

by
Norman W. Fichthorn
and **Aaron M. Flynn**

Norman W. Fichthorn
is a partner and
Aaron M. Flynn is
an associate, both with
Hunton & Williams LLP,
Washington, DC. E-mail:
nfichthorn@hunton.com;
flynna@hunton.com.

Litigating Regional Haze

Answers—and Questions—from the Most Recent Court Decisions

A brief overview of two recent court decisions concerning compliance with the U.S. Regional Haze Program.



Landscape at sunrise,
North Dakota.

Implementation of the U.S. Clean Air Act's (CAA) Regional Haze Program has been a source of controversy since the U.S. Congress enacted the program more than 35 years ago. In recent years, as states have prepared and submitted regional haze State Implementation Plans (SIPs) for review by the U.S. Environmental Protection Agency (EPA), and as EPA has taken action on those SIPs, fundamental disagreements between states and EPA have emerged. Those disagreements

have centered on the roles intended for the state and federal governments in implementing the program and the scope of EPA's discretion to disapprove regional haze SIPs. As discussed below, two recent court decisions have brought these disagreements into sharper focus.

In keeping with the CAA's "cooperative federalism" approach to regulating the nation's air resources, states have exercised policy judgment when

implementing the Regional Haze Program's Best Available Retrofit Technology (BART) requirements. Determining BART for any emission source requires states to consider five factors: the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility that may reasonably be anticipated to result from the use of [BART]. CAA § 169A(g)(2).

EPA's rules and BART Guidelines (which provide states with general instructions on how to conduct a "five factor" BART analysis) emphasize a primary role for state decision-making and significant state discretion. One of the first court decisions to address EPA's regional haze regulations, *American Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002), lends support to such a role for states. In that case, the U.S. Court of Appeals for the D.C. Circuit held that states, not EPA, "play the lead role in designing and implementing regional haze programs" and have "broad authority over BART determinations." *Id.* at 2, 8.

Consistent with that "broad authority," many states in the eastern half of the country chose to rely on compliance with the Clean Air Interstate Rule (CAIR) or CAIR's successor rule—the Cross-State Air Pollution Rule (CSAPR)—to satisfy BART requirements for nitrogen oxides (NO_x) and sulfur dioxide (SO₂) emissions from electric generating facilities within their borders. Western states, which were not subject to CAIR or CSAPR, instead have generally made source-by-source BART determinations for such facilities. Those determinations have varied, but, in many cases, states that did not impose the most stringent emission limits have had their SIPs disapproved by EPA (in whole or in part) and have had many of their emission sources made subject to more stringent requirements through EPA-developed Federal Implementation Plans (FIPs).

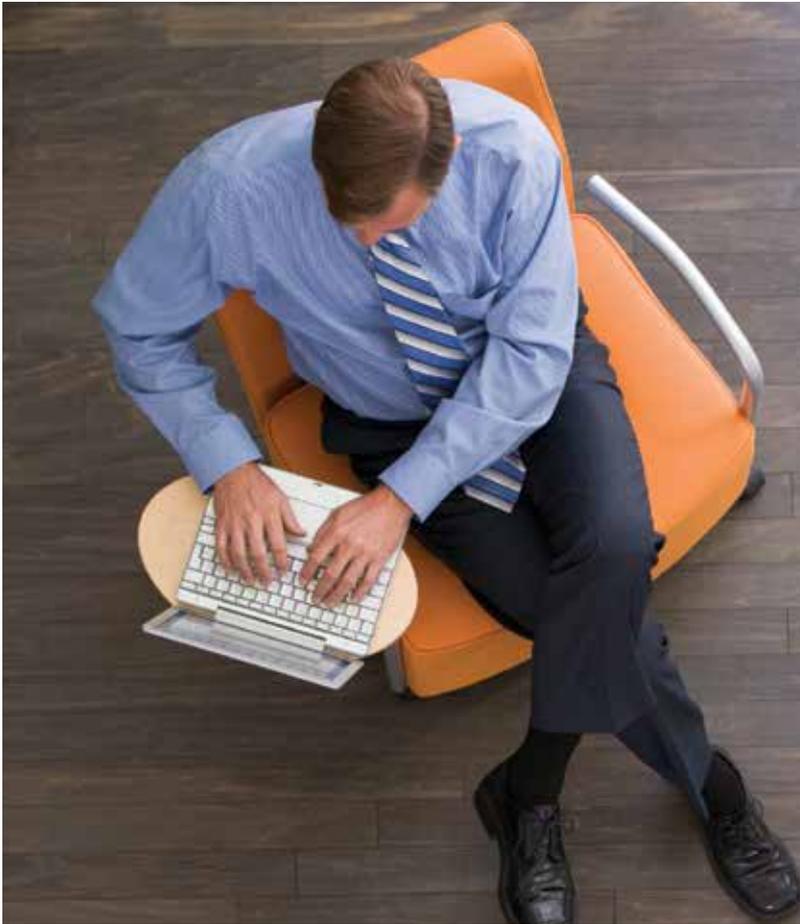
(Note: Whether reliance on CAIR or CSAPR emission reductions to satisfy BART will be determined to be lawful is complicated by those rules' uncertain legal status. In 2008, the D.C.

Court Challenges



Challenges to EPA regional haze actions are pending in the U.S. Courts of Appeals for the Ninth and Tenth Circuits, including in Case No. 12-71523 (9th Cir.) (Nevada); No. 12-73710, et al. (9th Cir.) (Montana); No. 13-70366, et al. (9th Cir.) (Arizona); No. 13-73383, et al. (9th Cir.) (Arizona); No. 11-9552, et al. (10th Cir.) (New Mexico); Nos. 12-9596, et al. (10th Cir.) (New Mexico, Utah, and Wyoming); and No. 13-9520, et al. (10th Cir.) (Colorado). Several of these cases raise issues similar to those in *Oklahoma and North Dakota*, as well as other issues. Other challenges to EPA regional haze determinations have been addressed through settlement or otherwise. *E.g.*, No. 12-73411 (9th Cir.) (Nevada's Reid Gardner Generating Station).

Circuit found CAIR to be legally flawed and directed EPA to replace it with a valid rule, while providing that CAIR would remain effective in the interim. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008). In 2012, the D.C. Circuit reviewed legal challenges to CSAPR and struck it down, preventing CSAPR from taking effect, and directing that CAIR remain in place pending EPA proceedings to develop a new replacement rule. *EME Homer City Generation LP v. EPA*, 696 F.3d 7, 37-38 (D.C. Cir. 2012).



A&WMA Buyers Guide

Tap into the incredible network of the Air & Waste Management Association with the A&WMA Buyers Guide. Powered by MultiView, the Guide is the premier search tool for environmental professionals. Find the suppliers you need, within the network of the association you trust.

Start your search today at awma.org.



AIR & WASTE MANAGEMENT
ASSOCIATION



MULTIVIEW

The issue of CSAPR's legal validity was then brought on appeal to the U.S. Supreme Court. Regardless of the Supreme Court's decision in that appeal, the question whether compliance with CAIR or CSAPR can satisfy BART obligations is likely to be litigated. Cases addressing this question have been filed in various federal appeals courts and are being held in abeyance pending the Supreme Court's decision concerning CSAPR's legal validity.)

This pattern was seen in the two EPA regional haze rulemaking proceedings—for Oklahoma and North Dakota—that have been litigated and for which courts have issued decisions. Regarding Oklahoma, EPA disapproved the state's SO₂ BART determinations (emission limits of 0.65 lb/mmBtu or 0.55 lb/mmBtu, based on use of low-sulfur coal) for two power plants. EPA imposed a FIP requiring expensive scrubbers and setting a 0.06 lb/mmBtu emission rate. Similarly, EPA disapproved, among other provisions, the part of North Dakota's NO_x BART SIP that set a 0.17

lb/mmBtu emission limit for Coal Creek Station, based on combustion controls. EPA imposed a NO_x BART FIP for this facility establishing a 0.13 lb/mmBtu emission rate based on costlier selective noncatalytic reduction (SNCR) controls.

The State of Oklahoma and industry parties challenged EPA's Oklahoma rule in federal court. *Oklahoma v. EPA*, 723 F.3d 1201 (10th Cir. 2013), *petition for cert. filed*, (U.S. Jan. 29, 2014) (No. 13-921). They argued that EPA exceeded its authority and disregarded state discretion by disapproving Oklahoma's SIP and adopting a FIP. The U.S. Court of Appeals for the Tenth Circuit rejected this argument, holding that EPA had "the power to review Oklahoma's BART determination" to ensure it met the CAA's requirements. *Id.* at 1207-08. The court found that Oklahoma had deviated from the BART Guidelines' requirements regarding assessment of compliance costs. *Id.* at 1211-15. This flaw, the court concluded, opened the door to EPA's adoption of a FIP, and, even though the court



found the challenges to the FIP presented “a close case,” it deferred to EPA’s technical findings in support of its FIP. *Id.* at 1217.

The State of North Dakota and Great River Energy challenged EPA’s disapproval of North Dakota’s NO_x BART SIP and EPA’s FIP for Coal Creek Station in *North Dakota v. EPA*, 730 F.3d 750 (8th Cir. 2013), *petition for cert. filed*, (U.S. Feb. 5, 2014) (No. 13-940). The U.S. Court of Appeals for the Eighth Circuit held that EPA’s disapproval of the state’s NO_x BART determination for Coal Creek was justified, concluding that EPA’s role in reviewing SIPs was more than ministerial and that EPA had authority to review whether the state’s BART assessment was “moored to the CAA’s provisions.” *Id.* at 761. The court further concluded that the SIP’s cost assessment was skewed by a substantial and conceded data flaw and that EPA had therefore properly found the SIP inconsistent with the CAA. *Id.* The court, however, also held that EPA’s FIP was inconsistent with CAA requirements because EPA refused to consider, during its own BART assessment, the fact that Coal Creek had installed and was operating a particular type of NO_x emission control. *Id.* at 762. The court rejected EPA’s arguments that it could permissibly disregard emission controls that were installed voluntarily or that were installed after the “baseline period” against which visibility improvements are judged. The court concluded that, under the BART Guidelines, *any* installed emission control must be considered. *Id.* at 764.

EPA and environmental advocacy groups have cited these two court decisions in litigation challenging EPA actions on regional haze requirements for other states; they argue that these decisions support broad EPA authority to disapprove regional haze SIPs and to impose FIPs (see sidebar above “Court Challenges”). Fairly read, however, these decisions do not make broad pronouncements that significantly alter the manner in which regional haze SIPs and FIPs should be judged. For instance, the Tenth Circuit in *Oklahoma* applied a standard of judicial review that it viewed as being based on the long-standing Supreme Court precedent of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Oklahoma*, 723 F.3d at 1207-10. The Tenth Circuit’s affirmance of

EPA’s SIP disapproval, moreover, turned on its finding that Oklahoma’s cost assessment conflicted with a costing methodology that EPA argued was mandatory under the BART Guidelines—a methodology that the challenging parties, according to the court, had failed to argue was merely optional. *Id.* at 1211-15. Similarly, the conceded, substantial data flaw that invalidated North Dakota’s SIP determination differs significantly from the BART-related policy choices that are available to states under the CAA.

For these reasons, it is most appropriate to view these two recent judicial decisions as being largely confined to the facts presented in the specific rulemakings at issue—and not as dramatically affecting the respective roles of EPA and states under the CAA’s visibility provisions. Because petitions for Supreme Court review of the decisions have been filed, that Court soon will have an opportunity to decide whether to weigh in on this increasingly contentious issue. **em**

The Committee for the Professional Development of Women Luncheon

Tuesday, June 24
Long Beach, California



This fantastic event is part of A&WMA’s 2014 Annual Conference & Exhibition and will include a hands-on, skills-building program, followed by lunch and a keynote address by **Judy B. Yorke, President of Yorke Engineering.**

All attendees will receive a complimentary ticket to a Networking Event on Thursday, June 26.

Learn more at <http://ace2014.awma.org>.