Case No. 13-9524

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILDEARTH GUARDIANS,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and GINA McCARTHY, Administrator, U.S. Environmental Protection Agency,
Respondents,

ARIZONA PUBLIC SERVICE COMPANY,
Intervenor-Respondent.

ON PETITION FOR REVIEW OF FINAL ACTION BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF OF INTERVENOR

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ORAL ARGUMENT REQUESTED

FEDERAL RULE OF APPELLATE PROCEDURE 26.1 DISCLOSURE STATEMENT

Arizona Public Service Company is a wholly-owned subsidiary of its parent corporation, Pinnacle West Capital Corporation. No publicly held company other than Pinnacle West Capital Corporation owns 10 percent or more of Arizona Public Service Company's stock.

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There are no prior or related appeals or petitions for review.

GLOSSARY

Act	Clean Air Act
Agency	U.S. Environmental Protection Agency
ANPR	Advanced Notice of Proposed Rulemaking
APS	Arizona Public Service Co.
BART	Best Available Retrofit Technology
CAA	Clean Air Act
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act
FCPP	Four Corners Power Plant
FIP	Federal Implementation Plan
FWS	U.S. Fish and Wildlife Service
HAPs	Hazardous Air Pollutants
JA	Joint Appendix
MACT	Maximum Achievable Control Technology
MATS	Mercury and Air Toxics Standards
MW	Megawatts
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NOx	Nitrogen Oxide

OSM	Office of Surface Mining Reclamation and Enforcement
Pet. Br.	Final Opening Brief of Petitioner
PM	Particulate Matter
SCR	Selective Catalytic Reduction
SIP	State Implementation Plan
SO_2	Sulfur Dioxide
TAR	Tribal Authority Rule
TIP	Tribal Implementation Plan
VOCs	Volatile Organic Compounds
WEG	WildEarth Guardians

JURISDICTIONAL STATEMENT

Arizona Public Service Company ("APS") adopts and incorporates by reference the statement of jurisdiction provided by the Respondents, the U.S. Environmental Protection Agency ("EPA" or "the Agency") and Gina McCarthy, Administrator, EPA. Resp.'s Final Br. at 1.

STATEMENT OF THE ISSUES

1. Whether WildEarth Guardians ("WEG") can demonstrate Article III standing where (a) it has not alleged that EPA's issuance of a federal implementation plan ("FIP") limiting emissions of visibility-impairing pollutants from the Four Corners Power Plant ("Four Corners") actually injures its members' concrete and particularized interests, (b) the only effects alleged—the impacts of mercury and selenium emissions from Four Corners on listed species—were not caused by the action challenged here, and (c) the alleged effects cannot be redressed by a decision in WEG's favor because consultation could not result in EPA taking action in this rulemaking for the purpose of reducing emissions of mercury and selenium.

2. Whether EPA's issuance of the FIP triggers consultation obligations under section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), where (a) EPA does not have discretion under the Clean Air Act's ("CAA" or "the Act") visibility program to take action for the purpose of regulating mercury and

selenium emissions or benefitting species, and (b) the FIP promulgated by EPA has no effect on listed species.

STATEMENT OF THE CASE

On its face, this case concerns a challenge by WEG to EPA's final rulemaking action implementing the visibility impairment provisions of the CAA for Four Corners. WEG's challenge is based on EPA's purported failure to engage in consultation under the ESA to explore ways in which Four Corners could be required to achieve reductions in mercury and selenium emissions for the benefit of listed species in addition to the CAA's visibility improvement requirements. Final Br. of Pet'r ("Pet. Br.") at 29 n.9, 41-44, 47. On closer examination, however, this case is much ado about nothing.

WEG contends that EPA violated the law by failing to consider the effects on listed species of two pollutants unrelated to visibility impairment—mercury and selenium—in a visibility rulemaking. But consultation regarding these alleged effects is not required and would be an exercise in futility. As a legal matter, EPA is powerless to address such effects in this rulemaking: the CAA prohibits EPA from regulating mercury and selenium under its visibility protection provisions and affords EPA no discretion to consider the effects of these pollutants or other air emissions on listed species when setting emission standards to protect visibility.

More fundamentally, any action EPA could have taken in this rulemaking, or could possibly take after remand, cannot affect listed species. The EPA action challenged here is not a permissive rulemaking that authorizes the ongoing operations of Four Corners: it is a wholly restrictive rulemaking that limits the facility's emissions of certain pollutants. Furthermore, Four Corners is already subject to the Mercury and Air Toxics Standards ("MATS") rule, a nationwide standard requiring the maximum emission reductions achievable for the only pollutants that WEG alleges affect the listed species. 77 Fed. Reg. 9304 (Feb. 16, 2012). Four Corners must comply with these standards by April 16, 2015, more than two years before the compliance date it would face to install any emission controls required by the FIP challenged here. *See infra* Argument Section III. In other words, incidental reductions in mercury and selenium that WEG seeks to include in this visibility rulemaking, if any, would be required only *after* other EPA regulations had already achieved those same reductions.

For these reasons, WEG simply has nothing at stake in *this* suit.[1] Although WEG may feel strongly about the environmental concerns described in its brief,

[1] WEG's purpose in filing this action is particularly puzzling given that, as WEG knows, the Department of Interior's Office of Surface Mining Reclamation and Enforcement ("OSM"), in cooperation with the Bureau of Indian Affairs and several other federal agencies, is *currently* evaluating action to authorize further mining activities to provide fuel to Four Corners and to renew the lease and rights-of-way for the plant. *See* 77 Fed. Reg. 42,329 (July 18, 2012). As part of this

those general concerns do not amount to a "case or controversy" to support standing. *See Utah v. Babbitt*, 137 F.3d 1193, 1202 (10th Cir. 1998) ("Standing is not measured by the intensity of a party's commitment, fervor, or aggression in pursuit of its alleged right and remedy."). WEG has not shown that it has suffered any injury caused by EPA's visibility rulemaking, or that a favorable decision by this Court could redress any injury. Indeed, the only result that could come from a ruling in WEG's favor—and perhaps the only result that WEG seeks—is the establishment of new, and novel, precedent. But the "judicial Power is one to render dispositive judgments," not advisory opinions. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (internal quotations omitted).

The Court should dismiss or deny WEG's petition for review.

STATEMENT OF FACTS

I. Statutory and Regulatory Background

A. Clean Air Act

1. The CAA Visibility Protection Program

The CAA program at the heart of this case is designed solely to protect and improve visibility in designated national parks and other specially protected federal lands by reducing emissions of pollutants that form regional haze. CAA § 169A, 42 U.S.C. § 7491. The goal of this program is "the prevention of any future, and

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evaluation, OSM has committed to conducting formal consultation under the ESA regarding the very effects WEG complains of in this action. *Id.* at 42,330.

the remedying of any existing, impairment of visibility in . . . [protected] areas which impairment results from manmade air pollution." *Id.* § 169A(a)(1), 42 U.S.C. § 7491(a)(1). Under section 169A and its implementing regulations, states are required to adopt emission limitations and other measures within their state implementation plans ("SIPs") that represent the "best available retrofit technology," or "BART," for controlling visibility-impairing pollutants from qualifying sources. *See id.* § 169A(b)(2)(A), 42 U.S.C. § 7491(b)(2)(A); 40 C.F.R. § 51.308 (establishing requirements for regional haze program). Failure by a State to submit an adequate visibility SIP by the deadline triggers EPA's statutory obligation to adopt a FIP to fill that regulatory gap under CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1).

Pursuant to section 169A, EPA promulgated the Regional Haze Rule to address regional haze, a form of visibility impairment caused by the emission of air pollutants from numerous sources located across a wide geographic area. 40 C.F.R. § 51.308 (Regional Haze Rule); 64 Fed. Reg. 35,714 (July 1, 1999) (promulgating Regional Haze Rule); 70 Fed. Reg. 39,104 (July 6, 2005) (substantially revising Regional Haze Rule); *see* 40 C.F.R. § 51.301 (defining regional haze). Under the Regional Haze Rule, if a regulated source is a large fossil-fuel-fired power plant, the regulatory authority must determine what emission limits constitute BART by applying EPA's BART Guidelines, which

(despite being termed "Guidelines") establish a mandatory procedure for selecting appropriate emission controls for sources above a certain threshold. 40 C.F.R. pt. 51, app. Y (BART Guidelines); *see id.* § 51.308(e)(1)(ii)(B) (requiring use of BART Guidelines for fossil-fuel-fired power plants with total generating capacity greater than 750 megawatts ("MW")).

Emission limitations representing BART are determined on a source-by-source basis and must be selected on the basis of five factors specified by Congress:

> [1] the costs of compliance, [2] the energy and nonair quality environmental impacts of compliance, [3] any existing pollution control technology in use at the source, [4] the remaining useful life of the source, and [5] the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

CAA § 169A(g)(2), 42 U.S.C. § 7491(g)(2); *see also* 40 C.F.R. § 51.308(e)(1)(ii)(A). EPA and the courts have interpreted the phrase "nonair quality environmental impacts" to refer to the negative secondary effects and waste byproducts of emission control alternatives, and not the potential collateral benefits from reducing other pollutants. *E.g.*, 40 C.F.R. pt. 51, app. Y, IV.D.4.i.4 (analysis of this factor focuses on "potential for causing adverse environmental effects"); *Sierra Club v. EPA*, 353 F.3d 976, 990 (D.C. Cir. 2004) (interpreting identical factor for selection of emission controls under CAA § 112 to refer to "the by-products of the control technology"); *see also infra* Argument Section II.C.2. Any

covered source must install and operate BART "as expeditiously as practicable," and not later than five years after the BART determination for that source is made final. CAA § 169A(g)(4), 42 U.S.C. § 7491(g)(4); 40 C.F.R. § 51.308(e)(1)(iv).

2. Regulation of Hazardous Air Pollutants

Congress explicitly prohibited EPA from regulating hazardous air pollutants ("HAPs") under the visibility provisions of section 169A. CAA § 112(b)(6), 42 U.S.C. § 7412(b)(6) (stating that "[t]he provisions of part C of this subchapter," which include section 169A, "shall not apply" to HAPs). Instead, HAPs are regulated under the carefully crafted framework provided in section 112. *Id.* § 112, 42 U.S.C. § 7412. Section 112 contains a list of over one hundred designated HAPs, which includes mercury and selenium. *Id.* § 112(b)(1), 42 U.S.C. § 7412(b)(1) (listing "Mercury Compounds" and "Selenium Compounds"). EPA must identify all categories and subcategories of sources that emit HAPs and promulgate regulations for those categories through a two-stage process. *Id.* § 112(c)(1), (d)(1), 42 U.S.C. § 7412(c)(1), (d)(1).

At the first stage of HAP rulemaking, EPA must promulgate technology-based standards for each HAP source category that "require the maximum degree of reduction" in HAP emissions that the Administrator, "taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable . . . ."

Id. § 112(d)(2), 42 U.S.C. § 7412(d)(2). These limits are known as "maximum achievable control technology" or "MACT" standards. *See* 77 Fed. Reg. 9304, 9308 (Feb. 16, 2012). In February 2012, EPA adopted the MATS rule, which sets nationally applicable MACT standards for emissions of mercury and other HAPs from electric generating units such as Four Corners and requires compliance by April 16, 2015. *Id.* at 9465.

At the second stage, which takes place eight years later, EPA may adopt more stringent risk-based standards for a HAP source category if such standards are required "in order to provide an ample margin of safety to protect public health . . . or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect." CAA § 112(f)(2)(A), 42 U.S.C. § 7412(f)(2)(A). "Adverse environmental effect" includes effects to wildlife or natural resources, including "adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas." *Id.* § 112(a)(7), 42 U.S.C. § 7412(a)(7). Congress thus specifically provided for the promulgation of HAP standards to address effects on listed species, but only at this second stage of standard-setting. *Sierra Club v. EPA*, 353 F.3d at 992 (consideration of listed species improper in first phase of developing MACT standard where Congress "expressly channeled consideration of endangered species to the second phase of CAA standard promulgation").

3. Regulation of Sources on Tribal Lands

Although most CAA programs are administered by the states and the federal government through a system of cooperative federalism, the regulation of sources located on tribal lands presents a special case. *See Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1285 (D.C. Cir. 2000) (noting that "Congress delegated to tribes the authority to regulate air quality in areas within the exterior boundaries of a reservation"). The allocation of authority between EPA and tribes to administer CAA regulatory programs for sources within the exterior boundaries of Indian reservations is based on section 301(d) of the CAA and its implementing regulations, known as the Tribal Authority Rule ("TAR"). CAA § 301(d), 42 U.S.C. § 7601(d); 40 C.F.R. §§ 49.1-49.11. The purpose of these provisions is to (1) provide Indian tribes some flexibility in the implementation of CAA programs on tribal lands, and (2) authorize EPA to take some limited action to fill any remaining regulatory gaps. 63 Fed. Reg. 7254, 7255 (Feb. 12, 1998) (section 301(d) allows EPA to "tailor[] the provisions [of the CAA] to tribes"); *id.* at 7264 (principal goal of section 301(d) is "to allow tribes the flexibility to develop and administer their own CAA programs to as full an extent as possible"); *see Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1126 (10th Cir. 2009) (EPA action under TAR not required to meet otherwise applicable completeness criteria).

The Act directs EPA to identify the provisions of the CAA for which it is appropriate to treat Indian tribes as states and to establish procedures for tribes to carry out the appropriate functions of those provisions through tribal implementation plans ("TIPs"). CAA § 301(d)(2), (d)(3), 42 U.S.C. § 7601(d)(2), (d)(3). EPA has determined that only tribes that apply for approval to administer specific CAA programs and meet certain eligibility criteria qualify for treatment as states. 40 C.F.R. § 49.3. Where EPA has determined that the treatment of tribes as states is inappropriate for the purposes of a particular provision, the CAA authorizes EPA to "provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose." CAA § 301(d)(4), 42 U.S.C. § 7601(d)(4). In addition, the TAR directs EPA to promulgate "such Federal implementation plan provisions as are necessary or appropriate to protect air quality" to fill any regulatory gaps where a tribe does not submit an adequate TIP. 40 C.F.R. § 49.11(a). The TAR's limitation to "necessary or appropriate" provisions permits EPA to adopt "a FIP of limited scope." 78 Fed. Reg. 8274, 8289 (Feb. 5, 2013) (proposing FIP with BART limits for a different power plant within boundaries of Navajo Nation).

B. Endangered Species Act

The ESA provides a framework for the conservation of endangered and threatened species and the ecosystems on which they depend. 16 U.S.C.

§ 1531(b). Congress primarily delegated the administration of the ESA to the Departments of Interior and Commerce, which have in turn divided their responsibilities and delegated their functions to the U.S. Fish and Wildlife Service ("FWS") for the protection of terrestrial and freshwater species and the National Marine Fisheries Service ("NMFS") for the protection of marine and anadromous species, respectively. *See* 16 U.S.C. § 1532(15); 50 C.F.R. § 402.01(b) (allocating responsibility between FWS and NMFS); 50 C.F.R. pts. 223-24 (listing species under jurisdiction of NMFS). The ESA directs these agencies to identify and list any species that is endangered or threatened and designate any critical habitat of that species. 16 U.S.C. § 1533.

Section 7 of the ESA requires that each federal agency, "in consultation with and with the assistance of [FWS or NMFS], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence" of any listed species or "result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). This duty to consult applies only to actions in which there is "discretionary Federal involvement or control." 50 C.F.R. § 402.03.

The procedures governing section 7 consultation are set forth in joint regulations promulgated by FWS and NMFS. *See* 50 C.F.R. pt. 402. If an action will have no effect on listed species or critical habitat, no consultation is required.

Id. § 402.14(a) (no consultation required unless "may affect" determination is made). If the agency taking an action concludes that its action "may affect," but is "not likely to *adversely* affect," listed species or critical habitat, the agency may satisfy section 7(a)(2) of the ESA through "informal consultation" by obtaining a written concurrence with this conclusion from FWS or NMFS. *Id.* §§ 402.14(b)(1), 402.13 (emphasis added). Otherwise, the action agency must enter formal consultation with FWS or NMFS, as appropriate. *Id.* If, through formal consultation, FWS or NMFS concludes that an action will result in jeopardy or adverse modification, it must suggest "reasonable and prudent alternatives" that can be taken by the action agency and would avoid such jeopardy or modification.[2] 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).

II. Factual Background

A. Four Corners Power Plant

Four Corners is a five-unit coal-fired electric generating facility located on the Navajo Nation Indian Reservation near Farmington, New Mexico. 77 Fed.

[2] However, FWS and NMFS do not have the final say: the action agency may choose to not implement these suggested alternatives or to develop its own. *See* 50 C.F.R. § 402.15(a) (action agency, and not FWS or NMFS, "shall determine whether and in what manner to proceed"); FWS & NMFS, Endangered Species Act Consultation Handbook; Procedures for Conducting Section 7 Consultations and Conferences at 2-7 (Mar. 1998), *available at* http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf ("ESA Consultation Handbook") (action agency "may choose not to implement the Services' reasonable and prudent alternative").

Reg. 51,620 (Aug. 24, 2012), [Joint Appendix ("JA") 065]. The facility's five units have a total capacity of 2,060 MW. *Id.* APS serves as the facility operator and is the sole owner of Units 1, 2, and 3, which are rated to a capacity of 170 MW (Units 1 and 2) and 220 MW (Unit 3). *Id.* Units 4 and 5 are each rated to 750 MW and are co-owned by six entities: APS, Southern California Edison, Public Service Company of New Mexico, Salt River Project, El Paso Electric Company, and Tucson Electric Power. *Id.* APS is currently seeking regulatory approval to purchase Southern California Edison's share of Units 4 and 5, which would make APS the owner or majority owner of all units at Four Corners. *Id.* at 51,627, [JA072].

The Four Corners area has been in attainment of the national ambient air quality standards for all criteria pollutants since at least 1984. EPA, Green Book, Historical Whole or Part County Nonattainment Status by Year Since 1978, New Mexico, *available at* http://www.epa.gov/oaqps001/greenbk/phistory_nm.html (listing San Juan County, in which Four Corners is located, as nonattainment only for carbon monoxide from 1978-1980 and sulfur dioxide from 1978-1984). Four Corners has a strong history of emission reduction efforts, undertaken both voluntarily and in cooperation with EPA, the Navajo Nation, and environmental organizations. *See* 77 Fed. Reg. at 51,628, [JA073] ("EPA agrees that there have been numerous installations of pollution controls over the several decades that

FCPP has been in operation."); APS, Comments on Source Specific Federal Implementation Plan for Implementing [BART] for Four Corners Power Plant: Navajo Nation: Proposed Rule at 22 (May 2, 2011), Doc. No. EPA-R09-OAR-2010-0683-0177 ("APS Comments on Proposed FIP"), [JA200]. APS undertook retrofit measures in the 1970s, 1980s, and 1990s to achieve substantial reductions in emissions of particulate matter ("PM"), nitrogen oxides ("NOx"), and sulfur dioxide ("SO_2"), the primary pollutants associated with visibility impairment, and Four Corners is currently achieving high removal efficiencies for all of these emissions. *Id.* at 22-23, [JA200-01]. In 2002 APS chose to initiate a test program to improve the facility's SO_2 control level, *id.* at 23, [JA201], and in 2004 APS voluntarily agreed to operate Four Corners at a federally enforceable SO_2 control level of 88%, a level that EPA later determined was equivalent to BART for SO_2 emissions, 77 Fed. Reg. at 51,628, [JA073], 72 Fed. Reg. 25,698, 25,701 (May 7, 2007), [JA001, JA004]. These efforts have reduced SO_2 emissions from Four Corners by over 22,000 tons per year. 77 Fed. Reg. at 51,628, [JA073].

B. BART FIP Rulemaking

The rulemaking at issue in this case concerns EPA's determination of source-specific BART emission limits for Four Corners under the regional haze provisions of the CAA's visibility protection program. On August 28, 2009, EPA published an Advanced Notice of Proposed Rulemaking ("ANPR") announcing its

intent to propose a FIP for Four Corners[3] establishing BART limits for emissions of NOx and PM from the plant.[4] 74 Fed. Reg. 44,313, 44,315-16 (Aug. 28, 2009), [JA012, JA014-15]. EPA noted that its authority to promulgate a BART FIP for Four Corners was based on the regional haze regulations, promulgated under CAA section 169A, and the Act's tribal authority provisions, contained in section 301(d)(4) and implemented as the TAR. *Id.* at 44,314-15, [JA013-14]. The Agency solicited information to aid in its application of the five-factor analysis to determine BART for Four Corners, including comments on the methodology for modeling visibility improvements and the costs of compliance for potential BART controls. *Id.* at 44,315, [JA014]. APS submitted comments to EPA on October 28, 2009, detailing its concerns regarding these issues and addressing the five factors used to determine BART emissions levels. *See* APS, Comments on Assessment of Anticipated Visibility Improvements at Surrounding Class I Areas and Cost Effectiveness of [BART] for Four Corners Power Plant and the Navajo Generating

[3] EPA also stated its intent to propose a separate FIP determining BART for Navajo Generating Station, another power plant located within the Navajo Nation. 74 Fed. Reg. at 44,315, [JA014].

[4] Although Four Corners was already subject to federally enforceable emission limits for NOx and PM, these limits did not reflect consideration of the CAA's visibility protection requirements. *See* 72 Fed. Reg. at 25,700 ("[T]oday's rule, however, does not address the requirements of EPA's nationally applicable Regional Haze rule . . . ."), [JA003].

Station: Advanced Notice of Proposed Rulemaking (Oct. 28, 2009), Doc. No. EPA-R09-OAR-2009-0598-0195, [JA113-47].

On October 19, 2010, EPA published a proposed FIP for Four Corners. 75 Fed. Reg. 64,221 (Oct. 19, 2010), [JA034] ("Proposed FIP"). The Proposed FIP contained emission limits that EPA was considering as BART for both NOx and PM from all five units. *Id.* The proposed new limits for NOx were based on installation of selective catalytic reduction technology ("SCR") at every unit, while the PM limits were based on operation of the existing fabric filter or "baghouse" technology at Units 4 and 5 and the installation of equivalent controls at Units 1-3. *Id.* APS submitted extensive legal and technical comments to EPA on the Proposed FIP. *See* APS Comments on Proposed FIP, [JA179-266].

On November 24, 2010, APS submitted to EPA a letter proposing an alternative control strategy to reduce emissions of NOx from Four Corners. *See* 76 Fed. Reg. 10,530 (Feb. 25, 2011), [JA049]. APS offered to voluntarily shut down Units 1-3 by 2014 and install and operate SCR on Units 4 and 5 by the end of 2018. *Id.* at 10,532, [JA051]. In light of APS's offer, EPA published a supplemental proposed rule (the "BART Alternative Proposal") on February 25, 2011, in which EPA proposed APS's voluntary plan—with some changes—as an alternative NOx emissions control strategy for Four Corners. *Id.* at 10,530, [JA049]. Under the BART Alternative Proposal, Four Corners could elect to

comply with the alternative plan by shutting down Units 1-3 by 2014 and operating SCR on Units 4 and 5 by the end of 2018 in lieu of the proposed BART determination. *Id.* at 10,532, [JA051]. Based on its review of the estimated emission reductions, EPA determined that the BART Alternative Proposal would result in greater visibility improvement than EPA's proposed BART limits, thus satisfying the requirements of the regional haze regulations for alternative measures. *Id.* at 10,534, [JA053].

WEG submitted comments on the Proposed FIP and the BART Alternative Proposal on May 2, 2011. WEG Comments on the Proposed [BART FIP] for the Four Corners Power Plant, New Mexico (May 2, 2011), Doc. No. EPA-R09-OAR-2010-0683-0184, [JA342-50] ("WEG Comments"). In its comments, WEG asserted that EPA was required to consult with FWS regarding the impacts of mercury and selenium emissions (which are both HAP emissions) from Four Corners on two endangered fish species, the razorback sucker and the Colorado pikeminnow, and their critical habitats. *Id.* at 8, [JA349]. WEG argued that EPA was required to consult with FWS under section 7 of the ESA because "the operation of the Four Corners Power Plant may adversely affect" the listed species and because EPA's reliance on the TAR for its rulemaking authority provided the Agency with sufficient discretion regarding effects of mercury and selenium

(HAP) emissions on listed species to trigger the consultation duty. *Id.* at 5, 7, [JA346, JA348].

On August 24, 2012, EPA published the final rule that is the subject of this action. 77 Fed. Reg. 51,620 (Aug. 24, 2012) ("Four Corners BART FIP"), [JA065]. In the Four Corners BART FIP, EPA finalized the proposed BART determination for NOx emissions for all five units and the proposed BART determination for PM emissions for Units 4 and 5. *Id.* at 51,621-22, [JA066-67]. Under the Four Corners BART FIP, Four Corners must install and operate the new NOx control technology on all five units by October 23, 2017, and must operate the existing baghouse technology on Units 4 and 5 to achieve the BART limit for PM emissions within sixty days of those units' scheduled outages in 2013 and 2014. *Id.* In addition, EPA finalized the BART Alternative Proposal, allowing Four Corners to opt into an alternative control strategy in lieu of installing BART by permanently shutting down Units 1-3 by January 1, 2014, and complying with a more stringent NOx limit by July 31, 2018. *Id.* The rule required Four Corners to notify EPA by July 1, 2013 whether it would select the BART alternative or install and operate BART.[5] *Id.* at 51,621, [JA066].

[5] EPA has since proposed to extend that notification deadline to December 31, 2013, in response to new uncertainties facing APS as a result of the potential deregulation of the Arizona electricity market. 78 Fed. Reg. 41,731 (July 11, 2013). This proposed extension does not alter the alternative measure's

However, EPA determined that it was "not necessary or appropriate to finalize [the] proposed PM BART determination for Units 1-3." *Id.* at 51,622, [JA067]. The reason is that, in the intervening period between the publication of the Proposed FIP and the Four Corners BART FIP, EPA had set stringent new standards for PM by promulgating the MATS rule, which limits mercury and other HAP emissions from electric generating units under CAA section 112. 77 Fed. Reg. at 9304. The MATS rule establishes MACT standards for mercury as well as PM, as a surrogate for certain HAPs (including selenium), that represent the "'maximum degree of reduction'" achievable. *Id.* at 9307 (quoting CAA § 112(d)(2), 42 U.S.C. § 7412(d)(2)). Existing sources must comply with the MATS rule's stringent emission limitations by April 16, 2015. *Id.* at 9465 (codified at 40 C.F.R. § 63.9984). In light of these pre-existing PM and mercury emission requirements, EPA determined in the Four Corners BART FIP that, "[b]ecause the final MATS rule has been issued and sets filterable PM and mercury limits that would be applicable to the units at FCPP, . . . EPA is determining that it is not necessary or appropriate at this time to finalize our proposal to set new PM limits for Units 1-3." 77 Fed. Reg. at 51,637 (footnote omitted), [JA082].

EPA also explained that ESA consultation was not required because the only potential effects at issue involved HAP emissions (mercury and selenium), which

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compliance deadlines, which would still require shutdown of Units 1-3 by January 1, 2014. *Id.*

the Agency lacked authority to regulate in its regional haze rulemaking and which, in any event, would already be regulated under the MATS rule. *Id.* at 51,643-44, [JA088-89]. EPA specifically responded to WEG's comments, stating:

> EPA disagrees with [WEG] that determining BART and promulgating this FIP for FCPP necessitates ESA Section 7 consultation. EPA understands that [FWS] is primarily concerned about the effects of mercury and selenium on endangered fish species in the San Juan River. EPA notes that under the BART Alternative, mercury and selenium emissions will be reduced from FCPP due to the closure of Units 1-3. Additionally, EPA's national MATS rule set new emission limits for mercury that would apply to Units 1-3 at FCPP if those units continue operation. EPA further notes that the goal of the Regional Haze Rule is to reduce emissions of visibility-impairing pollutants in order to restore visibility to natural conditions at the mandatory Federal Class I areas, and mercury and selenium do not affect visibility. Therefore, EPA does not have authority to regulate emissions of mercury or selenium under BART.

Id.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to hear this petition for review because WEG lacks standing. WEG has not shown that it or its members have suffered any cognizable injury in fact. Although WEG may believe that its members' ability to enjoy the listed fish species might be *improved* by different requirements in the FIP for Four Corners, there is no way that the FIP could actually *injure* WEG or its members through some increased harm to listed species. WEG also has not established causation: the general concerns of WEG's members relate only to the effects of mercury and selenium from the continued operation of Four Corners,

which was not at issue in this visibility rulemaking. Moreover, WEG's alleged injuries cannot be redressed by a favorable decision in this Court, since EPA has no authority in a visibility rulemaking to address the effects of mercury and selenium. *See infra*, Argument Section I.

WEG's petition also fails on the merits. Consultation under the ESA is not required where the agency lacks discretion to take action for the benefit of listed species, since consultation in such circumstances "would be a meaningless exercise." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1024 (9th Cir. 2012), *cert. denied, New 49'ers, Inc. v. Karuk Tribe of Cal.*, 133 S. Ct. 1579 (2013). EPA had no discretion in the action challenged here to address the alleged effects of mercury and selenium emissions from Four Corners on the listed fish species. The CAA explicitly prohibits EPA from regulating HAPs in a visibility rulemaking under section 169A, the provision under which the challenged FIP was promulgated. *See infra*, Argument Section II.B.

Furthermore, section 169A allows EPA to consider only five factors in determining BART requirements, none of which includes consideration of reductions in HAP emissions or effects on listed species. WEG asserts that EPA's authority to weigh "nonair quality environmental impacts" when determining BART encompasses consideration of the effects complained of in this case. Pet. Br. at 40. But the effects that WEG describes result from the deposition of

mercury and selenium emitted into the air, which is an *air quality* environmental impact and plainly falls outside the scope of "nonair quality environmental impacts." Moreover, EPA and the courts have both determined that this factor is limited to the harmful byproducts of certain control technologies, such as wastewater discharge. *See infra*, Argument Section II.C.

EPA's authority in this visibility rulemaking was not expanded to allow consideration of other factors simply because the Agency relied on the TAR to take regulatory action for a source on tribal land. The TAR is merely a tool for EPA to fill regulatory gaps by implementing specific provisions of the CAA, not to take broad action in pursuit of the overall purposes of the Act. *See infra*, Argument Section II.D.

Finally, even if EPA had the discretion to take action for the benefit of listed species in a visibility rulemaking, ESA consultation was not required because the FIP could not affect those species. WEG points exclusively to emissions of mercury and selenium as the source of its alleged harms. Thus, any BART requirements reducing mercury and selenium emissions that EPA could have included in the challenged FIP would only take effect *after* the emission limits for HAPs contained in the MATS rule, which already requires the "maximum degree

of reduction" achievable for those pollutants.[6] CAA § 112(d)(2), 42 U.S.C. § 7412(d)(2). In addition, none of the FIP's BART requirements alter the control technology required for PM emissions from any of Four Corners' units, which are the controls that WEG alleges could provide collateral benefits for listed species. *See infra*, Argument Section III.

ARGUMENT

I. WEG Lacks Standing To Challenge the Four Corners BART FIP.

WEG's case fails at the outset because WEG has no standing to challenge the Four Corners BART FIP. The constitutional minimum of Article III standing for any case or controversy requires that the petitioner demonstrate three elements: (1) an "injury in fact," meaning an invasion of a legally protected interest that is "actual or imminent" and "concrete and particularized"; (2) a causal connection between the injury and the challenged action; and (3) that the injury will be likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 561 (1992) (internal quotation marks omitted)). The injury that WEG alleges is (at most) purely conjectural, is not caused by this regional haze rulemaking, and cannot be redressed by a decision in favor of WEG. Accordingly, the petition for review must be dismissed.

[6] In the course of establishing potential BART for Four Corners, EPA determined that five years would be "as expeditious[] as practicable" for the construction of baghouses for Units 1-3. *See* 75 Fed. Reg. at 64,234, [JA047] (providing five years for installation of PM controls at Units 1-3); *infra* Section III.

An asserted injury must go beyond a "generally available grievance" claiming harm to a party's interest in "proper application of the Constitution and laws," and must instead demonstrate an injury to a petitioner's concrete interest. *Lujan*, 504 U.S. at 573-74. While a plaintiff may allege a "procedural failure," that alone is not enough: "the requirement of injury in fact is a hard floor of Article III jurisdiction." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 497 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."). Further, the petitioner must make "a factual showing of perceptible harm" to its interests. *Lujan*, 504 U.S. at 566. Where injury in fact is based on a risk of harm resulting from alleged "uninformed decisionmaking," the petitioner must show both that the alleged procedural violation (1) "created an increased risk of actual, threatened, or imminent environmental harm" and, critically, (2) "that this increased risk of environmental harm injures its concrete interest." *Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1237 (10th Cir. 2012) (internal quotation marks omitted) (petitioners lacked standing because they failed to show environmental harm to their interests).

WEG alleges that by foregoing consultation with FWS over its BART determination for Four Corners, EPA engaged in "uninformed decisionmaking" that causes WEG member Mike Eisenfeld to worry about the health of the San

Juan River, the various fish species that live there (including the razorback sucker and Colorado pikeminnow), and Eisenfeld's family as it uses the river. Pet. Br. at 28. Although WEG devotes considerable effort to establishing that Eisenfeld has an interest in the listed fish species through his "geographical nexus" to their habitat, WEG has failed to show any "increased risk of actual, threatened, or imminent environmental harm" to his interests resulting from EPA's visibility rule. While WEG may believe that its members' ability to enjoy listed fish species might be *improved* by certain procedures that it believes should be undertaken in connection with EPA's visibility rulemaking for the plant, WEG fails to show or even articulate how its members' ability to enjoy those fish species are actually *injured* by the FIP for the plant. *Summers*, 555 U.S. at 496 (concrete interest must be injured by action); *Wyoming*, 674 F.3d at 1237 (allegation that agency might have allowed *more* recreational snowmobile use of park insufficient to show injury).

The only pollutants from Four Corners that WEG claims affect the listed species are mercury and selenium. *See, e.g.*, Pet. Br. at 13 (pointing only to "mercury and selenium"); WEG Comments at 3, [JA344] (stating same); 77 Fed. Reg. at 51,643, [JA088] (EPA notes that FWS "is primarily concerned about the effects of mercury and selenium"). Yet at no point does WEG show that EPA's supposedly uninformed regional haze rule will itself injure WEG's concrete

interests. WEG's silence is telling: it alleges no facts by which EPA's action in issuing the Four Corners BART FIP to improve visibility somehow harms the listed species, much less injures any concrete interests WEG members have in enjoying those species. The purpose of the EPA rulemaking challenged here was to determine whether additional controls on visibility-impairing pollutants were necessary or appropriate for Four Corners, and if so, to require them. 77 Fed. Reg. at 51,621, [JA066]. At no time did EPA consider loosening the plant's emission standards or otherwise taking action that could increase emissions of mercury or selenium. *See generally* ANPR, [JA012-33]; Proposed FIP, [JA034-48]; BART Alternative Proposal, [JA049-63]. Thus, the rulemaking at issue presented only two possible scenarios: EPA could either decide that no new emission standards were necessary or appropriate, resulting in no additional risk to the fish species, or require additional emission controls, which WEG itself acknowledges would *benefit* those species. *See* Pet. Br. at 41-43. In either case, EPA's decision would not *harm* the razorback sucker or the Colorado pikeminnow. Accordingly, WEG has failed to allege that its members have suffered *any* injury in fact in relation to EPA's action.

If anything, WEG merely asserts an injury that is "conjectural or hypothetical," which is an insufficient basis for standing. *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Rather than argue that

EPA's decision not to consult with FWS will risk allowing more mercury and selenium emissions to enter the San Juan River than before the rulemaking, WEG claims that EPA's "uninformed decisionmaking" will "allow[] more air pollution from the FCPP than *may have been allowed* had Section 7 consultation taken place." Pet. Br. at 25 (emphasis added). In other words, WEG's alleged injury is based on comparison to some hypothetical outcome that could have emerged from consultation, rather than comparison of the effects of the rulemaking to actual conditions before EPA's action. This not only inverts the injury analysis, but also is the epitome of a conjectural injury: finding injury would require the court to engage in "a futile act of speculation in order to determine the extent of some remote, uncertain injury." *Colo. Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1397 (10th Cir. 1992).

Moreover, the asserted invasion of Eisenfeld's interest is not "concrete and particularized." WEG's standing argument is based on Eisenfeld's "concern[]" about potential environmental harms: he worries about "the health of the San Juan River," "the survival and recovery of the Colorado pikeminnow and razorback sucker and their critical habitat," and the safety of his family while using the river. Pet. Br. at 27, 28, 29 n.9. But even if Eisenfeld's concerns about those issues were reasonable, a petitioner must "demonstrate something beyond a reasonable concern over future environmental harm" in order to establish standing. *Amigos Bravos v.*

U.S. Bureau of Land Mgmt., 816 F. Supp. 2d 1118, 1129 (D.N.M. 2011); *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961 (9th Cir. 2003)). Injury in fact cannot be established without "a factual showing of perceptible harm." *Lujan*, 504 U.S. at 566. Courts require plaintiffs to demonstrate *concrete* harm to their interests. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184 (2000) (finding standing where affiants' concern about pollution "led the affiants to *respond* to [illegal discharges] . . . by *refraining from use*" of the affected area) (emphases added). In contrast, although Eisenfeld is concerned about the fish, the river, and his family, he has not demonstrated that EPA's action has or will impact his interest in any concrete and particularized way. Unlike the petitioners in *Friends of the Earth*, Eisenfeld's concerns have not led him to refrain from using the river or to use it less often: indeed, Eisenfeld states that he plans to float the river in June and July of 2013. Eisenfeld Decl. ¶ 14.

In addition, WEG has failed to satisfy the causation and redressability requirements for Article III standing. As Respondents show in their brief, WEG's allegations of harm relate only to the effects of mercury and selenium from the continued operation of Four Corners, yet continued operation of the plant was not at issue in this visibility rulemaking. Resp.'s Final Br. at 29. WEG also cannot establish redressability because EPA had no authority to address mercury or

selenium emissions in this visibility rulemaking, and consultation with FWS therefore "cannot redress the alleged harm." *Id*. at 31-32.

Therefore, WEG's petition must be dismissed for lack of standing. WEG has failed to demonstrate that EPA's decisionmaking process for the Four Corners BART FIP increased the risk of actual, threatened, or imminent environmental harm to the listed fish species in any way, or that any concrete interest of its members was invaded. Furthermore, the alleged injuries were not caused by the EPA action challenged here, and could not possibly be redressed if this Court were to grant WEG's petition.

II. EPA Has No Authority or Discretion Under the CAA To Address the Effects of Hazardous Air Pollutants on Listed Species in a Regional Haze Rulemaking.

WEG asserts that EPA has discretion to promulgate BART FIP provisions that would benefit listed species by influencing Four Corners' HAP emissions. Pet. Br. at 3. But EPA had no authority or discretion in this regional haze rulemaking to take action for the purpose of limiting mercury or selenium emissions or to otherwise act for the purported benefit of listed species. Where there is no discretion to take action for the benefit of listed species, consultation under the ESA is not required. HAPs and their effects on wildlife are regulated exclusively under section 112 of the CAA. The regional haze rulemaking challenged here, in contrast, was promulgated pursuant to section 169A, which

focuses exclusively on addressing visibility impairment and provides EPA with only five criteria to consider in the selection of BART—none of which includes the control of HAP emissions or a source's effects on listed species. The facts that Four Corners is located on tribal land, and that the Four Corners BART FIP was thus promulgated under the authority of the TAR, do not expand EPA's authority or discretion to allow consideration of these factors.

A. Consultation is not required where the agency has no discretion to take action for the benefit of listed species.

EPA was not required to consult with FWS about the alleged effects of mercury and selenium emissions on listed species because EPA had no discretion to consider these effects in the Four Corners BART rulemaking. An agency action triggers the ESA's consultation duty only if the agency has discretion to influence or change that action for the benefit of a listed species or its critical habitat. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) ("*NAHB*"); *Karuk Tribe of Cal.*, 681 F.3d at 1024-25. The obligation to consult with FWS on potential effects to listed species or critical habitat is only triggered by discretionary agency actions. 50 C.F.R. § 402.03; *NAHB*, 551 U.S. at 664-71. Furthermore, the agency's discretion "must have the capacity to inure to the benefit of a protected species." *Karuk Tribe of Cal.*, 681 F.3d at 1024 (citing *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974-75 (9th Cir. 2003)). If the agency cannot shape its action in response to its effects on listed

species, "'consultation would be a meaningless exercise.'" *Id.* (quoting *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995)); *see also NAHB*, 551 U.S. at 671 (EPA's discretion regarding factors unrelated to the protection of listed species did not trigger ESA consultation duty).

Furthermore, if the agency lacks discretion to consider or address effects to listed species in a particular action, the ESA does not independently provide that discretion. *See Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 299 (5th Cir. 1998) ("The ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction.") (emphasis in original); *Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regulatory Comm'n*, 962 F.2d 27, 34 (D.C. Cir. 1992) (ESA directs agencies to "utilize their authorities to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act.") (internal quotation marks omitted); *Sierra Club v. Babbitt*, 65 F.3d at 1510 (quoting *Platte River*). Where Congress directs an agency to consider only specific factors when exercising its delegated authority in a particular area, the ESA cannot engraft an additional factor to that list authorizing the consideration of listed species. *See NAHB*, 551 U.S. at 649 (ESA does not operate as a "tenth criterion" in addition to Clean Water Act's nine statutory criteria governing delegation of permitting authority).

B. EPA has no authority to regulate emissions of mercury and selenium in a regional haze rulemaking.

EPA's promulgation of the Four Corners BART FIP did not trigger a duty to consult with FWS because the CAA forbids the Agency from taking action in a regional haze rulemaking to regulate mercury and selenium, the only two pollutants that the record indicates could affect listed species. *See, e.g.*, Pet. Br. at 13 (pointing only to effects of "mercury and selenium"); WEG Comments at 3, [JA344] (stating same); 77 Fed. Reg. at 51,643, [JA088] (noting that FWS "is primarily concerned about the effects of mercury and selenium"). Section 112(b)(6) of the Act states that "[t]he provisions of part C of this subchapter (prevention of significant deterioration)"—which include, *inter alia*, the visibility protection provisions of section 169A—"shall not apply to pollutants listed under this section." 42 U.S.C. § 7412(b)(6); *see* CAA § 169A, 42 U.S.C. § 7491 (codified in Part C of Title 42, Chapter 85, Subchapter I of the U.S. Code). Hence, the plain language of the CAA *expressly prohibits* EPA from taking action to limit or otherwise control mercury and selenium in a regional haze rulemaking like the Four Corners BART FIP. Because EPA lacks any authority to respond to the effects of mercury and selenium on listed species in this rulemaking, consultation "would be a meaningless exercise" and was not required. *See Turtle Island Restoration Network*, 340 F.3d at 974.

Instead, Congress provided a separate mechanism for EPA to protect listed species and their critical habitat from the effects of HAP emissions through section 112. As described in Section I.A.2 of the Statement of Facts, *supra*, section 112 establishes a two-stage program for the control of HAP emissions. At the first stage EPA must promulgate technology-based MACT standards based on the "maximum degree of reduction" achievable, while at the second stage EPA is empowered to adopt risk-based standards in order to prevent "adverse environmental effects," including "adverse impacts on populations of endangered or threatened species." CAA § 112(a)(7), (d)(2), (f)(2), 42 U.S.C. § 7412(a)(7), (d)(2), (f)(2). This carefully defined framework, in which Congress reserved the consideration of effects on wildlife until the later risk-based rulemaking phase, precludes consideration of such effects prior to that time. *Sierra Club v. EPA*, 353 F.3d at 992. In *Sierra Club*, the D.C. Circuit held that EPA was not required to engage in ESA consultation with FWS regarding its promulgation of MACT standards in the first stage of section 112 rulemaking, noting that Congress "expressly channeled consideration of endangered species to the second phase of CAA standard promulgation." *Id.* Requiring consultation under the ESA before that stage would "collapse the separate technology-based/risk-based phases of the statute into a single analysis," which would "undo what the 1990 Amendments [to

the CAA] sought to accomplish."[7] *Id.* Requiring consultation under section 169A would do the same.

Thus, the regulation of HAPs and any consideration of those pollutants' effects on listed species fall squarely and exclusively within the framework of section 112, and are outside EPA's reach in a regional haze rulemaking under section 169A. Accordingly, the Four Corners BART FIP did not trigger any duty to consult because EPA lacked the authority to address the alleged effects of its action on listed species.

C. EPA has no discretion to consider HAP emissions or listed species in a BART determination.

EPA further has no obligation to consult with FWS in this rulemaking because the Agency has no discretion under section 169A to consider the control of HAP emissions or effects on listed species from air emissions when determining BART. The ESA's consultation duty is not triggered merely by the existence of "some discretion" on the part of the agency, as WEG suggests. Pet. Br. at 35. In holding that EPA lacked sufficient discretion to require consultation under the

[7] Contrary to WEG's suggestion, *see* Pet. Br. at 34, the fact that the D.C. Circuit in *Sierra Club* dismissed the plaintiff's argument on the basis that Congress provided for consideration of listed species at the second stage of HAP regulation does not indicate that, in the absence of that command, ESA consultation would have otherwise been required at the first stage of HAP regulation or in any other CAA rulemaking. For example, as is the case for most technology-based standards under the CAA (including BART), MACT is determined on the basis of statutory factors that do *not* include consideration of impacts on listed species. *See* CAA § 112(d)(2), 42 U.S.C. § 7412(d)(2); *infra* Argument Section II.C.2.

ESA, the Supreme Court observed that "[w]hile the EPA may exercise some judgment" in carrying out a provision of the Clean Water Act, "[n]othing in the text of [that provision] authorizes the EPA to consider the protection of threatened or endangered species *as an end in itself*." *See NAHB*, 551 U.S. at 671 (emphasis added) (finding that although statutory criteria for delegation of permitting authority to states provided EPA some discretion, none of the criteria allowed consideration of listed species). "If an agency cannot influence a private activity to benefit a listed species, there is no duty to consult." *Karuk Tribe of Cal.*, 681 F.3d at 1024. Nothing in the CAA gives EPA discretion to address the concerns raised by WEG over mercury and selenium emissions (or, indeed, of any other air pollutant) in the Four Corners BART FIP rulemaking for the benefit of the listed fish species.

Section 169A directs that the states and EPA "shall" consider five factors in determining BART for visibility-impairing pollutants:

> [1] the costs of compliance, [2] the energy and nonair quality environmental impacts of compliance, [3] any existing pollution control technology in use at the source, [4] the remaining useful life of the source, and [5] the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

CAA § 169A(g)(2), 42 U.S.C. § 7491(g)(2); 40 C.F.R. § 51.308(e)(1)(ii)(A). None of these statutory criteria authorizes EPA to account for the alleged impacts of air emissions of mercury and selenium on listed species, or for a control technology's

ability to reduce HAP emissions or related benefits to listed species when determining what technology constitutes BART for a source.[8]

WEG claims that the second criterion, calling for consideration of the "nonair quality environmental impacts of compliance," provides EPA the discretion necessary to determine BART for Four Corners on the basis of the alleged effects of mercury and selenium emissions from the plant on listed species. Pet. Br. at 40. However, WEG misapplies the established meaning of this factor.

1. Deposition of HAPs from air emissions is an air quality impact, not a "nonair quality environmental impact."

First, the consideration of "nonair quality environmental impacts" is irrelevant here because the effects of which WEG complains—"mercury and selenium deposition" resulting from airborne emissions of those pollutants, *see* Pet. Br. at 15—are in fact *air quality* environmental impacts. According to WEG, Four Corners affects the listed fish species by emitting mercury and selenium into the air, where they are then deposited onto surrounding areas and wash into the San

[8] Furthermore, EPA may not consider other criteria beyond those provided in CAA section 169A to determine BART. Where Congress enumerates specific factors to guide an agency's decision, the agency may not look to other factors unless specifically authorized. *See Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 672 (D.C. Cir. 2013) (per curiam) (EPA rightly did not consider public health objectives or "risk reduction achieved by additional controls" when revising MACT standards where statute "directs EPA to 'tak[e] into account developments in practices, processes, and control technologies,' 42 U.S.C. § 7412(d)(6)," and "nothing in section 112(d)(6)'s text suggests that EPA must consider" other factors).

Juan River. Pet. Br. at 14 ("Mercury in the environment accumulates in watercourses through emissions, deposition, and runoff into the waterbody."). Under the CAA, EPA is directed to consider precisely these kinds of deposition impacts as *air pollution* when regulating air quality under various CAA programs.

For example, section 112 of the Act directs EPA to assess whether air pollutants under consideration for listing as HAPs present a threat of adverse environmental effects through "deposition." CAA § 112(b)(2), 42 U.S.C. § 7412(b)(2). Likewise, in the 1990 amendments to the CAA, Congress adopted a suite of provisions addressing pollutants that form acid rain in order to "reduce the adverse effects of acid *deposition* through reductions in annual emissions" of those pollutants. *Id.* § 401(b), 42 U.S.C. § 7651(b) (emphasis added). In addition, several other CAA programs require EPA to adopt standards designed to protect public "welfare," which is defined to include the kinds of effects on water, animals, and wildlife associated with deposition. *See id.* § 302(h), 42 U.S.C. § 7602(h) (defining "effects on welfare"); *id.* § 109(b)(2), 42 U.S.C. § 7409(b)(2) (EPA must set secondary national ambient air quality standards at level requisite to "protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air"); *id.* § 111(b)(1)(A), 42 U.S.C. § 7411(b)(1)(A) (directing EPA to promulgate new source performance standards to protect public health or welfare).

The only air quality impact that EPA may regulate under section 169A is visibility impairment. *See* CAA § 169A(a)(1), 42 U.S.C. § 7491(a)(1); *Oklahoma v. EPA*, Nos. 12-9526, 12-9527, 2013 WL 3766986, at *22 (10th Cir. July 19, 2013) (recognizing that regional haze program's goals and standard are aesthetic only). WEG cannot use the second BART factor to supplement section 169A's singular focus on visibility with other air quality impacts.

2. EPA and the courts have rejected WEG's interpretation of the "nonair quality environmental impacts" factor.

EPA's BART Guidelines preclude WEG's interpretation of "nonair quality environmental impacts." The BART Guidelines are regulations that establish a framework that regulatory authorities must follow in determining BART for large power plants. 40 C.F.R. pt. 51, app. Y; 40 C.F.R. § 51.308(e)(1)(ii)(B). The Guidelines make clear that the "nonair quality environmental impacts" to be addressed are limited to the potentially harmful byproducts of the control technology alternatives under consideration as BART. Consideration of this factor "starts with the identification and quantification of the solid, liquid, and gaseous *discharges* from the control device or devices under review" and should "narrow the analysis to *discharges* with potential for causing *adverse* environmental effects." 40 C.F.R. pt. 51, app. Y, IV.D.4.i.4 (emphases added). The Guidelines note that such effects "may provide a basis for the *elimination* of that control alternative as BART" – but nowhere do they state that the beneficial impacts may

support the *selection* of an alternative as BART. *Id.* at IV.D.4.i.2 (emphasis added). Tellingly, each and every example of "nonair quality environmental impacts" that EPA provides is a harmful byproduct or discharge produced by various control technologies. *See id.* at IV.D.4.i-j (listing as examples "[s]crubber effluent," "quantities of water used and water pollutants produced and discharged," "solid waste (e.g. sludges, solids) that must be stored and disposed of or recycled as a result of the application of each alternative," "use of scarce water resources," "significant differences in noise levels, radiant heat, or dissipated static electrical energy," and "hazardous waste discharges").

EPA reaffirmed this interpretation in the preamble to the Four Corners BART FIP, in which the Agency used the BART Guidelines to make its BART determination. 77 Fed. Reg. at 51,627, [JA072]. There, EPA rejected the proposition that "nonair quality environmental impacts" include the potential collateral benefits of reducing other types of pollution, such as ozone production and acid deposition, that could result from EPA's selection of visibility-improving BART requirements. *Id.* EPA stated that this BART factor "focuses on adverse environmental impacts associated with control technologies, i.e., generation of solid or hazardous wastes and discharges of polluted water," and that the Guidelines therefore do not require "quantification of human health or environmental co-benefits in determining BART." *Id.* This approach is consistent

with EPA's past statements interpreting this BART factor. *See, e.g.*, Letter From Joseph W. Paisie, Group Leader, Geographic Strategies Group, EPA Office of Air Quality Planning and Standards, to Mel S. Schulze, Hunton & Williams, at 3 (July 19, 2006) (Attachment 1) ("The final BART Guidelines do not require States to consider collateral benefits of emissions reductions in making BART determinations.").

Moreover, WEG's interpretation of the "nonair quality environmental impacts" factor is inconsistent with federal courts' decisions construing the exact same phrase in several other provisions of the CAA guiding EPA's selection of emission controls. It is well-established that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (internal quotation marks omitted); *United States v. Richards*, 87 F.3d 1152, 1157 (10th Cir. 1996) ("Under settled canons of statutory construction, we presume that identical terms in the same statute have the same meaning."). Outside of the visibility provisions of section 169A, Congress makes reference to "nonair quality environmental impacts" repeatedly throughout the CAA as a factor to be considered in the determination of appropriate emission limits under various regulatory programs. *See* CAA §§ 111(a)(1) (standards of performance for new stationary sources), 112(d)(2) (standards for sources of HAP emissions), 129(a)(2) (standards for solid waste incinerators), 211(k)(1) (emission

reductions for reformulated gasoline), 42 U.S.C. §§ 7411(a)(1), 7412(d)(2), 7429(a)(2), 7545(k)(1). Where the term is used for these programs, courts have held that the directive to consider "nonair quality environmental impacts" does not grant EPA discretion to set emission controls based on collateral environmental benefits that fall outside the scope of that specific program. This Court should interpret the term as it is used in section 169A consistently with its other uses in the CAA.

For example, under section 112, EPA must determine technology-based standards for HAP emissions "taking into consideration . . . any *non-air quality health and environmental impacts* and energy requirements." CAA § 112(d)(2), 42 U.S.C. § 7412(d)(2) (emphasis added). In *Sierra Club v. EPA*, the D.C. Circuit held that the CAA's statutory language "strongly supports" the interpretation that this factor refers to "the by-products of the control technology" under consideration. 353 F.3d at 990. The court flatly rejected the petitioners' argument that "non-air quality impacts" include "impacts of deposition, persistence, toxicity and bioaccumulation of metal HAP emissions on people, wildlife and the environment"—the same reading that WEG would apply to section 169A's use of the term. *Id.; see also id.* at 992 (holding that EPA may consider impact of HAPs on listed species only at residual risk rulemaking stage); *supra* Argument Section II.B.

Likewise, section 111 defines a "standard of performance" for the regulation of new sources as an emission standard reflecting consideration of "the cost of achieving such reduction and any *nonair quality health and environmental impact* and energy requirements." CAA § 111(a)(1), 42 U.S.C. § 7411(a)(1) (emphasis added). In *Portland Cement Association v. EPA*, the court "ha[d] little trouble" finding that EPA had fully addressed this factor in a rulemaking that discussed only the negative byproducts of the control technology at issue—such as scrubber slurry, additional water intake, solid waste trapped in PM fabric filters, and the secondary effects of increased energy use needed to power the control technology—and did not address potential co-benefits to listed species or to emissions of other air pollutants outside the scope of that rulemaking. 665 F.3d 177, 191 (D.C. Cir. 2011) (per curiam); *see* 75 Fed. Reg. 54,970, 55,022-23 (Sept. 9, 2010) (discussing nonair quality environmental impacts of proposed controls at issue in *Portland Cement Ass'n*).

Indeed, in the only case in which EPA attempted to use consideration of "nonair quality environmental impacts" to justify setting emission standards based on collateral benefits, its action was overturned. *See Am. Petroleum Inst. v. EPA*, 52 F.3d 1113 (D.C. Cir. 1995). Section 211(k)(1) directs EPA to establish requirements for reformulated gasoline to reduce vehicle emissions of volatile organic compounds ("VOCs") and toxic air pollutants, taking into consideration

"any nonair-quality . . . related health and environmental impacts . . . ." CAA § 211(k)(1), 42 U.S.C. § 7545(k)(1). In *American Petroleum Institute*, the Agency attempted to rely on this factor to justify its promulgation of a reformulated gasoline standard that was based on its "potential to provide global warming benefits" in addition to its primary statutory goal of reducing VOCs and toxic emissions. 52 F.3d at 1116. The D.C. Circuit rejected this approach, holding that "the consideration of nonair-quality factors listed in the section is only to ensure that any emission reduction steps do not have inordinate economic, environmental, or energy effects." *Id.* at 1120. These factors do not provide an independent basis for selecting more restrictive standards. *Id.*

In short, the BART criteria do not provide EPA with the discretion that WEG asserts. Of the five BART factors, WEG only alleges that one—the consideration of "nonair quality environmental impacts"—allowed EPA to address in its visibility rulemaking the potential for reductions in mercury and selenium emissions and the related alleged effects on listed fish species. WEG is wrong. The alleged deposition impacts of mercury and selenium emissions are air quality environmental impacts, and thus do not fall within the ambit of this factor. And, in any event, this factor concerns the potential negative byproducts of control technology alternatives: it does not support selection of control technologies on the basis of collateral nonair quality environmental benefits. Because EPA has no

discretion under the statute to consider potential impacts on listed species in this BART rulemaking, no duty to consult under the ESA was triggered. *NAHB*, 551 U.S. at 671.

D. The TAR does not expand EPA's discretion in a regional haze rulemaking to include regulation of HAP emissions for the benefit of listed species.

WEG argues that EPA's promulgation of the Four Corners BART FIP involved sufficient discretion to trigger the ESA's consultation requirement because it was done under the authority of the TAR, which purportedly "provides EPA with at least ***some discretion*** to protect air quality ***for the benefit of listed species*** under the ESA." Pet. Br. at 38 (emphases in original). However, the TAR merely provides EPA with regulatory "gap-filling" authority for sources located on tribal land. Although EPA is permitted to "directly administer" certain statutory provisions for which the Administrator determines that treatment of Indian tribes as states would be inappropriate, CAA § 301(d)(4), 42 U.S.C. § 7601(d)(4), it does not follow that the Agency's discretion under those provisions is expanded to allow EPA to pursue goals—such as the regulation of HAP emissions for the benefit of listed species—that it could not otherwise address under such provisions.

Section 301(d)(4) states that in cases where EPA determines that treatment of tribes as states is inappropriate, the Administrator may provide "other means by which [EPA] will directly administer such provisions as to achieve the appropriate

purpose." *Id.* EPA promulgated the TAR pursuant to this provision and section 301(a), which provides for the promulgation of "such regulations as are necessary" to carry out EPA's obligations under the Act. The TAR states that EPA "[s]hall promulgate without unreasonable delay such Federal implementation plan provisions as are necessary or appropriate to protect air quality" if an eligible tribe does not submit an adequate TIP. 40 C.F.R. § 49.11(a). Contrary to WEG's assertions, none of these statutory or regulatory provisions expands EPA's discretion in a regional haze rulemaking to allow the Agency to regulate HAP emissions or to otherwise act for the benefit of listed species.

WEG argues that the "appropriate purpose" guiding EPA actions under that section is "[t]he purposes and goals of the Clean Air Act," which it claims include the protection of fish and wildlife from air pollution. Pet. Br. at 38. However, section 301(d)(4) does not grant EPA such a sweeping mandate over tribal land. WEG's interpretation of that provision would allow EPA to disregard the numerous and distinct regulatory programs that Congress carefully established for various pollutants and sources in exchange for a broad, unprincipled command to "'protect and enhance the quality of the Nation's air resources'" however EPA sees fit every time the Agency engaged in a new rulemaking with respect to any sources on tribal lands. Pet. Br. at 39 (quoting CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1)); *see also* WEG Comments at 6, [JA347] (asserting that section 301(d)(4)

"provide[s] almost unlimited discretion to the EPA Administrator"). This is not and cannot be true.

Instead, the "appropriate purpose" that EPA is tasked with achieving in section 301(d)(4) is the purpose of the specific provision of the CAA that EPA is implementing in a specific rulemaking. The statute permits EPA to "directly administer *such provisions*" of the CAA as may be inappropriate for treatment of tribes as states in a particular "case," not to directly administer the entire Act. CAA § 301(d)(4), 42 U.S.C. § 7601(d)(4) (emphasis added). In the visibility rulemaking at issue here, the "appropriate purpose" EPA was required to achieve through the Four Corners BART FIP was the purpose of the Act's visibility provisions: "the prevention of any future, and the remedying of any existing, impairment of visibility" in certain areas. *Id.* § 169A(a)(1), 42 U.S.C. § 7491(a)(1). Hence, any discretion that section 301(d)(4) may have provided to EPA in this rulemaking could not pertain to the unrelated goal of limiting HAP emissions or taking action to benefit listed species.

WEG also points to section 301(a), which authorizes EPA to promulgate "such regulations as are necessary" to carry out its functions under the CAA, to assert that the TAR provides EPA discretion to act for the benefit of listed species in this visibility rulemaking. *Id.* § 301(a), 42 U.S.C. § 7601(a). Not so. Section 301(a) merely allows EPA to enact regulations that implement other functions

specifically provided for in the CAA, not to add supplemental authority to those functions. "EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area." *Am. Petroleum Inst.*, 52 F.3d at 1119. Likewise, EPA cannot use section 301(a) "as justification for adding new factors to a list of statutorily specified ones." *See id.* Section 112 defines EPA's functions in the area of limiting HAP emissions, while section 169A defines EPA's functions in the area of visibility-impairing pollutants and specifies limited factors for regulating their emissions. Accordingly, section 301(a) does not allow EPA to exceed its "specific statutory directive" by taking action to limit HAP emissions in a visibility rulemaking, or to "add[] new factors" such as reductions in HAP emissions or effects on listed species to the BART criteria specified by Congress.

The language of the TAR confirms this understanding of EPA's discretion. Section 49.11(a) directs EPA to promulgate "such *Federal implementation plan* provisions as are necessary or appropriate" in the absence of an adequate TIP. 40 C.F.R. § 49.11(a) (emphasis added). As used in the CAA, "Federal implementation plan" means "a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a *gap* or otherwise correct all or a portion of an *inadequacy* in a State implementation plan." CAA § 302(y), 42 U.S.C. § 7602(y) (emphases added). Thus, a FIP is a gap-filling measure only, and a FIP

promulgated under the TAR may contain only provisions that would have been required under a TIP submitted by a tribe. *See Ariz. Pub. Serv. Co.*, 562 F.3d 1116, 1119 (10th Cir. 2009) (TAR authorizes EPA to "fill any regulatory gaps"). As discussed above, tribes, like states, are neither authorized nor required to address HAP emissions or effects on listed species in a visibility rulemaking under section 169A. *See supra* Argument Sections II.B-C. Therefore, measures taken to address these issues in a FIP promulgated under the TAR would not be "necessary or appropriate" because their absence from a TIP would not be considered a gap or inadequacy.

Accordingly, the facts that Four Corners is located on tribal land and that EPA promulgated the Four Corners BART FIP under the TAR did not expand EPA's authority in determining BART to allow consideration of alleged effects of mercury and selenium emissions on the listed fish species. Because EPA lacked discretion to address these emissions for the benefit of the listed species, no ESA consultation was required.

III. EPA Correctly Concluded That ESA Consultation Was Not Required.

EPA correctly determined that its visibility rulemaking did not trigger consultation over the alleged effects on the razorback sucker and the Colorado pikeminnow because the only potential effects at issue involved HAP emissions. In the course of establishing potential BART for Four Corners, EPA determined

that five years after promulgation of a final BART FIP was "as expeditious[] as practicable" for the construction of any new PM controls on Units 1-3 and any NOx controls on all five units.[9] *See* 75 Fed. Reg. at 64,234, [JA047]; 77 Fed. Reg. at 51,640-41, [JA085-86]. Accordingly, any BART measures that EPA adopted in its rulemaking for Four Corners—no matter how collaterally beneficial to listed species as a result of coincidental changes in HAP emissions—would only take effect *after* the MATS rule, which already requires the maximum achievable reductions in the HAPs that WEG asserts harm these species. Furthermore, this rule results in no change to the environmental baseline of effects to the listed fish species.

Under the ESA, consultation is not required where an action will have "no effect" on listed species. *See* 50 C.F.R. § 402.14(a); *Newton Cnty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447-48 (9th Cir. 1996). The administrative record demonstrates that the Four Corners BART FIP has no effect on listed species, including the razorback sucker or the Colorado pikeminnow. There is no information in the record or allegation by WEG that any effect to species would occur as a result of EPA's underlying action, which was limited in scope to the

[9] Although EPA did determine that Four Corners could feasibly install new BART controls for NOx at one of its large units by October 23, 2016, that requirement would still take effect more than one year after the MATS rule's compliance deadline. 77 Fed. Reg. at 51,621, [JA066].

reduction of regional haze through the control of visibility-impairing pollutants. The only effects to listed species alleged by WEG concern HAP emissions, the regulation of which EPA had no discretion or authority to undertake in this rulemaking and EPA in fact did not undertake in this action.

Even assuming that employing control technologies for reducing visibility-impairing pollutants could potentially provide collateral *benefits* that indirectly reduce HAP emissions, such reductions in impacts would not be an effect of EPA's action as a matter of law because such collateral benefits are beyond EPA's authority to purposefully control through BART rulemaking. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004) ("We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect.").

Moreover, there would be no effect on listed species because EPA's action did not alter the status quo in any relevant way. The ESA directs agencies to consider the potential effects of their actions in comparison to the "environmental baseline," which represents the pre-action status quo. 50 C.F.R. § 402.02 (defining "effects of the action" in reference to the "environmental baseline"). The environmental baseline provides "a 'snapshot' of a species' health at a specified point in time" and reflects the "current status of the species." ESA Consultation

Handbook at 4-22. WEG's argument is premised on the purported collateral benefits of PM emission control technologies—in particular, fabric filter "baghouses"—for reducing HAPs such as mercury and selenium, and the potential effects to listed species of EPA's selection of such emission controls for Four Corners. Yet the Four Corners BART FIP *does not change* the plant's obligations with respect to the use of fabric filter baghouses or other PM controls: the rule does not set any new PM limits for Units 1-3 and approves as BART the *existing* baghouses that are *already in operation* at Units 4 and 5. 77 Fed. Reg. at 51,637, [JA082]. EPA's action does not cause any change from the current baseline with regard to the emission controls that WEG claims could affect listed species.

In any event, any BART requirements resulting in collateral reductions of mercury and selenium emissions—the only pollutants alleged to harm the listed species—would not take effect until *after* the effective date of the MATS rule, which already requires Four Corners to comply with emission standards representing the maximum achievable degree of reduction in these HAPs. *See* 77 Fed. Reg. at 9304 (final MATS rule). As EPA recognized in the Four Corners BART FIP, the MATS rule "sets filterable PM and mercury limits that would be applicable to the units at FCPP." 77 Fed. Reg. at 51,637, [JA082]. "Filterable PM" is a regulatory surrogate for "non-mercury HAP metals," which include selenium. 77 Fed. Reg. at 9369; *id.* at 9486 (defining non-mercury HAP metals).

The MATS rule requires affected sources, including Four Corners, to comply with its stringent emission standards within three years of its effective date, i.e., by April 16, 2015.[10] *Id.* at 9465; CAA § 112(i)(3)(A), 42 U.S.C. § 7412(i)(3)(A).

In contrast, the CAA requires sources to comply with BART requirements promulgated under section 169A "as expeditiously as practicable but in no event later than five years" after the applicable limit is approved. CAA § 169A(g)(4), 42 U.S.C. § 7491(g)(4); 40 C.F.R. § 51.308(e)(1)(iv). EPA determined that for Four Corners, installation and operation of all BART requirements within five years from the promulgation of the final FIP would be "as expeditious[] as practicable." *See* 75 Fed. Reg. at 64,234, [JA047]; 77 Fed. Reg. at 51,641, [JA086]. Because the Four Corners BART FIP became effective on October 23, 2012, any BART requirements in that rulemaking with co-benefits that could affect listed species would not take effect until October 23, 2017—over two years after Four Corners becomes subject to the MATS rule's emission standards already requiring the maximum degree of reduction achievable in the pollutants affecting the razorback sucker and Colorado pikeminnow. 77 Fed. Reg. at 51,620, [JA065]. For all of these reasons, the Four Corners BART FIP has no effect on the razorback sucker and the Colorado pikeminnow.

[10] Sources may also apply for a compliance date extension of up to one additional year if necessary for the installation of controls, potentially giving some sources until April 16, 2016. CAA § 112(i)(3)(B), 42 U.S.C. § 7412(i)(3)(B). This is still before the compliance date for the Four Corners BART FIP.

Finally, the determination as to whether consultation is triggered (i.e., whether an action will have "no effect" on listed species) is entrusted to the action agency alone (here EPA), not to FWS or NMFS. *Sierra Forest Legacy v. U.S. Forest Serv.*, 598 F. Supp. 2d 1058, 1066 (N.D. Cal. 2009) ("the 'no effect' determination is a decision of the action agency, not the Wildlife Services"); *Protect Our Water v. Flowers*, 377 F. Supp. 2d 844, 877 (E.D. Cal. 2004) ("the 'no effect' decision is the agency's to make"). This determination "must be upheld unless arbitrary and capricious." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2010), *cert. denied*, *Pub. Lands Council v. W. Watersheds Project*, 132 S. Ct. 366 (2011); *Newton Cnty. Wildlife Ass'n*, 141 F.3d at 811 (applying "arbitrary and capricious" standard of review); *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1449 (upholding "no effect" conclusion because it was not "so implausible that it could not be ascribed to a difference in view or the product of agency expertise") (internal quotation marks omitted).

There are no formalistic requirements for an agency to follow in assessing whether an action "may affect" listed species or critical habitat: "[h]ow this determination is made is left up to the agency."[11] *Heartwood, Inc. v. Agpaoa*, 611

[11] Although WEG asserts that an action agency "generally must prepare a document called a 'biological assessment'" to support a "no effect" determination, Pet. Br. at 9, this document is only required for "Federal actions that are 'major construction activities.'" 50 C.F.R. § 402.12(b); ESA Consultation Handbook at 3-11 (action agency "is not required to prepare a biological assessment for actions

F. Supp. 2d 675, 682 (E.D. Ky. 2009), *rev'd on other grounds*, 628 F.3d 261 (6th Cir. 2010); *see* ESA Consultation Handbook at 3-12 (contents of a biological assessment "are largely at the discretion of the action agency"). An agency's determination may be either express or implicit, and an agency may effectively articulate a "no effect" determination through language as simple as a sentence included in the Federal Register notice of an action that does not even refer explicitly to listed species. *See Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1008, 1019 (9th Cir. 2009) (finding that agency effectively "determin[ed] that its rulemaking would have no effect on listed species or habitat" for purposes of ESA analysis where agency simply stated that its rule "has no direct, indirect, or cumulative effect on the environment") (internal quotation marks omitted). Indeed, a reviewing court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *NAHB*, 551 U.S. at 658 (internal quotation marks omitted).

In the Four Corners rulemaking, EPA concluded that consultation with FWS was not required. To support its decision that ESA consultation was unnecessary,

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that are not major construction activities"). A "major construction activity" is "a construction project (or other undertaking having similar physical impacts)" that qualifies as a "major Federal action" for the purposes of the National Environmental Policy Act ("NEPA"). 50 C.F.R. § 402.02. The Four Corners BART FIP is neither a construction project (the FIP does not fund, permit, or otherwise authorize construction of a new facility) nor a major Federal action. *See* 15 U.S.C. § 793(c)(1) ("No action taken under the Clean Air Act . . . shall be deemed a major Federal action" for NEPA purposes).

EPA noted that FWS "is primarily concerned about the effects of mercury and selenium on endangered fish species in the San Juan River," that "EPA does not have authority to regulate emissions of mercury or selenium under BART," and in any event that "EPA's national MATS rule set new emission limits for mercury that would apply to Units 1-3 at FCPP if those units continue operation." 77 Fed. Reg. at 51,643-44, [JA088-89]. Although not explicitly couched as a "no effect" determination, in this statement EPA plainly declined to consult with FWS because EPA's selection of BART would not affect listed species.

EPA's reasoning in the Four Corners BART FIP is simple and indisputable: the BART visibility rulemaking would have no effect on listed species, so consultation was not required. This Court should uphold EPA's determination. *See NAHB*, 551 U.S. at 658.

CONCLUSION

For the foregoing reasons, APS respectfully requests that this Court deny WEG's petition for review of the Four Corners BART FIP.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

APS 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. APS therefore respectfully requests that the Court schedule oral argument.

CERTIFICATE OF WORD COUNT COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that this brief contains 13,316 words as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by Fed. R. App. P. 32(a)(7)(B).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF DIGITAL SUBMISSION AND IDENTICAL COMPLIANCE

I hereby certify that a copy of the foregoing final form Brief of Intervenor, as submitted in digital form via the Clerk's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Symantec Endpoint Protection version 11.0.7000.975, updated September 23, 2013, and, according to the program, is free of viruses.

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CERTIFICATE OF PRIVACY REDACTIONS

I hereby certify, pursuant to Fed. R. App. P. 25(a)(5) and 10th Cir. R. 25.5, that all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2013, I electronically filed the foregoing final form Brief of Intervenor with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to all attorneys of record. I further certify that on September 23, 2013, I dispatched seven hard copies of the foregoing to the Clerk of the Court.

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