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Attention: Docket ID No. EPA–R08–OAR–2024–0607

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Re: National Parks Conservation Association, Sierra Club, Center for Biological Diversity, Clean Air Task Force, Coalition to Protect America's National Parks, Environmental Defense Fund, and WildEarth Guardians' Comments on the Environmental Protection Agency's Proposed Rule Partially Approving and Partially Disapproving Colorado's Regional Haze State Implementation Plan for the Second Implementation Period [Docket No. EPA–R08–OAR–2024–0607]

National Parks Conservation Association (NPCA), Sierra Club, Center for Biological Diversity, Clean Air Task Force, Coalition to Protect America's National Parks, Environmental Defense Fund, and WildEarth Guardians (collectively, the Conservation Organizations) respectfully submit the following comments on the Environmental Protection Agency's (EPA) Proposed Rule Partially Approving and Partially Disapproving Colorado's Regional Haze State Implementation Plan (SIP) for the Second Implementation Period. The Table of Exhibits at the end of this comment letter identifies the materials the Conservation Organizations are submitting as attachments.

EPA should not finalize its proposal and should instead fully approve Colorado's SIP submission. Colorado's SIP includes voluntary retirement deadlines for several coal- and natural-gas fired electric generating units (EGUs) that multiple utilities proposed and agreed to. By making these voluntary retirement deadlines enforceable in the SIP, the Colorado Air Pollution Control Division (APCD or Division) shortened the remaining useful life of these

sources in its four-factor analyses—which allowed the utilities to avoid implementing pollution control measures at the EGUs that would otherwise be cost-effective. EPA should approve the SIP submission because the State's actions complied with EPA's long-standing guidance and interpretation of the Regional Haze Rule, which allows states to shorten the remaining useful life of a source if the source's closure is made federally enforceable in the regional haze SIP. In addition, EPA should approve the SIP submission in full because the Agency's rationale for partially disapproving the SIP is based on several incorrect and fundamentally flawed characterizations of the State's SIP rulemakings. If EPA disagrees and finalizes its proposed partial SIP disapproval, the State must update its four-factor analyses for the EGUs, as it would no longer be appropriate to rely on shortened remaining useful lives in the four-factor analyses if the retirements are not made federally enforceable. As the Conservation Organizations' analysis demonstrates, updated four-factor analyses will very likely show that additional control measures are cost-effective for the EGUs and should thus be required in Colorado's regional haze SIP for the second implementation period.

National Parks Conservation Association is a national organization whose mission is to protect and enhance America's national parks for present and future generations. NPCA performs its work through advocacy and education, with its main office in Washington, D.C. and 24 regional and field offices. NPCA has over 1.6 million members and supporters nationwide, with more than 41,000 members in Colorado. NPCA is active nationwide in advocating for strong air quality requirements to protect our parks, including submission of petitions and comments relating to visibility issues, regional haze SIPs, climate change, mercury impacts on parks, and emissions from power plants, oil and gas operations, and other sources of pollution affecting national parks and communities. NPCA's members live near, work at, and recreate in all the national parks, including those directly affected by emissions from Colorado's sources.

Sierra Club is a national nonprofit organization with 67 chapters and more than 832,000 members nationwide, including over 17,000 members in Colorado, dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club has long participated in regional haze rulemaking and litigation across the country in order to advocate for public health and our nation's national parks and wilderness areas.

The **Center for Biological Diversity** is a nonprofit organization dedicated to protecting endangered species and a healthy environment. The Center has over 89,000 members throughout the United States and the world and more than 3,000 members in Colorado.

Clean Air Task Force is a nonprofit organization dedicated to advancing the policy and technology changes necessary to achieve a zero-emissions, high-energy planet at an affordable cost. With more than 25 years of internationally recognized expertise on environmental policy and law, and a commitment to exploring all potential solutions, CATF is a pragmatic, non-ideological advocacy group with bold ideas for addressing climate change and air pollution. CATF has offices in Boston, Washington, D.C., and Brussels, with staff working remotely around the world.

The **Coalition to Protect America's National Parks** represents over 4,600 current, former, and retired employees and volunteers of the National Park Service, with over 50,000 collective years of stewardship of America's most precious natural and cultural resources. We are protection rangers and interpreters, scientists and maintenance workers, managers and administrators, and specialists in the full spectrum of the parks' resources. Our membership also includes former National Park Service directors, deputy directors, regional directors, and park superintendents. Recognized as the Voices of Experience, the Coalition educates, speaks, and acts for the preservation and protection of the National Park System, and mission-related programs of the National Park Service.

The **Environmental Defense Fund** is a non-profit, non-governmental and non-partisan environmental organization with millions of members and offices and staff across the United States who are carrying out the organization's mission to build a vital earth for everyone. Our key priorities are to stabilize the climate and strengthen people's ability to thrive in a changing climate. We do this by using science, economics, law, and uncommon partnerships to find practical and lasting solutions to the most serious environmental problems.

WildEarth Guardians protects and restores the wildlife, wild places, wild rivers, and health of the American West. In Colorado, we challenge air emissions permits and the state's lack of air pollution enforcement to ensure cleaner and clearer skies. WildEarth Guardians has 207,000 members nationwide.

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INTRODUCTION

Colorado is home to twelve renowned Class I areas, including Rocky Mountain National Park. Colorado's regional haze SIP for the second implementation period must reduce visibility-impairing air pollution in these twelve national parks and wilderness areas, along with numerous Class I areas in nearby states. Colorado's plan must make reasonable progress toward Congress's national goal of improving visibility in these Class I areas. Colorado's SIP submission fully complies with the Clean Air Act's regional haze requirements, and it will secure important visibility, environmental, and economic benefits.

A central component of Colorado's SIP submission is to make several utilities' voluntary retirement deadlines for their coal-fired EGUs enforceable in the SIP. In return for making the retirement deadlines enforceable, the APCD shortened the EGUs' remaining useful life in its four-factor reasonable progress analyses. Shortening the remaining useful life of the EGUs to reflect these already-planned retirements allowed the utilities to avoid installing otherwise cost-effective and reasonable pollution control measures. The State and the utilities supported this approach, and they concluded that these voluntary closure dates would maintain the reliability of the electric grid in Colorado. Moreover, in the first of the Colorado Air Quality Control Commission's (AQCC) two regional haze rulemakings for the second implementation period, NPCA and Sierra Club proposed to modestly accelerate some of the post-2028 EGU retirement deadlines so that the retirements would occur during the second implementation period, which covers the years 2021–2028. The APCD and the utilities opposed that proposal and insisted that the AQCC not order any closure timelines they did not agree to, and they repeatedly argued that the voluntary retirement dates the utilities proposed would better ensure grid reliability.

The record of the State's regional haze SIP rulemakings unequivocally shows that during the state-level rulemakings: (1) each utility agreed with and supported every EGU retirement deadline in the SIP; (2) the State and the utilities considered grid reliability and demonstrated that the retirement deadlines would not impair grid reliability; and (3) by making these voluntary retirement deadlines enforceable in the SIP, the utilities avoided being required to install otherwise cost-effective and reasonable pollution controls at the EGUs.

EPA, however, now proposes to disapprove the portions of the State's SIP submission that include the EGU retirement deadlines, as the Agency contends it is improper to make the Colorado EGU source closures enforceable in the State's SIP. EPA should not finalize its proposed rule and should fully approve Colorado's SIP submission for several reasons.

First, EPA's proposed disapproval is arbitrary and capricious because it ignores the extensive evidence in the record showing that Colorado considered energy and reliability impacts when it adopted its regional haze SIP. All of the relevant entities that are responsible for ensuring grid reliability in Colorado—i.e., the utilities themselves, the Colorado Public Utilities Commission, and the municipal utility boards—approved the proposed retirement dates for the EGUs after conducting extensive resource planning processes that analyzed energy demand, grid reliability, resource adequacy, and replacement generation resources. The State relied on the utilities' and governing bodies' analyses when it included the retirement deadlines in the SIP. And during the State's rulemakings, the utilities repeatedly stressed that their planned retirement

dates were the result of detailed planning processes that ensure grid reliability. EPA's proposed partial disapproval impermissibly ignores what occurred in the State's rulemakings. Moreover, EPA's conclusion that the retirement deadlines in the SIP would impair reliability are contradicted by the record and the judgment of the utilities and the governing bodies in Colorado that are tasked with ensuring grid reliability.

Second, EPA's claim that Colorado failed to provide necessary assurances that the "forced closures" in the SIP would not violate state or federal law is based on significant factual and legal errors. Contrary to EPA's characterization, Colorado's regional haze SIP did not include forced closures as a control measure. Instead, the SIP made the utilities' previously-announced retirement dates federally enforceable as part of the State's four-factor reasonable progress analyses. Specifically, Colorado utilized shortened remaining useful lives for the EGUs that reflected their upcoming retirements, concluding that additional emission controls could not be installed at the facilities prior to closure or would not be cost-effective in light of their truncated useful lives. This approach was consistent with EPA's long-standing guidance on how states should treat source closures in their regional haze SIPs. EPA's claim that the State should have considered the potential for Takings Clause violations when it included the EGUs' voluntary retirements in its SIP is unreasonable and illogical, as there cannot be a taking in this circumstance. In addition, while one utility now seeks to back out of its previous decision to retire one of its EGUs—several years after the State issued its SIP—the other utilities have not changed their plans to retire the EGUs.

Third, EPA's proposal is based in part on a flawed and impermissible new policy regarding the Uniform Rate of Progress (URP). EPA claims that because Colorado's Class I areas are projected to be below the adjusted URP glidepath in 2028, no further action is needed to comply with regional haze requirements for the second implementation period if EPA disapproves the source retirement deadlines. However, the Agency's new URP policy violates the substantive and procedural requirements of the Clean Air Act and the Regional Haze Rule. Regardless of where a state's Class I areas are projected to be compared to the URP, states must determine reasonable progress measures based on their four-factor analyses for sources.

Finally, EPA should not finalize its proposed rule for several additional reasons. EPA provided no justification for its proposed disapproval of Colorado's SIP provision regarding the conversion of Pawnee Unit 1 from coal-firing to gas-firing. In addition, EPA fundamentally mischaracterized SIP provisions limiting pollution from the Hayden coal-fired power plant. EPA also appears to be unaware that some of the EGUs at issue have already retired and have been decommissioned, which further demonstrates how EPA's proposed rule is not based on evidence, fails to grapple with the record, and is arbitrary and capricious.

DISCUSSION

I. Background

A. The Clean Air Act's Regional Haze Program

In what has been lauded as "America's best idea," Congress first set aside national parks in the 19th century to preserve and celebrate some of the nation's most spectacular scenery.[1] With the nation's rapid industrialization, however, these remarkable scenic views have become increasingly marred by air pollution.[2]

To reduce this threat to national parks and other treasured public lands, Congress amended the Clean Air Act in 1977 to create the regional haze program.[3] Congress determined that national parks, wilderness areas, and other "Class I" federal areas should enjoy the highest level of air quality, and it set a national goal of eliminating all human-caused visibility impairment at these areas.[4] After concluding that states and EPA had not made adequate progress toward reducing visibility impairment caused by regional haze, Congress again amended the Clean Air Act in 1990 to spur regional haze reductions.[5]

1. EPA's Regional Haze Rule

EPA promulgated the Regional Haze Rule to implement the Clean Air Act's haze program.[6] The Regional Haze Rule establishes an iterative and continual process for eliminating human-caused visibility impairment. It requires states to submit periodic regional haze plans in 2007, 2021, 2028, and every ten years thereafter, as well as periodic progress reports evaluating the status of their efforts to further reduce visibility-impairing pollution and continue to improve visibility conditions at each Class I area.[7] The Rule further requires states to develop regional haze plans that include a long-term strategy to make reasonable progress toward Congress's goal of eliminating human-caused visibility impairment at each Class I area, as well as reasonable progress goals (RPGs, expressed in deciviews) that reflect the implementation of the state's long-term strategy and other Clean Air Act requirements.[8]

In the second implementation period, which covers the years 2021–2028, and thereafter, reasonable progress measures are the central mechanism for reducing visibility-impairing

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[1] John Copeland Nagle, *The Scenic Protections of the Clean Air Act*, 87 N.D. L. Rev. 571, 575–77 (2011).
[2] *See id.* at 573.
[3] 42 U.S.C. § 7491.
[4] *Id.* §§ 7491(a)(1); 7472(a).
[5] *Id.* § 7492.
[6] 64 Fed. Reg. 35,714 (July 1, 1999); *see* 40 C.F.R. Part 51.
[7] 40 C.F.R. § 51.308(b), (f), (g).
[8] *Id.* § 51.308(d)(1), (d)(3) (first implementation period); 51.308(f)(2), (f)(3) (second implementation period).

pollution from sources.[9] A state's reasonable progress analysis must be based on four factors, which Congress set forth in Clean Air Act section 169A(g)(1): (1) the costs of compliance, (2) the time necessary for compliance, (3) the energy and non-air quality environmental impacts of compliance, and (4) the remaining useful life of the source.[10] The Regional Haze Rule requires that states first conduct this four-factor analysis to determine the measures that must be included in their long-term strategies, and then use the results of that analysis to develop RPGs reflecting achievement of the long-term strategy.[11] To that end, states follow the SIP "planning sequence" prescribed by EPA:

1. Calculate baseline, current and natural visibility conditions, progress to date, and the URP glidepath between baseline and natural visibility conditions.[12]
2. Develop a long-term strategy for addressing regional haze by evaluating the four factors to determine what emission limits and other measures are necessary to make reasonable progress.[13]
3. Conduct regional-scale modeling of projected future emissions based on implementation of the long-term strategy and other Clean Air Act requirements to establish RPGs and then compare those goals to the URP glidepath.[14]
4. Adopt a monitoring strategy and other measures to track future progress and ensure compliance.[15]

States must rely on the four statutory factors in evaluating reasonable progress under the Clean Air Act, and must also consider five additional factors, to establish their long-term strategy and set RPGs under the Regional Haze Rule.[16] The long-term strategy, in turn, must include "enforceable emissions limitations, compliance schedules, and other measures" that are necessary to make reasonable progress for each Class I area in the second implementation period.[17]

The Regional Haze Rule requires states to calculate the uniform rate of visibility improvement that is necessary to achieve natural visibility conditions at each Class I area.[18] This

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[9] *Id.* § 51.308(f), (f)(2)(i) ("The State must evaluate and determine the emission reduction measures that are necessary to make reasonable progress . . . .").
[10] 42 U.S.C. § 7491; 40 C.F.R. § 51.308(d)(1)(i)(A), (f)(2)(i).
[11] 40 C.F.R. § 51.308(d)(1).
[12] *Id.* § 51.308(f)(1).
[13] *Id.* § 51.308(f)(2).
[14] *Id.* § 51.308(f)(3).
[15] *Id.* § 51.308(f)(6).
[16] *Id.* § 51.308(f)(2)(i) (identifying the four factors), (f)(2)(iv) (establishing the five additional factors of emission reductions due to ongoing air pollution control programs; measures to mitigate the impacts of construction activities; source retirement and replacement schedules; basic smoke management practices for prescribed fire; and the anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the implementation period).
[17] *Id.* § 51.308(d)(3), (f)(2).
[18] 40 C.F.R. § 51.308(d)(1)(i)(B), (f)(1)(vi)(A).

calculation shows the straight-line URP glidepath between baseline visibility conditions and natural visibility conditions.[19] However, states cannot rely on the URP glidepath as an excuse for failing to comply with the Clean Air Act or the Regional Haze Rule, including the requirement to establish a long-term strategy based on consideration of the four factors. Indeed, EPA has made clear that the glidepath is "not a safe harbor" and "states may not subsequently reject control measures that they have already determined are reasonable" if an RPG is below the glidepath for a Class I area.[20] Rather, if a state's RPG for a Class I area provides a faster rate of visibility improvement than the glidepath, the state must still implement reasonable progress measures for sources.[21] And, if a state's RPG for a Class I area provides a slower rate of visibility improvement than the glidepath, the SIP must provide a "robust demonstration" that it would be unreasonable to require additional control measures for sources impacting that Class I area.[22]

Additionally, a state "must include in its implementation plan a description of the criteria it used to determine which sources or groups of sources it evaluated and how the four factors were taken into consideration in selecting the measures for inclusion in its long-term strategy."[23] States must also document the technical basis for the SIP, such as monitoring data, modeling, cost, engineering, and emission information.[24]

Through the process described above, the Clean Air Act and Regional Haze Rule empower states to develop regional haze SIPs that establish plans for achieving natural visibility conditions at Class I areas. The regional haze program thus presents states with an unparalleled opportunity to protect and restore regional air quality by curbing visibility-impairing pollution. EPA, of course, exercises an important oversight role under the Clean Air Act's cooperative federalism model.[25] The Tenth Circuit Court of Appeals has stressed that "the Act provides for substantive and careful EPA review[,]" and "the agency need not simply rubberstamp SIPs."[26] So long as a state's SIP satisfies the requirements of the Clean Air Act, however, EPA may not substitute its own policy preferences for those of the state and has "no authority to question the wisdom of a State's choices of emission limitations."[27] As EPA itself has explained in the context of numerous other regional haze SIP actions, "in reviewing SIP submissions, EPA's role is to

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[19] *See* 77 Fed. Reg. 75,704, 75,714 (Dec. 21, 2012) ("The URP [glidepath] is represented as a straight line drawn between a given Class I area's 2004 baseline value and 2064 natural condition or programmatic goal value.").
[20] 82 Fed. Reg. 3,078, 3,093 (Jan. 10, 2017).
[21] *Id.* at 3093–94.
[22] 40 C.F.R. § 51.308(f)(3)(ii)(A); *see also id.* § 51.308(d)(1)(ii) (similar).
[23] *Id.* § 51.308(f)(2)(i).
[24] *Id.* § 51.308(f)(2)(iii).
[25] 42 U.S.C. § 7410(c)(1), (k)(3); 40 C.F.R. § 52.02(a); *Mont. Sulphur & Chem. Co. v. EPA*, 666 F.3d 1174, 1181 (9th Cir. 2012) (explaining that when a SIP is inadequate and thus fails to comply with the Clean Air Act, "EPA is empowered to step in and fill any deficiencies with a FIP").
[26] *Wyoming v. EPA*, 78 F.4th 1171, 1180 (10th Cir. 2023); *see also Oklahoma v. EPA*, 723 F.3d 1201, 1204 (10th Cir. 2013).
[27] *Ohio v. EPA*, 603 U.S. 279, 284 (2024) (quoting *Train v. Nat. Res. Def. Council*, 421 U.S. 60, 79 (1975)).

approve State choices, provided that they meet the criteria of the Clean Air Act."[28] The Agency has also described states' selection of reasonable progress measures as "a technically complex exercise, but also a flexible one that provides states with bounded discretion to design and implement approaches appropriate to their circumstances."[29] In its review of regional haze SIP submissions, then, EPA must approve only those plans that meet the requirements of the Clean Air Act, while also taking care not to intrude on states' legitimate policy choices.

2. EPA's 2021 Clarifications Memo

On July 8, 2021, EPA issued a memorandum (the 2021 Clarifications Memo) that clarified certain aspects of the revised Regional Haze Rule and provided further information to states and EPA regional offices regarding their planning obligations for the second implementation period.[30] In particular, EPA made clear that states must secure additional emission reductions that build on progress already achieved and that there is an expectation that reductions be additive to ongoing and upcoming reductions under other Clean Air Act programs.[31] EPA also emphasized that source selection is a critical step in the SIP revision process, as it ultimately informs the measures that states select to achieve reasonable progress.[32] As a result, EPA directed states to design and conduct their source selection analysis to ensure it "has the potential to meaningfully reduce . . . contributions to visibility impairment."[33] Thus, it is generally not reasonable to exclude large sources of visibility-impairing pollution from evaluation.

Moreover, the 2021 Clarifications Memo reiterated that the reasonable progress four-factor analysis is the vehicle for identifying control measures that are necessary to achieve reasonable progress during this second implementation period.[34] EPA again explained that the URP glidepath is not a "safe harbor," and the fact that a Class I area is below the glidepath does not excuse the state from its obligation to consider the four statutory factors in evaluating control options.[35] EPA also noted that visibility is not included as one of the four statutory factors and that states may not rely on purportedly insufficient air quality benefits as a justification for refusing to require cost-effective emission reductions.[36] In addition, the 2021 Clarifications Memo makes clear that a state should not reject cost-effective and otherwise reasonable control measures merely because there have been emission reductions since the first implementation

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[28] *E.g.*, 89 Fed. Reg. 75,973, 75,974 (Sept. 17, 2024).
[29] 88 Fed. Reg. 58,178, 58,184 (Aug. 25, 2023).
[30] Memorandum from Peter Tsirigotis, Dir., EPA, to Reg'l Air Div. Dirs., Regions 1-10 (July 8, 2021), https://www.epa.gov/system/files/documents/2021-07/clarifications-regarding-regional-haze-state-implementation-plans-for-the-second-implementation-period.pdf [hereinafter "EPA 2021 Clarifications Memo"].
[31] *Id.* at 2.
[32] *Id.* at 3.
[33] *Id.*
[34] *Id.* at 6.
[35] *Id.* at 15–16.
[36] *Id.* at 12–13.

period due to other ongoing air pollution control programs or merely because visibility is otherwise projected to improve at Class I areas.[37]

The 2021 Clarifications Memo also instructs that for sources that have previously installed controls, states should still evaluate the "full range of potentially reasonable options for reducing emissions" from those sources, including options that may "achieve greater control efficiencies, and, therefore, lower emission rates, using their existing measures."[38] Moreover, "[i]f a state determines that an in-place emission control at a source is a measure that is necessary to make reasonable progress and there is not already an enforceable emission limit corresponding to that control in the SIP, the state is required to adopt emission limits based on those controls as part of its long-term strategy in the SIP."[39] This also means that so-called "on-the-way" measures—including anticipated shutdowns or reductions in a source's emissions or utilization—that states rely on to forgo a four-factor analysis or to shorten the remaining useful life of a source "must be included in the SIP" as enforceable emission reduction measures.[40]

B. Improving Visibility at Colorado's Class I Areas Will Result in Economic and Public Health Benefits.

Colorado is home to a wealth of iconic national parks and wilderness areas, such as Rocky Mountain National Park, Great Sand Dunes National Park, and Mesa Verde National Park. Colorado's twelve Class I areas preserve the region's most inspiring landscapes, rare geological formations, and diverse flora and fauna. For example, the National Park Service has noted that Rocky Mountain National Park's stunning mountains provide the park "with its sense of wonder and inspiration," and "contribute mightily to the wild, fantastic views" that have long thrilled park visitors.[41] Similarly, Great Sand Dunes National Park features "massive dunes surrounded by alpine peaks," which form "a unique scenic landscape that inspires awe and wonder."[42]

Colorado's renowned national parks and wilderness areas are important components of the state's economy. In 2023, more than 4.1 million people visited Rocky Mountain National Park, and this tourism supported more than 7,800 jobs and more than $568 million in visitor spending.[43] More than 505,000 people visited Mesa Verde in 2023, which supported more than

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[37] *Id.* at 13.
[38] *Id.* at 7.
[39] *Id.* at 8.
[40] *Id.* at 10.
[41] Nat'l Park Serv., *Foundation Document, Rocky Mountain National Park* 5 (2013), https://www.nps.gov/romo/learn/management/upload/ROMO_Foundation_Document.pdf (internal quotation marks omitted).
[42] *Great Sand Dunes Management*, Nat'l Park Serv., https://www.nps.gov/grsa/learn/management/index.htm (last visited Sept. 14, 2025).
[43] Matthew Flyr & Lynne Koontz, Nat'l Park Serv., *2023 National Park Visitor Spending Effects* 35 (2024), https://www.nps.gov/nature/customcf/NPS_Data_Visualization/docs/NPS_2023_Visitor_Spending_Effects.pdf.

775 jobs and $59 million in visitor spending.[44] In addition, more than 512,000 people visited Great Sand Dunes in 2023, which supported more than 420 jobs and $34 million in visitor spending.[45] When the air at a national park is not clean, visitation drops by at least eight percent, harming local economies and indicating that air quality directly affects public use and enjoyment of our national parks.[46] A strong regional haze plan for Colorado will improve visibility at the State's twelve Class I areas, and thereby increase revenue to the parks and wilderness areas and surrounding communities.

Colorado's regional haze SIP will also improve public health. The same pollutants that mar scenic views at national parks and wilderness areas also cause significant public health impacts. For example, nitrogen oxide (NOx) pollution is a precursor to ground-level ozone, which is associated with respiratory diseases, asthma attacks, and decreased lung function.[47] In addition, NOx reacts with moisture and other compounds to form particulates that can cause and worsen respiratory diseases, aggravate heart disease, and lead to premature death.[48] Similarly, sulfur dioxide (SO_2) increases asthma symptoms, leads to increased hospital visits, and can form particulates that aggravate respiratory and heart diseases and cause premature death.[49] Particulate matter (PM) can penetrate deep into the lungs and cause a host of health problems, such as aggravated asthma, chronic bronchitis, and heart attacks.[50]

The Clean Air Task Force estimates that the EGUs at issue in Colorado's SIP submission cause serious public health harms. For example, Craig Generating Station's air pollution causes 21 deaths, 8 heart attacks, and 270 asthma attacks every year.[51] Hayden Generating Station's air pollution causes 7 deaths, 2 heart attacks, and 82 asthma attacks each year.[52] The Nixon Power

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[44] *Id.* at 31.
[45] *Id.* at 27.
[46] David Keiser et al., *Air pollution and visitation at U.S. national parks*, 4 Sci. Advances at 3 (2018), https://www.science.org/doi/10.1126/sciadv.aat1613.
[47] *Health Effects of Ozone Pollution*, EPA, https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution (last visited Sept. 14, 2025).
[48] *Basic Information about NO_2*, EPA, https://www.epa.gov/no2-pollution/basic-information-about-no2 (last visited Sept. 14, 2025); Health and Environmental Effects of Particulate Matter (PM), EPA, https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm (last visited Sept. 14, 2025).
[49] *Sulfur Dioxide (SO_2) Basics*, EPA, https://www.epa.gov/so2-pollution/sulfur-dioxide-basics (last visited Sept. 14, 2025).
[50] *Particulate Matter (PM) Basics*, EPA, https://www.epa.gov/pm-pollution/particulate-matter-pm-basics (last visited Sept. 14, 2025); Yixing Du et al., *Air particulate matter and cardiovascular disease: the epidemiological, biomedical and clinical evidence*, 8 Journal of Thoracic Disease No. 1, E8 (2016).
[51] Clean Air Task Force, *Raising Awareness of the Health Impacts of Coal Plant Pollution*, https://www.catf.us/work/power-plants/coal-pollution/ (last visited Sept. 14, 2025).
[52] *Id.*

Plant causes 3 deaths, 1 heart attack, and 41 asthma attacks annually.[53] And Rawhide Energy Station causes 4 deaths, 2 heart attacks, and 55 asthma attacks per year.[54]

NOx pollution from the EGUs at issue in Colorado's SIP submission also causes serious nitrogen deposition issues at Rocky Mountain National Park. The park's high elevation ecosystems are particularly vulnerable to nitrogen deposition, and EGUs, agriculture, and other sources have significantly increased nitrogen deposition levels at the park.[55] These elevated nitrogen levels have decreased biodiversity, increased the potential for insect and disease outbreaks, decreased the ability of the park's ecosystems to respond to environmental stressors, and caused unhealthy conditions in sensitive ecosystems.[56]

C. Colorado's Regional Haze SIP Rulemakings

The AQCC is Colorado's state air agency, and it is responsible for implementing the Clean Air Act in Colorado and adopting Colorado's regional haze SIP. The APCD proposes regulations for the AQCC's adoption through the AQCC's rulemaking process, and it also administers Colorado's air permitting program. For regional haze rulemakings, the APCD conducts the four-factor analyses and other technical components required by the Regional Haze Rule, and it develops and proposes the regional haze SIP for the AQCC's approval.

The AQCC conducted a two-phase rulemaking to adopt Colorado's regional haze SIP for the second implementation period.[57] In the Phase 1 rulemaking that concluded in 2020, the APCD conducted reasonable progress analyses for twelve sources, including several coal-fired EGUs, one gas-fired EGU, and a coal mine.[58] In its four-factor reasonable progress analyses, the APCD shortened the remaining useful life of these sources based on several utilities' previously-announced plans to retire these sources. The AQCC approved the APCD's proposal to make the voluntary retirement deadlines enforceable in the SIP. The Phase 2 rulemaking in 2021 included four-factor reasonable progress analyses for several other sources (including a few EGUs), as well as the other SIP components required by the Regional Haze Rule.[59] In the 2021 rulemaking, the AQCC finalized the State's complete regional haze SIP for the second implementation period.[60]

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[53] *Id.*
[54] *Id.*
[55] EPA Region 8 et al., *Draft Rocky Mountain National Park Initiative: 2022 Nitrogen Deposition Milestone Report* at 14, 8 (2024), https://cdphe.colorado.gov/public-information/planning-and-outreach/rocky-mountain-national-park-initiative.
[56] *Id.* at 14.
[57] *See* Memorandum from Jill Hunsaker Ryan, Exec. Dir., Colo. Dep't of Pub. Health & Env't to Kathleen Becker, Reg'l Adm'r, EPA Region 8, May 16, 2022, EPA-R08-OAR-2024-0607-0002.
[58] The State's Phase 1 rulemaking documents are contained in EPA-R08-OAR-2024-0607-0003 through EPA-R08-OAR-2024-0607-0008.
[59] The State's Phase 2 rulemaking documents are contained in EPA-R08-OAR-2024-0607-0009 through EPA-R08-OAR-2024-0607-0015.
[60] While portions of Colorado's SIP narrative were adopted in 2020 through the AQCC's Phase 1 rulemaking, in this comment letter, Conservation Organizations cite the final 2021 version of the

The long-term strategy adopted by the AQCC provided that reasonable progress for several of the EGUs (Rawhide Unit 1, Nixon Unit 1, Drake Units 6 and 7, Comanche Units 1 and 2, Craig Units 1, 2, and 3, and Cherokee Unit 4) consisted of the combination of continued compliance with the facilities' existing emission limits and closure no later than their voluntary retirement dates.[61] It also provided that if the Colorado Public Utilities Commission (PUC) approved the utility-proposed voluntary retirement dates for Hayden Units 1 and 2, reasonable progress for those units consisted of maintaining existing emission limits and work practices combined with closure by the end of 2027 (Unit 2) and 2028 (Unit 1).[62] Similarly, for Pawnee Unit 1, the long-term strategy provided that if the PUC approved the utility-proposed voluntary fuel conversion, converting the unit from coal-firing to natural gas-firing by the end of 2028 would satisfy reasonable progress.[63]

From the outset of the Phase 1 rulemaking, the APCD repeatedly made it clear that it was proposing that the SIP include voluntary, already-planned retirement deadlines for the EGUs. For example, in its Memorandum of Notice announcing the proposed rulemaking, the APCD stated that its proposed rule "builds upon the [utilities'] decisions to close the EGUs," and the proposal "does not otherwise require any shut-downs in order to comply with the [reasonable progress] goals."[64] The APCD's Economic Impact Analysis stated that the State's proposal "builds on the

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SIP narrative and not the earlier versions that appear in the State's rulemaking record. The final SIP narrative is titled "Colorado Visibility and Regional Haze State Implementation Plan for the Twelve Mandatory Class I Federal Areas in Colorado" (adopted December 17, 2021) and is contained in EPA-R08-OAR-2024-0607-0015, 26_Regional Haze SIP Element (2020 and 2021).pdf [hereinafter "SIP Narrative"].

[61] *See* SIP Narrative at 52–54, 59–61 & tbl.7-2 (summarizing reasonable progress determinations for these units as a combination of existing emission limits along with the facility closure dates); *id.* at 69–70 (stating that APCD "recommends that . . . [reasonable progress] is a combination of" existing SO_2, PM, and NOx emission limits and the closure date for Rawhide Unit 1); *id.* at 72–73 (same for Martin Drake Units 6 and 7); *id.* at 73–75 (same for Nixon Unit 1); *id.* at 80–82 (same for Comanche Units 1 and 2); *id.* at 87–90 (same for Craig Units 1, 2 and 3); *id.* at 92–94 (same for Cherokee Boiler 4). *See also* Colorado Regulation Number 23, Part A, IV.F.1, IV.F.1.a–i, EPA-R08-OAR-2024-0607-0015, 25_5 CCR 1001-27 at 11 (under the header titled "Regional Haze Second Implementation Period, Reasonable Progress Determinations," stating that Cherokee Unit 4, Comanche Units 1 and 2, Craig Units 2 and 3, Martin Drake Units 6 and 7, Nixon Unit 1, and Rawhide Unit 1 "will close no later than the associated date. The sources must comply with the applicable emission limits in Section IV. and monitoring, recordkeeping, and reporting requirements in Section V. until the closure date.").

[62] SIP Narrative at 53, 61; *id.* at 83–86 (stating that APCD "recommends that . . . [reasonable progress] is a combination of" existing SO_2, PM, and NOx emission limits and the unit closure dates, if they are approved by the PUC); Colorado Regulation Number 23, Part A, IV.F.3, IV.F.5.

[63] SIP Narrative at 54, 62; *id.* at 95–97 (stating that APCD "recommends that . . . [reasonable progress] is" existing SO_2, PM, and NOx emission limits and, if approved by the PUC, conversion to burn natural gas fuel by December 31, 2028); Colorado Regulation Number 23, Part A, IV.F.3, IV.F.6.

[64] Memorandum of Notice of Colo. Dep't of Pub. Health & Env't, Air Pollution Control Div. at 4 (Aug. 3, 2020), EPA-R08-OAR-2024-0607-0003, 09_Memorandum of Notice [hereinafter "Memorandum of Notice"].

specified . . . facilities' decisions to close these units."[65] Similarly, the APCD's prehearing statement explained that "[t]he facilities included in this Phase 1 proposal have announced closure dates in the near future," and thus the Division's proposal "is utilizing [the] announced closures in the four factor analysis."[66]

The utilities' filings in the State's Phase 1 rulemaking also left no doubt that the APCD's proposal reflected their voluntary plans to close the EGUs, and that the utilities agreed with making their already-planned retirement dates enforceable in the SIP. For example, Colorado Springs Utilities' (CSU) prehearing statement stated that it had "announced voluntary retirements" of Nixon Unit 1 and Martin Drake Units 6 and 7, and it supported "mak[ing] these retirements enforceable" through the SIP.[67] In its rebuttal statement, CSU explained that it had announced these "voluntary retirement[s]" in June 2020, that "[t]hese voluntary retirements allow[] the Colorado [SIP] to account for such retirement dates in determining whether any additional control measures . . . are reasonable and required," and that CSU "generally supports the proposal to adopt a rule that makes the announced retirement dates . . . enforceable."[68] Platte River Power Authority (PRPA) similarly acknowledged in its prehearing statement that it had "voluntarily announced [the] early closure" of Rawhide Unit 1 and that the SIP "will make this closure enforceable" by the APCD and AQCC.[69] Public Service Company of Colorado (PSCo, also sometimes referred to as Xcel) also acknowledged its voluntary closure dates for Comanche Units 1 and 2 and Cherokee Unit 4, and that the SIP would make the retirement deadlines enforceable.[70] Tri-State Generation and Transmission Association, Inc. (Tri-State) included similar language in its prehearing statement regarding its closure plans for Craig Units 1, 2, and 3, Nucla Station, and the Colowyo Coal Mine.[71]

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[65] Final Econ. Impact Analysis of Colo. Dep't of Pub. Health & Env't, Air Pollution Control Div. at 5 (Oct. 8, 2020), EPA-R08-OAR-2024-0607-0003, 11_Economic Impact Analysis (final) [hereinafter "Economic Impact Analysis"].

[66] Prehearing Statement of Colo. Dep't of Pub. Health & Env't, Air Pollution Control Div. at 5 (Oct. 8, 2020), EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division [hereinafter "APCD Prehearing Statement"].

[67] Prehearing Statement of City of Colo. Springs & Colo. Springs Utils. at 1 (Oct. 8, 2020), EPA-R08-OAR-2024-0607-0004, 14_City of Colorado Springs & Colorado Springs Utilities [hereinafter "CSU Prehearing Statement"].

[68] Rebuttal Statement of City of Colo. Springs & Colo. Springs Utils. at 1, 2 (Oct. 27, 2020), EPA-R08-OAR-2024-0607-0004, 14_City of Colorado Springs & Colorado Springs Utilities [hereinafter "CSU Rebuttal Statement"].

[69] Prehearing Statement of Platte River Power Auth. at 1 (Oct. 8, 2020), EPA-R08-OAR-2024-0607-0004, 14_Platte River Power Authority [hereinafter "PRPA Prehearing Statement"].

[70] Prehearing Statement of Pub. Serv. Co. of Colo. at 1 (Oct. 8, 2020), EPA-R08-OAR-2024-0607-0004, 14_Public Service Company of Colorado dba Xcel Energy [hereinafter "PSCo Prehearing Statement"].

[71] Prehearing Statement of Tri-State Generation & Transmission Ass'n at 1 (Oct. 8, 2020), EPA-R08-OAR-2024-0607-0004, 14_Tri-State Generation & Transmission Association, Inc [hereinafter "Tri-State Prehearing Statement"].

NPCA and Sierra Club supported many of the APCD's proposed closure dates in the Phase 1 rulemaking.[72] But NPCA and Sierra Club argued the AQCC should accelerate the post-2028 retirement deadlines for several EGUs to December 31, 2028, so that the closures and resulting emissions reductions would occur within the regional haze program's second implementation period.[73] In response to NPCA and Sierra Club's Alternate Proposal, the APCD and the utilities reiterated their belief that the SIP should not require the utilities to take any actions beyond the voluntary and previously-announced closure deadlines, and that allowing the utilities to lock-in their preferred retirement plans would help ensure grid reliability. For example, the APCD stated that "[t]he utility stakeholders have expressed concern regarding closure dates being altered due to potential grid reliability impacts and resource planning issues," and that the APCD's proposal reflecting the utilities voluntary retirement dates was more reasonable because those retirement dates had "gone through the utilities' internal planning for grid reliability, service stability, and resource demand."[74] CSU claimed that NPCA and Sierra Club's Alternate Proposal to accelerate the closure dates went beyond the scope of the AQCC's regional haze authority; and that unlike the Alternate Proposal, CSU's retirement dates "are the result of its Gas/Electric Integrated Resource Planning Process" that accounts for "reliability, environmental impacts, flexibility/diversity and innovation."[75]

The AQCC ultimately decided to not accelerate any of the EGU retirement deadlines as proposed by NPCA and Sierra Club and instead adopted the APCD's proposal to make federally enforceable the voluntary retirement dates that the utilities had previously announced. Consequently, the utilities' compliance obligations for the EGUs in the SIP consist of complying with the voluntary retirement deadlines they had previously proposed and supported throughout the AQCC rulemaking, as well as continuing to comply with existing emission limits and other control measures prior to closure.[76]

II. The State Adequately Considered Energy and Reliability Impacts When Adopting Its Long-Term Strategy.

EPA improperly proposes to partially disapprove Colorado's long-term strategy "to the extent the SIP includes insufficiently justified enforceable source closures."[77] EPA contends that Colorado did not "adequately consider the energy impacts associated with the source closures"[78] and "did not sufficiently assess the closures' impacts on maintaining grid reliability and utilities' ability to meet energy demand."[79] These claims are incorrect and mischaracterize the SIP

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[72] Prehearing Statement of Nat'l Parks Conservation Ass'n & Sierra Club at 1 (Oct. 8, 2020), EPA-R08-OAR-2024-0607-0004, 14_National Parks Conservation Association & Sierra Club [hereinafter "NPCA & Sierra Club Prehearing Statement"].
[73] *Id.*
[74] Rebuttal Statement of Colo. Dep't of Pub. Health & Env't, Air Pollution Control Div. at 5 (Oct. 27, 2020), EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division [hereinafter "APCD Rebuttal Statement"].
[75] CSU Rebuttal Statement at 5, 7.
[76] SIP Narrative at 52-54.
[77] 90 Fed. Reg. 31,926, 31,937 (July 16, 2025).
[78] *Id.*
[79] *Id.* at 31,937–38.

submission and the AQCC's regional haze SIP rulemaking. There is extensive evidence in the AQCC rulemaking record documenting the energy and reliability impacts of the voluntary EGU closures. The record does not support EPA's assertions that the State failed to adequately consider how the EGU retirements would impact grid reliability and failed to consider safeguards to address reliability issues. Accordingly, EPA should reverse its initial findings and conclusions in its final rule, and it should fully approve Colorado's SIP submission.

As a threshold matter, EPA's proposed partial disapproval on the basis of alleged energy and reliability impacts is arbitrary and capricious and unlawful because it relies solely on information that was not available at the time the SIP was developed, in an outcome-determinative way. Every piece of information that EPA relies on as the basis for alleged energy and reliability impacts of the EGU closures—from CSU's statements to an Executive Order to a North American Electric Reliability Corporation (NERC) report—were issued in 2024 or 2025,[80] years after Colorado adopted its SIP (in 2020 and 2021) and submitted it to EPA (in 2022), on the timeline prescribed by the Agency. The proposed rule does not identify a single piece of evidence that was available at the time Colorado developed and submitted the SIP regarding adverse energy or reliability impacts from the EGU retirement deadlines that Colorado incorporated into the SIP. It is arbitrary and capricious for EPA to rely, in an outcome-determinative way, on information that was not available at the time Colorado submitted the SIP where EPA has both "failed to recognize" that its "use of updated data was entirely outcome determinative" and it has not "reasonably explain[ed] its decision to base its disapproval of" Colorado's "SIP on data that did not exist when the state submitted its SIP."[81] EPA's reliance on information not available when Colorado submitted the SIP is particularly arbitrary here because EPA failed to fulfill its mandatory duty to timely act on Colorado's SIP submission, and it had to be sued and subject to a consent decree before the Agency finally proposed action on Colorado's SIP. Had EPA acted on Colorado's SIP in the timeframe prescribed by the Clean Air Act, the information EPA cites regarding alleged energy and reliability impacts would never have been at issue.

This Section III addresses the source closures listed in Table 3 of EPA's notice of proposed rulemaking.[82] EPA's proposal to disapprove the coal-to-gas conversion of Pawnee Unit 1 is discussed in Section IV below.

A. The State Considered Extensive Evidence on the Energy and Reliability Impacts of the Measures Included in Its Long-Term Strategy.

Contrary to EPA's assertions, the State fully considered the energy and reliability impacts of the retirement deadlines it adopted in its SIP.[83] EPA claims that the State's submission "did not include how grid reliability and electrical demand was evaluated related to the closure of these units. Nor did the evaluation discuss what safeguards, if any, the State considered to ensure concerns about grid reliability and electrical demand would be addressed."[84] Although the State's

[80] *See id.* at 31,938–39.
[81] *Texas v. EPA*, 132 F.4th 808, 862 (5th Cir. 2025).
[82] 90 Fed. Reg. at 31,934.
[83] *See id.* at 31,938.
[84] *Id.*

rulemaking record is replete with evidence that the EGU retirements will not adversely affect the grid, EPA cherry picks a few examples in the SIP submission to conclude that Colorado did not adequately consider energy impacts.[85] EPA claims that "the State's evaluation of the energy and nonair quality environmental impacts of compliance factor did not include how grid reliability and electrical demand was evaluated related to the closure of these units."[86]

EPA's proposal glosses over three key elements of the AQCC rulemakings that culminated in adoption of the SIP. First, before the APCD proposed the draft SIP to the AQCC, the utilities had previously announced all of the EGU retirements after conducting detailed analyses of the impacts of those retirements on the grid. Second, the APCD proposed to make these voluntary retirements federally enforceable through the SIP. And third, the source retirements were approved by the governing body of each utility (the Colorado PUC, in the case of PSCo and Tri-State, and municipal utility boards, in the case of CSU and PRPA). As explained below, the rulemaking record flatly contradicts EPA's assertion that Colorado "did not include how grid reliability and electrical demand was evaluated related to the closure of these units" and did not "discuss what safeguards, if any, the State considered to ensure concerns about grid reliability and electrical demand would be addressed."[87]

1. Utility Owners, Who Are Responsible for Ensuring the Reliability of Their Systems, Concluded that the Retirement Deadlines Are Consistent with Maintaining Electric System Reliability.

First and foremost, EPA ignores that the utility owners of the EGUs at issue had decided to retire each of the sources in Table 3 of EPA's proposed rule before the AQCC adopted the SIP. The retirement deadlines that EPA proposes to disapprove originated with the utilities that own the affected sources. In deciding on the retirement deadlines, each utility comprehensively analyzed the energy and reliability impacts of retiring the sources.[88]

Colorado bifurcated its regional haze SIP rulemaking into two phases, and the APCD proposed its Phase 1 rule in August 2020.[89] In Phase 1, the AQCC adopted on December 16,

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[85] *Id.* (citing passages in the SIP that EPA states "describ[e] the increasing need to fluctuate the utilization of traditional, coal-fired power plants, which have historically provided baseload electric generating capacity, to balance the inherent variability of available capacity generated from renewable resources" and "recognize that accommodating concerns about grid reliability and electrical demand was 'key to the closure date announcements' of the coal-fired power plants, particularly related to the need for further tightening of existing interim emission limits on retiring units" (footnote omitted)).

[86] *Id.*

[87] *Id.*

[88] *See* Derek Stenclik & Aaron Schwartz, Telos Energy, *Colorado Resource Adequacy Planning: How Colorado Utilities and Regulators Ensure Reliability* at 7-8, 18-19 (Sept. 2025) [hereinafter the "Telos Energy Report"] (describing the process by which Colorado's utilities assess reliability in their electric resource plans); *id.* at 11-18 (describing the metrics and methods by which Colorado's utilities assess resource adequacy).

[89] Notice of Rulemaking Hearing, AQCC at 4, EPA-R08-OAR-2024-0607-0003, 03_Hearing Notice & Proposed Language.

2020 a regional haze SIP revision containing the retirement deadlines for all sources in EPA's Table 3, except Hayden Units 1 and 2.[90] In Phase 2, the AQCC adopted on December 17, 2021 a SIP revision containing the Hayden Units 1 and 2 retirement deadlines.[91] The table below shows that the utilities had, prior to the AQCC's adoption of the SIP, announced their intent to retire each of the units in question.

Table 1: Utility Announcements of Source Retirement Dates[92]

EGU unit	**Majority owner/operator**	**Date retirement was first announced by the utility**	**Document in which announcement was made**
Rawhide Unit 1	PRPA	October 29, 2020	2020 Integrated Resource Plan
Martin Drake Unit 6	CSU	June 26, 2020	2020 Electric Integrated Resource Plan
Martin Drake Unit 7	CSU	June 26, 2020	2020 Electric Integrated Resource Plan
Nixon Unit 1	CSU	June 26, 2020	2020 Electric Integrated Resource Plan
Comanche Unit 1	PSCo	August 2017	Proposed Colorado Energy Plan

[90] Meeting Minutes, Dec. 16–18, 2020, AQCC, EPA-R08-OAR-2024-0607-0008, 21b_Meeting Minutes.

[91] Meeting Minutes, Dec. 14–17, 2021, AQCC, EPA-R08-OAR-2024-0607-0015, 22_Meeting Minutes_12-2021.

[92] The table is based on the following sources. For Rawhide: PRPA, *2020 Integrated Resource Plan* 10, 15, 21 (2020) [hereinafter "PRPA 2020 IRP"]. For Drake and Nixon: CSU, *2020 Electric Integrated Resource Plan* 12 (2020) [hereinafter "CSU 2020 EIRP"]. For Comanche 1 and 2: Colo. PUC Proceeding No. 16A-0396E, Supporting Test. and Attachs. of David L. Eves at 4, 44 (Aug. 29, 2017); Colo. PUC Proceeding No. 16A-0396E, Decision No. C18-0761 at 20, 42 (Sept. 10, 2018). For Craig 2 and 3: Press Release, Tri-State, Tri-State announces retirement of all coal generation in Colorado and New Mexico (Jan. 9, 2020). For Cherokee Unit 4: Colo. PUC Proceeding No. 10M-245E, Decision No. C10-1328 at 45–47 (Dec. 15, 2010); Colo. PUC Proceeding No. 21A-0141E, Hr'g Ex. 101, Attach. AKJ-1, Technical App., Rev. 2 at 119 (Table 2.4-2). For Hayden: Press Release, Xcel Energy, Xcel Energy proposes its Clean Energy Plan with a targeted 85% carbon emissions reduction by 2030 (Mar. 31, 2021); Robert Walton, *Xcel to accelerate Hayden coal plant closure as 3 other Colorado plants get reprieve*, UtilityDive, Dec. 21, 2020, https://www.utilitydive.com/news/xcel-to-accelerate-hayden-coal-plant-closure-as-3-other-colorado-plants-get/592525/.

Comanche Unit 2	PSCo	August 2017	Proposed Colorado Energy Plan
Hayden Unit 1	PSCo	January 5, 2021	Press release
Hayden Unit 2	PSCo	January 5, 2021	Press release
Craig Unit 2	Tri-State	January 9, 2020	Press release
Craig Unit 3	Tri-State	January 9, 2020	Press release
Cherokee Unit 4	PSCo	December 15, 2010	PSCo's Clean Air, Clean Jobs Plan

Each utility undertook an extensive planning process that considered the electricity supplies it would need to serve its customers before deciding that it could retire the sources while maintaining reliability. CSU and PRPA, the two utilities that do not have their electric resource plans overseen by the Colorado PUC, followed a similar process to decide on source retirements. In deciding to retire the Rawhide power plant, PRPA spent approximately two years meeting with stakeholders, commissioning consultant studies, analyzing supply and demand data, and conducting computer modeling, culminating in a vote by its board.[93] PRPA's 2020 Integrated Resource Plan (IRP) has an entire section devoted to "reliability planning," which examined the reliability impacts of retiring Rawhide.[94] CSU undertook a similar process over an 18-month period to decide on the Martin Drake and Nixon retirements in its 2020 Electric Integrated Resource Plan (EIRP).[95]

PSCo and Tri-State (whose plans are overseen by the PUC) decided on their source retirements following a similar planning process that extensively considered reliability.[96] PSCo proposed the Comanche 1 and 2 closures in its 2016 electric resource plan (ERP), which the PUC approved after considering analyses, written testimony, and public comments.[97] PSCo is the operator of the Hayden units, but there are other utilities that own shares of Hayden, and PSCo consulted with those co-owners before announcing the retirement dates for Hayden 1 and 2. PSCo's 2021 ERP analyzed the Hayden and Cherokee 4 closures,[98] which the PUC approved.[99]

[93] PRPA 2020 IRP at 12, 24, 33, 55, 68.
[94] *Id.* at 68–85.
[95] CSU 2020 EIRP at 55–97.
[96] *See* PSCo Rebuttal Statement at 3, EPA-R08-OAR-2024-0607-0004, 14_Public Service Company of Colorado dba Xcel Energy.
[97] Colo. PUC Proceeding No. 16A-0396E, Decision No. C18-0761 (Sept. 10, 2018).
[98] *See, e.g.*, Colo. PUC Proceeding No. 21A-0141E, Hr'g Ex. 101, Attach. AKJ-2, Technical App., Rev. 2 at 163, 171–73.
[99] *See, e.g.*, Colo. PUC Proceeding No. 21A-0141E, Decision No. C22-0459 at 29 (Aug. 3, 2022).

Tri-State announced the Craig 2 and 3 closures as part of its "Responsible Energy Plan," which Tri-State's member cooperatives voted on and announced in 2020.[100] Tri-State presented its analysis of the reliability implications of closing Craig 2 and 3 in its 2020 and 2023 ERPs.[101] The PUC approved the Craig closures.[102]

In a joint submission to the AQCC, the four utilities stated:

> Ahead of this rulemaking, each Utility voluntarily announced plans to permanently retire their coal-fired power generation sources well before the end of each unit's remaining useful life. The closure decisions were based on careful analysis of a number of factors, including the need to maintain reliable service at affordable costs.[103]

Each utility also submitted individual statements during the AQCC's SIP rulemaking that highlighted how they had considered reliability when arriving at the retirement deadlines the Division proposed to include in the SIP. For example, CSU stated:

> [Colorado Springs] Utilities did not make its retirement decisions blithely; rather they are the result of its Gas/Electric Integrated Resource Planning process ("G/EIRP"), by which it evaluates the full range of energy resources to ensure reliable service to its ratepayers at the lowest cost. The G/EIRP process accounts for the necessary features of system operation, such as reliability, environmental impacts, flexibility/diversity and innovation.[104]

Indeed, CSU explained that it "ranked reliability as the most important attribute" during its resource planning process.[105] Tri-State noted that "[t]he schedule for these retirements has been

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[100] Press Release, Tri-State (Jan. 9, 2020); *see also* Tri-State Pre-Hearing Statement at 1 EPA-R08-OAR-2024-0607-0004, 14_Tri-State Generation & Transmission Association, Inc. ("The schedule for these retirements has been coordinated within Tri-State's resource planning system to ensure that replacement power can be provided when the retirements will occur. It is important to establish unit and facility retirement dates that will allow Tri-State to make a seamless transition from a steady baseload supply of power to intermittent renewable resources that will require sufficient redundancy and new transmission lines to guarantee adequate power is available." (footnote omitted)); Tri-State Rebuttal Statement at 3–4, EPA-R08-OAR-2024-0607-0004, 14_Tri-State Generation & Transmission Association, Inc.

[101] Colo. PUC Proceeding No. 23A-0585E, Tri-State, *Phase II Implementation Report* (Apr. 11, 2025); Colo. PUC Proceeding No. 20A-0528E, Tri-State, *Phase II Implementation Report* (Feb. 13, 2023).

[102] Colo. PUC Proceeding 23A-0585E, Decision No. C25-0612 at 9, 40 (Aug. 26, 2025); Colo. PUC Proceeding No. 20A-0528E, Decision No. R22-0191 at 8–9 (Mar. 28, 2022).

[103] Joint Mot. to Reconsider at 1–2, EPA-R08-OAR-2024-0607-0004, 14_City of Colorado Springs & Colorado Springs Utilities.

[104] CSU Rebuttal Statement at 7, EPA-R08-OAR-2024-0607-0004, 14_City of Colorado Springs & Colorado Springs Utilities.

[105] *Id.* at 2.

coordinated within Tri-State's resource planning system to ensure that replacement power can be provided when the retirements will occur."[106]

2. The State Relied on the Utilities' Reliability Analyses and Extensively Considered the Energy and Reliability Impacts of the Retirement Deadlines.

In developing its regional haze SIP submission, the State considered the energy and reliability impacts of the source retirements in at least three separate ways: (1) by evaluating, and relying on, the reliability analyses conducted by the utilities and the PUC; (2) by hearing evidence on reliability at the rulemaking hearing held on November 19–20, 2020; and (3) in drafting the SIP narrative and in responding to EPA's comments.

First, as described above, the utilities conducted analyses of the energy and reliability impacts of the EGU retirements they announced, and the information they submitted to the State during the SIP rulemaking was based on those reliability analyses—which the State then considered in developing the SIP. The APCD stated: "The Division requested, and the companies provided, source-specific energy and non-air quality information for each [reasonable progress] unit."[107] The utilities' prehearing statements and rebuttal statements, as well as their joint motion to reconsider, contain information on the processes by which the utilities and their oversight bodies (the utility boards or the PUC) consider energy and reliability impacts of source retirement dates.[108] The APCD noted that it had considered the utilities' analyses of reliability in its proposal to incorporate the retirement deadlines the utilities had proposed (and which were ultimately included in the SIP): "The Division believes the announced closure dates are reasonable having gone through the utilities' internal planning for grid reliability, service stability, and resource demand."[109]

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[106] Tri-State Pre-Hearing Statement at 1, EPA-R08-OAR-2024-0607-0004, 14_Tri-State Generation & Transmission Association, Inc. (footnote omitted).

[107] SIP Narrative at 57.

[108] CSU Rebuttal Statement at 7, EPA-R08-OAR-2024-0607-0004, 14_City of Colorado Springs & Colorado Springs Utilities (stating that CSU's "retirement dates are the result of expert analysis in Utilities' G/EIRP" and explaining how CSU considered reliability in the technical analyses that led CSU to decide to retire Drake and Nixon by the dates in the SIP); Joint Mot. to Reconsider at 8, EPA-R08-OAR-2024-0607-0004, 14_City of Colorado Springs & Colorado Springs Utilities (asserting that the utility boards and the PUC have the authority and the expertise to review the utilities' retirement dates and ensure they are reliable); PSCo Rebuttal Statement at 3, EPA-R08-OAR-2024-0607-0004, 14_Public Service Company of Colorado dba Xcel Energy (explaining that PSCo assesses the reliability of planned retirements through its resource plans filed at the PUC, and that therefore PSCo supported the Division's proposal that incorporated retirement dates that resulted from PSCo's resource plans filed at the PUC); Tri-State Rebuttal at 4, EPA-R08-OAR-2024-0607-0004, 14_Tri-State Generation & Transmission Association, Inc. (describing how the resource plans that Tri-State develops and files at the PUC analyze the reliability of source retirements, and supporting the Division's proposal to incorporate retirement dates that Tri-State had announced).

[109] APCD Rebuttal Statement at 5, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division; *see also id.* at 10; APCD Pre-Hearing Statement at 9,

Second, during the Phase 1 rulemaking to adopt the SIP, the AQCC held an evidentiary hearing on November 19–20, 2020, with Commission deliberations continuing on December 16, 2020. During this hearing, the AQCC heard oral testimony concerning the energy and reliability impacts of the EGU retirements.[110] Witnesses for the APCD, the utilities, and Sierra Club and NPCA all discussed the energy and reliability impacts of proposed retirement deadlines. Witnesses for the APCD and the utilities echoed their parties' written statements that the retirement deadlines proposed by the APCD (which the AQCC ultimately adopted in the SIP) had been selected by the utilities after careful planning that fully considered energy and reliability impacts.[111] In addition, Ron Binz, former chairperson of the Colorado PUC, explained to the AQCC Commissioners how the PUC evaluates electric utilities' resource plans in general, and how the PUC specifically considers reliability.[112] Conservation Organizations prepared a transcript of the relevant portions of the AQCC hearing, which is attached to this comment letter.[113] Notable statements made at the hearing include:

- Lisa Devore, APCD: "Operators selected these dates after looking at technical feasibility[,] which includes looking at the grid and the reliability of the grid."[114]
- Julie Rosen, CSU: CSU engaged in "a robust and comprehensive energy resource planning process occurring over a relatively long period of time . . . it's a holistic plan. It includes all sorts of components in addition to the coal fired unit retirements at Drake and Nixon . . . These [] dates were not selected in a vacuum or [] by themselves. They're a part of a holistic sustainable energy plan adopted by the utilities board."[115]

EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division ("Utilities have noted grid reliability concerns publicly in Electric Resource Plans (ERPs). These issues are also highlighted in Electric Integrated Resource Plans (EIRPs) that may be filed with the PUC as required by 4 CCR 723-3 Rules 3600 and 3605 and during the PUC Process that these issues are key to the closure date announcements." (footnote omitted)); APCD Resp. to Mot. to Reconsider at 5, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division; Transcript Excerpts of 2020 AQCC Hearings at 43–46 (testimony of APCD witness Lisa Devore noting that the Division used and incorporated the utilities' and PUC's analyses).

[110] *See* Meeting Minutes, Nov. 19 & 20, 2020, AQCC, EPA-R08-OAR-2024-0607-0008, 211_Meeting Minutes; Meeting Minutes, Dec. 16–18, 2020, AQCC, EPA-R08-OAR-2024-0607-0008, 21b_Meeting Minutes.

[111] *See* Transcript Excerpts of 2020 AQCC Hearings at 1–6, 43–46 (APCD witness Lisa Devore); *id.* at 16–28 (CSU witness Dave Padgett); *id.* at 28 (CSU attorney Julie Rosen); *id.* at 29–32 (PRPA witness Chris Wood); *id.* at 39–40 (Tri-State witness Andy Berger); *id.* at 41–42 (PSCo witness John Bloomberg).

[112] *Id.* at 7–15 (NPCA/Sierra Club witness Ron Binz).

[113] Conservation Organizations also sent links to the video recordings of the AQCC hearing by email to Jaslyn Dobrahner, the EPA staff contact for this rulemaking. A copy of that email exchange is attached to this comment letter.

[114] Transcript Excerpts of 2020 AQCC Hearings at 5.

[115] *Id.* at 28.

- Chris Wood, PRPA: "In all of our decision-making, we abide by the three core pillars established by our board. We safely deliver energy that is reliable, financially sustainable, and environmentally responsible . . . Our most recent [] integrated resource plan, which was approved by our board just a few weeks ago, sets our current baseline in working towards our 100% non-carbon goal. It includes closure of the Rawhide unit one by December 31st, 2029. . . . It shows how this is achievable while maintaining all three of the board established pillars and also supports a just transition for employees in surrounding communities"[116]

- Doug Lempke, Tri-State: "We must plan to the level of guaranteeing ongoing power and we have to go through a process that will provide with very high confidence that our plans will result in success."[117]

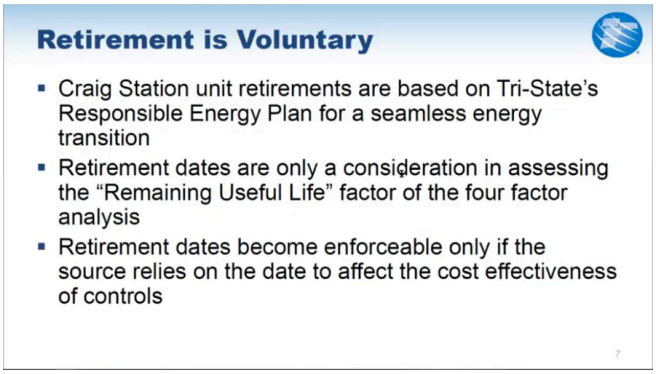
- Andy Berger, Tri-State: The "2029 date that was announced for Craig 3 as a part of our responsible energy plan and that . . . was [] arrived at considering what would allow us to continue to provide reliable power . . . ."[118]

- John Bloomberg, PSCo: Resource planning involves "[t]housands and thousands of documents evaluating whether the particular portfolios that are put forward by a utility are going to satisfy all the goals of that process in terms of reliability[,] is transmission available. What are the costs? . . . if renewables are going to be rolled into the resource mix. Not only are they available on an annual basis or just sort of this generic we can swap out one resource for another, but are they available during peak hourly demand periods? [] what is the resource availability in terms of what we can account for for those renewables? And all of those things go into the resource planning process. . . ."[119]

- Ron Binz, former chair of the Colorado PUC (testifying on behalf of NPCA and Sierra Club): "Nobody anywhere is going to approve a plan that . . . doesn't deliver [] reliable service. Reliable is measured by many standards[,] national, state, regional and otherwise."[120]

- Tri-State Vice President Barbara Walz presented the following slide deck:[121]

[116] *Id.* at 29–31.
[117] *Id.* at 35–36.
[118] *Id.* at 39–40.
[119] *Id.* at 41–42.
[120] *Id.* at 47.
[121] Tri-State Slide Deck from 2020 AQCC Rulemaking Hearing at 7 (referenced in Transcript Excerpts of 2020 AQCC Hearings at 15–16).



Given that at least eight different witnesses presented testimony to the AQCC on the energy demand and grid reliability impacts of the voluntary EGU retirement dates during the evidentiary hearing, EPA's finding that Colorado failed to adequately consider those impacts is patently incorrect.

Finally, in its response to EPA comments on its draft SIP, the State explained how it had considered energy and reliability impacts. In its comments, EPA appeared to question whether it was appropriate for the State to have considered reliability as part of its four-factor analyses.[122] The State defended its consideration of reliability.[123] EPA's proposed disapproval is arbitrary and capricious because EPA cannot now assert that the State failed to consider reliability when EPA previously questioned and criticized the State for doing so as part of its four-factor analyses.

[122] EPA Comments at 2, EPA-R08-OAR-2024-0607-0011, 16_EPA Comments ("Throughout, the state includes 'maintaining grid reliability' and 'meeting demand during this transition [upcoming EGU retirements] is critical to allow for flexibility' as reasons why further controls, including emission limit tightening, is not reasonable. Generally speaking, the rationale for the control determination chosen should be based on the four-factor analysis and not rely on other factors such as grid reliability, future demand, etc. . . . Colorado should explain why considering factors such as these will nonetheless result in a reasonable determination of new or additional controls.").

[123] APCD Resp. to EPA Comments at 5–6, EPA-R08-OAR-2024-0607-0011, 17_Division Response to EPA Comments ("Grid reliability pertains to the third factor, energy and non-air quality impacts. The EGUs at issue in this planning period have been voluntarily scheduled by the utilities to shut-down. . . . These voluntary closures impact the cost-effectiveness of additional controls by shortening the remaining useful life of the sources. . . . The EPA guidance recognizes the need to evaluate non-air environmental impacts based on very source- and place-specific considerations. These EGUs are utility-scale generation sources that serve the citizens of the state. Closing a facility of this size without consideration of grid reliability impacts, a non-air quality impact, through the PUC process can jeopardize the state's entire electric infrastructure, and have broad public and environmental health impacts. Colorado specific consideration of non-air quality impacts and shared jurisdictional control of EGUs with the PUC is critical.").

3. The State Also Considered and Relied on the Oversight of the Municipal Utility Boards and the Colorado Public Utilities Commission.

The State also considered energy and reliability impacts in part by relying on the entities that have jurisdiction to review and approve electric utilities' resource plans under Colorado law. CSU and PRPA are municipally-owned utilities and are overseen by their own governing boards. Each governing board is responsible for reviewing and approving the utility's electric resource plan, and as part of its review, the governing board assesses whether the plan will reliably meet customers' electricity needs.[124] The governing boards of CSU and PRPA approved electric resource plans with the retirement deadlines for Drake, Nixon, and Rawhide that the State ultimately included in its SIP. During Colorado's SIP rulemaking, both the utilities and the APCD argued that it was appropriate for the State to make these voluntary retirements federally enforceable in the SIP because the utilities' governing boards had reviewed the retirement dates and ensured they would not harm reliability.[125] Moreover, both CSU and PRPA later submitted Clean Energy Plans containing these retirement deadlines to the Colorado PUC, which, in consultation with APCD, verified the plans.[126]

In addition to relying on all the evidence on energy and reliability impacts that was presented during the SIP rulemaking, the State relied on the PUC's legal responsibility and expertise to ensure that the EGU retirements for PSCo and Tri-State would not negatively affect grid reliability.[127] Both the Division and the utilities agreed that, for the utilities regulated by the PUC, the PUC would help to ensure that the retirement deadlines proposed by the utilities and incorporated into the SIP were implemented in a manner that maintained reliability.[128]

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[124] CSU, *Excellence in Governance Policy Manual* (Mar. 19, 2025); PRPA, *Organic Contract* (May 30, 2019).

[125] *E.g.*, Joint Mot. to Reconsider, EPA-R08-OAR-2024-0607-0004, 14_City of Colorado Springs & Colorado Springs Utilities; APCD Resp. to Mot. to Reconsider, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division.

[126] *See* Colo. PUC Proceeding No. 22M-0200E, Decision No. C22-0313-I (May 18, 2022) (opening a docket to consult with the APCD to verify Clean Energy Plans from CSU, Holy Cross, and PRPA).

[127] Transcript Excerpts of 2020 AQCC Hearings at 1–6, 43–46 (APCD witness Lisa Devore).

[128] Joint Mot. to Reconsider at 8, EPA-R08-OAR-2024-0607-0004, 14_City of Colorado Springs & Colorado Springs Utilities ("Another type of agency has the responsibility – and the specific authority – to weigh those factors in approving utilities' future resource plans, including transmission constraints, affordability, and reliability. That is the job of the PUC and local utility boards, not the AQCC. The PUC and local utilities boards routinely deal in those complex decisions."); Tri-State Rebuttal Statement at 3–4, EPA-R08-OAR-2024-0607-0004, 14_Tri-State Generation & Transmission, Inc. (describing the PUC's role in assessing the reliability of Tri-State's electric resource plan); APCD Resp. to Mot. to Reconsider at 1, 4–5, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division (explaining that the resource planning process at the PUC was the appropriate forum for evaluating retirement dates, including the reliability impacts of retirement, and supporting the APCD's proposal because it included retirement dates that already had been, or would be, reviewed by the PUC).

Article XXV of the Colorado Constitution states that the Colorado PUC has responsibility for regulating public utilities, including public electric utilities. The PUC regulates the electric resource plans for two of the utilities at issue here: PSCo and Tri-State. Colorado statutes specifically instruct the PUC to consider reliability when reviewing and approving electric resource plans.[129] The PUC's regulations also contemplate that utilities and the PUC will consider reliability during the resource planning process,[130] as well as in other processes such as interconnection of new loads.[131]

As noted above, before the AQCC approved the SIP, the PUC had already conducted a multi-year proceeding in which it had approved PSCo's proposal to retire Comanche Units 1 and 2 by the deadlines that were then incorporated into the SIP.[132] After the SIP was adopted, the PUC approved the retirement deadlines included in the SIP for the remaining PSCo units (Hayden 1 and 2)[133] and the Tri-State units (Craig 2 and 3).[134] The PUC issued these approvals in contested cases in which PSCo and Tri-State submitted testimony from their resource planning experts, along with technical analyses. Parties had the opportunity to issue discovery, submit written testimony, and cross-examine the utilities' witnesses. The PUC had an opportunity to hold an evidentiary hearing and ask questions of the utilities' witnesses. The robustness of these litigated proceedings at the Colorado PUC lends further credence to the conclusion that the State ensured that adequate safeguards were in place to ensure reliability, contrary to EPA's claims.[135]

4. EPA Ignores that the State Included in the SIP Only the Retirement Deadlines that Source Owners Had Proposed, Rejecting a Proposal to Mandate Earlier Involuntary Retirement Deadlines.

In its proposed partial SIP disapproval, EPA ignores what actually transpired in the rulemakings that the AQCC undertook to adopt Colorado's regional haze second implementation period SIP revision. The AQCC rulemakings began with the APCD proposing a rule. The APCD's proposal included the retirement deadlines that were ultimately included in the SIP, and each of those retirement deadlines had been announced by the source owner prior to the

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[129] *E.g.,* Colo. Rev. Stat. § 40-2-125.5(4)(a)(II) (requiring PSCo to submit a Clean Energy Plan to the PUC that would "result in an affordable, reliable, and clean electric system."); *id.* § 40-2-125.5(4)(a)(V)("The clean energy plan must describe the effect of the actions and investments in the clean energy plan on the safety, reliability, and renewable energy integration, and resilience of electric service in the State of Colorado."); *id.* § 40-2-125.5(4)(d)(II) (requiring the PUC to consider the Clean Energy Plan's "impact on the reliability and resilience of the electric system" and stating that the Commission "shall not approve any plan that does not protect system reliability.").

[130] 4 Colo. Code Reg. §§ 723-3:3605(e)(I)–(II), (f)(II)(B), 723-3:3609(a), (b).

[131] *Id.* §§ 723-3:3851, 723-3:3853(f)(I), 723-3:3856(c)(I).

[132] Colo. PUC Proceeding No. 16A-0396E, Decision No. C18-0761 (Sept. 10, 2018).

[133] Colo. PUC Proceeding No. 21A-0141E, Decision No. C22-0459 (Aug. 3, 2022).

[134] Colo. PUC Proceeding No. 23A-0585E, Decision No. C25-0612 (Aug 26, 2025); Colo. PUC Proceeding No. 20A-0528E, Decision No. C23-0437 (June 30, 2023).

[135] *See* 90 Fed. Reg. at 31,938.

Division's proposal.[136] Both before and after requesting that the AQCC open a rulemaking to consider the Division's proposal, the Division met with stakeholders, including the utilities that own the sources subject to the retirement deadlines in the SIP.[137]

Sierra Club and NPCA filed an Alternate Proposal to accelerate the retirement of some of the EGUs.[138] In contrast to the Division's proposal, the Alternate Proposal included retirement deadlines that the sources had *not* announced and had *not* agreed to.[139] The four utilities—CSU, PRPA, Tri-State, and Xcel—opposed the Alternate Proposal[140] and supported the Division's proposal to include in the SIP the retirement deadlines that the AQCC ultimately adopted.[141]

During the AQCC rulemakings that led to adoption of the SIP, no party submitted any evidence that the retirement deadlines in the SIP would cause grid reliability problems or hinder the utilities' ability to satisfy electricity demand. Each of the utility owners of the affected EGUs was a party to the AQCC rulemaking. During the AQCC rulemaking, none of the utilities claimed that the retirement deadlines that were ultimately included in the SIP would threaten reliability. Instead, the utilities argued that the way for the AQCC to best protect electric system reliability when developing its SIP was to rely on the reliability analyses the utilities had

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[136] *See supra* Sections I.C, II.A.1; *see also* APCD Prehearing Statement at 2, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division ("[T]he Division is proposing a first regional haze rulemaking to move the regional haze provisions from Regulation Number 3 to a new Regulation Number 23 and include closure dates for nine RP sources, mostly electric generating units (EGUs) at several power generating stations around the state and a coal mine on the west slope, that have announced retirements.").

[137] APCD Prehearing Statement at 3, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division; *see also* Transcript Excerpts of 2020 AQCC Hearings at 3–4 (testimony of APCD witness Lisa Devore, describing the APCD's outreach to the utilities and the utilities' analysis of the technical and economic feasibility of the closure dates they proposed).

[138] NPCA and Sierra Club Prehearing Statement at 10–38,EPA-R08-OAR-2024-0607-0004, 14_National Parks Conservation Association & Sierra Club.

[139] *Id.*

[140] *E.g.*, PSCo Rebuttal Statement at 3, EPA-R08-OAR-2024-0607-0004, 14_Public Service Company of Colorado dba Xcel Energy; Tri-State Rebuttal Statement at 3, EPA-R08-OAR-2024-0607-0004, 14_Tri-State Generation & Transmission, Inc.; PRPA Rebuttal Statement at 2−4, EPA-R08-OAR-2024-0607-0004, 14_Platte River Power Authority; CSU Rebuttal Statement at 3, 5–8, EPA-R08-OAR-2024-0607-0004, 14_City of Colorado Springs & Colorado Springs Utilities.

[141] The utilities' filings in Phase 2 of the AQCC's SIP rulemaking indicated that the utilities still supported inclusion of the EGU retirement deadlines in Colorado's regional haze SIP revision. *See, e.g.*, CSU Prehearing Statement at 2, EPA-R08-OAR-2024-0607-0010, 15_PARTY_City of Colorado Springs & Colorado Springs Utilities; PRPA Prehearing Statement at 3, EPA-R08-OAR-2024-0607-0010, 15_PARTY_Platte River Power Authority; PSCo Prehearing Statement at 1, EPA-R08-OAR-2024-0607-0010, 15_PARTY_Public Service Company of Colorado dba Xcel Energy; Tri-State Prehearing Statement at 1, EPA-R08-OAR-2024-0607-0010, 15_PARTY_Tri-state Generation & Transmission Association Inc.

conducted and on the PUC and municipal utility board processes for approving the utilities' resource plans.[142] The APCD presented similar arguments.[143]

Ultimately, the AQCC adopted a SIP based on the APCD's proposal to include the retirement deadlines that the utilities supported and had announced prior to Colorado's SIP rulemaking. The AQCC rejected the Alternate Proposal primarily because it found that the Alternate Proposal had not adequately analyzed the reliability impacts of the accelerated retirement deadlines, whereas the utilities had already analyzed the reliability impacts of the retirement deadlines in the APCD's proposal.[144]

In sum, the fact that the utility-supported EGU retirements would not create harmful energy or reliability impacts was a primary factor on which the AQCC based its decision to adopt the retirement deadlines in the SIP. EPA's claims that the State did not adequately consider these issues are incorrect, and thus EPA cannot rationally justify partially disapproving the SIP on this basis.

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[142] Joint Mot. to Reconsider at 8, EPA-R08-OAR-2024-0607-0004, 14_City of Colorado Springs & Colorado Springs Utilities ("Another type of agency has the responsibility – and the specific authority – to weigh those factors in approving utilities' future resource plans, including transmission constraints, affordability, and reliability. That is the job of the PUC and local utility boards, not the AQCC. The PUC and local utilities boards routinely deal in those complex decisions."); *id.* at 9 ("We urge commissioners to . . . adopt the revised proposal the Division submitted at the start of the AQCC's hearing.").

[143] APCD Resp. to Joint Mot. to Reconsider at 1, 4–5, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division.

[144] 5 Colo. Code Regs. § 1001-27, Part B, at 32, EPA-R08-OAR-2024-0607-0015, 25_5 CCR 1001-27 [hereinafter the "Statement of Basis and Purpose"] ("The Commission recognizes concerns regarding grid reliability and demand needs are substantiated. Utilities have noted publicly in Electric Resource Plans (ERPs) and Electric Integrated Resource Plans (EIRPs) filed with the PUC as required by 4 CCR 723-3 Rules 3600 and 3605 that these issues are key to the closure date announcements. The Commission considered an alternative proposal to advance the closure dates for the Nixon, Rawhide, and Craig 3 power plants to the end of 2028. While this proposal was not ultimately adopted . . ."). The APCD agreed with the utilities and argued that "[t]he Alternate Proposal was not supported by the detailed and thorough cost and reliability analyses performed by the utilities that the Division's proposed closure dates went through, or in the case of Tri-State and Xcel, will go through, in the electric resource planning processes." APCD Resp. to Joint Mot. to Reconsider at 1, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division. The AQCC also agreed with the APCD's argument that "[t]he utilities undertook their own individual processes to assess the various impacts of closing the named facilities, including determining if and when closure would be technically feasible or economically reasonable. There is no evidence in the record regarding any stakeholder outreach or utility feasibility consultation associated with NPCA's alternate proposal and the proposed closure deadlines." APCD Rebuttal Statement at 10, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division; *see also* Transcript Excerpts of 2020 AQCC Hearings at 51 (statements of Commissioners Milford and Ogletree expressing reservations about the adequacy of the technical information in the record about the feasibility of the Alternate Proposal).

5. The State Relied on Long-Standing Processes Employed by Municipal Utility Boards and the Colorado PUC to Safeguard Reliability.

EPA incorrectly claims that the State did not "discuss what safeguards, if any, the State considered to ensure concerns about grid reliability and electrical demand would be addressed."[145] EPA appears to be unfamiliar with the AQCC rulemaking record, which contains extensive discussion of safeguards to protect reliability. By ignoring the voluminous AQCC rulemaking record summarized above, EPA's proposal is arbitrary and capricious and unlawful.[146]

As discussed previously, the utilities voluntarily proposed the EGU retirement dates after conducting years-long analyses that found the retirements compatible with maintaining reliability. During the AQCC rulemakings to develop the SIP, no party claimed that the retirement deadlines ultimately included in the SIP would harm reliability. Thus, the Conservation Organizations disagree with EPA's premise that the State was legally obligated to discuss "safeguards" for addressing the reliability of voluntary retirements proposed and analyzed by the utilities themselves.

Regardless, the record shows that the State relied on existing regulatory processes in Colorado as a safeguard against grid reliability and electrical demand issues. The utilities and the APCD noted that the entities that oversee electric resource plans—municipal utilities' governing boards and the Colorado PUC—have the expertise and the responsibility to ensure that utility plans are reliable, and that they are implemented in a manner consistent with maintaining reliability.[147] As explained in the attached Telos Energy Report, Colorado utilities revise their electric resource plans at regular intervals, and a core component of these revisions is updating demand forecasts and ensuring that adequate generating resources exist to meet current and future demand.[148] And the process for all Colorado utilities is flexible enough to allow for procurement even outside of the regular schedule for developing resource plans; for example, the PUC recently approved PSCo's proposal to expedite procurement of new generation and storage resources in light of changes in federal law.[149] The regularly-scheduled updates to resource plans, combined with the flexibility to procure resources outside of regular plan updates, allow municipal boards and the PUC to approve the acquisition of new generating resources to ensure that there is enough supply to meet demand. In addition to the resource planning that the utilities conduct, this regulatory process that happens at the municipal boards and the Colorado PUC is

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[145] 90 Fed. Reg. at 31,938.

[146] *See generally Fred Meyer Stores, Inc. v. Nat'l Labor Relations Bd.*, 865 F.3d 630, 638 (D.C. Cir. 2017) (explaining that an agency's decision "evidence[d] a complete failure to reasonably reflect upon the information contained in the record and grapple with contrary evidence—disregarding entirely the need for reasoned decisionmaking").

[147] *E.g.*, APCD Rebuttal Statement at 5, 10, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division.

[148] Telos Energy Report at 6, 15.

[149] Colo. PUC Proceeding No. 21A-0141E, Decision No. C25-0652-I (Sept. 8, 2025).

the primary safeguard against reliability issues. The State relied on and discussed this safeguard in the SIP rulemaking.[150]

6. EPA's Position that the State Was Required to Consider Reliability Impacts is Unsupported by Law, Inconsistent with Existing Rules and Guidance, and Is a New Position EPA Failed to Acknowledge and Explain.

As explained above, the State thoroughly considered the energy demand and grid reliability impacts of the voluntary EGU retirements that it codified and proposed to make federally enforceable in the SIP. But even if the State had not adequately considered those impacts, that would not provide sufficient grounds for EPA to disapprove the SIP because the Clean Air Act does not require states to consider energy demand or grid reliability when developing a regional haze SIP revision. Neither the Clean Air Act nor the Regional Haze Rule mentions energy demand or grid reliability. EPA cannot disapprove Colorado's SIP for its alleged failure to consider factors—energy demand and electric system reliability—that states are not legally required to consider.

Moreover, as noted above in Section II.A.2, it would be arbitrary and capricious for EPA to disapprove Colorado's SIP for alleged failure to consider reliability impacts when EPA had previously submitted comments to Colorado that expressly criticized the State for considering grid reliability.[151] EPA's prior comments to Colorado are further evidence that the State did in fact consider reliability, contrary to EPA's claims in the proposed rule.[152] And EPA cannot now disapprove the SIP for failing to do something—consider grid reliability—that EPA previously faulted the State for doing.[153] EPA's current interpretation of the Clean Air Act as requiring states to consider reliability in four-factor analyses is contrary to the prior interpretation EPA conveyed in its comments to Colorado, and EPA has failed to display awareness of its change in position and articulate a rational basis for its new position.

In addition, EPA's claim that the State was obligated to consider grid reliability impacts is inconsistent with EPA's existing regulations and guidance, which do not include system-wide energy demand and grid reliability impacts within the statutory factor of "energy and non-air

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[150] *E.g.*, APCD Rebuttal Statement at 5, 10, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division; *see also* Transcript Excerpts of 2020 AQCC Hearings at 1–6, 43–46 (testimony of APCD witness Lisa Devore).

[151] *See Kentucky v. EPA*, 123 F.4th 447, 452 (6th Cir. 2024) ("The EPA acted in an 'arbitrary' way by telling Kentucky one thing and then doing another.")

[152] EPA Comments at 2, EPA-R08-OAR-2024-0607-0011, 16_EPA Comments ("Throughout, the state includes 'maintaining grid reliability' and 'meeting demand during this transition [upcoming EGU retirements] is critical to allow for flexibility' as reasons why further controls, including emission limit tightening, is not reasonable. Generally speaking, the rationale for the control determination chosen should be based on the four-factor analysis and not rely on other factors such as grid reliability, future demand, etc… Colorado should explain why considering factors such as these will nonetheless result in a reasonable determination of new or additional controls.").

[153] *See id.*

quality environmental impacts of compliance." That factor must be considered under both Best Available Retrofit Technology (BART)[154] and reasonable progress requirements.[155] Prior to this proposed rule, EPA's interpretation of that factor did not include a requirement to consider system-wide energy demand and electric grid reliability.

In its BART Guidelines, EPA provided extensive direction on how states should interpret "energy impacts"—namely, to assess the energy requirements of operating potential pollution control technologies.[156] EPA reinforced how it interpreted this factor for purposes of reasonable progress in its 2007 Reasonable Progress Guidance, stating that "[i]n assessing energy impacts, you may want to consider whether the energy requirements associated with a control technology result in energy penalties. For example, controls on diesel engines may decrease the engine's fuel efficiency, leading to an increase in diesel fuel consumption."[157] EPA reaffirmed this interpretation in its 2019 Guidance, stating that "the energy and non-air environmental impacts – generally involves assessing the impacts of a control measure on the energy consumed by a source."[158] In discussing the "energy impacts" component of this factor, EPA stated that "[w]e recommend that states focus their analysis on direct energy consumption at the source rather than indirect energy inputs needed to produce raw materials for the construction of control equipment."[159] Furthermore, in EPA's 2017 Regional Haze Rule Revision rulemaking, no comments suggesting that this factor be interpreted as including system-wide energy demand or grid reliability considerations were received or discussed by EPA.[160]

EPA has consistently and exclusively interpreted this factor as warranting a comparison of the energy requirements between potential control measures, and not any consideration of potential impacts on system-wide energy demand or electric grid reliability. The interpretation of "energy and non-air quality environmental impacts of compliance" that EPA advances in this action is inconsistent with the interpretation the Agency announced in developing the BART Guidelines, the Regional Haze Rule, and guidance documents.

To the extent that EPA is now announcing a new interpretation of "energy and non-air quality environmental impacts" as requiring consideration of system-wide energy demand and grid reliability impacts, EPA's new position is unlawful for the additional reasons that: (1) EPA cannot revise the Regional Haze Rule through action on this SIP because EPA has not provided notice that it intends to revise that rule and has not provided an opportunity to comment on any such revisions;[161] and (2) EPA has failed to acknowledge its change in position regarding the

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[154] 42 U.S.C. § 7491(g)(2), 40 C.F.R. § 51.308(e)(1)(ii)(a).
[155] 42 U.S.C. § 7491(g)(1), 40 C.F.R. § 51.308(f)(2)(i).
[156] Guidelines for BART Determinations Under the Regional Haze Rule ("BART Guidelines"), 40 C.F.R. Part 51 Appendix Y, § IV(D)(4)(h).
[157] EPA, *Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program* at 5-2 (June 1, 2007).
[158] EPA, *Guidance on Regional Haze State Implementation Plans for the Second Implementation Period* 33 (Aug. 2019) [hereinafter "2019 Guidance"].
[159] *Id.*
[160] *See* EPA, *Responses to Comments on Protection of Visibility: Amendments to Requirements for State Plans; Proposed Rule* (Dec. 2016).
[161] *See* 5 U.S.C. § 553(c); 42 U.S.C. § 7410(a)(2); 40 C.F.R. § 51.102(a).

interpretation of "energy and non-air quality environmental impacts" and failed to explain the bases for its new position.[162]

This argument applies equally to EPA's contention that the State did not consider "safeguards" to "ensure concerns about grid reliability and electrical demand would be addressed."[163] It is not clear what EPA means by "safeguards" and whether this contention is distinct from EPA's assertion that Colorado "did not include how grid reliability and electrical demand was evaluated related to the closure of these units."[164] But as noted above, throughout the SIP rulemaking, the State noted that existing regulatory processes at the Colorado PUC and the boards of the municipal utilities would ensure the reliability of the electric grid. And the attached Telos Energy Report demonstrates that multiple layers of safeguards—including utility planning and utility board or PUC oversight—exist to ensure the reliability of Colorado's electric grid. Colorado pointed to the PUC's oversight of PSCo and Tri-State, and PRPA's and CSU's Boards' oversight of their respective utilities, as mechanisms for ensuring electric system reliability.[165] But even if the State had not relied on those safeguards, neither the Clean Air Act nor the Regional Haze Rule require a state to even consider such safeguards when developing a regional haze SIP, much less to include them in a regional haze plan.

B. The Record Does Not Support EPA's Implicit Judgment that the Source Retirements Will Impair Reliability.

To the extent that EPA is proposing to disapprove, or does disapprove, the EGU retirements based on its judgment that the retirements will impair the reliability of the electric grid and/or lead to electricity shortfalls, the Agency's judgment is unsupported by the evidence and is arbitrary and capricious.

1. There Is No Evidence that Retiring the EGUs Owned by PRPA, PSCo, and Tri-State Will Harm Reliability.

Publicly available evidence indicates that PRPA, Tri-State, and PSCo remain committed to implementing the source retirements that they first proposed prior to adoption of the SIP, and which are codified in the SIP. As both a legal and a practical matter, each utility has primary responsibility for maintaining electric reliability within their service territory.[166] Each of these utilities' most recent electric resource plans continue to include the retirement deadlines that were incorporated into the SIP. And in an April 2025 submission to EPA, CSU noted that "[n]o

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[162] *Fed. Commc'ns Comm'n v. Fox TV Stations, Inc*., 556 U.S. 502, 515 (2009) (Ordinarily, an agency must "display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* . . . And of course the agency must show that there are good reasons for the new policy.").
[163] 90 Fed. Reg. at 31,938.
[164] *Id.*
[165] *See*, *e.g.*, APCD Rebuttal Statement at 5, 10, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division.
[166] *See* Telos Energy Report at 9-11.

other utility has raised any technical or reliability concerns about their ability to retire their coal plants in accordance with CDPHE's current schedule for early coal plant retirements."[167]

PSCo currently has a Phase I electric resource plan proceeding that is pending before the Colorado PUC.[168] PSCo's current plan reflects the fact that Comanche Unit 1 retired in 2022, consistent with the retirement deadline in the SIP.[169] PSCo's current plan also includes retiring Comanche 2 by the end of 2025, Hayden 1 by the end of 2028, and Hayden 2 by the end of 2027.[170] In PSCo's last resource plan proceeding, the PUC approved the acquisition of new resources to replace the energy and capacity from Comanche 2, Hayden 1, and Hayden 2.[171] In Phase II of PSCo's pending electric resource plan, the PUC will approve any additional resources that may be needed to accommodate load growth (i.e., increased demand) and maintain grid reliability. PSCo analyzed the energy and reliability impacts of retiring the Comanche and Hayden units and concluded that it could reliably serve its customers' electricity needs without those coal units.[172] PSCo's analyses account for load growth, including load growth from new large industrial customers such as data centers; in fact, load growth was one of the central issues in PSCo's pending resource plan.[173] At no point in the past two PSCo electric resource plan proceedings did PSCo, any intervenor, or the PUC provide any evidence that retiring Comanche 1 and 2 and Hayden 1 and 2 would impair grid reliability.

Similarly, Tri-State's most recent electric resource plan analyzes and includes the retirement of Craig Units 2 and 3. The PUC recently approved Tri-State's electric resource plan,[174] which includes retiring Craig Unit 2 by September 30, 2028, and retiring Craig Unit 3 by January 1, 2028 (even earlier than the deadline in the SIP).[175] The PUC approved Tri-State's acquisition of new generating and storage resources—including construction of a new 307 MW gas plant—that will replace the energy and capacity from retiring the Craig units.[176]

In addition, Tri-State is a wholesale electric cooperative that generates and transmits electricity to retail cooperatives that distribute the electricity to end users. Several distribution

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[167] Overview of 04/23/25 CSU Meeting with CDPHE (Apr. 23, 2025), EPA-R08-OAR-2024-0607-0028.
[168] Page 7 of the Telos Energy Report describes the Phase I and Phase II processes in electric resource plan proceedings.
[169] Colo. PUC Proceeding No. 24A-0442E, Hr'g Ex. 101, Attach. JWI-2, Volume 2 - Technical App., Rev. 2 at 84–85 (not showing Comanche 1 in the list of existing generating resources).
[170] *Id.* (showing estimated retirement dates for existing PSCo generation units).
[171] Colo. PUC Proceeding No. 21A-0141E, Decision No. C24-0052 (Jan. 23, 2024).
[172] *See, e.g.*, Colo. PUC Proceeding No. 24A-0442E, Hr'g Ex. 101, Attach. JWI-2, Volume 2 - Technical App., Rev. 2.
[173] *See id.* at 27–81 (discussing demand forecasts); *see also* Colo. PUC Proceeding No. 24A-0442E, Hr'g Ex. 107, Direct Test. and Attachs. of Thomas L. Bailey (Oct. 15, 2024); Colo. PUC Proceeding No. 24A-0442E, Hr'g Ex. 123, Rebuttal Test. and Attachs. of Thomas L. Bailey (May 23, 2025).
[174] Colo. PUC Proceeding No. 23A-0585E, Decision No. C25-0612 (Aug. 26, 2025).
[175] Colo. PUC Proceeding No. 23A-0585E, Tri-State, *Phase II Implementation Report* 54 tbl.70 (showing the retirement dates in the portfolio that the PUC ultimately approved).
[176] Colo. PUC Proceeding No. 23A-0585E, Decision No. C25-0612 at 3 (Aug. 26, 2025).

cooperatives who were members of Tri-State have exited Tri-State, meaning that they are no longer customers and therefore Tri-State does not provide electricity to them. United, LaPlata, and Mountain Parks have exited Tri-State's system, reducing Tri-State's load by 21%.[177] As a result, Tri-State forecasts that after its largest member cooperatives exited its system in 2024, its winter peak demand will be lower in every year for the next decade relative to its 2024 winter peak demand.[178] Similarly, Tri-State forecasts that its summer peak demand in 2025 and 2026 will be lower than in 2024, and that summer peak demand in 2027 will be roughly equal to summer peak demand in 2024.[179] Tri-State's shrinking customer base was reflected in its analysis of the energy and reliability impacts of retiring and replacing the Craig units.

PRPA finalized its most recent integrated resource plan in 2024, and that plan reflects the retirement of Rawhide Unit 1 by the end of 2029.[180] PRPA's 2024 IRP analyzed the reliability of PRPA's system after the retirement and replacement of Rawhide 1, and PRPA concluded the system would remain reliable.[181] This conclusion echoed the conclusions in PRPA's 2020 IRP that PRPA could retire and replace Rawhide 1 by the end of 2029 and maintain system reliability.

EPA states that it reviewed the SIP in light of the resurgence of domestic manufacturing and AI data centers.[182] But the utilities have already accounted for electricity demand from these sectors in their service territories when they developed their resource plans. The attached Telos Energy Report describes how electric utilities consider demand growth in the load forecasts they use in electric resource planning.[183] Here, each of the electric utilities that have source retirements in the SIP has prepared a resource plan with a detailed calculation of the utility's current and future electricity demand, and the resources needed to meet that demand. PRPA's current resource plan was finalized in 2024; Tri-State's current resource plan was approved by the PUC in the summer of 2025; and PSCo's current resource plan is pending at the PUC, with the PUC expected to issue its Phase I decision in fall of 2025. PRPA, Tri-State, and PSCo each have resource plans that were developed within the last year that fully account for each utility's expectations of growth in electricity demand from all sources, including any manufacturing or data center facilities.[184] PRPA, PSCo, and Tri-State have retained the retirement deadlines in the

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[177] Colo. PUC Proceeding No. 23A-0585E, Hr'g Ex. 101, Direct Test. and Attachs. of Lisa K. Tiffin, Rev. 1 at 14 (Dec. 1, 2023) ("The most significant change between our 2020 ERP and the 2023 ERP is the reduction in load modeled throughout most of the Resource Planning Period ("RPP") resulting from the planned exit of three Tri-State members in 2024 and 2025. These Members, combined, represented 21 percent of Tri-State's load, primarily in Colorado." (footnote omitted)).

[178] Colo. PUC Proceeding No. 23A-0585E, Hr'g Ex. 101, Attach. LKT-1, Attach. F at 7 (filed Dec. 1, 2023).

[179] *Id.*

[180] PRPA, *2024 Integrated Resource Plan* 30 (2024) [hereinafter "PRPA 2024 IRP"] ("Rawhide Unit 1 will close by the end of 2029"); *see also id.* at 106, 133, 181.

[181] *See id.*

[182] 90 Fed. Reg. at 31,938.

[183] Telos Energy Report at 6, 10.

[184] Colo. PUC Proceeding 24A-0442E, Hr'g Ex. 101, Attach. JWI-2, Volume 2 - Technical App., Rev. 2 at 27–81 (discussing elements of the demand forecast in PSCo's 2024 electric resource plan); PRPA 2024 IRP at 56–97 (presenting PRPA's demand forecast); Colo. PUC Proceeding

SIP in their resource plans and reaffirmed that they can reliably meet customers' electricity needs by retiring and replacing those sources.

EPA also cites a 2024 NERC study to suggest that retiring and replacing the EGUs would impair grid reliability in Colorado.[185] That study simply does not say what EPA suggests it does. The 2024 NERC study does not state that retiring and replacing any of the EGUs included in Table 3 of EPA's proposal would lead to an unreliable electric grid in Colorado. The passages quoted by EPA in the proposed rule reflect NERC's generalized assessment of the overall challenges facing the electric industry as a whole in North America—not NERC's assessment of Colorado in particular.[186] In fact, NERC determined that, in contrast to higher-risk regions in North America, the region that includes Colorado is "expected to have sufficient resources under a broad range of assessed conditions."[187] NERC's probabilistic analysis "indicate[s] negligible unserved energy and load-loss risk" for this region,[188] which NERC stated was likely to experience increased demand from data centers.[189] As to the "reliability challenges facing the industry,"[190] a challenge is just that: a situation that can be navigated successfully with the right approach. The existence of a challenge does not mean that Colorado's utilities and their governing bodies will fail to meet the challenge. Nowhere in the 2024 study does NERC predict that Colorado utilities will fail to maintain reliability if they continue to implement the source retirements in Table 3 of EPA's proposal. The attached Telos Energy Report explains the multiple layers of safeguards in place for ensuring reliability of Colorado's electric grid, including utility resource planning and procurement, utility board oversight, and PUC oversight of utilities.

In addition, the United States Department of Energy's (DOE) July 2025 report[191] would not support disapproval of the source retirements in Table 3 of the proposed rule. As the attached report from the Institute for Policy Integrity and the attached requests for rehearing explain, DOE's report is riddled with unreasonable assumptions and is based on a flawed methodology.[192]

No. 23A-0585E, Hr'g Ex. 101, Attach. LKT-1, Attach. F (presenting Tri-State's load forecast); Colo. PUC Proceeding No. 23A-0585E, Phase II Implementation Report Attachment B: Modeling Assumptions (filed Apr. 11, 2025).

[185] 90 Fed. Reg. at 31,939 (citing NERC's 2024 Long-Term Reliability Assessment).

[186] The statements quoted in the NPRM are taken from a paragraph describing NERC's findings for "most of the North American BPS [bulk power system]." NERC, *2024 Long-Term Reliability Assessment* at 6, EPA-R08-OAR-2024-0607-0035. As explained above, NERC classified the region that includes Colorado as "normal risk" (the lowest-risk category), indicating that the quoted statements cannot be assumed to reflect NERC's assessment of this region. *Id.*

[187] *Id.*; *see also id.* at 12 ("NERC assesses areas as normal risk when resource adequacy criteria are met and there is a low likelihood of electricity supply shortfall even when demand is above forecasts or resource performance is abnormally low (e.g., above-normal forced outages or low [variable energy resource] performance).").

[188] *Id.* at 129.

[189] *Id.* at 32.

[190] 90 Fed. Reg. at 31,939 (quoting NERC, *2024 Long-Term Reliability Assessment* at 6).

[191] U.S. Dep't of Energy, *Resource Adequacy Report: Evaluating the Reliability and Security of the United States Electric Grid* (July 2025) [hereinafter "DOE Report"].

[192] Jennifer Danis et al., *Enough Energy: A Review of DOE's Resource Adequacy Methodology* (July 2025), https://policyintegrity.org/publications/detail/enough-energy; *In re: Resource*

For example, the DOE report assumes that only a small fraction of the generating and storage resources that utilities are planning to build come online to replace power plants that retire.[193] That assumption is factually incorrect for Colorado's utilities, which have already built and/or contracted for new generating and storage resources to replace most of the sources in Table 3, or have concrete plans to acquire replacement resources in the future.[194] Moreover, as the attached Telos Energy Report notes, the reliability analyses conducted by PRPA, PSCo, and Tri-State in their resource plans are more granular and more accurate than the kind of nationwide assessment DOE conducted based on NERC's methodologies.[195] The DOE report conducted modeling on a regional basis, rather than on a utility-specific basis as PRPA, PSCo, and Tri-State do. For these reasons, relying on the DOE report to support a partial disapproval of Colorado's SIP submission would be arbitrary and capricious.

2. CSU's Statements Do Not Establish that Retiring Nixon By the Deadline in the SIP Would Harm Reliability.

Even for CSU, the record does not show that retiring Nixon by the end of 2029 would impair grid reliability or cause CSU to be unable to meet electricity demand. First and foremost, in making those assertions, CSU has not pointed to the same kind of robust reliability analyses that it conducted when it originally announced Nixon's retirement. As noted in the Telos Energy Report, the industry standard in the electric utility industry is to conduct sophisticated computer modeling of the hourly dispatch of a utility's system over several years to assess reliability as part of the resource planning process.[196] CSU did that in the 2020 IRP (confirmed by its 2022 CEP), in which CSU decided to retire Nixon by the end of 2029. CSU has not presented any

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Adequacy Report: Evaluating the Reliability and Security of the United States Electric Grid, July 2025, State Attorneys General Mot. to Intervene and Request for Reh'g at 15–16, 22 (Aug. 6, 2025) (explaining that the DOE Report assumed an unrealistic and unexplained amount of load growth); *id.* at 16–17 (the DOE Report used unreasonably low estimates of capacity additions); *id.* at 25–27 (the DOE Report is not granular and specific enough to support its conclusions); *In re: Resource Adequacy Protocol, Evaluating the Reliability and Security of the United States Electric Grid*, Clean Energy Orgs. Request for Reh'g at 24–25 (explaining that the DOE Report fails to account for the ability of utilities to plan for and meet any resource needs occurring in 2030); *id.* at 28–36 (showing that the DOE Report underestimates the amount of new resources that will come online by 2030), *id.* at 38–40 (noting that the DOE Report overestimates the retirements expected by 2030).

[193] DOE Report, App. A at A-5 (noting that to develop the 2030 portfolios, the study "[a]ssumes that only projects considered very mature in the development pipeline—such as those with signed interconnection agreements—will be built. This results in minimal capacity additions beyond 2026.").

[194] *See* Colo. PUC Proceeding No. 23A-0585E, Decision No. C25-0612 (Aug. 26, 2025) (approving a portfolio to replace Tri-State's Craig units); Colo PUC Proceeding No. 21A-0141E, Decision No. C24-0052 (Jan. 23, 2024) (approving a portfolio to replace PSCo's Comanche Units 1 and 2); CSU's 2020 and 2024 EIRPs (describing the portfolio of resources that will replace the Nixon and Drake coal units); PRPA's 2020 and 2024 IRPs (describing the portfolio of resources that will replace Rawhide).

[195] Telos Energy Report at 10.

[196] *Id.* at 11–13.

comparable analysis showing that its original conclusion—that it could retire Nixon by the end of 2029 and maintain reliability—no longer hold true.

CSU is governed by a board that approves its electric resource plans. The only resource plan that has been approved by CSU's board and is in effect today requires retiring and replacing Nixon by the end of 2029.[197] Whatever CSU has stated in letters to EPA or the Colorado Department of Public Health and Environment (CDPHE), and whatever CSU may say in its comment letter to EPA in this rulemaking, the fact remains that the only official electric integrated resource plan that CSU's board has approved states that CSU will retire Nixon by the end of 2029. Only CSU's board has the authority to approve changes to an electric resource plan, and the record does not reflect any such change approved by that board. Moreover, as of the date this comment letter is being submitted, CSU's website still states that it will retire and replace Nixon on the timeline adopted in the SIP.[198] EPA's reliance on mere assertions from CSU that are unsupported by any actual reliability analyses, and that are unsupported by evidence that CSU's governing body has approved a change to the Nixon retirement date, would be arbitrary and capricious.

In addition, CSU's statements in its recent letters to EPA and CDPHE regarding why it cannot retire and replace Nixon by the end of 2029 do not withstand scrutiny. CSU asserts that it would be in a capacity-negative position if it retired Nixon by the end of 2029[199]—but that is based on the unreasonable assumption that CSU does not replace Nixon with other generating and storage resources. The unreasonableness of this assumption is proven by CSU stating that it prefers to retire Nixon in 2035, but showing that if it retires Nixon in 2035 but does not replace it, CSU will be short of capacity.[200] This underscores the obvious point that if a utility retires a generating unit without replacing it (and does not experience a decrease in demand), the utility will face a capacity shortfall. Regardless of when Nixon retires, CSU would be short on capacity if it does not replace Nixon's capacity and does not experience a decrease in demand. CSU cannot manufacture a reliability problem by making the unreasonable assumption that it would retire a generating unit without replacing it.

CSU's assertion that it will be in a capacity-negative position also suffers from unsubstantiated allegations about load growth, particularly from data centers. Although CSU proffers that it "entertained nine prospects looking to enter the Colorado Springs market to serve traditional and hyper-scale AI datacenters" in 2024, amounting to 911 MW of new "potential power demand," CSU provides no information on the likelihood that these data centers will materialize.[201] Utilities across the country are confronting "phantom" interconnection requests

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[197] CSU 2020 EIRP at 12.
[198] Ray D. Nixon Power Plant, CSU, https://www.csu.org/facilities/nixon-power-plant ("To meet state regulations, we plan to close and decommission Nixon's coal turbines and related equipment in 2030.") (last visited Sept. 15, 2025).
[199] Letter from Travas Deal, Chief Exec. Officer, CSU, to Jill Hunsaker Ryan, Exec. Dir., CDPHE at pdf pp. 4, 7–9 (Mar. 11, 2025), EPA-R08-OAR-2024-0607-0026 [hereinafter "Mar. 11, 2025 CSU Letter"].
[200] *Id.*
[201] *Id.* at pdf p. 8.

from data centers, which often shop around a single proposal to multiple jurisdictions.[202] These speculative interconnection requests distort demand forecasts and inject uncertainty into utilities' planning processes.[203] Without more information on the likelihood of any of the data center "prospects" actually coming online in CSU's service territory, "entertaining" those prospects is not enough to justify CSU's inclusion of such speculative load in its capacity projections. Furthermore, demand response and other flexibility measures will allow data centers to consume less power than previously believed and will reduce the need to build more generation and transmission.[204]

CSU implicitly concedes that it could retire and replace Nixon by the end of 2029, but simply prefers not to, because of alleged cost constraints. CSU received over 200 responses from developers to its 2024 Request for Proposal (RFP).[205] CSU moved forward with only 2 of those 200 responses because CSU alleges that the project costs for the other bids would be too high, leading to a "13.9% increase in electric rates over 10 years" if it "were to pursue the project mix offered by developers in this RFP."[206] CSU did not explain how it calculated that projected rate increase, and it is not clear whether it is based on the highest-cost bids, an average of all 198 bids that CSU rejected, or some other subset. CSU did not state whether it attempted to negotiate lower costs with any developers of the 198 projects it rejected. Nor did CSU contend that the purported rate increase would be impermissible or unacceptable. For example, CSU did not explain how that rate increase would compare to its historical rate increases, or how the rate increase and the associated monthly bill for the average CSU customer would compare to other utilities in Colorado. Without this type of information, it is impossible to judge whether the alleged rate increase would be unreasonable. The State requested more information to

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[202] Brian Martucci, *A fraction of proposed data centers will get built. Utilities are wising up.*, UtilityDive, May 15, 2025, https://www.utilitydive.com/news/a-fraction-of-proposed-data-centers-will-get-built-utilities-are-wising-up/748214/.

[203] Bianca Giacobone, *Phantom data centers are flooding the load queue*, Latitude Media, Mar. 26, 2025, https://www.latitudemedia.com/news/phantom-data-centers-are-flooding-the-load-queue/.

[204] Michael Terrell, *How we're making data centers more flexible to benefit power grids*, Google, Aug. 4, 20205, https://blog.google/inside-google/infrastructure/how-were-making-data-centers-more-flexible-to-benefit-power-grids/; Tyler Norris et al., Duke Nicholas Inst. for Energy, Env't & Sustainability, *Rethinking Load Growth: Assessing the Potential for Integration of Large Flexible Loads in US Power Systems*, 3 (2025), https://nicholasinstitute.duke.edu/sites/default/files/publications/rethinking-load-growth.pdf ("Overall, these results suggest the US power system's existing headroom, resulting from intentional planning decisions to maintain sizable reserves during infrequent peak demand events, is sufficient to accommodate significant constant new loads, provided such loads can be safely scaled back during some hours of the year.").

[205] Mar. 11, 2025 CSU Letter at pdf p. 10.

[206] *Id.*

substantiate CSU's allegations, but the record for this action does not contain a response from CSU to that request.[207]

CSU's own statements show that CSU could have procured—and still could procure—sufficient energy and capacity resources to replace Nixon by the end of 2029 and maintain reliability. CSU simply chose not to because of cost concerns that have not been substantiated. But cost and reliability are separate issues. The fact that CSU is attempting to delay its replacement of Nixon because of the purportedly high cost does not show that retiring and replacing Nixon by the end of 2029 would necessarily impair reliability.

CSU's statements about replacement resource timing and transmission constraints do not hold water. CSU suggests it would be a problem to bring replacement resources online before 2030,[208] but at the same time concedes that the overwhelming majority of responses to its 2024 RFP could enter service before 2030.[209] CSU contends it does not have sufficient transmission capacity to access replacement resources outside its service territory and notes that building or upgrading transmission would take several years.[210] But there are several years between now and the end of 2029, when CSU committed to retire Nixon. CSU has not claimed—much less proven—that it is unable to build any new transmission that may be needed to bring replacement resources online by the end of 2029.

The record also reflects that Colorado utilities have already retired and replaced many coal units and still maintained reliability. And Colorado utilities have plans to retire and replace additional coal units by 2029. The factors that CSU cites to support the claim that it cannot do so with Nixon by the end of 2029—market conditions and load growth—are not unique to CSU but rather affect all Colorado utilities.[211] CSU claims that other utilities are experiencing the same problems as CSU, but CSU is the only utility that has requested a change to any of the retirement deadlines in the SIP.[212] There is no evidence in the record that CSU is unique and that CSU alone is unable to retire and replace a coal unit (Nixon) by the end of 2029 while maintaining reliability.

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[207] *See* Letter from Michael Ogletree, Senior Dir. of State Air Quality Programs, CDPHE, to Travas Deal, Chief Exec. Officer, CSU 3 (Apr. 11, 2025), EPA-R08-OAR-2024-0607-0030 ("While the overall results of this work have been summarized, the State requests additional information in order to better understand how the evaluations were performed, all other options that were investigated to utilize both new and existing resources, and the reasons that almost all of the 200 submitted bids in the request for proposal are not considered viable. Colorado believes that this information is necessary to inform a decision by the State on how to proceed on the Springs Utilities request to modify the RH SIP.") [hereinafter "Apr. 11, 2025 CDPHE Letter"].
[208] Mar. 11, 2025 CSU Letter at pdf p. 11.
[209] *Id.* (CSU's statement that "a few of the evaluated projects were not able to come online until 2029" means that all *except* for a few were able to come online before 2029, and that all RFP responses were able to come online by the end of 2029).
[210] *Id.* at pdf p. 12.
[211] CSU, Colorado Regional Haze Plan Exclusion of 2029 Retirement Mandate for Nixon Unit 1 at 1 (Mar. 27, 2025), EPA-R08-OAR-2024-0607-0027.
[212] Mar. 11, 2025 CSU Letter at pdf pp. 9–10.

Finally, to the extent that EPA's proposed action is based on the assumption that retiring a coal or gas plant inherently impairs reliability, EPA's assumption is factually incorrect and a disapproval on this basis would be arbitrary and capricious. Some of the retirements in the SIP have already occurred: PSCo has already retired Comanche 1[213] and CSU has already retired and demolished Drake 6 and 7.[214] EPA presents no evidence that those retirements have caused reliability problems. Nor is there any such evidence. To the contrary, even DOE's flawed July 2025 report concluded that, currently, there are adequate electricity supplies to meet existing demand in the Southwest Region that includes Colorado.[215] The fact that utilities have retired and replaced three of the units with retirement deadlines in the SIP and maintained reliability disproves any assumption that retiring and replacing coal (or gas) units inherently causes reliability problems.

C. The State Was Not, and Is Not, Required to Develop Its Regional Haze SIP in Accordance with Executive Order 14241 or Any Future Executive Order Concerning Coal, Grid Reliability, or Other Issues.

EPA proposes to "find the State did not appropriately weigh the energy impacts of the closure measures against its substantial progress toward natural visibility conditions in a manner consistent with issued executive orders' priority on energy generation."[216] But EPA cites only a single executive order, EO 14241. It is unclear whether EPA is relying on any executive order other than EO 14241 as a basis for its proposed action. It would be unlawful and arbitrary and capricious for EPA to partially disapprove Colorado's SIP submission based on executive orders that were not specifically identified in the proposed rule, which would fail to provide the public with adequate notice and an opportunity to comment on the basis for EPA's action.

Moreover, it would be unlawful and arbitrary and capricious for EPA to disapprove the SIP on the ground that the State did not develop and adopt a plan consistent with EO 14241, or any other executive order, for several reasons. First, the plain language of EO 14241 does not purport to impose any obligations on states, much less any obligations on how states develop regional haze plans under the Clean Air Act. Interpreting EO 14241 as providing instructions to states in developing regional haze plans is inconsistent with the plain text of the executive order. Moreover, EO 14241 does not mention EPA or provide instructions to EPA. It would be arbitrary and capricious for EPA to base its action on an interpretation of EO 14241 that is not supported by the plain text of that document.

Second, EO 14241 states that it "shall be implemented consistent with applicable law."[217] Applicable law empowers states to formulate their regional haze plans in accordance with the

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[213] Press Release, Xcel Energy, Xcel Energy and Pueblo leaders establish committee considering clean energy sources to replace coal retirements (Apr. 18, 2023), https://co.my.xcelenergy.com/s/about/newsroom/press-release/xcel-energy-and-pueblo-leaders-establish-committee-considering-clean-energy-sour-MC3NMKDH4JIRHTRDCYWC4THEFA44.
[214] Martin Drake Power Plant, CSU https://www.csu.org/current-projects/martin-drake-power-plant (last visited Sept. 13, 2025).
[215] DOE Report at 37.
[216] 90 Fed. Reg. at 31,938.
[217] Exec. Order No. 14,241 § 7, 90 Fed. Reg. 13,673, 13,676 (Mar. 25, 2025).

Clean Air Act, the Regional Haze Rule, and EPA's Guidance. As explained in Section I.A.1 above, while EPA must disapprove SIPs that do not meet the requirements of the Clean Air Act, Congress provided states with substantial discretion to develop SIPs. EPA may not disapprove a SIP merely because it disagrees with a state's policy choices, as EPA does here. Nor does applicable law preclude states from exceeding the minimum requirements of the Clean Air Act or achieving visibility improvements that exceed the URP, as discussed in Section V.D. And as discussed below in Sections III.B and III.C, the State considered announced EGU retirements in accordance with EPA regulations and guidance. The plain language of EO 14241 does not purport to alter the requirements of the Clean Air Act or states' obligations under the Act.

Third, even if EO 14241 were interpreted as purporting to impose legal obligations on states with respect to developing SIPs, the executive order cannot lawfully amend the requirements of the Clean Air Act. Congress specified the factors that a state must consider when adopting a long-term strategy for making reasonable progress under the regional haze provisions.[218] Congress further specified the timeline, process, and factors by which EPA reviews and acts on a SIP.[219] Subject to narrow exceptions that are not relevant here, the lawful scope of executive orders is limited to the operation of the executive branch.[220] The President lacks legal authority to amend a statute, such as the Clean Air Act, through an executive order.[221] As a result, EO 14241 cannot lawfully be interpreted as changing the requirements of the Clean Air Act governing how states adopt, and EPA reviews and acts on, SIPs.

It would be equally unlawful for EPA to treat EO 14241 as either a binding rule or non-binding guidance on how states and EPA must consider the "energy and non-air environmental quality" factor in the Clean Air Act. As a threshold matter, EO 14241 is neither a rule nor guidance under the Clean Air Act, because only EPA—not the President—has the authority to issue rules and guidance under the Clean Air Act. Congress delegated authority to the EPA Administrator—not to the President—to enforce and implement the Clean Air Act, including the provisions relevant here regarding EPA review and action on regional haze SIPs.[222] Setting aside that threshold issue, EO 14241 is not a lawful rule under the Clean Air Act because the Act prescribes detailed procedural requirements for rulemakings, which were not followed when issuing EO 14241.[223] As courts have recognized, "[r]egardless of how serious the problem

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[218] 42 U.S.C. § 7491(g)(1).
[219] *Id.* § 7410.
[220] *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 273 n.5 (1974) ("The Executive Order is plainly a reasonable exercise of the President's responsibility for the efficient operation of the Executive Branch.").
[221] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.").
[222] 42 U.S.C. § 7410 (describing the Administrator's responsibilities in reviewing and acting on a SIP submission); *id.* § 7602(a) ("The term 'Administrator' means the Administrator of the Environmental Protection Agency.").
[223] *See id.* § 7607(d).

an administrative agency seeks to address . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'"[224]

Fourth, as a practical matter, the State could not possibly have considered EO 14241, given that the State adopted its SIP in two phases in 2020 and 2021, several years before the President issued EO 14241 in 2025. In fact, Colorado adopted its SIP on the very timeline that EPA prescribed for second implementation period SIP revisions. EPA cites no precedent for the proposition that EPA is empowered to disapprove a SIP based on an executive order that was issued after a state issued its SIP.[225] If that were the rule, a President could issue an executive order that requires disapproval of all previously adopted SIPs, on the grounds that the SIPs failed to consider the new executive order. Such a rule would be unworkable in practice, inconsistent with procedural requirements for amending Clean Air Act regulations, and inconsistent with the Clean Air Act's cooperative federalism framework.

These four arguments apply equally to any executive order that may be issued on or before the date EPA takes final action on the SIP but that was not mentioned in the proposed rule. Any future executive order would provide instructions to federal agencies, not to states, and thus could not be construed as imposing binding obligations on states' development of SIPs. Any proper, future executive order would also have to be consistent with applicable law, including Clean Air Act requirements governing SIPs, and could not lawfully change the Clean Air Act, implementing regulations, or EPA guidance. And given Colorado's reliance interests in relying on EPA's guidance that existed when it adopted its SIP (which remains in effect today, as EPA has not formally withdrawn or revised that guidance), it would be arbitrary and capricious to disapprove a SIP based on any executive order issued between publication of EPA's proposed and final rule that did not exist when the State acted. Thus, it would be arbitrary and capricious for EPA to base its disapproval in whole or in part on any future executive order issued on or before the date of its final action.

III. EPA's Claim that the State Failed to Provide Assurances that "Forced" Closures Would Not Violate State or Federal Law Is Based on Factual and Legal Errors.

EPA also improperly proposes to disapprove the retirement deadlines contained in the SIP on the ground that the State did not comply with the requirement in 42 U.S.C. § 7410(a)(2)(E)(i) to provide necessary assurances that implementation of the plan would not be prohibited by state and/or federal law.[226] EPA contends that the retirement deadlines in the SIP "risk" violating the Takings Clause in the federal and Colorado constitutions and also that they are not authorized by the Clean Air Act.[227] Disapproving parts of the SIP based on this

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[224] *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000), *superseded by statute*, Family Smoking Prevention & Tobacco Control Act of 2009, 123 Stat. 1776, *as recognized in Food & Drug Admin. v. Wages & White Lion Invs., L.L.C.*, 604 U.S. 542 (2025) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).
[225] *See generally Kentucky*, 123 F.4th at 452 ("The EPA acted in an 'arbitrary' way by telling Kentucky one thing and then doing another."); *Texas*, 132 F.4th at 861–62.
[226] 90 Fed. Reg. at 31,938–39.
[227] *Id.* at 31,938.

"necessary assurances" argument would be unlawful and arbitrary and capricious for three reasons. First, when it adopted the SIP, the State had no reason to provide assurances that closures proposed and supported by the source owners would not constitute a taking or were authorized by the Clean Air Act. Second, even assuming for the sake of argument that EPA's "necessary assurances" argument was correct, it would not justify disapproving the retirement deadlines for sources that have not reversed course. Third, EPA's "necessary assurances" argument is not a lawful basis for disapproving even the Nixon retirement deadline, because EPA's new position conflicts with regulations and guidance, EPA has changed its position without acknowledging and explaining the basis for that change, and the State has reliance interests in relying on EPA regulations and guidance that were in effect when the State adopted its SIP (and that remain in effect today).

This Section III addresses EPA's "necessary assurances" rationale for the source closures listed in Table 3 of EPA's notice of proposed rulemaking.[228] EPA's proposal to disapprove the coal-to-gas conversion of Pawnee Unit 1 is discussed in Section IV below.

A. EPA Fundamentally Mischaracterizes the SIP, Which Did Not Impose Retirements as a Control Measure But Instead Made Previously-Announced Retirements Federally Enforceable to Avoid Requiring the Control Measures Assessed in Four-Factor Analyses.

EPA's "necessary assurances" arguments invents facts to justify EPA's policy goals, rather than reviewing the evidence of what the State actually did when it adopted its regional haze SIP. Specifically, EPA's "necessary assurances" arguments rest on two factual errors: (1) it mischaracterizes the retirement deadlines as "forced" or "unconsented;" and (2) it mischaracterizes the SIP as having imposed "forced" or "unconsented" closures as "emission limitations" or "control measures." The record before EPA contradicts these factual underpinnings of EPA's "necessary assurances" argument.

1. The Clean Air Act Does Not Require States to Provide Assurances that Voluntary Retirement Deadlines Would Not Constitute a Taking.

When Colorado adopted its SIP, each source owner had already proposed to retire the sources in question by the retirement deadlines that the AQCC ultimately made a part of the SIP. As explained throughout Section II above, each source owner submitted extensive testimony in writing and at the rulemaking hearing describing how it had selected the retirement deadline that the State was proposing to adopt in the SIP, and each source owner supported incorporating into the SIP the retirement deadlines that EPA now proposes to disapprove. The SIP's Statement of Basis and Purpose repeatedly refers to the retirement deadlines in the SIP as reflecting "voluntary closures."[229] To take the Hayden power plant as an example, the State noted that "[f]or reasons unrelated to Regional Haze Rule requirements, PSCo has voluntarily proposed to

[228] *Id.* at 31,934.
[229] Statement of Basis and Purpose at 36.

retire the Units 1 and 2 coal-fired boilers by the end of 2028 and 2027, respectively."[230] The utility owners of the EGUs also described the retirements as voluntary, as when CSU described its "Announced voluntary retirement of Drake Units 6 and 7" and its "Announced voluntary retirement of Nixon Unit 1."[231]

EPA never explains the legal rationale for concluding that the State, at the time it adopted and submitted its SIP, was required to provide assurances that retirement deadlines that the source owners had selected and agreed to would not violate the Takings Clause. There was no possible takings claim for the State to provide assurances to EPA about—because the utility owners of the power plants submitted written filings stating that they supported the Division's proposal to include the retirement dates in the SIP. Given the consent and support of the property owners to the State's codification of the retirement deadlines, there was no factual or legal basis for the State to conduct a takings analysis of the Division proposal that the State adopted or to explain why the SIP would not constitute a taking. Clean Air Act section 110(a)(2)(E) does not require states to analyze all future hypothetical possibilities that are not based on the evidence available when the State adopts its SIP and that are unmoored from reality in order to secure EPA approval of their SIPs. Moreover, under the Clean Air Act, a state can submit a SIP revision at any time to address new information that arises after a prior SIP was adopted.

2. Because the State Did Not Require Source Retirements as an Emission Limitation or Control Measure, EPA Cannot Disapprove the SIP on that Basis.

EPA's argument that the Clean Air Act does not authorize the SIP's retirement deadlines rests on mischaracterizing the SIP as having adopted the deadlines as emission limitations or control measures. EPA contends that the text and structure of the Clean Air Act indicate that Congress did not intend to authorize "forced" or "unconsented" closures as emission limitations or control measures.[232] But that is simply not what the State did.

In fact, the State did just the opposite: the APCD relied on the sources' previously-announced retirement plans as a factor in deciding not to require additional pollution controls at the EGUs. The retirement deadlines were not adopted as control measures—they were adopted to avoid having to require control measures. As the APCD explained:

> [A]ccounting for closure schedules is appropriate for inclusion in the reasonable progress four-factor analysis for each unit. The closure dates have the effect of decreasing the remaining useful life of any theoretical additional control technology analyzed in the four-factor analysis. Pursuant to the Regional Haze Rule, 40 C.F.R. 51.308(f)(2)(iv)(C) source retirement and replacement schedules can be considered in developing the state's long-term strategy and in performing control measure analyses. The Division considered the announced closure dates in its four factor analyses for all of the identified Phase I units and facilities and

[230] APCD Four-Factor Analysis for Hayden Station at 12, 16, 21, EPA-R08-OAR-2024-0607-0014, 2021_Hayden.
[231] CSU Prehearing Statement at 3, EPA-R08-OAR-2024-0607-0010, 15_PARTY_City of Colorado Springs & Colorado Springs Utilities.
[232] 90 Fed. Reg. at 31,938–39.

> determined making the closure dates federally enforceable will provide significantly greater emission reductions than the application of any proposed emission control technology.[233]

In addition to requesting that each source owner prepare a four-factor analysis, the State prepared its own Technical Support Documents (TSDs) with four-factor analyses for each source. "Source retirement" was not analyzed as a control measure in any of the State's TSDs. Instead, in its four-factor analyses, the State considered announced retirements when evaluating the statutory factors of the "remaining useful life" of the source and the "costs of compliance."[234] When the utility owner had announced a plan to retire the source in the near term, the State found that the shorter remaining useful life weighed against requiring additional pollution controls that either could not be installed before the source retired or could operate for only a few years before the source retired.[235]

The shorter useful lives associated with upcoming source retirements also heavily influenced the cost analyses the State prepared for some of the EGUs, causing amortization of control costs to occur over a much shorter time period and rendering additional controls not cost-effective.[236] For example, the APCD estimated that the cost-effectiveness of installing

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[233] APCD Rebuttal Statement at 4, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division.

[234] *See* 42 U.S.C. § 7491(g)(1).

[235] *E.g.,* APCD Prehearing Statement at 10, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division ("A key consideration in the four factor analysis is the remaining useful life of the emission source. For most of the EGUs with announced retirement dates, the amortization period is significantly shortened thereby resulting in higher control costs."); APCD Rebuttal Statement at 4, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division ("[A]ccounting for closure schedules is appropriate for inclusion in the reasonable progress four-factor analysis for each unit. The closure dates have the effect of decreasing the remaining useful life of any theoretical additional control technology analyzed in the four-factor analysis. Pursuant to the Regional Haze Rule, 40 C.F.R. 51.308(f)(2)(iv)(C) source retirement and replacement schedules can be considered in developing the state's long-term strategy and in performing control measure analyses. The Division considered the announced closure dates in its four-factor analyses for all of the identified Phase I units and facilities and determined making the closure dates federally enforceable will provide significantly greater emission reductions than the application of any proposed emission control technology."); SIP Narrative at 57 ("The remaining useful life of the source: The state considers already announced retirement dates in the four factor analysis process and ultimately, in Regulation 23 for setting enforceable closure dates. For those sources not expected to retire over the next twenty years, this factor did not affect any of the state's RP determinations.").

[236] Final Econ. Impact Analysis at 4, EPA-R08-OAR-2024-0607-0003, 11_Economic Impact Analysis (final) ("[T]he Division is simply incorporating closures of specific emission units into the regional haze SIP. This changes the analysis of costs by means of changing the remaining useful life of the unit."); *id.* at 7; APCD Prehearing Statement at 10, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division ("For most of the EGUs with announced retirement dates, the amortization period is significantly shortened thereby resulting in higher control costs.").

selective noncatalytic reduction (SNCR) at Nixon Unit 1 would range from $18,979–$23,424 per ton of NOx reduced, because the State assumed a three- to four-year remaining useful life based on the plant closing by the deadline CSU had proposed, December 31, 2029.[237] By contrast, earlier analyses submitted by CSU and NPCA and Sierra Club used a much longer remaining useful life and showed that SNCR would cost approximately $8,696–$9,620 per ton of NOx reduced[238]—below the $10,000/ton cost-effectiveness threshold that Colorado established for the regional haze second planning period.[239] Shortening the remaining useful life consistent with announced retirements had the same impact on the cost analyses for NOx controls at Rawhide,[240] Drake Units 6 and 7,[241] and Craig Unit 3.[242] Although the record does not contain a cost analysis for additional controls at Cherokee Unit 4 assuming a full useful life, the State's analysis using a shortened useful life showed that additional NOx controls would exceed its $10,000/ton cost-effectiveness threshold.[243] Colorado did not calculate the cost-effectiveness of additional NOx controls for Comanche Units 1 and 2, but asserted that "[w]ith a significantly shortened remaining useful life, the addition of post-combustion controls is not economically feasible."[244]

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[237] APCD Reasonable Progress (RP) Four-Factor Analysis of Control Options For Colorado Springs Utilities – Ray D. Nixon Power Plant (Nixon Unit 1) at 15 (Oct. 2020), EPA-R08-OAR-2024-0607-0007, 2020_Nixon_Boiler [hereinafter "Nixon Four-Factor Analysis"].

[238] *Id.*

[239] APCD Prehearing Statement at 7, EPA-R08-OAR-2024-0607-0010, 15_PARTY_Air Pollution Control Division.

[240] APCD Regional Haze for Second 10-year Planning Period Reasonable Progress (RP) Four-Factor Analysis of Control Options for Platte River Power Authority – Rawhide Energy Station at 18–19 (Oct. 2020), EPA-R08-OAR-2024-0607-0007, 2020_Rawhide.

[241] Victoria Stamper, who served as a technical consultant to NPCA, Sierra Club, and Earthjustice during Colorado's Phase 1 rulemaking process, conducted an analysis in 2020 showing that SCR and SNCR could be installed at Martin Drake Units 6 and 7 for less than $10,000/ton NOx removed, assuming full useful lives. Victoria R. Stamper, *Comments on Certain Company Submittals to the Colorado Department of Public Health and Environment on Air Pollution Controls to Make Reasonable Progress Towards the National Visibility Goal* 35 (May 5, 2020) [hereinafter "Stamper Report"]. APCD, however, determined that "[w]ith a significantly shortened remaining useful life, the addition of post-combustion controls is not economically feasible." APCD Reasonable Progress (RP) Analysis of Control Options for Colorado Springs Utilities – Drake Plant at 8 (Oct. 2020), EPA-R08-OAR-2024-0607-0007, 2020_Drake.

[242] *Compare* Stamper Report at 6, *with* APCD Regional Haze for Second 10-year Planning Period Reasonable Progress (RP) Four-Factor Analysis of Control Options for Tri-State Generation & Transmission Association, Inc. – Craig Station Units 1, 2 & 3, at 29–30 (Oct. 2020), EPA-R08-OAR-2024-0607-0007, 2020_Craig.

[243] APCD Regional Haze for Second 10-year Planning Period Reasonable Progress (RP) Four-Factor Analysis of Control Options for Public Service Company of Colorado Cherokee Station, Unit 4 at 9–13 (Oct. 2020), EPA-R08-OAR-2024-0607-0007, 2020_Cherokee Unit 4.

[244] APCD Regional Haze for Second 10-year Planning Period Reasonable Progress (RP) Four-Factor Analysis of Control Options for Public Service Company of Colorado Comanche Station, Units 1 and 2 at 9 (Oct. 2020), EPA-R08-OAR-2024-0607-0007, 2020_Comanche 1&2.

The State then made the retirement dates announced by utilities that it had considered as part of the "remaining useful life" and "costs of compliance" factors federally enforceable as part of the SIP.[245] As further explained in Sections III.B and III.C below, in doing so, the State adhered to EPA's long-standing instruction that states must follow that approach in order to rely on an announced retirement to shorten the remaining useful life of a source.[246]

EPA points to CSU's recent statements to CDPHE and the Agency as grounds for disapproving the retirement deadlines.[247] But during the AQCC's Phase 1 rulemaking to adopt the SIP, CSU urged the AQCC to account for what it called its "voluntary retirements," and it noted that the State was required to make federally enforceable any retirement deadlines that were considered as part of four-factor analyses. CSU stated:

> In June 2020, Utilities announced the voluntary retirement of its remaining coal-fired electric generating units, including the retirements of Martin Drake Units 6 and 7 no later than December 31, 2022, and Ray D. Nixon Unit 1 no later than December 31, 2029. These voluntary retirements allow[] the Colorado Regional Haze State Implementation Plan to account for such retirement dates in determining whether any additional control measures, such as emissions limits or work practice standards, are reasonable and required for reasonable progress in the Regional Haze Second Implementation Period. If such retirement dates are accounted for in the Regional Haze SIP four-factor reasonable progress analyses, the [AQCC] must make the specifically announced retirement dates enforceable.
>
> The [APCD] Proposal does this – it proposes to make the announced retirement dates enforceable and it accounts for the announced retirement dates in the reasonable progress four-factor analyses for each source. Within the proposed RH SIP's and the Technical Support Documents' four-factor analyses for Drake and Nixon, the Division's Proposal demonstrates that no additional controls are reasonable because the unit retirements render any possible additional control measures not cost-effective. The Division's Proposal concludes that the unit retirements by the announced dates will result in greater emission reductions and visibility improvements than would otherwise be achieved by control measures in the Regional Haze program.[248]

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[245] *E.g.*, APCD Prehearing Statement at 8, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division ("[T]he Division's proposal is making publicly announced retirement dates enforceable through the rule along with using the closures to satisfy and exceed Reasonable Progress requirements . . .").

[246] *See* 2019 Guidance at 34; EPA 2021 Clarifications Memo at 10; Letter from Carl Daly, Acting Dir., Air & Radiation Div., EPA to Trisha Oeth, Interim Dir., APCD at 3, EPA-R08-OAR-2024-0607-0011, 16_EPA Comments.

[247] 90 Fed. Reg. at 31,938.

[248] CSU Rebuttal Statement at 1, EPA-R08-OAR-2024-0607-0004, 14_City of Colorado Springs & Colorado Springs Utilities (parentheticals and footnote omitted). Other utilities similarly supported this approach. *See* PSCo Prehearing Statement at 1, EPA-R08-OAR-2024-0607-0004, 14_Pubic Service Company of Colorado dba Xcel Energy ("The closure dates have the effect of

In sum, EPA's speculation as to whether the Clean Air Act authorizes "forced" closures as emission limitations or control measures is not at issue here, because (1) at the time the SIP was adopted, all of the announced retirements were voluntary and supported by the source owners, and (2) the State did not analyze or require source closures as emission limitations or control measures in its four-factor analyses, but instead relied on announced closures to conclude that new pollution controls for the affected EGUs would not be appropriate. Contrary to EPA's characterizations, the AQCC made federally enforceable the announced retirements it had considered when ruling out potential control measures—and it did so pursuant to EPA's regulations, guidance, and comments to the State.

B. The Owners of Every EGU Other than Nixon Continue to Consent to the Retirement Deadlines They Proposed to the State.

Even assuming for the sake of argument that EPA's argument on "necessary assurances" were correct, that argument is relevant only to the Agency's proposed disapproval of "forced" or "unconsented" closures. The crux of EPA's "necessary assurances" argument is that an "unconsented" or "forced closure" risks violating the Takings Clause of the federal and Colorado constitutions, as well as the Clean Air Act.[249] EPA uses the phrase "unconsented" or "forced closure" to mean "a source closure opposed by the source in question that would be made federally enforceable as a result of a SIP approval."[250]

EPA merely assumes—with no supporting evidence—that the owners of the EGUs other than Nixon oppose the retirement deadlines in the SIP. EPA's assumption is incorrect. As discussed above, the current electric resource plans for Tri-State, PRPA, and PSCo contain the same retirement deadlines as the SIP.[251] At no time since the adoption of the SIP have Tri-State, PRPA, or PSCo opposed the retirement deadlines for their sources. These three utilities remain committed to implementing the retirement deadlines they proposed to the State and which the State codified in the SIP.

EPA speculates that "[i]ndustry assessments . . . may cause additional sources to reverse course on previously agreed-to closure provisions."[252] Tellingly, EPA concedes here that as of the time it issued its proposed rule, none of the source owners other than CSU have "reverse[d] course" and opposed the retirements that they supported during the AQCC's rulemaking to adopt the SIP. It would be unlawful for EPA to disapprove the SIP based on sheer speculation about

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decreasing the remaining useful life of any theoretical additional control technology analyzed in the four-factor analysis.").

[249] 90 Fed. Reg. at 31,938–39.

[250] *Id.* at 31,939.

[251] *See* Colo. PUC Proceeding No. 24A-0442E, Hr'g Ex. 101, Attach. JWI-2, Volume 2; Colo. PUC Proceeding No. 23A-0585E, Tri-State Phase II Implementation Report; PRPA 2024 IRP; CSU 2020 IERP.

[252] 90 Fed. Reg. at 31,939. EPA refers to "Industry assessments," but it cites only a single assessment, a 2024 NERC study. *See id.* It is unclear what "assessments" other than the NERC study EPA is referring to. For the reasons discussed in Section II.B.1 above, the NERC study does not support the conclusion that increasing energy demand may cause PRPA, PSCo, and Tri-State to reverse course.

what sources "may" do in the future, where there is no evidence in the record indicating that Tri-State, PSCo, or PRPA oppose the retirement deadlines that they themselves adopted and proposed to the State for inclusion in the SIP.

EPA does not contend that a consented or voluntary closure that is incorporated into a SIP risks violating state or federal law. Nor could it. EPA fails to cite any case holding that a government decision that relies on and codifies a utility's previously-announced decision to close a power plant could constitute a takings. EPA does not explain how a state's decision to rely on and codify a retirement previously announced by the source itself conflicts with, or is not authorized by, the Clean Air Act. EPA's own regulations require states to consider "[s]ource retirement and replacement schedules" when developing a long-term strategy,[253] and EPA Guidance instructs states to follow the process Colorado followed here.[254] It is the height of arbitrary and capricious action for EPA to assert that a state could risk violating state or federal law for following EPA's own regulations and guidance.

Thus, even if the facts and law supported EPA's "necessary assurances" argument (which we do not concede), by its own terms, EPA's contention that Colorado failed to provide necessary assurances regarding "unconsented" or "forced" closures would not apply to Rawhide Unit 1, Martin Drake Units 6 and 7, Comanche Units 1 and 2, Hayden Units 1 and 2, Craig Units 2 and 3, the ColoWyo Coal Mine, and Cherokee Unit 4. EPA has not presented any evidence that the owners of these sources no longer consent to the retirements. The necessary assurances argument therefore provides no basis for disapproving those retirement deadlines. But as explained in Sections III.C and III.D below, the Agency's necessary assurances argument is not a lawful basis for disapproving the Nixon retirement deadline either.

C. EPA's New Position on How States May Consider Announced Retirements Is Unlawful and Arbitrary and Capricious.

1. EPA's New Position Is Inconsistent with EPA Regulations.

EPA's proposal to disapprove the retirement deadlines in the SIP is inconsistent with EPA regulations requiring states to consider source retirement schedules when developing their long-term strategies. The Regional Haze Rule provides:

> (iv) The State must consider the following additional factors in developing its long-term strategy:
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> …
>
> (C) Source retirement and replacement schedules[.][255]

Here, the State followed, and relied on, this EPA regulation in developing its SIP. As the APCD explained:

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[253] 40 C.F.R. § 51.308(d)(3)(v)(D).
[254] 2019 Guidance at 33–34.
[255] 40 C.F.R. § 51.308(f)(2)(iv)(C).

> [T]he Regional Haze Rule explicitly provides under 40 C.F.R. 51.308(f)(2)(iv)(C) that, so long as they are legally enforceable under the SIP, source retirement and replacement schedules must be considered in developing the State's long-term strategy and in performing control measure analyses. This is precisely what the Division did in conducting the Regional Haze four-factor analysis, resulting in a determination that control requirements for the subject units are not cost-effective given the utilities' proposed retirement dates . . . .[256]

It would be unlawful and arbitrary and capricious for EPA to disapprove a SIP that follows the EPA regulations that were in effect at both the time the SIP was adopted by the State and at the time EPA takes final action on the SIP, as is the case here. Furthermore, EPA, in this action, has adopted a new position on how states may consider source retirements that is inconsistent with 40 C.F.R. § 51.308(f)(2)(iv)(C). Whereas 40 C.F.R. § 51.308(f)(2)(iv)(C) requires states to consider source retirement schedules, EPA is proposing to disapprove Colorado's SIP because the State considered and included in its SIP the source retirement schedules that source owners had announced prior to adoption of the SIP. EPA's new position is not a lawful basis for disapproving the SIP, because EPA cannot amend or rescind a regulation such as 40 C.F.R. § 51.308(f)(2)(iv)(C) without first completing the notice-and-comment rulemaking process to amend the regulation—which EPA has not done here. It would be unreasonable and irrational for EPA to reject the SIP based on Colorado's consideration of a statutory factor in compliance with EPA's regulations.

2. EPA Has Not Acknowledged And Explained Its Change in Policy, and It Has Failed to Acknowledge the State's Reliance Interests and Weigh Them Against Its New Policy.

EPA's regulations and guidance prescribe how a state can account for an announced retirement when assessing the statutory factor of the remaining useful life of a source. EPA's long-standing position is that a state can shorten the remaining useful life of a source for purposes of a control analysis to account for an announced retirement, but only if the state makes the retirement federally enforceable.[257] EPA's guidance was in place when Colorado adopted its SIP, when it submitted its SIP, and today. The State followed EPA regulations and guidance to account for CSU's previously-announced decision to close Nixon by the end of 2029 when it considered the statutory factors of the "time necessary for compliance," the "remaining useful

[256] APCD Resp. to Joint Mot. to Reconsider at 2, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division.

[257] 2019 Guidance at 34 ("In the situation of an enforceable requirement for the source to cease operation before the end of the useful life of the controls under consideration, a state may use the enforceable shutdown date as the end of the remaining useful life. To the extent such a requirement is being relied upon for a reasonable progress determination, the measure would need to be included in the SIP and/or be federally enforceable. See 40 CFR 51.308(f)(2). . . . In the situation where an enforceable shutdown date does not exist, the remaining useful life of a control under consideration should be [the] full period of useful life of that control as recommended by EPA's Control Cost Manual."); *see also* EPA 2021 Clarifications Memo at 10.

life of the source," and the "cost of compliance."[258] The State concluded that with a shorter remaining useful life that accounted for CSU's announced retirement of Nixon, additional pollution controls were not appropriate. The APCD explained:

> The Division concluded in the first implementation period that emission limits assumed to be achieved through the installation and operation of [ultra-low NOx burners with overfire air] was NOx RP for Nixon Unit 1. The NOx limit is being met through operation of these controls. However, the source has announced a closure date[] for Unit 1 at the end of 2029, which significantly impacts the remaining useful life of this unit. Therefore, it is estimated that if SIP approval occurs in the year 2022, the remaining useful life will be three to four years for Unit 1, assuming it would take three to five years for installation of any additional controls. Factoring in this short life span additionally demonstrates that further controls, emission limit tightening or fuel switching are not appropriate for Nixon Unit 1.
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> The Division notes with the upcoming closure at Nixon along with multiple other Colorado EGUs, that variability in operations will occur in the future, and do not allow for emission limit tightening in the interim. Accordingly, the Division recommends against further tightening of existing emission limits on retiring units. Moreover, requiring EGUs to make any further investment in controls only to retire the units in a few years, will add significant costs that may be passed on to the rate payer.[259]

EPA has now effectively changed its position on how a state can account for an announced retirement when assessing the remaining useful life of a source. Prior to this proposal, EPA had never stated that a SIP becomes automatically disapprovable when a source owner later reconsiders the retirement that it previously announced and supported during a SIP rulemaking. Prior to this proposal, EPA had never contended that a state that acted consistent with Agency regulations and guidance on how to account for an announced retirement can later be deemed by EPA to have failed to provide necessary assurances if the source owner later reconsiders the retirement that it previously announced and supported during a state's SIP rulemaking.

There are four separate problems with EPA's new policy. First, EPA's new policy departs from EPA's existing guidance for implementing the Clean Air Act's regional haze provisions. While an agency may change its position to the extent the new position is consistent with applicable statutes, it must acknowledge its change in position and provide a rational explanation for the new position.[260] The agency must also assess whether there are any reliance interests in its

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[258] Nixon Four-Factor Analysis at 17–19, EPA-R08-OAR-2024-0607-0007, 2020_Nixon_Boiler (finding that the "time necessary for compliance" would extend only to the end 2029 because CSU planned to close Nixon by that date and that the "remaining useful life" of the Nixon plant would end in 2029 because "Unit 1 is slated for retirement at the end of 2029.").

[259] *Id.* at 19.

[260] *Fox TV Stations*, 556 U.S. at 515 (Ordinarily, an agency must "display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* . . . And of course the agency must show that there are good reasons for the new policy."); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) ("Agencies are

previous policies, determine whether any such interests are significant, and weigh them against competing policy concerns.[261]

Here, EPA has done none of these things. EPA failed to acknowledge in the proposed rule that it is changing the position it articulated in its 2019 Guidance and other documents regarding how states can account for announced retirements when assessing the remaining useful life of a source. EPA failed to provide any explanation for its new position. And EPA has not considered reliance interests, including those of Colorado and other states that have crafted regional haze SIPs based on EPA's policy.

Second, it is unlawful and arbitrary and capricious for EPA to disapprove a SIP where the state followed EPA's guidance that remains in effect at the time of EPA's disapproval, as is the case here (i.e., EPA has not rescinded or replaced the relevant guidance). EPA issued the 2019 Guidance to inform states of EPA's interpretation of the Clean Air Act, so that states could develop their regional haze SIPs for the second implementation period in accordance with EPA's interpretations.[262]

The 2019 Guidance expressly provides that states may rely on a previously-announced retirement date to shorten the remaining useful life of a source (or decide not to analyze a source at all), but only if the retirement date is included in the SIP and made federally enforceable.[263] EPA's comments on Colorado's SIP echoed the 2019 Guidance and 2021 Clarifications Memo, emphasizing that "[a]ny measure/limit that is 'necessary for reasonable progress' must be in the SIP."[264] EPA expounded on the statutory and regulatory underpinnings of this policy in its recent partial disapproval of Wyoming's regional haze SIP:

> CAA 110(a)(2)(A) requires that SIPs include "*enforceable* emission limitations and other control measures," as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the CAA. CAA 169A(b)(2) specifies that regional haze SIPs must "*contain* such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal." Finally, 40 CFR 51.308(f)(2) provides that the state's "long-term strategy must include the *enforceable* emissions limitations, compliance schedules, and other measures that are necessary to make reasonable progress." *See also Committee for a Better Arvin v. EPA*, 786 F.3d 1169, 1175–77 (9th Cir. 2015).[265]

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under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure.").

[261] *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 591 U.S. 1, 33 (2020).

[262] 2019 Guidance at 1 ("The purpose of this guidance document is to help states develop approvable regional haze state implementation plans (SIPs) . . . . (footnote omitted)).

[263] *Id.* at 33–34.

[264] Letter from Carl Daly, Acting Dir., Air & Radiation Div., EPA to Trisha Oeth, Interim Dir., APCD at 3, EPA-R08-OAR-2024-0607-0011, 16_EPA Comments.

[265] EPA, Response to Comments for the Federal Register Notice for Air Plan Partial Approval and Partial Disapproval; Wyoming; Regional Haze Plan for the Second Implementation Period at 83–84 (Nov. 22, 2024), Docket No. EPA-R08-OAR-2023-0489 [hereinafter "Wyoming RTC"].

Here, Colorado expressly and reasonably relied on EPA's 2019 Guidance, which is firmly rooted in the statutory and regulatory text.[266] In determining the appropriate enforceable measures that are necessary to make reasonable progress in the second planning period, Colorado relied on announced retirement dates to require only that the soon-to-retire EGUs continue to implement their existing emission limits before closure.[267] To ensure that the SIP reflected and made federally enforceable the key assumption upon which it chose not to alter the EGUs' existing emission limits for the second planning period, Colorado incorporated the EGUs' retirement deadlines into its SIP. It would be unlawful and arbitrary and capricious for EPA to disapprove the SIP for following EPA guidance that remains in effect and has not been rescinded.

EPA's proposed course of action is also inconsistent with its recent partial disapprovals of the Arizona and Wyoming regional haze second implementation period SIPs. EPA disapproved those states' long-term strategies in part because Arizona and Wyoming relied on announced source retirement dates that they did not make federally enforceable in their SIPs.[268] Here, EPA proposes to take the opposite approach with Colorado. Inconsistency is the hallmark of arbitrary and capricious decision making.[269]

Third, EPA's new position is arbitrary and capricious because it is unworkable in practice, will lead to absurd outcomes, and is inconsistent with the language and goals of the regional haze program. EPA's new position is, in effect, that if a source owner agrees to a source retirement when a SIP is adopted by a state and the SIP relies on that retirement, the SIP becomes disapproveable at any time the source owner later reconsiders the retirement. This new policy incentivizes sources to play a cat-and-mouse game in which they could announce a retirement to preempt a state from requiring additional pollution controls; then, after the state declines to require additional controls in its SIP, the source reverses course and no longer supports the closure deadline it previously agreed to. EPA fails to address how its new policy will avoid this outcome.

EPA's new policy could also disincentivize states from accounting for announced retirements and instead motivate them to require pollution controls at sources with announced retirements—which will lead customers to pay for pollution controls at sources that are retiring

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[266] APCD Prehearing Statement at 6–7, EPA-R08-OAR-2024-0607-0004, 14_Air Pollution Control Division ("The Division maintains that this Regional Haze proposal is enforcing the announced closure dates within the appropriate four factor analysis pathway as detailed in the Clean Air Act, 2017 Regional Haze Rule revisions, and August 2019 EPA [Guidance].").
[267] SIP Narrative at 52–54.
[268] 89 Fed. Reg. 102,744, 102,763 (Dec. 18, 2024) ("[T]he 2019 Guidance and Clarifications Memo clearly indicate that, under the RHR, where a shutdown date is used to shorten a source's remaining useful life as part of a reasonable progress determination, an enforceable requirement to shutdown must be included in the SIP and/or be federally enforceable. The potential shutdowns of SGS Units 1 and 2 are not federally enforceable. Therefore, they cannot be relied upon to shorten the remaining useful life of these units." (footnote omitted)); 89 Fed. Reg. 95,121, 95,123 (Dec. 2, 2024) ("[W]e conclude that Wyoming's long-term strategy does not meet the requirements of CAA section 169A(b)(2) and 40 CFR 51.308(f)(2) . . . [because] Wyoming improperly relied on planned but unenforceable source retirements.").
[269] *See, e.g.*, *Clean Wis. v. EPA*, 964 F.3d 1145, 1163 (D.C. Cir. 2020).

soon. Under EPA's new policy, a state that relies on an announced retirement faces disapproval of its SIP if at any time the source owner changes its mind about the retirement date it previously agreed to, making the legal status of the SIP highly uncertain. To avoid the uncertainty and legal risk under EPA's new policy, states would act rationally by ignoring announced retirement dates. This would mean assessing pollution controls using a longer remaining useful life, which will lead states to require pollution controls that they would not otherwise have required had they been able to rely on an announced closure under EPA's long-established policy. In turn, this will drive up costs for customers at sources that in actuality may close soon, which is inconsistent with the Clean Air Act's instruction that states consider the remaining useful life of a source and the costs of compliance.[270]

Fourth, EPA has failed to "address how a change will affect those who have relied on its prior position" and has failed to "identify these reliance interests and weigh them against the 'policy' reasons supporting the change."[271] EPA's proposed rule fails each part of this test. EPA's action is arbitrary and capricious because it is inconsistent with Colorado's reliance interests in relying on EPA rules, guidance, and actions that existed when the State developed its SIP—especially where such rules and guidance have not been rescinded and remain in force today. Moreover, EPA failed to explain how it considered and weighed those reliance interests and why those reliance interests do not warrant approval of the entire SIP. There is no passage in the proposed rule in which EPA acknowledges that Colorado incorporated voluntary source retirement deadlines into its regional haze SIP by relying on EPA's regulations, guidance, and prior actions on other regional haze plans. Nor does the proposed rule identify Colorado's reliance interests in relying on EPA's rules, guidance, and actions that existed at the time the State developed its SIP. EPA has not explained how it is reasonable to "give the States *one* set of 'metrics' to draft their plans and then use *another* set of metrics to grade them."[272] Finally, EPA's proposed rule does not weigh the State's reliance interests against any policy rationale that EPA has for its new position. For these reasons, EPA's proposed partial disapproval is arbitrary and capricious and unlawful.[273]

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[270] 42 U.S.C. § 7491(g)(1).

[271] *Kentucky*, 123 F.4th at 468. Other Circuit Courts of Appeal have reached similar conclusions as the Sixth Circuit in *Kentucky*. *See, e.g.*, *Texas*, 132 F.4th at 862 ("But the agency failed to recognize, much less 'reasonably consider[],' that for Mississippi, the use of updated data was entirely outcome determinative. Nor did EPA 'reasonably explain[]' its decision to base its disapproval of Mississippi's SIP on data that did not exist when the state submitted its SIP." (footnote omitted)).

[272] *Kentucky*, 123 F.4th at 470.

[273] *See id.* at 471 ("The EPA told Kentucky that it could use the 2011 modeling and 1 ppb threshold and then denied Kentucky's plan in large part because Kentucky had done what the EPA told it to do. Because the EPA did not adequately consider Kentucky's 'reliance interests' when changing course in these ways, it acted arbitrarily.").

D. State Regulations, Including Measures in a SIP, Cannot Constitute Physical Takings.

EPA asserts that the State failed to provide necessary assurances that the "forced" closures are not "per se" takings prohibited by the state and/or federal Takings Clauses.[274] EPA cites two cases regarding per se takings, both of which involve physical takings.[275] As an initial matter, as explained in Section III.A.1 above, no takings occurs when a state agency takes an action that implements a property owner's voluntary decision to close a facility by a certain date in the future. The state and federal Takings Clauses are not implicated when, at the time a state takes an action, it does not require a property owner to do anything other than comply with its previously-announced voluntary plans that the property owner supports. But even if the Takings Clauses were potentially at issue here, the physical takings cases EPA cites are inapplicable.

Both takings cases EPA cites involve physical takings, i.e., government actions that physically appropriate private property for a public use. In *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), at issue was a government policy where "a percentage of a grower's crop must be physically set aside in certain years for the account of the Government, free of charge. The Government then sells, allocates, or otherwise disposes of the raisins in ways it determines are best suited to maintaining an orderly market."[276] The Court found that the "reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee."[277] The Court reaffirmed the "'longstanding distinction' between government acquisitions of property and regulations."[278]

Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021), likewise concerned a physical taking. In that case, "[a] California regulation grants labor organizations a 'right to take access' to an agricultural employer's property in order to solicit support for unionization. . . . The question presented is whether the access regulation constitutes a *per se* physical taking . . . ."[279] The Court found that it did. It explained: "The access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. The regulation grants union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year."[280] The Court reiterated that the Takings Clause analysis is different for a physical appropriation of property versus regulation of the uses of property: "When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies."[281]

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[274] 90 Fed. Reg. at 31,938–39.
[275] *Id.* at 31,939 (citing *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) and *Horne v. Dep't of Agric.*, 576 U.S. 350 (2015)).
[276] *Horne*, 576 U.S. at 354.
[277] *Id.* at 361.
[278] *Id.* (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 323 (2002)).
[279] *Cedar Point Nursery*, 594 U.S. at 143–44.
[280] *Id.* at 149.
[281] *Id.* at 148.

Here, the AQCC did not physically appropriate the EGUs for public use. The State did not "use[] its power of eminent domain to formally condemn property," or "physically take[] possession of property," or "occup[y] property."[282] Retirement deadlines are not a physical appropriation of private property and therefore cannot qualify as a physical taking. EPA has no factual or legal basis for claiming that the State was required to provide adequate assurances that retirement deadlines in a SIP do not constitute physical takings, given that case law makes clear that a government restriction on the use of property is not a physical taking and is instead analyzed under a different legal standard.

IV. EPA Provides No Justification for Its Proposed Disapproval of the Pawnee Unit 1 Fuel Conversion.

In addition to the source closures listed in Table 3 of its notice of proposed rulemaking, EPA asserts—without providing any rationale—that its proposed partial disapproval extends to Section IV.F.6 of Regulation 23.[283] That section, which the AQCC adopted during its Phase 2 rulemaking, makes federally enforceable PSCo's voluntary decision to convert Pawnee Unit 1 from coal-firing to natural-gas firing no later than the end of 2028. The proposed rule contains no explanation why EPA believes disapproval of this particular SIP element is appropriate.

The Agency's proposed disapproval of Section IV.F.6 appears to reflect its mistaken belief that Colorado's SIP requires Pawnee to retire. EPA states that its "proposed disapproval would encompass, and therefore decline to incorporate, the *enforceable source closures contained* in Colorado's 2022 SIP submission (listed in table 3 of section IV.C.1.a. of this document) and *in Colorado's Regulation Number 23*."[284] The Agency identified Section IV.F.6 as one of the sections of Regulation 23 that it specifically proposes to disapprove, indicating its belief that Section IV.F.6 requires a source closure.[285] But Section IV.F.6 provides only that "[c]ontingent upon PUC approval . . . Pawnee Unit 1 will convert from coal to natural gas fuel no later than December 31, 2028."[286] PSCo itself referred to its plans for Pawnee as a conversion and expressly differentiated it from a retirement.[287] At PSCo's request, the Colorado PUC subsequently approved the fuel conversion, directing it to occur no later than January 1, 2026.[288]

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[282] *See id.* at 147–48.
[283] 90 Fed. Reg. at 31,939 & n.51.
[284] *Id.* at 31,939 (emphases added).
[285] *Id.* at 31,939 n.51.
[286] Colorado Regulation Number 23, Part A, IV.F.6, EPA-R08-OAR-2024-0607-0015, 25_5 CCR 1001-27 (emphasis added); *see also* SIP Narrative at 62, 95–97. The first sentence of Section IV.F.6 states that Pawnee Unit 1 must comply with various requirements "if the PUC does not approve the ERP/CEP or until the approved closure date." However, the "closure date" phrase appears to have resulted from the erroneous copying of identical text contained in the immediately preceding section IV.F.5, which pertains to the closure of Hayden Units 1 and 2. The remainder of Section IV.F.6 and the discussion of Pawnee Unit 1 in the SIP narrative make clear that Pawnee will undergo fuel conversion, not closure.
[287] Rebuttal Statement of Public Service Company of Colorado d/b/a Xcel Energy at 1, EPA-R08-OAR-2024-0607-0010, 15_PARTY_Public Service Company of Colorado dba Xcel Energy (referring to "the dates for retirement of Hayden and conversion of Pawnee").
[288] Colorado PUC Proceeding No. 21A-0141E, Decision No. C22-0459, at 23, 29.

Plainly, Section IV.F.6 of Regulation 23 does not establish an enforceable source closure for Pawnee.[289]

Alternatively, if EPA did in fact intend to propose disapproval of the Pawnee fuel conversion, finalizing that disapproval would be unlawful and arbitrary and capricious. The only justifications EPA proffers for disapproval—its concerns about the energy impacts of EGU closures, its contention that the State did not provide the "necessary assurances" required by the Clean Air Act, and its belief that "forced" closures are inconsistent with the Act—are not implicated by the Pawnee fuel conversion. As further detailed below, converting Pawnee from burning coal to burning gas will not harm grid reliability. And a requirement to change the type of fossil fuel burned at the unit, which PSCo proposed and supported, is neither a "closure" nor "forced."

The text of EPA's proposed rule makes it clear that the Agency's concerns about energy demand and grid reliability impacts relate only to source closures, not fuel conversions. In the proposed rule, EPA announced its "find[ing] that Colorado's long-term strategy did not adequately consider the energy impacts associated with the *source closures contained in table 3 of section IV.C.1.a.* of this document."[290] The Pawnee fuel conversion is not a source closure, and it is not listed in EPA's Table 3. Nowhere does EPA specifically conclude that alleged energy impacts justify disapproving the Pawnee conversion, and the various energy concerns the Agency raises[291] indisputably pertain only to the closure of coal- and natural-gas fired power plants, not to fuel conversions. EPA does not explain how merely switching from one fossil fuel to another at an existing power plant could jeopardize grid reliability or utilities' ability to satisfy electricity demand. The fuel conversion will not alter Pawnee's generating capacity (505 MW).[292] PSCo also described the Pawnee fuel conversion as a "low-cost" option that would "provid[e] our system with a dispatchable generator to provide critical system reliability."[293] And for the

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[289] Relatedly, EPA's proposal to disapprove the portions of Section IV.F.3 of Regulation 23 "pertaining to the cessation of coal handling at . . . Pawnee Unit 1" also appears to result from an erroneous reading of Regulation 23. 90 Fed. Reg. at 31,939 n.51, 31,943, 31,944. Section IV.F.3 of Regulation 23 does not establish such a requirement.

[290] 90 Fed. Reg. at 31,937 (emphasis added). EPA elaborated that "Colorado did not sufficiently assess the *closures' impacts* on maintaining grid reliability and utilities' ability to meet energy demand." *Id.* at 31,937–38 (emphasis added). And in its discussion of Executive Order 14241, EPA asserted that "Colorado did not adequately account for the energy impacts of including these *source closures*" and that "the State did not appropriately weigh the energy impacts of the *closure measures* . . . in a manner consistent with issued executive orders' priority on energy generation." *Id.* at 31,938 (emphases added).

[291] *See id.* at 31,937–39.

[292] Morgan Cnty. Plan. & Zoning Dep't, Morgan County Planning Commission File Summary at 1 (Jan. 16, 2025) ("Pawnee Station is currently operating as a 505MW net capacity coal fired, steam-electric generating station and the conversion to natural gas will maintain the 505MW capacity."), https://morgancounty.colorado.gov/sites/morgancounty/files/documents/PC%20Board%20Packet%2001-21-2025.pdf.

[293] Colo. PUC Proceeding No. 21A-0141E, Hr'g Ex. 101, Alice Jackson Direct Test., Rev. 1 at 4 (Mar. 31, 2021); *see also* Colo. PUC Proceeding No. 22A-0563E, PSCo Verified Appl. for

same reasons explained in Section II.C above, EPA cannot rely on Executive Order 14241 to disapprove the fuel conversion. Therefore, EPA has not justified a disapproval of the Pawnee fuel conversion on the basis of purported energy impacts.

Similar problems apply to EPA's "necessary assurances" rationale and its position that the Clean Air Act does not contemplate "forced" source closures. Here again, the proposed rule refers only to source closures, not fuel conversions, in its discussion of this basis for disapproval.[294] Even if EPA intended to extend this rationale to the Pawnee fuel conversion, it has not explained how federal and state prohibitions against uncompensated takings could possibly apply to an operational change that PSCo voluntarily proposed and that will enable it to continue using (and making money from) the plant.[295] Conversion of the plant is already well underway, indicating that PSCo continues to support the measure.[296] For these same reasons, EPA's argument that "forced" closures are inconsistent with Clean Air Act sections 110 and 169A has no application to the Pawnee fuel conversion.

Finally, disapproval of the Pawnee fuel conversion would be inconsistent with EPA's recent approval of Wyoming's regional haze first implementation period SIP revision related to reasonable progress requirements for Units 1 and 2 of the Jim Bridger power plant.[297] In that SIP revision, Wyoming replaced a previous emission limit that effectively required the installation of SCR with new requirements to convert the units from coal- to natural-gas firing and to meet

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Approval of a Certificate of Public Convenience and Necessity for the Conversion of Pawnee Generating Station from Coal Operations to Natural Gas Operations at 3 (Dec. 20, 2022) ("Converting Pawnee will allow the Company to maintain a 505 MW dispatchable resource within its fleet while we continue to incorporate increasing levels of variable renewable generation into Public Service's operating system. . . . The timing of this conversion was carefully considered with thought given to the potential impact on resource adequacy and system reliability given the important role the unit plays.") [hereinafter "Pawnee CPCN Application"].

[294] 90 Fed. Reg. at 31,927 ("EPA also proposes to find that the State has not provided necessary assurances required by CAA section 110(a)(2)(E) that unconsented enforceable *source closures* would not be prohibited by state or federal law." (emphasis added)); *id.* at 31,937 ("[T]he State has not provided necessary assurances that the enforceable *closures* would not violate State and Federal law . . . ." (emphasis added)); *id.* at 31,938 ("Colorado has not provided the assurances required by CAA section 110 that implementing the SIP's forced *closure* provisions is not prohibited . . . ." (emphasis added)); *id.* at 31,939 ("Colorado has not provided the necessary assurances required by CAA section 110(a)(2)(E)(i) that Federal law would not prohibit the State from implementing the submitted closure provisions . . . .").

[295] APCD, Regional Haze Second 10-year Planning Period Reasonable Progress (RP) Four-Factor Analysis of Control Options, Public Service Company of Colorado – Pawnee Station, at 9 (Nov. 2021), EPA-R08-OAR-2024-0607-0014, 2021_Pawnee; *see also* Pawnee CPCN Application at 7–8 (requesting that the PUC grant a certificate of public convenience and necessity for the Pawnee conversion and approve PSCo's proposed plan, project timeline, construction schedule, and costs for the conversion).

[296] *See* Morgan Cnty. Plan. & Zoning Dep't, Morgan County Planning Commission File Summary, January 16, 2025, at 2 ("The overall conversion and construction would start in early 2025 to allow an in-service date by January 1, 2026.").

[297] 90 Fed. Reg. 38,005 (Aug. 7, 2025).

revised NOx and heat limit inputs.[298] EPA's approval of Wyoming's SIP revision ensures the federal enforceability of the fuel conversion, which EPA found "is not unreasonable and is supported by . . . [the] Regional Haze Rule."[299] EPA's notices of proposed and final rulemaking for the Wyoming action contain no discussion of energy demand or grid reliability impacts, Executive Order 14241, necessary assurances, or compatibility with the Clean Air Act, confirming that voluntary fuel conversions simply do not implicate those issues. The unexplained inconsistency between EPA's proposed disapproval of the Pawnee fuel conversion and its approval of the Jim Bridger fuel conversion in Wyoming's SIP renders EPA's action here arbitrary and capricious.

V. EPA's Reliance on Its New URP Policy Violates the Clean Air Act and the Regional Haze Rule.

As part of its justification for proposing to partially disapprove Colorado's SIP submission, EPA claims that, "even with all source closures removed from the SIP, Colorado is unlikely to contribute to visibility impairment at any Class I areas projected to be above the adjusted 2028 URP."[300] EPA points to the new URP policy it first announced in its proposal to approve West Virginia's regional haze SIP, stating that "the Agency is proposing to adopt a policy whereby states that are not contributing to visibility impairment at Class I areas projected to be above the Uniform Rate of Progress are presumed to be making reasonable progress toward natural visibility conditions provided they have considered the four statutory factors."[301]

As further discussed in Section VI below, EPA also relies on its new URP policy to claim that Colorado need not take further action to address a partial disapproval.[302] Even though Colorado's RPGs are based in part on enforceable closures for at least two units that EPA has proposed to disapprove, EPA asserts that Colorado does not need to take any further action to demonstrate that the SIP makes reasonable progress.[303] This is because the Agency finds that Class I areas affected by Colorado pollution would "very likely" still be below the adjusted URP without those retirements.[304] EPA does not provide any modeling or other technical analysis to support its convoluted reasoning. Rather, EPA asserts that Colorado's SIP submission makes a "robust demonstration" that, even without the enforceable source retirements that EPA proposes not to incorporate into the State's SIP, no additional controls are reasonable or necessary to make reasonable progress.[305] Yet, Colorado did not make any such robust demonstration or conduct the required analysis to support such a demonstration anywhere in the SIP submission.

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[298] 89 Fed. Reg. 25,200, 25,200–01 (Apr. 10, 2024).
[299] *Id.* at 25,208.
[300] 90 Fed. Reg. 31,926, 31,938 (July 16, 2025). As further explained below, Colorado chose not to rely on the adjusted URP.
[301] *Id.* at 31,938 n.47 (citing the proposal to approve West Virginia's SIP, 90 Fed. Reg. 16,478 (Apr. 18, 2025) [hereinafter "West Virginia SIP Proposal"]).
[302] *Id.* at 31,943.
[303] *Id.* at 31,941.
[304] *Id.*
[305] *Id.*

With its reliance on its new URP policy in this rulemaking, EPA ignores that the policy as announced in the West Virginia proposal allegedly supported approval when Class I areas affected by a state have projected 2028 RPGs below the URP glidepath and the state considered the four statutory factors.[306] Here, EPA proposes to rely on the new URP policy to support not an approval, but a partial disapproval. EPA now proposes to alter its new URP policy so that the Agency can not only presumptively approve SIPs that decline to impose reasonable progress measures where affected Class I areas are on the URP glidepath, but can also disapprove SIPs that contain emission reduction measures that EPA unilaterally asserts—despite the State's determinations to the contrary—do not constitute reasonable progress because affected Class I areas are allegedly already "on track" to achieve natural conditions. In other words, EPA now converts the URP from the purely tracking metric that it was intended to be when EPA (not Congress) first created it into both a safe harbor that states *need not* exceed and a ceiling that states *cannot* exceed.[307]

EPA's new URP policy: (1) violates the Clean Air Act's and the Regional Haze Rule's plain language, intent, and context; and (2) violates the Clean Air Act's requirements that Agency SIP actions be consistent with national policy and consistent across EPA regions. EPA, therefore, cannot rely on its new URP policy to justify a partial disapproval of Colorado's SIP submission.

A. EPA's New URP Policy Violates the Clean Air Act.

As an initial matter, EPA's reliance on and application of its new URP policy here reflects two changes in position from its prior guidance on the URP, one of which EPA has acknowledged and attempted to explain and one of which it has not. First, as noted above, EPA points to its new URP policy as first announced in its proposal to approve West Virginia's SIP, where EPA relied on the policy to presumptively approve that SIP. As EPA explained in the West Virginia proposal, the new policy as applied to presumptively approve a SIP reflects only "a change in policy from current guidance as to how the URP should be used in the evaluation of regional haze second planning period SIPs."[308] Thus, EPA has not proposed to change any of its prior interpretations regarding the requirements of the Clean Air Act or Regional Haze Rule.[309]

Second, as noted above, EPA alters its new URP policy in its proposal here to partially disapprove, rather than presumptively approve, Colorado's SIP submission, treating the URP as a

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[306] West Virginia SIP Proposal, 90 Fed. Reg. at 16,483.

[307] EPA 2021 Clarifications Memo at 15 (explaining that the URP is only "a planning metric used to gauge the amount of progress made thus far and the amount left to make").

[308] West Virginia SIP Proposal, 90 Fed. Reg. at 16,483.

[309] To the extent EPA views any of the arguments or statements made in its proposal to partially disapprove Colorado's SIP, or its other proposals in which the Agency relies on its new URP policy, as changing any of its prior interpretations of the Clean Air Act and the Regional Haze Rule, such changes would constitute unacknowledged and unexplained changes in position. *Fox Television Stations*, 556 U.S. at 515 (explaining that "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position" and that "[a]n agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books" (emphasis in original)).

ceiling states cannot exceed. EPA has not acknowledged that its alteration of the new URP policy here is a change in position from its past guidance on the URP. EPA also has not provided a reasoned explanation for its altered URP policy or explained how applying its new URP policy to partially disapprove, rather than approve, Colorado's SIP can be squared with the statutory text, intent, or context of the Clean Air Act. As a result, EPA's alteration and application of its new policy here is an unacknowledged and unexplained change in position.[310]

As explained below, EPA cannot demonstrate that its new URP policy, or its application of its altered URP policy here, complies with the Act.

1. EPA's New URP Policy Violates the Plain Language of the Clean Air Act.

Under the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, a statutory provision is interpreted "using the traditional tools of statutory construction" to arrive at the provision's "best reading."[311] The starting point for that inquiry is the text of the Clean Air Act.[312] The plain language of Section 42 U.S.C. § 7491 bars EPA's new URP policy.

Section 7491(b)(2) requires states to develop SIPs that "make reasonable progress toward meeting the national goal" of eliminating human-caused visibility impairment in Class I areas. Section 7491(g)(1), in turn, defines "reasonable progress," providing that, "in determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements."

Section 7491(g)(1) begins with the dependent clause "in determining reasonable progress," which must be joined with the independent clause of that section—*i.e.*, the four reasonable progress factors—to make sense. Thus, accurately reading those clauses together, the Act requires that states and EPA must determine what constitutes "reasonable progress" based on the four statutory factors listed in Section 7491(g)(1). Notably absent from the statutory text is any reference to the URP.[313]

EPA misreads this provision when, in its new URP policy, it changes the phrase "taken into consideration" into "considers." The word "consideration" means "something that is considered as a ground of opinion or action" or "the act of regarding or weighing carefully."[314] Here, the things that states and EPA must "take into consideration" are the four statutory factors listed in (g)(1). In other words, states and EPA must not merely "consider" the four statutory

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[310] *Id.*
[311] 603 U.S. 369, 403, 400 (2024).
[312] *See Env't Def. Fund v. EPA*, 124 F.4th 1, 11 (D.C. Cir. 2024).
[313] The URP is an administrative construct that the Agency, not Congress, created to serve as a visibility tracking metric. EPA 2021 Clarifications Memo at 15.
[314] Consideration, Webster's Third New International Dictionary of the English Language 484 (1961); *see also* Consideration, The Compact Edition of the Oxford English Dictionary 859 (1971) ("consideration" is "The taking into account of anything as a motive or reason; a fact or circumstance taken, or to be taken into account; a reason considered.").

factors, but must use them "in determining reasonable progress," confirming that the best reading of this statutory provision requires states to determine reasonable progress based on the four statutory factors, and not other unlisted factors. Had Congress intended states to consider other factors, such as the URP, in determining what constitutes reasonable progress, it would have listed those factors in the statutory definition of "reasonable progress."[315]

Additionally, section 7491(b)(2)(B) requires that states develop SIPs that set forth long-term strategies "for making reasonable progress toward meeting the national goal" covering "ten to fifteen year[]" periods. The Act does not contemplate prolonging progress toward attaining natural visibility conditions. Instead, Congress set a framework for EPA to establish iterative planning periods during which states must continue to make progress toward the national visibility goal.[316] Relying on the new URP policy to allow states to avoid adopting new or additional emission reduction measures necessary to make reasonable progress in each planning period if the states show that all affected Class I areas are projected to be below the URP makes this statutory text superfluous.[317]

The new URP policy also would only require states and EPA to apply the Act's text in certain scenarios. Under the new policy, even if a state conducts control analyses that show new or existing emission reduction measures are necessary based on the four statutory factors, states or EPA can ignore the results of those analyses and not include any measures in the SIP to make reasonable progress if they show that all affected Class I areas are projected to be below the URP glidepath. In fact, that is exactly what EPA does in its proposal here. EPA alters and uses its new URP policy to propose to disapprove and refuse to incorporate into Colorado's SIP federally enforceable measures that the State determined constitute reasonable progress because Class I areas affected by Colorado sources' emissions allegedly are projected to be below the adjusted URP.[318] As a result, EPA disregards the text that Congress set forth in section 7491(g)(1) requiring states and EPA to determine reasonable progress based on the four factors and in section 7491(b)(2)(B) to build on emission reductions to make progress in each planning period.

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[315] *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that it is arbitrary and capricious for agencies to "rel[y] on factors which Congress has not intended").

[316] *See* Env't & Nat. Res. Pol'y Div. of the Cong. Rsch. Serv. of Library of Cong., *A Legislative History of the Clean Air Act Amendments of 1990* 5796 (Comm. Print 1993) (providing that Congress passed Section 7491 in the 1990 Clean Air Act amendments to specifically require EPA to promulgate regional haze regulations to improve visibility conditions in Class I areas after the Agency's continued failure to adopt such regulations).

[317] *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Armstrong Paint & Varnish Works v. Nu-Emanual Corp.*, 305 U.S. 315, 333 (1938) (explaining that "to construe statutes so as to avoid results glaringly absurd, has long been a judicial function").

[318] 90 Fed. Reg. 31,926 at 31,938, 31,941 (July 16, 2025).

A policy that makes the statutory text superfluous in some cases, but not in others, would be absurd.[319]

EPA similarly relies on the new URP policy to shun its duties under the Clean Air Act to engage in rigorous and substantive review of state SIPs. Multiple courts, including the Supreme Court, have held that the Clean Air Act's plain text requires EPA to engage in rigorous and substantive review of SIPs.[320] Section 7491(b)(2)(B)'s requirement that states develop SIPs "that mak[e] reasonable progress toward meeting the national goal" inherently requires EPA to assess whether SIP submissions provide adequate measures to achieve that goal. Section 7410(k)(3), which requires EPA to determine if SIPs "meet[] all of the applicable requirements of this chapter," further necessitates that EPA will assess the adequacy, effectiveness, and reasonableness of SIPs to ensure they comply with the Act and its implementing regulations.

EPA's new URP policy would render these Clean Air Act requirements superfluous.[321] In pointing to the new policy, EPA tries to evade its duty to review four-factor analyses or control determinations to ensure that the technical bases for those analyses are adequately documented and the determinations are based on reasoned decision making. EPA's proposal here again is a prime example. EPA makes conclusory statements that Colorado showed that there are no other emission reduction measures that would be reasonable to include in its long-term strategy.[322] The Agency provides a one-sentence rationale for its conclusion, pointing to Colorado's consideration of the four statutory factors for a "comprehensive" set of sources and the "large number" of emission control measures in the SIP.[323]

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[319] *TRW Inc.*, 534 U.S. at 31; *Griffin*, 458 U.S. at 575; *Armstrong Paint & Varnish Works*, 305 U.S. at 333.

[320] *Alaska Dep't of Env't. Conservation v. EPA*, 540 U.S. 461, 488-90 (2004); *Arizona ex rel. Darwin v. EPA*, 815 F.3d 519, 525, 531-32 (9th Cir. 2016); *North Dakota v. EPA*, 730 F.3d 750, 760-62 (8th Cir. 2013); *Oklahoma v. EPA*, 723 F.3d 1201, 1207-10 (10th Cir. 2013); EPA, Response to Comments for the Federal Register Notice for the Texas and Oklahoma Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; and Federal Implementation Plan for Regional Haze, EPA-R06-OAR-2014-0754, at 847 (Dec. 9, 2015) [hereinafter "2016 FIP RTC"] ("[O]ur review of SIPs is not limited to a ministerial type of automatic approval of a state's decisions. We must consider not only whether Texas considered the appropriate factors but acted reasonably in doing so. In undertaking such a review, we do not 'usurp' the state's authority but ensure that such authority is reasonably exercised."); *id.* at 848–49 ("[T]he state was not free to make [reasonable progress] determinations that were inconsistent with the CAA. Thus, while states have discretion in establishing reasonable progress goals it must be reasonably exercised. Texas' approach to reasonable progress was flawed and we properly rejected it.").

[321] *TRW Inc.*, 534 U.S. at 31; *Griffin*, 458 U.S. at 575; *Armstrong Paint & Varnish Works*, 305 U.S. at 333.

[322] 90 Fed. Reg. at 31,941.

[323] *Id.*

It is indisputable, however, that the State did not endeavor to make a robust demonstration under 40 CFR § 51.308(f)(3)(ii) anywhere in its SIP submission.[324] Nor did the State attempt to show that there would be no other control measures for selected sources that would be reasonable to include in the long-term strategy. For example, for Comanche Units 1 and 2 (which are equipped only with low-NOx burners and overfire air), the APCD did not update its first planning period capital cost estimates or assess the cost-effectiveness of post-combustion NOx controls; nor did it address whether, if it had updated that earlier analysis, additional measures may have been necessary to reduce emissions from those units.[325] Indeed, in a recent letter to CSU regarding its request to postpone the Nixon retirement deadline, Colorado explained that if the source retirements are not made federally enforceable in the SIP, the State would need to update its four-factor analyses: "Any change or removal of the announced retirement date will require an updated analysis of control technologies for the reasonable progress determination."[326] Furthermore, the State's SIP submission does not assess the number of years it would take to attain natural visibility conditions if the source retirements were excluded, as required by 40 C.F.R. § 51.308(f)(3)(ii). EPA's bare assertion that Colorado's SIP submission somehow contains the robust demonstration the State never attempted to make illustrates the Agency's disregard for its statutory oversight obligations under its new URP policy.

Additionally, EPA ignores that Colorado relied on the unadjusted URP for affected Class I areas. The State assessed the pros and cons of relying on the adjusted URP and concluded that "[f]or multiple reasons, Colorado is utilizing the default URP glidepath"[327]—a choice well within the State's discretion.[328] As a result, Colorado similarly did not attempt to analyze whether (1) any glidepath adjustments would satisfy the requirements of the Regional Haze Rule[329] or (2) whether, without the source retirements at issue here, Class I areas would in fact be below their adjusted URPs. Although EPA attempts to make such an assertion on behalf of the State by providing a back-of-the-napkin analysis of Great Sand Dunes National Park, EPA's conclusion is not supported by any updated modeling or technical analysis.[330] More fundamentally, it is improper for EPA to rely on the adjusted URP to make a determination of compliance when the State expressly rejected that metric in developing its SIP.

Moreover, the plain text of the Clean Air Act embodies Congress's determination that the rate of progress achieved by the emission reduction measures found to be reasonable based on

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[324] *See generally* SIP Narrative (searching the SIP narrative for the phrase "robust demonstration" returns no results).
[325] Regional Haze for Second 10-year Planning Period Reasonable Progress (RP) Four-Factor Analysis of Control Options for Public Service Company of Colorado Comanche Station, Units 1 and 2 (Oct. 2020), EPA-R08-OAR-2024-0607, 2020_Comanche 1&2.pdf.
[326] Apr. 11, 2025 CDPHE Letter at 2.
[327] SIP Narrative at 42-45.
[328] 40 C.F.R. § 51.308(f)(1)(vi)(B) (providing that states "may propose" to adjust the URP glidepath based on wildland prescribed fire and international emissions, but not requiring that states do so). *See also supra* Section I.A.1 (describing state discretion in SIP development).
[329] *Id.* § 51.308(f)(1)(vi)(B) (requiring that glidepath adjustments be based on "scientifically valid data and methods").
[330] 90 Fed. Reg. at 31,941.

the four statutory factors "is, by definition, a reasonable rate of progress."[331] EPA tries to sever the requirement to make "reasonable progress" from the four statutory factors to allow states and the Agency to make a free-floating determination, unmoored from those factors, as to what is "reasonable." The Agency cannot change the fact that Congress deliberately placed "reasonable progress" under section 7491(g)'s heading of "Definitions," making it a statutorily defined term.

EPA's own interpretation of the Act's text in its 2017 Regional Haze Rule revision preamble makes clear that the new URP policy violates the Clean Air Act. In that preamble, EPA explained that the terms "compliance" and "subject to such requirements" in section 7491(g)(1) showed that "Congress intended the relevant determination to be the requirements with which sources would have to comply in order to satisfy the [Clean Air Act's] reasonable progress mandate."[332] In other words, the four-factor analyses must be the basis on which states determine the measures that represent reasonable progress.

Thus, EPA's new URP policy, or its alteration and application here, cannot be the "best reading" of the Clean Air Act's regional haze provisions. Rather, EPA's own (still standing) interpretation of the Act discussed below—that the URP is not a safe harbor and states and EPA cannot rely on a claim that Class I areas are below their respective URPs to reject emission reduction measures that are found to be necessary to make reasonable progress based on an analysis of the four statutory factors—constitutes the best of the reading of the statute.

2. EPA's Contemporaneous Understanding of the Act Reflects the Best Reading of the Statute.

Under *Loper Bright*, an agency's contemporaneous understanding of a statutory provision may warrant respect in interpreting that provision.[333] EPA's contemporaneous understanding of the Clean Air Act's haze requirements is the best reading of those requirements and confirms that the statutory text prohibits the Agency's new policy.

EPA's 1999 Regional Haze Rule, which was EPA's first significant attempt at implementing the Clean Air Act's 1990 visibility amendments, is the best evidence of EPA's "contemporaneous" understanding of the statute's requirements. That rule tracks the statutory text discussed above and provides that:

> In establishing a reasonable progress goal for any mandatory Class I Federal area within the State, the State must . . . [c]onsider the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected sources, and include a demonstration showing how these factors were *taken into consideration* in selecting the goal.[334]

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[331] 82 Fed. Reg. at 3,093.
[332] *Id.* at 3,091.
[333] 603 U.S. at 386.
[334] 64 Fed. Reg. at 35,714, 35,766 (emphasis added).

Thus, the 1999 Regional Haze Rule also did not permit states or EPA to treat the URP as a safe harbor by relying on Class I areas' URP glidepath status to reject controls found to be necessary to make reasonable progress based on an analysis of the four statutory factors. Rather, the 1999 Regional Haze Rule required states and EPA to establish RPGs based on the four statutory factors. Again, as noted above, the concept of the URP does not appear anywhere in the statute. Rather, EPA introduced the concept of the URP with the 1999 Regional Haze Rule to serve as an "analytical requirement."[335] The 1999 Regional Haze Rule references the "uniform rate of improvement," providing that "[i]n establishing the reasonable progress goal, the State must consider the uniform rate of improvement in visibility and the emission reduction measures needed to achieve it for the period covered by the implementation plan."[336] Although the terminology used in 40 C.F.R. § 51.308(d) is slightly different, the "uniform rate of improvement" referenced there is understood to be the same as the "uniform rate of progress" referenced in section 51.308(f). Still, nothing in the 1999 Regional Haze Rule regulatory text allows states or EPA to ignore the requirement to determine the emission reduction measures necessary to make reasonable progress based on the four statutory factors.

As with the Act's plain text, the 1999 Regional Haze Rule's text requires that EPA engage in rigorous and substantive review of state SIPs and reasonable progress determinations. The 1999 Regional Haze Rule required that, "[i]n determining whether the State's goal for visibility improvement provides for reasonable progress towards natural visibility conditions, the Administrator *will evaluate* the demonstrations developed by the State pursuant to paragraphs (d)(1)(i) and (d)(1)(ii) of this section."[337] The cross-referenced paragraphs pertain to the state's demonstration of how the four factors were taken into consideration in establishing the RPGs. Thus, neither EPA nor states could treat the four-factor analysis required by the Act and the Regional Haze Rule as an ungraded, make-work exercise.

Moreover, the 1999 Regional Haze Rule preamble made clear that states and EPA could not use the URP to avoid complying with the statutory and regulatory requirements of the haze program. EPA explained that the 1999 Rule set out a four-step process states had to go through to determine the measures necessary to make reasonable progress.[338] Step 2 required states to calculate the URP for a given Class I area.[339] Step 3 required states to identify the amount of progress that would result if they achieved the URP by the end of the first planning period.[340] Step 4 then required states to "identify and analyze the emissions measures" needed to achieve that amount of progress during the first planning period "based on the statutory factors."[341] Following its recitation of this four-step process, EPA stated that:

> If the State determines that the amount of progress identified through the analysis is reasonable based upon the statutory factors, the State should identify this amount of progress as its reasonable progress goal for the first long-term strategy,

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[335] *Id.* at 35,731–32.
[336] *Id.* at 35,766; 40 C.F.R. § 51.308(d)(1)(i)(B).
[337] 64 Fed. Reg. at 35,766 (emphasis added); 40 C.F.R. § 51.308(d)(1)(iii).
[338] 64 Fed. Reg. at 35,732.
[339] *Id.*
[340] *Id.*
[341] *Id.*

> unless it determines that additional progress beyond this amount is also reasonable. If the State determines that additional progress is reasonable based on the statutory factors, the State should adopt that amount of progress as its goal for the first long-term strategy.[342]

The "analysis" EPA discussed here references the analysis in Step 4 of the process—i.e., the statutory four-factor analysis. Thus, EPA clearly explained that, even if the measures found to be reasonable based on a four-factor analysis would result in a rate of progress that is below the URP for a given Class I area, the Regional Haze Rule still required states to include those measures in the long-term strategy as necessary to make reasonable progress. In fact, during the rulemaking process for its 1999 Regional Haze Rule, EPA had originally proposed "presumptive 'reasonable progress targets,'"[343] similar to how its new URP policy treats the URP as the target states should aim for (but not exceed) in their SIPs. But EPA ultimately rejected that approach in the final Rule.[344] Thus, EPA rejected the notion that the URP itself necessarily represented reasonable progress.

In the 26 years since EPA adopted the 1999 Regional Haze Rule, the Agency has time and again reaffirmed its contemporaneous understanding of the Clean Air Act's haze provisions. In its response to comments on the 2017 Regional Haze Rule revision, EPA devoted an entire section to explaining that the URP is not a safe harbor.[345] EPA pointed out that reading the 1999 Regional Haze Rule preamble to support the notion of the URP as a "safe harbor":

> would lead to a nonsensical result. If a state had to identify, analyze, and adopt only those measures that would be needed to achieve the URP, there would never be a circumstance in which it would determine that the amount of progress identified was not reasonable or in which it determined that additional progress is reasonable. This would . . . *read the statutory four-factor analysis out of the regional haze rule*. If consideration of whether additional measures were also reasonable were merely an option for the state, an explanation of the implication of a state determination that there are such additional measures would be irrelevant to the central question of what a state must do to prepare an approvable SIP revision.[346]

EPA further explained in the 2017 Regional Haze Rule preamble that:

> Treating the URP as a safe harbor would be inconsistent with the statutory requirement that states assess the potential to make further reasonable progress towards natural visibility goal in every implementation period. Even if a state is currently on or below the URP, there may be sources contributing to visibility

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[342] *Id.*
[343] *Id.* at 35,730.
[344] *Id.* at 35,731.
[345] EPA, Responses to Comments on Protection of Visibility: Amendments to Requirements for State Plans; Proposed Rule (81 FR 26942, May 4, 2016) at 161-70 (Dec. 2016) [hereinafter "2017 RHR RTC"].
[346] *Id.* at 169 (emphasis added).

> impairment for which it would be reasonable to apply additional control measures in light of the four factors. Although it may conversely be the case that no such sources or control measures exist in a particular state with respect to a particular Class I area and implementation period, this should be determined based on a four-factor analysis for a reasonable set of in-state sources that are contributing the most to the visibility impairment that is still occurring at the Class I area. It would bypass the four statutory factors and undermine the fundamental structure and purpose of the reasonable progress analysis to treat the URP as a safe harbor, or as a rigid requirement.[347]

EPA repeated its interpretation that the Act's requirements prohibit using the URP as a safe harbor in its guidance and memoranda for this second planning period. In its 2019 Guidance, EPA states that the Regional Haze Rule does not "establish[] the URP glidepath as the amount of visibility improvement that constitutes 'reasonable progress.'"[348] Similarly, in its 2021 Clarifications Memo, EPA devotes an entire section to explaining that the "Uniform Rate of Progress is Not a 'Safe Harbor'" and states that:

> EPA has reviewed several draft second planning period regional haze SIPs that conclude that additional controls, including potentially cost-effective and otherwise reasonable controls, are not needed because all of the Class I areas in the state (and those out-of-state areas affected by emissions from the state) are below their [URPs]. The 2017 RHR preamble and the August 2019 Guidance clearly state that it is not appropriate to use the URP in this way, i.e., as a "safe harbor." The URP . . . *is not based on consideration of the four statutory factors and, therefore, cannot answer the question of whether the amount of progress made in any particular implementation period is "reasonable progress."*[349]

Although EPA has claimed that its new URP policy does not treat the URP as a safe harbor, EPA's statements explaining its new policy underscore that it does.[350] As shown above, EPA's current guidance—embodied by the 1999 Regional Haze Rule, 2017 Regional Haze Rule, 2019 Guidance, and 2021 Clarifications Memo—is that the URP is not a safe harbor. But EPA

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[347] 82 Fed. Reg. at 3,099–100; *see also* 2017 RHR RTC at 165-66 (stating that "the glidepath was not established by Congress and the EPA never intended it as the goal of the regional haze program" and while some commenters claimed that treating the URP as a safe harbor would provide regulatory certainty, EPA "[did] not believe it should be achieved by bypassing the statutory analysis and relieving states of the requirement to consider the four factors for a reasonably chosen set of sources even when the RPGs without additional controls would be on or below the glidepath").

[348] 2019 Guidance at 49.

[349] EPA 2021 Clarifications Memo at 15 (emphasis added).

[350] West Virginia SIP Proposal, 90 Fed. Reg. at 16,483–84; Response to Comments for the Federal Register Notice for Air Plan Approval; West Virginia; Regional Haze State Implementation Plan for the Second Implementation Period, Docket No. EPA-R03-OAR-2025-0174, at 23-24 (June 25, 2025), https://www.regulations.gov/document/EPA-R03-OAR-2025-0174-0076.

acknowledges that its new policy is a change from its prior guidance.[351] Thus, EPA's new URP policy must treat the URP as a safe harbor, which EPA has repeatedly said violates the Clean Air Act and Regional Haze Rule. Otherwise, EPA's explanation and application of its new policy is inconsistent and incoherent, which also violates the Clean Air Act and fundamental principles of reasoned agency decision making.[352]

At every opportunity since promulgating the original 1999 Regional Haze Rule, EPA has reaffirmed, reiterated, and repeated that relying on the URP to avoid requiring emission reduction measures shown to be necessary to make reasonable progress based on an analysis of the four statutory factors violates the Clean Air Act. Yet, EPA's new URP policy, and its alteration and application of the policy here, allows states and EPA to do exactly that. Thus, it cannot represent the best reading of the statute. Rather, EPA's contemporaneous interpretation of the Act embodied by the 1999 Regional Haze Rule constitutes the best reading of the Act's haze requirements.

3. The Context of the Act's Visibility Provisions Confirms the Best Reading of the Statute.

The context of section 7491(g)(1) also shows that EPA's contemporaneous interpretation of the Act is the best reading of the statute for two reasons.[353] First, section 7491(g)(1) does not list visibility conditions or the URP as factors that can be considered in determining the measures necessary to make reasonable progress. Section 7491(g)(2) defining BART, on the other hand, explicitly includes visibility as one of its five factors. "Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another."[354] Because Congress intentionally omitted any reference to visibility or the URP in the definition of reasonable progress, it is clear that states may not reject measures based on assertions about visibility conditions at Class I areas. Rather, states and EPA consider visibility in the development of SIPs through the identification of affected Class I areas and selection of sources for which they will conduct four-factor analyses. Under the Act, a state must develop a long-term strategy to "make reasonable progress toward meeting the national goal" of preventing and

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[351] West Virginia SIP Proposal, 90 Fed. Reg. at 16,483.

[352] *Sierra Club v. EPA*, 719 F.2d 436, 459 (D.C. Cir. 1983) (explaining that "inconsistency is the hallmark of arbitrary action").

[353] *U.S. Sugar Corp. v. EPA*, 113 F.4th 984, 993 (D.C. Cir. 2024) (explaining that the context of a statutory provision is another tool of statutory construction).

[354] *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. 178, 186 (2020) (quoting *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 537 (1994)); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("[When] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *U.S. v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 509 (2014) (explaining that practical difficulties in implementation or administrative efficiency do not justify departure from the Act's plain text; courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461–62 (2002))); *State Farm*, 463 U.S. at 43 (explaining that it is arbitrary and capricious for agencies to "rel[y] on factors which Congress has not intended").

remedying anthropogenic visibility impairment for any in-state Class I areas and any out-of-state Class I areas for which in-state pollution sources "may reasonably be anticipated to cause or contribute to any impairment of visibility."[355] Accordingly, states and EPA account for visibility impacts in determining which Class I areas are affected by in-state pollution sources and in selecting the sources that contribute to impairment at those Class I areas to be addressed in the long-term strategy, but do not consider the URP or the status of visibility impairment at Class I areas in determining what emission reduction measures are necessary to make reasonable progress for those selected sources. To insert the URP as an unnamed, fifth non-statutory factor is contrary to the plain language of the Act. And even if the Clean Air Act allowed states or EPA to consider visibility conditions as an unnamed fifth factor (it does not), EPA has repeatedly explained that using visibility conditions in the way EPA does with its new URP policy violates the Clean Air Act and Regional Haze Rule.[356]

Second, section 7491 does not contain any exemptions from the Act's reasonable progress requirements, including in cases where affected Class I areas are projected to be below the URP glidepath. This is again in stark contrast to section 7491(c), which explicitly authorizes exemptions of certain major stationary sources from BART requirements based on visibility conditions and impacts. That Congress did not provide for similar, or any, exemptions in the statute's reasonable progress provisions shows that Congress did not intend any exemptions from the requirement to determine the measures that are necessary to make reasonable progress based on the four statutory factors.[357] Yet, by applying its new policy here to partially disapprove Colorado's SIP submission and assert that the State need not take any further action, EPA improperly proposes to exempt the facilities for which it disapproves federally enforceable retirement deadlines from the requirement to evaluate and determine the measures necessary to make reasonable progress through consideration of the four statutory factors.[358]

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[355] 42 U.S.C. § 7491(b)(2).

[356] 82 Fed. Reg. at 3,093 ("[I]t would not be appropriate for a state to reject a control measure (or measures) because its effect on [visibility] is subjectively assessed as not meaningful." (internal quotation marks omitted)); 2017 RHR RTC at 186 ("[A] state that elects to consider an additional factor such as visibility benefit must consider it in a reasonable way that does not undermine or nullify the role of the four statutory factors in determining what controls are necessary to make reasonable progress."); EPA 2021 Clarifications Memo at 13 ("[A] state should not use visibility to summarily dismiss cost-effective potential controls. . . . [A] state that has identified cost-effective controls for its sources but rejects most (or all) such cost-effective controls across those sources based on visibility benefits is likely to be improperly using visibility as an additional factor.").

[357] *Intel Corp. Inv. Pol'y Comm.*, 589 U.S. at 186; *Russello*, 464 U.S. at 21; *EME Homer City Generation, L.P.*, 572 U.S. at 509; *State Farm*, 463 U.S. at 43.

[358] 90 Fed. Reg. 31,926, 31,938, 31,941, 31,943 (July 16, 2025); *see also infra* Section VI.

4. The Purpose of the Act's Visibility Provisions Further Confirms the Best Reading of the Statute.

The purpose[359] of the Clean Air Act's regional haze provisions is "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."[360] In its 2017 Regional Haze Rule revision preamble, EPA rejected the idea that states could use the URP as a safe harbor, pointing to the Act's natural visibility goal:

> This approach is consistent with and advances the ultimate goal of section [7491]: Remedying existing and preventing future visibility impairment. Congress required the EPA to promulgate regulations requiring reasonable progress toward that goal, and it would be antithetical to allow states to avoid implementing reasonable measures until and unless that goal is achieved.[361]

Contrary to Congress's stated goal in establishing the regional haze program, the new URP policy would allow states to adopt SIPs that do not include *any* additional measures to remediate anthropogenic visibility impairment during a given planning period. That result would be inconsistent with the purpose of the statute. Furthermore, EPA's proposal to disapprove Colorado's EGU retirements, specifically, is contrary to the purpose of the Act. As noted above, Colorado determined that compliance with existing limits and measures until the date of closure, combined with making those closure dates federally enforceable in the SIP for affected EGUs, constituted reasonable progress. Thus, the EGUs' existing limits and measures combined with their voluntary retirement dates were necessary to ensure that the SIP satisfied the purposes of the Clean Air Act and Regional Haze Rule.[362]

B. The New URP Policy Is Inconsistent with the Regional Haze Rule.

Using the "'traditional tools' of construction,"[363] EPA cannot square its new URP policy with the Regional Haze Rule, just as it cannot square that policy with the Clean Air Act.

The Regional Haze Rule's long-term strategy requirements track those of the Clean Air Act, requiring that such strategies "must include the enforceable emissions limitations, compliance schedules, and other measures that are necessary to make reasonable progress, as determined pursuant to [40 C.F.R. § 51.308](f)(2)(i) through (iv)."[364] Section 51.308(f)(2)(i), in turn, provides that:

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[359] *See, e.g.*, *Lissack v. Comm'r of Internal Rev.*, 125 F.4th 245, 258 (D.C. Cir. 2025) (considering, among other things, Congress' purpose in amending tax whistleblower provisions).
[360] 42 U.S.C. § 7491(a)(1).
[361] 82 Fed. Reg. at 3,094.
[362] 42 U.S.C. § 7491(a); 40 C.F.R. § 51.300(a); Colo. Rev. Stat. § 25-7-105.
[363] *Kisor v. Willkie*, 588 U.S. 558, 575 (2019) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984), *overruled on other grounds by Loper Bright*, 603 U.S. at 649) (stating that the traditional tools of construction include "the text, structure, history, and purpose of a regulation").
[364] 40 C.F.R. § 51.308(f)(2).

> The State *must* evaluate and determine the emission reduction measures that are necessary to make reasonable progress by considering the costs of compliance, the time necessary for compliance, the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any potentially affected anthropogenic source of visibility impairment. The State should consider evaluating major and minor stationary sources or groups of sources, mobile sources, and area sources. The State must include in its implementation plan a description of the criteria it used to determine which sources or groups of sources it evaluated and *how the four factors were taken into consideration in selecting the measures for inclusion in its long-term strategy*.[365]

Once again, section 51.308(f)(2)(i) contains a dependent clause ("by considering" the four factors) that must be joined with its independent clause ("the State must evaluate and determine . . . the measures that are necessary to make reasonable progress) to make sense. As with the Clean Air Act and 1999 Regional Haze Rule, accurately reading these clauses together requires that states and EPA determine the measures that must be included in a state's long-term strategy *based on* the four statutory factors. Nothing in sections 51.308(f)(2)(ii)-(iii) changes this requirement or allows states to point to the URP to reject otherwise reasonable measures that satisfy the four factors.

The Regional Haze Rule's RPG provisions further make clear that the URP cannot supplant the requirement to conduct thorough and reasonable four-factor analyses to identify necessary measures for the long-term strategy. Section 51.308(f)(3)'s requirement that states establish RPGs for their in-state Class I areas refers back to (f)(2)'s requirement to establish emission limitations and other measures necessary to make reasonable progress.[366] As explained above, section 51.308(f)(2) is directly linked to the four factors, as the emission limitations and measures necessary to make reasonable progress must be based on the four factors.

Thus, like the Clean Air Act, the Regional Haze Rule does not allow states or EPA to reject emission reduction measures that are reasonable, and therefore necessary to make reasonable progress, by asserting that Class I areas affected by a state are projected to be below the URP glidepath. Nor does the Regional Haze Rule allow states or EPA to entirely forgo conducting four-factor analyses, conduct unreasonable and unsupported four-factor analyses, or fail to substantively review four-factor analyses for selected sources on this basis. Yet, EPA proposes to do all of the above in its proposal here by proposing to (1) disapprove facility closures that Colorado determined constitute reasonable progress along with the facilities' existing measures and (2) determine that, despite the Agency's disapproval of the facility closures, Colorado does not need to take further action to conduct revised four-factor analyses that assume a full remaining useful life for these facilities.[367]

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[365] *Id.* § 51.308(f)(2)(i) (emphasis added).
[366] *Id.* § 51.308(f)(3) (requiring states to set RPGs for their in-state Class I areas that "reflect the visibility conditions that are projected to be achieved by the end of the applicable implementation period as a result of those enforceable emissions limitations, compliance schedules, and other measures required under paragraph (f)(2)").
[367] 90 Fed. Reg. at 31,938, 31,941, 31,943; *see also infra* Section VI.

The purpose and history of the 2017 Regional Haze Rule revision confirm that states and EPA cannot reject necessary emission reduction measures or forgo a four-factor analysis by pointing to the URP. As EPA explained in the 2017 Regional Haze Rule revision preamble, one purpose of the revised Rule was to clarify misunderstandings in the interpretation and application of the 1999 Regional Haze Rule. EPA clarified the proper consideration of the URP with regard to four-factor analyses:

> [If] a state has reasonably selected a set of sources for analysis and has reasonably considered the four factors in determining what additional control measures are necessary to make reasonable progress, then the state's analytical obligations are complete if the resulting RPG for the most impaired days is below the URP line. The URP is not a safe harbor, however, and states may not subsequently reject control measures that they have already determined are reasonable. If a state's RPG for the most impaired days is above the URP line, then the state has an additional analytical obligation to ensure that no reasonable controls were left off the table.[368]

EPA explained that the four-factor analysis is not a box checking exercise; rather, states must engage in thorough and reasoned analyses to satisfy the requirements of the Regional Haze Rule. Contrary to EPA's new policy, a state's mere mention or reference to the four statutory factors is not sufficient to demonstrate that the state conducted those analyses in compliance with the Regional Haze Rule.[369]

EPA further clarified that even the 1999 Regional Haze Rule prohibited reliance on the URP to evade the four-factor analysis requirements of the Act and the Rule:

> [T]he URP was never intended to be a safe harbor. In the 1999 RHR, we explained that "[states should identify the amount of progress that is reasonable based upon the statutory factors and adopt that amount of progress in their long-term strategies.]"[370] This approach is consistent with and advances the ultimate goal of section [7491]: Remedying existing and preventing future visibility impairment. Congress required the EPA to promulgate regulations requiring reasonable progress toward that goal, and it would be antithetical to allow states to avoid implementing reasonable measures until and unless that goal is achieved.[371]

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[368] 82 Fed. Reg. at 3,093.

[369] As EPA itself recognized in its recent partial disapproval of Wyoming's regional haze second implementation period SIP submission, "CAA 169A and the RHR do not require the EPA to approve a SIP submission so long as the state has discussed each of the four factors, no matter the content of the state's conclusions or underlying analysis." Wyoming RTC at 18.

[370] The full text of the quoted language from the 1999 Regional Haze Rule preamble can be found above. To avoid duplication, that text is paraphrased here.

[371] 82 Fed. Reg. at 3,093–94.

Thus, in response to a comment that EPA should explicitly state in the Regional Haze Rule itself that the URP is not a safe harbor, EPA declined to do so because it believed that point was already patently clear:

> EPA agrees . . . that the requirement of 40 CFR 51.308(f)(2) applies regardless of whether the affected Class I area is currently attaining, or is projected to attain, the uniform rate of progress. We are not adding the suggested language in the final version of this section because we believe that the text being finalized, supplemented with the statements in the preamble and this document about the safe harbor concept are sufficient clarification of this point.[372]

Just as with the text and requirements of the Clean Air Act discussed above, EPA has time and again explained that treating the URP as a safe harbor or a ceiling that states cannot exceed, as the Agency proposes to do with its new URP policy and alteration and application of that policy here, violates the Regional Haze Rule.

To the extent EPA attempts to argue that its new URP policy does not create a safe harbor, and so is consistent with the Clean Air Act and Regional Haze Rule, because it only creates a presumption and still requires states to consider the four statutory factors, that argument fails. First, requiring states to mention the four factors while allowing them to conduct unreasonable and unsupported four-factor analyses, as EPA does under its new policy by shirking its substantive review duties, is a distinction without a difference from allowing states to forgo a four-factor analysis altogether. Second, as noted above, EPA does not acknowledge or provide a reasoned explanation for how its alteration of the new URP policy and reliance on the altered policy here to propose disapproval, rather than approval, of Colorado's SIP submission would comply with the Act and the Regional Haze Rule.[373] Thus, EPA does not apply its new URP policy as a presumption here, but rather as a ceiling states cannot exceed.[374]

Finally, just as with the plain language of the Clean Air Act, the text of the Regional Haze Rule specifically requires EPA to engage in rigorous and substantive reviews of state SIP submissions. The Rule requires that "[i]n determining whether the State's goal for visibility improvement provides for reasonable progress towards natural visibility conditions, [EPA] will also evaluate the demonstrations developed by the State pursuant to [section 51.308(f)(2)],"[375] including "how the four factors were taken into consideration in selecting the measures for inclusion in [the] long-term strategy"[376] and whether "the State . . . document[ed] the technical basis, including modeling, monitoring, cost, engineering, and emissions information, on which the State is relying to determine [those measures]."[377] This text requires EPA to not only determine whether states conducted four-factor analyses, but whether those analyses were reasonably conducted and adequately justified.

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[372] 2017 RHR RTC at 170; *see also* EPA 2021 Clarifications Memo at 13 (stating that EPA has "consistently stated" that "relying on URP as a safe harbor . . . does not comport with the RHR").
[373] *See* the introductory paragraphs to Sections V and V.A above.
[374] *Id.*
[375] 40 C.F.R. § 51.308(f)(3)(iv).
[376] *Id.* § 51.308(f)(2)(i).
[377] *Id.* § 51.308(f)(2)(iii).

C. Announcing and Applying the New URP Policy in State-Specific Regional Actions Violates the Procedural Requirements of the Clean Air Act.

EPA's new URP policy also violates the Clean Air Act's procedural requirements, as it is inconsistent with both national policy and actions taken on second implementation period SIPs by nearly every EPA region. The new policy also effectively revises the Regional Haze Rule without complying with the Act's rulemaking requirements.

1. The New URP Policy Unlawfully Departs from National Policy.

In its proposal, EPA fails to acknowledge that its new URP policy departs from the Agency's prior position that the URP is not a safe harbor and that the long-term strategy must consist of measures found to be reasonable as a result of four-factor analyses. The statement in footnote 47 in the proposed rule[378] does not satisfy the requirement in *Fox Television* that an agency acknowledge that a new policy departs from the agency's past position and explain the basis for the change in the agency's position.[379] EPA's statement in footnote 47 that the Agency is adopting a policy neither acknowledges that the new policy departs from the Agency's prior position nor explains the rationale for the new policy.

EPA ignores that its announcement of this new position in a regional SIP action, and continued application of that policy in other regional SIP actions, including this one, violates the Clean Air Act's requirements that SIP actions be consistent with national policy. Moreover, as noted above, EPA alters its new URP policy in the proposal here, unlawfully converting the URP into an enforceable ceiling.

EPA's new URP policy, both as announced in the West Virginia proposal and as altered and applied in the proposal here, is incompatible with its own longstanding policy that the URP is not a safe harbor and the mere fact that a Class I area is projected to be on or below the URP glidepath does not allow states or EPA to forgo required four-factor analyses or ignore reasonable emission reduction measures. Not only is this EPA's longstanding policy, it is also the Agency's national policy. As explained in detail above, EPA codified the prohibition on using the URP to evade the four-factor analysis requirement as national policy in the 1999 and 2017 Regional Haze Rules, as well as its 2019 Guidance and 2021 Clarifications Memo.[380]

The Clean Air Act requires EPA to "assure fairness and uniformity in the criteria, procedures, and policies applied" in its SIP actions.[381] In accordance with this directive, EPA adopted consistency regulations[382] that explicitly require regional offices to carry out SIP actions

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[378] 90 Fed. Reg. at 31,938 n.47.
[379] 556 U.S. at 515.
[380] *See supra* Section V.A.2.
[381] 42 U.S.C. § 7601(a)(2)(A); *see Nat'l Env't. Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (explaining that EPA must, "without limitation," "assure that actions taken under the act . . . [are] carried out fairly and in a manner that is consistent with the Act" and its regulations (alteration in original) (quoting 40 C.F.R. § 56.5(a)(1), (2))).
[382] 40 C.F.R. Part 56.

"fairly and in a manner that is consistent with the Act and Agency policy"[383] and to have "mechanisms for identifying and correcting inconsistencies by standardizing . . . policies being employed by Regional Office employees in implementing and enforcing the [A]ct."[384] Regional offices also "shall seek concurrence from the appropriate EPA Headquarters office on any interpretation of the Act, . . . when such interpretation may result in application of the [A]ct or rule, regulation, or program directive that is inconsistent with Agency policy."[385] Because EPA's proposed partial disapproval of Colorado's SIP submission is based on an interpretation of the Clean Air Act that "varies from national policy," the Agency is required under 40 C.F.R. § 56.5(b) to obtain the concurrence of the relevant EPA Headquarters Office before finalizing the proposed approval. Yet, nothing in the record indicates that the regional office obtained that concurrence.

Additionally, where, as here, a regional action involves inconsistent application of the Clean Air Act's requirements, the regional office "shall classify such actions as special actions" and "shall follow" EPA's mandatory SIP review guidelines.[386] The guidelines, in turn, require "complete" interagency review, a "public hearing[]," and "full concurrence" from each affected EPA office for any SIP action, like this one, where EPA proposes to partially disapprove a SIP's emission reduction measures and issue "corrective" measures[387] that effectively amend the SIP (i.e., by "declin[ing] to incorporate" a SIP's enforceable emission reductions into federal law[388]), based on its new interpretation that meeting the URP renders any additional emission reduction measures unwarranted. Because EPA's proposal "would significantly affect emission control regulations" or "have significant national policy implications," a full interagency review and concurrence is required.[389] The guidelines further make clear that special actions require concurrence at the Assistant Administrator or General Counsel level and require review and concurrence before publication of the proposed rule in the Federal Register.[390] Again, the record includes no reference to the Agency's SIP review guidelines, let alone any indication that EPA complied with them.[391]

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[383] 40 C.F.R. § 56.5(a)(1).
[384] *Id.* § 56.3(a)-(b); *see* 44 Fed. Reg. 13,043, 13,045 (Mar. 9, 1979) (stating that EPA "interprets § 301(a)(2) of the Act as a mandate to assure greater consistency among the Regional Offices in implementing the Act, certainly *not* as a license to institutionalize the kind of inconsistencies that prompted Congress to enact this provision" (emphasis added)).
[385] 40 C.F.R. § 56.5(b).
[386] *Id.* § 56.5(c) (referencing "State Implementation Plans—Procedures for Approval/Disapproval Actions, OAQPS No. 1.2–005A, or revision thereof").
[387] EPA, Office of Air Quality Plan. & Standards, No. 1.2–005A, *Revisions to State Implementation Plans—Procedures for Approval/Disapproval Actions, in* Guidelines Series §§ 7.1; 7.2. (1975) [hereinafter, "SIP Review Guidelines"].
[388] 90 Fed. Reg. at 31,939.
[389] SIP Review Guidelines at § 7.2.
[390] *Id.* at §§ 6.1, 6.3 & 7.2.
[391] EPA, SIP Consistency Issues Guide: How to Identify and Resolve SIP Consistency Issues (2018), EPA-R06-OAR-2018-0770-0046 at 6, 21-33 (requiring EPA to "document" regional consistency issues to "ensur[e] the issue is fully analyzed, including seeking and consolidating input from other offices including regional offices, OAQPS, OTAQ, OGC, and other HQ offices").

Furthermore, with respect to interagency review, Executive Order 12,866 requires review by the Office of Management and Budget of any "significant regulatory actions," which includes actions that "[r]aise novel legal or policy issues arising out of legal mandates."[392] EPA's new URP policy, contradicting over twenty years of prior EPA practice, raises novel legal and policy issues. However, the record shows no attempt at compliance; indeed, EPA's proposal incorrectly states that compliance is not required.[393]

EPA cannot take action on a SIP submission in a manner that violates applicable Clean Air Act requirements.[394] Yet, by applying the new policy that sharply departs from national policy, EPA proposes to do just that. EPA's proposed piecemeal approach to rewriting its national URP policy arbitrarily and impermissibly "institutionalize[s] the kind of inconsistencies that prompted Congress to enact" Section 7601(a)(2) in the first place.[395] Because EPA has failed to demonstrate that it complied with its own consistency regulations, as required by 40 C.F.R. § 56.5, the Agency's proposed action is contrary to law.

2. The New URP Policy Is Inconsistent with Actions Across EPA Regions.

In addition to requiring consistency with national policy, EPA's regulations further require that EPA regional office SIP actions are as consistent as reasonably possible with the activities of other EPA regions.[396] This requirement is also meant to implement Congress's directive that EPA "assure fairness and uniformity in the criteria, procedures, and policies applied by the various [EPA] regions in implementing and enforcing" the Clean Air Act.[397]

EPA's proposed action is inconsistent with other regional actions, in two ways. First, the proposed partial disapproval is inconsistent with SIP actions from nearly every other EPA region stating that "the URP . . . is not a 'safe harbor.'"[398] As EPA has repeatedly explained—in both

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[392] Exec. Order No. 12,866, *Regulatory Planning and Review*, 51 Fed. Reg. 51,735 at §§ 6(a)(3)(A) (agency responsibility); 3(f)(4) (definition of significant regulatory action) (Sept. 30, 1993).
[393] 90 Fed. Reg. at 31,939–41.
[394] 42 U.S.C. § 7410(k)(3), (l); *see also Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) ("It has become axiomatic that an agency is bound by its own regulations."); *U.S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 526 n.20 (D.C. Cir. 1978) ("Although it is within the power of [an] agency to amend or repeal its own regulations, [an] agency is not free to ignore or violate its regulations while they remain in effect.").
[395] 44 Fed. Reg. 13,043, 13,045 (Mar. 9, 1979).
[396] 40 C.F.R. § 56.5(a); *see also* Memorandum from Janet McCabe, Deputy Assistant Admin., Off. Air & Radiation, EPA, to Reg'l Admins., Regions I – X (Apr. 6, 2011), (available at https://www.epa.gov/sites/default/files/2016-02/documents/mccabelltrras.pdf).
[397] 42 U.S.C. § 7601(a)(2)(A).
[398] 88 Fed. Reg. 80,655, 80,633 (Nov. 20, 2023) (EPA Region 1 stating in its proposal on New Hampshire's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 58,663, 58,670 (July 19, 2024) (EPA Region 1 stating in its proposal on Connecticut's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 87 Fed. Reg. 51,016, 51,024 (Aug. 19, 2022) (EPA Region 2 stating in its proposal on New Jersey's Round 2

disapproving first planning period regional haze SIPs as well as revising the Regional Haze Rule itself and in partially disapproving second planning period SIPs—"the URP is not a safe harbor and an area's position with respect to the URP should not be a factor in determining whether a control measure is reasonable."[399] EPA's proposal here is also inconsistent with the Agency's SIP actions during the first planning period, during which EPA regions disapproved multiple SIPs where states improperly relied on the URP as a safe harbor.[400] EPA's proposed partial disapproval

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SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 20,384, 20,392 (Mar. 22, 2024) (EPA Region 2 stating in its proposal on New York's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 86 Fed. Reg. 19,793, 19,800 (Apr. 15, 2021) (EPA Region 3 stating in its proposal on Washington, D.C.'s Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 88 Fed. Reg. 58,178, 58,186 (Aug. 25, 2023) (EPA Region 3 stating in its proposal on Maryland's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 67,018, 67,026 (Aug. 19, 2024) (EPA Region 3 stating in its proposal on Delaware's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 47,481, 47,489 (June 3, 2024) (EPA Region 4 stating in its proposal on Georgia's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 67,341, 67,349 (Aug. 20, 2024) (EPA Region 4 stating in its proposal on North Carolina's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 105,506, 105,504 (Dec. 27, 2024) (EPA Region 4 stating in its proposal on Florida's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 56,827, 56,834 (July 11, 2024) (EPA Region 5 stating in its proposal on Minnesota's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 65,492, 65,500 (Aug. 9, 2024) (EPA Region 5 stating in its proposal on Wisconsin's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 71,124, 71,131 (Aug. 30, 2024) (EPA Region 5 stating in its proposal on Ohio's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 178, 185 (Jan. 2, 2024) (EPA Region 7 stating in its proposal on Kansas's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 63,258, 63,266 (Aug. 2, 2024) (EPA Region 7 stating in its proposal on Iowa's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 56,693, 56,702 (July 10, 2024) (EPA Region 8 stating in its proposal on North Dakota's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 63,030, 63,039 (Aug. 1, 2024) (EPA Region 8 stating in its proposal on Wyoming's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 67,208, 67,217 (Aug. 19, 2024) (EPA Region 8 stating in its proposal on Utah's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 47,398, 47,406 (May 31, 2024) (EPA Region 9 stating in its proposal on Arizona's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 103,737, 103,745 (Dec. 19, 2024) (EPA Region 9 stating in its proposal on California's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)); 89 Fed. Reg. 13,622, 13,631 (Feb. 23, 2024) (EPA Region 10 stating in its proposal on Oregon's Round 2 SIP that the URP "is not a safe harbor" (quotation marks omitted)).

[399] 89 Fed. Reg. 55,140, 55,156 (July 3, 2024); *see generally supra* note 398; *see also* 82 Fed. Reg. at 3,099–100; 81 Fed. Reg. 296, 326 (Jan. 5, 2016) (disapproving Texas's first planning period SIP and finding "the uniform rate of progress is not a safe harbor under the Regional Haze Rule" (internal quotation marks omitted)).

[400] 82 Fed. Reg. at 3,084, 3,084 n.30 (providing an example of a SIP rejection); 76 Fed. Reg. 64,186, 64,195 (Oct. 17, 2011) (EPA Region 6 proposing to partially disapprove Arkansas's

of Colorado's SIP submission based on the Agency's new treatment of the URP as a safe harbor is inconsistent with EPA not allowing other states to treat the URP as a safe harbor.

Second, EPA's action is not just inconsistent with the Agency's prior actions concluding that the URP is not a safe harbor, it is also inconsistent with the Agency's recently-revised URP policy. EPA now claims that it can partially disapprove SIPs that contain emission reduction measures or source retirement commitments whenever EPA unilaterally finds that such measures are not necessary to ensure reasonable progress because affected Class I areas are allegedly "on track" to achieve natural conditions. Thus, EPA has converted its new URP policy into both a floor and a ceiling, simultaneously insulating sources from reasonable, cost-effective pollution reductions when affected Class I areas are on the glidepath, while also prohibiting such measures. This shifting, "heads-I-win, tails-you-lose" approach is the hallmark of arbitrary and inconsistent decision making.

3. The New URP Policy Effectively Revises the Regional Haze Rule.

As a core part of the 2017 Regional Haze Rule, EPA explicitly recognized that the mere fact that a Class I area is at or below the URP associated with the achievement of natural visibility by 2064 is "not a safe harbor" from requiring control measures that are necessary to make reasonable progress based on the four statutory factors.[401] Such an approach would be "antithetical" to the Clean Air Act's goal of remedying and preventing all visibility impairment.[402] Indeed, "until and unless" that natural visibility goal is achieved, states cannot reject control measures that are necessary based on a consideration of the four statutory reasonable progress factors.[403]

In effect, EPA's new policy improperly revises the national Regional Haze Rule in three key ways. First, it creates an exception to the national Rule's categorical prohibition against relying on the URP as a safe harbor from the implementation of reasonable control measures.[404] Now, EPA claims that the Clean Air Act and the Regional Haze Rule allow states to avoid control measures that are necessary under the four statutory factors where the state demonstrates that affected Class I areas are meeting the URP. In effect, EPA has revised its national rule that the URP is not a safe harbor, into a rule that allows exceptions when EPA decides that all affected Class I areas are meeting the URP. Second, the proposed action changes the applicability of the Regional Haze Rule's URP policy, making that national policy inapplicable to Colorado. The proposed action therefore amends the national, categorical URP policy to no longer be national or categorical. Third, as discussed, EPA now proposes to modify its recently-revised URP policy (again) so that the Agency may disapprove SIPs that contain emission reduction measures that the Agency unilaterally concludes—despite the State's determinations to the

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Round 1 RPGs); 77 Fed. Reg. 14,604, 14,612 (Mar. 12, 2012) (EPA Region 6 taking final action to partially disapprove Arkansas's RPGs).

[401] 82 Fed. Reg. at 3,093 ("[T]he rate of progress that will be achieved by the emission reductions resulting from all reasonable control measures is, by definition, a reasonable rate of progress.").

[402] *Id.* at 3,094.

[403] *Id.*

[404] *Id.* at 3,093.

contrary—are not appropriate because affected Class I areas are allegedly "on track" to natural conditions.

Section 7607(d)(1) of the Act requires the "promulgation or *revision* of regulations under part C of subchapter I [of the Act] (relating to prevention of significant deterioration of air quality and protection of visibility)" to be carried out using the procedures in Section 7607(d).[405] These procedures include providing the opportunity for a public hearing,[406] which EPA has not done, and keeping the proposed rule open for public comment for 30 days after the hearing,[407] which EPA has not done. Moreover, the Act's rulemaking procedures require that EPA include in the docket all data, information, and documents related to the methodology for the proposed revision, as well as an explanation of the major legal interpretations underlying the rule.[408] In addition, as noted above, this action is subject to the requirement in Executive Order 12,866 for interagency review by the Office of Management and Budget; and in turn, the procedures in Section 7607(d) require EPA to provide the results of such review in the docket prior to the date of proposal or finalization.[409] There is no indication EPA has followed these requirements. EPA is therefore improperly attempting to revise the Regional Haze Rule without following the statutorily required procedures.

D. EPA's New URP Policy Does Not Justify Disapproving Any Part of Colorado's SIP Submission.

As described above, there are multiple substantive and procedural reasons why EPA's new URP policy is unlawful and arbitrary and capricious. But even assuming for the sake of argument that EPA's policy were lawful (it is not), the new policy would not provide a lawful basis for partially disapproving Colorado's SIP submission, including the EGU retirement dates. If EPA's new URP policy were lawful, then at best, it could justify approving a SIP that accords with the new policy. But EPA's new policy does not justify disapproving a SIP that exceeds EPA's view of the minimum amount of progress needed to satisfy the Clean Air Act.

EPA cannot lawfully disapprove a SIP because EPA would have made different policy choices than a state[410] or because the SIP exceeds what EPA believes are the minimum

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[405] 42 U.S.C. § 7607(d)(1)(J) (emphasis added).
[406] *Id.* § 7607(d)(5)(ii). The Federal Register Act requires 15 days of notice in the Federal Register prior to such a hearing. 44 U.S.C. § 1508(2).
[407] 42 U.S.C. § 7607(d)(5)(iv).
[408] *Id.* § 7607(d)(3).
[409] *Id.* § 7607(d)(4)(B)(ii).
[410] *See, e.g., Wyoming*, 78 F.4th at 1178 (explaining that, in developing a SIP, "the initial responsibility falls to the states" and "[t]he Act vests states with 'wide discretion in formulating' SIPs" (quoting *Union Elec. Co. v. EPA.*, 427 U.S. 246, 250 (1976))); *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003) ("[T]he CAA supplies the goals and basic requirements of state implementation plans, but the states have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements."). The Clean Air Act's cooperative federalism framework and state discretion in developing SIPs are further discussed in Section I.A.1 above.

requirements of the Clean Air Act.[411] Instead, EPA must approve a SIP that meets the applicable requirements of the Act and therefore may disapprove a SIP only if it violates an applicable requirement of the Act.[412]

EPA has failed to meet its burden of explaining how its new URP policy demonstrates that Colorado's inclusion of previously-announced source retirement dates in its SIP violates the Clean Air Act. This is a burden that EPA cannot meet. By its own terms, EPA's new policy purports only to establish the minimum conditions under which a state can be presumed to have complied with the reasonable progress provisions of the Clean Air Act. But nothing in the Clean Air Act prevents a regional haze SIP from exceeding the minimum requirements of the Act. To the contrary, a long line of cases holds that states are free to include more stringent provisions in their SIPs than the Clean Air Act requires, and that EPA may not disapprove a SIP on the ground that it exceeds the minimum requirements of the Clean Air Act.[413]

Here, even if EPA were correct that Colorado was not required by the Clean Air Act to include the source retirements in its SIP (which we do not concede), Colorado has the discretion under the Clean Air Act to exceed the Act's requirements. As one AQCC commissioner explained during the Commission's deliberations in the Phase 1 rulemaking hearing, it was important to "make greater progress" and "get further under . . . this glide path" in light of the State's inability to control emissions from wildfires and other sources of visibility impairment, which harms the State's economy and quality of life.[414] These choices were well within the discretion afforded to Colorado under the Clean Air Act's cooperative federalism framework, and they further Congress's goal of eliminating anthropogenic visibility impairment in Class I areas. EPA has not provided a rational and lawful basis for finding that even under its new policy, Colorado's choice to include requirements the Agency asserts are more stringent than needed to meet EPA's new policy violates the Clean Air Act. And EPA cannot provide a rational explanation. States retain the discretion to include measures in their SIPs that exceed the

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[411] *Union Elec. Co.*, 427 U.S. at 265 (concluding that "the States may submit implementation plans more stringent than federal law requires and that the Administrator must approve such plans if they meet the minimum requirements of [section] 110(a)(2)"); *Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1126 (10th Cir. 2009) (same) (quoting *Union Elec. Co.*, 427 U.S. at 265); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3d Cir. 2013) ("[S]tates are expressly allowed to employ standards more stringent than those specified by the federal requirements."); *BCCA Appeal Grp.*, 355 F.3d at 826 n. 6 ("Because the states can adopt more stringent air pollution control measures than federal law requires, the EPA is empowered to disapprove state plans only when they fall below the level of stringency required by federal law."); *Duquesne Light Co. v. EPA*, 166 F.3d 609, 611 (3d Cir. 1999) ("[T]he SIP must be approved if it is found to meet the minimum requirements of the Clean Air Act. . . . The Clean Air Act expressly provides that the states may adopt more stringent air pollution control measures than the Act requires with or without EPA approval."); *New Mexico ex rel. Balderas v. Sterigenics U.S., LLC*, 2021 U.S. Dist. LEXIS 71525, at *14 (D.N.M. Apr. 13, 2021) ("States also have the right to require even more stringent air pollution requirements than the Clean Air Act.").

[412] *See* 42 U.S.C. 7410(k)(3) ("the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter.").

[413] *See supra* note 411.

[414] Transcript Excerpts of 2020 AQCC Hearings at 48–49 (statements of Commissioner Jones).

minimum requirements of the Clean Air Act; and EPA may disapprove such measures only if they violate the Clean Air Act—which Colorado's do not.

VI. Partial Disapproval of Colorado's SIP Submission Would Require Further Regulatory Action.

The Clean Air Act provides no authority for EPA's assertion that if it partially disapproves Colorado's SIP submission, "there will be no additional regulatory action needed, either in the form of a federal implementation plan or another SIP revision."[415] Rather, if EPA finalizes its disapproval of the source retirement deadlines, Colorado must conduct updated four-factor analyses for the affected sources, require those sources to implement emission reduction measures the State determines necessary to make reasonable progress, and submit a new SIP revision to EPA for approval. The evidence in the State's rulemaking record and in an attached report by Joe Kordzi (a technical consultant retained by Sierra Club, NPCA, and Earthjustice) shows that cost-effective controls for Nixon and other EGUs are available.

A. The Clean Air Act Requires Further Regulatory Action.

Contrary to EPA's claim, the Clean Air Act does not exempt states from having a regional haze SIP that has been fully approved by EPA. Clean Air Act section 110(k)(3) provides that a "plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the *entire plan revision* as complying with the applicable requirements of this chapter."[416] Here, EPA proposes to disapprove portions of Colorado's SIP submission for purported failure to comply with Clean Air Act sections 110(a)(2)(E)(i),[417] 169A,[418] and 169A(g)(1),[419] as well as 40 C.F.R. § 51.308(f)(2)(i).[420] Plainly, if EPA finalizes a partial disapproval, it will have determined that Colorado's entire plan revision does not comply with all applicable requirements of the Clean Air Act.

Similarly, Clean Air Act section 110(c)(1)(B) makes clear that additional regulatory action would be necessary for Colorado to secure an approved SIP for the regional haze second implementation period. That section states:

> The Administrator *shall promulgate* a Federal implementation plan at any time within 2 years after the Administrator . . . disapproves a State implementation plan submission in whole *or in part*, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.[421]

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[415] 90 Fed. Reg. at 31,939–40; *see also id.* at 31,943 ("Because no outstanding obligations remain, there will be no additional regulatory action needed, either in the form of a federal implementation plan or another SIP revision, as a result of the partial disapproval.").
[416] 42 U.S.C. § 7410(k)(3) (emphasis added).
[417] 90 Red. Reg. at 31,927, 31,937–39.
[418] *Id.* at 31,939.
[419] *Id.* at 31,937.
[420] *Id.* at 31,927, 31,937, 31,939, 31,941, 31,943.
[421] 42 U.S.C. § 7410(c)(1)(B) (emphases added).

If EPA partially disapproves Colorado's SIP submission, then, the statute imposes a nondiscretionary duty on the Agency to either approve a new SIP revision or promulgate a FIP.[422] As the U.S. Supreme Court has explained, the statutory term "shall" means "must," and it "imposes a mandatory command."[423] While EPA suggests that its approval of certain portions of Colorado's SIP submission would discharge its statutory obligations, the plain language of Clean Air Act section 110(c)(1)(B) permits no exceptions. Indeed, EPA itself has long recognized that "[t]he disapproval of any part of a required SIP submittal" starts the two-year clock for further regulatory action.[424]

The Ninth Circuit rejected an approach similar to the one EPA proposes in this rulemaking, holding that the Agency cannot shirk its mandatory duty under Clean Air Act section 110(c)(1) following partial disapproval of a SIP submission.[425] In *Association of Irritated Residents v. EPA*, the Agency partially approved and partially disapproved a California SIP submission related to the one-hour ozone NAAQS.[426] In the challenged rulemaking, EPA contended that its partial disapproval did not trigger any further obligations under Clean Air Act section 110(c)(1) because the disapproved SIP elements "will not affect the requirements for the State to have an approved SIP"[427] and will "not alter the fact that the SIP already meets these statutory requirements."[428] The court disagreed, reasoning that the plain language of section 110(c)(1)(B) requires either that the state submit a compliant SIP revision or EPA promulgate a FIP each time the Agency disapproves a SIP revision.[429] *Association of Irritated Residents* contradicts EPA's claim here that further regulatory action is unnecessary because the approved portions of Colorado's SIP submission will satisfy Clean Air Act requirements.[430] First, EPA's position is inconsistent with the court's holding that *every* partial disapproval of a SIP revision requires further action. Second, for the reasons noted throughout this comment letter, partial disapproval of Colorado's SIP submission would leave a significantly diminished long-term strategy that would not secure reasonable progress toward Congress's national visibility goal.[431]

Finally, even absent Clean Air Act section 110(c)(1)'s mandate for further regulatory action, a partial disapproval would still require Colorado to revisit its long-term strategy for the regional haze second implementation period. The Clean Air Act and Regional Haze Rule empower states to "play the lead role in designing and implementing regional haze programs to

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[422] *New York v. EPA*, 921 F.3d 257, 262–63 (D.C. Cir. 2019) (noting that EPA's duties under 42 U.S.C. § 7410(c)(1) are mandatory).
[423] *Bufkin v. Collins*, 145 S. Ct. 728, 737 (2025).
[424] Memorandum from John Calcagni, Director, EPA, to EPA Directors at 2 (July 9, 1992), https://www.epa.gov/sites/default/files/2015-07/documents/procsip.pdf.
[425] *Ass'n of Irritated Residents v. EPA*, 686 F.3d 668, 675–77 (9th Cir. 2012).
[426] *Id.*
[427] 74 Fed. Reg. 10,176, 10,176 (Mar. 10, 2009).
[428] *Id.* at 10,181.
[429] *Ass'n of Irritated Residents*, 686 F.3d at 675–76 (noting this result "aligns with Congress's intent in writing the statutory language to mandate promulgation of a FIP upon any disapproval" and citing a failed legislative amendment that would have removed that mandatory obligation).
[430] *See* 90 Fed. Reg. at 31,939.
[431] *See* Sections III.A.2, V.A.1, VI.B, VII.

clear the air in national parks and wilderness areas."[432] As explained in Sections I.C and III.A.2, the source retirement deadlines were a key driver of Colorado's long-term strategy—specifically, the State incorporated the EGUs' shortened remaining useful lives into its four-factor analyses and determined that the installation of additional control measures would not be warranted, as the facilities would soon close under enforceable retirement deadlines. Disapproving those deadlines would materially alter the stringency of Colorado's plan, upsetting the deliberate balance the State struck and jeopardizing the emission reductions it determined would satisfy the Clean Air Act's requirement to make reasonable progress toward Congress's national visibility goal.[433]

Indeed, Colorado has already acknowledged that a partial disapproval would require further regulatory action. In its April 2025 letter to CSU, the State noted that even though delaying the Nixon retirement would not affect the URP glidepath modeling, removing the enforceable retirement deadline would require an updated four-factor reasonable progress analysis. The State explained:

> It is not accurate to say that the announced closure date is not necessary to demonstrate reasonable progress. The announced closure date is a critical component of the four factor analysis on which the reasonable progress determination for the Round 2 RH SIP is based. The announced retirement date directly impacts the remaining useful life of the unit, and therefore, the cost effectiveness of the control technologies that are evaluated. Any change or removal of the announced retirement date will require an updated analysis of control technologies for the reasonable progress determination.[434]

Therefore, if EPA disapproves the source retirement deadlines and they are not federally enforceable as part of the State's SIP, Colorado must perform new four-factor analyses for those sources to evaluate whether additional emission reduction measures are warranted.

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[432] *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 2 (D.C. Cir. 2002); *see also* 82 Fed. Reg. at 3090 (explaining that while EPA has oversight authority, "[u]nder the principles of cooperative federalism, the CAA vests state air agencies with substantial discretion as to how to achieve Congress's air-quality goals and standards").

[433] In the Statement of Basis and Purpose relating to the Phase 1 rulemaking source closures, Colorado highlighted "state flexibility in determining what strategies to implement to reduce impacts to visibility under the Regional Haze rule." Statement of Basis and Purpose at 33. It noted that "[t]he adopted revisions will improve Colorado's ability to comply with the goals of the regional haze rule while preventing or reducing the need for costly retrofits potentially required in Colorado's next reasonable progress planning period." *Id.* Colorado also stated that "[t]he revisions will contribute to further reductions of NOx emissions and therefore contribute to the prevention of pollution." *Id.* at 34; *see also* SIP Narrative at 67 ("For all RP determinations, to be submitted for federal approval into the State Implementation Plan, the Division recommends that the RP emission limits and enforceable closure dates satisfy and/or exceed Regional Haze requirements for this planning period . . . .").

[434] Apr. 11, 2025 CDPHE Letter at 2.

B. Colorado Must Update Its Four-Factor Analyses for Sources with Disapproved Retirement Deadlines and Require Additional Emission Reduction Measures that Are Necessary to Make Reasonable Progress.

Updating the four-factor analyses for sources with EPA-disapproved retirement deadlines would show that additional emission reduction measures are necessary to make reasonable progress. As explained in Section III.A.2 above, the State's use of shortened useful lives drastically increased the dollar/ton cost-effectiveness values of some of the control measures analyzed during the State's rulemaking process. Conducting new cost analyses based on the full useful lives of emission control equipment would show that additional measures are cost-effective for many of those sources. Using Nixon Unit 1 as an example, Mr. Kordzi found that scrubber upgrades and SNCR would be highly cost-effective if the full equipment life is used in the cost analysis.[435] Mr. Kordzi's full report is attached to this comment letter, and Table 2 below summarizes the results of his analysis.

Table 2: Additional Control Technologies for Nixon Unit 1[436]

Emission Control Technology	**Pollutant Reductions**	**Cost-Effectiveness (2024 dollars)**
Scrubber Upgrades	349 tons per year SO_2	$2,170/ton
SNCR (30-year useful life, 20-40% removal efficiency)	196–391 tons per year NOx	$4,109–$6,784/ton
SNCR (20-year useful life, 30% removal efficiency)	294 tons per year NOx	$5,528/ton

Installing additional control technologies would also likely be cost-effective at other EGUs with EPA-disapproved retirement deadlines. Previous cost analyses conducted in 2020 for those facilities showed that control measures would cost less than $10,000/ton, assuming full equipment lives.[437] Furthermore, adjusting the State's cost-effectiveness threshold to 2024 dollars would result in an updated cost-effectiveness threshold of $13,154/ton.[438]

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[435] Joe Kordzi, *An Analysis of the Ray D. Nixon Power Plant* 17, 21–22, 25 (Sept. 2025) [hereinafter "Kordzi Report"].

[436] The information in this table is drawn from pages 17 and 21 of the Kordzi Report, as well as a spreadsheet attached to that report (sncrcontrolcostmanual_costcalculationspreadsheetvf_march_2021.xlsm, "Summary" worksheet, table assessing cost-effectiveness using 30% Desired SNCR efficiency and 20-year Equipment life).

[437] Victoria Stamper, who served as a technical consultant to NPCA, Sierra Club, and Earthjustice during Colorado's Phase 1 rulemaking process, conducted an analysis in 2020 showing that several control options would cost less than $10,000/ton, assuming the full useful life of control equipment: SCR at Craig Unit 3; SNCR and SCR at Rawhide; and SNCR and SCR at Martin Drake Units 6 and 7. Stamper Report at 3–5,14, 23–24, 35.

[438] Kordzi Report at 2.

In conclusion, if EPA finalizes its disapproval of the source retirement deadlines, Colorado must perform updated four-factor analyses for the affected sources, require any emission reduction measures that are shown to be cost-effective and necessary for reasonable progress, and submit a new SIP revision to EPA for approval.

VII. EPA's Proposed Rule Contains Several Other Errors.

EPA's proposed rule contains several other errors that EPA must remedy. First, EPA's proposal to disapprove the portions of Section IV.F.3 of Regulation 23 "pertaining to the cessation of coal handling at . . . Hayden Units 1 and 2" reflects an incorrect reading of Regulation 23.[439] In contrast to Section IV.F.3's requirement that the Nixon Coal Handling unit cease coal unloading and crushing by a certain date, that section's requirements for Hayden relate only to *coal ash* and sorbent loading and unloading—not "coal handling" writ large.[440] Colorado explained that the Hayden facility includes an ash silo, which is associated with particulate matter emissions from coal ash and sorbent loading and unloading activities.[441] Coal ash and solvent are unloaded from the silo onto trucks and transported to the Hayden Station Ash Disposal Facility.[442] To control haze-forming particulate matter emissions from these activities, Section IV.F.3 requires Hayden to comply with an emission limit of "22.39 tons/yr from coal ash, sorbent loading, unloading only (12-month rolling total)," as well as the monitoring, recordkeeping, and reporting requirements specified in Section V of Regulation 23. The monitoring, recordkeeping, and reporting requirements for "Hayden coal ash and sorbent loading/unloading" include work practices to control fugitive emissions from coal ash and sorbent handling, unpaved haul roads, and the facility's ash disposal site.[443] Section V also explains how to calculate emissions totals for purposes of assessing compliance with the 22.39 tons/yr particulate matter emission limit.[444] None of the requirements in Section IV.F.3 of Regulation 23, or in the sections that it cross-references, relate to the "cessation of coal handling" at Hayden Units 1 and 2. Nor does EPA explain how it could possibly be appropriate to disapprove Regulation 23's particulate matter emission limitation and the monitoring, recordkeeping, and reporting requirements related to coal ash and sorbent handling. Those provisions are necessary to control particulate matter emissions at the facility during the period leading up to the retirement of Hayden Units 1 and 2.

Second, EPA's proposal indicates that the Agency is unaware of the most basic facts concerning the sources it opines about and whose retirement deadlines it proposes to disapprove. For example, EPA proposes to disapprove the retirement deadlines for Drake Units 6 and 7 and Comanche Unit 1, displaying a complete ignorance of the fact that all three of those units closed years ago.[445] Drake Units 6 and 7 are not only now closed—they are completely demolished.

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[439] *See* 90 Fed. Reg. at 31,939 n.51, 31,943, 31,944.
[440] 5 Colo. Code Regs. § 1001-27:A.IV.F.3 (table listing particulate emission limit for the Hayden Coal Ash Handling & Disposal and Unpaved Roads emission unit).
[441] SIP Narrative at 86.
[442] *Id.*
[443] 5 Colo. Code Regs. §§ 1001-27:A.IV.F.3, 1001-27:A.V.B.4.b.
[444] *Id.* § 1001-27:A.V.B.4.b.
[445] *See* Colo. PUC Proceeding No. 24A-0442E, Hr'g Ex. 101, Attach. JWI-2, Volume 2 - Technical App., Rev. 2 at 84–85 (not showing Comanche 1 in the list of existing generating

EPA's proposal not only fails to mention these facts, it assumes that these three units are actively generating electricity and that the retirement deadlines in the SIP would somehow force the closure of units that closed years ago. At the same time, EPA asserts that Craig Unit 1 has already closed.[446] But that facility is still operating in advance of its December 31, 2025 retirement date,[447] which EPA incorporated into Colorado's first implementation period SIP.[448] This is yet another example of how EPA's action is not based on evidence, fails to grapple with the record, and is arbitrary and capricious.

VIII. EPA Should Address Other Issues that Affect Its Administration of the Regional Haze Program.

In addition to addressing the numerous flaws in its proposal to partially disapprove Colorado's regional haze SIP submission, EPA should also address the two broader issues that affect its administration of the regional haze program described below.

A. Threats to the IMPROVE Network Jeopardize the Ability of States, Including Colorado, to Rely on the IMPROVE Network to Satisfy the Regional Haze Rule's Monitoring Requirements.

The Regional Haze Rule requires states to submit a SIP that provides (1) "a monitoring strategy for measuring, characterizing, and reporting of regional haze visibility impairment that is representative of all mandatory Class I Federal areas within the State," and (2) "for the reporting of all visibility monitoring data to the Administrator at least annually for each mandatory Class I Federal area in the State."[449] The Regional Haze Rule also provides that states may satisfy these requirements through their participation in the IMPROVE network.[450] As EPA explains in its proposal, the IMPROVE monitoring network "is used to measure visibility impairment caused by air pollution at the 156 Class I areas covered by the visibility program."[451]

Despite the importance of the IMPROVE network to the regional haze program (and other Clean Air Act programs), there have been recent threats to the network's continued operation.[452] For instance, the Trump Administration issued a stop-work order on multiple contracts to maintain the IMPROVE network just three months ago.[453] Although those contracts

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resources). CSU stopped generating electricity at Drake Units 6 and 7 in 2022 and completed demolition of the units in 2024. Martin Drake Power Plant, CSU, https://www.csu.org/current-projects/martin-drake-power-plant.

[446] 90 Fed. Reg. at 31,941.

[447] *See* Colo. PUC Proceeding No. 24A-0442E, Hr'g Ex. 2100, Answer Test. of Melody Villard, Rev. 1 at 32 (Apr. 18, 2025).

[448] 83 Fed. Reg. 31,332, 31,332 (July 5, 2018).

[449] 40 C.F.R. § 51.308(f)(6), (f)(6)(iv).

[450] *Id.* § 51.308(f)(6).

[451] 90 Fed. Reg. at 31,931.

[452] *See generally* Decl. of Bruce Polkowsky (May 16, 2025).

[453] Maxine Joselow, *Park Service suspends air-quality monitoring at all national parks*, Wash. Post, May 5, 2025,

appear to have been reinstated, funding cuts for air quality monitoring remains an issue, threatening the continued operation of the IMPROVE network.

EPA has announced the new URP policy discussed above, but it could not determine whether any SIP qualifies for approval under its new policy without the necessary monitoring data from the IMPROVE network. All states, including Colorado, rely on IMPROVE monitoring data to develop the URP glidepaths for their in-state Class I areas and to determine whether Class I areas are above or below the glidepaths.[454] All states, including Colorado, also rely on their participation in the IMPROVE network to satisfy the Regional Haze Rule's requirements that states have monitoring networks to measure visibility at Class I areas and report that data to EPA on an annual basis.[455] Without the IMPROVE network, not only would states be unable to meet the Regional Haze Rule's monitoring requirements, but they also could not show that their SIPs qualify for approval under EPA's new policy.

B. EPA Should Make the CEPCI Annual Index Publicly Available.

As noted in EPA's Control Cost Manual, the Agency has extensively used the Chemical Engineering Plant Cost Index (CEPCI) to escalate the dollar-year for control cost analyses, including for regional haze plans.[456] Thus, access to the CEPCI annual index is necessary for the public to be able to review state and/or EPA four-factor analyses and to develop meaningful comments on whether those analyses are reasonable, reliable, and well-supported. However, the CEPCI annual index is now only available to the public via a paid subscription at a high cost of $734.97 per year.[457] Without this piece of critical information, the public cannot meaningfully engage in public notice and comment processes on state draft SIPs or EPA proposals to act on those SIPs, as required by the Clean Air Act and the Administrative Procedure Act.[458]

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https://www.washingtonpost.com/climate-environment/2025/05/05/national-parks-air-quality-monitoring/.

[454] SIP Narrative at 18–28, 156–57 (using IMPROVE information to calculate baseline, natural, and current visibility conditions, as well as the URP glidepath); 90 Fed. Reg. at 31,932 (explaining that Colorado used IMPROVE monitoring to calculate baseline, natural, and current conditions and the URP for each of its in-state Class I areas).

[455] *See, e.g.*, 90 Fed. Reg. at 31,942–43 (explaining that Colorado satisfied the Regional Haze Rule's monitoring requirements through its participation in IMPROVE and stating that EPA proposes to find that Colorado met the Regional Haze Rule's monitoring requirements through, among other things its "continued participating in the IMPROVE network").

[456] EPA, Control Cost Manual § 1, ch. 2 at 19 (Nov. 2017); 2019 Guidance at 31 (recommending that states follow the guidelines in EPA's Control Cost Manual in their four-factor analyses).

[457] The Chemical Engineering Plan Cost Index, Chem. Eng'g, https://www.chemengonline.com/pci-home (last visited Sept. 14, 2025) (stating that the CEPCI "is a premium subscription service").

[458] 5 U.S.C. § 553(c); 42 U.S.C. § 7410(a)(2); 40 C.F.R. § 51.102(a); *see also* Public Participation Guide: Introduction to Public Participation, EPA, https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation (last visited Sept. 14, 2025) ("Public participation is not simply a nice or necessary thing to do; it actually results in better outcomes and better governance.").

CONCLUSION

EPA's proposal presents an unreasonable and impermissible Catch-22 for Colorado. EPA proposes to disapprove portions of Colorado's SIP, including the EGU retirement deadlines, when the State considered the information presented by utilities during the SIP rulemaking regarding their plans to close power plants and it followed EPA rules and guidance existing when the SIP was adopted to make those announced closures federally enforceable. But if the State had instead considered additional pollution controls without factoring in the source's announced retirement schedules, the SIP could still not be approved—because both Colorado and federal law require a state to consider the evidence in the record when developing a SIP.[459]

Tellingly, EPA has not identified or explained, in EPA's view, what the State could have done when it developed its SIP based on the record before the State and EPA's positions at the time that would merit EPA's approval now. Specifically, EPA does not claim that the State should have simply ignored the record evidence that the utilities had announced plans to voluntarily close the sources for which the State was assessing pollution control measures. EPA also does not claim that under EPA's guidance and position at the time the SIP was adopted, the State could have shortened the remaining useful life of sources based on the announced retirement schedules, but then not made the retirement deadlines federally enforceable as part of the SIP.

Indeed, neither of those options would have been lawful. Colorado law requires agencies such as the AQCC (which adopted the SIP) to base their decisions on the record evidence before them.[460] The Clean Air Act likewise requires SIPs to be based on, among other things, a "reasoned analysis."[461] A SIP that ignores material evidence such as announced retirement schedules would not be reasoned. Moreover, the Regional Haze Rule expressly requires states to consider "[s]ource retirement and replacement schedules" when developing the long-term strategy for a regional haze plan.[462] Thus, it would have been unlawful for the State to simply disregard the record evidence that sources had announced near-term closures of EGUs.

And as explained above, it would have been unlawful for the State to consider the announced retirements in its four-factor analyses of control measures, but not make the retirements federally enforceable. At the time the SIP was adopted, EPA's guidance instructed

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[459] *See generally North Dakota*, 730 F.3d at 761 ("[W]e reject the argument that EPA is required under § 169A to approve a BART determination that is based upon an analysis that is neither reasoned nor moored to the CAA's provisions. At oral argument, the State all but conceded EPA's ability to review the substantive content of the BART determination when it acknowledged that EPA would have the authority to disapprove a SIP if the state plainly proceeded without a sufficient factual basis."); *Silverado Commc'n Corp. v. Pub. Utils. Com'n of Colo.*, 893 P.2d 1316, 1320–21 (Colo. 1995) (reviewing whether a state agency decision was "reasonable" and "supported by the evidence").

[460] *See, e.g.*, *Silverado Commc'n Corp.*, 893 P.2d at 1320–21.

[461] *North Dakota*, 730 F.3d at 761 (quoting *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 485, 490 (2004)).

[462] 40 C.F.R. § 51.308(d)(3)(v)(D).

states that retirement deadlines must be federally enforceable if they are relied upon as part of a control analysis for regional haze purposes.[463]

EPA may claim that the State could have considered source retirements and not made them federally enforceable because all affected Class I areas are on the URP glidepath, and therefore the State did not need to conduct any four-factor analyses at all. But that argument would rest solely on a new EPA position that was announced in 2025—years after this SIP was adopted. As discussed throughout Section V above, EPA's new position conflicts with EPA's position at the time the SIP was adopted. Thus, the State could not lawfully have followed EPA's current policy on the URP when it adopted its SIP, as doing so would have violated EPA's then-existing policy.

As a result, EPA has failed to explain what Colorado could have done, based on the record before the State and EPA's positions when the SIP was adopted, that EPA believes would comply with applicable requirements and warrant approval now. It is arbitrary and capricious for EPA to, in effect, disapprove a SIP without identifying and explaining what the State could have done, at the time it acted, that would have been lawful in EPA's view. It is also arbitrary and capricious for EPA to take action based on positions that put the State in an impossible position, where under EPA's view any action the State might have taken when it adopted its SIP would result in EPA disapproving the SIP now. For these reasons, EPA's proposal is also inconsistent with the Clean Air Act's cooperative federalism framework.

In sum, EPA should not finalize its proposal to partially disapprove Colorado's regional haze SIP submission. Instead, EPA should fully approve the SIP submission, as the SIP complies with the Clean Air Act and the State followed EPA's long-standing guidance on how states should implement the regional haze program and conduct four-factor analyses. In addition, EPA should not finalize the proposed partial disapproval because the proposed rule is arbitrary and capricious, as it is based on several incorrect rationales and findings.

The Conservation Organizations appreciate EPA's consideration of these comments. Please do not hesitate to contact us with any questions.

Sincerely,

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[463] *E.g.*, 2019 Guidance at 33–34.

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TABLE OF EXHIBITS

No.	Description
1	Clean Air Task Force, *Raising Awareness of the Health Impacts of Coal Plant Pollution*, https://www.catf.us/work/power-plants/coal-pollution/ (last visited Aug. 25, 2025)
2	*In re: Resource Adequacy Protocol, Evaluating the Reliability and Security of the United States Electric* Grid, Request for Rehearing of Clean Energy Organizations (Aug. 6, 2025)
3	Colorado PUC Proceeding No. 16A-0396E, Decision No. C18-0761 (Sept. 10, 2018)
4	Colorado PUC Proceeding No. 21A-0141E, Decision No. C24-0052 (Jan. 23, 2024)
5	Colorado PUC Proceeding 23A-0585E, Decision No. C25-0612 (Aug. 26, 2025)
6	Colorado PUC Proceeding No. 21A-0141E, Decision No. C22-0459 (Aug. 3, 2022)
7	Colorado PUC Proceeding No. 10M-245E, Decision No. C10-1328 (Dec. 15, 2010)
8	CSU 2020 Electric Integrated Resource Plan
9	CSU, Excellence in Governance Policy Manual (Mar. 19, 2025)
10	Colorado Springs Utilities, Martin Drake Power Plant, https://www.csu.org/current-projects/martin-drake-power-plant (last visited Sept. 2, 2025)
11	CSU, Ray D. Nixon Power Plant, https://www.csu.org/facilities/nixon-power-plant (last visited Sept. 15, 2025)
12	Colorado PUC Proceeding No. 16A-0396E, Testimony of David L. Eves in Support of Stipulation (Aug. 29, 2017)
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