ORAL ARGUMENT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 13-9524

WILDEARTH GUARDIANS,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and GINA McCARTHY,[1] Administrator,

Respondents,

ARIZONA PUBLIC SERVICE COMPANY,

Intervenor.

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

RESPONDENT'S FINAL BRIEF

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), current Administrator Gina McCarthy is automatically substituted for her predecessor, Acting Administrator Bob Perciasepe.

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STATEMENT OF RELATED CASES

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

GLOSSARY

APA	Administrative Procedure Act
BART	Best Available Retrofit Technology
CAA	Clean Air Act or Act
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FIP	Federal Implementation Plan
Four Corners	Four Corners Power Plant
FWS	United States Fish and Wildlife Service
Guardians	WildEarth Guardians
JA	Joint Appendix
MATS	Mercury and Air Toxics Standards
MW	megawatts
NAAQS	National Ambient Air Quality Standards
NMFS	National Marine Fisheries Service
NO_x	Nitrogen oxides
PM	Particulate Matter
SCR	Selective Catalytic Reduction
SIP	State Implementation Plan
SO_2	Sulfur dioxide
TIP	Tribal Implementation Plan

JURISDICTION

Petitioner WildEarth Guardians ("Guardians") challenges the Environmental Protection Agency's ("EPA's") final rule entitled "Source Specific Federal Implementation Plan for Implementing Best Available Retrofit Technology for Four Corners Power Plant: Navajo Nation," 77 Fed. Reg. 51,620 (Aug. 24, 2012) ("Final Rule" or "FIP"). The FIP requires the Four Corners Power Plant, a coal-fired power plant on the Navajo Nation Indian Reservation near Farmington, New Mexico, to achieve emission reductions required by the Clean Air Act's visibility protection provision. The FIP is thus "locally or regionally applicable" and, pursuant to the Clean Air Act, such actions may only be reviewed in the court of appeals for "the appropriate circuit." 42 U.S.C. § 7607(b); see also Sierra Club v. EPA, 353 F.3d 976, 992 (D.C. Cir. 2004) (reviewing Endangered Species Act claims under Section 7607(b)). Because the FIP applies to a facility located within the Tenth Circuit, the petition for review was properly transferred to this Court from the Ninth Circuit.[1]

[1] Guardians originally filed its petition for review in the Ninth Circuit. The Ninth Circuit granted EPA's motion to transfer the petition to this Court, agreeing with EPA that this Court is the appropriate court to hear the petition. Order of Feb. 25, 2013, 9th Cir. Case No. 12-73417, ECF No. 8525454, [Joint Appendix ("JA") 384-85].

However, the Court lacks jurisdiction over Guardians' petition because Guardians has not demonstrated that it has Article III standing to challenge the FIP.

STATEMENT OF THE ISSUES

1. Whether Guardians can demonstrate Article III standing where its claimed injury – an alleged failure by EPA to consult with the United States Fish and Wildlife Service regarding the impacts of mercury and selenium emissions from the Four Corners Power Plant on the Colorado pikeminnow and razorback sucker and their habitat in the San Juan River – (a) was not caused by EPA's issuance of a FIP that only regulates other air pollutants, i.e., air pollutants that affect visibility, and (b)

cannot be redressed by a decision in Guardians' favor because consultation could not result in a FIP issued under the regional haze program for the purpose of reducing emissions of air pollutants that do not affect visibility (such as mercury and selenium).

2. Whether EPA's issuance of the FIP triggers consultation obligations under section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), where (a) EPA does not have discretion under the Clean Air Act's visibility program to take action that inures to the benefit of listed species, and (b) the FIP promulgated by EPA has no effect on listed species.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case involves a challenge to action taken by EPA to implement the regional haze requirements of the Clean Air Act ("CAA") and EPA's regulations with respect to the Four Corners Power Plant ("Four Corners" or "the Plant"), a source located on Navajo land in Indian country. These statutory and regulatory provisions are intended to prevent and remedy the impairment of visibility in national wilderness areas and parks ("Class I areas") caused by man-made air pollution. 42 U.S.C. § 7491(a)(1). The air pollutants that reduce visibility include fine particulate matter ("PM") and compounds that contribute to particulate matter formation, such as nitrogen oxides ("NO_x") and sulfur dioxide ("SO_2") and, under certain conditions, volatile organic compounds and ammonia.[2] Guidelines for Best Available Retrofit Technology Determinations under the Regional Haze Rule, 40 C.F.R. pt. 51, App. Y, § (III)(A)(2) ("What Pollutants Do I Need to Consider?").

Four Corners is one of the largest sources of visibility-impairing emissions in the United States. Although the Navajo Nation may develop a tribal implementation plan, or "TIP," under the CAA to address regional haze requirements applicable to the Plant, it is not required to develop a TIP and has not

[2] This petition for review does not involve any challenge related to regulation of sulfur dioxide, volatile organic compounds, or ammonia.

yet done so. In this situation, other provisions of the CAA and EPA's regulations give EPA the authority to fill this gap by promulgating a FIP.[3] EPA promulgated such a regional haze FIP for the Plant in 2012, and in this case, that FIP is being challenged by an environmental organization.

Significantly, Guardians does not contend that the FIP regulates emissions of visibility-impairing pollutants, such as NO_x, PM, or SO_2, in an insufficient or inappropriate manner. Nor does Guardians contend that the FIP insufficiently addresses visibility impairment in Class I areas affected by emissions from the Plant. Instead, Guardians' concern is with an entirely separate issue; namely, the effect of emissions of hazardous air pollutants, i.e., mercury and selenium, on certain endangered species. On this issue, Guardians specifically alleges that under Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536, EPA should have consulted with the United States Fish and Wildlife Service to explore ways in which the FIP could achieve reductions in mercury and selenium emissions for the benefit of listed species. Preliminary Brief of Petitioner ("Pet's Br.") at 29 n.9, 41-44, 47. As will be discussed below, however, the FIP only addresses emissions of

[3] The CAA defines a Federal Implementation Plan as "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, and which includes enforceable emission limitations, or other control measures, means or techniques . . . and provides for attainment of the relevant national ambient air quality standards." 42 U.S.C. § 7602(y).

pollutants that impact visibility. Hazardous air pollutant emissions are regulated exclusively under other CAA programs, not the regional haze program. EPA therefore had no discretion to adopt FIP requirements here that are desired by Guardians. For this reason, Guardians lacks standing because its alleged injuries, even if assumed to be cognizable, could not be redressed by a decision in Guardians' favor in this regional haze case. And even if the Court were to reach the merits, the petition for review would have to be denied for essentially these same reasons.

II. STATUTORY AND REGULATORY BACKGROUND

A. State and Federal Implementation Plans

The CAA, enacted in 1970 and extensively amended in 1977 and 1990, is intended to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). The CAA provides for the control and improvement of the nation's air quality primarily 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.

§§ 7408-09. CAA Section 110 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. § 7410(a)(1). 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. Id. § 7410(c)(1).

B. CAA Section 301(d) and the Tribal Authority Rule

Congress first comprehensively addressed the role of Indian Tribes under the CAA in the 1990 Amendments. Under CAA Section 301(d), Congress authorized EPA to treat Indian Tribes in the same manner as States if certain conditions are met. 42 U.S.C. § 7601(d). Pursuant to Section 301(d) and EPA's regulations, Tribes may, 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. § 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." 42 U.S.C. § 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. 7254 (Feb. 12, 1998) (final rule); Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000), cert. denied, Michigan v. EPA, 532 U.S. 970 (2001) (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 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 7264-65. Thus, most of the provisions that 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, the regulations do not treat Tribes in the same manner as States with regard 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 adopted this approach 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 7264-265. 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. 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 more specifically under Section 301(d)(4), 42 U.S.C. § 7601(d)(4), which authorizes EPA to promulgate regulations to directly administer, by means to be determined at EPA's discretion, CAA provisions for which EPA has determined it is inappropriate or administratively infeasible to treat Tribes in the same manner as States. 40 C.F.R. § 49.11. See also 63 Fed. Reg. at 7265 (discussing CAA Sections 301(a) and 301(d)(4) as the source of EPA's discretionary gap-filling authority).

EPA has previously promulgated a FIP for Four Corners under the Tribal Authority Rule ("2007 FIP"). The 2007 FIP was originally proposed to fill the regulatory gap that existed because New Mexico permits and SIP rules are not applicable or enforceable under the CAA in the Navajo Nation, and the Tribe has not sought approval of a TIP for the Plant. 64 Fed. Reg. 48,731 (Sept. 8, 1999) (proposed rule); see also 71 Fed. Reg. 53,631 (Sept. 12, 2006) (revised proposed rule). The final 2007 FIP set SO_2 emission limits and required Four Corners to comply with a 20-percent opacity limit on both the emissions from combustion and fugitive dust emissions from material handling operations. 72 Fed. Reg. 25,698 (May 7, 2007). Arizona Public Service Company, the operator of Four Corners, and Sierra Club each filed petitions for review of the 2007 FIP for Four Corners on separate grounds. Ariz. Pub. Serv. Co. v. EPA, 562 F.3d 1116 (10th Cir. 2009).

This Court rejected both petitions, granted EPA's request for a voluntary remand of a single narrow aspect of the 2007 FIP (i.e., the opacity limit for the fugitive dust for the material handling operations), and upheld other provisions of the final rule. Id. at 1122, 1131.

C. EPA's Regional Haze Program to Address Visibility

In 1977, Congress amended the CAA to address visual impairment, or "haze," that reduced visibility in many national parks and wilderness areas across the country. Part C, Subpart III of the Act establishes a visibility protection program and "declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution.''[4] 42 U.S.C.

[4] The terms ''impairment of visibility'' and ''visibility impairment'' are defined in the CAA to include a reduction in visual range and atmospheric discoloration. 42 U.S.C. § 7491(g)(6). A fundamental requirement of the visibility protection program is for EPA, in consultation with the Secretary of the Interior, to promulgate a list of ''mandatory Class I Federal areas'' where visibility is an important value. 42 U.S.C. § 7491(a)(2). These areas include national wilderness areas and national parks greater than six thousand acres in size. Id. § 7472(a). Relevant here, there are several mandatory Class I areas within an approximately 300 km (or 186 mile) radius of Four Corners: Grand Canyon National Park in Arizona; Mesa Verde National Park and La Garita Wilderness Area in Colorado; Bandelier Wilderness Area in New Mexico; and Arches, Bryce Canyon, Canyonlands, and Capitol Reef National Parks in Utah. 40 C.F.R. §§ 81.403, 81.406, 81.421, 81.430.

§ 7491(a)(1).

On December 2, 1980, EPA promulgated the first phase of the required visibility regulations, codified at 40 C.F.R. §§ 51.300–307. 45 Fed. Reg. 80,084 (Dec. 2, 1980). These regulations deferred regulating "regional haze"[5] from multiple sources, finding that the scientific data were inadequate at that time. Id. at 80,086. Congress added Section 169B to the Act in the 1990 CAA Amendments, requiring EPA to take further action to reduce regional haze. 42 U.S.C. § 7492. In 1993, the National Academy of Sciences released a comprehensive study that concluded that ''current scientific knowledge is adequate and control technologies are available for taking regulatory action to improve and protect visibility.'' *Protecting Visibility in National Parks and Wilderness Areas*, Committee on Haze in National Parks and Wilderness Areas, National Research Council, National Academy Press at 11, 242 (1993) [JA014, 035].

EPA thereafter promulgated regulations to address regional haze. 64 Fed. Reg. 35,714 (July 1, 1999). Consistent with the statutory requirement in 42 U.S.C.

[5] Regional haze is visibility impairment that is produced by a multitude of sources and activities which emit fine particles and their precursors and which are located across a broad geographic area. 64 Fed. Reg. at 35,715. When it adopted the initial visibility protection provisions of the CAA, Congress recognized that the "visibility problem is caused primarily by emission into the atmosphere of sulfur dioxide, oxides of nitrogen and particulate matter, especially fine particulate matter, from inadequate[ly] controlled sources." H.R. Rep. No. 95-294, at 204 (1977).

§ 7491(b)(2)(a), EPA's 1999 regional haze regulations include a provision directing States to require certain major stationary sources "in existence on August 7, 1977, but which ha[ve] not been in operation for more than fifteen years as of such date," which also emit pollutants that are reasonably anticipated to cause or contribute to any visibility impairment, to procure, install, and operate Best Available Retrofit Technology ("BART"). In determining what constitutes BART, States are required to take into account five factors identified in the CAA and EPA's regulations. 42 U.S.C. § 7491(g)(2) and 40 C.F.R. § 51.308(e)(1)(ii)(A). Those factors, from the Act's statutory definition of BART, which are applied to all technically feasible control technologies, are: (1) the costs of compliance, (2) the energy and non-air quality environmental impacts of compliance, (3) any pollution control equipment in use or in existence 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. Id.

D. CAA Section 112 and the Regulation of Hazardous Air Pollutants

A distinct provision of the CAA, Section 112, designates over one hundred pollutants as "hazardous," including mercury and selenium compounds. 42 U.S.C. § 7412(b)(1). Section 112 directs EPA to list all categories of "major" and certain categories of "area" sources of hazardous air pollutants and to establish emission

standards requiring the "maximum degree of reduction in emissions" deemed achievable for those sources.[6] 42 U.S.C. § 7412.

To address emissions of hazardous air pollutants from fossil-fuel fired power plants, EPA recently promulgated a national rule, the Mercury and Air Toxics Standards ("MATS rule"), under Section 112 of the CAA, 42 U.S.C. § 7412, that set emission limits for several hazardous air pollutants, including mercury. See 77 Fed. Reg. 9304 (Feb. 16, 2012). The MATS rule applies to all existing coal-fired power plants, including Four Corners. See EPA Response to Comments at 125, 164 [JA381, 383]; 77 Fed. Reg. at 51,643 [JA088].

E. The Endangered Species Act

The ESA was enacted in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species. . . ." 16 U.S.C. § 1531(b). The ESA contains both substantive and procedural requirements designed to conserve endangered and threatened species, and the ecosystems on which they depend. 16 U.S.C. § 1531(b). The starting point for species preservation is Section 4 of the ESA, 16 U.S.C. § 1533,

[6] A "major" source is a stationary source that has the potential to emit 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. 42 U.S.C. § 7412(a)(1). An "area" source is any stationary source that is not a major source. Id. § 7412(a)(2).

which empowers the Secretaries of the Interior and Commerce to list species as "threatened" or "endangered," and to designate "critical habitat" for listed species. See 16 U.S.C. § 1532(6) (defining "endangered species"); 16 U.S.C. § 1532(20) (defining "threatened species"); 16 U.S.C. § 1532(5)(A) (defining "critical habitat"). The Secretary of the Interior is responsible for listed terrestrial and freshwater species – including the razorback sucker and Colorado pikeminnow, the species at issue in this case – and administers the ESA through the Fish and Wildlife Service ("FWS"). The Secretary of Commerce is responsible for listed marine species and administers the ESA through the National Marine Fisheries Service ("NMFS"). See id. § 1532(15); 50 C.F.R. §§ 17.11, 402.01(b).

Once a species is listed, Section 7(a)(2) of the ESA requires each federal agency ("action agency") to ensure, in consultation with FWS and/or NMFS ("consulting agency"), that any action authorized, funded, or carried out by the agency "is not likely to jeopardize the continued existence" of an endangered or threatened species, or "result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). The ESA's implementing regulations provide that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. See also Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1104 (10th Cir. 2010) ("Section 7 applies to 'actions in which there is

discretionary Federal involvement or control.'") (quoting 50 C.F.R. § 402.03). Thus, where an agency lacks discretion to take an alternative course of action for the benefit of listed species, the requirements of ESA Section 7 are not triggered. Nat'l Ass'n of Home Builders v. Defenders of Wildlife ("Home Builders"), 551 U.S. 644, 668-669 (2007).

If the agency has discretionary involvement or control over the action, it must make an initial determination of whether its action may affect listed species or critical habitat. See 50 C.F.R. § 402.14(a). If the action will have no effect on listed species, the consultation requirements are not triggered. See Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994). If the action agency determines that its action "may affect" listed species or critical habitat, it must pursue either informal or formal consultation with the appropriate consulting agency. See 50 C.F.R. §§ 402.13, 402.14. Informal consultation is an optional process comprised of all discussions and correspondence between the consulting agency and the action agency in order to determine whether formal consultation is necessary. 50 C.F.R. § 402.13(a). If an action agency determines, with the written concurrence of the consulting agency, that the action "is not likely to adversely affect" the listed species or critical habitat, the consultation process is terminated, and formal consultation is not necessary. See id.

If the action agency determines that the proposed action is "likely to adversely affect" listed species or designated critical habitat, the agencies must engage in formal consultation. 50 C.F.R. §§ 402.13(a), 402.14(a)–(b). Formal consultation typically begins with a written request by the action agency, 50 C.F.R. § 402.14(c), and may include the preparation of a biological assessment by the action agency that evaluates "the potential effects of the action on listed and proposed species and designated and proposed critical habitat." 50 C.F.R. § 402.12(a). Formal consultation concludes with the issuance of a biological opinion by the consulting agency assessing the likelihood of jeopardy to the species and whether the proposed action will result in destruction or adverse modification of critical habitat; if so, the consulting agency must suggest reasonable and prudent alternatives to the action, where available. See 50 C.F.R. § 402.14(g), (h).

III. PROMULGATION OF THE FEDERAL IMPLEMENTATION PLAN FOR IMPLEMENTING BEST AVAILABLE RETROFIT TECHNOLOGY FOR FOUR CORNERS

A. The Four Corners Power Plant

Four Corners is a coal-fired power plant located within the Navajo Indian Reservation near Farmington, New Mexico. Final Rule, 77 Fed. Reg. at 51,620 [JA065]. The Plant consists of five coal-fired electric utility steam generating units with a total capacity of 2060 megawatts ("MW"). Id. Units 1, 2, and 3 at Four Corners are owned entirely by Arizona Public Service Company, which serves as

the facility operator, and are rated to 170 MW (Units 1 and 2) and 220 MW (Unit 3). Id. Units 4 and 5 are each rated to a capacity of 750 MW, and are co-owned by six entities: Southern California Edison (48%), Arizona Public Service Company (15%), Public Service Company of New Mexico (13%), Salt River Project (10%), El Paso Electric Company (7%), and Tucson Electric Power (7%). Id. Based on 2009 emissions data from the EPA Clean Air Markets Division, Four Corners is the largest source of NO_X emissions in the United States (over 40,000 tons per year of NO_X). "Source Specific Federal Implementation Plan for Best Available Retrofit Technology for Four Corners Power Plant: Navajo Nation," 75 Fed. Reg. 64,221, 64224 (Oct. 19, 2010) ("Proposed Rule") [JA037]. Located near the Four Corners region of Arizona, New Mexico, Utah, and Colorado, Four Corners is within approximately 300 kilometers of sixteen mandatory Class I areas. Id. The numerous Class I areas that surround Four Corners are sometimes known as "the Golden Circle of National Parks." Id. Millions of tourists visit these areas, many visiting from other countries to view the unique vistas of the Class I areas in the Four Corners region. Id.

B. The BART FIP for Four Corners

Visibility is impaired in the 16 Class I areas surrounding Four Corners. 75 Fed. Reg. at 64,224 [JA037]. The National Park Service noted in 2008 that '''[v]isibility is impaired to some degree at all [Class I areas] where it is being

measured and remains considerably higher than the target natural conditions in many places, particularly on the haziest days.''' Id. (citing *Air Quality in National Parks*, 2008 Annual Performance & Progress Report, National Resource Report NPS/NRPC/ARD/NRR–2009/151, September 2009, at 30) [JA037].

Pursuant to EPA's authority to fill regulatory gaps under CAA Section 301(d) and the Tribal Authority Rule, and based on the importance of visibility as a value in the Golden Circle of National Parks and the substantial NO_X and PM emissions generated by Four Corners, in 2010 EPA proposed to find that BART emission limits are necessary or appropriate for Four Corners. 75 Fed. Reg. at 64,221, 64,223 (citing 40 C.F.R. § 49.11(a) authority to fill regulatory gaps), 64,224-32 [JA037-045]. For NO_X, EPA proposed a plant-wide emission limit of 0.11 lb/MMBtu,[7] representing an 80 percent reduction from current NO_X emission rates, achievable by installing and operating Selective Catalytic Reduction ("SCR")[8] technology on Units 1–5. Id. at 64,225-30 [JA038-43]. For PM, EPA proposed an emission limit of 0.012 lb/MMBtu for Units 1–3 and 0.015 lb/MMBtu for Units 4 and 5, achievable by installing and operating any of several equivalent

[7] MMbtu is one million British thermal units. This emission rate reflects the pounds of NO_x emitted per unit of heat input.

[8] SCR is the most stringent add-on control technology that reduces NO_x emissions, by injecting ammonia or urea in the presence of a catalyst, from the emissions stream before it is emitted into the ambient air.

controls on Units 1–3, and through proper operation of the existing baghouses[9] on Units 4 and 5. Id. at 64,230-32 [JA043-45]. EPA did not make any "necessary or appropriate" finding with respect to regulating any other aspect of Four Corners (including mercury and selenium emissions).

Following the publication of the proposed rule, Arizona Public Service Company, acting on behalf of Four Corners' owners, submitted a letter to EPA offering an alternative to reduce visibility-impairing pollution. 76 Fed. Reg. 10,530 (Feb. 25, 2011) [JA049]. Under the alternative, Four Corners would shut down Units 1–3 by 2014 and install and operate SCR on Units 4 and 5 to an emission limit of 0.11 lb/MMBtu at each unit by the end of 2018. Id. at 10,532 [JA051]. In light of the offered alternative, on February 25, 2011, EPA published a Supplemental Proposal with a technical evaluation of Arizona Public Service Company's suggested alternative. 76 Fed. Reg. at 10,530 [JA049].

Under EPA's Supplemental Proposal, Four Corners would be allowed the option to comply with an alternative emission control strategy in lieu of complying with the October 19, 2010 proposed BART determination. 76 Fed. Reg. at 10,540 [JA059]. The alternative emission control strategy required closure of Units 1–3 by January 1, 2014 and the installation and operation of add-on post-combustion

[9] A baghouse is an add-on fabric filter that reduces particulate matter from the emissions stream before it is emitted into the ambient air.

controls on Units 4 and 5 to meet a NO_X emission limit of 0.098 lb/MMBtu at each unit by July 31, 2018. Id. EPA proposed that this alternative emission control strategy was "better than BART" because it would result in greater visibility improvement in surrounding Class I areas at a lower cost than the initial October 19, 2010 BART proposal. Id. at 10,532-33 [JA051-52].

In the final rule, EPA concluded that it is necessary or appropriate to promulgate a source-specific FIP requiring Four Corners to achieve emission reductions required by the CAA's BART provision. 77 Fed. Reg. at 51,621 [JA066]. EPA further required Four Corners to meet new emission limits for NO_X and PM.

For NO_X emissions, EPA finalized both the BART determination in its October 2010 proposal and the optional alternative to BART in the February 2011 supplemental proposal. The final rule requires Four Corners to choose which emissions control strategy to follow and to notify EPA of its choice by July 1, 2013.[10] Id. EPA's final BART determination requires Four Corners to meet a plant-wide heat input-weighted emission limit of 0.11 lb/MMBtu on a rolling 30-

[10] On June 19, 2013, Arizona Public Service Company requested a six-month extension of the date by which to notify EPA of the compliance option it would implement. EPA has proposed to grant the request for a six-month extension of the date for electing the compliance option, until December 31, 2013. 78 Fed. Reg. 41,731 (July 11, 2013). EPA is accepting comments on its proposal until August 12, 2013 and will thereafter take final action on the request.

calendar day average, which represents an 80-percent reduction from current NO_X emission rates. This NO_X limit is achievable by installing and operating add-on post-combustion controls on Units 1–5.[11] Id. Alternatively, Four Corners may choose to comply with an alternative emission control strategy that requires permanent closure of Units 1–3 by January 1, 2014, and installation and operation of add-on post combustion controls on Units 4 and 5 to meet a NO_X emission limit of 0.098 lb/MMBtu each, based on a rolling average of 30 successive boiler operating days, by July 31, 2018. Id. at 51,621-22 [JA066-67].

For PM, the final rule requires Units 4 and 5 to meet a BART emission limit of 0.015 lb/MMBtu within 60 days after restart following the scheduled major outages for Units 4 and 5 in 2013 and 2014. Id. at 51,622 [JA067]. This emission limit is achievable through the proper operation of the existing baghouses. Id. EPA determined that it was not necessary or appropriate to finalize the proposed PM BART determination for Units 1–3. Id.

STANDARD OF REVIEW

The FIP challenged in this case is subject to judicial review under the standards of the Administrative Procedure Act ("APA"), which provides that the Court may set aside any action found to be "arbitrary, capricious, an abuse of

[11] Installation and operation of the new NO_X controls on one 750 MW unit must be within four years of October 23, 2012. NO_X controls on the remaining units must be installed and operated within five years of October 23, 2012.

discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see Ariz. Pub. Serv. Co., 562 F.3d at 1123 n.4 (finding that a FIP issued by EPA pursuant to CAA Section 301 and the Tribal Authority Rule is reviewable under the APA rather than under the similar standards set forth in CAA Section 307(d), 42 U.S.C. § 7607(d)). The Court must affirm as long as EPA considered all relevant factors and articulated a "rational connection between the facts found and the choice made." Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962). While the court's inquiry is to be "searching and careful, [its] review is ultimately a narrow one." Maier v. EPA, 114 F.3d 1032, 1039 (10th Cir. 1997). The court will uphold agency action on the basis of even "a less-than-ideal explanation as long as the agency's decisionmaking process may reasonably be discerned." Ariz. Pub. Serv. Co., 562 F.3d at 1123 (citation omitted). Where the petitioner's complaints reflect a mere difference in view from that of the agency, the agency action must be upheld. See id. at 1130-31.

A court's deference to an agency is "especially strong where the challenged decisions involve technical or scientific matters within the agency's area of expertise." Utah Envtl. Cong. v. Bosworth, 443 F.3d 732, 739 (10th Cir. 2006) (citation omitted). Such deference is "especially appropriate in [a court's] review of EPA's administration of the complicated provisions of the Clean Air Act." Catawba Cnty., N.C. v. EPA, 571 F.3d 20, 41 (D.C. Cir. 2009) (citation omitted);

see also Oklahoma v. EPA, Nos. 12-9526, 12-9527, 2013 WL 3766986, at *4 (10th Cir. July 19, 2013) (deferring to EPA's interpretation of the visibility program provisions of the CAA).

Questions of statutory interpretation are governed by the two-step test set forth in Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837, 842-45 (1984). If the statute is clear, the court "'appl[ies] its plain meaning' and the inquiry ends." Ariz. Pub. Serv. Co., 562 F.3d at 1123 (citation omitted). If, however, the statute is silent or ambiguous, the court "defer[s] to the authorized agency and 'appl[ies] the agency's construction so long as it is a reasonable interpretation of the statute.'" Id. (citation omitted). Further, "[a]n agency is entitled to substantial deference when it acts pursuant to an interpretation of its own regulation." Id. (citing Culbertson v. U.S. Dep't of Agric., 69 F.3d 465, 467 (10th Cir. 1995) and Gonzales v. Oregon, 546 U.S. 243, 255 (2006)). The agency's interpretation is "controlling unless plainly erroneous or inconsistent with the regulation." Gonzales, 546 U.S. at 256 (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)).

SUMMARY OF THE ARGUMENT

Guardians challenges EPA's action in promulgating the Final Rule as "not in accordance" with the requirements of the Endangered Species Act. Guardians claims that EPA violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), because the Agency did not consult with the Fish and Wildlife Service on the

impacts of the FIP on listed species. Pet's Br. at 2. Specifically, Guardians claims that EPA should have sought consultation to address emissions of mercury and selenium – pollutants that do not impact visibility and are not regulated under the FIP – with respect to the survival and recovery of the Colorado pikeminnow and razorback sucker and their habitat in the San Juan River. Pet's Br. at 27-28, 41-45; Comments of Guardians at 6-7 [JA347-48].

As an initial matter, this Court lacks jurisdiction to hear this petition. Even if Guardians could claim a procedural injury based on its assertion that there is an increased risk of environmental harm in the absence of consultation on the FIP, Guardians has not demonstrated a causal connection between EPA's promulgation of a regional haze FIP that regulates NO_x and PM and any direct or indirect effects to the razorback sucker or the Colorado pikeminnow arising from NO_x or PM emissions. Guardians' allegations of harm to those listed species relate solely to emissions of mercury and selenium, hazardous air pollutants which do not affect visibility and are not addressed in the FIP (because they are beyond the scope of EPA's regional haze authority). The FIP does not authorize the overall general or continued operations of Four Corners and is thus unrelated to the Plant's mercury and selenium emissions. Emissions of such hazardous air pollutants are regulated by a separate EPA rule not before the Court. See Statutory and Regulatory Background Section II.D, supra. Thus, the promulgation of the FIP could not

cause the alleged injury to Guardians' members' interests in the Colorado pikeminnow or razorback sucker. In addition, Guardians has not established that its claimed injury can be redressed even if EPA were required to initiate consultation with the FWS, as EPA lacks the authority in a regional haze FIP to regulate for the purpose of decreasing emissions of hazardous air pollutants.

For similar reasons, Guardians' petition also fails on the merits. ESA Section 7 consultation requirements apply only to actions in which there is "discretionary Federal involvement or control." 50 C.F.R. § 402.03. First, EPA lacks the discretion to consider reductions in hazardous pollutants such as mercury and selenium when setting BART limits for pollutants that affect visibility such as NO_x and PM. EPA's authority is limited by the determination made pursuant to Section 301(d) of the CAA, 42 U.S.C. § 7601(d), and the Tribal Authority Rule, 40 C.F.R. § 49.11(a), to fill a specific regulatory gap to implement regional haze requirements at Four Corners. Here, EPA made a determination that BART emission limits are necessary or appropriate for the Four Corners Power Plant to further the goals of the Agency's regional haze program to address visibility impairment. As set forth under the CAA's visibility protection provisions, 42 U.S.C. §§ 7491, 7492, EPA's regulatory discretion is limited to addressing the pollutants that affect visibility, such as NO_x and PM.

Guardians' assertion that EPA's BART Guidelines, 50 C.F.R. pt. 51, App. Y, provide EPA discretion to address mercury and selenium emissions through a FIP that regulates other air pollutants is misplaced. The BART Guidelines make clear that BART is pollutant-specific, and that the relevant pollutants for BART do not include mercury or selenium. Further, the portion of the BART Guidelines relating to the requirement that the Agency take into account "non-air quality environmental impacts of compliance" is not intended to require consideration of air quality impacts resulting from the facility's existing air emissions or from the incidental reductions that a particular control option might achieve.

Even if EPA had made a finding under the Tribal Authority Rule that it is necessary or appropriate to address mercury or selenium emissions from Four Corners in order to fill a regulatory gap, the Agency is prohibited from taking such action in a regional haze FIP under 42 U.S.C. § 7491, as the Act explicitly states that hazardous air pollutants may not be regulated under Subchapter I, Part C of the CAA. Instead, hazardous air pollutants are regulated under separate programs contained in Subchapter I, Part A, including CAA Section 112, 42 U.S.C. § 7412, which apply as national standards and not as FIP or SIP requirements. This is illustrated by the fact that in 2012, EPA promulgated nationally applicable Mercury and Air Toxics Standards pursuant to CAA Section 112.

In addition, Guardians has not claimed, nor did EPA find, that the pollutants regulated under the FIP – NO_x and PM – have any impact on the listed fish and their habitat in the San Juan River. Thus, in promulgating the FIP, EPA had no duty to consult under Section 7(a)(2) of the ESA.

ARGUMENT

I. THIS COURT LACKS JURISDICTION BECAUSE GUARDIANS CANNOT DEMONSTRATE ARTICLE III STANDING.

"[J]urisdiction is a threshold question which an appellate court must resolve before addressing the merits of the matter before it." Timpanogos Tribe v. Conway, 286 F.3d 1195, 1201 (10th Cir. 2002) (citation omitted). The Supreme Court articulated the "irreducible constitutional minimum" for Article III standing in Lujan v. Defenders of Wildlife:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.] Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

504 U.S. 555, 560-61 (1992) (internal quotations and citations omitted); See also Comm. to Save the Rio Hondo v. Lucero, 102 F.3d 445, 447 (10th Cir. 1996). "Standing is not measured by the intensity of a party's commitment, fervor, or aggression in pursuit of its alleged right and remedy." Utah v. Babbitt, 137 F.3d

1193, 1202 (10th Cir. 1998) (citations omitted). "Nor is the perceived importance of the asserted right a substitute for constitutional standing." Id. The party invoking federal jurisdiction bears the burden of establishing each of these elements. Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 874-75 (10th Cir. 1992).

Here, Guardians asserts that one of its members "is aware of the impacts to [the Colorado pikeminnow and razorback sucker] and the San Juan River caused by mercury and selenium emissions from power plants in the Four Corners area" and that its member is concerned about "the health of the San Juan River, and how EPA's failure to address mercury and selenium emissions from Four Corners harms the survival and recovery" of those species and their habitat.[12] Pet's Br. at 28. Guardians further asserts that "EPA's uninformed decisionmaking and its failure to insure that its actions will not harm the Colorado pikeminnow or razorback sucker" is the cause of the asserted injury to its members' interest in the listed species and their critical habitat in the San Juan River. Id. at 28-29. Guardians states that an order remanding EPA's Rule pending consultation under the ESA would redress its members' injuries. Id. at 29.

[12] Guardians' reliance on a draft Biological Opinion for Desert Rock Energy Project, Pet's Br. at 14-16, is misplaced. The document was made a part of this record when Guardians attached it to its comments on the Proposed Rule [JA351-52]. Moreover, the document was withdrawn and never finalized and should not be considered or relied upon by the parties or the Court.

Guardians' standing argument is without merit. First, Guardians has not met its burden to demonstrate a causal connection between alleged injuries to its members and EPA's conduct. The challenged conduct in this case is the issuance of a FIP requiring Four Corners to reduce NO_x emissions and setting limits for PM based on existing emission rates. 77 Fed. Reg. at 51,620 [JA065]. There is no evidence in the record of direct or indirect effects to the razorback sucker or the Colorado pikeminnow arising from NO_x or PM emissions, and Guardians points to no such evidence. Rather, Guardians' allegations of harm to these species relate to emissions of mercury and selenium, hazardous air pollutants which do not affect visibility and are not addressed in the FIP. The FIP does not license or in any other way authorize the general or continued operations of Four Corners and is thus causally unrelated to the Plant's mercury and selenium emissions. Thus, Guardians cannot establish "a substantial likelihood" that EPA's conduct caused the alleged injury to its members' interest in the Colorado pikeminnow or razorback sucker. See Nova Health Sys. v. Gandy, 416 F.3d 1149, 1156 (10th Cir. 2005) (stating that Article III requires "proof of a substantial likelihood that the defendant's conduct caused the plaintiff's injury in fact").

Second, Guardians has not met its burden to establish that a favorable decision on the merits would redress its alleged injuries. Although it is true that a party asserting a procedural injury "can often establish redressibility with little

difficulty, because they need to show only that the relief requested – that the agency follow the correct procedures – may influence the agency's ultimate decision," it is also true that the redressibility requirement "is not toothless in procedural injury cases." Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1226-27 (9th Cir. 2008). Guardians' standing argument is premised on its incorrect legal conclusion that in taking the specific action at issue here – the promulgation of a regional haze FIP – EPA had discretion to regulate NO_x and PM emissions for the additional purpose of reducing mercury and selenium emissions in order to protect endangered and threatened species. Pet's Br. at 29 n. 9, 41. To the contrary, and as discussed in detail in both the Statutory and Regulatory Background Section II, supra, and in Section II of the Argument, infra, the Final Rule implements the CAA's visibility program, which only regulates emissions of the pollutants that contribute to regional haze or impairment of visibility.[13] It is undisputed that visibility impairment "is caused primarily by emission into the atmosphere of [sulfur dioxide], oxides of nitrogen and particulate matter, especially fine particulate matter, from inadequate[ly] controlled sources." H.R. Rep. No. 95-294, at 204 (1977); see also BART Guidelines, 50 C.F.R. pt. 51,

[13] As noted in Section II.D of the Statutory and Regulatory Background, supra, CAA Section 112, 42 U.S.C. § 7412, is the appropriate mechanism to address emissions of hazardous air pollutants from power plants (including Four Corners) and EPA recently promulgated a nationally applicable final Mercury and Air Toxics Standards rule under the authority of Section 112. See 77 Fed. Reg. 9304.

App. Y § (II)(3)("What pollutants should I address?"). Nor is there anything in the record that suggests that either mercury or selenium emissions affect visibility. See EPA's Response to Comments at 164 [JA383]; 77 Fed. Reg. at 51,643-44 [JA088-89]. Indeed, it is beyond dispute that they do not. Accordingly, the visibility FIP issued for Four Corners sets emission limits only for NO_x and PM.

Further, for purposes of the FIP at issue in this case, visibility concerns are the only issues for which EPA has made the requisite "necessary or appropriate" finding and EPA's authority under the Tribal Authority Rule, 40 C.F.R. § 49.11(a), is triggered solely for that purpose. EPA has made no such finding under the Tribal Authority Rule regarding regulation of mercury or selenium at Four Corners (and has neither proposed, nor taken final action under the Tribal Authority Rule regarding such pollutants). EPA's authority in this action is thus limited to addressing the pollutants emitted from Four Corners that affect visibility in the surrounding Class I areas.

Where granting the relief requested – i.e., consultation with FWS – would have no effect on the administrative process, as is the case here, there can be no redressibility. Consultation under the ESA on the FIP would not redress Guardians' professed interest in a FIP that sets NO_x and PM emission reductions and limits based on consideration of reductions of mercury and selenium. Because EPA lacks the discretion to set emission limits for mercury and selenium as part of

the FIP, the relief requested by Guardians cannot redress the alleged harm to the listed species they raise. The Court should thus dismiss the petition for lack of standing.

II. EPA WAS NOT REQUIRED TO CONSULT WITH FWS UNDER ESA SECTION 7 BECAUSE THE AGENCY LACKS DISCRETION TO ADDRESS MERCURY AND SELENIUM IN THE FIP.

A. Only Federal Actions Involving Discretion to Adopt Additional Protections for Listed Species Are Subject to the ESA's Consultation Requirements.

Even if the Court determines that Guardians has demonstrated standing, Guardians' claim fails on its merits. Although Guardians argues that "EPA's promulgation of the Four Corners FIP meets the ESA's broad definition of an action and is, therefore, subject to consultation with the Service," Pet's Br. at 31-32, not all federal agency actions are subject to the consultation requirements of ESA Section 7. As noted above, "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. Based on this statutory and regulatory language, the Supreme Court has made clear that "not every action authorized, funded, or carried out by a federal agency is a product of that agency's exercise of discretion." Home Builders, 551 U.S. at 668. Rather, an agency has discretion where it "can exercise 'judgment' in connection with a particular action." Id.

In Home Builders, the Supreme Court considered the interplay between ESA Section 7(a)(2) and Section 402(b) of the Clean Water Act which directs EPA to transfer certain discharge permitting powers to state authorities upon an application and showing that nine specified criteria have been met. 551 U.S. at 664; 33 U.S.C. § 1342(b). The Court found that Section 402(b) "is mandatory and the list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application." Home Builders, 551 U.S. at 661. The Court also found that application of the ESA's consultation requirement "may require the agency to adopt an alternative course of action" for the benefit of listed species, which would "effectively repeal the mandatory and exclusive list of criteria set forth in § 402(b), and replace it with a new, expanded list that includes § 7(a)(2)'s no-jeopardy requirement." Id. at 662. The Court went on to note that the petitioner's reading of the consultation requirement would likewise "partially override every federal statute mandating agency action by subjecting such action to the further condition that it pose no jeopardy to endangered species." Id. at 664. The Supreme Court held that the ESA's implementing regulations at 50 C.F.R. § 402.03 resolve this tension by "giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but not when the agency is prohibited from considering such extrastatutory factors." Id. at 665.

Other federal courts have similarly found ESA Section 7(a)(2) inapplicable where an agency lacks relevant discretion regarding an action that it "is required by statute to undertake once certain specified triggering events have occurred." Home Builders, 551 U.S. at 669. For example, the Ninth Circuit concluded that where annual operating plans issued by the Bureau of Reclamation pursuant to the Colorado River Basin Project Act are required to "describ[e] the actual operation [of the Dam] under the adopted criteria for the preceding compact water year and the projected operation for the current year," the implementing statute requires the Bureau of Reclamation to perform a "specific, non-discretionary act[] rather than achieve broad goals." Grand Canyon Trust v. U.S. Bureau of Reclamation, 691 F.3d 1008, 1018-19 (9th Cir. 2012) (citations omitted).

Thus, while the ESA directs federal agencies to "utilize their authorities in furtherance of" the statute's purposes, 16 U.S.C. § 1536(a)(1), it does not expand an agency's existing authorities, or alter the requirements of the statute under which the agency is acting. The weight of judicial authority has held that Section 7(a)(2) does not expand an agency's authority. In American Forest & Paper Association v. EPA, 137 F.3d 291 (5th Cir. 1998), the Fifth Circuit reached the same conclusion as the Supreme Court in Home Builders when it rejected an attempt to condition the transfer of Clean Water Act permitting authority to the State of Louisiana on provisions protecting listed species. The Fifth Circuit found

that where a State meets the nine criteria specified in the statute, approval is non-discretionary, and the agency cannot condition approval on addressing endangered species concerns. The court stated:

> [if the agency] lacks the power to add additional criteria [under its enabling statute], nothing in the ESA grants the agency the authority to do so. Section 7 of the ESA merely requires EPA to consult with FWS or NMFS before undertaking agency action; it confers no substantive powers.

Id. at 297-98. The court further explained that "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." Id. at 299.

The District of Columbia Circuit reached the same conclusion in Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission, 962 F.2d 27 (D.C. Cir. 1992), rejecting an argument that any statutory limitations on an agency's authority are implicitly superseded by the general command of ESA Section 7. The court noted that "the statute 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." Id. at 34. Similarly, the Ninth Circuit recently held that the Animal Plant and Health Inspection Service had no duty to consult under Section 7 where the agency concluded that genetically modified alfalfa was not a "plant pest" under the Plant Protection Act, thus depriving the agency of jurisdiction to regulate the plant. See

Ctr. for Food Safety v. Vilsack, 718 F.3d 829, 842 (9th Cir. 2013) ("The ESA's consultation duty is triggered, however, only when the agency has authority to take action and discretion to decide what action to take. There is no point in consulting if the agency has no choices.").

In Karuk Tribe of California v. United States Forest Service, 681 F.3d 1006 (9th Cir. 2012), relied upon by Guardians, the Ninth Circuit recognized that for the requirements of Section 7(a)(2) to apply, "the discretionary control retained by the federal agency . . . must have the capacity to inure to the benefit of a protected species." Id. at 1024. The court found that the mining regulation at issue in that case conferred discretion on the United States Forest Service to influence private mining activities for the benefit of listed species. Id. at 1025. Indeed, "[t]he overriding purpose of the regulations is 'to minimize [the] adverse environmental impacts' of mining activities on the federal forest lands," and there is a "likelihood that mining activities will cause significant disturbance of surface resources, which include fisheries and wildlife habitat." Id. (citations omitted). Further, in Karuk Tribe the court found that the agency had, in fact, already exercised discretion for the benefit of listed species in imposing conditions on mining activities in national forests. Id. at 1025-26. Because the Forest Service "made an affirmative, discretionary decision whether to allow private mining activities to proceed under

specified habitat protection criteria," the court held that there was sufficient agency discretion to trigger a duty to consult under ESA Section 7. Id. at 1026-27.

In this case, EPA had no duty to consult under Section 7 because under the relevant statutory and regulatory scheme, EPA lacks the discretion to consider and take action regarding the effects on listed species of pollutants that do not contribute to visibility impairment, such as mercury and selenium. For Guardians to prevail, it would have to demonstrate that EPA has the authority under the regional haze program to regulate air pollutants that impact visibility – such as NOx and PM – in part based on the added purpose of reducing emissions of pollutants that do not impact visibility – such as mercury and selenium. EPA has no such discretion. As discussed in detail below, the scope of EPA's authority is limited to addressing visibility effects from Four Corners via a regional haze FIP. For purposes of the FIP, that is the sole "necessary or appropriate" determination made by EPA under the Tribal Authority Rule, and the Agency's FIP authority is thus limited to its authority under the visibility protection provisions of the CAA. EPA issued the FIP consistent with that finding and the regional haze program, the goal of which is "to reduce emissions of visibility-impairing pollutants in order to restore visibility to natural conditions . . . ." 77 Fed. Reg. at 51,643-44 [JA088-89]. See also 40 C.F.R. pt. 51, App. Y §(I)(B) ("The CAA establishes a national goal of eliminating man-made visibility impairment from all Class I areas."). The

CAA requires certain major stationary sources to install Best Available Retrofit Technology if they emit air pollutants that may reasonably be anticipated to cause or contribute to any visibility impairment. 77 Fed. Reg. at 51,621 [JA066]. Here, EPA lacked the discretion to impose conditions in the FIP for the purpose of addressing mercury or selenium, or any other pollutants that do not affect visibility in the area surrounding Four Corners.

As noted above, the appropriate mechanism to address hazardous pollutants is Section 112 of the CAA, 42 U.S.C. § 7412. Section 112 identifies mercury and selenium compounds as hazardous air pollutants and directs EPA to establish emission standards for major sources of hazardous air pollutants, such as power plants. Id. § 7412(d). In its comments on the Proposed Rule, Guardians acknowledged that Section 112 regulates hazardous air pollutants from stationary sources of air pollution.[14] Guardians' Comments at 7 [JA348]. However, Guardians incorrectly asserted that "Section 112 does not, by its explicit terms, limit EPA's authority." Id. When Congress amended the CAA in 1990, it specifically provided that "the provisions of Part C of [subchapter I of the CAA]

[14] Guardians asserted that EPA had discretion to address mercury and selenium in the FIP based in part on the fact that that EPA had not yet promulgated hazardous air pollutant emission standards for coal-fired power plants. Guardians Comments at 7 [JA348]. EPA's Mercury and Air Toxics Standards rule had been proposed at the time Guardians submitted its comments in May 2011, and the rule was finalized in February 2012. 77 Fed. Reg. at 9304.

(prevention of significant deterioration) shall not apply to pollutants listed under [Section 112]." 42 U.S.C. § 7412(b)(6). Because the visibility protection provisions of the Act are contained within CAA Subchapter I, Part C – Prevention of Significant Deterioration of Air Quality – EPA does not have the discretion or authority to address the hazardous air pollutants listed in Section 112(b)(1) under Sections 169A and 169B of the Act, 42 U.S.C. §§ 7491, 7492.

B. Neither CAA Section 301(d) Nor the Tribal Authority Rule Provides EPA With Discretion to Address Mercury and Selenium Emissions in a Regional Haze FIP.

Guardians first asserts that EPA has discretion under the CAA and the Tribal Authority Rule to "change or promulgate FIP provisions that would, in turn, influence the operation of and resulting emissions from [Four Corners] for the benefit of a protected species." Pet's Br. at 39. Guardians fails to demonstrate how this is so.

Guardians cites CAA Section 301(d), which authorizes the Administrator generally to treat Indian Tribes as States and further provides that

> In any case in which the Administrator determines that the treatment of Indian tribes 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.

42 U.S.C. § 7601(d)(4) (emphasis added). Section 301 plainly indicates that EPA may take action to fill a regulatory gap with respect to a specific purpose (e.g., to

address visibility). With regard to FIPs, EPA has, as a general matter, implemented this provision under the Tribal Authority Rule, 40 C.F.R. § 49.11, which establishes EPA's authority to promulgate FIP provisions that EPA determines are "necessary or appropriate" where a Tribe has not submitted or received EPA approval of a TIP.

Where EPA makes such a "necessary or appropriate" determination, the Agency then takes action to implement the specific provision of the CAA to which the determination applies. EPA is thus subject to the same basic limits on the scope of its authority as it would be if it were implementing the relevant provision of the CAA outside of the tribal context. Here, EPA's relevant determination under the Tribal Authority Rule was that BART emission limits are necessary or appropriate to reduce visibility impacts from Four Corners. 77 Fed. Reg. at 51,620 [JA065]. EPA made no such finding regarding any other element of the CAA, including any relevant authority relating to regulation of selenium or mercury.[15] Because EPA's determination was limited to the visibility program, EPA's sole action was to promulgate a FIP for Four Corners that established BART limits, and in doing so, the Agency was limited to the same basic requirements of the visibility program as would apply for a source located outside

[15] In light of EPA's promulgation of the nationally-applicable Mercury and Air Toxics Standards rule issued in 2012, there is no regulatory gap for hazardous air pollutant emissions from stationary sources such as Four Corners.

of Indian country. As discussed in detail above, the visibility program provides EPA authority to address only those pollutants that affect visibility.

Guardians incorrectly reads CAA Section 301(d) and the Tribal Authority Rule to mean that when EPA acts to fill a gap and achieve a particular purpose (such as improving visibility), it must look to and address all of the "purposes and goals of the Clean Air Act," Pet's Br. at 38-39, rather than the purposes and authority contained in the specific provision of the CAA and its regulations being implemented pursuant to the Tribal Authority Rule. The same argument was already rejected by this Court in Arizona Public Service Company v. EPA, 562 F.3d 1116 (10th Cir. 2009), in which the Court reviewed the first FIP promulgated by EPA for Four Corners. In that case, several environmental organizations asserted that the Tribal Authority Rule required EPA to implement a more comprehensive FIP in order to address all the air quality problems in the vicinity of Four Corners, similar to what would be expected in a complete SIP or TIP. Id. at 1124. This Court rejected such an all-or-nothing approach, and recognized that a FIP "'means a plan (or portion thereof) promulgated by the [EPA] to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan." Id. at 1125 (citing 42 U.S.C. § 7602(y)). The Court upheld EPA's

interpretation of its authority under the Tribal Authority Rule to issue a targeted FIP and concluded that where EPA takes action to fill a gap, it does not "intend to self-impose a duty to implement all measures otherwise required for states and tribes." 562 F.3d at 1125-26. Rather, EPA may to determine what rulemaking is necessary or appropriate to protect air quality and then to promulgate only that particular rule. Id. at 1125.

Here, EPA has determined only that it is necessary or appropriate to address regional haze under the visibility protection provisions of the CAA. EPA has thus implemented the FIP for Four Corners to establish BART limits, and in doing so, the Agency's discretion is limited to setting BART limits to address the pollutants that cause regional haze.

Nor should this Court accept Guardians' invitation to liken this case to the Eleventh Circuit's decision in Florida Key Deer v. Paulison, 522 F.3d 1133, 1141 (11th Cir. 2008). In that case, the court considered a claim by conservation groups that the Federal Emergency Management Agency's ("FEMA's") administration of the National Flood Insurance Program required consultation under ESA Section 7(a)(2). The court concluded that because the purposes of the National Flood Insurance Act "are broad," and call for "consideration of whether a locality's land-use measures will 'otherwise improve' land management and use," FEMA "enjoys broad discretion" under the statute, including "discretion to consider endangered

and threatened species." Id. at 1142-43. As an initial matter, the statutory provisions at issue in Florida Key Deer were quite different from the targeted provisions at issue here. In Florida Key Deer, in the context of reviewing FEMA's administration of an entire program, the agency action at issue was implementation of the National Flood Insurance Program and its subcomponents. In reaching its conclusion, the court looked to the broad purposes of the entire National Flood Insurance Act with respect to the administration of the entire program, as opposed to the specific, discrete agency actions that FEMA carries out in administering the Act. Accordingly, the Eleventh Circuit did not grapple with the fact that, in the context of that case, certain actions taken under the underlying act may be discretionary while others are not. See, e.g., Nat'l Wildlife Fed'n v. FEMA, 345 F. Supp. 2d 1151, 1173-74 (W.D. Wash. 2004) (holding that FEMA's mapping, developing eligibility criteria, and community rating system are discretionary acts but the sale of flood insurance is non-discretionary); Coal. for a Sustainable Delta v. FEMA, 812 F. Supp. 2d 1089, 1132 (E.D. Cal. 2011) (holding that FEMA's sale of flood insurance is a non-discretionary act that does not require consultation).

The National Wildlife Federation and Coalition for a Sustainable Delta decisions are consistent with the Supreme Court's opinion in Home Builders, in which the Court focused its review on the specific statutory provision at issue there – Section 402(b) of the Clean Water Act – and not the purposes of the entire act in

determining whether the agency action required consultation under Section 7 of the ESA. Home Builders, 551 U.S. at 661-62. Here, EPA found that it is necessary or appropriate under the Tribal Authority Rule to implement the statutory authority of CAA Section 169A, 42 U.S.C. § 7491, and implementing regulations for BART at Four Corners. The statute and BART regulations are focused on the reduction of emissions of visibility-impairing pollutants from older coal-fired plants such as Four Corners, and do not provide broad discretion for EPA to regulate visibility-impairing air pollutants for the co-benefits of reducing emissions of other air pollutants that do not impact visibility in order to benefit wildlife. See Oklahoma v. EPA, 2013 WL 3766986, at *22 (recognizing that the regional haze program's goals and standards are aesthetic and do not directly relate to health and safety).

This conclusion is reinforced by the fact that Congress has specifically prohibited EPA from addressing hazardous air pollutants listed under Section 112(b)(1) under the visibility protection program authorized under subchapter I, Part C of the CAA. 42 U.S.C. § 7412(b)(6). Rather, the authority to address hazardous pollutants exists under the separate Section 112 program, and such authority has been exercised (and applies to Four Corners) through the promulgation of the Mercury and Air Toxics Standards rule promulgated by EPA in February 2012. See 77 Fed. Reg. at 9304.

C. The BART Guidelines Do Not Provide EPA With Discretion to Address Mercury and Selenium Emissions.

CAA Section 169A(g)(2) provides that EPA must consider "the energy and nonair quality environmental impacts of compliance" when determining which of the available control options represents BART.[16] 42 U.S.C. § 7491(g)(2) (emphasis added). The BART Guidelines further state that EPA is to "address environmental impacts other than air quality due to emissions of the pollutant in question." 40 C.F.R. pt. 51, App. Y § (IV)(D)(4)(i) (emphasis added). Here, the "pollutant[s] in question" are only visibility-impairing pollutants, specifically NO_x and PM. 77 Fed. Reg. at 51,620 [JA065]. Guardians alleges no harm to listed species resulting from NO_x or other visibility-impairing pollutants.

Further, the BART Guidelines also explain that "[i]n the non-air quality related environmental impacts portion of the BART analysis, you address environmental impacts other than air quality. . . ." 40 C.F.R. pt. 51, App. Y

[16] In support of its view that EPA has discretion to influence emissions of mercury and selenium through the FIP, Guardians points to statutory language requiring EPA to take into account five factors in determining BART. See Pet's Br. at 5, 40-41. Those factors are: (1) the costs of compliance, (2) the energy and non-air 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 be reasonably anticipated to result from the use of such technology. 42 U.S.C. § 7491(g)(2). Specifically, Guardians asserts that the second factor, "the energy and non-air quality environmental impacts of compliance," provides EPA with the discretion to determine BART in a manner that would benefit listed species. Pet's Br. at 40.

§ (IV)(D)(4)(i) (emphasis added). The BART Guidelines include examples of "non-air quality environmental impacts," such as the discharge of water pollutants, the quality and quantity of solid waste that must be stored and disposed of or recycled, irreversible or irretrievable commitments of resources (such as water), noise, and hazardous waste discharges. Id. However, air quality impacts, such as those resulting from the facility's existing air emissions or from the incidental reductions that a particular control option might achieve, cannot be considered in determining BART because CAA Section 169A(g)(2) expressly limits EPA's discretion to consideration of "nonair quality environmental impacts." 42 U.S.C. § 7491(g)(2).

Congress limited EPA's discretion when weighing the five BART factors in this way because the goal of CAA Section 169A is solely to prevent and remedy visibility impairment. 42 U.S.C. § 7491(a)(1); Oklahoma v. EPA, 2013 WL 3766986, at *22 (recognizing that the regional haze program's goals and standards are aesthetic). Other air quality impacts, such as those related to public health, toxics, and acid or heavy metal deposition, are expressly dealt with by other sections of the CAA. For example, mercury and selenium are hazardous air pollutants that are regulated pursuant to CAA section 112, 42 U.S.C. § 7412.

Thus, EPA did not have discretion under the CAA or the BART Guidelines to consider the environmental impacts of Four Corners' emissions of mercury or

selenium into the ambient air. This lack of discretion applies both to the direct air quality impacts of mercury and selenium emissions, such as toxic exposure through respiration, and to the indirect impacts of these emissions, such as deposition to aquatic ecosystems.

In sum, although CAA Section 169A(g)(2) and the BART Guidelines allow for discretion in the balancing of the five BART factors, BART "shall be determined pursuant" to EPA's Guidelines, Oklahoma v. EPA, 2013 WL 3766986, at *4, and under the BART Guidelines the "non-air quality environmental impacts" factor does not provide EPA the discretion to consider the impacts of mercury or selenium emissions in setting BART for pollutants that impact visibility. Cf. Home Builders, 551 U.S. at 663-65 (finding that ESA Section 7(a)(2) does not expand an agency's discretion beyond its statutory authority or permit the agency to consider extrastatutory factors). At the very least this is a reasonable reading of the BART Guidelines that should be "controlling" under Auer v. Robbins, 519 U.S. at 461-62. See also Qwest Corp. v. Colo. Pub. Utils. Comm'n, 656 F.3d 1093, 1098 (10th Cir. 2011) (recognizing Auer deference).

III. EPA WAS NOT REQUIRED TO CONSULT WITH FWS UNDER ESA SECTION 7 BECAUSE THE REDUCTION OF NO_X AND PM UNDER THE FIP HAD NO EFFECT ON LISTED SPECIES.

Apart from the absence of discretion to address pollutants that do not contribute to visibility impairment in the FIP, Guardians has also not demonstrated

that consultation would be required in this case because there is no evidence in the record that the FIP has any effects on listed species. Even for actions in which there is relevant federal discretionary involvement or control, consultation is triggered only if the action may affect listed species or critical habitat. See 50 C.F.R. § 402.14(a) (requiring formal consultation if an action "may affect listed species or critical habitat"). If the action will have no effect, the consultation requirements of ESA Section 7 are not triggered. See, e.g., Sw. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1447 (9th Cir. 1996) (where agency makes an initial determination that its action will have no effect on listed species, "[t]hat finding obviates the need for formal consultation under the ESA"). The ESA Section 7 Consultation Handbook, jointly promulgated by FWS and NMFS, specifies that it is unnecessary for an action agency to seek concurrence from FWS or NMFS when a proposed action will have no effect on listed species or critical habitat. See U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook ("Consultation Handbook"), March 1998, at 3-12 (available at www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf).[17]

[17] FWS and NMFS published the Consultation Handbook after providing an opportunity for public comment. See 60 Fed. Reg. 8729 (Feb. 15, 1995). Thus, the Services' interpretations of their own consultation regulations are entitled to deference. See, e.g., Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000)

Here, the FIP requires Four Corners to reduce NO_x emissions and sets limits for PM based on existing emission rates. 77 Fed. Reg. at 51,620 [JA065]. As explained above, there is no evidence in the record of direct or indirect effects on the Colorado pikeminnow or razorback sucker arising from this action. See supra Argument Section I. The sole example cited by Guardians – "accumulation of mercury in aquatic ecosystems" – is not an effect of this action, because the FIP does not regulate, permit, or authorize the Plant's mercury emissions. Nor does the FIP authorize the continued operations of Four Corners generally. Because mercury and selenium emissions are not attributable to the FIP, those emissions would not be "effects of the action" for purposes of any consultation under ESA Section 7. See 50 C.F.R. § 402.02 ("*Effects of the action* refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.").[18] Determining the effects of

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(deference to agency's interpretation of statutory or regulatory provision is warranted if the interpretation was "arrived at after . . . a formal adjudication or notice-and-comment rulemaking.").

[18] The "environmental baseline" includes the impacts of all activities in the action area, the anticipated impacts of all proposed federal projects in the action area that have already undergone Section 7 consultation, and the impacts of non-federal actions contemporaneous with the consultation in process. 50 C.F.R. § 402.02. FWS and NMFS explain in the Consultation Handbook that the effects of the action "are considered along with the environmental baseline and the predicted

this action would "involve consideration of the present environment in which the species or critical habitat exists, as well as the environment that will exist when the action is completed, in terms of the totality of factors affecting the species or critical habitat." 51 Fed. Reg. 19,926, 19,932 (June 3, 1986) (preamble to ESA Section 7 consultation regulations). Here, there will be no increase in emissions of hazardous air pollutants, such as mercury and selenium, after promulgation of the BART FIP; nor does the FIP authorize any existing emissions of such pollutants. Thus, Guardians cannot demonstrate that EPA's action had any effects on listed species that would give rise to a duty to consult under ESA Section 7.

IV. GUARDIANS' ARGUMENT THAT EPA WAS ARBITRARY AND CAPRICIOUS IN PROMULGATING THE FIP SHOULD NOT BE CONSIDERED.

Finally, although Guardians asserts that EPA's promulgation of the FIP was "not in accordance with law" because EPA did not initiate consultation with the FWS under Section 7(a)(2) of the ESA, Pet's Br. at 23, Guardians also asserts that EPA's actions were arbitrary and capricious. Pet's Br. at 23 n.7. This Court should decline to address this argument, which consists of a single sentence in a footnote. United States v. Hardman, 297 F.3d 1116, 1131 (10th Cir. 2002) ("Arguments raised in a perfunctory manner, such as in a footnote, are waived.").

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cumulative effects to determine the overall effects to the species for purposes of preparing a biological opinion on the proposed action." Consultation Handbook at xiii–xiv (citing 50 C.F.R. § 402.02).

In any event, the argument fails for the same reasons discussed above with respect to Guardians' argument that EPA's action was "not in accordance with law."

CONCLUSION

For the foregoing reasons, EPA respectfully requests that the Court dismiss the petition for review for lack of jurisdiction or deny it on the merits.

Respectfully submitted,

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DATE: September 20, 2013

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.

CERTIFICATE OF COMPLIANCE WITH 10th CIRCUIT RULE 25.5

In accordance with 10th Circuit Rule 25.5, the undersigned certifies that (a) all required privacy redactions have been made; (b) that the hard copies to be submitted to the Court are exact copies of the version submitted electronically; and (c) that the electronic version was scanned for viruses and is free of viruses.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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 12,456 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Martha C. Mann
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CERTIFICATE OF SERVICE

The undersigned certifies that on September 20, 2013, the foregoing RESPONDENT'S FINAL RESPONSE BRIEF was served electronically through the court's CM/ECF system on all registered counsel.

s/ Martha C. Mann
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