency found that it could not approve the states' submissions due to alleged procedural problems, such as inadequate cost estimates. The Consent Decree deadlines do not afford states sufficient time to correct the alleged procedural inadequacies. In some cases (New Mexico and North Dakota) EPA refused to even consider important information submitted by the state in order to comply with the deadline. Then, EPA claimed that it had no choice but to impose its preferred controls in order to comply with the Consent Decrees.¹⁴ Of

course, none of this would have been necessary (or even allowed) if EPA had not voluntarily bound itself to a court order dictating the terms of the Regional Haze approval process. But by second-guessing the *process* that states use to make their determinations, EPA argues that it is not running afoul of the Clean Air Act in injecting itself to decide the *substance* of what is inherently a state decision. In EPA's view, it is not directly questioning a state's choice of emissions controls to comply with the Regional Haze regulation, but it is merely imposing federal controls because the court-imposed deadline leaves it no other option. But the end result is unquestionably the same.

A common reason that EPA cites as a procedural inadequacy in state submissions is incorrect estimation of costs. But EPA's own basis for this assertion is itself suspect. For example, in the course of reviewing Regional Haze implementation plans submitted by New Mexico,¹⁵ Oklahoma,¹⁶ and North Dakota,¹⁷ EPA hired an independent contractor, to vet the states' cost-effectiveness analysis. In Nebraska, EPA audited the states' analysis using this same independent contractors' previous Regional Haze work in Oklahoma.¹⁸ In fact, this independent contractor is a paid consultant who routinely serves as a witness for the very same environmental groups who sued to obtain the Regional Haze Consent Decrees.¹⁹ Unsurprisingly, the cost-estimates of controls at coal-fired power plants by EPA's paid consultant were hundreds of millions of dollars lower than those performed by state officials in New Mexico, Oklahoma, North Dakota, and (by extension) Nebraska, after years of deliberation. EPA then predicated its disapproval of these states' Regional Haze strategies based largely on the work of this hired contractor.

How EPA Engineered Control Over a Purely State Program

This point bears repeating: By second-guessing these states' cost-effectiveness calculations, EPA in the ordinary course could forestall the approval of a state's Regional Haze implementation plan, but it could not on its own impose its preferred emissions controls. *But by combining this tactic of delaying approval of the state plans with Sue and*

Settle and a court-imposed deadline to act, EPA has manufactured a loophole to provide itself with the ability to reach into the state haze decision-making process and supplant the state as decision maker. EPA has, effectively, engineered a way to get around the protections of state primacy built into the Regional Haze statute by Congress.

Since August 2011, EPA has used this method to impose almost \$375 million in annual costs on ratepayers in New Mexico, Oklahoma, and North Dakota—over the staunch objection of their governors—by requiring installation of more costly controls than the BART controls each state chose. Agencies in these states had spent years preparing Regional Haze strategies to improve visibility, in accordance with the procedures set out by the Clean Air Act. Yet EPA discarded these plans and imposed federal controls in their stead.

All Cost, No Benefit

Beyond the fundamental interference with state primacy on regional haze issues, there are two specific problems with EPA's plan: (1) It is several times more expensive than the states' preferred haze controls, and (2) it offers little to no discernible *visibility* benefits over the states' preferred haze controls. For utilities and their customers, EPA's Regional Haze program is all cost, no benefit.

In North Dakota, the state proposed the installation of Selective Non-Catalytic Reduction (SNCR) at a total cost of \$50 million for all of the state's plants. EPA rejected the state's proposal and forced a FIP upon the state, instead requiring Selective Catalytic Reduction (SCR) at a cost of more than \$500 million. After public pressure and an unfavorable court ruling, EPA largely backtracked.²⁰ However, the agency still is imposing the installation of unnecessary retrofits²¹ that result in a cost differential of almost \$12 million per year for the state.

In Arizona, the Navajo Generating Station installed low nitrogen oxides (NOx) burners at a cost of \$45 million. An SCR system for the plant would cost more than \$700 million. In Wyoming, EPA has proposed to impose \$96 million per year in unjustified

costs. Oklahoma had a simple solution to switch from coal to natural gas (making even greater emissions reductions), but instead EPA required retrofitting existing plants with the most stringent sulfur dioxide controls available at a cost of \$1.8 billion.

The National Renewable Energy Laboratory (NREL), at the request of the U.S. Department of the Interior, performed a study on the impact of EPA's proposed haze requirements on the Navajo Generating Station in Arizona.²² NREL found that EPA's proposed haze controls would cause "no discernible change" on the plant's potential health effects or impact on groundwater.²³ Regarding visibility impacts of NOx emissions, NREL wrote: "Whether the incremental contribution is significant or even perceptible is a matter of debate among experts in the field of visibility science."²⁴

Visibility is a measure of how well an observer can view a scene, including how far one can see and the ability to see textures and colors. Visibility is reduced and haze is increased by the absorption and scattering of light by gases and aerosols (particles) in the atmosphere. These gases include sulfates and nitrates from the combustion of coal by electric generating plants. EPA uses a metric known as a "deciview" to measure the amount of haze as it relates to the amount of light that is scattered and absorbed. A deciview value of 0 represents the clearest possible visibility, i.e., the view is unaffected by haze. As the deciview number increases, visibility becomes progressively poorer. In theory, an increase of 1 deciview is supposed to reduce visibility enough to be discernible to the naked eye. In reality, however, a change of up to 2 deciviews is impossible for most people to see.²⁵ Because all but one²⁶ of the visibility improvements mandated by EPA's proposed regional haze rule will only result in deciview reductions of less than 2, these visibility improvements will not be discernible. In other words, utilities may have to spend billions of dollars for visibility improvements that no one will be able to see or even notice.

Consider, for example, the actual difference EPA's preferred controls would make in New Mexico:

New Mexico's Controls



EPA's Controls



White Mountain Wilderness Area, New Mexico

Visibility comparisons for six states are included in state one-pagers at the end of this report. A full description of the methodology used to generate these photos is available in Appendix B.

Unfortunately, EPA is only getting started. In the immediate future, the agency is poised to impose similar constraints on Wyoming, Minnesota, Arizona, Utah, and Arkansas—all in the name of imperceptible “improvements” in visibility. Ultimately, as explained later, no state is immune from having its rightful Regional Haze authority trumped by EPA at profound costs for virtually nonexistent benefits.

EPA's True Motive: Shutting Down Coal

The Obama administration has made no secret that it seeks to use regulations to put the coal industry out of business. The strategy is simple: Impose the most burdensome controls on all coal-fired power plants regardless of whether or not they are necessary. While campaigning for the presidency in January 2008, then-candidate Barack Obama told the editorial board of the *San Francisco Chronicle* that “If someone wants to build a new coal-fired power plant they can, but it will bankrupt them because they will be charged a huge sum for all the greenhouse gas that’s being emitted.”²⁷ More recently, in a speech to Howard University students in October 2011, EPA Administrator Lisa Jackson said: “In their [the coal industry] entire history—50,

60, 70 years, or even 30 ... they never found the time or the reason to clean up their act. They’re literally on life support. And the people keeping them on life support are all of us.”²⁸

EPA is inching closer to its goal. Recent reports by the National Mining Association and the Institute for Energy Research indicate that between 25 and 33 gigawatts (GW) of coal-fired electricity generation²⁹ are set to be retired due to the suite of anti-coal regulations issued by EPA since President Obama took office, including new rules targeting hazardous air pollutant emissions and the interstate movement of air pollutants. Fifty-seven power plants have gone on the chopping block, meaning the jobs of 29,000 workers have already been placed in jeopardy.

For EPA, the Regional Haze rule is valuable yet relatively quiet ammunition in its war against coal. It unquestionably adds significant new costs to coal-fired power plant operators, costs that will almost certainly be passed on to electricity consumers. But what makes EPA's Regional Haze program so striking is that it accomplishes nothing other than imposing new costs for power plants. It is a visibility regulation that does nothing to improve the view. It is a regulatory means to an end—namely, imposing the most expensive possible controls on every coal-fired power plant regardless of whether it makes sense to do so.

Regional Haze Is Not Just a Western Problem

There is a common misperception that Regional Haze is a western problem. This is because EPA has proposed to allow states to meet the preponderance of their Regional Haze commitments by participating in the Cross State Air Pollution Rule (CSAPR),³⁰ which is confined largely to eastern states. Thus, EPA proposed to approve 20 Regional Haze plans in January and February 2012.³¹

CSAPR states are not, however, in the clear. In fact, they may be worse off than non-CSAPR states. They face a “double dip” of redundant 1999 and 1980 Regional Haze regulations being implemented by EPA as “phase one” and “phase two” of a larger Regional Haze plan. This power grab is a result of the phased approach EPA has used in implementing the Regional Haze program. EPA first issued Regional Haze regulations in 1980.³² At that time, computing was nascent and complex atmospheric modeling was nonexistent. As a result, EPA largely deferred requiring states to act because attributing visibility impairment to a specific source was impossible. Nineteen years later, in 1999, atmospheric modeling had advanced to the point whereby EPA could support a regulatory regime to improve visibility, and the agency issued a second set of Regional Haze regulations.³³ For whatever reason, EPA never repealed the 1980 regulation (known as Reasonably Attributable Visibility Impairment or RAVI), despite the fact that its most significant requirements were virtually identical to the 1999 Regional Haze program. Therefore, both regulations remain on the books, even though they are essentially duplicates.³⁴

Now, EPA is claiming authority to impose both of these copycat Regional Haze regulations, one on the heels of the other. On January 25, 2012, EPA proposed to approve Minnesota’s preferred Regional Haze controls for the 2025-megawatt Sherburne County Generating Plant (Sherco Plant) operated by Xcel Energy. EPA predicated its proposed approval based on the state’s participation in the CSAPR.³⁵

However, in the same notice, EPA warned that it would soon be issuing further Regional Haze requirements for the Sherco Plant pursuant to

the 1980 RAVI regulations.³⁶ In discussions with the Minnesota Pollution Control Agency, EPA has indicated that it will press for \$250 million in “double dip” controls, specifically SCR technology.³⁷ As is seen in the Minnesota Case Study later in this paper, EPA’s preferred RAVI controls would achieve an imperceptible benefit in visibility improvement. The Minnesota example makes clear that there is no refuge from EPA’s visibility regulations.

In the long term, EPA’s abuse of its Regional Haze authority could present a persistent problem for all states. Under its rules, states must revise their Regional Haze implementation plans every 10 years, until the nation’s ambient air is returned to natural conditions (which is to say, forever). If EPA’s regional haze power grab is allowed to stand, then the agency would have assumed an enormous new source of authority, with which it could effectively impose whatever controls it wants once every decade.

It is thus imperative for states to act now to check EPA on Regional Haze, thereby preserving the structure established by Congress and ensuring the balance of environmental federalism.

Endnotes

1. <http://www.epa.gov/aboutepa/whatwedo.html>.
2. 42 U.S.C. § 7491.
3. EPA, Visibility, Basic Information, www.epa.gov/visibility/what.html
4. 42 U.S.C. § 7491(a)(1).
5. http://www.epa.gov/ttn/oarpg/t1/fr_notices/classimp.gif.
6. The House and Senate versions of the 1977 Amendments to the Clean Air Act differed on the balance of federalism for the Regional Haze provision. In conference, members of Congress came to an agreement whereby states would have a distinctly high degree of primacy vis a vis EPA. Consider this floor exchange between Sens. James A. McLure (ID) and Edmund Muskie (ME):

Mr. McLure: "Under the conference agreement, does the State retain the sole authority for identification of sources for the purpose of visibility issues under this section?"

Mr. Muskie: "Yes; the State, not [EPA] Administrator, identifies a source that may impair visibility and thereby falls within the requirement of [Regional Haze]."

Mr. McLure: "And does this also hold true for determination of "Best Available Retrofit Technology" [a primary control required by the Regional Haze program]?"

Mr. Muskie: "Yes. Here again it is the State which determines what constitutes "Best Available Retrofit Technology"..." See *Congressional Record*-1977-0804-26854.
7. See 42 U.S.C. § 7491(b)(2)(A), which stipulates that states determine both which sources are subject to Best Available Retrofit Technology and what constitutes BART; see also *id.* at § 7491(A)(g)(2), which states that BART determinations can be made only after consideration of costs.
8. *American Corn Growers Assn' v. EPA*, 291 F.3d 1, 8 (D.C. Cir. 2002).
9. See 42 U.S.C. § 7491 (a)(3), which calls for EPA to conduct a "report" on Regional Haze attribution and modeling; and § 7491(b)(1), which establishes that EPA must use the aforementioned report to inform "guidelines" on "appropriate techniques and methods" for states to use when making determinations for "Best Available Retrofit Technology."
10. See 40 C.F.R. § 51.308(e), which establishes the process by which states—and not EPA—make both attribution and determination decisions for Best Available Retrofit Technology standards required by Regional Haze. In the preamble to these BART guidelines, EPA noted, "[T]he [Clean Air] Act and legislative history indicate that Congress evinced a special concern with insuring that States would be the decision-makers." 70 Fed. Reg. 39137.
11. *Center for Energy and Economic Development v. EPA*, 398 F.3d 653 (D.C. Cir. 2005); *American Corn Growers Assn' v. EPA*, 291 F.3d at 8.
12. The five Consent Decrees:

National Parks Conservation Assn' et al. v. Jackson, Civil Action No. 1: 11-cv-01548 (D.D.C. Dec. 2, 2011)

Sierra Club v. Jackson, No. 1-10-cv-02112-JEB (D.D.C. Aug. 18, 2011)

WildEarth Guardians v. Jackson, No. 1:11-cv-00743-CMA-MEH (D. Col. June 16, 2011)

WildEarth Guardians v. Jackson, No. 4:09-CV-02453 (N.D. Cal. Feb. 23, 2010)

WildEarth Guardians v. Jackson, No. 1:10-cv-01218-REB-BNB (D. Col. Oct. 28, 2010)
13. See, e.g., Comments submitted by Sue Kidd, Director, Environmental Policy and Programs, Arizona Public Service, Document ID EPA-HQ-OGC-2011-0929-0013, available at www.regulations.gov. ("Finally, APS is concerned that Arizona was not properly consulted by EPA prior to entering into the proposed consent decree with the environmental plaintiffs. Given the lead role and considerable discretion given to states by Congress under the regional haze provisions of the CAA, it is axiomatic that EPA should have discussed with ADEQ the terms of the proposed consent decree *before* signing it.")
14. In New Mexico, EPA used a putatively nondiscretionary consent decree deadline to actually ignore the state's Regional Haze submission. "We did receive a New Mexico RH SIP submittal on July 5, 2011, but it came several years after the statutory deadline, and after the close of the comment period on today's action. In addition, because of the missed deadline for the visibility transport, we are under a court-supervised consent decree deadline with WildEarth Guardians of August 5, 2011, to have either approved the New Mexico SIP or to have implemented a FIP to address the 110(a)(2)(D)(i) provision. It would not have been possible to review the July 5, 2011 SIP submission, propose a rulemaking, and promulgate a final action by the dates required by the consent decree." 76 Fed. Reg. 52390.

Likewise, in North Dakota, where EPA tried to ignore a major component of the state's Regional Haze submission (namely, North Dakota Department of Environmental Quality's Best Available Control Technology determination for the Milton R. Young power plant). EPA said, "Given our September 1, 2011 deadline to sign this notice of proposed rulemaking under the consent decree discussed in section III.C, we lack sufficient time to act on or consider this aspect of Amendment No. 1. Under CAA section 110(k)(2), EPA is not required to act on a SIP submittal until 12 months after it is determined to be or deemed complete. We have considered some of the documents related to the State's BACT determination for Milton R. Young Station and have included those documents in the docket for this proposed action." 76 Fed. Reg. 58579.

In promulgating a federal implementation plan for Regional Haze on Oklahoma, EPA stated, "We also are required by the terms of a consent decree with WildEarth Guardians, lodged with the U.S. District Court for the Northern District of California, to ensure that Oklahoma's CAA requirements for 110(a)(2)(D)(i) (II) are finalized by December 13, 2011. Because we have found the state's SIP submissions do not adequately satisfy either requirement in full and because we have previously found that Oklahoma failed to timely submit these SIP submissions, we have not only the authority but a duty to promulgate a FIP that meets those requirements." 76 Fed. Reg. 81732
15. See "Revised BART Cost-Effectiveness Analysis for Selective Catalytic Reduction at the Public Service Company of New Mexico San Juan Generating Station," Final Report, prepared by Dr. Phyllis Fox, Ph.D. (November 2010).
16. 76 Fed. Reg. 16183, at n.24.
17. 76 Fed. Reg. 58599, at n.22.
18. See Appendix B, "EPA's evaluation of cost of Flue Gas Desulfurization (FGD) controls Nebraska Public Power District (NPPD) Gerald Gentlemen Station (GGS), Units 1,2," to EPA Region 7 Technical Support Document, *available at* www.regulations.gov, Document ID No. EPA-R07-OAR-2012-0158-002.
19. See "Dr. Fox Resume," 25 February 2011, *available at* www.regulations.gov, Document ID No. EPA-R06-OAR-2010-0190-0070.
20. For a Prevention of Significant Deterioration (PSD) Best Available Control Technology (BACT, which is by statute more

- onerous than the BART for Regional Haze) determination at the Milton R. Young station, North Dakota said that SCR was infeasible because the Milton R. Young station is a cyclone boiler that burns lignite coal. EPA argued that SCR was feasible. On December 21, 2012, the U.S. District Court for the District of Columbia ruled in favor of the state. The Milton R. Young plant, in addition to being subject to BACT (for PSD), was also subject to BART (for Regional Haze). Because the courts ruled that SCR was infeasible for BACT, it was also infeasible for BART, at both Milton R. Young and another coal-fired power plant with a cyclone boiler, Leland Olds.
21. Namely, an unnecessary SNCR system at the Coal Creek Units and an unnecessary Low Nitrogen Boiler unit at the Antelope Valley Station.
 22. David J. Hurlbut et al., "Navajo Generating Station and Air Visibility Regulations: Alternatives and Impact," National Renewable Energy Laboratory, *available at* <http://www.nrel.gov/docs/fy12osti/53024.pdf>.
 23. *Id.* at iv.
 24. *Id.*
 25. Henry, R.C., "Just Noticeable Differences in Atmospheric Haze," *Journal of the Air & Waste Management Association*, 52:1238-1243, October 2002.
 26. Oklahoma was a 2.89 deciview delta.
 27. <http://www.politifact.com/ohio/statements/2011/mar/14/ohio-coal-association/ohio-coal-industry-says-obama-promised-bankrupt-co>.
 28. <http://www.wvmetronews.com/news.cfm?func=displayfullstory&storyid=48811>.
 29. Institute for Energy Research, "Impact of EPA's Regulatory Assault on Power Plants: New Regulations to Take 33 GW of Electricity Generation Offline and the Plant Closing Announcements Keep Coming ...," Feb. 7, 2012, *available at* <http://www.instituteforenergyresearch.org/2012/02/07/impact-of-epas-regulatory-assault-on-power-plants-february-7-update>.
 30. 76 Fed. Reg. 82219.
 31. New Jersey (proposed approval 3 January 2012); Minnesota, Virginia, Ohio (proposed approval 25 January 2012); Illinois, Delaware (proposed approval 26 January 2012); Alaska (proposed approval 26 February 2012); Georgia (proposed approval 27 February 2012); Rhode Island, New Hampshire, Maryland, North Carolina, Michigan, South Carolina, Vermont, Wisconsin, Alabama, Missouri, Iowa (proposed approval 28 February 2012).
 32. 40 C.F.R. §§ 51.302-51.306.
 33. 64 Fed. Reg. 35714.
 34. Both Regional Haze and RAVI require Best Available Retrofit Technology. The difference between the two programs is that states get to decide which units are subject to Regional Haze BART, whereas Interior Department officials have the authority to determine which units are subject to RAVI BART. Department of Interior federal land managers are the stewards of Class 1 Areas, which is why EPA's 1980 RAVI regulations incorporated their input. As explained above, however, the Regional Haze and RAVI regulations are largely duplicative, and it is not clear why RAVI was not excised from the Code of Federal Regulations with the promulgation of the Regional Haze regulations. Moreover, the Congressional history of the Regional Haze provision makes clear that States—not the federal government—are to make attribution decisions for sources subject to Best Available Retrofit Technology. Complicating matters further is the fact that there has not yet been a Best Available Retrofit Technology determination made pursuant to RAVI, so no State has yet challenged the Interior Department's authority to determine which sources are subject to RAVI requirements. None of this should matter, though, because there is no practical difference between the requirements pursuant to the 2 regulations (RAVI and Regional Haze), so it is nonsensical for federal land managers to subject to RAVI an entity that is already subject to Regional Haze. Unfortunately, this is exactly what the Interior Department has done. In 2009, it decided to subject the Sherco Units 1 and 2 to RAVI BART, despite the fact that Minnesota, at the time, was crafting a Regional Haze BART determination for the power plant. Therefore, the only thing that stands in the way of EPA "double dipping" on Regional Haze is the Department of the Interior, which is to say that the only thing preventing the Obama administration from imposing the same regulation twice on coal-fired power plants is the Obama administration.
 35. 77 Fed. Reg. 3681.
 36. 77 Fed. Reg. 3689. ("Therefore, this proposed rule only addresses satisfaction of regional haze requirements and does not address whether Minnesota's plan addresses requirements that apply as a result of the certification of Sherco as a RAVI source. EPA will act on RAVI BART in a separate notice.")
 37. See Xcel Energy, Resource Plan Update, Docket No E002/RP-10-825 before the Minnesota Public Utilities Commission, at 45, 46 (Dec. 1, 2011) ("In its June 2011 preliminary review of the MPCS's BART assessments, EPA Region 5 indicated that it believes BART for [Sherco] Units 1 and 2 should include "Selective Catalytic Reduction...Plant specific estimates for Sherco Unites 1 and 2 demonstrate that SCRs would cost customers upwards of \$250 million.")




Case Study: Arizona

Affected Arizona Residents

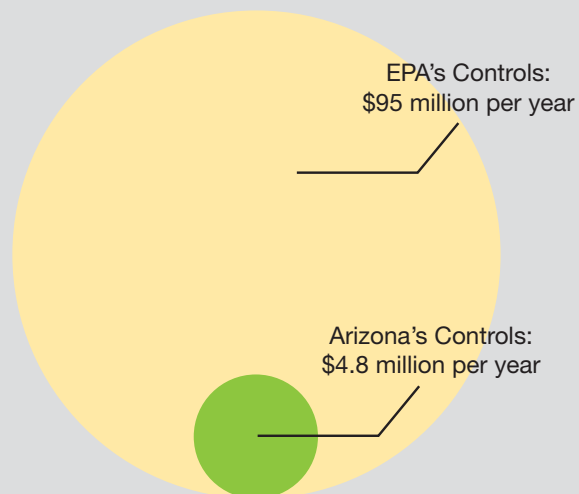


LEGEND

 Central Arizona Project Service Area

(Source: <http://phoenixwaterfrontalk.com/2009/06/22/water-in-the-desert-phoenix-water-supply/central-arizona-project-and-the-area-it-serves/>)

Cost: EPA's Controls v. Arizona's Controls



Is this worth \$90.2 million per year?

Arizona's Controls



EPA's Controls



Grand Canyon National Park, Arizona

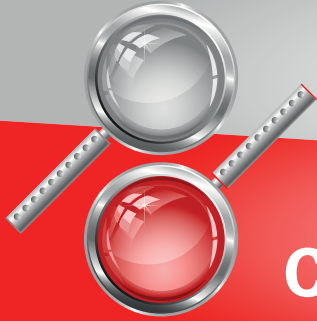
In most states, EPA's Regional Haze regulation threatens to raise electricity bills; however, in Arizona, it threatens to increase the cost of water.

The Navajo Generating Station on the Navajo Nation territory powers the Central Arizona Project, a massive water delivery project that provides almost 20% of the state's water needs.

In August 2009, EPA solicited public comments on possible Regional Haze controls for nitrogen oxides that the plant operator, Salt River Project, estimated would cost \$700 million.¹ EPA limited the scope of its solicitation to comments on the price of electricity, despite the fact that the impact would be felt by water consumers. EPA's proscribed analysis engendered concerned

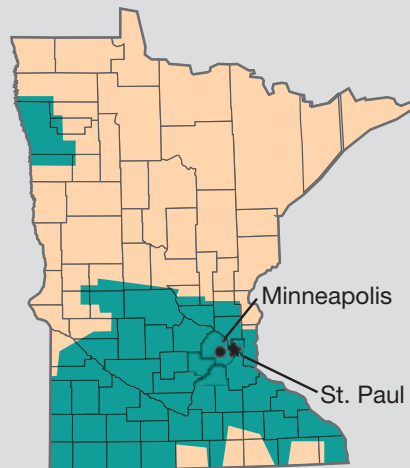
comments from Navajo,² Arizona,³ and even federal officials⁴ (the Bureau of Reclamation owns a 25% stake in the power plant).

According to peer-reviewed research, there is a maximum probability of 35% that the slight improvement in visibility caused by EPA's preferred controls would be detectable to the human eye (see the images above).⁵ To achieve this "benefit," a federal study estimates that EPA's controls would increase the price of water 15% in central and southern Arizona.⁶ The agency's decision is expected in spring 2012.



Case Study: Minnesota

Affected Minnesota Residents

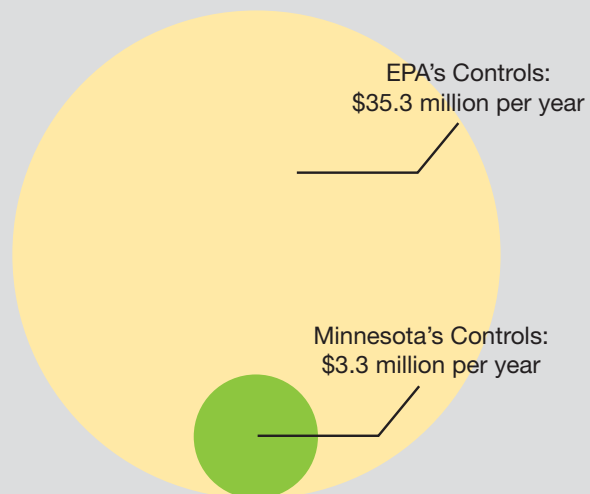


LEGEND

 Xcel Energy Service Area

(Source: http://www.xcelenergy.com/About_Us/Our-Company/Service_Areas/Minnesota_Communities_Served)

Cost: EPA's Controls v. Minnesota's Controls



Is this worth \$32 million per year?

Minnesota's Controls



EPA's Controls



Boundary Waters Canoe Area, Minnesota

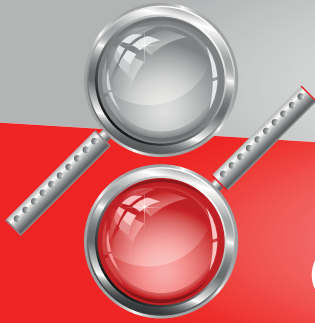
Minnesota is subject to back-to-back Regional Haze regulations. EPA is claiming authority to regulate Regional Haze twice in succession at the 2,255 megawatt Sherburne County Generating Plant (Sherco) operated by Xcel Energy.

This regulatory "double-dip" is achieved by an illogical reading of the agency's Regional Haze rules. On the one hand, EPA claims that the Sherco Plant warrants regulation because it is "reasonably anticipated" to cause visibility impairment at the Boundary Waters Canoe Area (BWCA); on the other, EPA claims that visibility impairment at BWCA is "reasonably attributable" to the Sherco Plant,¹ which merits further regulation. Of course, these statements are identical: If it is "reasonably anticipated" that

Sherco impairs visibility at BWCA, then visibility impairment at BWCA is necessarily "reasonably attributable" to the Sherco Plant.

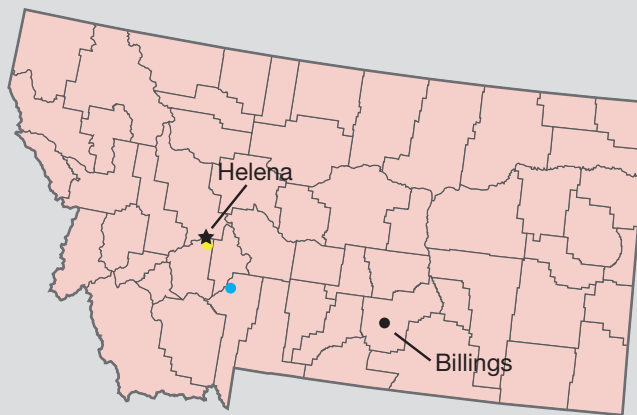
On the basis of this nonexistent difference, EPA is seizing the authority to regulate twice. In comments to Minnesota, EPA has indicated that an additional \$250 million of controls at the Sherco Plant would be "cost-effective."²

The photos above demonstrate the negligible visibility "improvement" that would be achieved by EPA's Regional Haze "double-dip."






Case Study: Montana

Affected Montana Residents

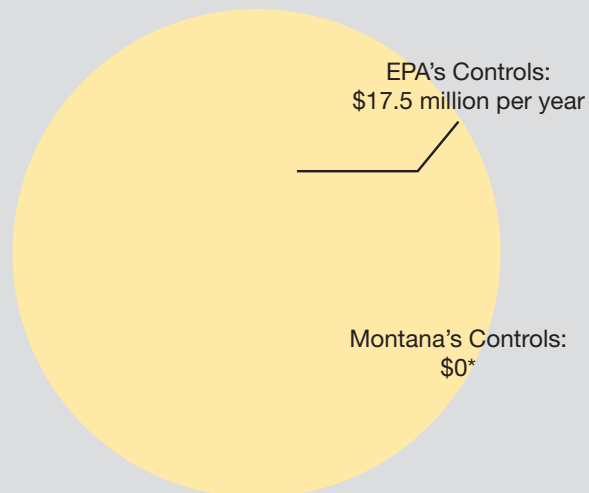


LEGEND

-  PPL Montana Service Area
-  Ash Grove Cement Plant
-  Holcim, Inc. Trident Plant

(Source: <http://www.pplmontana.com/>)

Cost: EPA's Controls v. Montana's Controls



* In 2006, Montana devolved its Regional Haze responsibilities to EPA.

Is this worth \$17.5 million per year?

Montana's Baseline



EPA's Controls



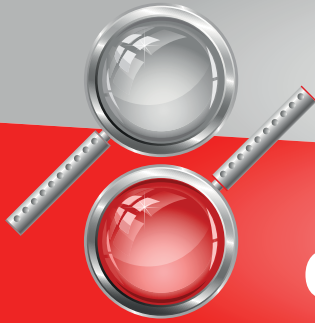
Cabinet Mountains Wilderness Area, Montana

Montana is the only state to have ceded its Regional Haze authority to EPA, a unique characteristic for which the Treasure State is now paying a steep price.

In 2006, the Montana Department of Environmental Quality withdrew its efforts to implement the Regional Haze rule due to the need "to prioritize and redirect scarce resources from secondary welfare programs, such as visibility, to primary public health protection programs."¹ As a result, EPA assumed authority over the state's Regional Haze program.

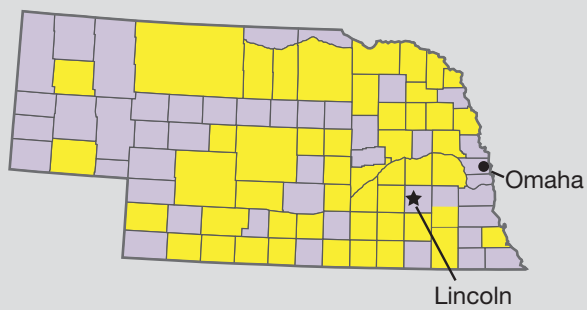
On March 20, 2012, EPA proposed a federal Regional Haze plan for Montana. If finalized, EPA's plan would impose more than \$17 million in annual compliance costs on two cement plants and a coal-fired power plant² to achieve a visibility "improvement" that is invisible to the naked eye (see photo comparison above).

Notably, EPA's proposed Regional Haze controls are almost 250% more expensive than what the agency's standing rules presume to be "cost-effective" for Regional Haze compliance.³



Case Study: Nebraska

Affected Nebraska Residents

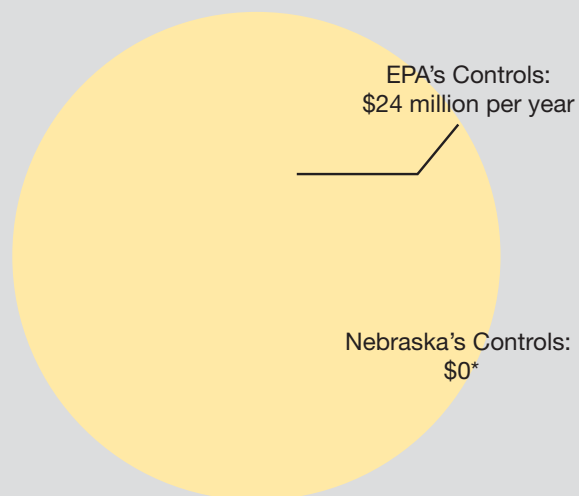


LEGEND

 **Nebraska Public Power District Service Area**

(Source: http://www.nppd.com/assets/wholesale_serve.jpg;
http://www.nppd.com/assets/power_districts.jpg)

Cost: EPA's Controls v. Nebraska's Controls



* Nebraska has proposed to continue use of low sulfur coal.

EPA's proposed plan would cost Nebraska almost \$24 million per year.

Nebraska's Controls

***Image
Unavailable***

In Nebraska, EPA is using Regional Haze, an aesthetic regulation, to force the state's participation in a health-based regulation, as if an imperceptible "improvement" in the view at National Parks is equivalent to saving lives.

In July 2011, Nebraska submitted a Regional Haze implementation plan to EPA. Under the terms of a Consent Decree signed with environmental groups, EPA must either approve Nebraska's plan or impose a federal implementation plan by June 15, 2012.¹

On March 2, 2012, EPA proposed to disapprove part of the state's plan because of alleged "errors and deviations" in Nebraska's cost-effectiveness analysis performed to determine sulfur dioxide Regional Haze controls for the coal-fired Gerald Gentleman Station.² Notably,

EPA's Controls

***Image
Unavailable***

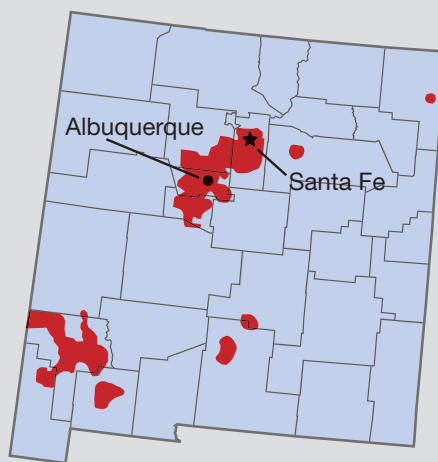
EPA's vetting of Nebraska's cost calculations was predicated on the work of a paid consultant who routinely serves as a witness for the very same environmental groups that sued to obtain the Regional Haze Consent Decrees.³

Based on EPA's revised cost-effectiveness estimates, the agency proposed to disapprove Nebraska's Regional Haze controls for the Gerald Gentleman Station. In its stead, EPA proposed to force Nebraska to participate in the Cross-State Air Pollution Rule, a health-based regulation. EPA's proposed plan would cost Nebraska almost \$24 million annually⁴ to achieve "benefits" that are invisible.



Case Study: New Mexico

Affected New Mexico Residents

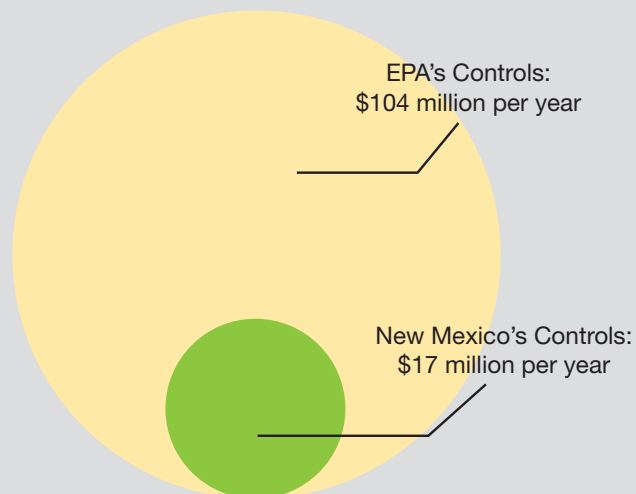


LEGEND

 PNM Service Area

(Source: <http://www.pnm.com/about/service-area.htm>)

Cost: EPA's Controls v. New Mexico's Controls



Is this worth \$87 million per year?

New Mexico's Controls



EPA's Controls



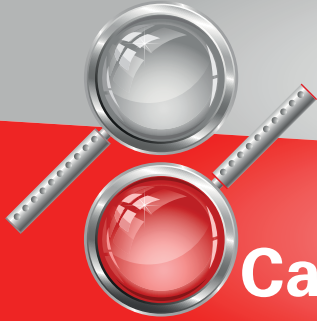
White Mountain Wilderness Area, New Mexico

In July 2011, after four years of careful deliberation, New Mexico submitted a Regional Haze plan to EPA. The state's plan included controls for the 1,800 megawatt San Juan Generating Station that exceeded the Regional Haze emissions targets recommended by EPA's own rules.

The agency, however, refused to even consider New Mexico's plan. Indeed, EPA claimed that it had no choice but to disregard the state's Regional Haze controls because it had to rush to meet a September 2011 deadline negotiated with the environmental group WildEarth Guardians—without the involvement of New Mexico state officials—and included in a court-approved Consent Decree.¹

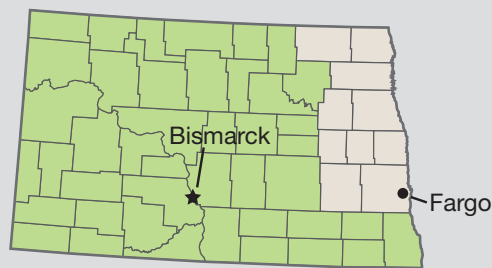
On August 22, 2011, EPA imposed a federal plan that requires nearly \$840 million more in capital costs than New Mexico's preferred plan,² in order to achieve a visibility "improvement" that is invisible to the naked eye (see the photo comparison above). According to Xcel Energy, which operates the San Juan Generating Station, EPA's plan would raise utility bills in New Mexico by \$120 annually.³

New Mexico is challenging EPA's plan in the U.S. Court of Appeals for the Tenth Circuit.



Case Study: North Dakota

Affected North Dakota Residents

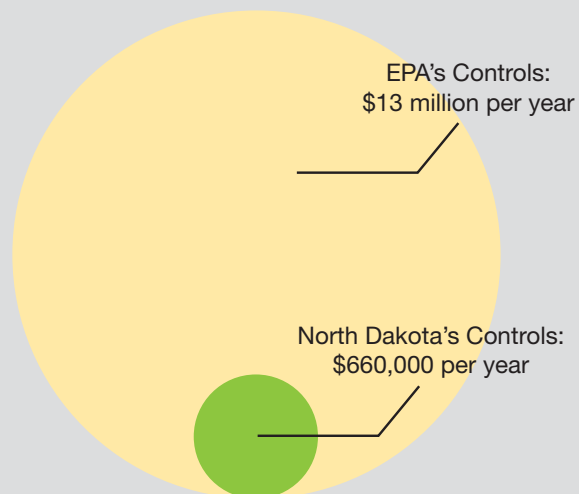


LEGEND

 Basin Electric Power Cooperative Service Area

(Source: http://www.nppd.com/assets/wholesale_serve.jpg;
http://www.nppd.com/assets/power_districts.jpg)

Cost: EPA's Controls v. North Dakota's Controls



EPA's proposed plan would cost North Dakota nearly \$13 million per year.

North Dakota's Controls

***Image
Unavailable***

Although North Dakota is 1 of only 12 states that achieves all of EPA's air quality standards for public health, it would not be able to achieve EPA's Regional Haze goals for visibility improvement even if all industry in the state shut down. This is due primarily to interstate emissions originating in neighboring Canada. Accordingly, North Dakota's Regional Haze plan accounted for international emissions.¹

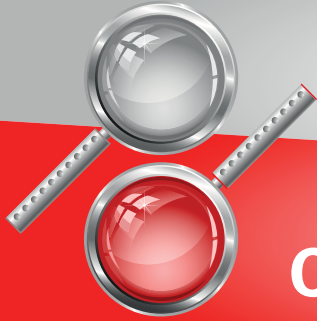
However, EPA determined that such a real world approach was "inappropriate."² On these grounds, EPA partially disapproved the state's Regional Haze plan in early March and then imposed almost \$13 million annually in Regional Haze controls at two power plants in North Dakota over the objections of the state.³

EPA's Controls

***Image
Unavailable***

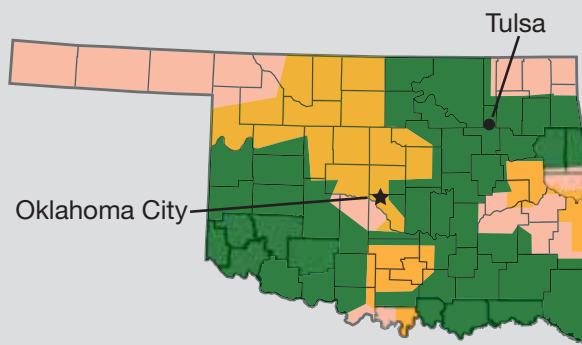
Even if one accepts EPA's unrealistic assumption that international emissions should not be considered in Regional Haze planning, the agency's "cost-effective" controls achieve only an imperceptible "improvement" in visibility.

In its proposed Regional Haze federal implementation plan for North Dakota, EPA tried to justify the imposition of more than \$80 million annually in additional emissions controls that the state had determined weren't technologically feasible. EPA only relented after a federal district court in Washington, D.C., ruled in December 2011, that North Dakota was correct and EPA's preferred controls were technologically infeasible.⁴



Case Study: Oklahoma

Affected Oklahoma Residents

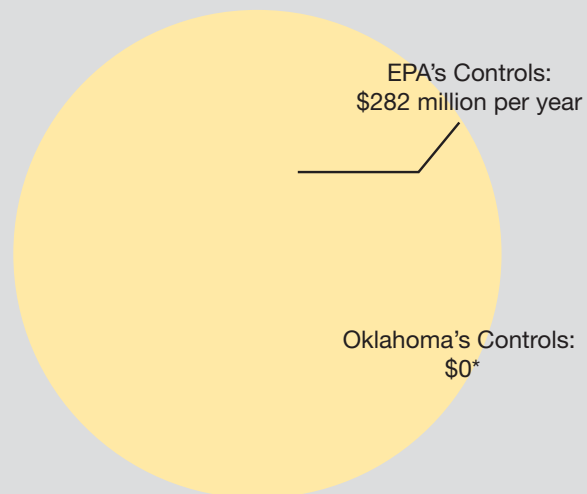


LEGEND

- American Electric Power Service Area
- Oklahoma Gas & Electric Service Area

(Source: <http://www.psoklahoma.com/info/facts/ServiceTerritory.aspx>;
<http://www.oge.com/investor-relations/Pages/InvestorRelations.aspx>)

Cost: EPA's Controls v. Oklahoma's Controls



* Oklahoma plans to fuel-switch by 2026.

Is this worth \$282 million per year?

Oklahoma's Controls



EPA's Controls



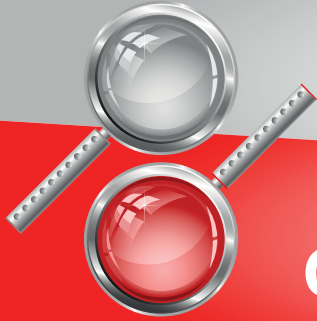
Wichita Mountains Wildlife Refuge, Oklahoma

The Clean Air Act explicitly directs states to weigh costs against visibility benefits when they decide how to implement the Regional Haze program. Accordingly, Oklahoma declined to impose the most expensive sulfur dioxide controls on six power plants subject to Regional Haze requirements, because the capital costs—almost \$1.8 billion¹—were deemed unreasonable in light of the imperceptible benefits (see the photo comparison above). Instead, Oklahoma proposed an alternative plan that would achieve even greater emissions reductions by fuel switching from coal to natural gas.

EPA, however, refused to approve Oklahoma's Regional Haze plan, because the agency objected to the state's cost-effectiveness analysis. On the

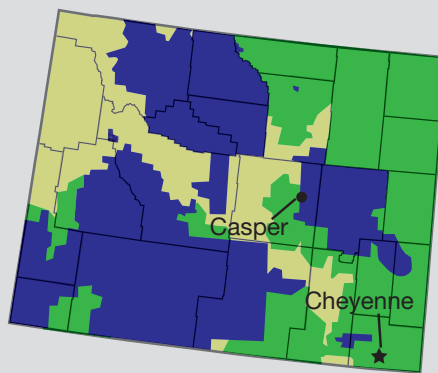
basis of alternative cost estimates prepared by a paid consultant who routinely serves as a witness for the very same environmental groups that sued to obtain the Regional Haze Consent Decrees² and who had not visited the power plants at issue,³ EPA concluded that the most stringent sulfur dioxide controls were cost-effective and imposed them on December 28, 2011.

According to Oklahoma Gas & Electric, EPA's imposed rule would "likely trigger the largest customer rate increase in OG&E's history, while the resulting impact on regional haze would be practically imperceptible."⁴



Case Study: Wyoming

Affected Wyoming Residents

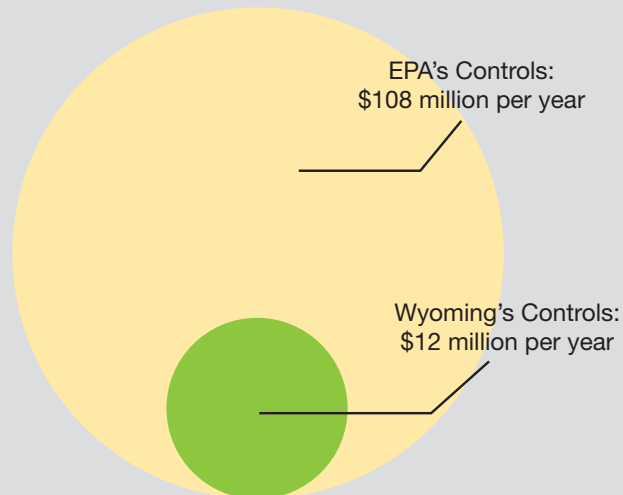


LEGEND

- Rocky Mountain Power Service Area
- Basin Electric Power Cooperative Service Area

(Source: http://www.pacificorp.com/content/dam/pacificorp/doc/About_Us/Company_Overview/Service_Area_Map.pdf;
http://www.basinelectric.com/About_Us/Members/Map/index.html)

Cost: EPA's Controls v. Wyoming's Controls



Is this worth \$96 million per year?

Wyoming's Controls



EPA's Controls



Snowy Range Scenic Byway, Wyoming

In January 2011, the Wyoming Department of Environmental Quality submitted a Regional Haze implementation plan to EPA. Under the terms of a Consent Decree signed with environmentalist litigants, the agency is required to issue a final determination on Wyoming's Regional Haze plan by October 14, 2012.

On June 4, 2012 EPA proposed to partially disapprove Wyoming's Regional Haze plan and impose a federal implementation plan in its stead.¹ The agency's preferred plan would cost almost \$96 million more than the state's plan,² to achieve an indiscernible visibility "improvement" (see images above).

In comments to the Wyoming Department of Environmental Quality, EPA faulted the state for having "inflated" the cost-effectiveness estimates for visibility improvement. In particular, EPA critiqued Wyoming's Regional Haze analysis for failing to account for cumulative visibility improvements across multiple federal National Parks and Wilderness Areas, as if multiple imperceptible "improvements" in visibility at different locations (hundreds of miles apart from one another) somehow add up and become perceptible.³ This is an obvious attempt to exaggerate the impact of the agency's preferred, more expensive controls.

Appendix A: Sources for State Case Studies

Arizona

1. Capital costs and annual costs taken from table 12, "NGS Costs of Compliance for NO_x Based on SRP Analysis," 74 FR 44320,44321 (Aug. 28, 2009).
2. See Comment to ANPRM 09 0598 from Dr. Joe Shirley Jr., Navajo Nation, EPA-R09-OAR-2009-0598-0169.
3. See 11-6-2009 EPA letter responding to Arizona Gov. Jan Brewer, EPA-R09-OAR-2009-0598-0203.
4. See 11-25-09 EPA letter to Bureau of Reclamation, in which EPA acknowledges meeting with bureau officials in Phoenix to discuss their reservations with EPA's ANPR, EPA-R09-OAR-2009-0598-0198.
5. The spread between controls preferred by state and Native American officials and those preferred by EPA is .61 deciview. According to Ronald Henry (2005), "Estimating the Probability of the Public Perceiving a Decrease in Atmospheric Haze," *Journal of the Air and Waste Management Association*, Vol. 55 No. 11, p 1760, there is a maximum probability of 35% that a human being could perceive a one deciview change in visibility (see Appendix B for more).
6. Hurlbut et al. (2012) Navajo Generating Station and Air Visibility Regulations: Alternatives and Impacts, Chapter 4, "Central Arizona Project and Navajo Generating Station." This report was the product of an interagency agreement between EPA, the Interior Department, and the Energy Department. After EPA's initial ANPR failed to address the impact of Regional Haze controls at the Navajo Generating Station on water prices, the Bureau of Reclamation balked. As a result of the interagency agreement, the National Renewable Energy

Laboratory performed a study on the possible impacts of various Regional Haze controls. The study is to be considered by EPA before it makes its decision.

Minnesota

1. See EPA's proposed approval of Minnesota's Regional Haze SIP, 77 FR 3689 (Jan. 25, 2012). EPA claims that Sherco is subject to Best Available Retrofit Technology requirements pursuant to 40 CFR 51.308 (the Regional Haze program) and also virtually identical Best Available Retrofit Technology requirements pursuant to 40 CFR 51.302 to 51.306 (the Reasonably Attributable Visibility Impairment program).
2. Capital costs taken from Xcel Energy, Resource Plan Update, Docket No E002/RP-10-825 before the Minnesota Public Utilities Commission, 1 December 2011, p 45, 46.
3. Annual costs taken from Minnesota Pollution Control Agency. BART Determination for Xcel Energy's Sherburne County Generating Plant, October 26, 2009.

Montana

1. "Re: Comments on Proposed Revision to Montana's Visibility Plan," correspondence from Bob Habeck, Montana Department of Environmental Quality to PPL Montana, February 17, 2012.
2. Capital costs and annual costs taken from EPA, "Approval and Promulgation of Implementation Plans; State of Montana; State Implementation Plan and Regional Haze Federal Implementation Plan," 77 FR 23988 (April 20, 2012): table 22 Summary of NO_x BART Analysis Comparison of Control Options for Ash Grove; table 51 Summary of NO_x BART Analysis Comparison of Control Options for Holcim; table 77

Summary of NO_x BART Analysis Comparison of Control Options for Colstrip Unit 1; table 87 Summary of EPA SO₂ BART Analysis Comparison of Lime Injection and Lime Injection with an Additional Scrubber Vessel for Colstrip Unit 1; table 101 Summary of NO_x BART Analysis Comparison of Control Options for Colstrip Unit 2; table 111 Summary of EPA SO₂ BART Analysis Comparison of Lime Injection and Lime Injection with an Additional Scrubber Vessel for Colstrip Unit 2.

3. Ibid. In 2005, Guidance for BART determinations, EPA established “presumptive limits” that represented “cost-effect” controls for Regional Haze compliance. For Ash Grove, Holcim, and Colstrip power station, EPA’s NO_x presumptive limits would require the installation of combustion controls (Low NO_x Burners or Separated Overfire Air controls). For the Colstrip power station, EPA’s SO_x presumptive limits would require the installation of a lime injection system. These would cost \$6.4 million (data are compiled from the tables in the previous citation).

Nebraska

1. National Parks Conservation Association, Montana Environmental Information Center, Grand Canyon Trust, San Juan Citizens Alliance, Our Children’s Earth Foundation, Plains Justice, Powder River Basin Resource Council, Sierra Club, and Environmental Defense Fund v. Lisa Jackson, Civil Action No. 1: 11-cv-01548 (ABJ).
2. See EPA’s Regional Haze Proposed Federal Implementation Plan, 77 FR 12780 (Mar. 2, 2012).
3. See EPA’s Technical Support Document for its proposed Regional Haze federal implementation plan for Nebraska, Appendix A, “EPA’s evaluation of cost of Flue Gas Desulfurization (FGD) controls Nebraska Public Power District (NPDD) Gerald Gentleman Station (GGS), Units 1 and 2. EPA-R07-OAR-2012-0158-0023. Footnotes 5, 6, 7, 11, 13, and 25 are the cited sources for EPA’s

objections to Nebraska’s cost-effectiveness analysis. Each footnote references EPA’s cost-effectiveness analysis for Oklahoma’s Regional Haze SIP. This analysis was performed by Dr. Phyllis Fox. See EPA-R06-OAR-2010-0190-0018, TSD Appendix C: Revised BART Cost-Effectiveness Analysis for Flue Gas Desulfurization at Coal-Fired Electric Generating Units in Oklahoma: Sooner Units 1 and 2, Muskogee Units 4 and 5, Northeastern Units 3 and 4. Final Report Revised 10-26-2010.

4. Annual cost achieved by multiplying emissions reductions at Gerald Gentleman Station required to meet EPA’s “presumptive limits” for BART (39,185 tons per year of sulfur dioxide; see 77 FR 12780 (March 2, 2012)) times EPA’s estimated 2012 price for a ton of sulfur dioxide on the emissions market established by the Cross State Air Pollution Rule (\$600).

New Mexico

1. In New Mexico, EPA used a putatively nondiscretionary Consent Decree deadline to actually ignore the state’s Regional Haze submission. “We did receive a New Mexico RH SIP submittal on July 5, 2011, but it came several years after the statutory deadline, and after the close of the comment period on today’s action. In addition, because of the missed deadline for the visibility transport, we are under a court-supervised consent decree deadline with WildEarth Guardians of August 5, 2011, to have either approved the New Mexico SIP or to have implemented a FIP to address the 110(a)(2)(D) (i) provision. It would not have been possible to review the July 5, 2011 SIP submission, propose a rulemaking, and promulgate a final action by the dates required by the consent decree.” 76 FR 52390 (Aug. 22, 2011).
2. Capital costs and annual costs taken from New Mexico Environment Department Air Quality Bureau BART Determination for San Juan Generating Station, Units 1–4, February 28, 2011, table 10, “Impact Analysis and Cost-Effectiveness of Additional NO_x Control Technologies.”

3. See Exhibit 7t, "Rate Impact Analysis (February 11, 2011), New Mexico Environmental Department, Notice of Intent to Present Technical Testimony to the Environmental Improvement Board," May 2, 2011.

North Dakota

1. See state of North Dakota Comments on U.S. EPA Region 8 Approval and Promulgation of Implementation Plans; North Dakota Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Regional Haze, Docket No. EPA-R08-OAR-2010-0406, pages 41–66.
2. See 76 FR 58570, 58637 (Sept. 21, 2011) for EPA's reasoning.
3. The two power plants are the Coal Creek Station 2 and the Antelope Valley Station. For the Coal Creek Station, costs were determined based on the application of SNCR technology at \$3,198/ton NO_x removed and 2,678 tons NO_x removed/year. See 76 FR 58603. For the Antelope Valley Station, costs were taken from table 67, 76 FR 586266 (Sept. 21, 2011).
4. See United States of America and state of North Dakota v. Minnkota Power Cooperative, Inc. and Square Butte Electric Cooperative, Case No. 1:06-cv-034, Ruled December 21, 2011.

Oklahoma

1. Capital costs and annual costs taken from the Oklahoma Department of Environmental Quality Air Quality Division BART Application Analysis for the Muskogee Generating Station (table 10: Economic Cost for Units 4 and 5 – Dry FDG – Spray Dryer Absorber, p 17); the Sooner Generating Station (table 10: Economic Cost for Units 4 and 5 – Dry FDG – Spray Dryer Absorber, p 17); and the Northeastern Power Plant (table 11: Economic Cost for Units 4 and 5 – Dry FDG – Spray Dryer Absorber, p 14). These were three separate BART analyses that

were completed in January 2010. N.B. On April 24, 2012, Public Service Company of Oklahoma (PSO), Sierra Club, and EPA reached an agreement "in principle" on the Northeastern Power Plant Units 4 and 5. In order to comply with both Regional Haze and the Mercury and Air Toxics Standards Rule, which was promulgated by EPA in December 2011, PSO agreed to install "certain emissions control" equipment on one of the units by 2015, and retire the other in 2016. The unit that continued operation would retire in 2025–2026.

2. See footnote 24, 76 FR 16168, 16183 (Mar. 22, 2011), which notes that a review of the state's cost-effectiveness methodology was performed by Dr. Phyllis Fox. See also "Dr. Fox Resume," February 25, 2011, EPA-R06-OAR-2010-0190-0070, which establishes that she is a frequent litigation witness for environmentalist organizations. Four months after she was contracted by EPA to vet Oklahoma's cost-effective analyses for Regional Haze determinations, Fox was contracted by the Sierra Club to prepare comments pushing for the most stringent nitrogen oxides controls for Regional Haze at the Four Corner Power Plant on the Navajo Nation.
3. See OG&E comments to EPA Region 6 EPA-R06-OAR-2010-0190, page 6, "Dr. Fox's conclusions are unreliable because she lacks the knowledge, skill, experience, training, and education to proffer opinions on the projected costs and visibility impact of installing and operating scrubbers at the OG&E units. She has never designed, installed, or operated a scrubber and has never visited the OG&E Units."
4. See OG&E comments to EPA Region 6 EPA-R06-OAR-2010-0190, cover letter.

Wyoming

1. EPA's Regional Haze proposed federal implementation plan, 77 FR 33022.

2. Ibid. Annual cost data compiled from: table 9 Summary of Jim Bridger Units 3 and 4 NOx BART Analysis—Costs per Boiler; tables 28-30, Summaries of Basin Electric Laramie River Units 1-3 NOx BART Analysis; table 31 Summary of Dave Johnston Unit 3 NOx BART Analysis; table 32 Summary of Jim Bridger Units 1 and 2 NOx BART Analysis—Costs per Boiler; table 33 Summary of Wyodak Unit 1 NOx BART Analysis.

3. Wyoming Department of Environmental Quality Response to BART Comments, Comment III.3. “Cumulative Modeled Impacts,” for BART analyses for Laramie River Station, Wyodak Plant, Dave Johnston Power Plant, Naughton Power Plant, and the Jim Bridger Power Plant, “EPA Region 8 commented that cumulative, modeled Class 1 impacts from all units at a facility (or combined impacts from multiple facilities) should be presented in addition to results for individual units.” See also, Wyoming Department of Environmental Quality Response to BART Comments, Comment III.12 “NOx Controls” for Wyodak Plant, “A Revised cost analysis should indicate that SCR [selective catalytic reduction] is cost-effective at Wyodak.” See also, Wyoming Department of Environmental Quality Response to BART Comments, Comment III.12, “NOx Controls,” for Laramie River Station, “If such a limit [as achieved by Selective Catalytic Reduction retrofits at the plant] is achievable at LRS, it should be required as BART.” In all Wyoming Department of Environmental Quality Response to BART Comments, comment III.12, “NOx Controls,” indicates EPA’s preference that Selective Catalytic Reduction controls be required for Regional Haze. In each case, the State chose a different, less stringent technology.

Appendix B: Methodology for Case Study Photos

Winhaze 2.9.9 Software was used to create images depicting the visibility improvement engendered by both EPA's and the states' preferred controls. Winhaze is a computer imaging software program that simulates visual air quality differences in various National Parks and Wilderness Areas. Users can select a scene and then model the visibility that corresponds to an input value, of which there are three: extinction, visual range, and deciview. For Regional Haze modeling, deciview is the standard metric of visibility improvement. Winhaze is available for free at <ftp://ftp.air-resource.com/WINHAZE>.

According to EPA, "a one deciview change in haziness is a small but noticeable change in haziness under most circumstances when viewing scenes in a Class 1 Area."¹ This finding, however, is disputed by academic research. A 2005 peer-reviewed journal article suggests that there is only a 17%–35% chance of a person perceiving a one deciview change.²

A 2010 journal article found that the shutdown of the 1,500 megawatt Mohave Generating Station caused no perceptible improvement in visibility at the Grand Canyon National Park, despite the fact that it was only 50 miles away.³ This suggests that even drastic reductions in visibility-impairing emissions might not perceptibly improve visibility.

The following inputs were used to generate the Winhaze images for the state case studies.

Winhaze 2.9.9 Inputs:

Arizona

- Maximum impacted Class 1 area: Canyonlands National Park, Utah⁴
- Baseline visibility: 10.17⁵
- Improvement engendered by EPA controls: 1.12⁶
- Improvement engendered by state controls: .51⁷
- Maximum visibility impact modeled at Grand Canyon National Park, Arizona

Minnesota

- Maximum impacted Class 1 area: Boundary Waters Canoe Area, Minnesota
- Baseline visibility: 16.1⁸
- Improvement engendered by EPA controls: .88⁹
- Improvement engendered by state controls: .57¹⁰

Montana

- Maximum impacted Class 1 area: Gates of the Mountains Wilderness Area, Montana
- Baseline visibility: 11.29¹¹
- Improvement engendered by EPA controls: 1.67¹²
- Improvement engendered by Montana controls: 0¹³
- Maximum visibility impact modeled at Cabinet Mountains Wilderness Area, Montana.

Nebraska

- Maximum impacted Class 1 area: Badlands National Park, South Dakota
- Baseline visibility: 15.9¹⁴
- Improvement engendered by EPA controls: .86¹⁵
- Improvement engendered by state controls: baseline

New Mexico

- Maximum impacted Class 1 area: Mesa Verde
- Baseline visibility: 10.9¹⁶
- Improvement engendered by EPA controls: 1.34¹⁷
- Improvement engendered by state controls: .22¹⁸
- Maximum visibility impact modeled at White Mountain Wilderness Area, New Mexico

North Dakota

- Maximum impacted Class 1 area: Theodore Roosevelt National Park North Unit, North Dakota
- Baseline visibility: 17.0¹⁹
- Improvement engendered by EPA controls: 1.77²⁰
- Improvement engendered by state controls: 1.71²¹

Oklahoma

- Maximum impacted Class 1 area: Wichita Mountains Wildlife Refuge, Oklahoma
- Baseline visibility: 23.1²²
- Improvement engendered by EPA controls: 2.89²³
- Improvement engendered by state controls: baseline

Wyoming

- Maximum impacted Class 1 area: Wind Cave National Park, South Dakota
- Baseline visibility: 15.2²⁴
- Improvement engendered by EPA controls: 2.3²⁵
- Improvement engendered by state controls: 1.26²⁶
- Maximum visibility impact modeled at Snowy Range Scenic Byway, Wyoming.

Endnotes

1. 74 FR 44327.
2. Ronald Henry (2005), "Estimating the Probability of the Public Perceiving a Decrease in Atmospheric Haze," *Journal of the Air and Waste Management Association*, Vol. 55 No. 11 p 1760.
3. Terhorst and Berkman (2010) "Effect of Coal-Fired Power Generation on Visibility in a Nearby National Park," *Atmospheric Environment*, Vol. 44 p 2524.
4. For all state case studies, "maximum impacted Class 1 area" was identified as the National Park or Wilderness Area for which there was the greatest discrepancy in visibility improvement between EPA's controls and the state's controls.
5. Baseline data for 20% worst visibility days at Canyonlands NP were derived from IMPROVE observations for the worst 20% days in 2004, as obtained from the Visibility Information Exchange Web System (VIEWS) website (<http://vista.cira.colostate.edu/views>).
6. Visibility improvement data taken from table 34, "Visibility Impacts 98th Percentile DV of NGS on Eleven Class 1 Areas As Modeled by SRP 74 FR 44332.
7. Ibid.
8. Baseline data for 20% worst visibility days at Boundary Waters Canoe Area was derived from IMPROVE observations for the Worst 20% days in 2004, as obtained from the Visibility Information Exchange Web System (VIEWS) web site.
9. Taken from table 5, "Visibility Impacts," Minnesota Pollution Control Agency BART Determination for Xcel Energy's Sherburne County Generating Station.
10. Ibid.
11. Capital costs and annual costs taken from EPA, "Approval and Promulgation of Implementation Plans; State of Montana; State Implementation Plan and Regional Haze Federal Implementation Plan," 77 FR 23988, (April 20, 2012), table 6. Summary of Uniform Rate of Progress for 20% Worst Days, 77 FR 23997.
12. Ibid, table 22. Summary of NOx BART Analysis Comparison of Control Options for Ash Grove, 77 FR 24007; table 50. Delta Deciview Improvement for NOx Controls on Holcim, 77 FR 24017.
13. Montana ceded control of its Regional Haze program to EPA in 2006.
14. Baseline data for 20% worst visibility days at Badlands National Park were derived from IMPROVE observations for the worst 20% days in 2004, as obtained from the Visibility Information Exchange Web System (VIEWS) website.
15. Visibility improvement over baseline for Badlands National Park taken from 77 FR 12780.
16. Baseline data for 20% worst visibility days at Mesa Verde NP were derived from IMPROVE observations for the worst 20% days in 2004, as obtained from the Visibility Information Exchange Web System (VIEWS) website.
17. Visibility improvement data taken from table 6, "NMED Modeled Maximim Impacts of the 98th Percentile Delta-dv Impacts from 2001–2003," 76 FR 502.
18. Ibid.
19. Baseline data for 20% worst visibility days at Theodore Roosevelt National Park were derived from IMPROVE observations for the worst 20% days in 2004, as obtained from the Visibility Information Exchange Web System (VIEWS) website.
20. Visibility improvement data taken from North Dakota Regional Haze BART submittal by Great River Energy for Coal Creek Stations 1, 2 (GRE's modeling data were approved by North Dakota) table 7-4 "Year 2000 Modeling Results"; Visibility improvement data for Antelope Valley Station were taken from state of North Dakota, Comments on U.S. EPA Region 8 Approval and Promulgation of Implementation Plans; North Dakota Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Regional Haze," p 67.
21. Ibid.
22. Baseline data for 20% worst visibility days at Wichita Mountains National Park were derived from IMPROVE observations for the worst 20% days in 2004, as obtained from the Visibility Information Exchange Web System (VIEWS) website.
23. Visibility improvement data taken from EPA's proposed Regional Haze federal implementation plan for Oklahoma, table 9, "EPA Modeled Maximum Impacts Due To Dry Scrubbing of the 98th Percentile Delta-DV Impacts from 2001–2003," 76 FR 16186.
24. Baseline data for 20% worst visibility days at Wind Cave National Park were derived from IMPROVE observations for the Worst 20% days in 2004, as obtained from the Visibility Information Exchange Web System (VIEWS) website.
25. Visibility improvement data taken from EPA, proposed Regional Haze federal implementation plan for Wyoming, 77 FR 33022, table 9 Summary of Jim Bridger Units 3 and 4 NOx BART Analysis—Costs per Boiler; tables 28-30 Summaries of Basin Electric Laramie River Units 1-3 NOx BART Analysis; table 31 Summary of Dave Johnston Unit 3 NOx BART Analysis; table 32 Summary of Jim Bridger Units 1 and 2 NOx BART Analysis—Costs per Boiler; table 33 Summary of Wyodak Unit 1 NOx BART Analysis.
26. Ibid.

Appendix C: Consent Decrees

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NATIONAL PARKS CONSERVATION)	
ASSOCIATION, MONTANA ENVIRONMENTAL)	
INFORMATION CENTER, GRAND CANYON)	
TRUST, SAN JUAN CITIZENS ALLIANCE,)	
OUR CHILDREN’S EARTH FOUNDATION,)	
PLAINS JUSTICE, POWDER RIVER BASIN)	CIVIL ACTION NO.
RESOURCE COUNCIL, SIERRA CLUB,)	1: 11-cv-01548 (ABJ)
AND ENVIRONMENTAL DEFENSE FUND)	
)	
Plaintiffs,)	
)	
v.)	
)	
LISA JACKSON, in her official capacity as)	
Administrator, United States Environmental)	
Protection Agency,)	
)	
Defendant.)	
_____)	

CONSENT DECREE

This Consent Decree is entered into by Plaintiffs National Parks Conservation Association, Montana Environmental Information Center, Grand Canyon Trust, San Juan Citizens Alliance, Our Children’s Earth Foundation, Plains Justice, Powder River Basin Resource Council, Sierra Club, and Environmental Defense Fund (“Plaintiffs”), and by Defendant Lisa Jackson, in her official capacity as Administrator of the United States Environmental Protection Agency (“EPA” or “the Administrator”).

WHEREAS, Section 110(c) of the Clean Air Act, 42 U.S.C. § 7410(c), requires the Administrator of EPA to promulgate a federal implementation plan (“FIP”) within two years of a finding that a state has failed to make a required a state implementation plan (“SIP”) submittal. The pertinent provision of Section 110(c) states:

(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 section 110(k)(1)(A).

WHEREAS, on January 15, 2009, EPA found that the following 34 States¹ had failed to submit Clean Air Act SIPs addressing any of the required regional haze SIP elements of 40

C.F.R. § 51.308: Alaska, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, U.S. Virgin Islands, Virginia,

Washington, and Wisconsin. 74 Fed. Reg. 2392, 2393 (Jan. 15, 2009);

WHEREAS, on January 15, 2009 EPA also found that the following five states had submitted some, but not all, of the required regional haze SIP elements set forth at 40 C.F.R. §§ 51.308 and 51.309: Arizona—40 C.F.R. § 51.309(g) and 40 C.F.R. § 51.309(d)(4); Colorado—40 C.F.R. § 51.308(d) and 40 C.F.R. § 51.308(e) for two sources; Michigan—40 C.F.R. § 51.308(d) and 40 C.F.R. § 51.308(e) for six sources; New Mexico—40 C.F.R. § 51.309(g) and 40 C.F.R. § 51.309(d)(4); Wyoming—40 C.F.R. § 51.309(g). 74 Fed. Reg. at 2393;

WHEREAS, on January 15, 2009, EPA stated that its finding “starts the two-year clock for the promulgation by EPA of a FIP. EPA is not required to promulgate a FIP if the state makes the required SIP submittal and EPA takes final action to approve the submittal within two years of EPA’s finding.” 74 Fed. Reg. at 2393;

WHEREAS, EPA did not, by January 15, 2011, promulgate regional haze FIPs or approve regional haze SIPs for any of the 34 states for which it found on January 15, 2009 a 1 Throughout this Consent Decree, the term “state” or “State” has the meaning provided in 42 U.S.C. § 7602(d). failure to submit SIPs addressing any of the required regional haze SIP elements, and EPA also did not, by January 15, 2011, promulgate regional haze FIPs or approve regional haze SIPs correcting the non-submittal deficiencies that EPA found on January 15, 2009 with respect to the regional haze SIP requirements for Arizona, Colorado, Michigan, New Mexico and Wyoming;

WHEREAS to meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA’s regional haze regulations the following states (and one region) submitted regional haze SIPs to EPA prior to January 15, 2009 (hereinafter, “regional haze SIP submittals”), and whereas EPA has yet to take final action on such submittals pursuant to 42

U.S.C. 7410(k): Alabama; Albuquerque, NM; Iowa; Louisiana; Mississippi; Missouri; North Carolina; South Carolina; Tennessee; and West Virginia;

WHEREAS, Plaintiffs served prior notice on the Administrator alleging that her failure to promulgate regional haze FIPs and take final action on regional haze SIPs as described above constituted failure to perform duties that are not discretionary under the Act, and of Plaintiffs’ intent to initiate the present action. This notice was provided via certified letters, posted January 19, 2011, and addressed to the Administrator;

WHEREAS, Plaintiffs filed a complaint pursuant to CAA section 304(a)(2), 42 U.S.C. § 7604(a)(2), alleging failure by the Administrator to perform nondiscretionary duties as referenced above;

WHEREAS, Plaintiffs and EPA (collectively, the “Parties”) wish to effectuate a settlement of the above-captioned cases without expensive and protracted litigation, and without a litigated resolution of any issue of law or fact;

WHEREAS, the Parties consider this Consent Decree to be an adequate and equitable resolution of the claims in the above-captioned case and consent to entry of this Consent Decree; and

WHEREAS, the Court, by entering this Consent Decree, finds that this Consent Decree is fair, reasonable, in the public interest, and consistent with the CAA, 42 U.S.C. §§ 7401 et seq.

NOW THEREFORE, before the taking of testimony, without trial or determination of any issue of fact or law, and upon the consent of the Parties, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. This Court has subject matter jurisdiction over the claims set forth in the Complaint and to order the relief contained in this Consent Decree.
2. Venue is proper in the United States District Court for the District of Columbia.

Resolution of Claims

3. By the “Proposed Promulgation Deadlines” set forth in Table A below EPA shall sign a notice(s) of proposed rulemaking in which it proposes approval of a SIP, promulgation of a FIP, partial approval of a SIP and promulgation of a partial FIP,

or approval of a SIP or promulgation of a FIP in the alternative, for each State therein, that collectively meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations.

4. By the "Final Promulgation Deadlines" set forth in Table A below, EPA shall sign a notice(s) of final rulemaking promulgating a FIP for each State therein to meet the regional haze

implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations, except where, by such deadline EPA has for a State therein signed a notice of final rulemaking unconditionally approving a SIP, or promulgating a partial FIP and unconditional approval of a portion of a SIP, that collectively meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations.

TABLE A

Deadlines for EPA to Sign Notice of Promulgation for Proposed and Final Regional Haze FIPs and/or Approval of SIPs ("RH" = Regional Haze)

Proposed Promulgation Deadlines	Final Promulgation Deadlines	State
	December 13, 2011	Nevada Oklahoma (all BART elements)
	December 15, 2011	Kansas New Jersey
November 15, 2011	March 15, 2012	District of Columbia Maine
November 29, 2011	March 29, 2012	South Dakota
January 17, 2012	May 15, 2012	Minnesota Illinois Indiana New York Ohio Pennsylvania Virginia
February 15, 2012	June 15, 2012	Alaska (all BART elements) Georgia Maryland Nebraska New Hampshire New Mexico(all remaining RH SIP elements) Rhode Island Vermont Wisconsin
March 15, 2012	July 13, 2012	Connecticut Massachusetts
May 14, 2012	September 14, 2012	Hawaii Virgin Islands
May 15, 2012	November 15, 2012	Alaska (all remaining RH SIP elements) Arizona Idaho (all remaining RH SIP elements) Florida Michigan Oklahoma (all remaining RH SIP elements) Oregon (all remaining RH SIP elements) Texas Washington

5. By the “Proposed Promulgation Deadlines” set forth in Table B below EPA shall sign a notice of proposed rulemaking in which it proposes to approve or disapprove, in accordance with 42 U.S.C. § 7410(k), the regional haze SIP submittals for each state or area indicated.

6. By the “Final Promulgation Deadlines” set forth in Table B below, EPA shall sign a notice of final rulemaking in which it approves or disapproves, in accordance with 42 U.S.C. § 7410(k), the regional haze SIP submittals for each state or area indicated.

TABLE B

Deadlines for EPA to Sign Notices of Promulgation for Proposed and Final Approval or Disapproval of Regional Haze SIP Submissions

Proposed Promulgation Deadlines	Final Promulgation Deadlines	State or Area
	March 15, 2012	Tennessee West Virginia
February 15, 2012	June 15, 2012	Alabama Albuquerque, NM Iowa Louisiana Mississippi Missouri North Carolina South Carolina

General Provisions

- 7. The deadlines in Table A or B may be extended for a period of 60 days or less by written stipulation executed by counsel for EPA and Plaintiffs and filed with the Court. Any other extension of a deadline in Table A or B may be approved by the Court upon motion made pursuant to the Federal Rules of Civil Procedure by EPA and upon consideration of any response by Plaintiffs and reply by EPA.
- 8. EPA agrees that Plaintiffs are entitled to recover their costs of litigation (including attorneys’ fees) (“litigation costs”) incurred in this matter pursuant to 42 U.S.C. § 7604(d). The deadline for the filing of any motion for litigation costs for activities performed prior to the lodging of this decree with the Court is hereby extended for a period of 120 days. During this time the Parties shall seek to resolve informally any claim for litigation costs, and if they cannot reach a resolution, Plaintiffs may seek such litigation costs from the Court. The Court shall retain jurisdiction to resolve any request for litigation costs. Plaintiffs reserve their right to seek litigation costs for any work performed after the lodging of this Consent Decree. EPA does not concede that Plaintiffs will be entitled

to fees for any work performed after the lodging of the Consent Decree, and the parties reserve all claims and defenses with respect to any future costs of litigation claim.

- 9. No later than ten business days following signature by the Administrator or her delegatee of the notice of any proposed or final rulemaking referenced above, EPA shall deliver the notice to the Office of the Federal Register for review and prompt publication. Following such delivery to the Office of the Federal Register, EPA shall not take any action (other than is necessary to correct any typographical errors or other errors in form) to delay or otherwise interfere with publication of such notice in the Federal Register. EPA shall make available to Plaintiffs copies of the notices referenced herein within five business days following signature by the Administrator or her delegatee.
- 10. Plaintiffs and EPA shall not challenge the terms of this Consent Decree or this Court’s jurisdiction to enter and enforce this Consent Decree.
- 11. Nothing in this Consent Decree shall be construed to limit or modify any discretion accorded EPA by the CAA or by general

principles of administrative law in taking the actions which are the subject of this Consent Decree, including the discretion to alter, amend, or revise any responses or final actions contemplated by this Consent Decree. EPA's obligation to perform the actions specified by Paragraphs 3 through 6 does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.

12. Nothing in this Consent Decree shall be construed as an admission of any issue of fact or law or to waive or limit any claim or defense, on any grounds, related to any final action EPA may take with respect to the SIPs or FIPs identified in paragraphs 3 through 6 of this Consent Decree.
13. Nothing in this Consent Decree shall be construed to confer upon the district court jurisdiction to review any final decision made by EPA pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to confer upon the district court jurisdiction to review any issues that are within the exclusive jurisdiction of the United States Court of Appeals pursuant to 42 U.S.C. §§ 7607(b)(1) and 7661d. Nothing in this Consent Decree shall be construed to waive any remedies or defenses the Parties may have under 42 U.S.C. § 7607(b)(1).
14. The Parties recognize and acknowledge that the obligations imposed upon EPA under this Consent Decree can only be undertaken using appropriated funds legally available for such purpose. No provision of this Consent Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.
15. Any notices required or provided for by this Consent Decree shall be made in writing and sent via e-mail to the following:
 16. In the event of a dispute among the Parties concerning the interpretation or implementation of any aspect of this Consent Decree, the disputing Party shall provide the other Party with a written notice outlining the nature of the dispute and requesting informal negotiations. If the Parties cannot reach an agreed-upon resolution, any Party may move the Court to resolve the dispute.
 17. No motion or other proceeding seeking to enforce this Consent Decree or for contempt of court shall be properly filed unless the Party seeking to enforce this Consent Decree has followed the procedure set forth in Paragraph 16.
 18. The Court shall retain jurisdiction to determine and effectuate compliance with this Consent Decree, to resolve any disputes thereunder, and to consider any requests for costs of litigation (including reasonable attorneys' fees). After EPA's obligations under Paragraphs 3 through 6 have been completed, EPA may move to have this consent decree terminated. Plaintiffs shall have 14 days in which to respond to such motion.
 19. The Parties agree and acknowledge that before this Consent Decree can be finalized and entered by the Court, EPA must provide notice in the Federal Register and an opportunity for comment pursuant to 42 U.S.C. § 7413(g). EPA will deliver a public notice of this Consent Decree to the Federal Register for publication and public comment within 10 business days after lodging this Consent Decree with the Court. After this Consent Decree has undergone

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an opportunity for notice and comment, EPA's Administrator and the Attorney General, as appropriate, will promptly consider any such written comments in determining whether to withdraw or withhold consent to this Consent Decree, in accordance with section 113(g) of the Clean Air Act. If the Administrator or the Attorney General elects not to withdraw or withhold consent to this Consent Decree, the Parties will promptly file a motion that requests the Court to enter this Consent Decree. If a motion to enter the Consent Decree is not filed within 60 days after the notice is published in the Federal Register, any party may file dispositive motions in this matter.

20. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by the Parties and that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent Decree.
21. The undersigned certify that they are fully authorized by the Party or Parties they represent to bind that Party or those Parties to the terms of this Consent Decree.

SO ORDERED this ____ day of _____ 2011.

HON. AMY BERMAN JACKSON
United States District Judge

SO AGREED:

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB,)
)
Plaintiff,)
)
v.)
)
LISA JACKSON, in her official)
capacity as Administrator, United States)
Environmental Protection Agency,)
)
Defendant.)
_____)

Case: 1:10-cv-02112-JEB

CONSENT DECREE

WHEREAS, Plaintiff Sierra Club filed this action pursuant to section 304(a)(2) of the Clean Air Act (“CAA”), 42 U.S.C. § 7604(a)(2), alleging that Defendant Lisa Jackson, Administrator of the United States Environmental Protection Agency (“EPA”), failed to timely perform a duty mandated by CAA section 110(k)(2) and (3), *id.* §§ 7410(k)(2) and (3), to approve or disapprove (or approve in part and disapprove in part) the state implementation plan (“SIP”) revision dated July 29, 2008, submitted by Arkansas to EPA (referred to as “Arkansas Regional Haze SIP”).

WHEREAS, Plaintiff and EPA (collectively the “Parties”) wish to effectuate a settlement of the above-captioned case without expensive and protracted litigation.

WHEREAS, the Parties consider this Decree to be an adequate and equitable resolution of the claims in the above-captioned case.

WHEREAS, the Court, by entering this Decree, finds that this Decree is fair, reasonable, in the public interest, and consistent with the CAA, 42 U.S.C. §§ 7401 *et seq.*

NOW THEREFORE, before the taking of testimony, without trial or determination of any issue of fact or law, and upon the consent of the Parties, it is hereby ORDERED, ADJUDGED and DECREED that:

1. This Court has subject matter jurisdiction over the claims set forth in the Complaint related to the Arkansas Regional Haze SIP and to order the relief contained in this Decree. Venue is proper in the United States District Court for the District of Columbia.
2. By December 15, 2011, EPA shall sign a notice of final rulemaking in which it shall approve or disapprove, in accordance with CAA section 110(k), 42 U.S.C. § 7410(k), the Arkansas Regional Haze SIP. EPA shall expeditiously deliver the notice of final rulemaking to the Office of the Federal Register for publication and shall provide a copy of the notice of final rulemaking to Plaintiff within ten (10) days after signature.
3. The Parties agree that Plaintiff is entitled to recover costs of litigation (including attorneys’ fees) incurred in this matter pursuant to CAA section 304(d), 42 U.S.C. § 7604(d). The deadline for filing a motion for costs of

litigation (including attorney's fees) for activities performed prior to entry of this Consent Decree in this case is hereby extended until ninety (90) days after entry of this Consent Decree by the Court. During this time the Parties shall seek to resolve informally any claim for costs of litigation (including attorney's fees), and if they cannot, will submit that issue to the Court for resolution.

4. The deadline in paragraph 2 of this Decree may be extended for a period of ninety (90) days or less by written stipulation executed by counsel for Plaintiff and EPA which shall be filed with the Court. Any other extension of the deadline in paragraph 2 of this Decree may be approved by the Court upon a motion of EPA, made pursuant to the Federal Rules of Civil Procedure, and upon consideration of any response by Plaintiff. Any other provision of this Consent Decree may be modified by the Court following motion of Plaintiff or EPA pursuant to the Federal Rules of Civil Procedure and upon consideration of any opposition by the non-moving party.
5. Plaintiff and EPA shall not challenge the terms of this Decree or this Court's jurisdiction to enter and enforce this Decree.
6. Nothing in this Decree shall be construed to limit or modify any discretion accorded EPA by the CAA or by general principles of administrative law in taking the action which is the subject of this Decree, including the discretion to alter, amend or revise any final action contemplated by this Decree. EPA's obligation to perform the actions specified in paragraph 2 by the time specified therein does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.
7. Nothing in this Decree shall be construed as an admission of any issue of fact or law nor to waive or limit any claim or defense, on any grounds, related to any final action EPA may take with respect to the Arkansas Regional Haze SIP.

8. Nothing in this Decree shall be construed to confer upon the district court jurisdiction to review any final decision made by EPA pursuant to this Decree. Nothing in this Decree shall be construed to confer upon the district court jurisdiction to review any issues that are within the exclusive jurisdiction of the United States Courts of Appeals pursuant to CAA sections 307(b)(1), 42 U.S.C. § 7607(b)(1). Nothing in this Decree shall be construed to waive any remedies or defenses the Parties may have under CAA section 307(b)(1).
9. The Parties recognize and acknowledge that the obligations imposed upon EPA under this Decree can only be undertaken using appropriated funds legally available for such purpose. No provision of this Decree shall be interpreted as or constitute a commitment or requirement that the United States obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.
10. Any notices required or provided for by this Decree shall be made in writing, via facsimile, email, or other means, and sent to the following:

For Plaintiff:

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11. In the event of a dispute between the Parties concerning the interpretation or implementation of any aspect of this Decree, the disputing Party shall provide the other Party with a written notice outlining the nature of the dispute and requesting informal negotiations. If the Parties cannot reach an agreed-upon resolution within ten (10) business days after receipt of the notice, any party may move the Court to resolve the dispute.
12. No motion or other proceeding seeking to enforce this Decree or for contempt of Court shall be properly filed unless Plaintiff has followed the procedure set forth in paragraph 11, and provided EPA with written notice received at least ten (10) business days before the filing of such motion or proceeding.
13. The Court shall retain jurisdiction to determine and effectuate compliance with this Decree.

After EPA has completed the relevant actions set forth in paragraph 2 of this Consent Decree, any relevant notices have been published in the Federal Register, and any claim for costs of litigation, including attorneys' fees, has been resolved, EPA may move to have this Decree terminated. Plaintiff shall have fourteen (14) days in which to respond to such motion.

14. The Parties agree and acknowledge that before this Consent Decree can be finalized and entered by the Court, EPA must provide notice in the Federal Register and an opportunity for comment pursuant to CAA section 113(g), 42 U.S.C. § 7413(g). EPA will submit a public notice of this Consent Decree to the Federal Register for publication and public comment within ten (10) days after lodging this Consent Decree with the Court. After this Consent Decree has undergone an opportunity for notice and comment, the Administrator and the Attorney General, as appropriate, will promptly consider any such written comments in determining whether to withdraw or withhold consent to this Consent Decree, in accordance with section 113(g) of the CAA. If the Administrator or the Attorney General elects not to withdraw or withhold consent to this Consent Decree, the Parties will promptly file a motion that requests the Court to enter this Consent Decree.
15. The undersigned representatives of each Party certify that they are fully authorized by the Party they represent to bind that Party to the terms of this Decree.

SO ORDERED this ____ day of _____, 2011.

JUDGE JAMES E. BOASBERG
UNITED STATES DISTRICT JUDGE

SO AGREED:

FOR PLAINTIFF

/s/ William J. Moore, III
WILLIAM J. MOORE, III
1648 Osceola Street
Jacksonville, Florida 32204
(904) 685-2172

FOR DEFENDANT

IGNACIA S. MORENO
Assistant Attorney General
Env. & Natural Resources Division

/s/ Eileen T. McDonough
EILEEN T. MCDONOUGH
Environmental Defense Section
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Of Counsel for Defendant:

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Dallas, TX 75202

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 1:11-cv-0001-CJA-MEH (Consolidated with 11-cv-00743-CMA-MEH) WILDEARTH GUARDIANS,

Plaintiffs,

v.

LISA JACKSON, in her official capacity as Administrator, United States Environmental Protection Agency,

Defendant.

CONSENT DECREE

This Consent Decree is entered into by Plaintiffs WildEarth Guardians (“Guardians”), National Parks Conservation Association (“NPCA”), and the Environmental Defense Fund (“EDF”), and by Defendant Lisa Jackson, in her official capacity as Administrator of the United States Environmental Protection Agency (“EPA”).

WHEREAS, Guardians filed this action pursuant to section 304(a)(2) of the Clean Air Act (“CAA”), 42 U.S.C. § 7604(a)(2), alleging that EPA failed to perform a duty mandated by CAA section 110(k)(2) and (3), 42 U.S.C. § 7410(k)(2) and (3), by not acting on two State Implementation Plan (“SIP”) submissions, one addressing Colorado regional haze and the other addressing North Dakota excess emissions during startup, shutdown, malfunction and maintenance. The complaint further sought to compel EPA to take final action on these submissions by a date certain;

WHEREAS, Guardians and NPCA filed an amended complaint pursuant to CAA section 304(a)(2), 42 U.S.C. § 7604(a)(2), alleging additional claims that EPA failed to perform a duty mandated by CAA section 110(k)(2) and (3), 42 U.S.C. § 7410(k)(2) and (3), by

not acting on a Wyoming SIP submission addressing Wyoming regional haze, and duties mandated by CAA section 110(c), 42 U.S.C. § 7410(c), to promulgate regional haze Federal Implementation Plans (“FIPs”) for Montana, North Dakota, Colorado and Wyoming. The amended complaint further sought to compel EPA to take final action on these regional haze matters by a date certain;

WHEREAS, the Environmental Defense Fund (“EDF”) filed a complaint pursuant to CAA section 304(a)(2), 42 U.S.C. § 7604(a)(2), alleging that EPA failed to perform a duty mandated by CAA section 110(c), 42 U.S.C. § 7410(c), to promulgate a regional haze FIP for the State of Colorado or, alternatively, to finally approve a regional haze SIP for the State of Colorado;

WHEREAS, Guardians, NPCA, EDF and EPA (collectively, the “Parties”) wish to effectuate a settlement of the above-captioned cases without expensive and protracted litigation, and without a litigated resolution of any issue of law or fact;

WHEREAS, the Parties consider this Consent Decree to be an adequate and equitable resolution of the claims in the above-captioned case and consent to entry of this Consent Decree; and

WHEREAS, the Court, by entering this Consent Decree, finds that this Consent Decree is fair, reasonable, in the public interest, and consistent with the CAA, 42 U.S.C. §§ 7401 et seq.

NOW THEREFORE, before the taking of testimony, without trial or determination of any issue of fact or law, and upon the consent of the Parties, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. This Court has subject matter jurisdiction over the claims set forth in the Amended Complaint and the EDF Complaint and to order the relief contained in this Consent Decree.

2. Venue is proper in the United States District Court for the District of Colorado.

Resolution of Claim Asserted Solely by Guardians

3. By October 27, 2011, or within 20 days after the entry date of this Consent Decree, whichever date is later, EPA shall sign a notice of final rulemaking in which it takes final action on the State of North Dakota's revisions to Chapters 33-15-01 and 33-15-05, N.D.A.C., that North Dakota submitted to EPA on April 6, 2009. Such final action may consist of an approval, disapproval, limited approval/limited disapproval, partial approval/partial disapproval, or any combination thereof, as long as EPA takes final action on the entirety of the specified rule revisions.

Resolution of Claims Asserted by Guardians and NPCA

4. By July 21, 2011, or within 20 days after the entry date of this Consent Decree, whichever date is later, EPA shall sign a notice of proposed rulemaking in which it proposes approval of a SIP, promulgation of a FIP, partial approval of a SIP and promulgation of a partial FIP, or approval of a SIP or promulgation of a FIP in the alternative, for the State of North Dakota, to meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations.
5. EPA shall by January 26, 2012, sign a notice of final rulemaking promulgating a FIP for the State of North Dakota, to meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations, unless, by January 26, 2012, EPA has signed a notice of final rulemaking unconditionally approving a SIP, or promulgating a partial FIP and partial unconditional approval of a SIP, for the State of North Dakota that meets the regional haze implementation plan requirements that were

due by December 17, 2007 under EPA's regional haze regulations.

6. By April 15, 2012, EPA shall sign a notice of proposed rulemaking in which it proposes approval of a SIP, promulgation of a FIP, partial approval of a SIP and promulgation of a partial FIP, or approval of a SIP or promulgation of a FIP in the alternative, for the State of Wyoming, to meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations.
7. EPA shall by October 15, 2012, sign a notice of final rulemaking promulgating a FIP for the State of Wyoming, to meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations, unless, by October 15, 2012, EPA has signed a notice of final rulemaking unconditionally approving a SIP, or promulgating a partial FIP and partial unconditional approval of a SIP, for the State of Wyoming that meets the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations.
8. By January 20, 2012, EPA shall sign a notice of proposed rulemaking in which it proposes approval of a SIP, promulgation of a FIP, partial approval of a SIP and promulgation of a partial FIP, or approval of a SIP or promulgation of a FIP in the alternative, for the State of Montana, to meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations.
9. EPA shall by June 29, 2012, sign a notice of final rulemaking promulgating a FIP for the State of Montana, to meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations, unless, by June 29, 2012, EPA has signed a notice of final rulemaking unconditionally approving a SIP, or promulgating a partial FIP and partial unconditional approval of a SIP, for the State of Montana that meets the regional haze implementation plan

requirements that were due by December 17, 2007 under EPA's regional haze regulations.

Resolution of Claims Asserted by Guardians, NPCA and EDF

10. By March 8, 2012, EPA shall sign a notice of proposed rulemaking in which it proposes approval of a SIP, promulgation of a FIP, partial approval of a SIP and promulgation of a partial FIP, or approval of a SIP or promulgation of a FIP in the alternative, for the State of Colorado, to meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations.
11. EPA shall by September 10, 2012, sign a notice of final rulemaking promulgating a FIP for the State of Colorado, to meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations, unless, by September 10, 2012, EPA has signed a notice of final rulemaking unconditionally approving a SIP, or promulgating a partial FIP and partial unconditional approval of a SIP, for the State of Colorado that meets the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations.

General Provisions

12. The deadline in Paragraph 3 may be extended for a period of 60 days or less by written stipulation executed by counsel for EPA and Guardians and filed with the Court. Any other extension of a deadline in paragraph 3 may be approved by the Court upon motion made pursuant to the Federal Rules of Civil Procedure by EPA and upon consideration of any response by Guardians and reply by EPA. The deadlines in Paragraphs 4 through 9 may be extended for a period of 60 days or less by written stipulation executed by counsel for EPA, Guardians and NPCA and filed with the Court. Any other extension of a deadline in paragraphs 4 through 9 may be approved by the Court upon motion made pursuant to the

Federal Rules of Civil Procedure by EPA and upon consideration of any response by Guardians and NPCA, and reply by EPA. The deadlines in Paragraphs 10 and 11 may be extended for a period of 60 days or less by written stipulation executed by counsel for EPA, Guardians, NPCA, and EDF and filed with the Court. Any other extension of a deadline in paragraphs 10 and 11 may be approved by the Court upon motion made pursuant to the Federal Rules of Civil Procedure by EPA and upon consideration of any response by Guardians, NPCA and EDF, and reply by EPA. Any other modification of this Consent Decree may be approved by the Court upon motion made pursuant to the Federal Rules of Civil Procedure by any Party to this Consent Decree and upon consideration of any response by the non-moving Parties and reply by the moving party.

13. The United States agrees to pay Guardians as full settlement of all claims by Guardians for attorneys' fees, costs, and expenses ("costs of litigation") incurred in this consolidated litigation through the date of lodging this consent decree, under any authority, the sum of \$23,545 as soon as reasonably practicable following entry of this Consent Decree, by electronic funds transfer to a bank account identified by Guardians. Guardians agrees that the United States' payment to Guardians of \$23,545 fully satisfies any and all claims for costs of litigation Guardians may have with respect to these consolidated cases, except that Guardians reserves the right to seek costs of litigation pursuant to 42 U.S.C. §7604(d) for any additional work performed after the lodging of this Consent Decree. The costs of litigation paid under this Paragraph shall have no precedential value in any future claim. Guardians will not seek costs of litigation incurred between February 22, 2011 and the date of lodging this consent decree in Case No. 09-cv-02148-REB-MJW (D. Colo.). NPCA does not seek costs of litigation related to its claims in these consolidated cases for work performed through the date of lodging this Consent Decree. NPCA reserves its right to seek costs of litigation pursuant

to 42 U.S.C. §7604(d) for any work performed after the lodging of this Consent Decree. EDF, which filed a separate complaint in this matter, does not seek costs of litigation related to its claims in these consolidated cases for work performed before or after the lodging of this Consent Decree. EPA does not concede that Guardians or NPCA will be entitled to fees for any work performed by Guardians or NPCA after the lodging of the Consent Decree, and EPA reserves all defenses with respect to any future costs of litigation claim.

14. No later than ten business days following signature of the notice of any proposed or final rulemaking referenced above, EPA shall submit the notice for review and publication to the Office of the Federal Register. Following such delivery to the Office of the Federal Register, EPA shall not take any step to delay or otherwise interfere with publication of such notice in the Federal Register.
15. Guardians, NPCA, EDF and EPA shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.
16. Nothing in this Consent Decree shall be construed to limit or modify any discretion accorded EPA by the CAA or by general principles of administrative law in taking the actions which are the subject of this Consent Decree, including the discretion to alter, amend, or revise any responses or final actions contemplated by this Consent Decree. EPA's obligation to perform the actions specified by Paragraphs 3 through 11 by the times specified does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.
17. Nothing in this Consent Decree shall be construed as an admission of any issue of fact or law or to waive or limit any claim or defense, on any grounds, related to any final action EPA may take with respect to the SIPs or FIPs

identified in paragraphs 3 through 11 of this Consent Decree.

18. Nothing in this Consent Decree shall be construed to confer upon the district court jurisdiction to review any final decision made by EPA pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to confer upon the district court jurisdiction to review any issues that are within the exclusive jurisdiction of the United States Court of Appeals pursuant to CAA section 307(b)(1) and 505, 42 U.S.C. §§ 7607(b)(1), 7661d. Nothing in this Consent Decree shall be construed to waive any remedies or defenses the Parties may have under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1).
19. The Parties recognize and acknowledge that the obligations imposed upon EPA under this Consent Decree can only be undertaken using appropriated funds legally available for such purpose. No provision of this Consent Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.
20. Any notices required or provided for by this Consent Decree shall be made in writing and sent via e-mail to the following:

For Guardians:

Ashley Wilmes
awilmes@wildearthguardians.org

James Tutchton
jtuthton@wildearthguardians.org

For NPCA:

Reed Zars
rzars@lariat.org

For EDF:

Pamela Campos
pcampos@edf.org

For EPA:

Alan Greenberg
alan.greenberg@usdoj.gov

Lea Anderson
anderson.lea@epa.gov

Jonah Staller
staller.jonah@epa.gov

21. In the event of a dispute among the Parties concerning the interpretation or implementation of any aspect of this Consent Decree, the disputing Party shall provide the other Party with a written notice outlining the nature of the dispute and requesting informal negotiations. If the Parties cannot reach an agreed-upon resolution within ten business days after receipt of the notice, any Party may move the Court to resolve the dispute.
22. No motion or other proceeding seeking to enforce this Consent Decree or for contempt of court shall be properly filed unless the Party seeking to enforce this Consent Decree has followed the procedure set forth in Paragraph 21.
23. The Court shall retain jurisdiction to determine and effectuate compliance with this Consent Decree, to resolve any disputes thereunder, and to consider any requests for costs of litigation (including reasonable attorneys' fees). After EPA's obligations under Paragraphs 3 through 14 have been completed, this consent decree may be terminated. EPA shall notify the Court by motion of the completion of its obligations under Paragraphs 3 through 14, and Plaintiffs shall have 14 days in which to respond to such motion.
24. The Parties agree and acknowledge that before this Consent Decree can be finalized and

entered by the Court, EPA must provide notice in the Federal Register and an opportunity for comment pursuant to CAA section 113(g), 42 U.S.C. § 7413(g). EPA will deliver a public notice of this Consent Decree to the Federal Register for publication and public comment within 10 business days after lodging this Consent Decree with the Court. After this Consent Decree has undergone an opportunity for notice and comment, EPA's Administrator and the Attorney General, as appropriate, will promptly consider any such written comments in determining whether to withdraw or withhold consent to this Consent Decree, in accordance with section 113(g) of the Clean Air Act. If the Administrator or the Attorney General elects not to withdraw or withhold consent to this Consent Decree, the Parties will promptly file a motion that requests the Court to enter this Consent Decree. If a motion to enter the Consent Decree is not filed within 90 days after the notice is published in the Federal Register, any party may file dispositive motions in this matter.

25. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by the Parties and that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent Decree.
26. The undersigned representatives of each Party certify that they are fully authorized by the Party they represent to bind that Party to the terms of this Consent Decree.

SO ORDERED this ____ day of _____ 2011.

United States District Judge

SO AGREED:

FOR PLAINTIFF WILDEARTH GUARDIANS

s/Ashley D. Wilmes
Dated: June 6, 2011
Ashley D. Wilmes
WildEarth Guardians
827 Maxwell Ave., Suite L
Boulder, CO 80304
(859) 312-4162
awilmes@wildearthguardians.org

FOR PLAINTIFF NATIONAL PARKS CONSERVATION
ASSOCIATION:

s/ Reed Zars
Dated: June 6, 2011
Reed Zars
Attorney at Law
910 Kearney Street
Laramie, WY 82070
307-745-7979
rzars@lariat.org

FOR ENVIRONMENTAL DEFENSE FUND:

s/ Pamela Campos
Dated: June 6, 2011
Pamela Campos
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80302
720-205-2366
pcampos@edf.org

FOR DEFENDANT LISA JACKSON:

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division

By: s/Alan D. Greenberg
Dated: June 6, 2011
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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-01218-REB-BNB

WILDEARTH GUARDIANS,

Plaintiff,

v.

LISA JACKSON, in her official capacity as Administrator
of the Environmental Protection Agency,

Defendant.

and to order the relief contained in this
Consent Decree.

2. Venue lies in the District of Colorado.
3. Plaintiff and Defendant shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree. Upon entry, no party shall challenge the terms of this Consent Decree. This Consent Decree constitutes a complete and final resolution of all claims which have been asserted or which could have been asserted in the Complaint.
4. This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the Court does not enter this Consent Decree, the obligations set forth in this Decree are null and void.
5. By April 30, 2012, EPA shall sign a notice of proposed action in which it proposes either to approve in whole, approve in part and disapprove in part, or disapprove in whole, the State of Utah's Regional Haze SIP submission that Utah submitted to EPA on September 9, 2008. Within 15 days, EPA shall submit the notice for review and publication to the Office of Federal Register.
6. By October 31, 2012, EPA shall sign a final action in which it either approves in whole, approves in part and disapproves in part, or disapproves in whole, the State of Utah's Regional Haze SIP submission that Utah submitted to EPA on September 9, 2008. Within 15 days, EPA shall submit the notice for review and publication to the Office of Federal Register.
7. By December 1, 2011, EPA shall sign a final action in which it either approves in whole, approves in part and disapproves in part, or

CONSENT DECREE

WHEREAS, on May 26, 2010, Plaintiff WildEarth Guardians filed its Complaint in this action against Lisa Jackson, in her official capacity as Administrator of the United States Environmental Protection Agency ("EPA");

WHEREAS, Plaintiff alleges that EPA has failed to take action on two State Implementation Plan ("SIP") submissions from the State of Utah with the time frame required by section 110(k)(2) of the Clean Air Act, 42 U.S.C. § 7410(k)(2);

WHEREAS, Plaintiff and Defendant have agreed to a settlement of this case without any admission of any issue of fact or law, which they consider to be a just, fair, adequate and equitable resolution of the claims raised in this action; and

WHEREAS, it is in the interest of the public, the parties and judicial economy to resolve the issues in this action without protracted litigation.

NOW, THEREFORE, it is hereby ORDERED,
ADJUDGED AND DECREED as follows:

1. This Court has subject matter jurisdiction over the claims set forth in the Complaint

disapproves in whole, the State of Utah's request to re-designate Salt Lake and Utah Counties and Ogden City to attainment for the National Ambient Air Quality Standard ("NAAQS") for particulate matter having an aerodynamic diameter of a nominal 10 micrometers ("PM-10"), along with Utah's maintenance plan for Salt Lake and Utah Counties and Ogden City for the PM-10 NAAQS, that Utah submitted to EPA on September 2, 2005, and which EPA previously proposed to disapprove in whole on December 1, 2009. Within 15 days, EPA shall submit the notice for review and publication to the Office of Federal Register.

8. The parties agree, that if the Court enters this Consent Decree, then the parties will amend their Settlement Agreement in *WildEarth Guardians v. Jackson*, No. 09-cv-02148-REB-MJW (D. Colo.), as set forth in this paragraph: Item 5, R307-401, Renumbering of NSR rules; Item 6, R307-413, Soil venting and aeration; Item 8, Rules reorganization, grouping of smaller materials into a coherent structure; Item 10, Ogden PM10 SIP Clean Air Determination; and Item 11, Utah R307-401-14, Used Oil Fuel Burned for Energy Recovery, shall each have a deadline for signature on proposed action of June 15, 2012, and a deadline for signature on final action of December 14, 2012. If the Settlement Agreement in *WildEarth Guardians v. Jackson*, No. 09-cv-02148-REB-MJW (D. Colo.), is not amended as set forth in this paragraph after the Court enters this Consent Decree, then EPA's deadline for final action on the Utah re-designation request and maintenance plan discussed in Paragraph 7 above, shall be December 1, 2012, and not December 1, 2011.
9. The deadlines in Paragraphs 5, 6 and 7 may be extended for a period of 60 days or less by written stipulation executed by counsel for Plaintiff and Defendant and filed with the Court. Any other extension to the deadlines in Paragraphs 5, 6 and 7 or any other modification to this Consent Decree, may be approved by the Court upon motion made pursuant to the Federal Rules of Civil Procedure by either party to this Consent Decree and upon consideration of any response by the non-moving party and reply by the moving party.
10. EPA's obligation to take any action required in Paragraphs 5, 6 and 7 shall become null and void if the underlying SIP submission is withdrawn by the State of Utah prior to the deadline relating to EPA's action on relevant SIP submission or submissions. EPA shall provide WildEarth Guardians with a copy of any written notice of withdrawal prior to the relevant deadline.
11. EPA agrees to settle Plaintiff's claim for costs and attorneys' fees by paying \$5,973.97 as soon as reasonably practicable after entry of this Consent Decree. This amount shall be paid by Fed Wire Electronic Funds Transfer to WildEarth Guardians' counsel Robert Ukeiley, P.S.C., pursuant to payment instructions provided by Robert Ukeiley. Plaintiff agrees to provide counsel for Defendant all necessary information for processing the electronic funds transfer within five (5) business days of receipt of the Court's order entering this Consent Decree. Plaintiff agrees to accept payment of \$5,973.97 in full satisfaction of any and all claims for costs and attorneys' fees with respect to this case incurred up until the time of entry of this Consent Decree by the Court. EPA does not concede that Plaintiff will be entitled to fees for any efforts after the time of entry of this Consent Decree, and EPA reserves all defenses with respect to any such efforts and any related fee claim. The fees paid under this Paragraph shall have no precedential value in any future fee claim.
12. The Court shall retain jurisdiction to determine and effectuate compliance with this Consent Decree, to rule upon any motions filed in accordance with Paragraph 9 of this Consent Decree, and to resolve any disputes in accordance with Paragraph 17 of this Consent Decree. Once EPA has taken the action called for in Paragraphs 5,

- 6, 7 and 11 of this Consent Decree, this Decree shall be terminated and the case dismissed with prejudice. The Parties may either jointly notify the Court that the Decree should be terminated and the case dismissed, or EPA may so notify the Court by motion. If EPA notifies the Court by motion, then Plaintiff shall have twenty days in which to respond to such motion.
13. Except as provided herein, nothing in this Consent Decree shall be construed to limit or modify any discretion accorded EPA by the Clean Air Act or by general principles of administrative law in taking the actions which are the subject of this Consent Decree.
 14. The parties agree and acknowledge that final approval and entry of this proposed Consent Decree are subject to the requirements of Clean Air Act § 113(g), 42 U.S.C. § 7413(g). That subsection provides that notice of this proposed Decree be given to the public, that the public shall have a reasonable opportunity to make any comments, and that the Administrator or the Attorney General, as appropriate, must consider those comments in deciding whether to consent to this Consent Decree. After this Consent Decree has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold consent to this Consent Decree in accordance with section 113(g) of the CAA. If the federal government elects not to withdraw or withhold consent to this Consent Decree, Defendant or the parties shall promptly file a motion that requests the Court to enter this Consent Decree.
 15. Nothing in the terms of this Consent Decree shall be construed to waive any remedies Plaintiff may have under section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), with respect to any future challenges to the final rulemaking action called for in Paragraphs 6 and 7.
 16. Nothing in this Consent Decree shall be construed to provide this Court with jurisdiction over any challenges by Plaintiff or any other person or entity not a party to this litigation with respect to any future challenges to the final rulemaking action called for in Paragraphs 6 and 7.
 17. In the event of a dispute between the parties concerning the interpretation or implementation of any aspect of this Consent Decree, the disputing party shall contact the other party to confer and attempt to reach an agreement on the disputed issue. If the parties cannot reach an agreed-upon resolution, then either party may move the Court to resolve the dispute.
 18. It is hereby expressly understood and agreed that this Consent Decree was jointly drafted by Plaintiff and Defendant and that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent Decree. This Consent Decree shall be governed and construed under the laws of the United States.
 19. The obligations imposed upon EPA under this Consent Decree may only be undertaken using appropriated funds. No provision of this Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable law or regulation.
 20. The undersigned representative of each party certifies that he is fully authorized to consent to the Court's entry of the terms and conditions of this Consent Decree.
 21. Any written notices or other written communications between the parties contemplated under this Consent Decree shall be sent to the undersigned counsel at the addresses listed in the signature blocks below unless written notice of a change in counsel and/or address is provided.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

Dated: 10/28/2010

s/David A. Carson

DAVID A. CARSON

United States Department of Justice Environment
and Natural Resources

Division

999 18th Street

South Terrace, Suite 370

Denver, Colorado 80202

(303) 844-1349

david.a.carson@usdoj.gov

COUNSEL FOR DEFENDANT

Dated: 10/8/2010

s/Robert Ukeiley

ROBERT UKEILEY

Law Office of Robert Ukeiley

435R Chestnut Street, Suite 1

Berea, Kentucky 40403

(859) 986-5402

rukeiley@igc.org

COUNSEL FOR PLAINTIFF

Upon consideration of the foregoing, the Court hereby finds that this Consent Decree is fair, reasonable, consistent with the Clean Air Act and in the public interest., and the Court hereby enters the Consent Decree.

IT IS SO ORDERED.

Date: _____

United States District Judge

U.S.C. § 7410(a)(2)(D)(i)(I) regarding contributing significantly to nonattainment in other states for the 1997 NAAQS for 8-hour ozone; and

(b) either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP for North Dakota to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(II) regarding interfering with measures in other states related to prevention of significant deterioration of air quality.

5. No later than November 10, 2010, the Administrator shall sign a notice or notices:

(a) either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP, for Idaho to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(I) regarding contributing significantly to nonattainment in other states for the 1997 NAAQS for 8-hour ozone and PM2.5;

(b) either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP, for (i) Idaho, New Mexico, and North Dakota to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(I) regarding interfering with maintenance of attainment in other states for the 1997 NAAQS for 8-hour ozone and PM2.5, and (ii) Colorado to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(I) regarding interfering with maintenance of attainment in other states for the 1997 NAAQS for 8-hour ozone; and

(c) either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP, for Idaho, New Mexico, and Oklahoma to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(II) regarding interfering with measures in other states related to prevention of significant deterioration of air quality.

6. No later than May 10, 2011, the Administrator shall sign a notice or notices:

(a) either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation

of a partial FIP, for (i) California, Oklahoma, and Oregon to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(I) regarding contributing significantly to nonattainment in other states for the 1997 NAAQS for 8-hour ozone and PM2.5, and (ii) Colorado to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(I) regarding contributing significantly to nonattainment in other states for the 1997 NAAQS for PM2.5;

(b) either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP, for (i) California, Oklahoma, and Oregon to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(I) regarding interfering with maintenance of attainment in other states for the 1997 NAAQS for 8-hour ozone and PM2.5, and (ii) Colorado to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(I) regarding interfering with maintenance of attainment in other states for the 1997 NAAQS for PM2.5; and

(c) either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP, for California, Colorado, and Oregon to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(II) regarding interfering with measures in other states related to prevention of significant deterioration of air quality.

7. (a) No later than May 10, 2011, the Administrator shall sign a notice or notices either approving a SIP, promulgating a FIP, or approving a SIP in part with promulgation of a partial FIP, for California, Colorado, Idaho, New Mexico, North Dakota, Oklahoma, and Oregon to meet the requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(II) regarding interfering with measures in other states related to protection of visibility;

(b) If any of the States identified in paragraph 7(a) has not submitted an administratively complete proposed SIP to address the visibility requirement of 42 U.S.C. § 7410(a)(2)(D)(i)(II) by May 10, 2010, then by November 10, 2010, the Administrator shall sign a notice or notices proposing for each such State either

promulgation of a FIP, approval of a SIP (if one has been submitted in the interim), or partial promulgation of a FIP and partial approval of a SIP, to address the visibility requirement.

8. Within 15 business days following signature of such action required by paragraphs 4 - 7, EPA shall deliver notice of such action to the Office of the Federal Register for prompt publication. Following such delivery to the Office of the Federal Register, EPA shall not take any step (other than as necessary to correct within 10 business days after submittal any typographical or other errors in form) to delay or otherwise interfere with publication of such notice in the Federal Register.
9. The deadlines in paragraphs 4 through 7 may be extended for a period of 60 days or less by written stipulation executed by counsel for WildEarth Guardians and EPA and filed with the Court. Any other extension to the decree deadlines may be approved by the Court upon motion by any party to this Consent Decree and upon consideration of any response by the non-moving party.
10. Plaintiff alleges that it is the "prevailing party" in this action and that, as such, it is entitled to reasonable attorney's fees and costs pursuant to section 304 of the CAA, 42 U.S.C. § 7604. The parties hereby agree to settle all of Plaintiff's claims for attorney's fees and costs in this action, without further litigation or any final determination regarding entitlement to or reasonableness of attorney's fees and costs, for a total of \$ 22,420.00. Payment shall be made by electronic funds transfer to the account specified by Plaintiff's counsel Robert Ukeiley. Plaintiff agrees to provide counsel for Defendant all necessary information for processing the electronic funds transfer within five (5) business days of receipt of the Court's order entering this Consent Decree. In the event that the payment required by this Paragraph is not made within 90 days of entry of this Order, interest on the unpaid balance shall be paid at the rate established pursuant to section 107(a) of CERCLA, 42 U.S.C. § 9607(a), commencing on the effective date of this Order and accruing through the date of the payment.
11. Plaintiff agrees that receipt from Defendant of the payment described in Paragraph 10 shall operate as a release of Plaintiff's claims for attorneys' fees and costs in this matter through and including the date of this agreement. The parties agree that Plaintiff reserves the right to seek additional fees and costs incurred subsequent to this agreement arising from a need to enforce or defend against efforts to modify the schedule outlined herein, or for any other unforeseen continuation of this action.
12. By this agreement, Defendant does not waive any right to contest fees claimed by Plaintiff or Plaintiff's counsel, including the hourly rate, in any future litigation, or in any continuation of the present action. Further, this stipulation as to attorney's fees and costs has no precedential value and shall not be used as evidence in any other attorneys' fees litigation.
13. The Court shall retain jurisdiction to determine and effectuate compliance with this Consent Decree. Upon EPA's demonstration that it has satisfied all of the obligations of this Consent Decree it may move to have this decree terminated. Plaintiff shall have twenty days in which to respond to such motion.
14. Except as provided herein, nothing in this Consent Decree shall be construed to limit or modify any discretion accorded EPA by the Clean Air Act or by general principles of administrative law in taking the actions which are the subject of this Consent Decree.
15. The parties agree and acknowledge that final approval and entry of this proposed Consent Decree are subject to the requirements of Clean Air Act § 113(g), 42 U.S.C. § 7413(g). That subsection provides that notice of this proposed Decree be given to the public, that the public shall have a reasonable opportunity to make any comments, and that

the Administrator or the Attorney General, as appropriate, must consider those comments in deciding whether to consent to this Consent Decree.

16. Nothing in the terms of this Consent Decree shall be construed to waive any remedies plaintiff may have under section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1).
17. In the event of a dispute between the parties concerning the interpretation or implementation of any aspect of this Consent Decree, the disputing party shall contact the other party to confer and attempt to reach an agreement on the disputed issue. If the parties cannot reach an agreed-upon resolution, then either party may move the Court to resolve the dispute.
18. EPA's commitments in this Decree are subject to the availability of appropriated funds. No provision of this Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341 or any other applicable law or regulation.
19. The undersigned representatives of each party certify that he is fully authorized to consent to the Court's entry of the terms and conditions of this Consent Decree.

Dated: February 18, 2010
/S/ James J. Tuchtton (by permission)
James J. Tuchtton (CA Bar No. 150908)
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Assistant Attorney General
Dated: February 18, 2010
/S/ Norman L. Rave, Jr.
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Counsel for Defendant

IT IS SO ORDERED.

2/23/10

Dated: _____

The Honorable Claudia Wilken
United States District Judge

About the Author



William Yeatman

William Yeatman is assistant director of the Center for Energy and Environment at the Competitive Enterprise Institute (CEI), a free-market think tank in Washington, D.C. His energy commentary has appeared in newspapers and magazines across the country, and he is a frequent guest on television and radio. He has testified before the U.S. House of Representatives and also state legislatures. Prior to joining CEI, Yeatman was a Peace Corps volunteer in the Kyrgyz Republic, where he taught entrepreneurship and small business management to rural women. Before that, he ran a homeless shelter in Denver, Colorado. Yeatman holds a master's in international administration from the Denver Graduate School of International Studies and a bachelor's in environmental sciences from the University of Virginia.



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