

Case Nos. 14-9529; 14-9530; 14-9534

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents,

and

POWDER RIVER BASIN RESOURCE COUNCIL, *et al.*,

Intervenors.

POWDER RIVER BASIN RESOURCE COUNCIL, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents,

and

STATE OF WYOMING, *et al.*,

Intervenors.

PACIFICORP,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents,

and

POWDER RIVER BASIN RESOURCE COUNCIL, *et al.*,

Intervenors.

Petition for Review of Final Action of the
United States Environmental Protection Agency

STATE OF WYOMING'S OPENING MERITS BRIEF

D. David DeWald (WSB No. 7-5538)
Senior Assistant Attorney General
Wyoming Attorney General's Office
109 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7895
(307) 777-3542 *facsimile*
david.dewald@wyo.gov

Counsel for State of Wyoming

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
GLOSSARY	viii
STATEMENT OF RELATED CASES	1
STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUES	2
STATEMENT OF THE CASE.....	3
I. Introduction	3
II. The Clean Air Act’s Visibility Protection Program.....	7
A. Congress Declares A National Visibility Goal in Class 1 Areas	7
B. EPA Regularly Promulgates Rules to Ensure Progress Towards Congress’s Visibility Goal.....	9
1. The 1999 Regional Haze Rule: a Framework for State Plans.....	9
2. The 2001 Proposed BART Guidelines: Exploring Ideas and Developing Agreement on State BART Determination Guidance.....	11
3. The 2004 Proposed BART Guidelines: Fine-tuning the Concepts and Solidifying the Consensus	12
4. The 2005 Final BART Guidelines: Flexibility for State BART Determinations, but with Presumptive BART Emission Limits	13
III. Wyoming’s Plans for Improving Visibility.....	16

A.	The NO _x BART Permit Applications	17
B.	Wyoming’s NO _x BART Determinations	18
IV.	EPA’s Inconsistent Approach to Disapproving Wyoming’s NO _x BART Determinations.....	20
A.	2012: EPA Proposes to Approve Wyoming’s Cost Estimates, Disapprove Parts of Its Visibility Modeling, and Finds that Selective Catalytic Reduction <i>Is Not Reasonable</i>	21
B.	2013: EPA Also Proposes to Disapprove Wyoming’s Cost Estimates and Find that Selective Catalytic Reduction <i>Is Reasonable</i>	22
C.	2014: EPA Abandons Prior Concerns about Cost Estimates, but Still Disapproves Wyoming’s BART Determinations for Other Reasons and Finds that Selective Catalytic Reduction Is Reasonable	25
	STANDARD OF REVIEW	26
	SUMMARY OF THE ARGUMENT	28
	ARGUMENT	29
I.	Wyoming’s BART determinations complied with EPA’s presumptive BART limits, and EPA cannot disapprove those determinations without first revising the presumptive limit rules	30
A.	The plain language of BART Guidelines shows that the presumptive limits are BART	32
B.	EPA thoroughly vetted the presumptive limits because it intended the limits to represent BART	35
C.	EPA has historically interpreted the presumptive limits to represent source-specific BART	38

II. EPA unlawfully applied the BART Guidelines to Wyoming’s BART determination for Wyodak Unit 1..... 41

III. EPA based its disapprovals of Wyoming’s BART Determinations on arbitrary and capricious rationales 46

A. EPA contradictorily applied the BART Guidelines..... 46

B. EPA punished Wyoming for following EPA’s directions on control rates..... 49

C. EPA employed a double standard by forcing Wyoming to evaluate ineffective controls that would never be implemented..... 51

D. EPA relied on inconsistent applications of its “reasonableness” standard 53

CONCLUSION 56

STATEMENT REGARDING ORAL ARGUMENT 56

CERTIFICATE OF COMPLIANCE..... 58

ADDENDUM 59

ATTACHMENTS

Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations, Final Rule, 70 Fed. Reg. 39104 (July 6, 2005)

Approval, Disapproval and Promulgation of Implementation Plans; State of Wyoming; Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze; Final Rule, 79 Fed. Reg. 5032 (January 30, 2014)

TABLE OF AUTHORITIES

Cases

<i>Alaska Dep’t of Env’t Conservation v. EPA</i> , 540 U.S. 461 (2004).....	27
<i>Am. Corn Growers Ass’n v. EPA</i> , 291 F.3d 1 (D.C. Cir. 2002).....	3, 12, 30
<i>Aragon v. United States</i> , 146 F.3d 819 (10th Cir. 1998)	45
<i>BCCA Appeal Grp. v. EPA</i> , 355 F.3d 817 (5th Cir. 2003)	29
<i>Big Horn Coal Co. v. Temple</i> , 793 F.2d 1165 (10th Cir. 1986)	27
<i>Christopher v. SmithKline Beecham Corp.</i> , 567 U.S. 142 (2012).....	40, 41, 50
<i>Copar Pumice Co., Inc. v. Tidwell</i> , 603 F.3d 780 (10th Cir. 2010)	28
<i>FCC v. Fox Television Stations, Inc.</i> , 556 U.S. 502 (2009).....	32, 40
<i>Lightfoot v. Dist. of Columbia</i> , 355 F. Supp. 2d. 414 (D.D.C. 2005).....	55
<i>Luminant Generation Co. LLC v. EPA</i> , 714 F.3d 841 (5th Cir. 2013)	27, 30
<i>Mainline Rock & Ballast, Inc. v. Sec’y of Labor</i> , 693 F.3d 1181 (10th Cir. 2012)	31, 34
<i>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	28
<i>Nat. Res. Def. Council v. EPA</i> , 526 F.3d 591 (9th Cir. 2008)	48, 50, 52

NLRB v. Bell Aerospace Co.,
416 U.S. 267 (1974).....50

Oklahoma v. EPA,
723 F.3d 1201 (10th Cir. 2013) 26, 27, 29, 31

Schweiker v. Hansen,
450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981).....45

Texas v. EPA,
690 F.3d 670 (5th Cir. 2012)21

Train v. Nat. Res. Def. Council,
421 U.S. 60 (1975).....55

*U.S. Dep’t of Treasury I.R.S. Office of Chief Counsel v. Fed. Labor Relations
Auth.*,
739 F.3d 13 (D.C. Cir. 2014).....48

Union Elec. Co. v. EPA,
427 U.S. 246 (1976).....29

Walker v. BOKF, Nat’l Ass’n,
30 F.4th 994 (10th Cir. 2022)35

WildEarth Guardians v. EPA,
759 F.3d 1064 (9th Cir. 2014)17

Statutes

5 U.S.C. § 706.....27

42 U.S.C. § 74093

42 U.S.C. § 7410 1, 2, 7, 20, 29, 30

42 U.S.C. § 7491 1, 3, 4, 7, 8, 9, 12, 42, 51

42 U.S.C. § 76071

Rules

Rules, Wyo. Dep’t Env’t Quality, Air Quality, ch. 6, § 9 (Dec. 2006)17

Regulations

40 C.F.R. pt. 51 (2005) 13, 14, 15, 16, 30, 33, 34

40 C.F.R. § 51.301 (2014)9

40 C.F.R. § 51.308 10, 11

Approval and Promulgation of State Implementation Plans; State of Colorado; Regional Haze State Implementation Plan, 77 Fed. Reg. 76871 (Dec. 31, 2012) 49, 50

Approval and Promulgation of State Implementation Plans; State of Wyoming; Regional Haze Rule Requirements for Mandatory Class I Areas Under 40 CFR 51.309, 77 Fed. Reg. 73926 (Dec. 12, 2012) 6, 16, 40, 41

Approval, Disapproval and Promulgation of Implementation Plans; State of Wyoming; Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze, 78 Fed. Reg. 34738 (June 10, 2013)17

Proposed Guidelines for Best Available Retrofit Technology (BART) Determinations Under the Regional Haze Regulations, 66 Fed. Reg. 38108 (July 20, 2001) 11, 12, 36, 42, 43

Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations, 69 Fed. Reg. 25184 (May 5, 2004) 12, 13, 30, 32, 33, 34, 36, 52

Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations; Final Rule, 70 Fed. Reg. 39104 (July 6, 2005) 13, 14, 15, 16, 19, 24, 33, 34, 35, 36, 37, 39, 42, 43, 44, 45, 46, 51, 52, 55

Regional Haze Regulations, 64 Fed. Reg. 35714 (July 1, 1999)..... 9, 10, 11

Regional Haze Regulations; Revisions to Provisions Governing Alternative to Source-Specific Best Available Retrofit Technology (BART) Determinations, 70 Fed. Reg. 44154 (Aug. 1, 2005)..... 35, 39, 41

Regional Haze Regulations; Revisions to Provisions Governing Alternative to
Source-Specific Best Available Retrofit Technology (BART)
Determinations, 71 Fed. Reg. 60612 (Oct. 13, 2006)..... 39, 41

GLOSSARY

Best Available Retrofit TechnologyBART

42 U.S.C. 7401 et seq..... Clean Air Act

Environmental Protection Agency.....EPA

Million British thermal unitMMBtu

Nitrogen oxides NO_x

Particulate matterPM

Pounds per million British thermal unit.....lbs/MMBtu

Sulfur dioxide..... SO₂

STATEMENT OF RELATED CASES

The State of Wyoming's petition for review of the EPA's partial disapproval of Wyoming's regional haze implementation plan for NO_x is related to the following two cases, which also challenge EPA's actions on Wyoming's plan:

- *PacifiCorp v. EPA*, No. 14-9534, and
- *Powder River Basin Resource Council v. EPA*, No. 14-9530.

Wyoming intervened as a respondent in the latter case.

STATEMENT OF JURISDICTION

Under the Clean Air Act, Congress gave the states the responsibility to develop plans to control regional haze and to determine BART for large haze-causing pollution sources. 42 U.S.C. § 7491. In 2011, Wyoming submitted to EPA its plan for controlling NO_x, a haze-causing pollutant. EPA has authority under the Clean Air Act to review Wyoming's plan and its component NO_x BART determinations under 42 U.S.C. § 7410(k).

On January 30, 2014, EPA partially disapproved Wyoming's plan. (*See* Jt. App. Vol. I at 000100-291)¹. On March 28, 2014, Wyoming petitioned this Court to review EPA's partial disapproval of the State's plan. This Court has jurisdiction to review EPA's partial disapproval under 42 U.S.C. § 7607(b)(1), which authorizes

¹ Citations to the Joint Deferred Appendix filed on February 20, 2015 are cited as: Jt. App. Vol. # at page #.

review of EPA's actions on state plans under 42 U.S.C. § 7410 in the local circuit court.

STATEMENT OF ISSUES

1. In the BART Guidelines, EPA established presumptive BART emission limits for NO_x and said that those limits **are** BART. Wyoming's NO_x BART determinations for Wyodak Unit 1 complied with EPA's presumptive BART limits. Nonetheless, EPA disapproved this BART determination. Is EPA's disapproval arbitrary, capricious, or contrary to law?

2. EPA's BART Guidelines are mandatory only for power plants greater than 750 megawatts in size. Although Wyodak Unit 1 is a 335 megawatt power plant, EPA disapproved Wyoming's BART determination for Wyodak Unit 1 because it allegedly failed to comply with the non-binding Guidelines. Was EPA's disapproval in this regard arbitrary, capricious, or contrary to law?

3. EPA determined that the Clean Air Act mandated disapproval of five of Wyoming's BART determinations due to alleged deviations from the BART Guidelines. Yet, EPA approved eight of Wyoming's BART determinations that relied on the same allegedly erroneous methodology. Was EPA's disparate treatment of Wyoming's BART determinations arbitrary, capricious, or contrary to law?

4. In support of its disapproval of Wyoming's BART determinations, EPA asserted that the State used the wrong emission rates for two control technologies.

Wyoming's BART analyses used the emission control rates EPA told the State to use in its BART determinations. Are EPA's disapprovals of Wyoming's BART determinations in this regard arbitrary, capricious, or contrary to law?

5. EPA claims its disapprovals were warranted because Wyoming's BART determinations were not reasonable. EPA applied that standard contradictorily, producing opposite results from equivalent facts. Are EPA's disapprovals of Wyoming's BART determinations in this regard arbitrary, capricious, or contrary to law?

STATEMENT OF THE CASE

I. Introduction

This case involves EPA's partial disapproval of one of the State of Wyoming's implementation plans for the Clean Air Act's regional haze program. (*See* Jt. App. Vol. I at 000100-291). The goal of the regional haze program is to restore visibility in national parks and wilderness areas to natural conditions. 42 U.S.C § 7491(a). The program is not concerned with public health or welfare, which are separately protected under the Clean Air Act through ambient air quality standards. *See id.* § 7409(b).

Because the regional haze program focuses only on an aesthetic goal, Congress gave the states discretion to decide how best to achieve that objective. *Id.* § 7491; *see also Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 8 (D.C. Cir. 2002)

(Explaining that “Congress intended the states to decide which sources impair visibility and what BART controls should apply to those sources.”). Although Congress made clear its visibility goal, it did not make the goal mandatory or set a deadline for achieving it.

The regional haze program asks states to balance economic factors with visibility improvement to ensure regional haze can be addressed without disrupting major industry. Congress required states to develop plans that ensure reasonable progress toward the visibility goal, while weighing the benefits of progress against the costs incurred in pursuit of the goal. *See* 42 U.S.C. § 7491(b)(2), (g)(2). In the Clean Air Act, Congress charged EPA with reviewing state plans and providing general guidance on how the states should craft their plans. *Id.* § 7491(b). To fulfill that role, EPA engaged in a lengthy rulemaking process, beginning in relevant part with the 1999 regional haze rule and culminating in the 2005 BART Guidelines.

Wyoming has played an active role in addressing regional haze for the last two decades, first as a member of the Grand Canyon Visibility Transport Commission and then with the Western Regional Air Partnership. (*See* Jt. App. Vol. I at 000004). The State’s investigations have shown that, in national parks and wilderness areas in Wyoming, emissions of PM, SO₂, and NO_x are the primary causes of regional haze. (Jt. App. Vol. II at 000333).

On both the clearest and the haziest days, PM and SO₂ are the principal causes of haze in Wyoming. (*Id.*) For example, in Yellowstone and Grand Teton National Parks, PM and SO₂ cause nearly 70% of the haze on both the clearest and haziest days. (Jt. App. Vol. II at 000334 (Figure 3.1-1)). By contrast, NO_x causes a little less than 18% of the visibility impairment on the best days and only 7% on the worst days. (*Id.*) In Wyoming's wilderness areas, NO_x plays a similarly small role in the formation of regional haze. (*See, e.g.*, Jt. App. Vol. II at 000336 (Figure 3.2-1)). As such, Wyoming has worked diligently to address these emissions, with an emphasis on PM and SO₂ because they carry the largest potential to reduce haze.

Much of the NO_x in Wyoming's skies originates outside Wyoming's borders. (Jt. App. Vol. II at 000364). Likewise, only a small amount of out-of-state visibility degradation is from Wyoming NO_x emissions. Only 18% of neighboring states' nitrate concentrations are contributed by Wyoming on the worst days. (Jt. App. Vol. I at 000435). Moreover, Wyoming's NO_x emissions contribute only 14% to the visibility impairment at the nearest Class I areas in neighboring states. (*Id.*) Because NO_x is only a minor contributor to haze in Wyoming, and only a portion of haze-causing NO_x emissions originate in Wyoming, controlling NO_x plays a limited role in eliminating haze in Wyoming. Nevertheless, Wyoming required major sources of NO_x emissions to install hundreds of millions of dollars in controls as part of its

plans to meet Congress's aesthetic goal. (*See, e.g.*, Jt. App. Vol. III at 000510-11, 521).

EPA approved Wyoming's regional haze plans for controlling emissions of PM and SO₂. (*See* Jt. App. Vol. III at 000001-41); 77 Fed. Reg. 73926 (Dec. 12, 2012). Those plans address approximately 70% of the haze-causing emissions in Wyoming. (*See, e.g.*, Jt. App. Vol. II at 000336). EPA also approved the majority of Wyoming's regional haze plan for NO_x. (Jt. App. Vol. I at 000001-41). However, EPA disapproved five of Wyoming's ten control technology selections for NO_x due to alleged technical errors in the underlying analyses.² (Jt. App. Vol. I at 000107).

Accordingly, this case concerns an incredibly small percentage of the haze-causing substances from Wyoming, more specifically, that which is caused by NO_x emissions. Any action taken on NO_x alone will not result in a significant improvement in visibility. Nonetheless, EPA's replacement federal plan imposes hundreds of millions of dollars in additional costs on Wyodak Unit 1 and electricity consumers in Wyoming.

EPA's reasons for disapproving Wyoming's BART controls varied significantly from the agency's first proposed action in 2012, to the second proposal

² Four of the five control technology selections for NO_x emissions that were disapproved by EPA are no longer at issue in this case, including the Basin Electric Power Cooperative Units and Dave Johnson Unit 3. Since these issues are now settled, Wyoming focuses its argument on Wyodak Unit 1.

in 2013, and, ultimately, the final disapproval in 2014. Throughout that process, EPA failed to follow the plain language of its BART Guidelines and offered conflicting rationales in support of its actions, often abandoning previously relied upon facts. EPA's actions turned the regional haze program on its head by only considering visibility improvement and not weighing the cost of compliance—completely disregarding Wyoming's extensive work toward achieving Congress's visibility goal.

II. The Clean Air Act's Visibility Protection Program

Congress created a cooperative-federalism approach between the EPA and the states to implement the Clean Air Act, but purposefully did not endow even responsibilities between the two. EPA establishes national standards and ensures that the states meet those norms while the states hold a larger role and the primary responsibility for “air pollution control at its source[.]” *See, e.g.*, 42 U.S.C. § 7410(a)(1), (a)(3). Congress implemented the visibility protection program through this system of cooperative federalism, with a focus on giving states the majority of the decision making power. *Id.* § 7491(b) (directing EPA to establish guidelines and the states to make control technology determinations).

A. Congress Declares a National Visibility Goal in Class 1 Areas

In the 1977 Clean Air Act amendments, Congress established a goal of eliminating and preventing human-caused visibility impairment in 156 national

parks and wilderness areas in the United States. 42 U.S.C. § 7491(a)(1). Recognizing that solving the problem of visibility impairment could not occur overnight, Congress did not set a deadline for achieving the national goal or make success mandatory. *Id.* § 7491(f). Congress did, however, direct EPA to establish guidelines for state visibility protection plans. These plans are required to include reasonable progress goals toward achieving the visibility goal, contain long-term strategies for protecting visibility, and impose reasonable emissions limitations. *Id.* § 7491(b).

To ensure progress towards the goal, Congress required state plans and EPA’s guidelines to address haze-causing pollutants released by “major stationary sources” put into service between 1962 and 1977. *Id.* § 7491(b)(2)(A).³ Where such a source causes or contributes to visibility impairment, Congress required the source to be subject to BART. *Id.* And, for power plants bigger than 750 megawatts, Congress made compliance with EPA’s guidelines mandatory. *Id.* § 7491(b).

Congress did not identify which controls would constitute BART. *Id.* § 7491(b)(2)(A). Instead, Congress provided five statutory factors the states must consider when determining BART for a particular source: “[1] the 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

³ A “major stationary source” is one that emits 250 tons or more of any pollutant and falls into one of 26 source categories, which include, for example, steel mills, petroleum refineries, and coal-fired power plants. 42 U.S.C. § 7491(g)(7).

useful life of the source, and [5] the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.” *Id.* § 7491(g)(2).

B. EPA Regularly Promulgates Rules to Ensure Progress Towards Congress’s Visibility Goal

After Congress established the visibility goal, EPA, the states, and other interested parties spent two decades resolving technical uncertainties necessary to address regional haze. (Jt. App. Vol. I at 000004). That initial work culminated in EPA’s 1999 regional haze rule. However, EPA continued to adjust the regional haze framework with three subsequent rulemakings: the 2001 and 2004 proposed BART Guidelines and the 2005 final BART Guidelines.

1. The 1999 Regional Haze Rule: a Framework for State Plans

In its 1999 regional haze rule, EPA defined regional haze as a “visibility impairment that is caused by the emission of air pollutants from numerous sources located over a wide geographic area.” 64 Fed. Reg. 35714, 35715 (July 1, 1999) (codified at 40 C.F.R. § 51.301 (2014)). Because PM, SO₂, and NO_x scatter and absorb light, understood as “light extinction,” the rule identifies those pollutants as the principal causes of haze. 64 Fed. Reg. at 35725.

To measure changes in light extinction and, therefore, visibility, EPA established a metric known as the “deciview.” 40 C.F.R. § 51.301. The deciview “express[es] uniform changes in haziness in terms of common increments across the

entire range of visibility conditions, from pristine to extremely hazy conditions.” 64 Fed. Reg. at 35725. In this way, the deciview is like the decibel scale for sound where “each unit change in deciview represents a common change in perception[.]” *Id.* Thus, the deciview allows for easy comparison across situations, such that a person perceives the same difference in visibility from a three-deciview change in a hazy environment as the person would with an equal adjustment in a mostly clear environment. *Id.* Though the science and subjectivity of visibility is itself hazy, a change of one full deciview is the approximate threshold for human perception. *Id.* at 35726-27; (*see also* Jt. App. Vol. II at 000328) (comparing photographs of different deciview impairments)].

In the 1999 regional haze rule, EPA concluded that, although visibility is less degraded in the West than in the East, every state contains sources of visibility-impairing pollutants that could contribute to regional haze. 64 Fed. Reg. at 35721. As a result, the rule directs every state to submit a regional haze implementation plan. 40 C.F.R. § 51.308(d). Consistent with Congress’s direction, the rule requires those state plans to include long-term strategies for sources of visibility impairing pollutants, criteria ensuring reasonable progress toward the national goal, and BART for emitting facilities. *Id.* § 51.308(d), (e). The final requirement—BART—is at issue in this case.

EPA required in the regional haze rule that state plans include either: (a) determinations of BART controls for major sources that cause or contribute to regional haze; or (b) an alternative to source-specific BART, such as an emissions trading system. *Id.* § 51.308(e)(1), (2). For states opting to make BART determinations, the rule requires state plans to contain two key BART elements: (1) a list of sources in the state that are eligible for BART; and (2) BART determinations for each BART-eligible source found to cause or contribute to haze. *Id.* § 51.308(e)(1)(i), (ii). In the haze rule, EPA committed to issue additional guidance on how states should conduct those BART determinations. 64 Fed. Reg. at 35740.

2. The 2001 Proposed BART Guidelines: Exploring Ideas and Developing Agreement on State BART Determination Guidance

In 2001, EPA proposed guidelines for state BART determinations. *See* 66 Fed. Reg. 38108 (July 20, 2001). Those Guidelines proposed flexible instructions on how the states should identify sources eligible for and subject to BART, evaluate the five statutory BART factors, and design a BART-alternative emissions trading program. *Id.* at 38109.

The Guidelines also proposed that, for large power plants, BART would presumptively require installation of controls to eliminate 90-95% of SO₂ emissions. *Id.* at 38130. EPA proposed that the states could deviate from this presumption only

where justified by site-specific circumstances and consideration of the five statutory BART factors. *Id.* Because Congress intended for the haze rule to address older and larger emitting facilities, EPA proposed that the BART Guidelines would only be mandatory for power plants with a generating capacity in excess of 750 megawatts, and not for smaller plants. *Id.* at 38108 (citing 42 U.S.C. § 7491(b)(1)). However, while EPA’s proposed BART Guidelines were pending, the District of Columbia Circuit Court of Appeals invalidated a portion of EPA’s 1999 regional haze rule. *Am. Corn Growers*, 291 F.3d at 8-9.

3. The 2004 Proposed BART Guidelines: Fine-tuning the Concepts and Solidifying the Consensus

To address the D.C. Circuit’s remand of the 1999 regional haze rule EPA re-proposed the Guidelines. *See* 69 Fed. Reg. 25184 (May 5, 2004). The re-proposed Guidelines amended the 2001 proposal in two relevant respects.

First, EPA proposed to revise the presumptive BART emission limits for SO₂. *Id.* at 25199. In response to comments, EPA refined the presumptive limit to require either elimination of 95% of emissions or a performance rate of 0.1 to 0.15 lbs/MMBtu. *Id.* EPA developed this limit based on its evaluation of available data on costs and visibility. *Id.* at 25199-200. Accordingly, EPA “propos[ed] to establish a requirement that these control levels are BART[.]” *Id.* at 25200.

Second, EPA proposed for the first time to establish presumptive BART emission limits for NO_x. *Id.* at 25201. Unlike SO₂, for which one control technology

(scrubbers) predominates, NO_x can be controlled through two different methods: combustion and post-combustion controls, which can operate independently or in tandem. *Id.* at 25202. The effectiveness of both classes of controls varies based on plant design and fuel type. *Id.* For power plants that use the post-combustion control method of selective catalytic reduction during part of the year, EPA proposed that an increase to year-round use of the control would presumptively represent BART. *Id.* For all other power plants, EPA proposed a presumptive NO_x BART emission limit of 0.2 lbs/MMBtu. *Id.* EPA again invited public comment on the propriety of these limits. *Id.*

4. The 2005 Final BART Guidelines: Flexibility for State BART Determinations, but with Presumptive BART Emission Limits

After considering public comments, EPA finalized the BART Guidelines. *See* 70 Fed. Reg. 39104 (July 6, 2005) (codified at 40 C.F.R. pt. 51 App. Y). The Guidelines direct the states to evaluate major stationary sources of PM, SO₂, and NO_x and subject to BART the sources that impact visibility by at least 0.5 deciviews. 40 C.F.R. pt. 51 App. Y, § III(1) (2005). EPA determined that the Guidelines are mandatory only for power plants exceeding 750 megawatts. *Id.* at § I (F). For all other BART sources, the states “are not required to use the process in the guidelines when making BART determinations[.]” *Id.* at § I (F).

In the Guidelines, EPA repeatedly emphasized that the states have substantial flexibility and discretion in conducting BART analyses. *See, e.g.*, 70 Fed. Reg. at 39108 (“States have the flexibility”); *id.* at 39123 (“States can make judgments”). Because the Clean Air Act does not dictate how the states must weigh the five statutory BART factors, EPA made clear that “the States are free to determine the weight and significance to be assigned to each factor.” *Id.* at 39123. Within this flexible framework, the Guidelines provide the states discretion on how to assess both the visibility and cost factors in the BART analysis.

For visibility, the Guidelines direct the states to develop modeling protocols that rely on EPA-approved models, such as CALPUFF,⁴ to estimate a source’s impacts on visibility using current and post-control emissions. 40 C.F.R. pt. 51 App. Y, § III(3). EPA cautioned that the “estimate of visibility improvement does not by itself dictate the level of control a State would impose on a source,” 70 Fed. Reg. at 39123. Furthermore, EPA explained that “States should have flexibility when evaluating the fifth statutory factor [visibility improvement].” *Id.* at 39129.

For costs, the Guidelines require states to develop estimates of the annualized and capital costs of BART controls. 40 C.F.R. pt. 51 App. Y § IV(D). The Guidelines provide that the bases for those estimates should “be documented, either with data

⁴ CALPUFF is a pollutant dispersion model that estimates a source’s impacts on visibility. 70 Fed. Reg. at 39121.

supplied by an equipment vendor (i.e., budget estimates or bids) or by a referenced source [such as EPA's *Control Cost Manual*]." *Id.* EPA recommended that the states use the *Control Cost Manual* "where possible," but the estimates must still "take into account any site-specific design or other conditions ... that affect the cost of a particular BART technology option." *Id.* EPA explained in the final rule that this arrangement provides the states with "flexibility in how they calculate costs." 70 Fed. Reg. at 39127.

EPA's Guidelines also finalized the presumptive BART emission limits for large coal-fired power plants. *Id.* at 39131 (codified at 40 C.F.R. pt. 51 App. Y § IV(E)). The limits are based on a "comprehensive modeling analysis of the anticipated visibility impacts of controlling large [power plants]," as well as a detailed review of the costs of controls. 70 Fed. Reg. at 39132-35. For SO₂, EPA established presumptive BART as 95% removal of SO₂ emissions or an emission rate of 0.15 lb/MMBtu. 40 C.F.R. pt. 51 App. Y § IV(E).

For NO_x, EPA established presumptive BART as the year-round use of post-combustion controls, such as selective catalytic reduction, at sources already using those controls part of the year. *Id.* § IV(E)(5). For power plants with a generating capacity over 750 megawatts that are not already using post-combustion controls, EPA established presumptive BART limits. *Id.* These limits also allow states to consider the installation of other combustion controls based on boiler type, size, and

fuel. *Id.* (Table 1). For example, the presumptive NO_x BART limit for a dry-bottom wall-fired boiler greater than 200 megawatts burning sub-bituminous coal is 0.23 lbs/MMBtu. *Id.* (Table 1). Importantly, except for cyclone boilers, EPA expressly rejected “presumptive limits based on the installation of [selective catalytic reduction],” a post-combustion control. 70 Fed. Reg. at 39135-36.

EPA explained that the “States, as a general matter, must require owners and operators of greater than 750 megawatt power plants to meet these BART emission limits.” *Id.* at 39131. However, EPA allowed the states to “establish a different requirement if the State can demonstrate that an alternative determination is justified based on a consideration of the five statutory factors.” *Id.*

III. Wyoming’s Plans for Improving Visibility

Wyoming’s studies of regional haze in the national parks and wilderness areas showed that PM and SO₂ are the primary causes of haze. (Jt. App. Vol. II at 000333). Importantly, EPA approved all of Wyoming’s plans to reduce emissions of both PM and SO₂. (*See* Jt. App. Vol. I. at 000001-41); 77 Fed. Reg. 73926 (Dec. 12, 2012). However, one component of Wyoming’s regional haze plan was to also address NO_x emissions. Wyoming made NO_x BART determinations for fifteen BART units, including the remaining unit at issue in this case, Wyodak Unit 1.

To facilitate those BART determinations, Wyoming promulgated a permitting regime that required sources to submit applications to the Department of

Environmental Quality for BART permits. *See Rules, Wyo. Dep't Env't Quality, Air Quality*, Ch. 6, § 9 (Dec. 2006). Among other things, Wyoming's permitting rules: (1) incorporate EPA's BART rules; (2) direct BART sources to submit permit applications; and (3) require Wyoming to provide public notice of and accept comments on proposed BART decisions. *Id.* The rules require Wyoming to provide notice of proposed BART determinations to EPA and affected federal land managers and hold public hearings. *Id.* In considering BART applications, Wyoming also developed a modeling protocol, which EPA approved, to guide the visibility component of the BART analyses. (Jt. App. Vol. I at 000001).

A. The NO_x BART Permit Applications

PacifiCorp submitted the BART permit application for Wyodak Unit 1. (*See* Jt. App. Vol. V at 001077). To aid in the preparation of the application, PacifiCorp retained CH2M Hill,⁵ which in turn relied on the work of Sargent & Lundy,⁶ as well as control equipment vendors. (Jt. App. Vol. V at 001092). The application evaluated

⁵ CH2M Hill similarly prepared a BART analysis for Nevada's regional haze plan, which EPA approved and the Ninth Circuit upheld. *WildEarth Guardians v. EPA*, 759 F.3d 1064, 1073 (9th Cir. 2014).

⁶ Sargent & Lundy provided the engineering studies of NO_x controls in the Integrated Planning Model, which EPA relied on in this case to estimate control costs. *See* EPA's Power Sector Modeling Platform v.5.13 at 1-2 (Table 1-1) (November 27, 2013), <https://www.epa.gov/power-sector-modeling/power-sector-modeling-platform-v513>; 78 Fed. Reg. 34738, 34749 (June 10, 2013) (stating that "we have largely used the Integrated Planning Model cost calculations").

a variety of combustion and post-combustion controls, as well as the associated costs and anticipated visibility improvements.

For example, PacifiCorp's application for Wyodak Unit 1 evaluated low NO_x burners, overfire air, selective non-catalytic reduction, and selective catalytic reduction, as well as rotating opposed fire air. (*Id.*).

PacifiCorp's capital cost estimates for controls ranged from \$13 million for the least expensive control to \$172 million for the most expensive. (Jt. App. Vol. V at 001189 (Table 4)). To evaluate anticipated visibility improvements from the controls, PacifiCorp conducted multiple rounds of CALPUFF modeling consistent with Wyoming's EPA-approved modeling protocol. (Jt. App. Vol. V at 001165-79).

EPA offered numerous technical comments on the analyses. (*See, e.g.*, Jt. App. Vol. VI at 001389-92; 001393-1400). For example, EPA encouraged Wyoming to evaluate selective catalytic reduction in conjunction with low-NO_x burners and overfire air controls at a control rate of 0.07 lb/MMBtu. (Jt. App. Vol. VI at 001392).

B. Wyoming's NO_x BART Determinations

Wyoming evaluated PacifiCorp's BART permit application for Wyodak Unit 1 in light of the five statutory BART factors and EPA's BART Guidelines.⁷ (Jt. App. Vol. V at 001214-15). Wyoming determined the best available retrofit technology

⁷ Because the Guidelines are not mandatory for Wyodak Unit 1, Wyoming relied on the Guidelines only as helpful guidance in that BART determination. (Jt. App. Vol. V at 001214).

to be low NO_x burners with overfire air and corresponding emission limits at least as stringent as EPA's presumptive NO_x BART limits. (Jt. App. Vol. V at 001214 (establishing BART "equal to EPA's presumptive limit")). Wyoming also found its chosen controls to be particularly cost effective, one of the five statutory BART factors. (*See, e.g.*, Jt. App. Vol. V at 001214 (Wyoming's BART control would reduce NO_x at a cost of \$881 per ton removed)); *see also* 70 Fed. Reg. at 39167 (EPA finding cost effective those controls capable of removing NO_x at a cost below \$1,500 per ton).

Those BART controls would reduce cumulative NO_x emissions from Wyodak Unit 1 by 1,483 tons per year. (Jt. App. Vol. V at 001214). Those emission reductions, as well as those achieved under other components of Wyoming's plans, ensured that the State would make reasonable progress toward Congress's visibility goal. (Jt. App. Vol. VI at 001338). However, Wyoming's BART analyses indicated that those NO_x controls would impose substantial costs on PacifiCorp—over \$13 million in capital costs for Wyodak Unit 1 alone. (Jt. App. Vol. V at 001214).

Balancing all factors as instructed by the rules, Wyoming rejected the most stringent and costly control option—selective catalytic reduction with low NO_x burners and overfire air. (Jt. App. Vol. V at 001214-15). That option was substantially less cost effective than Wyoming's chosen control. (*Id.*). Notably, at

Wyodak Unit 1, installing selective catalytic reduction with low NO_x burners and overfire air would be more than thirteen times the capital cost (\$172 million vs. \$13 million) and annualized cost (\$19 million vs. \$1.3 million) of Wyoming's chosen BART controls. (Jt. App. Vol. V at 001189 (Table 4)).

Wyoming also rejected selective catalytic reduction because of its energy and non-air quality environmental impacts, another statutory BART factor. (Jt. App. Vol. V at 001214-15). Selective catalytic reduction requires 150 times more energy to operate than the State's chosen control. (Jt. App. Vol. II at 000420). As a result, operating selective catalytic reduction at Wyodak Unit 1 would consume 2.4 megawatts of electricity. (Jt. App. Vol. V at 001097 (Table 3-2)). By contrast, Wyoming's BART control can actually reduce energy consumption by optimizing combustion. (*Id.*) Also, selective catalytic reduction generates other environmental impacts in the form of solid waste from spent catalysts (rare earths) and reagents (ammonia). (Jt. App. Vol. V at 001214-15).

IV. EPA's Inconsistent Approach to Disapproving Wyoming's NO_x BART Determinations

In January 2011, Wyoming submitted to EPA a regional haze implementation plan that included Wyoming's NO_x BART determinations. (Jt. App. Vol. II at 000292). Under the Clean Air Act, EPA must approve a state regional haze implementation plan if the plan meets the requirements of the Act. 42 U.S.C. § 7410(k)(3). To disapprove a state's plan, EPA must explain how the plan interferes

with applicable requirements of the Clean Air Act. *See Texas v. EPA*, 690 F.3d 670, 683 (5th Cir. 2012) (the court upheld an EPA analysis of a definition within a flexible permit program, ultimately determining that the definition interfered with federal major new source review regulations under the Clean Air Act).

EPA reviewed Wyoming's plan in a hypocritical but committed pursuit of disagreeing with the technical analyses underlying the State's control choices. While EPA criticized Wyoming's technical methods, it constantly changed its own technical evaluations, as well as its reasons for disapproving different parts of the plan. EPA issued proposals in 2012 and 2013 to disapprove different parts of Wyoming's plan based on different allegations that the State's analyses were technically defective. (*See* Jt. App. Vol. I at 000001; 000042). In 2014, after EPA reworked its own analyses multiple times, they arrived at a final action that was drastically different from the previous two proposals in both justification and end result. (*See* Jt. App. Vol. I at 000100).

A. 2012: EPA Proposes to Approve Wyoming's Cost Estimates, Disapprove Parts of Its Visibility Modeling, and Finds that Selective Catalytic Reduction *Is Not Reasonable*

In June 2012, EPA proposed to disapprove Wyoming's NO_x BART determinations at seven units, including Wyodak Unit 1. (*See* Jt. App. Vol. I at 000003). EPA accepted Wyoming's cost analyses, but asserted that the State's visibility improvement modeling was defective because it combined improvements

from PM, SO₂, and NO_x controls. (Jt. App. Vol. I at 000010). Therefore, EPA could not ascertain improvements attributable to only NO_x controls. (*Id.*). As a result, EPA performed its own modeling and proposed its own BART determinations for a federal implementation plan to replace Wyoming's. (*See, e.g.*, Jt. App. Vol. I at 000030-31). Instead of the combustion controls Wyoming selected, EPA proposed to require each of the disapproved units to install selective non-catalytic reduction. (Jt. App. Vol. I at 000030-31; 000034).

Wyoming opposed EPA's proposed disapprovals, explaining that EPA's replacement NO_x BART determinations yielded no meaningful improvement in visibility over the State's controls but imposed significant additional costs. (Jt. App. Vol. VI at 001359-60). In response to EPA's confusion about modeling, PacifiCorp asserted that its combined pollutant modeling showed the improvements attributable to NO_x controls. (Jt. App. Vol. VI at 001505; 001513).

B. 2013: EPA Also Proposes to Disapprove Wyoming's Cost Estimates and Find that Selective Catalytic Reduction *Is Reasonable*

Faced with errors in its analyses pointed out during the public comment period, EPA proposed a different action on Wyoming's plan. (*See* Jt. App. Vol. I at 000042). EPA proposed to disapprove the same seven BART determinations, plus one more, as well as Wyoming's cost analyses that the EPA previously proposed to approve. (Jt. App. Vol. I at 000045). EPA alleged that it "identified deficiencies in various cost assumptions and methods" in Wyoming's plan, including supposed

deviations from EPA's *Control Cost Manual*, cost estimates that "exceeded real-world industry costs," and incorrect baseline emissions calculations. (Jt. App. Vol. I at 000053).

For example, according to EPA, Wyoming underestimated the cost of selective non-catalytic reduction, which uses urea as a chemical reagent, because the cost of urea commodities had risen since Wyoming submitted its plan. (*Id.*). EPA similarly determined that Wyoming was mistaken to assume that selective catalytic reduction could control NO_x at a rate of 0.07 lbs/MMBtu. (*Id.*). In EPA's opinion, Wyoming should have evaluated that control at a rate of 0.05 lbs/MMBtu. (*Id.*). However, EPA had previously taken a conflicting position. In EPA's comments on Wyoming's plan, EPA encouraged Wyoming to assume a selective catalytic reduction control rate of 0.07 lbs/MMBtu. (Jt. App. Vol. VI at 001391). EPA did not explain this disparity, except to claim that "EPA has determined that on an annual basis [selective catalytic reduction] can achieve emission rates of 0.05 lb/MMBtu or lower." (Jt. App. Vol. I at 000053).

Based on these alleged errors in Wyoming's analyses, EPA developed its own cost estimates to replace the State's. (Jt. App. Vol. I at 000054). EPA also "found it necessary" to revise the modeling it performed the year before. (*Id.*). Based on EPA's new cost and visibility analyses, EPA proposed yet a different set of

replacement BART determinations for a federal implementation plan. (Jt. App. Vol. I at 000080-84).

EPA proposed to require the installation of selective non-catalytic reduction with low NO_x burners and overfire air at Wyodak Unit 1, which would impose eleven times the annualized cost of the State's control, but yield additional visibility improvement of only 0.15 deciviews. (Jt. App. Vol. I at 000089-90 (\$1.27 million versus \$14.39 million)). At this point, although the EPA pretended to consider all five factors of the BART analysis equally, it became clear that visibility improvement was not being evenly evaluated as compared to capital costs. This contradicts EPA's statement that "states are free to determine the weight" of the five BART factors. 70 Fed. Reg. at 39123.

In response, Wyoming asserted that changes in urea prices did not provide a legitimate basis for disapproving the plan. (Jt. App. Vol. VIII at 001977). Wyoming further argued that, even if changes in urea prices provided a valid basis for disapproving Wyoming's plan, urea prices had since fallen to levels equivalent to the State's cost assumptions. (*Id.*). Wyoming also noted that it relied on EPA's own guidance documents to estimate control efficiency for selective non-catalytic reduction, and that EPA had approved Colorado's use of a control rate for selective catalytic reduction equal to Wyoming's (0.07 lbs/MMBtu). (Jt. App. Vol. VIII at 001980-81).

PacifiCorp further explained that EPA’s assertions of erroneous cost estimates were mistaken. PacifiCorp showed that its cost estimates were in line with “real-world” costs, and that EPA itself had not followed the *Control Cost Manual*. (Jt. App. Vol. VII at 001821-22).

C. 2014: EPA Abandons Prior Concerns about Cost Estimates, but Still Disapproves Wyoming’s BART Determinations for Other Reasons and Finds that Selective Catalytic Reduction Is Reasonable

In 2014, EPA changed course, again, deciding to disapprove Wyoming’s BART determinations, and to impose replacement BART determinations under a federal implementation plan. (*See* Jt. App. Vol. I at 000100). EPA justified its disapprovals on the general grounds that “the State neglected to reasonably assess the costs of compliance and visibility improvement in accordance with the BART Guidelines.” (Jt. App. Vol. I at 000119).

Notwithstanding PacifiCorp’s explanation of why its combined visibility modeling allowed EPA to ascertain visibility improvement from NO_x controls, the agency continued to believe that PacifiCorp’s combined pollutant modeling required disapproval of the BART determinations. (Jt. App. Vol. I at 000178). And although Wyoming explained why it was not necessary to model visibility improvement from selective non-catalytic reduction controls—an ineffective control that EPA itself did not select as BART—EPA continued to assert that the absence of that modeling necessitated disapproval of Wyoming’s plan. (*Id.*). EPA also continued to believe,

despite PacifiCorp's explanations otherwise, that Wyoming used incorrect baseline emissions for PacifiCorp's BART analyses. (*See, e.g.*, Jt. App. Vol. I at 000118).

After alleging these mistakes in Wyoming's analyses, EPA altered its visibility improvement modeling for the third time and its cost analyses for the second time, not due to any of EPA's own errors in its previous evaluations of those BART factors, but seemingly due to unstated preferences. (Jt. App. Vol. I at 000108). EPA mandated the retrofit of Wyodak Unit 1 with the most stringent controls—selective catalytic reduction with low NO_x burners and overfire air—at a capital cost of nearly \$120 million with annualized costs of nearly \$13 million. (*Id.*).

On March 27, 2014, Wyoming asked EPA to reconsider and stay its action pending judicial review. EPA did not act on that request. The next day, Wyoming petitioned this Court for review of EPA's action. Wyoming also moved the Court to stay the deadlines for installing EPA's replacement BART controls pending judicial review of the agency's actions.⁸

STANDARD OF REVIEW

The Court reviews EPA's disapproval of a state Clean Air Act implementation plan under the Administrative Procedure Act. *Oklahoma v. EPA*, 723 F.3d 1201, 1211 (10th Cir. 2013) (citation omitted). Accordingly, the Court will hold unlawful

⁸ The Court granted a stay on September 9, 2014. (ECF No. 54). In 2017, the EPA, Wyoming, and Basin Electric Power Cooperative entered into a settlement agreement. (*See* ECF No. 162).

and set aside an EPA state plan disapproval that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* (citing 5 U.S.C. § 706(2)).

Although EPA’s disapproval of a state plan is reviewed under the Administrative Procedure Act, EPA’s discretion to disapprove a state plan is limited. *Id.* at 1213 n.7. The key question is whether EPA has carried its burden of demonstrating that the state’s plan does not meet the requirements of the Clean Air Act. *See Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 858 (5th Cir. 2013) (“in disapproving a plan, the agency is required to provide reasoning supporting its conclusion that the disapproved provision would interfere with an applicable requirement of the [Clean Air] Act”). To answer that question, the Court does not routinely defer to EPA’s judgment, but instead evaluates whether the state’s plan “was reasonable, in light of the statutory guides and the state administrative record.” *Alaska Dep’t of Env’t Conservation v. EPA*, 540 U.S. 461, 494 (2004).

The Court will hold unlawful and set aside agency actions that fail to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures. *Big Horn Coal Co. v. Temple*, 793 F.2d 1165, 1169 (10th Cir. 1986) (citation omitted). The Court also will set aside an action as arbitrary and capricious if the agency “has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered

an explanation for its decision that runs counter to the evidence before the agency,’ or if the agency action ‘is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’” *Copar Pumice Co., Inc. v. Tidwell*, 603 F.3d 780, 793 (10th Cir. 2010) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Though narrow, the Court’s arbitrary and capricious review is nonetheless “probing and in-depth[.]” *Id.* (citation omitted).

SUMMARY OF THE ARGUMENT

Since each of Wyoming’s BART determinations complied with EPA’s presumptive BART limits, EPA cannot claim that Wyoming’s BART determinations do not fulfill the BART requirements of the Clean Air Act. EPA also cannot assert that the BART Guidelines, which are nothing more than helpful guidance for Wyodak Unit 1, provide a basis for disapproving Wyoming’s BART determination for that unit.

EPA also cannot rely on the arbitrary and capricious rationales it advanced in support of disapproving Wyoming’s plan. While EPA claims that alleged errors in Wyoming’s analyses of costs and visibility required disapproval of the disputed BART determinations, EPA approved multiple other BART determinations from Wyoming containing the same alleged errors. The agency cannot have it both ways. EPA cannot reasonably disapprove Wyoming’s plan when the State specifically

followed EPA's own directions on estimating control efficiencies and disregarding ineffective controls. Yet, that is precisely what EPA did.

EPA's disapprovals of Wyoming's BART determinations are laden with arbitrary and unlawful errors. Wyoming did all that the Clean Air Act required. Accordingly, the Court should vacate EPA's disapproval of Wyoming's NO_x BART determination for Wyodak Unit 1.

ARGUMENT

The Clean Air Act provides states with "wide discretion" to design their implementation plans to account for particular needs. *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976). That discretion includes "broad authority to determine the methods and particular control strategies [a state] will use to achieve the statutory requirements." *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003) (alteration added).

Accordingly, EPA may disapprove a state's implementation plan only if it fails to meet the requirements of the Act. 42 U.S.C. § 7410(k)(3). Importantly, the Court in *Oklahoma v. EPA* determined that EPA may only disapprove and issue its own Federal Implementation Plan if "the State does not satisfy **the minimum criteria** established under [subsection 110](k)(1)(A) of [the Clean Air Act]." *Oklahoma*, 723 F.3d at 1204 (emphasis added). When disapproving a plan, EPA "is required to provide reasoning supporting its conclusion that the disapproved

provision would interfere with an applicable requirement of the Act.” *Luminant Generation Co.*, 714 F.3d at 858 (citation omitted). In light of Congress’s clear grant of power to the states to make control technology selections, EPA bears a heavy burden in disapproving BART determinations in a state’s regional haze plan. *See Am. Corn Growers*, 291 F.3d at 8 (Explaining that “Congress intended the states to decide ... what BART controls should apply[.]”).

I. Wyoming’s BART determinations complied with EPA’s presumptive BART limits, and EPA cannot disapprove those determinations without first revising the presumptive limit rules.

In the BART Guidelines, EPA established presumptive BART emission limits for NO_x. 40 C.F.R. pt. 51 App. Y § IV(E)(5)(Table 1). Because EPA said that those limits “are BART,” Wyoming imposed BART controls on Wyodak Unit 1 that were at least as stringent as the presumptive limits. 69 Fed. Reg. at 25200. Wyoming expressly cited and relied on the presumptive limits in support of its BART determinations. (Jt. App. Vol. V at 001214). Because EPA said the presumptive limits fulfill the requirements of BART and Wyoming’s BART determinations complied with the limits, EPA had no authority to disapprove those BART determinations. *See* 42 U.S.C. § 7410(k)(3) (authorizing EPA to disapprove a state plan only where the plan does not meet the requirements of the Act).

Although EPA described the presumptive limits as BART and even relied on the presumptive limits to establish BART on multiple occasions, EPA now disavows

those positions. EPA asserted in its disapproval of Wyoming’s plan that the presumptive limits merely “serve as a floor ... for BART.” (Jt. App. Vol. I at 000165). According to EPA, the presumptive limits should not be relied upon because they are based on “older, generic calculations[.]” (*Id.*) Further, this claim is contrary to this Court’s determination that the EPA should only disapprove a state implementation plan and impose a federal implementation plan if the state’s plan fails to meet the **minimum** criteria. *See Oklahoma*, 723 F.3d at 1224 (emphasis added). Even taking EPA’s assertion at face value that the presumptive limits only serve as a floor, when Wyoming’s plan met that floor, it immediately became enough to satisfy the BART requirements.

The question before the Court, therefore, is whether EPA’s regulations provide that the presumptive limits are BART, or just a floor for the BART analysis—and if that floor was met in Wyoming’s submitted plan. Importantly, where “the meaning of a regulatory provision is clear on its face, the regulation must be enforced in accordance with its plain meaning[.]” *Mainline Rock & Ballast, Inc. v. Sec’y of Labor*, 693 F.3d 1181, 1185 (10th Cir. 2012) (citation omitted). If the regulation is ambiguous, this Court generally defers to EPA’s interpretation of its own regulations, “unless that interpretation is plainly erroneous or inconsistent with the regulation.” *Oklahoma*, 723 F.3d at 1211 (citation).

A. The plain language of BART Guidelines shows that the presumptive limits are BART.

In its disapprovals, EPA said that its presumptive limits in the final BART Guidelines are just a floor, or starting point, for the BART analysis. (Jt. App. Vol. I at 000105, 000165). Further in EPA’s disapproval of Wyoming’s plan, EPA stated that “the BART definition establishes a floor for emissions reductions.” (Jt. App. Vol. I at 000122). EPA clearly said that this definition, and affiliated presumptive limits, fulfill the requirements of BART. (*Id.*). Therefore, EPA’s disapprovals of Wyoming’s BART determinations which complied with the presumptive limits and weighed five BART factors, were arbitrary, capricious, and contrary to the plain meaning of the BART Guidelines. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“An agency may not ... simply disregard rules that are still on the books.”).

When EPA re-proposed the BART Guidelines in 2004, it unambiguously explained that the presumptive limits are BART. For example, EPA said that it was “proposing to establish a requirement that **these control levels are BART[.]**” 69 Fed. Reg. at 25200 (emphasis added); *see also id.* at 25199 (explaining that EPA was “requiring specific BART emission limitations”). EPA elaborated “that **these control levels represent a reasonable determination of BART** for large [power plants].” *Id.* at 25202 (emphasis added). Thus, EPA invited comment on which

specific presumptive limits “should be considered to **represent BART.**” *Id.* at 25200 (emphasis added).

In its 2005 final rule, EPA adopted this approach. 70 Fed. Reg. at 39131. EPA said in no uncertain terms that the presumptive limits are not merely a floor but rather constitute BART. *See id.* at 39134 (stating that a presumptive limit “**is BART**”) (emphasis added). EPA described the limits as “presumptive” only because the Guidelines allow states to determine BART to be less stringent than the limit. *See* 40 C.F.R. pt. 51 App. Y § IV(E)(5) (“You may determine that an alternative control is appropriate based on a careful consideration of the statutory factors.”).

As a result, EPA’s new interpretation of the presumptive limits as a non-binding floor cannot be reconciled with the BART Guidelines. When EPA proposed the presumptive limits in 2004, commenters objected because “setting presumptive limits infringes on a state’s authority to establish BART on a case-by-case basis considering not only visibility improvement, but the other statutory factors as well.” 70 Fed. Reg. at 39131. Agreeing with these comments, EPA conceded that “there may be situations where the use of such controls would not be technically feasible and/or cost-effective.” *Id.* at 39134. Thus, although the presumptive limits “are extremely likely to be appropriate for all greater than 750 [megawatt] power plants subject to BART, a State **may** establish different requirements if the State can demonstrate that an alternative determination is justified based on a consideration of

the five statutory factors.” *Id.* (emphasis added); *see also* 40 C.F.R. pt. 51 App. Y § IV(E)(5).

If, as EPA claims, the rules created a floor for the BART analysis, the rules would not allow the states to determine that BART is below the floor. But the rules allow just that: the “States have the ability to consider the specific characteristics of the source at issue and to find that the presumptive limits would not be appropriate for that source.” 70 Fed. Reg. at 39134. Consequently, if the presumptive limits operate as a limit on state BART analyses at all, they create a benchmark for success, not a true floor that state’s need to aim for. 40 C.F.R. pt. 51 App. Y § IV(E)(5) (providing that the state may, but not must, establish an alternative limit where justified by the statutory factors).

Therefore, EPA’s claim in this case that the presumptive limits are merely useful tools that establish a “floor” for BART is plainly inconsistent with EPA’s unambiguous explanation of the rules. This Court enforces the plain meaning of agency regulations. *Mainline Rock & Ballast*, 693 F.3d at 1185. EPA’s regulations plainly mean that the presumptive limits “**are BART[.]**” 69 Fed. Reg. at 25200. (emphasis added). The Court should, therefore, vacate EPA’s disapprovals of Wyoming’s BART determinations, which complied with EPA’s presumptive BART limits.

B. EPA thoroughly vetted the presumptive limits because it intended the limits to represent BART.

In addition to claiming that the presumptive limits merely represent a floor for the BART analysis, EPA said that Wyoming should not have relied on the presumptive limits because they were based on generic, outdated information. (Jt. App. Vol. I at 000105, 000165). EPA’s rulemaking record easily disposes of this newfound belief. An agency’s interpretation is controlling unless plainly erroneous or inconsistent with the regulation. *See Walker v. BOKF, Nat’l Ass’n*, 30 F.4th 994, 1006 (10th Cir. 2022). Therefore, like the plain text of the BART Guidelines, the rulemaking record refutes EPA’s newly proffered interpretation of the presumptive limits.

EPA established the presumptive limits as BART based on the agency’s comprehensive review of data related to the cost and visibility improvement factors in the BART analysis. 70 Fed. Reg. at 39132-35. As EPA explained, “[t]he presumptive standards were developed through a formal rulemaking process, including extensive public comment and full analysis of costs and economic impacts[.]” 70 Fed. Reg. 44154, 44159 (Aug. 1, 2005).

To determine the appropriate levels of control, EPA evaluated emissions control data for “all individual BART-eligible coal-fired units[.]” 70 Fed. Reg. at 39134. With this data, EPA performed detailed calculations based on specific BART unit characteristics, including boiler and fuel type, controls already installed,

nameplate capacity, cost effectiveness, and control efficiencies. *Id.* at 39132. EPA conducted a “comprehensive modeling analysis of the anticipated visibility impacts[.]” *Id.* EPA included the supporting technical data and analyses in its rulemaking docket to support the limits. *Id.* at 39134, n.62. Based on these evaluations of the cost and visibility factors, EPA adopted presumptive limits it believed to be “highly cost-effective” that likely would “result in significant improvements in visibility and help to ensure reasonable progress toward the national visibility goal.” *Id.* at 39131.

EPA also subjected the presumptive limits and the supporting analyses to extensive public comment. When EPA first proposed the BART Guidelines, the agency invited comment on a presumptive limit only for SO₂. 66 Fed. Reg. at 38130. EPA “received many comments on the ... control presumption[.]” 69 Fed. Reg. at 25199. Those comments, in turn, led EPA to revise its presumptive limits rule.

For example, multiple states asked EPA to express the 2001 proposed presumptive SO₂ limit not only as a percent control level, but also as a performance level (i.e., lbs/MMBtu). *Id.* EPA adopted this approach. *Id.* at 25200. Commenters also asked EPA to “address technologies for control of NO_x at BART sources.” *Id.* at 25201. EPA obliged this request as well, “proposing that the States must, as a general matter, require ... sources to achieve a control level of 0.2 lbs/MMBtu.” *Id.* at 25202.

In response to comments on the proposed NO_x limit, EPA “performed additional analyses of all individual BART-eligible coal-fired units[.]” 70 Fed. Reg. at 39134. Those analyses, in turn, “indicated that both cost effectiveness and post-control rates for NO_x do depend largely on boiler design and type of coal burned.” *Id.* As a result, EPA abandoned its proposed presumptive NO_x BART limit of 0.2 lbs/MMBtu. *Id.* Instead, based on the additional analyses EPA conducted in response to comments, the agency established different presumptive NO_x BART limits based on boiler design and fuel type. *Id.* at 39135 (Table 2).

In light of EPA’s diligent efforts to vet the presumptive limits through multiple technical analyses and two rounds of comprehensive public comment, the agency cannot now credibly claim that the presumptive limits were based on mere “generic” information. (*But see* Jt. App. Vol. I at 000165 (refusing to apply the presumptive limits because Wyoming did not show that they “in fact represent BART, under current circumstances, at these particular plants’’)). The record irrefutably shows that EPA based the presumptive limits on comprehensive evaluations of real-world data related to the BART factors for “all individual BART-eligible coal-fired units[.]” 70 Fed. Reg. at 39134. EPA would not have invested so much effort into developing the presumptive limits if they were meant only to be a starting point, rather than the benchmark, for the BART analysis. The record shows

that EPA devoted its resources to substantiating the presumptive limits because EPA intended those limits to be BART.

EPA's claim that the presumptive limits are based on "old" information also is mistaken. By this logic, the entirety of the BART Guidelines, which entail multiple technical facets of control technology, including EPA's outdated *Control Cost Manual*, are also "old." Thus, EPA cannot consistently uphold the Guidelines as the measure of BART compliance, while at the same time dismissing as "old" those portions ill-suited to the agency's current policy predilections.

If EPA wishes to revise its BART Guidelines, it is free to do so through the rule-making process, but it cannot make *ad hoc* revisions to the Guidelines during its review of state plans crafted pursuant to the Guidelines. Because the rulemaking record shows that EPA intended the presumptive limits to be BART, the Court should reject the unfounded interpretation EPA has offered in support of its action.

C. EPA has historically interpreted the presumptive limits to represent source-specific BART.

Though EPA now claims that the presumptive limits do not represent BART, the agency adopted a contrary position in past actions. Those previous actions show that EPA's preferred interpretation in this case is either mistaken, or an unsubstantiated change in agency position.

On at least three separate occasions, EPA has interpreted the presumptive limits to represent source-specific BART when evaluating BART-alternative

programs. First, as part of the final BART Guidelines, EPA determined that its Clean Air Interstate Rule (CAIR) fulfilled the requirements of BART. 70 Fed. Reg. 39141-42. To make that determination, EPA had to show that, as a BART-alternative, CAIR would in fact be better than BART. *Id.* And to make that showing, EPA had to establish a “BART benchmark” to compare to CAIR. *Id.* at 39141. For the BART benchmark, EPA relied on the presumptive limits. 70 Fed. Reg. at 39141.⁹ Thus, EPA concluded that the presumptive limits represent BART for the purpose of showing that CAIR, which covers eastern states suffering worse haze problems than Wyoming, is better than BART.

Then, EPA codified this interpretation when it revised the BART-alternative rules. As EPA explained in the proposal, treating the presumptive limits as BART in alternative programs would “provide for consistent application of the BART guidelines for [power plants] between source-by-source programs and alternative cap and trade programs.” 70 Fed. Reg. at 44157. By equating the presumptive limits with BART, EPA’s rules provide that “the State can develop an estimate of BART emissions reductions using the same approach that it would use to establish source-by-source BART emissions limitations under the BART guidelines.” 71 Fed. Reg. 60612, 60615 (Oct. 13, 2006).

⁹ EPA relied on the presumptive NO_x limit it proposed in 2004 (0.2 lbs/MMBtu) rather than the limits adopted in the 2005 rule, which vary based on boiler and fuel type. *Id.* at 39141.

Finally, EPA treated the presumptive limits as equivalent to BART when it approved Wyoming's regional haze plan for controlling SO₂. 77 Fed. Reg. 73926. As a BART-alternative plan like CAIR, Wyoming had to establish that the plan would be better than BART. To do so, Wyoming relied on EPA's presumptive SO₂ BART emission limit of 0.15 lbs/MMBtu. 77 Fed. Reg. at 73929. Though commenters questioned whether this limit in fact represents BART, EPA remained consistent in its belief that the presumptive limits are BART. *Id.* (Concluding that "the presumptive limits are reasonable and appropriate ... for the better than BART demonstration[.]").

Because EPA has repeatedly relied on the presumptive limits to represent BART, the agency cannot now recast the limits as the mere starting point for the BART analysis after Wyoming submitted its plan. EPA has not even acknowledged this change in its interpretation of the presumptive limits, let alone offered a rational explanation for the change. This Court should refuse to defer to EPA's changed interpretation. *See Fox Television*, 556 U.S. at 517; *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156-57 (2012) (cautioning against deferring to a new interpretation that imposes substantial consequences on conduct occurring before the agency announced its interpretation).

EPA also cannot confine the application of the presumptive limits to BART-alternative programs, which it has previously implied. *See, e.g.*, 77 Fed. Reg. at

73929. Only after the D.C. Circuit invalidated EPA’s BART alternative rules did the presumptive limits come to play a role in the BART alternative program. As EPA explained, the presumptive limits were “developed for application on a source-specific basis.” 70 Fed. Reg. at 44159. But, in light of the D.C. Circuit’s decision, EPA concluded that the presumptive limits could be re-tooled for use in the BART alternative context. 71 Fed. Reg. at 60615, 60619. As a result, EPA itself made clear that the presumptive limits apply equally in both BART and BART-alternative programs. In both cases, EPA interpreted the presumptive limits to represent BART.

EPA cannot establish the rules for state BART determinations, allow states to rely on those rules, and then rewrite the rules after the fact to the states’ detriment. EPA’s rules provide that the presumptive limits fulfill the requirements of BART, and Wyoming reasonably relied on those rules. EPA has, in effect, rewritten the rules of the game, after time expired, and changed the score to reflect its desired result. Upholding EPA’s new interpretation of the presumptive limits would subject Wyoming to an unfair surprise and “undermine the principle that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires.” *Christopher*, 567 U.S. at 156 (citation and quotation marks omitted) (alteration in original).

II. EPA unlawfully applied the BART Guidelines to Wyoming’s BART determination for Wyodak Unit 1.

EPA disapproved Wyoming’s BART determination for Wyodak Unit 1, a 335

megawatt power plant, because it did not comply with the BART Guidelines. (Jt. App. Vol. 1 at 000119; 000089-90). However, Congress provided, and EPA expressly acknowledged, that the Guidelines do not dictate how states conduct BART determinations at power plants that do not exceed 750 megawatts in size. 42 U.S.C. § 7491(b); 70 Fed. Reg. at 39108. Accordingly, EPA’s disapproval of Wyoming’s BART determination for Wyodak Unit 1 is arbitrary, capricious, and contrary to law.

Congress expressly limited EPA’s authority to issue mandatory guidelines on how states conduct BART determinations. Twenty-six categories of large sources are potentially subject to BART, including, “kraft pulp mills, Portland Cement plants, ... iron and steel mill plants, ... petroleum refineries, [and] fossil-fuel boilers of more than 250 million British thermal units per hour heat input[.]” 42 U.S.C. § 7491(g)(7). Although Congress included a broad array of sources in the BART program, it authorized EPA to issue binding guidance for state BART determinations for only a small subset of one of the twenty-six source categories: fossil-fuel fired power plants larger than 750 megawatts. *Id.* § 7491(b).

When EPA initially proposed the BART Guidelines in 2001, it expressed uncertainty about this limit to its authority. 66 Fed. Reg. at 38108-09. EPA understood that the statute “requir[ed] EPA to publish BART guidelines and to require that States follow the guidelines in establishing BART emission limitations

for power plants with a total capacity exceeding the 750 megawatt cutoff.” *Id.* at 39108. But, according to EPA at the time, “[t]he statute is less clear regarding whether the guidelines must be used for sources other than 750 megawatt power plants[.]” *Id.* at 38108-09.

Facing its own hypocritical proposals, EPA next tried to “require States to use the guidelines for all of the [twenty-six source] categories.” *Id.* at 38109. Recognizing that its own proposal might be mistaken, the agency invited comment “on whether the regional haze rule should: (1) Require use of the guidelines only for 750 megawatt utilities, with the guidelines applying as guidance for the remaining categories, or (2) require use of the guidelines for all of the affected source categories.” *Id.*

In the final rule, EPA adopted the narrower interpretation of its authority. Though multiple commenters urged EPA to make the BART Guidelines mandatory “for all 26 categories of stationary sources,” EPA rejected this argument. 70 Fed. Reg. at 39108. It “concluded that it would not be appropriate for EPA to require States to use the guidelines in making BART determinations for other categories of sources. The better reading of the Act indicates that Congress intended the guidelines to be mandatory only with respect to 750 megawatt powerplants.” *Id.*

In abandoning its proposed interpretation, EPA expressly acknowledged the limit to its statutory authority to prescribe mandatory BART Guidelines. For all

BART sources other than power plants larger than 750 megawatts, EPA “encourage[d] States to follow the guidelines” but did not “requir[e] States to do so.” *Id.* As a result, the BART guidelines are not mandatory for power plants smaller than 750 megawatts, just “helpful guidance.” *Id.*

Notwithstanding this crystal clear messaging, EPA rejected Wyoming’s BART determination for Wyodak Unit 1, a 335 megawatt power plant, because it did not comply with the non-mandatory BART Guidelines. EPA disapproved the Wyodak Unit 1 BART determination on the grounds that Wyoming committed the same alleged errors as in the other BART analyses: it incorrectly assessed controls costs and visibility improvement. (Jt. App. Vol. I at 000119; 000089-90).

Notably, EPA did not identify any error in the Wyodak analysis that is distinct from the errors alleged in the other BART analyses. (*See* Jt. App. Vol. I at 000119 (referring to generalized discussion of alleged modeling errors); *id.* at 000090 (referring to generalized discussion of alleged cost mistakes)). Each of those alleged errors is based on supposed non-compliance with the BART Guidelines, which are not mandatory for Wyodak Unit 1.

For example, Wyoming calculated Wyodak Unit 1’s baseline annual emissions “based on allowable emissions, rated heat input, and 7,884 hours of operation (equivalent to an 85% capacity factor).” (Jt. App. Vol. I at 000054). According to EPA, this calculation required disapproval of Wyoming’s BART

determination because it does not fulfill the BART Guidelines' requirement that baseline emissions be "representative of actual emissions from the baseline period." (*Id.* (citing BART Guidelines, 70 Fed. Reg. at 39167)).

EPA's only basis for claiming that Wyoming's calculation of baseline emissions is not representative of the baseline period is that Wyoming used a formula different from the one in the BART Guidelines. The Guidelines "recommend that States use the 24-hour average actual emission rate from the highest emitting day of the meteorological period modeled." (Jt. App. Vol. I at 000054-55).¹⁰ Thus, EPA relies on a mere recommendation in non-binding Guidelines to claim that Wyoming's use of one baseline emission formula over another required disapproval of the State's ultimate BART determination.

Where an agency intends a guidance document to be merely advisory, that guidance is not entitled to the force and effect of law. *See Aragon v. United States*, 146 F.3d 819, 824-25 (10th Cir. 1998) (agency manual not entitled to the force and effect of law) (citing *Schweiker v. Hansen*, 450 U.S. 785, 789, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981)). EPA clearly stated that the BART Guidelines are nothing more than "helpful guidance" to determine BART for sources other than power plants

¹⁰ While EPA claims that Wyoming's baseline emissions estimate is not representative of actual emissions, EPA acknowledged that its preferred baseline emission formula is also not necessarily representative of actual emissions. 70 Fed. Reg. at 39129.

exceeding 750 megawatts. 70 Fed. Reg. at 39108. Accordingly, EPA cannot now reverse course and claim, contrary to the plain language of the BART Guidelines, that the Guidelines establish mandatory requirements for BART sources other than large power plants. This Court should enforce the plain meaning of EPA's regulations and, accordingly, vacate EPA's disapproval of Wyoming's BART determination for Wyodak Unit 1.

III. EPA based its disapprovals of Wyoming's BART Determinations on arbitrary and capricious rationales.

A. EPA contradictorily applied the BART Guidelines.

EPA justifies its actions on Wyoming's BART determinations using two irreconcilable applications of the Clean Air Act. On the one hand, EPA states that it "disapprov[ed] the State's NO_x BART determinations, **as the [Clean Air Act] requires**, because the State neglected to properly consider the costs of compliance and the visibility benefits associated with several of the available control[s.]" (Jt. App. Vol. I at 000121 (emphasis added)). Explaining this interpretation, EPA says that "Wyoming did not properly follow the BART Guidelines or the [*Control Cost Manual*] in conducting its BART analyses and, therefore, did not correctly consider the costs of compliance or the visibility benefits associated with available control technologies as the [Clean Air Act] requires." (*Id.*)

According to EPA, these alleged "flaws in the analysis prevented the State of Wyoming from conducting meaningful consideration of the BART factors[.]" (Jt.

App. Vol. I at 000124). The claimed errors, EPA said, “were neither harmless nor *de minimis*,” (Jt. App. Vol. I at 000135). As a result, the alleged errors “were significant enough that [EPA] cannot conclude the State determined BART according to [Clean Air Act] standards.” (Jt. App. Vol. I at 000127). In sum, EPA interpreted the Clean Air Act to require disapproval of Wyoming’s BART determinations due to alleged deviations from the BART Guidelines.

On the other hand, EPA concluded that the Clean Air Act does not require disapproval of Wyoming’s remaining NO_x BART determinations, even though many of the underlying analyses contained the same alleged errors. (*See, e.g.*, Jt. App. Vol. I at 000118). For example, even though no longer at issue in this case, Wyoming’s BART analysis for Dave Johnston Unit 4 relies on the same visibility and cost methodology that Wyoming relied on for the Dave Johnston Unit 3 BART analysis. (*See* Jt. App. Vol. I at 000084-85). Notwithstanding those supposed flaws, EPA approved Wyoming’s BART determination for Unit 4. (Jt. App. Vol. I at 000114). The same holds true for Naughton Units 1 and 2, which EPA also approved. (*See id.*). Although EPA previously proposed to disapprove those BART determinations based on the same alleged technical flaws in the analysis, EPA approved Wyoming’s BART determinations because EPA ultimately agreed with Wyoming’s control technology choices. (*See, e.g.*, Jt. App. Vol. I at 000118-19).

Thus, EPA offers conflicting interpretations of the Clean Air Act to support its actions. According to EPA, the Clean Air Act required EPA to disapprove two of Wyoming's BART determinations because of the alleged cost and visibility calculation errors. But the Clean Air Act did not require disapproval of the other BART determinations with the same alleged cost and visibility errors, so long as EPA agreed with the end result.

EPA cannot have it both ways. *See Nat. Res. Def. Council v. EPA*, 526 F.3d 591, 607-08 (9th Cir. 2008) (Concluding that "EPA's inconsistent and conflicting position ... causes its interpretation ... to be an arbitrary and capricious one."). Either the Act required disapproval of Wyoming's BART determinations due to the alleged analytical errors, or it did not. Because EPA's action depends on conflicting interpretations of the Act in equivalent situations, EPA's disapprovals of Wyoming's BART determinations were necessarily arbitrary and capricious. *See, e.g., U.S. Dep't of Treasury I.R.S. Office of Chief Counsel v. Fed. Labor Relations Auth.*, 739 F.3d 13, 21 (D.C. Cir. 2014) (inconsistent interpretations of the same term must be set aside as arbitrary and capricious). Thus, even if the presumptive limits do not provide the benchmark for Wyoming's BART determinations, EPA's disapprovals must nonetheless be vacated.

B. EPA punished Wyoming for following EPA's directions on control rates.

When EPA commented on Wyoming's plan, EPA advised Wyoming to assume a performance rate of 0.07 lbs/MMBtu for selective catalytic reduction operating in tandem with low-NO_x burners and overfire air. (Jt. App. Vol. VI at 001392). Accordingly, each of Wyoming's BART determinations relied on that control assumption. (Jt. App. Vol. V at 001188). However, EPA reversed course to Wyoming's detriment, claiming in the final action that Wyoming was mistaken to rely on a control rate of 0.07 lbs/MMBtu. (Jt. App. Vol. I at 000053). Instead, according to EPA in 2014, Wyoming should have assumed a control rate of 0.05 lbs/MMBtu, even though EPA previously said otherwise. (*Id.*).

By contrast, EPA approved Colorado's use of a control efficiency of 0.07 lbs/MMBtu for selective catalytic reduction with low-NO_x burners and overfire air. *See* 77 Fed. Reg. 76871, 76873 (Dec. 31, 2012). Colorado submitted its plan in May 2011, four months after Wyoming submitted its plan. *Id.* at 76871; (Jt. App. Vol. II at 000292). Though multiple commenters argued that Colorado's plan failed to comply with the BART Guidelines because it did not evaluate this control at a rate of 0.05 lbs/MMBtu, EPA disagreed. 77 Fed. Reg. at 76873. The agency explained that, although that control rate can "in some cases" be achieved, "the annual emission rate assumed by Colorado, 0.07 lb/MMBtu, is within the range of actual emission

rates demonstrated at similar facilities in EPA’s Clean Air Markets Division (CAMD) emission database.” *Id.*

Wyoming brought this discrepancy to EPA’s attention. (Jt. App. Vol. VIII at 001980). EPA responded that “the situation bears no relationship to this one, where we have carefully explained our disagreement with multiple aspects of Wyoming’s NO_x BART determinations.” (Jt. App. Vol. I at 000135). EPA’s response evades and does not resolve the discrepancy it created.

EPA based its actions on conflicting interpretations of the BART Guidelines. Wyoming relied on the agency’s express interpretations of the Guidelines to craft BART determinations consistent with EPA’s expectations. Now, EPA has reinterpreted those same regulations to require something different. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (suggesting an agency may not change interpretations where it would impose “new liability ... for past actions which were taken in good-faith reliance on [agency] pronouncements”); *see also Christopher*, 567 U.S. at 156 (favorably citing *Bell Aerospace*). EPA’s action is arbitrary and capricious, and should be set aside. *See Nat. Res. Def. Council*, 526 F.3d at 607-08 (Concluding that “EPA’s inconsistent and conflicting position ... causes its interpretation ... to be an arbitrary and capricious one.”).

C. EPA employed a double standard by forcing Wyoming to evaluate ineffective controls that would never be implemented.

EPA claims that Wyoming's failure to model visibility improvement from selective non-catalytic reduction at Wyodak Unit 1 required disapproval of that BART determination. (Jt. App. Vol. I at 000054). Wyoming did not model visibility improvement for this particular control technology at Wyodak Unit 1 because selective non-catalytic reduction would provide only negligible improvements in emissions controls over Wyoming's chosen controls but would create substantial operational problems and parasitic costs. (Jt. App. Vol. V at 001187). Under these circumstances, which EPA does not deny, Wyoming reasonably did not anticipate that selective non-catalytic reduction would be selected as BART. Therefore, Wyoming permissibly did not devote additional resources to evaluating that control.

According to EPA, the absence of visibility modeling for selective non-catalytic reduction in these BART determinations prevented Wyoming from fulfilling the requirement that it consider "the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology." (Jt. App. Vol. I at 000054) (quoting 42 U.S.C. § 7491(g)(2)). Yet, EPA took a contrary stance when it promulgated the BART Guidelines in 2005.

At that time, EPA took precisely Wyoming's view of selective non-catalytic reduction that it now chastises, explaining that selective non-catalytic reduction is "generally not cost-effective except in very limited applications[.]" 70 Fed. Reg. at

39134. Thus, when EPA established the presumptive BART limits, selective non-catalytic reduction was “not included in EPA’s analysis.” *Id.* This approach, like Wyoming’s, was entirely consistent with EPA’s previous position that it is not “necessary that States conduct detailed evaluations of control measures that are very unlikely to be selected as BART.” 69 Fed. Reg. at 25197.

Therefore, EPA has imposed an arbitrary double standard: EPA need not waste resources evaluating visibility improvement from ineffective controls, but EPA will disapprove a state BART determination that takes the same sensible approach even though the BART Guidelines provide otherwise.¹¹ Here, again, the EPA bases its disapprovals of Wyoming’s BART determinations on inconsistent and arbitrary decision making. EPA said in the Guidelines that states do not need to model ineffective controls, and itself called out selective non-catalytic reduction as an example. Wyoming relied on EPA’s interpretation, only to have EPA reinterpret the rules after the fact. EPA’s disapprovals of Wyoming’s BART determinations are arbitrary and capricious and should be vacated. *See Nat. Res. Def. Council*, 526 F.3d at 607-08 (court vacated EPA determination under the Clean Water Act, because EPA’s changed position as to what constituted “contamination” was arbitrary and capricious).

¹¹ Notably, neither EPA nor Wyoming believed that selective non-catalytic reduction represented BART for Wyodak Unit 1.

D. EPA relied on inconsistent applications of its “reasonableness” standard.

After stripping away each of the erroneous allegations EPA used to support its disapproval of Wyoming’s BART determinations, there remains EPA’s general assertions that Wyoming’s control selections were not “reasonable.” (Jt. App. Vol. I at 000116). But EPA’s actions show that reasonableness in this context represents only the agency’s shifting preferences. As a result, EPA’s rejection of Wyoming’s BART determinations because they were not “reasonable” was unlawfully arbitrary.

Between EPA’s first proposal on Wyoming’s BART determinations in 2012 and the agency’s final action in 2014, EPA did an about face in its view of reasonableness. In 2012, EPA agreed with Wyoming that the most stringent control—selective catalytic reduction with low NO_x burners and overfire air—was too costly to be reasonable as BART at any of the disputed units. (Jt. App. Vol. I at 000030-31, 000034). The next year, EPA changed course and concluded that the same control configuration was not too expensive to be reasonable as BART for Dave Johnston Unit 3, but still was not cost effective enough to be reasonable for Wyodak Unit 1. (Jt. App. Vol. I at 000081, 000083). In the final action, EPA deviated again from its prior view of reasonableness, concluding for the first time that the most stringent control is also reasonable as BART for Wyodak Unit 1. (Jt. App. Vol. I at 000115).

The rationales underlying EPA's changes cannot be reconciled. Even though EPA constantly changed the inputs to the BART analyses through its two proposals and eventual final action, EPA reached different conclusions about reasonableness based on functionally identical facts. In 2012, EPA found that the most stringent control—selective catalytic reduction with low NO_x burners and overfire air—would **not** be reasonable as BART because it was not cost effective in comparison to just low NO_x burners with overfire air. (Jt. App. Vol. I at 000034 (Table 33)). EPA reached that conclusion because the most stringent control was approximately four times less cost effective than just low NO_x burners and overfire air (\$4,252/ton vs. \$881/ton) and would deliver only an imperceptible additional improvement in visibility (.47 deciviews). (*Id.*).

But, in the final action, EPA adopted a conflicting definition of reasonableness. EPA concluded that selective catalytic reduction with low NO_x burners and overfire air was reasonable BART, in spite of the fact its cost effectiveness value was analogously high in comparison to low NO_x burners with overfire air (\$4,036/ton vs. \$1,027/ton) with a similarly small incremental improvement in visibility (0.40 deciviews). (Jt. App. Vol. I at 000113 (Table 15), 000119).

EPA's opinion of the reasonableness of a BART determination is, therefore, subject to change without explanation. As a result of the agency's inability to define

consistently its view of reasonableness, EPA cannot rely on this unwritten, arbitrary standard to reject Wyoming's BART determinations. *See Lightfoot v. Dist. of Columbia*, 355 F. Supp. 2d. 414, 432 (D.D.C. 2005) (noting that unwritten standards "open the door to unaccountable, arbitrary decision-making") (citation omitted).

Even if a BART reasonableness standard exists, here Wyoming's BART determinations were reasonable. As EPA explained in the BART Guidelines, although "States may in specific cases find that the use of [selective catalytic reduction] is appropriate, [EPA] ha[s] not determined that [selective catalytic reduction] is generally cost-effective for BART across unit types." 70 Fed. Reg. at 39136. Like EPA, Wyoming reasonably found that selective catalytic reduction would not be cost-effective for BART.

EPA's inconsistent views of reasonableness render the agency's action unlawfully arbitrary. EPA's rejections of Wyoming's BART determinations show that EPA simply disagreed with the State's control technology selections. *See Train v. Nat. Res. Def. Council*, 421 U.S. 60, 79 (1975) (holding that EPA may not disapprove a state plan simply because it disagrees with the control choices). Accordingly, the Court should vacate EPA's arbitrary disapprovals of the State's BART determinations.

CONCLUSION

In the Clean Air Act, Congress commanded reasonable progress toward the visibility goal. Wyoming has met that mandate. This Court should not approve EPA's specious disapprovals of Wyoming's BART determinations. It should apply the plain language of the Act and EPA regulations, which require approval of Wyoming's NO_x BART determinations for Wyodak Unit 1.

For the foregoing reasons, Wyoming asks this Court to vacate EPA's disapproval of the State's NO_x BART determinations.

STATEMENT REGARDING ORAL ARGUMENT

This case raises novel and important questions concerning the Clean Air Act's regional haze program. At stake are Wyoming's authority under the Act to select pollution controls and the hundreds of millions of dollars in needless expenses EPA has imposed. The State, therefore, requests that the Court hold oral argument on this matter.

[Remainder of page intentionally left blank]

Submitted this 25th day of October, 2022.

/s/ D. David DeWald

D. David DeWald (WSB No. 7-5538)

Senior Assistant Attorney General

Wyoming Attorney General's Office

109 State Capitol

Cheyenne, Wyoming 82002

(307) 777-7895

(307) 777-3542 *facsimile*

david.dewald@wyo.gov

Counsel for State of Wyoming