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By E-mail and by Federal Express

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Re: Petition for Reconsideration of Final Rule Regarding Pennsylvania Regional Haze State Implementation Plan, 77 Fed. Reg. 41,279 (July 13, 2012)

Dear Administrator Jackson, Regional Administrator Garvin, and Division Director Esher:

On behalf of the National Parks Conservation Association, the Sierra Club, and the Clean Air Council (Conservation Groups), Earthjustice hereby petitions for reconsideration of the final rule titled "Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Regional Haze State Implementation Plan" and published by the United States Environmental Protection Agency (EPA) in the Federal Register on July 13, 2012 (77 Fed. Reg. 41,279) (Final Pa. Haze SIP).

Today, the Conservation Groups are separately filing a petition for review of the Final Pa. Haze SIP with the United States Court of Appeals for the Third Circuit under Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b) (2012). We intend to litigate issues raised by the Final Pa. Haze SIP in the Third Circuit, and we file this Petition for Reconsideration with EPA as a protective measure in light of the vacatur of the Cross-State Air Pollution Rule (CSAPR) by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) on August 21, 2012,[1] after the issuance of the Final Pa. Haze SIP.

I. Background

A. Conservation Groups

The Sierra Club is a national nonprofit environmental organization with approximately 619,000 members nationwide, including nearly 24,000 in Pennsylvania. The Sierra Club's mission is to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's resources and ecosystems; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out those objectives.

The National Parks Conservation Association (NPCA) is a national nonprofit organization with over 350,000 members nationwide dedicated to protecting and enhancing America's national parks for present and future generations. NPCA advocates for national parks, educates decision-makers and the public about the importance of preserving the parks, and works to strengthen and uphold the laws that protect the parks.

The Clean Air Council is a Philadelphia-based, member-supported, nonprofit environmental organization dedicated to protecting everyone's right to breathe clean air. With 8,000 members, the Clean Air Council works through public education, community advocacy, and government oversight to ensure enforcement of environmental laws.

Earthjustice is a nonprofit public interest law firm dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all people to a healthy environment.

B. Regional Haze and Best Available Retrofit Technology

In 1977, Congress amended the Clean Air Act to provide national parks and other "mandatory Class I Federal areas" with the highest degree of protection from visibility impairment. 42 U.S.C. § 7491 (2012). Congress set a national goal of preventing and remedying all human-caused visibility impairment at national parks and other Class I areas. *Id.* §

[1] *EME Homer City Generation, L.P. v. EPA*, ___ F.3d ___, 2012 WL 3570712 (D.C. Cir.).

7491(a)(1). This national goal is to be achieved through, among other things, the installation of BART controls at certain "major stationary sources," whose emissions "may reasonably be anticipated to cause or contribute to" visibility impairment at Class I areas. *Id*. § 7491(b)(2)(A); *see also* 40 C.F.R. § 51.308(e).

EPA's regional haze rule (RHR) addressed visibility impairment caused by "numerous sources located over a wide geographic area." 40 C.F.R. §§ 51.301, 51.308; *see also* 70 Fed. Reg. 39,104 (July 6, 2005) (revising the RHR). The goal of the RHR is to eliminate human-caused visibility impairment at all Class I areas by 2064. 40 C.F.R. § 51.308(d)(1). To accomplish this goal, the states or EPA must develop regional haze plans for each state that include BART and a long-term strategy, including enforceable emission limitations, to ensure reasonable progress toward the 2064 natural visibility goal. *Id.* §§ 51.308(d)(1), (d)(3).

C. Summary of Rulemaking

On January 26, 2012, EPA proposed limited approval of the Pa. Haze SIP, noting that it had proposed a limited disapproval of the Pa. Haze SIP in a "separate action" because of deficiencies arising from the remand of the Clean Air Interstate Rule (CAIR) by the D.C. Circuit.[2] This separate action was the "CSAPR Better than BART" proposed rule.[3]

On February 27, 2012, the Conservation Groups filed comments on the Proposed Pa. Haze SIP.[4] We wrote that Pennsylvania relied on CAIR in preparing BART determinations for electric generating units (EGUs) for nitrogen oxides (NOx) and sulfur dioxide (SO_2), and that CAIR had been remanded by the D.C. Circuit. Conservation Group Comments at 34. We noted that EPA had proposed, via the CSAPR Better than BART rule, a limited disapproval of the Pa. Haze SIP and a FIP to replace reliance on CAIR with reliance on CSAPR. *Id.* We wrote that "CSAPR itself has been stayed by the D.C. Circuit subject to resolution of challenges to its legality." *Id.* We incorporated by reference comments on the separate CSAPR Better than BART proposal, and our finding that the CSAPR rulemaking would not require Pennsylvania EGUs to satisfy BART for NOx and SO_2. *Id*. We concluded that "at the time of this proposed

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[2] Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Pennsylvania; Regional Haze State Implementation Plan, 77 Fed. Reg. 3984, 3996-97 (proposed Jan. 26, 2012) (Proposed Pa. RH SIP).

[3] In its "CSAPR Better than BART" proposal, EPA proposed limited disapproval of the regional haze SIPs for Pennsylvania and other states that relied on CAIR to satisfy certain regional haze requirements. EPA also proposed Federal Implementation Plans (FIPs) for these states to replace reliance on CAIR requirements in these SIPs with reliance on CSAPR as an alternative to BART. Regional Haze: Revisions to Provisions Governing Alternatives to Source-Specific Best Available Retrofit Technology (BART) Determinations, Limited SIP Disapprovals, and Federal Implementation Plans, 76 Fed. Reg. 82,219 (proposed Dec. 30, 2011).

[4] The Pa. Haze SIP rulemaking is posted at Docket No. EPA-R03-OAR-2012-0002, available at www.regulations.gov. The main text of comments by the Conservation Groups on the Pa. Haze SIP are posted at Docket No. EPA-R03-OAR-2012-0002-0033.

Pennsylvania [Haze] SIP, the record contains no BART determinations for NOx or SO_2 emissions from EGUs, in violation of the Clean Air Act." *Id*. at 34-35.

On July 13, 2012, EPA issued its final rule regarding the Pa. Haze SIP.[5] In response to our comment about EPA's reliance on CSAPR Better than BART for addressing NOx and SO_2 at BART-eligible EGUs, EPA stated that it was "finalizing a limited approval of Pennsylvania's Haze SIP based on its reliance on [CAIR]". 77 Fed. Reg. at 41,280.

II. Grounds for Reconsideration

A. EPA Must Disapprove the Final Pa. Haze SIP due to the CSAPR Vacatur

EPA's Proposed Pa. Haze SIP did not take action "to address the Commonwealth's reliance on CAIR to meet certain haze requirements." 77 Fed. Reg. 3984, 3997. In our comments on the Proposed Pa. Haze SIP, the Conservation Groups wrote that EPA had left "the question of BART for NOx and SO_2 emissions from Pennsylvania EGUs unaddressed." Conservation Group Comments at 34. Noting that our analysis for the CSAPR Better than BART rulemaking demonstrated that the CSAPR rule did not require Pennsylvania EGUs to meet BART for NOx and SO_2, we wrote:

> Thus, at the time of this proposed Pennsylvania [Haze] SIP, the record contains no BART determinations for NOx or SO_2 emissions from EGUs, in violation of the Clean Air Act.

Id. at 34-35. EPA published the Final Pa. Haze SIP on July 13, 2012, adding no further requirements beyond CSAPR to satisfy BART requirements for NOx and SO_2 from Pennsylvania EGUs.

Then, on August 21, 2012, the D.C. Circuit invalidated CSAPR.[6] As a result, there is now no legally valid BART (or BART substitute) regulation of NOx and SO_2 emissions from EGUs in Pennsylvania. With no lawful emissions limitations for high-emitting EGUs[7], the Pa. Haze SIP fails to demonstrate that all measures needed to meet Pennsylvania's emission reduction obligations are included in the long-term strategy to achieve the reasonable progress goals of the Clean Air Act and the RHR.[8] Therefore, EPA must disapprove the Pa. Haze SIP and adopt a FIP to establish enforceable limitations to reduce these emissions and achieve reasonable progress.

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[5] Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Regional Haze State Implementation Plan, 77 Fed. Reg. 41,279 (July 13, 2012).

[6] *EME Homer City Generation, L.P. v. EPA*, ___ F.3d ___, 2012 WL 3570712 (D.C. Cir.).

[7] According to emission data submitted to EPA with Appendix I to the Pa. Haze SIP, EGUs constitute the highest-emitting BART-subject sources in Pennsylvania for NOx (top 7 sources) and SO_2 (top 10 sources).

[8] 42 U.S.C. § 7491(b)(2); 40 C.F.R. §§ 51.308(d)(1), (d)(3).

As it happens, EPA had already anticipated the vacatur of CSAPR and the need to reconsider the Pa. Haze SIP and other regional haze plans. In the final CSAPR Better than BART rule,[9] EPA recognized that it "may be obliged to revisit the regional haze plans that rely on the [CSAPR] if the rule is not upheld, or if it is remanded and subsequently revised." 77 Fed. Reg. at 33,647. Thus, EPA has already agreed that reconsideration is now warranted given the CSAPR vacatur.

B. Reliance on CAIR Warrants Reconsideration

EPA noted in the Proposed Pa. Haze SIP that it had proposed a limited disapproval of the Pa. Haze SIP in the CSAPR Better than BART rule because of the remand of CAIR by the D.C. Circuit. 77 Fed. Reg. 3984, 3996-97. EPA stated that it was "not taking action in this notice to address the Commonwealth's reliance on CAIR to meet regional haze requirements." *Id.* at 3984 (emphasis added).

Then, in the Final Pa. Haze SIP, EPA reversed direction, stating: "In today's action, EPA is finalizing a limited approval of Pennsylvania's RH SIP based on its reliance on the Clean Air Interstate Rule (CAIR)." 77 Fed. Reg. at 41,280 (emphasis added). EPA's "reliance on CAIR" statement conflicts directly with the statement above from the Proposed Pa. Haze SIP that EPA was not addressing reliance on CAIR. It is also inconsistent with EPA's action in the CSAPR Better than BART rule that expressly replaced reliance on CAIR with reliance on CSAPR[10], and with the earlier remand of CAIR by the D.C. Circuit.[11]

EPA provides no explanation for its reversal of position, that is, the approval of Pennsylvania's reliance on CAIR in the Final Pa. Haze SIP after EPA's prior announcement in the Proposed Pa. Haze SIP that it was taking no action to address the Commonwealth's reliance on CAIR. Further, EPA's action based on reliance on CAIR is fatally flawed given that the D.C. Circuit has ruled CAIR legally invalid. As EPA itself has noted, because CAIR has been invalidated, it cannot be relied on to meet all or part of the regional haze plan obligations for the first planning period, which requires enforceable measures to protect visibility through 2018. Because there is no basis for EPA's final action, and because EPA's new approach arose for the first time in the Final Pa. Haze SIP with no opportunity for public comment, reconsideration and reversal of this final position is warranted.

[9] Regional Haze: Revisions to Provisions Governing Alternatives to Source-Specific Best Available Retrofit Technology (BART) Determinations, Limited SIP Disapprovals, and Federal Implementation Plans, 77 Fed. Reg. 33,642 (June 7, 2012).
[10] 77 Fed. Reg. at 33643.
[11] *North Carolina v. EPA*, 531 F.3d 896, *modified*, 550 F.3d 1176 (D.C. Cir. 2008).

III. Conclusion

For the reasons set forth herein, we petition EPA to expeditiously reconsider and reverse its approval of the Final Pa. Haze SIP. As noted, this Petition is filed on a protective basis, as the Conservation Groups do not believe they are obligated to seek administrative reconsideration on this matter. The Conservation Groups intend to challenge EPA's action on the Final Pa. Haze SIP by petition for review in the Third Circuit, and do not intend to delay that litigation pending EPA action in response to this administrative reconsideration petition. EPA and the state are already years behind schedule in meeting statutory deadlines for limiting regional haze-causing emissions, so further delay in curing deficiencies in the Pa. Haze SIP cannot be justified.

If EPA would like to discuss the issues raised by this Petition, please contact me at (215) 206-0352 or cmcphedran@earthjustice.org.

Sincerely,

Charles McPhedran, Esq.
Earthjustice

cc (by e-mail): Stephanie Kodish, NPCA
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