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CENTER FOR ENERGY AND ECONOMIC DEVELOPMENT,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY

Respondent.

On Petition for Review of Final Action of the U.S. Environmental Protection Agency

**BRIEF OF PETITIONER  
CENTER FOR ENERGY AND ECONOMIC DEVELOPMENT**

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## GLOSSARY

BART	Best Available Retrofit Technology
CAA	Clean Air Act
EPA	Environmental Protection Agency
FIP	Federal Implementation Plan
GCVTC	Grand Canyon Visibility Transport Commission
JA	Joint Appendix
LH	Legislative History
MW	Megawatt
RHR	Regional Haze Rule
SIP	State Implementation Plan
SO <sub>2</sub>	Sulfur Dioxide
WRAP	Western Regional Air Partnership

## JURISDICTIONAL STATEMENT

The petition for review in this case challenges regulations promulgated by the U.S. Environmental Protection Agency (“EPA”) pursuant to Sections 169A and 169B of the Clean Air Act (“CAA”), 42 U.S.C. §§ 7491 and 7492.<sup>1</sup> See “Revisions to Regional Haze Rule to Incorporate Sulfur Dioxide Milestones and Backstop Emissions Trading Program for Nine Western States and Eligible Indian Tribes Within that Geographic Area,” 68 Fed. Reg. 30,418 (June 5, 2003) (hereafter “Annex Rule”). The Annex Rule was adopted pursuant to and as an amendment of the agency’s Regional Haze Rules (“RHR”), 64 Fed. Reg. 35,714 (July 1, 1999). Significant portions of the RHR were invalidated by this Court in American Corn Growers Ass’n v. EPA, 291 F.3d 1 (D.C. Cir. 2002). The Court has jurisdiction over this appeal, and the petition for review was timely filed, under CAA § 307(b)(1).

### STATEMENT OF ISSUES

1. Whether the Annex Rule is unlawful because it is based on the same collective or group approach to the Best Available Retrofit Technology (“BART”) provisions of CAA § 169A that was invalidated in American Corn Growers?
2. Whether EPA has discretion under CAA § 169A to adopt the Annex Rule “in lieu of” the statutory BART program?
3. Assuming arguendo that EPA has discretion to adopt the Annex Rule “in lieu of” the statutory BART program, whether the Annex Rule represents a rational exercise of that discretion in light of American Corn Growers?

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<sup>1</sup> Henceforth CAA citations will refer to the Act itself. Parallel citations to the United States Code are provided in the Table of Authorities.

4. Whether the Annex Rule impermissibly constrains authority granted to states in CAA § 169A by requiring them to use a “group” or “collective” approach in determining required emission reductions for large stationary sources?

5. Whether the Annex Rule fails to rationally implement the reasonable progress goal of CAA § 169A(a)(1)?

## STATUTES AND REGULATIONS

This case arises under CAA §§ 169A and 169B. Pertinent statutes and regulations are included in the addendum.

## STATEMENT OF THE CASE

### I. Introduction

Section 309(f)(1) of EPA’s 1999 RHR provides that nine western states may opt out of nationally applicable regional haze regulations if the Grand Canyon Visibility Transport Commission (“GCVTC”) (or a regional planning body formed to implement the GCVTC’s recommendations) submitted for EPA approval an “Annex” setting forth enforceable emission reduction “milestones” applicable to major stationary sources in the nine states.<sup>2</sup> The purpose of the enforceable milestones is to reduce sulfur dioxide (SO<sub>2</sub>) emissions thought to be degrading visibility conditions at sixteen mandatory federal Class I areas on the Colorado plateau.<sup>3</sup> RHR

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<sup>2</sup> 40 C.F.R. § 51.309(f)(1).

<sup>3</sup> The affected states are Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, and Wyoming. RHR § 309(f)(1) and the Annex Rule also apply to four Indian tribes. The sixteen Federal Class I Areas on the Colorado Plateau are: Grand Canyon National Park, Sycamore Canyon Wilderness, Petrified Forest National Park, Mount Baldy Wilderness, San Pedro Parks Wilderness, Mesa Verde National Park, Weminuche Wilderness, Black Canyon of the Gunnison Wilderness, West Elk Wilderness, Maroon Bells Wilderness, Flat Tops Wilderness, Arches National Park, Canyonlands National Park, Capital Reef National Park, Bryce Canyon National Park, and Zion National Park.

§ 309(f)(1) sets forth the conditions the Annex is required to meet in order to obtain EPA approval.

The Annex Rule challenged in this case reflects EPA’s approval of the Annex submitted by the Western Regional Air Partnership (“WRAP”), the successor organization to the GCVTC. Following the WRAP’s submittal of the Annex to EPA but before EPA finalized its rulemaking to approve the Annex, this Court issued its decision in American Corn Growers invalidating and remanding the “group-BART provisions” of the RHR.<sup>4</sup> Petitioner CEED contends that the Annex Rule reflects the same “group-BART approach” that this Court found to be contrary to CAA § 169A in American Corn Growers. Accordingly, CEED contends that the Annex Rule must be invalidated and remanded for the same reasons as set forth in that decision.

## **II. The CAA Visibility Program**

Congress first addressed the problem of visibility impairment at the nation's mandatory Class I areas<sup>5</sup> in the 1977 amendments to the CAA. CAA § 169A(a)(1) established a “national goal” of 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.” CAA § 169A(b)(2) directed EPA to issue regulations requiring individual states to submit State Implementation Plans (“SIPs”)<sup>6</sup> that contain “emissions limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward” meeting the CAA § 169A(a)(1) national visibility goal. Under CAA § 169A(b)(2)(B), such

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<sup>4</sup> 291 F.3d at 14.

<sup>5</sup> Mandatory Class I areas, in general, are certain national parks and wilderness areas. See CAA § 162(a).

<sup>6</sup> See CAA § 110.

regulations must provide for state adoption of a “long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal . . . .”

In addition to the broad set of tools a state can employ to implement a long-term “reasonable progress” visibility strategy, states are required by CAA § 169A to specifically address possible visibility impairment caused by certain large stationary sources. EPA referred to these sources in its 1999 RHR as “BART-eligible” sources because, if such sources meet the statutory criteria, they may be required to install “best available retrofit technology” (“BART”).<sup>7</sup> Under CAA § 169A(b)(2)(A), the “emission limits, schedules of compliance and other measures” that States are required to include in their SIPs for the purpose of addressing “reasonable progress” must include:

A requirement that each major stationary source<sup>8</sup> which is in existence on August 7, 1977, but which has not been in operation for more than fifteen years as of such date,<sup>9</sup> and which, as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title)<sup>10</sup> emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such [Class 1] area, shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, as determined by the State (or the Administrator in

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<sup>7</sup> 40 C.F.R. § 51.301.

<sup>8</sup> “Major stationary source” is defined in CAA § 169A(g)(7) as including twenty-six types of industrial sources capable of emitting 250 tons per year or more of any pollutant.

<sup>9</sup> The time limitation framework for BART eligibility was intended to exclude from coverage plants constructed more than fifteen years prior to the date of the 1977 CAA Amendments. LH 2673, JA \_\_\_\_ . (“LH” refers to “legislative history; full citations to the relevant legislative history are shown in the Table of Authorities.) Congress determined it was not necessary to subject plants constructed after the date of the 1977 CAA amendments to BART because these plans would be subject to prevention of significant deterioration standards under CAA §§ 160-165. Thus, a “BART-eligible” source, that is, one that may be subject to retrofit requirements under the BART language of CAA §169A(b)(2)(A), is a “major stationary source,” as defined in CAA § 169A(g)(7), in existence as of August 7, 1977 but which had not been in operation for more than fifteen years as of that date.

<sup>10</sup> EPA has an oversight role under CAA § 110(c), in that the Administrator may promulgate a Federal Implementation Plan if the state fails to promulgate a SIP or if the Administrator disapproves the SIP.

