UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

July 22, 2002

OFFICE OF
AIR AND RADIATION

Rick Sprott
Director
Utah Division of Air Quality
150 North 1950 West
Salt Lake City, UT 84116

Dear Mr. Sprott:

As you know, the U.S. Environmental Protection Agency ("EPA") recently proposed to revise its regional haze rule to incorporate a proposal that was submitted by the Western Regional Air Partnership ("WRAP"). Specifically, we proposed to incorporate the sulfur dioxide milestones and elements of the backstop emissions trading program that the WRAP submitted on September 29, 2000 as an Annex to the 1996 report of the Grand Canyon Visibility Transport Commission ("GCVTC"). *See* 67 Fed. Reg.30,418 (May 6, 2002).

After we issued our proposal to approve the WRAP Annex, the D.C. Circuit Court of Appeals issued a decision in *American Corn Growers et al. v. EPA*, 291 F.3d 1 (D.C.Cir. 2002) that invalidated part of our regional haze rule. Because the WRAP Annex would be incorporated into the regional haze rule, a number of parties have asked whether the Court's decision will have an impact on the Annex. Because the WRAP States and Tribes are approaching a critical juncture in deciding whether to submit plans under section 308 or 309 of the regional haze rule, I wanted to provide you with our analysis of the impact of the Court's decision on the Annex. As outlined in detail below, we have carefully reviewed this issue and concluded that the Annex is fully consistent with the Court's ruling. In other words, we do not believe that the recent decision in *American Corn Growers* in any way affects the WRAP Annex or EPA's proposal to incorporate the Annex into its regional haze rule.

Background

In order to better understand EPA's conclusion regarding the Annex, it may be helpful to review the history of the GCVTC and the WRAP. In its 1996 report to EPA, the GCVTC recommended a wide range of control strategies to address regional haze, including strategies to reduce emissions of sulfur dioxide from large stationary sources. Thus, the GCVTC specifically recognized that stationary sources would need to be an important part of an overall visibility strategy and, in particular, that controlling sulfates from these sources was a key strategy for addressing haze. As part of this overall strategy, the GCVTC also concluded that interim targets that provided for "steady and continuing emission reductions" over the entirety of the planning period might also be needed.

In 1997, EPA proposed the regional haze rule, and in 1998, the Western Governors Association (WGA) submitted comments to EPA requesting the addition of specific language to the rule to address the recommendations of the GCVTC. In these comments, the WGA reemphasized the commitment of the Western governors to the GCVTC recommendations. Following public notice and an opportunity to comment on the WGA's proposal, EPA issued the final regional haze rule. 64 Fed. Reg. 35714 (July 1, 1999). In section 309 of the rule, EPA established a specific set of SIP requirements for the States and Tribes that participated in the GCVTC. As EPA noted in the preamble to the rule, these requirements acknowledged and gave effect to the substantial body of work already completed by the GCVTC and the WRAP.

One element of the these specific SIP requirements addresses the GCVTC's recommendation that the States establish a cap on regional emissions of SO_2 from stationary sources. Under section 309 of the regional haze rule, the WRAP was required to submit an annex to the GCVTC Report that would contain specific emission reduction milestones for the years 2003, 2008, 2013, and 2018. This provision explicitly references the recommendations of the GCVTC for "steady and continuing emissions reductions . . . consistent with the Commission's definition of reasonable progress" and its goal of 50 to 70 percent reduction in emissions of SO_2.

In the preamble to the final rule, EPA explained that the WRAP would have to take into account four specific factors in setting these milestones. The preamble specifically noted that "[t]he first factor affecting the selection of interim milestones is the GCVTC's definition of reasonable progress." 64 Fed. Reg. at 35756. The other factors listed in the rule are: (1) the ultimate target in 2040 of a 50 to 70 percent reduction in emissions of SO_2 from stationary sources; (2) the requirement that the emissions cap provide for greater progress than would be achieved through source-specific "best available retrofit technology" (BART) requirements; and (3) the timing of progress assessment and the identification of mechanisms to address the cases where emissions exceed milestones.

Does the Court's Decision in *American Corn Growers* Apply to Section 309?

In the regional haze rule, EPA concluded that the specific SIP requirements in section 309 provide for reasonable progress toward the national visibility goal. The WRAP's plan for capping SO_2 emissions from stationary sources is a part of the Western States' and Tribes' long-term strategy for achieving reasonable progress. As described above, the SO_2 program grew out of the GCVTC's recommendations for measures to remedy adverse impacts on visibility.

We understand that some stakeholders in the WRAP process are concerned that the WRAP's program for controlling SO_2 emissions in the West, as further defined by the Annex to the GCVTC's Report, is a "BART provision" subject to the *American Corn Growers* court remand. For several reasons, however, this is simply not the case.

Under the Clean Air Act, the BART provisions require the installation of control technology on specific sources that were built between 1962 and 1977. As you know, however,

nothing in the Annex requires specific controls on any individual source. A key component of the Annex's SO_2 program is the goal that all reductions called for by the program remain voluntary. If, as we anticipate, the reductions are achieved through voluntary measures, then there will be no requirements of any kind. Even if the SO_2 milestones are not achieved through voluntary actions, the Annex does not provide for source-specific controls. Rather, the failure to achieve these milestones would trigger a "backstop" emissions trading program. Such a program, by its very nature, does not dictate that any particular source install control technology or otherwise reduce its emissions.

We also note that the Annex covers *all* stationary sources that emit more than 100 tons per year of SO_2 – not just sources built between 1962 and 1977 – and thus goes well beyond the scope of the statutory BART provisions. For this reason (and others noted above), it is clear that the SO_2 program is a component of the WRAP's strategy for ensuring reasonable progress, an aspect of the regional haze program that was most assuredly *not* addressed by the *American Corn Growers* decision.

EPA approved the WRAP's long-term strategy for addressing visibility consistent with the broad discretion afforded States by section 169A and Title I of the Clean Air Act in developing strategies to meet reasonable progress goals and national standards. *See Union Electric Co. v. EPA*, 427 U.S. 246 (1976); *Train v. NRDC*, 421 U.S. 60 (1975). The SO_2 program, which caps emissions of SO_2 from all large stationary sources, reflects the WRAP States' and Tribes' judgement as to one appropriate means for addressing haze and ensuring reasonable progress. The decision to limit emissions from this category of sources is well within the discretion of the States and Tribes. The court's decision in *American Corn Growers*, which addresses only the BART provisions, does not in any way limit the general authority of the States to choose appropriate control measures to ensure reasonable progress. Any suggestion that the decision requires States to undertake a source specific analysis of a source's contribution to the problem of regional haze before the State can subject a source to regulation would go far beyond the actual holding in the case.

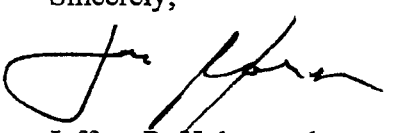
As discussed above, section 309 does not require participating States to assess and impose BART on individual sources. BART is only relevant as one of four factors that the WRAP must consider in establishing the appropriate emission reduction milestones for SO_2 – i.e. the level of the cap. The regional haze rule requires that the milestones in the Annex to the GCVTC Report "must be shown to provide for greater reasonable progress than would be achieved by application of best available retrofit technology (BART) pursuant to 51.308(e)(2)." 40 CFR § 51.309(f)(1)(i). This is not a requirement for BART. The requirement that the milestones "provide for greater reasonable progress" than BART is based on the decision by EPA to provide States with the flexibility to adopt alternative measures in lieu of the BART requirements set forth in statute *so long as* these alternative measures were "better than BART." *See* 40 CFR § 51.308(e)(2). In short, the SO_2 program described in the regional haze rule, as further defined by the Annex, does not impose controls on specific sources but rather ensures that greater reasonable progress is made than would be through installation of source specific controls

on the BART sources. The regional haze rule accordingly authorizes States to achieve improvements in visibility through the most cost-effective measures available.

The *American Corn Growers* court did not address the provisions in the regional haze rule allowing States to adopt a trading program or other alternative measures in place of source specific control measures for BART sources. The EPA finds nothing in the court's decision that would invalidate the trading program alternative to BART, as provided for in section 308(e)(2). In the preamble to the regional haze rule, EPA sets forth the basis for its decision to allow States this flexibility and described the process for States to make a showing that the alternative measures provided for greater reasonable progress. Significantly, nothing in the D.C. Circuit's opinion suggests that such an alternative is in conflict with the requirements of the visibility provisions of the Clean Air Act. In fact, an approach that allows States to adopt alternative measures in lieu of BART fully comports with the court's view of the States' broad authority in this area. Accordingly, so long as the Annex meets the requirements set out in section 309(f), EPA believes that it may approve the proposed revisions to the regional haze rule incorporating the emission reduction milestones and other measures set forth in the Annex.

EPA is currently reviewing the comments received on the proposed revision to the regional haze rule. At this point, we expect to take final action on the Annex by early 2003. Thank you for your interest in this important matter. If you have any further questions, please contact Lydia Wegman at 919-541-5005.

Sincerely,



Jeffrey R. Holmstead
Assistant Administrator

c: Julie Simpson