Hearing on EPA's Regional Haze Program:
Litigation During the Program's First Planning Period

Testimony of Aaron Flynn, Partner, Hunton & Williams LLP

U.S. House Committee on Science, Space, & Technology
Subcommittee on Environment

March 23, 2016

Summary

When Congress enacted the regional haze provisions of the Clean Air Act, it made very clear that the states—not EPA—should make the key decisions about how to implement the program. Congress directed EPA to develop rules to guide state decision-making, while states were tasked with weighing the relevant information and then deciding which controls were justified and which demanded too much.

The early decisions of the D.C. Circuit acknowledged and strictly adhered to Congress's design for the program. EPA began to stray from a commitment to recognizing state discretion when implementation of the regional haze program began in earnest. While state plans that adopted EPA's policy preferences were often approved, states that chose to use their discretion differently frequently faced plan disapproval and replacement of their policy decisions with federal plans imposing strict emission limits and expensive technology requirements.

The courts, while acknowledging the states' role in the regional haze program, have largely deferred to EPA. Ongoing litigation over EPA's rulemaking action for Texas and Oklahoma will likely decide a number of key questions, including the scope of state discretion under the Clean Air Act's reasonable progress provisions, that will govern the next implementation period for the regional haze program.

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It is an honor to appear before this Subcommittee and to offer testimony on the Clean Air Act's regional haze program. My name is Aaron Flynn, and I am a partner in the law firm of Hunton & Williams LLP. I have practiced environmental law as an attorney for the Congressional Research Service and for the White House Office of Science and Technology Policy. Since joining Hunton and Williams in 2007, my practice has focused on the regional haze program and the litigation surrounding that program. I have represented industry clients in every nationally significant rulemaking and in many of the cases involving regional haze, including litigation pending before the Fifth Circuit regarding EPA's regional haze rulemaking action for Texas and Oklahoma and before the D.C. Circuit regarding whether EPA may allow electric generating companies to rely on the Cross-State Air Pollution Rule, or CSAPR, to satisfy the Clean Air Act's regional haze requirements. I am not, however, representing anyone with regard to this testimony. I am testifying in my own personal capacity as a Clean Air Act practitioner who focuses on EPA's visibility program.

Background

Congress enacted section 169A of the Clean Air Act as part of the 1977 amendments to the Clean Air Act, and, in doing so, established a national goal of preventing any future, and remedying any existing, visibility impairment in mandatory Class I federal areas that is caused by manmade air pollution. In particular, that provision of the Act targeted visibility impairment

caused by geographically dispersed sources of air pollution or, in other words, regional haze. 42 U.S.C. § 7491(a)(1). The Act directs EPA to issue regulations designed "to assure … reasonable progress toward meeting the national goal" and to require each state to submit a state implementation plan ("SIP") containing "such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal." *Id*. § 169A(a)(4), (b)(2). A regional haze SIP has three main elements: (1) reasonable progress goals, which are visibility goals for each mandatory Class I federal area (certain national parks and wilderness areas) located in the state; (2) a long-term strategy, which is the state's plan for meeting the reasonable progress goals; and (3) "best available retrofit technology" (or "BART") requirements for certain large stationary sources.

EPA's regional haze rule states that for each Class I area in a state, the state "must establish goals (expressed in deciviews[1]) that provide for reasonable progress towards achieving natural visibility conditions." 40 C.F.R. § 51.308(d)(1). The rules further require that a reasonable progress goal "provide for an improvement in visibility for the most impaired days over the period of the implementation plan and ensure no degradation in visibility for the least impaired days over the same period." *Id*. To establish a reasonable progress goal, a state must conduct an assessment of four factors: "[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 any potentially affected sources." *Id*. § 51.308(d)(1)(i)(A). The rules further require states to "include a demonstration showing how these factors were taken into consideration in selecting the goal." *Id*. In addition, in setting its reasonable progress goals, a

[1] A deciview is a "haze index derived from calculated light extinction, such that uniform changes in haziness correspond to uniform incremental changes in perception across the entire range of conditions, from pristine to highly impaired." 40 C.F.R. § 51.301.

state must determine and take into account what EPA refers to as the "uniform rate of progress" that would be needed to attain natural visibility conditions by the year 2064. *Id.* § 51.308(d)(1)(i)(B). A state may establish reasonable progress goals that differ from the uniform rate of progress if the state demonstrates that the uniform rate for the Class I area in question would not be reasonable. *Id.* § 51.308(d)(1)(ii). A state makes such a showing by conducting a reasonable progress analysis that considers the four reasonable progress factors. *Id.* Finally, states whose emissions may cause visibility impairment in another state's Class I area, and states with Class I areas that may experience visibility impairment caused by emissions from other states, may be subject to an interstate-consultation requirement. *Id.* § 51.308(d)(1)(iv). The purpose of that requirement is to provide a forum for states to decide collaboratively on reasonable emission reductions and appropriate apportionment of responsibility for reducing emissions during each planning period of the regional haze program.

In connection with establishment of reasonable progress goals, EPA's rules also direct each state to submit a long-term strategy to address regional haze in its Class I areas and the Class I areas in other states that are affected by emissions from the state. *Id.* § 51.308(d)(3). That strategy "must include enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals established by States having mandatory Class I Federal areas." *Id.* As in the setting of reasonable progress goals, states must consult with one another when emissions from one state impact Class I areas in other states, and a state that causes or contributes to visibility impairment in a Class I area in another state must "demonstrate that it has included in its implementation plan all measures necessary to obtain its share of the emission reductions needed to meet the progress goal for the area." *Id.* § 51.308(d)(3)(ii). The rules also require states to document the modeling they rely on and

specifically allow states to rely on modeling conducted by the regional planning organizations ("RPOs") provided for in the Clean Air Act. *Id*. § 51.308(d)(3)(iii).

The regional haze rule also specifies requirements for BART. States determine and require BART for "BART-eligible" sources that are "subject to BART" for the purpose of controlling emissions that impair visibility in Class I areas. BART-eligible sources are, generally, individual stationary sources that emit sizable amounts of visibility-impairing pollutants, that are within certain statutorily specified source categories (including fossil-fuel fired steam electric generating units, or "EGUs," of a certain size), and that were in existence on August 7, 1977, but had not been in operation for more than 15 years as of that date. 42 U.S.C. § 7491(b)(2)(A); 40 C.F.R. § 51.301 (defining "existing stationary facility"); *see generally* 70 Fed. Reg. 39,104 (July 6, 2005) (promulgating BART rules). A BART-eligible source is "subject to BART" if, based on an analysis of visibility impacts, it "may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area." 40 C.F.R. § 51.308(e)(1)(ii).

Determining BART for a specific eligible source generally requires consideration of five factors as they apply to that source: (1) the costs of compliance, (2) the energy and non-air quality environmental impacts of compliance, (3) any existing pollution control technology in use at the source, (4) the remaining useful life of the source, and (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. 42 U.S.C. § 7491(g)(2); *see also* 40 C.F.R. § 51.301 (definition of BART). EPA's BART rules also permit states, instead of requiring a source to install, operate, and maintain BART, to establish a "BART alternative" that would "achieve greater reasonable progress than would be achieved through the installation and operation of BART." *Id*. § 51.308(e)(2). The emission reductions

necessary for a BART alternative to achieve greater reasonable progress than would be achieved through BART must be surplus to the emission reductions resulting from measures adopted to meet requirements of the Clean Air Act as of the SIP's baseline date. *Id*. § 51.308(e)(2)(iv). The BART rules provide three alternative tests for determining whether a given BART alternative achieves greater reasonable progress than BART would. Pursuant to 40 C.F.R. § 51.308(e)(2)(i)(E), a state may establish a BART alternative "based on the clear weight of evidence that the trading program or other alternative measure achieves greater reasonable progress than would be achieved through the installation and operation of BART at the covered sources." The BART rules also allow a state to establish a BART alternative pursuant to specific criteria stated in 40 C.F.R. § 51.308(e)(3). Under that provision, a state may demonstrate that either (1) "the distribution of emissions [under the BART alternative] is not substantially different than under BART, and the alternative measure results in greater emission reductions" than BART would, or (2) "the distribution of emissions is significantly different" but air quality dispersion modeling shows that for the worst and best 20 percent of days for the affected Class I areas,

> (i) Visibility does not decline in any Class I area, and
>
> (ii) There is an overall improvement in visibility, determined by comparing the average differences between BART and the alternative over all affected Class I areas.

Id. § 51.308(e)(3).

In two separate rulemakings, EPA itself identified two BART alternatives based on EPA regulations promulgated under other sections of the Clean Air Act that states subject to those programs could rely on to satisfy BART obligations for NOx and SO_2 emissions. First, EPA determined that compliance with the Clean Air Interstate Rule ("CAIR") could satisfy electric generating units' NOx and SO_2 BART requirements, the so-called "CAIR=BART rule."

Subsequently, when EPA replaced CAIR with the Cross-State Air Pollution Rule ("CSAPR"), EPA promulgated a rule finding that compliance with that program would satisfy NOx and SO_2 BART requirements, i.e. the "CSAPR=BART rule". States and EPA have also promulgated BART alternatives for individual power plants.

Early Court Decisions Emphasized State Authority

EPA promulgated its first rule to implement the regional haze program in 1999, prompting the first legal challenge to the program in *American Corn Growers Association v. EPA*, 291 F.3d 1 (D.C. Cir. 2002). One of the primary issues in that case concerned provisions of EPA's 1999 rule governing the manner in which states assess BART requirements for facilities, like electric generating units, that are determined to affect visibility conditions in national parks and wilderness areas. As noted above, the Clean Air Act requires states to consider and weigh five factors when determining the type of emission controls that constitute BART for a particular facility: "the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology." 42 U.S.C. § 7491(g). EPA's 1999 BART rule would have effectively forced states to place the greatest weight on one factor—the degree of visibility improvement—by requiring states to assess aggregate visibility impacts from all BART sources rather than from individual sources. The D.C. Circuit struck down that provision of the rule, finding that Congress had not authorized EPA to limit state discretion to implement the regional haze program in that manner. Indeed, the court used expansive language when describing the role of the states with respect to regional haze, holding that states "play the lead in designing and implementing regional haze programs," that "Congress

directed states to make" the judgment as to how to weigh the BART factors, and that the 1999 regional haze rule was ultimately "inconsistent with the Act's provisions giving the states broad authority over BART determinations." *Id*. at 2, 6, 8. In particular, the Court relied on the legislative history of the 1977 Clean Air Act Amendments, see H.R. Conf. Rep. No. 96-564 (1977), U.S.C.C.A.N. 1977 at 1502, 1536, as "confirm[ing] that Congress intended the states" and not EPA "to decide which sources impair visibility and what BART controls should apply to those sources." *Corn Growers*, 291 F.3d at 8. The court further explained that EPA's interpretation of the Clean Air Act's regional haze provisions was flawed because "[u]nder EPA's take on the statute, it is . . . entirely possible that a source may be forced to spend millions of dollars for new technology that will have no appreciable effect on the haze in any Class I area." *Id*. at 7.

EPA adopted new regional haze rules responding to the D.C. Circuit's decision in *Corn Growers* in 2005. 70 Fed. Reg. 39104 (July 6, 2005). EPA also promulgated "BART Guidelines" and the CAIR=BART rule, described above. The 2005 rules and the BART Guidelines, including the CAIR=BART rule, were also challenged in the D.C. Circuit. Most significantly, in *Utility Air Regulatory Group. v. EPA*, 471 F.3d 1333 (D.C. Cir. 2006), the D.C. Circuit again affirmed state discretion to develop alternatives to BART, so long as those alternatives achieve greater reasonable progress than BART would, providing states with the flexibility to adopt regulatory mechanisms, such as an emissions trading program, that would not necessarily be legally permissible as a BART requirement but that could achieve visibility improvement more cost-effectively. *See also Ctr. For Energy and Econ. Dev. v. EPA*, 398 F.3d 653 (D.C. Cir. 2005) (also validating the concept of BART alternatives). The D.C. Circuit also approved the CAIR=BART rule as a valid alternative to BART.

Litigation Concerning Regional Haze Plans

After these decisions addressing the validity of the broader rules governing the regional haze program, the states and EPA turned their attention to implementing these visibility requirements. The RPOs undertook substantial technical work to model visibility conditions throughout the nation and to assess impacts attributable to emissions from various sources. Often relying to a significant extent on the technical work of the RPOs, states began assessing reasonable progress, BART, and often BART alternatives, as appropriate for the sources located within their borders. The deadline for submitting regional haze SIPs to EPA for review was December 17, 2007. On January 15, 2009, EPA issued a finding that 37 states, plus the District of Columbia and the U.S. Virgin Islands, had failed to submit regional haze SIPs. Although many states submitted regional haze SIPs after the 2009 finding of failure, EPA generally did not take further action by the applicable legal deadlines either to promulgate federal implementation plans ("FIPs") or to act on those SIPs, prompting environmental groups to sue the Agency pursuant to section 304 of the Clean Air Act to obtain a court order setting new deadlines for EPA action. That litigation eventually resulted in a consent decree establishing those deadlines.

Once EPA began to act on the regional haze plans for specific states, a relatively clear pattern emerged. Where EPA had direct regulatory authority over specific facilities, including electric generating units located on tribal lands, the Agency tended in many cases to opt for the most stringent emission control technologies available—scrubbers in the case of SO_2 and selective catalytic reduction, or SCR, technology for NOx emissions, despite information in the record suggesting that the costs of these requirements were not justified by the benefits. States that made similar BART determinations for their electric generating units frequently had their SIPs approved. States that concluded, after applying the five BART factors, that less stringent

and expensive controls were BART, however, received greater scrutiny of their SIPs, and many of those determinations were rejected by EPA, which then went on to impose its own regional haze federal implementation plans or FIPs requiring the more stringent control technologies.

A number of states whose BART SIPs were disapproved, along with their affected facilities, filed petitions for review challenging those SIP disapprovals and EPA's promulgation of FIPs. Some of those challenges, like cases filed in October 2011 challenging a regional haze FIP for New Mexico, have not resulted in decisions from the federal courts but have instead been resolved or are in the process of being resolved through new regional haze rulemakings containing requirements that the parties to these cases have determined are acceptable.

The decisions that have been rendered, while acknowledging a role for states, have been interpreted as allowed EPA to minimize state discretion and in some cases appear to grant EPA the primary policy-making role. The first such decision came in 2013 from the Tenth Circuit in *Oklahoma v. EPA*, 723 F.3d 1201 (10th Cir. 2013). That case involved SO_2 BART limits for four Oklahoma electric generating units located at the Muskogee Generating Station and the Sooner Generating Station. Oklahoma's regional haze SIP established a 0.65 lb/MMBtu 30-day average SO_2 emission limit and a 0.55 1b/MMBtu annual average SO_2 emission limit for these units based on continued use of low-sulfur coal. After applying the BART factors, the state rejected emission limits based on more stringent scrubber controls as unjustified given the significant costs and minimal visibility benefits. EPA contended that Oklahoma had misjudged the costs of installing scrubbers and on that basis promulgated a FIP requiring these Oklahoma units to achieve a 0.06 lb/MMBtu SO_2 emission rate. The state and industry petitioners requested that the Tenth Circuit stay EPA's regional haze rule for Oklahoma pending judicial review, and a two-judge panel of the court granted that request. Ultimately, however, a different

panel of judges concluded that EPA had authority to review Oklahoma's SIP for compliance with the Clean Air Act and EPA's regulations. Further, the court held that EPA had properly exercised its authority to disapprove the SIP's SO_2 BART determinations for the Muskogee and Sooner plants, accepting EPA's finding that Oklahoma's consideration of the BART cost factor was inconsistent with the BART Guidelines and that the information on site-specific costs Oklahoma provided was not adequately documented. The court did not explicitly address whether the BART Guidelines actually require cost calculations to be made in the manner in which EPA preferred, even though there are strong arguments that the Guidelines do not impose a requirement to adhere to any particular costing methodology. And the court's decision did not clarify what level of cost documentation would be sufficient. The analysis EPA used to support the policy decisions contained in its FIP for Oklahoma—despite an acknowledgement from the court that "this is a close case"—received substantial deference from the Tenth Circuit.

Shortly after the Tenth Circuit's ruling in the Oklahoma case, in September 2013 the Eighth Circuit issued its decision in *North Dakota v. EPA*, 730 F.3d 750 (8th Cir. 2013). There, the state and Great River Energy challenged EPA's disapproval of North Dakota's BART determination for the Coal Creek Station. That determination required the facility to meet a 0.17 lb/MMBtu NOx emission limit based on use of combustion controls, rather than the more expensive SCR or selective non-catalytic reduction ("SNCR"). EPA replaced that determination with an emission limit of 0.13 lb/MMBtu based on use of costly SNCR controls. The court upheld EPA's decision to disapprove the SIP because the BART determination had been based on an admitted and substantial error in the cost calculations. The court, however, also rejected EPA's FIP for Coal Creek Station in North Dakota, because EPA had refused to consider the emission control technology already in place at Coal Creek Station, a clear violation of the Clean

Air Act, which lists consideration of such controls as one of the BART factors. Given the relatively clear errors, these elements of the court's decision were not surprising. The state's challenge to EPA's disapproval of its reasonable progress determination for the Antelope Valley Station, however, reflected substantial deference to EPA decision-making. With respect to EPA's reasonable progress determination for that plant, the court accepted EPA's finding that it was unreasonable for North Dakota to rely on a cumulative source visibility model rather than a single source visibility model, even though neither the Clean Air Act nor EPA's rules expressly prohibit use of such a model.

Another significant decision involving these issues was issued by the Ninth Circuit on June 9, 2015, in *National Parks Conservation Association v. EPA*, 788 F.3d 1134 (9th Cir. 2015). That case involved challenges to an EPA FIP for the state of Montana by PPL Montana, the operator and partial owner of two electric generating facilities, the Colstrip and Corette power plants, affected by the FIP, and by several environmental groups. Unlike Oklahoma and North Dakota, Montana opted not to submit a regional haze SIP to EPA. Accordingly, this case does not speak directly to the relative roles of the states and the federal government under the regional haze program. It does, however, speak to the limits of EPA's discretion when the Agency determines BART. The Ninth Circuit held that EPA had failed to justify its NOx and SO_2 BART determinations for Colstrip Units 1 and 2 because EPA had simply asserted that such limits were cost-effective and justified without providing any further explanation. The court reached a similar conclusion with respect to EPA's limited explanation for its BART determinations for Corette, but also found that the costs and visibility impacts associated with emission controls that EPA rejected for Corette were nearly identical to those that EPA found sufficient to justify limits for Colstrip. Because these outcomes appeared inconsistent and EPA

provided no explanation for that inconsistency, the court determined the BART FIP was unlawful. Finally, the court concluded that EPA's FIP was fatally flawed because EPA failed to respond to PPL Montana's argument that the visibility impacts EPA projected were so small they were within the margin of error of the model EPA used and that installation of BART could not, therefore, be reasonably anticipated to result in visibility improvements.

The next case to be decided was *Nebraska v. EPA*, 812 F.3d 662 (8th Cir. 2016). That case involved EPA's partial disapproval of Nebraska's regional haze SIP and its SO_2 BART determination for the Gerald Gentleman Station. Nebraska had determined that SO_2 scrubbers and dry sorbent injection control technology would have been unreasonably costly in relation to the visibility improvement such controls were projected to produce and that no additional controls constituted SO_2 BART. Specifically, Nebraska found the expense associated with obtaining water needed to operate the scrubbers would have pushed the costs of scrubber technology unreasonably high. EPA disagreed, finding that the costs were reasonable and the visibility impacts were significant. EPA also concluded that Nebraska had overestimated some costs and underestimated visibility benefits. The Eighth Circuit held that EPA properly executed its statutory role in determining that Nebraska's rationale was unreasonable, and it deferred to EPA's decision to disapprove the SIP.

EPA promulgated a FIP for Nebraska to replace the state's SO_2 BART determination for the Gerald Gentleman Station. That FIP relied on the CSAPR=BART rule to satisfy that facility's SO_2 BART obligations and was challenged by environmental groups. The court upheld EPA's application of the CSAPR=BART rule. Litigation addressing that rule is discussed further below.

On February 24, 2016, the Ninth Circuit issued its opinion in *Arizona ex rel. Darwin v. EPA*, --- F.3d ---, 2016 WL 722685 (9th Cir. 2016), in which Arizona and the Salt River Project Agricultural Improvement and Power District challenged EPA's disapproval of Arizona's regional haze SIP and promulgation of a FIP for the Coronado Generating Station. (Arizona's SIP included BART determinations for three Arizona power plants, although two of those plants, over the course of the Arizona BART litigation, were able to negotiate new BART SIP provisions that have settled, or may soon settle, disputed issues raised as to those power plants.) Once again, EPA disapproved state NOx BART determinations because the Agency disagreed with the manner in which the state evaluated costs and visibility impacts. As a result, it promulgated a FIP imposing emission limits based on installation and operation of SCR controls plus low-NOx burners, represented by a facility-wide average NOx limit of 0.065 lb/MMBtu for Coronado. The Ninth Circuit, in one of the most extensive judicial discussions of the state and federal roles under the regional haze program to date, made clear that, although the statute grants substantial leeway to states in making BART determinations, the court will often defer to EPA judgments about whether the state decisions are reasonable. Having articulated that standard of judicial review, the court affirmed EPA's disapproval of the Arizona SIP. As seen in other cases, the court accepted EPA's assertion that the SIP's cost estimates were insufficiently documented and it accepted EPA's conclusion that the state had inadequately evaluated visibility impacts on a cumulative and most-impacted Class I area basis, despite strong evidence that the state had effectively considered both. The Ninth Circuit also, in large part, rejected the challenge to EPA's FIP for Arizona, deferring to EPA's decision to use a cumulative approach to evaluate visibility impacts and rejecting arguments that EPA underestimated costs and failed to reasonably consider the presumptive BART limits contained in its own BART Guidelines.

The outcome of these cases suggests that Congress's intent that states be empowered to make BART determinations, and the policy decisions associated with ensuring reasonable progress toward the national visibility goal, has been frustrated for a number of states. Instead, EPA has effectively established a more uniform national policy on regional haze requirements, and states that attempt to deviate from those policy choices often are subjected to regional haze FIPs. Although the courts generally have acknowledged that states have an important role under the regional haze program, in several decisions to date, courts have largely been unwilling to ensure state primacy.

In addition to the decisions described above, a number of additional cases remain pending in the federal courts. Litigation addressing EPA's CSAPR=BART rule is the subject of cases that are now being held in abeyance in the Fourth and Sixth Circuits, as well as in cases before the D.C. Circuit that are now at the very earliest stages of proceedings. The Third Circuit and the Eighth Circuit were also presented with cases addressing the CSAPR=BART rule. Rather than hold those cases in abeyance, as other courts did, pending resolution of the litigation involving CSAPR, those courts decided those cases. In *Nebraska v. EPA*, 812 F.3d 662 (8th Cir. 2016), as stated above, the Eighth Circuit held that EPA properly relied on its CSAPR=BART rule in promulgating a FIP for the Gerald Gentleman Station in Nebraska. In *National Parks Conservation Association v. EPA*, --- F.3d ---, 2016 WL 94598 (8th Cir. 2016), that court similarly held that EPA had properly approved a Minnesota regional haze SIP that relied on the CSAPR=BART rule. The Third Circuit, on the other hand, determined that jurisdiction to hear cases related to the CSAPR=BART rule rests exclusively with the D.C. Circuit. *National Parks Conservation Association v. EPA*, 803 F.3d 151 (3d Cir. 2015). The outcome of the

CSAPR=BART rule litigation in the D.C. Circuit could have significant implications with respect to states' ability to rely on BART alternatives as EPA has provided in its regulations.

A number of additional regional haze cases remain pending in the federal courts. Perhaps the most significant of those cases is litigation over EPA's final regional haze rule for Texas and Oklahoma. In a final rule published on January 5, 2016, EPA took a number of unprecedented actions in its partial approval and partial disapproval of Texas and Oklahoma's regional haze SIPs. 81 Fed. Reg. 296 (Jan. 5, 2016). Of particular significance, EPA disapproved the reasonable progress goals for two Class I areas in Texas and one Class I area in Oklahoma based on its conclusion that Texas sources could achieve more emission reductions than Texas required in its SIP. EPA took that action despite the considerable deference that the Clean Air Act and the Agency's own guidance grants to states when making reasonable progress determinations.

EPA's disapproval of the reasonable progress goals was also based, in part, on EPA's conclusion that Texas and Oklahoma had not engaged in sufficient interstate consultation and that Oklahoma, in particular, had improperly failed to gain Texas's agreement to sufficient emission reductions at Texas power plants to achieve reasonable progress in the Class I area located in Oklahoma. EPA had never before disapproved a regional haze SIP due to what it views as inadequate interstate consultation. In conjunction with its SIP disapprovals, EPA promulgated regional haze FIPs for Texas and Oklahoma. Those FIPs include revised reasonable progress goals and new SO_2 limits for 15 electric generating units in Texas. EPA imposed these SO_2 limits under the Clean Air Act's reasonable progress provisions, not the Act's BART requirements, on which EPA has temporarily deferred action for Texas. Again, such an approach is unlike EPA's action for other states, and it is inconsistent with EPA's reasonable progress guidance, which states that BART is likely to satisfy all reasonable progress

requirements for the first planning period of the program. Further, EPA rejected Texas and Oklahoma's reliance on analyses conducted by the regional planning organization for those states. EPA also imposed reasonable progress requirements that it acknowledges cannot be achieved by the end of the first regional haze planning period in 2018, thereby interfering with Texas's ability to evaluate requirements for the second planning period, which extends from 2019 to 2028. Moreover, EPA's FIP has been estimated to cost approximately $2 billion more than Texas's regional haze SIP and is projected by EPA to achieve additional visibility benefits that are not humanly perceptible and are indeed only fractions of a deciview. Further, emission reductions already achieved through implementation of existing requirements have resulted in monitored visibility conditions in the affected Class I areas that satisfy the goals set forth in EPA's plan.

Petitions for review of the Texas and Oklahoma regional haze rule have been filed in the Fifth, Tenth, and D.C. Circuits. The State of Texas and the Texas utilities that are regulated by EPA's rule have filed motions to stay the rule while the litigation is pending. EPA is due to respond to those motions on March 31, 2016. How the stay motions and the litigation itself are resolved could have significant implications not only for Texas sources and the State of Texas in the near term but also for implementation of the regional haze program during the second planning period.

Conclusion

Congress made clear when it enacted section 169A of the Clean Air Act in 1977 that it intended states to be the primary decision-makers as to how the regional haze program should be implemented and how the national goal of eliminating manmade visibility impairment in Class I areas should be achieved. The D.C. Circuit recognized that fact in the earliest litigation

concerning rules to implement the program. On their face, EPA's rules and the BART Guidelines leave states with substantial discretion to devise regional haze implementation plans. Since EPA began its efforts to review regional haze SIPs, however, it has become clear that the Agency has specific emission control policy preferences. EPA has been able to impose those preferences by interpreting its BART rules to impose strict requirements—many would argue improperly—and the courts often have deferred to EPA in this respect. Congress intended states to have much more flexibility under the regional haze program than EPA and some court decisions have recently recognized. If Congress's intent is to be realized, there must be a substantial change in policy from the Executive Branch or corrective actions by Congress.

Thank you again for the opportunity to testify today.