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BY ELECTRONIC MAIL

Carl Daly
Director
Air Program
Environmental Protection Agency, Region 8
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Re: Docket ID No. EPA-R08-OAR-2010-0406, Proposed Partial Approval and Disapproval of North Dakota Regional Haze State Implementation Plan, Proposed Promulgation of Federal Implementation Plan

Dear Mr. Daly:

WildEarth Guardians submits the following comments in response to the Environmental Protection Agency's ("EPA's") proposed partial approval and disapproval of North Dakota's State Implementation Plan ("SIP") implementing the Clean Air Act's regional haze program and proposed Federal Implementation Plan ("FIP"). *See* 76 Fed. Reg. 58570-58648 (Sept. 21, 2011) (hereafter "Proposed Rule"). We support the vast majority of what the EPA has proposed, but object to certain key portions. Our specific objections are as follows:

1. Proposed SIP Approval

Our concerns over the proposed SIP approval relate to North Dakota's proposed best available retrofit technology ("BART") provisions. It appears that EPA has proposed to approve BART provisions that are not supported by the record, are contrary to the Clean Air Act, and/or are otherwise lack a rational basis.

a. BART for Stanton Station

We are concerned that the BART limits for the Stanton Station do not represent the "degree of reduction achievable through the application of the best system of continuous emission reduction," taking into account various factors, including cost of compliance and energy, nonair quality impacts, and other factors. *See* 40 C.F.R. § 51.301 (setting forth definition of "best available retrofit technology"). In particular, it appears that the Stanton Station can meet

lower sulfur dioxide (“SO₂”) and nitrogen oxide (“NO_x”) emission rates by burning Powder River Basin coal, which the facility is designed to burn. Despite this, the proposed BART SIP would allow both the burning of lignite and Powder River Basin coal, even though the burning of lignite would lead to greater SO₂ and NO_x emissions even while using add-on controls (contrast SO₂ emission rates of 0.24 lb/mmBtu for lignite and 0.16 for Powder River Basin coal and NO_x emission rates of 0.29 lb/mmBtu emission rate for lignite and 0.23 lb/mmBtu for Powder River Basin coal). To this end, allowing for the burning of lignite coal at Stanton appears to be directly contrary to BART requirements under the Clean Air Act.

In this case, it would appear that the “degree of reduction achievable through the application of the best system of continuous emission reduction” would be met when the Stanton Station burns Powder River Basin coal, as designed, together with the proposed add-on controls. The EPA’s own proposed rule shows that the “best system of continuous emission reduction,” even when considering other factors such as cost and nonair quality impacts, is achieved with the use of Powder River Basin coal combined with add-on controls.

Although the EPA cites a 7th Circuit Court of Appeal decision in noting that States are not required to consider fuel switching as part of a BART analysis (*see* 76 Fed. Reg. 58589), the EPA also noted that this 7th Circuit decision applies only with regards to the redesign of a source. In this case, burning Powder River Basin coal would not be a redesign of the Stanton Station. As the EPA discloses and the proposed BART limits attest to, Stanton is designed to burn Powder River Basin coal. Thus, a BART determination that requires only the burning of Powder River Basin coal would not only be wholly consistent with the Clean Air Act, but compelled.¹ Indeed, it would be absurd to believe that BART would allow the use of dirtier fuels when a facility is designed to utilize cleaner fuels.

The EPA cannot legally adopt the proposed BART limits for lignite coal at the Stanton Station as they are contrary to the Clean Air Act.

b. Enforceability of Filterable PM Limits

We have two concerns over the proposed BART filterable PM limits for Coal Creek Units 1 and 2, Stanton Unit 1, Milton R. Yong Units 1 and 2, and Leland Olds Units 1 and 2.

To begin with, it is unclear over what time period the proposed PM limits would apply. EPA’s BART guidelines state that for electric generating units (“EGUs”), BART limits the EPA must specify an “averaging time of a 30-day rolling average.” 40 C.F.R. § 51, Appendix Y, Section V. Thus, it appears that the proposed BART limits are inconsistent with the EPA’s BART guidelines. Although North Dakota may be allowed to specify an alternative averaging period, the State—and accordingly the EPA—must at least provide a reasonable rationale for deviating from the guidelines. The proposed rule seems to provide no such rationale. In fact, the

¹ Alternatively, if EPA is concerned that it may be inappropriate to limit coal consumption based on geographic region, the EPA could limit the chemical composition of coal used in the Stanton Station to ensure that coal from the Powder River Basin is utilized. In any event, by allowing North Dakota to establish BART limits for lignite coal, even though such limits do not represent the “best system of continuous emission reduction” is contrary to the Clean Air Act and the agency’s regional haze regulations at 40 C.F.R. § 51.308.

filterable PM limits are expressed only as “lb/mmBtu” emission rates. It is entirely unclear whether this rate applies on an hourly, 24-hour, 30-day, or annual basis. The EPA must specify the averaging time in order for the limit to be enforceable.

To this end, we are also concerned that the proposed BART determinations put forward by North Dakota are unenforceable because there are no monitoring, recordkeeping, or reporting requirements proposed that would actually ensure compliance with the filterable PM limits. There are simply no monitoring requirements proposed that would actually ensure that the PM limit is met on a continuous basis. This is contrary to the Clean Air Act, which defines BART based on continuous emission reductions.

The EPA has recommended the use of PM CEMS for coal-fired power plants, noting, for example, that, “based on our analysis of available data, there is no technical reason that a PM CEMS cannot be installed and operated reliably on electric utility steam generating units.” *See* EPA, “Comments Regarding Draft Construction Permit for Public Service Company of Colorado, Comanche Unit 3” (May 12, 2005), attached as Exhibit 1. Furthermore, the Milton R. Young power plant was required to install PM CEMS as part of the EPA’s Consent Decree resolving New Source Review (“NSR”) violations at the facility. *See* Paragraph 82 of the Consent Decree.

WildEarth Guardians submits that PM CEMS must be installed, operated and used to demonstrate continuous compliance with the particulate matter emission limits on the subject-to-BART units. Regardless, the EPA has proposed to approve North Dakota’s SIP without the requisite monitoring, recordkeeping, and reporting requirements to assure compliance with the filterable PM limits.

c. Timing of Compliance

The EPA notes that North Dakota’s SIP requires each source subject to BART to install and operate BART within five years after EPA approval of the proposed SIP. *See* Proposed Rule at 58595. However, the Clean Air Act requires that BART be installed and operated “as expeditiously as practicable.” 42 U.S.C. § 7491(b)(2)(A). In this case, there is no indication that North Dakota’s blanket “5 year” compliance requirement is “as expeditiously as practicable” as required by the Clean Air Act. Although the law certainly states that compliance must occur “in no event later than five years” (*see* 42 U.S.C. § 7491(g)(4)), this does not provide license to North Dakota to simply allow up to five years for subject-to-BART sources to comply, particularly if such sources could comply earlier.

The EPA must review North Dakota’s blanket five year compliance date to ensure that it is “as expeditiously as practicable.” If subject-to-BART sources can comply earlier, the EPA must promulgate a FIP to ensure compliance in accordance with the Clean Air Act.

2. Proposed FIP

a. Margin of Compliance Concerns

In establishing proposed NO_x limits for Milton Young Units 1 and 2, Leland Olds Unit 2, Coal Creek Units 1 and 2, the EPA has proposed to incorporate a “margin of compliance” into the limits, thereby allowing higher emission than are actually achievable. For example, for Milton Young Unit 1, the EPA states, “In proposing a BART emission limit of 0.07 lb/MMBtu, we adjusted the annual design rate of 0.05 lb/MMBtu upwards to allow for a sufficient margin of compliance for a 30-day rolling average limit that would apply at all times, including startup, shutdown, and malfunction.” Proposed Rule at 58610. However, it appears that EPA’s proposal to incorporate a “margin of compliance” into its BART determinations is contrary to the Clean Air Act and not supported by the Agency’s own regulations and guidance.

As an initial matter, BART must represent the “degree of reduction achievable through the application of the best system of continuous emission reduction,” taking into account “the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.” 42 U.S.C. § 7491(b)(2)(A) and (g)(2). Thus, EPA is clearly not allowed to establish BART limits based on a “margin of compliance” consideration. This is especially the case where, as here, the “margin of compliance” consideration has nothing to do with the “cost of compliance,” the “energy and nonair quality environmental impacts of compliance,” the “existing pollution control technology in use,” and the “remaining useful life of the source.”

On the contrary, the EPA is clear that lower NO_x emission rates for Milton Young Units 1 and 2, Leland Olds Unit 2, Coal Creek Units 1 and 2 do, in fact, represent the “degree of reduction achievable through the application of the best system of continuous emission reduction” taking into account the five factors set forth at 42 U.S.C. § 7491(g)(2). For instance, the EPA notes that for Milton Young Units 1 and 2, the annual design rate for an SCR installation would be 0.05 lb/mmBtu. *See* Proposed Rule at 58610 and 58613. The EPA even found that meeting a 0.05 lb/mmBtu emission rate for these Units would be cost-effective. *See id.* Despite this, the EPA ultimately proposed emission rates of 0.07 lb/mmBtu for both Milton Young Units 1 and 2. The Agency similarly weakened the proposed BART emission rates for NO_x for Leland Olds Unit 2 and Coal Creek Units 1 and 2. Such a weakening is not allowed by the Clean Air Act as it clearly relies on factors that were not articulated in the Clean Air Act.

To this end, the EPA must establish its proposed BART emission rates for NO_x for Milton Young Units 1 and 2, Leland Olds Unit 2, and Coal Creek Units 1 and 2 based on the statutory requirements of the Clean Air Act. Based on the EPA’s own analysis, this means that for Milton Young Units 1 and 2, the BART emission rate must be 0.05 lb/mmBtu for both units, for Leland Olds Unit 2, the BART emission rate must be 0.05 lb/mmBtu, and for Coal Creek Units 1 and 2, the BART emission rate must be 0.108 lb/mmBtu for both units.

b. Timing of Compliance

The EPA proposed FIP requires each source subject to BART limits for NO_x to install and operate BART within five years after EPA approval of the proposed SIP. *See e.g.*, Proposed Rule at 58610. However, the Clean Air Act requires that BART be installed and operated “as

expeditiously as practicable.” 42 U.S.C. § 7491(b)(2)(A). In this case, there is no indication that the EPA’s blanket five year compliance requirement is “as expeditiously as practicable” as required by the Clean Air Act. Although the law certainly states that compliance must occur “in no event later than five years” (*see* 42 U.S.C. § 7491(g)(4)), this does not provide license for the EPA to simply allow up to five years for subject-to-BART sources to comply, particularly if such sources could comply earlier.

The EPA must review its five-year FIP compliance dates to ensure that they are “as expeditiously as practicable.” If subject-to-BART sources can comply earlier, the EPA must promulgate its FIP to ensure compliance in accordance with the Clean Air Act.

c. Petition for Reconsideration Provision Concerns

The EPA notes in its proposal that if North Dakota believes SCR is infeasible for Milton R. Young Units 1 and 2 and Leland Olds Unit 2, that “Minnkota, Basin Electric, and/or the State may request reconsideration of our final action based on the potential outcomes of any field testing regarding catalyst life they may choose to undertake prior to the date the emission limits in our FIP become effective.” Proposed Rule at 58619. However, it is unclear what the EPA is referring to when the Agency refers to “request reconsideration.”

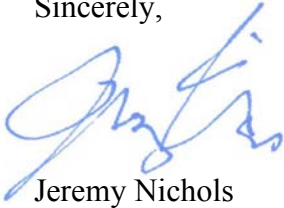
Under the Clean Air Act, a petition for reconsideration of a final rule may only be filed within 60 days of the promulgation of a final rule and may only raise objections of central relevance to the rule and only where “it was impracticable to raise such an objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment.” 42 U.S.C. § 7607(d)(7)(B). If EPA is referring to such a petition for reconsideration, then the Agency is correct that Minnkota, Basin Electric, and/or the State may request reconsideration of the EPA’s final action, but only within 60 days of the final rule. If the EPA intends to allow parties to petition for reconsideration after 60 days, however, then such an action would be contrary to the Clean Air Act.²

The EPA must clarify what it means by “request for reconsideration” and ensure that any process by which any party may request reconsideration of the final rule is consistent with the Clean Air Act.

² Although it could be argued that Minnkota, Basin Electric, and/or the State could file a petition for rulemaking under the Administrative Procedure Act (“APA”), it is notable that the Clean Air Act explicitly States that the APA rulemaking procedures under 5 U.S.C. § 553 do not apply to petitions for reconsideration of final rules. *See* 42 U.S.C. § 7606(d)(1).

Thank you for the opportunity to comment.

Sincerely,



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