Nos. 07-9546 and 07-9547 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ARIZONA PUBLIC SERVICE COMPANY, and SIERRA CLUB, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

ARIZONA PUBLIC SERVICE COMPANY, and SIERRA CLUB, et al.,

Intervenors.

ON PETITIONS FOR REVIEW OF A FINAL ACTION OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

EPA'S FINAL MERITS BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

EPA is aware of no prior or related appeals.

JURISDICTION

Petitioners challenge a final action of the United States Environmental Protection Agency ("EPA") promulgating a source-specific Federal Implementation Plan ("FIP") under the Clean Air Act ("CAA") for the Four Corners Power Plant ("the Plant"). The Plant is located on the Navajo Reservation near Farmington, New Mexico. This Court has jurisdiction over the petitions under section 307(b)(1) of the CAA, 42 U.S.C. § 7607(b)(1), which provides that the federal courts of appeals for the appropriate circuit shall have jurisdiction over any final action of the EPA Administrator under the CAA that is locally or regionally applicable and that the EPA Administrator has not determined to be of nationwide scope or effect. Both petitions were timely filed, within 60 days of the date the notice of EPA's final rule was published in the *Federal Register*. See Id.

STATEMENT OF THE ISSUES

1. Whether EPA reasonably determined to apply a 20-percent opacity limit to Units 4 and 5 at the Plant, when the 20-percent limit ensures that the air pollution control technology employed at Units 4 and 5 for particulate matter pollution is working properly during the period between the annual tests that are required to determine direct compliance with the particulate matter pollution limit?

A. Whether EPA provided a reasoned explanation for its decision to apply a 20-percent opacity limit to Units 4 and 5 when EPA explained that the

limit was imposed to ensure that Units 4 and 5 stay in continuous compliance with the underlying particulate matter pollution limit?

B. Whether EPA properly rejected the Arizona Public Service Company's assertion that it cannot attain the 20-percent opacity limit at Units 4 and 5 for 0.2 percent of the time, when the company provided no data whatsoever to EPA in support of this assertion during the administrative proceedings and when the company now concedes that it added an undisclosed margin of safety to the 0.2 percent figure?

C. Whether EPA reasonably provided for an affirmative defense with respect to civil penalties, as opposed to a complete exemption from liability, for exceedences of the opacity limit at Units 4 and 5 during periods of malfunction of the pollution control technology, when it has been EPA's long-held interpretation of the Clean Air Act that a complete exemption from compliance should not be available for such exceedences?

2. Whether the Court should grant EPA's motion for voluntary remand of the fugitive dust limit that EPA imposed for the Plant, when EPA agrees that it did not provide a sufficient justification for the limit?

3. Whether EPA's Federal Implementation Plan for the Plant is consistent with EPA's Tribal Authority Rule?

STATEMENT OF THE CASE

I. Nature of the Case

A. Introduction

Petitioners Arizona Public Service Company ("APS"), and the Sierra Club, Dine´ Care, Dine´ for the C-Aquifer and the San Juan Citizens Alliance (collectively "the Sierra Club") bring separate petitions challenging EPA's source-specific FIP for the Four Corners Power Plant, located on the Navajo Reservation near Farmington, New Mexico. The Plant is operated and partially-owned by APS. The FIP imposes federally enforceable emissions limits on specific air pollutants emitted from the plant. The overwhelming majority of the emission limits in the FIP are identical to limits previously incorporated into a state implementation plan by the State of New Mexico. However, because the New Mexico plan is not approved to apply on the Navajo Reservation, and the State thus lacks regulatory jurisdiction under the CAA for air pollution sources located on the Navajo Reservation, and because the Navajo Nation has not promulgated an EPA-approved tribal implementation plan covering the plant, EPA took its final action in this case to fill this regulatory gap so that federally enforceable limits would apply to the plant. APS challenges several aspects of the limits related to opacity, which is an indirect indicator of particulate matter pollution. The Sierra Club

argues that EPA's FIP does not go far enough because, according to the Sierra Club, EPA's regulations provide that EPA may not impose a source-specific FIP unless it first undertakes detailed studies and air quality monitoring prior to imposing any limitations. In the Argument Section below, we first address APS's arguments, and then the Sierra Club's.

B. Statutory and Regulatory Background

1. Criteria Pollutants and SIPs.

The CAA, enacted in 1970 and extensively amended in 1977 and 1990, establishes a comprehensive program for controlling and improving the nation's air quality through a combination of state and federal regulation. Under Title I of the Act, EPA is charged with identifying those air pollutants that endanger the public health and welfare, and that result from numerous or diverse mobile or stationary sources, and with formulating the National Ambient Air Quality Standards ("NAAQS") that establish maximum permissible concentrations of those pollutants in the ambient air. 42 U.S.C. §§ 7408-7409. EPA has established NAAQS for six "criteria" pollutants: sulfur dioxide ("SO_2"), particulate matter ("PM"), carbon monoxide ("CO"), nitrogen dioxide ("NO_2"), lead, and ground level ozone.[1/] See

[1/] Ozone is not directly emitted by sources. Rather, it results from the combination of precursor pollutants, including volatile organic compounds ("VOCs") and NOx, (continued...)

40 C.F.R. pt. 50. As required by the CAA, EPA has set the NAAQS at levels requisite to protect public health with an adequate margin of safety and to protect the public welfare from any known or anticipated adverse effects. 42 U.S.C. § 7409(b).

Section 110 of the CAA, 42 U.S.C. § 7410, contemplates that the measures necessary to attain the NAAQS will be applied to individual sources through a State Implementation Plan ("SIP") prepared by each State, subject to EPA review and approval, for each "air quality control region" within the State. Id. A SIP must specify the measures and other limitations necessary to attain and maintain the NAAQS for each pollutant. Id. §§ 7410(a)(2)(A) - (K). SIP measures approved by EPA are federally enforceable. If a State fails to submit approvable SIP measures, section 110(c) of the CAA requires EPA to promulgate a Federal Implementation Plan ("FIP"). Id. § 7410(c)(1). EPA previously approved the New Mexico SIP, which includes limits upon coal-burning power plants as necessary or appropriate to attain and maintain the NAAQS. 40 C.F.R. pt. 52, sbpt. GG.

Pursuant to the CAA, as amended in 1990, EPA designated areas of the country as "attainment" or "nonattainment" depending upon whether or not they

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[1/](...continued)
with heat and sunlight.

met the NAAQS for a particular pollutant, or "unclassifiable" if there was insufficient available information to classify an area. 42 U.S.C. § 7407(d). The Four Corners area where the Plant is located is designated as an attainment area for all of the NAAQS. 40 C.F.R. § 81.332.

2. EPA's Tribal Authority Rule.

Congress first comprehensively addressed the role of Tribes under the CAA in the 1990 Amendments. Specifically, under CAA section 301(d), 42 U.S.C. § 7601(d), Congress authorized EPA to "treat Indian Tribes in the same manner as States" if certain conditions were met. Id. Under section 301(d) and EPA's regulations, Tribes may choose, but are not required, to manage CAA programs.

Congress recognized the unique legal status and circumstances of Indian Tribes by establishing a scheme allowing EPA to treat Tribes differently from States in several respects. Specifically, Congress directed EPA to promulgate regulations "specifying those provisions of [the CAA] for which it is appropriate to treat Indian Tribes as States," 42 U.S.C. § 7601(d)(2), and authorized EPA to "promulgate regulations which establish the elements of tribal implementation plans ["TIPs," the tribal equivalent of SIPs] and procedures for approval or disapproval of tribal implementation plans and portions thereof." Id. at § 7601(d)(3). Finally, Congress provided that, "[i]n any case in which [EPA]

determines that the treatment of Indian [T]ribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose." Id. at § 7601(d)(4).

EPA promulgated the Tribal Authority Rule pursuant to this authority. 40 C.F.R. pt. 49. See also 59 Fed. Reg. 43,956 (Aug. 25, 1994) (proposed rule); 63 Fed. Reg. 7,254 (Feb. 12, 1998) (final rule); Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000) (upholding the Tribal Authority Rule). The Tribal Authority Rule allows eligible Tribes to be treated in the same manner as States "with respect to all provisions of the [CAA] and implementing regulations, except for those provisions [listed] in § 49.4 and the [EPA] regulations that implement those provisions." 40 C.F.R. § 49.3. In promulgating the Tribal Authority Rule, EPA recognized that, as compared to States, Tribes were generally in the early stages of developing air planning and implementation expertise and would need sufficient time to develop air quality programs. 63 Fed. Reg. at 7,264-265. Thus most of the provisions which EPA found inappropriate for Tribes relate to the mandatory program submittal deadlines imposed by the CAA and the related federal oversight mechanisms triggered by findings that States have failed to meet such deadlines or submit approvable programs. Id. In particular, EPA excepted

the provision relating to the requirement that EPA promulgate a FIP within a certain time when a State has failed to make a required submission or when a State has failed to submit a complete SIP under CAA section 110(c)(1), 42 U.S.C. § 7410(c)(1). 40 C.F.R. § 49.4(d). EPA did so because Tribes are not required to submit TIPs, and because Tribes that do submit TIPs will need adequate time to prepare such TIPs. See 63 Fed. Reg. at 7,264-265. Thus, EPA deemed it inappropriate to treat Tribes in the same manner as States with respect to the requirements of section 110(c)(1), because those requirements are triggered by the failure of a State to submit a "required submission" or to correct a deficiency within a certain time-frame. See id.

While EPA determined that the requirements of CAA section 110(c)(1) were not applicable with respect to TIPs, EPA also determined that, under other provisions of the CAA, it has the discretionary authority to promulgate "such federal implementation plan provisions as are necessary or appropriate to protect air quality" where a Tribe has not submitted a TIP. 40 C.F.R. §§ 49.4(d), 49.11(a). EPA determined that it had this "gap filling" authority under CAA section 301(a), 42 U.S.C. § 7601(a), which authorizes EPA to prescribe such regulations as are necessary to carry out the CAA, and under section 301(d)(4), 42 U.S.C. § 7601(d)(4), which authorizes EPA to directly administer, by means to be

determined at EPA's discretion, CAA provisions for which EPA has determined it is inappropriate or infeasible to treat Tribes in the same manner as States. 40 C.F.R. § 49.11. See also 63 Fed. Reg. at 7,265 (discussing CAA sections 301(a) and 301(d)(4) as the source of EPA's discretionary gap-filling authority).

3. EPA's Acid Rain Regulations.

The 1990 CAA amendments also added nationally applicable requirements for large coal-fired power plants to reduce emissions of acidic compounds and their precursors. 42 U.S.C. §§ 7651-7651o. Under CAA section 412, 42 U.S.C. § 7651k, owners and operators of coal-fired power plants are required "to install and operate CEMS [continuous emissions monitoring systems] on each affected unit at the source, and to quality assure the data for sulfur dioxide, nitrogen oxides, opacity and volumetric flow rate at each such unit." Id. EPA promulgated regulations to implement this requirement, by requiring, among other things, the installation and operation of continuous monitors for opacity, known as a Continuous Opacity Monitoring System ("COMS"). 40 C.F.R. § 75.14.

4. Opacity Limitations.

Opacity is not a criteria pollutant, but States have often included opacity limits in their SIPs. Opacity levels can, for example, indicate whether or not emissions control equipment for reducing PM is operating properly and therefore

whether excessive PM is being emitted from a regulated source. As the Eleventh Circuit has succinctly summarized:

> Opacity is one of the most basic emission limitations imposed on sources of particulate air pollution . . . . The term 'opacity' refers to the extent to which a plume of smoke reduce[s] the transmission of light and obscure[s] the view of the background. . . . For example, a plume with 20% opacity blocks 20% of light passing through it; no light passes through a plume with 100% opacity. Opacity is not a pollutant, but instead a measure of the light-blocking property of a plant's emissions, which is important in the Clean Air Act regulatory scheme as an indicator of the amount of visible particulate pollution being discharged by a source.

Sierra Club v. TVA, 430 F.3d 1337, 1341 (11th Cir. 2005). While the CAA and EPA's regulations do not mandate any particular opacity limit, "many states' SIPs impose a 20% opacity limit." Sierra Club v. Ga. Power Co., 365 F. Supp. 2d 1297, 1300 n.2 (N.D. Ga. 2004), rev'd in part, 443 F.3d 1346 (11th Cir. 2006). See also, Sierra Club v. Public Service Co. of Colo., Inc., 894 F. Supp. 1455, 1458 (D. Colo. 1995) (discussing Colorado's 20-percent opacity limit). A COMS measures opacity by projecting a beam of light across the interior diameter of a smokestack to a mirror located on the other side of the stack. See Sierra Club v. TVA, 430 F.3d at 1341 (describing COMS). The COMS measures and records the amount of light that is reflected back from the mirror and thereby measures the opacity of the emissions from the stack. Id.

5. EPA's Excess Emissions Policy With Respect to Startups, Shutdowns and Malfunctions.

Under longstanding EPA policy, emissions resulting from malfunctions of the control technology employed by a regulated source under a SIP or FIP constitute violations of the underlying emissions limitations, but a regulatory agency may provide the source an affirmative defense to a claim for civil penalties for such violations. See J.A. 69 (Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction (Feb. 15, 1983)) ("Bennett Memorandum"); J.A. 160, (State Implementation Plans: Policy Regarding Excessive Emissions During Malfunctions, Startup, and Shutdown (Sept. 20, 1999)) ("Herman Memorandum"); J.A. 185 (Re-Issuance of Clarification – State Implementation Plans (SIPS): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown (Dec. 5, 2001) ("Schaeffer Memorandum"). See also Michigan Dep't. of Envtl. Quality v. Browner, 230 F.3d 181, 183 (6th Cir. 2000) (discussing Bennett Memorandum); Sierra Club v. Ga. Power Co., 365 F. Supp. 2d at 1303-04 (discussing Bennett, Herman and Schaeffer Memoranda).

The statutory basis of this policy is that under CAA section 110(a)(1), 42 U.S.C. § 7410(a)(1), it is a fundamental requirement of the CAA that SIPs must provide for attainment and maintenance of the NAAQS. See J.A. 71 (Bennett Memorandum at 17-3) (explaining that an automatic exemption for a malfunction

might aggravate air quality such that the SIP no longer provides for attainment of the ambient air quality standards); Sierra Club v. Ga. Power Co., 365 F. Supp. 2d at 1303 (explaining that malfunction events pose a risk of exceeding the emission limitations contained in SIPs); J.A. 161 (Herman Memorandum at 2) (explaining that EPA cannot approve an affirmative defense provision for malfunction that does not allow the imposition of injunctive relief because this would undermine the fundamental requirement of attainment and maintenance of the NAAQS). Michigan Dep't. of Envtl. Quality v. Browner, 230 F.3d at 183 (upholding EPA's interpretation of CAA section 110(a)(1) with respect to the excess emissions policy as a reasonable interpretation of the Act).

EPA's policy also takes into account that for some sources there may exist infrequent, short periods during startup and shutdown where excess emissions cannot be avoided and where bypassing the control equipment may be necessary to prevent personal injury or property damage. J.A. 73 (Bennet Memorandum at 17-5). See also J.A. 162 (Herman Memorandum at 3) (explaining that "for some source categories, even the best available emissions control systems might not be consistently effective during startup or shutdown periods"). An allowance may be made for such periods through an alternative limitation, so long as the SIP demonstrates that such alternative limits will not interfere with attainment and

maintenance of the NAAQS. See id.

C. Factual and Procedural Background

The Plant consists of five coal-fired electric utility steam generating units with a total capacity in excess of 2000 megawatts. 72 Fed. Reg. 25,698 (May 7, 2007). The Plant has historically achieved emissions limits that were established by New Mexico and approved by EPA into the New Mexico SIP. Id. See also 64 Fed. Reg. 48,731, 48,732 (Sept. 8, 1999) (noting the Plant's historic voluntary compliance with New Mexico's SIP). New Mexico and APS believed that the New Mexico SIP's emissions limits applied to the Plant. However, because the New Mexico SIP is not approved to apply on the Navajo Reservation as a jurisdictional matter, New Mexico did not have regulatory jurisdiction over the Plant, thus creating a regulatory gap. In 1993, EPA, New Mexico, the Navajo Nation Environmental Protection Agency and APS negotiated a Memorandum of Agreement ("MOA") providing that EPA would promulgate a FIP for the Plant. J.A. 78 (Letter from David M. Vackar, New Mexico Environment Department to Ken Bigos, EPA (Apr. 15, 1993) with attached MOA). The MOA provides that "EPA plans to promulgate a FIP which will in essence federalize the requirements

of the New Mexico SIP historically" followed by the Plant. J.A. 81 (MOA at 3).[2/] Thus, when it promulgated the final rule in this case, EPA explained that because the New Mexico SIP was not approved to apply on the Navajo Reservation as a jurisdictional matter, and because the Navajo Nation does not have a federally-approved TIP establishing emission limits for the Plant, a jurisdictional gap existed with respect to the Plant. 72 Fed. Reg. at 25,698. EPA therefore promulgated its source-specific FIP for the Plant in order to fill this regulatory gap and ensure that the previously-established emissions limits would be federally enforceable. Id.

The FIP was initially developed in consultation with the Navajo Environmental Protection Agency, the New Mexico Environmental Department, and APS. See, e.g., J.A. 114 (Letter from Michael B. Wood, APS, to Leslie Ann Guinan, EPA, attachment, at 1 (Aug. 1, 1996) ("1996 APS attachment").[3/] EPA first proposed to promulgate a site-specific FIP for the Plant in 1999. 72 Fed. Reg. at 25,698. However, EPA did not finalize its proposed FIP at that time because a stakeholders group had engaged APS in discussions over the possibility of

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[2/] The relevant New Mexico SIP included limits for SO_2, NOx, and PM. J.A. 79 (MOA at 1).

[3/] Neither the CAA nor EPA's regulations require that limits in a FIP, TIP or SIP applicable to a particular source be "negotiated" with that source. However, for practical reasons, regulatory agencies often develop such limits in consultation with the source.

lowering the Plant's SO_2 emissions. Id. As a result of those negotiations, APS agreed to enhance the efficiency of its SO_2 scrubbers, which resulted in substantial reductions in the plant's SO_2 emissions. Id. The Navajo Nation and the stakeholders group requested that EPA include these additional SO_2 emissions reductions in the FIP, and APS did not object to this proposal. Id. EPA then proposed a new FIP in 2006. 71 Fed. Reg. 53,631 (Sept. 12, 2006).

EPA proposed to establish the lower SO_2 emissions limit for the Plant and to establish as federally enforceable the limits for PM and NOx contained in the New Mexico SIP that the Plant had historically achieved.[4/] EPA also proposed to establish emissions limits for opacity and a requirement to limit dust emissions from certain plant operations. 71 Fed. Reg. at 53,632. As EPA explained, because the Four Corners area is an attainment area, and because the proposed FIP would establish federally enforceable emission limits that are either more stringent than, or at least as stringent as, the limits in the New Mexico SIP that the Plant has historically achieved, EPA's expectation was that air quality would be positively impacted by the proposed action. Id. at 53,631.

[4/] The proposed NOx limit was also more stringent than that contained in the New Mexico SIP. The more stringent NOx limit had been submitted to EPA as a SIP revision by New Mexico in 1991. J.A. 157 (EPA's Technical Support Document at 3 ("1999 TSD") (May 4, 1999)).

After considering the comments it received during the public comment period on the proposed FIP, EPA issued its final rule on May 7, 2007. 72 Fed. Reg. at 25,698. The FIP imposes limits on SO_2, PM and NOx. Id. at 25,705 (to be codified at 40 C.F.R. §§ 49.23(d)(1), (2) & (5)). It includes a 20-percent opacity limit for Units 4 and 5 at the Plant, averaged over any six-minute period, excluding one six-minute-period-per-hour of not more than 27-percent opacity. Id. (to be codified at 40 C.F.R § 49.23(d)(4))[5]. It also includes a 20-percent opacity limit with respect to fugitive dust at the Plant. Id. (to be codified at 40 C.F.R. § 49.23(d)(3)).

APS's and the Sierra Club's petitions followed, and the cases were consolidated by agreement of the parties and subsequent order of the Court. Subsequently, EPA moved for a limited voluntary remand of the record so that it could provide additional explanation for its rejection of one contention made by APS during the public comment period on the proposed FIP with respect to the opacity limits for Units 4 and 5 at the Plant. EPA also sought a limited voluntary remand so that it could provide additional explanation with respect to the basis for its opacity limit for fugitive dust generated at the Plant. The Court denied EPA's

[5] It is common to measure opacity in this manner and to exclude one six-minute period-per-hour in the limit. See, e.g., Sierra Club v. TVA, 430 F.3d at1341.

motion for a voluntary remand without further explanation. As set forth in the Argument Section below, no remand is necessary with respect to APS's assertion regarding the opacity limit for Units 4 and 5. However, EPA still believes that a remand is necessary with respect to the limit for fugitive dust. Accordingly, EPA has filed a new motion for a voluntary remand with respect to the fugitive dust limit. EPA agrees that the limit for fugitive dust can be vacated on remand. EPA has not yet decided whether it will propose a new limit with respect to fugitive dust for the Plant following remand.

STANDARD OF REVIEW

Agency action subject to review under 42 U.S.C. § 7607(b)(1) is judged under the standards set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), which provides that agency action will not be set aside unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See Sierra Club v. EPA, 99 F.3d 1551, 1553, 1555 (10th Cir. 1996).[6/] The

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[6/] APS asserts that EPA's final rule in this case was issued under CAA section 307(d), 42 U.S.C. § 7607(d). APS's Br. at 23. This is not the case. Section 307(d) applies to certain statutorily specified EPA rulemakings, which do not include EPA's promulgation of a FIP under the authority provided by CAA sections 301(a) and 301(d), 42 U.S.C. §§ 7601(a), (d). See 42 U.S.C. §7607(d)(1)(B) (providing that section 307(d) applies to "the promulgation or revision an implementation plan by the Administrator under section 7410(c) of this title"). If the final rule had been issued under CAA section 307(d), then the similar arbitrary and capricious

(continued...)

arbitrary and capricious standard "is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Indeed, an agency's determinations must be upheld if they "conform to 'certain minimal standards of rationality.'" Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 521 (D.C. Cir. 1983) (citations omitted).

An agency action is arbitrary and capricious only "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 is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43. Under this standard, the reviewing court may not set aside agency action merely because the court would have decided the issue differently, so long as the agency has considered the relevant factors and offered a rational explanation for its action. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). In addition, "[e]ven when an agency

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[6/](...continued)
standard of CAA section 307(d)(9) would apply to the rulemaking. 42 U.S.C. § 7607(d)(9). Because CAA section 307(d) does not apply to the FIP in these cases, the arbitrary and capricious standard of the APA is the correct standard of review.

explains its decision with 'less than ideal clarity,' a reviewing court will not upset the decision on that account 'if the agency's path may reasonably be discerned.'" Alaska Dep't. of Envtl. Conservation v. EPA, 504 U.S. 461, 497 (2004) (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)).

A reviewing court should apply the "arbitrary or capricious" standard to the agency decision based on the record the agency presents to the reviewing court. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985). See also 5 U.S.C. § 706 (courts "shall review the whole record or those parts of it cited by a party"). When there is a contemporaneous explanation of the agency decision, the validity of that action "must stand or fall on the propriety of that finding, judged of course, by the appropriate standard of review," and thus "[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973).

Questions of statutory interpretation are governed by the familiar two-step test set forth in Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-45 (1984). Under the first step, the reviewing court must determine "whether Congress has directly spoken to the precise question at issue." Id. at 842. If congressional intent

is clear from the statutory language, the inquiry ends. Id. If, however, the statute is silent or ambiguous, the court must decide whether the agency's interpretation is based upon a permissible construction of the statute. Id. at 843. To uphold the agency's interpretation, the court need not find that the agency's is the only permissible construction, or even the reading the court would have reached, but only that the agency's interpretation is reasonable. Id. at 843, n.11; Sierra Club v. EPA, 99 F.3d at 1555 (same).

Congress delegated to EPA the authority to promulgate final rules as necessary to carry out the objectives of the CAA, 42 U.S.C. § 7601(a), and provided EPA discretion to establish alternative means to directly administer CAA provisions to protect air quality in the absence of an EPA-approved tribal program. 42 U.S.C. § 7601(d)(4). EPA has exercised this authority through notice-and-comment rulemaking procedures here. Therefore, EPA's action in promulgating a source-specific FIP for the Plant qualifies for Chevron deference. See United States v. Mead Corp., 533 U.S. 218, 227-30 (2001).

"An agency is entitled to even greater deference when it acts pursuant to an interpretation of regulations promulgated by the agency itself." Culbertson v. USDA, 69 F.3d 465, 467 (10th Cir. 1995). A court should give "controlling weight" to EPA's interpretation of its own regulation, "unless it is plainly

erroneous or inconsistent with the regulation." United States v. Larionoff, 431 U.S. 864, 872 (1977) (citation omitted); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1165 (10th Cir. 1999) (en banc) (same).

EPA's factual determinations are also entitled to substantial deference. See Arkansas v. Oklahoma, 503 U.S. 91, 112 (1992). EPA's factual determinations should be upheld as long as they are supported by the administrative record, even if there are alternative findings which could also be supported by the record. Id. This is especially true with respect to EPA's scientific determinations. Central Ariz. Water Conservation. Dist. v. EPA, 990 F.2d 1531, 1539-40 (9th Cir. 1993) ("[A] reviewing court must generally be at its most deferential when the agency is making predictions, within its area of special expertise, at the frontiers of science"). Id. A court should defer to EPA's interpretation of equivocal evidence as long as it is reasonable. Id.

SUMMARY OF THE ARGUMENT

EPA clearly provided a reasoned explanation for its decision to apply a 20-percent opacity limit to Units 4 and 5 of the Plant. As EPA has explained throughout the rulemaking for the FIP, the opacity limit at Units 4 and 5 ensures that the baghouse technology APS employs to meet the underlying PM limit is working properly and that the Units are therefore in continuous compliance with the

PM limit. In addition, EPA reasonably rejected APS's assertion that it should be allowed to exceed the limit for up to 0.2 percent of the time. APS provided no evidence of any kind whatsoever in support of its assertion that it could not achieve the limit for up to 0.2 percent of the time due to unknown reasons that are not otherwise accounted for in the FIP. Indeed, APS now concedes that it padded the 0.2 percent figure with a margin of safety to ensure that it could never be found to have exceeded the standard regardless of the cause of the exceedence. The Court should therefore reject APS's argument that it was arbitrary and capricious for EPA to reject APS's request for a complete exemption from liability for all excess emissions for 0.2 percent of the time. However, even if the Court were to decide that a remand is appropriate for a fuller explanation as to why EPA rejected APS's assertion with respect to the 0.2 percent issue, the Court should not vacate the opacity limit for Units 4 and 5 during the time of any such remand.

The Court should also reject APS's contention that it was arbitrary and capricious for EPA to provide APS with an affirmative defense with respect to claims for civil penalties, as opposed to a complete exemption from liability, for exceedences due to any malfunctions of air emissions control technology. EPA reasonably applied its longstanding interpretation of section 110(a) of the CAA as not allowing for exemptions due to malfunctions, and the Court should defer to that

reasonable interpretation here. Thus, the Court should reject all of APS's arguments and uphold the FIP.

The Court should also reject the Sierra Club's argument that EPA may not take limited action under the Tribal Authority Rule in order to fill a regulatory gap in Indian country as it did here. The Tribal Authority Rule, which has previously been upheld by the D.C. Circuit, clearly provides EPA with discretion to promulgate those plan provisions EPA determines to be necessary or appropriate to protect air quality. Contrary to the Sierra Club's argument, the Tribal Authority Rule does not require that EPA first undertake all the measures that would be required for a complete SIP prior to taking *any* action EPA deems necessary or appropriate to protect air quality. Indeed, the Sierra Club's unreasonable construction of the Tribal Authority Rule should be rejected because it is contrary to the express purposes and plain language of the Tribal Authority Rule, and it would prevent EPA from implementing discrete measures as necessary or appropriate to protect air quality unless and until either the relevant Tribe or EPA has undertaken all studies and taken all measures otherwise applicable to a full implementation plan. Finally, the Sierra Club's suggestion that EPA had no technical justification for the limits imposed in the FIP is mistaken. In fact, EPA either codified the limits of the previously approved New Mexico SIP or made them more stringent,

and the Four Corners area in which the Plant is located is in attainment status for all of the NAAQS. While the New Mexico limits were not applicable on the Reservation as a jurisdictional matter, EPA had previously reviewed and approved the technical basis and justification of the limits. The Court should therefore reject all of the Sierra Club's arguments and uphold the FIP.

ARGUMENT

I. EPA REASONABLY DETERMINED TO APPLY THE 20-PERCENT OPACITY LIMIT TO UNITS 4 AND 5 OF THE PLANT.

As discussed in the Background section, EPA previously approved as technically valid the PM limit (as well as the limits for other criteria pollutants) in the New Mexico SIP with which the Plant has historically complied. See 72 Fed. Reg. at 25,698; 64 Fed. Reg. at 48,732. EPA acted to fill the regulatory gap in this case because the New Mexico SIP was not approved to apply on the Navajo Reservation. APS did not challenge EPA's approval of the limits in the New Mexico SIP with which it had been complying, and it does not now challenge the PM limit applicable to Units 4 and 5 of the Plant. APS Br. at 31 n.8.[7/]

[7/] Although it does not challenge the PM limit applicable to Units 4 and 5, APS suggests that EPA never provided a reasoned explanation for why it selected this limit other than that it was "administratively convenient" to use the limit contained in the New Mexico SIP. APS Br. at 31. As explained above, EPA had previously approved the PM limit in the New Mexico SIP as technically valid. EPA clearly

(continued...)

APS now asserts that EPA has not provided a reasoned explanation for the 20-percent opacity limit for Units 4 and 5. APS Br. at 29-31. It also argues that EPA imposed the 20-percent limit despite uncontroverted "evidence" that APS cannot continuously achieve the limit. Id. at 32-36. APS also asserts that EPA did not provide a reasoned justification for its rejection of APS's assertion that Units 4 and 5 should be exempted from strict compliance with the 20-percent opacity limit for 0.2 percent of the time. Id. at 33. Finally, APS argues that it was arbitrary and capricious for EPA to provide only an affirmative defense for periods of malfunction of the bag-house technology APS applies to meet the PM and opacity limits, as opposed to the complete exemption from the limits that APS requested. Id. at 37-44. All of these arguments lack merit, and the Court should therefore deny the petition for review. However, even if the Court determines that a remand is appropriate in order for EPA to better explain its reasons for rejecting APS's contention that APS should be relieved from compliance with the opacity standard

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[7/](...continued)
explained, both in its notice of proposed rulemaking and in its final rule, that its FIP for the Plant was appropriate to ensure that the limits were federally enforceable due to the jurisdictional gap existing on the Navajo Reservation. See 71 Fed. Reg. at 53,632; 72 Fed. Reg. at 25,698, 25,699. As APS does not challenge the PM limit, which EPA previously determined was appropriate to ensure attainment and maintenance of the PM NAAQS, APS's suggestion that EPA has not provided a reasoned explanation for the PM limit it chose to include in the FIP is both beside the point and incorrect.

at Units 4 and 5 for 0.2 percent of the time, the Court should not vacate the opacity limit for Units 4 and 5 during remand.[8/]

A. EPA Provided a Reasoned Explanation for its Decision to Impose the 20-percent Opacity Limit Applicable to Units 4 and 5 of the Plant.

Throughout the entire history of this rulemaking, including when EPA published its first notice of proposed rulemaking with respect to the establishment of a source-specific FIP for the Plant in 1999, EPA has explained that the opacity limit for Units 4 and 5 was necessary in order to confirm that the units are in continuous compliance with the PM limit and are properly operated and maintained. 64 Fed. Reg. at 48,733. See also Sierra Club v. TVA, 430 F.3d at 1341 ("Opacity is . . . important in the Clean Air Act regulatory scheme as an indicator of the amount of visible particulate pollution being discharged by a source"). At the outset, EPA explained that Units 4 and 5 "operate with baghouses for particulate control and therefore are able to meet this limit." 64 Fed. Reg. at 48,733. EPA made clear that a properly operated baghouse is able to meet the 20-percent opacity limit as measured by COMS unless the stacks are saturated with condensed water vapor. Id.

[8/] APS also challenges the limit for fugitive dust. As discussed below, the Court should grant EPA's motion for a voluntary remand with respect to the fugitive dust limit.

at 48,736.[9/]

This is completely consistent with EPA's very first discussions with APS regarding the limit. In fact, after the 20-percent opacity limit was first proposed in discussions between EPA, APS, the Navajo Environmental Protection Agency, and the New Mexico Environmental Department in 1994, APS indicated that normal opacity levels on Units 4 and 5 are less than 5 percent. J.A. 115 (1996 APS attachment at 2). APS then presented its review of the first year of COMS data for Units 4 and 5 and explained that Units 4 and 5 achieved 20-percent opacity except during periods of startup, shutdown, or malfunction; periods of known saturated stack conditions; and periods that were not fully explainable but that were attributed to saturated stack conditions. J.A. 117-18 (id. at 4-5). Indeed, with respect to one unexplained event, APS specifically stated that based upon its own best engineering judgment, "[t]he only reasonable explanation we can think of for the high opacity reading was a saturated stack, but we cannot determine why it occurred." J.A. 117 (id. at 4). On that basis, APS suggested that some exception needed to be provided for greater-than-20-percent opacity during periods of startup, shutdown,

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[9/] APS employs wet scrubbers on Units 4 and 5 upstream of the COMS. See J.A.115 (1996 APS attachment at 2). APS installed the COMS at Units 4 and 5 in the 1994 to 1995 time frame due to the CAA requirements respecting acid rain. Id.

malfunction and saturated stack conditions. J.A. 118 (id. at 5).

Consistent with this dialogue with APS, when EPA issued its notice of proposed rulemaking for the FIP in 2006, EPA proposed a 20-percent opacity limit for Units 4 and 5, and stated its intention to exclude water vapor. 71 Fed. Reg. at 53,633 (middle column). EPA indicated that Units 4 and 5 use baghouse technology to control PM emissions. Id. It distinguished Units 1, 2, and 3, which use venturi scrubbers (a different technology that makes the stacks continuously wet) for PM emissions controls. Id. Instead of proposing to impose an opacity limit for Units 1, 2, and 3, EPA proposed to require the Plant to design and enact a plan to monitor certain operating parameters for Units 1, 2, and 3 in order to yield information about continuous proper operation of the venturi scrubbers for PM control. Id. (middle to third column). EPA sought comment on this proposal and on whether an opacity standard could be applied to Units 1, 2 and 3 at all. Id. (third column). EPA specifically explained that COMS would not be required for Units 1, 2, and 3, because the stacks for those Units are continuously wet from water vapor from the scrubbers. Id. EPA also explained that, consistent with its excess emissions policy, EPA would provide APS with an affirmative defense to civil penalties for excess emissions resulting from malfunctions. Id. Thus, prior to final promulgation of the FIP in 2007, EPA had fully explained that the 20-percent

opacity limit was being imposed for Units 4 and 5 because a properly functioning baghouse can achieve the limit unless the stacks are saturated, and because the limit therefore ensures that the baghouse technology is properly operated.

EPA also made this clear in its final rule. In fact, EPA explained in response to a public comment regarding saturated stack conditions that EPA did not believe it necessary to require APS to make a demonstration that an exceedence of the 20-percent limit during such conditions was in fact caused by uncombined water droplets. 72 Fed. Reg. at 25,701. EPA again explained that the opacity limit is "set to assure proper operation of the baghouse," and that the "rule will require that the facility assure that there has been no bypass through the bypass damper during these periods of assumed water droplet interference." Id.

EPA echoed this same reasoning in its final rule with respect to Units 1, 2, and 3. It explained that "[o]pacity limits are generally applied to ensure a source is meeting its PM emissions limit." Id. It then explained that COMS are not appropriate for Units 1, 2, and 3 because COMS are inconsistent with the use of venturi scrubbers due to steam in the exhaust. Id. EPA therefore found that an opacity limit is not appropriate to ensure proper operation of Units 1, 2, and 3, but that another form of parametric monitoring should be employed to ensure proper

operation of the venturi scrubbers. Id.[10/]

Thus, EPA clearly provided a reasoned justification for the 20-percent opacity limit for Units 4 and 5, namely because the baghouse technology can achieve the 20-percent limit when the stacks are not saturated with uncombined water droplets during times of normal operation, the limit ensures that the technology is properly operated and that the Units are in continuous compliance with the underlying PM limit.[11/] APS understood this, stating in its comments to EPA that "the opacity limit was developed . . . based upon the expectation that it would be achievable, assuming proper operation of the baghouses." J.A. 291 (APS 2006 comments at 4). As testament to the validity of the expectation, APS stated that it could meet the limit 99.8 percent of the time for each reporting period. J.A. 292 (id. at 5). While APS proposed that it be allowed an exemption from the limit for 0.2 percent of the time (and while APS may disagree with the limit without

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[10/] Under parametric monitoring, specific operational parameters are identified and data is collected to ensure that the source is operating within those parameters. See 40 C.F.R. § 64.3. Under the FIP, APS is required to develop a parametric monitoring plan for Units 1, 2, and 3 at the Plant. 72 Fed. Reg. at 25,707 (to be codified at 40 C.F.R. § 49.23(e)(8)).

[11/] EPA also imposed a requirement that APS perform annual testing to ensure direct compliance with the PM limit itself. 72 Fed. Reg. at 25,706 (to be codified at 40 C.F.R. § 49.23(e)(3)). Thus, the opacity limit helps to ensure that the Units are in continuous compliance with the underlying PM limit during the periods between the annual tests.

the 0.2 percent exemption), it is clear that APS fully understood EPA's justification for the limit. Thus, APS's assertion that EPA has not provided a reasoned explanation for the limit is incorrect. Indeed, APS concedes as much in its brief, stating that it is a "given that measurement of opacity could be useful in assuring that the PM control equipment, *e.g.*, the baghouses on Units 4 and 5, is being properly operated . . . ." APS Br. at 30.[12/]

EPA's proposed action on the Alabama SIP with respect to opacity, in which EPA discussed variability, among other things, is not to the contrary. See APS's Br. at 30-31. Indeed, EPA there explained:

> [W]here Method 5 tests are used to demonstrate compliance with filterable PM mass emission limitations, opacity limits and associated monitors are commonly used as an indirect monitor for PM emissions and as indicators of good PM control equipment operation during the periods between Method 5 tests. EPA has long recognized opacity monitoring as a method of ensuring proper control device operations.

72 Fed. Reg. 18,428, 18,429 (Apr. 12, 2007). This is consistent with EPA's action here, where the opacity limit for Units 4 and 5 ensures continuous compliance with

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[12/] APS asserts that EPA did not establish why the particular limit of 20-percent is right for this purpose. Id. However, at no time has APS suggested that *another* limit would be more appropriate and, as discussed above, its own engineers indicated that the baghouses can achieve the 20-percent limit when properly operated and when the stacks are not saturated. J.A. 117-18 (1996 APS attachment at 4-5).

the underlying PM limit during the periods between annual tests. In the proposed Alabama action, EPA was addressing whether a proposed revision to the Alabama SIP would interfere with any applicable requirement concerning attainment, or any other CAA requirement under CAA section 110(*l*), 42 U.S.C. § 7410(*l*).[13/] See 72 Fed. Reg. at 18,429. EPA there noted that no changes were being proposed to revise the underlying PM limit in the Alabama SIP. Id. Nonetheless, EPA evaluated the proposed SIP revision under CAA section 110(*l*) due to the "indirect relationship between opacity and PM emissions, including the use of opacity to track the effectiveness of PM control equipment operation." Id. While a State has some discretion with respect to the particular opacity limit in its SIP, a State may not relax any existing SIP limit without meeting the anti-backsliding requirements of CAA section 110(*l*). Thus, when EPA was discussing the variability of control devices over time, it was in reference to EPA's analysis of Alabama's proposal to change an opacity limit in its SIP from allowing one six minute exceedence every hour to allowing 2.4 hours of exceedences every day, but not more than 2-percent opacity exceedences on a quarterly basis under CAA section 110(*l*). See 72 Fed.

[13/] Section 110(*l*) provides, in pertinent part, that EPA "shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement of this chapter." 42 U.S.C. § 7410(*l*).

Reg. at 18,430-431. EPA explained that it could not approve Alabama's proposed SIP revision unless Alabama made certain changes recommended by EPA, which would ensure there would be no backsliding from attainment and maintenance of the PM NAAQS with respect to Alabama's proposed 2-percent allowance from the opacity limit on a quarterly basis, as opposed to one six-minute period out of every hour (as in the existing Alabama SIP and as also applies in the FIP for the Plant). Id. Thus, EPA's proposed action on the Alabama SIP revision merely recognizes that States have some latitude in determining control strategies for attainment areas both during the adoption of SIP measures and in the revision of such measures, as long as the SIPs provide for attainment, reasonable further progress, and maintenance of the applicable NAAQS.

There is nothing in the Alabama proposal indicating that EPA views opacity limits measured on an hourly basis as an unreasonable direct method for measuring the proper functioning of control equipment, or as an unreasonable indirect method for monitoring compliance with the underlying PM emission limit in the time periods between direct measurements of compliance with that limit. Moreover, the one example provided in the proposed action on the Alabama SIP for when a coal-fired power plant may experience a sporadic exceedence of the opacity limit does not apply to the Plant in any event. That example was for variations in the

constituents of coal burned. 72 Fed. Reg. at 18,429. Such variation would not be a factor with a baghouse, which is a simple filtration device that is not affected by the characteristics or concentration of the ash in the gas stream. Variation in the constituents of the coal burned could be a factor with other types of PM control equipment such as electrostatic precipitators, the performance of which may be affected by the electrical characteristics (resistance) and concentration of ash in the gas stream each of which may vary with different types of coal. Electrostatic precipitators are used by some coal-fired power plants in Alabama. See Sierra Club v. TVA, No. 3:02-cv-2279, slip op. at 11 (N.D. Ala. Aug. 27, 2007) (copy provided in addendum). Thus, the discussion regarding variability in the proposed action on the Alabama SIP revision is not relevant to the Plant.

B. APS's Assertion That it Cannot Meet the 20-percent Opacity Limit on Units 4 and 5 for 0.2 Percent of the Time During Normal Operations Is Not Supported by the Record and Should Therefore be Rejected.

APS argues that "uncontroverted evidence" shows it cannot meet the opacity standard for 0.2 percent of the time, even during normal operation of its baghouses, and that the FIP is therefore contrary to the evidence before EPA. APS Br. at 32-36. APS asserts that it is entitled to an exemption from the opacity limit at Units 4 and 5 for 0.2 percent of the time, *in addition to* the one six-minute-per-hour period that is already excluded when determining compliance with the limit. This

argument should be rejected because it is completely unsupported in the administrative record.

It is true that APS asserted in 2006, during the public comment period on the proposed FIP, that it was not able to meet the 20-percent opacity limit at Units 4 and 5 during normal operations for 0.2 percent of the time. J.A. 292 (APS's 2006 Comment Letter at 5). However, APS submitted no "evidence" of any kind whatsoever to support this assertion. While APS claimed the assertion was supported by its COMS monitoring data, there was no pre-existing requirement that it supply such data to EPA, and APS did not supply the data with its comments. More important, there is no indication that APS undertook any analysis to determine what *caused* the exceedences it claims were recorded in the COMS data as APS's engineers had done in 1996. Rather, it appears that APS took its raw COMS data and ran a "Monte Carlo" simulation to determine a predicted percentage of exceedences. See id.[14/] The fact that a model may predict that future exceedences may occur 0.2 percent of the time based upon past exceedences does not prove that the exceedences should be excused, because, for instance, the

[14/] While APS did not provide any detail with respect to the "Monte Carlo" simulation it claims to have run with its raw COMS data, it should be noted that a "Monte Carlo" simulation is not a simulation specific to opacity limits. EPA understands it to be a generic term for a statistical method or methods applied to a large amount of data to arrive at a calculated range of probability.

exceedences may be due to improper operation of the control technology. Regardless, APS did not even provide the Monte Carlo simulation to EPA, nor did it provide the presentation referenced in footnote 7 of its comments. See id. Because APS completely failed to provide *any* evidence to EPA in support of its assertion, the record does not support APS's argument and the argument should therefore be rejected. C.f., Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978) ("[A]dministrative proceedings should not be just a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have the agency determination vacated on the ground that the agency failed to consider matters forcefully presented.")

Moreover, it is clear from APS's brief that the 0.2 percent prediction is not fully grounded in even the data that APS claims to have, but failed to provide. APS concedes that its 0.2 percent proposal "included a reasonable margin of safety" to ensure that APS would never be considered to be out of compliance with the standard. APS Br. at 35 n.9, 19 n.6. Yet, despite this admission, APS did not even bother to inform EPA of this critical caveat in its comments on the proposed FIP. See J.A. 292 (APS 2006 comment letter at 5). EPA's rejection of APS's contention

regarding the 0.2 percent issue should not now be described as arbitrary and capricious or counter to the evidence when APS not only failed to support the contention with any evidence but also failed to be candid with EPA in its description of what the alleged evidence actually shows. Nor does APS reveal now what "margin of safety" it added to come up with the 0.2 percent figure. Neither EPA nor this Court should be required to guess at what the unprovided data actually show. Indeed, it seems clear that APS has merely attempted to determine how many times it has exceeded the standard in the past, regardless of the reason for the exceedence, and then padded this number in order to seek a percentage exemption from the standard that will make it extremely unlikely it could ever be forced to comply strictly with the standard in the future. This is clearly contrary to the CAA's requirement of continuous compliance, and should therefore be rejected. See Sierra Club v. TVA, 430 F.3d at 1348 (rejecting defendant's similar "brassy argument" that it should be excused from continuous compliance with the opacity limit in Alabama's SIP).

Finally, EPA's action approving North Carolina's SIP revision with respect to opacity does not support APS's arguments here. See APS Br. at 32, 34. As with the proposed Alabama SIP revision discussed above, EPA reviewed the North Carolina SIP under the anti-backsliding requirements of CAA section 110(*l*), 42

U.S.C. § 7410(*l*). 70 Fed. Reg. 61,556, 61,558 (Oct. 25, 2005).[15/] Prior to the proposed SIP revision, North Carolina had excluded one six-minute period of COMS measurements per hour when determining compliance with the State's opacity standard, just as EPA's FIP does for the Plant. Id. at 61,556, 61,557. Under North Carolina's revised SIP, the State excludes no more than four six-minute periods in a day (for a total of 24 minutes), which may be considered in the aggregate. Id. The revision further provides that these 24-minute daily periods may not exceed 0.8 percent of the total operational hours in a calendar quarter. Id. EPA determined that the revision was not a relaxation of the current SIP because the underlying PM standards are measured on a 24-hour basis and because the revision would not increase the total opacity exceedences that were not previously counted towards the limit in any given day. Id. at 61,558. As with the Alabama SIP revision, EPA's action on the North Carolina SIP revision merely recognizes the State's discretion with respect to SIP revisions as long as backsliding does not occur under CAA section 110(*l*). It does not somehow establish a general rule that opacity limits should provide for some percentage of allowed exceedences. In fact, the 0.8 percent quarterly limit in the North Carolina SIP was a further cap on the

[15/] EPA also reviewed the North Carolina revision under the similar anti-backsliding requirement for nonattainment areas under CAA section 193, 42 U.S.C. § 7515. 70 Fed. Reg. at 61,558.

exceedences that were excluded from the measured compliance period. 70 Fed. Reg. at 61,558 ("EPA believes that the imposition of the quarterly cap on exception periods provides assurances that the revised standard will provide equivalent or greater protection on a quarterly or annual basis."). This is entirely different from the unsupported 0.2 percent exception that APS requested in this case. APS requested an exception for 0.2 percent of its operating time *in addition to* the one six-minute-per-hour period that is already excluded when determining compliance with the standard. J.A. 292 (APS's 2006 comment letter at 5) ("The allowable exceedance (sic) of one six minute period per hour up to 27 percent should not count in determining the 0.2 percent excused exceedences per reporting period."). Accordingly, the 0.8 percent cap in the North Carolina SIP revision does not support the 0.2 percent *additional* exceedences that APS desires in this case.

C. While No Remand Is Necessary With Respect to the 0.2 Percent Issue, if the Court Were to Remand This Matter to EPA for a More Detailed Explanation With Respect to the Issue, It Should Not Vacate the Underlying Opacity Limit For Units 4 and 5 During the Remand.

In an abundance of caution, EPA previously moved for a remand of the record so that it could provide a fuller explanation for its rejection of APS's contention on the 0.2 percent issue. EPA believed at that time that a limited, voluntary remand for a fuller explanation of EPA's action made sense with respect

to the 0.2 percent issue because EPA could easily moot any claim that it had not adequately explained its reasoning with respect to the issue. Had the Court granted EPA's motion, EPA would have explained, among other things, that APS's contention was rejected because APS failed to provide any factual support for the contention.[16/] In retrospect, as shown above, a remand is unnecessary for this purpose because the record plainly shows that APS failed to provide any data or evidence whatsoever in support of its contention. Thus, no purpose would be served by a remand of the record in these circumstances and the Court should reject APS's argument as unsupported in the record.

In addition, EPA's decision-making path with respect to the 0.2 percent issue can be ascertained from the record currently before the Court. EPA reasonably interpreted APS's comment with respect to the 0.2 percent issue as part and parcel of its request for an exemption, as opposed to an affirmative defense, for periods of malfunction. APS had consistently raised the malfunction issue with EPA over 292 (APS 1996 attachment at 5) (asserting that APS could not achieve the 20-percent

[16/] EPA was unaware until it saw APS's brief that APS had not been completely candid with the Agency with respect to the 0.2 percent issue. Now that APS has conceded that it added a "margin of safety" to its unsupported assertion, EPA would also reject the assertion as unfounded for this reason as well.

opacity limit during periods of startup, shutdown, malfunction, or during periods of saturated stack conditions). When APS commented on EPA's FIP proposal in 1999, APS specifically stated:

> In fact, when New Mexico adopted the standards that EPA is now adopting here, it was understood that the standards were only achievable if allowance was made for excess emissions during events such as startup, shutdown and malfunction. APS installed a level of control technology that was consistent with that understanding. No matter how carefully operated and well maintained that control technology, there will inevitably be periods of excess emissions during periods of startup, shutdown and malfunction.

J.A. 176 (Letter from Michael B. Woods, APS, to Douglas K. McDaniel, EPA (Nov. 8, 1999), attached comments at 6) ("APS 1999 attachment"). Prior to 2006, APS had never claimed that it could not achieve the standard when the baghouses were properly operated, outside of periods of startup, shutdown, malfunction or saturated stack conditions. Indeed, as far back as 1996, APS indicated that it could normally achieve five percent opacity or better with proper operation of the baghouses. J.A. 118 (1996 APS attachment at 5).

Outside of periods of startup, shutdown, malfunction or saturated stack conditions, the only reason for excess emissions with a baghouse that EPA is aware of is operator error. As set forth below, EPA fully explained its rejection of APS's request for an exemption for periods of malfunction, while providing APS with an

alternative limit during periods of startup and shutdown. As discussed above, EPA also provided APS with an alternative limit during periods of saturated stack conditions. APS is clearly not entitled to any relief from the limit when excess emissions occur during periods when APS fails to operate its baghouses properly. Because operator error or malfunctions are the only logical explanation for any excedences that occur at Units 4 and 5 outside of startup, shutdown and saturated stack conditions, and because APS provided no evidence whatsoever to the contrary in its comments to EPA on the 0.2 percent issue, EPA reasonably believed that it had addressed all of the relevant issues (startup, shutdown, malfunction and saturated stack conditions) and it therefore reasonably did not go into further detail on the 0.2 percent issue.[17/] Accordingly, EPA's decision-making path can be ascertained with respect to the 0.2 percent issue, and the Court should therefore reject APS's contention that EPA failed "to explain why APS's proposed solution [to the alleged problem] was unacceptable." See Alaska Dep't. of Envtl. Conservation v. EPA, 504 U.S. at 497 ("Even when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that

[17/] We note that APS concedes that it can meet the 20-percent opacity limit at least 99.8 percent of the time. In fact, it can meet the standard more than 99.8 percent of the time because its requested 0.2 percent allowance includes a margin of safety. The 0.2 percent allowance APS requests would obviously cover all exceedences of the standard, including those due to malfunction or operator error.

account if the agency's path may reasonably be discerned.") (internal quotation marks omitted).

Moreover, given that the record does not support APS's contention on the 0.2 percent issue, any failure by EPA to more explicitly explain its rejection of APS's comment on the 0.2 percent issue can only be described as a minor procedural error that would not warrant vacatur of the underlying opacity limit for Units 4 and 5 even if a remand for a fuller explanation was appropriate. Where procedural errors can readily be corrected on remand, the courts have declined to vacate administrative decisions despite finding that the decisions could not be upheld due to the procedural errors. See, e.g., Fertilizer Inst. v. EPA, 935 F.2d 1303, 1313 (D.C. Cir. 1991) (leaving challenged EPA rule in place pending action on remand despite concluding on the merits that EPA had failed to provide adequate notice and opportunity for comment). In determining whether to vacate an agency determination after finding the determination cannot be upheld on the merits, the District of Columbia Circuit has considered "'the seriousness of the [final rule's] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" Allied Signal, Inc. v. NRC, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (quoting International Union, United Mine Workers of Am. v. Fed. Mine Safety & Health

Admin., 920 F.2d 960, 967 (D.C. Cir. 1990).

Those considerations do not warrant vacatur of the opacity limits for Units 4 and 5 based upon any perceived failure of EPA to more fully explain its reasoning on that issue. EPA could easily cure any such failure by explaining on remand that APS did not support its contention on the 0.2 percent issue with any data justifying the requested exemption. A failure that can be cured so easily can hardly be described as a serious deficiency warranting vacatur of the rule. See Honeywell International Inc. v. EPA, 374 F.3d 1363, 1380 (D.C. Cir. 2004) (Rogers, J., dissenting in part and explaining that "because EPA . . . might be able to easily cure any defect, vacating the rule risks unnecessary disruption to the regulatory scheme."), modified, 393 F.3d 1315 (D.C. Cir. 2005); c.f., Qwest Corp. v. FCC, 258 F.3d 1191, 1201-05 (10th Cir. 2001) (vacating rule on remand after detailing four significant problems with the agency's explanation of its decision that prevented the Court from determining whether the agency's decision was rational). In addition, the disruptive consequences of such a vacatur would potentially be significant because, without the FIP, APS may be able to exceed the underlying PM limit without detection. As explained above, direct compliance with the PM limit is determined through an *annual* test. The 20-percent opacity limit is an indirect method for determining compliance during the long periods between the annual

tests because it shows that the baghouses are working properly. It would therefore be disruptive and potentially harmful to vacate the opacity standard during any remand because this would potentially allow undetected violations of the PM standard to occur. See Sierra Club v. TVA, 430 F.3d at 1348 ("The Clean Air Act does not assume an accepted level of undetected non-compliance; it provides that there is to be continuous compliance."). Therefore, the Court should not vacate the opacity limits for Units 4 and 5 even in the unlikely event it remands that portion of the FIP to EPA for a more detailed explanation of EPA's rationale with respect to the 0.2 percent issue.

D. EPA Reasonably Provided APS an Affirmative Defense With Respect to Civil Penalties, as Opposed to a Complete Exemption From the Opacity Standard, For Units 4 and 5 During Periods of Malfunction of the Control Technology.

As EPA discussed above in the Background section, and as explained in its final rule, it has been EPA's longstanding position that excess emissions resulting from malfunctions of the control technology employed by a source to comply with a SIP or FIP constitute CAA violations, but a regulatory agency may provide an affirmative defense to a claim for civil penalties for such violations. 72 Fed. Reg. at 25,702. See J.A. 69 ("Bennett Memorandum"); J.A. 160, ("Herman Memorandum") J.A. 185 ("Schaeffer Memorandum"). See also Michigan Dep't. of

Envtl. Quality v. Browner, 230 F.3d at 183 (discussing Bennett Memorandum); Sierra Club v. Ga. Power Co., 365 F. Supp. 2d at 1303-04 (discussing Bennett, Herman and Shaeffer Memoranda). Indeed, even prior to issuing these memoranda, EPA had explained that automatic exemptions were not consistent with CAA section 110. See 42 Fed. Reg. 21,472 (May 27, 1977). Consistent with this longstanding policy, EPA has provided the Plant with an affirmative defense with respect to any civil penalties, but not with respect to injunctive relief, for exceedences of any FIP limit that occur during periods of malfunction of the Plant's control technology. 40 C.F.R. §§ 49.23 (c)(1), (c)(7), (h)(3).

EPA's interpretation of the CAA as not allowing for automatic exemptions from compliance during periods of malfunction has been specifically upheld as a reasonable interpretation of the Act. In Michigan Dep't. of Envtl Quality v. Browner, 230 F.3d at 183, the court upheld EPA's disapproval of a SIP revision by Michigan that provided an automatic exemption for exceedences occurring during periods of startup, shutdown and malfunction. There, the court reviewed EPA's longstanding interpretation of CAA section 110 as not allowing for such exemptions. Id. at 183-84. The court noted that CAA section 110 prohibits EPA from approving a SIP revision that would interfere with attainment of the NAAQS or any other applicable CAA requirement. Id. at 185. Because an automatic

exemption from SIP limits for malfunction events could interfere with attainment and maintenance of the NAAQS, the court upheld as reasonable EPA's interpretation of CAA section 110 as disallowing automatic exemptions for malfunctions. Id.

This Court should likewise uphold EPA application of its reasonable interpretation of the CAA's requirements in its notice-and-comment rulemaking in this case.[18/] Indeed, EPA's determination to provide APS an affirmative defense with respect to penalties, as opposed to a complete exemption for both penalties and injunctive relief, is consistent with the CAA's requirement for "continuous compliance with pollution limitations." Sierra Club v. TVA, 430 F.3d at 1348. Under 42 U.S.C. § 7602(k), Congress has provided that emission limitations, such

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[18/] While EPA and APS discussed a possible exemption for malfunctions during the course of the rulemaking, see APS's Br. at 11-12, EPA ultimately determined *not* to change its longstanding interpretation of the Act as prohibiting such an exemption. That EPA may have considered changing course does not diminish the deference to which its final decision is due. EPA has clearly explained the basis for not providing an exemption for malfunctions in its final rule. 72 Fed. Reg. at 25,702. EPA is therefore entitled to deference here regardless of any discussions it may have had with APS about a possible exemption. See National Ass'n of Homebuilders v. Defenders of Wildlife, 127 S. Ct. 2518, 2530 (2007) ("The federal courts ordinarily are empowered to review only an agency's *final* action . . . and the fact that a preliminary determination is later overruled . . . does not render the decisionmaking process arbitrary and capricious"); National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981-82 (2005) (agency inconsistency is not a basis for declining to apply Chevron framework and a change in policy may still qualify for deference under Chevron).

as those imposed in the FIP for the Plant, must "assure continuous emission reduction[s]." Id. A complete exemption with respect to all relief for exceedences due to malfunctions would be inconsistent with the CAA's requirement for such continuous reductions. Exceedences due to malfunction could be an indication that additional, upgraded or different control technology is necessary in order to meet the underlying limitation. Therefore, it is reasonable for EPA to provide an affirmative defense with respect to civil penalties, but not for injunctive relief, and this reasonable interpretation of the CAA's requirements should be upheld under Chevron. See Michigan Dep't. of Envtl Quality v. Browner, 230 F.3d at 185 ("Given the deference we owe to the EPA's decision, we cannot say that EPA's interpretation of . . . the CAA . . . is unreasonable.").

APS makes several arguments against the affirmative defense provision, none of which has merit. APS first asserts that the affirmative defense provided in the FIP does not cure EPA's alleged underlying error in imposing an arbitrary limit in the first place. However, as shown above, the opacity limit for Units 4 and 5 is not arbitrary. Rather, the limit ensures that the Plant's baghouses are being operated properly and therefore serve as an indirect indicator that Units 4 and 5 are meeting the underlying PM limit. Accordingly, APS's indirect attack on the affirmative defense provision must fail.

The same is true of APS's repetitive mantra that the opacity limit on Units 4 and 5 is not necessary to attain the NAAQS. See APS's Br. at 39-41, 43. The opacity limit ensures that the baghouses are operating properly, the properly operating baghouses ensure that the underlying PM limit is continuously achieved, and the underlying PM limit is designed to ensure attainment and maintenance of the NAAQS as previously determined in the approved New Mexico SIP from which the limit was derived.

APS also asserts that excess emissions due to malfunctions at the Plant will not necessarily lead to a violation of the relevant NAAQS, and that EPA could limit an exemption for malfunctions by requiring that no excess emissions cause or contribute to a violation of the NAAQS. APS Br. at 39-40. However, as EPA explained in its final rule, violations of the NAAQS are rarely based upon emissions from one source, but rather result from emissions from numerous sources. 72 Fed. Reg. at 25,702. Thus, excess emissions from a single source during periods of malfunction could *interfere* with attainment or maintenance of the NAAQS regardless of whether they directly lead to a violation of the NAAQS. See Michigan Dep't. of Envtl. Quality v. Browner, 230 F.3d at 185 ("The CAA prohibits the EPA from approving a revision that would interfere with attainment or any other applicable CAA requirement"). Indeed, the purpose of the underlying

emission limits is to ensure that exceedences of the NAAQS do not occur in the first place. EPA should not first have to wait until an exceedence of the NAAQS has occurred before it may require a source that has exceeded its own emission limits to undertake corrective action, regardless of the underlying cause of the exceedence. This would be inconsistent with the CAA's requirement that the NAAQS be maintained. 42 U.S.C. § 7410(a)(1) (plans must provide for maintenance of the NAAQS).[19/] APS's arguments should therefore be rejected.

Nor is EPA's provision of an affirmative defense for malfunctions in this case inconsistent with its treatment of emissions during periods of startup and shutdown as APS asserts. APS Br. at 41. As EPA has explained in its policies with respect to startups, shutdowns and malfunctions, for some sources there may exist infrequent, short periods during startup and shutdown where excess emissions cannot be avoided and where bypassing the control equipment may be necessary to prevent personal injury or property damage. J.A. 73 (Bennett Memorandum at 17-

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[19/] APS's suggestion that EPA could always issue an emergency administrative order or seek emergency injunctive relief from a court where a source presents an imminent and substantial endangerment to public health under 42 U.S.C. § 7603, is not helpful. As the NAAQS are set to protect public health, allowing a source to produce emissions large enough to cause an imminent and substantial endangerment *before* EPA may take any action to correct an exceedence of an emission limit is obviously antithetical to Congress' goals in passing the CAA. See APS's Br. at 41 n.11.

5). See also J.A. 162 (Herman Memorandum at 3) (explaining that "for some source categories, even the best available emission control systems might not be consistently effective during startup or shutdown periods"). An allowance may be made for such periods through an alternative limitation, which may allow greater emissions during a defined period of time, as EPA has done here. See id. See also 72 Fed. Reg. at 25,702 (explaining that such alternative limits in the FIP for the Plant are not exemptions); 40 C.F.R. §§ 49.23(c)(12), (13) (defining shutdown and startup based upon the particular unit's megawatt load); 40 C.F.R. § 49.23(h)(2) (requiring that frequency and duration of startup and shutdown periods be minimized and that contemporaneous logs be kept of such periods). Thus, startup and shutdown are planned events of short duration that must be carefully documented by the operator. These events can be anticipated and thus can be considered in determining whether a SIP will provide for attainment and maintenance of the NAAQS. Malfunctions, on the other hand, cannot be anticipated in time, size, or number of occurrences. There potentially could be numerous malfunction events of long duration and/or size.[20/] Thus, it is imperative that EPA and affected citizens retain the ability to seek injunctive relief to remedy

[20/] While APS's sole concern seems to be the opacity standard, the provisions for startup, shutdown, and malfunctions apply both to the opacity standard and to the underlying PM standard. 40 C.F.R. §§ 49.23(h)(2), (3).

excess emissions resulting from malfunctions. It was therefore reasonable for EPA to provide such an alternative limit for periods of startup and shutdown for the Plant while providing an affirmative defense to claims for civil penalties, but not claims for injunctive relief for periods of malfunction.

Finally, the New Source Performance Standards ("NSPS") for power plants have no bearing here. See APS Br. at 42. Under CAA section 111, the NSPS are *technology-based* standards that apply to stationary sources that are constructed, modified, or reconstructed after the standard is proposed. 42 U.S.C. § 7411(a)(2).[21/] They are, in that sense, unrelated to attainment or maintenance of the health-protective NAAQS. The emission limits for the Plant were derived from the New Mexico SIP, an element of a health-based program which mandates attainment and maintenance of the NAAQS. As discussed above, EPA has reasonably determined that exemptions should not be allowed for malfunctions because this would be inconsistent with the CAA section 110 requirements that implementation plans

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[21/] Section 111 provides that a new source "performance standard" must:

> reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

42 U.S.C. § 7411(a)(1).

ensure attainment and maintenance of the NAAQS. Therefore, the fact that EPA's regulations provide an exemption from the NSPS for power plants for malfunctions is not inconsistent with EPA's longstanding treatment of malfunctions with respect to SIP-based standards under CAA section 110. See J.A. 69 (Bennett Memorandum); J.A. 160, (Herman Memorandum); J.A. 185 (Schaeffer Memorandum).

II. THE COURT SHOULD GRANT EPA'S MOTION FOR A VOLUNTARY REMAND WITH RESPECT TO THE FUGITIVE DUST LIMIT.

EPA previously moved for a voluntary remand of its opacity limit for fugitive dust emissions at the Plant, so that it could better explain the justification for that limit. This limit is contained in the FIP at 40 C.F.R. § 49.23(d)(3). EPA concedes that it did not adequately explain its rationale for imposing this limit in either its notice of proposed rulemaking or in its final rule. Therefore, EPA again moves for a remand of the fugitive dust limit, and it agrees that the limit can be vacated on remand. The limit is severable from the rest of the FIP and EPA has not yet determined whether it will propose to establish a new limit for fugitive dust at the Plant following remand. Accordingly, the Court should grant EPA's motion for a voluntary remand with respect to the fugitive dust limit found at 40 C.F.R. § 49.23(d)(3) and vacate the limit.

III. EPA'S FIP FOR THE PLANT IS CONSISTENT WITH EPA'S TRIBAL AUTHORITY RULE, WHICH CLEARLY PROVIDES EPA WITH THE DISCRETION TO ISSUE FIPS SPECIFICALLY TAILORED FOR INDIAN COUNTRY.

The Sierra Club argues that the FIP for the Plant is arbitrary and capricious under the Tribal Authority Rule because EPA failed to first undertake a full-blown analysis of all of the measures it believes are necessary to protect air quality on the Navajo Reservation. It argues that this should have included, among other things, a demonstration that the NAAQS are protected. Sierra Club Br. at 24-33. The legal basis of the Sierra Club's argument is its contention that the Tribal Authority Rule imposes a mandatory duty upon EPA to undertake all the actions set forth in EPA's regulations at 40 C.F.R. pt. 51, App. V, when a Tribe has not promulgated an EPA-approved TIP. Sierra Club Br. at 26-27.[22/] Thus, according to the Sierra Club, EPA may not act to fill a regulatory gap under the Tribal Authority Rule as it did in this case. The Sierra Club requests that this Court order EPA to issue a new FIP for the

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[22/] As is shown below, the Tribal Authority Rule provides EPA with discretion to determine what measures are necessary or appropriate to protect air quality in the absence of an EPA-approved TIP. This Court therefore has jurisdiction to review the Sierra Club's petition because EPA has taken final action in promulgating a FIP. 42 U.S.C. § 7607(b). See Maier v. EPA, 114 F.3d 1032, 1038-39 (10th Cir. 1997) ("Because exclusive jurisdiction to review the substance of regulations finally promulgated by the EPA lies with the Courts of Appeals, we have jurisdiction to compel revisory rulemaking unless the agency's failure falls within that class of nondiscretionary duties for which jurisdiction has been granted to the district court").

Plant. Sierra Club Br. at 33. As is shown below, EPA's site-specific FIP for the Plant is completely consistent with the Tribal Authority Rule, and the Sierra Club's arguments to the contrary are without merit.

The Sierra Club also appears to suggest that there is no technical justification for the limits contained in the FIP for the Plant. Sierra Club Br. at 24. However, as is also shown below, EPA reasonably imposed the limits in the FIP, which are based upon, and in some instances more stringent than, the limits in the previously-approved New Mexico SIP.

A. The Tribal Authority Rule Does Not Require the Sierra Club's All-or-Nothing Approach.

The Sierra Club's argument boils down to a contention that, under the Tribal Authority Rule, EPA must promulgate a FIP meeting all of the completeness criteria of EPA's regulations at 40 C.F.R. pt. 51, App. V, when a Tribe has failed to develop a TIP. This argument is contrary to the plain language of the Tribal Authority Rule and would prevent EPA from taking such limited action as is necessary or appropriate to protect air quality in Indian country as EPA has done here. As EPA explained in the final rule, the Tribal Authority Rule authorizes EPA to promulgate FIP provisions that EPA determines are "necessary or appropriate to protect air quality." 72 Fed. Reg. at 25,699. Specifically, the Tribal Authority Rule provides that EPA, "pursuant to the discretionary authority explicitly granted"

under sections 301(a) and 301(d)(4) of the CAA:

> Shall promulgate without unreasonable delay such Federal implementation plan *provisions as are necessary or appropriate to protect air quality*, consistent with the provisions of sections 301(a) and 301(d)(4), if a tribe does not submit a tribal implementation plan meeting the completeness criteria of 40 CFR part 5, Appendix V, or does not receive EPA approval of a submitted tribal implementation plan.

40 C.F.R. § 49.11(a) (emphasis added). The plain language of the regulation provides EPA with discretion to determine what provisions are *necessary or appropriate* to protect air quality, and to promulgate such provisions. Contrary to the Sierra Club's argument, the regulation does not require EPA to promulgate *all* provisions, or to undertake all studies and demonstrations that would otherwise be in an implementation plan meeting the completeness criteria of 40 C.F.R. pt. 51, App. V. If that had been EPA's intention there would have been no need for EPA to specify that it need only implement such provisions as are "necessary or appropriate to protect air quality." Rather, the regulation could simply have provided that EPA shall promulgate a FIP meeting all the requirements of the completeness criteria of 40 C.F.R. pt. 51, App. V. The Court should therefore reject the Sierra Club's argument as contrary to the plain language of the regulation. Indeed, because EPA's reading of its own regulation in these cases is not "unreasonable, plainly erroneous, or inconsistent with the regulation's plain

meaning," the Court should defer to EPA's reading of the regulation. Culbertson v. USDA, 69 F.3d at 467 (internal quotation marks and citations omitted). See also Safe Authority for Everyone v. EPA, 2006 WL 3697684 *2 (9th Cir.) (noting "EPA's broad discretion in promulgating air quality regulations on Indian reservations") (copy provided in addendum).[23/]

The fact that EPA determined in the Tribal Authority Rule that many of the requirements for SIPs also apply to TIPs does not, as the Sierra Club argues, mean that EPA may not promulgate a more limited FIP under the Tribal Authority Rule's gap-filling authority. See Sierra Club's Br. at 29-30. The Tribal Authority Rule was promulgated under CAA section 301(d), not CAA section 110(a), and EPA specifically concluded in the Tribal Authority Rule that the requirements of CAA section 110(c), respecting the need for a FIP when a State has failed to provide a complete SIP, do not apply to Tribes. 40 C.F.R. § 49.4(d). When it promulgated 40 C.F.R. § 49.11, EPA explained that it "may act to protect air quality pursuant to its 'gap-filling' authority under the Act as a whole" and that it also has "discretionary authority" to act where it has determined that it is inappropriate or administratively

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[23/] The Sierra Club's admonition that "shall" means "shall" adds nothing to its argument. See Sierra Club's Br. at 29. EPA has taken all the action it deemed necessary or appropriate to protect air quality in the circumstances of this case. Thus, even assuming the regulation imposed any duty upon EPA at all, EPA has satisfied that duty here.

infeasible to treat Tribes in the same manner as States. 63 Fed. Reg. at 7,265. Thus, it was clear that EPA intended the regulation to provide it with discretion to fill gaps as necessary or appropriate to protect air quality without first promulgating all of the provisions otherwise required for a complete SIP or TIP.

In addition, EPA has explained that it will take some time to develop tribal and federal programs over Reservations and other lands subject to tribal jurisdiction. 59 Fed. Reg. at 43,961. In the meantime, EPA noted that it has undertaken certain specific actions as necessary or appropriate to fill gaps in specific circumstances. 63 Fed. Reg. at 7,263 ("The Agency has issued permits and undertaken the development of . . . FIPs to control sources locating in Indian country"). Thus, EPA's "strategy for implementing the CAA in Indian country proposes a multi-prong approach" including site-specific FIPs along with a "'grass-roots'" approach in which it will work with Tribes "to assess the air quality problems and develop, in consultation with [T]ribes, either tribal or federal strategies for addressing the problems." Id. at 7,264. Therefore, contrary to the Sierra Club's argument, it was not EPA's intention when it promulgated the Tribal Authority Rule that EPA would be required to implement *all* measures otherwise required for a SIP when exercising its gap-filling authority under the regulation. Rather, as is clear from the regulatory text and EPA's contemporaneous statements

in the preamble to the Tribal Authority Rule, it was always EPA's intention that Tribes would be provided time to develop TIPs and that EPA retained the discretion to take those actions EPA determines are "necessary or appropriate" to protect air quality in the interim. In fact, the Navajo Nation specifically supported EPA's gap-filling action in this case and specifically "advised EPA that it continues to support EPA's efforts to impose such controls on [the Plant] as are necessary to ensure continued compliance with the substantive requirements of the New Mexico SIP . . . ." 64 Fed. Reg. at 48,732-733.

Also without merit is the Sierra Club's assertion that because the terms "necessary or appropriate" appear in CAA section 110(a), 42 U.S.C. § 7410(a), the Tribal Authority Rule must somehow be read to require that EPA promulgate all measures and undertake all studies required for the development of an entire SIP when it promulgates a FIP under the Tribal Authority Rule. See Sierra Club's Br. at 31.[24/] As explained above, the Tribal Authority Rule was promulgated under CAA section 301(d), not CAA section 110(a), and EPA specifically concluded in the Tribal Authority Rule that the requirements of CAA section 110(c), respecting the need for a FIP when a State has failed to provide a complete SIP, do not apply to

[24/] The Sierra Club inadvertently misquotes section 110(a)(2)(A) as using the phrase "necessary and appropriate," as opposed to "necessary or appropriate." Compare 42 U.S.C. § 7410(a)(2)(A) to Sierra Club's Br. at 31.

Tribes. 40 C.F.R. § 49.4(d). Of course, the Sierra Club may not now challenge the Tribal Authority Rule itself in this Court. Petitions challenging a national EPA regulation under the CAA, such as the Tribal Authority Rule, may only be brought in the District of Columbia Circuit, and must be brought within 60 days of the date the regulation was published in the *Federal Register*. 42 U.S.C. § 7607(b). The District of Columbia Circuit upheld the Tribal Authority Rule in Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280. Thus, the Sierra Club may not argue here that the breadth of discretion provided in the Tribal Authority Rule is somehow inconsistent with the requirements of the CAA.

In addition, regardless of any similarity in terms between section 110(a) and EPA's regulation at 40 C.F.R. § 49.11(a), as shown above, it was EPA's explicit intention when it promulgated the regulation to provide itself with broad discretion to promulgate only those measures it deemed necessary or appropriate to protect air quality at any particular time. Therefore, the Sierra Club's arguments should be rejected as contrary to the intention of the regulation.

Moreover, CAA section 110 allows EPA to make partial or piecemeal approvals of SIP elements, ensuring that earlier-approved provisions will become federally enforceable as soon as possible. Association of Irritated Residents v. EPA, 423 F.3d 989, 997 (9th Cir. 2005). Likewise, EPA may proceed in a

piecemeal fashion as necessary or appropriate to protect air quality under the Tribal Authority Rule. Indeed, the Sierra Club's all-or-nothing approach would frustrate EPA's intention in promulgating its regulation at 40 C.F.R. § 49.11(a), because it would prevent EPA from implementing discrete measures as necessary or appropriate to protect air quality unless and until either the relevant Tribe or EPA has undertaken a comprehensive analysis of air quality and developed an implementation plan containing measures to address all air quality problems in an area. While the Sierra Club's underlying intention may be to further the protection of air quality in the Four Corners area, in reality, its approach would only serve to unnecessarily delay the implementation of necessary or appropriate controls while additional analyses and control measures are developed. The Court should therefore reject the Sierra Club's attempt to lessen EPA's gap-filling authority to impose measures that are necessary or appropriate to protect air quality as it has done in its site-specific FIP for the Plant.

B. EPA Reasonably Applied the Pre-existing Limits.

The Sierra Club also suggests that there is no technical justification for the limits imposed in the FIP due to statements by EPA that the limits are based on those that the Plant had historically followed. Sierra Club Br. at 24. As explained above, while, for the most part, EPA codified the emission limits the Plant has

historically followed, those emissions limits had been previously determined by New Mexico to be the limits necessary for attainment and maintenance of the NAAQS under CAA section 110. Although not applicable on the Navajo Reservation as a jurisdictional matter, EPA had previously reviewed and approved the technical basis and justification for the limits in the New Mexico SIP. See 40 C.F.R. pt. 52, sbpt. GG. The Sierra Club did not challenge the justification for those limits at the time of EPA's action on the New Mexico SIP. The only differences between the emission limits for the FIP and those contained in the previous New Mexico SIP, are for NOx and SO_2, both of which are *more stringent* than the previously-approved SIP limits. J.A. 156-57 (1999 TSD at 2-3); 72 Fed. Reg. at 25,698. The NOx limit had been proposed by New Mexico as a SIP revision. J.A. 157 (1999 TSD at 3). The SO_2 limit had been negotiated by a stakeholders group and represents substantial emissions reductions from that which the Plant had historically achieved. 72 Fed. Reg. at 25,698.[25/] Therefore, the underlying premise of the Sierra Club's argument is incorrect, because the emission limits in the FIP were previously reviewed by EPA and determined to be appropriate to attain and

[25/] As explained above, the opacity limits in the FIP for Units 4 and 5 are imposed to ensure that those Units achieve the PM limit. The Sierra Club makes no showing whatsoever to suggest to that the opacity limits are not technically justified for this purpose.

maintain the NAAQS as part of EPA's action on the New Mexico SIP. Because the Four Corners area is in attainment for all of the NAAQS, the more stringent limits for NOx and SO_2 obviously continue to assure attainment and maintenance of the NAAQS.[26/]

As explained above, EPA acted to fill a regulatory gap with respect to the enforceability of the emissions limits for the Plant because the plant is located on the Navajo Reservation. There was no need for EPA to expend the considerable resources and time necessary for the comprehensive analysis and demonstrations the Sierra Club asserts are required, because New Mexico had already undertaken the analyses necessary to show that the emissions limits for the Plant were technically justified as necessary to attain and maintain the NAAQS, and because two of the FIP limits are even more stringent than those limits. Indeed, as EPA has explained, a Tribe is not required to develop CAA programs "wholly from

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[26/] The Sierra Club's assertion that EPA was required to consider CO_2 in the FIP is without merit. See Sierra Club Br. at 10-11. Although the Supreme Court concluded that CO_2 is an air pollutant in Massachusetts v. EPA, 127 S. Ct. 1438 (2007), this does not mean that EPA must consider CO_2 when promulgating a FIP in Indian country. Under CAA section 110(a), 42 U.S.C. § 7410(a), a State must submit a plan providing for the attainment, maintenance, and enforcement of each NAAQS. Because EPA has not promulgated a NAAQS for CO_2 there is currently no obligation for any SIP or FIP to include measures respecting CO_2. The Sierra Club's discussion of mercury is likewise irrelevant in this case because there is no NAAQS for mercury. See Sierra Club's Br. at 8-9.

scratch[,]" . . . [rather] "a Tribe may adopt or incorporate standards from an adjacent or similarly situated State . . . ." 59 Fed. Reg. at 43,961. Likewise, EPA may incorporate relevant state limits when filling jurisdictional gaps in Indian country as it has done in these cases.[27/] Accordingly, it was reasonable for EPA to exercise its discretionary authority under the Tribal Authority Rule by imposing the limits at least as stringent as those that the Plant had historically achieved.

CONCLUSION

For all these reasons, the Court should deny the petitions for review.

[27/] We note that the Sierra Club has asserted only that EPA must undertake certain studies in order to determine what air pollution control measures are necessary for the Plant. It has not even attempted to show that the actual limitations imposed in the FIP are not sufficient to attain and maintain the relevant NAAQS.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

EPA believes that the issues in this case are sufficiently complex that oral argument would be beneficial to the Court in its consideration of those issues. EPA therefore respectfully requests that the Court schedule oral argument.

STATEMENT OF COMPLIANCE

In accordance with Fed. R. App. 32(a)(7)(C), the undersigned certifies that this brief is proportionally spaced, uses 14-point type, and contains 15,773 words.

s/David A. Carson
David A. Carson

CERTIFICATION OF DIGITAL SUBMISSION

In accordance with the Court's Emergency General Order Regarding the Electronic Submission of Selected Documents, it is hereby certified that: (1) no privacy redactions were required for this Brief, (2) the electronic version of this Brief is an exact copy of the written Brief that is filed with the Clerk, and (3) the digital copy of this Brief has been scanned for viruses with the most recent version of E-Trust Antivirus 7.1.192 virus scanning program, which was last updated on December 1, 2007, and, according to the program, is free of viruses.

s/David A. Carson
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I served two true and correct copies of the foregoing EPA's Merits Brief, along with two copies of a compact disc containing a copy of EPA's Merits Brief in digital format, upon the following counsel by first class United States mail:

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