

Case Update: Sierra Club Challenge to the U.S. Environmental Protection Agency Approval of Arkansas Haze Plan

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As first reported here on December 13th, the Sierra Club and National Parks Conservation Association (collectively "Sierra Club") recently filed a Petition for Review ("Petition") in the United States Court of Appeals for the Eighth Circuit challenging the United States Environmental Protection Agency ("EPA") approval of revisions to the State of Arkansas's plan for addressing regional haze. The challenged plan includes permanent and enforcement measures to reduce sulfur dioxide, oxides of nitrogen and particulate matter using best-available retrofit technology at seven electric-generating units.

There have been a number of motions filed and orders entered since the case was filed. The motions have primarily consisted of interested parties petitioning the court to intervene in the matter.

Prior to the filings of the potential interested parties, the two primary parties to the suit- Sierra Club and EPA- filed a joint motion to hold the case in abeyance. The parties agreed that the court should stay the proceedings until Judge Karen Baker of the Eastern District of Arkansas enters a Settlement Agreement in a separate but related case. Sierra Club and EPA claimed in their joint motion that entry of the Settlement Agreement in the federal Arkansas case would resolve all of the claims in the 8th Circuit case and would eliminate the need for further proceedings in the haze challenge.

The court agreed and entered an Order granting the joint motion to hold the case in abeyance on December 18, 2019. In its Order, the court stated the first status report will be due on March 20, 2020.

The electric utility company Entergy Arkansas, LLC, Entergy Mississippi, LLC, and Entergy Power, LLC (collectively "Entergy") filed a Motion to Intervene on December 19, 2019. Neither Sierra Club nor EPA opposed Entergy's Motion. The court granted Entergy's request on December 23, 2019.

Three additional parties have filed motions to intervene. The Arkansas Department of Energy and Environment, Division of Environmental Quality ("DEQ"), and the Arkansas Affordable Energy Coalition ("AAEC") both filed their motions on December 23, 2019. DEQ is represented by the Office of the Arkansas Attorney General. At this time, the court has not yet entered an Order regarding either DEQ's or AAEC's request.

The Arkansas Electric Cooperative Corporation ("AECC") also filed a motion to intervene. It lodged its request with the court on December 24, 2019. According to AECC's motion, EPA does not oppose intervention. The AECC motion also indicates that at this time, Sierra Club has taken no position on the

intervention, although they do reserve the right to oppose the intervention once they review the filing. To date, the court has not acted on AECC's request.

The federal regional haze program is driven by 169A of the Clean Air Act. Congress sought to address visibility in Mandatory Class I federal areas in which an impairment results from manmade air pollution.

Section 169A requires that certain sources contributing to visibility impairment install Best Available Retrofit Technology ("BART"). The states are responsible for determining the appropriate BART controls for certain stationary sources. EPA reviews the states' State Implementation Plan ("SIP") submissions for consistency with the relevant regulations.

In the event EPA determines that an SIP does not meet the Clean Air Act's requirements, the federal agency may itself make certain choices and impose a Federal Implementation Plan ("FIP"). Section 169A gives states substantial responsibility to determine appropriate BART controls and EPA may not disapprove reasonable state determinations that comply with the relevant statutory and regulatory requirements.

EPA had previously issued a Regional Haze FIP for Arkansas.

The December 13, 2019 article regarding Sierra Club's appeal of EPA's haze plan approval may be found [here](#).