



# **EPA's Shocking New Mexico Power Grab**

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President Barack Obama's Environmental Protection Agency (EPA) has moved aggressively to usurp policy making authority from the states. In West Virginia and Kentucky, for example, the EPA has effectively overhauled Clean Water Act (CWA) permitting regimes, in disregard of administrative procedure rules.<sup>1</sup> Texas Attorney General Greg Abbott has sued the EPA six times over its decision to reject state's 17-year old "Flexible Permit" air quality permitting program for refineries.<sup>2</sup> Oklahoma Attorney General Scott Pruitt is suing the EPA over its proposal to impose Clean Air Act controls at six coal fired power plants that cost almost \$1 billion more than what the Sooner State had proposed.<sup>3</sup> And that is just the beginning.

On August 22, 2011, the EPA committed its most outrageous affront to environmental federalism, with New Mexico as the victim. Specifically, the EPA refused to consider New Mexico's visibility improvement plan, required under the Clean Air Act (CAA), and imposed a federal plan in its stead. This paper demonstrates how the EPA ran roughshod over New Mexico's rightful authority, at a cost of almost \$340 million to New Mexico ratepayers. Thanks to the EPA's power grab, 500,000 PNM ratepayers in New Mexico are facing a \$120 per year electricity tax<sup>4</sup> (PNM is the state's largest utility). The "benefit" of this tax, according to peer-reviewed research, is a visibility "improvement" that is imperceptible to most people.

New Mexico's plight is right out of a Kafka novella: The EPA has never adequately explained what it is trying to do. It is being completely unreasonable yet circumspect. Its proposed rulemaking failed to articulate clearly why New Mexico's proposal was unacceptable, and the final rulemaking addressed comments by citing either passages of its oblique proposed rulemaking<sup>5</sup> or unidentified passages of the final rulemaking.<sup>6</sup>

All we know for sure is that it has crafted an ad hoc regulatory regime for visibility improvement that treats New Mexico differently from every other state. The EPA has singled out New Mexico for arbitrary enforcement of the agency's own dubious interpretations of two related Clean Air Act sections:

- The Regional Haze provision, which provides that states work together to improve visibility at federal National Parks and Wilderness Areas, while giving the states a high degree of control; and
- The Good Neighbor provision for visibility, which provides that states demonstrate they have implemented adequate measures to ensure that their emissions do not "interfere with measures required to be included in the applicable implementation plan for any other state...to protect visibility."<sup>7</sup>

In June 2011, New Mexico regulators completed a plan that would have achieved the requirements of both the Good Neighbor and Regional Haze provisions. However, the EPA refused to even consider New Mexico's plan, based on arbitrary, unnecessary deadlines that the EPA set for New Mexico, and for no other state.

Two months later, the EPA imposed a federal visibility plan on New Mexico. It was \$700 million more expensive than the state plan, which, again, met all of the EPA's own requirements.<sup>8</sup> To put it another way, the EPA's took the liberty of exceeding its own cost-effectiveness regulations. In order to justify these exorbitant costs, the EPA created a hybrid authority from the Clean Air Act's Good Neighbor and Regional Haze provisions. Illogically

(and likely illegally), the EPA found that together, these provisions mandate emissions controls 10 times as expensive as would have been required by the sum of the individual provisions. No other state has been subjected to visibility regulations that were far more stringent than the EPA's own criteria.

It gets worse. The EPA alleged that New Mexico violated the Good Neighbor provision for visibility based on a vague, undefined standard that was more lenient for other states. The EPA fails to explain why it treated New Mexico differently.

**New Mexico's Visibility-Improvement Controls Meet EPA's Requirements...**

|  | NOX Controlled Emissions Rate (lb/mmBTU) |
|--|--|
| Controls mandated by EPA's Regional Haze provision authority           | 0.24                                     |
| Controls mandated by EPA's (claimed) Good Neighbor provision authority | 0.28                                     |
| New Mexico's proposed controls   | 0.23                                     |
| Controls imposed by EPA's federal implementation plan                  | 0.05                                     |

**...Yet, EPA Is Imposing Controls That Far Exceed Its Own Rules, and Cost \$700 Million More**

|  | NOX Controlled Emissions Rate (lb/mmBTU) | Cost (\$millions) |
|--|--|-------------------|
| New Mexico's proposed controls (which meet all federal and state laws and regulations) | 0.23                                     | <b>64</b>         |
| Controls imposed by EPA  | 0.05                                     | <b>779</b>        |

The EPA's actions warrant a response. The New Mexico Legislature should express its disapproval in the strongest possible terms. Lawmakers should send a message to the White House, informing it that New Mexico objects to the EPA's capricious and arbitrary machinations. A description of the EPA's abuse of power regarding each provision follows.

**The Regional Haze Provision**

In 1977 and 1990, Congress passed amendments to the Clean Air Act providing that states work together to improve visibility at federal National Parks and Wilderness Areas. Together, these amendments are known as the Regional Haze provision.<sup>9</sup>

Notably, this provision accords states a uniquely high degree of control relative to the EPA. According to the EPA's 2005 Regional Haze implementation guidelines, "[T]he [Clean Air] Act and legislative history indicate that Congress evinced a special concern with insuring that States would be the decision-makers"<sup>10</sup> on visibility-improvement policy making. The courts, too, have interpreted the Clean Air Act such that states have primacy on Regional Haze decision making. In the seminal case *American Corn Growers v. EPA* (2001), which set boundaries between the states and the EPA on Regional Haze policy, the D.C. Circuit Court remanded the EPA's 1999 Regional Haze implementation guidelines for encroaching on states' rightful authority.<sup>11</sup>

Under the Regional Haze provision, states must establish “Reasonable Progress” goals to improve visibility on a regional basis. A primary mechanism by which states would achieve Reasonable Progress is a requirement that all major emitters built between 1962 and 1977 install what is known as Best Available Retrofit Technology (BART) to improve visibility.

BART is not any particular technology, but a process. First, states have to decide which emitters contribute significantly to visibility impairment at any and all federal National Parks and Wilderness Areas. Then, for each source, the law requires that states must perform a five-factor analysis, which includes:

1. Cost of compliance;
2. Energy and non-air quality environmental impacts of compliance;
3. Any existing pollution control technology in use at the source;
4. Remaining useful life of the source; and
5. The degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.<sup>12</sup>

### **New Mexico Singled Out Under BART Rules**

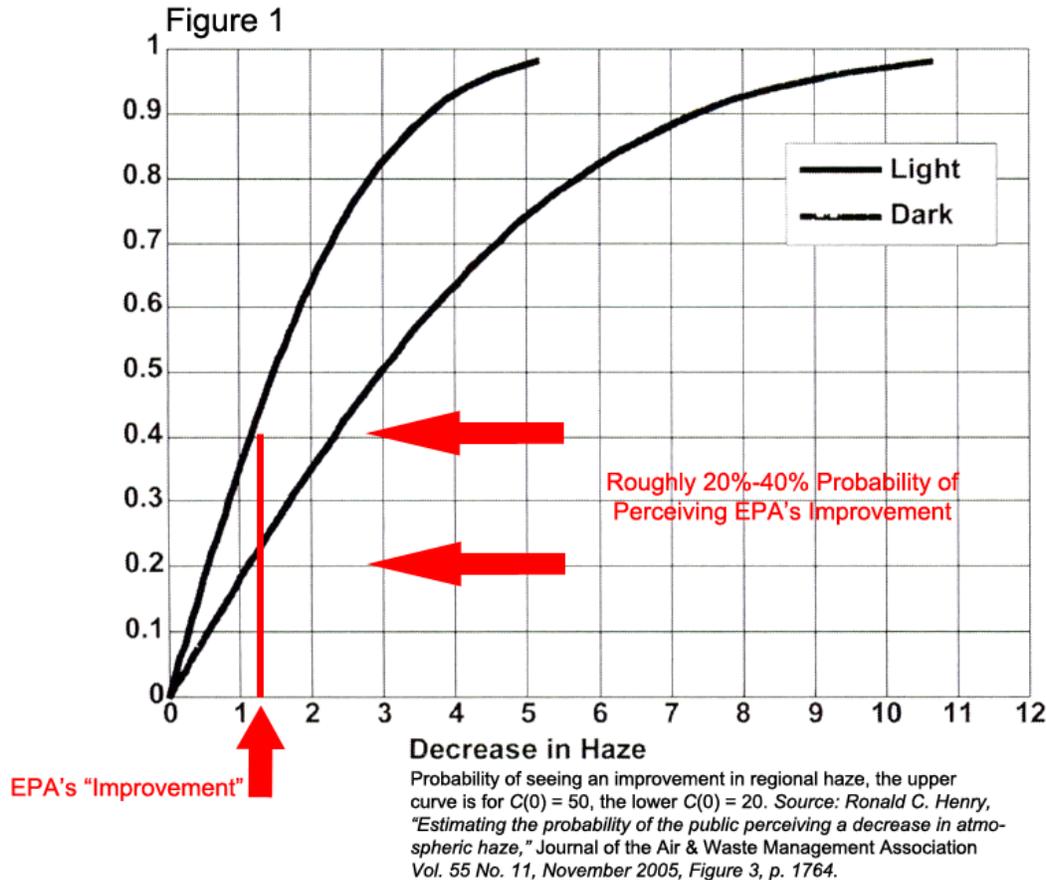
In 2005, the EPA published BART guidelines that establish targets for power plants to reduce visibility-impairing pollutants, known as “presumptive limits.” For coal-fired electricity generating units smaller than 750 megawatts, the 2005 guidelines were only recommendations, so states could essentially decide on any emissions control technology after regulators performed the BART five-factor analysis. But for coal power plants larger than 750 megawatts, like the 1,800-megawatt San Juan Generating Station, these BART “presumptive limits” were mandatory.<sup>13</sup>

From December 2010 to May 2011, the New Mexico Environmental Department (NMED) performed the five-factor BART analysis in a public rulemaking, in accordance with all applicable procedural law. The plan was predicated on the EPA’s 2005 guidelines, and it set emissions controls for the San Juan Generating Station, near Farmington, at the BART “presumptive limits.” In fact, the NMED had no choice in the matter—state law forbids air quality regulators from setting emissions limits pursuant to federal law at a level that is more stringent than what the federal government requires.<sup>14</sup> On June 3, 2011, the Environmental Improvement Board approved the Regional Haze plan by a unanimous vote.<sup>15</sup>

The NMED’s visibility-improvement plan met all state and federal laws and regulations. Despite this, the EPA in August 2011 rejected the state’s cost-effectiveness analysis, a key component of the BART process.<sup>16</sup> Then the EPA, based on its own cost-effectiveness analysis, imposed emissions requirements on the San Juan Generating Station that far exceeded its own “presumptive limits.”

New Mexico’s Regional Haze strategy, which, again, met all applicable federal and state laws and regulations, cost \$73.8 million; the EPA’s plan cost \$748 million. PNM’s 500,000 New Mexico ratepayers would bear \$397 million of this cost. The EPA plan would increase electricity bills by \$9.50 a month, according to an analysis by the utility.<sup>17</sup>

That is a lot of money, especially considering that the “benefits” are invisible. Peer-reviewed research suggests that there is at most a 50 percent chance the visibility “improvement” wrought by the EPA’s preferred controls could be perceptible by the general population on the seventh-worst visibility day of the year at Mesa Verde, the national park closest to the San Juan Generating Station.<sup>18</sup>



The EPA has not approved a single regional haze submission, but it has proposed federal plans for two other states in addition to New Mexico: Oklahoma<sup>19</sup> and North Dakota.<sup>20</sup> However, those two states had proposed regional haze plans that failed to meet the EPA’s mandatory “presumptive limits.”<sup>21</sup> New Mexico, on the other hand, proposed a plan in full compliance with federal and state laws and regulations. In a contortion of logic, the EPA is rejecting New Mexico’s cost-effective analysis for a plan that achieves the EPA’s own target for cost-effectiveness. It is the only state subject to this bizarre reasoning.

### **New Mexico Singled out by EPA’s Self-Imposed Regional Haze Deadline**

In its August rulemaking, the EPA claimed that it could not even consider NMED’s plan, because it was submitted after its January 15, 2011, deadline.<sup>22</sup> Thus, the EPA claimed that, “Because...New Mexico did not timely formulate and submit its BART determinations, we have the authority and the responsibility to make a NOX BART determination for [the San Juan Generating Station].”<sup>23</sup>

But New Mexico was not the only state to submit a Regional Haze plan late. Colorado, Montana, North Dakota, and Wyoming also made late submissions. Under a consent decree with environmentalist litigation organizations, the EPA will get around to judging those plans by: January 2012 for North Dakota; June 29, 2012, for Montana; September 10, 2012, for Colorado; and October 15, 2012, for Wyoming.<sup>24</sup>

For these states, the EPA was compelled to act by three environmentalist organizations (WildEarth Guardian, the National Parks Conservation Association, and the Environmental Defense Fund), and the earliest deadline was established in January 2012. Yet for New Mexico, the EPA acted on its own accord. The EPA chose to ignore New Mexico's visibility strategy on the basis of this arbitrary, self-imposed deadline, set months before that of every other state, in blatant disregard of Congress' intent to have the states take the lead on Regional Haze.

### **The Good Neighbor Provision**

To borrow a poker term, New Mexico had the "nuts" *vis a vis* the EPA on visibility improvement policy. The EPA wanted the most expensive controls installed at the San Juan Generating Station, but New Mexico's Regional Haze plan was unassailable. Not only did Congress afford the states a uniquely high degree of sovereignty over the EPA on visibility improvement policy, but New Mexico regulators submitted a plan that meets the EPA's own rules.

The EPA, however, had an ace up its sleeve. In an unprecedented seizure of power, its proposed rulemaking to impose a federal visibility plan on New Mexico, published January 7, 2011, claimed that the agency has dual-authority under the Clean Air Act to run roughshod over New Mexico on visibility-improvement policy.<sup>25</sup> In addition to the Regional Haze provision, the EPA also claims to have authority under the Good Neighbor provision of the Clean Air Act,<sup>26</sup> which provides that states demonstrate they have implemented adequate measures to ensure that their emissions do not "interfere with measures required to be included in the applicable implementation plan for any other state...to protect visibility."

This is a dubious legal reasoning, because the Regional Haze provision explicitly mandates that states control emissions of haze-causing pollutants that significantly diminish visibility in all federal National Parks and Wilderness Areas, not just ones within their own borders. That is, the Regional Haze provision effectively requires states to meet the Good Neighbor provision. It makes no sense for Congress to create a program requiring states to work together to reduce visibility impairment in the Regional Haze provision, and then to also create a vague, amorphous, ill-defined separate source of authority with one phrase in the Good Neighbor provision, an altogether different section of the law.

More importantly, the EPA has yet to fully approve a single Regional Haze plan. How can the EPA know whether New Mexico is adversely affecting other states' visibility improvement programs that do not yet exist? Indeed, this is the exact reasoning used by the EPA in 2006, when it published implementation rules for the Good Neighbor provision. In the rules, the EPA said that, "is not possible at this time to assess whether there is any interference with measures

in...another State designed to ‘protect visibility’...until regional haze [plans] are submitted and approved.”<sup>27</sup>

According to the EPA’s own guidelines, the Good Neighbor provision for visibility is essentially a procedural requirement. All states had to do was make a “simple submission” indicating that they intended to submit a Regional Haze plan. To be clear: EPA’s 2006 interpretation of the Clean Air Act imparts no authority to the agency pursuant to the Good Neighbor provision. Now, however, the EPA is interpreting it as an independent source of power!

The EPA’s apparent power grab pursuant to the Good Neighbor provision of the Clean Air Act is being challenged in federal court by PNM, among others,<sup>28</sup> so the legality of the agency’s interpretation remains in question. What is not in question is that the EPA created a regulatory program under the Good Neighbor provision that treats New Mexico differently than every other state.

### **New Mexico Singled out under EPA Good Neighbor Provision Rules**

As noted above, the EPA’s own Good Neighbor provision guidelines interpret compliance as a clerical matter, and not as a source of authority. In accordance with its 2006 Good Neighbor provision implementation rules, the EPA in 2007 and 2008 approved “simple submissions”—promises to submit a Regional Haze plan—submitted by Arizona,<sup>29</sup> Iowa,<sup>30</sup> Kansas,<sup>31</sup> Minnesota,<sup>32</sup> Nebraska,<sup>33</sup> Nevada,<sup>34</sup> South Dakota,<sup>35</sup> Utah,<sup>36</sup> and Wyoming.<sup>37</sup>

Like these states, New Mexico submitted a plan to comply with the Good Neighbor provision, one that comported with the EPA’s own 2006 guidelines. However, without explanation, the EPA remained silent on the Good Neighbor provision plans for visibility improvement submitted by a handful of states, including New Mexico. These states were left in regulatory limbo for years. Notably, former Governor Bill Richardson’s administration objected to the EPA’s refusal to approve New Mexico’s submission. The NMED expressed its “fundamental concerns regarding the workability of the [Good Neighbor provision proposal] review process” and also stated that the EPA’s refusal to act results in “a never ending cycle of [proposal] submissions without approvals.”<sup>38</sup>

In August, more than three and a half years after New Mexico submitted its Good Neighbor provision proposal, the EPA reversed itself and claimed that its 2006 implementation rules were published “in error.” Whereas those 2006 guidelines rightly asserted that it was “impossible” to know whether one state is interfering with other states’ visibility-improvement programs if such programs do not yet exist, now the EPA is arguing that it is possible to determine whether a state is violating the Good Neighbor provision, based on what the state “should” have in its Regional Haze plan, *even if that plan has not yet been approved by the EPA* (to date, the EPA hasn’t approved a single plan).<sup>39</sup>

Unfortunately, the EPA failed to put forth concrete rules to assess the approvability of a state’s Good Neighbor visibility proposal in the absence of an approved Regional Haze plan. So there is no objective referent. Troublingly, the EPA interprets “should” differently for New Mexico than it does for other states.

For New Mexico, the EPA decided that the Good Neighbor plan “should” have controls at least as stringent as those assumed by the Western Air Regional Partnership (WRAP), a group of Western states that formed to coordinate their environmental modeling regarding visibility improvement. In its proposed rulemaking, the EPA stated that, “any discrepancies between what was included in the WRAP photochemical modeling and what is presently enforceable, is a concern.”<sup>40</sup> The EPA concluded, on the basis of this “discrepancy”<sup>41</sup> that New Mexico is interfering with visibility improvement programs in other WRAP states, and, therefore, is in violation of the Good Neighbor provision.

For other WRAP states, however, the EPA treated “discrepancies” differently. Earlier in 2011, the EPA proposed to approve Oregon’s Good Neighbor plan for visibility,<sup>42</sup> despite the fact that the EPA allowed the 568-megawatt Boardman coal-fired power plant, in northeastern Oregon, to emit almost four times as much sulfur-dioxide (SO<sub>2</sub>) as assumed by WRAP modeling—0.4 pounds of sulfur dioxide per million British Thermal Unit (lbs SO<sub>2</sub>/mmBTU), well above the WRAP-determined emissions limit of 0.12 lbs SO<sub>2</sub>/mmBTU.<sup>43</sup>

The magnitude of Oregon’s “discrepancy” with WRAP modeling, which was approved by the EPA, is comparable with the magnitude of New Mexico’s “discrepancy,” which was disallowed by the EPA. San Juan Generating Station overshot the WRAP modeling assumptions by 0.025 pounds of nitrogen oxides (NO<sub>x</sub>) per million British Thermal Unit.<sup>44</sup> San Juan is almost three times larger than Boardman, but the EPA is allowing the latter to emit NO<sub>x</sub> much more above the WRAP model’s limit than the former. Moreover, on a per weight basis, sulfur dioxide impairs visibility much more do than nitrogen oxides, so it makes no sense to regulate NO<sub>x</sub> more strictly for the purposes of visibility improvement.

Another example of the EPA’s capriciousness occurred in April 2011, when it approved Colorado’s Good Neighbor plan for visibility,<sup>45</sup> even though it could not legally take into account 45,700 tons of sulfates and 5,200 tons of nitrogen oxides that had been assumed by WRAP modeling.<sup>46</sup> For comparison, consider that the San Juan Generating Station would have complied with the EPA’s ad hoc criteria for Good Neighbor provision compliance by reducing nitrogen oxides by about 3,500 tons—which is 1,700 tons less than the 5,200 tons “discrepancy” that the EPA allowed for Colorado.

For New Mexico, a mere discrepancy of any size between emissions and modeling assumptions was cause for the rejection of a Good Neighbor plan, while large discrepancies did not affect approval for Colorado and Oregon. There is no way to know the reason for this disparate treatment, because the EPA never established impartial criteria.

### **New Mexico Singled out by EPA’s Good Neighbor Provision Deadline**

Having seized an independent source of authority under the Good Neighbor provision of the Clean Air Act, the EPA then alleges that New Mexico is in violation of the provision, based on an arbitrary standard that was different for other states. Even if these shenanigans were legal (they’re likely not), New Mexico’s visibility improvement plan, submitted in July, would have achieved the requirements of both the Regional Haze and Good Neighbor provisions.

But the EPA in August refused to even consider New Mexico's plan, because the agency claimed that it didn't have the time to do so. In the first section, the EPA's arbitrary Regional Haze deadline was explained. In addition to this bogus cutoff, the EPA stated that it was rushed to act in order to comply with an August 5 deadline to decide on New Mexico's Good Neighbor provision proposal. Unlike the Regional Haze deadline, which was self-imposed, this Good Neighbor provision deadline was established by a court-approved consent decree.

As noted earlier, New Mexico submitted a proposal to comply with the Good Neighbor provision in September 2007. It met the EPA's own implementation rules, but the EPA refused to act on it, thereby leaving New Mexico in regulatory limbo.

The Clean Air Act gives the EPA 18 months to either approve or reject a state submission, and in June 2009, an environmentalist litigation group, WildEarth Guardians, sued to compel action. Under the terms of the Consent Agreement, the EPA had until August 5, 2011, to either approve or reject New Mexico's Good Neighbor provision compliance proposal.<sup>47</sup> The EPA claims that this cutoff, in addition to its self-imposed Regional Haze deadline, is the reason that it could not even consider the visibility improvement plan submitted by New Mexico a month earlier.<sup>48</sup>

New Mexico, however, was not the only state subject to this consent decree. Under the original agreement, the EPA also had to move on proposals submitted by California, Colorado, Idaho, North Dakota, Oklahoma, and Oregon. Those states were treated differently.

California and Idaho are different circumstances altogether, in that neither is home to coal-fired power plants that are subject to visibility-improvement regulations. The EPA approved their plans this year. And, as already noted, the EPA approved Good Neighbor provision proposals for Oregon and Colorado using more generous (yet still undefined) criteria than was applied to New Mexico.

That leaves Oklahoma and North Dakota, in addition to New Mexico, as the only states still subject to the consent decree. Interestingly, the EPA used its discretion under the court-approved agreement to extend the deadlines to these states, to October 14, 2011, for Oklahoma<sup>49</sup> and February 9, 2012, for North Dakota.<sup>50</sup> If the EPA had pushed for the same treatment for New Mexico, then it would have given itself the time to consider New Mexico's Regional Haze compliance proposal, which achieved all applicable federal and state laws and regulations.

Even if the EPA refused to try to change the August 5 deadline for New Mexico, as it did for other states, there is no basis in its claim that it had no choice but to impose a federal visibility plan on New Mexico due to the consent decree. In fact, it had the discretion to perform two actions:

1. Approve New Mexico's Good Neighbor provision proposal because it comported with EPA's existing rules; or
2. Approve the proposal under the EPA's new, ad hoc rules, because New Mexico's proposed visibility improvement plan included what the state "should have," per the EPA's own guidelines.

In short, the EPA's supposed lack of discretion was a complete fiction.

## **Conclusion: New Mexico Needs To Fight Back**

The San Juan Generating Station complies with every single health-based air quality standard pursuant to the Clean Air Act. Indeed, since 2005, PNM has invested nearly \$300 million to upgrade emissions controls at the power plant. Now, however, the EPA is trying to impose almost \$700 million in unnecessary costs, in order to achieve largely imperceptible "improvements" in visibility at National Parks and Wilderness Areas.

To be sure, New Mexico is subject to a Clean Air Act mandate to install retrofits at the 1,800 megawatt San Juan Generating Station that would control the emission of visibility-impairing pollutants. Accordingly, New Mexico air quality regulators composed a compliance plan that met all applicable state and federal laws and regulations. However, the EPA wanted New Mexico to install emissions controls that far exceeded its own requirements. So it manufactured an ad hoc regulatory regime specific to the Land of Enchantment. Simply put, New Mexico is being treated differently than every other state, in order to justify \$700 million in costs beyond what the EPA's own rules stipulate are necessary.

New Mexico lawmakers should send a strong message to the EPA that its actions are unacceptable. They should enact a resolution condemning the EPA's arbitrary regulations and demand that New Mexico be treated like its peers. In so doing, they would be governing in the best interest of the nearly 500,000 New Mexicans who face a \$120 per year electricity tax to pay for invisible benefits.

## **Notes**

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<sup>1</sup> On October 6, 2011, a federal district court ruled that the EPA violated the Administrative Procedure Act by substantively changing the Clean Water Act permitting process for surface coal mines in Appalachia. The case had been brought by West Virginia, Kentucky, and the National Mining Association. See Case No. 1:10-cv-01220-RBW Document 96, filed October 6, 2011, available: [http://www.nma.org/pdf/tmp/100611\\_404\\_opinion.pdf](http://www.nma.org/pdf/tmp/100611_404_opinion.pdf).

<sup>2</sup> See 75 FR 41312 for the EPA's rulemaking to end the Flexible Permit program. See also, Erin Mulvaney "Texas Vows to Fight EPA Regulations," *Dallas Morning News*, March 11, 2011, <http://trailblazersblog.dallasnews.com/archives/2011/03/texas-leaders-vow-to-fight-epa.html>.

<sup>3</sup> See 76 FR 16168 for EPA's proposed Oklahoma rule; see also, "Oklahoma Attorney General Sues EPA over Regional Haze Rule," press release from office of Oklahoma Attorney General Scott Pruitt, <http://www.oag.state.ok.us/oagweb.nsf/0/1B875A0A1B56FAF2862578A2005C0B16>.

<sup>4</sup> PNM Submission to the Environmental Improvement Board, "Update Rate Impact Analysis," February 11, 2011, [http://www.nmenv.state.nm.us/aqb/reghaz/documents/NMED\\_Ex7u\\_RateImpactAnalysis\\_02112011.pdf](http://www.nmenv.state.nm.us/aqb/reghaz/documents/NMED_Ex7u_RateImpactAnalysis_02112011.pdf).

<sup>5</sup> For example, see 76 FR 52390, "*As explained in the notice of proposed rulemaking*, we believe 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 programs of other states..." As explained in the second section of this paper, the EPA's proposed rulemaking never established criteria for what constitutes "appropriate means." Instead, the EPA applied different standards to different states.

<sup>6</sup> For example, see 76 FR 52415, 52416, "*As previously discussed*, we have made findings related to the New Mexico SIP submission needed to address interstate transport and the requirement that emissions from New Mexico sources do not interfere with measures required in the SIP of any other state to protect visibility..." The only possible antecedent to "as previously discussed" is the fifth footnote of this paper, which leads to nowhere. See also comment 41.

<sup>7</sup> Clean Air Act Section 110(a)(2)(D)(i)(II).

<sup>8</sup> PNM Submission to the Environmental Improvement Board.

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<sup>9</sup> Clean Air Act Sections 169 A and 169 B.

<sup>10</sup> 70 FR 39137.

<sup>11</sup> 291 F. 3d 1: *American Corn Growers Association v. Environmental Protection Agency*, paragraph 22, “We agree with these petitioners that the [Regional ] Haze Rule’s Best Available Retrofit Technology (BART) provisions are inconsistent with the Act’s provisions giving the states broad authority over BART determinations.”

<sup>12</sup> Clean Air Act, Section 169A(g)(1).

<sup>13</sup> 70 FR 39108, “[The Clean Air Act] clearly requires us to promulgate Best Available Retrofit Technology (BART) guidelines that the States must follow in establishing BART emission limitations for power plants with a total capacity exceeding the 750 megawatt cutoff.” The EPA cites 169(b) of the Clean Air Act, stipulating that, “in the case of a fossil fuel fired generating power plant having a capacity in excess of 750 megawatts, the emissions limitations required under this paragraph shall be determined pursuant to guidelines, promulgated by the Administrator...”

<sup>14</sup> See NMSA 74-2-5 C.(1)(a): “Regulations adopted by the Environmental Improvement Board...shall be no more stringent but at least as stringent as required by the federal act and federal regulations pertaining to visibility protection in mandatory class 1 areas...”

<sup>15</sup> NM Environmental Improvement Board, In matter of Proposed Revisions to the State Implementation Plan for Regional Haze under 40 CFR Section 51.09, June 6, 2011,

[http://www.nmenv.state.nm.us/aqb/reghaz/documents/EIB\\_11-01\\_Order\\_and\\_Statement\\_of\\_Reasons.pdf](http://www.nmenv.state.nm.us/aqb/reghaz/documents/EIB_11-01_Order_and_Statement_of_Reasons.pdf).

<sup>16</sup> 76 FR 52391, “PNM’s estimated costs for installing SCR on the units of the San Juan Generating Station [which were approved by the New Mexico Environmental Department and the Environmental Improvement Board] are higher than justified.” See generally, 76 FR 52391, 52392, “General Cost Comments.”

<sup>17</sup> PNM Submission to the Environmental Improvement Board.

<sup>18</sup> This is a conservative estimate. It is based on the New Mexico Environmental Department-modeled difference in visibility improvement at Mesa Verde between New Mexico’s preferred Regional Haze controls and those preferred by the EPA (1.12 deciviews). This difference is then applied to a chart (Figure 1), which was taken from Ronald Henry, “Estimating the Probability of the Public Perceiving a Decrease in Atmospheric Haze,” *Journal of the Air and Waste Management Association* Vol. 55 No. 11, p. 1764.

<sup>19</sup> 76 FR 16168.

<sup>20</sup> 76 FR 58570.

<sup>21</sup> In Oklahoma, the state’s Regional Haze plan to address sulfur dioxide at six coal-fired power plants exceeded the presumptive limits established in the 2005 BART Guidelines. In North Dakota, the state’s regional haze plan to address nitrogen oxides emissions at three coal-fired power plants that operate a cyclone boiler exceeded the presumptive limits. See 76 FR 16168 and 76 FR 58570.

<sup>22</sup> The EPA stated: “We received a RH SIP submittal from the state on July 5, 2011. Unfortunately, due to the timing of that submittal, we cannot evaluate it as part of this action. We note that this RH SIP submittal arrived approximately 3 1/2 years past the due date of December 17, 2007, and well past January 15, 2011, the date by which we were obligated either to approve a RH SIP submission or to promulgate a RH FIP, as a result of the 2009 finding of failure to submit the RH SIP,” 76 FR 32415.

<sup>23</sup> 76 FR 52387.

<sup>24</sup> 76 FR 34983.

<sup>25</sup> 76 FR 52415, “EPA has two separate sources of authority and obligations to take this action, i.e., a statutory obligation to promulgate a [federal plan] to meet the requirements of [the Good Neighbor provision for visibility] and a statutory obligation to promulgate a [federal plan] to meet the RH (Regional Haze) program requirements of the CAA (Clean Air Act).”

<sup>26</sup> Clean Air Act, Section 110(a)(2)(D)(i)(II).

<sup>27</sup> Memorandum to Regional Air Division Director, Regions 1-10, August 15, 2006, p. 9,

[http://www.epa.gov/ttn/oarpg/t1/memoranda/section110a2di\\_sip\\_guidance.pdf](http://www.epa.gov/ttn/oarpg/t1/memoranda/section110a2di_sip_guidance.pdf).

<sup>28</sup> Oklahoma and North Dakota have sued the EPA over its use of the Good Neighbor provision for visibility as an independent source of power.

<sup>29</sup> 72 FR 41629.

<sup>30</sup> 72 FR 10380.

<sup>31</sup> 72 FR 10608.

<sup>32</sup> 73 FR 31366.

<sup>33</sup> 72 FR 71245.

<sup>34</sup> 72 FR 41629.

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<sup>35</sup> 73 FR 26019.

<sup>36</sup> 73 FR 16543.

<sup>37</sup> 73 FR 26019.

<sup>38</sup> In comments to the EPA on its proposed federal implementation plan for New Mexico, PNM cited a May 6, 2010 letter to the EPA from NMED, asking EPA to stop delaying and approve the state's Good Neighbor provision proposal.

<sup>39</sup> 76 FR 52419, "[The Good Neighbor compliance plan] evaluation is supposed to consider what other states should have in their State Implementation Plans as of this point in time, and is not limited by the fact that other states may or may not have approved those [Regional Haze plans] at this point in time."

<sup>40</sup> 76 FR 497.

<sup>41</sup> Maddeningly, the EPA never elaborates on how it came to conclude that EPA violated the Good Neighbor provision for visibility. It mentioned an analysis (76 FR 497), "We have evaluated [New Mexico's] discrepancies and determined that they are significant due to the changes in visibility projections in the modeling." But the EPA doesn't cite an analysis, nor does it explain itself any further.

<sup>42</sup> 76 FR 12651.

<sup>43</sup> 76 FR 12660, 12661, 12662.

<sup>44</sup> 76 FR 497, "Although the SJGS is subject to a federally enforceable permit, the permit's 30-day rolling average NOx emission limit of 0.30 lb/mmBTU for all units is less restrictive than the emission rates modeled by the WRAP of 0.27 lbs/mmBTU for units 1 and 3, and 0.28 lbs/mmBTU for units 2 and 4 in addressing the daily visibility impacts."

<sup>45</sup> 76 FR 22036.

<sup>46</sup> 76 FR 8329, "To account for measures that are not federally enforceable, EPA increased the Colorado emissions inventory 45,700 tons for sulfates and 5,200 tons for nitrates from the emission inventory used for Colorado in the WRAP 2018 reasonable progress modeling."

<sup>47</sup> *WildEarth Guardians v. Lisa Jackson*, Case No. 4:09-CV-02453-CW.

<sup>48</sup> 76 FR 52415, "We are under a consent Decree deadline with WildEarth Guardians that requires the Agency to take action by August 5, 2011, either to approve the New Mexico [Good Neighbor provision for visibility proposal] or promulgate a Federal Implementation Plan, to address the [Good Neighbor provision for visibility]. Because of the lateness of the July 5, 2011 submission, it is not possible to review and potentially approve the July 5, 2011, SIP submission by proposing a rulemaking and promulgating a final action by August 5."

<sup>49</sup> *WildEarth Guardians v. Lisa Jackson*, Case No. 4:09-CV-02453-CW Document 34.

<sup>50</sup> *WildEarth Guardians v. Lisa Jackson*, Case No. 4:09-CV-02453-CW Document 37.



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