

ENVIRONMENTAL PROTECTION AGENCY

Approval, Disapproval and Promulgation of Air Quality Implementation Plans; Partial Approval and Partial Disapproval of Air Quality Implementation Plans and Federal Implementation Plan; Utah; Revisions to Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze; Final Rule

81 Fed. Reg. 43894-01 (July 5, 2016), EPA-R08-OAR-2015-0463; FRL-9947-42-Region 8

APPLICATION FOR PARTIAL ADMINISTRATIVE STAY BY THE STATE OF UTAH

The State of Utah (Utah) requests that the Environmental Protection Agency (EPA) immediately stay a portion of the final rule “Approval, Disapproval and Promulgation of Air Quality Implementation Plans; Partial Approval and Partial Disapproval of Air Quality Implementation Plans and Federal Implementation Plan; Utah; Revisions to Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze,” 81 Fed. Reg. 43894-01, pending judicial review of the final rule.¹ In this final rule, EPA approved Utah’s Regional Haze State Implementation Plan (RH SIP) PM₁₀ BART determinations and emission limits for Hunter Units 1 and 2 and Huntington Units 1 and 2.² *See* 81 Fed. Reg. 43894-01, 43921. Utah is not requesting a stay of this determination.

However, in the same final rule, EPA disapproved Utah’s NO_x BART Alternative that included emission reductions of NO_x and SO₂ for Hunter Units 1 through 3, Huntington Units 1 and 2, and Carbon Units 1 and 2, and also PM₁₀ emission reductions for Carbon Units 1 and 2. *See id.* EPA promulgated a Federal Implementation Plan (FIP) to replace the disapproved portion of the Utah RH SIP as to the NO_x BART Alternative. *See id.* The FIP imposes Selective Catalytic Reduction (SCR) and existing Low NO_x Burner/Separated Over-Fire Air (LNB/SOFA)

¹ Utah is preparing to file petition for review of the final rule in the United States Court of Appeals for the Tenth Circuit.

² EPA approved monitoring, recordkeeping, and reporting requirements for units subject to the PM₁₀ emission limits, including conditional approval of the recordkeeping requirements for the PM₁₀ emission limits. *See* 81 Fed. Reg. 43894-01, 43921.

as BART for NO_x on the eligible units with a compliance deadline of five years from the date the FIP becomes effective. *See id.* at 43907. Utah requests an immediate stay of this disapproval and promulgation of the FIP under the authority of the federal statute, 5 U.S.C. § 705.

Absent a stay, the state will suffer irreparable harm because its citizens and businesses will have to bear higher electricity costs³ due to PacifiCorp having to purchase and install controls required under the FIP that will cost approximately \$700 million for four units. Additionally, potential closure of the plants subject to unreasonably costly regulation with uncertain environmental benefits would lead to increased unemployment in Emery County, which already has a high unemployment rate. Also, any monetary damages are not recoverable because of the federal government's sovereign immunity and constitute irreparable injury.

Utah will also face regulatory complications in preparing Utah's plan to comply with the Clean Power Plan (CPP) rule that involves the electric generating units at issue in this action. Addition of SCR to these units could complicate Utah's regulatory scheme for compliance with CPP and the long-term planning.

While the final rule is undergoing judicial review, Utah must review and issue permits for the FIP-required SCR installations at Hunter and Huntington. This process will require shifting resources and spending significant time on a public review process, and preparation and issuance

³ In its responses to comments on the proposed rule at issue, EPA itself acknowledges that the "residential customers are more likely to experience rate increases in the range of 5-10% due to installation of SCR controls required by the FIP" and these increases are "not trivial". Response to Comments for the Federal Register Notice for Air Quality State Implementation Plans; Approvals and Promulgations: Utah; Revisions to Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze; Partial Approval and Partial Disapproval (EPA Response to Comments), Docket No. EPA-R08-OAR-2015-0463 at 370 (June 1, 2016). EPA has considered potential rate increase impacts for a Regional Haze FIP for Hawaii, 77 Fed. Reg. 61478, 61488 (Oct. 9, 2012), a BART FIP for Four Corners Power Plant on the tribal land, 77 Fed. Reg. 51620, 51625-26 (Aug. 24, 2012), and a BART FIP for Apache Generating Station, 77 Fed. Reg. 72512 (Dec. 5, 2012). In the RH FIP for Hawaii, EPA made an exception for the Hill Plant, the largest source of anthropogenic SO₂ emissions on the Big Island. 77 Fed. Reg. 31692-01, 31706 (May 29, 2012) (proposed rule). Relying on EPA's own cost effectiveness analysis, EPA determined that requiring additional controls for the Hill plant would cause electricity rates to "unduly increase." *Id.* at 31707.

of the final permits.⁴ Absent a stay, in this time of limited state resources and tight budgets, Utah will be irreparably harmed if it is forced to devote time and resources to tasks with no value if EPA's final rule is judicially overturned. "[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J concurring).

Additionally, Utah and its agencies will experience irreparable harms from EPA's undercutting of the cooperative federalism framework laid out in the CAA and EPA's illegal disapproval and federal replacement of an appropriate state plan. *See Texas v. EPA*, -- F.3d --, 2016 WL 3878180, at *42 (5th Cir. July 15, 2016) (finding that "the institutional injury to Texas from the inversion of the federalism principles enshrined in the Clean Air Act may constitute irreparable injury.").

Finally, there is a substantial likelihood that Utah will succeed in showing that EPA abused its discretion in promulgating the final rule and imposing a FIP requiring costly controls for NO_x emissions with no concrete visibility improvement. Utah will be able to show that (1) EPA abused its discretion by imposing a novel and legally unsupportable test for weighing the evidence⁵ individually and collectively and then re-weighing the evidence, placing the most weight on the one metric out of nine considered and the only one Utah determined to be unsupportive of the BART Alternative when evaluating Utah's weight-of evidence approach for the BART Alternative; (2) EPA violated the regional haze statute and regulation, and ignored the

⁴ These burdens are in addition to the time and resources Utah has already devoted to the permits for these units based on the RH SIP submitted to EPA in September 9, 2008, on which EPA acted with a three-year plus delay after an environmental group filed a lawsuit to compel EPA to act. *See WildEarth Guardians v. Jackson*, No. 10-cv-01218-REB-BNB (D. Colo. Oct. 28, 2010).

⁵ Utah worked closely with EPA when it developed the BART Alternative for NO_x. *See Decl. of Bryce Bird* ¶ 48. EPA did not submit any substantive comments on the alternative during the state public comment period and only requested Utah to prepare a commitment SIP to properly account for SO₂ emissions reductions due to the closure of the Carbon plant. *Id.* ¶¶ 49-50. Utah timely submitted the requested SO₂ commitment SIP, on which EPA elected not to act in the final rule. *Id.* ¶51. As a result, EPA's actions already have caused a great waste of state resources.

BART Guidelines (which EPA claims apply), by excluding costs and non-air quality benefits from its evaluation of Utah's BART Alternative; and (3) the FIP violates applicable laws and is not legally sustainable.

Granting a stay pending litigation of the final rule is consistent with the actions in a number of other regional haze cases, where significant costs were imposed by the regulation. *See Texas v. EPA*, 2016 WL 3878180, at *20 (granting motion for stay pending resolution of challenge to the final rule imposing \$2 billion in costs); *Oklahoma v. EPA*, 723 F.3d 1201, 1206-07 (staying implementation of the rule that imposed \$1.2 billion in costs); (10th Cir. June 22, 2012); *Wyoming v. EPA*, Nos. 14-9529, 14-9530, 14-9533, 14-9534 (10th Cir. Sept. 9, 2014) (staying and tolling deadlines for rules imposing \$700 million in costs); *Cliffs Natural Res. Inc. v. EPA*, Nos. 13-1758, 13-1761 (8th Cir. June 14, 2013) (staying and tolling compliance deadlines for rules imposing \$200 million in costs).

Utah respectfully requests action on this application **by 4PM EST on September 29, 2016**, so that Utah can seek emergency relief in court. Utah will treat EPA's failure to act on this application within the specified time as a constructive denial of its request for stay.

BACKGROUND

I. Utah's RH SIP Process for NO_x

Utah has worked on the development of Utah's RH SIP since 1997. Decl. of Bryce Bird ¶ 8. Utah was a participant in the Grand Canyon Visibility Transport Commission (GCVTC) and the Western Regional Air Partnership (WRAP), a follow-on organization to the GCVTC. *Id.* The GCVTC evaluated haze at Class I Areas on the Colorado Plateau, and determined that sulfur dioxide (SO₂) had the most significant impact on visibility. *Id.* Consequently, GCVTC recommended that SO₂ should be the focus of the stationary source reductions on the Colorado Plateau. *Id.* This recommendation was the basis of Utah's original Regional Haze SIP. *Id.*

On December 12, 2003, Utah prepared and submitted a Regional Haze State Implementation Plan (2003 RH SIP) to achieve natural visibility in national parks and other similarly-protected areas within its borders as required by the Clean Air Act (CAA) and EPA regulations. *Id.* ¶ 9. As sulfates were one of the primary pollutants of concern emitted by stationary sources in the Colorado Plateau, the 2003 RH SIP was heavily weighted to achieve SO₂ reductions. *Id.* ¶ 10. While Utah's RH SIP was focused on achieving SO₂ reductions from stationary sources, substantial reductions in NO_x were also projected to occur from stationary sources as well as mobile and non-road sources. *Id.* ¶ 11. Statewide NO_x emissions were expected to decline by 36% from 270,000 tons per year (tpy) to 172,000 tpy during the period of 1996 to 2018. *Id.*

The CAA mandates EPA determine whether a state's SIP submission is sufficient to meet the minimum criteria within 60 days of submittal. *See* 42 U.S.C. § 7410(k)(1)(B). If EPA finds a submission meets the minimum criteria, EPA must act within 12 months to approve, disapprove, or partially approve a state's SIP. *See id.* § 7410(k)(2). Contrary to these statutory obligations, EPA never acted on Utah's 2003 RH SIP submission.

Still having no approval from EPA, in June of 2008, the Utah Air Quality Board (Board)—Utah's air pollution rulemaking body—proposed a revision to the 2003 RH SIP. Decl. of Bryce Bird ¶ 12. The revision was necessary to address BART requirements for two other pollutants—NO_x and PM—and update the projection of visibility improvement based on the new requirements for NO_x and PM. *Id.* By that time, substantial SO₂ reductions had been achieved in the Colorado Plateau as a result of the measures implemented through Utah's 2003 RH SIP, notwithstanding EPA's failure to take the required final action. *Id.* ¶ 13.

In June of 2008, Utah informally submitted its proposed revised RH SIP (2008 RH SIP) to EPA, which included BART determinations and limits for NO_x and PM, for EPA's comment and approval. *Id.* ¶ 14. In July of 2008, EPA commented on the 2008 RH SIP during the state rulemaking process, criticizing Utah's BART analysis and enforceability of the proposed limits. *Id.* ¶ 15. On September 3, 2008, the Board finalized the 2008 RH SIP and responded in detail to EPA's comments regarding the BART analysis. *Id.* ¶ 16. As required by Section 7410 of the CAA, once approved by the Board, the 2008 RH SIP became legally binding on PacifiCorp as a matter of state law. *Id.*; see 42 U.S.C. § 7410(a).

On September 9, 2008, Utah formally submitted its 2008 RH SIP to EPA. *Id.* ¶ 17. Among other things, 2008 RH SIP required installation of NO_x and PM BART emissions controls on four electrical generating units at the Huntington and Hunter power plants that are owned or operated by PacifiCorp. *Id.* PacifiCorp installed these controls in compliance with the RH SIP. *Id.* EPA did not reach a final determination on Utah's 2008 RH SIP by March 9, 2010 (statutory deadline). *Id.* ¶ 18.

On December 20, 2010, Utah submitted a supplement to the 2008 RH SIP to further clarify Utah's BART determinations. *Id.* ¶ 19. On January 5, 2011, the Board proposed another revision to the 2008 RH SIP (2011 RH SIP Revision). *Id.* ¶ 20. The substantive changes in that Revision affected only the SO₂ milestones section of the plan and therefore did not constitute a new RH SIP submission with respect to the BART requirements for NO_x and PM. *Id.*

On February 24, 2011, EPA submitted comments in the state rulemaking process on the proposed 2011 RH SIP Revisions and the 2008 RH SIP. *Id.* ¶ 21. On May 16, 2012, EPA published a notice of proposed rulemaking in the Federal Register, proposing to partially approve and partially disapprove Utah's 2011 RH SIP Revision and the 2008 RH SIP. *Id.* ¶ 22. This

action was delayed almost three years. *Id.* ¶ 23. EPA acted only after WildEarth Guardians sued the agency for failure to perform a non-discretionary duty and obtained a consent decree that imposed deadlines on EPA to act on Utah's SIP submissions.⁶ *Id.*; see also *WildEarth Guardians v. Jackson*, No. 10-cv-01218-REB-BNB (D. Colo. Oct. 28, 2010).

On July 16, 2012, Utah submitted comments to EPA on the proposed disapproval, taking issue with a number of EPA's assertions regarding Utah's PM and NO_x BART analyses. Decl. of Bryce Bird ¶ 24. On December 14, 2012, nearly three years after the statutory deadline of March 9, 2010, EPA issued its final rule partially approving and partially disapproving Utah's 2011 RH SIP Revision and 2008 RH SIP. *Id.* ¶ 25. EPA amended this rule on January 22, 2013 to add some non-substantive language. *Id.* In the final rule, EPA disapproved the NO_x and PM BART provisions of the 2008 RH SIP. *Id.*

However, by the time EPA disapproved Utah's RH SIP in December 2012, the plan had already become legally binding state law requiring PacifiCorp to install the PM and NO_x BART controls on its units subject to the 2008 RH SIP. *Id.* ¶ 26. Through proactive planning during 2006 to 2014, PacifiCorp has installed new pollution controls on Hunter Units 1 and 2 in 2014 and 2011 respectively, and on Huntington Units 1 and 2 in 2010 and 2006 respectively. *Id.* ¶ 27.

Although EPA partially disapproved the Utah 2011 RH SIP Revision and 2008 RH SIP, EPA did not promulgate a regional haze *federal* implementation plan (RH FIP). *Id.* ¶ 28. Instead, EPA allowed Utah to re-evaluate and resubmit its PM and NO_x BART determinations. *Id.* Utah has worked diligently since 2012 to submit a revised RH SIP to EPA, leveraging its more than ten-year-long effort to develop a RH SIP that would meet EPA's view of the BART requirements. *Id.* ¶ 29. Utah proposed an initial RH SIP revision on October 1, 2014. *Id.* ¶ 30.

⁶ See *WildEarth Guardians v. Jackson*, No. 10-cv-01218-REB-BNB (D. Colo. Oct. 28, 2010).

Utah took public comment on this proposal and held a public hearing. *Id.* After receiving public comment, Utah decided to modify and re-propose its RH SIP revision. *Id.*

EPA's Regional Haze Rule provides two pathways to address BART: (1) a case-by-case determination under the provisions of 40 C.F.R. §51.308(e)(1) or (2) an alternative to BART under the provisions of 40 C.F.R. §51.308(e)(2). *Id.* ¶ 31. The October 2014 proposal contained a detailed 5-factor analysis for a BART determination under the case-by-case provisions established in 40 C.F.R. §51.308(e)(1). *Id.* ¶ 32. EPA's disapproval of the BART provisions for NO_x and PM in 2012 was primarily due to the alleged lack of a 5-factor analysis that met EPA's criteria. *Id.* The 5-factor analysis in the October 2014 proposal relied on visibility modeling completed by PacifiCorp in 2012. *Id.* The proposal reaffirmed the 2008 BART determinations for NO_x and PM. *Id.* Post-combustion controls for NO_x were evaluated and determined to be cost-prohibitive. *Id.* One factor considered as part of Utah's BART analysis was the no-cost co-benefit of visibility improvement expected to occur due to the planned closure of PacifiCorp's Carbon Plant in 2015. *Id.* To ensure the ongoing visibility benefit, the proposed October 2014 RH SIP revision made the closure enforceable. *Id.* The proposal also determined that the PM controls required in the 2008 BART determinations were the most stringent technology available and therefore met the criteria for BART. *Id.*

In November 2014, Utah completed additional modeling that included emission reductions from three electric generating units that were not subject-to-BART: PacifiCorp Carbon Unit 1, PacifiCorp Carbon Unit 2, and PacifiCorp Hunter Unit 3. *Id.* ¶ 33. These modeling results were made available for public review, and the public comment period was extended to allow adequate review. *Id.* After reviewing the modeling results as well as public comments received on the October 2014 RH SIP revision proposal, Utah prepared a new

proposal under 40 C.F.R. § 51.308(e)(2) that provided for an alternative to BART for NO_x. *Id.* ¶ 34. Utah chose to demonstrate that the alternative measure achieves greater reasonable progress than would be achieved through BART by using a “weight of evidence” analysis under Section 308. *Id.* To support a “weight of evidence” analysis under Section 308, Utah collected and evaluated information from nine different metrics: (1) annual emissions of visibility-impairing pollutants; (2) improvement in the number of days with significant visibility impairment; (3) 98th percentile modeling impact in deciviews (dv); (4) annual average impact (dv); (5) 90th percentile modeling impact (dv); (6) timing of emissions reductions; (7) results from IMPROVE monitoring data; (8) energy and non-air quality benefits; and (9) costs. *Id.* ¶ 35.

Utah evaluated a number of different metrics to compare the BART benchmark (the most stringent control technology—low-NO_x burners with overfire air (LNB/SOFA) in conjunction with selective catalytic reduction (SCR)) to the BART Alternative. The emission reductions under the Alternative included reductions of SO₂ and PM in addition to NO_x and the visibility improvement could occur during different episodes and during different times of the year under the two scenarios. *Id.* ¶ 36. The only metric that did not support the BART Alternative was the 98th percentile modeling impact—the metric demonstrating visibility impacts on one of the most impaired days. *Id.* ¶ 37. Utah explained that the most stringent NO_x scenario (BART benchmark) barely achieved greater modeled visibility improvement than the Alternative on these high nitrate days because high nitrate values occur primarily in the winter months. *Id.* Utah also took into consideration that there is greater uncertainty regarding the effect of NO_x reductions on wintertime nitrate values because past NO_x emission reductions have not resulted in corresponding reductions in monitored nitrate values during the winter months. Utah has greater confidence in the visibility improvement due to reductions of SO₂ because past SO₂ reductions

have resulted in corresponding reductions in monitored sulfate values throughout the year. *Id.* ¶ 38.

Utah's BART Alternative compared the NO_x, SO₂, and PM emission reductions achieved across all three PacifiCorp Plants (Hunter, Huntington, and Carbon) with the emission reductions that would be achieved through the installation of the most stringent control technology for NO_x—LNB/SOFA with SCR. *Id.* ¶ 39. The analysis showed that combined emissions of NO_x, SO₂, and PM would be 2,856 tons per year lower under the alternative scenario. *Id.*

The Alternative also showed that it would improve visibility on more days throughout the year, would achieve a greater average visibility improvement, and would achieve greater reductions in SO₂—the most significant anthropogenic pollutant during the high visitation months of March through November. *Id.* ¶ 40. The visibility improvement that would occur under the most stringent control technology for NO_x during the winter months was more uncertain. *Id.* ¶ 41. The fact that ammonium nitrate levels were decreasing during most of the year, but were increasing during the winter, was the best indication that the increase in ammonium nitrate was not due to changes in emissions because the emission changes are not seasonal. *Id.* Besides, the significant NO_x reductions that have already occurred due to controls installed pursuant to Utah's 2008 RH SIP and the related BART determinations have not reduced ammonium nitrate values during the winter months when ammonium nitrate values are the highest, possibly due to low levels of ammonia that limit the formation of ammonium nitrate. *Id.* ¶ 42.

The timing of the reductions also supported the BART Alternative, demonstrating that the early emissions reductions commenced in 2006 and would provide “a corresponding early and on-going visibility improvement.” *Id.* ¶ 43; *see also* Staff Review 2008 PM BART

Determination and Recommended Alternative to BART for NO_x, Utah Division of Air Quality (Utah Staff Review Report) at 1-13 (May 13, 2015).

Utah considered cost as one of the factors also weighing in favor of the BART Alternative. *Id.* ¶ 44. Utah found that the Alternative achieves better visibility improvements than the BART benchmark at a significantly lower cost, which presents a classic “win/win” scenario for all the affected parties. *Id.* The BART Alternative also avoided a \$2 million energy penalty and created environmental benefits from the closure of the Carbon plant. *Id.* ¶ 45. Specifically, the closure reduced water usage, eliminated wastewater discharge, eliminated production of solid wastes in the form of fly ash, reduced fugitive dust, eliminated all emissions, fuel use, and other maintenance, testing, and operational processes for emergency generators, fire pumps, and ancillary equipment at the Carbon plant. *Id.*

Utah has reviewed and prepared a detailed Technical Support Document consisting of six chapters and over 2,000 pages to support its PM₁₀ BART and NO_x BART Alternative determinations. *Id.* ¶ 46. Besides the 36-page staff review summarizing these determinations, the Technical Support Document includes PacifiCorp’s BART analysis for all units, Utah’s five-factor BART analysis update, DAQ’s engineering review, emissions inventory, IMPROVE monitoring data, and visibility modeling. *Id.*

Utah developed the BART Alternative for NO_x through close collaboration and consultation with EPA. *Id.* ¶ 47. Utah and EPA worked together as regulatory partners to ensure that Utah’s BART Alternative was approvable. *Id.* EPA submitted comments on Utah’s BART Alternative during the state rulemaking public comment period that did not point to any substantive flaws in Utah’s submission and did not direct Utah to weigh the evidence differently under the “weight of evidence” analysis. *Id.* ¶ 48. The only modifications EPA requested were

minor clarifications and revisions. *Id.* EPA only raised one substantive issue during the collaboration process—proper accounting for the SO₂ emissions reductions due to closure of the Carbon plant and clarification of emission inventory requirements for tracking compliance with the SO₂ milestone. *Id.* ¶ 49. Utah submitted its revised RH SIP for NO_x and PM to EPA on June 4, 2015. *Id.* ¶ 50. On October 20, 2015, Utah submitted a SO₂ commitment SIP to EPA pledging to revise SIP Section XX.D.3.c and State rule in Utah Administrative Code R307-150 by March 2018 to address these concerns. *Id.* ¶ 51. EPA did not take action on this SIP in its final rule, essentially causing Utah's efforts to draft and submit the SO₂ commitment SIP to become a wasted effort. *Id.*

II. The Final Rule Partially Disapproving Utah's RH SIP

EPA issued the final rule partially approving and partially disapproving Utah's 2015 RH SIP submission—just two years before the 2018 expiration of the first ten-year planning period covered by the revision. The final rule promulgates a FIP that requires the BART-eligible units to install SCR by August of 2021. *See* 81 Fed. Reg. 43907. To arrive at this decision, EPA reweighed the metrics Utah submitted in support of the BART Alternative (disregarding some of the metrics completely) and concluded that Utah's BART Alternative “does not demonstrate greater reasonable progress than BART.” *Id.* at 43896.

To support its “weight-of evidence” analysis under 40 C.F.R. § 51.308 in its 2015 RH SIP submission, Utah collected, evaluated, and weighed information from nine different metrics: (1) annual emissions of visibility-impairing pollutants; (2) improvement in the number of days with significant visibility impairment; (3) 98th percentile modeling impact (dv); (4) annual average impact (dv); (5) 90th percentile modeling impact (dv); (6) timing of emissions reductions; (7) results from IMPROVE monitoring data; (8) energy and non-air quality benefits; and (9) costs. *See* Utah Staff Review Report at 27; Utah's SIP, Section XX, Regional Haze (June

3, 2015). Utah fashioned its analysis around the considerations for determining BART, namely costs, energy and non-air quality benefits, existing pollution control equipment, and visibility improvement. Most of the metrics focused on visibility improvement because this is the most difficult factor to quantify and predict.

Utah's analysis considered all of these factors in their totality consistent with the Regional Haze Rule (RHR), which states, "Because each Class I area is unique, we believe States should have flexibility to assess visibility improvements due to BART controls by one or more methods, or by a combination of methods" 70 Fed. Reg. 39,104-01, 39,129 (July 6, 2005). The rule also reads that the "States are free to determine the weight and significance to be assigned to each factor." *Id.* at 39,130. Utah concluded that all factors except for the 98th percentile modeling impact (which slightly supports the BART benchmark more than the Alternative) supported the BART Alternative and therefore, the "weight of evidence shows that the alternative program will provide greater reasonable progress than BART." Utah Staff Review Report at 11-12. Utah weighed the relative strength and weaknesses of the 98th percentile metric and found it to be less reliable because it only measured the extreme tails of the model predictive. *Id.* at 24-25. The highest ends of the model are often influenced by non-anthropogenic factors—in this case lower temperatures in the winter that cause higher values of ammonium nitrate. Utah gave the early emissions reductions, the monitoring data, and the number of days with improved visibility impacts more weight than the single 98th percentile modeling impact factor. *Id.* at 16, 24-25.

In its final rule adopting the partial disapproval, EPA excluded energy and non-air quality benefits and costs from consideration and dismissed as inconclusive the annual emissions comparison for visibility-impairing pollutants that supported the BART Alternative because Utah

determined that SO₂ and PM emissions had equivalent, or stronger, impacts on visibility than NO_x emissions. EPA then imposed a novel and legally unsupportable test on weighing the evidence individually and collectively, that it has never applied in prior regional haze actions, and re-weighed the evidence, assigning less weight to some metrics and more weight to the other metrics or entirely dismissing some of the evidence as inconclusive. Most importantly, EPA assigned marginal weight to the actual monitoring data and placed the most weight on the 98th percentile metric, which is a modeled projection of visibility improvement on the selected worst days of the year.

ARGUMENT

Pending judicial review, EPA can “postpone the effective date of action taken by it” when “justice so requires.” 5 U.S.C. § 705. To determine whether justice requires imposition of a stay, EPA has applied the traditional four-factor analysis:⁷ (1) likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the stay is granted; and (4) the public interest in granting the stay. *See Chamber of Commerce v. Edmondson*, 594 F.3d 742, 764 (10th Cir. 2010); *Winter v. NRDC*, 555 U.S. 7, 20 (2008); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (D.D.C. 2012). The most critical factors of this test are the first two — the likelihood of success on the merits and irreparable harm. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). However, at the same time, an agency reviewing a request for a stay is to review these factors in their totality and not in a rigid or isolated manner. For example, if a party demonstrates that it satisfies the last three factors, a lesser showing may be sufficient with

⁷ EPA has traditionally applied the same test for stay as applies to judicial requests for preliminary injunctions. *See Corn Savings & Loan Ass’n v. Fed. Home Loan Bank Bd.*, 562 F. Supp. 279, 280 (E.D. Ark. 1983); *Schwartz v. Covington*, 341 F.2d 537, 538-39 (9th Cir. 1965); *Hamlin Testing Laboratories, Inc. v. U. S. Atomic Energy Comm’n*, 337 F.2d 221, 222 (6th Cir. 1964); *Nat’l Indian Youth Council v. Andrus*, 623 F.2d 694, 695 (10th Cir. 1980); *Associated Securities Corp. v. SEC*, 283 F.2d 773, 775 (10th Cir. 1960).

respect to the first factor. *See Fed. Lands Legal Consortium v. United States*, 195 F.3d 1190, 1195 (10th Cir. 1999) (if the moving party establishes that the last three factors of the test are in its favor, the party may ordinarily satisfy the first factor by “showing that questions going to the merits are so serious, substantial, difficult and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation”).⁸

For the reasons explained below, Utah satisfies all of these factors. Consequently, EPA should stay the portion of the final rule disapproving the NO_x BART Alternative and promulgating the FIP and toll the effective date of the rule pending judicial review.

I. Utah is Likely to Succeed on the Merits

A reviewing court will invalidate EPA action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law. . . .” 42 U.S.C. § 7607(d)(9). Agency action is arbitrary and capricious if the agency

(1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment.

San Juan Citizens Alliance v. Stiles, 654 F.3d 1038, 1045 (10th Cir. 2011) (quoting *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009).

The portion of the EPA’s final rule disapproving Utah’s NO_x BART Alternative and promulgating a FIP has serious flaws on a number of critical issues, including legal misinterpretations, improper application of statutes and regulations that govern BART

⁸ The Tenth Circuit may apply a heightened standard of review to “disfavored” preliminary injunctions. In *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc) (per curiam), the Tenth Circuit identified as disfavored: (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits. The stay requested here does not fall into any of these categories.

Alternative determinations, and flawed technical grounds. In addition, the CAA charges EPA to approve Utah's SIP if it meets the requirements of the Act. *See* 42 U.S.C. § 7410(k)(3) (emphasis added) ("In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator **shall** approve such submittal as a whole if it meets all of the applicable requirements of this chapter."). EPA may not disapprove a SIP based on a difference of opinion. *See Train v. Nat. Res. Def. Council*, 421 U.S. 60, 79 (1975).

Therefore, Utah is likely to succeed on the merits and will satisfy the Tenth Circuit's more liberal test of showing "that questions going to the merits are so serious, substantial, difficult and doubtful" that they are ripe for litigation and deserve a "more deliberate investigation." *Fed. Lands Legal Consortium*, 195 F.3d 1190, 1195; *see also Otero Sav. & Loan Ass'n v. Fed. Reserve Bank of Kansas City, Mo.*, 665 F.2d 275, 278 (10th Cir. 1981).

Additionally, the burden of proof on a movant to satisfy this element is low. A movant must only make a prima facie case "showing a reasonable probability that he will ultimately be entitled to the relief sought." *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980) (quoting *Crowther v. Seaborg*, 415 F.2d 437, 439 (10th Cir. 1969)). Utah satisfies this first most critical element of the test.

A. EPA Abused its Discretion by Imposing a Novel and Legally Unsupported Test for Weighing the Elements and Then Re-Weighing the Elements Under the "Weight-of-Evidence" Test and Substituting its Judgment for Utah's Reasonable Determination that BART Alternative Achieves Greater Reasonable Progress than BART

The CAA "uses [a] cooperative-federalism approach to regulate air quality." *Oklahoma v. EPA*, 723 F.3d 1201, 1204 (10th Cir. 2013) (quoting *U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1159 (10th Cir. 2012)). As the D.C. Circuit explained under this approach, "EPA determines the . . . standards of air quality—but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends through state implementation

plans and timetables of compliance” *Virginia v. EPA*, 108 F.3d 1397, 1408 (D.C. Cir. 1997) (quoting *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036-37 (7th Cir. 1984)). The federalism requirements of the SIP development process are reinforced by President Clinton’s Executive Order 13,132 issued on August 4, 1999. The Order directs EPA to avoid actions limiting the policymaking discretion of individual states unless there is both constitutional and legislative authority to override a state, granting the states “the maximum administrative discretion possible.” 64 Fed. Reg. 43,255, 45,256 (1999). This directive is consistent with the congressional intention that the states are the primary authors of their own SIPs and should be afforded considerable deference in interpreting and implementing SIP programs.

EPA is obligated to approve a SIP that meets all the applicable requirements of the CAA and the Regional Haze Rule. *See* 42 U.S.C. § 7410(k)(3); *see also Train*, 421 U.S. at 79 (finding that the CAA gives the EPA “no authority to 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).”). Under the holdings of various courts across the nation, EPA’s review of the states’ SIP submissions is limited to finding errors and lack of compliance with the federal requirements⁹ but does not go as far as substituting EPA’s discretion for a state’s reasonable discretion.

By imposing EPA’s contrary opinion on the nine metrics where Utah’s approach complied with the CAA and the Regional Haze Rule, EPA violated the CAA’s “cooperative federalism” framework. *See Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013). The RH SIP framework is designed to allow a state to create programs that meet the

⁹ *See e.g. Oklahoma v. EPA*, 723 F.3d 1201 (10th Cir. 2013) (denying Oklahoma’s petition for review of EPA’s disapproval of Oklahoma’s SIP because the state cited erroneous financial data in support of using . . .); *See Texas v. EPA*, 2016 WL 3878180, at *1 (citing *Luminant Generation Co. LLC v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012) (internal quotation marks omitted) (holding that the CAA “confines EPA’s role in implementing air quality standards” to “reviewing SIPs for consistency with the Act’s requirements.”); *North Dakota v. EPA*, 730 F.3d 750 (8th Cir. 2013) (finding that EPA’s disapproval of BART determinations by North Dakota for coal-powered electricity generating plant was not arbitrary, capricious, or abuse of discretion because analysis contained data flaws that led to overestimated cost of compliance under CAA).

federal requirements and at the same time balance costs and visibility improvements, taking into account the interests of the states' citizens and economy. EPA acts arbitrarily and capriciously when it ignores this framework and substitutes its own discretion for a state's discretion contrary to the CAA, which indicates "a congressional preference that states, not EPA, drive the regulatory process." *Texas v. EPA*, 2016 WL 3878180, at *1.

Against this backdrop, Utah's RH SIP for NO_x BART satisfied all of the applicable statutory and regulatory criteria. An approvable BART alternative must satisfy the following elements: (1) a demonstration that the alternative measure "will achieve greater reasonable progress than would have resulted from the installation and operation of BART at all sources subject to BART in the State and covered by the alternative program;" (2) a requirement that "all necessary emission reductions take place during the period of the first long-term strategy for regional haze;" and (3) a demonstration that "the emission reductions resulting from . . . [the] alternative measure will be surplus to those reductions resulting from measures adopted to meet requirements of the CAA as of the baseline date of the SIP." 40 C.F.R. § 51.308(e)(2)(i)-(iv). The first element is at issue in this final action because EPA correctly found that Utah's BART Alternative for NO_x met the second and third requirements. *See* 81 Fed. Reg. 2004, 2025-2026, 2032 (Jan. 16, 2016) (proposed rule). Utah chose to demonstrate greater reasonable progress using the "weight-of-evidence" test under 40 C.F.R. Section 51.308(e)(2).

Utah's RH SIP for NO_x BART Alternative included analysis of nine factors selected by the state (including cost of compliance and energy and non-air quality environmental impacts of compliance), supported by visibility modeling, actual monitoring data of haze-causing particles, and a demonstration of early and on-going visibility improvement contained in the detailed Technical Support Document. Utah elected to use a number of different factors to compare the

BART Alternative to the BART benchmark (the most stringent control technology—LNB/SOFA with SCR), including reductions of SO₂ and PM in addition to NO_x and the variability in timing of visibility improvements depending on the season.

Only one out of the nine metrics—the 98th percentile modeled impact—did not support the finding that the BART Alternative achieves greater reasonable progress than BART. *See* Utah Staff Review Report at 24. However, this metric is only marginally non-supportive of the BART Alternative for two reasons: (1) the metric shows greater visibility improvement under the BART benchmark at five out of nine Class I areas subject to the final rule, i.e. only slightly more than half (55%) of the areas show preference for BART benchmark (with an average difference of just 0.14 dv); and (2) the modeling captured visibility improvement on the high nitrate days without considering seasonal changes in nitrates due to winter temperatures rather than emissions from stationary sources. IMPROVE monitoring data demonstrates that there is greater uncertainty regarding the effect of NO_x emissions reductions on wintertime nitrate values because past NO_x emission reductions have not resulted in corresponding reductions in monitored nitrate values during the winter months.¹⁰ Ammonium nitrate levels were decreasing during most of the year, but were increasing during the winter, which was the best indication that the increase in the ammonium nitrate was not due to changes in emissions because the emission changes are not seasonal.

In its final rule, EPA overstepped its statutory and regulatory authority of reviewing SIPs “for consistency with the Act’s requirements,” and instead re-weighed each of the factors to arrive at the opposite conclusion. *See Luminant Generation Co. LLC v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012) (citing 42 U.S.C. § 7410(k)(3)).

¹⁰ To contrast, reductions of SO₂ have resulted in corresponding reductions in monitored sulfate values throughout the year.

B. EPA Arbitrarily and Capriciously Excluded Cost and Non-Air Quality Benefits from the BART Alternative Determination

EPA arbitrarily and capriciously found that the costs of compliance and energy/non-air quality environmental impacts should not be assigned any weight because they “do not evaluate visibility benefits at the nine Class I areas impacted by the State’s sources.” 81 Fed. Reg. 43894-01, 43897. However, consideration of these factors is required by the CAA, 42 U.S.C. § 7491(g)(2), and the analysis of these factors are part of the BART Guidelines (which EPA cites in the final rule as relevant authority for its disapproval), 40 C.F.R. pt. 51, App’x Y. The CAA directs that for purposes of “determining best available retrofit technology the State . . . shall take into consideration the costs of compliance, the energy and nonair quality environmental impacts of compliance” 42 U.S.C. § 7491(g)(2). Evaluation of cost and non-air quality benefits is an explicit part of the BART Guidelines that EPA relies on to evaluate Utah’s BART Alternative (specifically the 98th percentile metric). *See* 40 C.F.R. pt 51, App’x Y, § IV.D.4.i.

EPA refused to follow the law, and its own related guidance, and assign any weight at all to these two factors in evaluating the BART Alternative. Yet both of these factors have a substantial impact when one compares the BART benchmark to the BART Alternative. Utah correctly placed significant weight on the zero additional cost for the BART Alternative and the greater reasonable progress resulting from it:

The costs to Utah rate payers (and those in other states served by PacifiCorp) to replace the power generated by the Carbon Plant have already occurred; there will be no additional cost to achieve the co-benefit of visibility improvement. In other words, the Alternative Measure achieves better visibility improvements than would be achieved by requiring SCR as BART at the four EGUs, and at a significantly lower cost. **This presents a classic “win/win” scenario –the Alternative Measure results in greater reasonable progress and that greater reasonable progress is achieved at a much lower price compared to SCR.**

Utah Staff Review Report at 27 (emphasis added). Further, Utah properly took into account the energy penalty associated with the most stringent NO_x control at over \$2 million per year and

other environmental non-air quality impacts. *See id.* at 26, Table 13. These impacts resulted from the closure of the Carbon plant, which reduced solid waste, wastewater discharge, water use, fugitive dust, and eliminated air emissions, fuel use, and maintenance of the plant equipment. *See id.* at 26.

EPA erred in dismissing these metrics, which clearly weigh in favor of the BART Alternative. Instead, EPA imposed a FIP that will cost rate payers \$700 million and result in projected incremental modeled improvement in visibility of only 0.14 dv over the BART Alternative according to only one metric. *See* PacifiCorp's Comments Re: Approval, Disapproval and Promulgation of Air Quality Implementations Plans; Partial Approval and Partial Disapproval of Air Quality Implementation Plans and Federal Implementation Plan; State of Utah; Revisions to Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze (PacifiCorp's Comments) at 1, n.2 ("... adding LNB/OFA/SCR to the Utah BART Units will cost approximately \$170 million for each unit, with the total for all four Utah BART Units exceeding \$700 million.") (March 14, 2016); 81 Fed. Reg. at 2030 (footnote omitted) ("On the whole, when using this method, the BART Benchmark is slightly better on average across all years and nine Class I areas (0.14 dv difference).").

C. EPA's FIP Violates Applicable Laws and is not Legally Sustainable

In the event the state has not complied with the requirements of the CAA, EPA can become a primary regulator by promulgating a federal implementation plan within two years of disapproval. 42 U.S.C. § 7410(c)(1). EPA promulgates the federal implementation plan "to fill all or a portion of a gap . . . in a State implementation plan." *Id.*, § 7602. Consequently, EPA's obligations and authority to promulgate the federal implementation plan are the same as the state's when promulgating its implementation plan. *See, e.g.*, 77 Fed. Reg. 40,150, 40,164 (July 6, 2012) ("At the point EPA becomes obligated to promulgate a FIP, EPA steps into the State's

shoes, and must meet the same requirements. . . .”). In this case, EPA’s FIP violates applicable laws and is not legally sustainable for the following reasons.

First, EPA’s FIP requires implementation of the control measures (SCR) by 2021, which is beyond the current regional haze planning period ending in 2018.¹¹ EPA may not include BART measures that would be implemented beyond the current implementation period in a FIP that is ostensibly filling a gap in the revision that covers the period ending in 2018. The Regional Haze Rule requires states to develop an implementation plan for the period from 2009–2018 and to submit revised plans for each ten-year period thereafter. 40 C.F.R. § 51.308(b), (f). Initial state implementation plans were due December 17, 2007.¹² *Id.* § 51.308(b). When it promulgated the Regional Haze Rule, EPA elected to bind states to a ten-year revision period. 40 C.F.R. § 51.308(f). When EPA steps into the shoes of a state to develop a federal implementation plan, that period is as binding on EPA as it was on the state. *See* 77 Fed. Reg. at 40,164 (“At the point EPA becomes obligated to promulgate a FIP, EPA steps into the State’s shoes, and must meet the same requirements. . . .”). EPA has definitively stated that the first regional haze planning period for Utah ends in 2018. 77 Fed. Reg. 28,825, 28,838 (May 16, 2012) (“The first planning period ends in 2018.”); 77 Fed. Reg. 74,355, 74,368 (Dec. 14, 2012) (“Nor, at this time, are such emissions increases expected during the first planning period (2003-2018).”)

The regional haze planning process is iterative, as provided by both the CAA and the Regional Haze Rule. *See* 64 Fed. Reg. at 35,734 (requiring “control strategies to cover an initial implementation period extending to the year 2018, with a reassessment and revision of those

¹¹ EPA has proposed an amendment to the RH rule to extend the deadline for the states’ comprehensive SIP revisions for the second implementation period to 2021. 81 Fed. Reg. 26,942 (May 4, 2016) (proposing revisions to 40 C.F.R. § 51.308(f)). The amendment extends the SIP revision submission deadline only and not the length of the implementation period. *Id.* at 26,944 (EPA does not intend for “the proposed changes to affect the development of state plans for the first implementation period . . . due under the existing Regional Haze Rule.”).

¹² Utah’s initial regional haze state implementation plan was timely submitted in 2003.

strategies, as appropriate, every 10 years.”). Therefore, it was improper for EPA to prescribe installation of SCR in 2021 because Utah had to require installation of BART controls by 2018.

EPA addresses this argument in its response to comments, claiming that because it promulgates the RH FIP for Utah under 40 C.F.R. § 51.308(e)(1), the controls must be installed under the FIP “as expeditiously as possible” instead of by the end of the first planning period as 40 C.F.R. § 51.308(e)(2) requires. EPA Response to Comments, Docket No. EPA-R08-OAR-2015-0463 at 338. EPA’s argument is unpersuasive because it contradicts EPA’s prior statements on the timing of the BART determinations in other states and the end of the planning period for Utah. For example, in promulgating the final rule for Wyoming BART determinations, EPA commented, “[a]dditionally, BART is required in the first planning period, which ends in 2018, and is required to be installed as expeditiously as practicable” 79 Fed. Reg. 5032-01, 5055 (Jan. 30, 2014). And also, “The requirement for states to implement BART applies during the first planning period ending in 2018 and is the first increment of progress.” *Id.* at 5170. Similarly, in approving Maine’s revision to the Maine SIP addressing regional haze for the first planning period from 2008 through 2018, EPA stated, “States must determine BART eligibility and controls only during this first planning period and therefore Maine is not required to reevaluate its BART determination if utilization of the boiler increases.” 77 Fed. Reg. 24385-01, 24387 (April 24, 2012). In taking the final action on Arizona’s regional haze SIP, EPA articulated this requirement as follows, “While the goal of the regional haze program is to achieve natural visibility conditions in all mandatory Class I Federal areas by 2064, the requirement for states to implement BART applies only during the first planning period ending in 2018.” 77 Fed. Reg. 72512, 72534 (Dec. 5, 2012).

Second, when establishing the baseline emissions in order to calculate the cost-effectiveness of the SCR, EPA did not take into account the impact of the existing controls. EPA violated the CAA and BART Guidelines, as this error skewed the BART analyses when it comes to cost-effectiveness. *See* 42 U.S.C. § 7491(g)(2) (requiring the regulating agency to take into account “any existing pollution control technology in use at the source[.]”); 40 C.F.R. pt. 51, App’x Y, § IV.D.4.d (emphasis added) (“[t]he baseline emissions should represent a **realistic** depiction of **anticipated** annual emissions for the source. In general, for the existing sources subject to BART, you will estimate the anticipated annual emissions based upon actual emissions from a baseline period.”); *see also North Dakota v. EPA*, 730 F.3d 750, 762, 764 (8th Cir. 2013) (holding that EPA’s refusal to consider the existing pollution control technology that was installed voluntary two years prior EPA’s BART determination for purposes of calculating cost-effectiveness was arbitrary and capricious).

Third, the FIP is imposing \$700 million in installation costs without any corresponding perceptible visibility benefit. At best, EPA claims one metric out of nine shows an average of 0.14 dv improvement from the BART benchmark over the Alternative, an imperceptible modeled visibility improvement costing over one half a billion dollars. The imposition of such costs without any corresponding benefit is irrational and unlawful. *See* 42 U.S.C. § 7491(g)(1) (including “the costs of compliance” in determination of reasonable progress); *Michigan v. EPA*, 135 S. Ct. at 2707 (“One would not say that it is even rational . . . to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.”).

II. Absent an Immediate Stay, Utah will Suffer Irreparable Harm

The courts generally consider three factors in evaluating the harm that will occur: (1) the substantiality and seriousness of the alleged injury; (2) the likelihood of its occurrence (i.e. the injury must be actual and not purely speculative); and (3) the adequacy of the proof provided.

See Cuomo v. United Nuclear Regulatory Comm'n, 772 F.2d 972, 977 (D.C. Cir. 1985); *see also Vill. of Logan v. U.S. Dep't of Interior*, 577 F. App'x 760, 766 (10th Cir. 2014) (quoting *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (finding that the injury must be "actual and not theoretical"). When determining whether a petitioner satisfied this prong, the courts assign more weight to irreparability of the injury rather than its magnitude. *See e.g. Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012); *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985) ("Federal courts have long recognized that, when 'the threatened harm is more than de minimis, it is not so much the magnitude but the irreparability that counts for purposes of a preliminary injunction."). An injury is irreparable when any of the following circumstances are present: (1) "it is not practicable to calculate damages to remedy this kind of harm", *Foodcomm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003); (2) damages would not be available due to the government's sovereign immunity, *see, e.g., Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) ("Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury"); *Patton v. Dole*, 806 F.2d 24, 28 (2d Cir. 1986) (finding irreparable harm where plaintiff likely would have no damages claim because of the federal government's sovereign immunity); (3) expenditures required by the rule will interfere with the states' sovereign priorities. "Directing a priority expenditure from the state treasury 'may derange the operations of government, and thereby cause serious detriment to the public.'" *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers) (quoting *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870)).

As discussed below, the facts presented in this request demonstrate that Utah will suffer irreparable harm if EPA does not stay the final rule and toll the effective date of the FIP.

EPA's FIP became effective on August 4, 2016, and requires PacifiCorp to complete installation of the SCR on all four units within five years of the effective date. Taking into account the complexity of the installation and the number of units subject to the FIP, five years is a stringent deadline. PacifiCorp must begin procuring goods and services necessary to comply with the FIP. In other words, PacifiCorp cannot delay the installation until the Tenth Circuit resolves the legal challenge to the final rule. Thus, if EPA does not stay the rule, PacifiCorp would be incurring substantial unnecessary costs to install SCR in the likely event that the Tenth Circuit overturns the final rule. The substantial costs could cause PacifiCorp to decide to retire some plants early to comply with the FIP. It would be cost-prohibitive to reopen the affected plants in the event the court ultimately concludes that EPA acted unlawfully.

Any costs PacifiCorp will incur in the process of complying with the FIP will be passed on to Utah's citizens and businesses in the form of higher electricity rates, which EPA acknowledges are "not trivial" and will potentially go up 5 to 10%. EPA Response to Comments, Docket No. EPA-R08-OAR-2015-0463 at 370; *see also supra* n.3. Currently, Rocky Mountain Power (the business name under which PacifiCorp operates in Utah) supplies electricity to more than 1.8 million residential and business customers in Utah (including Utah state government offices) and five other western states. Utah clearly has an economic interest at stake, and if the Tenth Circuit overturns the final rule, Utah cannot recover these costs from EPA because of federal sovereign immunity. Therefore, Utah's harm is irreparable because it cannot be redressed monetarily. *See Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("[N]umerous courts have held that the inability to recover monetary damages

because of sovereign immunity renders the harm suffered irreparable.”); *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996); *Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001); *Thunder Basin Coal Co.*, 510 U.S. at 220-21 (Scalia, J concurring).

The expenses that Rocky Mountain Power’s Utah customers will incur are analogous to a situation where a party suffers monetary damages that are not otherwise recoverable. Courts have held that “[i]mposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.” *Edmonson*, 594 F.3d at 770-71 (finding that various business organizations would suffer irreparable harm if they had to pay a tax later deemed unconstitutional because they would not be able to recover taxes paid to the state due to the state’s sovereign immunity); *see also Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (finding that an order directing law firm to temporarily repay fees to its Indian tribe client would have caused irreparable harm to the law firm due to the Indian tribe’s sovereign immunity and inability to repay the fees at a later date); *Kansas Health Care Ass’n v. Kansas Dep’t of Social & Rehabilitation Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994) (finding irreparable harm based on the petitioner’s inability to recover funds from the government defendant).

The economic impact of EPA’s FIP is not limited to the increased rates but may also result from the early closure of the plants subject to the regulation. The two plants, Hunter and Huntington, operated and largely owned by PacifiCorp, are located in Emery County, Utah. Presently, Emery County faces significantly higher unemployment than the rest of the state and the United States. Emery County has 7.0% unemployment compared to the state and nationwide averages of 4.0% in and 4.9% respectively.¹³ Jobs in the utility and mining industries represent

¹³ Economic Snapshot – Emery County Unemployment Rate June 2016, <http://jobs.utah.gov/wi/regions/county/emery.html> (last visited September 1, 2016).

nearly 30% of the private sector jobs in Emery County, and of those combined industry jobs, PacifiCorp's plant operations constitute 60%.¹⁴ Plant closures would have permanently deleterious effects on the employment and infrastructure of the rural communities in the county and surrounding areas. The mining industry will be affected also. A good example is the Deer Creek Canyon Mine owned and operated by PacifiCorp subsidiary Energy West Mining. The 2015 closure of the mine resulted in the loss of 182 jobs in Emery County.¹⁵

Absent a stay of the final rule, Utah will also experience significant regulatory complications in preparing Utah's plan to comply with the CPP rule. Decl. of Bryce Bird ¶ 52. Even though the U.S. Supreme Court has currently stayed the CPP rule, the D.C. Circuit Court of Appeals is handling the CPP legal challenge on an expedited basis. *Id.* ¶ 53. The full court (en banc) will hear arguments on the merits on September 27, 2016 with the decision to be expected in early 2017. *Id.* A petition for writ of certiorari to the U.S. Supreme Court is highly likely and, if granted, the final decision on CPP may issue as early as the beginning of 2018. *Id.*

In the event the courts uphold CPP, Utah would need to immediately begin preparing its state plan even if EPA or the courts extend compliance deadlines. *Id.* ¶ 54. CPP imposes significant obligations on the states beyond what the states have experienced under the Clean Air Act or any other federal rule. *Id.* Preparing a state plan will be a complicated task, which will take Utah some time to complete. *Id.* ¶ 55. Among other things, it will involve interstate

¹⁴ "Employment and Wages Emery County 4th Quarter 2015," available at <http://jobs.utah.gov/jsp/wi/utalmis/industrydetail.do> (last visited September 1, 2016); *see also* Hunter Plant II Fact Sheet, http://www.pacificorp.com/content/dam/pacificorp/doc/Energy_Sources/EnergyGeneration_FactSheets/RMP_GFS_Hunter.pdf (last visited September 1, 2016); Huntington Plant Fact Sheet, http://www.pacificorp.com/content/dam/pacificorp/doc/Energy_Sources/EnergyGeneration_FactSheets/RMP_GFS_Huntington.pdf (last visited September 1, 2016).

¹⁵ Jason Lee, *PacifiCorp to close Deer Creek Mine in 2015*, Des. News., Dec. 15, 2014, available at <http://www.deseretnews.com/article/865617785/PacifiCorp-to-close-Deer-Creek-Mine-in-2015.html?pg=all> (last visited September 1, 2016); *see also* Barry Casell, *PacifiCorp clears way for permanent shutdown of Deer Creek coal mine in Utah*, Aug. 10, 2015, available at <http://www.power-eng.com/articles/2015/08/pacificorp-clears-way-for-permanent-shutdown-of-deer-creek-coal-mine-in-utah.html> (last visited September 1, 2016).

collaboration, interagency analyses, working with the regulated community, and consultation with various stakeholders to determine what is technically feasible. *Id.*

As part of its CPP compliance plan, Utah may opt to develop a tradable emissions allowance system, where the facilities would need to begin retiring an allowance for each ton of CO₂ they emit. *Id.* ¶ 56. If CPP withstands legal challenge, Hunter and Huntington plants will be subject to the rule. *Id.* ¶ 57. Installing SCR controls required by the regional haze FIP at this time would make it more likely that these plants would have to continue to operate to recoup the costs of controls and, at the same time, continuing operation would become increasingly costly as CPP allowances become more scarce over time. *Id.* This is where the measures required by the CPP and the regional haze FIP imposed by EPA may be at odds. *Id.* ¶ 58. The CPP will put pressure on all coal-fired power plants, including Hunter and Huntington, to either close, curtail operations, or continue operating at higher costs due to the allowance retirement requirement. *Id.* Whereas, the installation of SCR under the FIP will necessitate continued operation of these plants at the current capacity in order to recover the significant capital investment costs. *Id.*

Taking into account a finite useful life of these units, addition of SCR will complicate Utah's regulatory scheme for these units in order to ensure compliance with CPP statewide as well as other long-term planning and regulatory goals. Decl. of Bryce Bird ¶ 59. If installation of SCR goes forward as required by the FIP, this harm is irreparable because it could not be redressed monetarily. *Id.*

In the final CPP rule, EPA itself acknowledged the connection between the CPP requirements and the reasonable progress requirements of the Regional Haze Rule and the potential impacts on the affected EGUs. *See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64662-01, 64923 (Oct. 23,

2015). Specifically, EPA recognized that the EGUs subject to BART requirements in the 2016-2021 timeframe “could ultimately be faced with the potential for stranded assets as a result of state 111(d) [CPP] plans” if they choose to retire to comply with the CPP. *Id.* To address this issue, EPA recognized that “states have the option of developing BART alternatives that replace control requirements that would otherwise result in stranded assets at a particular EGU” *Id.* Additionally, EPA pledged to “continue to work with states to explore options for integrating compliance requirements” to mitigate this issue. *Id.* Therefore, EPA must take into account this regulatory complexity and the resulting harm and stay the RH FIP in order to integrate compliance requirements of the CPP and RHR and avoid or at least significantly mitigate the possibility of stranded assets.

Finally, the installation and operation of SCR at Hunter and Huntington will involve a lengthy permitting process. Decl. of Bryce Bird ¶ 60. Due to the five-year compliance deadline under the FIP and the time necessary to obtain permits, PacifiCorp will need to apply for the permits immediately. *Id.* ¶ 61. The permitting process will involve staff review and development of draft permits, public notice and possible public hearings, and likely extensive public input requiring a detailed response to expected comments on the proposed permit changes. *Id.* ¶ 62. Groups that usually oppose coal-fired power plants are likely to comment and object to the proposed permits. *Id.* ¶ 63.

John Jenks, the engineer who will be preparing these permits, is currently working on Utah’s Serious Area PM_{2.5} SIP because he has substantial experience with the refinery operations. *Id.* ¶ 64. Mr. Jenks also has substantial expertise with the power plant permits. *Id.* ¶ 65. He was the project engineer on the most recent permitting actions for Hunter and Huntington and, therefore, would be assigned to lead the permitting effort for installation of SCR required by

the FIP. *Id.* Due to the FIP time frames, Mr. Jenks's priorities would shift from working on Serious Area PM_{2.5} SIP (a health-based standard) to permitting SCR for Hunter and Huntington (the task of improving visibility in the national parks). *Id.* ¶ 66.

As the permitting process must begin immediately in order to comply with the FIP deadline, Utah will be harmed by devoting its resources to a permitting project that may be unnecessary. Such harm is irreparable as it interferes with Utah's sovereign priorities, requiring certain unnecessary expenditures. *See Barnes*, 501 U.S. at 1304.

EPA's final rule also prevents Utah's agencies like the Utah Division of Air Quality from fulfilling its regulatory function of fashioning a regional haze program that meets statutory and regulatory requirements while balancing costs and visibility improvement in a matter appropriate for the citizens and economy of the state. The final rule imposes sovereign harm on Utah by displacing the system of cooperative federalism laid out in the CAA.

III. The Remaining Factors Strongly Favor a Stay

The third factor looks at whether a stay will "substantially injure the other parties interested in the proceeding." *Nken*, 556 U.S. at 426. The analysis of this factor likewise supports granting of the stay. There is no harm to the public when it comes to visibility in Class I areas at issue for two reasons: (1) any potential improvement in visibility (the only consideration of the regional haze program) from installation of SCR is imperceptible to human eye; and (2) Utah is meeting its reasonable progress goals, which EPA has approved in 2012.

Installation of SCR under the current FIP will not improve visibility as observed by visitors to Class I areas because even EPA's modeled improvement is imperceptible to the human eye. EPA's modeling shows that its FIP results in SCR-related visibility improvement of less than 1 dv down to 0.02 dv when "most people can detect a change in visibility at one dv."

Approval, Disapproval and Promulgation of Air Quality Implementation Plans; Partial Approval

and Partial Disapproval of Air Quality Implementation Plans and Federal Implementation Plan; Utah; Revisions to Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze, 81 Fed. Reg. 2004, 2009 (Jan 14, 2016) (proposed rule). In its recent proposed rule Protection of Visibility: Amendments to Requirements for State Plans, EPA also recognizes significant differences in visibility improvements between the eastern and western states due to natural events and geography. *See* 81 Fed. Reg. 26942-01, 26946. EPA acknowledges that the considerable visibility improvements (4 to 7 dv) occurred only in eastern Class I areas on the 20 percent haziest days. *See id.* Whereas some western Class I area experienced either less improvement (1 to 4 dv) or reductions in emissions from “man-made sources have been overwhelmed by impacts from wildfire and/or dust events.” *Id.* “There are also some western areas where visibility has changed only by a slight amount.” *Id.* Therefore, EPA’s own evaluation demonstrates that the emission controls are less effective in western states when compared to eastern states.

Further, haze conditions within the state are steadily improving ahead of the schedule because Utah is meeting and exceeding its reasonable progress goals. In 2012, EPA approved Utah’s “reasonable progress” determination for its RH SIP in its entirety. *See* Approval, Disapproval and Promulgation of State Implementation Plans; State of Utah; Regional Haze Rule Requirements for Mandatory Class I Areas Under 40 CFR 51.309, 77 Fed. Reg. 74355-02, 74367-68 (Dec. 14, 2012). EPA found that “the State met all reasonable progress requirements for the Class I areas,” and the controls in Utah’s 2008 RH SIP, including BART controls, would result in “a significant decrease in stationary source NO_x and SO₂ emissions.” *Id.* As further proof of the accuracy of this determination, Utah is not only meeting but also exceeding its reasonable progress goals. On May 18, 2015, Utah submitted its Reasonable Progress report to

EPA, demonstrating reasonable progress towards the established goals as required by law. *See* Progress Report for Utah's State Implementation Plan for Regional Haze (Progress Report 2015) at F-11, Table 2.1 (May 18, 2015). The report showed that the installation of the controls on Huntington Unit 1 in 2010 and Huntington Unit 2 in 2006 decreased annual emissions of SO₂ by 15,802 tons and NO_x by 5,529 tons between 2002 (for Unit 1)/2003 (for Unit 2) and 2014. *See* Progress Report 2015 at F-13. These decreases offset some of the increases seen during the 2005-2009 progress period due to large fire events in July and August of 2009 that increased particulate organic mass in Bryce Canyon and Capitol Reef National Parks. *See id.* at F-10. Table 2.1 shows that during 2005-2009 progress period, Bryce Canyon and Capitol Reef did not show visibility improvement on the 20% most impaired days. *See id.* at F-11. However, both of these areas showed improvement during the 2011-2013 period above the 2018 preliminary reasonable progress case. *See id.*

In its Progress Report 2015, Utah also “determined that the current implementation plan elements and strategies are sufficient to meet all established reasonable progress goals” *Id.* at F-165. This current implementation plan did not include EPA's FIP SCR installation requirement; and such requirement would be unnecessary because Utah is meeting and exceeding the reasonable goals in the Class I areas in the state.

The remaining factor looks at “where the public interest lies.” *Nken*, 556 U.S. at 426. In this case, the public interest strongly favors granting the stay. There is a broad public interest in maintaining the CAA's system of “cooperative federalism.” *Dominion Transmission*, 723 F.3d at 240. Under this system, state regulators, who have better knowledge of the local issues, economy, and conditions, can design state implementation plans that both meet federal statutory and regulatory requirements and balance costs with visibility improvements. State citizens

certainly have an interest in their agencies being able to enact policies that meet the needs of the state's population and economy and strike the appropriate balance between competing needs.

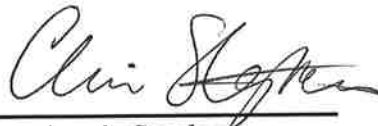
Moreover, the public has an interest in lower electricity rates, especially when compared with the imperceptible visibility improvement that installation of SCR may achieve at a \$700 million cost.

CONCLUSION

For the foregoing reasons, EPA should grant Utah's request to stay a portion of the final rule disapproving NO_x BART Alternative and promulgating FIP and toll the effective date of the rule.

Respectfully submitted this 1 day of September 2016.

Sean D. Reyes
Utah Attorney General



Christian C. Stephens
Marina V. Thomas
Craig W. Anderson
Assistant Attorney Generals
Utah Attorney General's Office
Environment Division
195 North 1950 West
P.O. Box 140873
Salt Lake City, UT 84114-0873
cstephens@utah.gov
marinathomas@utah.gov
canderson@utah.gov

***Counsel for State of Utah, on behalf of
the Department of Environmental Quality,
Division of Air Quality***