UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILDEARTH GUARDIANS, Petitioner, v. U.S. ENVIRONMENTAL PROTECTION AGENCY and LISA JACKSON, Respondents, PUBLIC SERVICE COMPANY OF NEW MEXICO, Intervenor.	)	Case No. 11-9552
PUBLIC SERVICE COMPANY OF NEW MEXICO, Petitioner, v. U.S. ENVIRONMENTAL PROTECTION AGENCY and LISA JACKSON, Respondents, WILDEARTH GUARDIANS, DINE CITIZENS AGAINST RUINING OUR ENVIRONMENT *et. al.*, Intervenors.	)	Case No. 11-9557
SUSANA MARTINEZ, Governor of New Mexico, and NEW MEXICO ENVIRONMENT DEPARTMENT, Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY Respondents, WILDEARTH GUARDIANS, DINE CITIZENS AGAINST RUINING OUR ENVIRONMENT *et al.*, Intervenors.	)	Case No. 11-9567

INTERVENOR WILDEARTH GUARDIANS' CONSOLIDATED RESPONSE IN OPPOSITION TO MOTIONS FOR STAY OF THE FINAL RULE

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INTRODUCTION

The San Juan Generating Station ("SJGS") is one of the largest sources of air pollution in the United States. Located in northwest New Mexico, the soot and smog from this 1,800 megawatt coal-fired power plant degrades the once-sweeping scenic vistas of two of the nation's most treasured national parks—the Grand Canyon and Mesa Verde. Pollution from this power plant also degrades in the air quality in the Four Corners region, resulting in serious health impacts for those people who live, recreate in, and otherwise enjoy the region.

To reduce haze and smog-forming pollution from the SJGS by more than 80 percent, the U.S. Environmental Protection Agency ("EPA") promulgated a rule requiring the plant to install Best Available Retrofit Technology ("BART") that would significantly limit emissions of nitrogen dioxide and sulfur dioxide, air pollutants that directly cause haze and smog. The State of New Mexico was originally required to adopt a clean-up plan for the SJGS, but because of delay and the inability of the State to develop a State Implementation Plan ("SIP") that complied with the Clean Air Act, EPA developed its own proposal. Under the Clean Air Act, when a state fails to protect clean air by means of a SIP that meets the Act's requirements, EPA is legally obligated to develop a Federal Implementation Plan ("FIP") to clean up a state's major sources of air pollution such as the SJGS.

EPA's FIP required the SJGS to meet a nitrogen oxide emission rate of 0.05 lb/mmbtu through the use of Selective Catalytic Reduction ("SCR"), the most up-to-date control technology, reducing emissions by more than 80 percent. In addition to

protecting visibility at the region's national parks, EPA and other health experts have recognized that these emissions reductions also provide a host of public health benefits including decreased asthma-related episodes and emergency room visits, decreased incidences of air pollution-related heart attacks, and premature deaths.

EPA proposed a FIP for the SJGS on January 5, 2011, two years after finding that New Mexico had failed to take action. One month before EPA's promulgation of a final FIP, New Mexico finally submitted a SIP to clean up the SJGS. With insufficient time to review this last-minute submittal before EPA's commitment to promulgate a final FIP, EPA promulgated a final FIP on August 5, 2011 pursuant to the agency's non-discretionary duty under the Clean Air Act. The Public Service Company of New Mexico ("PNM") (part-owner of the SJGS), New Mexico Governor Susana Martinez, and the New Mexico Environment Department (New Mexico") (collectively, "Movants") challenged the FIP in separate actions and now seek a stay of the FIP pending the outcome of the respective challenges.

Movants have not met all four of the required factors for a stay. Their argument that EPA lost its authority to promulgate a FIP upon submission of New Mexico's last-minute SIP is not supported by the plain language of the Clean Air Act. They have not demonstrated that they are likely to be irreparably harmed by a stay. Moreover, a stay will allow the SJGS to continue spewing soot and smog into the air around several national parks and wildlife areas in the Four Corners region, further impairing visibility in those areas and curtailing the public's enjoyment of those special places. Besides visibility impairment, continued high levels of dangerous air pollutants from the SJGS

will degrade the respiratory and cardiovascular health of people who live in the Four Corners region, resulting in increased medical costs that will be borne by these individuals and the State of New Mexico. When all of these factors are weighed against PNM's near-term, self-imposed, financial expenditures and potential small rate increases for PNM's electricity customers, it is clearly within the public interest to implement the FIP without delay.

BACKGROUND

I. CLEAN AIR ACT REQUIREMENTS

Congress enacted the Clean Air Act to "speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again." H.R.Rep. No. 1146, 91st Cong., 2d Sess. 1,1, 1970 U.S. Code Cong. & Admin. News 5356, 5356. The Act employs a model of cooperative federalism whereby EPA and the states share the responsibility "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). Under the Clean Air Act, each state is required to develop and submit, for EPA's approval, a State Implementation Plan ("SIP") indicating how it will implement, maintain, and enforce the Act's air quality standards. *See generally id*. § 7410(a)(2). When EPA determines that a SIP is complete (or it is deemed complete by operation of law), the agency has 12 months to review the SIP to ensure it meets the minimum requirements of the Act. *See id*. § 7410(k)(2). At the end of the 12-month period, EPA must then approve or disapprove the SIP in whole or in part. *See id*. § 7410(k)(3).

If a state fails to submit a SIP, submits an incomplete SIP, or if EPA disapproves a SIP in whole or in part because the SIP does not meet the Clean Air Act's minimum requirements, then EPA must develop its own plan, called a Federal Implementation Plan ("FIP"). *See id*. § 7410(c)(1). The Act requires EPA to Promulgate a FIP within two years of such a finding or disapproval "unless the State corrects the deficiency, ***and*** the Administrator approves the plan or plan revision, ***before*** the Administrator promulgates such [a FIP]." *Id*. (emphasis added).

To fulfill the purpose of the Clean Air Act, Congress has established a number of different air pollution goals, including the national goal of "prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas[1] which impairment results from manmade air pollution." 42 U.S.C. § 7491(a)(1). Thus, a SIP must include provisions for eliminating soot and smog from air pollution sources within a state's borders that may reasonably be anticipated to cause or contribute to visibility impairment for any protected area located within or beyond that state's boundaries. *See id*. § 7410(a)(2)(D)(i)(II) (visibility requirements for Interstate Transport SIPs or FIPs). A SIP must also include provisions for complying with EPA's Regional Haze Rule. *See generally id*. § 7491 (requirements for Regional Haze SIPs or FIPs). With respect to addressing regional haze[2] in a FIP or SIP, the Clean Air Act requires

[1] Class I areas consist of all international parks, national wilderness areas that exceed 5,000 acres in size, national memorial parks that exceed 5,000 acres in size, and national parks that exceed 6,000 acres in size. *See* 42 U.S.C. § 7472.

[2] Regional haze is visibility impairment produced by a multitude of sources that emit fine particles into the air across a broad geographic region. *See* 64 Fed. Reg. 35,715 (July 1, 1999). The emission and movement of sulfur dioxide, nitrogen oxides and fine

regulating entities to evaluate the use of retrofit controls, *i.e.*, Best Available Retrofit Technology ("BART"), at major stationary sources with the potential to emit greater than 250 tons of any pollutant. *See id*. § 7491(g)(7).

II. THE INTERSTATE TRANSPORT AND REGIONAL HAZE FIPs FOR NEW MEXICO

On May 25, 2005 EPA made a finding that New Mexico, along with six other states, failed to submit an Interstate Transport SIP revision required to satisfy the "good neighbor" provisions of Section 110(a)(2)(D)(i) with respect to the 1997 8-hour ozone National Ambient Air Quality Standard ("NAAQS") and the $PM_{2.5}$ NAAQS. *See* 70 Fed. Reg. 21,147 (April 25, 2005). This finding started the two year clock for EPA to either approve an Interstate Transportation SIP revision for these states or promulgate a FIP by May 25, 2007. *See id*.; *see also* 42 U.S.C. § 7410(c)(1). When EPA failed to meet this statutory deadline for Interstate Transport SIPs or FIPs, WildEarth Guardians brought suit against EPA on June 3, 2009 to compel the agency to take action. *See WildEarth Guardians v. Jackson* ("Jackson I"), 2011 WL 6779276 (N.D. Cal. Dec. 27, 2011). The case resulted in a consent decree[3] in which EPA agreed to approve a SIP or promulgate an Interstate Transport FIP by specified dates for each of the seven states for each of the four elements of Section 110(a)(2)(D)(i), including the visibility requirement. *See id*. at

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particulate matter (*e.g.*, sulfates, nitrates, organic carbon, elemental carbon, and soil dust) "impairs visibility by scattering and absorbing light." *Id*.

[3] The relationship between the consent decree requirement that EPA take action on an Interstate Transport SIP or FIP by a date certain and EPA's decision to take concurrent action on a Regional Haze FIP is discussed in detail below in Section I.A.1 of the Argument.

*1. With respect to New Mexico, EPA was required to take final action on an Interstate Transport FIP or SIP by August 5, 2011.

New Mexico submitted a revised Interstate Transport SIP to EPA on September 17, 2007 to address Section 110(a)(2)(D)(i) of the Act. *See* 76 Fed. Reg. 491, 496. On January 5, 2011 EPA proposed disapproval of the Interstate Transport SIP because it did not include adequate provisions for visibility protection in other states pursuant to Section 110(a)(2)(D)(i)(II) of the Act. *Id*. In its September 2007 Interstate Transport SIP submission, New Mexico stated that it would address the requirements that it not interfere with visibility programs in other states through a Regional Haze SIP update that it would submit to EPA by December 2007. *Id*. New Mexico did not make the requisite Regional Haze SIP submission in 2007 or at any time prior to EPA's announcement of its proposed Interstate Transport and Regional Haze FIPs in January 2011. *Id*.

New Mexico was required to submit to EPA a Regional Haze SIP by December 17, 2007. *See* 40 C.F.R. § 51.308(b). In January 2009, EPA made a finding that New Mexico had failed to submit a Regional Haze SIP meeting the requirements of the Clean Air Act, including the requirement for BART. *See* 74 Fed. Reg. 2,392 (Jan. 15, 2009). EPA acknowledged that this finding started "the two year clock for the promulgation by EPA of a FIP." *Id*. Accordingly, EPA was required to either promulgate a Regional Haze FIP or approve a Regional Haze SIP from New Mexico by January 15, 2011. *See* 42 U.S.C. § 7410(c)(1).

On January 5, 2011 EPA proposed Interstate Transport and Regional Haze FIPs for New Mexico to ensure that emissions from New Mexico sources do not interfere with

visibility programs of other states, and to implement nitrogen oxide ("NOx") and sulfur dioxide ("SO_2") emission limits at the San Juan Generating Station ("SJGS") to prevent such interference. *See* 76 Fed. Reg. 491-92 (Jan. 5, 2011). In the proposed rule, EPA recognized that:

> NOx and SO2 are significant contributors to visibility impairment in and around New Mexico. As the Four Corners Task Force notes, '[r]eduction of NOx is particularly important to improve visibility at Mesa Verde National Park, which is 43 km away from SJGS. . .[V]isibility has degraded at Mesa Verde over the past decade, and the portion of degradation due to nitrate has increased. . .'

76 Fed. Reg. AT 493. EPA determined that the SJGS, located in northwest New Mexico, "is one of the largest sources of NOx pollution in the United States." 76 Fed. Reg. 52,388. On August 22, 2011 EPA published the final rules at issue in this case implementing the Interstate Transport and Regional Haze FIPs. *See id*. In this Notice, EPA acknowledged that it had received a Regional Haze SIP from New Mexico on July 5, 2011, but that EPA would not have been able to review the SIP, propose a rule, and promulgate a final rule before the deadline by which EPA had committed to promulgate both a final Interstate Transport FIP and a final Regional Haze FIP ("the BART Rule"). *Id*. at 52,390. As discussed above, EPA was required to take final action on Interstate Transport FIP or SIP by August 5, 2011. *Id*. In the interests of efficiency, and because EPA had a non-discretionary duty to also take action on a Regional Haze FIP or SIP for New Mexico, EPA chose to promulgate a Regional Haze FIP with the Interstate Transport FIP. *Id*.

The Interstate Transport and Regional Haze FIPs implement NOx and SO_2 emission limits at the SJGS, requiring the plant to reduce NOx pollution to 0.05 pounds

per million BTU and SO_2 pollution by 0.15 pounds per million BTU. *See* 76 Fed. Reg. 52,388. As part of the Regional Haze FIP, EPA implemented a BART requirement for SJGS to use Selective Catalytic Reduction ("SCR") technology to meet emission reductions, and determined that SCR was "the most cost-effective pollution control to achieve emission reductions outlined in the federal plan." *Id*. In the final rule, EPA extended the time frame for compliance with the rule from three years, the time frame initially stipulated in the proposed rule, to five years.[4]

EPA determined that the BART Rule "will reduce the visibility impacts due to [the SJGS] by over 50% at each one of the 16 national parks and wilderness areas in the area and promote local tourism by decreasing the number of days when pollution impairs scenic view." *Id*. at 52,389 (emphasis added). Moreover, EPA also recognized that health benefits would flow from the BART Rule because installation of SCR technology would reduce NOx pollution by over 80 percent. *Id*.

ARGUMENT

Movants have the burden of establishing that they are entitled to a stay of the BART Rule. Movants must demonstrate a likelihood of success on the merits, a likelihood of irreparable harm if the stay is not granted, that the balance of equities tips in the movant's favor, and that a stay is in the public interest. *See Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008); *see also Attorney General of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009) (accord). If the

[4] In its Petition for Review in Case No. 11-9552, Guardians challenges this enlarged implementation timeframe.

movant fails to meet its burden of proof on any of the four requirements, its request must be denied. *See Chem. Weapons Working Group v. U.S. Dep't of the Army*, 111 F.3d 1485, 1489 (10th Cir. 1997). "Because a [stay] is an extraordinary remedy, the movant's right to relief must be clear and unequivocal." *Kikimura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001) (citation omitted). Because PNM and New Mexico have failed to meet the standard for a stay, their requests for a stay of the BART rule should be denied.

I. PNM AND NEW MEXICO HAVE FAILED TO ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS

Movants have not met their burden to show they have a likelihood of prevailing on their claims against EPA regarding the BART Rule because (1) EPA properly promulgated, and had the non-discretionary duty to promulgate, the BART Rule in accordance with the Clean Air Act and its implementing regulations, and (2) EPA provided proper support for compliance costs, visibility improvements, and emissions limits associated with the BART Rule.

A. EPA Properly Promulgated a BART FIP.

Movants' primary basis for arguing that EPA improperly promulgated the BART Rule is that EPA's non-discretionary duty to promulgate a FIP ceased when New Mexico submitted its own Regional Haze SIP one month before EPA promulgated the Final Rule. *See generally* PNM Br. 6-11, NM Br. 7-14. Therefore, the dispositive legal question for the Court is whether a state's last-minute submittal of a SIP, such as New Mexico's submittal of a Regional Haze SIP one month before EPA promulgated the final BART Rule, serves to relieve EPA of its statutory responsibility under Section 110(c) of the

Clean Air Act to promulgate a FIP ***within two years*** after finding that a state has failed to make a required submission. The plain language of the Act, and recent decisions from other courts on this issue, indicate that New Mexico's last-minute submittal of a Regional Haze SIP does not automatically relive EPA of its mandatory duty to promulgate a Regional Haze FIP. Moreover, adoption of Movant's argument that a SIP submittal at any time prior to promulgation of a final FIP stops the FIP process would be contrary to the goals of the Clean Air Act, which sets specific schedules for implementation of regional haze rules for "the prevention of any future, and the remedying of any existing, impairment of visibility" in Class I areas. 42 U.S.C. § 7491(a)(1).

Through the Clean Air Act, Congress established a partnership between EPA and the states to achieve national air quality goals. *See* 42 U.S.C. §§ 7401-7515. As part of this model of cooperative federalism, Congress charged EPA "with the responsibility for setting the national ambient air standards" but relegated EPA "to a secondary role in the process of determining and enforcing the specific, source-by source emission limitations" necessary to meet the national air standards. *Train v. Nat. Res. Defense Counsel*, 421 U.S. 60, 79 (1975). Congress placed the responsibility for determining how to achieve and enforce national air standards on the states through the SIP process, and EPA's secondary role in this process is to approve SIPs that meet all of the Act's requirements. *See* 42 U.S.C. § 7410(a)(2).

However, Congress explicitly provided for situations in which EPA would need to step in when a state failed to comply with its mandatory responsibilities to provide for achieving national air standards. Section 110(c) of the Act gives EPA the authority and

requires EPA to promulgate a FIP "at any time within 2 years" after EPA finds that a state has failed to make a required submission, a SIP or SIP revision does not meet the requirements of the CAA, or if EPA disapproves a SIP in whole or in part. *See* 42 U.S.C. § 7410(c); *see also Train*, 421 U.S. at 79 (recognizing that EPA "may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies [CAA] standards."). Section 110(c)(1) goes on to say that EPA will only be relieved of its FIP obligation if "that State corrects the deficiency, ***and*** the Administrator approves the plan or plan revision, ***before*** the Administrator promulgates such [a FIP]." (emphasis added). Thus, according to the plain language of the Act, two things must happen once the two-year FIP clock starts to run to relive EPA of its FIP responsibilities: (1) a state must submit a SIP or correct a deficient SIP and submit it to EPA, and (2) EPA must approve the SIP. If ***both*** of these actions have not happened within the statutory time limit for EPA's non-discretionary duty to prepare a FIP, then EPA not only has the authority to prepare a FIP, the agency is also ***required*** to prepare a FIP so as not to be in violation of the Clean Air Act.

Accordingly, EPA acted within its authority when it promulgated both the Interstate Transport FIP[5] and the BART Rule. EPA disapproved New Mexico's Interstate Transport SIP provisions addressing section 110(a)(2)(D)(i)(II) regarding

[5] PNM makes the additional argument that EPA lacked authority to promulgate an Interstate Transport FIP for New Mexico because EPA was required to approve New Mexico's 2007 Interstate Transport SIP and/or the State's July 2011 submittal of a Supplemental Interstate Transport SIP. PNM Br. 9-10. This argument lacks merit for the same reasons discussed above for the BART Rule. EPA had the authority to promulgate an Interstate Transport FIP once the agency disapproved the State's Interstate Transport SIP and had not yet approved the State's supplemental SIP.

visibility protection on August 22, 2011. 76 Fed. Red. 52,388. EPA also found that New Mexico failed to submit a Regional Haze SIP. 74 Fed. Reg. 2,392 (Jan. 15, 2009). Pursuant to Section 110(c) of the Act, EPA was required to take final action on the regional haze requirements by January 15, 2011. *See* 76 Fed. Red. at 52,390 n.3 (EPA acknowledgement of same). Since making those findings, EPA has not approved an Interstate Transport SIP or a Regional Haze SIP for New Mexico. Accordingly, pursuant to the plain language of Section 110(c)(1), EPA has the authority and the obligation to promulgate both an Interstate Transport FIP and a Regional Haze FIP for New Mexico.

A recent opinion from the Federal District Court for the District if Colorado involving a similar factual scenario with respect to the timing of EPA's promulgation of a FIP squarely addressed the issue of whether EPA had the authority to proceed with the FIP process once a state had submitted a SIP. In *WildEarth Guardians et al. v. Jackson* ("Jackson II"), 2011 WL 4485964 at *7 (D. Colo. Sept. 27, 2011), the State of North Dakota challenged a consent decree between Guardians and EPA in which EPA agreed by a date certain to propose a Regional Haze FIP for North Dakota concurrent with a partial or complete denial of that state's pending Regional Haze SIP, which North Dakota submitted to EPA in 2010. North Dakota argued that before EPA could proceed with the FIP process, the Clean Air Act required the agency to first review the pending SIP and determine whether it met the Act's requirements. *Id*. The court did not agree with North Dakota's interpretation of the Act:

> In the event that final action is not taken on North Dakota's RH SIP before the schedule calls for the promulgation of a final FIP [], the Court notes that it appears the EPA would nonetheless be authorized to promulgate a regional haze FIP. The

> CAA requires the EPA to promulgate a FIP within 2 years of finding that a State failed to make a required SIP submission. That duty remains "*unless* the State corrects the deficiency, *and* the Administrator approves the plan or plan revision, *before* the Administrator promulgates such [FIP]." As North Dakota so readily points out, the EPA has not issued a final rulemaking approving North Dakota's RH SIP; thus, the EPA's obligation to promulgate a FIP remains.

Id. at *7 n.8. (emphasis in original) (internal citation omitted); *see also Nat. Res. Defense Council v. Browner*, 57 F.3d 1122, 1124 (D.C. Cir. 1995) ("FIP promulgation can be avoided only if EPA has actually approved the state's SIP submission."). Importantly, the court also recognized that "North Dakota's construction of the Act would seemingly allow a state to indefinitely postpone the promulgation of a FIP by filing inadequate SIP after inadequate SIP, and demanding that EPA approve or disapprove of them before promulgating a FIP," thereby contravening the goals of the Clean Air Act. *Id*.

Movants offer the same incorrect interpretation of the Clean Air Act here as that put forth by North Dakota, *i.e.*, that EPA was required to stop its FIP process for the BART Rule upon receipt of New Mexico's last-minute Regional Haze SIP. Both Movants ignore Section 110(c)'s ***two-part*** requirement that a state submit a SIP ***and*** EPA approve the SIP before EPA is relieved of its FIP obligation. New Mexico's disregard for the second requirement is evident in its incorrect assertion of what the Act requires:

> If a state *has submitted* a BART SIP to EPA before EPA promulgates a BART FIP, as New Mexico did, EPA must, under *Train*, determine if the SIP "satisfies" the Act's BART provisions *before EPA can know whether it has any authority to promulgate a BART FIP for that state*.

NM Br. 15 (emphasis in original); *see also* PNM Br. 10 (same). New Mexico offers no support for this assertion from the Act, its implementing regulations, or case law, and cannot do so because none of these sources supports New Mexico's interpretation.

Instead, using the plain language of the Act several courts have determined that it is not the ***submittal*** of a SIP that divests EPA of its authority to promulgate a FIP; rather, it is EPA's ***approval*** of the SIP that takes away the agency's authority to promulgate a FIP. *See Browner*, 57 F.3d at 1124.

Train does not contradict this interpretation of Section 110(c). Moreover, *Train* is inapposite here because it does not speak to the issue of whether or not EPA has the authority to promulgate a FIP concomitant with a pending (but unapproved) SIP submission. *Train* simply reinforces the state's primary role in "determining and enforcing" the process by which the state will meet the Clean Air Act's air quality standards, and recognizes that EPA may promulgate a FIP "if a State fails to submit [a SIP] which satisfies those standards." *Train*, 421 U.S. at 79. Therefore, *Train* does not support Movants' arguments that EPA lacked authority to promulgate the BART Rule.

Finally, as Judge Arguello noted in *Jackson II*, divesting EPA of its FIP authority upon receipt of a SIP without a review and a determination by EPA of whether the SIP satisfies the requirements of the Clean Air Act would have the effect of allowing a state to indefinitely postpone a FIP and, by extension, the air quality protections the FIP was intended to implement. Yet, this result is certain to occur here under the incorrect interpretation of Section 110(c) offered by Movants. Although Movants attempt to support their arguments for this interpretation through discussions of the division of authority between the states and EPA under the Act, and highlight the State's primary role in determining how it will comply with air quality standards, these discussions only detract from the main question of whether EPA retained the authority to promulgation a

FIP once New Mexico submitted its last-minute Regional Haze SIP. Because EPA had not ***approved*** New Mexico's SIP prior to promulgating the final BART Rule, EPA retained its authority to promulgate the Rule. Therefore, EPA's promulgation of the BART Rule was legal and proper.

1. Guardians' Consent Decree with EPA was not the source of EPA's authority to promulgate the BART Rule.

Movants erroneously assert that EPA used its consent decree with Guardians to "circumvent the CAA's requirement that EPA defer to State BART determinations" when EPA promulgated the BART Rule before reviewing New Mexico's last-minute SIP submission. NM Br. 15; see also PNM Br. 7-8. This argument is without merit. Nowhere does EPA claim that the consent decree ***authorizes*** it to promulgate the BART Rule. Rather, the consent decree requires EPA to comply with the agency's statutory obligation under the Clean Air Act to approve a SIP or promulgate a FIP to address the requirements of Section 110(a)(2)(D)(i) for the specified states by the deadlines in the decree. The consent decree with Guardians merely established a timetable by which EPA must act with respect to its mandatory duty to approve an Interstate Transport SIP or promulgate an FIP. The fact that EPA chose, for efficiency's sake, to promulgate the BART rule at the same time in no way exceeded the bounds of what EPA was authorized to do under the Act, nor did EPA rely on the consent decree for authority to promulgate the BART Rule.

As already discussed above and acknowledged by EPA in its Notice of the final BART Rule, EPA's authority and obligation to promulgate both an Interstate Transport

FIP and a Regional Haze FIP derive from the Clean Air Act. *See* 76 Fed. Reg. 52,388 (EPA stated that it was promulgating the rule pursuant to Section 110(c) of the Act). In the Federal Register Notice for the final BART Rule, EPA referred to the consent decree with Guardians several times. Specifically, EPA referred to the deadline for an Interstate Transport SIP or FIP for New Mexico, stating that the agency was required to have approved a SIP or promulgated a FIP by August 5, 2011. 74 Fed. Reg. at 52,390. EPA also stated that it was appropriate to take action on the interstate transport and regional haze requirements at the same time "because the purposes and requirements of the interstate transport provisions of the CAA with respect to visibility and the [regional haze] program are intertwined." *Id*. at 52,416. Moreover, EPA's FIP obligation for both interstate transport and regional haze rules was already overdue. *Id*. at 52,414. Thus, EPA decided to promulgate a Regional Haze FIP (the BART Rule) on the same schedule as the Interstate Transport FIP mandated by the consent decree.

The argument that EPA used a consent decree to impermissibly expand its authority to promulgate a BART FIP has already been rejected in *Jackson I*. There, North Dakota sought to intervene to challenge a consent decree[6] between Guardians and EPA that required EPA to take final action related to North Dakota's interstate transport requirements by March 2, 2012. *Jackson I*, 2011 WL 6779276 at *1. EPA notified North Dakota that it was taking action on both interstate transport and regional haze by the

[6] The consent decree at issue in this case is the same decree that required EPA to promulgate an Interstate Transport FIP or approve a SIP for New Mexico by August 5, 2011. EPA's non-discretionary duty with respect to regional haze requirements was not at issue in this case. *Id*.

required deadline in the consent decree. North Dakota argued that EPA lacked authority to take action on regional haze, and impermissibly relied on the consent decree for its authority to promulgate a Regional Haze FIP. *Id*. at *2. The court examined EPA's stated basis for its authority to promulgate a Regional Haze FIP put forth in the Federal Register notice of the proposed action and determined that EPA did not rely on the consent decree for its authority to take action on a Regional Haze FIP or SIP. *Id*. Instead, EPA was "simultaneously exercising its separate authority on both regional haze and interstate transport requirements, for efficiency." *Id*. The court concluded that:

> [T]he evidence presented shows that EPA consistently cites to the Clean Air Act as providing authority for it to promulgate both the regional haze FIP and the interstate transport FIP. The EPA cites the consent decree only as providing a deadline for action on the interstate transport FIP. The EPA made an administrative decision to address both together, and thus chose to address the regional haze FIP by the same date, as is within its right.

Id. at *4. EPA has made the same "administrative decision" here to address the Interstate Transport and Regional Haze FIPs together, using the deadline for the former action as the deadline for the latter action as well. EPA relies on the Clean Air Act, however, for its ***authority*** to take both actions. Accordingly, Movants' argument that EPA improperly relied on the consent decree for its authority to promulgate the BART Rule is misplaced and Movants have no chance of prevailing on the merits of this argument.

B. EPA Provided Proper Support For Compliance Costs, Visibility Improvements, And Emissions Limits Associated With The Bart Rule.

PNM takes issue with several substantive aspects of the BART Rule. First, PNM argues that EPA did not properly analyze the cost of PNM's compliance with the BART Rule. PNM Br. 11-13. Second, PNM takes issue with EPA's visibility modeling

method, claiming that EPA's modeling method overestimated visibility improvements of the BART Rule. *Id*. at 13-14. Finally, PNM claims that the BART emission limits imposed by the Rule are not achievable using available technology. *Id*. 14-15. EPA is in the best position to defend its own analysis methods and assumptions used to support these three substantive factors. Moreover, to avoid duplication Guardians hereby incorporates by reference Intervenor San Juan Citizen Alliance ("SJCA") *et al*.'s substantive arguments regarding the propriety of EPA's choice of SCR technology as BART, cost estimates, and modeling underlying the BART Rule. *See* SJCA's Response Brief, §§ III.C.2-5.

Guardians takes issue with PNM's use of extra-record evidence to support its merits arguments that EPA's cost estimates and BART limits are not rational because this Court's review of PNM's merits arguments is limited to the rulemaking record. Guardians also takes issue with PNM's argument that EPA's visibility modeling is inadequate because there is ample evidence in the record demonstrating a rational basis for EPA's choice of modeling methodology.

1. PNM's Arguments Regarding Costs of Compliance and Achievability of the BART Limit are based on Post-Decision Documents That are not Part of the Record.

Judicial review of EPA's final rule is governed by the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*. ("APA"). Pursuant to the APA, a court assessing agency action must "review the whole record or those parts of it cited by a party." *Id*. § 706. However, a court's review is limited to the administrative record before the agency at the time the agency made its decision. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("the

focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"); *Citizens for Alternatives to Radioactive Dumping v. DOE*, 485 F.3d 1091, 1096 (10th Cir. 2007) ("Judicial review of agency action is normally restricted to the administrative record.") (citing *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004)).

In the context of rulemaking pursuant to the Clean Air Act, the "record for judicial review shall consist exclusively of" all documents, data, comments and EPA responses to comments, and transcripts that comprise the rulemaking docket, along with the proposed and final rules, a statement of basis and purpose for each, and an explanation for any major changes between the proposed and final rules. *See* 42 U.S.C. § 7607(7)(A). Thus, "the record presented to the court on a petition for review [] consists of materials required by the statute to be included in the docket supplemented by materials of central importance to the rulemaking placed in the docket prior to the promulgation of the rule." *Am. Petroleum Inst. v. Costle*, 609 F.2d 20, 22 (D.C. Cir. 1979). The record is closed on "the date that the rule is signed and released to the public. . . [a]t that time, the agency's decision is fixed" and no additional materials can be added to the rulemaking docket." *Id*. at 24.

Although judicial review of EPA's action is limited to the rulemaking docket, PNM supports its argument that EPA's cost assessments are flawed with a post-decision report prepared two months after EPA promulgated the final BART Rule. PNM Br. 13 (citing to an October 21, 2011 cost assessment included in PNM's Petition for Reconsideration to the EPA Administrator). PNM also includes this post-decision cost

assessment as an exhibit in its Motion for Stay. PNM also relies on a post-decision document to support its argument that the BART limit of 0.05 lb/mmBtu for NOx emissions is not achievable. PNM Br. 15 (citing to an October 21, 2011 analysis report for achievable NOx limits also included in PNM's Petition for Reconsideration to the EPA Administrator). Both of these documents are not properly before this Court because they were produced two months after EPA's promulgation of the final BART Rule. *See Costle*, 609 F.2d at 22 (documents post-dating the EPA Administrator's promulgation of a final rule are not part of the record for judicial review). Accordingly, in deciding whether EPA's cost estimates and BART limits are legally adequate, this Court should limit its review to the rulemaking docket and not consider post-decisional documents that were not available to EPA when it made its final decision. *See New Mexico Envtl. Improvement Div. v. Thomas,* 789 F.2d 825, 835-36 (10th Cir. 1986) (rejecting extra-record evidence because the information was not before the agency during its decisionmaking process but, rather, was raised on appeal).

2. PNM's Argument that EPA's Visibility Analysis is Flawed Lacks Merit Because the Agency is Entitled to Deference in Its Choice of Analysis Methodology.

PNM takes issue with EPA's visibility modeling method and, as a result, with EPA's visibility benefit calculations derived from the modeling. PNM br. 13-14. In deciding disputes primarily involving issues of fact that "[require] a high level of technical expertise, [the court] must defer to the informed discretion of the responsible federal agencies." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 377 (1989) (internal quotation omitted); *see also Morris v. U.S. Nuclear Regulatory Com'n.*, 598

F.3d 677, 691 (10th Cir. 2010) ("[D]eference to the agency is especially strong where the challenged decisions involve technical or scientific matters within the agency's area of expertise."). "EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem." *Sierra Club v. EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999) (citation omitted). Moreover, when it comes to the choice of air quality modeling methodology:

> EPA has undoubted power to use predictive models so long as it explains the assumptions and methodology used in preparing the model and provides a complete analytical defense should the model be challenged. That a model is limited or imperfect is not, in itself, a reason to remand agency decisions based upon it.

Appalachian Power Co. v. EPA, 249 F.3d 1032, 1052 (D.C. Cir. 2001) (internal citation and quotation omitted). Thus, when dealing with a rulemaking on air quality issues, EPA "must have discretion to rely on the reasonable opinions of its own qualified experts." *Marsh*, 490 U.S. at 378.

It is more appropriate for EPA, rather than Guardians, to defend the adequacy of the agency's "assumptions and methodology" in the highly technical area of visibility benefits analysis. Explanations of EPA's assumptions and its chosen methodology for calculating visibility benefits of the BART Rule can be found in the record, which clearly shows a rational basis for EPA's modeling methodology. PNM simply disagrees with EPA's method for calculating visibility benefits and asserts that EPA should have, instead, adopted the visibility modeling methods used by PNM. PNM Br. 14. However, ("[c]ourts are not in a position to decide the propriety of competing methodologies…but … should determine simply whether the challenged method had a rational basis."

Committee to Preserve Boomer Lake v. Dept. of Transportation, 4 F.3d 1543, 1553 (10th Cir. 1993) (emphasis added). A mere disagreement over a particular analysis methodology is not enough for PNM to succeed on the merits of its claim that EPA's visibility modeling did not have a rational basis.

II. MOVANTS HAVE FAILED TO DEMONSTRATE THAT IRREPARABLE HARM TO THEM IS LIKELY ABSENT A STAY

Movants have not demonstrated a likelihood of success on the merits of their claims, thus this Court should deny the motions for stay on that basis alone. However, even if Movants have some likelihood of success on the merits, to obtain a stay Movants also must demonstrate "a likelihood that [they] will suffer irreparable harm in the absence of preliminary relief." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009). "[P]urely speculative harm does not amount to irreparable injury." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003). Movants have the burden to "demonstrate a significant, rather than speculative, risk of irreparable harm." *RoDa Drilling*, 552 F.3d at 1210. The Supreme Court recently confirmed that irreparable injury must be demonstrated, not presumed: "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. Movants may not avoid a demonstration that "irreparable injury is *likely* in the absence of an injunction." *Id.* (emphasis in original). In determining whether the movant has made the requisite showing of irreparable harm, this Circuit also considers "whether such harm

is likely to occur before the. . .court rules on the merits." *Greater Yellowstone Coal.*, 321 F.3d at 1260. PNM and New Mexico have not met their burden to show that they are likely to suffer ***irreparable*** harm if the BART Rule remains in place during the course of this litigation; therefore, this Court should deny both motions to stay the BART Rule. *See id*. ("If a trial on the merits can be conducted before the injury would occur there is no need for interlocutory relief.") (citation omitted).

A. PNM's Alleged Harm is Speculative and Does Not Satisfy the Irreparable Harm Standard.

1. PNM's Alleged Financial Harm is Not Irreparable.

PNM alleges that it will be irreparably harmed during the pendency of this litigation because it will have to make certain financial expenditures within the next six months to meet the September 2016 deadline for full compliance with the BART Rule. PNM Br. 16. However, PNM later contradicts this assertion of alleged irreparable financial harm by stating that PNM will seek to recover these costs in its electricity rates from its customers. PNM Br. 17 ("Those costs will be passed along in the form of higher retail-customer bills."); *see also* NM Br. 16 ("The costs are likely to be passed along to New Mexico consumers. . . in the form of higher electricity rates."). Furthermore, PNM's assertion that it will need to make financial expenditure within the next six months is undercut by the record, which shows that PNM can complete installation of SCR technology within three years, obviating the need for PNM to start spending money while this litigation is pending.

PNM's statement that it "cannot defer expenditures necessary for work while this

case is litigated and still meet EPA's deadline" is not supported by evidence in the record demonstrating that installation of SCR technology can be accomplished in an average time range of 37 to 43 months. *See* EPA's "Complete Response to Comments," Doc. No. 2 at 72. EPA stated that the record did not contain any evidence that installation of SCR at SJGS "would take longer than an average SCR." *Id*. at 75. Moreover, "the largest air quality control retrofit in the history of the United States" at the 2,200 MW Sammis plant was able to install SCR technology on two units in 62 months concurrent with new installations of other pollution-reducing equipment "requiring significant ductwork modification." *Id*. at 72-73. EPA concluded that SCR installation at the SJGS would not require the same long time frame as the Sammis retrofit because "this project [Sammis] is not comparable to SCR retrofits at SJGS" given that the SJGS is "relatively unconstrained" compared to the Sammis plant. *Id*. Finally, EPA stated that the 62-month time frame for SCR installation at the Sammis plant "would have been shorter" had it not been for the significant ductwork modification necessary to concurrently install a ***different*** technology. *Id*. at 73.

The record demonstrates that PNM can accomplish installation of SCR technology in a much shorter time frame than the 60-month compliance schedule set by EPA. Although PNM may prefer to use the entire allotted compliance schedule to complete the SCR installation, it has not demonstrated that a shorter compliance time frame is feasible, thereby rendering its proposed expenditures within the next six months unnecessary. Accordingly, because PNM's near-term expenditures are self-inflicted, these expenditures do not constitute irreparable financial harm. *See Salt Lake Tribune Pub.*

Co., LLC v. AT & T Corp., 320 F.3d 1081, 1106 (10th Cir. 2003) ("We will not consider a self-inflicted harm to be irreparable. . ."). Even if PNM is justified in making financial expenditures in the next six months to meet the compliance time frame, PNM's alleged financial harm is not irreparable because, by its own admission, PNM is planning to recover its expenses associated with complying with the BART Rule through an increase in electricity rates. As the Supreme Court has stated:

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Samson v. Murray, 415 U.S. 61, 90 (1974) (quotation omitted). Because PNM has not demonstrated that its near-term expenditures to comply with the BART Rule are necessary and because PNM is planning to pass along any expenditures for the BART Rule to its customers, PNM has not met its burden to demonstrate ***irreparable*** financial injury.

2. PNM Cannot Allege Harm to Its Customers.

As part of its alleged irreparable harm if a stay is not granted, PNM claims that its customers will experience a rate increase from PNM's near-term expenditures associated with implementing SCR technology. PNM Br. 17. Even if PNM's claim of a near-term rate increase was true, which it is not as discussed below, this harm to PNM's customers is not cognizable as harm to PNM itself because PNM is not a "voluntary membership organization" or a "trade association" representing the interests of its members. *See Hunt v. Washington State Advertising Com'n*, 432 U.S. 333, 342-43 (1977) (describing

requirements for associational standing). PNM is a subsidiary of PNM Resources, an investor-owned energy holding company based in Albuquerque, New Mexico, and provides electricity to customers in New Mexico. *See* PNM Exh. 12 (resumé of Terry Horn). PNM's customers purchase electricity from PNM, nothing more. PNM is not an advocacy organization representing the interests of its customers or a trade association for purchasers of electricity. Moreover, if PNM's customers are harmed by a rate increase it is PNM that is directly responsible for that harm, not EPA. Therefore, even if PNM was able to show that its customers would be irreparably harmed by a rate increase, PNM would still have failed to demonstrate irreparable harm to ***itself*** from such a rate increase.

3. PNM's Customers will not be Irreparably Harmed if the Court does not stay the BART Rule.

Even if PNM can represent the interests of its customers and attribute its customers' alleged financial harm to the company, PNM has not demonstrated that harm to its customers in the form of increased electricity rates is ***likely*** during the pendency of this litigation. As discussed above, to meet the irreparable harm requirement, PNM must show that an increase in customer electricity rates "is likely to occur before the [appellate] court rules on the merits." *Greater Yellowstone Coal.*, 321 F.3d at 1260. PNM has not done so here. PNM has provided "estimated rate impact[s] for a typical residential customer" based on PNM's share of costs for complying with the BART Rule. PNM Br. 17 and Ortiz Decl. (Exh. 14 to PNM's Br.). PNM estimates that a rate increase per individual customer would range from $20.33 over a one-year recovery period to $38.30 per year over a three-year recovery period. *See* Ortiz Decl. ¶ 12 (PNM Exh. 14).

However, PNM fails to mention two important points about these alleged increased electricity rates. First, there is no guarantee that these rate increases will occur at all, given that PNM must seek approval for any rate increase from the New Mexico Public Regulation Commission ("PRC"). Second, it is highly unlikely that PNM's customers will see a rate increase resulting from the BART Rule within the next two years even if PNM receives approval from the PRC. Therefore, any harm to PNM's customers if the BART Rule is not stayed is only speculative at this point.

Because any potential rate increases must be approved by the PRC, Noble Decl. ¶ 4 (Exh. 1), PNM's customers are unlikely to experience increased electricity rates from the BART Rule during the pendency of this litigation.[7] First, New Mexico law prohibits PNM from seeking PRC approval for a rate increase related to the costs of installing SCR until 24 months prior to the in-service date of the equipment. *Id*. ¶ 10. Because the BART Rule gives PNM until September 2016 to have SCR operational at the SJGS, PNM cannot apply for a rate increase based on the capital costs of SCR technology before September 2014. *Id*. Second, rate cases typically take up to 12 months to process once they are filed. *Id*. ¶ 6. Thus, even if PNM could immediately seek approval for a rate increase associated with near-term costs for SCR installation, approval of any rate increase would not come until the end of 2012 at the earliest. Finally, there is no guarantee that PNM will receive the specific rate increase that it requests from the PRC. *Id*. ¶ 6. Accordingly, PNM has not demonstrated that harm to it's customers is ***likely***

[7] The ratemaking process in New Mexico is described in the Declaration of Charles Noble, attached as Exhibit 1.

during the pendency of this litigation because of costs incurred by PNM to comply with the BART Rule.

B. New Mexico's Alleged Harms Are Not Irreparable.

1. New Mexico has not demonstrated that Its Sovereignty will be irreparably harmed absent a stay.

New Mexico argues that its sovereignty will be irreparably harmed if the Court does not stay the BART Rule, yet provides no explanation of how EPA's promulgation of the BART FIP constitutes ***irreparable*** harm to New Mexico's sovereignty. NM Br. 18. Instead, New Mexico simply repeats the argument presented earlier in its brief that EPA was required to cease its FIP process and approve New Mexico's last-minute Regional Haze SIP submittal. *Id*. As discussed above, EPA had the authority, and was required, to promulgate the BART Rule when it had not approved New Mexico's last-minute SIP submission. Moreover, EPA's promulgation of the BART rule did not irreversibly supplant New Mexico's authority under the Clean Air Act to promulgate its own BART Rule.

As EPA noted in its promulgation of the final BART FIP, the FIP "can be replaced by a state plan that EPA finds meets the applicable [CAA] requirements. The federal plan will remain in effect no longer than necessary." 76 Fed. Reg. 52,388. EPA also stated that it "will give priority to the review of New Mexico's SIP." *Id*. at 52,414. The Act imposes on the agency a 12-month deadline to review New Mexico's SIP submission to ensure it meets the minimum requirements of the Act. *See* 42 U.S.C. § 7410(k)(2). Therefore, if EPA determines that New Mexico's BART SIP meets all of the applicable

requirements of the Act, New Mexico's SIP will replace EPA's FIP with no diminution of New Mexico's authority to determine how the State will meet Clean Air Act standards.

Congress, through the Clean Air Act, established a partnership between EPA and the states to achieve national air quality goals. *See* 42 U.S.C. §§ 7401-7515. As part of this model of cooperative federalism, Congress explicitly contemplated situations in which a state may fall short of its mandatory responsibilities under the Act and, through section 110(c) of the Act, gave EPA the authority to step in and fill the gap left by a state's failure to comply. *See* 42 U.S.C. § 7410(c); *see also Administrator, State of Ariz. v. EPA*, 151 F.3d 1205, 1212 (9th Cir. 1998) ("FIPs are specifically meant to fill in the gaps where a State has failed to submit a SIP or where the State's SIP does not satisfy minimum criteria under the CAA."). Furthermore, the FIP provision fully contemplates depriving states of their authority to determine means of compliance with air quality standards to further the goals of the Act:

> The FIP provides an additional incentive for state compliance because it rescinds state authority to make the many sensitive technical and political choices that a pollution control regime demands. The FIP provision also ensures that progress toward NAAQS attainment will proceed notwithstanding inadequate action at the state level.

Browner, 57 F.3d at 1124. Because Congress clearly intended to deprive a state of its primacy in making certain decisions typically left to a state under the Act when a state has not met its compliance obligations, and New Mexico had not met its regional haze requirements prior to EPA's promulgation of the BART Rule, EPA's action has not harmed New Mexico's sovereign status, let alone caused any harm to New Mexico that is irreparable.

2. New Mexico has not demonstrated irreparable harm to its citizens.

New Mexico claims that PNM's cost to comply with the BART Rule will be passed on to New Mexico energy consumers in the form of higher electricity rates, thereby harming New Mexico citizens and agencies. NM Br. 19. New Mexico predicts a 14 percent increase in electricity costs to state facilities if SCR technology is implemented in place of the SNCR technology that New Mexico prefers. *Id*. at n.15. However, New Mexico has provided no concrete evidence that its agencies or citizens will incur higher electricity rates during the pendency of this litigation. Instead, New Mexico simply assumes that PNM will receive approval to pass through all of its SCR costs to ratepayers and that the rate increase will happen in the immediate future. As discussed above, whether PNM's costs to implement the BART Rule can be passed through to its customers is an issue for the PRC to decide, and PNM cannot even ***request*** a rate increase associated with SCR costs until September 2014. *See* Noble Decl. ¶ 10. Therefore, any increase in electricity rates to cover SCR costs is only speculative at this point and, given the timing of the ratemaking process, unlikely to occur during the pendency of this litigation.

III. THE BALANCE OF HARMS WEIGHS AGAINST A STAY OF THE BART RULE

Movants also fail the third prong of the test for a stay because each has failed to demonstrate that the alleged harm to their interests greatly outweighs the harm that staying the BART Rule would cause to the other parties. Even if the Movants could establish irreparable harm, which they have not done, the likelihood of harm alone does

not mandate a stay. *See Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1086 (10th Cir. 2004) (upholding denial of a preliminary injunction where movants had established irreparable harm but had not demonstrated that balancing of harms tipped in their favor). Moreover, as Guardians has shown above, Movants will not be ***irreparably*** harmed by the denial of their motions to stay the BART Rule; therefore, there is no harm to balance against the potential harm to Guardians if the stay is granted. *See Salt Lake Tribune,* 320 F.3d at 1106 (holding that if a movant fails to show irreparable harm, then "there is no harm to balance against the potential harm to the defendants if the injunction is granted").

But even if the Court does engage in a balancing of harms between the parties, the harm to Guardians if the Court grants a stay outweighs the speculative economic harm to Movants if the BART Rule is not stayed. Guardians' members recreate in the Four Corners Region and, in so doing, are exposed to the excessive air pollution from the San Juan Generating Station. *See* Declaration of Jeremy Nichols ("Nichols Decl.") ¶¶ 4-6 (Exhibit 2). This pollution from the San Juan Generating Station impacts visibility in, and thus Guardians' members enjoyment of, Mesa Verde National Park. *Id*. ¶¶ 5-6; *see also* 76 Fed. Reg. 52,388 (naming Mesa Verde as specifically affected by SJGS air pollution). In addition to visibility impacts, Guardians' members are also aware that air pollution from the SJGS contains excessive amounts of sulfur dioxide and nitrogen oxides ("NOx"), and that NOx has deleterious effects on human respiratory health. *Id*. ¶¶ 8-9. Because Guardians' members currently use, and intend to continue using, Mesa Verde National Park and the greater Four Corners area that includes the SJGS, *Id*. ¶¶ 20-

21, staying implementation of the BART Rule would extend the time period for exposure to excessive amounts of dangerous air pollution and visibility impairment for Guardians' members.

The Tenth Circuit has noted that "financial concerns alone generally do not outweigh environmental harm." *VCPC*, 373 F.3d at 1086. Yet "financial concerns" are all that PNM has raised for its side of the equity scale.[8] Moreover, PNM has completely ignored the harm to Guardians from allowing the SJGS to emit excessive levels of dangerous air pollutants over a longer period of time if a stay is granted and implementation of the BART Rule is delayed. Instead, PNM tries to downplay the role of the BART Rule in protecting air quality by couching it as addressing "a wholly aesthetic consideration," i.e., visibility impairment, and as simply "reduc[ing] further the already-controlled emissions from [the SJGS]." PNM Br. 18. However, PNM misses the point that if the SJGS emissions were "already controlled" within the parameters required by the Clean Air Act to protect visibility, then EPA would not have promulgated the Interstate Transport and BART Rules. New Mexico similarly downplays the air quality protections resulting from the BART Rule by asserting that no significant harm will result from a stay because public health is not the subject of the BART Rule. NM Br. 20.

Movants both fail to recognize that harm to public health is not the only type of cognizable harm that Guardians and other parties may incur from a stay. The Supreme

[8] New Mexico raised financial harm to the State's agencies and citizens from alleged higher electricity rates. New Mexico also claimed harm to state sovereignty if a stay was not granted. For the reasons discussed in Section II.B.1 above, this harm is not cognizable and, therefore, should not be considered in the balancing of harms between the parties.

Court has recognized that aesthetic and recreational interests, such as those that Guardians seeks to protect here, are legally protected interests. *See Sierra Club v. Morton*, 404 U.S. 727, 734 (1972). Therefore, the Court must balance, at a minimum, PNM's alleged near-term financial harm and the potential $20 rate increase incurred by PNM's customers at some undetermined future time against the on-going harm to Guardians' recreational and aesthetic interests in cleaner air and improved visibility in and around Class I areas in the Four Corners region.

Movants also fail to realize that even if protection of public health is not one of the statutory goals of the BART Rule, the Rule still has the ***effect*** of protecting public health because installation of SCR at the SJGS will significantly reduce NOx emissions in the Four Corners region. The SJGS "is one of the largest sources of NOx pollution in the United States." 76 Fed. Reg. 52,388. In its response to comments included in the agency's notice for the final rule, EPA recognized that the NOx emission limit in the BART Rule would also protect public health:

> We also agree that the same NOx emissions that cause visibility impairment also contribute to the formation of ground-level ozone, which has been linked with respiratory problems, aggravated asthma, and even permanent lung damage. . . Therefore, although our action concerns visibility impairment, we note the potential for significant improvements in human health and the ecosystem.

76 Fed. Reg. at 52,410. Moreover, when EPA promulgated its Regional Haze regulations in 1999, the agency recognized that the same pollutants that cause visibility impairment "can cause serious health effects and mortality in humans." 64 Fed. Reg. at 35,715. In 2005, EPA further analyzed this connection between pollutants that impair both visibility and public health in its Regulatory Impact Analysis for the Clean Air Visibility Rule and

BART Guidance, and determined that regional haze rules would prevent:

> approximately 1,600 premature deaths, 2,200 nonfatal heart attacks, 960 hospitalizations for respiratory and cardiovascular diseases, 170,000 lost work days, and 1 million days when adults restrict normal activities because of respiratory symptoms exacerbated by $PM_{2.5}$ pollution.

EPA Regulatory Impact Analysis, Exh. 3 at 1-4. The total cost savings associated with these avoided health effects ranges from $8.4 to $9.8 billion annually, compared to the $1.4 to $1.5 billion cost of implementing regional haze protections in all 50 states. *See* EPA Fact Sheet for Regional Haze Rule Amendments, Exh. 4. Nationally, the qualitative and quantitative health benefits from BART far and away exceed the costs to industry of implementing BART, particularly given that the utility industry has a mechanism for recovering BART costs from its customers.

People living and recreating in the Four Corners region will experience a similar magnitude of qualitative and quantitative health benefits from EPA's BART Rule for the SJGS. Installation of the SCR technology on the SJGS's four units will annually prevent 3-7 deaths, 3 non-fatal heart attacks, 227 instances of asthma exacerbation, and 370 lost work days from excessive air pollution—an annual savings of $24.5 to $60.7 million in health care costs. *See* Thurston Decl. Table 2 (Exhibit to SJCA *et al*.'s Response Brief). These benefits are not realized for every year that operation of the SCR technology at the SJGS is delayed, so that even a delay of a few months risks substantial, irreparable harm to public health in the Four Corners region. *Id*. ¶ 38.

Therefore, in addition to balancing Movants' alleged harms against Guardians' harms related to impaired visibility in the Four Corners region, the Court must also

balance PNM's alleged financial harm and the potential $20-$30 rate increase incurred by PNM's customers against the potential loss of 3-7 lives annually, and other health impacts and costs, that are likely to occur if the BART Rule is stayed until the conclusion of this litigation. When all of the harms likely to occur to the non-moving parties are considered, the balance of harms weighs strongly against staying the BART Rule.

IV. A STAY WOULD BE ADVERSE TO THE PUBLIC INTEREST

The final requirement that Movants must satisfy to obtain a stay is a showing that the stay, if issued, would not be adverse to the public interest. *See Hartford House, Ltd. v. Hallmark Cards, Inc.,* 846 F.2d 1268, 1270 (10th Cir. 1988). Numerous courts have recognized that removal of pollutants from the air which endanger the lives and health of the populace is a compelling public interest. *See, e.g., United States v. Wheeling-Pittsburgh Steel Corp.,* 866 F.2d 57, 60 (3d Cir. 1988); *Nance v. Envtl. Protection Agency,* 645 F.2d 701, 716 (9th Cir. 1981); *United States v. City of Painesville, Ohio,* 644 F.2d 1186, 1193 (6th Cir. 1980). In enacting the Clean Air Act, Congress made a determination that the public interest required federal and state governments to take substantial measures to combat the deleterious effects of air pollution. *See* 42 U.S.C. § 7401. Accordingly, staying the BART Rule would be adverse to the public interest in breathing clean air and maintaining human respiratory health because a stay would allow the SJGS to continue emitting harmful levels of soot and smog for at least two more years.

As a component of ozone, NOx impacts not only visibility but also human respiratory health. Ozone concentrations in national parks the Four Corners region are

approaching the current ozone standard of 0.075 parts per million ("ppm"), and current levels are already in the range of ozone levels that the Clean Air Scientific Advisory Committee has deemed to be harmful to human health. *See* EPA Doc. No. 24, Exh. 1 at p. 4 (San Juan Citizens Alliance *et al.* comment letter on proposed rule). Furthermore, adverse public health impacts from increasing ozone concentrations is not a theoretical issue in San Juan County, New Mexico, where the SJGS is located. A 2007 New Mexico Department of Health asthma study for San Juan County showed that increased ozone concentrations in the air were associated with an increase in asthma-related medical visits. *See* San Juan County Asthma Study at 2, Exh. 5. Emergency room visits for asthma increased by 34 percent for every 0.020 ppm increase in ambient ozone concentrations. *Id*. Clearly, the public interest in breathing clean air is already adversely impacted in San Juan County, and these adverse impacts will continue until the SCR technology becomes operational at the SJGS. Therefore, any delay in the compliance time frame for the BART Rule will be adverse to the public health interests.

Movants omit any mention of the health benefits of the BART Rule in their discussions of this stay factor. Instead, both Movants attempt to divert the Court's attention away from the health benefits of the Rule. New Mexico simply dismisses any consideration of health benefits, or adverse health impacts from a stay, with the fallacy that because public health is not the "subject" of the BART Rule, staying implementation of the Rule will not jeopardize public health. NM Br. 20. New Mexico fails to meet its burden to show that a stay will not be adverse to the public interest with this unsupported and illogical assertion. PNM's argument that the public will not be harmed by a stay

rests on an attempt to cast the regional haze requirements as aspirational only, *i.e.*, reducing visibility impairment is a goal that may be met over time, rather than imposing a mandatory obligation on states and the EPA to effect any actual visibility improvements. PNM Br. 18-19. PNM further downplays the significance of visibility improvement as "a wholly aesthetic consideration" without recognizing that visibility is one of the public welfare factors protected under the Clean Air Act. PNM's attempt to reframe the purpose of the Act with respect to visibility fails, and PNM has not met its burden to show that the public interest is not harmed by a stay.

Even if the public interest inquiry is limited to consideration of visibility impacts from a stay, as Movants suggest, a stay would still harm the public interests in increased visibility and reduced smog in and around Class I areas because a stay would increase the already high levels of soot and smog in and around Mesa Verde and other national parks and wilderness areas in the Four Corners Region. EPA has recognized that reducing visibility impairment is in the public interest:

> Visibility directly affects people's enjoyment of a variety of daily activities. Individuals value visibility both in the places they live and work, in the places they travel to for recreational purposes, and at sites of unique public value. . .

EPA Regulatory Impact Analysis, Exh. 3 at 4-58. EPA determined that the regional haze regulations "will provide approximately $240 million in improved visibility benefits each year." EPA Fact Sheet for Regional Haze Rule Amendments, Exh. 4. For the BART Rule at issue here, EPA determined that installation of SCR technology at the SJGS would reduce by over 50 percent the visibility impacts at the 16 Class I areas affected by the plant's air pollution. *See* 76 Fed. Reg. at 52,389. Because the goal of the Clean Air

Act's regional haze requirements is to improve visibility at Class I areas like Mesa Verde, and the BART Rule will improve visibility at 16 Class I areas by 50 percent or more, any delay in implementation of the BART Rule will be adverse to the public interest in clear and clean skies around these areas, and would be contrary to the Clean Air Act. Thus, Movants have not met their burden to demonstrate that a stay of the BART Rule would not be adverse to the public interest.

CONCLUSION

For the foregoing reasons, Guardians respectfully requests that this Court deny Movants' motions to stay the BART Rule.

Respectfully submitted January 13, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of INTERVENOR WILDEARTH GUARDIANS' CONSOLIDATED RESPONSE IN OPPOSITION TO MOTIONS FOR STAY OF FINAL RULE were served on all counsel of record for the consolidated cases by the Court's ECF system on January 13, 2012.

/s/ Samantha Ruscavage-Barz
Counsel for Intervenor WildEarth Guardians