An opportunity for a new federal-state relationship under the regional haze program

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Since President Trump's inauguration and the beginning of Scott Pruitt's tenure as administrator of the U.S. Environmental Protection Agency (EPA), much of the focus of Clean Air Act activity in the new administration has been on global climate change issues. As more time passes, however, EPA is beginning to address other areas of Clean Air Act regulatory policy, and, in some respects at least, charting a new course that departs from the record of the Obama administration. One of the areas to which EPA has started to give renewed attention is the regional haze program.

That program addresses impairment of visibility in the skies over protected national parks and wilderness areas due to widespread haze—haze attributable to emissions to the air from diverse anthropogenic sources, in many cases over broad geographic regions. Under the Clean Air Act's principle of "cooperative federalism," states are supposed to be the principal decision-makers regarding how to implement the regional haze program. EPA approves—or disapproves—states' implementation plans, depending on whether they meet criteria outlined in EPA's underlying visibility-protection regulations.

The technical and policy issues that arise in addressing regional haze are many and complex, due in part to the nature of the environmental problem. Regional haze results from atmospheric particles formed, in part, from emissions of sulfur dioxide, nitrogen oxides, organic compounds, and other substances from automobiles and trucks, construction and agricultural equipment, factories and electricity-generating power plants (among others), as well as natural, largely uncontrollable sources like dust storms and forest fires. Moreover, some emissions that contribute to regional haze in the United States come from sources located outside its borders—sources over which neither states nor EPA have regulatory authority. Developing regional haze implementation plans entails ambient-air monitoring, computer modeling, and often-contentious policy choices. Requirements in such plans that call for additional emission controls on sources may entail costs in the hundreds of millions or even billions of dollars—costs that can increase consumer prices for electricity and manufactured products, for example—while the computer-projected visibility improvements often may be small or even imperceptible to the human eye.

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Although EPA approved a number of state regional haze implementation plans during the Obama administration, EPA disapproved several others and imposed stricter, costlier requirements through federal plans. Litigation resulted, in which states (and others) argued that EPA's actions exceeded federal authority. One of several examples was litigation in the Tenth Circuit challenging EPA's disapproval of significant elements of Oklahoma's regional haze plan, including the state's decisions on "best available retrofit technology" controls for power plants. EPA substituted a federal plan with more stringent and expensive controls. As Oklahoma's attorney general at the time, Scott Pruitt led the challenge to EPA's action. Oklahoma and other challengers initially won a judicial stay of EPA's plan, but the Tenth Circuit later ruled on the merits against Oklahoma, *Oklahoma v. EPA*, 723 F.3d 1201 (10th Cir. 2013), and the Supreme Court declined Oklahoma's request to review that decision.

In the Trump administration, EPA may be more deferential to state decisions. When Administrator Pruitt wrote to governors in March about climate change regulatory policy under the new administration, he announced that "[t]he days of coercive federalism" are over—seemingly pointing to greater cooperation with states. Developments in the coming months may signal whether that new approach will prevail in regional haze policy. Although best available retrofit technology plans are now in place in most states—either because EPA approved state plans or because EPA imposed its own federal plans—a new phase of regional haze regulation is approaching: development of new "reasonable progress" state plans (due to be submitted to EPA by 2021), designed to achieve continued progress in reducing haze in parks and wilderness areas.

Litigation already has occurred on reasonable-progress plans for the regional haze program's first ten-year "planning period" (2008–2018). For example, through most of 2016 and into early 2017, litigation proceeded in the Fifth Circuit on EPA's disapproval of Texas's reasonable-progress plan and EPA's imposition of far more demanding federal requirements. In July 2016, the court stayed EPA's plan. Then, after unfruitful settlement discussions and the November 2016 elections, EPA asked the Fifth Circuit to return the rule to EPA for further consideration, a request that the court granted in March (while keeping the stay of the rule in effect during EPA's remand proceedings). As a result of separate litigation, EPA faces a September 2017 deadline to issue a final rule in a related proceeding concerning best available retrofit technology requirements for Texas and has told the Fifth Circuit it plans to initiate new rulemaking on Texas reasonable-progress requirements thereafter.

While the Texas case proceeded, EPA in May 2016 proposed substantial revisions to its underlying visibility-protection rules, with particular focus on reasonable-progress requirements. Many commenters criticized major provisions of the proposal for unduly constraining state discretion. On January 10, 2017, ten days before President Trump's inauguration, EPA published a final rule largely adopting the proposed revisions. The State of Alaska and industry parties filed with EPA petitions for administrative reconsideration of parts

of the rule, while four states (Texas, Alaska, Arkansas, and North Dakota) and several industry parties filed petitions for review challenging the rule in the D.C. Circuit, as did environmental organizations that oppose certain provisions. In May, EPA filed a motion (which the court granted) to defer by 60 days, until July 24, the deadline for proposals on how to brief the case. EPA sought the postponement "because of the federal government's change in administration," adding that the deferral "will allow EPA additional time to brief new administration officials with decision-making responsibility about this case, so that they may become familiar with the issues presented."

EPA has not yet acted on the petitions for reconsideration of the January 2017 reasonable-progress rule revisions. But those petitions, as well as EPA's upcoming decisions regarding emission control requirements for Texas, provide opportunities for EPA to move toward a more cooperative federalism in regional haze policy.