

The Unknown Limits of Regional Haze Requirements

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Regular readers of this publication will be well-aware that, last October, EPA finalized new regulations for implementation of the Clean Air Act regional haze visibility program in Arkansas, commonly referred to as the "regional haze FIP." Recent issues of this publication included articles that discussed the meandering history of the Arkansas regional haze program and the impacts of the FIP to Arkansas in terms of costs and potential improvements in long-range scenic visibility. But focusing only on the program's implementation in Arkansas or any single state overlooks the broader history and trajectory of the regional haze program and how EPA has gradually expanded its authority under the program until it has potentially unlimited discretion to impose new requirements on stationary sources.

To set our backdrop, recall that when Congress' stated goal when it created the Clean Air Act's visibility program was the elimination of manmade visibility-impairing pollution at approximately 150 national parks and wilderness areas throughout the country. Under the visibility program, states are required to periodically submit plans (SIPs) that include measures necessary to make progress towards the Congressional goal. States' initial plans are also required to reduce visibility impairment from the largest individual sources by adopting emissions limits representing the Best Available Control Technology (BART) for major stationary sources of a certain age that measurably contribute to impairment at one of the scenic areas. Beyond that, Congress required state plans to include long-term (10-15 years) strategies for making reasonable progress towards Congress' stated goal.

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EPA instituted the Regional Haze Rule to provide the framework of an approvable SIP. The Rule directed states to determine the Uniform Rate of Progress (URP) that would be necessary for the state to reach the visibility goal at its scenic areas by 2064. The regulations then called on the state to determine the measures necessary to make progress along that URP or “glidepath” during the 10-year planning period and determine if those measures are reasonable based on other considerations such as costs of compliance and remaining life of the source. Under this framework in the program’s early years, EPA was able to significantly advance its agenda to obtain the maximum amount of emissions reductions from as many stationary sources as possible. It was particularly effective in the western states that were the first to implement the program because large expanses of federal lands in those states increased the likelihood that emissions from any given source would have a nexus with a scenic area and trigger application of BART to that source; which, in turn, allowed states and EPA to make rapid progress along the state’s glidepath due to the sizeable improvements that could be obtained from control of a small number of sources.

However, as implementation of the visibility program moved east to other areas of the country, EPA’s early achievements in the western states became more difficult to replicate. As the amount of federal lands impacted by emissions from stationary sources became sparser, there were fewer BART sources available from which EPA could extract quick-and-easy improvements. Additionally, many states like Arkansas were achieving progress towards the visibility goal absent a visibility program by obtaining emissions reductions from implementation of other air programs. As the states made progress along their glidepaths and there were fewer stationary sources remaining to control, each additional increment of improvement would be more difficult to obtain than the last. Congress was aware of that reality when it crafted the program, which is why it envisioned that the additional reasonable progress measures beyond BART would need to be evaluated across different groups and types of sources. But reducing

emissions by imposing control measures on the forestry service’s prescribed burns, mobile sources (which are the main contributors to regional haze at the scenic areas), or even on groups of minor stationary sources, is far more complicated and politically sensitive than measures for the usual major source scapegoats, so EPA’s instinct has been towards expanding its authority to impose controls on those familiar sources.

Since it would be impossible for EPA to review and make determinations on all the states’ plans at a single time, it can do only a few at a time. That sequencing can also be useful for EPA because it is able to choose favorable precedent from earlier determinations as justification for later determinations, or conveniently develop new guidelines to address an issue that was problematic for EPA elsewhere, and gradually shape its regulatory authority. The Arkansas FIP and recent amendments to the Regional Haze Rule are just the most recent example of that gradual expansion by EPA. In the Arkansas FIP, EPA identified 6 BART sources; and, as mentioned above, that Arkansas was indisputably ahead of its URP even without the regional haze program requirements. Arkansas also has one large non-BART source which EPA salivated to impose control requirements on. Under the existing framework described above, EPA would determine the measures necessary to make progress towards the URP, and then evaluate whether imposing those measures is reasonable based on other considerations. But since Arkansas was already ahead of the URP, no additional measures would be necessary to make reasonable progress. Furthermore, modeling showed that the non-BART source’s emissions had so little impact at Arkansas scenic areas that controlling the emissions would not result in any perceptible visibility improvement. Under the existing framework for making reasonable progress determinations, EPA lacked an avenue to impose control requirements on the non-BART source which it so badly wanted.

EPA’s solution for the Arkansas FIP was to essentially turn the framework described above on its head. Instead of beginning with a determination of the measures necessary to make progress towards the

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URP and then evaluating whether those measures were reasonable, EPA began by identifying the sources which EPA determined would be unreasonable to not control, then evaluated the control costs and visibility improvements of the control measures for the source identified, and added those improvements into the overall improvements expected from the BART sources and set that total as Arkansas' final goal for the current planning period. Less than a month later, EPA published the proposed amendments to the Regional Haze Rule that would make it consistent with this new approach. EPA claims that the purpose of the update was merely to "clarify" the interpretation of reasonable progress which it has always applied.

The most troublesome aspect of this isn't EPA's willingness to blatantly reverse course on its own

guidelines to achieve its preferred ends. What's most worrying are the potential implications for all types of stationary sources if the interpretation set out in the amendments to the Regional Haze Rule survives challenges in court. By divorcing the reasonable progress requirements from the URP and visibility improvements, it seems that EPA can require controls in the second planning period which begins in 2018 for any source as long as EPA determines such controls are reasonable and cost-effective based on dollars/ton removed. EPA finalized the amendments on January 10. The deadline for appealing the amendments is in March, and a number of industry groups are expected to bring judicial challenges. The Federation will also continue to closely monitor this issue, advise its members and advocate for their interests in this changing regulatory landscape.

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