UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 12-3084

STATE OF NEBRASKA,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and
LISA P. JACKSON, Administrator,

Respondents.

No. 12-3085

NATIONAL PARKS CONSERVATION ASSOCIATION and SIERRA CLUB,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LISA P. JACKSON, Administrator, United States Environmental Protection Agency,

Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
(EPA-R07-OAR-2012-0158)

OPENING BRIEF OF NATIONAL PARKS CONSERVATION ASSOCIATION AND SIERRA CLUB

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Congress set aside some of the most breathtaking landscapes and ecologically important areas as national parks, and instructed EPA to restore the air quality in national parks so that all Americans can use and enjoy them. This case is about EPA's failure to protect our national parks from air pollution.

Gerald Gentleman Station, a large power plant, is the single largest source of air pollution in the state of Nebraska, and has operated for over thirty years with no controls on its sulfur dioxide pollution. Recognizing the harmful impacts that many old power plants have on national parks, Congress amended the Clean Air Act to require that plants like Gerald Gentleman install pollution controls representing the best available retrofit technology ("BART"). EPA's plan allows Gerald Gentleman to continue emitting tens of thousands more tons of sulfur dioxide per year than the Clean Air Act allows, thwarting the statute's goal of eliminating air pollution in our national parks.

Petitioners National Parks Conservation Association and Sierra Club (collectively, the "Conservation Organizations") respectfully request oral argument in this case due to the complex and important issues at stake. The Conservation Organizations request 20 minutes to present their case.

CORPORATE DISCLOSURE STATEMENT

National Parks Conservation Association: National Parks Conservation Association has no parent companies, and there are no publicly held companies that have a 10% or greater ownership interest in National Parks Conservation Association.

National Parks Conservation Association, a corporation organized and existing under the laws of the District of Columbia, is a nonprofit organization dedicated to protecting and enhancing America's national parks for present and future generations.

Sierra Club: Sierra Club has no parent companies, and there are no publicly held companies that have a 10% or greater ownership interest in Sierra Club.

Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

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GLOSSARY

BART	Best Available Retrofit Technology
Dv	Deciview
EPA	United States Environmental Protection Agency
FIP	Federal Implementation Plan
GGS	Gerald Gentleman Station
lbs/MMBtu	Pounds per Million Metric British Thermal Units
NO_x	Nitrogen Oxides or Oxides of Nitrogen
NPCA	National Parks Conservation Association
RAVI	Reasonably Attributable Visibility Impairment
SIP	State Implementation Plan
SO_2	Sulfur Dioxide

JURISDICTIONAL STATEMENT

I. THIS COURT HAS JURISDICTION OVER PETITIONERS' CLAIMS.

This Court has jurisdiction to review EPA's partial approval and partial disapproval of a revision to Nebraska's State Implementation Plan ("SIP" or "Haze Plan") and issuance of a federal implementation plan. *See* 42 U.S.C. § 7607(b)(1) ("A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit."). As EPA's approval of the state plan and EPA's promulgation of a federal plan are applicable to Nebraska, *see* 77 Fed. Reg. 40,150 (July 6, 2012), venue is proper in this Court. *See* 42 U.S.C. § 7607(b)(1). EPA had jurisdiction to issue the final Nebraska regional haze rule pursuant to 42 U.S.C. §§ 7491 and 7492.

The Conservation Organizations timely filed this petition for review on September 4, 2012. Under the Clean Air Act, petitions for review of EPA action in approving a SIP or promulgating a FIP must be filed within 60 days from publication of the approval or promulgation in the Federal Register. 42 U.S.C. § 7607(b)(1). Because September 4, 2012 was the sixtieth day after the challenged final action was published in the Federal Register on July 6, 2012, this petition is timely.

The final section of the brief addresses jurisdictional arguments EPA raised in support of its unsuccessful motion for a further stay of these proceedings.

II. THE CONSERVATION ORGANIZATIONS HAVE STANDING TO BRING THIS CASE.

Petitioners have standing to challenge EPA's final Nebraska Haze Plan. "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). In addition, "[a]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 181 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

Petitioners NPCA's and Sierra Club's members would have standing on their own to challenge EPA's decision, as their use and enjoyment of the Badlands and Rocky Mountain National Park is harmed by haze pollution from Gerald Gentleman Station. *See* Declaration of Lilias Jarding (attached hereto as

Addendum 93-97) ("Jarding Decl."); Declaration of Alan Apt (attached hereto as Addendum 98-102) ("Apt Decl."); Declaration of Chris Applegate (attached hereto as Addendum 103-108) ("Applegate Decl."). These injuries to NPCA's and Sierra Club's members' aesthetic and recreational enjoyment of the Parks establish the requisite injury-in-fact to satisfy Article III standing requirements. *See Laidlaw*, 528 U.S. at 183.

These injuries to the aesthetic and recreational interests of NPCA's and Sierra Club's members are "fairly traceable" to EPA's Haze Plan for Nebraska. EPA's decision permits more air pollution from Gerald Gentleman than the Clean Air Act allows. NPCA and Sierra Club members regularly travel to Badlands and Rocky Mountain National Parks to enjoy their scenic vistas and view wildlife, and their ability to do so is harmed by the haze pollution caused by Gerald Gentleman. *See* Jarding Decl. ¶¶ 4-6, 13; Apt Decl. ¶¶ 4-5, 10; Applegate Decl. ¶¶ 6-7, 13.

NPCA's and Sierra Club's members' injuries would be redressed by a favorable decision vacating and remanding the Nebraska Haze Plan as not requiring pollution controls sufficiently protective of Badlands and Rocky Mountain National Parks. A subsequent decision by EPA to impose more stringent emission limits would reduce the amount of air pollution at Badlands and Rocky Mountain National Park, improving air quality and redressing harm to NPCA's and

Sierra Club's members' aesthetic and recreational interests. *See* Jarding Decl. ¶¶ 4-6, 13; Apt Decl. ¶¶ 4-5, 11; Applegate Decl. ¶¶ 6-7, 13.

Finally, Petitioners have organizational standing because the issue at stake here—the proper implementation of the Clean Air Act's visibility protection provisions for national parks—is germane to both groups' institutional missions. *See* Declaration of Yolanda Andersen (attached hereto as Addendum 89-92) ¶¶ 4-6; Declaration of Laura Connors (attached hereto as Addendum 85-88) ¶¶ 3; Declaration of Stephanie Kodish (attached hereto as Addendum 81-84) ¶¶ 4-7. For all of these reasons, Petitioners have standing to pursue this action.

STATEMENT OF ISSUES

Whether EPA's issuance of a haze plan that fails to require the Gerald Gentleman Station to install any controls for sulfur dioxide emissions was arbitrary and capricious, an abuse of discretion, or otherwise unlawful in light of:

1. EPA waiving compliance with the BART requirements and instead approving a weaker plan based on the Transport Rule that will allow tens of thousands more tons of sulfur dioxide pollution every year;

2. EPA's failure to offer any explanation—much less a rational explanation—for declining to require a scrubber as a geographic enhancement or a control in addition to the Transport Rule; and

3. EPA's failure to require the pollution reductions necessary for Badlands, Rocky Mountain, and Wind Cave National Parks to meet their respective reasonable progress goals.

Apposite statutory and regulatory provisions and cases for issue 1: 42 U.S.C. § 7491(b)(2), (g)(2); 40 C.F.R. § 51.308(e)(2)-(3); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *Dakota Underground, Inc. v. Sec'y of Labor*, 200 F.3d 564, 568 (8th Cir. 2000).

Apposite statutory and regulatory provisions and cases for issue 2: 40 C.F.R. § 51.308(e)(2)(v); *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007); *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008); *Am. Horse Protection Ass'n, Inc. v. Lyng*, 812 F.2d 1, 6 (D.C. Cir. 1987); *Menorah Med. Ctr. v. Heckler*, 768 F.2d 292, 295 (8th Cir. 1985).

Apposite statutory and regulatory provisions and cases for issue 3: 40 C.F.R. § 51.308(d)(3), (d)(3)(i)-(ii).

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND AND STATUS

In 1977, Congress required states to adopt regional haze plans designed to rid national parks and wilderness areas of visible air pollution. Under the Clean Air Act, regional haze plans must impose emission limits based on best available retrofit technology to curb haze pollution from certain older, larger power plants

such as Gerald Gentleman, and require all other measures as necessary to meet the reasonable progress goals set for national parks and wilderness areas.

Nebraska did not submit a regional haze plan to EPA until July 13, 2011. *See* 77 Fed. Reg. 12,770, 12,775 (Mar. 2, 2012). On July 6, 2012, EPA finalized its disapproval of Nebraska's sulfur dioxide BART determination for Gerald Gentleman and issued a federal plan allowing Gerald Gentleman to comply with the Transport Rule instead of complying with the sulfur dioxide BART requirements. 77 Fed. Reg. 40,150.

On June 5, 2012, NPCA and Sierra Club petitioned for review of EPA's action issuing the final regional haze rule for Nebraska. *Nat'l Parks Conservation Ass'n v. EPA*, No. 12-3085 (8th Cir. filed Sept. 4, 2012). The State of Nebraska and the Nebraska Public Power District (the "District" or "NPPD") also petitioned for review of the rule. *Nebraska v. EPA*, No. 12-3061 (8th Cir. filed Sept. 4, 2012); *Nebraska Pub. Power Dist. v. EPA*, No. 12-3084 (8th Cir. filed Aug. 31, 2012). On October 26, 2012, the Court granted motions filed by the State and the District to intervene as respondents in the case filed by NPCA and Sierra Club. In the same Order dated October 26, 2012, the Court granted the motion filed by NPCA and Sierra Club to intervene as respondents in the cases filed by the State and the District. On November 4, 2014, the Court granted the District's motion to voluntarily dismiss its petition.

II. HAZE POLLUTION IN OUR NATIONAL PARKS

Under the Clean Air Act, Congress designated certain national parks, monuments, and wilderness areas as "Class I" areas that EPA must ensure meet the highest air quality standards. 42 U.S.C. § 7472(a). Unfortunately, most Class I areas suffer from air pollution that both obscures scenic vistas and is dangerous to public health. 64 Fed. Reg. 35,714, 35,715 (July 1, 1999).

Three national parks that suffer from haze pollution are at issue in this case: Badlands and Wind Cave National Parks in South Dakota, and Rocky Mountain National Park in Colorado. Roughly one million people visit Badlands National Park each year to view dramatic geologic formations, wildlife such as bison, bighorn sheep, and prairie dogs, and one of the world's richest deposits of mammal fossils. Wind Cave National Park preserves some of the last remaining, intact prairie, home to species such as bison and elk. Rocky Mountain National Park protects over 400 square miles of spectacular mountain habitat; it is "a special place that personifies the rugged splendor of the Rocky Mountains." NPCA App. 000101.[1]

The National Park Service manages Badlands, Rocky Mountain, and Wind Cave National Parks. Congress gave the National Park Service and other federal land managers an important role in implementing the Clean Air Act's haze

[1] References to the administrative record are indicated by "NPCA App." followed by the page number in the Conservation Organizations' separate appendix.

provisions. For example, each state must consult with federal land managers during the development of a haze plan and include the federal land managers' recommendations in their notice to the public. 42 U.S.C. § 7491(d).

III. GERALD GENTLEMAN STATION

Gerald Gentleman Station is the largest stationary source of sulfur dioxide pollution in the state of Nebraska. *See* 77 Fed. Reg. at 12,778; NPCA App. 000023, 000030. Gerald Gentleman is a large, coal-fired power plant owned by the Nebraska Public Power District. NPCA App. 000175. Gerald Gentleman has the potential to emit 49,785 tons of sulfur dioxide per year. 77 Fed. Reg. at 12,780. To put that in perspective, the Clean Air Act defines a "major source" of air pollution to include any stationary source with the potential to emit 250 tons per year. 42 U.S.C. § 7479(1).

The tens of thousands of tons of sulfur dioxide Gerald Gentlemen emits every year contribute to haze pollution in six Class I areas: Badlands and Wind Cave National Parks in South Dakota; Rocky Mountain National Park in Colorado; and Hercules Glades and Mingo Wilderness Areas in Missouri. 77 Fed. Reg. at 12,779. Gerald Gentleman impairs visibility in these six Class I areas by a combined 8.86 deciviews. *Id.*[2] EPA instructs states that any source that impairs

[2] EPA uses the "deciview" as a measure of visibility impairment. 40 C.F.R. § 51.301. Higher deciview values mean greater impairment (i.e., less visibility). "A deciview is a haze index derived from calculated light extinction, such that

visibility by .5 deciviews at a single Class I area should be subject to the BART requirements, 40 C.F.R. pt. 51, app. Y § III(A)(1), so an impact of 8.86 deciviews indicates that Gerald Gentleman is a very large contributor to regional haze in surrounding states.

Gerald Gentleman's two units went into service more than 30 years ago, NPCA App. 000175, and during that time, wet and dry scrubbers have become well-established technologies for limiting sulfur dioxide pollution from power plants. *See* NPCA App. 000182. However, Gerald Gentleman does not currently operate any post-combustion technologies for controlling sulfur dioxide pollution. *See* NPCA App. 000175-000176.

IV. THE CLEAN AIR ACT'S REGIONAL HAZE PROGRAM

Congress set "as a national goal" eliminating visible air pollution caused by humans in national parks and wildernesses areas. 42 U.S.C. § 7491(a)(1). EPA's implementing regulations set a presumptive goal of reaching natural visibility conditions by 2064. 40 C.F.R. § 51.308(d)(1)(i)(B). To achieve the statutory goal, each state must create a regional haze plan and submit it to EPA for its review and approval. *See* 42 U.S.C. §§ 7410(a), 7491(b)(2). EPA evaluates the SIP and either approves or disapproves it in whole or in part. *Id.* § 7410(k). If EPA's evaluation

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uniform changes in haziness correspond to uniform incremental changes in perception across the entire range of conditions, from pristine to highly impaired." *Id.*

reveals that a SIP does not comply with the Clean Air Act, then EPA must promulgate a federal plan, or FIP, that remedies the shortcomings. *Id.* § 7410(c)(1); *see also N. Dakota v. EPA*, 730 F.3d 750, 761-62 (8th Cir. 2013).

A. BART Emission Limits

Each haze plan must include emissions limits for certain sources that reflect installation and operation of the best available retrofit technology, or BART. *Id.* § 7491(b)(2)(A). A state or EPA must consider five factors when determining BART: the "costs of compliance, the energy and non-air quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology." *Id.* § 7491(g)(2). BART is an essential component and minimum requirement of the regional haze program as it compels emissions reductions from older, disproportionately polluting sources that often have escaped control under other Clean Air Act programs. *See id.*

Under the statute and EPA's implementing regulations, the default approach to meeting the BART requirements is for a state to consider the five statutory factors on a case-by-case basis. *See* 42 U.S.C. § 7491(b)(2)(A) (requiring BART "for each major stationary source"); 40 C.F.R. § 51.308(e)(1)(ii)(A) ("[t]he determination of BART must be based on an analysis of the best system of

continuous emission control technology and associated emissions reductions achievable for each BART-eligible source"). However, EPA's regulations allow states to waive the BART requirements through "an emission trading program or other alternative measure" rather than by setting BART limits on a case-by-case basis if the applicable standards for using an alternative are met. 40 C.F.R. § 51.308(e)(2).

An alternative to BART "must achieve greater reasonable progress than would be achieved through the installation and operation of BART." 40 C.F.R. § 51.308(e)(2). A state may demonstrate that an alternative program makes greater reasonable progress than BART by proving that under the alternative program, (1) visibility does not decline in any Class I area and (2) there is an overall improvement in visibility compared to BART at all affected Class I areas. *Id.* § 51.308(e)(3)(i)-(ii).

Trading programs give sources emission allocations, and then allow sources to trade the allowances. As a result, some sources may reduce emissions significantly, while others may not reduce emissions at all or may even increase emissions. When EPA originally authorized alternatives to BART, EPA recognized that trading programs can create "hot spots": areas where emissions fail to decrease, or even increase. 71 Fed. Reg. 60,612, 60,627 (Oct. 13, 2006). To address this problem, EPA inserted a provision whereby states that opt to use an

alternative program and waive the BART requirements can supplement the alternative program to address any pollution not adequately controlled by the alternative program. EPA calls this provision a "geographic enhancement." 40 C.F.R. § 51.308(e)(2)(v).

B. The Transport Rule

In 2012, EPA allowed many states to forgo the BART requirements if the states complied with the Transport Rule. 77 Fed. Reg. 33,642 (June 7, 2012) ("BART Alternative Rule"). EPA issued the Transport Rule to promote downwind attainment of national health standards for ozone and particulate matter by reducing upwind emissions of nitrogen oxides and sulfur dioxide. *EPA v. Homer City Generation L.P.*, 572 U.S. ---, ---, 134 S. Ct. 1584, 1596 (2014). The Transport Rule set state budgets for emissions of nitrogen oxides and sulfur dioxide and authorized sources to make intrastate and interstate emission trades to meet compliance obligations. 76 Fed. Reg. 48,208 (Aug. 8, 2011).

In the BART Alternative Rule, EPA reiterated that states that waived the BART requirements and relied on the Transport Rule could supplement the Transport Rule with a geographic enhancement to remedy pollution that would not be adequately controlled by the Transport Rule. 77 Fed. Reg. at 33,652 ("In this final action we are preserving the language in the regional haze regulations at 40 CFR 51.308(e)(4) that allows states to include in their SIPs geographic

enhancements to the trading program"). In the final Nebraska regional haze rule, EPA confirmed that even when states use the Transport Rule to satisfy the BART requirements, states can require additional pollution controls to address hot spots and other remaining pollution problems. 77 Fed. Reg. at 40,164 ("A State may always choose to include in their SIPs provisions applicable to a specific source even if RAVI[3] is not triggered.").

C. Reasonable Progress Goals and the Long-Term Strategy

In addition to setting emission limits reflecting BART for certain sources, each state's regional haze plan must also set goals for each Class I area located within the state that will ensure reasonable progress toward achieving natural visibility conditions by 2064 (the "reasonable progress goals"). *See* 42 U.S.C. § 7491(b)(2); 40 C.F.R. § 51.308(d)(1). Each state's long-term strategy "must include enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals established by States having mandatory Class I Federal areas." 40 C.F.R. § 51.308(d)(3). Each state that has pollution sources that impair visibility in Class I areas located in another state "must demonstrate that it has included in its implementation plan all

[3] EPA's regulations authorize a federal land manager to certify that reasonably attributable visibility impairment ("RAVI") exists in a national park or wilderness area based on evidence that the haze is attributable, in part, to a particular facility. *See* 40 C.F.R. § 51.302(c).

measures necessary to obtain its share of the emission reductions needed to meet the [reasonable] progress goal for the area." *Id.* § 51.308(d)(3)(ii).

V. THE NEBRASKA PLAN

EPA disapproved Nebraska's proposed haze plan because it was "based on flawed analysis and an unreasonable conclusion." 77 Fed. Reg. at 40,153. Although Gerald Gentleman is the largest stationary source of sulfur dioxide pollution in the state, and has no post-combustion controls for sulfur dioxide pollution, Nebraska determined that the best available retrofit technology for Gerald Gentleman is to continue using no pollution controls. NPCA App. 000195.

In reaching the conclusion to excuse Gerald Gentleman from installing pollution controls to meet BART, Nebraska evaluated two technologies for controlling sulfur dioxide pollution: wet and dry scrubbing. NPCA App. 000181-82. The State ultimately agreed with the Nebraska Public Power District to reject sulfur dioxide controls for Gerald Gentleman because of cost and the potential for increased water use. Nebraska's BART determination was based on the analysis that the Nebraska Public Power District conducted. *Compare* NPCA App. 000195 *with* NPCA App. 000156-57.

After reviewing the State's analysis, EPA found the State's BART determination for Gerald Gentleman "was not approvable for a number of reasons, including errors in Nebraska's cost analysis for" scrubbers, "the reasonableness of

the costs of controls," and "the significant visibility improvement" that would result from a scrubber. 77 Fed. Reg. at 40,152. Specifically, EPA's review uncovered the following serious errors in the State's analysis:

- **Nebraska Overestimated the Cost of a Scrubber**: Nebraska's cost estimate was too high by approximately $400 million. NPCA App. 000278. EPA's revised, annualized cost estimate of $60 million is nearly one-half of Nebraska's estimate of $108 million. *Id.*
- **Nebraska Underestimated the Visibility Improvement from a Scrubber**: Nebraska failed to consider the visibility improvement at all the parks and wilderness areas where haze would improve if a scrubber were installed at Gerald Gentleman. 77 Fed. Reg. at 12,780. "FGD control would offer an improvement of 3.17 dv [deciviews] across the six Class I areas that GGS affects." *Id.* at 12,779.
- **Nebraska Incorrectly Calculated the Cost-Effectiveness of a Scrubber**: Nebraska estimated that installing a scrubber would cost $2,726 for every ton of sulfur dioxide pollution it removed. The actual cost would be much lower, between $1,972 and $2,310 per ton, a cost EPA found to be reasonable. 77 Fed. Reg. at 12,780.

- **Nebraska's Analysis of Water Use was Unsupported**: EPA found that sufficient water is available to operate a scrubber, and included the cost of obtaining water in its cost calculations. 77 Fed. Reg. at 40,161-63.
- **Nebraska Underestimated the Effectiveness of a Scrubber**: Nebraska assumed that a scrubber could remove 80% of sulfur dioxide emissions, but scrubbers can remove 90% or more of sulfur dioxide emissions. 77 Fed. Reg. at 12,780.

EPA found Nebraska's BART determination to be "based on flawed analysis and an unreasonable conclusion." 77 Fed. Reg. at 40,153. As the State's proposal was "both unreasoned and unjustified, and [ ] therefore not approvable," EPA disapproved the State's proposal. *Id.*

The Clean Air Act required EPA to issue a federal plan after disapproving the State's proposal. 42 U.S.C. § 7410(c)(1)(B). EPA reviewed Nebraska's analysis of the five statutory factors that must be considered in determining BART, and concluded that the most effective pollution control technology, a scrubber, satisfied each of the five factors. In particular, EPA found that a scrubber would be feasible, cost-effective, and significantly improve visibility. 77 Fed. Reg. at 12,779-80; 77 Fed. Reg. at 40,152, 40,162-63; NPCA App. 000250-51. Nonetheless, EPA abandoned its BART analysis when it issued its federal plan. Instead, EPA waived compliance with BART and relied on the Transport Rule.

The National Park Service "strongly disagree[d]" with EPA's proposal for addressing sulfur dioxide pollution from Gerald Gentleman. NPCA App. 000281. In particular, the National Park Service "strongly disagree[d] with EPA's proposal that the Transport Rule provides greater visibility improvement than source specific BART controls at GGS." *Id.* The National Park Service manages the three areas that suffer the worst air pollution from Gerald Gentleman: Badlands, Rocky Mountain, and Wind Cave National Parks. NPCA App. 000280.

The Park Service informed EPA that the Transport Rule emission limits "do not require any additional controls" for Gerald Gentleman. NPCA App. 000281. The Park Service criticized EPA's proposal because it will allow Gerald Gentleman to emit tens of thousands of tons of sulfur dioxide pollution more than if EPA had required BART. *Id.*

The Park Service's comments were based on EPA's analysis showing that the Transport Rule would cause Gerald Gentleman to reduce its sulfur dioxide emissions by approximately 2,500 to 4,000 tons. NPCA App. 000319 (citing EPA's analysis of emissions under the Transport Rule). By comparison, a scrubber would reduce emissions by roughly 23,000 to 28,000 tons.[4] 77 Fed. Reg.

[4] EPA presented two different estimates of the tons of sulfur dioxide that a scrubber would remove: based on Gerald Gentleman's potential to emit, and a second estimate based on Gerald Gentleman's actual emissions. EPA believes that baseline emissions should reflect average actual emissions, so throughout the brief we use EPA's calculations based on baseline emissions of 31,513 tons. *See*

at 12,780. EPA's proposal means that Gerald Gentleman is allowed to emit at least 20,000 tons of sulfur dioxide pollution each year that would be eliminated under BART. *See id.* As the National Park Service pointedly stated, "EPA's *own technical analyses* demonstrate that visibility at Badlands and Wind Cave National Parks will be poorer under the Transport Rule than under source specific BART." NPCA App. 000281 (emphasis added.) The Park Service urged EPA to require Gerald Gentlemen to install a scrubber, either as a BART control or as a geographic enhancement. *Id.*[5]

Congress gave the National Park Service and other federal land managers a special role in implementing the Clean Air Act's haze provisions. For example, when developing a haze plan, each state must consult with federal land managers and include the federal land managers' recommendations in their public notice. 42 U.S.C. § 7491(d). Over the objections of the National Park Service and Conservation Organizations that the law and the record require that Gerald Gentleman install and operate a scrubber, EPA excused Gerald Gentleman from complying with BART and instead issued a federal plan relying on the Transport Rule. 77 Fed. Reg. at 40,151.

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77 Fed. Reg. at 12,780.

[5] The Conservation Organizations submitted similar comments to EPA on the proposed rule. NPCA App. 000318-30.

SUMMARY OF ARGUMENT

The Nebraska Haze Plan unlawfully allows Gerald Gentleman Station, the largest source of sulfur dioxide pollution in Nebraska, to do virtually nothing to control its air pollution. As a result, the plant will continue emitting tens of thousands more tons of sulfur dioxide every year. Visibility conditions at six national parks and wilderness areas will be far worse than if EPA had required BART controls at Gerald Gentleman. EPA's inadequate Haze Plan violates the Clean Air Act in three ways.

First, EPA's federal plan violates the statutory mandate to require the best available retrofit technology for controlling sulfur dioxide emissions from Gerald Gentleman. EPA disapproved the State's rejection of a scrubber because the State arbitrarily rejected a scrubber that would be feasible, cost-effective, and significantly improve visibility. Having laid down that marker, the Clean Air Act then required EPA to select a scrubber or something that would reduce pollution and improve visibility more than a scrubber. Instead, EPA selected the Transport Rule, which is worse than a scrubber at removing sulfur dioxide and improving visibility. As a result, EPA's federal plan violates the Clean Air Act's mandate to require the use of the best available retrofit technology and violates EPA's regulatory requirement that an alternative to BART be better than BART.

Second, EPA failed to provide any explanation—much less a rational explanation—for failing to require a scrubber as a geographic enhancement. Both the National Park Service and the Conservation Organizations recommended that even if EPA relied on the Transport Rule to waive compliance with BART, EPA should exercise its authority to address the tens of thousands of tons of sulfur dioxide pollution that would be emitted by Gerald Gentleman even after the Transport Rule was implemented. EPA stated that it was declining to do so, but failed to offer any explanation for its choice. Moreover, EPA cannot offer any rational explanation for failing to require the very control—a scrubber—that EPA found was feasible, cost-effective, and would significantly improve visibility.

Third, EPA's federal plan violates the regulatory requirement to include all measures necessary to meet the reasonable progress goals for national parks and wilderness areas. South Dakota set the reasonable progress goals for Badlands and Wind Cave under the assumption that Gerald Gentleman would follow EPA's guidelines and install a scrubber. EPA's federal plan does not require a scrubber, and instead allows far more pollution than would result from use of a scrubber. As a result, Gerald Gentleman will not reduce emissions by the amount South Dakota assumed would be needed to meet the reasonable progress goals for Badlands and Wind Cave. Similarly, Colorado developed its haze plan assuming Gerald Gentleman would install a scrubber. Colorado urged Nebraska to consider

requiring Gerald Gentleman to install a scrubber in order to make reasonable progress toward improving visibility at Rocky Mountain National Park. By failing to require a scrubber at Gerald Gentleman, the Haze Plan lacks the measures necessary to meet the reasonable progress goals for Badlands, Rocky Mountain, and Wind Cave National Parks.

ARGUMENT

I. STANDARD OF REVIEW

EPA's final regional haze rule for Nebraska must be vacated if the agency's decision was arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with the Clean Air Act and implementing regulations. *See* 42 U.S.C. § 7607(d)(9). The Clean Air Act standard of review the Court uses for evaluating an EPA federal implementation plan is the same standard as that prescribed by the Administrative Procedures Act, 5 U.S.C. § 706(2). *N. Dakota v. EPA*, 730 F.3d at 758.

Courts have found agency actions to be arbitrary and capricious where the agency's decision violated applicable statutory or regulatory provisions or where the agency failed to provide a rational explanation for its final decision. *Barthel v. USDA*, 181 F.3d 934, 937-38 (8th Cir. 1999); *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1124-25 (8th Cir. 1999); *Menorah Med. Ctr. v. Heckler*, 768 F.2d 292, 295 (8th Cir. 1985). Likewise, where the agency has not supported its conclusions, courts will vacate and remand for further

explanation. *Dakota Underground, Inc. v. Sec'y of Labor*, 200 F.3d 564, 568 (8th Cir. 2000); *New York v. EPA*, 413 F.3d 3, 34-36 (D.C. Cir. 2005).

II. EPA'S PLAN FAILS TO SATISFY THE CLEAN AIR ACT'S BEST AVAILABLE RETROFIT TECHNOLOGY REQUIREMENTS.

EPA violated the Clean Air Act requirements for issuing a BART determination for controlling sulfur dioxide emissions from Gerald Gentleman. EPA disapproved the State's plan because the State arbitrarily rejected a scrubber that would be feasible, cost-effective, and significantly improve visibility. EPA's conclusion that a scrubber is a reasonable option for Gerald Gentleman has significance because the Act requires Gerald Gentleman to install the *best* available retrofit technology. By finding that a scrubber is reasonable, EPA laid down a marker. BART would have to be a scrubber, or better than a scrubber. And pursuant to EPA's regulations, using an alternative to BART would be permissible only if the alternative were better than BART at reducing pollution and improving visibility.

Instead, EPA substituted the Transport Rule, which, as EPA's own analysis shows, would allow for tens of thousands of tons more sulfur dioxide emissions every year than BART and would fail to achieve anywhere near the same improvements in visibility as would requiring a scrubber as BART. EPA's arbitrary decision resulted in a federal plan that violates the Clean Air Act's

mandate to require the use of the best available retrofit technology and violates the regulatory requirement that a BART alternative be better than BART.

A. EPA's Haze Plan Will Lead to Tens of Thousands of Tons of Sulfur Dioxide Pollution More than if EPA Had Selected a Scrubber as BART.

The State's flawed BART analysis ultimately resulted in the state deciding that Gerald Gentleman, the single largest source of sulfur dioxide pollution in the state, should be subject to no additional pollution controls under BART. 77 Fed. Reg. at 12,779. EPA disagreed, finding the State's rejection of a scrubber at Gerald Gentleman to be "based on flawed analysis and an unreasonable conclusion." 77 Fed. Reg. at 40,153. Nebraska failed to follow the applicable guidelines for calculating costs and overestimated the cost of a scrubber. *Id.* at 12,780. After correcting Nebraska's errors, the cost of a dry or wet scrubber "is reasonable." *Id.* EPA also noted that "we do not believe that the water is unattainable, but that it can be obtained at a cost." 77 Fed. Reg. at 40,162. Even after including the cost of obtaining water to operate a scrubber, EPA found that the cost of a scrubber was still reasonable. *Id.* at 12,780. EPA also found that Nebraska underestimated the amount of pollutants a scrubber can remove and underestimated the visibility improvement a scrubber can achieve. *Id.* Based on all these flaws in Nebraska's analysis, EPA found that Nebraska's BART

determination did not meet the Clean Air Act's legal requirements and could not be approved. 77 Fed. Reg. at 40,151-53.

While EPA properly disapproved Nebraska's plan, EPA unlawfully failed to correct the deficiencies in the State plan, as required by the Clean Air Act. *See* 42 U.S.C. § 7410(c)(1)(B). EPA concluded that all of the five statutory factors for determining BART weighed in favor of requiring a scrubber: the cost is reasonable, 77 Fed. Reg. at 40,152; there are no adverse environmental impacts from using a scrubber, *id.* at 40,162-63; the existing pollution controls and remaining useful life do not affect the analysis; and there would be "significant visibility improvement achieved as a result of installing FGD [a scrubber]." *Id.* at 40,152.

The statute mandates the use of the *best* available retrofit technology. 42 U.S.C. § 7491(b)(2)(A). When EPA disapproved the State's rejection of a scrubber because a scrubber is a reasonable control, EPA established a benchmark. BART had to be equal to or better than a scrubber in order to be the best technology.

Instead, EPA substituted the Transport Rule in lieu of requiring BART at Gerald Gentleman even though the Transport Rule is vastly inferior to a scrubber at reducing sulfur dioxide emissions and improving visibility. As the National Park Service stated, "[a]llowing GGS to avoid all controls is not better than 28,166

tons of SO2 reductions under source specific BART." NPCA App. 000281. The record indicates that the Transport Rule is not the best available retrofit technology—a scrubber would remove at least five times as many tons of sulfur dioxide.

Table 1. Transport Rule Compared to a Scrubber[6]

	Transport Rule Allowances	**Scrubber, .15 lbs/MMBtu**	**Scrubber, .06 lbs/MMBtu**
Reduction in SO_2 Emissions, Tons	4,010	23,147	28,166
Percentage Reduction in SO_2 Emissions	12%	73%	89%

Moreover, EPA's substitution of the Transport Rule for BART violates EPA's regulatory requirement that a state can waive compliance with BART only if it devises an alternative that improves visibility more than BART. "A State may opt to implement or require participation in an emissions trading program or other alternative measure rather than to require sources . . . to install . . . BART." 40 C.F.R. § 51.308(e)(2). However, the "alternative measure must achieve greater reasonable progress than would be achieved through . . . BART." *Id.* A state may demonstrate greater reasonable progress by showing that the alternative measure

[6] 77 Fed. Reg. at 12,780; NPCA App. 000319. Table 1 compares the reduction in sulfur dioxide and the percentage reduction in sulfur dioxide emissions that would result from the Transport Rule and a scrubber. EPA considered two different emission limits that a scrubber could achieve, so those two options are listed here, .06 and .15 lbs/MMBtu.

improves visibility more than BART. *Id.* § 51.308(e)(3)(ii). EPA violated its own regulations by approving the Transport Rule in lieu of BART despite a record showing that the Transport Rule will not improve visibility more than installing BART controls at Gerald Gentleman.

B. EPA Ignored Evidence in the Record and Failed to Explain the Basis for Not Requiring Scrubbers as BART Controls.

EPA refused to respond to the comments from the National Park Service and the Conservation Organizations that at Gerald Gentleman a scrubber would reduce emissions and improve visibility more than the Transport Rule. Rather than respond to these significant comments, EPA referred to a separate rulemaking. 77 Fed. Reg. at 40,156 ("Response 46: . . . EPA refers the commenter to EPA's final action on the December 30, 2011 proposed rule, 77 FR 33642 (June 7, 2012)."). But there is no evidence that in the separate rulemaking EPA considered comments from the Park Service and the Conservation Organizations on the Nebraska Haze Plan. EPA did not point to a single passage in either the Nebraska regional haze record or in the BART Alternative Rule record where the agency responded to comments from the Park Service and the Conservation Organizations that it is unlawful to rely on the Transport Rule in the Nebraska Haze Plan because a scrubber would reduce pollution and improve visibility more than the Transport Rule at Gerald Gentleman.

This Court should not countenance EPA's shell game. During the Nebraska Haze Plan rulemaking, evidence came to light that a scrubber would be feasible, cost-effective, and significantly improve visibility, 77 Fed. Reg. at 12,780, 40,152, and would reduce pollution and improve visibility more than the Transport Rule at Gerald Gentleman. NPCA App. 000319, 000321. EPA's failure to provide a rational connection between the facts regarding a scrubber and its final decision not to require a scrubber is arbitrary and capricious. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (Judicial review of agency action is based on the "'whole record' compiled by the agency"); *Dakota Underground, Inc.*, 200 F.3d at 568 ("'Because the [agency] only listed the facts and stated its conclusions, but did not connect them in any rational way, the [agency's] decisions are arbitrary and capricious.'") (quoting *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1407 (D.C. Cir. 1995)).

Accordingly, the Court should find that EPA failed to make a BART determination that is reasoned and consistent with the record, and should vacate the sulfur dioxide BART determination for Gerald Gentleman.

II. EPA OFFERED NO RATIONAL EXPLANATION FOR REJECTING SCRUBBERS AS A GEOGRAPHIC ENHANCMENT.

Even assuming that EPA could have relied on the Transport Rule to supplant the required BART analysis, EPA failed to provide any rational explanation for rejecting a scrubber as a geographic enhancement to the Transport Rule.

A. The Record Supports Requiring a Scrubber as a Geographic Enhancement.

Even before issuing the BART Alternative Rule, EPA had recognized that when using a trading program in lieu of requiring specific pollution controls at each BART facility, "there may be cases where BART could produce greater improvement at one or more class I areas." 71 Fed. Reg. at 60,621. The overriding statutory command is to make reasonable progress in improving visibility at all Class I areas. 42 U.S.C. § 7491(b)(2). EPA realized that to meet this goal, further action might be needed at some sources to fill the gaps left by an approach that focused on visibility improvement in the aggregate rather than at each area.

To that end, EPA devised the "geographic enhancement" which authorizes states that rely on the Transport Rule to impose additional controls on sources in order to address pollution that remains even after the Transport Rule. *See* 40 C.F.R. § 51.308(e)(2)(v). States must use a geographic enhancement in certain circumstances, namely, if a source has been certified as causing reasonably attributable visibility impairment, or RAVI. *Id.* But states may include provisions applicable to a specific source even if no federal land manager has made a RAVI determination. 76 Fed. Reg. 82,219, 82,224 n.13 (Dec. 30, 2011).

After disapproving the State's BART determination for sulfur dioxide emissions from Gerald Gentleman Station, EPA "step[ped] into the shoes of the

State." 77 Fed. Reg. at 40,153; *see also* 42 U.S.C. § 7410(c)(1)(B). In issuing a federal plan for Nebraska, EPA had the same authority Nebraska had to require a scrubber at Gerald Gentleman as a geographic enhancement. 77 Fed. Reg. at 40,164. ("A state may always choose to include in their SIPs provisions applicable to a specific source even if RAVI is not triggered.").

The National Park Service urged EPA to require a scrubber at Gerald Gentleman as a geographic enhancement. NPCA App. 000281, 000292. The National Park Service noted that a geographic enhancement was needed because a scrubber would reduce sulfur dioxide pollution from Gerald Gentleman Station much more than the Transport Rule would.

In particular, the Transport Rule will create "hot spots" at Wind Cave and Badlands National Parks because the Transport Rule will improve visibility less at those parks than would a scrubber. The Conservation Organizations also urged EPA to require a scrubber as a geographic enhancement, NPCA App. 000319, 000330, noting that the Transport Rule authorizes pollution more than three times that emitted by a scrubber, and will lead to less visibility improvement than a scrubber. NPCA App. 000319, 000321.

Given that EPA's own modeling shows that the Transport Rule will lead to more pollution and worse visibility at Badlands and Wind Cave National Parks than would occur with a scrubber, this is precisely the situation for which EPA

created the geographic enhancement provision: to address "hot spots." NPCA App. 000281, 000319, 000321.

B. EPA Cited No Factual or Policy Bases for Not Requiring a Scrubber in Addition to the Transport Rule.

EPA offered no rational response to the National Park Service's recommendation that the agency require a scrubber as a geographic enhancement. EPA stated only that it was "choosing not to pursue any geographic enhancements" because the agency had purportedly "met the minimum requirements for SO2 BART for GGS by relying on the Transport Rule." 77 Fed. Reg. at 40,164.

When a commenter or petitioner requests that an agency undertake a discretionary action, the agency must "provide[] some reasonable explanation as to why it cannot or will not exercise its discretion." *Massachusetts. v. EPA,* 549 U.S. 497, 533 (2007); *see also Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (judicial review of agency decision to not initiate rulemaking must ensure the agency "has adequately explained the facts and policy concerns it relied on and to satisfy ourselves that those facts have some basis in the record.'"); *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 994 (D.C. Cir. 2001) ("That the Board has broad discretion is of no import. . . If the Board chooses to exercise its discretion, it must explain its action, and its explanation must reflect reasoned decisionmaking.").

To survive judicial review, a satisfactory explanation can take many forms. Agencies have responded by saying that they have higher priorities and do not have the resources to take the requested action at the moment; that they believe the proposal would not make good policy; or that they disagree with the facts presented by the commenter. *See WildEarth Guardians v. EPA*, 751 F.3d 649, 650-53 (D.C. Cir. 2014) (reviewing cases). Whatever the explanation, courts review an agency's reasons for not acting to ensure that "the agency employed reasoned decisionmaking," *Defenders of Wildlife*, 532 F.3d at 919, and that the agency's explanation is "consistent with the agency's delegated authority and supported by the record." *WildEarth Guardians*, 751 F.3d at 653.

Here, the National Park Service and the Conservation Organizations urged EPA to use its authority under the geographic enhancement and other provisions to require that Gerald Gentleman install and operate a scrubber. In the final rule, EPA conceded it possessed such authority, as EPA stood in the shoes of the state, and a "state may always choose to include in their SIPs provisions applicable to a specific source." 77 Fed. Reg. at 40,164. But in declining to exercise its authority to go beyond the Transport Rule and require a scrubber, EPA did not mention resource constraints, or policy considerations, or dispute any facts mentioned by commenters. EPA's conclusory sentences that it was not obligated to require a scrubber "are insufficient to assure a reviewing court that the agency's refusal to

act was the product of reasoned decisionmaking" because there is no articulation of "'factual and policy bases for [the] decision.'" *Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 6 (D.C. Cir. 1987) (citations omitted).

Moreover, there is no rational explanation that EPA could provide for failing to require the very controls—a scrubber—it deemed reasonable. EPA concluded that Nebraska's rejection of a scrubber "is not approvable for a number of reasons, including . . . the reasonableness of the costs of controls, the significant visibility improvement achieved as a result of installing FGD [a scrubber]." 77 Fed. Reg. at 40,152. EPA also concluded that a scrubber was feasible and the State's concerns about water usage were unfounded. *Id.* at 40,162-63. EPA never disputed that a scrubber would reduce tens of thousands of tons of sulfur dioxide pollution more than the Transport Rule and that EPA's own modeling shows that a scrubber would improve visibility more than the Transport Rule.

Having failed to rationally explain its decision, and having rendered a decision that is not based on the evidence in the record, EPA's failure to require a scrubber as a geographic enhancement is arbitrary and capricious. *See generally Menorah Med. Ctr.*, 768 F.2d at 295; *Dakota Underground, Inc.*, 200 F.3d at 568.

III. EPA'S FEDERAL PLAN VIOLATES THE LONG-TERM STRATEGY REGULATIONS.

EPA's failure to require a scrubber at Gerald Gentleman also violates the agency's regulatory requirements that each haze plan include "measures as

necessary to achieve the reasonable goals" for Class I areas, 40 C.F.R. § 51.308(d)(3), and "obtain its share of the emissions reductions needed to meet the progress goal for the [Class I] area." *Id.* § 51.308(d)(3)(ii). The final Nebraska plan does not contain the measures necessary for South Dakota to meet its reasonable progress goals for Badlands and Wind Cave National Parks. Similarly, the Nebraska plan does not contain the measures necessary to make reasonable progress at Rocky Mountain National Park in Colorado. To the contrary, the Nebraska haze plan impedes progress at these Class I areas.

A. The Nebraska Haze Plan Does Not Make Reasonable Progress Toward Eliminating Haze at Badlands and Wind Cave National Parks.

Gerald Gentleman's worst visibility impacts are on Badlands and Wind Cave National Parks. NPCA App. 000189. In its required haze plan, approved by EPA, South Dakota determined "reasonable progress goals" for Badlands and Wind Cave National Parks. 76 Fed. Reg. 76,646, 76,651 (Dec. 8, 2011); 77 Fed. Reg. 24,845 (Apr. 26, 2012). These goals set the amount by which visibility improvement must improve during the period of time covered by the state plan. South Dakota must then include all measures necessary to achieve these reasonable progress goals. 40 C.F.R. § 51.308(d)(3).

But the regulations do not leave the task of improving visibility at Badlands and Wind Cave to South Dakota alone, because air pollution originating in states outside South Dakota impairs visibility at Badlands and Wind Cave. Other states

that emit pollution that impairs air quality in these parks must also reduce their fair share of pollution. In particular, each state must require in its state plan "measures as necessary to achieve the reasonable progress goals established by the States having mandatory Class I Federal areas." 40 C.F.R. § 51.308(d)(3). Then, each state "must demonstrate that is has included in its implementation plan all measures necessary to obtain its share of the emission reductions needed to meet the progress goal for the area." *Id.* § 51.308(d)(3)(ii).

EPA's federal plan violates both regulatory requirements. South Dakota established its reasonable progress goals for Badlands and Wind Cave based on projections of the emissions reductions that would be achieved in South Dakota and neighboring states. As part of establishing the reasonable progress goals for Badlands and Wind Cave National Parks, South Dakota relied on modeling conducted by the Western Regional Air Partnership, an organization that provides technical assistance to western states for implementing the regional haze requirements.

South Dakota, like other states in the Western Regional Air Partnership, properly assumed that Gerald Gentleman would install and operate a scrubber that would reduce emissions to .15 lbs/MMBtu. NPCA App. 000324-25. South Dakota and other states in the Western Regional Air Partnership assumed that Gerald Gentleman would be required to comply with "presumptive BART," which

is EPA's determination of the presumptive, minimum level of controls that qualify as best available retrofit technology. *See* 40 C.F.R. pt. 51, app. Y § IV(E)(4). Presumptive BART for large power plants such as Gerald Gentleman is an emission rate of .15 lbs/MMBtu based on the use of a scrubber. *Id.*

It is undisputed that Gerald Gentleman will not achieve the .15 lbs/MMBtu emissions rate that South Dakota assumed would be achieved in order to meet the reasonable progress goals for Badlands and Wind Cave. EPA expressly conceded that "Nebraska's BART determination ultimately did not require presumptive SO2 BART [which is .15 lbs/MMBtu] for GGS, and Nebraska did not provide any information demonstrating those emission reductions would be otherwise achieved." 77 Fed. Reg. at 40,155; *see also id.* (Nebraska's "BART determination deviated from what was included in the [South Dakota] modeling"). Nebraska, too, admitted in its proposed haze plan that it would emit approximately 30,000 tons of sulfur dioxide more than earlier modeling had predicted. NPCA App. 000084-85. In relying solely on the Transport Rule, EPA's plan fails to reduce pollution by the amount needed for Badlands and Wind Cave to achieve their reasonable progress goals. EPA's plan therefore not only fails for Nebraska, it undermines the foundation of other states' plans that EPA approved.

EPA's excuses for why its plan does not violate these regulatory requirements do not withstand scrutiny. EPA's claim that South Dakota did not

ask Nebraska to include additional measures in its plan, 77 Fed. Reg. at 40,155, may be factually correct but is legally irrelevant. The regulations do not condition Nebraska's duty to include all measures necessary to meet the reasonable progress goals in South Dakota on whether South Dakota sends such a request to Nebraska. *See* 40 C.F.R. § 51.308(d)(3), (d)(3)(ii). The regulatory requirements apply regardless of whether South Dakota reminds Nebraska of its legal obligations.

Similarly, EPA's statement that "[t]he RPGs [reasonable progress goals] are not enforceable goals," 77 Fed. Reg. at 40,155, is beside the point. The actual measures that ensure that states meet their reasonable progress goals are and must be enforceable. 40 C.F.R. § 51.308(d)(3), (d)(3)(ii). If the final Nebraska plan does not contain the "measures as necessary to achieve the reasonable progress goals," 40 C.F.R. § 51.308(d)(3), EPA must disapprove the plan and issue a federal plan that does contain such measures, 42 U.S.C. § 7410(c)(1)(B), (k)(3).

Finally, EPA's claim that "South Dakota will have the responsibility to consider whether other reasonable control measures are appropriate to ensure reasonable progress during subsequent periodic progress reports and regional haze SIP revisions," 77 Fed. Reg. at 40,155, does not excuse a current lack of compliance. If the current Nebraska haze plan fails to meet applicable regulatory requirements, EPA must disapprove the plan and issue a federal plan that meets the requirements. 42 U.S.C. § 7410(c)(1)(B), (k)(3). EPA cannot issue a plan that is

legally inadequate now based on the mere possibility that the plan will be revised to come into compliance with the law in the future.

In sum, EPA's failure to require Gerald Gentleman to install a scrubber means that Gerald Gentleman will emit tens of thousands of tons more pollution per year than South Dakota assumed would be necessary to meet reasonable progress goals for the Badlands and Wind Cave. EPA's plan for Nebraska does not include all "measures as necessary to achieve the reasonable progress goals established by the States having mandatory Class I Federal areas," 40 C.F.R. § 51.308(d)(3), and the agency has not "demonstrate[d] that it has included in its implementation plan all measures necessary to obtain its share of the emission reductions needed to meet the progress goal for the area," 40 C.F.R. § 51.308(d)(3)(ii). By letting Gerald Gentleman off the hook from doing its fair share to reduce emissions, EPA's plan will prevent other states from reaching their reasonable progress goals unless they do more than their fair share. EPA's approval of a plan that violates applicable regulations is contrary to law and therefore the final Nebraska Haze Plan should be vacated.

B. The Nebraska Haze Plan Does Not Make Reasonable Progress Toward Eliminating Haze at Rocky Mountain National Park.

The State of Colorado submitted comments calling upon Nebraska to find that BART requires Gerald Gentleman to install and operate a scrubber. NPCA App. 000101. Colorado urged Nebraska to require a scrubber at Gerald Gentleman

"in part to help Colorado make progress toward the visibility improvement goals at Rocky Mountain National Park," *id.*, "a special place that personifies the rugged splendor of the Rocky Mountains." NPCA App. 000100. Colorado noted that Gerald Gentleman significantly impairs visibility in Rocky Mountain National Park, *id.*, a fact confirmed by Nebraska's and EPA's analyses. NPCA App. 000177, 000244.

Like South Dakota, Colorado relied upon the Western Regional Air Partnership modeling to establish the reasonable progress goals for its Class I areas, including Rocky Mountain National Park. NPCA App. 000325-26. This regional modeling assumed that Gerald Gentleman Station would, at a minimum, meet the presumptive BART limit of .15 lbs/MMBtu based on the use of a scrubber. *Id.*

EPA noted that it received comments on Nebraska's failure to include its share of emissions reductions needed to meet the reasonable progress goals in Colorado, 77 Fed. Reg. at 40,155, but EPA did not respond to these comments, and instead addressed only the comments concerning South Dakota. *Id.* EPA provided no justification for approving a Nebraska plan that will not include reasonable measures needed for Rocky Mountain National Park to achieve its reasonable progress goals.

In short, Colorado's letter urging Nebraska to require a scrubber at Gerald Gentleman, the regional modeling that assumed Gerald Gentleman would install a scrubber, and EPA's own analysis that a scrubber would be cost-effective, feasible, and improve visibility significantly all lead to the same conclusion: installing a scrubber at Gerald Gentleman is a reasonable control measure that is part of Nebraska's share of emissions reductions needed to make reasonable progress at Rocky Mountain National Park. As a result, the final Nebraska plan violates the requirement that each haze plan include "its share of the emissions reductions needed to meet the progress goal for the [Class I] area." 40 C.F.R. § 51.308(d)(3)(ii). EPA erred by issuing a plan that violates one of the regulatory requirements for a haze plan, and therefore the final Nebraska Haze Plan must be vacated.

IV. THE CLEAN AIR ACT PROVIDES THIS COURT WITH JURISDICTION OVER PETITIONERS' CLAIMS.

EPA has suggested that this court lacks jurisdiction, *NPCA v. EPA*, No. 12-3061, Respondents' Motion for a Further Stay of the Proceedings at 9 (motion filed Aug. 15, 2014), but EPA's argument ignores well-established precedent and mischaracterizes Petitioners' claims. EPA based its argument on the assumption that all of Petitioners' claims challenge a national rule, the "BART Alternative Rule," 77 Fed. Reg. 33,642, and challenges to a nationally applicable

rule may be brought only in the D.C. Circuit Court of Appeals. Respondents' Motion for a Further Stay of the Proceedings at 9.

EPA's argument fails because Petitioners are challenging the approval of the Nebraska haze plan, which is a locally and regionally applicable decision, rather than a decision that is nationally applicable. The Clean Air Act assigns locally or regionally applicable decisions to the appropriate regional Circuit Court. 42 U.S.C. § 7607(b)(1); *see also Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996). "EPA's 'action in approving or promulgating any implementation plan' is the prototypical 'locally or regionally applicable' action that may be challenged only in the appropriate regional court of appeals." *Am. Road & Transport Builders Ass'n v. EPA*, 705 F.3d 453, 455 (D.C. Cir. 2013).

Venue would be appropriate in the D.C. Circuit only if "EPA's regulations may themselves be nationally applicable" or "EPA . . . determine[s] that the otherwise locally or regionally applicable regulations have a nationwide scope or effect." *Id.* EPA did not make a finding that the Nebraska haze plan has "nationwide scope or effect." And none of the claims raised by Petitioners in this proceeding transform a plainly local and regional applicable action into one of national scope.

Petitioners' first claim concerns whether EPA complied with the statutory provision that the Nebraska haze plan require the Gerald Gentleman Station to

operate the best available retrofit technology. In defending its decision, EPA relies upon the national BART Alternative Rule, 77 Fed. Reg. 33,642 (codified at 40 C.F.R. § 51.308(e)(4)). The BART Alternative Rule authorized states to waive compliance with the BART requirements if a source is subject to the Cross State Air Pollution Rule ("CSAPR" or "Transport Rule"). The BART Alternative Rule does not require states to deem compliance with CSAPR compliance with the haze requirements; the BART Alternative Rule merely allows states to do so, if they deem it appropriate. *See* 40 C.F.R. § 51.308(e)(4).

Petitioners are not asking this Court to vacate or otherwise rule on the legality of the BART Alternative Rule. Petitioners seek relief relating to a specific portion of EPA's issuance of the final Nebraska regional haze plan. This Court could, and should, grant that relief without passing judgment on the lawfulness of the BART Alternative Rule as a national rule.

Petitioners' second and third claims concern the geographic enhancement and long-term strategy portions of the Nebraska Haze Plan. Again, these claims do not challenge any nationally applicable rule and Petitioners do not seek any relief regarding a nationally applicable rule.

In sum, the Clean Air Act grants the Eighth Circuit jurisdiction to hear this case because Petitioners challenge a locally and regionally applicable state implementation plan. *See* 42 U.S.C. § 7607(b)(1).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court vacate and remand specific portions of EPA's final action on the Nebraska regional haze plan. Specifically, Petitioners request that the Court: (1) vacate and remand the federal implementation plan approving reliance on the Transport Rule in lieu of source-specific BART for the control of sulfur dioxide emissions from Gerald Gentleman Station; (2) vacate and remand the federal implementation plan establishing a long-term strategy for Nebraska; and (3) remand the final Nebraska regional haze plan to EPA to consider whether to require Gerald Gentleman Station to install and operate a scrubber as a geographic enhancement.

Respectfully submitted this 25th day of November, 2014.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,463 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), namely the Corporate Disclosure Statement, Table of Contents, Table of Authorities, Statement Regarding Oral Argument, and the Addendum.

This brief and the addendum required under Eighth Circuit Rule 28A(g), which is being filed electronically as a separate document per Eighth Circuit Rule 28A(g)(5), have been scanned for viruses and are virus-free.

Respectfully submitted this 25th day of November, 2014.

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On November 25, 2014, I served a true and correct copy of:

1. Opening Brief of National Parks Conservation Association and Sierra Club; and

2. Addendum to Opening Brief of National Parks Conservation Association and Sierra Club

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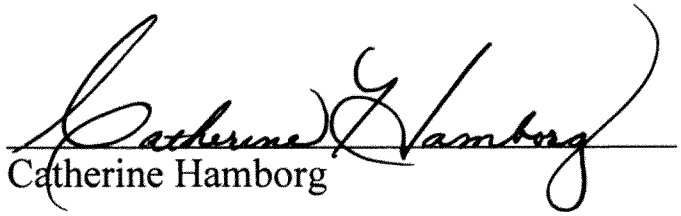
I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed on this 25th day of November, 2014, at Seattle, Washington.



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