



The Clean Air Act Regional Haze Program
Key Issues for
States in the
Current Planning
Period

by Nash E. Long

A discussion of the legal issues relating to the regional haze rule and its implementation.

Across the United States, states are working to implement a part of the U.S. Clean Air Act (CAA) that could significantly impact many sectors of the economy: the Regional Haze Rule. Regional haze refers to “visibility impairment ... caused by the emission of air pollutants from numerous anthropogenic sources located over a wide geographic area.”¹ Such sources may include “major and minor stationary sources, mobile sources, and area sources.”¹ Visibility impairment within the regional haze program refers to the reduction in visual range and atmospheric discoloration (visibility is typically expressed in deciviews, i.e., 1 deciview is the smallest change in visibility that is perceptible to the human eye).²

Congress established the regional haze program to reduce anthropogenic visibility impairment and to achieve natural visibility conditions by 2064 in federal Class I areas (i.e., national parks and wilderness areas). The regulations promulgated by the U.S. Environmental Protection Agency (EPA) under the regional haze program require states to show that they are making “reasonable progress” toward that 2064 visibility goal in each of a series of 10-year implementation periods.

States are now revising their State Implementation Plans (SIPs) for the second implementation period. In revising their SIPs, states must include the enforceable emissions limits on sources of air emissions that are necessary to make reasonable progress toward the 2064 goal. The rule contemplates state review of point source emissions, area source emissions, and mobile source emissions in developing a “long-term strategy” for reasonable progress toward the goal. After a state updates its SIP for the second implementation period, revising the long-term strategy as necessary, EPA will review the state plan for consistency with the CAA and the regional haze regulations.³

In the first implementation period, the principal controversy surrounding state plans concerned implementation of the “best available retrofit technology” (BART) requirement for existing coal-fired power plants—specifically, the amount of discretion states had to depart from EPA’s highly prescriptive BART guidelines for such determinations. In the second implementation period, by contrast, the principal controversy will likely focus on the “reasonable progress” determinations in implementation of the “long-term strategy” requirement. Here, two questions will likely dominate the discussion. First, what progress does the CAA require: progress on improving visibility, or progress in reducing emissions? Second, how much discretion and flexibility do the states enjoy in determining what progress is reasonable for the second implementation period? Disagreement on the answers to these questions could lead to EPA’s disapproval of state SIPs and litigation of such decisions in the federal courts.

Purpose of the Regional Haze Program

The CAA’s regional haze program is focused on achieving **visibility** improvements, not on reducing emissions for the sake of emission reductions. Unlike generally applicable control technology-based emission standards set by EPA under other sections of the CAA, the regional haze program

is focused on improving **visibility** in the 158 Class I areas scattered throughout the country. This air quality focus is confirmed by the regulations implementing the regional haze program, which fall under Subpart P of Part 51—“Protection of Visibility”(emphasis added).⁴ As the title suggests, the regional haze program is focused on establishing “goals (expressed in deciviews) that provide for reasonable progress toward achieving natural **visibility** conditions” by 2064 (emphasis added).⁴ EPA has therefore issued guidance to states on implementing the regional haze program, recommending that states should consider the cost-effectiveness of achieving visibility improvements using a “cost per unit of visibility benefit[s]” for both quantifying and evaluating the visibility benefit of potential controls.⁵

Some argue that achieving reasonable progress does not refer to visibility impacts, but rather to reductions in pollutants that have “the potential” to impair visibility. According to this line of argument, emissions of pollutants that can theoretically contribute to visibility impairment (e.g., sulfur dioxide, nitrogen oxides, and particulate matter) must be further controlled in each implementation period even if doing so has no measurable impact on visibility in a Class I area. Proponents of this argument rely upon the text of the “reasonable progress” provision in the CAA, which requires consideration of “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.”⁶ Because the reasonable progress provision does not identify visibility as a consideration in the reasonable progress determination, the argument goes, the statute requires application of emission controls whenever they are cost-effective, regardless of visibility impact. Thus, some parties argue that relatively high-cost measures are reasonable, even if they deliver very little in terms of visibility benefit.

This debate can have significant implications for regional haze planning. For example, many states are using visibility impacts to screen sources out of review for additional controls. In addition, many states have identified visibility benefits as a key metric to consider in evaluating the costs and benefits of a potential emissions reduction measure. If those who argue against visibility as a consideration are correct, then any SIP developed using analysis of visibility impacts and visibility benefits would be vulnerable to challenge. EPA has cautioned that just because a Class I area is ahead of schedule in making progress toward the 2064 visibility goal it does not represent a “safe harbor” that eliminates the need for review of sources and reasonable progress evaluations.⁷

Implementation of the Regional Haze Rule

In addition to the debate over the goal of the regional haze program, views diverge on how much discretion states have in determining what constitutes reasonable progress toward that goal. These discussions are playing out as state agencies consult with the Federal Land Managers and EPA on their draft SIPs, as required by the regional haze rule.⁸

More than other portions of the CAA, the regional haze program vests significant decision-making authority in the states. The CAA generally includes two types of emissions programs: (1) programs to achieve air quality objectives like the National Ambient Air Quality Standards (NAAQS), and (2) programs to regulate source emissions directly like the New Source Performance Standard (NSPS) and air toxics programs. The CAA's regional haze program is an example of the former: a program driven by a congressionally defined objective of remedying manmade visibility impairment in federal Class I areas.

Consistent with this statutory allocation of authority, EPA has defined "attain[ing] natural visibility conditions by 2064" as the air quality goal of the regional haze program.⁹ Having defined that goal, EPA's responsibility is then to promulgate regulations that provide guidelines to states on the development of plans to make reasonable progress toward meeting that goal.¹⁰ With respect to the implementation of the program, however, the CAA "confines the EPA to the ministerial function of reviewing SIPs for consistency with the Act's requirements."¹¹ Indeed, "EPA has no authority to question the wisdom of a state's choices . . . if they are part of a SIP that otherwise satisfies the standards set forth in 42 U.S.C. § 7410(a)(2)."¹² In other words, the CAA supplies the goals and basic requirements of SIPs, but the states have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements.¹³

Under the statute and EPA's regulations, states have broad discretion in developing plans for making reasonable progress toward the national visibility goal, if that discretion is exercised in a rational fashion and supported on the record. This discretion includes "wide latitude to determine appropriate additional control requirements for ensuring reasonable

progress,"¹⁴ as well as the "amount of progress that is 'reasonable'" under the program.¹⁵

EPA has issued guidance confirming the broad discretion states have in making reasonable progress determinations. This discretion includes the ability to consider other relevant factors in addition to those identified by the statute and regulations, so long as they "are consistent with applicable requirements of the CAA and EPA's regulations and are a product of reasoned decision-making."¹⁶ Moreover, how a state evaluates or "characterizes" each factor is largely within its discretion, so long as the state documents its analysis and demonstrates its approach is reasonable.¹⁷

Some parties commenting on draft state plans have cited recent statements by EPA, which they read as restricting state's authority to determine what constitutes reasonable progress. For example, EPA Region 7 in comments on the Kansas draft SIP suggested that it would be appropriate to use the four statutory reasonable progress factors of § 7491(g)(1) to perform source selection for controls analysis, and that a state should select "large" sources of emissions for review.¹⁸ Whether such approaches are required by the regional haze program, or merely permissible approaches given the broad discretion state under the program, will be a point of contention for approval of regional haze plans.

Conclusion

The first implementation period for the regional haze program saw many legal challenges to EPA's decisions approving and disapproving SIPs. Given the divergent views of stakeholders on the aim of the program and on how much flexibility states have to achieve that goal, another round of litigation over the plans for the second implementation period will likely ensue. **em**

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References

- 40 C.F.R. § 51.301.
- 42 U.S.C. § 7491(g)(6).
- 42 U.S.C. § 7410(k)(3).
- 40 C.F.R. § 51.308.
- U.S. Environmental Protection Agency. *Guidance on Regional Haze State Implementation Plans for the Second Implementation Period*, August 20, 2019 ("2019 Guidance" at 35). EPA provided additional guidance on its views in July 2021. See Mem. from P. Tsigotis, Director, EPA Office of Air Quality Planning and Standards, to EPA Regional Air Division Directors, Regions 1-10, "Clarifications Regarding Regional Haze State Implementation Plans for the Second Implementation Period" (July 8, 2021).
- 42 U.S.C. § 7491(g)(1).
- See Protection of Visibility: Amendments to Requirements for State Plans, 82 *Fed. Reg.* 3078, 3099 (Jan. 10, 2017).
- See 40 C.F.R. § 51.308(f)(2)(ii) and 40 C.F.R. § 51.308(i)(2).
- 40 C.F.R. § 51.308(d)(1)(i)(B).
- 42 U.S.C. § 7491(b)(1).
- See *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012); See also *United Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976) (recognizing states' "wide discretion" in formulating SIPs); *Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 581 (5th Cir. 1981) ("The great flexibility accorded the states under the Clean Air Act is . . . illustrated by the sharply contrasting, narrow role to be played by EPA.").
- CleanCOALition v. TXU Power*, 536 F.3d 469, 472 n.3 (5th Cir. 2008).
- BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003); See also *American Corn Growers Ass'n v. EPA*, 291 F.3d 1, 2 (D.C. Cir. 2002) ("The Haze Rule calls for states to play the lead role in designing and implementing regional haze programs. . . .").
- 77 *Fed. Reg.* 11,468 (Feb. 27, 2012).
- 64 *Fed. Reg.* 35,714, 35,736 (July 1, 1999).
- 2019 Guidance at 1.
- 2019 Guidance at 28.
- Mem. from Dana Skelley (EPA) to Douglas Watson (Kansas DHE), "EPA Comments on Kansas 2nd Round Regional Haze State Implementation Plan (SIP) Draft" (June 28, 2021) at 2, 4.