IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents. ---------- POWDER RIVER BASIN RESOURCE COUNCIL, et al., Intervenors.	Case No. 14-9529
POWDER RIVER BASIN RESOURCE COUNCIL, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents. ----------	Case No. 14-9530

STATE OF WYOMING; PACIFICORP; AMERICAN COALITION FOR CLEAN COAL ELECTRICITY; ARCH COAL, INC.; and IDAHO POWER COMPANY,

Intervenors.

PACIFICORP,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

POWDER RIVER BASIN RESOURCE COUNCIL; NATIONAL PARKS CONSERVATION ASSOCIATION; SIERRA CLUB; and WYOMING OUTDOOR COUNCIL,

Intervenors.

Case No. 14-9534

PACIFICORP'S OPENING BRIEF

(Deferred Appendix Appeal)

(Oral Argument Requested)

E. Blaine Rawson
Steven G. Jones
Stephanie Hanawalt
Ray Quinney & Nebeker, P.C.
36 South State Street, Suite 1400
Salt Lake City, UT 84111
sjones@rqn.com
(801) 532-1500

Attorneys for PacifiCorp

Marie B. Durrant
Assistant General Counsel
PacifiCorp
1407 North Temple, Suite 310
Salt Lake City, Utah 84116
marie.durrant@pacificorp.com
(801) 220-4707

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, PacifiCorp submits the following statement:

PacifiCorp's common stock is 100% owned by PPW Holdings, LLC, a Delaware limited liability company, which is, in turn, wholly owned by Berkshire Hathaway Energy Company. Berkshire Hathaway Energy Company is a majority owned subsidiary of Berkshire Hathaway Inc., a publicly held corporation. No publicly held company directly owns ten percent (10%) or more of PacifiCorp's common stock.

GLOSSARY OF TERMS

Act	Clean Air Act
Agency	United States Environmental Protection Agency
BACT	Best Available Control Technology
BART	Best Available Retrofit Technology
BART Guidelines	Enforceable regulations in Appendix Y of 40 C.F.R. Part 51
CAA	Clean Air Act
Cost Manual or CCM	EPA's Air Pollution Control Cost Manual
Dv	Deciview
EPA	United States Environmental Protection Agency
Final Rule	"Approval, Disapproval and Promulgation of Implementation Plans; State of Wyoming; Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze," 79 Fed. Reg. 5,032 (Jan. 30, 2014).
FIP	Federal Implementation Plan
LNB	Low NO_x Burners
lb/mmBtu	Pound Per Million British Thermal Units
NO_x	Nitrogen Oxides
OFA	Overfire Air
PSD	Prevention of Significant Deterioration
RH	Regional Haze

RHR	EPA's Regional Haze Rule
RH SIP	Regional Haze State Implementation Plan
SCR	Selective Catalytic Reduction
SNCR	Selective Non-Catalytic Reduction
SIP	State Implementation Plan
SOFA	Separated Overfire Air
SO_2	Sulfur Dioxide
Wyodak	Wyodak Power Plant

STATEMENT OF RELATED CASES

Pursuant to 10th Cir. Rule 28.2(C)(1), the following is a statement of related cases:

PacifiCorp's Petition for Review is related to two other cases pending before this Court (which have been consolidated with this case), which also challenge the United States Environmental Protection Agency's ("EPA") final action on the State of Wyoming's regional haze state implementation plan ("RH SIP") for nitrogen oxides ("NO_x"): *Wyoming v. EPA*, No. 14-9529 and *Powder River Basin Resource Council, et al. v. EPA*, No. 14-9530. Another case that was once consolidated with this case, *Basin Electric Power Coop. v. EPA*, No. 14-9533, has been settled.

Also, certain groups appealed EPA's approval of Utah's, Wyoming's, and New Mexico's adoption of an SO_2 emissions trading program to comply with the regional haze ("RH") regulations. PacifiCorp intervened in those cases. Those cases were consolidated, briefed, argued, and decided by this Court. *WildEarth Guardians v. EPA*, Nos. 12-9596, 13-9502, 13-9506, 13-9507, 13-9508, 13-9509, & 13-9510.

STATEMENT REGARDING NECESSITY OF SEPARATE BRIEFS

Pursuant to 10th Cir. Rule 31.3, PacifiCorp states that separate briefs for Petitioners are necessary, and have been approved by this Court. The State of Wyoming is exempt from the rule regarding separate briefs pursuant to 10th Cir. Rule 31.3(D). PacifiCorp is permitted to file a brief separate from Wyoming pursuant to 10th Cir. Rule 31.3(A). Powder River Basin Resource Council, et al., ("Environmental Petitioners") also filed a Petition for Review, including a claim that EPA should have required different emissions controls at PacifiCorp's Naughton facility. PacifiCorp and Environmental Petitioners have conflicting interests.

For the foregoing reasons, this Court recognized the necessity for separate briefs from Petitioners and approved the filing of the same. Order, *Wyoming v. EPA*, Case Nos. 14-9529, 14-9530, 14-9533, 14-9534 (10th Cir. May 15, 2014). In an Order entered on September 23, 2022, the Court reiterated its approval of the filing of separate briefs for the State of Wyoming, PacifiCorp and the Environmental Petitioners. *Wyoming v. EPA*, Case Nos. 14-9529, 14-9530, 14-9533, 14-9534, Doc. No. 0101974460 (10th Cir. Sept. 23, 2022).

JURISDICTIONAL STATEMENT

PacifiCorp petitions for review of the portion of the Final Rule that disapproves Wyoming's determination of the pollution control requirements for Wyodak. This Court has jurisdiction pursuant to the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7607(b)(1), and Rule 15(a) of the Federal Rules of Appellate Procedure. The Final Rule is a "locally or regionally applicable" regulation because it applies only to Wyoming; therefore, this Court has jurisdiction as "the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1).

The CAA requires a petition for review to be filed within 60 days of publication in the Federal Register. *Id.* PacifiCorp timely filed its Petition for Review (March 31, 2014) within 60 days of publication of the Final Rule (January 30, 2014).

PacifiCorp has standing. EPA's Final Rule required an unwarranted pollution control device estimated by PacifiCorp to cost in excess of $175 million. This constitutes a concrete and particularized injury, fairly traceable to the Final Rule, for which there is a probability of redress by a decision holding the Final Rule invalid. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

STATEMENT OF THE CASE

While this appeal involves numerous technical terms and application of many different statutes and regulations, the case itself is actually quite straightforward. In short, EPA erred by illegally rejecting a Wyoming pollution control decision for PacifiCorp's Wyodak power plant. Congress gave Wyoming authority to make this pollution control decision, and Wyoming did so correctly. Despite this fact, EPA replaced Wyoming's decision with a federal decision that illegally failed to consider the required statutory factors. PacifiCorp filed this Petition for Review to remedy EPA's errors.

The remainder of this section explains key technical terms and provides context for the application of the relevant regulations and statutes.

A. Overview.

The CAA required Wyoming to adopt a Regional Haze State Implementation Plan ("RH SIP"). Wyoming's RH SIP was required to identify the Best Available Retrofit Technology ("BART") for the regional haze pollutants of NO_x, SO_2, and particulate matter ("PM") for certain sources, including PacifiCorp's Wyodak power plant. Wyoming determined that a new generation of combustion controls should be installed in the Wyodak boiler – low NO_x burners and over-fire air ("LNB/OFA") – to meet the BART requirements. Wyoming reached this conclusion after studying the technical data, applying the correct legal

principles, considering the five statutory BART factors, consulting with EPA, and employing the discretion granted to Wyoming by Congress. EPA rejected Wyoming's reasoned NO_x BART determination, requiring the unnecessary post-combustion control known as selective catalytic reduction ("SCR"), which EPA had rejected twice before.

B. The Statutory and Regulatory Background of the Regional Haze Program.

Regional haze is caused when sunlight encounters particles in the air comprised of sulfates, carbon, fine and course particulate matter, sea salt, and nitrates. *See* Approval, Disapproval and Promulgation of Implementation Plans; State of Wyoming; Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze, 77 Fed. Reg. 33022, 33039 tbl.15 (Jun. 4, 2012) ("2012 Proposed Rule"). Haze reduces visibility in national parks and wilderness areas ("Class I areas"). The goal of the Regional Haze program is to restore (and preserve) natural visibility background conditions in Class I areas by the year 2064. 40 C.F.R. § 51.308(d)(1)(i)(B). PacifiCorp's appeal concerns only NO_x emissions (which form nitrates) and related NO_x emissions controls for the small Wyodak unit in Wyoming. Nitrates play a relatively small role in regional haze formation in Class I areas impacted by emissions from Wyoming. As EPA has recognized, sea salt, sulfates, carbon, and fine and course particulate matter

cause over 90% of the regional haze at the Class I areas in and around Wyoming. 2012 Proposed Rule, 77 Fed. Reg. at 33039 tbl.15.

Congress delegated the primary responsibility for the Regional Haze program to the states. States are required to prepare RH SIPs containing emission limits, compliance schedules, and other measures necessary to make "reasonable progress" toward meeting the 2064 goal. 42 U.S.C. § 7491(b)(2). EPA promulgated regulations for the states to use in developing RH SIPs, 40 C.F.R. §§ 51.308 and 51.309, and adopted rules governing how BART is determined ("BART Guidelines"). 40 C.F.R. Part 51, App. Y.

The Regional Haze program treats various types of sources differently. For example, the BART Guidelines are enforceable against coal-fired sources rated above 750 megawatts, but when the BART Guidelines were established as law through the rulemaking process, EPA determined that the BART Guidelines were not mandatory for smaller electrical generating units, like Wyodak. 40 C.F.R. § 51.308(e)(1)(ii)(B); 40 C.F.R. Pt. 51, App. Y, § I.H.

1. BART

In preparing a RH SIP, a state must establish BART for certain sources. The CAA requires "the State" to consider five statutory BART factors when determining what emissions controls constitute BART: (1) "[T]he costs of compliance," (2) "the energy and nonair quality environmental impacts of

compliance," (3) "any existing pollution control technology in use at the source," (4) "the remaining useful life of the source," and (5) "the degree of improvement in visibility[1] which may reasonably be anticipated to result from the use of such technology." 42 U.S.C. § 7491(g)(2). Congress directed that "the State" is to weigh these five BART factors, because states are in the best position to balance the improvement of scenic views against the cost of emission controls, the remaining life of a source, and other factors.[2]

A RH SIP, including the related BART determinations, is created through an extensive state rule-making process, including public notice and comment. The state then submits its RH SIP to EPA. EPA is then required to review the state's RH SIP to certify the RH SIP is complete. 42 U.S.C. § 7410(k)(1)(B). EPA substantively reviews each RH SIP and *must* approve a RH SIP if it meets the CAA's "applicable requirements." 42 U.S.C. § 7410(k)(3). EPA must grant a state's BART decision-making deference. *See* 42 U.S.C. § 7491(b)(2)(A; 7491(g)(2); 40 C.F.R. Part 51, App. Y, § E; *American Corn Growers Ass'n v. EPA*,

[1] The CAA and related regulations establish the "deciview" ("Dv") as the metric for measuring visibility improvement. The Dv is intended to reflect the level of actual human perception of visibility. Regional Haze Regulations, 64 Fed. Reg. 35,715, 35,725 (July 1, 1999).

[2] EPA has conceded that, because "the CAA does not specify how the State should take [the five criteria] into account, the *States* are *free to determine the weight and significance* to be assigned to each factor." Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations. 70 Fed. Reg. 39,104, 39,123 (July 6, 2005) (emphasis added).

291 F.3d 1, 8 (D.C. Cir. 2002) (the legislative history of CAA § 169(A) "confirms that Congress intended the states to decide which sources impair visibility and what BART controls should apply to those sources.")

2. RH SIPs are designed to reduce regional haze over decades.

The development and adoption of Wyoming's RH SIP is not a one-time event but is, instead, an active process of measuring and correcting actions to reduce regional haze extending over a period of decades. Every five years, Wyoming must submit reports to EPA describing progress towards its reasonable progress goals, 40 C.F.R. § 51.308(g), and every ten years Wyoming must make RH SIP revisions reevaluating each element of its long-term strategy and reasonable progress analyses, including any additional necessary emission controls. *Id.* §§ 51.308(f), 51.309(d)(1). Between these progress reports and comprehensive RH SIP revisions, Wyoming will conduct numerous reevaluations and revisions to address the regional haze requirements through 2064. Accordingly, even if the most stringent emission controls are not justified as BART under the initial RH SIP, that does not foreclose adoption of more stringent controls under a future RH SIP.[3]

[3] Other CAA programs require near-term emission reductions and/or installation of state-of-the-art emission control technology for coal-fired power plants in certain circumstances. For example, every "major modification" at an existing power plant that will cause a significant net emissions increase requires a Best Available

This litigation involves Wyoming's RH SIP which was submitted for the first regional haze planning period (2008-2018). While this litigation has been pending Wyoming has submitted a new RH SIP for the second planning period (2018-2028) which includes a section regarding Wyodak. Wyoming is awaiting EPA's approval of its second planning period RH SIP.

C. Relevant Factual Background.

1. PacifiCorp

PacifiCorp supplies electricity to more than 2 million residential and business customers in Wyoming and five other western states. Wyodak is one of twenty-two coal-fired electrical generating units serving PacifiCorp customers. All of these units have been subject to the Regional Haze program's BART requirements. During the first planning period, ten of PacifiCorp's BART-eligible units were located in Wyoming. Wyoming's RH SIP required PacifiCorp to install emissions controls at these ten facilities. (*See, e.g.,* PacifiCorp's Motion for Stay, *Wyoming v. EPA*, No. 14-9534, at Ex. F, ¶ 12, JA Vol. IX, JA002315–2316.)

As of 2015, the emissions control projects required under Wyoming's RH SIP had required PacifiCorp to spend more than $900 million between 2005 and

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Control Technology ("BACT") review. *See* 40 C.F.R. § 52.21. BACT, which is more stringent than BART, can require a source to install state-of-the-art emission controls like SCR.

2013; the remaining obligations under Wyoming's RH SIP were forecast to cost more than $550 million to install between 2014 and 2022. (*Id.*) Installing SCR at Wyodak, as required by EPA, was estimated to cost PacifiCorp and its customers an additional $175 million (or more) in capital costs, plus $1 million annually in additional operating costs. (*Id.* at JA Vol. IX, JA002314–2315, ¶ 8.)

2. Wyoming's NO_x BART permit determination met all applicable CAA requirements.

Contrary to EPA's allegations, Wyoming's RH SIP development was thoughtful, comprehensive, and legal. Wyoming not only followed the CAA's Regional Haze program, but exceeded its requirements by adopting a state-only BART permitting regulation based on CAA requirements: Wyo. Admin. Code, 02.002.6 § 9. (JA Vol. VII, JA001804.) Wyoming's BART permit regulation required BART-eligible sources to apply for and obtain a BART permit. (*Id.*)

In February 2007, PacifiCorp timely submitted to Wyoming a BART permit application for Wyodak. (*Id.*) In May 2009, after confirming that the BART controls met both the CAA and Wyoming's regulatory requirements, Wyoming published its BART permit application analysis for Wyodak. (*Id.*) After holding public hearings and responding to comments, Wyoming issued a BART permit for Wyodak in December 2009. (*Id.*)

Wyoming determined new generation LNB/OFA as NO_x BART for Wyodak. Wyoming undertook a careful analysis of all five statutory BART factors (cost, energy and non-air quality impacts, existing controls, remaining useful life, and visibility). (JA Vol. IX, JA002272, 2275–2289; JA001214-1215.) Regarding the five statutory BART factors and the presumptive limits in the BART Guidelines, Wyoming found that the new LNB/OFA were NO_x BART at Wyodak because LNB/OFA: (1) were cost effective, with a capital cost of $13.1 million and an average cost-effectiveness of $881/ton of NO_x removed; (2) would not have negative energy or non-air quality environmental impacts; (3) would replace Wyodak's existing combustion controls with the next generation of controls that produced an emission rate equal to EPA's "presumptive" NO_x BART limits; and (4) would achieve substantial visibility improvement relative to the cost and in combination with other pollution controls and the SO_2 caps adopted by Wyoming, and approved by EPA as BART for SO_2.[4] (Wyoming BART Application Analysis at JA Vol. V, JA001214-1215; Wyoming RH SIP at JA Vol. II, JA000409-410.)

The Wyodak BART permit imposed a 0.23 lb/MMBtu NO_x emissions limit, based on a 30-day rolling average. This was a substantial improvement over Wyodak's early generation LNB and permitted 0.70 lb/MMBtu NO_x emissions

[4] Although "remaining useful life" is one of the five statutory BART factors, it was not a determining factor for Wyoming for Wyodak in 2008 because Wyodak's useful life in 2008 was longer than the then-applicable depreciable life of SCR.

rate. 2012 Proposed Rule, 77 Fed. Reg. at 33,055. Wyoming's NO_x BART permit limit for Wyodak was almost three times more stringent than the previous permitted NO_x limit.

Reviewing the five statutory BART factors, Wyoming found the following regarding SCR: (1) the costs of compliance for SCR at Wyodak were "significantly higher" than LNB/OFA, requiring estimated additional capital costs of $171[5] million and estimated annual operating costs of $2.5 million[6]; (2) additional mitigation would be needed for SCR because of the use of hazardous chemical reagents and SCR is "parasitic," consuming 2.4 megawatts ("MW") of electricity from Wyodak that would otherwise serve customers; (3) while SCR would reduce NO_x emissions over existing controls, it would require five years to install, which was not prudent given the expected remaining useful life of Wyodak; and (4) the imperceptible visibility improvement from SCR was insufficient to justify the increased cost, environmental impacts, energy loss and potential impacts on remaining useful life that SCR represented when compared with LNB/OFA. (JA Vol. V, JA001214–1215.) Despite the opportunity to do so, EPA did not

[5] PacifiCorp had estimated in 2014 that the capital cost for installation of SCR at Wyodak to be $175 million and an additional $1 million in annual operating costs. (JA Vol. IX, JA002314–2315, ¶ 8.)

[6] These estimates were made in 2008. In 2014, PacifiCorp's updated estimates of the capital cost for installation of SCR at Wyodak changed slightly to $175 million, with annual operating costs estimated at $1 million. (JA Vol. IX, JA002314–2315, ¶ 8.)

challenge the Wyodak BART permit, which required installation of new LNB/OFA as BART by December 31, 2011. (JA Vol. IX, JA002272, ¶ 14.)

On January 7, 2011, Wyoming adopted its RH SIP, including the Wyodak NO_x BART requirement. Wyoming submitted the RH SIP to EPA on January 12, 2011, containing the same findings and justifications for NO_x BART at Wyodak as the BART permit. *See* 79 Fed. Reg. 5,032. As required by both the BART permit and Wyoming's RH SIP, PacifiCorp installed the LNB/OFA at Wyodak in the spring of 2011. (JA Vol. VII, JA001805, Table 1.)

3. EPA's proposed Wyodak NO_x BART disapproval twice rejected SCR as NO_x BART.

On June 4, 2012, EPA proposed to partially approve and partially disapprove Wyoming's RH SIP, and to issue a federal implementation plan ("FIP") for the disapproved portions of the RH SIP. *See* 2012 Proposed Rule, 77 Fed. Reg. 33,022. Regarding Wyodak, EPA proposed rejecting Wyoming's NO_x BART determination and replacing it with its own NO_x BART determination requiring installation of Selective Non-Catalytic Reduction technology ("SNCR"), within five years, to meet a 0.18 lb/MMBtu NO_x emission limit. *Id.* at 33,055. SNCR is significantly less costly than SCR. **Echoing Wyoming's RH SIP, EPA rejected SCR as NO_x BART in its 2012 Proposed Rule, viewing SCR as too expensive in comparison to the "small incremental visibility improvement over LNBs**

with OFA." *Id.* (emphasis added). PacifiCorp filed public comments regarding the 2012 Proposed Rule.

One year later, on June 10, 2013, EPA re-proposed its rule. *See* Approval, Disapproval and Promulgation of Implementation Plans; State of Wyoming; Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze, 78 Fed. Reg. 34,738 (Jun. 10, 2013) ("2013 Proposed Rule"). EPA once again proposed rejecting Wyoming's NO_x BART determination at Wyodak, again **rejected SCR as NO_x BART**, and required installation of SNCR, within five years, to meet a slightly lower 0.17 lb/MMBtu NO_x emissions limit. *Id.* at 34,785.

On August 26, 2013, PacifiCorp again submitted public comments focusing on why SNCR was not appropriate as BART at Wyodak. (*See* JA Vol. VII, JA001809–1815, 1823, 1848, 1854, 1859-60, and 1866.) Based on EPA's decision to reject SCR as NO_x BART at Wyodak (twice), PacifiCorp did not directly address SCR as NO_x BART at Wyodak, other than supporting both of EPA's previous proposed rulemakings that had rejected SCR as BART.

4. Not until EPA's final Wyodak NO_x BART Rule did the agency arbitrarily reverse course on SCR.

EPA issued its Final Rule on January 30, 2014. 79 Fed. Reg. 5,032 (Jan. 30, 2014) ("Final Rule"). In the Final Rule, EPA not only once again rejected Wyoming's NO_x BART determination (LNB/OFA) for Wyodak, but the Agency

also rejected both of its *own* proposed 2012 and 2013 NO_x BART controls (SNCR), replacing those determinations with a **requirement to install**, within 5 years, **new LNB/OFA**[7] **and SCR** with a 0.07 lb/MMBtu NO_x emissions rate. *Id.* at 5,046. PacifiCorp filed a Request for Reconsideration and Stay of the Final Rule on March 28, 2014. (JA Vol. IX, JA002299–2309.) Eight years later, EPA still has yet to respond to PacifiCorp's Request. This petition for review followed the filing of the Request for Reconsideration.

STATEMENT OF ISSUES

1. Did EPA illegally disapprove Wyoming's NO_x BART determination for Wyodak by requiring Wyoming to comply with the BART Guidelines (and related Cost Manual), even though those Guidelines are not mandatory as applicable requirements for Wyodak?

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[7] EPA's Final Rule is confusing and inconsistent regarding EPA's Wyodak NO_x BART controls. In some parts, the Final Rule requires installation of OFA (overfire air), 79 Fed. Reg. at 5,046, while in other parts it requires SOFA (separated overfire air), *id.* at 5,051. OFA and SOFA are variations of the same control technology, but there are differences. PacifiCorp installed new LNB/OFA in 2011. The Final Rule never clearly explains whether it is seeking a different type of LNB/OFA, or LNB/SOFA, or neither. The Final Rule likewise does not include any justification for combustion controls different from those installed in 2011. PacifiCorp sought clarification from EPA in PacifiCorp's Request for Reconsideration filed on March 28, 2014. Over 8 years have passed, and EPA still has not provided any additional guidance. This Court should require EPA to clarify and correct its Final Rule in this regard. EPA's handling of the "existing controls" BART factor for Wyodak is confusing and illegal. *See infra* Argument II.A.1.

2. Did EPA illegally disapprove Wyoming's reasoned and supported Wyodak NO_x BART determination by basing its disapproval on its own preferred methodology using virtually the same cost and visibility numbers as Wyoming in its NO_x BART determination?

3. Did EPA illegally disapprove Wyoming's Wyodak NO_x BART determination by failing to use the statutorily required "applicable requirements" standard? And did EPA improperly act as though its own preferences constituted "applicable requirements"?

4. Was EPA's replacement Wyodak NO_x BART determination illegally adopted because EPA failed to conduct the five-factor BART review required by both the CAA and EPA's own regulations?

5. Was EPA's replacement Wyodak NO_x BART determination illegally adopted because EPA relied on questionable data and ignored information contrary to its determination?

STANDARD OF REVIEW

I. Applicable Standard of Review.

Judicial review of EPA's action under the CAA is governed by Section 706 of the APA, 5 U.S.C. § 706. *Suncor Energy (USA), Inc. v. EPA*, 50 F.4th 1339, 1349-49 (10th Cir. 2022) ("*Suncor*"). Review under § 706 compels the Court to undertake a "thorough, probing, in-depth review." *Ron Peterson Firearms, LLC v.*

Jones, 760 F.3d 1147, 1162 (10th Cir. 2014) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971)). Under Section 706, the Court must "hold unlawful and set aside agency action, findings and conclusions found to be – … (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." *Suncor*, 50 F.4th at 1349 (citing 5 U.S.C. § 706(2)(A)).

In cases such as this, where a substantial period of time has passed between EPA's action and the Court's review, it is critical that EPA's actions "be reviewed on [the] basis [the] agency articulates and on evidence before [the] agency at [the] time it acted." *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1455 (10th Cir. 1994) (citing *Am. Min. Congress v. Thomas,* 772 F.2d 617, 626 (10th Cir. 1985) (because the Tenth Circuit is "a reviewing body, not an independent decision maker," review must be undertaken based on the materials before the agency and assess the decision the agency made at the time it acted)). "Because the arbitrary and capricious standard focuses on the rationality of an agency's decisionmaking process rather than on the rationality of the actual decision, '[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 50 (1983)).

II. The Standard of Review Applicable to Both Congress' Language in the Act and EPA's Interpretations of Its Own Regulations.[8]

A. Where Congress' Intent is Clearly Reflected, the Court Need Not Look Beyond the Language in the Act.

This case requires the Court to review EPA's application of both the Act and its own regulations. In reviewing the Agency's interpretation and application of the language in the Act, the Court "employ[s] the two-step analysis mandated by *Chevron*. At the first step, [the Court uses] 'traditional tools of statutory construction' to ascertain whether 'Congress had an intention on the precise question at issue.'" *Canyon Fuel Co., LLC v. Secretary of Labor*, 894 F.3d 1279, 1294 (10th Cir. 2018) (quoting *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 816 (10th Cir. 2012) (in turn quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Only if the "statute is silent or ambiguous with

[8] PacifiCorp anticipates that EPA may rely on the Court's decision in *Oklahoma v. EPA*, 723 F.3d 1201 (10th Cir. 2013), as the applicable standard of review. Not only has the standard of review in *Oklahoma* been superseded by the Supreme Court's decision in *Kisor* and this Court's application of *Kisor* in *Suncor*, and *Walker*, but *Oklahoma* is inapposite on its facts: (1) the BART Guidelines which the Court considered in *Oklahoma* apply to power plants with a "generating capacity of greater than 750 megawatts," 723 F.3d at 1208, which is far greater than Wyodak (335 megawatts) to which application of the BART Guidelines are not mandatory (*see infra* Argument I.A.); (2) as Wyoming has explained in detail, Oklahoma's RH SIP provisions did not meet "presumptive" BART emissions limits, did not require any new controls be installed, and overestimated the cost of controls. Wyoming Op. Br. at 30-41. By contrast, Wyoming's RH SIP contained none of those flaws, making the standard of review applied in *Oklahoma* inappropriate here.

respect to the specific issue," does the Court move on to consider whether the agency's application is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.[9]

Because the language in the Act on regional haze determinations is so clear, there is no need for the Court to proceed beyond *Chevron* step one. Congress left no doubt that the determination of BART is the responsibility of the States, stating that BART is to be "determined by the *State*," 42 U.S.C. § 7491(b)(2)(A) (emphasis added), and that the "*State* . . . shall take into consideration" the five BART factors. *Id.* at § 7491(g)(2) (emphasis added). Similarly, Congress mandated that EPA "*shall approve*" Wyoming's RH SIP "if it meets all of *the applicable requirements* of this chapter." 42 U.S.C. § 7410(k)(3) (emphasis added).

[9] In *Suncor*, the Court held that, even where EPA's interpretation "lacks the force of law, the Court may still consider the interpretation "under the framework set forth in *Skidmore* [*v. Swift & Co.*, 323 U.S. 134 (1944), but] only to the extent it is persuasive." *Suncor*, 2022 WL 9654872, at *10 (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2447 (2019) (Gorsuch, J. concurring)). Based on: (1) EPA's disregard of the fact that the NO_x Guidelines are inapplicable to small power plants like Wyodak; (2) its decision to require SCR after *twice* previously rejecting SCR based on its analysis of NO_x BART; (3) its failure to correctly apply the statutorily required applicable requirements and five-factor tests to SCR; and (4) its disregard of the relevant data, EPA's decision has no power to persuade. *Compare Suncor*, 50 F.4th at 1358 (vacating and remanding EPA's decision based on the Agency's reliance on factors that "do not have the power to persuade and instead are arbitrary and capricious.")

B. Because the Language in EPA's Regulations is Unambiguous, Deference to EPA's Interpretation is Unnecessary.

In *Walker v. BOKF, Nat'l Assoc.*, 30 F.4th 994 (10th Cir. 2022), the Court identified the elements that must be present before a court may accord deference to an administrative decision grounded on an agency's interpretation of its own regulations (here, EPA's BART Guidelines, the Cost Manual, and the five-factor test):

> Courts should defer to an agency's interpretation of its own regulations when (1) the regulation is "genuinely ambiguous," (2) the agency's interpretation is "reasonable," and (3) the "character and context of the agency interpretation entitles it to controlling weight," which includes when the interpretation is the agency's "authoritative" or "official position," implicates the agency's "substantive expertise" and reflects the "fair and considered judgment" of the agency.

Walker, 30 F.4th at 1006 (quoting *Kisor*, 139 S. Ct. at 2414-18). In *Suncor*, the Court accorded EPA's interpretation of the Agency's ambiguous regulation *no* deference where the interpretation was not generally applicable, did not reflect a definitive statement of EPA's position, had no precedential value, and did not reflect EPA's "longstanding practice." 50 F.4th at 1355.

The Court has been clear that "[f]irst and foremost, a court should not afford *Auer* deference[10] unless the regulation is genuinely ambiguous." *Walker*, 30 F.4th

[10] As used in *Suncor* and *Walker*, "*Auer* deference" refers to the rule first announced by the U.S. Supreme Court in *Auer v. Robbins*, 519 U.S. 452 (1997). *See Suncor*, 50 F.4th at 1353-54; *Walker*, 30 F.4th at 1006. *Auer* deference is appropriate when the regulation at issue is "genuinely ambiguous" and the agency

at 1006 (quoting *Kisor*, 139 S. Ct. at 2415). *Kisor* directed that, in deciding whether a regulation is actually ambiguous, the Court "make this determination only after exhausting 'all the traditional tools of construction,' including the 'text, structure, history and purpose of the regulation.'" *Id.* (quoting *Kisor*, 139 S. Ct. at 1212-15) (in turn quoting *Chevron,* 467 U.S. at 843 n.9).

Absent any ambiguity in either Congress' language in the CAA or EPA's regulations, the question of deference to EPA's interpretation and application of either the Act or its regulations does not even arise. "If the statute unambiguously expresses Congress's intent, there is no need to consider the agency's interpretation; 'the court as well as the agency must give effect to the unambiguously expressed intent of Congress.'" *Seminole Nursing Home, Inc. v. IRS,* 12 F.4th 1150, 1156 (10th Cir. 2021) (quoting *Chevron*, 467 U.S. at 842-43). "If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means – and the court must give it effect, as the court would any law." *In re MDL 2700 Genetech Herceptin*, 960 F.3d at 1210, 1232 (10th Cir. 2020) (quoting *Kisor*, 139 S. Ct. at 2415).

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has offered a "reasonable" interpretation, reflecting its "official position," based on its "substantive expertise." *Id.* In such circumstances, while the Court is not bound by [the agency's interpretation], *Auer* deference dictates that an agency's interpretation is 'controlling unless plainly erroneous or inconsistent with the regulation.'" *Id.* (quoting *Auer*, 519 U.S. at 461); *compare Suncor*, 50 F.4th at 1354 ("'*Auer* deference is just a general rule' that 'does not apply in all cases.'") (quoting *Kisor*, 139 S. Ct. at 2414).

III. Application of the Standard of Review in this Case.

Application of the Supreme Court's standard of review in *Kisor* and this Court's standard as articulated in *Suncor* and *Walker* compel the same result, namely reversing EPA's BART determination for Wyodak and remanding the decision for the following reasons:

1. EPA's own BART Guidelines and the related Cost Manual make clear that compliance with those Guidelines is not mandatory at Wyodak. Notwithstanding the language in those Guidelines, EPA overrode Wyoming's NO_x determination because EPA claimed Wyoming did not properly follow the Guidelines. *See* Argument I.A.

2. EPA failed to accord Wyoming's BART determination the deference which Congress required when Congress said BART is "determined by the State." *See* Argument I.B.

3. EPA likewise failed to employ the applicable requirements standard Congress expressly required in the Act. Instead, EPA substituted its own preferences for the applicable requirements by which Wyoming's BART NO_x determination was to be judged. *See* Argument I.D.

4. EPA failed to assess Wyoming's BART determination under the five statutory BART factors as required by both the plain language of the Act, and EPA's own regulations. *See* Argument II.A. Furthermore, EPA's NO_x BART determination is inconsistent with EPA's own findings. *See* Argument II.B.

EPA deserves no deference when it ignores Congress' clear intent as reflected in the language of the Act, or interprets its own regulations in a manner that is directly contrary to the CAA. "[N]o deference is due to an agency interpretation which fails to incorporate the plain meaning of the statute." *Mt. Emmons Min. Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997) (citing *Public Employees*

Retirement Sys. v. Betts, 492 U.S. 158, 171 (1989) ("Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.")).

A. Congress Granted States Broad Discretion to Make BART Determinations, Especially for Smaller Power Plants Like Wyodak.

As noted above, Congress was clear that BART determinations were to be made by the "States." 42 U.S.C. § 7491(b)(2)(A); (g)(2). Likewise, EPA's own BART Guidelines make clear that it is the "*States* [that] identify the level of control representing BART after considering the factors," and "[a]fter a *State* has identified the level of control representing BART (if any), it must establish an emission limit representing BART." 40 C.F.R. Part 51, App. Y, (emphasis added).

Moreover, the BART Guidelines recognize "[f]or sources other than 750 MW power plants, however, *States retain the discretion to adopt approaches that differ from the guidelines.*" *Id.* § I.H (emphasis added). Under EPA's own regulations, the Agency cannot require compliance with the BART Guidelines at Wyodak and must recognize Wyoming's broad discretion.

B. EPA Can Only Disapprove a RH SIP or Issue a Replacement RH FIP If a State Fails to Meet the CAA's "Applicable Requirements."

Once Wyoming makes its BART determination, EPA's authority to review that determination is extremely limited. Section 110 of the Act mandates that EPA

"*shall approve* [the] submittal as a whole if it meets all of *the applicable requirements* of this chapter." 42 U.S.C. § 7410(k)(3) (emphasis added). In making its BART determinations, "[a] state has 'wide discretion' in formulating its SIP and 'may select whatever mix of control devices it desires' so long as national standards are met." *Sierra Club v. EPA*, 939 F.3d 649, 673 n.106 (5th Cir. 2019) (quoting *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976)). "**That is why Congress tied the EPA's hands during SIP approval**: 'the Administrator *shall approve* such submittal as a whole if it meets all of the applicable requirements of this chapter.'" *Id.* (quoting 42 U.S.C. § 7410(k)(3)) (italics in original opinion, bold text added).

EPA acknowledged its responsibility to do just that in the Final Rule, stating that EPA "must review Wyoming's BART determinations for compliance with the *applicable requirements* of the CAA, RHR, and BART Guidelines." 79 Fed. Reg. at 5,053 (emphasis added); *see also id.* at 5,054 ("In this action, we are fulfilling our statutory duty to review Wyoming's regional haze SIP, including its BART determinations, for compliance with the *applicable requirements* of the CAA and the RHR, and to disapprove any portions of the plan that do not meet those requirements.") (emphasis added)); *cf. United States v. Arnold*, 878 F.3d 940, 945 (10th Cir. 2017) ("The Supreme Court and this circuit have made clear that when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the

subject of the command."). Accordingly, it is arbitrary and capricious for EPA to disapprove a RH SIP that meets the "applicable requirements."

As noted above, the Court has repeatedly been clear that deference to EPA's interpretation of the BART requirements is only appropriate if the Agency is applying a "genuinely ambiguous" regulation. PacifiCorp has located no case law indicating the term "applicable requirements" is ambiguous in the context of a BART determination in a state's RH SIP. Accordingly, applying Supreme Court's direction in *Chevron* and this Court's direction in *Suncor* and *Walker*, "'[i]f the statute is clear, [a court should] apply its plain meaning' and the inquiry ends." *Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1123 (10th Cir. 2009) (quoting *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199 (10th Cir. 2001)).

Here, the applicable requirements for smaller power plants like Wyodak are found in the regional haze statutes and regulations. 42 U.S.C. § 7491(b)(2) (requiring states to adopt a RH SIP that contains "such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal"); *id.* at § 7491(b)(2)(A) (requiring states to make BART determinations, and requiring eligible sources to "procure, install, and operate" BART); *id.* at § 7491(g)(2) (requiring that BART be determined by weighing and considering the five BART factors); 40 C.F.R. § 51.308(e) (detailed BART section of the regional haze regulation); 40 C.F.R. §

51.309(d)(4)(vii) (requiring that § 309 plans contain "necessary" BART provisions). However, the BART Guidelines are not part of the mandatory applicable requirements for Wyodak. *See infra* Argument I.A.

1. In reviewing Wyoming's NO_x BART determinations, EPA treated its preferences as "applicable requirements."

Unfortunately, EPA conflated its preferences with applicable requirements in the Final Rule. EPA cannot substitute its biases and preferences for the CAA's requirements. *See Texas v. EPA*, 690 F.3d 670, 679 (5th Cir. 2012) ("Because the administrative record reflects that the EPA's rejection is based, in essence, on the Agency's preference for a different drafting style, instead of the standards Congress provided in the CAA, the EPA's decision disturbs the cooperative federalism that the CAA envisions," which the court held arbitrary and capricious).

Here, EPA has attempted to do exactly what the Fifth Circuit rejected in *Texas*. For example, EPA claims in the Final Rule that, "[a]fter re-evaluating the BART factors and *dismissing our earlier rationale* for rejecting an otherwise reasonable control, *we find that LNB/SOFA + SCR is reasonable as BART*." 79 Fed. Reg. at 5,051 (emphasis added). EPA misses the mark by dismissing its earlier analysis and by assessing Wyoming's BART determinations based on the Agency's subjective view of "reasonableness." This is not what the Act requires. Rather than assessing whether EPA's NO_x BART determination is "reasonable,"

the CAA requires EPA to determine if Wyoming's NO_x BART determination met the applicable requirements of the CAA. If Wyoming's NO_x BART determination met those requirements, EPA is *required* to approve it, even if EPA identified another "reasonable" alternative it preferred.

Rather than following the Act's mandate, EPA illegally decided that its NO_x BART control for Wyodak was "more reasonable" than that selected by Wyoming. EPA also required Wyoming to meet EPA's newly-minted preferences for cost[11] and visibility[12] analyses. EPA's use of its preferences and application of its

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[11] Since the CAA specifically requires EPA to approve Wyoming's BART determinations if they comport with the applicable requirements of the Act, it is significant that EPA's Final Rule does not identify an "applicable requirement" anywhere in the CAA or EPA's regulations related to the "cost of compliance" BART factor that Wyoming failed to meet relative to Wyodak. Because the BART Guidelines are not mandatory for Wyodak, and thus not "applicable requirements," EPA cannot rely on Wyoming's alleged failure to meet the BART Guidelines as a failure to meet an "applicable requirement" concerning the "cost of compliance" factor.

[12] EPA acted arbitrarily and capriciously when it treated Wyoming's method of regional haze modeling, which EPA had previously approved, as a violation of an "applicable requirement." EPA claims Wyoming's failure to "provide visibility improvement modeling from which the benefits of individual NO_x controls could be ascertained" was a failure to meet applicable requirements found in "CAA section 169A(g)(2) or 40 CFR 51.308(e)(1)(ii)(A)." 79 Fed. Reg. at 5,057. Yet the cited statute and regulation are nothing more than the statutory definition of BART and contain no mention of modeling or any other means of assessing visibility. *Id.* EPA's claim fails because it does not identify the specific legal requirements of this statute and regulation, nor does EPA explain how Wyoming's visibility modeling failed to meet these unspecified requirements. *Id.* Despite EPA's incorrect claim, Wyoming's visibility improvement modeling *did* ascertain the benefits of individual NO_x controls. *See infra* Argument I.D. EPA's own

subjective reasonableness standard as the standard of review for Wyoming's RH SIP essentially eviscerated Wyoming's congressionally-mandated discretion.[13] *Cf. Oklahoma*, 723 F.3d at 1226, Kelley, J. (concurring in part and dissenting in part) ("Although the EPA has at least some authority to review BART determinations within a state's SIP, it has *no authority to condition approval of a SIP based simply on a preference for a particular control measure*.") (emphasis added); *accord EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 29 (D.C. Cir. 2012) ("[T]he Clean Air Act gives EPA 'no authority to question the wisdom of a State's choices of emissions limitations,' so long as the State's SIP submission would result in 'compliance with the national standards for ambient air.'") (reversed on other grounds) (quoting *Train v. NRDC*, 421 U.S. 60, 79 (1975)).

SUMMARY OF ARGUMENT

EPA took three distinct actions here that are arbitrary and capricious. First, EPA illegally disapproved Wyoming's NO_x BART determination for Wyodak notwithstanding the fact that the State's determination met all of the CAA's

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BART Guidelines give Wyoming great flexibility in analyzing the five BART factors for small plants like Wyodak.

[13] In EPA's view, it could determine that a state's BART determination meets all applicable requirements and nonetheless disapprove the BART determination because EPA found it subjectively "unreasonable." That is not the law – rather, Congress expressly mandated in 42 U.S.C. § 7410(k)(3) that EPA "*shall approve* [Wyoming's] submittal as a whole if it meets all of the applicable requirements of this chapter."

applicable requirements, was reasoned and supported, and fell within Wyoming's discretionary, Congressionally-mandated regional haze responsibilities. Under Congress' explicit direction in the CAA, EPA was required to approve Wyoming's NO_x BART determination. Instead, EPA imposed its own preferences and prejudices in lieu of the applicable requirements in the Act, including applying facially inapplicable provisions of the BART Guidelines.

Second, EPA's own NO_x BART determination failed to meet the applicable CAA requirements, including the five-factor BART analysis.

Finally, EPA's actions were inconsistent with both its prior NO_x determinations, as well as the evidence in the record.

ARGUMENT

I. EPA ARBITRARILY AND CAPRICIOUSLY DISAPPROVED WYOMING'S NO_X BART DETERMINATION FOR WYODAK[14]

A. EPA Illegally Required Compliance with the BART Guidelines and Cost Manual for Wyodak.

EPA must review only applicable requirements of the CAA when determining whether to approve Wyoming's NO_x BART determination for Wyodak. Here, EPA treated its BART Guidelines as "applicable requirements"

[14] To "avoid duplicative argument" and "consolidate briefing" as suggested by this Court's scheduling order, PacifiCorp hereby adopts and incorporates the arguments relevant to Wyodak (such as the "presumptive BART" argument and EPA inconsistency argument) made in Wyoming's Opening Brief.

for Wyodak, when in fact they are not. EPA's disapproval of Wyoming's NO_x BART determination for Wyodak is therefore "not in accordance with [the] law" and should be reversed. 5 U.S.C. § 706(2)(A); *see also Mines v. Sullivan*, 981 F.2d at 1068, 1070 (9th Cir. 1992) ("A court need not accept an agency's interpretation of its own regulations if that interpretation is inconsistent with the wording of the regulation or inconsistent with the statute under which the regulations were promulgated.").

While EPA's BART Guidelines are mandatory for coal-fired power plants over 750 MW, they are *not* mandatory for smaller coal-fired power plants. 40 C.F.R. § 51.308(e)(1)(ii)(B). The BART Guidelines recognize that for "sources other than 750 MW power plants, however, *States retain the discretion to adopt approaches that differ from the guidelines*." 40 C.F.R. Part 51, App. Y, § I.H (emphasis added); *see also* 42 U.S.C. § 7491(b)(2) (BART guidelines are applicable to "fossil-fuel fired powerplant[s] with total design capacity of 750 megawatts or more"). In other regional haze rulemakings, EPA has accorded states greater discretion and flexibility when determining BART for smaller power plants. *See* Approval and Promulgation of Air Quality Implementation Plans; Nevada; Regional Haze State and Federal Implementation Plans; BART Determination for Reid Gardner Generating Station, 77 Fed. Reg. 50,936, 50,944

(Aug. 23, 2012) (finding that Nevada was "not required to adhere to the BART guidelines" for a smaller power plant).

Wyodak is a 335 MW power plant. Final Rule, 79 Fed. Reg. at 5,052. As a result, Wyoming was not required to follow the BART Guidelines (or reference documents identified in the BART Guidelines, like the Cost Manual) in its Wyodak BART analysis. Since both Congress' direction in the Act *and* EPA's own BART Guidelines make this clear, EPA's disapproval of Wyoming's NO_x BART determination for failure to follow the BART Guidelines and Cost Manual is arbitrary and capricious.

1. Regulatory history shows EPA improperly treated the BART guidelines as an applicable requirement for Wyodak.

In the 2013 Proposed Rule, EPA analyzed Wyoming's NO_x BART determination for Wyodak using the same metric (compliance with the BART Guidelines and related Cost Manual) that EPA used for NO_x BART determinations at larger power plants in Wyoming. 78 Fed. Reg. at 34,785 ("We propose to find that *Wyoming did not properly follow the requirements of the BART Guidelines* in determining NO_x BART for this unit." (emphasis added)); *id.* ("*Our analysis follows our BART Guidelines*." (emphasis added)); *id.* ("The costs are within the range that EPA in other SIP and FIP actions has considered reasonable and *consistent with the BART Guidelines*." (emphasis added)).

After reviewing public comments, EPA realized it had improperly relied on compliance with the BART Guidelines as a basis for disapproving the NO_x BART determination for Wyodak. Rather than correct the error, EPA then attempted to downplay its error by belatedly acknowledging that the BART Guidelines were not mandatory for Wyodak, and weakly implying some other basis existed.[15] 79 Fed. Reg. at 5,052-53. However, even a cursory review of the Final Rule indicates EPA did not disapprove the NO_x BART determination for Wyodak because of those "other reasons," but instead disapproved the BART determination because EPA believed it did not meet the requirements of the BART Guidelines and related Control Cost Manual. *Id.* at 5,050-51 ("We proposed to disapprove the State's determination because the *State* neglected to reasonably assess the costs of compliance and visibility improvement *in accordance with the BART Guidelines*. . . . [W]e are finalizing our proposed disapproval of the State's NO_x BART Determination for Wyodak Unit 1." (emphasis added)); *id.* at 5,153-54

[15] EPA asserts it disapproved the NO_x BART determination for Wyodak because "Wyoming erroneously evaluated costs and visibility benefits when analyzing the various control options available for Wyodak, and thereby *did not reasonably consider the statutory factors and select the best system of control*." 79 Fed. Reg. at 5,053. EPA claims those errors are found "elsewhere in this document," but never identifies where in the two-hundred-page document they can be found. *Id.* (PacifiCorp's review of the Final Rule indicates that they cannot be found). EPA makes no attempt to describe how these alleged cost and visibility errors are different than the cost and visibility errors based on alleged non-compliance with the BART Guidelines and Cost Manual.

(applying the Control Cost Manual to Wyodak cost estimates); *id.* at 5,156 ("Because Wyoming's approach to estimating SCR costs was *not consistent with the BART Guidelines and CCM*, it was appropriate for EPA to revise these costs in our proposed rule." (emphasis added)); *id.* at 5,168 ("[I]n accordance with the *BART Guidelines*, controls may be warranted even in instances where the visibility benefit is less than perceptible." (emphasis added)); *id.* at 5,193 ("In our revised SCR cost analysis for Wyodak, we *followed the framework of the CCM* . . . . For example, we did not allow for owner's costs and AFUDC." (emphasis added)). While EPA included an unsupported, tardy acknowledgement in the Final Rule that the BART Guidelines are not mandatory for Wyodak, **EPA nonetheless disapproved the Wyodak BART analysis solely because it did not conform with the BART Guidelines and related Cost Manual.**

To justify disapproving Wyoming's NO_x BART determination for Wyodak, EPA was first required to identify the applicable requirements and explain how Wyoming's BART determination failed to meet those requirements. EPA failed on both counts, improperly applying the BART Guidelines to Wyodak which are not applicable requirements for smaller power plants. *See Texas*, 690 F.3d at 686 (holding EPA's rejection of a Texas SIP arbitrary and capricious because "EPA's explanation for its objection" provided "no insight into how the emissions caps

interfere with NAAQS [National Ambient Air Quality Standards] or another applicable requirement of the CAA").

Where EPA failed to follow the language in its *own regulations*, stating that the BART Guidelines (and by extension the CCM) are not mandatory for Wyodak, the Agency acted arbitrarily and not in accordance with the law. "If there is only one reasonable construction of a regulation[,] then a court has no business deferring to any other reading." *Reyes-Vargas v. Barr*, 958 F.3d 1294, 1301 (10th Cir. 2020). The BART Guidelines specifically state they are not mandatory for smaller power plants, and this Court should not allow EPA to act as if they are.

2. EPA cannot treat the Control Cost Manual as binding.

The Cost Control Manual also cannot be binding on the states, for four reasons:

First, Congress did not authorize EPA to promulgate regulations mandating how states must analyze any of the BART factors. Instead, it directed that BART is to be "determined by the State," 42 U.S.C. §7491(b)(2)(A), and it authorized EPA to promulgate regulations concerning general methods for identifying, measuring, modeling, preventing, and remedying visibility impairment. *Id.* § 7491(a)(3)(A)-(C), (b)(1). The Court has been clear that EPA's reading and application of the Act is accorded *no* deference where Congress' direction was clear and unambiguous – as it is here. "If the statute unambiguously expresses

Congress's intent, there is no need to consider the agency's interpretation; 'the court as well as the agency must give effect to the unambiguously expressed intent of Congress.'" *Seminole Nursing Home,* 12 F.4th at 1156 (quoting *Chevron*, 467 U.S. at 842-43).

EPA's own BART Guidelines unambiguously preserve each state's authority to make "a BART determination based on the estimates available for each criterion" and to "determine the weight and significance to be assigned to each factor." 70 Fed. Reg. at 39,123. As to costs, EPA emphasized in its rule amending the Guidelines that "States have flexibility in how they calculate costs" and that, while its Cost Manual "provides a good reference tool," "if there are elements or sources that are not addressed by the [Manual] or there are additional cost methods that could be used, we believe that these could serve as useful supplemental information." *Id.* at 39,127. EPA's failure to follow the clear language of its own guidelines renders its actions arbitrary and capricious.

Second, the Control Cost Manual—unlike the BART Guidelines—has not been subject to notice and comment, 5 U.S.C. § 553(b)-(c), which is required if the Manual is to have the "force and effect of law." *See Chrysler Corp v. Brown*, 441 U.S. 281, 301 (1979) ("[i]n order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites," including those found in the APA.).

Third, the Control Cost Manual is not binding upon Wyoming and PacifiCorp because it has not been published in the Code of Federal Regulations. *See NRDC v. EPA*, 559 F.3d 561, 565 (D.C. Cir. 2009) ("[a]gency statements 'having general applicability and legal effect' are to be published in the Code of Federal Regulations").

Fourth, EPA cannot impose the requirements of the Control Cost Manual upon Wyoming's SIP because EPA has not met the specific requirements for incorporating the Cost Manual by reference. *See* 1 C.F.R. § 51.1 (the agency must obtain approval from the Director of the Federal Register); *id.* at § 51.7(a)-(b) (the documents must meet certain criteria, and incorporation of documents produced by the same agency is generally inappropriate); *id.* at § 51.9(a)-(b) (the incorporating language must be "as precise and complete as possible," including statements that the document is "incorporated by reference" and "the incorporated publication is a requirement"); *id.* at § 51.1(f) (incorporation "is limited to the edition of the publication that is approved" and excludes "[f]uture amendments or revisions"). Because EPA has not complied with these requirements, the Manual is "ineffective to impose obligations upon, or to adversely affect" third parties. *Appalachian Power v. Train*, 566 F.2d 451, 457 (4th Cir. 1977).

Finally, even if it were binding, EPA intended the Cost Manual to be flexible. EPA acknowledges that the Cost Manual is better suited for regulatory

development than for cost-effectiveness determinations concerning individual facilities. Environmental Protection Agency, EPA/452/B-02-001, *EPA Air Pollution Control Costs Manual*, Section 1 at 1-4, 2-3 – 2-5 (6th ed. 2002), available at https://www.epa.gov/sites/default/files/2020-07/documents/c_allchs.pdf (accessed near the time of the rulemaking on Sept. 5, 2014). Thus, "customization," "modif[cation], and even "disregard[]" of its generic estimates is both expected and necessary to develop more accurate estimates of the actual costs of installing control technologies at existing facilities. *Id.* at 1-4, 1-7, 2-3 – 2-5.1

B. EPA Failed to Give Proper Deference to Wyoming's BART Determination, Quibbling with Wyoming's Analysis of Similar Cost and Visibility Improvement Numbers for SCR.

Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 451 (2004), allows EPA to reject a state BART determination only when the "determination is 'not based on a reasoned analysis'" and when it is necessary to ensure "statutory requirements are honored." 540 U.S. at 490. Congress made clear in the Act that EPA must approve a RH SIP when its only disagreement with the RH SIP is how the state balanced the various elements required by the statute. 42 U.S.C. § 7410(k)(3) (EPA "*shall approve*" [the] submittal as a whole if it meets all of *the applicable requirements* of this chapter) (emphasis added); *see Oklahoma*, 723 F.3d at 1209 (upholding EPA's decision in part because EPA "did not reject the

petitioners' BART determination because it disagreed with the way it balanced the five factors").

Here, EPA relied on the non-mandatory (for Wyodak) BART Guidelines to criticize Wyoming's analytical methods for two key BART factors—cost and visibility—and relied on that as a basis to disapprove the NO_x BART determination for Wyodak. 79 Fed. Reg. at 5,053. However, as explained below, the results from Wyoming's cost and visibility analyses yielded results comparable to the data EPA used in analyzing the same BART factors, indicating Wyoming's NO_x BART determination for Wyodak was as well-reasoned and supported as EPA's determination.

1. Cost: Average cost effectiveness

Wyoming carefully considered the "costs of compliance" BART factor for Wyodak by calculating the total capital costs, annual operating costs, average cost effectiveness, and incremental cost effectiveness. (Wyodak BART Permit at JA Vol. IX, JA002276–2277.) Despite Wyoming's comprehensive analysis, EPA criticized Wyoming's analysis of the "costs of compliance" BART factor for Wyodak. 79 Fed. Reg. at 5,050. EPA's criticism is surprising given that the cost numbers EPA relied on were comparable to Wyoming's numbers.

For example, Wyoming's 2009 average cost effectiveness estimate at Wyodak of $4,252 per ton for SCR plus LNB/OFA is only 5% more than EPA's

2014 average cost effectiveness estimate of $4,036 per ton for SCR plus LNB/OFA. *Compare* Wyoming BART Application Analysis for Wyodak at JA Vol. V, JA001190, *with* 79 Fed. Reg. at 5,044. EPA should not have rejected Wyoming's cost effectiveness estimate for Wyodak, particularly when EPA found even greater differences in cost to be "immaterial."[16]

EPA's criticism concerning Wyoming's average cost-effectiveness is really much ado about nothing. Wyoming did not rule out any NO_x controls (including SCR) on the basis of average cost-effectiveness. (JA Vol. IX, JA002281 (¶ III.5), JA002287.)[17] Instead, Wyoming rejected SCR on other grounds. The Court should completely disregard EPA's attempt to justify its rejection of Wyoming's BART determination for Wyodak for "cost" reasons because Wyoming, like EPA, ultimately found SCR to be "cost effective."

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[16] Despite EPA and Oregon differing in how each calculated BART-related costs that resulted in a cost variance of over $700 per ton, EPA stated that such difference "between the two estimates would not materially affect ODEQ's evaluation." Approval and Promulgation of Implementation Plans; State of Oregon; Regional Haze State Implementation Plan and Interstate Transport Plan, 76 Fed. Reg. 38,997, 39,000 (July 5, 2011). EPA further explained that in "EPA's view, ODEQ's final selection of BART would not have changed even if the cost effectiveness had been adjusted to reflect the EPA Cost Manual." *Id.*

[17] While Wyoming rejected SCR as NO_x BART, it based its decision to do so on grounds other than cost-effectiveness: "[T]he Division has concluded that the estimated costs are reasonable and that costs alone would not preclude the use of SCR." (JA Vol. IX, JA 002287).

2. Visibility improvement analysis

EPA also acted arbitrarily by ignoring the fact that the results from Wyoming's and EPA's visibility improvement analyses were also remarkably similar. In 2009, Wyoming estimated that the incremental visibility improvement at Wind Cave National Park (the Class I area most impacted by Wyodak) from installation of SCR at Wyodak would be a visually undetectable 0.391 deciviews.[18] (JA Vol. V, JA001211 tbl.19.) Wyoming rejected SCR as NO_x BART at Wyodak after concluding this level of visibility improvement would be imperceptible and insufficient to justify the costs and negative impacts. **Despite EPA's 2012 proposal to reject SCR based on an estimated 0.47 deciviews visibility improvement (deeming the "small incremental visibility improvement" too insignificant to justify SCR), EPA used an even lower visibility improvement, 0.40 deciviews, to reach the opposite conclusion in 2014 and require the installation of SCR at Wyodak.** 79 Fed. Reg. at 5,044; 77 Fed. Reg. at 33,055. This evidence proves that, not only was Wyoming's NO_x

[18] In reviewing EPA's actions here, it is important for the Court to be aware that EPA generally considers 1.0 dv to be the limit of human perceptibility and that, as a result, sources with impacts below 0.5 dv are not subject to BART. 40 C.F.R. Part 51, App. Y, § III.A.1. Thus, as it did with the Cost Manual, EPA chose to ignore the mandates of its own regulations, which is, by definition, arbitrary and capricious. *Mines*, 981 F.2d at 1070 ("A court need not accept an agency's interpretation of its own regulations if that interpretation is inconsistent with the wording of the regulation or inconsistent with the statute under which the regulations were promulgated.").

BART determination reasonable, but also that EPA acted arbitrarily by requiring SCR based on an imperceptible visibility improvement that is *smaller* than the visibility improvement EPA previously used to reject SCR.

3. EPA failed to provide the statutorily-required explanation for the Agency's change of position.

Wyoming's NO_x BART determination for Wyodak was based on a "reasoned analysis" largely mirroring EPA's subsequent re-analysis. EPA's disapproval was arbitrary for two reasons: First, EPA's disagreement is with the controls chosen after Wyoming balanced the five factors, not the results of the cost and visibility analyses. EPA, however, has no authority to challenge a BART determination because it prefers a different control. *See Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) ("The Act gives the Agency *no authority to question the wisdom of a State's choices* of emission limitations if they . . . satisf[y] the standards of [42 U.S.C. § 7410(a)(2)] . . . ." (emphasis added)).

Second, EPA's analysis of visibility impact is internally inconsistent because it mistakenly finds that a 0.40 dv modeled visibility improvement is sufficient to justify SCR at Wyodak, while EPA earlier found a 0.47 dv improvement did not. EPA provided no explanation whatsoever for this change in position. *Compare* 79 Fed. Reg. at 5,044 with 77 Fed. Reg. at 33,055. Where EPA's analysis is "internally inconsistent and inadequately explained," it is

arbitrary and capricious. *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (per curiam).

In a similar situation, the Ninth Circuit Court of Appeals rejected a Regional Haze rulemaking where EPA failed to provide an explanation of its inconsistent positions. *Nat'l Parks Conserv. Ass'n v. EPA,* 788 F.3d 1134 (9th Cir. 2015). The court refused to defer to many of EPA's regional haze analyses because they were "unsupported by any explained reasoning. These assertions leave the Rule's reader wondering what metric, if any, EPA used to determine BART, or if EPA employed no metric, why not." *Id*. at 1143. As such, the court "conclude[d] that EPA's BART determination for NO_x emissions at Colstrip Units 1 and 2 [was] arbitrary and capricious." *Id.*

Here, as in *Nat'l Parks Conserv. Assoc.*, it is impossible to identify what metric EPA used, if any, to determine the 0.40 deciview of modeled visibility improvement is sufficient to justify the tremendous costs of installing SCR. Like the Ninth Circuit, this Court should require EPA to explain its reasoning and remand this rulemaking.

Moreover, the Act requires EPA to provide an "explanation of the reasons for any major changes in the promulgated rule from the proposed rule." 42 U.S.C. § 7607(d)(6)(A). EPA violated this provision because the Final Rule failed to explain why 0.47 dv of visibility improvement in 2012 did not justify requiring

SCR, but 0.40 dv of visibility improvement in 2014 did. This is an unexplained "major change" in EPA's position. EPA also failed to explain how a mere 5% difference in cost-effectiveness calculations justified EPA requiring SCR and rejecting the State's BART determination, particularly when Congress has stated that the States will determine BART. 42 U.S.C. §7491(b)(2)(A). The Court should remand EPA's FIP because EPA did not provide an "explanation" of these policy changes.

C. EPA Relied on an Incomplete Analysis to Disapprove the Wyodak NO_x BART Determination.

EPA's actions are arbitrary and capricious if it relies on factors Congress did not intend it to consider, fails to consider an "important aspect of the problem," or if its decision "runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43. Here, EPA failed to consider important aspects of the problem and its decision runs counter to the evidence before the agency.

1. EPA failed to consider "real world" SCR cost information.

EPA's decision to require SCR at Wyodak "runs counter to evidence before the agency." *Id.* PacifiCorp supplied evidence demonstrating that EPA underestimated SCR costs. EPA disagreed with Wyoming's estimate of total capital costs for SCR at Wyodak and, without explaining why, disagreed with vendor bids supplied by PacifiCorp for Wyodak and other units. 79 Fed. Reg. at

5,156. As PacifiCorp pointed out in its public comments, EPA grossly miscalculated SCR capital costs in Wyoming. (JA Vol. V, JA001821–1822 tbls. 4, 5.)

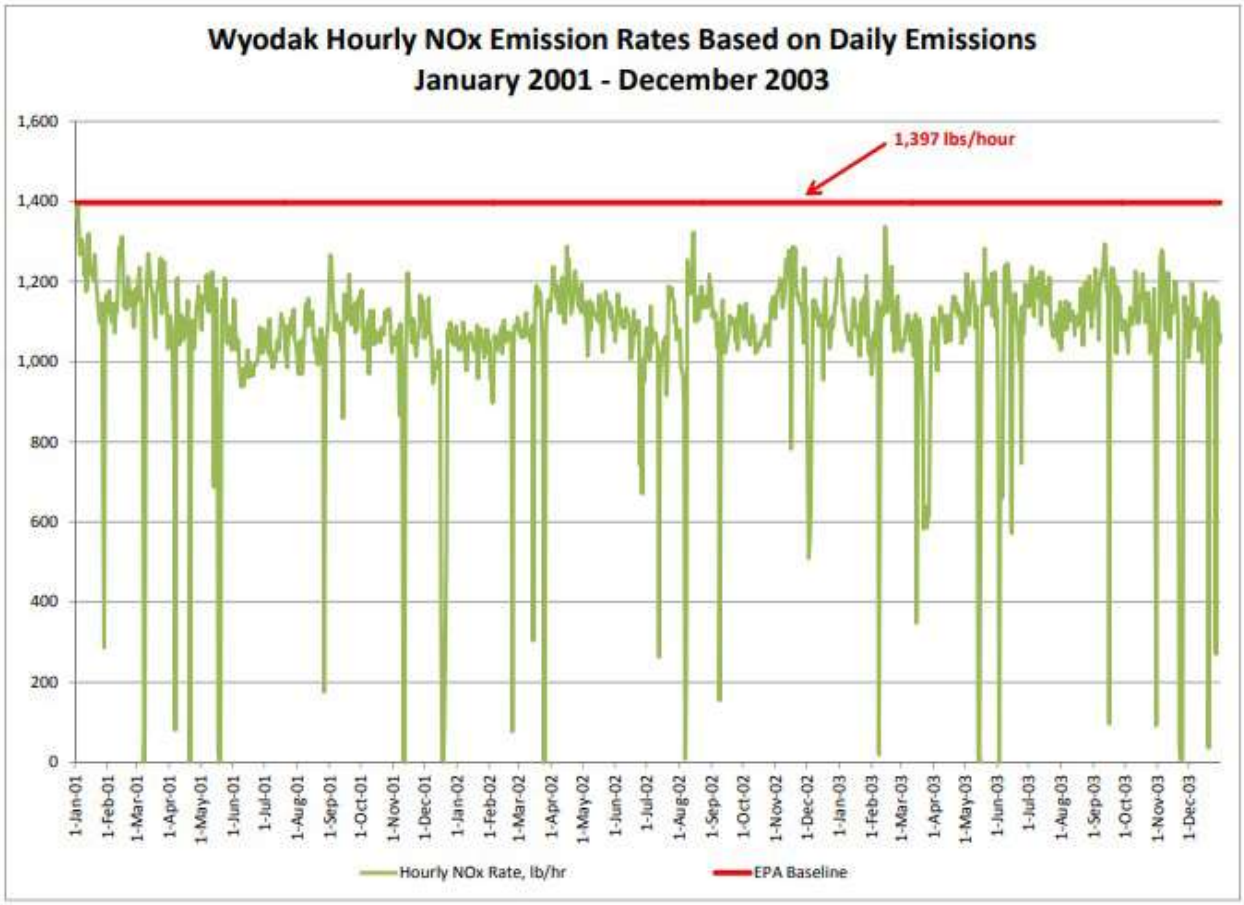
PacifiCorp provided a real-world example to back up its cost claims. As a result of Wyoming's RH SIP, PacifiCorp was required to install SCR at its Jim Bridger facility. PacifiCorp competitively bid the SCR projects at Jim Bridger Units 3 and 4. The estimated capital costs to install SCR at Jim Bridger Unit 3 at the time were $176.1 million and $186.7 million at Jim Bridger Unit 4. (*Id.*) As part of its BART review, EPA estimated the capital costs at Jim Bridger Unit 3 to be $134.1 million and $112.7 million at Unit 4—over $42 million and $74 million, respectively, below the actual competitive bids. (*Id.*) This evidence calls into question EPA's SCR methodologies, including the one used to disapprove Wyoming's Wyodak NO_x BART determination.

2. EPA failed to weigh the limits of its visibility model.

EPA's chosen method to conduct visibility modeling (an older version of the CALPUFF model) overestimates visibility impacts because it treats the worst emissions day over a three-year period **as if it occurs every day for three years.**

(JA Vol. VII, JA001839, 1845-1849.) As demonstrated by the chart below,[19] this assumption grossly overstates emissions.

[19] This chart was included as Attachment 6 to PacifiCorp's August 26, 2013 Comments on EPA's re-proposed action on Wyoming's RH SIP. While the full text and all exhibits to these comments were identified in EPA's original Index of Record at EPA-R08-OAR-2012-0149_2, Attachment 6 to those Comments was not included in the JA as it was designated in 2015. The Court's Order of September 23, 2022 (Doc. No. 010110744060) states that "[s]hould the parties determine that it is necessary to supplement the existing appendix with materials identified in EPA's May 7, 2014 certified list, the court hereby grants them prospective permission to do so as proposed in the Status Report." A copy of Attachment 6 to PacifiCorp's August 26, 2013 Comments is attached to this brief as Exhibit A and, based on the Court's "prospective permission" to do so, PacifiCorp requests that Attachment 6 be included as a supplemental part of the JA as JA Vol. IX, JA002317.



The red line represents what EPA's model assumed were Wyodak's emissions during the baseline period. The green lines indicate actual emissions. As the Court can see, EPA's model relies on an assumption that inflates the emissions from Wyodak, which in turn exaggerates its visibility impacts on the Class I areas at issue.

EPA went away from the CALPUFF model for the second planning period SIPs. Draft Guidance on Progress Tracking Metrics, Long-term Strategies, Reasonable Progress Goals and Other Requirements for Regional Haze State Implementation Plans for the Second Implementation Period, at 174 (July 2016)

("Specifically, EPA has recently proposed to remove CALPUFF as a preferred model for long-range transport assessments and to recommend its use as a screening technique . . . for addressing PSD increment beyond 50 km from a new or modifying source."). While CALPUFF may still be used for certain applications, it should be used cautiously and with a full understanding of its limitations.

Additionally, the older version of the CALPUFF model used by EPA is generally inaccurate and EPA has not accounted properly for those inaccuracies. (JA Vol. VII, JA 001838-001844). In its public comments, PacifiCorp explained that "EPA assumes that a difference of 0.1 or 0.2 deciviews between its model results and Wyoming's model results is material. It is not. The reality is that these computer models, including CALPUFF, are relatively imprecise. The inherent problems and limitations of the computerized visibility modeling EPA used here should be considered as part of EPA's BART determinations, but were not." (JA Vol. VII, JA 001838). Although EPA claims that its use of the 98th percentile metric resolves the inaccuracies with the model, 79 Fed. Reg. at 5,114, the 98th percentile metric does nothing to address the problems with the CALPUFF model's margin of error and other inaccuracies.

In the past, EPA has recognized that model "uncertainty" (including when it is part of a "margin of error") should be considered when making decisions. In

EPA's guidance governing modeling in place at the time of the 2014 FIP, specifically in the subsection entitled "Use of Uncertainty in Decision Making," EPA cautioned that "it is desirable to quantify the accuracy or uncertainty associated with concentration estimates used in decision making." 40 C.F.R. pt. 51, App. W § 9.1.3. The guidance reminds EPA decision-makers "to identify the reliability of the model estimates for that particular area and to determine the magnitude and sources of error associated with the use of the model." *Id.* § 9.1.3.b.

In its public comments, PacifiCorp simply asked that, as required by EPA's own modeling guidance, EPA consider the uncertainty of the CALPUFF modeling results, and then factor that uncertainty into its decisions related to Wyoming's BART determinations and EPA's FIP. (JA Vol. VII, JA 001838-001839, 001857-001858.) Yet EPA failed to address how the extremely minor visibility improvements modeled for Wyodak may fall within the CALPUFF model's margin of error, among other inaccuracies.

The Ninth Circuit rejected certain EPA BART decisions due to EPA's failure to properly consider the limitations of the CALPUFF model. PacifiCorp's position is very similar to the petitioner, PPL Montana, in *Nat'l Parks Conserv. Assoc.*, 788 F.3d 1134 (9th Cir. 2015). There, PPL Montana objected to EPA's use of the CALPUFF model's results to show the visibility benefit from a pollution

control because the result was "below the range of perceptibility and [fell] within the [CALPUFF] model's margin of error, meaning such improvement cannot be 'reasonably . . . anticipated' as required by the Act." 788 F.3d at 1146. EPA responded, just as it has here, *see* 79 Fed. Reg. at 5114, that EPA need not defend the model's application because "the CALPUFF model was approved in the Guidelines." *Id.* The Ninth Circuit rejected EPA's arguments, stating,

> [It is] no answer to respond, as EPA did, that low levels of visibility impairment must be addressed even though they are not perceptible to the human eye, or that measures have been taken to minimize the margin of error. The issue is . . . the model's ability to anticipate improvements at a level allegedly within its margin of error, whether perceptible or not to the human eye. EPA simply offered no response to this objection.

Id. at 1147.

Repeating the same actions roundly condemned by the Ninth Circuit, EPA never properly responded to PacifiCorp's objection about model uncertainty, in this instance the model's "margin of error" that EPA needed to consider when weighing the CALPUFF model results. EPA was required to explain how the 0.40 dv modeled visibility improvement from the CALPUFF could be relied upon, given the uncertainty of the model (including the "margin of error"), and EPA failed to explain if an imperceptible 0.40 dv modeled visibility improvement was valid or just "noise" from the uncertainty of the model. Using language directly applicable to the instant case, the Ninth Circuit explained, "[I]t is arbitrary and

capricious for EPA to force an emissions source 'to spend millions of dollars for new technology that will have no appreciable effect on the haze in any Class I area." *Id.*

Other courts also have determined that it is arbitrary and capricious for EPA to rely on a model that produces results that are demonstrably inconsistent with real-world observable data. "An agency's use of a model is arbitrary if that model 'bears no rational relationship to the reality it purports to represent.'" *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998). And if a model is challenged, "the agency must provide a full analytical defense." *Id.*; *see also Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1054 (D.C. Cir. 2001) (per curiam). EPA's reliance on the older version of CALPUFF's questionable results—determining a 0.40 deciview improvement that likely is a result of the model's "margin of error" warrants a control device costing an estimated $175 million at Wyodak—is arbitrary and capricious.

D. EPA Illegally Relied on its Preferences and Prejudices, Rather Than "Applicable Requirements."

Congress has mandated that EPA must base its BART decisions on the applicable requirements of the CAA, not on EPA's prejudices and preferences for how a state should do a BART determination. But this is exactly what EPA did. For example, EPA argues Wyoming's NO_x BART determinations were deficient

because Wyoming did not consider the visibility improvement associated with SNCR. 78 Fed. Reg. at 34,749. Even if correct, this criticism is immaterial. The Final Rule requires SCR, not SNCR, be installed at Wyodak as BART. 79 Fed. Reg. at 5,051. Wyoming's BART determination required that LNB/OFA, not SNCR, be installed as NO_x BART at Wyodak. 2012 Proposed Rule, 77 Fed. Reg. at 33,051, 33,052, 33,055. At this stage, Wyoming's visibility analysis for SNCR is little more than a historical artifact and has no relevance as to whether or not SCR should be NO_x BART at Wyodak. Moreover, to the extent the BART Guidelines would require such an analysis, the BART Guidelines are not binding on Wyodak.

EPA also incorrectly states Wyoming's visibility modeling was flawed because "it was not possible for EPA, or any other party, to ascertain the visibility improvement that would result from the installation of various NO_x control options." 78 Fed. Reg. at 34,749. Not only has EPA failed to identify the "applicable requirement" that drives this determination, but EPA contradicts itself on this point. In its Opposition to PacifiCorp's Motion for Stay, EPA alleged (incorrectly) that Wyoming did not explain why it dismissed SCR (a NO_x control) when it yielded an alleged cumulative 0.665 dv improvement. *See* EPA's Opposition to Motion to Stay, *Wyoming v. EPA*, No. 14-9534 (Doc. No. 01019278691), at 25 (10th Cir.) (July 14, 2014). EPA contradicts itself by

claiming in its Final Rule that Wyoming's visibility modeling was "inadequate" because there is no way to identify visibility improvement from NO_x controls, and then acknowledging in its Opposition to Stay that Wyoming's modeling identified visibility improvement attributable only to NO_x for SCR.

II. EPA ARBITRARILY AND CAPRICIOUSLY ADOPTED ITS OWN NO_X BART DETERMINATION FOR WYODAK

In circumstances in which EPA properly disapproves a state's BART determination, the CAA allows EPA to issue its own BART determination through a FIP. 42 U.S.C. § 7491(b)(2)(A), (g)(2). However, in issuing a BART determination, EPA must weigh and consider the same five statutory BART factors a state is required to consider. *North Dakota v. EPA*, 730 F.3d 750, 764 (8th Cir. 2013) ("Just as the State was required to properly consider each statutory factor in the BART analysis in the implementation of its SIP, so too was EPA in the promulgation of its FIP."). Here, EPA failed to correctly conduct an independent analysis of at least two of the five statutory BART factors.

A. EPA Failed to Conduct a Proper Five-Factor BART Analysis for Wyodak When Adopting Its FIP.

1. EPA's replacement NO_x BART determination failed to properly consider "any existing control technology."

In *North Dakota*, a power company had installed pollution control equipment two years before EPA conducted its BART determination. *North*

Dakota, 730 F.3d at 760. The power company argued EPA should consider the existing controls when calculating cost effectiveness. EPA refused, claiming it had no duty to consider "voluntarily" installed control technology. *Id.* at 762. The Eighth Circuit rejected both EPA's actions, and its excuses. The *North Dakota* court held that "EPA's refusal to consider the existing pollution control technology in use at the Coal Creek Station because it had been voluntarily installed was arbitrary and capricious." *Id.* at 764. The court further held EPA's failure to account for the "any existing pollution control technology" BART factor was contrary to the plain language of the CAA, refused to grant deference to EPA on this issue, and rejected part of EPA's FIP on this basis. *Id.* at 762-64.

EPA repeated the same mistake here. EPA's Wyodak NO_x BART determination fails to properly recognize an "existing pollution control technology," i.e., new LNB/OFA which were installed in 2011, a fact that PacifiCorp highlighted for EPA in its public comments. (JA Vol. VII, JA001805, 1835.) Despite having this information, EPA conducted a new NO_x BART analysis in its FIP for Wyodak that ignored the recently installed LNB/OFA and, instead, assumed that new LNB/OFA would be required by the Final Rule. *See* 79 Fed. Reg. at 5,044 tbl.15.

EPA's failure to consider "any existing pollution control technology" skewed EPA's Wyodak NO_x BART analysis. For example, EPA calculated "cost-

effectiveness" for NO_x BART at Wyodak assuming that new LNB/OFA had not been installed. *See* 79 Fed. Reg. at 5,044 tbl.15. EPA's failure to consider Wyodak's existing NO_x controls caused the Agency to overestimate the cost effectiveness of SCR by crediting SCR with the future removal of NO_x emissions that, in fact, are already being removed by the existing LNB/OFA. (JA Vol. VII, JA 001805, 001835.) This mistake was caused in large part by EPA's refusal to consider "existing controls" as part of its baseline emission analysis. "Baseline emissions" are an elemental part of a BART cost-effectiveness calculation. 40 C.F.R. Part 51, App. Y, § IV.D.4.d.

EPA also artificially inflated the alleged visibility improvement from SCR by combining the modeled visibility improvement for SCR (which has not yet been installed) with the modeled visibility improvement of LNB/OFA (which EPA knows has already been installed). *See* 79 Fed. Reg. at 5,051 (analyzing the "visibility improvement associated with LNB/SOFA + SCR," rather than just SCR). Once the visibility improvements from LNB/OFA are removed (0.21 dv at the most impacted Class I area), the alleged visibility improvements from SCR shrink to less than one half the perceptible level (0.40 dv).

EPA admitted in the Final Rule that it did not consider Wyodak's existing NO_x controls for some BART purposes because "EPA had not yet acted on Wyoming's regional haze SIP." 79 Fed. Reg. at 5,105. In other words, EPA

applied another variation of its "voluntarily installed" argument when it refused to consider the "existing controls" at Wyodak.[20] The Eighth Circuit rejected this same argument in *North Dakota*, and so should this Court. The plain language of the BART statute requires EPA to consider "*any* existing pollution control technology in use at the source" as part of a BART analysis. *See* 42 U.S.C. § 7491(g)(2) (emphasis added).

In *North Dakota*, the court found that EPA erred by making "no mention of or giving any significance to the word 'any' in § 7491(g)(2)." *North Dakota*, 730 F.3d at 763. The *North Dakota* court found that "any," as used in § 7491(g)(2), should be given its "obvious and expansive meaning" and that refusing to consider a previously installed pollution control technology was "arbitrary and capricious." *Id.* at 764. Likewise, EPA made no mention of the word "any" when applying § 7491(g)(2) as part of its BART determination for Wyodak, failing to consider an "existing pollution control technology."

EPA's mistake polluted the rest of its BART analysis for Wyodak. As a result of EPA ignoring the "existing controls" factor, EPA's NO_x BART analysis asks the wrong question. Instead, of asking "what cost and visibility

[20] PacifiCorp installed the LNB/OFA pursuant to a legally binding state BART permit, which required installation by December 31, 2011. EPA ignores this fact, claiming the RH SIP "did not require compliance with BART until five years *after* EPA's approval of the SIP." 79 Fed. Reg. at 5,105.

improvements are associated with the installation of LNB/OFA and SCR, even though LNB/OFA are already installed," EPA should have asked "what cost and visibility improvements are associated with the installation solely of SCR?" Moreover, EPA's refusal to recognize Wyodak's existing NO_x controls is contrary to EPA practice,[21] and even contrary to EPA's revised view of the North Dakota SIP.[22] For all the reasons stated above, EPA's actions relative to the "existing controls" BART factor were arbitrary and capricious.

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[21] "The *presence of existing pollution control technology at each source is reflected in our BART analysis* . . . where appropriate, we *consider existing equipment in developing baseline emission rates for use in cost calculations and visibility modeling.*" Promulgation of Air Quality Implementation Plans; Arizona; Regional Haze and Interstate Visibility Transport Federal Implementation Plan, 79 Fed. Reg. 9,318, 9,324 (Feb. 18, 2014) (emphasis added). Regarding regional haze issues in Colorado, EPA stated that the "CAA requires that, in making BART determinations, states and EPA take into consideration 'any existing pollution control technology in use at the source.' . . . Therefore, it was appropriate for the State to use the 2009 emissions baseline, which reflected the reductions achieved by LNB/OFA, in its BART analysis for Comanche." Approval and Promulgation of Implementation Plans; State of Colorado; Regional Haze State Implementation Plan, 80 Fed. Reg. 29,953, 29,958 (May 26, 2015).

[22] In a later proposed rulemaking, EPA acknowledged that the "existing pollution control technology" at issue in the *North Dakota* decision, known as "DryFining," was properly considered by the state in a revised BART analysis and that the DryFining technology's impact on emissions was properly considered when setting the emissions baseline. *See* Approval and Promulgation of Air Quality Implementation Plans; North Dakota; Regional Haze State Implementation Plan 83 Fed. Reg. 18,248, 18,253 (April 26, 2018). This administrative action is consistent with PacifiCorp's position, and contrary to the position EPA took in the Wyoming RH FIP, providing further evidence of EPA's arbitrary and capricious application of the "any existing pollution control technology" BART factor.

2. EPA also failed to analyze the "energy and non-air quality environmental impacts" BART factor.

EPA also failed to analyze another BART factor. For example, regarding the "energy and non-air quality environmental impacts" factor, EPA failed to consider Wyoming's findings that weighed against requiring SCR as NO_x BART at Wyodak and EPA failed to conduct its own independent analysis of this factor. Wyoming rejected SCR for a variety of reasons, including environmental impacts ("use of chemical reagents" and potential for a "blue plume"), energy impacts ("SCR is parasitic and requires an estimated 2.4 MW"), and lack of significant visibility improvement. (JA Vol. V, JA001188, 1214–1215.) Wyoming specifically chose LNB/OFA without SCR because LNB/OFA alone does "not require non-air quality environmental mitigation for the use of chemical reagents (i.e., ammonia or urea) and there is a minimal energy impact." (JA Vol. II, JA000409.)

In the 2013 Proposed Rule, EPA stated it "agrees with the State's analysis pertaining to energy or non-air quality environmental impacts and remaining-useful-life for this source." 78 Fed. Reg. at 34,784. As a result, PacifiCorp explained in its public comments that EPA failed to adequately consider this factor relative to EPA's chosen NO_x BART control. (JA Vol. VII, JA001833–1835.) Specifically, PacifiCorp pointed out that EPA ignored three types of

energy impacts that should have been considered: (1) energy associated with operating the controls; (2) energy that must be provided when the unit is removed from service; and (3) energy that must be replaced when emissions controls are not economically justifiable and cause the retirement or replacement of the unit. (JA Vol. VII, JA001833–1834.)

EPA again claimed to agree[23] with Wyoming's assessment of the "energy and non-air quality environmental impacts" BART factors. EPA stated: "[W]e have not changed our assessment of the other BART factors." 79 Fed. Reg. at 5,050. But if it "agreed" with Wyoming's energy and non-air quality assessment, EPA would have rejected SCR as BART in the Final Rule, just as Wyoming did.

Wyoming's specific findings were that this BART factor weighed *against* choosing SCR as BART. EPA never bothered to consider, or explain how it weighed and analyzed, the "energy and non-air quality environmental impacts" of SCR versus LNB/OFA at Wyodak and came to a different conclusion. Therefore, while EPA failed to conduct its own independent analysis of "existing pollution control equipment" and "energy and non-air quality environmental impacts" for SCR at Wyodak and relied on Wyoming's analysis instead, EPA ignored Wyoming's findings that those factors did not support SCR as BART at

[23] If it "agreed" with Wyoming, EPA would have rejected SCR as BART in the Final Rule, just as Wyoming had previously rejected SCR.

Wyodak. EPA's actions are arbitrary and capricious because the agency "failed to consider an important aspect of the problem [and] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

B. EPA's Replacement Wyodak NO_x BART Determination is Inconsistent with EPA's Own Findings.

In 2012, Proposed Rule, EPA said it eliminated SCR from consideration as NO_x BART at Wyodak because "the cost effectiveness value is significantly higher than LNBs with OFA and there is a comparatively small incremental visibility improvement over LNBs with OFA." 2012 Proposed Rule, 77 Fed. Reg. at 33,055. The "significantly higher" costs of SCR in 2012 were $4,252 per ton for SCR, compared to $881 per ton for LNB/OFA. *Id.* at 33,055 tbl.33. In EPA's 2014 FIP, despite the fact that the SCR costs ($4,036) were still "significantly higher" than LNB/OFA ($1,027), EPA ignored this cost disparity in its Final Rule. 79 Fed. Reg. at 5,044 tbl.15. As explained above, the CAA requires EPA to provide an "explanation of the reasons for any major changes in the promulgated rule from the proposed rule." *See* 42 U.S.C. § 7607(d)(6)(A). EPA provided no such explanation for ignoring this cost disparity.

A comparison of the modeled SCR visibility improvement results also indicates EPA improperly required SCR as NO_x BART at Wyodak. In its 2012

Proposed Rule, EPA stated that SCR had "comparatively small incremental visibility improvement over LNBs with OFA." 2012 Proposed Rule, 77 Fed. Reg. at 33,055. This "comparatively small incremental visibility improvement" in EPA's 2012 SCR visibility improvement analysis was 0.47 dv. *Id.* In EPA's Final Rule, the "incremental" visibility improvement between new LNB/OFA and SCR is 0.40 dv. 79 Fed. Reg. at 5,044. So, in 2014, EPA required SCR as NO_x BART at Wyodak based on an incremental deciview improvement that was less than the improvement EPA had already labeled "comparatively small" and insufficient to justify SCR in 2012. EPA's actions are arbitrary and capricious because its decision "runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. EPA's SCR analysis is inconsistent and arbitrary. Additionally, EPA provided no explanation of this "major change" in its position, thus violating 42 U.S.C. § 7607(d)(6)(A).

CONCLUSION

For the foregoing reasons, PacifiCorp respectfully requests that the Court overturn EPA's Final Rule as it relates to Wyodak as arbitrary, capricious, and exceeding its authority.

DATED this 28th day of October, 2022.

/s/ Steven G. Jones
E. Blaine Rawson
Steven G. Jones
Stephanie Hanawalt
Ray Quinney & Nebeker, P.C.
36 South State Street, Suite 1400
Salt Lake City, UT 84111
sjones@rqn.com
(801) 532-1500

/s/ Marie B. Durrant
Marie B. Durrant
Assistant General Counsel
PacifiCorp
1407 North Temple, Suite 310
Salt Lake City, Utah 84116
marie.durrant@pacificorp.com
(801) 220-4707

Attorneys for PacifiCorp

CERTIFICATE OF SERVICE

I hereby certify that on this 28th of October, 2022, the foregoing **PACIFICORP'S FINAL OPENING BRIEF (Deferred Appendix Appeal) – Oral Argument Requested** was served electronically on all active registered counsel of record through the Court's CM/ECF system to the following:

> Counsel for the State of Wyoming, as denominated on the Court's CM/ECF system as of October 28, 2022.
>
> Counsel for the United States Environmental Protection Agency, as denominated on the Court CM/ECF system as of October 28, 2022.
>
> Counsel for Powder River Basin Resource Council; National Parks Conservation Association; Sierra Club; and Wyoming Outdoor Council, as denominated on the Court CM/ECF system as of October 28, 2022.

and I additionally certify that I served the following non-registered counsel of record via U.S. First Class Mail, postage prepaid, to the following:

> Michael S. Regan
> Environmental Protection Agency (2310)
> 1200 Pennsylvania Ave. NW
> Washington, DC 20460-0000
>
> Merrick Garland
> U.S. Department of Justice
> 950 Pennsylvania Avenue, NW
> Washington, DC 20530
>
> Correspondence Control Unit
> Office of General Counsel (2311)
> United States Environmental Protection Agency
> 1200 Pennsylvania Avenue, N.W.
> Washington, DC 20460

DATED this 28th of October, 2022 .

/s/ Steven G. Jones
E. Blaine Rawson
Steven G. Jones
Stephanie Hanawalt
Ray Quinney & Nebeker, P.C.
36 South State Street, Suite 1400
Salt Lake City, UT 84111
sjones@rqn.com
(801) 532-1500

/s/ Marie B. Durrant
Marie B. Durrant
Assistant General Counsel
PacifiCorp Energy
1407 North Temple, Suite 310
Salt Lake City, Utah 84116
marie.durrant@pacificorp.com
(801) 220-2233

Attorneys for PacifiCorp

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1. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and the Court's May 15, 2014 Order, the undersigned counsel states that this brief complies with the applicable type-volume limitations, because this brief, exclusive of the items listed in Rule 32(a)(7)(B)(iii), contains 13,490 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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DATED this 28th day of October, 2022.

/s/ Steven G. Jones
E. Blaine Rawson
Steven G. Jones
Stephanie Hanawalt
Ray Quinney & Nebeker, P.C.
36 South State Street, Suite 1400
Salt Lake City, UT 84111
sjones@rqn.com
(801) 532-1500

/s/ Marie B. Durrant
Marie B. Durrant
Assistant General Counsel
PacifiCorp Energy
1407 North Temple, Suite 310
Salt Lake City, Utah 84116
marie.durrant@pacificorp.com
(801) 220-2233
Attorneys for PacifiCorp

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Sophos Endpoint, Core Agent 2022.2.2.1, Sophos Intercept X 2022.1.3.3, and according to the program are free of viruses.

DATED this 28th day of October, 2022.

/s/ Steven G. Jones
E. Blaine Rawson
Ray Quinney & Nebeker, P.C.
36 South State Street, Suite 1400
Salt Lake City, UT 84111
brawson@rqn.com
(801) 532-1500

/s/ Marie B. Durrant
Marie B. Durrant
Assistant General Counsel
PacifiCorp Energy
1407 North Temple, Suite 310
Salt Lake City, Utah 84116
marie.durrant@pacificorp.com
(801) 220-2233

Attorneys for PacifiCorp

1619192