Navigating the Legal Landscape for the Second Regional Haze Implementation Period

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This article summarizes case law on issues litigated during the first implementation period of the regional haze program that remain relevant for the second implementation period.

With the second implementation period of the regional haze program underway, states and industry are looking for legal guideposts that will govern key aspects of State Implementation Plans (SIPs). Litigation over first implementation period SIPs and Federal Implementation Plans (FIPs) has resulted in decisions by the U.S. Courts of Appeals that will guide certain aspects of second implementation period SIPs. However, key legal issues relating to regional haze SIPs remain unsettled.

In January 2017, the U.S. Environmental Protection Agency (EPA) extended the deadline for states to submit their second implementation period SIPs from July 31, 2018, to July 31, 2021, to allow states "to obtain and take into account information on the effects of a number of other regulatory programs that will be impacting sources over the next several years."[1] As of this writing, the majority of states continue to work on their SIPs, with only a handful of SIPs submitted to EPA for review.

The SIPs are to be focused on determining reasonable progress (RP controls)—that is, the emissions controls needed to ensure reasonable progress toward visibility goals.[2] RP controls for a source are identified by weighing four statutory factors: costs of compliance; the time necessary for compliance; the energy and non-air quality environmental impacts of compliance; and the remaining useful life of the source.[3]

Guiding Principles from the First Implementation Period

While much remains unsettled, litigation over first implementation period SIPs and FIPs resulted in clarity on certain regional haze issues. Some of these issues will bear on the legal durability of second implementation period SIPs.

EPA's Review Authority

Courts agree that EPA has "substantive authority to assure that a state's [regional haze] proposals comply with the Act [U.S. Clean Air Act, CAA], not simply the ministerial authority" to approve SIPs.[4] This means that courts will affirm EPA's approval or disapproval of a SIP, as long as it is not arbitrary or capricious.[4] However, EPA must provide a reasoned explanation for its decision,[5] and cannot simply substitute its judgment for the state's; for example, in staying EPA's disapproval of the Texas SIP, the Fifth Circuit determined that EPA improperly disapproved the state's approach to setting reasonable progress goals where that approach was not prohibited by the CAA.[6]

Cost-Effectiveness of Controls

Precedent on the cost-effectiveness of Best Available Retrofit Technology (BART) controls could be informative in EPA's review of second implementation period SIPs because cost is also a factor in evaluating RP controls.[7] Courts have afforded significant deference to EPA's determinations of cost-effectiveness of controls even where the state determined a control was not cost-effective. For example, the Ninth Circuit deferred to EPA's disapproval of Arizona's cost-effectiveness analysis for a power plant, based on EPA's "reasonable" explanation of the proper methodology for calculating costs.[8] The Eighth Circuit similarly sided with EPA in a challenge to the agency's partial disapproval of Nebraska's SIP. In holding that the state had erred in its cost-effectiveness analysis, the court deferred to EPA's determination that the state overestimated the costs of certain controls while underestimating their emissions control capabilities.[9]

Deference to EPA is nonetheless bounded by the requirement that the agency reasonably explain the basis for its determinations. In a challenge to the Montana FIP, the Ninth Circuit found EPA's cost-effectiveness decision arbitrary and capricious because it was "unsupported by any explained reasoning."[10] EPA's presentation of a range of dollars-per-ton for emissions controls was not an adequate explanation. An assessment of control costs thus falls into an area where a court may grant substantial deference to EPA's technical expertise when the agency acts in a reasonable manner. EPA's reasonable decisions to approve or disapprove a SIP's cost assessments for RP controls may similarly receive substantial deference from the courts.

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Reasonable Progress Analyses

Courts have found reasonable progress analyses to be similarly technical, thus deferring to EPA's expertise in evaluating RP controls. For example, the Eighth Circuit upheld EPA's disapproval of North Dakota's reasonable progress determinations, agreeing with EPA that the state's analysis had the effect of "rarely if ever" demonstrating that additional control measures would be required.[11] EPA's determination was "entitled to judicial deference" based on its expertise in the highly technical issues involved.[11] Similarly, the Ninth Circuit affirmed EPA's disapproval of Arizona's reasonable progress analysis for a cement plant, deferring to EPA's determination that the state's analysis incorporated flawed data, which caused it to overestimate the cost of installing and operating additional pollution controls.[12]

New and Unresolved Issues for the Second Implementation Period

Certain issues remain unresolved despite prior litigation and additional issues have surfaced in light of EPA's recent interpretations of CAA requirements. In August 2019, during the Trump Administration, EPA released guidance to the states on addressing reasonable progress requirements in their SIPs (2019 Guidance).[13] On July 8, 2021, in the first year of the Biden Administration, EPA released a clarification to the 2019 Guidance (2021 Clarification),[14] which provides additional nuance to certain issues addressed in the 2019 Guidance, including how states should conduct their analyses underlying their SIPs. While the full range of issues that may impact SIPs already submitted to EPA or that were close to submittal at the time of the 2021 Clarification's release, are not yet known, we highlight several here that could be raised in litigation over second implementation period SIPs.

Screening in Sources for a Reasonable Progress Analysis

In analyzing RP controls, states must determine which sources to "screen in" for assessment. EPA's 2019 Guidance indicated that states could screen in no sources, noting only that "[a] state that brings no sources forward for analysis of control measures must explain how doing so is consistent with the CAA's requirements."[13] EPA emphasized that states retain flexibility to defer consideration of controls for certain sources, explaining that "[a] key flexibility of the regional haze program is that a state is not required to evaluate all sources of emissions in each implementation period. Instead, a state may reasonably select a set of sources for an analysis of control measures."[13]

The 2021 Clarification, however, suggests EPA expects states to screen in some minimum number of sources. EPA notes that "[b]ringing no sources forward for source selection without a thoroughly justified explanation of why it is reasonable to forgo a four-factor analysis is inconsistent with the statutory and regulatory requirements," emphasizing that the agency "expect[s] such circumstances to be rare."[14]

Prior to issuance of the 2021 Clarification, certain states had anticipated not bringing forward any sources for analysis. If states persist in this approach, its consistency with the CAA

may be challenged by EPA in review of the state's SIP and primed for judicial challenge. A screening analysis invokes certain technical issues to which a court may grant EPA deference. However, the issue also would require a court to determine whether EPA's disapproval of such an approach is arbitrary or capricious, or otherwise inconsistent with the language of the CAA—classic legal determinations squarely within the wheelhouses of judges.

Using RP Controls to Determine Reasonable Progress Goals

Under the Regional Haze Update Rule, states must evaluate control measures needed to make reasonable progress before establishing reasonable progress goals based on the projected emissions decreases associated with these measures. In promulgating the regulations, EPA explained that it "intended states to develop their [reasonable progress goals] by modeling, among other things, the [control] measures in the long-term strategy."[15]

Industry stakeholders have asserted that this approach can result in requirements to install all emissions controls deemed cost-effective, even if they are not necessary to achieve visibility improvements. Because the CAA requires measures "necessary" to achieve reasonable progress toward visibility improvement goals, the argument goes, this approach is contrary to the plain language of the statute.[16]

Consideration of Visibility

EPA's 2019 Guidance explicitly provided that states could consider visibility when weighing the four statutory factors to select RP controls. EPA stated, "visibility benefits may again be considered ... to inform the determination of whether it is reasonable to require a certain measure."[13] The 2019 Guidance even suggested analytical approaches to guide this consideration.

In contrast, the 2021 Clarification expresses skepticism toward reliance on modest visibility improvements to reject cost-effective reduction measures. EPA explains that, going into the second implementation period, most large sources of visibility impairment have been addressed, so smaller sources will need to be considered to meet the statutory goal. Relying on visibility thresholds from the first planning period is no longer "appropriate ... for selecting sources or evaluating the impact of controls for reasonable progress."[14] It is now unclear whether EPA would approve a state determination that a lack of visibility improvement resulting from a control option justifies rejection of the control. As with the preceding issue, courts will need to balance deference to EPA on technical issues with their authority to determine the consistency of EPA's approach with the CAA, including the statute's requirement that RP controls be "necessary" to achieve reasonable progress.

Summary

We expect to see states undertake a range of approaches in meeting their reasonable progress obligations. These varying strategies and analyses are expected to raise a range of issues in EPA review and potentially in judicial review. Ultimately, we anticipate new case law on the scope of state and federal authority under the regional haze program. **em**

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References

1. 82 *Fed. Reg.* 3078, 3080 (Jan. 10, 2017).
2. *See* 42 U.S.C. § 7491(b)(2).
3. 42 U.S.C. § 7491(g)(1).
4. *See Arizona ex rel. Darwin v. Env't Prot. Agency*, 815 F.3d 519, 531 (9th Cir. 2016). *See also North Dakota v. U.S. E.P.A.*, 730 F.3d 750, 761 (8th Cir. 2013); *Oklahoma v. U.S. E.P.A.*, 723 F.3d 1201, 1207 (10th Cir. 2013).
5. *See Nat'l Parks Conservation Ass'n v. Env't Prot. Agency*, 803 F.3d 151, 166-67 (3d Cir. 2015) (reversing EPA's approval of Pennsylvania SIP where EPA failed to "show its work.").
6. *See Texas v. Env't Prot. Agency*, 829 F.3d 405, 428 (5th Cir. 2016).
7. 42 U.S.C. § 7491(g)(1); 40 C.F.R. § 51.308(f)(2)(i).
8. *See Arizona v. Env't Prot. Agency*, 815 F.3d 519, 539-41 (9th Cir. 2016).
9. *See Nebraska v. Env't Prot. Agency*, 812 F.3d 662, 668 (8th Cir. 2016).
10. *See Nat'l Parks Conservation Ass'n v. Env't Prot. Agency*, 788 F.3d 1134, 1143 (9th Cir. 2015).
11. *See North Dakota v. EPA*, 730 F.3d 750, 765-6 (8th Cir. 2013).
12. *See Phoenix Cement Co. v. EPA*, 647 F. App'x 702, 706 (9th Cir. 2016).
13. Memorandum from Peter Tsirigotis to Regional Air Division Directors re: *Guidance on Regional Haze State Implementation Plans for the Second Implementation Period* (Aug. 20, 2019); https://www.epa.gov/sites/default/files/2019-08/documents/8-20-2019_-_regional_haze_guidance_final_guidance.pdf.
14. Memorandum from Peter Tsirigotis to Regional Air Division Directors re: *Clarifications Regarding Regional Haze State Implementation Plans for the Second Implementation Period* (Jul. 8, 2021); https://www.epa.gov/system/files/documents/2021-07/clarifications-regarding-regional-haze-state-implementation-plans-for-the-second-implementation-period.pdf.
15. 82 *Fed. Reg.* 3078 (Jan. 10, 2017).
16. 42 U.S.C. § 7491(b)(2) (SIPs must contain "emission limits, schedules of compliance and other measures as may be *necessary* to make reasonable progress toward meeting the national goal….") (*emphasis* added).