IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF ARKANSAS, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al. Respondents.	No. 16-4270 (and Consolidated Cases)

AMENDED AND SUBSTITUTED MOTION TO STAY FINAL RULE OF THE ENVIRONMENTAL PROTECTION AGENCY BY ENTERGY ARKANSAS, INC., ENTERGY MISSISSIPPI, INC., ENTERGY POWER, LLC, AND ENERGY AND ENVIRONMENTAL ALLIANCE OF ARKANSAS

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1. Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan, 81 Fed. Reg. 66,332 (Sept. 27, 2016).

2. Entergy, Petition for Reconsideration and Request for Stay of Entergy Arkansas Inc., et al., of the Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan (exhibits omitted).

3. Energy and Environmental Alliance of Arkansas, Petition for Reconsideration and Request for Administrative Stay of the Regional Haze and Interstate Visibility Transport Federal Implementation Plan for the State of Arkansas.

4. Declaration of Kenneth J. Snell, Senior Manager, Sargent & Lundy, L.L.C. (January 11, 2018).

5. Declaration of Bryan Sikes, Manager, Fleet Maintenance – Controls and Electrical, Entergy Services, Inc. (January 11, 2018).

6. Entergy Arkansas Inc., Comments on the Proposed Regional Haze and Interstate Visibility Transport Federal Implementation Plan for Arkansas (Aug. 7, 2015) (Docket ID No. EPA-R06-OAR-2015-0189-0166) (exhibits omitted).

7. EPA, Guidance for Setting Reasonable Progress Goals under the Regional Haze Program (June 1, 2007) (Docket ID No. EPA-R06-OAR-2015-0189-0230).

8. Declaration of Jeremy Jewell, Principal Consultant, Trinity Consultants, Inc. (January 11, 2018).

9. Declaration of Jake Rice, III, Manager, Jonesboro City Water and Light (January 11, 2018).

10. Declaration of Kurtis W. Castleberry, Director, Resource Planning and Market Operations, Entergy Arkansas, Inc. (January 11, 2018).

11. Declaration of Jonathan Long, Vice President of Project Management, Entergy Services, Inc. (January 11, 2018).

GLOSSARY

APA	Administrative Procedures Act
APSC	Arkansas Public Service Commission
BART	Best Available Retrofit Technology
CAA	Clean Air Act, 42 U.S.C. §§ 7401-7671q
DSI	Dry Sorbent Injection
EAI	Entergy Arkansas, Inc.
EEAA	Petitioner Energy and Environmental Alliance of Arkansas
EPA	Environmental Protection Agency
FGD	Flue Gas Desulfurization
FIP	Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan, 81 Fed. Reg. 66,332 (Sept. 27, 2016)
IMPROVE	Interagency Monitoring of Protected Visual Environments
Independence	Independence Steam Electric Station
Lbs/hr	Pounds per hour
LNB/SOFA	Low NO_x Burners/Separated Over-fire Air
LTS	Long Term Strategy
MMBtu	Million British Thermal Units
NO_x	Nitrogen Oxides
RPG	Reasonable Progress Goals
SIP	State Implementation Plan
SO_2	Sulfur Dioxide
URP	Uniform Rate of Progress

White Bluff	White Bluff Steam Electric Station

INTRODUCTION

Pursuant to Rule 18(a) of the Federal Rules of Appellate Procedure, Entergy Arkansas, Inc. ("EAI"), Entergy Mississippi, Inc., and Entergy Power, LLC (collectively "Entergy") and the Energy and Environmental Alliance of Arkansas ("EEAA") move to stay the Environmental Protection Agency's ("EPA's") final rule "Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan" (the "FIP"), 81 Fed. Reg. 66,332 (Sept. 27, 2016) (Exh. 1) and to toll the applicable compliance deadlines.[1] Movants filed administrative stay requests with EPA, but no administrative stay is currently in effect, and their only recourse is with the Court.[2] EPA has stated that it does *not* oppose a stay. *See* Doc. 4614990 at 4-5.

Movants recognize that nearly a year has passed since their initial stay motion was filed. Although the passage of time has altered the regulatory landscape—most notably the State of Arkansas has proposed two rules that would replace the FIP if approved by EPA—it has not eliminated movants' ongoing irreparable harm. This Court and others have issued stays of regional haze FIPs previously, and the Court

[1] *See* 40 C.F.R. §§ 52.173(c)(6)-(8) & (c)(24)-(26). This motion amends and substitutes for the stay motion that movants filed February 8, 2017 (Doc. 4499749), which is superseded. Developments that occurred during the abeyance period necessitated amending the prior motion.

[2] *See* Exhs. 2-3. EPA granted a 90-day administrative stay of one part of the FIP, but it expired. 82 Fed. Reg. 18,994 (April 25, 2017).

should act now to prevent further irreparable harm. *See Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016); Order, *Cliffs Natural Resources v. EPA*, Doc. # 4045612, Case No. 13-1758 (8th Cir. June 14, 2013); Order, *Wyoming v. EPA*, Doc. # 1019307361, Case No. 14-9529 (10th Cir. Sept. 9, 2014). A stay is warranted even if the Court places this matter into long-term abeyance as EPA has requested (*see* Doc. 4611165) because movants continue to be irreparably harmed.

First, movants will succeed on the merits of their challenge because the FIP is arbitrary, capricious, and not in accordance with the Clean Air Act ("CAA"), 42 U.S.C. § 7607(d)(9), or the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551(5), 553(c). The two plants at issue include four coal-fired units, two each at the White Bluff Steam Electric Station ("White Bluff") and the Independence Steam Electric Station ("Independence"), that are co-owned and operated by Entergy.[3] They are required by the FIP to install approximately *$2 billion of emission controls* under draconian deadlines that would result in minuscule benefits (given that visibility in Arkansas' two Class I areas already beats the goals EPA set for Arkansas) and that cannot be achieved in the timeframe the FIP is designed to address. *Cf. Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Further, EPA failed to consider mandatory statutory factors, diverged from past precedent without a reasoned basis, made major errors in its analysis and calculations, and departed from its proposed FIP so

[3] EEAA members are co-owners of these plants.

significantly that movants were deprived of their procedural rights under the CAA and APA.

Second, if a stay is not granted, movants (not to mention their customers and local communities) will suffer substantial irreparable harm. The most immediate deadline—April 2018 for the nitrogen oxides ("NO_x") emissions limitations at both plants—is fast approach but the limitations cannot reliably be met and would require curtailment of operations at the units if not stayed. As to sulfur dioxide ("SO_2"), Entergy must start spending millions of dollars in 2018 on resource planning for development of replacement power and related activities, because it cannot simply gamble both that EPA will approve the state's proposed replacement rules and that the courts will uphold those rules. Movants' irreparable harms would be avoided by a judicial stay including tolling the FIP's compliance deadlines.

Third, the public interest will not be harmed by a brief stay, and the balance of harms, including those to the local communities and Entergy's employees and customers, weighs heavily against EPA's imperceptible projected visibility benefits and in favor of a stay.[4]

[4] The FIP solely addresses visibility, not human health.

BACKGROUND

A. The CAA's Visibility Program

To address man-made visibility impairment (*i.e.*, "regional haze") in national parks and other Class I areas, states must establish visibility goals and propose state implementation plans ("SIPs") containing measures "to make reasonable progress" towards meeting those goals. 42 U.S.C. § 7491(b); *see generally* 40 C.F.R. § 51.308. Arkansas has two Class I areas, the Caney Creek and Upper Buffalo Wilderness Areas. 81 Fed. Reg. at 66,332.

This long-term program is implemented in phases ("planning periods") in which states develop interim reasonable progress goals ("RPGs") in 10-year intervals, ultimately seeking to achieve natural visibility conditions in Class I areas by 2064. 64 Fed. Reg. 35,714, 35,746 (July 1, 1999). The first such period is 2008-2018. *See, e.g.,* 81 Fed. Reg. at 66,338. Regional haze SIPs for the first period must include: (1) RPGs (expressed in "deciviews"[5]) for Class I areas in the state; (2) implementation of best available retrofit technology ("BART") for eligible stationary sources; and (3) a long-term strategy ("LTS") to achieve reasonable progress (including emissions limits or other measures).

[5] Changes of less than 1.0 deciview are generally imperceptible to the human eye. *See* 77 Fed. Reg. 30,248, 30,250 (May 22, 2012).

To establish RPGs, states must, at a minimum, consider four statutory factors: "the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements." 42 U.S.C. § 7491(g)(1). States must also determine "the [uniform] rate of progress needed to attain natural visibility conditions by the year 2064" ("URP" or "glidepath"), and consider "the emission reduction measures needed to achieve [the glidepath] *for the period covered by the implementation plan*," *i.e.*, the 10-year planning period. 40 C.F.R. § 51.308(d)(1)(i)(B) (emphasis added).

BART determinations for eligible sources must consider five factors: "the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology." 42 U.S.C. § 7491(g)(2).

Although "cost of compliance" and "remaining useful life" are separate factors, EPA acknowledges that the latter should be treated as an element of the former. 40 C.F.R. Part 51, app. Y(IV)(D)(4)(k)(1). The shorter the remaining useful life of the source, the less cost-effective the controls will be, because they will be utilized for a shorter period of time. "Where the remaining useful life is less than the [default] time

period for amortizing costs, *you should use this shorter time period in your cost calculations*." *Id.* (emphasis added).

Finally, states must develop LTSs for Class I areas. *Id.* § 51.308(d)(3). LTSs include "enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals." *Id.* These may include reasonable progress emissions limitations for affected sources.

B. The Arkansas Regional Haze SIP and FIP

In 2012, EPA partially disapproved Arkansas' proposed regional haze SIP, including NO_x and SO_2 BART determinations for White Bluff and the RPGs. 77 Fed. Reg. 14,604, 14,605 (Mar. 12, 2012). EPA agreed that BART is not required for Independence, *id.* at 14,607, and therefore the plant could only be regulated, if at all, for reasonable progress purposes.

Subsequently, EPA proposed and finalized the FIP, standing in the shoes of the state. *Cent. Arizona Water Cons. Dist. v. EPA*, 990 F.2d 1531, 1541 (9th Cir. 1993). The FIP establishes NO_x and SO_2 limits for both plants (based on BART for White Bluff and reasonable progress for Independence) that will require installation of approximately $2 billion in emission controls, Snell Dec. ¶9 (Exh. 4), on tight deadlines: 18 months for NO_x and five years for SO_2. 81 Fed. Reg. at 66,413-14. Specifically, the control technology required by EPA's mandated emissions limitations

are, for NO_x, low-NO_x burners with separated over-fire air ("LNB/SOFA"), and, for SO_2, flue gas desulfurization ("FGD" or "scrubbers"). *Id.* at 66,343-44, 52-53.[6]

During the abeyance period, the state proposed two parts of a SIP revision that, if approved by EPA, would supersede the portions of the FIP applicable to White Bluff and Independence. *See* 82 Fed. Reg. 42,627 (Sept. 11, 2017) (EPA's proposal to approve the state's "Part I" SIP concerning NO_x); https://www.adeq.state.ar.us/air/planning/sip/pdfs/regional-haze/public-review-package.pdf (the state's proposed "Part II" SIP revision intended to replace most of the remaining portions of the FIP); Doc. 4611165 Exhibit A (Memorandum of Understanding between EPA and the state). EPA approval is not certain, but if approved these rules will likely be challenged by the Environmental Petitioners or others.

STANDARD OF REVIEW

The stay analysis must consider: "(1) the likelihood that a party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 423 (8th Cir. 1996).

[6] EPA subsequently proposed to extend the NO_x deadline to January 27, 2020, 82 Fed. Reg. 32,284 (July 13, 2017), but has not taken action on that proposal.

ARGUMENT

I. MOVANTS WILL SUCCEED ON THE MERITS OF THEIR CLAIMS

A. EPA Unlawfully Imposed an 18-Month Deadline for the FIP's NO_x Limitations Without Notice and an Opportunity for Comment

The FIP's 18-month deadline to install LNB/SOFA and achieve two tiers of NO_x emissions limitations at White Bluff and Independence, 81 Fed. Reg. at 66,416, 66,420, is unlawful because it is not a logical outgrowth of EPA's proposed three-year deadline. 80 Fed. Reg. 18,944, 19,002, 19,004 (Apr. 8, 2015). Furthermore, actual experience shows that EAI cannot install, tune, test, and reliably operate LNB/SOFA at all four units in time to achieve compliance by April 2018. *See infra* Section II(A).

Agencies may not "pull a surprise switcheroo on regulated entities," *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005), and interested parties are not required to "divine [the agency's] unspoken thoughts." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (citation omitted); *see also Nat'l Exch. Carrier Ass'n, Inc. v. FCC,* 253 F.3d 1, 4 (D.C. Cir. 2001). Thus, a final rule is only a logical outgrowth of its proposal "if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *CSX Transp.,* 584 F.3d at 1079–80.

EPA proposed three years for installation of LNB/SOFA. 80 Fed. Reg. at 18,975, 96. EPA did *not* solicit comment on this deadline or otherwise imply it was considering a shorter timeframe, *id.* at 18,973-75, 94-97, in stark contrast to its express

solicitation of comment on the compliance deadlines for other sources. *See, e.g.*, *id.* at 18,985 (proposing three years but soliciting comments on one to five years). Instead, EPA's decision to shorten the deadline appears to have come from Environmental Petitioners' comments. *See* 81 Fed. Reg. at 66,378. Contrary to EPA's assertion, *id.* at 66,344, it is well-established that EPA "cannot bootstrap notice from a comment." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

Had movants been given an opportunity to comment on the shorter 18-month deadline, they would have explained that such a deadline is infeasible. *See infra* Section II.A. EPA's error is material. EAI has been working to install and tune the controls, but it cannot reliably meet the April 2018 deadline. *Id.*

B. EPA's Low-Load NO_x Limitations Are Unlawful Because They Cannot Be Achieved and Were Imposed Without Notice and an Opportunity for Comment

EPA unlawfully imposed low-load NO_x emissions limitations that were not a logical outgrowth of the proposed FIP. The three-hour averaging period required for low-load NO_x emissions, 81 Fed. Reg. at 66,416, 66,420, renders the standard unachievable, even using the technology required by EPA.

EPA proposed a single NO_x emissions limit of 0.15 lbs NO_x/MMBtu, averaged over 30 operating days for both plants. 80 Fed. Reg. at 19,002, 19,004. EAI's comments explained that the White Bluff and Independence units are frequently operating at less than 50% capacity due to changes in electricity dispatch, EAI Comments at 49-50, but LNB/SOFA cannot be operated effectively at less than 50%

capacity, rendering EPA's proposed NO_x limits unachievable. *Id.* at 51. EAI proposed an alternative NO_x emission limit of 1,342.5 lbs NO_x/hr, averaged over 30 operating days to even out the peaks and valleys. *Id.*

In the FIP, EPA recognized that its proposed NO_x emissions limits were unachievable during low load conditions but issued final standards that are not a logical outgrowth of the proposal or EAI's alternative. Specifically, EPA finalized low-load limitations of 671 lbs NO_x/hr (half of EAI's proposal), with an averaging period of only three hours (less than one percent of EAI's proposal). 81 Fed. Reg. at 66,416, 66,420. Both the numeric limit and the averaging period differed so substantially from EPA's (and EAI's) proposal that they deprived movants of any opportunity to comment on the standard and explain why it would prove unachievable in practice.

EPA's error is material. Given the chance to comment, movants would have explained that the low-load NO_x limitation would be unachievable under many operating conditions. Now, actual experience proves the point that NO_x can spike when generating loads are ramped up or down due to demand. Sikes Dec. ¶15 (Exh. 5). Such brief excursions can cause an exceedance when averaged over short periods of time (*e.g.*, three hours). *Id.* Thus, even if the required NO_x emission controls are operating as intended, the units will be unable to meet the low-load NO_x limits unless the averaging time is extended significantly. *Id.* Neither the CAA nor EPA's

implementing regulations authorize EPA to establish unachievable emissions limits, and certainly not without notice and opportunity for comment.

C. EPA Unlawfully Imposed More Than a Billion Dollars of SO_2 Controls on the White Bluff Units Without Accounting for the Remaining Useful Lives of Those Units

The FIP unlawfully imposes SO_2 controls (FGD) on the White Bluff units that are estimated to cost about $1 billion, Snell Dec. ¶9, and that are not cost effective based on the remaining useful lives of those units. Yet to qualify as BART, FGD *must* be cost effective, considering the remaining useful lives of the units. 42 U.S.C. § 7491(g)(2); *accord* 40 C.F.R. §§ 51.308(e)(1)(ii)(A) & app. Y(IV)(D)(4)(k). By ignoring EAI's commitment in its comments on the proposed FIP to cease coal firing at the White Bluff units and wrongly assuming those units would remain in service for at least 30 years, EPA grossly and artificially underestimated the cost of FGD on a dollar per ton of SO_2 removed basis (the metric used by EPA), making FGD appear cost effective when it patently is not.

EAI commented on the proposed FIP that it would accept a binding commitment to cease coal firing at the two White Bluff units in 2027 and 2028. EAI Comments at 5 (Exh. 6). Thus, for purposes of the BART analysis, those units had only six and seven years of remaining useful lives, respectively, after the 2021 compliance deadline. *See* 81 Fed. Reg. at 66,416. If EPA had used that remaining life in its analysis as required by 40 C.F.R. Part 51, app. Y(IV)(D)(4)(k)(1), instead of a 30-year amortization period, the annualized cost of FGD would have *tripled* from $2,421-

$2,565 to $7,119-$8,004 per ton SO_2. *Compare* 81 Fed. Reg. at 66,343 *with* Snell Dec. ¶28. These annualized costs vastly exceed the cost-effectiveness thresholds EPA has used in other BART determinations.[7] Because EPA ignored the remaining useful lives of the White Bluff units, the SO_2 limitations for that plant are not in accordance with law.

EPA's justifications for ignoring EAI's comments are misguided and cannot justify the agency's unlawful action here. First, EPA erroneously asserts that EAI's comments did not include a binding commitment to cease coal firing, although EPA acknowledged that it would be obligated to consider remaining useful life if EAI had included such a binding commitment. 81 Fed. Reg. at 66,356-57. EAI's statement, however, is impossible to misconstrue: "[EAI] proposes *to cease burning coal at White Bluff Units 1 and 2 by 2027 and 2028* … and *is prepared to take an enforceable commitment to that effect*." EAI Comments at 5 (emphasis added). Second, EPA incorrectly asserts that EAI's offer to cease coal firing at White Bluff was contingent upon EPA's acceptance of higher SO_2 limits at the Independence units. 81 Fed. Reg. at 66,358. That alleged contingency appears nowhere in EAI's comments. Third, EPA dismissed EAI's offer because Entergy failed to evaluate dry sorbent injection ("DSI") as an

[7] *See, e.g.,* 79 Fed. Reg. 52,420, 52, 436 (Sept. 3, 2014) (finding FGD *not* cost effective at $5,090 per ton in Arizona); 77 Fed. Reg. 23,988, 24,047 (Apr. 20, 2012) (finding SO_2 controls *not* cost effective at $5,442 per ton in Montana).

interim SO_2 control measure. *Id.* at 66,357. This is a red herring. The viability of DSI as a control measure is unrelated to the cost effectiveness of FGD.

Additionally, EPA's BART analysis is arbitrary and capricious because it is inconsistent with EPA's treatment of other facilities that have offered to cease operations as an alternative to installing expensive emissions controls. EPA's regulations specifically authorize it to establish alternative emissions limits where a source may ultimately cease the operations that produce emissions. 40 C.F.R. Part 51, app. Y(IV)(D)(4)(k)(3). In fact, in the FIP, EPA imposed an alternative limit on petitioner Domtar's Power Boiler No. 1. *See* 81 Fed. Reg. at 66,346 (alternative BART standards if Domtar burns only natural gas). EPA offered no reasoned basis to deviate from this precedent nor for refusing to establish alternative BART limits for White Bluff. *See Dillmon v. NTSB*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009) (citing *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009)).

D. EPA Unlawfully Imposed More Than a Billion Dollars of Controls on the Independence Units That Are Expected to Produce Only Imperceptible Visibility Improvements and That Are Not Achievable in the First Implementation Period

The FIP unlawfully singled out Independence for reasonable progress emissions controls—FGD and LNB/SOFA—costing about $ 1 billion dollars. Snell Dec. ¶9. Because Independence is not required to install BART, controls can only be required if they are "necessary to make reasonable progress toward" achieving natural

visibility levels. 42 U.S.C. § 7491(b)(2). The controls selected here are unnecessary and otherwise unlawful for three reasons.

First, the FIP's reasonable progress emission limitations are not in accordance with law because they require controls that cannot be implemented nor improve visibility during the planning period covered by the FIP. EPA's regulations require consideration of "the emission reduction measures needed *to achieve [the RPG] for the period covered by the implementation plan*" and to impose "enforceable emissions limitations, compliance schedules, and other measures, as necessary, to achieve the [RPGs]." 40 C.F.R. § 51.308(d)(1)(i)(B), (d)(3) (emphasis added). Here, the first period runs from 2008 to 2018, *see, e.g.,* 81 Fed. Reg. at 66,338, but scrubbers are not even required to be installed until 2021.[8] *Id.* at 66,416, 20. This is precisely the situation the Fifth Circuit confronted when it stayed a similar regional haze FIP. *Texas*, 829 F.3d at 430 (holding that petitioners were likely to succeed on claims, *inter alia*, that EPA unlawfully required emissions controls that would be installed after 2018).

[8] Environmental Petitioners incorrectly argue that a later rule changed the first planning period to 2008-2021. *See* Doc. 4613892 at 12. That other rule did nothing more that extend the state's deadline for submitting *second* planning period SIPs from 2018 to 2021. *See* 82 Fed. Reg. 3,078, 3,116-18 (Jan. 10, 2017). It did not amend the FIP, which says on its face that 2018 is "*the end of the implementation period.*" 81 Fed. Reg. at 66,338 (emphasis added).

Second, EPA's emissions limitations for Independence are unjustified in light of the progress Arkansas already has made on visibility in Class I areas. Simply put, it is not necessary to limit emissions to "achieve" goals that have already been achieved. 40 C.F.R. § 51.308(d)(1)(i)(B). "RPGs are interim goals," EPA, Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program (Regional Haze Guidance) at 1-2 (Exh. 8), and there is no obligation to complete all emissions reductions at once. "It is reasonable … to defer reductions to later planning periods in order to maintain a consistent glidepath [*i.e.*, the URP] toward the long-term goal." *Id.* at 1-4. Furthermore, imposition of BART and other CAA regulations may be sufficient to achieve reasonable progress during the first planning period. *Id.* at 4-1. Recent Interagency Monitoring of Protected Visual Environments ("IMPROVE") data confirms that visibility in Arkansas' Class I areas already is better than *both* the glidepath (by more than 40 times the estimated benefits from controlling Independence) *and* EPA's RPGs. Jewell Dec. ¶¶12-14 (Exh. 7). In fact, visibility conditions at both areas are already below the URP for the *second* planning period. *Id.* ¶12; *see also* EAI Comments at 19-23.

Thus, it was arbitrary and capricious for EPA to impose more than $1 billion in emissions controls on Independence, particularly in light of the imperceptible visibility improvements, less than the human eye can even perceive, projected from those

controls. *Cf. Michigan*, 135 S. Ct. at 2707 (finding it irrational "to impose billions of dollars in economic costs" in a CAA rule to produce minimal benefits).[9]

Finally, the FIP's reasonable progress emissions limitations for the Independence units are arbitrary and capricious because EPA deviated, without reason, from the process used to establish reasonable progress emission limitations in other FIPs. Here EPA singled out Independence merely because it is the largest non-BART-eligible emission source in Arkansas. 80 Fed. Reg. at 18,991-92. But in doing so, EPA ignored its own guidance, which directs the agency to "consider a broad array of sources and activities when deciding which sources or source categories contribute significantly to visibility impairment." EPA, Reasonable Progress Guidance at 3-2.

EPA likewise departed from the detailed and comprehensive multi-source analysis conducted in Texas and other states. *See, e.g.,* 79 Fed. Reg. 74,818, 74,877-78 (Dec. 16, 2014) (Texas); 77 Fed. Reg. at 24,050 (Montana); 76 Fed. Reg. 58,570, 58,635 (Sept. 21, 2011) (North Dakota). In those other states, EPA identified all sources for which installation of controls might be worthwhile and then performed a reasonable progress analysis on *all* of those sources. Here, EPA simply singled out

[9] Even using EPA's projected visibility benefits, which were based on computer modeling, the improvements at individual Class I areas are small. 81 Fed. Reg. at 66,353. The Environmental Petitioners wrongly claim that the benefits are even higher than EPA claimed, citing the *proposed* (not final) rule and improperly summing the benefits at each area into a grand total. *See* Doc. 4613892 at 6-7.

Independence without any additional analysis, 81 Fed. Reg. at 66,362-65, and failed to offer a reasoned justification for ignoring this past agency precedent of doing so. *See Dillmon*, 588 F.3d at 1089-90; *see also* 40 C.F.R. § 56.5(a) (requiring national consistency between EPA regions).

II. MOVANTS WILL SUFFER IMMINENT AND IRREPARABLE HARMS ABSENT A STAY

A. Entergy Faces Irreparable Harm Due to the FIP's NO_x Deadline

Entergy will be irreparably harmed because the April 2018 deadline to comply with the FIP's NO_x limitations provides insufficient time to install and appropriately tune LNB/SOFA at White Bluff and Independence to meet those emissions limitations. *See generally* Sikes Dec.[10]

For reasons beyond just the FIP, Entergy moved forward with installation of LNB/SOFA since the litigation commenced. After more than a year's work, the units are unable to meet the FIP NO_x limitations by the deadline at all four units *and* comply their existing permit limitations. *Id.* ¶¶12-17. For example, at the units where LNB/SOFA has been installed and tuning is on-going, Entergy has determined that, under many operating conditions, the units could only achieve the FIP's main NO_x limitation by exceeding their permit limitations for another pollutant, carbon

[10] For simplicity, Section II focuses on Entergy's irreparable harms, as well as harms to the community. Co-owners, such as EEAA members would also be harmed. *See, e.g.,* Rice Dec. (Exh. 9).

monoxide. *Id.* ¶16. Without relief from the FIP or another compliance option, in April 2018, these units would be forced to curtail operations significantly because Entergy will not willfully operate in noncompliance. *Id.* ¶17. Untimely curtailment of operations could significantly impact dispatch or force the plant owners to purchase replacement power on the spot market—potentially at significantly increased prices—to meet the reliability needs of their customers. Castleberry Dec. ¶¶10-13 (Exh. 10). The Catch-22, however, is that Entergy must be able to operate to further tune the equipment to meet the FIP's limitations.

Entergy also believes that it will not be able to reliably operate in compliance with the FIP's secondary NO_x limitation—the low-load limitation—at all locations and in all operating conditions. Sikes Dec. ¶15. This is exacerbated by the fact that the averaging time specified in the FIP, which was promulgated without an opportunity for comment, is too short. A stay would avoid these irreparable harms.

B. Entergy Will Suffer Irreparable Harm from the FIP's SO_2 Requirements

The FIP's SO_2 emissions limitations require Entergy to start resource planning for development of replacement power and related activities that may be entirely unnecessary, because Entergy cannot simply gamble that EPA will approve the state's proposed replacement rules *and* that the courts will uphold those rules and EPA's approvals in light of already-threatened litigation. Should that gamble fail, Entergy would have to shutter the plants prematurely, harming employees and local

communities, without sufficient time to develop replacement power. Movants are irreparably harmed because they must expend millions of dollars in resources planning for compliance with an unlawful rule. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and in the judgment) ("[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs."); Castleberry Dec. ¶¶14-26; Long Dec. ¶¶10-13 (Exh. 11).

To be clear, should the state's replacement rule fail, movants would have insufficient time before the FIP's 2021 SO_2 compliance deadline meet the limits or arrange for adequate and cost-effective replacement power. Scrubbers take five years to design, source, and install, Snell Dec. ¶¶29-32, and replacement power takes at least that long to plan, permit, and construct, neither of which could be accomplished in the limited time before 2021. Castleberry Dec. ¶22; *see also* Long Dec. ¶11. Entergy would have no choice but to shutter the units in 2021, and movants would be forced to purchase power, if available, on the open market to serve their customers.

Furthermore, deactivating any of the units would cause irreparable harm to Entergy employees and their local communities. White Bluff supports an estimated 1,237 direct and indirect jobs. Castleberry Dec. ¶27. At Independence, Entergy employs 115 full-time employees and hundreds of contractors who provide a variety of support services. *Id.* ¶28. If White Bluff and Independence were to cease operations, the company would have to lay off or reassign its employees, and the

contractors would be out of work. *Id.* ¶29. These shutdowns would have significant impacts on the rural Arkansas communities where the plants are located. *Id.* ¶30.

To ameliorate those worst case harms, movants must start resource planning in 2018 and would expend millions of dollars during the next 12-24 months that could otherwise be avoided. *Id.* ¶¶19, 26. Planning for the deactivation of White Bluff and Independence would be complicated and costly given that the four units account for about 3,300 megawatts of generating capacity, which represents nearly a quarter of Arkansas' net generation, more than 50% of the net generation for several co-owners, and is enough to power approximately 500,000 homes. *Id.* ¶20. Until replacement generation is constructed, Entergy would need to obtain replacement power on the open market, exposing customers to price variability. *Id.* ¶¶22-23.

Movants' irreparable harms will continue until there is certainty about the regional haze requirements in Arkansas, meaning one of the following occurs: (i) EPA approves the state's replacement SIP and those approvals and the underlying rules both survive judicial review; (ii) EPA approves the state's replacement SIP, but either the approvals or underlying rules are reversed, and the FIP is then litigated to conclusion; or (iii) EPA disapproves the state's replacement SIP and the FIP is litigated to conclusion. The minimum time for that certainty is about 12 months (based on EPA's commitment to complete administrative proceedings related to the State's proposed replacement rules by the end of 2018, *see* Doc. 4611165 at Exhibit

A). The maximum is 24-36 months or more (based on the estimated time needed to complete any state and federal litigation related to the state's replacement rule).

All the while, movants alone bear the very substantial risk of failing to take action now to comply with the FIP. The above harm would be avoided by a judicial stay including tolling the FIP's compliance deadlines.

III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST FAVOR A STAY

The final two factors are plainly met. Given that the FIP only addresses visibility at two Class I areas in Arkansas, not human health, *see* 42 U.S.C. § 7491(a)(1), the only arguable harm to the public interest from a stay would be a brief delay in negligible visibility improvements that would not occur until after the stay period and would be less than the human eye can even perceive. EAI Comments at 41. Moreover, as noted above, visibility in Arkansas' Class I areas already is better than both the RPGs and the Class I areas' glidepaths. Jewell Dec. ¶¶12-13. Finally, the negligible visibility improvements could not occur during the planning period addressed by the FIP. By contrast, if a stay is not granted, movants will be irreparably harmed and the four units' viability will be jeopardized.

CONCLUSION

For the foregoing reasons, the Court should stay 40 C.F.R. §§ 52.173(c)(6)-(8) and (c)(24)-(26) pending judicial review and make clear that the associated compliance deadlines are tolled during the period of the stay.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel states that this motion complies with Fed. R. App. P. 27(d)(2)(A) because it contains 5,065 words, excluding the caption, table of contents, table of authorities, list of exhibits, glossary of terms, signature blocks, and certificates of compliance and service as counted by a word processing system and, therefore, is within the 5,200 word limit. This motion also complies with typeface and type-style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface in 14-point Garamond. The electronic files comprising this motion and filed with the Court have been scanned and are virus free, as set forth in 8th Cir. R. 28(h)(2).

Dated: January 11, 2018

/s/ Timothy K. Webster

Counsel for Entergy Arkansas Inc., Entergy Mississippi Inc., and Entergy Power, LLC

CERTIFICATE OF SERVICE

I hereby certify that the copies of the foregoing Amended and Substituted Motion to Stay Final Rule of the Environmental Protection Agency by Entergy Arkansas Inc., Entergy Mississippi Inc., Entergy Power, LLC, Arkansas Electric Cooperative Corporation, and Energy and Environmental Alliance of Arkansas was served, this 11th day of January, 2018, through CM/ECF on all registered counsel.

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