THE ATTORNEY GENERAL
STATE OF ARKANSAS
LESLIE RUTLEDGE

July 15, 2015

Mr. Guy Donaldson
Chief, Air Planning Section (6PD-L)
Environmental Protection Agency
1445 Ross Avenue, Suite 700
Dallas, Texas 75202-2733

Attention: Docket ID No. EPA-R06-OAR-2105-0189; comments submitted electronically

Dear Mr. Donaldson:

The Environmental Protection Agency ("EPA" or "Agency") has acted in an arbitrary and capricious manner by proposing a Federal Implementation Plan ("FIP") to address certain regional haze and visibility transport requirements for the State of Arkansas ("State"). The proposed FIP has no basis in law or science and is a prime example of overreaching federal regulation in response to "sue and settle" litigation brought by the Sierra Club. As such, the EPA should withdraw the proposed FIP and consult with the State in developing an approvable State Implementation Plan ("SIP").

My initial concern deals with the abbreviated time frame being forced upon this review by a third party lawsuit. On February 11, 2015, the EPA lodged a proposed Consent Decree in *Sierra Club v. McCarthy*, Case No. 4:14-CV-00643-JLH, Eastern District of Arkansas ("*Sierra Club*"). The proposed Consent Decree requires EPA to issue a final regional haze FIP on or before December 15, 2015. I submitted comments regarding the proposed Consent Decree on April 20, 2015. Contemporaneously, EPA submitted the proposed FIP for public comment on April 8, 2015 and extended that period until July 15, 2015. As I stated in my comments regarding the proposed Consent Decree in *Sierra Club*, I do not believe that five (5) months is an adequate time period for the EPA to fully analyze and respond to the public comments. Again, I urge the EPA to reconsider the *Sierra Club* December

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15, 2015 deadline for the issuance of a final FIP. EPA must take an appropriate amount of time to address the many concerns that are being raised in the public comments. A rushed process that fails to fully review all considerations will lead to an arbitrary and capricious decision. Such a decision will most certainly lead to protracted litigation, not protection of the environment. In the light of recent case law, EPA is not likely to prevail in litigation challenging the proposed FIP.[1]

I. "Cumulative Visibility Improvement"

The purpose of the Regional Haze Rule is to improve visibility in the nation's national parks and wilderness areas. For Arkansas, the Caney Creek and Upper Buffalo Wilderness Area are the areas where visibility must be improved. EPA measures visibility impairment and improvement in terms of "deciviews." A deciview is "a haze index derived from calculated light extinction, such that uniform changes in haziness correspond to uniform incremental changes in perception across the entire range of conditions." 40 C.F.R. § 51.301. One deciview equals a slightly perceptible change in visibility to the human eye.

The required improvements for each area will yield a less than one deciview improvement to visibility. The fraction of improvement will be imperceptible to the human eye. If a deciview is a measurement of perception of a landscape, it is essentially a snapshot in time. It is physically impossible for a person to look at the vistas of all class I Federal areas at the same time. Thus, small, imperceptible changes in visibility across the four class I Federal areas cannot be combined to manufacture a measure of perceptible improvement in visibility. It is, therefore, not logical then to aggregate the visibility improvements across all four class I Federal areas for each source, as is done in the proposed FIP. As such, one may question how the cost can be justified when visibility will not be perceptibly improved.

EPA has invented the concept of "cumulative visibility improvement" to get around this question. The Clean Air Act does not define, nor even mention, "cumulative visibility improvement" ("CVI") as a measurement under the five-factor analysis for choosing an appropriate Best Available Retrofit Technology ("BART"). CVI is a construct of the EPA that defies common sense and cannot be used to justify its chosen BART controls. The deciview is not a measurement that can be added together to get a total sum and have that total sum indicate positive results. It defies logic that the affect in the Caney Creak area can be added to the affect in the Upper Buffalo Wilderness Area and that such will result in overall improvement. At best, this standard confuses the public and incorrectly represents the actual visibility improvements that will result from the chosen controls. At

[1] *Nat'l. Parks Conservation Ass'n. v. EPA*, -- F.3d --, 2015 WL 3559149 (9th Cir. 2015).

worst, this inflated number was impermissibly used by EPA to justify the enormous costs of BART controls.

The use of CVI is not grounded in law or fact. As such, its use is arbitrary and capricious.

II. Reasonable Progress Goals

The States must establish Reasonable Progress Goals ("RPGs) for each class I Federal area in the state to provide incremental visibility improvements toward to the ultimate goal of reaching natural background conditions by 2064. 40 C.F.R. § 51.308(d). EPA disapproved Arkansas's RPGs in 2012; however, EPA approved the State's commitment to submitting periodic progress reports. Based on a May 2015 progress report, EPA is aware that Arkansas is meeting the Uniform Rate of Progress ("URP"), which is a "glide path" for reaching the 2064 goal. *See* State Implementation Plan Review for the Five-Year Regional Haze Progress Report, Revised May 2015, Arkansas Department of Environmental Quality, found at: https://www.adeq.state.ar.us/air/planning/pdfs/ar_5yr_prog_rep_review-final-6-2-2015.pdf.

40 C.F.R. § 51.308(d)(1) requires the States to "establish goals (expressed in deciviews) that provide for reasonable progress towards achieving natural visibility conditions." In setting a reasonable progress goal, the State must "consider the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected sources, *and include a demonstration showing how these factors were taken into consideration in selecting the goal*." 40 C.F.R. § 51.308(d)(1)(i)(A) (emphasis added). In *North Dakota v. EPA*, 730 F.3d 750 (2013), the Eighth Circuit Court of Appeals held that EPA was bound to follow the same regulatory requirements as the State when promulgating a FIP.

Thus, if EPA proposes RPGs in a FIP it must set those goals using the regulatory factors, including a demonstration of how those factors were applied. Then EPA *may* determine that additional measures are necessary to meet the goals. The law clearly states that "reasonable progress goals…are not directly enforceable." 40 C.F.R. § 51.308(d)(1)(v).

However, EPA uses the guise of setting RPGs to unlawfully apply a BART-type analysis to the Entergy Independence electric generating unit ("Independence"). Independence is not subject to the BART requirements because it was not constructed between 1962 and 1977. Its construction commenced after this time period. EPA uses a "reasonable progress analysis for point sources" to shoehorn Independence into the use of emission controls without a legal basis for doing so.

This action is outside the scope of the Clean Air Act and its implementing regulations.

As cited above, the law clearly sets forth the process for RPGs. EPA must begin by setting a RPG and then conduct an analysis of whether additional controls are necessary. However, EPA turns this process on its head. First, EPA looked at the emissions from Independence as a point source. It then uses the regulatory factors for setting a RPG to justify a "cut and paste" of its BART analysis for Entergy White Bluff and calls it a "reasonable progress analysis for point sources." There is not authority for this procedure in the law. This is a textbook example of regulatory overreach to achieve a policy goal.

Only after completing its BART-like analysis for Entergy Independence does EPA discuss the establishment of RPGs. In direct contravention of 40 C.F.R. § 51.308(d)(1)(i)(A), EPA fails to demonstrate how the regulatory factors were used to set the goals. Its discussion of those factors as it relates to Entergy Independence is unlawful and cannot be substituted for the demonstration required by law.

EPA's proposed "reasonable progress" action clearly exceeds its authority under the Clean Air Act and is arbitrary and capricious.

III. EPA Fails to Adequately Consider Costs

In *Nat'l. Parks Conservation Ass'n. v. EPA*, -- F.3d --, 2015 WL 3559149 (9th Cir. 2015), the Ninth Circuit Court of Appeals struck down parts of the EPA's Regional Haze FIP for Montana as arbitrary and capricious. The Court found that EPA "failed to explain what makes a cost reasonable in light of potential visibility benefits." The same fatal flaw plagues the proposed FIP for Arkansas.

This is an aesthetic standard, not a public health standard. As such, EPA must justify its decision in terms of improving visibility. As with the Montana FIP, EPA fails to explain why the costs are reasonable in light of the limited visibility improvements cited in the proposed FIP. EPA provides the cost calculations and it provides the visibility calculations; however, the agency does not connect the two. It does not complete the analysis by giving a rational explanation as to why the costs of the chosen controls were justified by the visibility improvement.

In *Michigan v. EPA*, 576 U.S. ___ (2015), Slip Opinion at 5, the United States Supreme Court reaffirmed that "[f]ederal administrative agencies are required to engage in reasoned decision making." (internal quotes and citation omitted). As the Ninth Circuit clearly stated, "[T]he law does require EPA to 'cogently explain why it has exercised its discretion in a given manner." *Nat'l Parks* at *5 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Auto Ins. Co.,* 463 U.S. 29 (1983)). The Eighth Circuit has agreed, stating: "A rule is arbitrary and capricious if 'the

agency fails to articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Menorah Medical Center v. Heckler*, 768 F.2d 292, 295 (8th Cir. 1985) (internal quotations omitted). Thus, without a satisfactory explanation of its decision, there is no way that EPA can justify its decision.

Without an adequate explanation, the EPA cannot prove that it adequately considered costs in developing the proposed FIP. Costs are an important factor in both determining appropriate BART controls and in setting reasonable progress goals. In fact, it is the first factor listed for both determinations. Based on the data provided in the proposed rule, the total capital costs for compliance with the proposed FIP will be over $278 million.[2] Other commenters to the FIP argue that the actual cost is much higher than has been determined by EPA. Total annual costs for compliance will be over $175 million.[3] When compared to the impreceptible visibility improvements that will be gained, this is too costly for the State of Arkansas and its citizens.

In *Michigan v. EPA*, supra, the United States Supreme Court reiterated its support for sensible consideration of cost within a regulatory scheme.

> Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions. It also reflects the reality that too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.

Id., Slip Opinion at 7 (citing *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 233 (2009)). EPA should seriously consider the costs imposed by the proposed FIP to achieve minimal aesthetic improvement. Resources are likely more wisely spent on public health programs under the Clean Air Act.

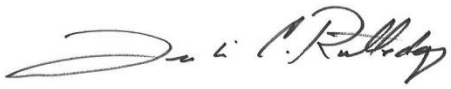
Justice Scalia succinctly sums up my concern with the proposed FIP. "One would not say that it is even rational, never mind 'appropriate' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." *Id*., Slip Opinion at 7. EPA fails to explain its rationale from imposing significant costs upon Arkansans without significant environmental benefits. As such, the proposed FIP is unlawful and should be withdrawn by the EPA.

Additionally, the Arkansas Department of Environmental Quality ("ADEQ") will be filing extensive comments on the proposed FIP. I support the comments of

[2] 80 Fed. Reg. 18944 (April 8, 2015).
[3] *Id.*

ADEQ. I encourage EPA to carefully consider the comments from ADEQ and the parties affected by the proposed FIP.

Sincerely,



Leslie Rutledge
Attorney General

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