UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16-4270 (Consolidated)

STATE OF ARKANSAS, et al.,
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents

On Petition for Review of an Agency Action of the
United States Environmental Protection Agency

MOTION OF THE STATE OF ARKANSAS FOR STAY OF FINAL RULE

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 18, Petitioner the State of Arkansas moves for a stay pending this Court's review of the final rule entitled, "Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan," 81 Fed. Reg. 66332 (Sept. 27, 2016) (Exhibit A) ("Final Rule"), and to toll that rule's compliance deadlines pending this Court's review. On November 22, 2016, the Arkansas Department of Environmental Quality (ADEQ) requested that the Environmental Protection Agency reconsider and administratively stay the Final Rule. Exhibit B (petition). Given the Final Rule's short compliance deadlines, ADEQ notified EPA that if ADEQ did not receive a response within 70 days, Arkansas would treat that failure as a constructive denial. *Id.* EPA failed to act and has constructively denied the stay request.

The Final Rule arbitrarily, capriciously, and unlawfully imposes substantially more than a billion dollars in costs without any visibility benefit, imposes post-planning period controls, threatens the reliability of Arkansas's electricity supply, and conflicts with federal law. Further, absent a stay, Arkansas, its citizens, and its economy will immediately suffer irreparable harm.

BACKGROUND

I. Regulatory Framework

The Clean Air Act established a national goal of preventing and remedying manmade air visibility impairment in designated national parks and wildlife areas (Class I areas). 42 U.S.C. 7491(a)(1). Visibility impairment means the "reduction in visual range and atmospheric discoloration," 42 U.S.C. 7491(g)(6), and it is "caused by geographically dispersed sources emitting fine particles and their pre-cursors into the air." *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 3 (D.C. Cir. 2002) (per curiam). Two Class I areas—Caney Creek and Upper Buffalo—are at issue here. *See* 81 Fed. Reg. at 66332/3.

The Clean Air Act "directed EPA to issue regulations requiring states to submit [State Implementation Plans] SIPs containing emissions limits, schedules of compliance, and other measures necessary to make reasonable progress toward meeting the national visibility goal." *North Dakota v. EPA*, 730 F.3d 750, 755 (8th Cir. 2013) (internal quotation marks omitted). Under EPA's regulations, states submit SIPs every ten years to achieve reasonable progress "for the period covered by the implementation plan." 40 C.F.R. 51.308(d)(1)(i)(B); *id.* at 51.308(f) (2012).[1] The first SIPs—covering progress by 2018—were due in 2007. *Id*. at 51.308(b).

[1] After the Final Rule, EPA amended its regulations. *See Protection of Visibility: Amendments to Requirements for State Plans*, 82 Fed. Reg. 3078 (Jan. 10, 2017). The pre-amendment regulations apply here.

SIPs "establish goals (expressed in deciviews) that provide for reasonable progress towards" natural visibility and "improvement in visibility for the most impaired days over the period of the implementation plan" in Class I areas.[2] 40 C.F.R. 51.308(d)(1). In setting those reasonable progress goals, states consider four factors, including compliance costs, "the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of" affected sources. *Id.* at 51.308(d)(1)(i)(A); *see also* 42 U.S.C. 7491(g)(1). States also calculate a uniform rate of progress representing the improvement needed to achieve natural visibility by 2064. 40 C.F.R. 51.308(d)(1)(i)(B). If a state's goals provide for less progress than that rate in a planning period, it must show that its goals are reasonable. *Id.* at 51.308(d)(1)(ii).

SIPs also contain a strategy for addressing impairment, including "enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals." 40 C.F.R. 51.308(d)(3); *see also* 42 U.S.C. 7491(b)(2). In formulating that strategy, EPA considers any predicted visibility improvement from other regulations. EPA, *Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program* (June 1,

[2] A deciview is a visibility impairment measurement. 40 C.F.R. 51.301. Only "a change in visibility of 1.0 deciview is . . . perceptible." 81 Fed. Reg. at 66390/3 n.239.

2007) ("2007 Guidance"), p. 4-1. Improvement from those restrictions alone may be sufficient to achieve reasonable progress.

Among the items EPA must consider are any controls imposed under the best available retrofit technology (BART) framework. BART requires states to determine the best technology for controlling emissions—at certain major sources built between 1962 and 1977—"which may reasonably be anticipated to cause or contribute to" visibility impairment in any Class I area. 42 U.S.C. 7491(b)(2)(A). To do so, states submit "[a] list of all BART-eligible sources" and an analysis considering the "technology available," costs, energy and non-air quality impacts, current pollution control equipment, the source's remaining useful life, and the degree of visibility improvement reasonably "anticipated to result from the use of such technology." 40 C.F.R. 51.308(e)(1)(i)-(ii); *see also* 42 U.S.C. 7491(g)(2).

EPA must approve a SIP complying with those requirements. 42 U.S.C. 7410(k)(3). If EPA disapproves a SIP, it has two years to promulgate a Federal Implementation Plan (FIP). *Id.* at 7410(c).

II. Facts

A. Arkansas's State Implementation Plan

Arkansas's SIP represented years of work by ADEQ and others. *See* Exhibit C (Spencer), ¶¶ 9-12, 24-37. Using emissions inventories and accepted models, Arkansas calculated the rate of progress necessary to achieve natural visibility

conditions. *See* 77 Fed. Reg. 14604, 14621 (March 12, 2012). It established reasonable progress goals—22.48 deciviews at Caney Creek and 22.52 deciviews at Upper Buffalo—better than that rate. *See* 76 Fed. Reg. 64186, 64195/1 (Oct. 17, 2011). Arkansas also employed monitoring data to calculate baseline visibility conditions for the 20% worst and 20% best days during the 2000-2004 period and used accepted modeling to estimate likely improvements from all federal and state emissions programs, including existing BART limitations. *See id*. at 64194. Because that modeling demonstrated that Arkansas's progress exceeded the uniform rate of progress and established that Arkansas would achieve natural visibility *before* 2064, Arkansas did not impose any additional controls. *See id*. at 64194-96.

In March 2012, EPA concluded that Arkansas had correctly calculated the uniform rate of progress and was on track to achieve natural visibility. 81 Fed. Reg. at 66408/2. Nevertheless, EPA partially disapproved the SIP because in setting its reasonable progress goals, Arkansas had not discussed the four statutory factors. *Id*. EPA concluded that if Arkansas had conducted that analysis, then it might have determined that additional progress—*beyond* that which would achieve natural visibility conditions *before* 2064—could be achieved in the first planning period. *Id*. at 66361/1-2. EPA had two years from that point to promulgate a FIP.

B. The Final Rule imposing a Federal Implementation Plan

The Final Rule requires five electricity generating units at White Bluff, Flint Creek, and Independence—which account for a substantial portion of Arkansas's electricity output—to be taken offline so that new controls can be installed within a brief 18-month period. 81 Fed. Reg. at 66342/2-3. It also requires additional controls not included in the SIP. *E.g.*, *id*. Yet it would achieve essentially the same reasonable progress goals. *E.g.*, Exhibit C, ¶¶ 16-19 (SIP and FIP goals differ by 0.01 deciviews).

Rather than begin by establishing reasonable progress goals and imposing controls to achieve that progress, the Final Rule began by noting that sulfur dioxide (SO_2) and nitrogen oxide (NOx) are the largest contributors to visibility impairment at Caney Creek and Upper Buffalo and identifying White Bluff, Flint Creek, and Independence as the three largest Arkansas-based SO_2 and NOx emitters. *See* 81 Fed. Reg. at 66350-51. EPA singled out those sources even though all Arkansas-based sources, in combination, account for around 3% of modeled visibility impairment due to SO_2 and 0.25% due to NOx at Arkansas's Class I areas. *Id.*

White Bluff and Flint Creek are subject to BART, and EPA purported to apply that framework in requiring those facilities to install SO_2 scrubbers in 2021 and low NOx burners at the end of April 2018. *Id.* at 66416/1-2, 66354/3. Yet EPA's BART analysis eschewed consideration of the actual impact of those controls; it

also rested on impact estimates that were within the modeling's acknowledged error margin. *See id.* at 66342.

Independence is not subject to BART, and the Final Rule purported to have "considered the four statutory factors" in requiring Independence to install identical controls. *Id.* at 66351-53. But in reality, the Final Rule's four factor analysis amounted to little more than an assertion that it would be unreasonable not to impose the same controls on all three of the state's largest SO_2 and NOx emitters. *See id.* at 66363/2.

Because the scrubbers required by the Final Rule will be installed *years* after the first planning period, they will *not result in any* planning period visibility improvement. *E.g.*, *id*. at 66420. Similarly, the low NOx burners—installed *days* before that period's conclusion—will have effectively no impact. Exhibit C, ¶ 23 (impact from controls installed in 2018 estimated at 0.00820 deciviews at Caney Creek and 0.00742 at Upper Buffalo); *see also* 81 Fed. Reg. at 66353 (estimating that, *ultimately*, burner impact will be under 0.50 deciviews at one site and less than 0.25 at other).

After imposing those controls, the Final Rule calculated reasonable progress goals "reflect[ing] the visibility improvement anticipated by 2018 from [its] combination of control measures." *Id.* at 66332/3. Unsurprisingly, given that most controls will be installed after or at the very end of the planning period, those goals

represented 0.01 deciviews of visibility improvement vis-à-vis the disapproved SIP. *E.g.*, Exhibit C, ¶ 18. And, as explained below, those goals represent perceptively less progress than Arkansas has already achieved.

Further, the Final Rule did not consider arguments that requiring those controls be installed in a brief period could threaten the reliability of Arkansas's electricity supply. Indeed, because there was evidence that one type of control could generally be installed on a single unit within six to eight months, the Final Rule somehow concluded that additional controls could be installed on five separate units within 18 months without threatening the reliability of Arkansas's electricity supply. 81 Fed. Reg. at 66378/2-3.

C. Arkansas seeks reconsideration of the Final Rule

ADEQ sought reconsideration of the Final Rule arguing, among other things, that the controls at Independence are unnecessary because "2015 monitoring data shows that Arkansas" has met the Final Rule's reasonable progress goals. Exhibit B, p. 3. ADEQ also requested that EPA administratively stay the Final Rule. *See id*. EPA constructively denied that request.

STANDARD OF REVIEW

Courts set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); 42 U.S.C. 7607(d)(9)(A). EPA acts arbitrarily and capriciously when it "relie[s] on

factors which Congress has not intended it to consider," fails "to consider an important aspect of the problem, offer[s] an explanation for its decision that runs counter to the evidence," or offers an implausible explanation. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). Thus, EPA must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *see also* 42 U.S.C. 7607(d)(6)(B) (EPA must respond to "comments, criticisms, and new data"). And "EPA's actions must . . . be [internally] consistent." *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015); *accord Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (per curiam).

ARGUMENT

This Court considers four factors in deciding whether to grant a stay: (1) the likelihood that the movant will prevail on the merits; (2) the likelihood that the movant will suffer irreparable harm absent a stay; (3) the prospect of harm to others if a stay is granted; and (4) the public interest. *See Iowa Utilities Bd. v. FCC*, 109 F.3d 418, 423 (8th Cir. 1996); *Packard Elevator v. ICC*, 782 F.2d 112, 115 (8th Cir. 1986). Applying that standard, this Court has previously stayed FIPs. *See Cliffs Nat. Res. Inc. v. EPA*, Nos. 13-1758, 13-1761 (8th Cir. June 14, 2013); *see*

also Texas v. EPA, 829 F.3d 405, 435-36 (5th Cir. 2016); *Oklahoma v. EPA*, 723 F.3d 1201, 1206-07 (10th Cir. 2013). A stay is likewise appropriate here.

I. Arkansas is likely to prevail on the merits.

A. The Final Rule imposes massive costs with no visibility benefit.

The Final Rule concludes that substantially more than a billion dollars in controls are "cost-effective" and will "result in meaningful visibility benefit." 81 Fed. Reg. at 66361/3. That conclusion is contrary to the record and irrational.

EPA ignored evidence that without additional costly controls, Arkansas would achieve—and, on reconsideration, evidence that it has already achieved—the Final Rule's visibility goals. The Final Rule concludes that reducing visibility impairment at Caney Creek to 22.47 and to 22.51 deciviews at Upper Buffalo represents the reasonable rate of progress that will be achieved by 2018 from the Final Rule's controls. *See id*. at 66332/3, 66355/3. Yet the record established that as a result of other regulations, Arkansas would achieve that same rate of progress without *any* additional controls. *See id.* at 66351-52 (noting comments), 66366/1-2 (similar), 66408/1-2 (similar); 76 Fed. Reg. at 64194-95 (SIP concluded that without additional controls, Arkansas would achieve conditions just 0.01 deciviews short of the Final Rule's reasonable progress goals); Exhibit C, ¶ 18 (similar). Indeed, underscoring that analysis, commenters submitted data demonstrating that by May 2011, without any additional controls, Arkansas had already "achieved 73%

of the 2018 [goals] [Arkansas] established for Caney Creek . . . and 66% of the 2018 [goals] [Arkansas] established for Upper Buffalo." 81 Fed. Reg. at 66360/2. And subsequently available data confirms that, in 2015, Arkansas *achieved perceptibly better* visibility conditions than the Final Rule's reasonable progress goals. *See* Exhibit B, pp. 3-5 (discussing data demonstrating that Arkansas has achieved visibility conditions approximately 2 deciviews better than the Final Rule would purportedly achieve); Exhibit C, ¶¶ 20-22 (same).

In adopting the Final Rule and failing to grant reconsideration, EPA unlawfully ignored that evidence. With respect to the May 2011 data, EPA concluded that it was "not obligated to consider" that data because it concerned unapproved SIP goals established without the required four factor analysis and that had been compiled in connection with a SIP revision. 81 Fed. Reg. at 66361/3-62. That decision runs counter to the requirement that EPA respond to "new data submitted . . . during the comment period," 42 U.S.C. 7607(d)(6)(B), and guidance requiring EPA to consider reductions anticipated from other regulatory programs. 2007 Guidance, 4-1. It also disregards the fact that the SIP and Final Rule set essentially the same goals and, therefore, evidence that Arkansas would meet the SIP goals likewise demonstrated that it would meet the Final Rule's goals. *See* Exhibit C, ¶ 16-19.

Equally arbitrary is EPA's failure to act on data establishing that—as predicted—Arkansas has already achieved significantly more progress than the Final Rule determined would represent reasonable progress and be achievable through costly controls. Had EPA considered that evidence, it could not have concluded that it was cost-effective—let alone rational—to require the people of Arkansas to spend more than a billion dollars to achieve existing conditions. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."); *Nat'l Parks,* 788 F.3d at 1144 (EPA must "explain what makes a cost reasonable in light of potential visibility benefits").

Additionally, EPA failed to consider whether the cost of additional controls were warranted given that Arkansas had achieved more progress than (the uniform rate of progress demonstrated) would be required to achieve natural visibility. *See* 81 Fed. Reg. at 66408/2 (conceding progress). It justified that failure on the grounds that more progress might be achieved. *See id.* at 66361/1. But EPA does not explain how it is rational to impose well over a billion dollars in costs to achieve infinitesimal movement toward a goal that Arkansas was already on track to accomplish. Indeed, to put things in perspective, if the Final Rule had imposed

only one billion dollars in costs, each dollar would yield just 0.00000000000781 deciviews of planning period improvement. *See* Exhibit C, ¶ 23.

Further, even assuming that EPA could theoretically rely entirely upon post-planning period improvement to justify imposing costs in a first planning period FIP (which as explained below, it cannot), the Final Rule did not determine whether the fractions of imperceptible improvement from particular individual controls justified the costs of those controls. For example, even using the Final Rule's overstated estimate, the low NOx burners at Independence will—over time—result in less than 0.50 deciviews of improvement at Caney Creek and 0.25 deciviews of improvement at Upper Buffalo. 81 Fed. Reg. at 66353. But rather than determine whether such fractions of imperceptibility justify those burners' costs, the Final Rule simply lumped those burners with other controls and concluded "that, in the aggregate" and over time, various controls "will contribute to visibility progress." *Id.* at 66391/2.[3] And that unlawful approach—focused on aggregate change—pervades the Final Rule. *See id.* at 66342 (less than 0.10 deciview change from Flint Creek controls), 66344-45 (substantially less than 0.25 deciview change from White Bluff controls), 66345/2-3 (similar change at Ashdown Mill).

[3] The Final Rule concedes that NOx is "not the principal contributor to visibility extinction," 81 Fed. Reg. at 66351/1, but it concludes NOx controls are warranted because the impact from the *combination* of NOx and SO_2 controls would "exceed 1 dv." *Id.* at 66403/1. It ignores the fact that virtually all of that improvement would occur because of SO_2 controls installed after the covered period. *See id.* at 66403/2.

B. The Final Rule unlawfully imposes controls beyond the planning period.

The first planning period ends on July 31, 2018, but the Final Rule requires the installation of "controls [in the form of new scrubbers at Independence that] will not be installed until 2021." 81 Fed. Reg. at 66410/2-3. The planning process is iterative, requiring states to submit plans every ten years that "consider . . . the emission reduction measures needed to achieve [reasonable progress] *for the period covered* by the implementation plan," and impose "enforceable emissions limitations, compliance schedules, and other measures as necessary *to achieve the reasonable progress goals*." 40 C.F.R. 51.308(d)(1)-(3) (emphasis added). When EPA takes over that process, "it stands in the position of the state with all the same requirements," including the requirement that controls achieve planning period progress. *Texas*, 829 F.3d at 429.

Applying that principle, the Fifth Circuit recently stayed a FIP that imposed post-planning period controls because, by definition, those controls would not achieve planning period progress. *Id*. at 427-28. This Court should do the same here because, like the Texas FIP, the Final Rule imposes post-planning period controls (scrubbers installed in 2021) and other controls (low NOx burners installed *days* before planning period ends) that are not designed to—and will not—achieve planning period progress. And EPA's attempt to justify those controls based on

changes outside the first planning period conflicts with the requirement that an implementation plan achieve planning period progress.

Further, the Final Rule's imposition of post-planning period controls conflicts with the Clean Air Act's cooperative federalism framework. Under that framework, for *each* planning period, "the individual States" are empowered "to determine, in the first instance, the particular restrictions that will be imposed on particular emitters within their borders" and EPA's authority is limited to reviewing those determinations to ensure compliance with the Clean Air Act. *North Dakota*, 730 F.3d at 757 (quoting *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 12 (D.C. Cir. 2012)). By imposing controls *for a subsequent planning period*, the Final Rule upends that process and unlawfully divests Arkansas of its authority to make those determinations.[4]

C. The Final Rule ignores electricity impacts.

The Clean Air Act requires EPA to consider "the energy . . . impacts of compliance." 42 U.S.C. 7491(g)(1)-(2). The Final Rule ignores those impacts, including threats to the reliability of Arkansas's electricity supply posed by requiring five electric generating units to install sophisticated controls within an 18-month window. Those units represent a substantial portion of Arkansas's electricity out-

[4] The Final Rule's suggestion that EPA should be permitted to impose post-planning period controls because less than two years of that period remain conflicts with the Clean Air Act and ignores EPA's decision to wait more than four-and-a-half years to promulgate the Final Rule. *See Texas*, 829 F.3d at 430.

put, and EPA originally proposed giving operators three years to install new controls. *See* 81 Fed. Reg. at 66342, 66378/2. Commenters responded by explaining that a five year installation period would be required to "coordinat[e] and schedul[e] unit outages" and install the new controls without threatening the reliability of Arkansas's electricity supply. *Id.* at 66342/1. And consistent with those comments, in revising the Cross-State Air Pollution Rule, EPA recently concluded that, "it may be difficult to schedule outage time to upgrade all four" units at White Bluff and Independence "to state-of-the-art combustion controls for the 2017 ozone season and supply adequate electricity to meet demand in the state." *Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS*, 81 Fed. Reg. 74504, 74552/3 (Oct. 26, 2016).

EPA acknowledged a similar danger here, but did not address it. Instead, after citing evidence that "the typical deployment of [low NOx burners] . . . takes between 24-32 weeks (6-8 months) on a typical industrial boiler covering the bid evaluation through startup," Exhibit D (Institute of Clean Air Companies, *Typical Installation Timelines for NOx Emissions Control Technologies on Industrial Sources* (Dec. 4, 2006)), p. 3, EPA *somehow* concluded that outages on the five units at three facilities here could be safely scheduled, coordinated, and completed within 18 months. 81 Fed. Reg. at 66378/2-3 (citing comments relying on Exhibit

D).[5] In fact, *no one* suggested an 18-month period would be sufficient, and EPA's only explanation for adopting that period consists of a conclusory assertion that, "[t]his compliance date provides the affected utilities sufficient time beyond typical . . . installation timeframes to install these controls . . . while safeguarding the continuity of Arkansas' electricity supply." *Id*. And the Final Rule says even less about how EPA determined that same 18-month period would likewise be sufficient for Flint Creek to safely upgrade existing scrubbers, baldly asserting that, "[w]e believe that this will provide sufficient time for the facility to be able to" complete those upgrades. *Id.* at 66342/2.

From those "explanation[s], the Rule's reader is left to wonder what rationale EPA used to determine" that 18 months would safeguard Arkansas's electricity supply. *Nat'l Parks*, 788 F.3d at 1144 (similar approach was arbitrary and capricious); *see also Nat'l Parks Conservation Ass'n v. EPA*, 803 F.3d 151, 160-61 (3d Cir. 2015) (impossible to review conclusory assertions). EPA's failure to explain its conclusions demonstrates that it "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

D. The Final Rule unlawfully reverses the process for establishing controls.

The Final Rule imposes costly source specific controls before establishing reasonable progress goals. *E.g.*, 81 Fed. Reg. at 66355/3. By contrast, EPA is re-

[5] Contrary to EPA's estimate, here, it will take six to eight months just to modify relevant permits. Exhibit C, ¶¶ 38-39.

quired to establish reasonable progress goals, consider anticipated visibility improvement from existing programs and BART, and then, if additional controls are necessary to meet the reasonable progress goals, implement additional measures. *See* 42 U.S.C. 7491(b)(2); *see also* 40 C.F.R. 51.308(d)(3)(2005); 2007 Guidance, 4-1-4-2. In reversing that process, EPA arbitrarily focused on the three largest Arkansas-based emissions sources (which, in combination, account for a small fraction of impairment), determined their status as large emitters should make them subject to additional controls, decided to subject Independence (as the only non-BART source) to the same controls as the others, imposed controls, and thereafter set reasonable progress goals. *See* 81 Fed. Reg. at 66350-51, 66362/3, 66413-14.[6]

Aside from running afoul of the statutory requirements and regulations, that approach is nonsensical since it would—as here—empower EPA to impose controls on any source it arbitrarily decides is a large enough emitter that it should be controlled, regardless of the visibility impact of those emissions and whether controls are necessary to meet the reasonable progress goals. Indeed, the Final Rule's imposition of massive costs to achieve the same goals that data showed could be (and has been) achieved without additional controls underscores that approach's irrationality.

[6] EPA's amended regulations reflect its novel goal setting approach, but those amendments do not apply here.

Moreover, further illustrating that approach's arbitrariness, the Final Rule both explains that Independence was selected for additional controls because it is one of the state's "three largest emitters," *id.* at 66350/3, and argues that Independence was subjected to controls—not based on that status but—because it was somehow reasonable to impose additional controls. *Id.* at 66363/2. Yet the Final Rule does not explain what made those controls reasonable, beyond Independence's status as one of the three largest emitters. *See id*.

E. The Final Rule misapplies CALPUFF modeling.

The Final Rule imposes controls based on CALPUFF modeling that showed improvements within that model's error margin. *See Nat'l Parks*, 788 F.3d at 1146-47 (0.085 deciviews is less than CALPUFF's error margin); 81 Fed. Reg. at 66342 (smaller impact from controls). The Final Rule acknowledges CALPUFF can overestimate impacts, but rather than respond to comments asking EPA to explain how projected improvement within the error margin could justify additional controls, EPA simply asserted that because CALPUFF *can* also under-predict impacts, the model was appropriate. *See id.* at 66399/2.

F. EPA did not consider alternative methods of assessing costs.

The Final Rule did not respond to comments suggesting that in determining cost effectiveness, EPA consider visibility improvement on a dollar-per-deciview basis. *See* 81 Fed. Reg. at 66388/2. EPA has taken inconsistent—and confusing—

positions on that metric's applicability. *See Nat'l Parks Conservation Ass'n*, 803 F.3d at 164. Yet here, EPA declined to consider it, claiming that, "while the $/deciview metric can be useful" it "suggest[s] a level of precision in the calculation of visibility impacts that is not justified in many cases" and that the dollar-per-ton of pollution removed metric is *generally* preferred. 81 Fed. Reg. at 66388/3. Thus, despite comments explaining why the dollar-per-deciview metric would be useful in assessing *this FIP*, EPA simply declined to decide whether that metric might be useful here.

EPA likewise declined to consider comments explaining why EPA's use of a cumulative visibility impact metric—which aggregates fractions of imperceptibility at different sites—caused EPA to overstate control benefits. *See id*. at 66389. Commenters observed, for instance, that by aggregating microscopic, imperceptible impacts at different sites, EPA created a false impression of progress. *See id*.; *see also id*. at 66340-48. Instead of responding to those comments, EPA created a strawman, arguing that, contrary to the comments, "[n]othing in the [applicable regulations] suggests that" EPA "should ignore the full extent of the visibility impacts and improvements from controls at multiple Class I areas." *Id.* at 66390/2. But no one disputes that EPA can consider impacts at multiple locations. Rather, the comments suggested that EPA's method of considering those impacts was misleading and caused EPA to overestimate the benefits of additional controls.

II. Absent a stay, Arkansas will suffer irreparable harm.

Without a stay, Arkansas, its citizens, and its economy will immediately suffer irreparable harm. The Final Rule imposes substantial costs on electricity sources. *See* Exhibit E (Thomas), ¶ 8; Exhibit F (Miller), ¶¶ 13-20; *see also* 81 Fed. Reg. at 66376/2-3. Five electricity generating units will be required to shut down to install low NOx burners within 18 months. *Id.* at 66378. Ultimately, those and other modifications will cost substantially more than a billion dollars. *See, e.g.*, *id*. at 66390/3.

To meet those deadlines, operators must immediately incur substantial expenses. *Id.* at 66376/2-3. Those expenses will be irretrievably sunk, and "[t]he threat of [such an] unrecoverable economic loss" demonstrates irreparable harm. *Iowa Utilities Bd.*, 109 F.3d at 426; *see also Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994) (unrecoverable economic costs demonstrate harm); *Texas*, 829 F.3d at 433 ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and in the judgment))). Although operators may recoup some costs by passing them on to end-users, like "manufacturing facilities, small busi-

nesses, residential ratepayers, and those on fixed or low incomes," Exhibit E, ¶ 8, that "would merely spread the injury more broadly and increase further the damage." *Texas*, 829 F.3d at 434 n.41; *see also* Exhibit F, ¶¶ 13-20; Exhibit G (McMurray), ¶¶ 7-9; Exhibit H (Zook), ¶¶ 11-14.

The Final Rule likewise threatens the reliability of Arkansas's electricity supply. *See* Exhibit E, ¶ 9; Exhibit F, ¶¶ 19-20; 81 Fed. Reg. at 66376/2-3; *see also supra* at pp. 15-17; 81 Fed. Reg. at 74552/3 ("it may be difficult to schedule outage time to install" controls at four of the five units involved here and "supply adequate electricity"). The threat of disruption constitutes irreparable harm. *Baker Elec. Co-op.*, 28 F.3d at 1473 & n.5 (8th Cir. 1994) (disruption threat and increased costs constitute irreparable harm); *Texas*, 829 F.3d at 433-434 (reliability threat constitutes irreparable harm); *see also* Exhibit H, ¶ 14.

Further, by imposing controls that Arkansas must immediately comply with—and abide by in subsequent planning periods—the Final Rule immediately and irreparably interferes with Arkansas's sovereignty. *See Texas*, 829 F.3d at 434.

III. The remaining factors likewise favor a stay.

The third factor considers the prospect of harm to others if a stay is granted. Neither EPA nor anyone else can plausibly suggest that a stay will result in harm, given that the Final Rule's alleged visibility benefits are imperceptible, Arkansas has achieved greater progress than is required to achieve natural visibility condi-

tions before 2064, and current visibility conditions are better than what the Final Rule would purportedly achieve. *See* Exhibit C, ¶¶ 20-22; Exhibit B, 3-4; 81 Fed. Reg. at 66408/1-2. Moreover, many controls will not take effect until 2021.

The fourth factor considers whether a stay is in the public interest. This factor strongly favors a stay because "the public's interest in ready access to affordable electricity outweighs the inconsequential visibility differences that the federal implementation plan would achieve in the near future." *Texas*, 829 F.3d at 435; *see also Baker Elec. Co-op.*, 28 F.3d at 1473 (supply disruption could hinder productivity and cause economic harm); *Sierra Club v. Ga. Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999) (per curiam) ("[S]teady supply of electricity during the summer months, especially in the form of air conditioning to the elderly, hospitals and day care centers, is critical."); *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 357 (10th Cir. 1986) (public interest favors injunction where customers could lose electricity access); Exhibit H, ¶¶ 11-14.

CONCLUSION

For the foregoing reasons, this Court should stay the Final Rule and toll all compliance deadlines.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this brief contains 5,192 words.

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CERTIFICATE OF SERVICE

I, Nicholas J. Bronni, do hereby certify that on February 7, 2017, I electronically submitted for filing the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit via the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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