

Comments Prepared by the Competitive Enterprise Institute
EPA Draft Rule “Approval and Promulgation of Implementation Plans; Arkansas; Regional Haze State Implementation Plan; Interstate Transport State Implementation Plan To Address Pollution Affecting Visibility and Regional Haze”
Docket No. EPA-R06-OAR-2008-0727

Clean Air Act section 110(a)(2)(D)(i), also known as the “Good Neighbor Provision,” requires that each State Implementation Plan (SIP) include adequate measures to prohibit emissions that adversely affect, or “interfere,” with another state’s compliance with federal air quality mandates, through the interstate transport of air pollutants.

Specifically, section 110(a)(2)(D)(i) requires that each state’s SIP must “contain adequate measures...prohibiting...any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

- (I) Contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any primary or secondary air quality standard, or
- (II) Interfere with measures required to be included in the applicable implementation plan for any other State to prevent significant deterioration or to protect visibility.”

In April 2008, Arkansas submitted a State Implementation Plan revision (“Interstate Transport SIP”) to address its Good Neighbor Clean Air Act obligations triggered by the 1997 8-hour ozone and fine particulate matter National Ambient Air Quality Standards (“NAAQS”). Section 110(k)(1)(B) of the Clean Air Act requires the Environmental Protection Agency (“EPA” or “the Agency”) to act on a SIP revision within 18 months. However, EPA waited until October 17, 2011—nearly two years later than the Clean Air Act requires—to propose to “partially approve and partially disapprove the portion of the Arkansas interstate Transport SIP submittal that addresses the visibility requirement of section 110(a)(2)(D)(i)(II) that emissions from Arkansas sources do not interfere with measures required in the SIP of any other state” (76 FR 64220). EPA’s proposal does not address why the Agency violated the statutory deadline for action on Arkansas’s April 2008 interstate transport SIP revision submission.

There is no obvious nexus between the 1997 NAAQS revision, which is a public health standard, and the Clean Air Act’s regulatory regime to protect visibility. Rather, as EPA notes in its proposed partial disapproval of Arkansas’s Interstate Transport SIP revision submission, the Clean Air Act did not identify criteria to judge the adequacy of interstate transport SIPs to address the Good Neighbor Provision. According to the proposal, the visibility component of the Good Neighbor Provision “is ambiguous on its face, and we must interpret that provision” (76 FR 64219).

Regardless of whether the Agency merits the deference to interpret the Clean Air Act such that public health standards from 1997 trigger an independent authority to improve visibility in 2011, EPA’s interpretation must remain consistent. EPA cannot hold different states to different requirements pursuant to the visibility component of the Clean Air Act’s Good Neighbor provision. At the very least, EPA is required to explain why states are evaluated by disparate criteria. In [*National Cable & Telecommunications Assn. v. Brand X Internet Services* \(545 U.S. 967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820, 2005\)](#), the Supreme Court held that, “Unexplained inconsistency is ... a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.”

As is explained in detail below, Arkansas’s Interstate Transport SIP revision submission was judged by standards for compliance that are significantly different from those used by EPA to evaluate other SIPs.

First, EPA failed to justify why Arkansas's Interstate Transport SIP revision was not subject to the compliance criteria established in the Agency's August 2006 Guidance for State Implementation Plan Submissions to Meet Current Outstanding Obligations under Section(a)(2)(D)(i) for the 8-Hour Ozone and PM2.5 National Ambient Air Quality Standards. Arkansas drafted its Interstate Transport SIP revision submission in accordance with EPA's 2006 Guidance, as did many other states. In approving Interstate Transport SIP revisions submitted by Arizona, Iowa, Kansas, Minnesota, Nebraska, Nevada, South Dakota, Utah, and Wyoming, EPA based its decision on the fact that these states' SIPs comported with the 2006 Guidance. However, Arkansas's Interstate Transport SIP was evaluated by criteria other than those set forth by the 2006 Guidance. The EPA's proposed partial disapproval of Arkansas's Interstate Transport SIP revision submission does not address, much less explain, this regulatory inconsistency.

Second, the standard by which EPA evaluated Arkansas's Interstate Transport SIP revisions submission differs markedly from the standard that EPA recently used to approve SIPs submitted by Oregon and Colorado. Again, the Agency's proposed partial disapproval of Arkansas's Interstate Transport SIP revision submission does not address, much less explain, this regulatory inconsistency.

EPA's many interpretations of the requirements pursuant to the visibility prong of the Clean Air Act's Good Neighbor Provision

1. 2006 Guidance

In August 2006, EPA issued "Guidance for State Implementation Plan Submissions to Meet Current Outstanding Obligations under Section(a)(2)(D)(i) for the 8-Hour Ozone and PM2.5 National Ambient Air Quality Standards" ("2006 Guidance"), which interpreted the requirements pursuant to the visibility component of the Good Neighbor Provision triggered by the 1997 NAAQS revisions. The 2006 Guidance explained that is "not possible" to know whether one state is adversely affecting another state's implementation plan to protect visibility, until such plans are submitted and approved by EPA. According to the 2006 Guidance:

[I]t is currently premature to determine whether or not State SIPs for 8-hour ozone or PM2.5 contain adequate provisions to prohibit emissions that interfere with measures in other States' Sis designed to address regional haze. Accordingly, EPA believes that States may make a simple SIP submission confirming that it is not possible at this time to assess whether there is any interference with measures in the applicable SIP for another State designed to "protect visibility" for the 8-hour ozone and PM2.5 NAAQS until regional haze SIPs are submitted and approved (p. 9).

This is a logical interpretation: It is impossible to interfere with another state's plan that doesn't yet exist. Notably, the Agency has yet to approve any Regional Haze SIP submissions. Missouri is the only state with Federal Class 1 areas where visibility is impacted by the interstate transport of haze-causing emissions originating in Arkansas. Under the terms of a consent decree proposed in the federal register on December 2 (76 FR 75544), EPA is not required to act on Missouri's Regional Haze SIP submission until June 15, 2012.

In April 2008, Arkansas submitted to EPA an Interstate Transport SIP revision in accordance with the 2006 Guidance. Regarding the requirements pursuant to the visibility component of the Clean Air Act's Good Neighbor provision, the state's Interstate Transport SIP revision adopted both the reasoning and the language of the 2006 Guidance. According to the state's submission, "At this time, it is not possible to assess whether there is any interference with measures in the applicable SIP for another state designed to protect visibility..." (p 4, Arkansas Interstate Transport SIP revision submission).

Arkansas's Interstate Transport SIP revision submission was virtually identical to those submitted by Arizona, Iowa, Kansas, Minnesota, Nebraska, Nevada, South Dakota, Utah, and Wyoming, in that they all adhered to the 2006 Guidelines. EPA approved those states' Interstate Transport SIPs in a timely fashion because they were consistent with EPA's 2006 Guidelines. For example, in approving Wyoming's Interstate Transport SIP revision, EPA noted that, "Consistent with the August 15, 2006 EPA guidance, the Wyoming Interstate Transport SIP....concurs with EPA that it is currently premature to determine whether or not SIPs for 8-hour ozone or PM2.5 contain adequate provisions to prohibit emissions that interfere with measures in other states' SIPs designed to address regional haze" (73 FR 26023, 26024). In the same rulemaking, EPA used identical language to approve the visibility prong of South Dakota's Interstate Transport SIP (73 FR 26022).

Like these states, Arkansas's Interstate Transport SIP revision submission was "consistent with" the 2006 Guidelines. Yet EPA failed to approve it. Indeed, Arkansas's submission was ignored until October 2011, nearly two years after the Agency's statutory deadline to act. When EPA finally addressed Arkansas's Interstate Transport SIP revision, the state's submission was not evaluated by the criteria established in the 2006 Guidance—unlike the SIPs submitted by Arizona, Iowa, Kansas, Minnesota, Nebraska, Nevada, South Dakota, Utah, and Wyoming. EPA does not address, much less explain, this regulatory inconsistency in its proposed partial disapproval of Arkansas's Interstate Transport SIP revision submission.

2. Ad hoc interpretations made after EPA disavowed 2006 Guidance

In an August 2011 rulemaking to promulgate a federal implementation plan for visibility improvement in New Mexico, EPA for the first time claimed that its 2006 Guidelines interpreting the Good Neighbor Provision of the Clean Air Act—on which Arkansas had based its 2008 Interstate Transport SIP revision—had been published "in error" (76 FR 52418). In the same rulemaking, EPA put forth a new framework for interpreting the requirements pursuant to the visibility component of the Good Neighbor Provision. Whereas the 2006 Guidelines asserted that it was "not possible" to know whether a state is interfering with other states' visibility-improvement programs if such programs do not yet exist, EPA now holds that it is possible to determine whether a state is violating the Good Neighbor Provision, based on what the state "should" have in its Regional Haze SIP. In the August rulemaking to impose a FIP on New Mexico, EPA stated:

[The Interstate Transport SIP] evaluation is supposed to consider what other states should have in their SIPs as of this point in time, and is not limited by the fact that other states may or may not have approved those [Regional Haze SIPs] at this point in time (76 FR 52419).

Although EPA has not issued a new guidance document to reflect what states "should" have in their SIPs "at this point in time," the Agency has approved the visibility component of several Interstate Transport SIPs using criteria other than the 2006 Guidance. Troublingly, however, EPA has failed to apply a consistent standard in its evaluation of these plans. Instead, the Agency has interpreted the requirements of the visibility component of the Clean Air Act's Good Neighbor provision differently for different states.

EPA's new criteria for evaluating Interstate Transport SIP revision submissions is based on air quality modeling performed by regional planning organizations. The Clean Air Act mandates that states control emissions of haze-causing pollutants that significantly diminish visibility in all federal National Parks and Wilderness Areas, not just ones within their own borders. To this end, both the Clean Air Act and EPA's Regional Haze implementation rules encourage states to collaborate. Accordingly, states have formed

voluntary regional planning organizations to work together to improve visibility. Arkansas, for example, is a member of the Central Regional Air Partnership (“CENRAP”), including Nebraska, Kansas, Oklahoma, Texas, Minnesota, Iowa, Missouri, and Louisiana. Through such regional planning organizations, states have developed regional haze plans in a collaborative environment. As a result, any one state’s regional haze plan includes assumptions about reductions of haze-causing emissions in neighboring states.

For Arkansas’s Interstate Transport SIP, EPA determined that any deviation from CENRAP assumptions warranted a partial disapproval of the plan. In the proposed rulemaking, EPA explains:

[I]n developing their respective reasonable progress goals, CENRAP states consulted with each other through CENRAP’s work groups. As a result of this process, the common understanding was that each state would take action to achieve the emissions reductions relied upon by other states in their reasonable progress demonstrations under the RHR...In developing their visibility projections using photochemical modeling grid modeling, CENRAP states assumed a certain level of emissions from sources within Arkansas, consistent with the BART determinations made by ADEQ...As we are proposing to disapprove a majority of the BART determinations made by ADEQ for its subject to BART sources, we are proposing to find that the Arkansas SIP revision submittal does not fully ensure that emissions from sources in Arkansas do not interfere with other State’s visibility programs as required by section 110(a)(2)(D)(i)(II) of the CAA. Specifically, the BART determinations we are proposing to disapprove, will not result in the corresponding emissions reductions other states relied on to achieve the RPGs in their Class 1 areas (76 FR 64219, 64220).

Notably, EPA failed to identify a threshold of deviation from CENRAP assumptions in a state’s Regional Haze SIP beyond which a partial disapproval of that state’s Interstate Transport SIP submission is triggered. Instead, the Agency implies that any difference between Arkansas’s Regional Haze plan and CENRAP assumptions requires EPA to disapprove the visibility component of Arkansas’s Interstate Transport SIP. There is no indication that EPA performed an analysis of any kind to determine the significance of the disparity. Instead, EPA indicates that any discrepancy is impermissible. The Agency has interpreted the visibility component of the Good Neighbor Provision similarly in evaluations of Interstate Transport SIP revision submissions from New Mexico, Oklahoma, and North Dakota. All three states are subject to final or proposed FIPs based on the EPA’s authority pursuant to both the Good Neighbor and Regional Haze Provisions of the Clean Air Act.

The Agency used markedly different criteria to judge Interstate Transport SIP revision submissions from other states. For example, the visibility component of Oregon’s Interstate Transport SIP submission, which was approved by EPA in July 2011, permitted a significant difference between Oregon’s Regional Haze SIP and modeling assumptions relied on by neighboring states.

Oregon participated in the Western Regional Air Partnership (WRAP) regional planning organization in developing its Regional Haze SIP. Thus, Oregon’s neighboring states relied on the installation of advanced sulfur scrubbers on the 584 megawatt Boardman coal-fired power plant, in order to achieve an emissions limit for sulfur dioxide of .12 lb/mmBtu (76 FR 12661).

However, in the time since the WRAP consultations between Oregon and neighboring states, Oregon changed its Regional Haze SIP, such that the Boardman plant is required to install a dry sorbent injection system to control sulfur dioxide. This is a much less effective control technology than what was assumed by Oregon’s neighbors in WRAP consultations. Under Oregon’s Regional Haze SIP, the Boardman Plant would emit sulfur dioxide at .40 lbs/mmBtu through July 2018. Such an emissions rate is more than three times what Oregon’s neighboring states assumed. The discrepancy between Oregon’s Regional

Haze SIP and the assumptions used by neighboring states through WRAP consultations is significant. It amounts to almost 5,100 tons per year of sulfur dioxide, which is equivalent to a cumulative visibility impact of 3.6 dv in all affected Class I areas (76 FR 39000). These impacts were significant enough to compel the Oregon Department of Environmental Quality to recommend that the Environmental Quality Commission deny the Regional Haze SIP revision.

Despite the gulf between WRAP modeling assumptions and Oregon's Regional Haze SIP, EPA approved the visibility component of Oregon's Interstate Transport SIP revision submission on July 7, 2011. In its proposed rulemaking to approve Oregon's Interstate Transport SIP, EPA explained why the disparity was permissible:

We have reviewed the WRAP photochemical modeling emissions projections used in the demonstration of reasonable progress towards natural visibility conditions and compared them to the emissions limits that will result from the imposition of BART on sources in Oregon. We have concluded that with the emissions reductions achieved by these measures, the emissions from Oregon sources in the projected inventory for 2018 [which included both reductions and increases] will be approximately equal to that assumed in the WRAP analysis (76 FR 12664).

EPA doesn't provide documentation of this analysis, so it is impossible to know how the Agency came to the conclusion that Oregon's Regional Haze SIP submission would achieve reductions in the emission of haze-causing pollutants that are "approximately equal" to those assumed by neighboring states. Alternatively, EPA performed no such "review" of CENRAP "photochemical modeling emissions projections," in order to determine whether Arkansas's projected emissions were "approximately equal" to that assumed in the CENRAP analysis.

On April 20, 2011, EPA approved the visibility component of Colorado's Interstate Transport SIP revision submission, despite a an even greater discrepancy between modeling assumptions by regional planning organization and the emissions limits in Colorado's Regional Haze SIP submission than that which the Agency allowed for Oregon. According to EPA's proposed partial approval of Colorado's Interstate Transport SIP revision submission:

[T]he State's demonstration [that its Regional Haze plan does not interfere with visibility protection programs in neighboring states] relies on potential Regional Haze SIP emission reductions that have not been approved by EPA...To account for measures that are not federally enforceable, EPA increased the Colorado emission inventory 45,700 tons for sulfates and 5,200 tons for nitrates from the emission inventory used for Colorado in the WRAP 2018 reasonable progress modeling (76 FR 8328, 8329).

By comparison, Arkansas's projected emissions of sulfur dioxide in 2018 are 138,283 tons, according to Arkansas Regional Haze SIP submission. Therefore, the discrepancy between sulfur dioxide emissions reductions in Colorado's Regional Haze SIP submission and the assumptions of neighboring states is equal to almost a third of Arkansas's *total* sulfur dioxide emissions. If EPA had held Colorado to the same standard to which it held Arkansas, whereby any discrepancy between the Regional Haze SIP and assumptions by neighboring states is impermissible, then the Agency could not have approved the visibility component of Colorado's Interstate Transport SIP revision submission.

Yet EPA approved it. After conducting a "weighted emission potential" evaluation to assess the increase in Colorado sulfates and nitrates emissions above what neighboring states assumed, EPA concluded that "Colorado has a minimal impact on visibility" at federal Class 1 areas in neighboring states (76 FR 8329). There is no way to know whether EPA's evaluation for Colorado is the same analysis that it performed to

determine that the disparity between Oregon Regional Haze SIP submission and WRAP modeling assumptions is insignificant, because EPA did not explain the analysis behind its partial approval of Oregon's Interstate Transport SIP revision submission. Alternatively, the EPA did not conduct a "weighted emission potential" evaluation, in order to determine whether Arkansas's projected emissions had a "minimal impact on visibility."

Arkansas, Oregon, and Colorado submitted Interstate Transport SIP revisions predicated on Regional Haze SIPs for which EPA could or would not consider significant reductions of haze-causing emissions that neighboring states rely on to protect visibility. For Oregon and Colorado, EPA performed vague analyses to determine that this discrepancy did not warrant a partial disapproval of the visibility component of Interstate Transport SIP revisions submission. For Arkansas, EPA performed no such analysis. Without referencing its approval of the Oregon and Colorado Interstate Transport SIP revision submissions, EPA held Arkansas to a different standard. For Arkansas, any discrepancy between a state's Regional Haze SIP and the emissions reductions assumed by neighboring states is tantamount to "interfering" with neighboring states "measures to protect visibility." EPA's proposed disapproval fails to address why Arkansas was evaluated differently than these other states.