RESPONSE TO PETITIONS FOR RECONSIDERATION OF REGIONAL HAZE RULE

On July 15, 1999, the Center for Energy and Economic Development, the National Rural Electric Cooperative Association, the Michigan Manufacturers Association, the Nevada Manufacturers Association, the Colorado Association of Commerce and Industry, the Colorado Petroleum Association, the American Public Power Association, the Nevada Mining Association, the Wyoming Mining Association, the Colorado Mining Association, the Colorado Utilities Coalition, and the Western Fuels Associates (CEED) petitioned the Administrator of the Environmental Protection Agency (EPA) for reconsideration of the regional haze rule promulgated on July 1, 1999. See 64 Fed. Reg. 35714. The Utah Municipal Power Agency, the Northern States Power Company, Minnesota Power, Inc., Great River Energy, and the Montana-Dakota Utilities Company subsequently joined in CEED's petition for reconsideration. In addition, on August 30, 1999, the Utility Air Regulatory Group and the National Mining Association ("UARG/NMA") filed a petition with EPA asking for reconsideration of the regional haze rule and requested that its petition be consolidated with that of CEED. The petitioners further asked that EPA stay the effectiveness of the regional haze regulations pending reconsideration.

The EPA has reviewed CEED's and UARG/NMA's petitions and has determined that these petitions should be denied in full. The issues raised are not new and/or are not of central relevance to the outcome of the rulemaking. Accordingly, the petitions are lacking in merit. EPA has not stayed implementation of the regional haze rule pending this response because such action would not be warranted in this case.

I. BACKGROUND

Section 169A of the Clean Air Act (CAA) establishes as a national goal "the prevention of any future, and the remedying of any existing, impairment of visibility" in certain national parks and wilderness areas known as "Class I areas." 42 U.S.C. § 7491. The visibility protection program in the CAA requires EPA to issue regulations to assure reasonable progress toward meeting this national goal.

In addressing the problem of visibility impairment in Class I areas, EPA adopted a phased approach. In the first phase, EPA issued regulations in 1980 to address visibility impairment that is "reasonably attributable" to a single source or small group of sources. 45 Fed. Reg. 80086 (Dec. 2, 1980). At that time, EPA explicitly deferred until some future date the issuance of regulations addressing the problem of visibility impairment resulting from emissions from numerous sources and activities across a broad geographic area, i.e., "regional haze." The EPA addressed this latter issue when it promulgated the second phase of visibility regulations, the regional haze rule. 64 Fed. Reg. 35714 (July 1, 1999).

In developing the regional haze rule, EPA was able to take into account a significant body of scientific information and policy recommendations on visibility issues that had developed since promulgation of the first phase of the visibility regulations. The preambles to the proposed

and final regional haze rule highlight many of these key sources of information, including the report of the National Academy of Sciences, *Protecting Visibility in National Parks and Wilderness Areas* (1993) which concluded that the technical tools and the scientific understanding of visibility impairment were sufficiently refined to allow the Agency to move forward with a national program to address regional haze.[1]

The EPA issued a proposed rule to revise the visibility protection program to address regional haze on July 31, 1997. 62 Fed. Reg. 41138. After the public comment period closed, EPA received additional information on two important issues. The first issue related to the work done by the Grand Canyon Visibility Transport Commission (GCVTC) and a letter from the Western Governors' Association (WGA) regarding EPA's response to the Commission's recommendations within the context of the national rule. The second issue related to new legislation, the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178 (TEA-21) (codified at 42 U.S.C. § 7407 note), which affected the timeframe for implementation of the regional haze program. On September 3, 1998, EPA issued a notice of availability to inform the public of this new information and reopened the public comment period on these specific issues. 63 Fed. Reg. 46952. Altogether, EPA received over 1300 comments on the proposed rule and notice of availability.

After considering the comments received, EPA completed a draft of the final regional haze rule in February 1999 and submitted it to the Office of Management and Budget (OMB) for interagency review. Shortly thereafter, a scanned version of the draft of the final regional haze rule appeared on the internet. Subsequently, states, industry and environmental groups each met with the OMB, with EPA staff in attendance at each meeting, to present their concerns regarding the final rule. Following the completion of the interagency review process, the Administrator signed the regional haze rule on April 22, 1999, and it was published in the Federal Register on July 1, 1999.

The final regional haze rule establishes requirements for implementation plans, plan revisions, and periodic progress reviews to address the problem of regional haze. As a first step in the process, the States must establish goals that provide for reasonable progress towards achieving natural visibility conditions. Next, the States must adopt long-term strategies to achieve these reasonable progress goals. Long-term strategies include enforceable emission

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[1] Other sources of information taken into account by EPA during the rulemaking process include the National Acid Precipitation Assessment Program; the CAA Advisory Committee and its Subcommittee on Ozone, Particulate Matter, and Regional Haze Implementation Programs; the Grand Canyon Visibility Transport Commission; and the IMPROVE national visibility monitoring network. The EPA also considered numerous technical reports, special studies, and regional modeling assessments in developing the regional haze regulations. These sources of information are identified in the docket for the regional haze rule, docket number A-95-38.

limitations, compliance schedules, and other such necessary measures to improve visibility. In addition, the States must address the emissions from certain existing sources that were built between 1962 and 1977. To meet this requirement, the States must either require the adoption of the "best available retrofit technology" (BART) or, alternatively, adopt an emissions trading program or other alternative measures that will achieve greater reasonable progress than would be achieved through the imposition of BART controls on these existing sources.

Consistent with the TEA-21, which addressed the timing requirements for implementation of the regional haze rule, the regional haze rule requires States to submit implementation plans for each area in a State based on the date the area is designated as attainment, nonattainment, or unclassifiable for the national ambient air quality standards (NAAQS) for fine particulate matter ($PM_{2.5}$). Because of the time needed to establish a monitoring network for $PM_{2.5}$ and to collect sufficient data to make designations, EPA expects to promulgate $PM_{2.5}$ designations between 2003 and 2005. As a result, EPA anticipates that the States will submit initial implementation plans for regional haze sometime between 2004 and 2008.[2] Following submittal of its initial plan, each State must revise its implementation plan in 2018 and every ten years thereafter.

II. PETITIONS FOR RECONSIDERATION

The CEED and UARG/NMA seek reconsideration of the final regional haze rule under section 307(d)(7)(B) of the CAA. 42 U.S.C. § 7607(d)(7)(B). This provision of the CAA strictly limits petitions for reconsideration both in time and in scope.[3] Specifically, it provides

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[2] The nine Western States that participated in the GCVTC have the option to submit implementation plans in 2003 that would provide for the implementation of the Committee's recommendations.

[3] Section 307(d)(7)(B) of the CAA, 42 U.S.C. 7607(d)(7)(B), states:

> Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the

that EPA shall convene a proceeding to reconsider a rule if a person raising an objection can demonstrate (1) that it was impracticable to raise the objection during the comment period, or that the grounds for such objection arose after the comment period but within the time specified for judicial review (i.e., within 60 days after publication of the final rulemaking notice in the Federal Register; and (2) that the objection is of central relevance to the outcome of the rule.

As to the first, procedural, criterion for reconsideration, a petitioner must show cause why the issue could not have been presented during the comment period, either because it was impracticable to raise the issue during that time or because the grounds for the issue arose after the period for public comment (but within 60 days of publication of the final action). Thus, section 307(d)(7)(B) does not provide a forum to request EPA to reconsider issues that actually were raised, or could have been raised, prior to promulgation of the final rule. Likewise, new objections the grounds for which arise after the 60-day period for seeking judicial review also are not within the purview of section 307(d)(7)(B). Rather, it is well-settled law that such "arising after" claims must be addressed by first petitioning EPA to conduct a new rulemaking, and then, if the Agency denies the rulemaking petition, filing a petition for judicial review pursuant to the penultimate sentence of section 307(b)(1) of the CAA. See Oljato Chapter of the Navajo Tribe v. Train, 515 F.2d 654, 665-668 (D.C. Cir.1975).

Regarding the second, substantive, criterion for reconsideration, EPA's view is that an objection is of central relevance only if it provides substantial support for the argument that the regulation should be revised. See Denial of Petition to Reconsider NAAQS for PM, 53 Fed. Reg. 52698, 52700 (Dec. 29, 1988), citing Denial of Petition to Revise NSPS for Stationary Gas Turbines, 45 Fed. Reg. 81653-54 (Dec. 11, 1980), and decisions cited therein.

With respect to most of the arguments set forth by UARG/NMA and CEED in their petitions for reconsideration, petitioners clearly have not met the procedural predicate for reconsideration. That is, petitioners have not demonstrated that it was impracticable to raise these objections during the comment period, or that the grounds for these objections arose after the close of the comment period but within 60 days of publication of the final regional haze rule. As such, they do not meet the statutory criteria for administrative reconsideration under section 307(d)(7)(B). Several of the arguments might be considered to meet the procedural criteria for reconsideration, but even if viewed in this favorable procedural light, petitioners' arguments in terms of substance are not "of central relevance" to the outcome of the rulemaking. Thus, none of the issues raised in the petitions of UARG/NMA and CEED meet all the criteria for reconsideration under the CAA.

A. Visibility Transport Commissions as a Prerequisite to Regional Haze Regulations

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rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

The UARG/NMA argues that EPA cannot issue regulations to address regional haze until such time as visibility transport regions and visibility transport commissions (VTCs) are established for the various regions within the United States, and until such time as these VTCs issue recommendations to EPA regarding "what measures, if any, should be taken" to address regional haze in these areas. See UARG/NMA petition at 5. In addition, UARG/NMA argues that EPA should reconsider the regional haze rule to clarify that every state will be given the opportunity to participate in a VTC, to develop recommendations, and to have EPA undertake a rulemaking under section 307(d) of the CAA to determine whether such recommendations make reasonable progress toward the national visibility goal set forth in the statute. Id. at 4-7.[4]

The UARG/NMA's argument arises from section 169B(c)(1) of the CAA which provides EPA with the authority to establish VTCs either on the Administrator's own motion or by petition from the governors of at least two states. 42 U.S.C. § 7491(c)(1). In addition, Section 169B(f) required EPA to establish a VTC for the area affecting the visibility of the Grand Canyon within twelve months of the 1990 CAA Amendments. 42 U.S.C. § 7492(f). The EPA established the GCVTC in November 1991. The EPA has received no petitions to establish other VTCs, and no other VTCs have been established.

The EPA received the GCVTC's report in June 1996, and the proposed regional haze rule included an extensive review of the recommendations contained in that report. See 62 Fed. Reg. at 41141-41143. However, EPA chose not to incorporate the GCVTC's specific strategies as general requirements in the national regional haze rule. Rather, as explained in the preamble to the proposed rule, EPA provided a more flexible framework than that recommended by the GCVTC for the Grand Canyon and the other Class I areas on the Colorado plateau. See 62 Fed. Reg. at 41142. At the same time, EPA received numerous comments expressing concern that EPA's proposed rule did not specifically endorse or incorporate the GCVTC's recommendations. After the close of the comment period, EPA received a letter from Governor Leavitt of Utah on behalf of the WGA addressing this point. In this letter, the WGA requested that additional provisions be included in the national regional haze rule to allow the States in the GCVTC to submit implementation plans to assure reasonable progress in addressing regional haze impacts in the area addressed by the GCVTC report based on the technical work and policy recommendations of the Commission. Ultimately, EPA established a separate option in the final rule for the States and tribes that participated in the GCVTC by establishing a set of specific requirements based on the GCVTC report that these States and tribes can choose to follow. See 40 C.F.R. § 51.309.

By establishing a separate option for the States and tribes participating in the GCVTC, EPA acknowledged the substantial work undertaken since 1991 by the Commission and its follow-up body, the Western Regional Air Partnership (WRAP). In brief, the regional haze rule

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[4] In a letter sent on March 6, 2000, the West Virginia Division of Environmental Protection Office of Air Quality makes much the same point. Although not styled as a petition for reconsideration, the West Virginia letter would be untimely even if it had been so designated.

provides these States and tribes with the option of meeting the requirements for reasonable progress in the 16 Class I areas addressed by the GCVTC by submitting implementation plans containing measures based on the recommendations of the GCVTC. As discussed in the preamble to the final regional haze rule, however, the GCVTC States and tribes must supplement these measures in order to meet the requirements of the national rule. See 64 Fed. Reg. at 35750-35758. The regional haze rule thus acknowledges the work already completed by the GCVTC while providing a clear option for the members of the GCVTC to implement the GCVTC's recommendations within the framework of the national rule.

In its petition, UARG/NMA argues that EPA must establish visibility transport regions and commissions as a predicate for rulemaking. However, UARG/NMA does not demonstrate that it could not have presented this objection during the comment period or that the grounds for this objection arose after the public comment period. Indeed, UARG/NMA concedes that its arguments in support of these points are not new, but were raised in comments and that EPA responded to its arguments on this issue. UARG/NMA Pet. at 6.[5] Nonetheless, on the basis of these arguments, UARG/NMA asks EPA to reconsider the regional haze rule to recognize the Agency's purported obligation to undertake rulemakings under section 307(d) for the various regions in the country. UARG/NMA Pet. at 7. There is no basis for granting this request, since the key elements of UARG/NMA's petition on this point plainly do not meet the procedural test for reconsideration under section 307(d)(7)(B) of the CAA.

Even if the procedural criterion for reconsideration were satisfied, the UARG/NMA petition does not demonstrate that this objection is "of central relevance to the outcome of the rule" within the meaning of the CAA. As the Agency made clear in its response to comments, the CAA does not require EPA to establish and receive recommendations from other VTCs before issuing a national regional haze rule.[6] Rather, the CAA establishes a clear schedule for EPA to carry out its responsibilities under section 169A of the Act to issue visibility regulations designed to make "reasonable progress" in all Class I areas across the country. The CAA requires EPA to establish a VTC for the Grand Canyon within 12 months, requires the Commission to issue a report within 4 years of its establishment recommending what measures, if any, should be taken to address adverse impacts on visibility in the area, and requires EPA to issue regulations to assure reasonable progress toward the national visibility goal within 18

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[5] Although UARG/NMA's petition references only UARG's comments, NMA also raised these points in its comments. See also Supplemental Comments of the National Mining Association on the U.S. Environmental Protection Agency's Notice of Availability of Additional Information Related to Proposed Regional Haze Regulations, 40 C.F.R. Part 51; 63 Fed. Reg. 46952 (September 3, 1998) (Docket Number A-95-38), No. VIII-I-67.

[6] The District of Columbia Court of Appeals recently reviewed language similar to that at issue here and concluded that it plainly did not require EPA to convene a transport commission before taking action. Michigan v. EPA, 213 F.3d 663, 671-673 (D.C. Cir. 2000).

months of receiving that report. While the CAA provides for the possibility of other VTCs, EPA in its discretion did not elect to establish and no state petitioned EPA to establish additional VTCs for areas outside the Grand Canyon. In light of this, EPA believes it was appropriate to promulgate a national regional haze rule consistent with the requirements set forth in the CAA.

The UARG/NMA attempts to explain the purported necessity for EPA to undertake specific rulemakings on a region by region basis by arguing that EPA cannot issue regulations requiring States to submit regional haze implementation plans until "the states within each affected region [are allowed] to develop a consensus regarding 'what measures, if any, should be taken' to address regional haze." UARG/NMA Pet. at 5. There is no statutory support for compulsory region-by-region rulemaking as suggested by UARG/NMA. Moreover, rather than hampering regional planning efforts to address haze, the rule provides a flexible framework for States to work within in addressing regional haze that specifically provides for additional time for States working with other States to develop a coordinated approach to regional haze. 40 C.F.R. § 51.308(c).

The EPA further notes that in addition to the general flexibility of the regional haze rule, EPA has consistently encouraged the States and tribes to continue to work together to better understand the regional haze problems in their respective regions and to develop effective emission reduction strategies to address haze. See e.g. 64 Fed. Reg. at 35720. Congress provided an allocation of $4 million in FY99 to support regional planning activities, and over the past year EPA has been actively involved with the States in a process to identify regional planning organizations to address regional haze. There are now five multi-state regional planning organizations addressing the regional haze issue: the WRAP; the Central States Air Resources Agencies (CenSARA); the Lake Michigan Air Directors Consortium (LADCO) in the midwest; the Ozone Transport Commission (OTC) in the northeast; and the Southeastern States Air Resources Managers (SESARM). An additional $4.7 million was made available for distribution to these regional planning organizations in FY00. Thus, it is clear that States and tribes will have the opportunity to work together to reach consensus regarding the measures to be taken to address regional haze and to submit these measures to EPA as implementation plans. As EPA noted in the preamble to the rule, the Agency "plans to participate early and actively in regional planning efforts." 64 Fed. Reg. at 35720.

The UARG/NMA further suggests that in the event regional planning organizations in the future develop recommendations for addressing regional haze, EPA should be obligated to reassess and potentially revise the regional haze rule -- as applied to the States within the relevant region -- on the basis of these recommendations. The UARG/NMA does not explain the benefit of additional rulemaking on a region by region basis. As explained above, EPA does not agree that such region by region rulemaking is required by the CAA.

In sum, UARG/NMA's request that EPA reconsider the regional haze rule to clarify that it must establish a visibility transport commission for each region before issuing regional haze regulations meets neither the procedural nor the substantive test for reconsideration. As noted

above, UARG and NMA have raised these issues previously, and EPA has responded to the arguments made in support of this position. In addition, UARG/NMA's argument is lacking in substantive merit and therefore not of central relevance to the outcome of the regional haze rule. Accordingly, UARG/NMA's petition for reconsideration of the regional haze rule is denied on this point.

B. The District of Columbia Court of Appeals decision in American Trucking Association v. EPA.

In its petition, CEED contends that EPA must reconsider the regional haze rule because the decision in American Trucking Ass'n, Inc. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), rehearing granted in part and denied in part, 195 F. 3d 4, cert. granted Browner v. American Trucking Ass'n Inc., 120 S.Ct. 2003 (May 22, 2000) and American Trucking Ass'n. V. Browner, 120 S.Ct. 2193 (May 30, 2000), fundamentally changed key assumptions made by the Agency in promulgating the rule. CEED Pet. at 3. The EPA disagrees with CEED's contention that any of the key assumptions underlying the regional rule haze have changed. As explained below, CEED has not presented any valid arguments regarding the import of the American Trucking decision that would justify reconsideration of the regional haze rule. Reconsideration of the regional haze rule for the reasons set forth by CEED is accordingly not warranted.

At issue in American Trucking was EPA's revision in July 1997 of the NAAQS for PM and ozone. See 62 Fed. Reg. 38652 (July 18, 1997); 62 Fed. Reg. 38856 (July 18, 1997). The CAA requires EPA to set the primary NAAQS at a level requisite to protect the public health, allowing an adequate margin of safety. 42 U.S.C. § 7409(b)(1). To ensure the protection of public health, EPA revised the PM NAAQS, establishing separate primary standards for fine particles and inhalable coarse particles. The CAA also requires EPA to set secondary standards at a level requisite to protect the public welfare. 42 U.S.C. § 7409(b)(2). At the time it revised the primary standards for fine particles, EPA established identical secondary standards based, *inter alia,* on its finding that this would lead to improvement in visibility in most urban areas and many rural areas, particularly in the East. In setting the secondary standard, EPA acknowledged that this nationally uniform standard would not eliminate visibility impairment in all parts of the country. The regional haze rule addresses those visibility impacts remaining in Class I areas. In American Trucking, the court remanded, but did not vacate, the $PM_{2.5}$ standard.

The final regional haze rule provides for the coordination of State plans to address the $PM_{2.5}$ NAAQS and to address visibility impairment caused by regional haze. The EPA took this approach because the same fine particles addressed by the primary, health-based NAAQS also absorb and scatter light and are one of the principal causes of visibility impairment. 64 Fed. Reg. at 35715. As a result of the recognized impact of fine particles on visibility, EPA anticipated in the proposed regional haze rule that the regional haze program would address many of the same emissions sources and precursor pollutants as the implementation programs for the new NAAQS for ozone and PM. 62 Fed. Reg. 41138, 41140. In the final regional haze rule, EPA again noted that the problems underlying these air quality programs share common elements, and explained

that the final regional haze rule was designed to facilitate integration of emission management strategies for regional haze with the implementation of programs for the new NAAQS for ozone and PM. 64 Fed. Reg. at 35719-20. The EPA thus explicitly recognized and encouraged States in the final regional haze rule to coordinate the implementation of these distinct air quality programs. Id.

The EPA's decision to coordinate the implementation of these two programs was also consistent with and informed by the TEA-21. Although section 169B of the CAA requires EPA to issue regulations requiring States to revise their implementation plans within 12 months of the promulgation of regulations addressing visibility, the TEA-21 superseded this timetable. In the TEA-21, Congress first established deadlines for the designation of areas as attainment, nonattainment, or unclassifiable with respect to $PM_{2.5}$. Congress then explicitly linked the timing requirements for the submission of State implementation plans (SIP) to address visibility with the designation and implementation process for $PM_{2.5}$.[7] As a result, the final regional haze rule requires States to submit implementation plans for regional haze according to a timeline based on certain regulatory milestones under the fine particulates program. 64 Fed. Reg. at 35723. Significantly, the regional haze rule does not require the submission of implementation plans for regional haze if areas are not designated as attainment, nonattainment, or unclassifiable with respect to the NAAQS for $PM_{2.5}$.

The EPA does not believe that reconsideration of the regional haze rule because of the decision in American Trucking would be appropriate. Even assuming that the procedural predicate for reconsideration under section 307(d)(7)(B) of the CAA has been met, as a

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[7] Section 6102(c) of the TEA-21 states:

> (1) The Governors shall be required to submit designations referred to in section 107(d)(1) of the CAA for each area following promulgation of the July 1997 $PM_{2.5}$ [NAAQS] within 1 year after receipt of 3 years of air quality monitoring data performed ...
> (2) For any area designated as nonattainment for the July 1997 $PM_{2.5}$ [NAAQS] in accordance with the schedule set forth in this section, notwithstanding the time limit prescribed in paragraph (2) of section 169B(e) of the Clean Air Act, the Administrator shall require [SIP] revisions referred to in such paragraph (2) to be submitted at the same time as [SIP] revisions referred to in section 172 of the Clean Air Act implementing the revised [NAAQS] for fine particulate matter are required to be submitted. For any area designated as attainment or unclassifiable for such standard, the Administrator shall require the [SIP] revisions referred to in such paragraph (2) to be submitted 1 year after the area has been so designated. The preceding provisions of this paragraph shall not preclude the implementation of the agreements and recommendations set forth in the Grand Canyon Visibility Transport Commission Report dated June 1996.

substantive matter the American Trucking decision does not raise issues of central relevance that merit reconsideration of the rule at this time. As noted, EPA encouraged States to coordinate the implementation of the regional haze program with the implementation of programs for the fine particulate NAAQS because of the common emissions sources and precursor pollutants addressed by both. However, CEED simply has not supported its contention that any of the fundamental assumptions underlying the regional haze rule are invalid because of the possibility that implementation of the regional haze program will not be coordinated with that for the revised NAAQS.

First, the Supreme Court has agreed to review the decision in American Trucking, and no final decision by the Court on the D.C. Circuit's remand decision is expected until next year. Thus, it would be premature to grant reconsideration based on American Trucking even if EPA agreed with CEED's characterization of its significance. In addition, as noted previously, the $PM_{2.5}$ standard was not vacated by the D.C. Circuit, and EPA expects to promulgate $PM_{2.5}$ designations within one year after three years of monitoring data are available -- most likely beginning in 2003 or 2004. Further, EPA is on schedule to complete its review of the existing $PM_{2.5}$ standard by 2002 as promised by the Administrator at the time the current standards were promulgated.

As also noted above, even if the Supreme Court in American Trucking does not change the result reached by the D.C. Circuit, to the extent that the regional haze rule is linked to $PM_{2.5}$ regulatory provisions, and to the extent those $PM_{2.5}$ provisions are never put into place because of court rulings in American Trucking, the consequence would be that the States would be relieved of corresponding obligations to submit regional haze SIPs under the existing regional haze rule. Thus, there would be no need to reconsider EPA's regional haze rule by virtue of American Trucking for the reasons suggested by CEED.

Finally, sections 169A and 169B of the CAA mandate that EPA issue regulations to require States to address visibility in Class I areas. Although a coordinated schedule for the implementation of measures to address regional haze and the NAAQS for $PM_{2.5}$ is appropriate, nothing in the CAA or TEA-21 limits the requirement for EPA to fulfill its obligations under sections 169A and 169B in the absence of a $PM_{2.5}$ standard, if such absence is the final result of the American Trucking litigation. As is clear from these provisions of the CAA, Congress recognized visibility impairment in the Class I areas as an air quality problem in its own right, apart from any standard to address $PM_{2.5}$. In the event that the standard for $PM_{2.5}$ is vacated, EPA will need to consider the appropriateness of reopening the regional haze rule with respect to the question of the timing for submittal of implementation plans. This question of timing, however, is not a fundamental issue requiring reconsideration at this time.

The CEED also asserts that by virtue of American Trucking States cannot even begin regional haze SIP development. CEED Pet. At 8-9. This argument too lacks merit. Although it points to the fact that the regional haze program was designed to facilitate coordination with the fine particulate standard, CEED has not provided an adequate explanation of its claim that the

decision in American Trucking somehow acts as a bar to the development and implementation of strategies to address regional haze. The CEED argues that States cannot adequately meet the requirements of the regional haze rule "without a valid and underlying $PM_{2.5}$ standard," CEED Pet. at 8, but it does not provide any support for this position. Instead, CEED merely identifies a number of actions associated with implementation of the regional haze rule that the States purportedly cannot take in the absence of a standard for $PM_{2.5}$. For example, CEED maintains that in the absence of a $PM_{2.5}$ standard, States "cannot consult or plan effective regional haze strategies with other states." CEED Pet. at 8. However, CEED fails to elucidate its contention that the States would be hampered in their efforts to consult with one another or to undertake regional planning efforts by the lack of NAAQS for $PM_{2.5}$. Given the overall lack of explanation of its contentions, CEED has presented no evidence that the States cannot adequately begin the process of developing the necessary technical information needed for regional haze plans in light of the court's remand of the $PM_{2.5}$ standards.

The CEED also argues that the regulatory impact analysis (RIA) for the regional haze rule is now obsolete because, "assuming" the standard for ozone and $PM_{2.5}$ will change in the future as a result of the decision in American Trucking, the assumptions underlying the regional haze RIA would change too. CEED Pet. at 9-10. On this basis, CEED argues that under Thompson v. Clark, 741 F.2d 401 (D.C. Cir. 1984), the regional haze rule is arbitrary and capricious because of the purported defects in the regulatory impacts analysis. As explained above, it is premature to assume any particular final outcome of the $PM_{2.5}$ standards as a result of the American Trucking litigation. In any event, those assumptions were valid at the time the rule was signed. Thus, CEED is simply incorrect in its assertion that EPA must revise the RIA now in light of the possibility of changes resulting from the American Trucking decision. See Wisconsin Electric Power Co. v. Costle, 715 F.2d 323 (7th Cir. 1983), quoting ICC v. Jersey City, 322 U.S. 503, 64 S.Ct. 1129 (1944).

Finally, with respect to the American Trucking decision, CEED cursorily argues that EPA must reconsider the regional haze rule "to conform to the new regulatory principles the EPA will develop on remand of the Court's decision." CEED's Pet. at 10. Although CEED states that these principles "will be of obvious relevance," it again fails to provide an adequate explanation of its contention. Because EPA does not agree that the court's decision in American Trucking is of any central relevance to the substantive or procedural aspects of the regional haze rule, reconsideration of the final rule on this basis is not justified.

C. Required Analysis for the Establishment of Reasonable Progress Goals by States.

The CAA requires EPA to issue regulations requiring the States to make "reasonable progress" toward the national visibility goal of preventing any future and remedying any existing impairment of visibility in Class I areas resulting from manmade air pollution. 42 U.S.C. § 7491(b)(2). Consistent with this provision, the final regional haze rule sets forth a requirement for States with Class I areas to establish reasonable progress goals towards achieving natural visibility conditions for each Class I area within the State. 40 C.F.R. § 308(d)(1). In particular,

the rule requires States to adopt reasonable progress goals that provide for an improvement in visibility for the haziest days and allow no degradation in visibility on the clearest days.

In the proposed rule, EPA described a basic framework for the regional haze program that remains the core of the program today. It is based on the principle that States should have considerable flexibility in adopting visibility improvement goals and in choosing the associated emission reduction strategies for making "reasonable progress" toward the national visibility goal. EPA proposed a presumptive reasonable progress target of one deciview improvement in the haziest days every 10 or 15 years, with the provision that States could establish an alternative target based upon the consideration of specific factors included in the statutory definition of reasonable progress. 62 Fed. Reg. at 41154 & 41159. In particular, EPA proposed that a State could develop an alternative reasonable progress target "if it could demonstrate that achievement of the presumptive targets would not be reasonable" based on a consideration of specific factors set forth in the statute. 62 Fed. Reg. at 41154. The presumptive target would have applied to each Class I area, regardless of the level of existing impairment from natural background conditions. As a result of the range in visibility impairment in Class I areas, the proposed presumptive target would have given States with the most impaired areas that adopted the presumptive target a much longer time to approach the national visibility goal than those with the least impaired areas.

The final regional haze rule addresses the key concerns raised regarding the proposed presumptive target, but continues to provide the States considerable discretion in establishing reasonable progress goals for improving visibility in the Class I areas. Consistent with the statute, the rule requires States to take into account a number of factors in making their determination of reasonable progress, including the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and remaining useful life of any existing sources. In addition, as part of the goal-setting process, the regional haze rule requires States to determine the uniform rate of progress needed to attain natural visibility conditions by 2064. As with the proposed presumptive reasonable progress target of one deciview, the State is not required to adopt this rate of progress in improvement in visibility. Rather, if the State determines that this rate of progress is reasonable based upon its consideration of the costs of compliance and other specific factors set forth in the statute, it should adopt this rate as its reasonable progress goal. If, on the other hand, as in the proposed rule, the State determines that this rate of progress is not reasonable, it must explain its determination based on the factors identified in the statute and rule and provide a demonstration showing that its alternative goal provides for reasonable progress.

The UARG/NMA has requested that EPA reconsider the regional haze rule to clarify the implementation of the requirement that States analyze and consider the uniform rate of progress needed to attain natural visibility conditions within approximately 60 years. In particular, UARG/NMA has argued that the regional haze rule "might be misconstrued to force the state to chose [sic] a 60 year rate of progress, even if the state preferred either a 70 or 80 year rate of progress based on a balancing of the statutory factors," and therefore the regulatory language

should be modified. UARG/NMA Pet. at 9. In a letter dated May 18, 2000, counsel for UARG further stated that the requirement to take into account the rate of progress necessary to achieve natural visibility conditions by 2064 has added confusion to the process of the WRAP deliberations regarding best available retrofit technology.

As a basis for its petition on this matter, UARG/NMA contends that the definition of reasonable progress in the final rule is substantially different from that proposed by EPA. UARG/NMA Pet. at 2. In addition to noting the change from the presumptive reasonable progress target in the proposal to the analysis required in the final rule, UARG/NMA alleges that "[u]nlike the proposal, moreover, the final rule requires states to demonstrate that a SIP based on the 60 year glidepath concept is 'unreasonable' before an alternative SIP can be adopted." UARG/NMA Pet. at 3. As noted above, however, EPA proposed to adopt the same requirement with respect to the presumptive reasonable progress target, allowing a State to develop an alternative progress targets only where it could demonstrate that achievement of the presumptive target would not be reasonable . See 62 Fed. Reg. at 41154. Thus, UARG/NMA has failed to show that it would have been impracticable for it to raise the issue set forth in its petition during the comment period.

Even assuming, however, that the issue raised by UARG/NMA met the procedural criterion for reconsideration, UARG/NMA has not shown that the issue is of central relevance. The final regional haze rule clearly provides the States with the flexibility to establish a reasonable progress goal based on its analysis of the statutory factors. The preamble to the rule makes clear, however, that the State should adopt the most ambitious progress target for improving visibility that it considers to be "reasonable." 64 Fed. Reg. at 35732. Consequently, although UARG/NMA is correct in noting that the requirement to analyze and consider the 60-year rate of progress "is merely a planning tool," UARG/NMA Pet. at 10, petitioners' suggested clarification of the regional haze rule would erroneously suggest that States could adopt progress targets that provide for less than the maximum improvement in visibility that the States determine, with EPA's approval, to be reasonable. Moreover, while the attainment of natural visibility conditions within a specific timeframe is not a requirement, the CAA makes clear that States should undertake all reasonable measures to make progress towards this goal. See 42 U.S.C. § 7491(b). The EPA accordingly rejects UARG/NMA's request for EPA to reconsider the regional haze rule to clarify the reasonable progress provision.

As described above, in addition to establishing reasonable progress targets that provide for improvements in visibility on the worst days, the regional haze rules also requires States to set reasonable progress goals that ensure no degradation in visibility on the clearest days. The UARG/NMA has requested that EPA clarify the impact of this provision of the rule on the prevention of significant deterioration (PSD) and New Source Review (NSR) programs. As UARG/NMA notes, EPA explains the relationship of the PSD and NSR programs to regional haze rule in the Response to Comments, § I.F. The EPA does not believe it is necessary to reconsider the regional haze rule to further clarify the interaction of these programs with the regional haze rule.

D. Best Available Retrofit Technology

One of the key elements of the visibility protection provisions of the CAA is the requirement that certain existing, major stationary sources install and operate BART. The UARG/NMA requests in its petition that EPA reconsider certain elements of the BART provisions in the final regional haze rule. UARG/NMA Pet. at 11-19. In sum, UARG/NMA's petition seeks to call into question EPA's regulations implementing the statutory provision requiring BART at certain sources which "emit[] any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility" in a Class I area, and those regulations implementing the statutory requirement that the State take into consideration, *inter alia*, "the degree in improvement in visibility which may reasonably be anticipated to result from the use of such technology" in determining BART.

The notice of proposed rulemaking raised the underlying issue addressed by UARG/NMA in its petition for reconsideration, see 62 Fed. Reg. at 41149-41150, and EPA received numerous comments on the scope of the BART requirement. The preamble to the final regional haze rule and the Response to Comments respond to these comments and explain the basis for EPA's interpretation of the relevant statutory provisions. Although UARG/NMA contends that the provisions in the final regional haze rule regarding BART are substantially different from the regulations proposed, it ignores the preamble discussion in the proposed rule of these issues. See UARG/NMA Pet. at 3-4. Because the Agency's proposal clearly put the public on notice regarding EPA's approach to the scope of the BART provision, UARG/NMA has not demonstrated that it was impracticable to raise the objection during the comment period, or that the grounds for such objection arose after the comment period. The UARG/NMA has thus not met the criteria for administrative reconsideration under section 307(d)(7)(B) of the CAA.

The UARG/NMA's arguments regarding BART also do not meet the substantive test for reconsideration as these arguments do not provide substantial support for either revising or clarifying the regional haze rule, as UARG/NMA suggests. The CAA establishes an extremely low threshold for triggering the requirement to install BART. Central Arizona Water Conservation District v. EPA, 990 F.2d 1531, 1541 (9th Cir. 1993). Section 169A(b)(2)(A) requires sources of a certain size and category built between 1962 and 1977 that "emit[] *any* air pollutant which *may reasonably be anticipated* to cause *or contribute* to *any* impairment of visibility," to procure, install, and operate BART. 42 U.S.C. § 7491(b)(2)(A)(emphasis added). As EPA explained in the preamble to the proposed rule, these provisions appear to demonstrate Congress' interest in achieving a reduction in emissions from these minimally-controlled sources as an important component of state plans for making reasonable progress towards the national visibility goal. 62 Fed. Reg. at 41149.[8]

[8] The potential emission reductions from the pool of relevant sources constructed between 1962 and 1977 are substantial. EPA estimates, for example, that of the utility boilers in operation today, approximately 600 were built between 1962-1977 and are potentially subject to the requirement to install BART. The use of BART on these sources alone could have a

The determination of those existing sources which meet the low BART threshold set forth in the statute does not require a State to determine the exact contribution of a source to visibility impairment in a Class I area. 64 Fed. Reg. at 35739-40. Although UARG/NMA contends that a State "must demonstrate as a factual matter that a source 'impairs' visibility" before subjecting it to the requirement to install controls, UARG/NMA Pet. at 17, EPA does not agree. Past efforts to characterize the exact contribution of a source to visibility impairment at a specific national park have resulted in multi-million dollar studies lasting several years. The EPA does not believe that the CAA requires studies such as these to determine that a source is subject to BART under the regional haze rule. Because regional haze is the result of the transport of emissions across a broad geographic area, EPA reasonably concluded in the regional haze rulemaking that if a source emits pollutants from within a geographic area from which pollutants can be emitted and transported downwind to a Class I area, then that source may be reasonably anticipated to cause or contribute to visibility impairment in that Class I area. This approach is consistent with that adopted by EPA in addressing the transport of NO_x emissions in the eastern United States, an approach upheld by the Court of Appeals for the D.C. Cir. See Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000).

That Congress intended a low triggering threshold for determining whether a source may be reasonably anticipated to cause or contribute to visibility impairment is made even more apparent by the specific exemption provision set forth in section 169A(c) of the CAA. See 42 U.S.C. § 7491(c). This provision provides that EPA may, after notice and opportunity for public hearing, exempt a source from the BART requirement on a determination that the source, alone or in combination with others, is not reasonably anticipated to cause or contribute to a *significant* impairment of visibility. The UARG/NMA suggests, however, that only those sources "understood to have a 'significant' impact on visibility" be subject to control during the first planning period, i.e. from the time of implementation plan submittal to 2018. UARG/NMA Pet.

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significant impact on visibility as sulfur dioxide emissions from the approximately 600 existing units noted above, many of which have minimal sulfur dioxide control technology at present, range from about five to six million tons per year, or about one-half the nationwide sulfur dioxide emission from utilities. Memo from Kevin Culligan & Rich Damberg, *Estimate of Electric Utility Sources Potentially Subject to Best Available Retrofit Technology (BART)* (Nov. 21, 2000) (EPA docket number A-2000-28). (All utilities, in turn, contributed over two-thirds of the total national sulfur dioxide emissions in 1998. Office of Air Quality Planning and Standards, EPA, *National Air Pollutant Emission Trends, 1900-1998* at 2-2 (EPA-454/R-00-002, Research Triangle Park, NC March 2000.). Most of these approximately 600 sources are located in the eastern United States. Monitoring information shows that more than half of the visibility impairment at Class I areas in this part of the country can be attributed, on average, to sulfate particles formed from gaseous sulfur dioxide emissions. William C. Malm, et al., *Spatial and Seasonal Patterns and Temporal Variability of Haze and Its Constituents in the United States: Report III* (Cooperative Institute for Research in the Atmosphere, Colorado State University, Fort Collins, CO., May 2000).

at 17-18. This ignores the requirements and procedures set forth in the CAA. Under the CAA, sources which meet the low trigger threshold are subject to BART *unless* the conditions in section 169A(c) are met. In that case, EPA may exempt a source which it determines does not cause or contribute to significant visibility impairment, either alone or in combination with other sources. Such an exemption is further dependent on concurrence by the appropriate Federal land manager. This specific exemption process would be unnecessary if Congress had intended the trigger for BART to be a finding of significant impairment from a single source.

The UARG/NMA also takes issue with provisions in the regional haze rule that require a State to consider the *cumulative* amount of visibility improvement expected from all sources subject to BART when conducting a BART determination for a specific source. The EPA finds this approach to be reasonable for a number of reasons. First, because regional haze is by definition a regional problem caused by the emissions from numerous sources located across a wide geographic area, EPA believes that States should consider the cumulative, regional effect of potential emissions reductions from multiple sources in implementing the BART requirement. It is now well understood that emissions of $PM_{2.5}$ and its precursors can be transported long distances, on the order of hundreds of miles. The States, as well as EPA and the public, should consider how emission reductions from numerous sources subject to BART will together contribute to air quality improvements at Class I areas of concern.

Second, as EPA noted in the final rule, EPA believes it is reasonable to interpret the CAA to require States to consider the cumulative impact of applying retrofit controls to BART sources. 64 Fed. Reg. at 35741. The CAA requires the States to consider "the degree of improvement in visibility which may reasonably be anticipated to result *from the use of such technology.*" The EPA interprets this language to refer to the improvement in visibility resulting from the use of BART level controls to all sources subject to BART.

Third, EPA avoided inclusion of any approach in the regional haze rule that required the assessment of the visibility improvement attributed to an individual source because such an approach was not recommended in a 1993 study by the National Academy of Sciences. In fact, the National Research Council Committee on Haze in National Parks and Wilderness Areas concluded that "[a] program that focuses solely on determining the contribution of individual emission sources to visibility impairment is doomed to failure."[9]

The UARG/NMA further requested in its May 18, 2000 letter that EPA clarify that the regional haze rule does not require "multiple BART analyses at individual facilities for a given pollutant." The regional haze rule addresses this issue directly at 40 C.F.R. § 51.308(e)(3).

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[9] National Research Council, NAS Committee on Haze in National Parks and Wilderness Areas, *Protecting Visibility in National Parks and Wilderness Areas* 7 (1993).

E. Remaining Issues

In its petition for reconsideration, CEED identifies a number of provisions in the final regional haze rule for which it claims the public lacked an opportunity to comment and which were not a "logical outgrowth" of the proposed rule. CEED Pet. at 11-15. However, EPA provided sufficient notice to the public and opportunity to offer comment on the range of alternatives being considered by the EPA which led to the final regional haze rule. In addition, CEED has not demonstrated that further comment would provide the public with a necessary opportunity for interested parties to offer comments that could persuade the agency to modify its rule. See American Water Works Ass'n. v. EPA, 40 F.3d 1266, 1274 (D.C. Cir.1994). CEED itself has offered no comments on these provisions. Thus, CEED has not demonstrated that the opportunity for further comment could lead to a change in the final rule. As a result, CEED has not shown how its objection that EPA failed to provide an adequate opportunity for comment are of central relevance to the outcome of the regional haze rule. As CEED has provided no support for its argument that the rule should be revised, EPA denies CEED's petition for reconsideration on these grounds.

III. REQUEST FOR STAY OF IMPLEMENTATION

UARG/NMA and CEED have also requested that EPA stay implementation of the regional haze rule pending reconsideration of the rule. Because EPA is denying the petitions for reconsideration in their entirety, a stay pending reconsideration is unnecessary.