

Regional Haze

ROUND 2 – Just Around the Corner



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Round 1 Highlights

- “BART” was the most critical and controversial element
- EPA disapproved many state BART determinations
- Half of the country benched under CAIR / CSAPR
- Many Circuit Court lawsuits (3rd, 5th, 6th, 8th, 9th, 10th)
- EPA won most (but sometimes in a split decision)



42 U.S.C. § 7491 (CAA § 169A):

Regulations under subsection (a)(4) shall—...

(2) require each applicable implementation plan for a State in which any area listed by the Administrator under subsection (a)(2) is located (or for a State the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area) to contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal specified in subsection (a), including--

(A) except as otherwise provided pursuant to subsection (c), a requirement that each major stationary source which is in existence on the date of enactment of this section [enacted Aug. 7, 1977], but which has not been in operation for more than fifteen years as of such date, and which,

as determined by the State

(or the Administrator in the case of a plan promulgated under section 110(c) [42 USCS § 7410(c)]) emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area, shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology,

as determined by the State

(or the Administrator in the case of a plan promulgated under section 110(c) [42 USCS § 7410(c)]) for controlling emissions from such source for the purpose of eliminating or reducing any such impairment.

Oklahoma v. EPA (10th Cir.)

Majority:

- “In the present case, the EPA did not reject the petitioners' BART determination because it disagreed with the way it balanced the five factors. It rejected the BART determination because it failed to follow the [EPA's] guidelines”
- “To be sure, our dissenting colleague raises a number of valid concerns about the EPA's actions, and we acknowledge that this is a close case. ... [BUT], we must give deference to the EPA.”

Dissent:

- The EPA deserves no such deference [] where it does not support a conclusion contradicting Oklahoma's first, reasonable, detailed technical conclusion.

And so, it's time for Round 2 ...



... but in Round 2, the game has changed ...



... time for “REASONABLE PROGRESS”

“Reasonable Progress” v. BART

Reasonable Progress

1. Cost of compliance
2. Energy and non-air environmental impacts of compliance
3. Remaining useful life
4. **Time necessary for compliance**

BART

1. Cost of compliance
2. Energy and non-air environmental impacts of compliance
3. Remaining useful life
4. **Existing pollution control technology in use at the source**
5. **Degree of improvement in visibility**

EPA's Regional Haze Revisions

Making the game a little harder ...

- States should **ignore visibility** in determining which control measures to impose on sources
- Evaluate **all sources**, even if already “BART”
- **No baseline reset**—states ahead in the game, stay ahead; those behind, get further behind
- Reasonably Attributable Visibility Impairment (“**RAVI**”)

EPA's Regional Haze Revisions

Making the game a little easier ...

- **Extends deadline** for states to submit “round 2” SIPs for three years—from **2018** until **2021**
- Eliminates certain **procedural** requirements for SIPs
- States may take into account **international emissions** and **wildland prescribed fires** in developing SIP
- All states must attempt to discern whether impairment is **man-made**—more work, but any real difference?

EPA's Regional Haze Revisions

Really? You want to ignore visibility in developing a visibility program?

- “[B]aseline visibility impacts and prospective visibility benefits are not a ‘fifth factor’ that states must consider when determining reasonable progress. However, given that the goal of the regional haze program is to improve visibility, the EPA believes that states *may* consider visibility” (Proposed Guidance, at 14).
- “After the screening step, **we recommend that states consider only the four statutory factors** to determine whether control measures are necessary to achieve reasonable progress. ... **[W]e do not recommend that states model visibility benefits and weigh those benefits against the four statutory factors to identify appropriate control measures.**” (Proposed Guidance, at 15).

What happened in Texas?



What happened in Texas?

- Last in line ...
 - EPA disapproved TX regional haze SIP January 2015
- EPA skipped to round 2 ...
 - no decision on BART; focused on “reasonable progress” instead
- Reasonable progress looked a lot like BART ...
 - Over a dozen utility units required to install or upgrade scrubbers
 - \$2 billion in total cost; minimal visibility improvements
- “This is the future of regional haze ...”
 - claimed Texas action was a rule of “national applicability”

What happened in Texas?

- **Texas v. EPA (5th Cir. 2016)**

EPA's "Ministerial" Role

- “The Clean Air Act **confines EPA's role** in implementing air quality standards **to the ministerial function** of reviewing SIPs for consistency with the Act's requirements. ... The statute mandates that the administrator *shall* approve such [a state implementation plan] as a whole if it meets all of the applicable requirements of this chapter.”

Visibility Matters

- “EPA's reasonable progress targets are less than 1% lower than the Texas goals that EPA found inadequate ... [T]he federal implementation plan imposes emissions controls that will cost \$2 billion without achieving any visibility changes in the time period covered by the plan”



What happened in Texas?

- EPA cuts its losses ...
 - EPA seeks voluntary remand of Texas regional haze plan
- ... and tries again with Round 1 ...
 - Proposes new BART, ignoring its prior claim that the “reasonable progress” controls adopted in 2015 satisfied BART
- BART looks a lot like Reasonable Progress ...
 - Over a dozen utility units required to install or upgrade scrubbers
 - Even greater total cost and greater number of units
 - No attempt to evaluate total visibility improvements

What's Next?

- Will the Trump Administration address regional haze?
- If so, what will the Administration do, and could that affect the deadline for the next regional haze SIPs?
- Easy question: Will environmental groups use regional haze “reasonable progress” requirements to pursue more stringent environmental controls?
- What will the outcome be when the next SIPs are litigated in the circuit courts?