Comments Prepared by the Competitive Enterprise Institute
EPA Draft Rule "National Ambient Air Quality Standards for Particulate Matter"
Docket No. EPA-HQ-OAR-2007-0492
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1. A Secondary NAAQS for Visibility Either Conflates or Conflicts with the Regional Haze Program; If the Latter, Then Serious Federalism Concerns Are Raised

In the proposed rule, EPA repeatedly discusses how a revised secondary NAAQS for fine particulate matter would work "in conjunction" with the Regional Haze Program.[1] Yet this cannot be true. In fact, a revised secondary NAAQS necessarily would either conflate or clash with the Regional Haze Program. And where a secondary NAAQS conflicts with the Regional Haze Program, it would raise serious concerns

Under the Regional Haze Program, States must submit state implementation plans that include "emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal."[2] The "national goal" is defined by the Code of Federal Regulations as "natural visibility conditions by the year 2064."[3] All fifty States are subject to the Regional Haze Program.

Due to its comprehensive purpose (pristine air by 2064) and participation (all 50 States are subject), the Regional Haze Program is "more protective than a secondary NAAQS,"[4] as EPA notes in the proposed rule. This raises the question: How is it possible for the Regional Haze Program, which is "more protective than a secondary NAAQS," to protect visibility at a level that is insufficiently "requisite to

[1] "As in past reviews, the EPA is also considering that the secondary NAAQS should address PM-related visibility impairment in conjunction with the Regional Haze Program, such that the secondary NAAQS would focus on protection from visibility impairment principally in urban areas in conjunction with the Regional Haze Program that is focused on improving visibility in Federal Class I areas"; and, 77 FR 38990, "As in past reviews, the EPA is considering a national visibility standard in conjunction with the Regional Haze Program as a means of achieving appropriate levels of protection against PM-related visibility impairment in urban, non-urban, and Federal Class I areas across the country."
[2] 42 USC §7491(b)(1)(2)
[3] 40 CFR §51.308(d)(1)(i)(B)
[4] 77 FR 38966, "The regional haze visibility goal is more protective than a secondary NAAQS since the goal addresses any anthropogenic impairment rather than just impairment at levels determined to be adverse to public welfare."

protect the public welfare"[5] (the statutory purpose of a secondary NAAQS), and thereby necessitate the need for a secondary NAAQS?

EPA tries to square this circle by claiming that there is a functional difference between the Regional Haze Program and a secondary NAAQS for fine particulate matter, whereby the former protects visibility in rural areas, while the latter addresses visibility impairment in urban areas.[6] This is a dubious distinction. For starters, many urban areas (for example, Knoxville, Tennessee) are located just a short distance

upwind of Class 1 areas. More importantly, fine particles are frequently transported hundreds of miles, which means that it is impossible to attain pristine air conditions in Class 1 areas without also mitigating visibility-impairing emissions from urban areas. Accordingly, EPA requires that each State include, in their Regional Haze state implementation plans, a long term strategy that "consider[s] major and minor stationary sources, mobile sources, and area sources," in order to establish "enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals." Thus, the Regional Haze Program already addresses urban visibility impairment, in a fashion that is "more protective" than a secondary NAAQS. It follows that a secondary NAAQS for visibility merely duplicates the purposes of the Regional Haze Program. And that's the best case.

At worst, a secondary NAAQS for fine particulate matter actually clashes with the Regional Haze Program. This point is illustrated by the following hypothetical example. Consider State X, which has an EPA-approved Regional Haze state implementation plan that ensures reasonable progress towards a national goal of natural visibility conditions by the year 2064. If an urban area within State X is designated as being in non-attainment for a secondary PM 2.5 NAAQS to protect visibility, then that would mean that State X's reasonable progress goals are unreasonable.

Such a conflict (i.e., nonattainment of a secondary PM 2.5 NAAQS within a State that has an approved Regional Haze state implementation plan) would confuse Clean Air Act authorities on visibility protection policy. The Congress afforded States a unique degree of primacy on Regional Haze (relative to other provisions of the Clean Air Act). As articulated by the D.C. Circuit Court, "states…play the lead role in designing and implementing Regional Haze programs" generally, and that, in particular, the Clean Air Act "giv[es] the states broad authority over BART determinations."[7] States do not enjoy the same prerogatives on the design and implementation of NAAQS. In the hypothetical scenario described in the previous paragraph, State X could lose its rightful primacy on visibility.

EPA should elaborate on how these two regulatory regimes that address visibility protection would interact. EPA's explanation of the functional difference between the regulations (i.e., that one protects urban visibility and the other protects rural visibility) is unpersuasive. Of most concern is the failure of the proposed to rule to explain how a secondary NAAQS would conflict with State primacy under Regional Haze, in the case of secondary NAAQS non-attainment within a State that has approved reasonable progress goals.

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[5] 42 USC §7409)b)(2)

[6] See footnote 1

[7] American Corn Growers v. EPA, 291 F.3d at 2, 8(citing CAA §§ 169A(b)(2)(A); 169(A)(g)(2).