Comment to the Environmental Protection Agency

Visibility Protection:
Regional Haze State Plan Requirements Rule Revision
Proposed Rule

Advance Notice of Proposed Rulemaking

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This comment paper responds to the Environmental Protection Agency request for "feedback on a restructuring of the Regional Haze program" (RHP) as delineated in the Requirements for Regional Haze State Implementation Plans for the Second Planning Period.[1] Act (AIM) of 2020.[2] At the most general level, the federal RHP should be repealed or at a minimum scaled back dramatically so as to return haze policies to the states as reflected in their respective implementation plans. This comment is organized as follows:

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[1] See the EPA advance notice of proposed rulemaking at https://www.govinfo.gov/content/pkg/FR-2025-10-02/pdf/2025-19280.pdf. The Second Planning Period Requirements published August 20, 2019 are at https://www.epa.gov/sites/default/files/2019-08/documents/8-20-2019_-_regional_haze_guidance_final_guidance.pdf.

[2] The 2023 final rule is at https://www.govinfo.gov/content/pkg/FR-2023-10-24/pdf/2023-22529.pdf. The 2025 proposed rule is at https://www.govinfo.gov/content/pkg/FR-2025-10-03/pdf/2025-19438.pdf.

Summary

The federal Regional Haze Program should be repealed or at a minimum scaled back dramatically so as to return haze policies to the states as reflected in their respective implementation plans. The clear intent of Congress in the Clean Air Act as amended was to create a system of cooperative federalism for environmental protection, with aesthetic issues left largely to the states in terms of policy formulation. The RHP is inconsistent with both of those objectives. The Environmental Protection Agency during the Obama administration shunted aside state authority under the regional haze rule for regional haze conditions, with a wholesale imposition of federal implementation plans (FIPs) in place of state implementation plans (SIPs). These actions resulted from a sue-and-settle litigation game in which EPA largely acquiesced to the demands of environmental special interests and ideological groups, while excluding the states from participating in the policy formulation process. Moreover, the actual visibility benefits of the FIPs relative to the SIPs are essentially nonexistent; the actual goal of the FIPs is the shutdown of ever-more coal-fired powerplants.

I. The Federal RHP Is Inconsistent with the Clear Intent of Congress in the Clean Air Act to Leave Aesthetic Issues to the States

The RHP was incorporated into the 1977 Amendments to the Clean Air Act.[3] The central objective of all other provisions of the CAA, for both criteria and hazardous air pollutants, is the reduction of reasonably foreseeable risks to human health. Regional haze, on the other hand, is entirely a matter of aesthetics, in particular in national parks and other scenic areas, in the western regions of the U.S. in particular. Because regional haze is wholly an aesthetic concern, the CAA as amended gives the states broad discretion with respect to both the visibility goals — that is, the economic value of changes in visibility compared with the cost of achieving them — and the strategies implemented to achieve them. EPA oversight was given only a minimal role.

This overall structure of the FHP changed sharply during the Obama administration, as an obvious part of its efforts to shut down much of the coal industry generally, and coal-fired power generation in particular.[4] Since 2009 EPA has shunted aside state authority under the regional haze rule for regional haze conditions, imposing federal implementation plans (FIPs) in place of state implementation plans (SIPs). EPA has rejected fifteen such SIPs, overriding them with FIPs. The Clean Air Act from the beginning envisioned and created a cooperative federalism structure; states, for example, are responsible for devising policies to achieve National Ambient Air quality

[3] For a summary discussion, see https://www.nrcs.usda.gov/sites/default/files/2022-10/4-Regional-Haze-Rule-Implications.pdf.
[4] See Benjamin Zycher at https://www.aei.org/articles/president-obamas-clean-power-plan-all-cost-no-benefit/ and https://www.usnews.com/opinion/economic-intelligence/2015/07/16/climate-change-policy-wont-change-global-temperatures.

Standards for criteria pollutants. This overall structure is sensible, since a variety of state policies to achieve the NAAQS avoids the costs and rigidities of a one-size-fits-all policy environment.

Substitution of a FIP in place of a SIP is a drastic substitution of federal power over state authority. The previous three administrations in total imposed five FIPs under the CAA; the Obama EPA imposed 54, of which the aforementioned fifteen were imposed under the regional haze rule alone. Yeatman notes that "In floor debate in 1977, Congress unequivocally said that states would have the authority to decide how much value to assign to an aesthetic benefit, and the resulting language of the Clean Air Act reflects this fact."[5]

II. The Federal RHP Is the Result of the Sue-and-Settle Perversion of Regulatory Policy

Every EPA disapproval of a state regional haze SIP submission and every EPA substitution of a Sip with a FIP has been implemented pursuant to a "sue and settle" litigation agreement with environmental special interests and ideological groups. Beginning in 2009, a group of such environmental organizations — Sierra Club, WildEarth Guardians, Environmental Defense Fund, National Parks Conservation Association, Montana Environmental Information Center, Grand Canyon Trust, San Juan Citizens Alliance, Our Children's Earth Foundation, Plains Justice, and Powder River Basin Resource Council — filed lawsuits against EPA alleging that the agency had failed to perform its nondiscretionary duty to act on state submissions for regional haze.

Rather than defend these cases, EPA simply chose to settle with the plaintiffs. In five Consent Decrees negotiated with environmental groups, and without notice to the states that would be affected, EPA agreed to various deadlines to act on all states' proposed SIPs. The EPA during the Obama administration did not inform the respective states about the ongoing settlement negotiations as a matter of policy. Yeatman notes as an example that the Florida Department of Environmental Protection told a U.S. House of Representatives Committee that he learned of a citizen suit settlement affecting his state's regional haze planning when a notice appeared in the Federal Register, negating years of haze-related planning efforts.[6]

Notwithstanding the central CAA principle of cooperative federalism, the Obama EPA and environmental groups have excluded the states from negotiations resulting from these lawsuits. In one case, EPA joined with the environmental groups in litigation to prevent North Dakota from intervening in an EPA settlement imposing a FIP on that state. One central effect of preventing or limiting state participation in such negotiations is the imposition of unreasonable deadlines in the regulatory process. Yeatman notes the comment to EPA from Arkansas Attorney General Leslie Rutlege: "I do not believe that five months is an adequate time period for the EPA to fully analyze and respond to the public comments … a rushed process that fails to fully review all considerations will lead to an arbitrary and capricious decision."[7]

Accordingly, the formal nature of the settlements — the mere imposition of schedule

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[5] See William Yeatman at https://cei.org/sites/default/files/William%20Yeatman%20-%20Testimony%20-%203232016.pdf.
[6] *Ibid.*
[7] *Ibid.*

requirements — was a sham, an obvious tool with which to reject the state SIPs and to impose federal FIPs.

III. The Visibility Benefits of the Federal RHP Requirements Are Illusory

Yeatman notes as follows:

> EPA uses a metric known as a "deciview" to measure visibility improvement. A deciview value of 0 represents the clearest possible visibility, i.e., the view is unaffected by haze. As the deciview number increases, visibility becomes progressively poorer. According to peer-reviewed research, it would require an improvement of five to ten deciviews in order for the average person to perceive the difference in visibility with certainty, depending on conditions. With this referent in mind, consider the fact that in December of 2015, the EPA imposed a federal plan on Texas that would entail almost $2 billion in compliance costs in order to achieve a maximum visibility benefit of about .5 deciviews. Peer-reviewed science tells us there is a mere ten percent probability that the average person would detect this difference, which is the justification for nearly $2 billion in compliance costs.
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> Thanks to computer software, we can model the visibility "benefit" of EPA's Regional Haze FIPs over the State plans, and thereby compare the visibility improvements associated with the state and federal plans. For example, the largest deciview improvement achieved by any of EPA's fifteen Regional Haze takeovers (relative to the state plans) occurred in Oklahoma. There, the agency imposed a FIP that amounted to a 2.89 deciview improvement over the Oklahoma plan, at a cost of almost $1.8 billion. For my oral testimony, I hope to depict side-by-side images comparing the difference in visibility between the EPA plan and the Oklahoma plan to Members present. Otherwise the images are available online. Indeed, the images are indistinguishable! That is, the difference between the two plans is literally invisible. And, as noted above, the Oklahoma federal taekover *(sic)* represents the greatest degree of visibility improvement of any of the federal plans. Every other federal plan amounts to less than a two deciview "improvement."
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> While the benefits of EPA's Regional Haze takeovers are demonstrably non-existent, the costs are all too real. In Oklahoma, ratepayers are on the hook for $1.8 billion. In Texas, the capital costs are almost $2 billion. In New Mexico, costs exceed $700 million. In Wyoming, ratepayers face about $650 million in capital costs. EPA is soon to finalize a FIP in Arkansas that threatens to impose almost $275 million in upfront expenses. Of course, the regulatory burden will fall heaviest on the poorest, for whom energy costs occupy a higher share of their personal (often fixed) income. Crucially, none of these costs will bring about a perceptible change in visibility. The "benefit" to ratepayers is nothing.[8]

[8] *Ibid.* See also Ronald C. Henry, "Estimating the Probability of the Public Perceiving a Decrease in Atmospheric

IV. Conclusions

The Federal RHP Is inconsistent with the cooperative federalism regulatory system clearly created in the CAA, and represents a wholesale usurpation of state authority in the context of aesthetic questions. The substitution of federal FIPs in place of state SIPs is a violation of the principles of federalism, and the sue-and-settle consent decrees forcing FIPs onto the states represent an undermining of the rule of law. Moreover, the FIPs yield no visibility benefits even at substantial cost, and thus cannot satisfy any plausible benefit/cost test. The FHP should be repealed or dramatically reduced in scope.

Haze," *Journal of the Air & Waste Management Association*, Vol. 55, Issue 11, pp. 1760-1766, March 2, 2012, at https://www.tandfonline.com/doi/abs/10.1080/10473289.2005.10464760.