**A Communication from the Chief Legal Officers of the Following States:**

**Arkansas * Alabama * Colorado * Kansas**
**Michigan * North Dakota * Oklahoma * South Carolina**

August 10, 2016

Air and Radiation Docket and Information Center
U.S. Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

*RE: Docket ID No. EPA-HQ-OAR-2015-0531. Protection of Visibility: Amendments to Requirements for State Plans*

Dear EPA Air and Radiation Docket Information Center:

We write with respect to the proposed amendments to the regulations governing state plans for the protection of visibility in Class I federal areas under the Clean Air Act ("Regional Haze Rule") set forth at 81 FR 26942. If adopted, the proposed amendments would dramatically alter existing definitions, divest the states of their long-established role in determining what is a reasonably attributable visibility impairment source or set of sources, dramatically expand the authority of Federal Land Managers ("FLMs") at the expense of the states, replace measurable impairment standards with amorphous and ill-defined concepts, and cast aside the understood link between reasonable progress and long term goals. In many cases, the amendments would also fail to accomplish the agency's purported goals. Further, the proposed rule fails to consider the implications of many proposed changes, does not examine the effect of those revisions on states, businesses, and consumers, and does not address other significant issues identified in the proposed rule. Consistent with the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, the agency has a duty to fully consider and address those issues.

*A. Redefining Established Terms*

The proposed amendments would alter numerous definitions in a way that is inconsistent with the plain text of the Clean Air Act ("CAA"), would unnecessarily introduce regulatory uncertainty, and would improperly reduce the role of the states in accomplishing the CAA's goals.

- Visibility Impairment

The proposed redefinition of "visibility impairment" conflicts with the CAA's plain text and, if adopted, would create an ill-defined and unmeasurable standard. Under the CAA, that term means "reduction in visual range and atmospheric discoloration." 42 U.S.C. 7491(g)(6). As that language indicates, visibility impairment must be measureable. And although it arguably does not provide entirely clear direction, the existing visibility impairment definition at least attempts to provide a description consistent with that requirement by defining visibility impairment as "any humanly perceptible change in visibility (light extinction, visual range, contrast, coloration) from that which would have existed under natural conditions." 40 C.F.R. 51.301.

Rather than revise the existing definition to provide clearer guidance or offer a different definition consistent with the CAA's text, the proposed amendments do the opposite. To start, contrary to the CAA's plain text, the proposed redefinition states that "visibility impairment" cannot be measured but only "estimated or inferred." 81 FR 26969/3. The redefinition also eliminates references to specific items—light extinction, visual range, contrast, and coloration—that can be quantified and analyzed to determine visibility impairment. *Id.*; *see also* 81 FR 26969/2 (creating new "Natural visibility conditions" term that only considers estimates or inferences of "contrast, coloration, and texture"). That change likewise conflicts with the CAA's measurability requirement. For that reason, the redefinition should be rejected as contrary to law.

In addition to being an unlawful interpretation of the CAA, the proposed redefinition should be rejected because it is vague and unclear. In effect, the agency has proposed replacing a standard for determining visibility grounded on measuring specific items with an ill-defined conceptual approach that involves "estimate[ing] and inferr[ing]" changes in unspecified items. That approach introduces regulatory uncertainty and fails to provide a standard that states, regulated entities, citizens, courts, or even the agency itself can apply in evaluating circumstances or implementation plans. That lack of clarity, moreover, is amplified by other proposed revisions, the introduction of new terms, and the employment of the new visibility impairment definition in several other provisions. *See, e.g.*, 81 FR 26954/3 (revised definition's application to other amendments).

The proposed redefinition would also impose increased costs, and the proposed rule does not demonstrate that the agency has considered those costs. For instance, although concluding that other revisions may lower compliance costs, the proposed rule contains absolutely no consideration of the additional expenses that states and the agency will incur in estimating and inferring visibility changes from unknown factors rather than measuring those changes. *See, e.g.*, 81 FR 26967/3 (only considering costs savings but failing to consider additional costs); 81 FR 26968/1-2 (failing to consider effects on regulated entities and others). It likewise contains no consideration of the costs that will be incurred as a result of the uncertainty created by

introducing a new and vague redefinition instead of retaining an existing definition that states, regulated entities, and the agency generally understand. The proposed rule further demonstrates that the agency has failed to consider the costs that will be incurred in developing standards and methodologies for estimating and inferring changes. And the proposed rule does not consider litigation costs that will be incurred as states, regulated entities, the agency itself, and courts struggle to apply a novel and vague redefinition. Before adopting a redefinition, the agency should consider whether those increased costs can be justified by the redefinition's purported benefits.

Instead of focusing on "estimate[s] and infer[ences]" of undisclosed items to determine "visibility impairment," the agency should adopt a definition consistent with the CAA. That definition should provide specific and identifiable criteria for measuring "reduction in visual range and atmospheric discoloration." Items relevant to that determination would—as the agency has long recognized—include metrics for determining visual range, contrast, and coloration. Alternatively, the agency should allow states to define "visibility impairment" for purposes of drafting and implementing the CAA's provisions based on the best available local information.

- Reasonably Attributable

The proposed amendments would unnecessarily and unjustifiably divest the states of their long-established role in determining what is a reasonably attributable visibility impairment source or set of sources. *See* 81 FR 26945/2. Under current regulations, "Reasonably attributable means attributable by visual observation or any other technique the State deems appropriate." 50 C.F.R. 51.301. By contrast, the proposed amendments would define that term to mean "attributable by visual observation or any other appropriate technique." 81 FR 26962/1. Purportedly, "[t]he proposed change would make it clear that a state does not have complete discretion to determine what techniques are appropriate for attributing visibility impairment to specific sources." *Id.*

But the proposed redefinition does not accomplish that goal. Instead, the redefinition implies that the states will no longer have *any* role in determining those techniques. An implication underscored by language in the proposed rule making clear that, it is FLMs and not the states that "certify[] reasonably attributable visibility impairment" (*id.*) and other proposed revisions greatly expanding the role of FLMs. *See, e.g.*, 81 FR 26962/2; *see also infra* at pp. 6-7. Because the CAA makes clear that states play a critical role in achieving natural visibility conditions, this change should be rejected as contrary to the law. *See, e.g.*, 42 U.S.C. 7491. As explained later, had the agency properly reviewed the federalism implications of the proposed amendments, it would also have declined to divest the states of their deep-rooted role in determining what is reasonably attributable. Alternatively, consistent with cooperative federalism, the agency should adopt an approach whereby the agency and the states play equal roles in determining acceptable techniques. Or, as another option, the proposed amendments

should be revised to limit the agency's role to suggesting possible techniques with the states determining—based on their knowledge of local conditions—which technique would work best.

Additionally, to the extent the agency intends to revise the definition of reasonably attributable along the lines proposed, it must develop standards or a metric by which technology and methods may be judged. Indeed, while stating that the agency will determine "whether any attribution technique used is appropriate," the proposed rule does not contain any standard for determining whether a technique is appropriate. 81 FR 26962/1-2. To the contrary, the proposed rule emphasizes that the "universe of potentially appropriate attribution techniques is not limited to only" proven and verified methodologies but may include other techniques. 81 FR 26962/1. Without such metrics—or state involvement that could cabin agency preference—the proposed redefinition would create limitless agency discretion contrary to Congress' intention that the agency develop methodologies for implementing the CAA.

*B. Newly Defined Terms*

The proposed amendments also contain numerous new and ill-defined terms that as proposed would radically alter—or in many cases further modify—existing terms, regulatory concepts, and understood practices. For example, the proposed amendments define "visibility" for the first time as "the change in optical clarity when viewing objects at a distance." 81 FR 26955/2. As the proposed rule notes, visibility is "used in the definition of several other important terms." *Id.* Despite that, the proposed rule does not explain why the agency has proposed to define visibility in the manner that it has, evaluate or explain how defining that term for the first time will affect other definitions, whether that definition is consistent with existing practice, or consider what costs might result from adopting a new definition. The proposed rule also does not explain how or why the agency chose to incorporate the phrase "perceived changes in contrast, coloration, and texture elements in a scene" (81 FR 26969/3) into its visibility definition instead of the established principle that visibility consists of a combination of "light extinction, visual range, contrast, [and] coloration" (40 C.F.R. 51.301). Indeed, if anything, employing that established principle is likely to impose fewer costs associated with compliance and establishing the confines of a new concept; a fact that is underscored by the agency's failure to so much as consider the costs associated with introducing a new concept. *See, e.g.*, 81 FR 26967/3 (only considering costs savings); 81 FR 26968/1-2 (failing to consider effects on non-state parties).

Similarly, the proposed amendments would introduce the defined term "natural visibility conditions." 81 FR 26955/2. As above, although that newly defined term would affect numerous other existing provisions and uproot established practice, the proposed rule does not analyze those changes or explain why existing concepts are not used to define that term. Further, the proposed definition of "natural visibility conditions" conflicts with the CAA's measurability requirement, introduces expensive regulatory uncertainty, and fails to provide a standard that can be applied by defining that term simply by reference to "estimate[s] and infer[ences]" (81 FR

26969/2). Rather than introduce ill-defined terms and create expensive regulatory uncertainty, the agency should use established principles to define those terms. Alternatively, states should be permitted to develop definitions suited to local conditions.

*C. Change in How Least and Most Impaired Days are Selected*

The agency has also proposed revising how the most and least impaired days are selected. Currently, the days with the highest and lowest measured deciview levels are selected as the least and most impaired days. 81 FR 26954/3. The proposed amendments would replace this objective standard with "an approach focusing on anthropogenic impairment in particular." *Id.* That change, as the proposed rule notes, would significantly alter the existing regulatory framework. *See* 81 FR 26948/1-2 (explaining change would depart from consistent practice); 81 FR 26954/2-3 (recognizing change would uproot accepted state practices and depart from repeated EPA guidance). That amendment is not justified by the proposed rule, is inconsistent with accepted, established, and understood practice, and would depend on standards that have yet to be developed or submitted for public comment.

Critically, the proposed amendment would create regulatory uncertainty—and drive up compliance and other costs—by replacing an objective, measurable deciview-based standard with an amorphous approach that estimates what are the most impaired days based on a vague and unclear combination of unspecified impairments. *See* 81 FR 26955/1 (proposing to "revise definitions . . . to make clear that the 20 percent most impaired days should be selected based on anthropogenic visibility impairment rather than based on the days with the highest deciview values due to impacts from all types of sources"). The proposed rule purports to justify the revision on the grounds that it would allow exclusion of naturally occurring impairments from the selection process (81 FR 26948/2; 81 FR 26955/1; 81 FR 26956/1-2), but as the proposed rule acknowledges, the current rule already allows for the exclusion of those impacts. *See* 81 FR 26954/3 (current rule "suggests that only visibility impacts from anthropogenic sources should be included when considering the degree of visibility impairment"). The agency should not replace an objectively measurable standard to take account of factors that the current rule already considers.

Even if the agency otherwise believes an amendment is necessary, it should also decline to adopt the proposed rule until it incorporates suggested methodologies for "determining natural contributions to daily haze and thus the degree of visibility impairment for each monitored day" (81 FR 26955/3) into the proposed rule and receives comments on them. The proposed rule concedes that, "[i]n order to select the 20 percent most impaired days based on the days with the most anthropogenic impairment, natural contributions to daily deciview values *must be estimated by some method.*" *Id.* (emphasis added). Nevertheless, the proposed rule declines to establish, suggest, list criteria for evaluating potential methodologies, or recommend a methodology for so doing. 81 FR 26956/1. Rather, the proposed rule simply suggested that at some point the agency would "issue guidance describing a recommended approach." *Id.* Although the agency recently

issued what it styles nonbinding "Draft Guidance" suggesting a potential methodology, it is unclear why that methodology was not included in the proposed rule. *See* Draft Guidance on Progress Tracking Metrics, Long-term Strategies, Reasonable Progress Goals and Other Requirements for Regional Haze State Implementation Plans for the Second Implementation Period, U.S. Environmental Protection Agency, EPA-457/P-16-001 (July 2016), *available at* https://www.epa.gov/sites/production/files/2016-07/documents/draft_regional_haze_guidance_july_2016.pdf ("Draft Guidance"). Indeed, if the proposed rule rests on there being a way to determine impairment for each monitored day, the rule should set forth the methodology for so doing. And the agency's issuance of that methodology in the form of—what it argues is—nonbinding guidance that, even after comment and adoption, "is not judicially reviewable" (*id.* at p. 1) is little more than an attempt to improperly shield that methodology from scrutiny.

Further, though both the proposed rule and the draft guidance submit that "[b]ecause no particular method would be prescribed by rule states could develop, justify and use another method," neither contains any real direction on how the agency would evaluate those methodologies. 81 FR 26956/1; *see* Draft Guidance, p. 28 ("States may deviate from these recommendations if they demonstrate an adequate basis for taking another approach. The EPA recommends that a justification for an alternative approach include a comparison of the state's approach with the approach recommended here, including an explanation of why the state's approach is more appropriate and how it affects the comparison of the RPG to the URP line."). Thus, the agency should incorporate its suggested methodology and criteria for evaluating deviations from that methodology into the proposed rule and receive comments on it before issuing any final rule that relies on that suggested methodology. Alternatively, if the agency still intends to adopt the proposed changes, the proposed amendments should be revised to empower the states—which are closest to the conditions on the ground—to adopt standards appropriate to local conditions without agency interference.

*D. Expanding the Authority of Federal Land Managers*

By vesting them with complete and unfettered authority to select methodologies for determining what is reasonably attributable, the proposed amendments vastly increase the authority of FLMs. *See, e.g.*, 81 FR 26962/1-2; *see also supra* at p. 3 (discussing change). Indeed, even though the agency would retain the ultimate power to determine acceptability, the proposed amendments would grant FLMs the authority to make those determinations pending agency review without confining their discretion to make those determinations. Rather than adopting such an approach, the agency should reject the amendments to the definition of "reasonably attributable" or develop standards—along the lines suggested above—cabining the discretion of FLMs.

The proposed amendments would likewise empower FLMs to identify impairment sources without providing any limits on that power. *See* 81 FR 26962/3. That change is particularly significant because under other proposed amendments every state would now be

subject to those determinations. 81 FR 26961/3; 81 FR 26969/1. The proposed rule does not analyze the significance of vesting FLMs with such broad authority to require states to revise their implementation plans. *See* 81 FR 26962/2 (recognizing that an FLM's determination would require a state to revise its implementation plan). Instead of vesting FLMs with such broad authority, the agency should adopt amendments allowing the relevant states to confer, consult FLMs, and make then make those determinations.

*E. Failure to Consider International Impacts*

The proposed rule correctly recognizes that international sources impact visibility. But the proposed amendments do not provide any methodology that a state may employ to account for those impacts or explain how the agency will determine whether an adjustment for those impacts is appropriate. In fact, although the amendments would allow states to take natural impacts from international sources into account, as explained above, the agency has declined to provide a methodology for so doing. *See* 81 FR 56956/1.

Likewise, the proposed amendments fail to explain how anthropogenic impacts from international sources will be considered in determining visibility and reasonable progress. The proposed rule acknowledges that with respect to such sources, "[i]t is the role of the federal government, much more than the states, to work with other countries to make such reasonable progress." 81 FR 56956/2. Thus, the proposed rule concludes that, "it may be appropriate to allow states to adjust the reasonable progress goal framework . . . to explicitly take into account international impacts from anthropogenic sources." *Id.* Despite that, the proposed amendments do not provide any method by which the states, the agency, or courts may consider those impacts. *See id.* To the contrary, the proposed rule admits that—though international impacts are the federal government's responsibility—the agency has given up on attempting to estimate those impacts or developing guidance on how states can calculate them. *Id.* ("The EPA has further considered possible approaches regarding the impacts from anthropogenic sources in other countries, including border countries as well as more distant countries such as China," but declining to provide a way to determine those impacts); *id.* ("[W]e are not convinced that such impacts can be estimated with sufficient accuracy at this time."). Though the proposed rule argues that the failure to provide a methodology is justified because there is "great uncertainty about past, present and future emissions from sources in most other countries," (*id.*) it does not explain that conclusion or how the agency might review state attempts to make such calculations.

Moreover, even while conceding that it is incapable of calculating international impacts, under the proposed amendments, the agency would enjoy unfettered discretion to reject proposed state methodologies for performing those calculations. *See* 81 FR 26956/2-3 (EPA will review state approaches on a case-by-case basis). That approach is illogical because if the agency admits that it lacks the competence to perform those calculations, it should not retain discretion to judge state methodologies for so doing. To the contrary, in the absence of an alternative scientifically valid methodology for performing those calculations, the agency should be required

to accept state calculations. Alternatively, the agency should adopt an approach that presumes the validity of a state methodology for performing those assessments unless the agency can affirmatively demonstrate by clear and convincing evidence that the state methodology is unworkable and demonstrably scientifically invalid. Then, in either case, at a minimum, states could properly consider international impacts and would not be required to remedy effects beyond their control. Presuming the validity of state calculations and placing the burden of rebutting those calculations on the agency also makes policy sense because it places the burden of rebutting calculations on the entity best situated to resolve any ambiguity or work with other countries to reduce those impacts. *See* 81 FR 56956/2 (noting federal responsibility to establish reasonable progress with respect to international impacts).

Further, the proposed amendments also rely on the unjustified assumption that "explicit consideration of impacts from anthropogenic sources outside the U.S. would [not] actually affect the conclusion that states should make about what emissions controls for their own sources are needed for reasonable progress." 81 FR 26956/2. The proposed rule does not explain the basis for that assumption, and it conflicts with the proposal that states be required to exclude natural impacts from international sources because those impacts could influence their calculations. *See* 81 FR 26956/1-2; *see also* 81 FR 26955/1 (determining it is necessary to exclude domestic natural impacts from reasonable progress calculations); 81 FR 26948/2 (similar); 81 FR 26956/1-2 (similar). That is particularly true since, as the proposed rule admits, there is "great uncertainty about . . . future emissions from sources in most other countries" (81 FR 26956/2) and those impacts will likely increase over time and thereby affect whether states can demonstrate reasonable progress or reach natural conditions. Similarly, the conclusion above conflicts with the proposed rule's acknowledgment that "taking international impacts into account in some cases may affect whether a state (and contributing states) are subject to the requirements of proposed § 51.308(f)(3)(ii) regarding a demonstration that there are not additional emissions reduction measures needed for reasonable progress." 81 FR 26956/2. Consequently, the proposed amendments should be modified to avoid imposing additional requirements on states due to impacts from international anthropogenic sources beyond their control.

*F. Altering the Relationship Between Reasonable Progress and Long Term Goals*

The proposed amendments would uproot the understood nexus between reasonable progress and long term goals and dramatically redefine those terms. Specifically, the proposed amendments would make two fundamental changes. First, in contrast to the existing rules, the proposed amendments would require states to determine strategies for making reasonable progress toward natural visibility conditions before establishing long term goals. *See* 81 FR 26952/2-3. And second, the proposed amendments would abolish the long-established sequential process by which downwind states containing Class I areas establish reasonable progress goals and then consult with upwind states that contribute to visibility impairment in Class I areas to help achieve those goals. *See* 81 FR 26952/3; 81 FR 26961/3-26962/1. Instead, under the proposed amendments, upwind states would be forbidden from relying on goals

established by downwind states and would be required to conduct and adopt policies consistent with their own reasonable progress analysis of visibility impairments in downwind states. Those changes are unnecessary and illogical.

The proposed rule does not explain why the proposed amendments are necessary. To the contrary, although the proposed rule claims that the amendments are a clarification, the agency concedes that, "the regional haze SIPs submitted by the states during the first planning period generally demonstrated a clear understanding of the connections between" reasonable progress and long term goals. 81 FR 26952/1. In fact, at most, the proposed rule argues the amendments are necessary because of unidentified and unexplained statements "by some owner of industrial sources." *Id.* The reliance on such undisclosed statements, however, contradicts other parts of the proposed rule arguing that regulatory impacts on entities other than states are not relevant. *See* 81 FR 26968/1. At a minimum, the agency should address that inconsistency and evaluate whether the proposed amendments can be justified when the impacts on non-state entities are fully considered.

The proposed revisions are also illogical and, if adopted, would result in unnecessary regulation. At the most basic level, the proposed amendments are irrational because they would require states to devise strategies to achieve certain results before even attempting to establish progress goals. *See* 81 FR 26952/2-3. It is unclear how the states could develop strategies before establishing reasonable progress goals and the proposed rule makes no attempt to explain how such an approach is more logical than the current system. Further, even if it is possible to establish strategies before setting goals, so doing would invariably result in overregulation and impose unnecessary costs. For instance, as envisioned in the proposed rule, under the proposed amendments, states would be required to set emissions limits and impose additional source controls before determining what goals would achieve natural visibility conditions. *See* 81 FR 26949/2-3; 81 FR 26953/3; 81 FR 26972/3-26973/1. And not to impose such limitations, under the proposed amendments, a state or contributing state "must provide a robust demonstration." 81 FR 26953/3-26954/1. In effect, then, the proposed amendments would require limitations that may not be justified to achieve reasonable progress toward natural visibility conditions. The proposed rule—especially in light of the agency's acknowledgment that states have made progress toward achieving natural visibility conditions—does not justify imposing limitations before any determination is made concerning whether those limitations are actually necessary. Therefore, the revisions should be rejected. Alternatively, states should be given greater flexibility in setting long term strategies and reasonable progress goals with the agency required to presume the validity of those measures.

When applied to states that do not contain Class I areas, the problems created by the proposed amendments are even more acute. For example, under the proposed amendments, an upwind state could not rely on a downwind state's reasonable progress goals to determine and develop strategies to address their contribution to visibility impairment. Instead, they would be required—like the state containing a Class I area—to develop long term strategies first. *See* 81

FR 26952/3; 81 FR 26961/3. Aside from the problems highlighted above, this approach would also encourage infighting among the states with states setting different reasonable progress goals instead of jointly working toward the downwind states' goals. And those problems are amplified to an even greater degree by the fact that the proposed amendments would now require all states to engage in that analysis.

Lastly, the proposed rule incorrectly asserts that the proposed amendments "are consistent with the EPA's long-standing interpretation of the existing regulations." 81 FR 26952/1 (footnote omitted). To support that claim, the proposed rule cites only the agency's dubious—and recently rejected—legal justification for disapproving state implementation plans from Texas and Oklahoma. *Id.* at n. 23; *see Texas v. EPA*, No. 16-60118 (5th Cir. July 15, 2016), *slip op.*, at pp. 28-33 (concluding challenge to disapproval is likely to succeed and staying EPA's action). Indeed, as the United States Court of Appeals for the Fifth Circuit explained in rejecting what the proposed rule calls a long-standing interpretation, that approach is not only new but contrary to law and arbitrary and capricious. *See id.* at p. 28 ("EPA exceeded its statutory authority by disapproving the Texas and Oklahoma reasonable progress goals even though the goals complied with the Clean Air Act's standards."); *id.* at 31-33 (rejecting EPA's disapproval of Oklahoma's consultation with Texas); *see also* Comment Letter of Texas Commission on Environmental Quality in Docket No. EPA-R06-OAR-2014-0754, dated April 20, 2015, at pp. 5-7; *Luminant Generation Comp., LLC, et al. v. EPA*, Case No. 16-9508, (10th Cir.). And if anything, the proposed amendments appear to be little more than a thinly veiled attempt to justify the agency's rejection of those plans and the amendments should, therefore, be rejected.

*G. Changes to Progress Reports*

In order to reduce the compliance burden on states, the proposed rule eliminates the requirement that progress reports be formulated as a revised state implementation plan ("SIP"). *See* 81 FR 26966/2-3. The agency has correctly concluded that the current requirements are overly burdensome and time consuming and ought to be reduced and streamlined. Unfortunately, the proposed amendments will not accomplish those goals. *See* 81 FR 26966/3 (theorizing amendment may enable states to sidestep their own legal requirements). To the contrary, even if a state opts to submit a progress report that does not take the form of a SIP, states will still be required to "take one of four listed actions concerning whether the SIP is adequate to achieve established goals for visibility improvement" and, if not, the state would still "continue to have an obligation to revise its SIP." *Id.*

Rather than adopting the proposed amendments, to accomplish the agency's stated goal, the agency should eliminate the proposed requirement that states consult with FLMs in drafting progress reports. *See* 81 FR 26945/3 (proposing to require states to consult with FLMs in drafting progress reports). Or, at a minimum, that agency should reject the proposed expanded consultation requirement. *See* 81 FR 26965/1 (proposing to "add a requirement that [FLMs]

consultation occur . . . no fewer than 60 days prior to public hearing or other public comment opportunity").

The proposed amendments would also change the contents of those reports. In particular, they provide that "the period for calculating current visibility conditions is the most recent rolling 5-year period for which IMPROVE data are available as of a date 6 months preceding the required date of the progress report." 81 FR 26960/1. The proposed rule claims the six month "period would be sufficient for states to incorporate the most recent available data" based on the assumption that non-SIP progress reports would be "simpler" and may be completed more "expeditious[ly]" than progress reports containing SIPs. *Id.* But as explained above, the proposed amendments actually impose additional compliance burdens, and given those burdens, the six month period for compiling data will not be sufficient for most states. Instead, states should be allowed a 12-month or longer period to gather relevant data.

*H. Amended SIP Due Dates*

The proposed amendments would change the dates on which SIP revisions are currently due to allow "states to coordinate regional haze planning with other regulatory programs, including but not limited to the Mercury and Air Toxics Standards, [regulations concerning national ambient air quality standards], and the Clean Power Plan." 81 FR 26965/2 (footnotes omitted); *see* 81 FR 26944/3. Consistent with that goal, under the proposed amendments, states would "gather more information on the effects of these programs and develop periodic comprehensive SIP revisions that are more integrated with state planning for these programs." 81 FR 2695/3.

The problem with this rational is that—as the proposed rule grudgingly recognizes—those regulatory programs rest on dubious legal grounds, are currently subject to challenge, and in at least one case have been stayed by the United States Supreme Court. *See, e.g.,* 81 FR 26965/2 n.51 (conceding "[t]he compliance deadlines in the Clean Power Plan have been stayed by the Supreme Court"). As currently framed, therefore, the proposed amendments are little more than a thinly veiled attempt to pressure the states into complying with those unlawful and unenforceable regulatory programs. The agency also may not rely on unenforceable regulatory mandates to adopt other changes. And consequently, the proposed amendments must be revised to consider those facts. Further, because the proposed date change is interregnal to numerous other parts of the proposed amendments, the agency must also modify those other proposed amendments. *See, e.g.*, 81 FR 26953/2 (uniform progress rate).

*I. Unjustified Expansion of the Regional Haze Rule's Reach*

Under the proposed amendments, all states would suddenly—and for the very first time—be subject to the regional haze rule regardless of whether they are home to a federal Class I area or a contributing source. *See* 81 FR 26961/3; 81 FR 26969/1. According to the proposed rule, that vast application of the rule's reach is justified by "the evolved understanding that

pollutants emitted from one or a small number of sources can affect Class I areas many miles away" and the change "would provide these [Class I] areas with additional protection from reasonably attributable visibility impairment." 81 FR 26961/3-26962/1.

This amendment is wholly unnecessary and will not achieve any additional benefits because to the extent that there is a demonstrable relationship between out-of-state sources and visibility in a Class I area, that source is already subject to the rule. The proposed amendments are also contrary to the law because nothing in the CAA indicates that Congress intended the regional haze rule to apply to every state. *See* 42 U.S.C. 7491(b) (limiting Regional Haze Rule to states containing Class I areas and states that can reasonably be anticipated to contribute to impairment those areas). Therefore, the proposed amendments would unlawfully impose requirements on states without any basis beyond the generalized—and unexplained—assumption that pollutants from one state may eventually affect others.

*J. Failure to Conduct a Regulatory Flexibility Analysis*

The proposed rule does not contain the required regulatory flexibility analysis or justify the failure to conduct that analysis. *See* 81 FR 26968/1. The agency acknowledges that the proposed amendments will indirectly affect numerous sources that emit visibility impairing impurities, including particulate matter less than or equal to 10 and 2.5 microns in diameter, sulfur dioxide, nitrogen oxides, and volatile organic compounds. 81 FR 26942/3-264943/1. Given that, the agency is required to conduct a regulatory flexibility analysis.

*K. Failure to Follow Executive Order 13132*

Lastly, the proposed rule fails to comply with Executive Order 13132's requirement that agencies consider a rule's federalism implications. To justify that failure, the proposed rule bizarrely concludes that the amendments, "will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power" between those entities. 81 FR 26968/2.

But the proposed amendments would fundamentally alter the relationship between the states and federal government in numerous ways, including, *inter alia*, by: 1) divesting the states of their long-established role in selecting methodologies for determining what is reasonably attributable (81 FR 26962/1-2); 2) vastly expanding the authority at FLMs at the expense of the states (*see* 81 FR 26962/1-2; 81 FR 26965/1); 3) requiring states to assume responsibility for calculating international impacts that are the federal government's responsibility (81 FR 26956/2-3); 4) imposing expanded consultation requirements on state governments (81 FR 26965/1); and 5) rendering every state subject to the regional haze rule (81 FR 26961/3-26962/1). Accordingly, the agency is required to consider the federalism implications of those actions.

Under the APA, the agency has a duty to fully consider and address those issues before issuing a final rule.

Regards,

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