SEEING THROUGH THE REGIONAL HAZE

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On January 10, 2014, the United States Environmental Protection Agency (“EPA”) signed a final decision partially rejecting Wyoming’s regional haze state implementation plan (“SIP”). The final decision made few changes to the controversial proposed decision EPA released for public comment this past summer. Like the proposed decision, the final decision has been somewhat controversial and legal challenges appear likely.

*35 Background

In the 1977 amendments to the Clean Air Act (“CAA”), Congress established as a national goal “the prevention of any future, and remedying of any existing impairment in visibility in mandatory class 1 Federal areas which impairment results from manmade pollution.” Class 1 Federal areas are defined by the CAA as national parks that are over 6,000 acres and wilderness areas that are over 5,000 acres that were in existence in 1977. Wyoming Class 1 Federal areas include Grand Teton National Park, Yellowstone National Park, Bridger Wilderness, Fitzpatrick Wilderness, North Absorka Wilderness, Teton Wilderness, and Washakie Wilderness.

EPA defines regional haze as “visibility impairment that is produced by a multitude of sources and activities which are located across a broad geographic area and emit fine particles.” According to the EPA, when sunlight hits the fine particles, some of the light is absorbed, which reduces clarity and tints the air with a veil of brown or white haze. Sources of haze forming pollution includes man-made sources, such as motor vehicles and electric utility and industrial fuel burning, as well as natural sources such as dust and soot from wildfires. EPA has estimated that the visual range in the West where the majority of national parks and wilderness areas are located, has decreased from 140 miles to 35-90 miles.

In order to meet Congress' goal of reducing visibility impairment, the CAA directed states to develop state implementation plans (“SIPs” or “State Plans”) to protect visibility in Federal Class 1 areas. It further directed EPA to develop regulations providing states with guidance although the regulations were not finalized until 2005. To comply with the CAA and the subsequent EPA regulation, Wyoming submitted two regional haze State Plans to EPA on January 12, 2011. Eighteen months later, on June 4, 2012, EPA proposed partially accepting and partially rejecting Wyoming's plan. Specifically, EPA proposed rejecting Wyoming's determination of best available retrofit technology (“BART”) improvements to *36 address nitrogen oxide (NOx) emissions at several coal-fired power plants: Laramie River Station, Wyodak, Naughton, Jim Bridger and Dave Johnson.

EPA also proposed a federal implementation plan (“FIP” or “Federal Plan”). A Federal Plan fills the gaps left by the rejected portions of a state plan. EPA's proposed Federal Plan required the identified coal-fired power plants to install additional BART technology on a relatively quick time-line as well as meet additional pollution emission limits. EPA took comment on its proposed action and Federal Plan. After analyzing comments, EPA retracted its 2012 proposed
decision in order to revise its proposal to address the comments received submitted by conservation organizations and
the National Park Service, which were critical of Wyoming's cost analysis associated with its BART decision.

EPA released its revised proposed decision on June 10, 2013. EPA's revised proposal again rejected portions of
Wyoming's plan, including the NOx BART proposed improvements for the coal-fired plants listed in the 2012 rule, and
proposed a revised Federal Plan.

EPA's revised proposal sparked significant opposition from Wyoming government leaders, as well as the affected power
companies. In his comment letter to the EPA, Governor Mead stated EPA's proposal to reject portions of Wyoming's SIP
conflicted with Congress's design of the CAA which provides states with primary responsibility for improving visibility,
and EPA must defer to state plans unless those plans to not comply with the program requirements—which, he argued
was not the case with Wyoming's plan. The Governor expressed concern that EPA's proposal forced unnecessary and
expensive technology upgrades, as it would cost $1.2 billion in upfront costs and an additional $170 million per year,
costs that would ultimately be passed on to the electricity rate payer without demonstrating a perceptible improvement
in visibility over Wyoming's proposal. Not all were critical of the EPA's proposal. Conservation groups commented that
Wyoming's plan did not go far enough to protect visibility, and generally supported EPA's revised proposal.

After reviewing comments on its proposal, EPA signed its final decision on January 10, 2013. EPA's final 714-page
decision partially rejects Wyoming's SIP due to deficiencies in Wyoming's plan and imposes a Federal Plan. EPA's final
action approved Wyoming's plan for Jim Bridger and Naughton. However, EPA disapproved Wyoming's plan, and
imposed a Federal Plan for the Dave Johnson, Wyodak and Laramie River plants. Now that EPA has taken final action,
it seems likely that legal challenges from the State of Wyoming, affected power companies, and conservation groups
are likely.

Legal Challenges

While we await the likely legal challenges over EPA's action on Wyoming's plan, a review of recent regional haze litigation
may clarify what a challenge may entail.

Over the past few years, EPA has rejected a number of Western states' regional haze plans, including: Montana,
Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Utah, and Wyoming. Those rejections spurred a number
of legal challenges. The challenges have called into question EPA's authority to override state plans, as well as alleging
that the agency has engaged in a “sue and settle” pattern with environmental groups.

The 10th Circuits decision in Oklahoma v. U.S. E.P.A. is the leading case addressing EPA's authority to override state
plans. Oklahoma argued that EPA exceeded its statutory authority by rejecting Oklahoma's BART determinations for
coal-fired power plants and replacing them with a Federal Plan. Oklahoma claimed EPA's Federal Plan would force
utilities in the state to spend more than a billion dollars to install unnecessary technology over five years which would
lead to higher electric rates with little to no improvement in visibility. That same concern was apparently shared by the
14 states that filed *37 an amicus brief in support of Oklahoma.

The 10th Circuit ultimately rejected Oklahoma's challenge in a 2-1 decision, and also denied Oklahoma's subsequent
request for an en banc review. However, the 10th Circuit recently agreed to stay the impact of EPA's rule while the case
is considered for review by the United States Supreme Court.
Oklahoma also has been in the lead, along with 11 companion states including Wyoming, in challenging what it sees as a pattern where environmental groups sue the EPA, the EPA then agrees to settle the lawsuits through a binding decree which dictates rules for EPA's action, thereby eliminating that state's ability to engage in negotiations with EPA. Expressing his frustration over this apparent pattern, Governor Mead recently released the following statement: “Congress mandates that states, not special interest groups, be EPA’s partners in environmental regulation and EPA is skirting this mandate through the “sue and settle” strategy it has fostered.”

The United States District Court for the Western District of Oklahoma recently granted the EPA's motion to dismiss Oklahoma's sue and settle case, finding that Oklahoma's FOIA request was too broad and lacked sufficient specificity. However, a similar case, brought by PacificCorp in the U.S. District Court for the District of Colorado, is ongoing and may prove successful as the FOIA requests made by PacificCorp appear to be more specific.

Certainly much more could be shared on this issue, and I've really only skimmed the surface, but as anyone who has dealt with the CAA knows, it's a Cretan Labyrinth. I do hope I've given you a bit of background on Wyoming's regional haze plan, as it seems future legal challenges are on the horizon. The hazy horizon?

ENDNOTES

1. The author would like to thank Nancy Vehr, Jeremiah Williamson, Colin McKee and Sam Kalen for their assistance with this article, although any errors or omissions are strictly mine.


4. Id. at 7472 (a).

5. 40 C.F.R. § 81.436.

6. 77 FR 33,022, 33,024 (June 4, 2012). Included among these particles and precursors are sulfur dioxide (SO2), nitrogen oxides (NOx), organic and elemental carbon, and fine particulate matter. Id.
7. REGION 8, U.S. ENVIRONMENTAL PROTECTION AGENCY, REGIONAL HAZE RULE HANDOUT (June 24, 2013).

8. Id.

9. Id.


11. Id.; 40 C.F.R. §§ 51.308 and 51.309.

12. 77 Fed. Reg. 33022, 33024 (June 4, 2012). The first plan addressed regional haze requirements related to sulfur dioxide through a backstop trading program. See 77 Fed. Reg. 30953 (May 24, 2012) (proposed action) and 77 Fed. Reg. 73926 (Dec. 12, 2012) (final action). The second plan, which is the subject of this article, addressed regional haze requirements primarily related to NOx and PM.

13. Id.

14. See id. The EPA also took issue with Wyoming BART decisions concerning FMC's Westvaco trona mine and General Chemical's Green River trona processing facility. See id.

15. See id.

16. See id.


19. See id.

20. See id.


23. Id.


26. See id.

27. See id.

28. See id.

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30. Arizona v. EPA, No. 13-70366 (9th Cir., filed Jan. 31, 2013); Louisiana Dep’t of Env. Quality v. EPA, No. 12-60672 (5th Cir. filed Sept. 4, 2012); Michigan v. EPA, No. 13-2130 (8th Cir., filed May 21, 2013); Cliffs Natural Res., Inc. v. EPA, No. 13-1758 (8th Cir. filed Apr. 4, 2013) (Michigan and Minnesota); PPL Montana, LLC v. EPA, No. 12-73757 (9th Cir., filed Nov. 16, 2012); Nebraska v. EPA, No. 12-3084 (8th Cir. filed Sept. 4, 2012); Nevada Power Co. v. EPA, No. 12-73411 (9th Cir., filed Oct. 22, 2012); Martinez et al v. EPA, No. 11-9567 (10th Cir., filed Oct. 21, 2011) (New Mexico); North Dakota v. EPA, No. 12-1844 (8th Cir., filed Apr. 9, 2012); Oklahoma v. EPA (No. 12-9526) (Oklahoma); Utah v. EPA, No. 13-9535 (10th Cir., filed Mar. 21, 2013).

31. 723 F.3d 1201 (10th Cir. 2013).

32. Id. 1207.

33. Id.


35. Id. at 1224


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39. Supra note 33 at 7.


Footnotes

a1 Temple Stoellinger ... joined the University of Wyoming in 2013. Temple has a dual appointment with the College of Law where she is the Deputy Director of the Center for Law and Energy Resources and the Haub School of Environment and Natural Resources where she is an Adjunct Assistant Professor.

Before joining the University of Wyoming, Temple most recently served as the natural resource attorney for the Wyoming County Commissioners Association (WCCA). Through this role Temple provided legal advice and engaged in litigation on issues pertaining to energy and natural resource law of behalf of the boards of county commissioner in Wyoming's 23 counties. Prior to working for the WCCA, Temple worked in the Projects and Technology Legal Department for Shell, International B.V. at their world headquarters in the Netherlands. From 2004-2010 Temple served as a natural resource analyst and advisor to Wyoming Governor Dave Freudenthal where she had the opportunity to work on a wide variety of energy and natural resource issues of statewide, regional, and national significance.

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