# Testimony before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform of the House Committee on Oversight and Government Reform

"Mandate Madness: When Sue and Settle Just Isn't Enough"

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Dear Chairman Lankford, Ranking Member Connolly, and Members of the Subcommittee,

Thank you for allowing me to present my concerns on the legal and policy implications of the U.S. Environmental Protection Agency's actions regarding Regional Haze Regulations ("RHR"). There are three main points that cause concern among members of my staff, state leadership and Oklahoma stakeholders in relation to the EPA's actions: (1) the arbitrary and capricious nature of the EPA's preemption and disapproval of the Oklahoma State Implementation Plan ("SIP"); (2) the EPA's abrogation of notice and comment requirements when it imposes Federal Implementation Plans ("FIP") under the Regional Haze Regulations; and (3) the economic cost to states, industry and utility customers from the EPA's illegal actions under the Regional Haze Regulations. The EPA's refusal to follow its own rules has denied states due process and ignored the foundation of cooperative federalism set forth by Congress under the Clean Air Act. With the backing of the Obama Administration, the EPA is engaging in super legislative activity that Congress has not authorized, resulting in unchecked rule-making through questionable consent decrees. These issues are of great importance to the State of Oklahoma because Oklahomans value our state's natural resources, which provide sustenance to Oklahoma citizens and fuel our economic development. We take seriously our responsibility to preserve and protect these valuable natural assets so they may be enjoyed by future generations. This responsibility requires a delicate balance between environmental and economic interests. We must craft our environmental protection objectives with due consideration of the burden those objectives place on our economic development and overall well-being. With these considerations in mind, the State of Oklahoma submits that Oklahoma stakeholders, not the federal agency, should make decisions where outcomes directly affect Oklahomans.

**Background on Oklahoma's Battle against the EPA and the Agency's Abuse of Regional Haze Regulations**

In Section 169A of the 1977 Amendments to the Clean Air Act (CAA), Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section establishes as a national goal the "prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I federal areas which impairment results from manmade air pollution." 42 U.S.C. § 7491(a)(1). Congress recognized that this program requires a delicate balance that considers the timing, cost and economic impact of alternative methods to achieve such goals. 42 U.S.C. § 7491(g)(1) ("In determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance . . . .").

Congress added Section 169B to the Act in 1990 to address regional haze issues, and in 1999, EPA promulgated regulations addressing regional haze, 70 Fed. Reg. 39,104 (July 6, 2005), codified at 40 C.F.R. part 51, subpart P ("Regional Haze Regulations" or "RHR"). In Section 169B, Congress made clear its intent to delegate significant power to States to develop, review, approve, and implement site-specific implementation plans designed to make reasonable progress in achieving regional haze goals while balancing each State's unique economic and power needs. *See, e.g.*, 123 Cong. Rec. 13,696, 13,709 (1977). EPA has recognized that, because the issues to be balanced are uniquely State and source specific, "the State must determine the appropriate level of BART (best available retrofit technology) control for each source subject to BART." 70 Fed. Reg. at 39,107.

Ultimately, the CAA requires deference to State decision-making. The structure of CAA and RHR create distinct and defined duties of the State and EPA. The EPA is, for instance,

charged with promulgating general regulations designed to "assure … reasonable progress toward meeting the national goal." *Id.* § 7491(a)(4). The EPA must also promulgate the list of "mandatory Class I Federal areas" which are to receive visibility protection under the Act. *Id*. § 7491(a)(2). Further, the statute tasks the EPA with providing support to the states by, for instance, studying methods for redressing visibility impairment and then providing "guidelines" to the states suggesting such appropriate methods. Similarly, under section 169B of the Act, the EPA is tasked with studying regional visibility impairment, and convening regional commissions comprised of state authorities. *Id*. § 7492(a)(1), (c). The CAA does not give the EPA authority to question the wisdom of a state's choices of emission limitations if they are part of a plan that satisfies the standards of the Act.

For more than a decade, Oklahoma Gas & Electric (OG&E) has voluntarily burned low sulfur coal with the electrical generating units ("EGUs") at the Muskogee and Sooner Generating Stations ("OG&E Units") in order to limit sulfur dioxide emissions (SO2). OG&E is Oklahoma's largest electricity provider and serves approximately 789,000 customers in 268 communities in Oklahoma and western Arkansas. Oklahoma Industrial Energy Consumers (OIEC) is a non-partisan, unincorporated association of large consumers of energy with facilities located in the State of Oklahoma. OIEC members are engaged in energy price-sensitive industries such as pulp and paper, cement, refining, glass, industrial gases, plastic, film, and food processing. OIEC members employ thousands of Oklahomans.

On February 17, 2010, the State of Oklahoma submitted to EPA its regional haze revisions to the Oklahoma State Implementation Plan ("Oklahoma SIP"). *See* Oklahoma SIP, Doc. ID No. EPA-R06-OAR-2010-0190-0002 (relevant portions attached hereto as Exhibit 3). After properly balancing the statutory factors related to regional haze, Oklahoma determined that

low sulfur coal constituted BART for SO2 emissions from the OG&E Units and proposed a SIP that would have made OG&E's continued use of that low sulfur coal a mandatory condition of operation. In balancing the BART factors, Oklahoma had before it both a 2008 cost analysis for the OG&E Units — one that both the EPA and the Oklahoma Department of Environmental Quality ("ODEQ") had stated was prepared in conformity with the EPA Air Pollution Control Cost Manual ("CCM") — and a 2009 cost analysis prepared at ODEQ's and EPA's request that was more robust and site-specific than the 2008 cost estimate. *See id*. Both the 2008 Cost Analysis and the 2009 Cost Analysis were prepared with the assistance of OG&E's engineering consultant, Sargent & Lundy LLC ("S&L"). Oklahoma concluded, based on this and other information, that scrubbers were not cost effective for the OG&E Units.

On March 22, 2011, more than one year after Oklahoma submitted its SIP to the EPA, EPA published a proposed rule in the Federal Register proposing to approve in part and disapprove in part the Oklahoma SIP. *See* Proposed Rule, 76 Fed. Reg. 16,168. In the same notice, and without waiting for its proposed disapproval of parts of the Oklahoma SIP to become final — i.e., without waiting for and considering public comments on its proposed disapproval of portions of the Oklahoma SIP — EPA proposed a FIP to substitute its judgment for the judgment of Oklahoma on certain key issues statutorily delegated to Oklahoma, including the BART determinations for the OG&E Units.

On May 23, 2011, the State of Oklahoma, OIEC, and OG&E (among others) separately submitted extensive legal, policy, and technical comments to EPA opposing its proposed action and arguing that, for numerous reasons, the EPA's proposed action was contrary to the CAA and RHR and was otherwise arbitrary and capricious. Despite these comments, EPA published the Final Rule with respect to the Oklahoma SIP on December 28, 2011, disapproving the State's

SO2 BART determinations for the OG&E Units and for two units at another facility in the State. *See* 76 Fed. Reg. 81,728. EPA then simultaneously finalized the Oklahoma FIP that imposed an SO2 emission limit of 0.06 lbs/MMBtu for each OG&E Unit, which would require the installation of a scrubber at each affected unit by January 27, 2017. Moreover, in support of the FIP, EPA adopted entirely new approaches not contained within its proposed rule without proper notice and the opportunity to comment, in violation of APA requirements.

On December 28, 2011, EPA published a final rule with respect to the Oklahoma SIP, disapproving the State's SO2 BART determinations for the four OG&E units and for two units at another facility in the State based on EPA's own balancing of the five statutory factors. *See* Partial Approval of Oklahoma SIP and Promulgation of FIP, 76 Fed. Reg. 81,728 (Dec. 28, 2011) ("Final Rule"), JA 23. Petitioners filed requests for reconsideration with EPA in February 2012, but no action has been taken on those requests. The Final Rule both disapproved the Oklahoma SIP provisions that set out BART for the OG&E Units and promulgated a FIP, substituting EPA's own BART determination in place of the State's.

On February 24, 2012, the State of Oklahoma filed its Petition for Review in the Tenth Circuit Court of Appeals. On April 4, 2012, the State of Oklahoma filed a Joint Motion for a Stay of the Final Rule.

On June 15, 2012, Oklahoma filed its Joint Opening Brief in the Tenth Circuit Court of Appeals to resolve the pressing issues surrounding the EPA's abuse of the RHR, CAA, and rulemaking procedures. On June 22, 2012, the Tenth Circuit Court of Appeals granted the Petitioners Joint Motion for Stay of the Final Rule, concluding that the stay factors had been

met.[1] The stay was granted pending a hearing by the Tenth Circuit Court of Appeals merits panel.

**a. The Role of the States**

The role of the states under the CAA's visibility program is unique, as provided by sections 169A and 169B of the CAA. Unlike other programs where the states' role is to implement federally established standards, under the visibility program, the states have primary responsibility for establishing standards. In particular, the states are charged with developing emissions limitations after balancing a number of factors. The EPA's role under this program is simply one of support. Accordingly, the EPA must treat with special deference the determinations of a state, as embodied in a state's proposed Regional Haze SIP. States also are tasked with determining "such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal …." *Id*. § 7491(b)(2). States are responsible for determining best available retrofit technology for BART-eligible facilities. *Id*. § 7491(b)(2)(A). The states define the long-term strategy for making reasonable progress toward the national visibility goal. *Id*. § 7491(b)(2)(B). And it is the states, in consultation with one another, who are directed to assess the interstate transport of visibility impairing emissions and to decide what measures are necessary to address regional haze. *Id*. § 7492(d). Congress believed it important that states retain wide latitude in choosing how best to achieve national standards, given local needs and conditions. In addition to plain statutory language and the case law interpreting this language, the legislative history behind the Regional Haze Rule also is clear that Congress intended to vest individual states with broad authority to make BART determinations. For example, the following exchange occurred during the U.S.

[1] The stay factors are" I. Petitioners Are Likely To Succeed on the Merits II. Petitioners Will Suffer Irreparable Harm Absent a Stay III. The Balance of Equities Favors Granting Petitioner' Stay Request, and Granting a Stay is in the Public Interest.

Senate debate preceding adoption of the Conference Agreement behind Section 169A of the CAA:

> *Mr. McClure:* Under the conference agreement, does the state retain the sole authority for identification of sources for the purpose of visibility issues under this section?
>
> *Mr. Muskie:* Yes; the State, not the Administrator, identifies a source that may impair visibility and thereby falls within the requirement of section 128.
>
> *Mr. McClure:* And does this also hold true for determination of "Best Available Retrofit Technology?"
>
> *Mr. Muskie:* Yes; here again it is the State which determines what constitutes "Best Available Retrofit Technology," as defined in section 128. . . . .

123 CONG. REC. S13696, S13709 (1977).

Consistent with this legislative intent, EPA itself has explained that "the State must determine the appropriate level of BART control for each source subject to BART." 70 Fed. Reg. at 39, 107. The EPA has even acknowledged that "[i]n some cases, the State may determine that a source has already installed sufficiently stringent emission controls for compliance with other programs . . . such that no additional controls would be needed for compliance with the BART requirement." *Regional Haze Regulations*, 64 Fed. Reg. 35,714, 35,740 (July 1, 1999). The EPA also has acknowledged that "the State retains the primary responsibility of developing a viable visibility program" consistent with the goal established in section 169 A (a). This responsibility includes "final authority for the development of the SIP, BART determinations, and implementation of the visibility program" in light of the goals of the Act. *See Am. Corn Growers Ass'n v. E.P.A.*, 291 F.3d 1 (D.C. Cir. 2002).

**b. Limitations on EPA's authority**

The content of the EPA's regulations and guidance and their deference to State decision-making is no accident. These rules stem from the 2002 opinion of the D.C. Circuit in *American Corn Growers*. That case involved a challenge to EPA's 1999 regional haze rules. *See* 64 Fed. Reg. 35714 (July 1, 1999). The court confirmed the primacy of the states by invalidating EPA's rule on the grounds that it impermissibly constrained state authority. *See Am. Corn Growers Ass'n*, 291 F.3d at 8 (EPA's rule is invalid because it is "inconsistent with the Act's provisions giving the states broad authority over BART determinations"). The D.C. Circuit relied on, in part, the legislative history of the CAA's visibility provisions in reaching this conclusion. Summarizing H.R. CONF. REP. NO. 95-564 , the court stated:

> The Conference Report thus confirms that *Congress intended the states to decide* which sources impair visibility and *what BART controls should apply to those sources*. The Haze Rule attempts to deprive the states of some of this statutory authority, in contravention of the Act. *Id*. (emphasis added).

The EPA therefore, cannot, through either approving or disapproving a SIP, interfere with the state's primary role in determining how national ambient air quality standards should be met under the CAA. 42 U.S.C.A. §§ 7401 et seq. As long as the ultimate effect of a state's choice of emission limitations is compliant with the national standards for ambient air, the state is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation. Reviewing the history of section 110, and judicial interpretations of it, the court in *Commonwealth of Virginia v. Environmental Protection Agency*, noted that as section 110 stood in 1975, and as it stood after the 1977 and 1990 amendments, the provision did not confer upon the EPA authority to condition approval of a state implementation plan on the state's adoption of specific control measures. *See* 108 F.3d 1397(D.C. Cir. 1997). Although the EPA has the authority to determine whether a state's plan meets the Act's requirements for approval (42

U.S.C.A. § 110(a)(2)), courts have held that the agency cannot tell the states what measures they should employ in meeting the requirements. (42 U.S.C.A. § 7410)

In *Train v. Natural Resources Defense Council, Inc*., 421 U.S. 60 (1975) the U.S. Supreme Court found that although the CAA plainly charges the EPA with the responsibility for setting the national ambient air quality standards, the Act, just as plainly, relegates the EPA to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations that are necessary if the national standards are to be met. According to the Court, the Act gives the agency no authority to question the wisdom of a state's choices of emission limitations if they are part of a plan that satisfies the standards of §110(a)(2), and the agency may devise and promulgate a specific plan of its own only if a state fails to submit an implementation plan that satisfies those standards. The Court stated;

> "So long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."

*Id* at 79.

The CAA then "establishes a partnership between EPA and the states for the attainment and maintenance of national air quality goals." *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995). "Air pollution prevention . . . at its source is the primary responsibility of States and local governments. . . ." 42 U.S.C. § 7401(a)(3). Congress "carefully balanced State and national interests by providing for a fair and open process in which State and local governments, and the people they represent, will be free to carry out the reasoned weighing of environmental and economic goals and needs."

The CAA specifically vests states with the primary authority to determine BART by weighing the five statutory criteria set forth in 42 U.S.C., section 7491(g)(2). CAA Section

169A provides that "in determining [BART] the State (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration [the five BART factors]." 42 U.S.C. § 7491 (g)(2). Section 169A also provides that sources subject to BART "shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the [BART], as determined by the State (or the Administrator in the case of a plan promulgated under section 7410(c) of this title) . . . ." 42 U.S.C. §§ 7491(b)(2)(A). The EPA may disapprove a SIP and issue a FIP under section 7410(c) only where the State's SIP fails to meet minimum CAA requirements. 42 U.S.C. § 7410(k)(3). In the case of regional haze, the CAA requires only that States weigh the five statutory factors and arrive at a reasonable understanding of BART requirements. 42 U.S.C. § 7491 (g)(2).

As stated above, the U.S. Court of Appeals for the D.C. Circuit has reviewed the EPA's authority under the Regional Haze program and agreed that the CAA "calls for states to play the lead role in designing and implementing regional haze programs." *Am. Corn Growers Ass'n.* 291 F.3d 1, at 2. In 2002, the court reversed a portion of the EPA's original Regional Haze Rule that required states to analyze visibility improvements from multiple sources, rather than on a source-by-source basis, when determining BART requirements. The court held that the EPA could not require the states to evaluate one BART factor collectively while mandating that the other four factors be evaluated separately for individual sources. In addition to distorting the statutory factors, the court thought the EPA's approach was "inconsistent with the Act's provisions giving the states broad authority over BART determinations." *Id*. at 8; *see also Utility Air Regulatory Group v. E.P.A.*, 471 F.3d 1333, 1336 (D.C. Cir. 2006) (The second step in a BART determination "requires states to determine the particular technology that an individual source subject to BART must install.")

## I. The Arbitrary and Capricious Nature of the EPA's Preemption and Disapproval of Oklahoma's SIP

The CAA directs the States — not the EPA — to determine the appropriate level of BART to regulate regional haze. The EPA's proposed Federal Implementation Plan ("FIP") as it pertains to the disapproval of portions of the State Implementation Plan ("SIP") as to best available retrofit technology ("BART") and the long-term strategy ("LTS") is in violation of the Clean Air Act (CAA) and the discretion and authority granted to the State under that Act. In its quest to issue a Federal Implementation Plan ("FIP") that requires Oklahoma Gas and Electric Company ("OG&E") to spend over $1.2 billion to install dry flue gas desulfurization technology ("scrubbers") on four electric generating units in the next five years to address aesthetic concerns about regional haze, the Environmental Protection Agency ("EPA") eviscerated the authority and discretion given to the State of Oklahoma by the Clean Air Act ("CAA" or "Act"). In substituting its judgment for the judgment of the State, EPA illegally usurps the broad authority given by Congress to the States to make best available retrofit technology ("BART") determinations for regional haze. *See* 42 U.S.C. § 7491. The Oklahoma SIP included a state-specific balancing of BART factors that considered Oklahoma's unique energy and economic needs; a balancing that EPA is neither equipped nor authorized to conduct. Instead, EPA improperly mandated its desired outcome in place of Oklahoma's considered judgment as to the appropriate BART for facilities in the state.

The CAA and RHR set forth the process that must be followed in determining BART, but neither requires any specific outcome. Thus, the CAA and RHR require, in part, that a State balance five factors in making a BART determination for each qualifying facility.[2] EPA

[2] The five BART factors are: (i) the costs of compliance; (ii) the energy and nonair quality environmental impacts of compliance; (iii) any existing pollution control technology in use at the source; (iv) the

recognizes that "States are free to determine the weight and significance to be assigned each factor." Proposed Oklahoma BART Rule, 76 Fed. Reg. 16,168, 16,174 (Mar. 22, 2011) ("Proposed Rule"). EPA further acknowledges that "[i]n some cases, the State may determine that . . . no additional controls would be needed for compliance with the BART requirement." Original Regional Haze Regulations, 64 Fed. Reg. 35,714, 35,740 (July 1, 1999).

The CAA and RHR require that *States*, not EPA, have the primary role in implementing the regional haze program, including making BART determinations. *See, e.g.,* CAA § 169A(b)(2)(A), (g)(2), 42 U.S.C. § 7491(b)(2)(A), (g)(2) ("in determining [BART] *the state* (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration [the BART factors]") (emphasis added). The states are directed to define the long-term strategy and BART, one component of the long-term strategy, under the Act. It is the states that are required to consider and balance the five factors relevant to a BART determination. *See id*. § 7491(g)(2). The scope of state discretion is further confirmed in EPA guidance, which states that "*[t]he glidepath [to the national goal] is not a presumptive target, and States may establish a RPG [reasonable progress goal] that provides for greater, lesser, or equivalent visibility improvement as that described by the glidepath." Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program* at 1-3 (June 1, 2007)(emphasis added).

The EPA Proposed Rule ignores the plain language of the CAA and the Court of Appeals' recognition of the states' dominant role in determining BART in an effort to advance EPA's preference for scrubbers on all EGUs. EPA does not have authority to disapprove a SIP simply because it disagrees with a state's choice in emission control measures for specific

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remaining useful life of the source; and (v) the degree of improvement in visibility that may be expected as a result of such technology. 2 U.S.C. § 7491(g)(2); 40 C.F.R. § 51.308(e)(1)(ii).

sources. *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 581 (5th Cir. 1981) ("If an [sic] SIP or a revised SIP meets the statutory criteria, however, the EPA must approve it").

The EPA is proposing to take an action that usurps authority granted to Oklahoma in the Clean Air Act. The Clean Air Act created a Regional Haze program to improve visibility in certain national parks and wilderness areas. The EPA can set national goals and guidelines for the program, but individual states have the authority to craft plans specific to and appropriate for their state's citizens and interests. Each state has the right to select the best control technology ("BART") for sources of emissions that contribute to regional haze, taking into consideration five specific factors, including costs of control. Oklahoma chose the technologies that are appropriate for its sources in light of these five factors and submitted an implementation plan to EPA in February 2010. In particular, Oklahoma determined that low sulfur coal was the cost effective way to control sulfur dioxide emissions to address haze issues. A benefit of this determination is that it gives state utilities greater flexibility to switch to generating electricity with natural gas or renewable sources. The state determined that installing scrubbers now is not cost effective and would lock the utilities into burning coal for the next 20 years.

On March 22, 2011, EPA proposed to reject the state's determination and substitute its own judgment for the state's via implementation of its proposed FIP.[3] The EPA proposed to select scrubbers as the best technology for the relevant sources in Oklahoma. The adoption of a Federal Plan would go beyond the authority granted to the EPA by the Clean Air Act because the

[3] On March 23, 2011 The State of Oklahoma submitted to the Administrator of the EPA a Notice of Intent to file suit pursuant to Clean Air Act section 304 (b)(2), 42 U.S.C. section 7604 (b)(2) and 40 C.F.R. Part 54, for the EPA's failure to perform nondiscretionary duties. The suit against the EPA will be filed because the EPA was not authorized to propose a FIP for regional haze in Oklahoma on March 22, 2011, as no final action has been taken regarding Oklahoma's SIP. In addition, the window for EPA to propose a regional haze FIP was not open on March 22nd. The EPA has violated its nondiscretionary duty to honor the time constraints provided in Section 110 (c) of the CAA and 42 U.S.C. § 7410(c) regarding the promulgation of a FIP.

EPA does not have the power to question the state's determination as long as the state relied on the proper factors in making it, which Oklahoma did. It is estimated that the emission controls required by EPA will cost approximately $2 billion to install and result in a 15% - 20% increase in residential electric rates.

EPA may disapprove a SIP and promulgate a FIP only where a State's SIP fails to meet minimum CAA requirements. 42 U.S.C. § 7410(k)(3); *see also Train v. Natural Res. Def. Council*, 421 U.S. 60, 79 (1975). The RHR and BART guidelines issued by EPA, 70 Fed. Reg. 39,104 (July 6, 2005), require only that States engage in the process of weighing the five statutory factors in determining BART for eligible sources in a manner consistent with the RHR, and that "States are free to determine the weight and significance to be assigned to each factor." *See* 76 Fed. Reg. 16,168, 16, 174 (Mar. 22, 2011). As the Oklahoma SIP clearly shows, Oklahoma did properly engage in that process in making its BART determinations for the OG&E Units.

Oklahoma submitted its' SIP to EPA long before EPA proposed the Oklahoma FIP, and with a full record. Since ODEQ applied the statutory factors in promulgating the Oklahoma SIP, EPA was not free to reject Oklahoma's BART determinations with respect to the OG&E Units and promulgate a FIP substituting its judgment for that of the State.

As previously set forth, the U.S. Court of Appeals for the D.C. Circuit has affirmed that EPA's role in determining regional haze plans is limited, stating that the CAA "calls for states to play the lead role in designing and implementing regional haze programs." *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 2 (D.C. Cir. 2002). The Court reversed a portion of EPA's original RHR because it found that EPA's method of analyzing visibility improvements distorted the statutory factors and was "inconsistent with the Act's provisions giving the *states* broad authority

over BART determinations." *Id.* at 8 (emphasis added); *see also Utility Air Group v. EPA*, 471 F.3d 1333, 1336 (D.C. Cir. 2006) (The second step in a BART determination "requires states to determine the particular technology that an individual source 'subject to BART' must install"). EPA lacks the authority to disapprove the Oklahoma SIP merely because it disagrees with Oklahoma's choice in emission controls for specific sources.

The CAA gave Oklahoma the right to conduct this analysis and make a determination without being second-guessed by EPA. Oklahoma exercised the authority granted by the CAA and determined that "[t]he cost for [scrubbers] is too high, the benefit too low and these costs, if borne, further extend the life expectancy of coal as the primary fuel in the Sooner facility for at least 20 years and beyond. BART is the continued use of low sulfur coal." *See* Ex. 3, Oklahoma SIP, App. 6-5, Item 1, Sooner BART Review at p. 29, and Muskogee BART Review at p. 29.

EPA second guessed Oklahoma's authority by rejecting significant portions of the 2009 site-specific costs estimates, in many instances simply assuming, without verifying, that they resulted in the double counting of expenses. While OG&E disputes EPA's conclusion regarding the 2009 cost estimates, once EPA reached the conclusion that the CCM estimates should control, the proper response by EPA should have been to return to the 2008 cost estimates, which both EPA and ODEQ had stated complied with the CCM and which support the State's BART determinations for the OG&E Units. EPA's attempt to create a hybrid cost estimate by selectively modifying the 2009 estimate resulted in cost estimates that were neither site-specific and real (like OG&E's 2009 cost estimates) nor reflective of the CCM general estimates (like OG&E's 2008 cost estimates). EPA's "cherry-picking" approach to the cost estimates for the OG&E Units in order to justify its predetermined conclusion that scrubbers were BART was, therefore, arbitrary and capricious.

Despite the Act's exclusive assignment to the States of the authority to weigh the statutory factors, EPA nonetheless disputes Oklahoma's cost effectiveness analysis and seeks to use the assumptions and speculation of its consultant as the basis for disapproval of the Oklahoma SIP. EPA's principle contention is that the 2009 site-specific cost estimates considered by Oklahoma did not comply with the CCM. To reach that result, however, EPA (i) ignored the 2008 cost estimates that it had acknowledged were prepared in accordance with the CCM; (ii) rejected the 2009 estimates by giving preference to the assumptions and speculation of its consultant over the judgment of the State; and (iii) manipulated the inputs for the cost effectiveness calculation by ignoring the requirements of its own guidelines and basic engineering principles. Even beyond these fundamental flaws in EPA's cost effectiveness review of the Oklahoma SIP, the separate cost analysis conducted by EPA's consultant was not supported by the record and was arbitrary in its approach. At the same time, EPA took an improper approach to visibility improvement designed to overstate the benefits from the installation of scrubbers. The fundamental flaws in EPA's cost-effectiveness analysis not only demonstrate that its disapproval of the Oklahoma SIP was arbitrary and capricious, but also preclude a finding that EPA had a reasoned and proper basis for the FIP.

"States have flexibility in how they calculate costs." 70 Fed. Reg. at 39,127. Where the RHR give States flexibility and Congress has designated that States take the dominant role in determining BART, EPA is not free to undercut the State's reasonable exercise of that flexibility, particularly by substituting its own arbitrary approach. EPA illegally usurped State authority in violation of the plain language of the Act when it rejected Oklahoma's BART determination for the OG&E Units and, thus, the FIP is unlawful. In addition, because EPA published a notice that certain States, including Oklahoma, had initially failed to meet the deadline for submitting

regional haze SIPs, the CAA unequivocally imposed a two-year requirement for EPA to issue a FIP. *See* 42 U.S.C. § 7410(c); *Gen. Motors v. United States*, 496 U.S. 530, 537 (1990) (citing CAA §110(c) as an example of "explicit deadlines" established by the CAA). It is undisputed that EPA failed to promulgate a FIP within that two-year window. Thus, EPA's attempt to promulgate the Oklahoma FIP outside that two-year window, without first providing a new notice to re-open the two-year window for doing so, was contrary to the Act. Clearly, the EPA is going beyond its authority and abusing its power by overregulating in areas statutorily regulated by the States.

As previously noted, Oklahoma has the primary authority to determine BART and, pursuant to EPA's own guidelines, this primacy extends to the cost analysis, where the State is given "flexibility in how [it] determines costs." 70 Fed. Reg. at 39,127. Oklahoma's cost analysis, set forth in the Oklahoma SIP, clearly meets statutory requirements. Even if EPA was authorized to second guess Oklahoma's judgment, EPA has not articulated any sound or reasonable basis for rejecting Oklahoma's considered judgment regarding the appropriate costs to consider.

## II. The EPA's Abrogation of Notice and Comment Requirements When Imposing FIP's

The Final Rule violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et. seq*., because it introduces and relies upon rules or approaches not previously discussed in the proposed rule. *See* 5 U.S.C. § 553(b)(3) (requiring agencies to give notice of "the terms or substance of the proposed rule or a description of the subjects and issues involved."). "To satisfy the APA's notice requirement, . . . an agency's final rule need only be a logical outgrowth of its notice." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (internal

quotations and citations omitted). However, "a final rule fails the logical outgrowth test and thus violates the APA's notice requirement where interested parties would have had to divine the agency's unspoken thoughts because the final rule was surprisingly distant from the proposed rule." *Id.* (vacating portion of agency's final rule for violating APA's notice requirements) (internal quotations and citations omitted). Here, Oklahoma had no means by which to divine EPA's introduction of several new outcome determinative approaches set forth for the first time in the Final Rule and, therefore, had no opportunity to properly comment on or present evidence regarding them. The issues raised by the use of these new approaches are particularly important in this case because they tread on areas that the CAA commits to the discretion of the State in the first instance.

EPA's issuance of the Oklahoma FIP was also procedurally defective because of its timing. First, the CAA does not give EPA authority to propose a FIP prior to final disapproval of the Oklahoma SIP. The Act, moreover, requires that EPA give Oklahoma a reasonable opportunity to cure any alleged defects in a disapproved SIP. CAA Section 110(c)(1)(A) allows promulgation of a FIP after EPA "finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section or . . . disapproves a State implementation plan submission in whole or in part." 42 U.S.C. § 7410(c)(1). Section 110(c) also states that EPA shall propose a FIP "unless the State corrects the deficiency," thereby reflecting Congress's intention for States to have the power to design their own SIP and have an opportunity to correct a SIP before a FIP is issued. § 7410(c). Simultaneous promulgation of the FIP is also inconsistent with the Act's definition of a FIP. A FIP is defined as a plan "to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in

a State implementation plan." § 7602(y). Thus, a FIP cannot properly exist until after final action has been taken on a State's SIP.

CAA § 307(d)(3) requires that "[t]he statement of basis and purpose" that must accompany each proposed FIP include a summary of "the factual data on which the proposed rule is based" and "the major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3). EPA cannot credibly claim to be able to present the relevant factual, legal, and policy information and rationale to justify a proposed FIP before it has: (1) determined whether and to what extent the Oklahoma SIP may be deficient and un-approvable; (2) provided the public with an adequate explanation of any such determination in a proposed EPA rule on SIP approval or disapproval that is published for public review and comment; (3) received, considered, and responded to public comments on the proposed action; and (4) made a final determination and taken final action to disapprove the SIP in whole or in part.

This due order of action by EPA is important because, as demonstrated by the discussion above regarding cost effectiveness, EPA's authority when reviewing a Regional Haze SIP is much different than its authority when promulgating a FIP. Because the CAA delegates the power to determine BART exclusively to the States, the fact that EPA would take a different approach or reach a different conclusion is irrelevant to its approval or disapproval of a Regional Haze SIP. Yet, if EPA is allowed to take final action on such a SIP at the same time that it issues a FIP, it can blur this distinction and impermissibly use the FIP process to impose its preferences with respect to the five statutory BART factors onto the States.

Second, because EPA published a notice that States, including Oklahoma, had failed to meet the statutory deadline for submitting regional haze SIPs, it is undisputed that the CAA

unequivocally imposes a two-year limit on EPA's ability to take such action. *See* 42 U.S.C. § 7410(c)(1); *Gen. Motors v. United States*, 496 U.S. 530, 537 (1990) (citing CAA § 110(c) as example of "explicit deadlines" established by the CAA). It is also undisputed that EPA failed to promulgate a FIP within that two-year window. Thus, EPA's attempt to promulgate the Oklahoma FIP outside that two-year window, without first providing a new notice to re-open the two-year window for doing so, was contrary to the Act.

The new "overnight" cost method used by EPA to determine the cost effectiveness of scrubbers is at the core of EPA's Final Rule, both in disapproving the Oklahoma SIP and in justifying its FIP. EPA's failure to raise these new approaches as justification for its proposed actions in the Proposed Rule deprived Petitioners of the right and opportunity to comment on them. It was, therefore, improper under the APA and it deprived the State of the authority delegated to it by the CAA to determine the reasonable and appropriate methods for evaluating costs in making BART determinations. EPA's Final Rule is fatally defective because of its failure to provide notice of this new approach and allow comment on it.

The Final Rule also reveals, for the first time, EPA's new methodology to determining visibility improvement—the so-called "number of days" approach. 76 Fed. Reg. at 81,736. Again, because this approach was not raised by EPA in the Proposed Rule, the Final Rule is fatally defective. Because the Final Rule fails the logical outgrowth test, Petitioners' challenges to the Oklahoma FIP are likely to succeed, justifying a stay of the FIP.

The administrative record shows that EPA's "nothing but scrubbers" approach led it to reject a final regional haze state implementation plan ("SIP") that Oklahoma sent to EPA over a year before EPA proposed to adopt the FIP. The only way that EPA could achieve this predetermined outcome was to ignore the Act and its own guidance and violate the

Administrative Procedures Act ("APA") by raising and relying on new rules and methodologies for the first time in its final rule adopting the FIP. For EPA to accomplish this objective, it had to ignore its own policies and procedures for making these determinations and, in the Final Rule, use new approaches regarding cost effectiveness and visibility improvement that it had not identified in the proposed rule. This approach precluded public comment and violated Petitioners' procedural rights.

The RHR require States to submit their BART determinations, along with other required elements, as SIP revisions to EPA for approval ("Regional Haze SIPs"). EPA may disapprove a Regional Haze SIP and issue a FIP only when a SIP fails to meet all of the applicable requirements of the Act. 42 U.S.C. § 7410(k)(3). In this instance, the applicable requirements are that the emission limitations developed to address regional haze be developed pursuant to the evaluation process and balancing of the BART factors set out in the CAA and RHR. 42 U.S.C. § 7491(b).

## III. Economic Costs Associated with the EPA's Illegal Actions Under the Regional Haze Program

The EPA's action is sure to raise the costs of electricity to consumers, with a corresponding loss of jobs and economic activity. EPA's illegal adoption of the Final Rule will have an immediate and irreparable impact on the State whose CAA authority has been eviscerated by EPA's actions. Likewise, electricity consumers in Oklahoma will face significant electricity rate increases as a result of the costs imposed by the Final Rule.

Oklahoma has demonstrated the substantial economic impact EPA's Final Rule would have on the State. OG&E will be required to expend significant resources immediately in order to implement the installation of the scrubbers with any chance of meeting the five year deadline,

and just in the first two years, the costs will exceed $200 million. Even if OG&E were able to roll some of those costs into its rate structure, this will have an obvious adverse effect on the citizens of Oklahoma who have to pay those higher electricity rates. In today's economic climate, those very real economic impacts of EPA's FIP cannot and should not be ignored.

## IV. Conclusion

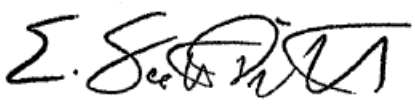
First, as noted above, Congress designated the State as the principle decision maker for BART determinations and regional haze programs. The EPA's actions here deprive Oklahoma of the ability to fashion a regional haze program that balances costs and visibility improvement in a manner that is appropriate for the citizens and economy of this State. The EPA's actions undermine the State's authority and damage the ability of Oklahoma to fulfill its regulatory function as created by Congress.

Second, as noted above, the EPA's abrogation of notice and comments when imposing FIP's on Oklahoma violates key and foundational principles of rulemaking.

Finally, if some of these costs are imposed on consumers in Oklahoma, the increased electricity rates will have an adverse economic impact with consumers paying higher rates directly and businesses looking to pass their higher costs to their customers. Indeed, as a large electricity consumer, the State too will feel the direct economic impact of higher rates. Neither the State nor its citizens has recourse for such unnecessary costs. Thus, irreparable harm will result from continuation of the current effective date for the Oklahoma FIP.

The State of Oklahoma has properly exercised its discretion under the CAA's visibility program to establish a long-term strategy for the reduction of visibility impairing pollutants, including the selection of BART. The EPA's proposed action disregards clear congressional intent that primary regulatory authority under the visibility program rests with the States. The

EPA's proposal would impose the EPA's policy judgments based on the EPA's balancing of factors where it has no authority to do so. The EPA does not have the right under the Clean Air Act to substitute its judgment for that of the state when it comes to determination of the best control technology for sources in the state.



E. SCOTT PRUITT
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Attorney General E. Scott Pruitt was elected as the 17th Attorney General of the State of Oklahoma on November 2, 2010. He is the second Republican in the history of the state to hold the office, which oversees 80 attorneys. Attorney General Pruitt has quickly risen as a national leader in the cause of restoring limited government and the proper balance of power between the states and the federal government.

As a first priority in office, Attorney General Pruitt established Oklahoma's first Federalism Unit in the Office of Solicitor General to more effectively combat unwarranted regulation and systematic overreach by federal agencies, boards and offices.

Pruitt currently serves as chairman of the Republican Attorneys General Association (RAGA) and vice-chairman of the Midwest Region of the National Association of Attorneys General (NAAG). Under his leadership, attorneys general have come together to advance policies and legal strategies that protect the interests of their states from an overly intrusive federal government, with a particular focus on domestic energy security and production. Attorney General Pruitt has led the charge with repeated notices and subsequent lawsuits against the U.S. Environmental Protection Agency for their leadership's activist agenda and refusal to follow the law.

Attorney General Pruitt is an ardent defender of Oklahoma consumers, families and children in his capacity as Oklahoma's top law officer. During his first months in office, he transformed the AG's consumer protection efforts into the Public Protection Unit with a broader focus on keeping citizens safe. He established the Internet Crimes Against Children Unit to provide specific training for investigators and expanded resources for tracking criminals who intend to exploit children through technology.

In response to a personal call to defend the needs of children who are less fortunate, Attorney General Pruitt worked to negotiate a state settlement through the Department of Human Services that will dramatically improve foster care in Oklahoma. He was awarded the "Hero Award" by the Marland Children's Home for his efforts to prevent closure of the home and eviction of children who are emotionally disabled. In 2011, Attorney General Pruitt received the Humanitarian Award by Oklahoma CARE, a coalition of ministries and providers who deliver care for troubled children and their families.

Establishing and respecting the Rule of Law is a hallmark of Attorney General Pruitt's administration. In late 2011, Attorney General Pruitt made national headlines when he took the bold step of negotiating an Oklahoma settlement with mortgage servicers instead of joining a 49-state mortgage settlement that exceeded the proper legal role and scope of authority vested in

state attorneys general. The Oklahoma agreement with several of the nation's largest mortgage service providers included $18.6 million in compensatory damages for Oklahomans who were harmed by unfair practices during the foreclosure process.

Before being elected Attorney General, Pruitt served Broken Arrow, Coweta and Tulsa in the Oklahoma State Senate where he served for eight years, four of those as Assistant Republican Floor Leader. In the Senate, he was the leading spokesman for workers' compensation reform, lawsuit reform and greater accountability for government spending. He championed traditional, faith-based legislation that included allowing faith-based organizations to partner with the state in helping prisoners successfully re-integrate into society after their sentences were fulfilled.

Attorney General Pruitt used his experience in the Legislature to transform the AG's Workers' Compensation and Insurance Fraud Unit and the Medicaid Fraud Control Unit. Under his leadership, the fraud units increased prosecutions, hired 12 investigators, secured more than $20 million in Medicaid fraud restitution and worked directly with Oklahoma businesses to educate workers on fraud recognition and reporting.

Attorney General Pruitt's record of defending religious freedoms began during his time in the state Legislature with his efforts to author and successfully pass the Religious Freedoms Act, making Oklahoma one of the first states to pass an act that makes it more difficult for a government to burden an individual's right to practice their faith, especially in public. His efforts continue as Attorney General, joining six states to fight the federal health care mandate that will require religious groups to violate their beliefs. In 2012, Pruitt was selected to serve as a trustee for The Southern Baptist Theological Seminary.

From 2003 to 2010, Attorney General Pruitt was co-owner and managing general partner of the Oklahoma City Redhawks, the Triple-A baseball team in Oklahoma City. The team, under his leadership, regularly rated among the league's leaders in attendance and merchandise sales.

Pruitt grew up in Lexington, Kentucky, where he graduated high school and earned a scholarship to play baseball as a second baseman at the University of Kentucky. He earned a bachelor's degree in communications and political science at Georgetown College before being accepted to the University of Tulsa College of Law. After working his way through law school and earning a Juris Doctorate, Pruitt ventured into private practice, specializing in constitutional and employment law.

The Attorney General and his wife of 22 years, Marlyn, are raising two children, McKenna and Cade, in Tulsa. The Pruitts are members of the First Baptist Church of Broken Arrow, where Pruitt serves as deacon.