Case No. 11-9557
Consolidated with: No. 11-9552, No. 11-9567

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PUBLIC SERVICE COMPANY OF NEW MEXICO,
Petitioner,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and Lisa Jackson, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

INTERVENORS' OPPOSITION TO MOTION FOR STAY

Submitted January 13, 2012

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GLOSSARY

Act	The federal Clean Air Act, 42 U.S.C. §§ 7410 *et seq.*
BART	Best Available Retrofit Technology
CALPUFF	Modeling program designated by the Interagency Workgroup on Air Quality Models as the "Guideline Model" for long-range transport applications.
Class I Federal Areas	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 and were in existence on August 7, 1977.
dv	Deciview
EIB	Environmental Improvement Board
IWAQM	Interagency Workgroup on Air Quality Models
EPA	United States Environmental Protection Agency
FIP	Federal Implementation Plan
$\mu g/m^3$	Micrograms per cubic meter. A measure of the concentration of a substance in a volume of air.
MI	Myocardial Infarction
NMED	New Mexico Environment Department
NO_x	Nitrogen Oxides
PM	Particulate Matter
$PM_{2.5}$	Particulate matter having a nominal aerodynamic diameter of 2.5 micrometers or smaller. Also referred to as fine particulate matter.

lbs/MMBtu	Pounds Per Million British Thermal Units
PNM	Public Service Company Of New Mexico
PRC	Public Regulation Commission
SRC	Selective Catalytic Reduction
SIP	State Implementation Plan
SNCR	Selective Non-Catalytic Reduction
SO_2	Sulfur Dioxide

INTRODUCTION

Air pollution from San Juan Generating Station ("San Juan"), an aging 1800-megawatt coal-fired power plant near Farmington, New Mexico, mars the clear skies and wide-open vistas of many of the American West's iconic landscapes, including Grand Canyon National Park, Mesa Verde National Park, and Bandelier National Monument. This same pollution also threatens the health and culture of nearby residents, especially members of the Navajo Nation, who are spiritually connected to these sacred places.

Consistent with its Clean Air Act ("Act") duty to control this haze pollution, the Environmental Protection Agency ("EPA") issued a Federal Implementation Plan ("FIP") that found Selective Catalytic Reduction ("SCR") to be the Best Available Retrofit Technology ("BART") for San Juan. In addition to protecting visibility, the FIP will protect human health by saving up to seven lives and preventing more than two thousand cases of exacerbated asthma symptoms *every year*. The FIP will also reduce the risk of heart attack, respiratory illness, emergency room visits, hospital admissions, and lost days of school and work due to pollution-related illness. To the extent that the value of human life can be monetized, the FIP's public health benefit exceeds sixty million dollars annually. The FIP will also protect tourism in the national parks affected by San Juan's pollution, which, in turn, will protect the local businesses that depend on that

tourism. In large part, these public health and environmental benefits underscore why EPA's FIP won the support of the National Park Service, Fish and Wildlife Service, State of Colorado, and thousands of members of the public.

New Mexico had multiple opportunities to submit a state implementation plan ("SIP") that, if approved, would have rendered EPA's FIP unnecessary. However, New Mexico failed to meet an initial December 17, 2007 deadline to submit a BART SIP proposal to EPA and eschewed additional opportunities to correct this failure by its final deadline of January 15, 2011. EPA thus had no choice but to promulgate its FIP. Now, more than four years after its original deadline, and long after the Act compelled EPA to promulgate a FIP, the New Mexico Environment Department ("NMED"), New Mexico Governor Martinez, and the plant's owner, Public Service Company of New Mexico (collectively, "Petitioners"), attack EPA's FIP and seek a stay.

Petitioners point to a belated July 5, 2011 BART SIP proposal for San Juan by the State's Environmental Improvement Board ("EIB") to argue that EPA somehow usurped New Mexico's authority. Petitioners' misplace their focus on this tardy and defective proposal. The question before this Court is whether EPA's FIP satisfies the Act. The question is not, as Petitioners would have it, whether New Mexico's SIP is somehow better. In this context, the administrative record shows that EPA's FIP is lawful.

Aside from being irrelevant, New Mexico's July 2011 proposal was too little too late. New Mexico submitted its July 2011 proposal more than six months after the Act's final January 2011 deadline. Moreover, New Mexico's July 2011 proposal offered a weak pollution control technology, known as Selective Non-Catalytic Reduction ("SNCR") that EPA, and the NMED itself, had rejected previously. New Mexico's proposal, which was primarily motivated by a change in administration rather than some newfound technical rigor, thus fell short of the Act's basic procedural and substantive requirements.

Even if Petitioners could prevail on the merits, a stay is not warranted because it would cause irreparable harm to the public and environment. These harms far outweigh any harm that Petitioners may suffer. Petitioners' alternative request for a stay pending EPA action on their administrative petitions for reconsideration also fails given EPA's lack of duty to act on those petitions, let alone do so by date certain. Ultimately, it is in the public interest to implement the FIP without delay.

BACKGROUND

In 1977, the United States Congress established "as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution." 42 U.S.C. § 7491(a)(1). "Class I Federal areas" include 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 and were in existence on August 7, 1977. *See* 42 U.S.C. §§ 7472(a), 7491(g)(5). In 1980, EPA promulgated rules addressing visibility impairments reasonably attributable to one source, or a small number of sources, to achieve this statutory goal. 45 Fed. Reg. 80,084 (Dec. 2, 1980).

In 1990, Congress again amended the Act, this time to address regional haze pollution attributable to multiple sources located across wide-ranging geographic areas. Congress did so by mandating that EPA promulgate rules to ensure that reasonable progress was being made to achieve the national goal for visibility protection and that certain major stationary sources of visibility pollution procure, install, and operate, "as expeditiously as practicable," "the best available retrofit technology." 42 U.S.C. § 7491(b)(2). These rules, promulgated in 1999 and codified at 40 C.F.R. part 51, subpart P, establish a comprehensive visibility protection program for Class I areas. 64 Fed. Reg. 35,714 (July 1, 1999).

In accord with this legal framework, each state with one or more Class I areas was obligated to submit a regional haze SIP by December 17, 2007. 42 U.S.C. § 7407(d)(7)(A); 40 C.F.R. § 51.308(b). A regional haze SIP provides "air pollution regulations, control strategies, and other means or techniques developed by a state to ensure that ambient air within that state meets the [national

standards]" and "ensure[s] that emissions from within the state do not have certain prohibited impacts upon the ambient air in other states through the interstate transport of pollutants." 76 Fed. Reg. 491, 493 (Jan. 5, 2011) (citing 42 U.S.C. § 7410(a)(2)(D)(i)). Where a state fails to submit a SIP by prescribed deadlines, or that SIP is disapproved, EPA must promulgate a FIP. 42 U.S.C. § 7410(c)(1).

The State of New Mexico failed to meet its obligation to submit a regional haze SIP to EPA by December 17, 2007. 74 Fed. Reg. 2,392, 2,393(Jan. 15, 2009). EPA's formal finding to that effect triggered a two-year clock for EPA to issue a FIP or, in the alternative, to approve a complete regional haze SIP from New Mexico by January 15, 2011. *Id*.; 42 U.S.C. § 7410(c); 74 Fed. Reg. 2,392, 2,393 (Jan. 15, 2009). New Mexico did not propose a SIP by this date. Accordingly, EPA proposed a FIP for public comment on January 5, 2011. 76 Fed. Reg. 491(Jan. 5, 2011); Administrative Record ("AR"), EPA Document ("Doc.") #2. After taking public comment through April 4, 2011, EPA published a final FIP on August 22, 2011. 76 Fed. Reg. 52,388 (Aug. 22, 2011); AR, EPA Doc. #1.

EPA's FIP imposes limits on emissions of nitrogen oxides ("NO_x") sulfur dioxide ("SO_2") and sulfuric acid mist from San Juan. Finding that San Juan's emissions impair visibility in sixteen national park and wilderness areas, or "Class I" areas, the FIP makes a BART determination for San Juan that limits its NO_x emissions to 0.05 pounds per million British thermal units ("lbs/MMBtu"), over a

rolling 30-day average. *Id*. at 52,439. This limit will reduce the plant's NO_x emissions by more than 80%. *Id*. at 52,389. To achieve this limit, San Juan must procure, install, and operate SCR technology. *Id*. at 52,388. EPA's finding that SCR is BART is consistent with a June 21, 2010 finding by NMED that SCR was BART. *See* NMEDAir Quality Bureau, BART Determination (June 21, 2010) (attached as Exhibit ("Exh.") 1). The FIP requires compliance with these limits – and thus installation of SCR – by September 21, 2016. *Id*. at 52,439.

After EPA proposed its FIP on January 15, 2011, and after Governor Martinez took office on January 1, 2011, New Mexico rushed to resuscitate its efforts to promulgate a SIP. In an abrupt about-face from its June 21, 2010 finding that SCR was BART, NMED proposed a far weaker NO_x emissions limit (0.23 lb/MMBtu) and far weaker pollution control technology (SNCR) on July 5, 2011. *See* Exh. 1; New Mexico's Motion for Stay ("NMED Br.") at 2. New Mexico's proposal came three months and a day after the close of EPA's public review and comment period for the proposed FIP. *Id*.

ARGUMENT

I. STANDARDS GOVERNING A MOTION FOR STAY

Petitioners' motions for stay were filed pursuant to Fed. R. App. P. 18. This Rule provides that such motions must comply with 10th Cir. R. 8 and, accordingly, must show the basis for the court of appeals' jurisdiction; the likelihood of success

on appeal; the threat of irreparable harm if the stay or injunction is not granted; the absence of harm to opposing parties if the stay or injunction is granted; and any risk of harm to the public interest. 10th Cir. R. 8. A stay is only appropriate in limited circumstances. As the Supreme Court has observed:

> A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant. The parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders that the legislature has made final.

Nken v. Holder, 129 S.Ct. 1749, 1757 (2009)(internal citations and quotations omitted). A stay, like a preliminary injunction, is therefore "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, pp. 129-130 (2d ed.1995)).

To satisfy 10th Cir. R. 8(A), a movant must establish a "substantial likelihood of prevailing on the merits." *Fed. Lands Legal Consortium ex rel. Robart Estate v. U.S.*, 195 F.3d 1190, 1194 (10th Cir. 1999). This prong is relaxed if the movant "can establish that the latter three requirements" – the threat of irreparable harm, the absence of harm to other parties, and risk to the public interest – "tip strongly in his favor." *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th

Cir. 2002). In this situation, the movant "may meet the requirement for showing success on the merits by showing 'that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" *Id.* (citation omitted).

As demonstrated below, a stay would cause irreparable harm to public health and the environment—harm that is against the public interest. Petitioners' allegations of harm caused by incurring near-term compliance costs pale in comparison. Accordingly, Petitioners are not entitled to a relaxed showing on the merits and must establish a "substantial likelihood of prevailing on the merits." *Fed. Lands Legal Consortium ex rel.*, 195 F.3d 1190, 1194.

II. PETITIONERS HAVE NOT ESTABLISHED JURISDICTION

Petitioners have failed to comply with 10th Cir. R. 8(A), which requires that they explain the basis of this Court's jurisdiction. While Petitioners may be able to show that this Court has jurisdiction to hear the stay motions, it is improper for Petitioners to put this Court in the position of deducing jurisdiction. Petitioners have an affirmative duty to satisfy 10th Cir. R. 8(A) and must do so in their opening brief. *Singh v. Ashcroft*, 375 F.3d 1007, 1008 (10th Cir. 2007) (motion for stay "should contain an argument establishing our jurisdiction over petitioner's appeal"). An important element of this duty is, of course, standing. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998) (standing is a

"threshold jurisdictional question" that a court must decide before it may consider the merits). Because Petitioners' stay motions provide no argument regarding jurisdiction, including standing, they do not comply with 10th Cir. R. 8(A).

III. PETITIONERS ARE NOT LIKELY TO SUCCEED ON THE MERITS

A. Petitioners Carry A Heavy Burden To Show That EPA's Action Was Arbitrary Or Capricious

The question before this Court on the merits is whether EPA's FIP is lawful. To obtain a stay, Petitioners must therefore show that EPA's FIP is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 42 U.S.C. § 7607(d)(9). This is the same standard of review provided by the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2). The core duty "of a court reviewing agency action under the 'arbitrary or capricious' standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Olenhouse v. Commodity Credit. Corp*., 42 F.3d 1560, 1574 (10th Cir. 1994).

B. Petitioners Cannot Use Extra Record Evidence To Show A Likelihood Of Success On The Merits

The plain language of the Act limits judicial review to evidence contained in the administrative record. *See* 42 U.S.C. § 7607(d)(7)(A) (1994); *Appalachian Power Co. v. E.P.A.*, 135 F.3d 791, 799, 807 (D.C. Cir. 1998) (relying on 42 U.S.C. § 7607(d)(7)(A) to strike extra-record evidence in judicial review of an

EPA rulemaking). The Act also provides, with limited exception, that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review." 42 U.S.C. § 7607(d)(7)(B); *Appalachian Power Co*., 135 F.3d at 814. The Act thus strengthens and further limits the well-established principle, in the APA context, that "Judicial review of agency action is normally restricted to the administrative record." *Citizens for Alternatives to Radioactive Dumping v. Dept. of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007) (citation omitted); *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973).

Petitioners ignore the plain language of the Act by introducing evidence on the merits of their case that was not presented to EPA during its public comment period (January 5, 2011 to April 4, 2011) and, in many instances, post-dates EPA's final FIP (August 22, 2011) by several months. 76 Fed. Reg. 52,388, 52,391. For example, although EPA finalized its FIP in August of 2011, PNM relies on:

- A report by Sargent & Lundy, a consulting firm, dated October 21, 2011. *See* PNM Br. at 13 (citing Exh. 6).
- The petition for reconsideration and stay of agency action it submitted to EPA on October 21, 2011. *See* PNM Br. at 13 (citing Exh. 4).
- A declaration prepared by Joseph Scire, an employee of Exponent, another consulting firm, dated November 16, 2011. *See* PNM Br. at 14 (citing Exh. 7).
- A technical memorandum prepared by yet another consulting firm, RMB

Consulting & Research, Inc., dated October 21, 2011. *See* PNM Br. at 15 (citing Exh. 8).

Similarly, NMED relies heavily on the SIP received by EPA on July 5, 2011. *See, e.g.*, NMED Br. at 11-14.

None of this evidence was supplied to EPA during the FIP's public review and comment period, as required by the Act. 42 U.S.C. §§ 7607(d)(7)(A), (B). Indeed, with the exception of New Mexico's SIP, all of the above-referenced evidence post-dates EPA's FIP by several months and therefore cannot be considered in determining the merits of this case. *Id.*

C. The Plain Language Of The Act Compelled EPA's FIP

1. The Act's Mandatory Deadlines Precluded EPA From Considering New Mexico's Late-Filed SIP Submission

Petitioners' primary contention on the merits of their case is that EPA improperly ignored New Mexico's June 2011 proposed SIP. Petitioners ignore the fact that New Mexico had a mandatory December 17, 2007 deadline to submit its regional haze SIP to EPA.[1] 42 U.S.C. § 7407(d)(7)(A); 40 C.F.R. § 51.308(b). There is no dispute that New Mexico failed to meet this mandatory deadline, or that New Mexico failed to take corrective action before January 15, 2009, when

[1] Petitioners also ignore the fact, as noted above, that New Mexico's SIP was not submitted to and received by EPA until July 5, 2011, well after the comment deadline for EPA's FIP had ended on April 4, 2011. *See* 42 U.S.C. § 7607(d)(7)(B) (limiting the scope of judicial review to arguments raised with "reasonable specificity" during the public comment period). If Petitioners sought to use New Mexico's SIP as a contrast with EPA's FIP, that SIP should have been provided to EPA during the comment period. *Id.*

EPA formally found that New Mexico had not submitted a regional haze SIP. 74 Fed. Reg. 2392, 2393.

EPA's 2009 finding triggered a new two-year clock compelling EPA to issue a FIP unless New Mexico submitted, and EPA approved, a legally-adequate SIP within that time period. 42 U.S.C. § 7410(c)(1); *see also Coalition for Clean Air v. Southern California Edison Co*., 971 F.2d 219, 223 (9th Cir. 1992) ("The House language retaining EPA's mandatory obligation to promulgate a FIP…was ultimately enacted by Congress and signed into law by President Bush on November 15, 1991 as part of the Clean Air Act Amendments."). As the Ninth Circuit has explained:

> An EPA determination that a state has failed to submit a required plan, or EPA disapproval of a submitted plan, triggers two time periods. First, a "sanctions clock" begins during which time the state must either remedy the deficiency or face sanctions. Second, a "FIP clock" begins by the end of which EPA must either approve a state-submitted SIP or promulgate a Federal Implementation Plan ("FIP").

Assoc. of Irritated Residents v. U.S. Envtl. Prot. Agency, 632 F.3d 584, 588 (9th Cir. 2011) (internal citation omitted).

EPA's two-year "FIP-clock" expired on January 15, 2011. *See* 74 Fed. Reg. 2392 (initiating two-year clock on January 15, 2009). When the clock expired, New Mexico had not submitted a proposed SIP to EPA, let alone obtained the requisite approval from EPA. In the meantime, EPA moved to fill the void created by New Mexico, as required by the Act, by proposing a FIP on January 5, 2011,

subjecting the proposed FIP to public review and comment through April 4, 2011, and ultimately publishing the final FIP in the Federal Register on August 22, 2011. 42 U.S.C. § 7410(c)(1);76 Fed. Reg. 52,388.

Despite its dilatory behavior, New Mexico now makes the novel claim that EPA should have abandoned its efforts to complete a FIP and shifted its focus to New Mexico's July 2011 SIP proposal, which the state submitted more than six months after the "FIP-clock" expired on January 15, 2011 and approximately thirty-seven months after New Mexico was first obligated to submit a SIP on December 17, 2007. NMED Br. at 16-17. This claim is meritless.

The Act provided New Mexico with two separate opportunities to submit a proposed SIP for EPA's approval over a period of five years and six months that began with EPA's promulgation of regional haze rules on July 6, 2005 and ended with the expiration of the "FIP-clock" on January 15, 2011. The Act does not support Petitioners' claim that New Mexico somehow had a third opportunity – after the two-year "FIP-clock" expired – to propose a SIP and thereby derail EPA's FIP, further delaying regional haze controls. EPA had no duty to consider, let alone approve, New Mexico's late-filed SIP. *Nat. Res. Def. 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.")

Petitioners' further undermine their argument by citing to caselaw that

actually contradicts their position. NMED Br. at 9, 14; PNM Br. at 3, 5, 6., *Train v. Nat. Res. Def. Council* involved a substantive challenge to EPA's approval of a SIP submittal from the State of Georgia. 421 U.S. 60, 79 (1975). Although that case does not address the issue presented here – EPA's FIP-clock obligation – it does expressly support EPA's promulgation of a FIP after the agency finds that a State failed to submit a timely SIP. *Id* at 79 ("[EPA] may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies [42 U.S.C. § 7410(c)]"). *Am. Corn Growers Ass'n v. EPA* specifically states that EPA lacks authority to administratively extend a State's statutory BART SIP submittal deadline, which is precisely what Petitioners seek here by demanding consideration of New Mexico's late-filed SIP. 291 F.3d 1, 14 (D.C. Cir. 2002)(internal citations omitted)("EPA cannot establish a 'grace period' for compliance when not authorized to do so by the [Act].").

Lacking any legal authority for the claim that EPA must consider New Mexico's SIP submittal after the two-year "FIP-clock" in 42 U.S.C. § 7410(c)(1) expired, Petitioners instead distort the contours of the Act's federal-state partnership by placing undue emphasis on "state primacy." *See* NMED Br. at 13-15; PNM Br. at 5-6. It is certainly true that the Act affords states the initial authority to develop a SIP. But that authority, and any discretion it implies, is plainly limited by the Act's mandatory deadlines. 42 U.S.C. § 7407(d)(7)(A); 40

C.F.R. § 51.308(b). Once a state fails to act in a timely manner, EPA is obligated to step in and prepare a FIP. *Id.*; 42 U.S.C. § 7410(c)(1).

Without these temporal limitations, states could perpetually thwart the Act's air quality requirements by simply ignoring the Act's deadlines and proposing late-filed SIPs every time they are faced with a FIP from EPA. Because this type of gamesmanship would upend the Act's fundamental purpose (timely attainment of air quality standards), it is prohibited by the statute's plain language. 42 U.S.C. § 7410(c)(1); c.f. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553-54 (stating that "administrative proceedings should not be a game or forum to engage in unjustified obstructionism…").

2. New Mexico's Late-Filed SIP Would Impermissibly Interfere With The Act's Visibility Requirements

Even assuming, *arguendo*, that EPA was somehow required to consider New Mexico's late-filed SIP as a proposed revision of the FIP, that SIP revision could not be approved because EPA has already determined that SNCR is not BART for San Juan. 76 Fed. Reg. 52,388. The Act's "anti-backsliding" provision restricts EPA's authority to revise a FIP, providing that the agency "shall not approve a revision of a plan if the revision would interfere with any . . . applicable requirement of [the Act]." 42 U.S.C. § 7410(l). Here, EPA's FIP found that a NO_x limit of 0.05 lbs/mmBTU at San Juan is required to satisfy the Act's regional haze requirements. 76 Fed. Reg. 52,388, 52,390. EPA also found SCR "to be the most

cost-effective pollution control to achieve [these] emission reductions." *Id*. at 52,388. By contrast, New Mexico's late-filed July 2011 SIP proposed a much weaker NO_x limit of 0.23 lbs/mmBtu (*see* NMED Br. at 2-3) which is achievable by use of the less effective SNCR technology. *Id*.

EPA, in rejecting SNCR as BART, explained that its "[e]valuation of a less expensive alternative, [SNCR], showed that SNCR at the San Juan Generating Station coal-fired power plant achieves far less reduction in pollution and less visibility improvement, and *does not fully meet the requirement of the Act for…BART*." 76 Fed. Reg. 52,388 (internal parentheses omitted)(emphasis added). As EPA thus concluded, "BART for the SJGS is an emission limit of 0.05 lbs/MMBtu, based on a 30 [boiler operating day] average, more stringent than the levels achievable by the SNCR technology recommended by the State." 76 Fed. Reg. 52,388, 52,394.

Given EPA's consummation of the FIP, the Act's "anti-backsliding" provision forbids EPA from, in effect, supplanting the FIP with the SIP, because EPA has already determined that SNCR would "interfere" with the Act's regional haze requirements. 42 U.S.C. § 7410(l); *Hall v. EPA*, 273 F.3d 1146, 1159 (9th Cir. 2001) (42 U.S.C. § 7410(l) requires EPA to "determine the extent of pollution reductions that are required and determine whether the emissions reductions effected by the proposed revisions will be adequate to the task.").

Furthermore, contrary to Petitioners' suggestion, EPA was in no way obligated to automatically approve New Mexico's proposed SIP, even if it were timely. *See* NMED Br. at 16-17. To the contrary, EPA is charged with ensuring that the proposed SIP meets the basic legal adequacy requirements of the Act, including timely attainment of the Act's goals. *Safe Air For Everyone v. EPA*, 488 F.3d 1088, 1093 (9th Cir. 2007) ("Before a SIP becomes effective, EPA must determine that it meets the [Act's] requirements. 42 U.S.C. § 7410(k)(3).")

3. The Administrative Record Shows That The FIP Considered All Relevant Factors And Evidence And Articulated A Rational Connection Between The Facts Found And The Choice Made

Petitioners, in particular NMED, lean heavily on New Mexico's SIP to argue that EPA's FIP is arbitrary and capricious. *See, e.g.*, NMED Br. at 10-15. This argument is misplaced. The question before this Court is whether EPA's FIP is lawful, not whether New Mexico's SIP is somehow better. In making the San Juan BART determination, EPA "examined the relevant data and articulated a rational connection between the facts found and the decision made." *Olenhouse*, 42 F.3d 1560, 1574.

As its name makes clear, BART must represent the best available technology for reducing visibility-impairing pollution. The Act defines "BART" as an emission limit that is:

> based on the degree of reduction achievable through the application of

> the best system of continuous emission reduction for each pollutant which is emitted by an existing stationary facility. The emission limitation must be established, on a case-by-case basis, taking into consideration the technology available, the costs of compliance, the energy and non-air quality environmental impacts of compliance, any pollution control equipment in use or in existence 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.

40 C.F.R. §51.301. The Act proscribes a non-discretionary five-step analytical path for making BART determinations for facilities such as San Juan, a path reflected in the Act and in EPA's BART rules. *See* 42 U.S.C. § 7491(g)(2); 40 C.F.R. § 51.308; 40 C.F.R. Part 51, Appx. Y. Putting aside who makes the BART decision, Petitioners themselves concede that the Act "assigns no specific weight to any factor" and that "decisions as to how to do so and the weight to give each factor in a particular case cannot be constrained or second-guessed…" NMED Br. at 9.

EPA's FIP is based on strong evidence in the administrative record that EPA scrutinized the facts before it and reasonably applied those facts to the required BART factors. EPA identified and evaluated all available retrofit control technologies (including SNCR), the costs of compliance, the energy and non-air quality environmental impacts of compliance, any pollution control equipment 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. 40 CFR § 51.308(e)(1)(ii)(A); 76 Fed. Reg. 491. There is

no question that EPA followed this five-step process in making a BART determination for San Juan, consistent with its obligations under the Act. *See* 76 Fed. Reg. 491, 498-504 (outlining EPA's BART proposal and analysis); 76 Fed. Reg. 52,388, 52,390 (finalizing BART proposal).

New Mexico's attack on the FIP is particularly perplexing given that NMED itself concluded that SCR was BART on June 21, 2010. *See* Exh. 1 at 33. Less than a year later, NMED changed course, uncritically acquiescing to PNM's request to promulgate a SIP that required SNCR, instead of SCR, as BART. NMED Br. at 2. To withstand judicial scrutiny, an agency that changes course must "supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Such reasoned analysis is lacking here. In sum, New Mexico's belated and politically-motivated change of heart cannot defeat EPA's well-supported BART determination.

4. The FIP's Cost Estimates Are Reasoned And Justified

Although Petitioners dispute various aspects of EPA's factual analysis, these complaints lack foundation, let alone rise to the level of showing that "there has been a clear error of judgment" by EPA. *Motor Vehicle Mfrs. Assn.*, 463 U.S. 29, 43(citation omitted). On the issue of cost, the administrative record shows that EPA provided a reasoned basis for its cost estimates for SCR, which it adjusted

slightly in response to comments. EPA Resp. to Comments (AR, EPA Doc. #2) at 4. Even the adjusted estimates, which range between $165 and $235 per kilowatt for SCR, are well within EPA's accepted range of cost effectiveness. *Id*. at 4, Table 1. By contrast, New Mexico's late-filed SIP relied on an analysis that estimated the cost of SCR to be between $446 to $559 per kilowatt. EPA identified the basic flaws in New Mexico's cost estimates as follows:

> [New Mexico's] costs are unusually high for four principal reasons: (1) using a methodology . . . that has been disallowed under EPA's Cost Manual methodology and specifically disallowed for SCR; (2) consistently using assumptions at the upper end of the range for key SCR components (e.g., SCR backpressure; stiffening design pressure); (3) including costs for equipment that is not necessary for a SCR (e.g., balanced draft conversion, sorbent injection, SCR bypass); and (4) using excessive contingencies. The BART Guidelines require that "documentation" be provided for "any unusual circumstances that exist for the source that would lead to cost-effectiveness estimates that would exceed that for recent retrofits." [New Mexico's] analysis does not support its unusually high cost estimates.

EPA Resp. to Comments (AR, EPA Doc. #2) at 5-6. In short, New Mexico artificially inflated the cost of SCR in its late-filed SIP by failing to follow EPA's cost methodology and by consistently choosing the upper end of costs of the various SCR components without any documentation to support these alleged "site specific" anomalies. *Id*. Beyond asserting that their analysis was better, Petitioners provide no factual basis to support their argument that EPA's cost conclusions reflect a "clear error in judgment." *Motor Vehicle Mfrs. Assn.*, 463 U. S. 29, 43.

PNM raises similar cost-related arguments in its stay motion. Instead of relying on the administrative record, the company introduces an entirely new cost analysis, dated October 21, 2011 and prepared by its consultant, Sargent & Lundy, to claim that New Mexico's undocumented "site-specific" cost inputs were correct. *See* PNM Br. at 13 (citing Exh. 6, the Sargent & Lundy study). As a threshold matter, PNM's *post hoc* cost analysis is not part of the record and cannot be used to cast doubt on EPA's FIP. 42 U.S.C. §§ 7607(d)(7)(A), (B). Furthermore, PNM makes no attempt to meet its burden under the Act to show that it was "impracticable" to conduct this analysis and provide it to EPA during the comment period on the FIP. 42 U.S.C. § 7607(d)(7)(B); *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1191 (D.C. Cir.1981) *(quoting* H.R.Rep. No. 95-294, at 323 (1977), which explains that, before new evidence may be considered, "[EPA] must first be given an opportunity to pass on the significance of the materials and determine whether supplementary proceeding[s] are called for or not.").

Instead, PNM's submission of this evidence appears to be a thinly-veiled, *post hoc* attempt to substantiate the cost-related arguments it made to EPA during the comment period – arguments that EPA rightly found "lacked information" and "record support." 76 Fed. Reg. 52,388, 52,392. Similar to the evidence rejected in *Appalachian Power*, because PNM's new evidence is being offered with "no explication and without opportunity for agency response, [the Court is] unable to

evaluate [its] accuracy or significance." 135 F.3d 791,799.

Without any specific example or citation to the record, PNM also complains that EPA's cost assessment "contains nothing approaching" the level of documentation EPA asked PNM to provide to justify its cost-related arguments. PNM Br. at 12. EPA, however, used standard assumptions and methodology contained in its Cost Manual, making its cost estimates noncontroversial. EPA Resp. to Comments (AR, EPA Doc. #2) at 4. On the other hand, PNM claimed exigent, site-specific circumstances, thus triggering EPA's request for additional documentation. 76 Fed. Reg. 52,388, 52,392. PNM cannot use its own failure to provide that documentation to attack EPA's FIP; it is PNM's burden to show that EPA's FIP is arbitrary or capricious, not the reverse. *Citizens Comm. to Save our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008). Indeed, EPA was duty-bound to seek additional documentation to support its independent analysis of PNM's contentions. *S. Utah Wilderness Alliance v. Norton*, 237 F.Supp.2d 48, 52-53 (D.D.C. 2002)(agency acted unlawfully when it did not independently verify statements of private company).

5. New Mexico's Modeling Does Not Comport With Federal Standards

EPA's air quality modeling for San Juan found that "[i]nstallation of SCR will result in significant and perceptible visibility improvements at a number of Class I areas." EPA Resp. to Comments (AR, EPA Doc. #2) at 116. Contrary to

PNM's claim that EPA's modeling did not measure improvement in individual Class I areas (PNM Br. at 14), EPA's visibility modeling showed a 3.11 deciview ("dv") improvement at Canyonlands, a 2.88 dv improvement at Mesa Verde and an improvement of 1 dv or greater at 7 other Class I areas. AR, EPA Doc. #2 at 116

With respect to the accuracy of these predictions, PNM acknowledges that EPA arrived at its visibility improvement estimates by using the specific version of the modeling program ("CALPUFF") that the Interagency Workgroup on Air Quality Models ("IWAQM") designated as the "Guideline Model" for long-range transport applications. Scire Decl. at ¶ 5. PNM further acknowledges that this particular modeling program is the standard program used by EPA and other federal agencies in conducting visibility assessments. *Id.* Given that this modeling program is widely accepted, PNM's objection to EPA's use of the program falls flat.

In its late-filed SIP proposal, New Mexico included new visibility modeling provided by PNM to argue that EPA's modeling overstates the visibility improvement to be expected from installation of SCR at SJGS. *See, e.g.*, NMED Br. at 13. The record shows that EPA reviewed and rejected PNM's modeling because it did not comport with EPA and Federal Land Managers' guidelines. *See, e.g.*, EPA Resp. to Comments (AR, EPA Doc. #2) at 113-114. EPA chose a modeling methodology that employed different inputs and different settings, and

therefore produced different results. While predictive modeling is an inherently imperfect science, EPA clearly explained its sound technical reasons for using its standard modeling protocol and rejecting PNM's fundamentally flawed modeling analysis as follows:

> We used the EPA current acceptable versions of the CALPUFF (v. 5.8) modeling system which is composed of CALPUFF version 5.8, and CALMET version 5.8. We used CALPOST version 6.221 that was approved by the Federal Land Managers to allow for application of the revised IMPROVE equation ("Method 8"). Some problems have been identified in the CALPUFF modeling system (v. 6.2111) since the original WRAP CALPUFF screening modeling was conducted which is also the version used by PNM's contractors and NMED. A detailed discussion of CALPUFF model versions and the version approved for regulatory action is included in response to a separate comment. PNM's CALMET modeling utilized radii of influence values inconsistent with EPA/FLM guidance, and did not follow the EPA/FLM guidance about including upper air observational data….

See, e.g., EPA Resp. to Comments (AR, EPA Doc. #2) at 113-114. Although Petitioners correctly report that EPA *initially* proposed to approve a Nevada SIP submittal that used a more recent CALPUFF version (PNM Br. at 14, n.13), EPA recently reversed course by expressly objecting to Nevada's visibility modeling and deferring final action on Nevada's BART determination for the Reid Gardner power plant. *See* EPA Final Rule on Nevada's Regional Haze SIP, attached as Exh. 2, at pp.10, 12-13.[2] EPA is now requiring Nevada to re-model the plant's visibility

[2] This document is also available at: http://www.epa.gov/region9/air/actions/pdf/nv/Final-NvRhFRN.pdf

impacts using EPA's standard protocol. *Id.*

6. Petitioners' Discussion Of New Mexico's Transport Pollution Obligations Is Inconsistent And Irrelevant

EPA found that its FIP not only satisfies San Juan's regional haze obligation, but also satisfies the plant's separate obligation to reduce its "transport" pollution load, which "interferes" with pollution control efforts by surrounding states. 42 U.S.C. § 7410(a)(2)(D)(i)(II). Petitioners argue that the timing of San Juan's regional haze compliance should not be linked to its transport obligations under the Act. PNM Br. at 11; NMED Br. at 15-17. Petitioners lack any legal authority for this argument.

Moreover, EPA fully justified the reasonableness of its joint determination by offering PNM "regulatory certainty [that] will help guide PNM's business decisions regarding capital investments in pollution controls." 76 Fed. Reg. 52,388; *see also id*. at 52,415-16 (basis for joint determination). Petitioners' argument is also undermined by the fact that New Mexico itself sought to use the Act's regional haze requirements to defer action on its transport obligation. 76 Fed. Reg. 491, 494. In fact, NMED's own late-filed July 5, 2011 SIP also makes a joint regional haze and transport pollution proposal.[3] Petitioners cannot have it both ways. Yet, putting Petitioners' inconsistent assertions aside, once EPA found that

[3] http://164.64.146.5/aqb/reghaz/documents/GovLtr.PDF (last visited on Jan. 13, 2012).

New Mexico had failed to submit a SIP, EPA was obligated to promulgate a FIP within two years. EPA properly exercised its discretion by incorporating San Juan's transport obligations in the same FIP. 42 U.S.C. § 7410(c)(1); 74 Fed. Reg. 2,392, 2,393; 76 Fed. Reg. 52388, 52415-16.

IV. A STAY WOULD IRREPARABLY HARM HUMAN HEALTH, THE ENVIRONMENT, THE ECONOMY, AND THE PUBLIC INTEREST

EPA's FIP will improve visibility across sixteen national park and wilderness "Class I" areas in the Four Corners region of Arizona, Colorado, New Mexico and Utah. Every year, the scenic vistas of these breathtaking landscapes, such as the Grand Canyon, draw millions of visitors seeking refuge from the noise and pollution of urban life. Recognizing that the "average visual range in many Class I areas in the Western United States is . . . about one-half to two-thirds of the visual range that would exist without manmade air pollution," Congress and the EPA have made visibility improvement in this areas a national priority. 64 Fed. Reg. 35714, 35715 (July 1, 1999).

Beyond visibility, EPA's FIP will also yield significant benefits to human health, the environment, and the local economy. In so doing, EPA's FIP offers some measure of relief to the Navajo people (who live adjacent to San Juan) from the overwhelming pollution load that has been a daily, life-threatening

environmental injustice for far too many decades.[4] *See*, Declaration of Anna M. Frazier at paragraphs 7, 9-11 (explaining impacts on the Navajo, including Intervenor Diné CARE's members), attached as Exh. A to Intervenors' Oct. 17 Motion to Intervene in Case No. 11-9557.

Petitioners completely disavow these wide-ranging benefits and fixate on visibility, which they unfairly disparage as "a wholly aesthetic consideration." PNM Br. at 18. NMED even strains the bounds of logic by stating, without any support, that "[p]ublic health…will not be jeopardized if [EPA's FIP] is stayed."[5] NMED Br. at 20. Such parochial statements are more than willfully ignorant, they are misleading.

While NO_x emissions have independent human health impacts, this pollutant also contributes to the formation of fine particulate matter ("$PM_{2.5}$"). *See*, Declaration of George D. Thurston ("Thurston Decl."), submitted herewith, ¶ 11. Dr. George D. Thurston, a Professor of Environmental Health at the New York University School of Medicine, and a nationally-renowned expert in the field,

[4] "Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." www.epa.gov/environmentaljustice/basics/index.html (last visited on January 6, 2012).

[5] This is a remarkable argument for NMED to make given that New Mexico's Air Quality Control Act specifically mandates that air quality regulations account for air pollution's "interference with health, welfare, visibility and property" and "the public interest, including the social and economic value of the sources and subject of air contaminants." NMSA §§ 74-2-5(E)(1)-(2).

conducted a health risk analysis of EPA's FIP and, on that basis, estimated that BART controls on San Juan will save up to seven lives and prevent thousands of asthma events every year just within a 200km by 200km region affected by the plant's emissions. *Id*. at Table 2. Especially given the plant's sparsely populated surroundings, these results are significant.

Dr. Thurston arrived at these estimates by relying on air quality modeling conducted by an expert named Dr. H. Andrew Gray, who used EPA's standard air quality modeling methodology and found that EPA's FIP would: (1) reduce NO_x concentrations by as much as 92 μg/m3, averaged over twenty-four hours; and (2) reduce particulate matter ("PM") concentrations by as much as 2.1 μg/m3, averaged over twenty-four hours. *See* Declaration of Dr. H. Andrew Gray, submitted herewith, at ¶ 4. Dr. Thurston then used the EPA-approved health risk modeling program, called BenMAP, to translate these pollution reductions into human health outcomes. Thurston Decl. at ¶¶ 28-33. As Dr. Thurston summarized in the following two tables, the FIP's public health benefits are considerable:

Table 1. Annual NO_2 Health Effects Avoided In Study Area When BART Is Applied

Health Endpoint	Expected Number Per Year Avoided	Total Dollar Valuation (2008$)
Asthma Exacerbation, Missed school days	780	$234,000
Asthma Exacerbation, Nighttime asthma	1600	$471,000
Asthma Exacerbation, One or More Symptoms	2200	$679,000
Cough	570	$171,000
Emergency Room Visits, Asthma	5	$2,000

Hospital Admissions, All Respiratory	7	$170,000
Hospital Admissions, Chronic Lung Disease (less Asthma)	4	$78,000

Table 2. Annual $PM_{2.5}$ Health Effects Avoided In Study Area When BART Is Applied

Health Endpoint	Expected Number Per Year Avoided	Total Dollar Valuation (2008$)
Acute Myocardial Infarction, Nonfatal	3	$791,000
Asthma Exacerbation, Cough	48	$10,000
Asthma Exacerbation, Shortness of Breath	69	$14,000
Asthma Exacerbation, Wheeze	110	$22,000
Chronic Bronchitis	2	$914,000
Hospital Admissions, All Cardiovascular (less Myocardial Infarctions)	1	$37,000
Hospital Admissions, Pneumonia	1	$15,000
Minor Restricted Activity Days	2,200	$69,000
Work Days Lost	370	$53,000
Mortality All Cause (Laden et. al)	7	$58,863,000
Mortality All Cause (Pope et. al)	3	$22,725,000

Notably, these "counts and dollar valuations are conservative estimates of the health benefits after the application of BART at San Juan as per EPA's FIP" and Thurston's analysis "likely underestimates the health and monetary benefits of applying EPA's BART determination to San Juan." Thurston Decl. at ¶ 35. As Dr. Thurston nonetheless summarizes:

> Based on the above BenMAP results, I conclude that ambient $PM_{2.5}$ air pollution from San Juan, are associated with increased risk of multiple adverse human health effects, including mortality, hospital admissions, asthma attacks, acute bronchitis, pneumonia, and other respiratory ailments. Among people most affected are those with existing respiratory and cardiac disease, infants and children, and the elderly. Indeed, the health effects and valuation analyses I have developed and presented above demonstrate that large numbers of

> human health impacts from air pollution can be avoided by the implementation of BART at San Juan as per EPA's FIP, with significant total monetary valuations.

Thurston Decl. at ¶ 34. Specifically, Dr. Thurston "conservatively estimate[s] the total public health-based economic benefits associated with reductions in ambient $PM_{2.5}$ concentrations … to be between $24.7 to $60.8 million per year, overall," and the "public health-based economic benefit associated with reductions in ambient NO_2 concentrations … to be $1.8 million per year…." *Id*. at ¶ 36, 37. These are *annual* benefits, meaning that "ten years from the point that BART is operational, the health benefits and valuations of BART will be roughly ten times the values provided in Table 1 and 2, before adjustment for a discount rate, as appropriate." *Id*. at 38.

These numbers only add to the existing harm to the public from New Mexico's failure to meet its original December 2007 SIP submittal deadline:

> the public health-based economic harm from the failure to meet that deadline already is on the order of 100 to 240 million 2008 dollars….Thus, it is reasonable to conclude that any further delay to EPA's BART determination for San Juan will only exacerbate the substantial, and irreparable, harms to public health that have already occurred from the failure to control air pollution from San Juan in a timely manner.

Thurston Decl. at ¶ 38.

The results of Dr. Thurston's analysis of EPA's FIP are hardly surprising given the extensive and ever-growing scientific literature showing strong

correlations between exposure to air pollution from coal-fired power plants and adverse health impacts to human beings. Dr. Thurston summarizes these studies as follows:

- "[A]dverse effects on the heart, including an increased risk of heart attacks" and, "[i]ndeed... exposure to elevated concentrations of fine particles in the air can elevate the risk of Myocardial Infarction ("MI" or heart attack) within a few hours, and extending 1 day after PM exposure." *Id*. at ¶ 12.
- "Epidemiologic research conducted on U.S. residents has indicated that acute exposure to PM air pollution is associated with increased risk of mortality." *Id*. at ¶ 13.
- "[L]ong-term exposure to fine PM is also associated with increased lifetime risk of death, and has been estimated to take years from the life expectancy of people living in the most polluted cities, relative to those living in cleaner cities." *Id*. at ¶ 15.
- "[L]ong-term exposure to combustion-related fine particular air pollution is [also] an important environmental risk factor for cardiopulmonary and lung cancer mortality." *Id*. at ¶ 16.

Petitioners may argue that the region's ambient air quality meets national standards. Any such argument is unavailing because, as Dr. Thurston concludes, "[t]here is no convincing evidence to date showing that there is *any* threshold below which PM exposure is safe for human beings." *Id*. at ¶ 17 (emphasis added). Accordingly, just as rising air pollution levels worsen health, "reductions in air pollution cause associated commensurate improvements in public health." *Id*. at ¶¶ 18, 25. Notably, "[t]hese health benefits can occur immediately." *Id*. at ¶ 18.

Dr. Thurston's findings show that a stay of EPA's FIP would cause irreparable harm to human health. "[T]hese benefits and their valuations are not

accrued each and every year that operation of the BART[] is delayed" and, therefore, "even a delay of just a few months carries the risk of substantial, and irreparable, harm to public health, which has substantial associated adverse economic valuations." *Id*.

Separately from human health, visibility protection of our treasured Class I areas, moreover, is not, as PNM suggests, a "wholly aesthetic consideration." *See* PNM Br. at 18. National Parks, Wilderness Areas, and the sixteen other Class I Federal Areas – such as the Grand Canyon and Mesa Verde National Parks – that benefit from EPA's FIP are powerful economic engines. In calendar year 2009, the National Park units containing Class I areas that will benefit from EPA's FIP accounted for over 8.3 million recreation visits, over $639 million in spending, and 9,592 jobs.[6] As EPA found when it promulgated the 2005 BART rule underlying EPA's FIP for San Juan, the non-health visibility benefits of the 2005 BART rule – quantified specifically for Class I Federal Areas in the southeast and southwest U.S. – will "range from approximately $80 million to $420 million annually in 2015." 70 Fed. Reg. 39104, 39146.

In promulgating its FIP for San Juan, EPA expressly noted that it "expect[s] that improved visibility would have a positive impact on tourism-dependent local

[6] Stynes, D. J. 2011. Economic benefits to local communities from national park visitation and payroll, 2009 Natural Resource Report NPS/NRPC/SSD/NRR—2011/281. National Park Service, Fort Collins, Colorado (attached as Exh. 3); *Also available at,* http://www.nature.nps.gov/publications/NRPM/nrr.cfm (last visited Jan. 2, 2011).

economies." EPA Resp. to Comments (AR, EPA Doc. #2) at 87. EPA further projected that the broader region, as a whole, could also reap "substantial" benefits from improved visibility, which would be hindered by a stay. 70 Fed. Reg. 39104, 39146.

V. PETITIONERS' ALLEGED HARMS DO NOT WARRANT A STAY

The above-described harm to the public from delaying pollution controls on San Juan far outweighs the alleged harm to Petitioners caused by EPA's FIP. *See Valley Cmty. Pres. Commn. v. Mineta*, 373 F.3d 1078, 1086 (10th Cir. 2004) (holding that the balance of harms must weigh in favor of the party seeking a preliminary injunction). And, in any case, Petitioners vastly overstate their claimed harm and further lack legal and factual foundation for their allegations. Petitioners allege that they will suffer three categories of harm without a stay: (1) an intrusion on New Mexico's sovereignty; (2) initial costs of complying with EPA's FIP, primarily by initiating permitting and planning processes to install SCR; and (3) costs to New Mexico consumers in the form of higher electricity rates. NMED Br. at 18-19; PNM Br. at 15-18. None of these alleged harms, to the degree they are even cognizable, warrant a stay of EPA's FIP. *See Valley Cmty. Pres. Commn.*, 373 F.3d at 1086 ("financial concerns alone generally do not outweigh environmental harm") (*citing, Citizens to Preserve Overton Park, Inc. v.Volpe*, 401 U.S. 402, 412-13 (1971)).

A. EPA Did Not Intrude On New Mexico's Sovereignty And, Even If It Did, Petitioners Are Not The Proper Party To Vindicate Any Harm Caused By Such An Intrusion

Petitioners wrongly contend that EPA's FIP intrudes on New Mexico's sovereignty and that this intrusion causes harm. NMED Br. at 18; PNM Br. at 19-20. Once again, Petitioners forget that New Mexico failed to promulgate a legally-adequate SIP in a timely manner, thus triggering EPA's two-year "FIP-clock."

Even if that were not the case, Petitioners cannot vindicate any harm resulting from any claimed intrusion on state sovereignty. Petitioners are not vested with the authority to promulgate a SIP; that authority is vested in the EIB alone. *See* NMSA §§ 74-1-8(A)(4), 74-2-5. The EIB is an independent agency that is exempt from the Secretary of the Environment Department's authority and afforded "independent legal advice." *See* NMSA §§ 9-7A-12, 74-1-8.1(A). The EIB is therefore the only entity that has standing to assert arguments pertaining to alleged intrusions on New Mexico's sovereignty to promulgate a SIP.[7] *See Mt. States Legal Found. v. Costle*, 630 F.2d 754 (10th Cir. 1980) (holding that nonprofit legal group and state legislators did not have standing to pursue claims related to state's sovereign powers). The EIB, however, is not a party to this litigation. In its absence, Petitioners lack authority to serve as its proxy.

[7] The Attorney General of New Mexico may also pursue such an action, whether independently or as legal counsel to the EIB, but has not done so here. NMSA §§ 8-5-2 (duties of the Attorney General), 74-1-8.1(A) (providing that the EIB "shall act with independent legal advice," including from the Attorney General).

B. Petitioners Have Failed To Substantiate The Need To Incur Near Term Compliance Costs

Petitioners contend that PNM will incur costs to comply with EPA's FIP and that these costs constitute harm justifying a stay. Specifically, PNM estimates, based on a total compliance cost of $741 million, that it will incur costs totaling $21.3 million by the end of 2012, and $112.8 million by the end of 2013. PNM Exh. 14 at ¶ 11; PNM Exh. NEW-2 (attached as Exh. 10 to PNM Br.). These estimates, as detailed above, are artificially inflated; EPA found that total compliance cost was $345 – not $741 – million.[8] *See* 76 Fed. Reg. 52,388 (EPA estimate of $345 million), 52,392 (critique of PNM estimates).

Petitioners' allegations of near-term costs are also premised on a fifty-seven month schedule to comply with EPA's FIP. While EPA's FIP does provide PNM with five-years – or sixty months – to design and install SCR, such compliance time is well above the median compliance time of thirty-three months, and average time of thirty-seven months, found by EPA for other SCR installations in the United States. 76 Fed. Reg. 52,388, 52,408. Indeed, it only took sixty-two months to complete "the most difficult [SCR installation] in the country," the Sammis retrofit, which had "extremely limited space for installation of the new air emission

[8] Of note, these compliance costs will provide economic benefits, including to local communities; "This project will require well-paid, skilled labor which can potentially be drawn from the local area, which would seem to benefit the economy." EPA Resp. to Comments (AR, EPA Doc. #2) at 87.

control equipment and systems." *Id*. (citation omitted). The Sammis retrofit also involved seven electric generating units (versus four here), was "more constrained than SJGS," and included, in addition to SCR, a separate "major pollution control retrofit project" such that "the implementation schedule for the SCRs would have been shorter if done alone." EPA Resp. to Comments (AR, EPA Doc. #2) at 72-74.

While EPA determined "that a longer time frame than the median time frame for construction … is justified due to site congestion," the record does not suggest that San Juan's SCR retrofit should take as long as more complex projects, like the Sammis retrofit. *Id*.

Petitioners thus do not justify their fifty-seven month compliance schedule and, in particular, do not justify why the near-term commitments outlined in that schedule are necessary.[9] Petitioners' materials provide no evidence that Petitioners evaluated alternative compliance schedules to mitigate near-term costs, let alone found that such alternative schedules were infeasible. Even if these costs and schedule are assumed, the bulk of PNM's compliance costs ($495 million) will not be incurred until after 2013, long after the likely duration of this litigation. *See* PNM Exh. NEW-2 (attached to PNM Exh. 10).

[9] Of note, PNM contemplated issuing a request for proposals for the SCR project in October 2011 with responses back by Feb. 2012, and a contract in place by July 2012. *See* PNM Decl. of Evelin Wheeler, paragraph 5. To Intevernors' knowledge, that RFP has not been issued, suggesting that any near-term commitments by PNM may be delayed.

C. Petitioners' Alleged Harm To Ratepayers Is Purely Speculative

Petitioners argue that a stay is in the interest of PNM's customers, who will be paying for the cost of SCR in the form of increased electricity rates. There are at least three problems with this contention. First, Petitioners contradict their claim of irreparable harm caused by the cost of SCR by admitting that they will seek to recover these costs from PNM's consumers. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended ... 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" (internal quotation and citation omitted)).

Second, while PNM may seek to recover costs that are reasonably and prudently incurred, PNM has yet to request approval of any such rate increase from New Mexico's Public Regulation Commission ("PRC"), the entity charged with adjusting PNM's consumer rates. *In re Petition of PNM Gas Services v. NMPUC*, 2000 NMSC 12, ¶ 5-8, 129 N.M. 1, 1 P.3d 383 (discussing general principles applied to rate cases). Indeed, PNM cannot request such a rate increase until twenty-four months prior to the expected date that SCR will be operational. NMSA § 62-6-14(E). Thus, any ratepayer increase is not "likely to occur before [this] court rules on the merits," as is required to show a sufficient risk of harm to

warrant a stay. *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1260 (10th Cir. 2003).

Third, the PRC may reject any eventual request, and consumers, accordingly, would suffer no harm. PNM even admits as much, explaining that that PNM may only "charge approved rates for its services," that the company carries the burden of justifying a rate increase, and that efforts to obtain a rate increase may be subject to challenge. PNM Exh. 14, ¶¶ 6-8 (explaining).

VI. The Balance of Harm Tips Strongly Against a Stay of EPA's FIP

Congress, in passing the Act, "recognized that clean air, wherever located, is in the public interest" and "decided … that the interest in clean air generally was superior to that interest represented by the polluting activity." *Nance v. EPA*, 645 F.2d 701, 716 (9th Cir. 1981). The benefits of reduced air pollution from San Juan are extensive. To the degree that the benefits of EPA's FIP can be monetized, PNM's artificially inflated cost estimates ($741 million over five years) pale in comparison to the public health benefits (conservatively, $60.8 million annually) and the tourism-based economic jobs and income from the National Park units containing Class I areas ($639 million in spending and 9,592 jobs in 2009) that will be put at risk by a stay. *Valley Cmty. Pres. Commn.*, 373 F.3d 1078, 1086. Moreover, on balance, these benefits – though reduced to dollars – involve not simply money, but human health, and even human life.

EPA recognized that the benefits, overall, of controlling regional haze pollution outweigh the costs to utilities, like PNM. As EPA conservatively found in 2005, when it promulgated the BART rule underling EPA's FIP for San Juan, the monetized benefits of the Act's regional haze protections far outweighs their compliance costs ($8.4-$9.8 billion in benefits versus 1.4–1.5 billion in costs, annually).[10] *See also* 70 Fed. Reg. 39104, 39144-39152 (explaining economic benefit-cost analysis for 2005 BART rule). EPA's 2005 BART findings establish a presumption that the balance of harms strongly favors denying Petitioners' stay motions. This presumption is only confirmed by the expert declarations of Dr. Andrew Gray and Dr. George Thurston, submitted herewith.

By disavowing the FIP's public health, economic, and environmental impacts (NMED Br. at 20), Petitioners fail to meet their burden to show that that their near-term compliance costs outweigh the public health and environmental costs of a stay. Public health and environmental injuries "can seldom be adequately remedied by money damages and [are] often permanent or at least of long duration, i.e., irreparable"). *Amoco Prod. Co. v. Village Of Gambell*, 480 U.S. 531, 545 (1987). These injuries trump Petitioners' weak – and ultimately inchoate – allegations of harm to New Mexico's sovereignty; inflated assertions regarding near-term compliance costs; and speculative, ill-founded contentions regarding rate

[10] http://www.epa.gov/visibility/fs_2005_6_15.html (last visited December 15, 2011).

increases for PNM's consumers. *Valley Cmty. Pres. Commn.*, 373 F.3d 1078, 1086.

Finally, none of Petitioners' cost-based arguments show that that the stay is necessary to "prevent the judicial process from being rendered futile by defendant's action or refusal to act." 11A Fed. Prac. & Proc. Civ. § 2947 (2d ed.). Petitioners appear to be well-positioned to mitigate the limited costs they must legitimately incur during this litigation. If not, they are free to seek an expedited review of the merits. *Virginia Petroleum Jobbers Assoc.*, 259 F.2d 921, 927 (finding expedited consideration of the merits "an adequate remedy").

CONCLUSION

Petitioners have not carried their heavy burden to show that this Court should stay EPA's FIP. For these same reasons, and because EPA has no duty to act on Petitioners' administrative petitions, let alone do so by date certain, Petitioners' alternative request for relief is similarly unjustified. Petitioners stay motions should therefore be DENIED.

Respectfully submitted January 13, 2012.

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CERTIFICATE OF DIGITAL SUBMISSION
AND PRIVACY REDACTIONS

The undersigned certifies that:

(1) All required privacy redactions have been made; and

(2) This digital submission was scanned for viruses with Symantec Endpoint Protection v11.0.6005.562, which was last updated on January 13, 2012. According to this program, this submission is free of viruses.

s/ Suma Peesapati
Suma Peesapati

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2012, a copy of this Unopposed Motion to Intervene by Diné Citizens Against Ruining Our Environment, National Parks Conservation Association, New Energy Economy, San Juan Citizens Alliance and Sierra Club was served electronically on all parties to this matter, through the Court's CM/ECF system.

s/ Suma Peesapati
Suma Peesapati