IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UTILITY AIR REGULATORY GROUP, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. 06-1056

SETTLEMENT AGREEMENT

WHEREAS, Petitioner Utility Air Regulatory Group ("UARG") seeks judicial review under section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), of a final rule of Respondent Environmental Protection Agency ("EPA") entitled "Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations," published at 70 Fed. Reg. 39,104 (July 6, 2005) (the "Regional Haze Rule");

WHEREAS, in the final rule, EPA provided Guidelines to the States on appropriate techniques and methods for implementing the Best Available Retrofit Technology ("BART") requirements of the Regional Haze Rule;

WHEREAS, the preamble to the final rule states that the Guidelines use the natural visibility baseline for the 20 percent best visibility days for determining a source's impact on visibility, and Petitioner is concerned that this statement incorrectly characterizes the provisions of the Guidelines;

WHEREAS, the Guidelines allow States to undertake a pollutant-specific analysis of visibility impacts when modeling emissions from all BART-eligible sources collectively, but the

Guidelines are silent as to whether a pollutant-specific analysis may also be performed when modeling impacts from a single source, and Petitioner seeks clarification whether such an approach is acceptable under the Guidelines;

WHEREAS, the preamble to the final rule states that international emissions are properly accounted for in the 5-year state implementation plan progress reports, and Petitioner is concerned that this statement may be construed, by negative inference, to mean that international emissions may not be accounted for in any other manner, including in the setting of reasonable progress goals, where no such limitation was intended by EPA;

WHEREAS, Petitioner seeks clarification that EPA's Guidelines contain no requirement for States, in making BART determinations, to consider nonair-quality environmental benefits from reducing emissions of visibility-impairing pollutants; and

WHEREAS, the Parties wish to effect a settlement of this case without expensive and protracted litigation;

NOW THEREFORE, Petitioner and EPA hereby agree as follows:

1. On or before April 21, 2006, the Parties will cause a copy of this Settlement Agreement to be lodged with the Court together with a joint motion to continue to hold the proceedings in abeyance pending EPA's completion of its obligations outlined in paragraphs 2 through 5.

2. Petitioner and EPA agree and acknowledge that final approval of this Settlement Agreement is subject to the requirements of section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g). That section requires that the Administrator provide notice of any proposed settlement agreement in the Federal Register and provide a period of at least thirty (30) days following

publication to allow persons who are not parties or intervenors in the litigation to comment in writing. The Administrator or the Attorney General, as appropriate, must consider those comments in deciding whether to consent to the Settlement Agreement and may withdraw or withhold her or his consent to the Settlement Agreement if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate or inconsistent with the requirements of the Act.

3. Within 10 (ten) business days of the lodging of this Settlement Agreement with the Court, the Administrator shall forward a notice to the Federal Register requesting public comments on this Settlement Agreement pursuant to section 113(g) of the Act. EPA reserves the right to modify either of the documents attached hereto as Attachments A and B as a result of the comments received and its consideration thereof.

4. Within 30 days after the close of such public comment period, and after review of any public comments and modifications as may be deemed appropriate by EPA, the Administrator or the Attorney General, as appropriate, shall determine whether to consent to this Settlement Agreement.

5. Should the Government determine to consent to this Settlement Agreement then, within five (5) business days following such determination, EPA will execute the documents attached hereto as Attachments A and B to this Settlement Agreement, as modified, if any modifications are deemed appropriate, and will cause them to be delivered to the designated addressees by U.S. mail. EPA shall at the same time send Petitioner's counsel a copy of each document as mailed.

6. If EPA performs the action described in paragraph 5 of this Agreement and executes and delivers documents that are not substantially inconsistent with the proposed language in Attachments A and B to this Agreement, then Petitioner and EPA shall promptly file a joint stipulation of dismissal of UARG's petition for review in this case with prejudice, in accordance with Rule 42(b) of the Federal Rules of Appellate Procedure.

7. If the Government determines not to consent to this Settlement Agreement or if EPA fails to execute and deliver documents that are the same in substance as set forth in Attachments A and B to this Agreement, Petitioner may move to reactivate this case and said reactivation shall be Petitioner's sole and exclusive remedy.

8. Nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA under the Clean Air Act or by general principles of administrative law. The obligations undertaken by EPA under this Agreement can only be undertaken using appropriated funds. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341.

9. Nothing in this Settlement Agreement shall be construed to limit or modify EPA's discretion to alter, amend, or revise the documents attached as Attachments A or B or to promulgate superseding regulations or issue new guidance. Nothing in this Settlement Agreement shall be construed to limit or modify any right of Petitioner to seek reconsideration or judicial review of any altered, amended, or revised version of either of such documents or to seek reconsideration or judicial review of any superseding regulations or new guidance.

10. Except as expressly provided in this Settlement Agreement, none of the parties hereto waives or relinquishes any legal rights, claims, or defenses it may have.

11. Each party will bear its own costs and attorneys fees.

12. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to bind the respective parties to the terms of this Settlement Agreement.

13. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the parties set forth below, subject to final approval by the Government pursuant to Paragraphs 2 -5.

SUE ELLEN WOOLDRIDGE
Assistant Attorney General
Environment & Natural Resources Division

DATED: April 19, 2006

Pamela S. Tonglao

PAMELA S. TONGLAO
U.S. Department of Justice
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 305-0897

M. LEA ANDERSON
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
M/S 2344A
Washington, D.C. 20460
(202) 564-5571

ATTORNEYS FOR RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DATED:_____

_____

NORMAN W. FICHTHORN
Hunton & Williams LLP
1900 K Street, N.W., Suite 1200
Washington, D.C. 20006
(202) 955-1500

MEL S. SCHULZE
Hunton & Williams LLP
Bank of America Plaza
Suite 4100
600 Peachtree Street, N.E.
Atlanta, GA 30308-2216
(404) 888-4021

ATTORNEYS FOR PETITIONER UTILITY AIR REGULATORY GROUP

ATTACHMENT A

MEMORANDUM

SUBJECT: Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations

FROM: Joseph W. Paisie, Group Leader
Geographic Strategies Group (MC 504-2)

TO: Kay Prince, Branch Chief
EPA, Region 4

In July 2005, EPA issued BART Guidelines that provide guidance to the States in making BART determinations for large power plants and other BART sources. In the BART Guidelines, we described several approaches that States could use to determine whether a source should be subject to review for BART, or whether it should be exempt from the BART requirements. As you know, BART applies to existing sources of a certain type, age, and size that "emit any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any [Class I] area." CAA §169A(b)(2)(A). One approach discussed in the Guidelines for determining that a source does not meet the threshold test for BART is to use the air quality model CALPUFF.

We understand that many States and Regional Planning Organizations (RPOs) are currently considering the use of CALPUFF for making BART determinations. We have received a question asking whether States can, or should, allow sources to use CALPUFF to estimate visibility impacts on a pollutant specific basis, or whether EPA intended CALPUFF to be used to model a source's visibility impacts based on its total emissions of visibility-impairing pollutants. We have also received a question regarding the process for estimating natural background conditions, one of the factors used to estimate a source's impact on visibility. This memo addresses these two questions.

Pollutant-Specific CALPUFF Analyses

Because of the complexity and nonlinear nature of atmospheric chemistry and chemical transformation among pollutants, EPA does not generally recommend that CALPUFF be used on a pollutant specific basis to determine whether a source meets the threshold test for BART. In

certain situations, however, it may be appropriate to do just that. For example, if a State chooses to adopt the Clean Air Interstate Rule (CAIR) program to address emissions of SO_2 and NO_x from electric generating units (EGUs), the CAIR may satisfy the requirements for BART for these pollutants from these sources. However, the State must determine whether its BART-eligible EGUs are subject to review under BART for direct emissions of particulate matter (PM). Because the task of predicting the impacts of PM on visibility is a relatively straight-forward exercise, unlike predicting the impacts of SO_2 and NO_x, we would recommend the use of CALPUFF on a pollutant specific basis to model only the impact of PM emissions on visibility. Using the results of such an analysis, States may then determine whether a source should be subject to review for PM controls, or alternatively, that the source is not subject to BART for PM.

Estimating Natural Visibility Conditions

The BART Guidelines explain that States should estimate a source's impact on visibility by "calculat[ing] daily visibility values for each receptor as the change in deciviews compared against natural visibility conditions." 70 Fed. Reg. 39104, 39162 (July 6, 2005). EPA has provided guidance to the States specifically for the complex task of estimating natural visibility conditions, *see* "Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Rule," EPA-454/B-3-005 (September 2003), but neither the BART Guidelines nor the guidance described above specify whether for purposes of determining whether a source is subject to BART, States should use annual values in calculating natural background visibility estimates or some other averaging period. The preamble to the BART Guidelines, however, states that the BART Guidelines suggest that States use a natural visibility baseline for the 20% best days for determining a source's impact on visibility.

We are clarifying here that the EPA did not intend to limit States to the use of the 20% best visibility days for this comparison through the statement in the preamble describing the BART Guidelines. States may use the 20% best visibility days or an annual average. The BART Guidelines allow for this flexibility, and we believe that either value would allow for States to determine appropriately whether a source is reasonably anticipated to cause or contribute to any impairment in visibility.

I am requesting that in your role as sublead Region for PM and Regional Haze, you transmit this memo to the other Regions. I would like to thank you in advance for your assistance.

If you have any questions about either of these issues, please contact either Kathy Kaufman or Todd Hawes in my office.

ATTACHMENT B

Mr. Mel S. Schulze, Esq.
Hunton & Williams
600 Peachtree Street,
Suite 4100
Atlanta, GA 30308

Dear Mr. Schulze:

You have asked for clarification regarding two issues raised by the rule published on July 6, 2005 revising the regional haze regulations and promulgating the Best Available Retrofit Technology (BART) Guidelines. The first issue arises from a statement in the preamble to this rule. The second arises from a question you have regarding a discussion in the BART Guidelines with respect to the BART determination process.

The first issue has to do with the impact of international emissions on the BART process and the statement in the preamble to the July 6, 2005 rule that the proper accounting for international emissions is in the five year progress reports. This statement was made in response to comments the Environmental Protection Agency (EPA) received on the discussion in the proposed BART Guidelines of natural visibility conditions, or the visibility conditions that would be experienced in the absence of human-caused impairment. In these comments, an argument was made that international emissions should be included in estimates of natural visibility conditions. Your question is whether EPA's statement in the BART Guidelines in response to these comments was intended in any way to change EPA's policy described in the 1999 regional haze rule on how States should account for international emissions in establishing reasonable progress goals or otherwise meet the requirements of the regional haze rule.

EPA received comments on the regional haze rule proposed in 1997 stating that emissions from outside the United States should be included as part of natural background to avoid requiring domestic sources to offset those emissions. EPA also received comments that the Agency should take into account that States are not able to control international sources in reviewing a State's proposal for a reasonable progress target. EPA responded to concerns regarding the role of international emissions in the regional haze context in a discussion of the long-term strategy for making reasonable progress in section III.G of the preamble to the final regional haze rule as follows:

> The EPA agrees that the projected emissions from international sources will in some cases affect the ability of States to meet reasonable progress goals. The EPA does not expect States to restrict emissions from domestic sources to offset the impacts of international transport of pollution. We believe that States should evaluate the impacts of current and projected emissions from international sources in their regional haze programs, particularly in cases where it has already been well documented that such sources are important. At the same time, EPA will work with the governments of Canada and Mexico to seek cooperative solutions on transboundary pollution problems.

64 Fed. Reg. 35714, 35736 (July 1, 1999). In a separate section discussing the States' obligation to submit reports evaluating progress toward the reasonable progress goal for each Class I area every five years, EPA again addressed the issue of international emissions. The regulations establishing the requirement for periodic reports require States to assess whether the current implementation plan strategies are sufficient to meet the reasonable progress goals. 40 CFR §308(g)(6). EPA has explained this in the preamble:

> If the State finds that international emissions sources are responsible for a substantial increase in emissions affecting visibility conditions in any Class I area or causing a deficiency in plan implementation, the State must submit a technical demonstration to EPA in support of its finding. If EPA agrees with the State's finding, EPA will take appropriate action to address the international emissions through available mechanisms. Appropriate mechanisms for addressing visibility-impairing emissions from international sources are further discussed in unit III.G on the long-term strategy.

64 Fed. Reg. at 35747.

The short-hand reference to the discussion of international emissions in the preamble to the BART Guideline rulemaking was not intended to change EPA's views on international emissions expressed in the preamble to the 1999 regional haze rule. Both in establishing reasonable progress goals and in assessing whether current implementation plan strategies are achieving these goals, States have the ability to take into account the nature of international emissions; in other words, EPA does not expect States to restrict emissions from domestic sources to offset the impacts of international transport of pollution.

The second issue for which you have asked for clarification has to do with the States' consideration, in determining BART, of nonair quality environmental impacts of compliance. This is one of several factors that States must take into account in determining BART. CAA §169A (g)(2).

EPA provided examples of the types of nonair quality environmental impacts of compliance that States should take into account in making BART determinations in the proposed

and final BART Guidelines. In the proposed BART Guidelines, we identified and discussed five examples of nonair quality impacts, including "Benefits to the Environment." 66 Fed. Reg. 38108, 38130 (July 20, 2001). In 2004, following the decision in *American Corn Growers Ass'n v. EPA,* 291 F.3d 1 (D.C. Cir. 2002), we published a revised version of the proposed BART Guidelines to respond to the court's decision. At that time, we had received several comments from environmental groups asking us to be more specific with respect to consideration of beneficial nonair quality related effects of controls. Although we explained in some detail, in the preamble to the 2004 proposal, that nonair quality benefits would be an appropriate factor for a State to consider in a BART determination, we noted that we did not agree with commenters that States should be required to conduct "an open-ended analysis of every affected nonair resource." 69 Fed. Reg. 25184, 25198 (May 5, 2004).

The final BART Guidelines, 40 CFR Part 51 Appendix Y, do not identify "Benefits to the Environment" as an example of nonair quality environmental impacts of compliance. *See* 70 Fed. Reg. at 39169. You have asked for clarification that, in making BART determinations, States are not required to consider any collateral benefits of emissions reductions.

The final BART Guidelines provide guidance to the States in making BART determinations by, among other things, providing examples of how to conduct analyses of nonair quality environmental impacts of compliance. The final BART Guidelines do not require States to consider collateral benefits of emissions reductions in making BART determinations. *Id.*

Sincerely,

Joseph W. Paisie
Group Leader
Geographic Strategies Group