



April 20, 2015

U.S. Environmental Protection Agency
 Attention: Docket ID No. EPA-R06-OAR-2014-0754
 Mr. Guy Donaldson
 Chief Air Planning Section (6PD-L)
 1445 Ross Avenue, Suite 1200
 Dallas, TX 75202-2733

Re: Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze and Interstate Transport of Pollution Affecting Visibility, Proposed Rule, Docket ID No. EPA-R06-OAR-2014-0754, FRL-9920-11-Region-6

Dear Mr. Donaldson:

The American Chemistry Council, American Coalition for Clean Coal Electricity, American Coke and Coal Chemicals Institute, American Forest & Paper Association, American Fuel & Petrochemical Manufacturers, American Iron and Steel Institute, American Petroleum Institute, American Wood Council, Brick Industry Association, Council of Industrial Boiler Owners, Electricity Consumers Resource Council, Independent Petroleum Association of America, Industrial Energy Consumers of America, International Liquid Terminals Association, National Association of Manufacturers, National Lime Association, National Mining Association, National Oilseed Processors Association, Portland Cement Association, Texas

Cotton Ginners' Association, The Aluminum Association, and the U.S. Chamber of Commerce (collectively, "the Associations")¹ appreciate the opportunity to submit the following comments in response to the Environmental Protection Agency's ("EPA's") proposed Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze and Interstate Transport of Pollution Affecting Visibility, Proposed Rule, Docket ID No. EPA-R06-OAR-2014-0754, FRL-9920-11-Region-6 (hereinafter, "proposal" or "proposed rule").

INTRODUCTION

The Associations represent the nation's leading energy and manufacturing sectors that form the backbone of the nation's industrial ability to grow our economy and provide jobs in an environmentally sustainable and energy efficient manner. Significantly, the Associations both represent and are reliant upon electric utilities like those directly impacted by EPA's proposal as well as other, large stationary sources which may be regulated under the Clean Air Act's regional haze program. EPA, in this proposal, seeks to dramatically increase its own authority over the regional haze program at the expense of the States and Tribes to whom Congress gave a primary role in implementing the regional haze program. The Associations are key and necessary stakeholders in any regulation that directly impacts energy providers and which may impact manufacturers directly or indirectly in the future.

For the reasons described below, EPA's proposal to disapprove of Texas' and Oklahoma's State Implementation Plans ("SIPs") and impose Federal Implementation Plans ("FIPs") in their place far exceeds EPA's legal authority under the Clean Air Act and would fundamentally transform the structure of the regional haze program from a State-driven program based on cooperative federalism to a centralized, federal program with little real input from States or regulated entities. Nothing in the Clean Air Act or the administrative record supports EPA's determination to supersede the States' judgment in mandating \$2 billion in new emission controls that will have no perceptible impact on visibility. If finalized, EPA's proposal could create dangerous precedent that could be used by EPA in the future to disregard the decisions made by other States under the regional haze program, impose requirements found nowhere in the Clean Air Act or EPA's own regulations, and require States and industry to undertake significant and costly regulatory burdens disproportionate to any visibility benefit.

In recognition of diminished visibility at national parks and other scenic areas, Congress enacted the Clean Air Act's regional haze provisions with a long-term goal of returning these areas to a state of natural visibility. At the same time, however, Congress realized such changes could not be fully realized immediately and adopted an approach by which States would make

¹ A description of each Association is included in Appendix A.

incremental improvements over time. Texas and Oklahoma have invested significant time and resources to understand the sources of regional haze related to their States, the effect of existing federal and State programs to reduce emissions from such sources, and to cooperate with each other and other nearby States to improve visibility. These efforts have been successful, and measured improvements in visibility conditions at the Big Bend, Guadalupe Mountain, and Wichita Mountain Class I areas have exceeded the proposed reasonable progress goals EPA would set for these three areas.

Despite the fact that real-world, measured air quality demonstrates that the States are on track to meet the visibility improvements contemplated by Congress and EPA, EPA has unreasonably proposed to disapprove their SIPs and impose FIPs in their place. The FIPs would impose emission control requirements on a handful of sources in Texas at significant cost, based on counterfactual projections that regional haze will somehow get worse, notwithstanding expected further emissions reductions from levels that have achieved the desired target today. And even then, EPA projects that these costly emissions controls would achieve only *de minimis* visibility improvements in 2018 that would not be perceptible to the human eye and, under EPA's own standards, would round to *zero*.

EPA's proposal, which, in essence, second guesses the reasoned decisions made by Oklahoma and Texas in their SIPs, is both unlawful and flatly inconsistent with EPA's prior administration of the regional haze program where it has routinely approved SIPs that were functionally equivalent to those of Texas and Oklahoma without subjecting them to the same level of scrutiny. The Clean Air Act gives States primacy in implementing the regional haze program and limits EPA's review of regional haze SIPs to an analysis of whether or not the State has complied with statutory and regulatory requirements. Despite the fact that Texas and Oklahoma followed all applicable regulatory requirements for developing regional haze SIPs, EPA here proposes unlawfully to second-guess the States' decisions and to substitute its own judgment for that of the States. EPA compounds this error by applying an unlawful methodology that focuses on emission controls at individual sources rather than source categories and that places undue reliance on visibility benefits to the detriment of the statutory factors mandated by Congress.

EPA's proposal stands in stark contrast to EPA's prior interpretation of the Clean Air Act and its own regional haze regulations, both in guidance and in its review of prior SIP submissions from other States. If finalized, EPA's new interpretation would dramatically expand EPA's authority while unfairly minimizing the role of the States in determining how to best balance competing interests while improving visibility at national parks. As the Supreme Court recently explained, an agency must "provide more substantial justification when its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." *Perez v.*

Mortgage Bankers Ass’n, Case No. 13-1041 (S. Ct. Mar. 9, 2015), *Slip op.* at 13 (internal citation omitted).

Here, EPA has failed entirely to address its change in interpretation, let alone provide “substantial justification” for it. Not only would EPA’s approach needlessly impose nearly \$2 billion in unnecessary costs on Texas utilities despite Texas’ reliance on EPA’s prior policy when preparing its SIP, it would create harmful precedent that could be used by EPA in the future to ignore States’ reasoned judgments and impose significant and excessive costs on the Associations’ members. Therefore, we urge EPA to withdraw the proposal and to recognize the reasoned judgment of Texas and Oklahoma by fully approving their regional haze SIPs.

BACKGROUND

A. The Clean Air Act’s Regional Haze Program.

Regional haze “is impairment of visual range or coloration caused by emissions of air pollution produced by numerous sources and activities, located across a broad regional area.” 77 Fed. Reg. 30,248, 30,249 (May 22, 2012). Congress first adopted regional haze provisions in 1977 to address haze issues in national parks and other federal “Class I areas” by adding Section 169A to the Clean Air Act. *See* 42 U.S.C. § 7491. That provision requires EPA to “promulgate regulations to assure ... reasonable progress toward meeting the national goal” of visibility. 42 U.S.C. § 7491(a)(4). EPA has established three primary components for a State’s regional haze SIP: (1) reasonable progress goals (“RPGs”) for Class I areas in the State; (2) a long-term strategy; and (3) implementation of “best available retrofit technology” (“BART”) for certain stationary sources.

Reasonable Progress. The Clean Air Act requires States to submit SIPs that contain “emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal.” 42 U.S.C. § 7491(b)(2). Significantly, the reasonable progress goal “is a goal and not a mandatory standard which must be achieved by a particular date as is the case with the NAAQS.” 64 Fed. Reg. 35,714, 35,733 (July 1, 1999). Further, States have considerable discretion in establishing goals because the Clean Air Act “requires only that a state establish reasonable progress, not the most reasonable progress.” *North Dakota v. EPA*, 730 F.3d 750, 768 (8th Cir. 2013).

States are required to evaluate four statutory factors when establishing reasonable progress goals for Class I areas. 42 U.S.C. § 7491(g)(1); 40 C.F.R. § 51.308(d)(1)(i)(A). These factors are: (1) “costs of compliance;” (2) “the time necessary for compliance;” (3) “the energy and nonair quality environmental impacts of compliance;” and (4) “the remaining useful life of any potentially affected sources.” 42 U.S.C. § 7491(g)(1). EPA has explained that “[i]n this context we believe that the cost of compliance factor can be interpreted to encompass the cost of compliance for individual sources or source categories[.]” EPA, *Guidance for Setting*

Reasonable Progress Goals Under the Regional Haze Program, at 5-1 (June 1, 2007) (emphasis added); see also EPA, *Additional Regional Haze Questions*, at 9 (Sept. 26, 2009) (“Reasonable progress is not required to be demonstrated on a source-by-source basis.”). Visibility improvements associated with emission control measures are *not* included as a mandatory statutory or regulatory factor for determining reasonable progress.

Furthermore, reasonable progress goals are “interim goals that represent incremental visibility improvement over time.” EPA *Reasonable Progress Guidance* at 1-2. The “first planning period” which Texas and Oklahoma address in their SIPs extends from 2008 to 2018. States are required to submit revisions to their SIPs in ten-year intervals. 40 C.F.R. § 51.308(f). During each ten-year planning period, States “must evaluate and reassess all of the elements required [by EPA’s regional haze regulations] taking into account improvements in monitoring data collection and analysis techniques, control technologies, and other relevant factors.” 40 C.F.R. § 51.308(f).

Long Term Strategy. In addition to the reasonable progress goals, States are required to develop long-term strategies to address visibility impairment for all Class I areas “which may be affected by emissions from the State.” 40 C.F.R. § 51.308(d)(3). Long-term strategies 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.*

EPA regulations require that each State “consult with the other State(s) in order to develop coordinated emission management strategies.” *Id.* § 51.308(d)(3)(i). Under EPA regulations, “[i]f the State has participated in a regional planning process, the State must ensure it has included all measures needed to achieve its apportionment of emission reduction obligations agreed upon through that process.” 40 C.F.R. § 51.308(d)(3)(ii). In preparing a long-term strategy a State must also evaluate seven specific factors, which differ from the four statutory reasonable progress factors.²

Best Available Retrofit Technology. To comply with the BART requirement, States must develop “emission limitations representing BART” for a discrete set of major stationary sources. 42 U.S.C. § 7491(b)(2)(A); 40 C.F.R. § 51.308(e). State BART determinations must address five statutory factors: (1) “the costs of compliance;” (2) “the energy and nonair 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 40 C.F.R. § 51.308(e)(1)(ii)(A). Thus, the BART analysis differs

² These factors include “[e]missions limitations and schedules for compliance to achieve the reasonable progress goal,” mitigation of construction activities, source retirement and replacement, smoke management techniques, and net changes in visibility projected from changes in point, area, and mobile sources. *Id.* § 51.308(d)(3)(v).

significantly from reasonable progress determinations because visibility improvement is included as a fifth statutory factor.

As an alternative to source-specific BART determinations, EPA's regulations provide that a State that participates in a specified regional trading program may rely on those obligations instead of requiring "sources subject to BART to install, operate, and maintain BART." 40 C.F.R. § 51.308(e)(2); *see also* 70 Fed. Reg. 39,104, 39,138-43 (July 6, 2005). EPA has determined that both the Clean Air Interstate Rule ("CAIR") and its replacement Cross State Air Pollution Rule ("CSAPR"), which limit SO₂ and NO_x emissions from power plants, qualify as BART alternatives for States subject to those programs. 70 Fed. Reg. 39,104 (July 6, 2005); 77 Fed. Reg. 33,642 (June 7, 2012).

B. EPA's Disapproval of The Texas and Oklahoma Regional Haze SIPs.

At issue here are regional haze SIPs submitted by Texas and Oklahoma concerning three Class I areas: Big Bend and the Guadalupe Mountains in Texas and the Wichita Mountains in Oklahoma. As contemplated by EPA's regulations, Texas and Oklahoma engaged in extensive consultation regarding Texas' contributions to regional haze in the Wichita Mountains through the Central Regional Air Planning Association ("CENRAP"). CENRAP is one of five regional planning organizations organized and funded by EPA for the purpose of assisting States with the technical aspects of their regional haze SIPs. 2009 Texas SIP Narrative at 3-1. Texas, Oklahoma and the other CENRAP States worked collaboratively to develop common data and modeling for their SIPs. *See, e.g.*, 79 Fed. Reg. at 74,833, 74,855. Oklahoma ultimately *concurred* with Texas that additional reductions beyond those being contemplated by Texas were not necessary for Oklahoma to meet the reasonable progress goals it had set for the Wichita Mountains. *Letter from Eddie Terrill, Air Quality Division Director, ODEQ, to Susana M. Hildebrand, Air Quality Division Director, TCEQ* at 1 (May 12, 2008).

Notwithstanding the extensive analysis undertaken by Texas and Oklahoma in partnership with CENRAP, EPA proposes here to disapprove both States' SIPs. Specifically, EPA proposes to disapprove most of the Texas submittal, including Texas' reasonable progress goals for Big Bend and the Guadalupe Mountains and Texas' long-term strategy. Further, notwithstanding Oklahoma's agreement that additional reductions beyond those already being contemplated by Texas were not necessary for Oklahoma to meet the reasonable progress goals that it had set for the Wichita Mountains, EPA also proposes to "simultaneously" disapprove of Texas and Oklahoma's consultation and disapprove Oklahoma's reasonable progress goal for the Wichita Mountains.

The fundamental basis for EPA's proposed SIP disapprovals is an "additional analysis" of a "small number of sources" in Texas. 79 Fed. Reg. at 74,839. EPA's analysis models a small subset of selected Texas "sources individually," 79 Fed. Reg. at 74,839, 74,841, "to identify those with the largest potential to impact visibility," EPA, *FIP Technical Support*

Document at A-1. EPA started its “additional analysis” by identifying 38 individual Texas facilities to determine if emission controls on those sources “would yield visibility benefits worth considering for reasonable progress analysis.” 79 Fed. Reg. at 74,877. EPA then employed a multi-step “cost-benefit” methodology and ultimately determined that additional controls at 15 Texas-based sources would achieve cost-effective visibility benefits at the three relevant Class I areas. *See id.* at 74,882-85.

EPA further relies on its “additional analysis” to develop proposed FIPs that “quantify” new reasonable progress goals for the three Class I areas and set specific SO₂ emissions limits for the 15 Texas sources identified in the “additional analysis.” *Id.* Generally speaking, EPA proposes SO₂ emission limits based on upgrades for units already equipped with scrubbers and installation of new flue gas desulfurization (“FGD”) systems for units that have not installed scrubbers. *Id.* at 74,884-85. EPA would require the sources with existing scrubber systems to meet their new limits by 2018, while sources installing new wet scrubbers would be required to meet their new limits by 2020. *Id.* at 74,891 (proposed 40 C.F.R. § 52.2284(d)(2)). EPA acknowledges that the new FGD systems cannot be installed during the current planning period, which ends in 2018. EPA, *FIP Technical Support Document* at 7.

In aggregate, the required emission controls would cost nearly \$2 billion. *See* 79 Fed. Reg. at 74,876-77. Based on EPA’s projections, however, these costs would not actually provide any material improvement in visibility during the interim planning period that the FIP is intended to address. EPA projects that its proposal would, in 2018, improve visibility by 0.03 deciviews at Big Bend, by 0.04 deciviews at the Guadalupe Mountains, and by 0.14 deciviews at the Wichita Mountains. 79 Fed. Reg. at 74,887. This “improvement” would be imperceptible to the human eye, which cannot detect change of less than 1.0 deciview. 77 Fed. Reg. at 30,250. Importantly, actual real-world monitoring data show that Big Bend, the Guadalupe Mountains, and the Wichita Mountains have *already achieved* the 2018 visibility targets that EPA has determined are reasonable. 79 Fed. Reg. at 74,843, 74,870.

COMMENTS

I. EPA’s Proposal Unlawfully Ignores State Primacy In Developing Regional Haze Plans.

EPA’s proposal to disapprove Texas and Oklahoma’s regional haze SIPs is unlawful because it disregards the primary role given to States in implementing the regional haze program. The Clean Air Act is built on principles of cooperative federalism that require EPA to defer to States in developing implementation plans so long as necessary statutory requirements are met. EPA’s proposal ignores those limits and would impose FIPs that ignore the primary implementation role given to Texas and Oklahoma. Not only is this approach inconsistent with the Clean Air Act and EPA’s past practice, it would give EPA unprecedented power arbitrarily to

substitute its own judgment for that of the States at virtually any stage of the implementation process.

As courts have recognized, the Clean Air Act was intended by Congress to be “a model of cooperative federalism.” *Sierra Club v. Korleski*, 681 F.3d 342, 343 (6th Cir. 2012); *see also Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001); *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 581 (5th Cir. 1981). Under this structure, Congress specifically found that “air pollution prevention ... is the primary responsibility of States and local governments.” 42 U.S.C. § 7401(a)(3). Relying on that finding, the Eighth Circuit recently noted that “the [Clean Air Act] grants states the primary role in determining the appropriate pollution controls within their borders.” *North Dakota*, 730 F.3d at 760-61. Within that context, “states have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements.” *BCCA Appeal Group v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003).

In contrast, after it has established broad emission standards, EPA’s role is limited to ensuring that the States’ implementation of those standards is consistent with the Act. *See Florida Power & Light*, 650 F.2d at 587 (“The great flexibility accorded the states under the Clean Air Act is ... illustrated by the sharply contrasting, narrow role to be played by EPA.”). In that narrow role, EPA is confined to “the ministerial function of reviewing SIPs for consistency with the Act’s requirements.” *Luminant Generation Company LLC v. U.S. EPA*, 675 F.3d 917, 921 (5th Cir. 2012). In other words, EPA cannot second-guess the States, but must approve any SIP that complies with basic statutory requirements. *See* 42 U.S.C. § 7410(k)(3) (“The Administrator *shall* approve [a SIP or SIP revision] as a whole if it meets all of the applicable requirements of this chapter.”) (emphasis added). When, as here, an agency is given a mandatory command (*e.g.*, “shall”) to base its decision on a limited set of factors prescribed by statute, it cannot depart from Congress’ direction by considering additional factors not listed in the statute. *See National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (rejecting interpretation of Clean Water Act that would have allowed EPA to deny transfer of permitting authority to State agencies based on additional factors when the statute stated that EPA “shall approve” transfer where “nine specified criteria are satisfied”).

EPA has previously recognized its limited role in implementing the regional haze program and explained that “[t]he final regional haze rule ... provide[s] States considerable discretion in establishing reasonable progress goals for improving visibility in Class I areas.” EPA, *Response to Petition for Reconsideration of Regional Haze Rule 11* (Jan. 10, 2001). Thus, rather than establishing strict implementation requirements, EPA’s rule “requires States to determine the rate of progress for remedying existing impairment that is reasonable, taking into consideration the statutory factors, and the informed input from all stakeholders.” 64 Fed. Reg. at 35,731; *see also* 40 C.F.R. § 51.308(d)(1)(i)(A). In its guidance to States, EPA further emphasized that the regional haze rule “gives States wide latitude to determine additional control

requirements” and, in applying the required statutory factors, the States “have flexibility in how to take into consideration these statutory factors and any other factors that you have determined to be relevant.” EPA, *Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program* 4-2, 5-1 (June 1, 2007). Thus, EPA has explained that “[a]s long as this evaluation is done adequately and the States provide a reasoned basis for their decision, EPA will defer to the state” with respect to reasonable progress determinations. 77 Fed. Reg. 40,150, 40,156 (July 6, 2012).

In this proposal, however, EPA ignores these well-established principles of cooperative federalism, disregards the reasoned judgment of Texas and Oklahoma, and seeks to impose a radically different implementation plan based on its own independent analysis. This is contrary to the Clean Air Act and unlawful. In the absence of any showing that Texas and Oklahoma failed to comply with the statutory and regulatory requirements for developing reasonable progress goals and long term strategies, EPA has no choice under the Clean Air Act but to approve these SIPs.

First, Texas fully complied with all statutory and regulatory requirements in developing its own reasonable progress goals for the Big Bend and Guadalupe Mountain Class I areas. Specifically, Texas appropriately considered the four statutory factors in 42 U.S.C. § 7479(g)(1) and established reasonable progress goals after determining that the uniform rate of progress was not reasonably achievable by 2018. EPA does not dispute that Texas’ evaluation complied with the statutory and regulatory requirements. EPA agrees that Texas’ reasonable progress goals provide for “improvement in visibility for the most impaired days during the period of the SIP and ensure no degradation in visibility for the least impaired days over the same period” in accordance with 40 C.F.R. § 51.3108(d)(1). 79 Fed. Reg. at 74,834. EPA also agrees with Texas that the reasonable progress goals based on the uniform rate of progress are not achievable due to international emissions. *Id.* at 74,843, 87. Thus, because Texas has complied with these criteria, EPA has a mandatory duty to approve the SIP pursuant to 42 U.S.C. § 7410(k)(3). *See National Ass’n of Home Builders*, 551 U.S. 644 (EPA has no discretion when statutory language says the agency “shall approve” a State program if statutory criteria are met). Nevertheless, EPA arbitrarily proposes to second-guess Texas’ 2018 reasonable progress goals by replacing them with goals that would improve projected visibility at the Big Bend and Guadalupe Mountain Class I areas by an imperceptible few hundredths of a deciview, but require enormous expenditures by a handful of stationary sources.

EPA’s proposal is contrary to the cooperative federalism principles on which the regional haze program is based. Under those principles, EPA must respect the State’s choices and approve its reasonable progress goals as long as the State performed the required analysis. EPA does not claim that Texas failed to perform the required analysis. Instead, it faults “how [Texas] analyzed and weighed the four reasonable progress factors.” EPA, *Texas Technical Support Document* 18. But, under the Clean Air Act, EPA must approve a State’s reasonable progress

goals, even if EPA would have weighed the statutory factors differently and reached a different result. *See, North Dakota*, 730 F.3d at 768 (“[T]he CAA requires only that a state establish reasonable progress, not the most reasonable progress.”); *see also Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 490 (2004) (recognizing that, when EPA reviews the reasonableness of state best available control technology determinations, it must act with deference and cannot “second guess state decisions”). Thus, it is unlawful and contrary to Congress’ intent for EPA to disapprove of Texas’ reasonable progress goals simply because EPA, after second-guessing Texas’ analysis, concluded that additional reductions from a handful of additional sources are feasible. *See also* Section II, *infra*.

Second, Oklahoma and Texas fully complied with EPA’s consultation requirements for cross-State emissions through participation in a regional planning process. Based on encouragement from EPA, Texas and Oklahoma worked with nearby States to establish CENRAP to assist the States with technical issues associated with their regional haze SIPs. In particular, CENRAP assisted the States in developing emissions inventories and modeling, including models for a 2002 base case for visibility in Class I areas, projections for 2018 emissions and visibility, estimates of natural conditions, and cost/benefit analyses for emission controls. Through the CENRAP process and subsequent consultation meetings with Oklahoma, Texas shared significant amounts of information with Oklahoma regarding SO₂ and NO_x emissions from Texas that could affect Class I areas in Oklahoma. Texas also responded to several requests from Oklahoma and agreed to make changes to its New Source Review program to ensure that potential visibility impacts in Oklahoma were accounted for. At the conclusion of the consultation period, Texas requested “Oklahoma’s concurrence on this assessment and verification that [Oklahoma] is not depending on any additional reductions from Texas sources in order to meet [Oklahoma’s] reasonable progress goals.” *Letter from Susanna M. Hildebrand, Air Quality Director, TCEQ, to Eddie Terrill, Air Quality Division Director, ODEQ 2* (Mar. 25, 2008). Oklahoma agreed with Texas’ assessment and did not request further reductions from Texas beyond those expected from existing programs agreed to or implemented by Texas. *See Letter from Eddie Terrill to Susanna Hildebrand, supra*. As a result, Oklahoma established reasonable progress goals that did not require additional emissions controls from Texas facilities, and Texas developed a long-term strategy that did not incorporate additional emissions controls to improve visibility in Oklahoma.

Despite the depth of coordination and consultation between Oklahoma and Texas, EPA’s proposal ignores the reasoned conclusions that these States reached and rejects Oklahoma’s reasonable progress goals and Texas’ long-term strategy because, in EPA’s separate and distinct judgment, Oklahoma should have sought additional information about potential emissions controls from certain sources in Texas. By second-guessing these States, EPA’s proposal is unlawful, arbitrary and capricious. EPA does not dispute the quality of Oklahoma’s modeling or its analysis of the four statutory factors required by 40 U.S.C. §7419(g)(1). Instead, it relies on what it considers to be “an incomplete consultation with Texas.” EPA, *Oklahoma Technical*

Support Document at 11. This conclusion is not supported by the record. EPA points to no flaws in the CENRAP regional planning process in which Texas and Oklahoma participated together. Nor does it point to any specific flaws in the subsequent consultation process between the States. In fact, EPA concedes that, as a result of consultations between the States, Oklahoma “had (1) abundant information showing the impact of Texas sources on visibility at the Wichita Mountains [and] (2) evidence that cost-effective controls on these sources were likely available.” 79 Fed. Reg. 74,867. EPA goes on to acknowledge that “the analysis developed by CENRAP [and used by Texas and Oklahoma in their consultations] provide[d] a great deal of information on contributions to visibility impairment and a set of potential add-on controls and costs associated with those controls.” *Id.* at 74,872.

Although the proposal acknowledges the wealth of information shared between the two States, EPA nonetheless asserts that Texas somehow deprived Oklahoma of relevant information about Texas sources and emission reduction options. In doing so, EPA fails to identify any specific information that Texas failed to provide. Instead, EPA simply reinterprets the data and modeling available to Oklahoma while it developed its SIP and reaches a different conclusion—that Oklahoma’s reasonable progress goals should require additional emission controls from a handful of Texas sources in order to provide small, imperceptible improvements to visibility in Class I areas in Oklahoma. In doing so, EPA clearly would exceed its statutory authority by putting aside a review of Oklahoma’s compliance with statutory and regulatory requirements and instead substituting its own judgment for that of the State. Not only is this an unlawful usurpation of Oklahoma’s discretion under the regional haze program to consider the four statutory factors and establish reasonable progress goals, it is also arbitrary, capricious, and unsupported by the record in light of the expansive consultation and information sharing process that took place between Texas and Oklahoma.

After proposing to disapprove Oklahoma’s reasonable progress goals, EPA goes on to propose disapproval of Texas’ long-term strategy on the basis that it is not consistent with the modified reasonable progress goals that EPA would impose through a FIP. This is both inconsistent with the Clean Air Act and EPA’s implementing regulations and patently unreasonable. Texas’ long-term strategy fully complies with the Clean Air Act and EPA’s regulations because it meets Texas’ obligations with respect to Oklahoma and all other States whose visibility may be impacted by emissions from Texas sources. Under EPA regulations, to satisfy the long-term strategy requirement, a State that “has participated in a regional planning process ... must ensure that it has included all measures needed to achieve its apportionment of emissions reduction obligations *agreed upon* through that process.” 40 C.F.R. § 51.308(d)(3)(ii) (emphasis added). Texas did so here. EPA concedes that “Oklahoma did not specifically request any additional reductions from Texas sources,” 79 Fed. Reg. at 74,856, meaning that the “agreement” between Texas and Oklahoma did not require any new emissions controls to be added to Texas’ long-term strategy. Instead, EPA ignores this agreement between the States and proposes to disapprove Texas’ long-term strategy because it is not consistent with the additional

emission reductions proposed by EPA in its Oklahoma FIP. This conclusion is flatly inconsistent with EPA regulations, which require consistency with reasonable progress goals “established by states” during the SIP process, not with alternative reasonable progress goals developed at a later date by EPA. 40 C.F.R. § 51.308(d)(3)(ii).

EPA simply ignores the relevant provision of Section 51.308(d)(3)(ii) and instead bases its proposed disapproval on a supposed “interpretation” of a different portion of that rule, which provides that a State’s SIP 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.” 40 C.F.R. § 51.308(d)(3). Engrafting a requirement nowhere found in the text of the regulation, EPA now proposes to “interpret” the phrase “progress goal” to instead mean a reasonable progress goal that is “approved or approvable” by EPA. 79 Fed. Reg. at 74,829. But no amount of supposed “*Auer* deference” permits EPA to “interpret” a regulation to impose a requirement that is contrary to the regulation itself. EPA simply ignores the fact that the “progress goals” phrase it cites refers to the sentence that precedes it: “the reasonable progress goals established by States having mandatory Class I Federal areas.” 40 C.F.R. § 51.308(d)(3).

Moreover, EPA’s proposed disapproval is unreasonable. Texas’ obligation to develop a long-term strategy must be based on the agreements reached among the States at the time their SIPs are submitted. Texas—and other States—cannot be expected to divine whether EPA will disagree with another State’s reasonable progress goals years in the future and then anticipate and preemptively incorporate into its long-term strategy the revised reasonable progress goals EPA may decide to include in a subsequent FIP. Thus, even if EPA were to disapprove a State’s reasonable progress goals, it is not reasonable to demand that neighboring States adjust their long-term strategies until the next review period.³

By going beyond its limited authority under the Clean Air Act strictly to review States’ compliance with applicable statutory and regulatory requirements in establishing reasonable progress goals and long-term strategies, EPA would fundamentally transform the regional haze program into a federal program over which State decisions could be vetoed for virtually any reason by EPA. Given the nature of regional haze issues, States spend significant resources modeling and tracking emissions from a wide variety of sources and consulting with neighboring States prior to developing SIPs to address regional haze. Those efforts will be largely futile if EPA can later substitute its own judgment for that of a State’s decision by conducting what is in essence a *de novo* review of a State’s reasonable progress goals and long-term strategy. Such an approach deprives States of any certainty in implementing the regional haze program and is in

³ EPA has previously agreed with this position, explaining that when a State’s final action with respect to reasonable progress goals “deviate[s] from what was included in the [regional] modeling,” the remedy is for affected States to “consider asking [the contributing state] for additional emission reductions” “during subsequent period progress reports and regional haze SIP revisions.” 77 Fed. Reg. at 41,155-56.

direct contradiction to the cooperative federalism principles upon which the regional haze program was based. If EPA proceeds to disapprove of Texas and Oklahoma's SIPs, it will set a dangerous precedent that will threaten the primacy of all States to use their judgment to establish reasonable progress goals and long-term strategies that will improve visibility over time while respecting other State interests that are recognized by the Clean Air Act.

II. EPA's Proposed Individual Source-Based Approach For Reasonable Progress Goals Is Unlawful.

EPA's proposal to disapprove Texas' reasonable progress goals and long-term strategy and replace them with a FIP is also unlawful because EPA adopts an individual source-based approach to setting reasonable progress goals inconsistent with the Clean Air Act. Unlike other aspects of the regional haze program, reasonable progress goal provisions are intended to address contributions from a wide range of sources that can be best addressed on a source-category basis. In this respect, they are fundamentally different from other provisions such as those for BART and reasonably attributable visibility impairment ("RAVI"), which are specifically designed to address individual sources. Moreover, EPA's adoption of an individual source-based approach is inconsistent with EPA's past practice and with EPA's strict uniformity rule for regional offices.

In the proposal, EPA rejects Texas' source category-based approach for establishing reasonable progress goals in favor of an approach that focuses on potential emissions controls for individual sources. In particular, EPA asserts that "TCEQ's analysis is insufficient to determine the visibility benefit of controlling the source or subset of sources with the most effective controls for improving visibility conditions." 79 Fed. Reg. at 74,841; *see also id.* at 74,838 ("[B]ecause TCEQ did not evaluate controls on a source-by-source basis, source-specific factors related to the evaluation of the reasonable progress four factor analysis could not be considered."). EPA then determined it was "necessary to conduct an additional analysis" because "individual sources were not considered by the TCEQ." *Id.* at 74,839. After conducting an individual source and individual emission control analysis of a small subset of sources within Texas, EPA concluded that several sources should be required to install additional control technologies. Not only does this approach ignore State primacy in establishing reasonable progress goals, it unlawfully shifts the focus of the reasonable progress goals from source categories to individual sources.

First, the Clean Air Act and EPA's implementing regulations draw a clear line between source category-based reasonable progress goals and other source-specific regional haze provisions. As the Tenth Circuit recently explained, "[n]either the Clean Air Act nor the Regional Haze Rule requires source-specific analysis in the determination of reasonable progress." *WildEarth Guardians v. EPA*, 770 F.3d 919, 944 (10th Cir. 2014). Instead, the Clean Air Act discusses "classes or categories of sources" that "may reasonably be anticipated to cause or contribute significantly to impairment of visibility" and directs EPA to promulgate rules to address them. 42 U.S.C. § 7491(a)(3), (b)(1). In contrast, under the Clean Air Act, BART and

RAVI provisions are applied individually to “each major stationary source” meeting certain threshold criteria. *Id.* § 7491(b)(2)(A), (c).

This structural distinction is maintained in EPA’s regulations. For example, under the Regional Haze Rule, SIPs that incorporate reasonable progress goals are intended to address “regional haze.” 40 C.F.R. § 51.308(d). Regional haze is defined by EPA as “visibility impairment that is caused by the emission of air pollutants *from numerous sources over a wide geographic area.*” *Id.* § 51.301 (emphasis added). In contrast, EPA defines BART as an “emission limitation [that] must be applied on a case-by-case basis . . .” *Id.* Likewise, EPA explains that its RAVI provisions are designed to address “visibility impairment that is caused by the emission of air pollutants from one or a small number of sources.” *Id.* Thus, EPA’s regulations draw a stark distinction between reasonable progress goals on the one hand, which address emissions from a broad range of sources, and BART and RAVI provisions, which address individual sources.

EPA’s own guidance also confirms this interpretation of both the Clean Air Act and EPA’s implementing regulations. In defining the reasonableness of controls, EPA expressly contrasts reasonable progress goals with BART:

Unlike the technical demonstration for CAIR or BART, the reasonable progress demonstration involves a test of a strategy. The strategy includes a suite of controls that has been identified through the identification of pollutants and source categories of pollutants for visibility impairment—the possible controls for these pollutants (and their precursors) and source categories—the application of four statutory factors and how much progress is made with a potential strategy with respect to the glide path. Modeling occurs with a strategy and is not a source-specific demonstration like the BART assessment.

EPA, *Additional Regional Haze Questions* 9 (Sept. 27, 2006). EPA goes on to explain more explicitly that “*Reasonable progress is not required to be demonstrated on a source-by-source basis.* It is demonstrated based on a control strategy developed from a suite of controls that has been assessed with the four statutory factors and the uniform rate of progress.” *Id.* (emphasis added). In describing its own obligations with respect to establishing reasonable progress goals in FIPs, EPA explained that it has “flexibility to make technical judgments within the bounds of the [regional haze] rule and . . . *is not statutorily obligated to impose source-specific controls.*” 77 Fed. Reg. at 40,164 (emphasis added). When establishing a FIP, “EPA steps into the State’s shoes,” *id.*, and EPA cannot disapprove a SIP—as it proposes to do here—for failing to conduct an analysis that EPA concedes is not statutorily required. *See* 42 U.S.C. § 7410(k)(3) (“The Administrator *shall* approve [a SIP or SIP revision] as a whole if it meets all of the applicable requirements of this chapter.”); *National Ass’n of Home Builders*, 551 U.S. at 664 (finding similar language forbids EPA from denying approval on the basis of non-statutory factors).

Second, EPA fails to provide a reasoned explanation for disapproving Texas' reasonable progress goals based on Texas' failure to conduct a source-by-source analysis of emission controls when EPA has never required an individual source-based approach in the past. In its prior reviews of State reasonable progress goals EPA has uniformly approved States' reliance on source category-based analyses, even in the face of public comments urging a source-based approach. For example, EPA approved Alaska's regional haze SIP in which the State asserted that "it is reasonable to conduct the four-factor analysis on the general source categories rather than on individual sources." Alaska, *SIP Narrative* 9-9 (2011); 78 Fed. Reg. 10,546 (Feb. 14, 2013) (approving Alaska SIP). Likewise, EPA approved Oregon's reasonable progress goals after the State explained that it "looked at key pollutants and certain source categories and the magnitude of their emission in applying the four factors." Oregon, *SIP Narrative* 163 (2011); 77 Fed. Reg. 50,611 (Aug. 22, 2012) (approving Oregon SIP). EPA also approved Washington's reasonable progress goals after the "state decided to focus its four-factor analyses on ... 10 specific industries and emission source categories." Washington, *SIP Narrative* at 9-5 to 9-7 (2010); 79 Fed. Reg. 33,439 (June 11, 2014) (approving Washington SIP).

It is a well-established tenet of administrative law that "[r]easoned decision making ... necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent." *Dillmon v. NTSB*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009) (citing *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009)). Indeed, given that the submitting States relied upon EPA's established guidance and precedents in crafting their SIPs, EPA is required to provide a "more substantial justification" for its disapprovals. *Perez v. Mortgage Bankers Ass'n, supra, slip op.* at 13. In its proposal to disapprove Texas' reasonable progress goals, EPA fails to even acknowledge, let alone provide a reasoned explanation for, its departure from past precedent where it has approved multiple SIPs based on analyses that were, in all relevant respects, identical to that conducted by Texas.

Third, by applying a wholly different standard in its evaluation of Texas' reasonable progress goals, EPA is violating its strict uniformity rule. EPA regulations state that "[e]ach responsible official in a Regional Office, including the Regional Administrator, shall assure that actions taken under the act: (1) Are carried out fairly and in a manner that is consistent with the Act and Agency policy as set forth in the Agency rules and program directives [and] (2) Are as consistent as reasonably possible with the activities of other Regional Offices" 40 C.F.R. § 56.5(a). This regulation reflects an agency-wide commitment to uniformity in interpreting and applying the Clean Air Act, and agency actions that violate these regulations are "contrary to law." See *National Environmental Development Association's Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014). In this proposal, EPA unlawfully applies a wholly different standard of review to Texas' reasonable progress goals than it has in prior reviews of reasonable progress goals submitted by other States that have likewise relied on source category-based analyses. To satisfy its own uniformity rule, EPA must treat Texas like any other State and approve its use of a source category-based analysis in setting reasonable progress goals.

Fourth, EPA's individual source-based approach unlawfully creates inconsistent treatment of sources by subjecting them to different standards under BART and reasonable progress SIPs. Several of the sources that EPA evaluates and targets for additional emission controls are BART-eligible sources. Because Texas is currently subject to CSAPR, BART-eligible sources can be controlled through Texas' implementation of that rule because EPA has concluded that CSAPR's emission limits on those sources are more stringent than BART. 77 Fed. Reg. 33,642, 33,648 (June 7, 2012). Further, by definition, CSAPR "will achieve greater reasonable progress than would have resulted from the installation and operation of BART." 40 C.F.R. § 51.3108(e)(2). As a result, Texas' compliance with CSAPR should be sufficient to meet reasonable progress goals with respect to BART-eligible sources. EPA's proposal to require separate and additional controls for BART-eligible sources on a source-by-source basis is fundamentally incompatible with EPA's BART and CSAPR regulations and further underscores the fact that reasonable progress goals should not be developed in an individual source-specific manner.

III. EPA's Reliance On Visibility Benefits In Evaluating Reasonable Progress Goals Is Unlawful.

EPA's proposal is also unlawful because it would require States to include visibility benefits as a mandatory, if not preeminent, factor in setting reasonable progress goals. Under the Clean Air Act, States are required to consider four factors in setting reasonable progress goals: "the costs of compliance, the time necessary for compliance, the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements." 42 U.S.C. § 7491(g)(1). Visibility benefits are not included among the statutory factors. As EPA has previously explained, "[t]he final regional haze rule clearly provides States with the flexibility to establish a reasonable progress goal *based on its analysis of the statutory factors.*" EPA, *Response to Petition for Reconsideration of Regional Haze Rule 13* (Jan. 10, 2001). Federal land managers have concurred in this conclusion and have urged EPA not to include visibility impacts as a mandatory fifth factor in State reasonable progress goals because EPA has no "clear statutory mandate to do so." See U.S. Forest Service, *Recommendations for Improved Implementation of the Regional Haze Program 5* (May 2014). In this respect, the State's obligations to establish reasonable progress goals are substantially different than those for BART, where visibility benefits play an important role. See 42 U.S.C. § 7491(g)(2) (including "the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology" as a mandatory factor in BART determinations). This difference reflects a clear Congressional intent that States cannot be compelled to include visibility benefits in determining reasonable progress goals and certainly cannot be compelled to consider them in the manner that EPA would require in this proposal.

Nevertheless, EPA proposes to disapprove Texas' reasonable progress goals based on a failure to consider visibility benefits alongside the required statutory factors. See, e.g., 79 Fed.

Reg. at 74,839 (asserting that Texas should have “separately evaluate[d] the visibility benefit from implementation of [emission] control[s]”); *id.* at 74,838 (asserting that “individual benefits were masked by the inclusion of those controls with little visibility benefit that only served to increase the total cost figure”). Simply put, visibility benefits are not mandatory statutory factors that States are compelled to consider when establishing reasonable progress goals. As a result, it is unlawful for EPA to disapprove a State’s reasonable progress goals based on a failure to evaluate visibility benefits.

EPA’s FIP proposal exacerbates the unlawful nature of EPA’s action by elevating visibility benefits above the four statutory factors. In applying its individual source-based approach, EPA relies on visibility benefits as a threshold test to determine which individual sources it will review for costs—a statutorily required factor. An approach that focuses first on visibility benefits will unnecessarily constrain States’ ability to use their discretion to apply the four statutory factors and establish reasonable progress goals as intended by Congress. In fact, even in the context of BART determinations, where visibility benefits must be considered, courts have rejected EPA’s attempts to elevate visibility above the other statutory factors. *See American Corn Growers Ass’n v. EPA*, 291 F.3d 1, 6-7 (D.C. Cir. 2002) (“The Haze Rule’s splitting of the statutory factors is consistent with neither the text nor the structure of the statute.”). There the court found that EPA’s regulation was unlawful because it “isolate[d] [the visibility] benefit calculation and constrain[ed] authority Congress conferred on the states.” *Id.* at 8-9.

EPA’s undue reliance on visibility benefits in its proposed disapproval of Texas’ reasonable progress goals and proposed FIP is unlawful and raises serious concerns regarding the implementation of reasonable progress goals. By elevating visibility benefits to a primary, threshold role in establishing reasonable progress goals, EPA would distort the statutory analysis envisioned by Congress and, contrary to cooperative federalism principles, would unnecessarily constrain States’ ability to use their discretion to consider the four reasonable progress factors that are mandated by Congress. Moreover, if EPA is permitted to disapprove of State reasonable progress goals on the basis of this non-statutory factor, States and regulated entities would face the risk of becoming subject to significant—and potentially disproportionate—emission control costs if EPA perceives that such emission controls would confer some miniscule visibility benefit.

IV. The Costs of EPA’s Proposal Are Extreme And Unjustified.

EPA’s proposed FIP for Texas is also arbitrary and capricious because the costs of the emissions controls that EPA would require are excessive in comparison to the minimal visibility benefits that they would provide. In evaluating the costs of the proposed emission control requirements, EPA disregards its own guidance and appears to apply only a cost per ton methodology that fails to account for important differences in the emissions that impair visibility as well as the role that location and other facility-specific factors can play in determining the

effect that emissions controls will have on visibility in the Class I areas that are the focus of the regional haze provisions. As a result, EPA singles out a handful of sources that would be required to spend billions of dollars to install emissions controls that would result, at most, in miniscule improvements in visibility in Class I areas that would be imperceptible to observers.

Unlike generally applicable emissions standards that are designed to improve air quality everywhere, the regional haze provisions are focused specifically on a limited number of Class I areas throughout the country. As a result, not all emissions reductions will have the same impacts on visibility in Class I areas. Key factors such as the type of pollutant at issue, distance from Class I areas, and prevailing winds can all affect the degree to which certain emissions will contribute to visibility impairment and, as a result, the visibility benefits that will be produced by reducing those emissions. In other words, not every ton of emissions reductions is the same. Recognizing this fact, EPA explains in guidance that “in assessing emission reduction strategies for source categories or individual, large scale sources, simple cost effectiveness estimates based on a dollar-per-ton calculation may not be as meaningful as a dollar-per-deciview calculation, especially if the strategies reduce different groups of pollutants.” EPA, *Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program 5-2* (June 1, 2007). EPA has reaffirmed that view in subsequent SIP reviews, stating its belief “that dollars per deciview is one of several metrics that can be used to analyze cost of visibility improvement.” 77 Fed. Reg. 40,150, 40,156 (July 6, 2012). That is, because of distance, wind patterns and other relevant meteorological factors, even emissions that might be quite inexpensive to reduce may have no meaningful impact on downwind visibility.

In the proposal, however, EPA fails to apply its own guidance in evaluating the cost effectiveness of its proposed FIP. While EPA provides an evaluation of dollars per ton of emissions reduction, 79 Fed. Reg. at 74,876-77, T. 32, it makes no effort to connect those costs to actual visibility benefits. Instead, EPA simply asserts, without providing a detailed cost/benefit comparison, that emissions controls at individual units are “cost effective” and that visibility benefits are “significant.” See EPA, *FIP Technical Support Document* at 31. In fact, while EPA separately evaluates the cost of the proposed FIP and the visibility benefits, it never compares them directly in an attempt to evaluate the cost effectiveness of the proposed controls. See generally EPA, *FIP Technical Support Document*; EPA, *Cost Technical Support Document*. Instead, EPA asserts that the Unfunded Mandates Reform Act, which requires a written cost benefit analysis, does not apply. 79 Fed. Reg. at 74,889-90. By failing to include the relevant cost benefit analysis in the record, it is impossible to verify EPA’s assertion that in preparing the FIP, “the cost of controls [were] weighted against their projected visibility benefits at a number of Class I areas.” EPA, *FIP Technical Support Document* at 11.

Had EPA conducted a proper dollars per deciview cost benefit analysis, it would be readily apparent that the emission controls in the proposed FIP are not cost effective. In total, EPA projects that installing the proposed emission controls at six facilities would cost

approximately \$1.8 billion. *See* 79 Fed. Reg. at 74,876-77, T32. However, the effect of those emission controls on nearby Class I areas would be imperceptible to the human eye. In fact, in 2018 the visibility conditions would improve at Big Bend from 16.6 to 16.57 deciviews and at Guadalupe Mountains from 16.3 to 16.26 deciviews. *See id.* at 74,887. In other words, EPA proposes to impose enormous costs to improve visibility by a few hundredths of a deciview. Even by EPA’s own metrics these costs are excessive in comparison to the benefits. Indeed, the human eye cannot detect changes in visibility of less than one deciview and, under EPA’s own statistical standards, these 2018 “improvements” would be treated as nonexistent.⁴ That is why, in another FIP proposal, EPA recently concluded that a similar incremental visibility improvement was minimal and could not justify the much smaller difference in cost between wet and dry SO₂ scrubbers. EPA, *Arkansas FIP Proposal, Prepublication Version* 160-61 (Mar. 6, 2015). Imposition of such massive costs without achieving any cognizable visibility benefit during the interim planning period cannot be considered cost effective. Thus, in light of the statutory obligation to consider the costs of compliance, 42 U.S.C. § 7491(g)(1), EPA’s proposed FIP is unreasonable, arbitrary, and capricious.

V. EPA Lacks Authority To Include Emission Controls That Cannot Be Implemented During The Regional Haze Planning Period.

The proposed FIP also exceeds EPA’s legal authority under the regional haze program because it would require individual sources to install new emission control devices in 2020, after the 10-year regional haze planning period has concluded. Under EPA’s regional haze rule, States must prepare SIPs that adopt control strategies over an initial implementation period from 2008 to 2018 and must then conduct “a comprehensive reassessment and revision of those strategies, as appropriate, every 10 years thereafter.” 77 Fed. Reg. at 30,252. EPA recognizes the limited scope of the SIP in the preamble, noting that the proposal “addresses regional haze for the first planning period from 2008 through 2018.” 79 Fed. Reg. at 74,818.

Focusing exclusively on emissions controls that can be implemented during the interim 2008 to 2018 planning period is consistent with both the reasonable progress goals and long-term strategy components of the States’ regional haze plans. For example, EPA guidance directs States to focus on emissions controls at sources that “could be controlled within the strategy period” when “setting the RPG and ... establishing the SIP requirements to meet the RPG.” EPA, *Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program* 5-2 (June 1, 2007). In evaluating SIPs submitted by other States, EPA has further explained that “[i]n setting the RPGs, states must also consider the rate of progress needed to reach natural visibility conditions by 2064 ... and the emissions reduction measures needed to achieve that rate of progress over the 10-year period of the SIP.” 76 Fed. Reg. 16,168, 16173 (Mar. 22, 2011)

⁴ U.S. EPA., Technical Support Document for Demonstration of the Transport Rule as a BART Alternative 24, n.24 (Dec. 2011), Docket ID No. EPA-HQ-OAR-2011-0729-0014 (“All differences that are < 0.05 [deciviews] were rounded down to 0.0 and are considered to be no degradation”).

(proposed approval of Oklahoma Uniform Rate of Progress) (emphasis added). Likewise, EPA has previously explained that “[t]he [long term strategy] is the compilation of all control measures a state will use *during the implementation period of the specific SIP submittal* to meet applicable RPGs.” 77 Fed. Reg. at 30,251 (emphasis added).

Despite recognizing these limits on the scope of SIPs under the interim planning period, EPA proposes a FIP that would require emission controls that cannot be implemented until at least 2020. *See* FIP TSD at 7 (acknowledging that “typical SO₂ scrubbers take up to five years to plan, construct, and bring to operational readiness”). In fact, EPA acknowledges that it “cannot assume that the SO₂ controls we are proposing will be installed and operational within this planning period, which ends in 2018.” *Id.* In this respect EPA’s proposal is inconsistent with past regional haze actions, where EPA has consistently limited the scope of FIPs to control measures that can be implemented during the interim planning period. *See, e.g.*, 77 Fed. Reg. 20,894, 20,944 (Apr. 6, 2012) (applying a July 31, 2018, compliance deadline in North Dakota FIP); 77 Fed. Reg. 57,864, 57,916 (Sept. 18, 2012) (applying a July 31, 2018, compliance deadline in Montana FIP); 79 Fed. Reg. 52,420, 52,426 (Sept. 3, 2014) (applying a December 31, 2018, compliance deadline in Arizona FIP).

EPA’s proposal to require installation of emission controls in 2020 exceeds EPA’s authority under the Clean Air Act and is, therefore, unlawful for at least two independent reasons. First, EPA’s proposed FIP ignores the statutory mandate to consider the “time necessary for compliance” as a factor in determining reasonable progress. 42 U.S.C. § 7491(g)(1). Because the time necessary for compliance will extend into the next planning period, beginning in 2018, EPA is obligated by statute to defer consideration of such emission controls until the next planning period. Further, by proposing emission controls that cannot be implemented until 2020, EPA’s proposed FIP would unlawfully extend beyond the scope of Texas’ required SIP submission. Under the Clean Air Act, the scope of EPA’s FIP authority is limited to preparing “a plan (or portion thereof)” that “fill[s] all or a portion of a gap or otherwise correct[s] all or a portion of an inadequacy in a State implementation plan.” 42 U.S.C. § 7602(y). Yet, Texas was under no obligation under the Clean Air Act or Regional Haze Rule to develop a SIP that extended beyond 2018. Because the scope of Texas’ SIP obligation was limited to achieving reasonable progress during the interim 2008 to 2018 planning period, EPA’s FIP authority is necessarily subject to the same limits. Thus, determination of whether additional emission controls are needed after 2018 must, by statute, be deferred until the next planning period.

CONCLUSION

For the reasons stated above, EPA's proposal to disapprove Texas and Oklahoma's SIPs and impose FIPs to establish reasonable progress goals and long-term strategies is unlawful, arbitrary, and capricious. The Associations urge EPA to approve Texas and Oklahoma's SIPs as consistent with the Clean Air Act and EPA's Regional Haze Rule.

The undersigned Associations appreciate the opportunity to comment on this proposal.

American Chemistry Council

**American Coalition for Clean Coal
Electricity**

**American Coke and Coal Chemicals
Institute**

American Forest & Paper Association

**American Fuel & Petrochemical
Manufacturers**

American Iron and Steel Institute

American Petroleum Institute

American Wood Council

Brick Industry Association

Council of Industrial Boiler Owners

Electricity Consumers Resource Council

**Independent Petroleum Association of
America**

Industrial Energy Consumers of America

**International Liquid Terminals
Association**

National Association of Manufacturers

National Lime Association

National Mining Association

National Oilseed Processors Association

Portland Cement Association

Texas Cotton Ginners' Association

The Aluminum Association

U.S. Chamber of Commerce

Appendix A

The **American Chemistry Council** (“ACC”) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is an \$812 billion enterprise and a key element of the nation's economy.

The **American Coalition for Clean Coal Electricity** (“ACCCE”) is a partnership of companies involved in producing electricity from coal. Coal, an abundant and affordable American energy resource, plays a critical role in meeting our country’s growing need for affordable and reliable electricity. ACCCE recognizes the inextricable linkage between energy, the economy and our environment. Toward that end, ACCCE supports policies that promote the use of coal, one of America’s largest domestically produced energy resources, to ensure a reliable and affordable supply of electricity to meet our nation’s growing demand for energy.

The **American Coke and Coal Chemicals Institute** (“ACCCI”), which was founded in 1944, is the international trade association that represents 100% of the U.S. producers of metallurgical coke used for iron and steelmaking, and 100% of the nation’s producers of coal chemicals, who combined have operations in 12 states. It also represents chemical processors, metallurgical coal producers, coal and coke sales agents, and suppliers of equipment, goods and services to the industry.

The **American Forest & Paper Association** (“AF&PA”) is the national trade association of the paper and wood products industry, which accounts for approximately 4 percent of the total U.S. manufacturing gross domestic product. The industry makes products essential for everyday life from renewable and recyclable resources, producing about \$210 billion in products annually and employing nearly 900,000 men and women with an annual payroll of approximately \$50 billion.

The **American Fuel & Petrochemical Manufacturers** (“AFPM”) (formerly known as NPRA, the National Petrochemical & Refiners Association) is a national trade association whose members comprise more than 400 companies, including virtually all United States refiners and petrochemical manufacturers. AFPM’s members supply consumers with a wide variety of products and services that are used daily in homes and businesses.

The **American Iron and Steel Institute** (“AISI”) serves as the voice of the North American steel industry and represents member companies accounting for over three quarters of U.S. steelmaking capacity with facilities located in 43 states.

The **American Petroleum Institute** (“API”) represents over 590 oil and natural gas companies, leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, has invested nearly \$2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

The **American Wood Council** (“AWC”) is the voice of North American traditional and engineered wood products, representing over 75% of the industry. From a renewable resource that absorbs and sequesters carbon, the wood products industry makes products that are essential to everyday life and employs approximately 400,000 men and women in family-wage jobs.

The **Brick Industry Association** (“BIA”), founded in 1934, is the recognized national authority on clay brick manufacturing and construction, representing approximately 250 manufacturers, distributors, and suppliers that historically provide jobs for 200,000 Americans in 45 states.

The **Council of Industrial Boiler Owners** (“CIBO”) is a trade association of industrial boiler owners, architect-engineers, related equipment manufacturers, and University affiliates representing 20 major industrial sectors. CIBO members have facilities in every region of the country and a representative distribution of almost every type of boiler and fuel combination currently in operation. CIBO was formed in 1978 to promote the exchange of information about issues affecting industrial boilers, including energy and environmental equipment, technology, operations, policies, laws and regulations.

The **Electricity Consumers Resource Council** (“ELCON”) is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of industrial commodities and consumer goods from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities in all regions of the United States. Many ELCON members also cogenerate electricity as a by-product to serving a manufacturing steam requirement.

The **Independent Petroleum Association of America** (“IPAA”) serves as an informed voice for the exploration and production segment of America’s oil and natural gas industry. IPAA represents the thousands of independent oil and natural gas producers and service companies across the United States. Independent producers develop 95 percent of domestic oil and gas wells, produce 54 percent of domestic oil and produce 85 percent of domestic natural gas.

The **Industrial Energy Consumers of America** (“IECA”) is a nonpartisan association of large energy intensive manufacturing companies with \$1.0 trillion in annual sales, over 2,900 facilities nationwide, and more than 1.4 million employees worldwide. It is an organization created to promote the interests of manufacturing companies through advocacy and collaboration for

which the availability, use and cost of energy, power or feedstock play a significant role in their ability to compete in domestic and world markets. IECA membership represents a diverse set of industries including: chemical, plastics, steel, iron ore, aluminum, paper, food processing, fertilizer, glass/ceramic, building products, independent oil refining, and cement.

The **International Liquid Terminals Association** (“ILTA”) is an international trade association that represents 84 commercial operators of aboveground liquid storage terminals serving various modes of bulk transportation, including tank trucks, railcars, pipelines, and marine vessels. Operating in all 50 states, these companies own more than 600 domestic terminal facilities and handle a wide range of liquid commodities, including crude oil, refined petroleum products, chemicals, biofuels, fertilizers, and vegetable oils. Customers who store products at these terminals include oil companies, chemical manufacturers, petroleum refiners, food producers, utilities, airlines and other transportation companies, commodity brokers, government agencies, and military bases. In addition, ILTA includes in its membership nearly 400 companies that are suppliers of products and services to the bulk liquid storage industry.

The **National Association of Manufacturers** (“NAM”) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than \$1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The **National Lime Association** (“NLA”) is the industry trade association for the manufacturers of high calcium quicklime and dolomitic quicklime (calcium oxide) and hydrated lime (calcium hydroxide), which are collectively and commonly referred to as “lime.” Lime is used in a wide array of critical applications and industries, including for environmental control and protection, metallurgical, construction, chemical and food production. With plant operations located in 24 states, NLA’s members produce greater than 99 percent of the United States’ calcium oxides and hydroxides.

The **National Mining Association** (“NMA”) is a national trade association whose members produce most of America’s coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation’s mining industries. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership, and to promote policies and practices that foster the efficient and environmentally sound development and use of the country’s mineral resources.

The **National Oilseed Processors Association** (“NOPA”) is a national trade association that represents 13 companies engaged in the production of vegetable meals and vegetable oils from oilseeds, including soybeans. NOPA’s member companies process more than 1.6 billion bushels of oilseeds annually at 63 plants in 19 states, including 57 plants which process soybeans.

The **Portland Cement Association** (“PCA”) represents 27 U.S. cement companies operating 82 manufacturing plants in 35 states, with distribution centers in all 50 states, servicing nearly every Congressional district. PCA members account for approximately 80% of domestic cement-making capacity.

Texas Cotton Ginners’ Association (“TCGA”), founded in 1897, is one of the oldest cotton organizations in the United States. TCGA represents a cotton gin membership of over 200 members that process over 95% of the Texas's cotton crop each year – approximately five million bales of cotton annually. Cotton gins separate the raw agricultural commodity, seed cotton from the farm, into its marketable forms consisting of cotton fiber, which is used by the cotton textile industry and cottonseed, which is used for food and animal feed.

The **Aluminum Association**, based in Arlington, VA, represents U.S. and foreign-based aluminum companies and their suppliers throughout the value chain, from primary production to value added products to recycling. The Association is the industry’s leading voice, providing global standards, business intelligence, sustainability research and industry expertise to member companies, policymakers and the general public.

The **U.S. Chamber of Commerce** (the “Chamber”) is the world’s largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America’s free enterprise system.