UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILDEARTH GUARDIANS,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LISA JACKSON,
Respondents,

PUBLIC SERVICE COMPANY OF MEXICO,
Intervenor.

Case No. 11-9552

PUBLIC SERVICE COMPANY OF NEW MEXICO,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LISA JACKSON,
Respondents.

WILDEARTH GUARDIANS, DINE CITIZENS AGAINST RUINING OUR ENVIRONMENT, NATIONAL PARKS CONSERVATION ASSOCIATION, NEW ENERGY ECONOMY, SAN JUAN CITIZENS ALLIANCE, SIERRA CLUB,
Intervenors.

Case No. 11-9557

SUSANA MARTINEZ, Governor of The State of New Mexico; NEW MEXICO ENVIRONMENT DEPARTMENT,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

Case No. 11-9567

WILDEARTH GUARDIANS, DINE CITIZENS AGAINST RUINING OUR ENVIRONMENT, NATIONAL PARKS CONSERVATION ASSOCIATION, NEW ENERGY ECONOMY, SAN JUAN CITIZENS ALLIANCE, SIERRA CLUB,
Intervenors.

RESPONDENTS' OPPOSITION TO MOTIONS FOR STAY OF AGENCY RULE

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

DANIEL PINKSTON
U.S. Department of Justice
999 18th Street, South Terrace, Suite 370
Denver, Colorado 80202
(303) 844-1804, daniel.pinkston@usdoj.gov

Of Counsel:
Brian S. Tomasovic
Assistant Regional Counsel
EPA Region 6

M. Lea Anderson
Office of General Counsel

TABLE OF CONTENTS

Page

INTRODUCTION 1

BACKGROUND 2

A. Statutory and Regulatory Background 2

1. The Clean Air Act Overview 3

2. Good Neighbor/Interstate Transport Provisions 4

3. Regional Haze 4

4. Administrative Proceedings and Judicial Review 12

B. Factual Background 13

ARGUMENT 22

I. STANDARDS FOR STAY PENDING APPEAL 22

II. NEITHER PNM NOR NMED IS LIKELY TO SUCCEED ON THE MERITS OF ITS PETITIONS FOR REVIEW 25

III. NEITHER PNM NOR NEW MEXICO HAS ESTABLISHED SUFFICIENT IRREPARABLE HARM IN THE ABSENCE OF A STAY PENDING RESOLUTION OF THE PETITIONS 32

A. New Mexico has not demonstrated likely irreparable injury 32

B. PNM has not demonstrated likely irreparable injury 35

IV. NEITHER THE BALANCE OF EQUITIES NOR THE PUBLIC INTEREST FAVORS A STAY 38

V. THE COURT SHOULD NOT STAY THE EFFECTIVENESS OF THE FINAL RULE PENDING CONSIDERATION OF THE ADMINISTRATIVE PETITIONS FOR RECONSIDERATION SUBMITTED TO EPA BY PETITIONERS 39

CONCLUSION 40

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28.2(C)(6), the following is a glossary of acronyms and abbreviations used in this Opposition:

BART	Best Available Retrofit Technology
BTU	British Thermal Units
CAA	Clean Air Act
EGU	Electrical Generating Units
EPA	Environmental Protection Agency
FIP	Federal Implementation Plan
MW	Megawatts
NAAQS	National Ambient Air Quality Standards
NMED	New Mexico Environment Department
NO_X	Nitrogen Oxides
PNM	Public Service Company of New Mexico
PRC	New Mexico Public Regulation Commission
PUA	New Mexico Public Utility Act
RAVI	Reasonably Attributable Visibility Impairment
RH	Regional Haze
RPO	Regional Planning Organizations
SCR	Selective Catalytic Reduction
SIP	State Implementation Plan

SJGS	San Juan Generating Station
SNCR	Selective Noncatalytic Reduction
SO_2	Sulfur Dioxide
WRAP	Western Regional Air Partnership

INTRODUCTION

These petitions for review challenge the United States Environmental Protection Agency's ("EPA") disapproval of part of a "State Implementation Plan" ("SIP") submitted by the State of New Mexico regarding the "good neighbor" provisions of section 110(a)(2)(D)(i) of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i), and the issuance of a "Federal Implementation Plan" ("FIP") establishing emission limits on nitrogen oxides ("NO_x") and sulfur dioxide ("SO_2") from the San Juan Generating Station ("SJGS"), located near Farmington, New Mexico. *See*, "Approval and Promulgation of Implementation Plans; New Mexico; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determination," 76 Fed. Reg. 52,388 (Aug. 22, 2011) (the "Final Rule"), Exhibit A hereto. Three petitions for review of the Final Rule have been filed in this Court: one by WildEarth Guardians (No. 11-9552); one by Public Service Company of New Mexico ("PNM"), one of the owners of the SJGS plant (No. 11-9557); and one by New Mexico Governor Susana Martinez and the New Mexico Environment Department ("NMED") (collectively, "New Mexico") (No. 11-9567).

Petitioners PNM and NMED seek a stay of the Final Rule pending this Court's decision, or, alternatively, pending EPA's resolution of the separate administrative petitions for reconsideration submitted by PNM and New Mexico to EPA pursuant to CAA section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B). A stay pending review "is an extraordinary remedy that may be awarded only upon a clear showing that [movant] is entitled to such relief." To obtain a stay, Petitioners must establish that they are "likely to succeed on the merits, that [they are] likely to suffer irreparable damage in the absence of preliminary relief, that the

balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20-21 (2008); *see also* 10th Cir. Rule 8.1; *FTC v. Mainstream Mkg. Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003). The Court need not consider all four factors if it concludes that Petitioners PNM and New Mexico are not entitled to relief under some of those factors. *Chem. Weapons Working Grp., Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1489 (10th Cir. 2003).

In the present case, movants satisfy none of these factors. The interplay of (a) the "good neighbor" (or "interstate transport") provisions of CAA section 110(a)(2)(D)(i)(II), 42 U.S.C. § 7410(a)(2)(D)(i)(II), which says that approvable SIPs must include provisions prohibiting air emissions within a State that would "interfere with" measures "to protect visibility" in another State's SIP and (b) CAA sections 169A and 169B, 42 U.S.C. §§ 7491, 7492, which provide for protection of visibility in Federal "Class I areas" (*i.e.*, certain national parks and wilderness areas), is complex. The record shows that EPA's Final Rule was well within EPA's authority under these provisions and well-grounded in fact, and that Petitioners PNM and New Mexico are not likely to succeed on the merits of their challenges. In addition, the "irreparable injury" asserted by PNM is speculative at best, and in the case of New Mexico, is not sufficient in kind to satisfy that element. Finally, the balance of harms and the public interest do not support the issuance of a stay pending resolution of the merits of these petitions for review. The motions for stay must therefore be denied.

BACKGROUND

A. Statutory and Regulatory Background

1. <u>The Clean Air Act Overview</u>

The Clean Air Act, 42 U.S.C. §§ 7401-7671q, establishes a comprehensive program for controlling and improving the nation's air quality through a system of shared federal and state responsibility. Under Title I of the Act, EPA's Administrator is charged with identifying air pollutants that endanger the public health and welfare and with formulating the National Ambient Air Quality Standards ("NAAQS"), which are nationally applicable standards set by EPA establishing permissible concentrations for six common (or "criteria") air pollutants, such as ozone. 42 U.S.C. §§ 7408-09; *see* 40 C.F.R. Part 50.

The CAA requires each State to submit for EPA's approval a "State Implementation Plan," providing for the attainment and maintenance of the NAAQS and meeting other requirements of the Act. 40 U.S.C. § 7410(a)(1), (k). The primary goal of a SIP is to explain what regulations, control measures, and programs the State will use to ensure that air quality standards are maintained. EPA is required to issue a "Federal Implementation Plan," or "FIP," 42 U.S.C. § 7602(y), within two years after EPA "finds that a State has failed to make a required submission or finds that the [SIP] or [SIP] revision submitted by the State does not satisfy the minimum criteria" for SIPs established in CAA section 110(k)(1)(A), 42 U.S.C. § 7410(k)(1)(A), or within two years after EPA "disapproves a State implementation plan in whole or in part." CAA section 110(c)(1), 42 U.S.C. § 7410(c)(1). However, a FIP need not be issued within that time if "the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates" such FIP. *Id.*

2. Good Neighbor/Interstate Transport Provisions

In addition to the requirements that a SIP provide for controlling pollutant emissions within the State that might lead to violation of the NAAQS within the State itself, the Clean Air Act provides that a SIP must also assure that emissions within the State will not interfere with air pollution control efforts in other States. One of the values to be protected under the Act is "visibility." CAA Section 110(a)(2)(D)(i), 42 U.S.C. § 7410(a)(2)(D)(i), states in part that a SIP approvable by EPA must contain adequate provisions "(i) prohibiting, consistent with the requirements of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . (II) interfere with measures required to be included in the [SIP] for any other State under part C of this subchapter . . . to protect visibility." Hence, each SIP must ensure that in-state emissions of air pollutants do not interfere with visibility protection provisions of other States' SIPs.

3. Regional Haze

Before 1977, the Clean Air Act "did not elaborate on the protection of visibility as an air-quality related value." *Chevron U.S.A., Inc. v. EPA*, 658 F.2d 271, 272 (5th Cir. 1981). "In response to a growing awareness that visibility was rapidly deteriorating in many places, such as wilderness areas and national parks, set aside for special protection in their natural states," *id.*, Congress in 1977 enacted CAA section 169A, 42 U.S.C. § 7491, "Visibility protection for Federal Class I areas." "Federal Class I areas" include national wilderness areas and national memorial parks exceeding 5,000 acres in size and national parks exceeding 6,000 acres in area. CAA section 162(a), 42 U.S.C. § 7472. Congress declared as a national goal "the prevention of any future, and the remedying of any existing, impairment of visibility in

mandatory class I Federal areas which impairment results from man-made air pollution." CAA section 169A(a)(1), 42 U.S.C. § 7491(a)(1). "Impairment of visibility" means "reduction in visual range and atmospheric discoloration." Section 169A(g)(6), 42 U.S.C. § 7491(g)(6).

Congress required EPA to promulgate regulations to assure "reasonable progress" toward meeting the national goal identified above and compliance with the requirements of section 169A by 1979. Section 169A(a)(4), 42 U.S.C. § 7491(a)(4). The regulations were to require SIPs for States in which a Class I area existed (and for States "the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility" in such Class I area) to include emission limits, compliance schedules, and "other measures as may be necessary to make reasonable progress toward meeting the national goal." Section 169A(b)(2), 42 U.S.C. § 7491(b)(2). The EPA regulations were to require that each "major stationary source" that was in operation starting after August 7, 1962, and in existence as of August 7, 1977, and that "emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in such area," would "procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology" (or "BART"), as determined by the State, or in the case of a FIP, by EPA. Section 169A(b)(2)(A), 42 U.S.C. § 7491(b)(2)(A); 40 C.F.R. § 51.301.[1]

In 1990, Congress amended the Clean Air Act to add section 169B, 42 U.S.C. § 7492, "Visibility." Section 169B is primarily concerned with regional haze issues. It requires,

[1] "Major stationary source" was defined to include "fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input" with the potential to emit 250 tons per year of any pollutant. CAA section 169A(g)(7), 42 U.S.C. § 7491(g)(7). The San Juan Generating Station qualifies as a major stationary source pursuant to this definition.

"among other things, that EPA undertake research to identify 'sources' and 'source regions' of visibility in Class I areas, consider designating transport commissions to study the interstate movement of pollutants, and establish a transport commission for the Grand Canyon National Park." *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 4 (D.C. Cir. 2002).

EPA promulgated the "Regional Haze Rule" in 1999. 64 Fed. Reg. 35,714 (July 1, 1999). In CAA section 169A(g)(2), Congress stated that in determining BART, the State must take into account (a) the costs of compliance; (b) the energy and nonair quality environmental impacts of compliance; (c) any existing pollution control technology in use at the source; (d) the remaining useful life of the source; and (d) the "degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology." 42 U.S.C. § 7491(g)(2). In the *American Corn Growers Association* case, the Court of Appeals for the District of Columbia Circuit remanded that part of the Regional Haze Rule that required factors (a) though (d) above to be considered by the State on a source-specific basis, but, as to the "degree of improvement of visibility" factor, required the State to in effect "calculate the degree in improvement in visibility that would be expected at each Class I area as a result of imposing BART on *all sources* subject to BART." *Am. Corn Growers*, 291 F.3d at 6 (emphasis in original).

In 2005, EPA promulgated revisions to the Regional Haze Rule in response to the *American Corn Growers* remand and also issued the "BART Guidelines." 70 Fed. Reg. 39,104 (July 6, 2005). The EPA regulations regarding "Protection of Visibility" are now located at 40 C.F.R. Subpart P, §§ 51.300-51.309. 40 C.F.R. § 51.300 is concerned with the "purpose and applicability" of the regulatory program, which includes requiring "States to develop

programs to assure reasonable progress toward meeting the national goal of preventing any future, and remedying any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution . . . ." 40 C.F.R. § 51.300(a). The regulations are applicable to New Mexico. *Id.* 51.300(b).

"BART" is defined as "an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant which is emitted by an existing stationary facility"; the emission limit is to be established on a case-by-case basis in consideration of the five statutory factors described above. CAA section 169A(g)(2), 42 U.S.C. § 7491(g)(2); 40 C.F.R. § 51.301.

40 C.F.R. § 51.308 contains the provisions regarding Regional Haze that must be incorporated in SIPs (and, by extension, in a FIP when EPA must issue an implementation plan). Pursuant to the Regional Haze regulation, each State "must address regional haze in each mandatory Class I Federal area located within the State and in each mandatory Class I Federal area located outside the State which may be affected by emissions from within the State." *Id.* § 51.308(d). States were required to submit SIPs regarding the Regional Haze program no later than December 17, 2007. *Id.* § 51.308(b). Among other things, each Regional Haze SIP must include "reasonable progress goals," *id.* § 51.308(d)(1); a calculation of baseline and natural visibility conditions, *id.* § 51.308(d)(2); a long-term strategy for achieving the reasonable progress goals, *id.* § 51.308(d)(3); and a monitoring strategy, statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in Class I areas, and reporting, recordkeeping, and other ancillary requirements. *Id.* § 51.308(d)(4).

The focus of these petitions for review has been on what constitutes NO_X BART, as established by EPA in the FIP for the SJGS. As noted above, the CAA required that EPA issue regulations providing that SIPs must require that qualifying major stationary sources (such as SJGS) procure, install and operate BART. The BART requirements for regional haze visibility improvement are located in 40 C.F.R. § 51.308(e) and in the "BART Guidelines," 40 C.F.R. Part 51, Appendix Y. Under the regulations, each State must submit a SIP "containing emission limitations representing BART and schedules for compliance with BART for each BART-eligible source that may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area."[2] 40 C.F.R. § 51.308(e). The Act specified that for power plants such as SJGS, the BART emission limits must to be determined according to guidelines promulgated by EPA. CAA section 169A(b)(2), 42 U.S.C. § 7491(b)(2). The regulation directs that the determination of BART for such power plants must be made pursuant to the BART Guidelines. 40 C.F.R. § 51.308(e)(1)(ii)(B).

The BART Guidelines, codified at 40 C.F.R. Part 51, Appendix Y, were promulgated after notice and comment in July 2005. 70 Fed. Reg. 39,104 (July 6, 2005). The BART determination process basically involves three steps: (a) determining which sources meet the definition of "BART-eligible source," as set forth in 40 C.F.R. § 51.301 (*i.e.,* meeting the requirement of dates of operation, potential to emit levels, and inclusion in specified categories of source-types); (b) determining if a source that falls within that definition "emits

[2] Alternatively, a State may demonstrate that "an emissions trading program or other alternative will achieve greater reasonable progress toward natural visibility conditions" than BART. 40 C.F.R. § 51.308(e). No such alternative has been proposed in this case.

any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility" in a Class I area, making that source "subject to BART"; and (c) for each source subject to BART, identifying the appropriate type and level of control for reducing emissions. 70 Fed. Reg. at 39,106-07. Parts II and III of the BART Guidelines describe steps in determining the first two inquiries stated above.

The BART Guidelines identify five steps in a case-by-case BART analysis: (Step 1) identify all available retrofit control technologies; (Step 2) eliminate technically infeasible options; (Step 3) evaluate control effectiveness of remaining control technologies; (Step 4) evaluate impacts and document the results; and (Step 5) evaluate the visibility impacts. 70 Fed. Reg. at 39,164; BART Guidelines Part IV(D). The "impacts" referred to in Step 4 are certain of the statutory factors identified in CAA section 169A(g)(2), 42 U.S.C. § 7491(g)(2), *i.e.*, the costs of compliance, energy impacts, non-air quality environmental impacts, and remaining useful life of the facility. 70 Fed. Reg. at 39,166; BART Guidelines IV(D)(4). The BART Guidelines also provide instructions about how the State should perform each of these steps. 70 Fed. Reg. at 39,163-170; BART Guidelines IV(D).

"Costs of compliance" (also known as "costs of control") is the first factor identified in CAA section 169A(g)(2). The Guidelines provide that in determining the costs of control of particular BART alternatives, the analyst should first identify the control technology alternatives (*i.e.*, the different kinds of retrofit technologies) and then develop estimates of capital and annual costs for each alternative. In determining costs, the Guidelines state that "in order to maintain and improve consistency, cost estimates should be based on the [EPA] *OAQPS Control Cost Manual*, where possible." 70 Fed. Reg. at 39,166; BART Guidelines

IV(D)(4)(a). However, the cost analysis may also consider data supplied by equipment vendors and "should also take into account any site-specific design or other conditions identified above that affect the cost of a particular BART technology option." *Id.* In addition, the Guidelines provide that "cost effectiveness" should be calculated. "Average cost effectiveness" is the total annualized cost of the control technology divided by the annual reduction in emissions achieved by the technology (resulting in a dollars/ton of emission reduction figure). "Incremental cost effectiveness" is a comparison of the cost and performance level of a control option to the next most stringent control method. 70 Fed. Reg. at 39,167; BART Guidelines IV(D)(4).

The BART Guidelines also set out "presumptive NO_X limits, differentiated by boiler design and type of coal burned" for coal-fired electrical generating units ("EGU") greater than 200 megawatts ("MW") located at 750 MW power plants without post-combustion controls such as "selective catalytic reduction" ("SCR") or "selective noncatalytic reduction" ("SNCR"). EPA set these presumptive limits based on a generic assessment of the costs of NO_X controls for such units and a conservative estimate of the minimum visibility impacts from these large power plants. As such, "the NO_X limits set forth here today are presumptions only; in making a BART determination, States have the ability to consider the specific characteristics of the source at issue and to find that the presumptive limits would not be appropriate for that source." 70 Fed. Reg. at 39,134.

The Act requires that "each source subject to BART" is required to install and operate BART as "expeditiously as practicable," but in no event later than five years after approval of the SIP. 42 U.S.C. § 7491(g)(4); 40 C.F.R. § 51.308(e)(1)(iv).

The Regional Haze Rule also provides a role for "Regional Planning Organizations" ("RPOs"). As indicated above, each regional haze SIP must include a "long-term strategy that addresses regional haze visibility impairment for each mandatory Class I Federal area within the State and for each mandatory Class I Federal area located outside the State which may be affected by emissions from the State." 40 C.F.R. § 51.308(d)(3). Where a State has emissions "reasonably anticipated" to contribute to visibility impairment in Class I areas in other States, the State at issue "must consult with the other State(s) in order to develop coordinated emission management strategies" (and concomitantly must also coordinate with other States affecting the Class I areas in the subject State). *Id.* § 51.308(d)(3)(i). If, as part of that consultative process, the State in question has participated in a "regional planning process," that State "must ensure it has included all measures needed to achieve its apportionment of emission reduction obligations agreed upon through that process." *Id.* § 51.308(d)(3)(ii).

The State of New Mexico, along with thirteen other Western States, fifteen Indian Tribes, numerous local air agencies, and federal agencies (Bureau of Land Management, EPA Fish & Wildlife Service, National Park Service, and the Forest Service) is a member of the Western Regional Air Partnership ("WRAP"), an RPO. The WRAP evaluated air quality impacts, including regional haze impacts, associated with regionally significant emission sources. As part of that process, it conducted air quality modeling based in part on assumptions regarding emissions in the particular planning period. "Embedded in these assumptions were anticipated emission reductions from each of the States in the RPO, including reductions from BART. . . . The reasonable progress goals in the draft and final

regional haze SIPs that have now been prepared by states in the West accordingly are based, in part, on the emissions reductions from nearby states that were agreed on through the WRAP process." 76 Fed. Reg. 491, 496 (Jan. 5 2011), a copy of which is attached hereto as Exhibit B.

4. <u>Administrative Proceedings and Judicial Review</u>

These petitions for review challenge EPA's issuance of a FIP to address the BART requirements of the regional haze program for nitrogen oxides (NO_X) at SJGS; EPA's disapproval of New Mexico's SIP revision submitted on September 17, 2007, for the purpose of addressing the "good neighbor/interstate transport" provisions of CAA section 110(a)(2)(D)(i) for the 1997 8-hour ozone NAAQS and the 1997 $PM_{2.5}$ NAAQS; and EPA's issuance of a FIP "to address this deficiency by implementing nitrogen oxides (NO_X) and sulfur dioxide (SO_2) emission limits necessary at the [SJGS], to prevent such interference." 76 Fed. Reg. at 52,388. The Court has jurisdiction to determine these petitions for review. CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1).

The rulemaking procedures of CAA section 307(d), which apply to "the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title," *i.e.*, issuance of a FIP, are applicable here. Section 307(d)(1)(B), 42 U.S.C. § 7607(d)(1)(B). Thus pursuant to CAA section 307(d)(7)(A), 42 U.S.C. § 7607(d)(7)(A), "the record for judicial review shall consist exclusively of" (a) the notice of proposed rulemaking, a statement of basis and purpose, and data, information and documents upon which the proposed rule relies, which are to be included on the rulemaking docket as of the date of the proposal, section 7607(d)(3); (b) written comments and

documents submitted by the public during the comment period, the transcript of public hearings, and additional documents the Administrator determines "are of central relevance of the rulemaking" after the proposed rule is published, section 7607(d)(4)(B)(i); and (c) a statement of basis and purpose to accompany the final rule, an explanation of differences from the proposed rule, and a response to the comments received during the comment period. 42 U.S.C. §§ 7607(d)(6)(A), (B).

Only "an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review." CAA section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B). If a person with an objection can show that it was impracticable to raise it during the comment period or if the grounds for the objection arose after the comment period, "and if such objection is of central relevance to the outcome of the rule," the EPA Administrator shall convene a proceeding for reconsideration of the rule. If the Administrator refuses, the objecting party may challenge the refusal in another petition for review. *Id.*

B. Factual Background

On July 18, 1997, EPA issued new NAAQS for $PM_{2.5}$ (62 Fed. Reg. 38,652) and for 8-hour ozone (62 Fed. Reg. 38,856). Pursuant to section 110(a)(1) of the Act, 42 U.S.C. § 7410(a)(1), each State was required to submit a SIP for implementation, maintenance, and enforcement of the new NAAQS within three years after promulgation of the NAAQS. Such SIP was required to include provisions prohibiting any source within the State from emitting air pollutants in amounts that would interfere with measures in *other* States' SIPs under Part C of Subchapter I of the Act (which includes the Regional Haze requirements of

CAA section 169A and 169B, 42 U.S.C. §§ 7491 and 7492) "to protect visibility." CAA section 110(a)(2)(D)(i)(II), 42 U.S.C. § 7410(a)(2)(D)(i)(II). On April 25, 2005, EPA made a finding that States had failed to submit SIPs to satisfy the requirements of CAA section 110(a)(2)(D)(i) for the 8-hour ozone and $PM_{2.5}$ NAAQS within the three-year period specified in CAA section 110(a)(1). 70 Fed. Reg. 21,147. By that finding of failure to submit, EPA started a two-year clock for the promulgation of a FIP pursuant to section 110(c), unless prior to the expiration of that time each State made a submission to meet the section 110(a)(2)(D)(i) interstate transport requirements and EPA approved such submission.

On August 15, 2006, EPA issued a "Guidance for [SIP] Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ [NAAQS]," the purpose of which was to give the States guidance in how to meet their obligations to submit SIPs that would satisfy the good neighbor/interstate transport requirements regarding visibility and other requirements ("2006 Guidance"). In the 2006 Guidance, EPA noted that the States and RPOs were then "identifying those Class I areas impacted by each State's emissions and developing strategies for addressing regional haze to be included in the States' regional haze SIPS," which were due no later than December 17, 2007 (as per 40 C.F.R. § 51.308(d)(3)). 2006 Guidance, at 9. EPA concluded that it was then premature to determine whether SIPs for 8-hour ozone or $PM_{2.5}$ contain provisions adequate to avoid interference with other States' regional haze measures, and stated that "States may make a simple SIP submission confirming that it is not possible at this time to assess whether there is any interference with measures in the applicable SIP for another State

designed to 'protect visibility' for the 8-hour ozone and $PM_{2.5}$ NAAQS until regional haze SIPs are submitted and approved." *Id.* at 9-10.

On September 17, 2007, New Mexico submitted a proposed SIP to address the interstate transport provisions of CAA section 110(a)(2)(D)(i) for the 8-hour ozone and $PM_{2.5}$ NAAQS. In the submission, New Mexico indicated that it intended to meet the requirements of CAA section 110(a)(2)(D)(i)(II) by submitting a timely Regional Haze SIP.[3]

Shortly thereafter, the December 17, 2007, Regional Haze SIP deadline of 40 C.F.R. § 51.308(d)(3) passed without New Mexico or other States submitting a Regional Haze SIP. On January 15, 2009, EPA issued a "Finding of Failure to Submit State Implementation Plans Required by the 1999 Regional Haze Rule," 74 Fed. Reg. 2392, in which EPA found that 37 States, the District of Columbia, and the U.S. Virgin Islands failed to meet the deadline of December 17, 2007. This notice stated that New Mexico had opted to develop a Regional Haze SIP based on the recommendations of the Grand Canyon Visibility Transport Commission under 40 C.F.R. § 51.309, but that it had not submitted SIP elements regarding reasonable progress regarding regional haze in Class I areas other than the 16 Class I areas covered in the Commission Report, as required by § 51.309(g). 74 Fed. Reg. at 2393.[4] This finding by EPA began a two-year FIP clock for Regional Haze SIPs running pursuant to CAA section 110(c). Consistent with the statute, however, EPA stated that this "FIP

[3] EPA later approved New Mexico's SIP submissions relating to requirements under CAA section 110(a)(2)(D)(i) that emissions in New Mexico not contribute significantly to other States' nonattainment of NAAQS, interfere with maintenance of attainment of the NAAQS in other States, or prevent significant deterioration of air quality in other States. 75 Fed. Reg. 33,174 (June 11, 2010), 75 Fed. Reg. 72,688 (Nov. 26, 2010).

[4] New Mexico also failed to submit an alternative stationary source program for control of SO_2, as required by 40 C.F.R. § 51.309(d)(4). 74 Fed. Reg. at 2393.

requirement is void if a state submits a regional haze SIP, and EPA approves that SIP within the two year period." *Id.* Thus, EPA was required to finalize a Regional Haze FIP, including a NO_X BART emission limit for SJGS, for New Mexico by January 15, 2011, unless New Mexico submitted a Regional Haze SIP and EPA approved it (including the SJGS NO_X BART determination) by that date.

In June 2010, NMED proposed, during a notice and comment rulemaking, a BART determination for SJGS, which was based on the "selective catalytic reduction" ("SCR") technology, the same technology adopted in the FIP at issue in these petitions. This proposed rulemaking was not finalized, but was withdrawn from consideration for final action by the New Mexico Environmental Improvement Board in December 2010. NMED Mot., at 2. The draft BART determination was not officially submitted to EPA as a SIP revision, but the Agency found it to be "thorough and comprehensive." 76 Fed. Reg. at 498.

EPA issued the proposed rule in this matter on January 5, 2011. 76 Fed. Reg. 491. EPA proposed to disapprove the "New Mexico Interstate Transport SIP provisions that address the requirement of [CAA] section 110(a)(2)(D)(i)(II) that emissions from New Mexico sources do not interfere with measures required in the SIP of any other state under Part C of the CAA to protect visibility." *Id.* As a result of that disapproval, EPA also proposed to issue a FIP "to prevent emissions from New Mexico sources from interfering with other states' measures to protect visibility, and to implement [NO_X] and [SO_2] emission limits necessary at one source to prevent such interference." *Id.* at 491-92. Finally, EPA proposed to make a BART determination for SJGS as to NO_X. *Id.* at 492.

In EPA's final action making a NO_X BART determination for SJGS, EPA noted that it had received New Mexico's submitted Regional Haze and Visibility Transport SIP revision on July 5, 2011, several years after the deadline and after the close of EPA's comment period. EPA also was under an obligation under CAA section 110(c)(1)(B) to either approve a regional haze SIP or to promulgate a regional haze FIP by January 15, 2011, since the two-year "FIP clock" started to run when EPA made the January 15, 2009, finding that an approvable Regional Haze SIP had not been submitted by New Mexico by the December 17, 2007, regulatory deadline. EPA also stated that it was under a court-supervised consent decree deadline in *WildEarth Guardians v. Jackson*, Case No. 4:09-CV-02453-CW (N.D. Cal.), pursuant to which EPA was required, by 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." 76 Fed Reg. at 52,390. EPA stated that it "will give priority to the review of New Mexico's recently submitted Haze SIP; however, it was received too late to be taken into consideration in this rulemaking." *Id.* at 52,412.

EPA noted that the Western Regional Air Partnership had performed modeling relating to visibility issues: "We believe that the analysis conducted by the WRAP provides an appropriate means for designing a FIP that will ensure the emissions from sources in New Mexico are not interfering with the visibility programs of other states, as contemplated in section 110(a)(2)(D)(i)(II) . . . [A]n implementation plan that provides for emissions reductions consistent with the assumptions used in the WRAP modeling will ensure the emissions from New Mexico sources do not interfere with the measures designed to protect visibility in other states." 76 Fed. Reg. at 496-97. The WRAP's modeling assumed that

SJGS's NO_X emissions would be 0.27 pounds/million British Thermal Units ("lb/MMBtu") for SJGS Units 1 and 3, and 0.28 lb/MMBtu for Units 2 and 4. *Id.* at 497. The then-current operating permit for SJGS included a 0.30 lb/MMBtu limit for NO_X, which is less stringent than the WRAP assumptions upon which other States based their calculations as to the effect of New Mexico sources. *Id.* As a result, EPA proposed to disapprove that part of the New Mexico Interstate Transport SIP provisions addressing the requirement that emissions from New Mexico not interfere with measures required in the SIP of any other State under Part C of CAA to protect visibility. *Id.*

EPA also discussed the failure of New Mexico to submit a complete Regional Haze SIP after EPA published a notice of failure to submit on January 15, 2009, thus starting the two-year FIP clock of CAA section 110(c) for Regional Haze SIPs, and providing EPA with full authority to separately address NO_X BART for the SJGS. *Id.* at 498. "[R]ather than making an initial determination to require the controls needed to prevent interference with the visibility programs of other states based on the assumptions in the WRAP photochemical modeling to meet section 110(a)(2)(D)(i)(II) requirements, followed soon thereafter by a separate NO_X BART evaluation, we find it is appropriate to perform that BART evaluation at this time." It found that addressing both the "good neighbor/interstate transport" obligations of CAA section 110(a)(2)(D)(i)(II), and the Regional Haze requirements of sections 169A and 169B "will be more efficient and will provide greater certainty to the source [*i.e.*, SJGS] as to the appropriate NO_X controls needed to meet these two separate but related requirements." *Id.*

EPA then performed an evaluation of BART in relation to SJGS, using the BART Guidelines. EPA determined that the "SJGS is subject to BART and [we] are proposing to require that units 1, 2, 3, and 4 meet an emission limit for NO_X of 0.05 lbs/MMBtu." The limit proposed was based on the installation of selective catalytic reduction on each of the units. *Id.* EPA proposed to find that the SJGS is a "BART-eligible source" and that the SJGS is "subject to BART." *Id.* at 498-99. EPA then performed a NO_X BART analysis consistent with 40 C.F.R. § 51.308(e)(1)(ii) and the BART Guidelines. EPA separately analyzed the five steps set forth in the BART Guidelines, *i.e.*, identification of all available retrofit control technologies; elimination of technically infeasible options; evaluation of the control effectiveness of the remaining technologies; an evaluation of the impacts (that is, the statutory factors for BART set forth in CAA section 169A(g)(2)); and an evaluation of the visibility impacts. 76 Fed. Reg. at 499-504. With certain exceptions, EPA stated that it drew on NMED's first proposed NO_X BART evaluation, which was withdrawn before submission as a SIP revision. *Id.* at 499. EPA proposed a three-year compliance period. *Id.* at 504.

A little less than two months after EPA's proposal, NMED on February 28, 2011, began a second round of public notice and comment on a regional haze SIP that was different from the first proposed regional haze SIP, in that NMED proposed a regional haze SIP containing a BART emission limit of 0.23 lbs/MMBtu, using "selective noncatalytic reduction" ("SNCR"). NMED stated that the 0.23 lbs/MMBTU was the "presumptive" NO_X limit for SJGS according to the BART Guidelines. NMED Motion, at 2-3.

The comment period on the EPA proposed rule ended March 7, 2011, but was extended to April 4, 2011. 76 Fed. Reg. at 52,391. NMED and PNM, among many others, submitted comments on the proposal. Among other matters, NMED proposed that EPA should wait until New Mexico's Regional Haze SIP was submitted before taking final action on the EPA proposed rule. New Mexico submitted the proposed Regional Haze SIP revision to EPA, which received it on July 5, 2011. 76 Fed. Reg. at 52,389.

EPA issued its Final Rule on August 22, 2011. 76 Fed. Reg. 52,388. It finalized the proposed rule in most respects, disapproving the New Mexico Interstate Transport SIP provisions addressing the requirement of CAA section 110(a)(2)(D)(i)(II) that emissions from New Mexico sources not interfere with measures required in the SIP of any other State under Part C of the Clean Air Act to protect visibility. In addition, the EPA finalized its promulgation of a FIP to address that deficiency by implementing SO_2 emission limits necessary at SJGS to prevent that interference. Finally, noting that EPA was under an obligation to issue a Regional Haze FIP by January 2011, the rule addressed not only the NO_X emission limits necessary to prevent interference with visibility, but also the NO_X BART requirements for SJGS in the rule. *Id.* EPA stated that the "FIP can be replaced by a state plan that EPA finds meets the applicable Clean Air Act requirements. The federal plan will remain in effect no longer than necessary." *Id.* at 52,388. "By addressing nitrogen oxide pollution requirements of both Interstate Transport and the Regional Haze Rule, PNM will meet these two Clean Air Act requirements for NO_X emission limits for the power plant with only one round of improvements. This regulatory certainty will help guide PNM's business decisions regarding capital investments in pollution controls." *Id.* EPA determined

that SCR was the most cost-effective pollution control to achieve the required emission reductions, while SNCR does not achieve an equivalent reduction in pollution and less visibility improvement. *Id.* In response to comments, EPA revised its cost estimate for SCR from $229 million to $345 million, and increased the compliance period from the proposed three years to the statutory maximum of five years. *Id.* at 52,388-89.

EPA reiterated its proposed conclusions that "the analysis conducted by the WRAP provides an appropriate means for designing a FIP that will ensure that emissions from sources in New Mexico are not interfering with the visibility of programs of other states, as contemplated in section 110(a)(2)(D)(i)(II)." *Id.* at 52,390. EPA chose an SO_2 emission limit of 0.15 lbs/MMBtu for the San Juan power plant, which was also the limit assumed by WRAP in its analysis. EPA made the SO_2 limit federally enforceable, satisfying the Interstate Transport requirements. *Id.* However, as set forth in the proposed rule, EPA stated it was "addressing NO_X control for the SJGS by fulfilling our duty under the BART provisions of the [Regional Haze] rule to promulgate a RH FIP for New Mexico to address, among other elements of the visibility program, the requirement for BART." *Id.* EPA determined that it was not prudent to delay a NO_X BART determination, since the BART requirements are more stringent than the Interstate Transport requirements. *Id.*

EPA received over 13,000 comments on the proposed rule, 76 Fed. Reg. at 52,391, most of which supported the proposal. EPA accompanied the Final Rule with a "Complete Response to Comments for NM Regional Haze/Visibility Transport FIP," Docket No. EPA-R06-OAR-2010-0846, Exhibit C hereto, which responded to all categories of

comments. EPA's responses to the comments were also summarized in the Final Rule. 76 Fed. Reg. at 52,391-437.

Three petitions for review of the Final Rule were filed. PNM filed a "Request for Administrative Stay" of the Final Rule with EPA dated September 16, 2011. PNM also filed an administrative request for reconsideration with EPA pursuant to 42 U.S.C. § 7607(d)(7)(B). NMED filed a similar "Petition for Reconsideration and Stay of Final Rule" on or about October 21, 2011. The Navajo Nation joined in the PNM and NMED petitions for reconsideration and for administrative stay. The petitions for reconsideration and administrative requests for stay of the Final Rule are still pending.

ARGUMENT

I. STANDARDS FOR STAY PENDING APPEAL

In order to obtain a stay pending appeal, Petitioners must establish their likelihood of success on the merits of their petition, the likelihood of irreparable harm if the stay is not granted, that the balance of equities tips in their favor, and the risk of harm to the public interest. *Winter v. NRDC*, 555 U.S. at 21; *see also* 10th Cir. Rule 8.1; *FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003).[5] "Injunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."

[5] This Court has suggested that, if the balance of the equities expressed in the latter three factors tips "decidedly" in a movant's favor, an injunction may be warranted even if the case presents only "serious questions." *See Mainstream Marketing*, 345 F.3d at 852-53. However, in *Winter v. NRDC*, the Supreme Court restated that a party seeking a preliminary injunction must show that he is "likely to succeed on the merits." 555 U.S. at 21. This leaves no room for this Court to relax the merits factor of the test where movants make a strong showing on the irreparable harm factor. Petitioners must establish all four of the requirements, as the Supreme Court has "frequently reiterated" them, in order to "make a clear showing" that they are entitled to this "extraordinary remedy." *Id.*

Winter, 555 U.S. at 22. A preliminary injunction "is an 'extraordinary and drastic remedy' . . . it is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citations omitted). Because preliminary injunctive relief is an extraordinary remedy, the right to relief must be clear and unequivocal. *Wilderness Workshop v. BLM*, 531 F.3d 1220, 1224 (10th Cir. 2008). Issuance of a preliminary injunction is the exception rather than the rule. *Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009).

In evaluating Petitioners' likelihood of success on the merits, the Court must be mindful of the standard of review that governs the merits stage. The standard of review for EPA actions subject to CAA section 307(d), 42 U.S.C. § 7607(d), such as this matter, is set forth at section 307(d)(9), 42 U.S.C. § 7607(d)(9). That section provides that the Court may reverse an action subject to section 307(d) only if it is found to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege or immunity; [or] (C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right." As noted by the Court of Appeals for the District of Columbia Circuit, the standard for substantive judicial review of EPA action set forth in section 7607(d)(9)(A) is taken directly from the Administrative Procedure Act. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 519-20 (D.C. Cir. 1983).

The arbitrary-and-capricious standard is highly deferential; it presumes the validity of agency actions and upholds them if they satisfy minimum standards of rationality. *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976) (*en banc*); *Boomer Lake Park v. Dep't of Transp.*, 4 F.3d 1543, 1549 (10th Cir. 1993). Although a reviewing court must conduct a "searching and careful" inquiry, the standard of review under the APA "is a narrow one." *Bowman Transp.,*

Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285-86 (1974). The reviewing court must assure itself that the agency considered the relevant factors in making the decision, but cannot substitute its own judgment for that of the agency. *Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933-34 (5th Cir. 1998).

Questions of statutory interpretation are governed by the two-step test set forth in *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984). In the first step, the reviewing court determines whether Congress spoke to the precise question at issue; if so the inquiry is at an end. If the statute is silent or ambiguous on the point, the court must determine whether the agency's interpretation is based on a permissible construction of the statute. *Id.* The reviewing court need only find that the agency's interpretation is reasonable, not that it is the only permissible interpretation. *Chemical Mfrs. Ass'n v. NRDC, Inc.,* 470 U.S. 116, 125 (1985).

EPA's interpretations of its own regulations are entitled to even greater deference. EPA's interpretation of its regulations should be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). EPA's factual findings are likewise entitled to substantial deference. *See Arkansas v. Oklahoma*, 503 U.S. 91, 112-13 (1992). EPA's factual determinations should be upheld as long as they are supported by the administrative record, even if there are alternative findings that could be supported by the record. *Id.*

II. NEITHER PNM NOR NMED IS LIKELY TO SUCCEED ON THE MERITS OF ITS PETITION FOR REVIEW

Both PNM and New Mexico argue that they are likely to succeed on the merits of their claims, because, among other reasons, the CAA gives the States "primary responsibility" for regulating the sources of air pollution. NMED "Petitioner's Motion for Stay of Final Rule" ("NMED Mot."), at 8; "Motion of Petitioner Public Service Company of New Mexico for Stay of Agency Rule" ("PNM Mot."), at 5. They argue that the principle of State primacy is particularly prominent in the regulation of regional haze, citing CAA sections 169A and 169B, the regional haze regulations at 40 C.F.R. § 51.308(e), and the decision of the court in *American Corn Grower's Ass'n*, 291 F.3d at 8. NMED Mot. at 8-10, PNM Mot. at 6. From this rather unremarkable proposition, they draw the conclusion that it was improper for EPA to have disapproved the New Mexico Interstate Transport SIP for NO_X, submitted to EPA in 2007, or to have issued the NO_X BART FIP for SJGS in the Final Rule, because of the pendency of the New Mexico Regional Haze SIP submission in July 2011. But PNM and New Mexico ignore provisions of the Act that clearly provide that, while the States have primary responsibility to implement air quality standards promulgated under the Act, EPA has a critical oversight role and is *required* to disapprove State-submitted SIPs and promulgate a FIP when the State has failed to implement the Act as required. That is what happened here.

New Mexico states that EPA is statutorily required to approve any SIP revision that satisfies the minimum requirements of CAA section 110(a)(2), 42 U.S.C. § 7410(a)(2), and cites *Train v. NRDC*, 421 U.S. 60, 79 (1975) to the effect that EPA may not "question the

wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2)," and that EPA "may devise and promulgate a specific plan of its own only if a State fails to submit an implementation which satisfies those standards." *Train*, 421 U.S. at 79; NMED Mot. at 14-15. New Mexico asserts that "[b]ecause the CAA affords States broad discretion in weighing the statutory factors and reaching BART determinations, EPA knew that it would be legally obligated to approve the [New Mexico BART] SIP once it considered it on the merits." *Id.* at 10.

From these premises, NMED and PNM argue that CAA section 110(c), 42 U.S.C. § 7410(c), and *Train* prohibit "promulgation of a FIP where EPA has made no determination whether a relevant pending SIP submittal is approvable." PNM Mot. at 8; NMED Mot. at 15. However, this argument only tells half the story, reading the FIP provisions of 42 U.S.C. § 7410(c)(1) out of the statute. That section provides that EPA "*shall* promulgate a Federal implementation plan at any time within 2 years after the Administrator" either finds that a State failed to make a required submission, or that the SIP or SIP revision is incomplete, or after EPA disapproves a SIP submission "in whole or in part." (Emphasis supplied). As described above, EPA made formal findings that the required Regional Haze SIPs had not been submitted, 74 Fed. Reg. 2,392 (January 15, 2009), which triggered the statutory two-year FIP clock.

Neither NMED nor PNM cites any specific authority for the argument that EPA is prohibited from issuing a FIP if a SIP addressing the same statutory provisions is pending before the Agency. It must first be noted that EPA is required to promulgate a FIP on the expiration of the FIP clock. *Coal. for Clean Air v. S. Cal. Edison Co.*, 971 F.2d 219, 223 (9th Cir.

1992). In *WildEarth Guardians v. Jackson*, Civ. Act. No. 11-CV-00001-CMA-MEH (D. Colo.), Judge Arguello, in issuing an "Order Entering Consent Decree" on September 27, 2011 (a copy of which is attached hereto as Exhibit D), held that EPA was authorized to issue a regional haze *FIP* even if there was a pending North Dakota regional haze *SIP* before the Agency. "The CAA requires the EPA to promulgate a FIP within 2 years of finding that a State failed to make a required SIP submission. That duty remains '*unless* the State corrects the deficiency, *and* the Administrator approves the plan or plan revision, *before* the Administrator promulgates such [FIP].' 42 U.S.C. § 7410(c) (emphasis added)." Order at n. 8. In that case, EPA had not issued a final rulemaking approving the North Dakota regional haze SIP, and "thus, the EPA's obligation to promulgate a FIP remains." *Id.* Judge Arguello also noted that North Dakota's construction of the CAA (identical to the position of NMED and PNM here) "would seemingly allow a state to indefinitely postpone the promulgation of a FIP by filing inadequate SIP after inadequate SIP, and demanding that the EPA approve or disapprove of them before promulgating a FIP." *Id.* The basic premise of NMED and PNM, that EPA was without authority to issue the Final Rule because of the pendency of New Mexico's Regional Haze SIP revision, is fatally flawed.

In addition, of course, New Mexico's supposition that its Regional Haze SIP submission is necessarily approvable by EPA is not sustainable. Moreover, the components of the New Mexico regional haze SIP submission are not ripe and not at issue here. EPA has not proposed or finalized its position on the components of the New Mexico regional haze SIP submission. The New Mexico SIP is not part of the record for judicial review, and an analysis of its contents was not a part of EPA's decision-making.

One reason given by EPA for not acting on the New Mexico Regional Haze SIP revision was its obligation under the *WildEarth Guardians v. Jackson* consent decree "to have either approved the New Mexico SIP or to have implemented a FIP to address the 110(a)(2)(D)(i) provision" by August 5, 2011. 76 Fed. Reg. at 52,390. Contrary to the claims of PNM (PNM Mot. at 7-8) and NMED (NMED Mot. at 15-16), EPA's Final Rule did not assert that it was required to issue a Regional Haze FIP due to this particular consent decree; it was clear that EPA was under a judicial order to either approve the New Mexico 2007 Interstate Transport SIP revision or to issue an interstate transport FIP by August 5, 2011, for SO_2 and NO_X emissions at SJGS. New Mexico's 2007 interstate SIP, which EPA disapproved, stated that a regional haze SIP submission would fulfill that requirement. EPA had no regional haze SIP submission from New Mexico at that time of its proposal. Because of (a) the expiration of EPA's two-year deadline for promulgation of a regional haze FIP, to impose a NO_X BART emission limitation, combined with (b) the *WildEarth Guardians* consent decree deadline of August 5, 2011, to act upon the NO_X interstate transport emission limitations for SJGS, EPA chose to combine the two actions in the interests of not placing SJGS in the position of having to meet two different NO_X emissions limitations at once.

Much of PNM's argument challenges EPA's determination of costs of compliance with the NO_X BART determination, the visibility effects to be expected, and the determination that the BART limit chosen by EPA is achievable. PNM Mot. at 11-15. As support for its claims, PNM cites a study by Sargent & Lundy dated October 21, 2011, which was submitted to EPA with the petition for reconsideration and attached to PNM's

Motion in this Court, and an analysis of NO_X limits by RMB Consulting & Research, Inc., dated October 21, 2011, and also attached to the petition for reconsideration. As is evident from the date of those documents, they were generated *after* the close of the EPA public comment period. As such, they are not considered part of the "record for judicial review" pursuant to 42 U.S.C. § 7607(d)(7)(A). Because the Clean Air Act would preclude the Court, absent more, from considering the Sargent & Lundy and RMB Consulting reports on the merits, it *a fortiori* must not consider them in deciding whether PNM has shown a likelihood of success on the merits here.

The actual record for judicial review in these petitions demonstrates that EPA gave serious consideration to the comments submitted by NMED, PNM, and others during the comment period, as evidenced by EPA's "Response to Comments" document, Exhibit C, and the summary of its responses to the comments contained in the Final Rule. EPA made regulatory determinations pursuant to the Regional Haze rules. The challenges to EPA's conclusions regarding costs and visibility improvements are simply differences of technical opinion. Under well-settled APA jurisprudence, EPA's determinations are not to be overturned based on such differences of opinion. *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989).

PNM also alleges that EPA's visibility modeling is flawed, stating that EPA relied upon on older version of the CALPUFF model to project anticipated visibility improvements from available controls. PNM Mot. at 14. PNM attached a declaration dated November 16, 2011, executed by Joseph S. Scire, which purports to support that conclusion. However, as with the Sargent & Lundy and RMB post-comment reports, that declaration

may not be considered by this Court. In any case, however, EPA provided extensive responses to comments regarding modeling issues, including "CALPUFF" use. Complete Response to Comments, Exhibit C, at 107-41; Final Rule, 76 Fed. Reg. at 52,431-34 ("The newer version(s) of CALPUFF have not received the level of review required for use in regulatory actiond subject to EPA approval and consideration in a BART decision making process," *id.* at 52,431).

PNM claims that the "Final Rule is premised on visibility benefits that conflict with EPA's own rule." PNM Mot. at 13. PNM asserts that EPA's use of a cumulative visibility benefit at a variety of Class I areas (versus analysis of impacts at the most affected site only) conflicts with EPA rules. EPA responded to this issue in its response to comments. 76 Fed. Reg. at 52,429-30. EPA noted the language of the BART Guidelines and explained the record support for its conclusion that "a quantitative analysis of visibility impacts and benefits at only the Mesa Verde area would not be sufficient to fully assess the impacts of controlling NO_X emissions from the SJGS." *Id.* at 52,430.

PNM claims that the cost documentation required by EPA "is of such extensive and detailed nature that it cannot reasonably be deemed an appropriate requirement of a BART cost assessment." PNM Mot. at 12. However, PNM offers no support for that argument. As discussed above, EPA, through the Regional Haze regulations and the BART Guidelines, has provided a detailed blueprint for the process used to determine what constitutes NO_X BART for coal-fired power plants such as SJGS. It is evident that EPA undertook an analysis consistent with those requirements in coming to the conclusion that BART for SJGS is 0.05 lbs/MMBtu for NO_X, achievable by using selective catalytic reduction.

PNM makes a number of other arguments. It claims that because NMED's proposed SNCR limit allegedly meets the "presumptive" BART limit for units like SJGS found in the BART Guidelines (*i.e.,* 0.23 lb/MMBtu), 70 Fed. Reg. at 39,174, there were no "impediments" to EPA's approval of such a limit. PNM Mot. at 6; NMED Mot. at 10. However, the BART Guidelines also state that the presumptive limits apply "unless a State [and, by extension, EPA when arriving at its own BART determination in developing a FIP] determines that an alternative control level is justified based on a careful consideration of the statutory factors." 70 Fed. Reg. at 39,193. EPA did in fact undertake such an analysis pursuant to the BART Guidelines and the statutory factors.

PNM also asserts that the 0.05 lb/MMBtu NO_X limit is not "achievable," and that the Final Rule is therefore contrary to law. PNM Mot. at 14. EPA responded in detail to comments regarding the achievability of the selected BART NO_X limit. *See* Complete Response to Comments, Exhibit C, at 51-63. In essence, EPA found that other facilities were already achieving that control level.

In addition, PNM claims that EPA found that a NO_X limitation below 0.06 lb/MMBtu is not achievable. PNM Mot. at 14. The 0.06 lb/MMBtu limit discussed in that notice of data availability did not purport to find that 0.06 lb/MMBtu is the lowest achievable BART limit for SCR. Rather, it cites the 0.06 limit as a "well controlled emission rate" for purposes of making modeling assumptions. It does not conclude that 0.06 lb/MMBtu is the lowest achievable NO_X emission rate for SCR at any specific facility. 76 Fed. Reg. 1,109, 1,115 (Jan. 7, 2011).

EPA's analysis and conclusions were reasonable and supported by documents and responses to comments in the administrative record. Neither PNM nor NMED has made a sufficient showing that it is likely to succeed on the merits sufficient to justify the "extraordinary" remedy of a stay pending appeal. As such, their motions must be denied for failure to show a critical element for securing a stay.

III. NEITHER PNM NOR NEW MEXICO HAS ESTABLISHED SUFFICIENT IRREPARABLE HARM IN THE ABSENCE OF A STAY PENDING RESOLUTION OF THE PETITIONS

A party seeking a stay must show "that irreparable injury is likely" in the absence of a stay. *Winter v. NRDC*, 555 U.S. at 21. Such a party "must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005). Neither New Mexico not PNM has made such a showing.

A. New Mexico has not demonstrated likely irreparable injury.

New Mexico asserts that it and its citizens will suffer irreparable harm because EPA allegedly "usurped" State authority by imposing requirements through a NO_X FIP for SJGS when a previously submitted SIP was supposedly approvable by EPA. It also states that PNM's papers suggest that the FIP "compels major, near-term financial commitments for PNM to be in a position to install and operate SCR controls to meet the Rule's deadline," and argues that costs "are likely to be passed along to New Mexico consumers, including State agencies and instrumentalities, in the form of higher electricity rates." NMED Mot. at 19.

New Mexico's first assertion, that it has suffered irreparable harm by a supposed "usurpation" of its sovereignty, is not sustainable.[6] First New Mexico has a remedy for its claim that EPA improperly arrogated power to itself in issuing the FIP – that is, if New Mexico or PNM is successful on the merits and the Final Rule is remanded to EPA, then New Mexico's averred sovereign interest will have been vindicated. As the Supreme Court stated in *Sampson v. Murray*, 415 U.S. 61, 90 (1974), *quoting Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), "The key word in this consideration is *irreparable* ... The possibility that adequate or compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable injury." (Emphasis in original). New Mexico has not established that, if it is successful, the period of time between the issuance of the Final Rule and a decision of this Court would somehow constitute "irreparable" damage to the State's sovereignty. In effect, New Mexico advocates a principle that any conflict between State and federal governments over their relative authority would necessarily lead to a finding of irreparable injury. That is not in accord with the well-accepted understanding that injury for purposes of preliminary relief

---

[6] New Mexico cites *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001), for the principle that intrusion on State "sovereignty" constitutes irreparable injury. NMED Mot. at 18. That case involved a dispute whether a tract of land not on a reservation but leased to a Tribe constituted "Indian lands" under the Indian Gaming Regulatory Act. The case was a "dispute between federal, tribal, and state officials as to which sovereign had authority over the tract." *Id.*, at 1225. The petitions here relate to the relative authority of the State and Federal governments regarding issuance of implementation plans, not control of territory. To extend the holding of *Kansas* to the circumstances here would be to find that any dispute over legal authority between a State and Federal government in a regulatory scheme necessarily constitutes "irreparable injury" to the government challenging the other's action. The facts in *Kansas* were too unusual to warrant such an extension. And note – a stay of EPA's action would mean under this theory that the federal government has suffered irreparable damage to its claimed sovereignty, such that the balance of harms analysis would favor it instead.

must be "certain, great, actual, 'and not theoretical.'" *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (*quoting, in part, Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). In any event, even if New Mexico or PNM was successful in its petition, it is not necessarily the case that the Court would determine that the Final Rule had to be remanded due to a claim that EPA somehow "usurped" New Mexico's role under the Clean Air Act.

In addition, New Mexico's alleged irreparable injury resulting from increased electricity costs to the State and its citizens is not enough to establish irreparable injury here. The allegation that New Mexico or its citizens will necessarily incur higher electricity bills as a result of the passage of time between now and a resolution of these petitions on the merits is highly speculative. According to the declaration of M. Evelin Wheeler, attached as Exhibit 10 to PNM's Motion for Stay, PNM's first major expenditure of funds, *i.e.*, up front fees for engineering, planning, and construction services, is to be paid by PNM by July 2012. Wheeler Dec. at ¶ 5. The Declaration of Terry Horn, submitted by PNM as Exhibit 12 to its Motion for Stay, indicates that PNM will have to go into capital markets to fund the SCR work. *Id.* at ¶ 4. PNM's papers do not address costs it would incur if the SNCR technology supported by PNM and New Mexico as BART was installed, and whether PNM would be incurring similar costs such that New Mexico and electricity consumers might face higher bills regardless of whether SCR or SNCR was selected as BART.

Even if PNM incurs costs before a decision on the merits, neither New Mexico nor PNM has established beyond speculation that those costs will be passed along to consumers. The Declaration of Gerard T. Ortiz, attached to PNM's Motion at Exhibit 14, notes that

PNM "is a public utility subject to the provisions of the New Mexico Public Utility Act, NMSA(1978) § 62-3-1 *et seq*. ("PUA"), and operating under the jurisdiction of" the New Mexico Public Regulation Commission ("PRC"). Ortiz Declaration at ¶ 4. PNM "is restricted by New Mexico law to charge only approved rates for its services. NMSA (1978) §§ 62-8-5 and 62-8-7. Therefore, PNM must seek approval from the PRC before it can increase rates to recover from the SCR Project." Ortiz Declaration at ¶ 6. Mr. Ortiz states that in seeking a rate change, "the burden is on the utility to show that the rate it is seeking is 'fair and reasonable.' NMSA (1978) § 62-8-7(A)." Ortiz Declaration at ¶ 7. "While PNM believes that the SCR Project costs would properly be recoverable in rates as environmental compliance costs, their recovery might be subject to dispute." *Id.* at ¶ 9. Thus, there is no instantaneous pass-through of PNM's costs to New Mexico or New Mexico consumers, and any pass-through at all is inherently speculative. That does not rise to the level of irreparable injury.

Even apart from whether a pass-through of costs is sufficiently certain, to the extent New Mexico argues that the Final Rule will result in higher electricity rates for its citizens, it lacks standing to raise such claimed injuries. In claims against the United States premised on federal law, a State must base its standing on alleged injuries to itself as a State, not as *parens patriae* for the interests of its citizens or businesses. *Ctr. for Biological Diversity v. DOI*, 563 F.3d 466, 476-77 (D.C. Cir. 2009).

B. <u>PNM has not demonstrated likely irreparable injury.</u>

In its Motion, PNM makes two arguments for the proposition that a stay is necessary to avoid irreparable injury. Its primary argument is that "[t]he Final Rule requires PNM to

expend considerable resources that are unrecoverable from EPA even if the Final Rule is invalidated." PNM Mot. at 15. It claims that "PNM and its customers will suffer substantial injury." *Id.* at 16. PNM states that the SCR project "entails significant capital costs that PNM will seek to recover in its rates," and that those costs "will be passed along in the form of higher retail-customer bills." *Id.* at 17.

First, "injury resulting from attempted compliance with government regulation ordinarily is not irreparable harm." *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980); *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2nd Cir. 2005). PNM's reading of the irreparable injury standard would more or less read irreparable injury out of the *Winter* standards in regulatory cases. More is required.

As discussed with regard to New Mexico's irreparable injury claim above, PNM will seek to pass its costs through by seeking approval from the New Mexico PRC. To the extent that those costs are recovered by PNM in its rates, then PNM will not suffer injury, irreparable or otherwise, even if the Final Rule is remanded. "Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Wisconsin Gas*, 758 F.2d at 674.

And while PNM casts its claims of irreparable injury in terms of both itself and its customers, PNM certainly does not have standing to seek on behalf of its customers the extraordinary and unusual remedy of a stay of the effect of the Final Rule pending resolution of these petitions for review.

Even if PNM is unable to pass through all of its costs regarding the SCR project to its customers, the timing and amount of the costs it might incur are somewhat speculative. It is

not clear how lengthy the petition for review process will be. Many of the costs identified by PNM will not be incurred until July 2012 (upfront engineering, planning, and construction costs); site preparation will not begin until October 2012; and actual erection of the selective catalytic reduction system is scheduled to begin in August 2013. Wheeler Declaration at ¶¶ 5, 6. Permit applications are not expected to be submitted until May 2012. Gannon Declaration, at ¶ 6.

Of course, we do not assert that PNM will not incur any costs regarding implementation of the Final Rule between now and when its petition for review is judicially resolved. However, the fact that certain major expenditures will not be incurred for several months, and PNM's plan to pass those costs through to the ratepayers, indicates that there is a degree of speculation in PNM's asseverations of irreparable harm. In addition, it is not clear from the materials presented by PNM how much of its expenditures might also relate to the planning and construction of SNCR, its favored BART choice.

Finally, PNM claims that "because EPA's 0.05 lb/mmBtu limit is infeasible, the Final Rule threatens curtailment of service to avoid noncompliance, jeopardizing the continued generation of a reliable supply of electricity to consumers." PNM Mot. at 15. This argument is not supported by any evidence and must be disregarded.

As discussed above, neither New Mexico nor PNM has made a sufficient showing of irreparable injury in the absence of a stay pending resolution of the petitions for review. As such, the motions for stay must be denied.

IV. NEITHER THE BALANCE OF EQUITIES NOR THE PUBLIC INTEREST FAVOR A STAY

As stated by the Supreme Court in *Winter v. NRDC*, the party seeking a stay must show, among the other factors, "that the balance of equities tips in his favor and that an injunction is in the public interest." 555 U.S. at 21. To obtain a stay, New Mexico and PNM must satisfy the burden of persuasion "*by a clear showing*." *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997)(emphasis in original). Petitioners have not established that the equities in this case tip in their favor. We have shown that neither New Mexico nor PNM has shown a likelihood of success on the merits or irreparable injury. Because an applicant for a stay must meet its burden of proof on all elements of the *Winter* test, it is unnecessary for the Court to make findings on the last two elements, balance of equities and the public interest. In any case, neither movant has shown that it prevails on those elements.

New Mexico argues that the balance of equities analysis favors a stay because the alleged infringement of State decision-making authority cannot be made whole once the alleged infringement occurs; the costs of compliance will significantly harm New Mexico and its citizens; and no significant harm would result from imposition of a stay because SJGS will still be subject to BART and other CAA requirements. NMED Mot. at 19. PNM makes the same arguments, but also states that the visibility goals of the Act serve solely aesthetic concerns and that it is a "goal" to be pursued under a "reasonable progress" standard with the emission reduction to be phased in over decades. PNM Mot. at 18-19. These purported equitable factors blend into petitioners' arguments as to whether the public interest would be served by issuance of a stay.

Congress judged that a national goal should be "the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I Federal areas which impairment results from man-made air pollution." CAA section 169A(a)(1), 42 U.S.C. § 7491(a)(1). Petitioners' judgment as to the relative importance of that goal when compared to the costs PNM might expend is not relevant. As we have described in detail above, EPA acted in a measured way, with due regard for New Mexico's role under the interstate transport and Regional Haze visibility provisions of the Clean Air Act. As a result of the congressional scheme under which EPA is directed to issue a FIP when the State does not comply with its obligations, EPA discharged its duty in the Final Rule. If a stay is granted, and the Final Rule is ultimately upheld, the statutorily-mandated BART process will have been delayed for the pendency of this litigation, to the ultimate detriment of the people the congressional visibility goals are designed to benefit. The alleged harm to New Mexico's "sovereignty," which would vanish if New Mexico is successful in its petition for review, does not outweigh the harm to the general public resulting from the imposition of a stay pending review.

If the Court finds that the balance of the equities and the public interest do not decidedly tip towards either New Mexico or PNM, then Petitioners have not met their burden to show each element and the motions for stay must be denied.

V. THE COURT SHOULD NOT STAY THE EFFECTIVENESS OF THE FINAL RULE PENDING CONSIDERATION OF THE ADMINISTRATIVE PETITIONS FOR RECONSIDERATION SUBMITTED TO EPA BY PETITIONERS

Both New Mexico and PNM propose, as an alternative to a stay of the effective date of the Final Rule pending completion of this litigation, that the Court stay the effective date pending EPA's resolution of the administrative petitions for reconsideration submitted to it by the Petitioners here pursuant to 42 U.S.C. § 7607(d)(7)(B). Those requests are still pending before the Agency. However, such a stay would simply drag out the harm caused by delaying effectiveness of the Final Rule, because it would require EPA to make findings in the first instance as to whether New Mexico or PNM can demonstrate to EPA "that it was impracticable to raise such objection within [the period for public comment on the proposed rule] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." If so, EPA is to convene a proceeding for reconsideration of the rule; if EPA refuses to do so, that refusal may be challenged in the appropriate Court of Appeals. CAA section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B). Congress gave EPA discretion in deciding whether to grant reconsideration, suggesting that the general rule should be against staying a promulgated rule pending administrative consideration of whether reconsideration is warranted under the statutory requirements. The Court should simply determine whether New Mexico or PNM have made the appropriate showing under the rules regarding whether a stay of this proceeding should be granted.

CONCLUSION

For the reasons set forth above, the motions for stay pending resolution of these petitions for review should be denied.

Respectfully submitted,

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

Dated: January 13, 2012 By: */s/ Daniel Pinkston*

DANIEL PINKSTON
Senior Trial Attorney
Environmental Defense Section
Environment and Natural Resources
Division
U.S. Department of Justice
999 18th Street
South Terrace, Suite 370
Denver, CO 80202
(303) 844-1804
daniel.pinkston@usdoj.gov

Of Counsel:
Brian S. Tomasovic
Assistant Regional Counsel
EPA Region 6

M. Lea Anderson
Office of General Counsel

COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Respondents' Opposition to Motions for Stay of Agency Rule by Notice of Electronic Filing using the Court's CM/ECF system, which will send notice of such filing via email to all counsel of record.

Said filing was made on or before the date set forth below.

Dated: January 13, 2012 By: /s/ Daniel Pinkston

Environmental Defense Section
United States Department of Justice