

March 28, 2005

**VIA COURIER**

Jeffrey R. Holmstead  
6101A  
USEPA Headquarters  
Ariel Rios Building  
1200 Pennsylvania Avenue, N. W.  
Washington, DC 20460

**Re: Docket ID No. OAR-2002-0076. Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations; Proposed Rule, 69 Fed. Reg. 25,184 (May 5, 2004).**

Dear Mr. Holmstead:

The Western Business Roundtable (Roundtable) petitions the Environmental Protection Agency (EPA) to delay issuance of and reconsider the above-referenced proposed rules (hereafter "BART Rules"). We understand EPA is planning to issue these rules in final form on or around April 15, 2005. We further understand that EPA entered into a consent decree committing it to issue the regulations by that date. We request that EPA take all steps necessary to seek Court modification of that consent decree based on new circumstances. The new circumstance is the decision by the United States Court of Appeals for the D.C. Circuit in *CEED v. EPA*, No. 03-1222 (D.C. Cir., February 18, 2005).

The Roundtable is a non-profit business trade association comprised of CEOs and senior executives of organizations doing business in the western United States. Our member companies are involved in a broad range of industries, including agricultural products, accounting, chemicals, coal, construction and construction materials, conventional and renewable energy production, energy services, engineering services, environmental services, financial services, internet technologies, manufacturing, mining, oil and gas, pharmaceuticals, pipelines, telecommunications, and public and investor-owned utilities. We work for a common sense, balanced approach to economic development and environmental conservation, and we support public policies that encourage economic growth, opportunity and freedom of enterprise.

A list of our member companies follows at the end of this letter. As can be seen, a number of our companies own so-called "BART-eligible" sources that would be regulated by the BART Rules. Further information concerning the Roundtable can be found at <http://www.westernroundtable.com>.

As you know, under 42 U.S.C. § 7607(d)(7)(B), EPA is required to reconsider an already-issued rule if a person raising an objection can demonstrate “that 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.” While EPA has not yet finalized the BART Rules, EPA should nevertheless use § 7607(b)(7)(B) as guidance in deciding now to delay issuance of those rules so that they can be further considered in light of *CEED v. EPA*. If EPA issues the final rule as presently scheduled on or around April 15, the Roundtable is prepared to file a § 7607(b)(7)(B) petition at that time. Time would be saved in the long run if EPA recognized now that the *CEED v. EPA* decision is of “central relevance” to the BART Rules and initiated action immediately to reconsider the rules in light of the Court’s decision.

The Roundtable believes that it is crystal clear that the BART Rules cannot withstand legal scrutiny given the reaffirmance in *CEED v. EPA* of the Court’s earlier decision in *American Corn Growers Ass’n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002). The *CEED v. EPA* decision left no doubt that the Court will strictly construe the *American Corn Growers* holdings that: (1) the statutory BART factors in 42 U.S.C. § 7491(g) must be applied on a source-by-source basis, so that the cost of visibility controls at a particular source can be weighed against the visibility benefit to be achieved by installation of controls at that source; and (2) EPA may not unduly constrain state discretion to apply the § 7491(g) factors in making individual source attribution determinations. As the Court stated in *CEED v. EPA*, quoting its holding in *American Corn Growers*, EPA is not authorized to require states to apply any of the § 7491(g) factors on a group or categorical basis, because to do so “distorts the judgment Congress directed the states to make for each BART-eligible source.” *CEED v. EPA*, slip op., at 4, quoting *American Corn Growers*, 291 F.3d at 7.

Despite the Court’s holdings in these two cases, the BART Rules still propose to inappropriately define and limit the manner in which the states may use or weigh data and other information in exercising their discretion to make reasoned BART decisions. EPA’s proposed approach unduly limits a state’s authority to identify which sources contribute to visibility impairment and directs how states must apply cost-benefit considerations in deciding if more controls are needed.

#### **A. The BART Rules Would Unduly Constrain a State’s Source Attribution Analysis**

The BART Rules would substitute EPA in place of the exclusive role Congress granted to the states for making individual source attribution determinations under §7491. Contrary to both *American Corn Growers* and *CEED*, the BART rules would proscribe the manner for determining whether an individual source “causes or contributes” to visibility impairment in any Class I area. Further, the BART Rules also substantially change the regulatory role of the “deciview” metric by converting it into a regulatory 0.5 deciview standard (versus a “goal”) for defining how states must exercise their authority and discretion in determining whether an individual source “causes or contributes” to visibility impairment at an individual Class I area.

The Roundtable urges EPA to respect the states’ statutory role and to allow states the freedom to use appropriate technical tools for making attribution determinations, including

analyses that rely on an equivalent to “human perceptibility” (what would be noticed by the human eye)—not on models or projections used for regulatory triggers below human perceptibility. Issues of human perceptibility are very Class I area site-specific and EPA should not proscribe or limit a state's discretion in identifying which sources would contribute to visibility impairment by dictating a non-humanly perceptible "one size fits all" threshold.

## **B. The BART Rules Would Unduly Constrain How a State Conducts a BART Analysis**

The BART Rules would require states to treat SO<sub>2</sub> and NO<sub>x</sub> emissions from BART-eligible Electric Generating Units (EGUs) on a categorical or group basis rather than a source-by-source basis. For example, the BART Rules would establish a presumption that EGUs greater than 250 MW must be required to install controls that remove at least 95 percent of SO<sub>2</sub> emissions. *See* discussion at 69 Fed. Reg. at 25, 199-201 and the proposed BART Guidelines at 25,228-29. EPA says that it would be “extremely difficult” for such EGUs located at power plants greater than 750 MW to rebut this presumption. *Id.* at 25,200. EPA also says it would be “just slightly” less difficult for such EGUs located at power plants that are 750 MW or less to rebut this presumption. *Id.*

There is simply no basis under *American Corn Growers* or *CEED v. EPA* for EPA to dictate that states must presumptively use categorical approaches in the BART process as to EGUs or any other type of BART-eligible source. Under those decisions, states have broad discretion to apply the statutory BART factors so as to avoid a result where sources are compelled to install millions of dollars in BART controls for “no appreciable effect on the haze in any class I area.” *CEED v. EPA*, slip op. at 4, quoting *American Corn Growers*, 291 F.3d at 7.

EPA justifies its categorical approach to EGUs by stating that SO<sub>2</sub> controls at EGUs achieving 95 percent removal are “cost effective.” 69 Fed. Reg. at 25,199-200. But EPA improperly measures cost-effectiveness in terms of dollars per ton of SO<sub>2</sub> removed. Under *CEED v. EPA* and *American Corn Growers*, the proper determination is for states to measure the dollars per increment of *visibility improvement* obtained by imposing controls at a particular source.

The BART Rule’s categorical rather than source-by-source approach also infects the program in Article VI of the proposed BART Guidelines for a “better than BART” regional trading program. In direct contravention of *CEED v. EPA* and *American Corn Growers*, this program measures “better than BART” against BART as determined under the improper categorical approach taken as to SO<sub>2</sub> emissions from EGUs in the proposed Guidelines. Thus, as was the case with the Western Annex considered in *CEED v. EPA*, failure to promulgate a proper BART program in the BART Rules will imperil efforts to develop regional approaches to regional haze.

Finally, *CEED v. EPA* holds that the focus of the Clean Air Act visibility program is to achieve “actual progress and improvement in visibility.” Slip op., at 13. We are not aware of any modeling showing how installation of costly pollution control equipment at Western EGUs, as required by the BART Rules, will create a perceptible improvement in visibility at

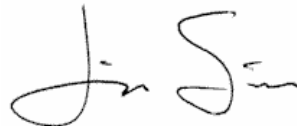
any Class I area. We are sure you agree with us that the point of the visibility program is to improve visibility, not reduce emissions for the sake of reducing emissions. The Western electric generation sector already emits a low amount of NO<sub>x</sub> and SO<sub>2</sub> because our generation sector for the most part utilizes low-sulfur coal and because a number of our generating units already are controlled. We believe there are other primary causes of Western visibility impairment (particularly fire) which should receive attention.

### **Roundtable Recommendations**

In sum, we urge EPA not to make the same mistake it made as to the Western Annex. It was plain to many of us after *American Corn Growers* that the then proposed Annex Rule was flawed. We know EPA was urged to reconsider the rule in light of the Court's decision. Instead, EPA decided to issue the rule, and the result is that much time and effort has been lost in developing an acceptable Western visibility program. Likewise, following *CEED v. EPA*, EPA should delay issuance of the BART Rules so that they may be reconsidered and made to conform to the Court's two decisions.

We appreciate the opportunity to submit this petition.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Sims". The signature is fluid and cursive, with the first name "Jim" and the last name "Sims" clearly distinguishable.

Jim Sims  
Executive Director

cc: <https://www.epa.gov.edocket>  
U.S. Senator James Inhofe  
U.S. Rep. Joe Barton  
Vice President Dick Cheney  
James Connaughton, CEQ  
DOE Secretary Samuel Bodman

# Members of the Western Business Roundtable

ADA-ES  
AngloGold Ashanti North America Inc.  
Arch Coal, Inc.  
Arizona OHV Coalition  
Basin Electric Power Cooperative  
Bill Barrett Corp.  
Black Hills Corporation  
Center For Energy & Economic Development  
CH2M Hill  
Edison Electric Institute  
Evergreen Energy Company  
FMC Corporation  
Gallagher & Kennedy  
Great Northern  
Gunnison Energy Corporation  
Intermountain REA  
Kennecott Energy Company  
Kiewit Mining Corp.  
Kinross Gold USA  
Marathon Oil Corporation  
MDU Resources Group, Inc.  
Newmont Mining Corporation  
PacifiCorp  
Peabody Energy  
Pinnacle West Capital Corporation  
Pioneer Natural Resources USA  
Placer Dome U.S., Inc.  
PNM Resources  
Portland General Electric  
PricewaterhouseCoopers  
Questar Market Resources, Inc.  
ADA-ES  
Shell Exploration and Production  
TheNewPush, LLC  
Tri-State Generation and Transmission  
Western Gas Resources  
Westmoreland Coal  
Wyoming Infrastructure Authority  
Xcel Energy