



STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

JON BRUNING
ATTORNEY GENERAL

May 2, 2012

Via www.regulations.gov

Ms. Chrissy Wolfersberger
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, KS 66101

RE: Docket No. EPA-R07-OAR-2012-0158

Ms. Wolfersberger:

The Nebraska Department of Environmental Quality (“NDEQ”) submitted its regional haze state implementation plan (“SIP”) revision to EPA Region VII on July 13, 2011. On March 2, 2012, the United States Environmental Protection Agency (“EPA”) published in the Federal Register a proposal to partially disapprove portions of Nebraska’s regional haze SIP.¹ The Proposed Rule would be limited to those revisions that address the long-term strategy (“LTS”) and determination of the best available retrofit technology (“BART”) for sulfur dioxide (SO₂) emissions from Nebraska Public Power District’s Gerald Gentleman Station Units 1 and 2 (“GGS”). EPA simultaneously proposed a federal implementation plan (“FIP”) requiring installation of flue gas desulfurization (“FGD”) technology at GGS to correct what it perceives to be deficiencies in Nebraska’s BART determination.

¹ *Approval, Disapproval and Promulgation of Implementation Plans; Nebraska; Regional Haze State Implementation Plan; Federal Implementation Plan for Best Available Retrofit Technology Determination; Proposed Rule; 77 Fed. Reg. 12770 (March 2, 2012).*

In the regional haze SIP, NDEQ determined that with the continued use of low sulfur coal, no further BART control was necessary. In the Proposed Rule, EPA found that NDEQ overestimated the costs of FGD controls, failed to conduct a full evaluation of the potential visibility benefits of FGD, and improperly rejected dry sorbent injection (“DSI”) as a potential BART. 77 Fed. Reg. at 12780. As a result, EPA proposed to disapprove NDEQ’s BART determination for SO₂ controls at GGS and the LTS to the extent it relied on that BART determination. *Id.*

The Nebraska Attorney General’s Office believes the Proposed Rule violates the Clean Air Act and should be withdrawn in favor of approval of the referenced Nebraska regional haze SIP provisions. The Attorney General submits the following comments in response to the Proposed Rule.

Background

The Director of NDEQ, by letter dated March 16, 2012, requested an extension of the public comment period and a public hearing on the Proposed Rule. EPA Region VII office asked that NDEQ withdraw its request for a public hearing due to a potential conflict with the timeframe set forth for final action under the Consent Decree with the National Parks Conservation Association filed March 30, 2012, in the United States District Court for the District of Columbia. Pursuant to the Consent Decree, EPA must take final action on Nebraska’s regional haze SIP revision no later than June 15, 2012. The Nebraska Attorney General submitted comments on the Proposed Consent Decree on January 3, 2012. See, Docket No. EPA-HQ-OGC-2011-0929.

NDEQ agreed to withdraw the request for a public hearing by letter dated April 2, 2012. In lieu of a public hearing, EPA held an informal meeting with NDEQ and local stakeholders in North Platte, Nebraska, on April 12, 2012. See, Docket No. EPA-HQ-OGC-2012-0158. EPA also agreed to extend the comment period, which was originally set to expire 30 days after the proposal, to May 2, 2012.

Cooperative Federalism Under the Clean Air Act’s Visibility Impairment Program

CAA Section 169A, added in 1977, establishes as a national goal the “prevention of any future, and the remedying of any existing, impairment in visibility in mandatory class I areas which impairment results from manmade air pollution.” 42 U.S.C. § 7491(a)(1). Presumably, the states are to consider achieving this goal by 2064, although the goal is non-binding. See, 40 C.F.R. § 51.308(d)(1)(i)(B), (d)(1)(ii). The overarching objective of the visibility program is that the States continue to achieve “reasonable further progress” toward the stated national goal. *Id.* at § 51.308(d)(1)(ii).

EPA has a number of responsibilities that are set forth in the Act: to promulgate regulations to assure reasonable progress toward meeting the national goal; creating a list of mandatory Class I

Federal areas which are entitled to visibility protection; providing support to states by conducting studies addressing methods for reducing visibility impairment; and providing guidelines to the states for implementing such methods. See, 42 U.S.C. § 7491(a)(2), (3), (4).

However, Congress assigned to the states the primary responsibility for determining best available retrofit technology for BART-eligible facilities and sets forth five criteria to be weighed in making BART determinations:

[I]n determining best available retrofit technology *the State...shall take into consideration* the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

See, 42 U.S.C. § 7491(g)(2) (emphasis added).

In addition to the plain language of the Act, the Congressional intent was clear as to the State's role as primary decision-maker for source-specific BART determinations. See, 123 Cong. Rec. S13696, S13709 (1977); H.R. CONF. REP. NO. 95-564. The primacy of the State's role in making BART determinations has also been verified by federal case law. See, *American Corn Growers Ass'n*, 291 F. 3d at 8 (noting that after identifying BART-eligible sources that may contribute to visibility impairment in class I areas, the *state* must determine what constitutes BART for controlling emissions from that source.)

NDEQ BART Determinations: Balancing the Statutory Factors

The CAA sets forth five statutory criteria to be weighed by the State in making BART determinations. See, 42 U.S.C. § 7491(g)(2). In the regional haze SIP, NDEQ determined that continued use of low sulfur coal at GGS was sufficient SO₂ control. NDEQ's analysis of SO₂ BART for GGS correctly considered the five statutory factors and followed other requirements of the CAA and EPA's regulations. The CAA does not give EPA the authority to conduct its own BART analysis and substitute its judgment for that of the state unless the regional haze SIP fails to satisfy the minimum criteria required by the CAA. See, 42 U.S.C. § 7410(c)(1)(A), (k)(1); 40 C.F.R. § 51.308. Nonetheless, EPA's proposal does just that.

Nebraska determined that due to non-air quality environmental impacts and costs of compliance, FGD controls were unreasonable at GGS. NDEQ's determination that FGD was not a cost-effective control technology for SO₂ emissions from GGS stemmed from the water requirements for operating FGD. As calculated by NDEQ, GGS would require an additional 3,877 acre-feet of

water per year to implement FGD. Those additional water requirements in the locale of GGS, described in more detail below, render FGD unreasonable.

GGS is located in an “over-appropriated” area of the Twin Platte Basin. As a consequence of this designation, the Twin Platte Natural Resources District has placed a moratorium on the construction of new groundwater wells and any increase in the number of irrigated acres, and must offset depletions to stream flows to return to 1997 levels. See, Twin Platte Natural Resources District Integrated Management Plan, Chapter 5, Part II.C.3.a.

Nebraska law creates a bifurcated governance structure for surface and groundwater: the Department of Natural Resources regulates surface water, while 23 local Natural Resources Districts regulate groundwater. Surface waters are subject to a system of prior appropriations by which water rights are prioritized “first in time, first in right.” Neb. Rev. Stat. § 46-203 *et seq.* (Reissue 2010). Given that the GGS is located in an over-appropriated area of the Twin Platte Basin, any acquisition of new surface water rights would place NPPD in a junior position to all other pre-existing water right holders. Furthermore, the Twin Platte NRD has placed a moratorium on new surface water rights. See, Twin Platte Natural Resources District Integrated Management Plan, Chapter 5, Part II.D.1. For these reasons, acquiring surface water rights to operate FGD controls is not a viable option.

Neither is acquiring new groundwater rights. Groundwater is not subject to the prior appropriation system but has become integrated with surface water management. See, Neb. Rev. Stat. § 46-701 *et seq.* (Reissue 2010). As noted, the Twin Platte NRD has placed a moratorium on new groundwater wells. Therefore, under Nebraska law, NPPD would be required to retire existing groundwater wells or surface water uses in an amount sufficient to offset any new depletion to streamflow. In addition, since 1997 Nebraska, Colorado and Wyoming have participated in the Platte River Recovery and Implementation Program (PRRIP), which seeks to restore shortages to U.S. Fish and Wildlife target flows in the Platte River for habitat benefit of threatened and endangered species. To accomplish this, PRRIP, and state law, requires a return to 1997-water use levels. Achievement of this goal requires constant and careful evaluation of the local water supply to see that Nebraska’s resources are put to use in the most efficient manner.

EPA’s BART analysis for GGS fails to account for all costs of compliance that were of concern to NDEQ. In its review of NDEQ’s BART-determination for GGS, EPA states that NPPD’s additional costs of acquiring groundwater rights do not render the cost per ton unreasonable; but admittedly fails to account for the loss of agricultural revenue in its analysis. 77 Fed. Reg. at 12779, FN25.

The plain language of the CAA provides Nebraska with great discretion to balance the five statutory factors. In fact, EPA recognized in the Regional Haze Rule Guidelines² (“Guidelines”) and again in the proposal that “[s]tates are free to determine the weight and significance to be assigned to each factor.” 77 Fed. Reg. at 12774 (citing 40 C.F.R. § 51.308(e)(1)(ii)). In the regional haze SIP, NDEQ followed the Guidelines to evaluate the costs of compliance and the non-air quality environmental impacts, including consideration of the extent to which short-term environmental gains were being achieved at the expense of long term environmental losses and the extent to which there may be an irreversible or irretrievable commitment of resources.

Long-Term Strategy and State Consultations

EPA’s proposal also reaches a nonsensical result in its endeavor to address Class I areas in South Dakota. The CAA establishes the national goal of “prevention of any future, and the remedying of any existing, impairment in visibility in mandatory class I areas which impairment results from manmade air pollution.” 42 U.S.C. § 7491(a)(1). EPA, in consultation with the Department of Interior, has promulgated a list of mandatory class I Federal areas for which reasonable progress toward improved visibility must be achieved. See, 42 U.S.C. § 7491(a)(2); 40 C.F.R. Part 81.

The CAA provides that EPA regulations “shall...require each applicable implementation plan...for a State the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any [Class I] area...to contain such emission limits, schedules of compliance and other measures *as may be necessary* to make reasonable progress toward meeting the national goal....” 42 U.S.C. § 7491(b)(2) (emphasis added).

Nebraska does not host any Class I areas. Whereas states that host Class I areas need to establish reasonable progress goals, non-host states do not. Rather, non-host states must consult with host states to develop a LTS ensuring the non-host state is doing its part to meet the reasonable progress goals of other states.

EPA regulations provide that Nebraska “must submit a long-term strategy that addresses regional haze visibility impairment...for each Mandatory Class I Federal area located outside the State which may be affected by emissions from the State. The long-term strategy must include enforceable emissions limitations, compliance schedules, and other measures *as necessary* to achieve the reasonable progress goals established by States having mandatory Class I Federal areas.” 40 C.F.R. § 51.308(d)(3) (emphasis added).

In the Proposed Rule, EPA states that CALPUFF modeling shows that Nebraska’s contribution to visibility impairment in the Badlands National Park in South Dakota warranted application of

² *Regional Haze Regulations and Guidelines for Best Available Retrofit Technology Determinations*, 70 Fed. Reg. 39104, 39130, Final Rule (July 6, 2005).

BART to GGS. However, on April 26, 2012, EPA published in the Federal Register a final rule approving South Dakota's regional haze state implementation plan.³ EPA does not mention Nebraska in the South Dakota Final Rule. Instead, EPA Region VIII concluded that South Dakota will meet its reasonable progress goals without final rule requiring any implementation of FGD at GGS. Thus, EPA cannot find in the Nebraska Proposed Rule that FGD controls at GGS are "necessary" to make reasonable progress toward meeting the national goal when it declined to make that finding in the South Dakota Final Rule.

Furthermore, it is the States, in consultation with one another, who are directed to assess the interstate transport of visibility-impairing emissions and decide what measures are necessary to address regional haze. See 42 U.S.C. § 7492(d); 40 C.F.R. § 51.308(d)(1)(iv), (3)(i). In the proposed disapproval of Nebraska's regional haze SIP and approval of South Dakota's regional haze SIP, EPA notes that the two States addressed the issue of BART controls at GGS during the consultation process.⁴ In its evaluation of South Dakota's reasonable progress goals, EPA proposed to approve South Dakota's reasonable progress goals noting that South Dakota should consult with Nebraska during the next planning period.

Unauthorized Use of Cumulative Impacts Analysis

Finally, analyzing the cumulative impacts of a source's emissions on multiple Class I areas for purposes of BART determinations is unauthorized. A BART-eligible source is "subject to BART" if it "may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal *area*." 40 C.F.R. § 51.208(e)(1)(ii) (emphasis added). In its proposal, EPA suggests that the "cumulative impacts" of GGS emissions on multiple downwind areas is somehow relevant to the BART-decision making process. This interpretation is contrary to the plain language of the CAA and the EPA's regulations which contemplate regulation of emissions that contribute to visibility impairment in "any Class I Federal area." The use of the singular "area" indicates that analyses of the cumulative downwind impacts from a source were not intended by Congress when creating the visibility program. Thus, it is beyond EPA's authority to require an analysis of such impacts as part of the BART determination.

³ *Approval and Promulgation of Implementation Plans; South Dakota; Regional Haze State Implementation Plan; Final Rule*; 77 Fed. Reg. 24845 (April 26, 2012).

⁴ *Approval and Promulgation of Implementation Plans; South Dakota; Regional Haze State Implementation Plan; Proposed Rule*; 76 Fed. Reg. 76646 (December 8, 2011).

Conclusion

The Attorney General requests that EPA withdraw the proposal and approve Nebraska's regional haze SIP as submitted. NDEQ spent significant resources preparing the regional haze SIP submission and has serious concerns about the impacts of EPA's proposal. Those impacts extend beyond the direct cost of implementing a particular control technology to the local agricultural economy as well as the State's ability to effectively meet its objectives under the Platter River Recovery Implementation Program. EPA is also exceeding its authority in substituting its judgment regarding the appropriate best available retrofit technology for Nebraska Public Power District's Gerald Gentleman Station Units 1 and 2.

Respectfully,

A handwritten signature in black ink, appearing to read "Jon Bruning". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jon Bruning
Nebraska Attorney General