**Boston College Environmental Affairs Law Review**

Volume 43
Issue 3 *Electronic Supplement*

Article 2

7-8-2016

# Cooperative Federalism and Visibility Protection Under the Clean Air Act

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# COOPERATIVE FEDERALISM AND VISIBILITY PROTECTION UNDER THE CLEAN AIR ACT

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**Abstract:** In 2005, the U.S. Environmental Protection Agency (EPA) issued regulations pursuant to the Clean Air Act requiring states to submit plans to address visibility impairment due to air pollution. The regulations directed states to consider installing emissions controls at certain stationary sources according to five factors, including the cost of compliance. In *Oklahoma v. U.S. Environmental Protection Agency*, the U.S. Court of Appeals for the Tenth Circuit held that EPA lawfully rejected Oklahoma's plan because the state plan failed to follow EPA-promulgated guidelines when determining the cost of compliance factor. This Comment argues that the outcome in *Oklahoma* was correct, however, the court did not apply the appropriate standard of review. The appropriate standard of review was to determine whether the state plan was reasonable and in compliance with the statute and EPA guidelines. EPA rightly rejected Oklahoma's plan because the plan failed to comply with the EPA regulations on cost of compliance calculations.

## INTRODUCTION

The average natural visual range at the Wichita Mountains in Oklahoma is about 115 miles; however, due to air pollution, the average visual range at the national park can be as low as twenty-three miles.[1] Air pollution impairs visibility across the country, evidenced by the fact that the typical visual range in the United States is about fifteen to thirty miles, or about one-third of the natural range of visibility.[2] Emissions from power genera-

* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2015–2016.

[1] *See Wichita Mountains National Wildlife Refuge: Air Pollution Impacts*, U.S. FISH & WILDLIFE SERV. [hereinafter *Air Pollution Impacts*], http://www.fws.gov/refuges/airquality/ARIS/WIMO/Impacts.html [http://perma.cc/QY8Z-9S4W]. The Wichita Mountain Wilderness Area is located in the Wichita Mountains Wildlife Refuge, which encompasses 59,020 acres in Oklahoma. *See Wichita Mountains: Wildlife & Habitat*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/refuge/Wichita_Mountains/wildlife_and_habitat/index.html [http://perma.cc/NK6Z-CCNP].

[2] *See* ENVTL. PROT. AGENCY, HOW AIR POLLUTION AFFECTS THE VIEW (2006), http://www.epa.gov/sites/production/files/2015-05/documents/haze_brochure_20060426.pdf [http://perma.cc/8GXK-REK2]. National parks and wildlife areas in the Western United States have one-half to two-thirds of the visual range that would exist without air pollution, and similar areas in the Eastern

tion are a significant contributor to hazy conditions and decreased visibility.[3] For example, among the biggest contributors to visibility impairment at the Wichita Mountains is sulfur dioxide emissions from fossil-fuel-fired power generation.[4] Sulfur dioxide reacts in the air and forms tiny particles of sulfate.[5] Those particles scatter light and create the "regional haze" that obstructs views at national parks and wildlife areas, such as the Wichita Mountains.[6]

In 1977, Congress added provisions to the Clean Air Act ("CAA") to address the problem of regional haze by declaring as a national goal the prevention and remedy of visibility impairment resulting from manmade air pollution.[7] The visibility provisions aim to eliminate visibility impairment at 156 "Class I Federal" areas, including forty-seven national parks, 108 wilderness areas, and one international park.[8] Under the statute, the states and the federal government both exercise responsibility for maintaining and improving air quality in a framework called cooperative federalism.[9] In accordance with the cooperative federalism framework, the Environmental

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United States have about one-fifth of the visual range that would exist under estimated natural conditions. *See* Regional Haze Regulations, 64 Fed. Reg. 35,714, 35,715 (July 1, 1999) (codified at 40 C.F.R. § 51.308 (2015)).

[3] *See* CLEAN AIR MARKET PROGRAMS, ENVTL. PROT. AGENCY, HUMAN HEALTH AND ENVIRONMENTAL EFFECTS OF EMISSIONS FROM POWER GENERATION (n.d.) [hereinafter EMISSIONS FROM POWER GENERATION], http://www3.epa.gov/captrade/documents/power.pdf [http://perma.cc/NS34-66XY]. Air pollution is also hazardous to the public health because it can lead to respiratory illness and decreased lung function. *See id.*

[4] *See* OKLA. DEP'T OF ENVTL. QUALITY, REGIONAL HAZE IMPLEMENTATION PLAN REVISION 41, 66 (2010) [hereinafter OKLAHOMA REVISED SIP], http://www.deq.state.ok.us/AQDnew/rulesandplanning/Regional_Haze/SIP/index.htm [http://perma.cc/N9LX-K2QV] (follow "RH SIP Chapter I–X" hyperlink). Fossil-fuel fired power generation accounts for over 60% of the total sulfur dioxide emissions in Oklahoma. *See id.* at 41.

[5] *See* EMISSIONS FROM POWER GENERATION, *supra* note 3. Sulfate emissions are the primary contributor to visibility impairment over the Wichita Mountains Wilderness. *See Air Pollution Impacts*, *supra* note 1.

[6] *See* EMISSIONS FROM POWER GENERATION, *supra* note 3; *Air Pollution Impacts*, *supra* note 1. Regional haze is "visibility impairment caused by geographically dispersed sources emitting fine particles and their precursors into the air." Am. Corn Growers Ass'n v. Envtl. Prot. Agency, 291 F.3d 1, 3 (D.C. Cir. 2002) (citing 64 Fed. Reg. 35,714).

[7] *See* Clean Air Act, 42 U.S.C. § 7491(a)(1) (2012); Chevron U.S.A., Inc. v. U.S. Envtl. Prot. Agency, 658 F.2d 271, 272 (5th Cir. 1981) (describing the Clean Air Act Amendments of 1977 and the visibility protections requirements).

[8] *See* Guidelines for BART Determinations Under the Regional Haze Rule, 70 Fed. Reg. 39,156, 39,156–39,172 (promulgated at 40 C.F.R. pt. 51, app.Y (2015)). The Wichita Mountains Wilderness Area is a protected "Class I Federal Area." *See* Designations of Areas for Air Quality Purposes: Oklahoma, 40 C.F.R. § 81.424 (2015).

[9] *See* North Dakota v. U.S. Envtl. Prot. Agency, 730 F.3d 750, 757 (8th Cir. 2013), *cert. denied* 134 S.Ct. 2662 (2014) (citing Am. Trucking Ass'ns v. Envtl. Prot. Agency, 600 F.3d 624, 625 (D.C. Cir. 2010)) (explaining that the visibility provisions of the Clean Air Act operate under the cooperative federalism framework); *see infra* notes 40–48 and accompanying text.

Protection Agency (EPA) establishes air quality standards, and the states implement those standards, subject to federal oversight.[10]

State governments and private industry have filed suit against EPA concerning the federal agency's rejection of state plans to reduce haze.[11] These challenges generally center on EPA-promulgated plans requiring more stringent emission controls, despite state determinations that the controls were not cost effective.[12] States and private industry argue that EPA is unlawfully seizing power from the states and undermining the cooperative federalism framework.[13] The U.S. Court of Appeals for the Tenth Circuit heard one of these challenges in *Oklahoma v. United States Environmental Protection Agency*, when the State of Oklahoma and Oklahoma Gas & Electric challenged EPA's plan requiring more stringent sulfur dioxide emission controls at two fossil-fuel-fired power plants that contributed to the haze at the Wichita Mountains.[14] Although some argue that the decision in *Oklahoma* was improper because the court failed to apply the correct standard of review, the court rightly found that EPA had authority to reject the state plan because it failed to comply with the statute and federal regulations.[15] In do-

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[10] *See* Oklahoma v. U.S. Envtl. Prot. Agency, 723 F.3d 1201, 1204 (10th Cir. 2013), *cert. denied* 134 S.Ct. 2662 (2014); GenOn REMA, LLC v. U.S. Envtl. Prot. Agency, 722 F.3d 513, 516 (3d Cir. 2013).

[11] *See* Utah *ex rel.* Utah Dep't of Envtl. Quality, Div. of Air Quality v. U.S. Envtl. Prot. Agency, 750 F.3d 1182, 1184 (10th Cir.), *reh'g denied* (10th Cir. 2014) (dismissing state's untimely challenge to EPA's regional haze plan for state of Utah); *North Dakota*, 730 F.3d at 755; *Oklahoma*, 723 F.3d at 1204, 1210; *see also* Petition for Review at 2, Arizona *ex re*l. Henry Darwin v. USEPA, No. 13-70366 (9th Cir. filed Jan. 31, 2013) (challenging EPA's regional haze plan for Arizona).

[12] *See supra* note 11 and accompanying text.

[13] *See Oklahoma*, 723 F.3d at 1207 (explaining petitioners' argument that EPA action usurps state authority); *see also* Brief of Amici Curie of Basin Elec. Power Coop. et al. on Petition for Writ of Certiorari at 5, *Oklahoma*, 134 S.Ct. 2662 (No. 13-921), 2014 WL 890913, at *5 (describing EPA's action as undermining the cooperative federalism framework); Final Opening Brief of Petitioner State of Arizona at 1–5, *Arizona* ex rel. *Henry Darwin*, No. 13-70366 (arguing that EPA overstepped statutory authority in promulgating federal plan for Arizona); American Chemistry Council et al., Comment Letter on Proposed Rule, Approval and Promulgation of Texas and Oklahoma Implementation Plans (April 20, 2015), http://www.ipaa.org/wp-content/uploads/downloads/2015/05/Regional-Haze-Comments-4.20.15.pdf [http://perma.cc/G256-ZJ2Q] (submitting comments to EPA's proposed implementation plans for Texas and Oklahoma, arguing EPA's action dramatically increases its authority).

[14] *See Oklahoma*, 723 F.3d at 1204–26; Approval and Promulgation of Implementation Plans; Oklahoma; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations, 76 Fed. Reg. 81,728, 81,739 (Dec. 28, 2011) (finding that installing emissions controls as recommended by EPA would improve visibility at the Wichita Mountains).

[15] *See* Oklahoma Petition for Writ of Certiorari at 20, *Oklahoma*, 134 S.Ct. 2662 (No. 13-921), 2014 WL 411561, at *20; Brief of Amicus Curiae States of Arizona et al. at 8–9, *Oklahoma*, 134 S.Ct. 2662 (No. 13-921), 2014 WL 1101428, at *8–9.

ing so, the court maintained EPA's crucial role within the cooperative federalism framework.[16]

## I. FACTS AND PROCEDURAL HISTORY

In 1977, Congress amended the CAA and established the national goal of "prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I Federal areas which impairment results from manmade air pollution."[17] Congress directed EPA to promulgate regulations to assure "reasonable progress" towards the national goal by requiring states to submit state implementation plans ("SIPs") containing emission limits and other measures necessary to prevent and remedy visibility impairment.[18] In 1980, EPA issued its first regional haze regulations and in 1988, began monitoring visibility at national parks.[19] In 1990, the CAA was amended again to provide EPA with additional research and technical support to pass more effective haze regulations.[20] On July 1, 1999, EPA issued its Regional Haze Rule.[21] In 2002, the U.S. Court of Appeals for the District of Columbia Circuit invalidated certain portions of the Regional Haze Rule, and in 2005, EPA subsequently issued a revised Regional Haze Rule.[22] The

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[16] *See* Alaska Dep't of Envtl. Conservation v. Envtl. Prot. Agency, 540 U.S. 461, 485 (2004); *Oklahoma*, 723 F.3d at 1207–08, 1210.

[17] *See* Clean Air Act Amendments of 1977, Pub. L. No. 95–95, sec. 128, § 91, Stat. 685, 742 (1977) (codified at 42 U.S.C. § 7491(a)(1) (2012)), https://history.nih.gov/research/downloads/PL95-95.pdf [https://perma.cc/T8WM-7QP3]. "Prior to 1977, the [CAA] did not elaborate on the protection of visibility as an air-quality related value." Chevron U.S.A., Inc. v. U.S. Envtl. Prot. Agency, 658 F.2d 271, 272 (5th Cir. 1981).

[18] *See* 91 Stat. at 742–43 (codified at 42 U.S.C. § 7491(a)(4) and (b)(2)); *see also* Am. Corn Growers Ass'n v. U.S. Envtl. Prot. Agency, 291 F.3d 1, 3 (D.C. Cir. 2002) (discussing amendments to the Clean Air Act). States are required to submit SIPs to address EPA promulgated air quality standards. *See* 42 U.S.C. § 7410(a)(1). Generally, SIPs are required to contain information such as emission limitations, air quality data, and enforcement programs. *See* 42 U.S.C. § 7410(a)(2)(A)–(C) (2012). If EPA revises or promulgates new air quality standards, states must submit SIP revisions addressing the updated air quality standards. *See* 42 U.S.C. § 7410(a)(2)(H) (2012).

[19] *See Am. Corn Growers Ass'n*, 291 F.3d at 3 (citing 45 Fed. Reg. 80,084 (Dec. 2, 1980)); Regional Haze Regulations, 64 Fed. Reg. 35,714, 35,718 (Jul. 1, 1999) (codified at 40 C.F.R. § 51.308), https://www3.epa.gov/ttn/caaa/t1/fr_notices/rhfedreg.pdf [https://perma.cc/U59K-33K2]; ENVTL. PROT. AGENCY, FACT SHEET: FINAL REGIONAL HAZE REGULATIONS F PROTECTION OF VISIBILITY IN NATIONAL PARKS AND WILDERNESS AREAS 2 (1999), http://www3.epa.gov/ttn/oarpg/t1/fact_sheets/hazefs2.pdf [http://perma.cc/T78U-QJGU].

[20] *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, sec. 816, § 104 Stat. 2399, 2695-97 (1990) (codified at 42 U.S.C. § 7492 (2012)).

[21] *See* Regional Haze Regulations, 64 Fed. Reg. at 35,714.

[22] *See Am. Corn Growers Ass'n*, 291 F.3d at 8–9 (holding that EPA's bifurcated approach on how to consider the best available retrofit technology factors was contrary to the Clean Air Act); 70 Fed. Reg. 39,104 (July 6, 2005).

revised rule required all states to submit revised implementation plans to EPA by December 17, 2007.[23]

In January 2009, EPA found that Oklahoma failed to submit an implementation plan by the deadline.[24] This finding triggered EPA's duty to promulgate its own federal implementation plan ("FIP") for the state within two years.[25] Before EPA submitted the FIP, however, Oklahoma submitted a revised SIP in February of 2010.[26] On March 22, 2011, EPA proposed to partially approve and partially disapprove the SIP.[27] In the same action disapproving part of the SIP, EPA proposed a FIP to account for the disapproved portions of the SIP.[28] After a public notice and comment period, EPA published its final plan on December 28, 2011 (the "Final Rule").[29]

EPA disapproved part of Oklahoma's SIP because it did not properly consider certain statutorily required cost factors.[30] Specifically, EPA believed that the SIP overestimated the costs of installing emission control technology on four units at Oklahoma Gas & Electricity's ("Oklahoma Gas") Muskogee and Sooner power generating stations.[31] The SIP set emissions limits that would not require the use of a certain emission control technology because the state determined that the cost of the technology was "too high" and the "benefit too low."[32] EPA hired a consultant to calculate cost estimates and concluded that the estimated cost of the emission control technology was significantly lower than the estimates calculated in the SIP.[33] Ultimately, EPA's Final Rule set more stringent sulfur dioxide emis-

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[23] *See* 70 Fed. Reg. at 39,156 (codified at 40 C.F.R. § 51.308(b) (2015)).

[24] *See* Finding of Failure to Submit State Implementation Plans Required by the 1999 Regional Haze Rule, 74 Fed. Reg. 2392, 2393 (Jan. 15, 2009). EPA also found that 36 other states, the District of Columbia, and the U.S. Virgin Islands failed to submit SIPs. *See id.*

[25] *See* 42 U.S.C. § 7410(c)(1) (2012); Oklahoma v. U.S. Envtl. Prot. Agency, 723 F.3d 1201, 1205 (10th Cir. 2013) *cert. denied* 134 S. Ct. 2662 (2014).

[26] *See Oklahoma*, 723 F.3d at 1205; OKLAHOMA REVISED SIP*, supra* note 4.

[27] *See* Approval and Promulgation of Implementation Plans; Oklahoma; Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations, 76 Fed. Reg. 16,168, 16,169 (Mar. 22, 2011) [hereinafter Proposed Rule] (proposing partial approval and partial disapproval of Oklahoma's SIP).

[28] *See* Proposed Rule*, supra* note 27*,* at 16,168.

[29] *See* Approval and Promulgation of Implementation Plans; Oklahoma; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations, 76 Fed. Reg. 81,728, 81,730–31 (Dec. 28, 2011) [hereinafter Final Rule] (setting forth final implementation plan for Oklahoma).

[30] *See* Proposed Rule*, supra* note 27, at 16,182.

[31] *See id*. The Muskogee plant emitted 16.19% of the total sulfur dioxide emissions at the time Oklahoma revised its plan. *See* OKLAHOMA REVISED SIP, *supra* note 4, at 41.

[32] *See* OKLAHOMA REVISED SIP, *supra* note 4, at 82.

[33] *See* Oklahoma v. U.S. Envtl. Prot. Agency, 723 F.3d 1201, 1206 (10th Cir. 2013) *cert. denied* 134 S.Ct. 2662 (2014); Proposed Rule, *supra* note 27, at 16,183. "For example, Oklahoma

sions limits than the SIP that required Oklahoma Gas to install the emissions controls it had previously determined to be not cost effective.[34]

On February 24, 2012, the State of Oklahoma, along with the Oklahoma Industrial Energy Consumers group, challenged EPA's Final Rule by filing a petition for review in the Tenth Circuit.[35] Oklahoma Gas filed a separate petition for review, and the petitions were consolidated by the court on the same day.[36] On July 19, 2013, in a 2–1 decision, the court denied the petition for review.[37] The dissenting opinion concurred with most of the majority's analysis but dissented with respect to certain EPA action in promulgating the Final Rule.[38] Subsequently, petitioners' writ of certiorari was denied by the United States Supreme Court.[39]

## II. LEGAL BACKGROUND

The Environmental Protection Agency (EPA) and the fifty states share responsibility for maintaining and improving air quality.[40] The Clean Air Act (CAA) directs EPA to create national ambient air quality standards ("NAAQS") for pollutants at levels that will protect public health.[41] Each state is required to submit a state implementation plan ("SIP") that provides for the implementation, maintenance, and enforcement of EPA's standards.[42] If EPA finds that a state has failed to submit an adequate plan either in whole or in part, the agency is statutorily required to promulgate a federal implementation plan ("FIP") within two years of the determination, "unless the State corrects the deficiency" before EPA's plan becomes final.[43]

In the visibility protection provisions of the CAA, Congress established the national goal of visibility improvement and directed EPA to

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estimated the cost of the [technology] to be $7,147 per ton of SO2 removed at one of the Sooner Generating Station units . . . EPA projected [the technology] at that same unit would cost $1,291 per ton of SO2 removed." Proposed Rule, *supra* note 27, at 16,183.

[34] *See* Final Rule, *supra* note 29, at 81,728.

[35] *See Oklahoma*, 723 F.3d at 1206. Section 7601 of the Clean Air Act specifies that "[a] petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1) (2012).

[36] *See Oklahoma*, 723 F.3d at 1206.

[37] *Id.* at 1204.

[38] *See id.* at 1224 (Kelly, J., dissenting).

[39] *See* Oklahoma v. Envtl. Prot. Agency, 134 S.Ct 2662 (2014).

[40] *See* Clean Air Act, 42 U.S.C. § 7410; North Dakota v. U.S. Envtl. Prot. Agency, 730 F.3d 750, 757 (8th Cir. 2013), *cert. denied* 134 S. Ct. 2662 (2014) (citing Am. Trucking Ass'ns v. Envtl. Prot. Agency, 600 F.3d 624, 625 (D.C. Cir. 2010)).

[41] *See* 42 U.S.C. §§ 7408–7409; *Oklahoma*, 723 F.3d at 1204.

[42] *See* 42 U.S.C. § 7410(a)(1).

[43] *See id.* § 7410(c).

promulgate regulations to further that goal.[44] The regulations required states to revise their SIPs to contain "emission limits, schedules of compliance, and other measures necessary to make reasonable progress toward meeting the national visibility goal."[45] States were obligated to determine the best available retrofit technology ("BART") for certain sources of emissions built between 1962 and 1977 that may "reasonably be anticipated to cause or contribute to any impairment of visibility."[46] The statute required that states consider certain factors when making BART determinations, such as costs of compliance.[47] Congress directed EPA to promulgate guidelines to assist states in making BART determinations and required states to follow the guidelines for fossil-fuel-fired power plants with a total generating capacity greater than 750 megawatts.[48]

The Administrative Procedure Act (APA) provides the standards of review for evaluating EPA action under the CAA.[49] The APA requires courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[50] Agency action is considered arbitrary or capricious if:

> "… the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that

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[44] *Id.* § 7491(a)(1).

[45] *Id.* § 7491(b)(2); *see* Regional Haze Rule, 40 C.F.R. § 51.308 (2015).

[46] *See* 42 U.S.C. § 7491(b)(2)(A). BART is "an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant which is emitted by . . . [a BART-eligible source]." Guidelines for BART Determinations Under the Regional Haze Rule, 70 Fed. Reg. 39,156, 39,156–39,172 (promulgated at 40 C.F.R. pt. 51, app.Y (2015)).

[47] 42 U.S.C. § 7491(g)(2). The statute lists four other factors to consider: the energy and non-air 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 which may reasonably be anticipated to result from the use of such technology. *Id.* The CAA requires that EPA consider these factors and follow the promulgated guidelines when determining BART for an FIP. *Id.*

[48] *Id.* § 7491(b)(2)(B); 40 C.F.R. § 51.308(e); 40 C.F.R. Pt. 51, App. Y; *see also* WildEarth Guardians v. U.S. Envtl. Prot. Agency, 759 F.3d 1064, 1069 (9th Cir. 2014) (finding that the BART guidelines are "merely advisory for smaller plants.").

[49] *See* Administrative Procedure Act, 5 U.S.C. § 706 (2012); Alaska Dep't of Envtl. Conservation v. Envtl. Prot. Agency, 540 U.S. 461, 496 (2004) (applying APA to EPA action under CAA); US Magnesium, LLC v. U.S. Envtl. Prot. Agency, 690 F.3d 1157, 1164 (10th Cir. 2012) (applying APA to EPA action under CAA). The CAA also provides standards of review for EPA action, but the arbitrary and capricious standard is "the same as that used under the [APA]." North Dakota v. U.S. Envtl. Prot. Agency, 730 F.3d 750, 758 (8th Cir. 2013), *cert. denied* 134 S.Ct. 2662 (2014) (citing EME Homer City Generation, L.P. v. Envtl. Prot. Agency, 696 F.3d 7, 23 (D.C. Cir. 2012), *rev'd and remanded* 134 S.Ct. 1584 (2014)).

[50] 5 U.S.C. § 706(2)(A).

> runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[51]

Under this standard, a court must determine whether the agency "considered the relevant data and rationally explained its decision."[52]

The United States Supreme Court established the analytical framework for reviewing a federal agency's interpretation of a statute in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[53] In *Chevron*, the Court was asked to review EPA regulations defining the term "stationary source."[54] In evaluating whether EPA's interpretation of the statute was contrary to law, the Supreme Court explained that first, a court must determine "whether Congress has directly spoken to the precise question at issue."[55] If the statute is clear and unambiguous, a court applies the statute's plain meaning and the inquiry ends.[56] If the intent of Congress is unclear or ambiguous, a court will defer to the agency's construction of the statute, so long as it is reasonable.[57] Where Congress has explicitly delegated rule making authority to an agency to fill the gaps left in a statute, agency regulations are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[58]

After finding that the CAA was unclear and ambiguous as to the definition of "stationary source," the Court concluded that the regulation was a reasonable interpretation of the statute and therefore deferred to EPA, upholding the agency's definition of the disputed term.[59]

In *Arizona Public Service Company v. United States Environmental Protection Agency*, the U.S. Court of Appeals for the Tenth Circuit applied the arbitrary and capricious standard and the *Chevron* framework when it reviewed EPA's action under the CAA.[60] Petitioners challenged a federal

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[51] *See* Ariz. Pub. Serv. Co. v. U.S. Envtl. Prot. Agency, 562 F.3d 1116, 1123 (10th Cir. 2009) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 463 U.S. 29, 43 (1983)).

[52] *See id.* at 1122.

[53] *See* 467 U.S. 837, 842–43 (1984).

[54] *See id.* at 840–41.

[55] *Id.* at 842.

[56] *See id* at 842–43.

[57] *See id.* at 843–45.

[58] *See id.* at 843–44. A federal agency "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (holding that United States Customs ruling letters not entitled to *Chevron* deference because relevant statute did not indicate congressional intent to delegate authority to issue the rulings with force of law).

[59] *See Chevron*, 467 at 844–45.

[60] *See* 562 F.3d at 1122–23.

implementation plan promulgated pursuant to congressionally delegated EPA regulations.[61] In discussing *Chevron*, the Court explained that "an agency action is entitled to *substantial* deference when it acts pursuant to its own regulation."[62] The Court found that EPA's federal plan was not plainly erroneous or inconsistent with EPA's regulations, and therefore deferred to the agency's interpretation under *Chevron*.[63] The court also held that EPA did not act arbitrarily and capriciously because the agency "identified a regulatory need and enacted a source-specific federal plan to fill this gap."[64] In denying the petition for review, the Court concluded that the disagreement between the petitioners and EPA was nothing more than a "difference in view."[65]

In *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, the Supreme Court applied the *Chevron* standard when the Court reviewed EPA's action to issue stop construction orders for a new major pollution emitting device permitted by a state agency.[66] First, the Court confirmed the agency's authority to review the best available control technology ("BACT") determinations for reasonableness because of EPA's "longstanding construction of the [CAA]."[67] The Court did not apply "dispositive force" to EPA's interpretation of the statute, however, because the agency's construction of the statute was reflected in internal guidance memoranda and was not promulgated with the "force of law."[68] Second, the Court upheld the EPA's action because once the federal agency found that the state's BACT determinations were unreasonable, EPA had the authority under the CAA to issue the stop orders.[69] Further, the Court held that although EPA's stop orders were not composed with "ideal clarity," EPA "adequately ground[ed] the determination" that the BACT determinations were unreasonable because they lacked evidentiary support.[70]

The U.S. Court of Appeals for the Eighth Circuit has denied petitions for review challenging EPA's rejection of state BART determinations in two similar cases.[71] In *North Dakota v. U.S. Environmental Protection Agency*,

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[61] *See id.* at 1118.
[62] *Id.* at 1123 (citing Culbertson v. U.S. Dep't of Agric., 69 F.3d 465 (10th Cir. 1995)).
[63] *See id.* at 1126.
[64] *Id.* at 1130.
[65] *Id.* at 1130–31.
[66] *See* 540 U.S. 461, 468–69 (2004).
[67] *Id.* at 495–96.
[68] *See id.* at 487–88 (citing Christensen v. Harris Co., 529 U.S. 576, 587 (2000)).
[69] *See id.* at 497, 502.
[70] *Id.*
[71] *See* Nebraska v. U.S. Envtl. Prot. Agency, No. 12-3084, 2016 WL 403655, at *5 (8th Cir. Feb. 3, 2016); North Dakota v. U.S. Envtl. Prot. Agency, 730 F.3d 750, 755 (8th Cir. 2013), *cert. denied* 134 S. Ct. 2662 (2014).

the State of North Dakota, Great River Energy, and two environmental groups challenged EPA's final rule approving in part and disapproving in part North Dakota's regional haze SIP.[72] EPA rejected the plan because the SIP contained data flaws that did not allow the State to meaningfully consider the cost of compliance factor.[73] The Eighth Circuit cited *Alaska* as persuasive analysis in upholding EPA's action to reject the BART determinations, concluding that EPA lawfully rejected the SIP for failing to consider the cost of compliance factor as required by statute.[74] The Eighth Circuit cited *Alaska* again in *Nebraska v. U.S. Environmental Protection Agency*, where the State of Nebraska disputed EPA's disapproval of the state's BART determinations at the Gerald Gentleman Station.[75] The court denied the petition for review because Nebraska's SIP contained costing errors and EPA determined that "Nebraska's action was unreasoned."[76]

## III. ANALYSIS

In *Oklahoma v. United States Environmental Protection Agency*, the U.S. Court of Appeals for the Tenth Circuit denied the petition for review and held that the Environmental Protection Agency (EPA) had the statutory authority under the Clean Air Act (CAA) to review Oklahoma's state implementation plan ("SIP").[77] The court found that EPA acted lawfully when the agency rejected Oklahoma's SIP and promulgated a federal implementation plan ("FIP").[78] The court rejected petitioners' procedural challenge that EPA improperly promulgated a FIP in the same action it denied the state plan.[79] The Tenth Circuit also found that the court did not have jurisdiction

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[72] *See* 730 F.3d at 755. Specifically, the State and Great River Energy challenged EPA's disapproval of the BART determinations for Coal Creek Station, a fossil-fuel fired power plant owned by Great River Energy with generating capacity over 750 megawatts. *See id.* at 759–61; Approval and Promulgation of Implementation Plans; North Dakota; Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Regional Haze, 76 Fed. Reg. 58,570, 58,619 (Sept. 21, 2011) (explaining that BART guidelines were mandatory because Coal Creek Station has a capacity of 1,100 megawatts).

[73] *See North Dakota*, 730 F.3d at 760–61.

[74] *See id.* at 761.

[75] *See Nebraska*, 2016 WL 403655, at *2, *5. The Gerald Gentleman Station is the largest source of sulfur dioxide pollution in the state. *See id.* at *2.

[76] *See id.* at *5.

[77] *See* 723 F.3d 1201, 1204 (10th Cir. 2013), *cert. denied* 134 S.Ct. 2662 (2014).

[78] *See id.*

[79] *See id.* at 1222–24. The court stressed the "high bar" the CAA creates for procedural challenges. *See id.* at 1223.

to consider petitioners' challenge to EPA using certain cost estimate calculations for the first time in its final rule (the "Final Rule").[80]

In holding that EPA acted within its statutory authority when the federal agency reviewed the SIP, the court applied the first step of *Chevron* and found that Congress mandated that EPA "must ensure SIPs comply with the statute."[81] Congress expressly delegated rulemaking authority to EPA to issue best available retrofit technology ("BART") guidelines and required that states, when making BART determinations at power plants having total generating capacity over 750 megawatts, follow those guidelines.[82] The court found that EPA's review of a SIP's compliance with BART guidelines was lawful because it was consistent with congressional intent as evidenced by the statute's text and legislative history.[83]

In ruling that EPA lawfully exercised its statutory authority to reject the SIP and promulgate the FIP in its Final Rule, the court applied the standard of review set out in the Administrative Procedure Act (APA).[84] These standards require the court to hold unlawful any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[85] Petitioners argued that EPA acted arbitrarily and capriciously in rejecting the SIP's cost estimates, and that the FIP cost estimates were impermissible because they did not follow the BART guidelines.[86] The court found that EPA had a reasonable basis to reject the cost estimates in the SIP because the state estimates did not follow EPA guidelines.[87] After deferring to EPA's expert and finding that EPA had explained its analysis and offered explanations contradicting petitioners' cost analysis, the Court concluded that EPA's cost estimates in the FIP were not arbitrary and capricious.[88]

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[80] *See id.* at 1214–15. The court found that it lacked jurisdiction because petitioners did not raise the issue with EPA first through a petition for reconsideration. *See id.*

[81] *See id.* at 1207–08.

[82] *See id.* at 1208.

[83] *See id.* at 1209–10.

[84] Administrative Procedure Act, 5 U.S.C. § 706(2) (2012); *Oklahoma*, 723 F.3d at 1211, 1224.

[85] 5 U.S.C. § 706(2); *Oklahoma*, 723 F.3d at 1211. The court was required to determine whether EPA "considered the relevant data and rationally explained the decision." Ariz. Pub. Serv. Co. v. U.S. Envtl. Prot. Agency, 562 F.3d 1116, 1122 (10th Cir. 2009). "Agency action is arbitrary or capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.* at 1123 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 463 U.S. 29, 43 (1983).

[86] *See Oklahoma*, 723 F.3d at 1210–11, 1214.

[87] *See id*. at 1212.

[88] *See id*. at 1217–22.

Following the decision in *Oklahoma*, EPA has cited the case to support its position that the federal agency has authority to review the substance of SIPs.[89] In contrast, some states have argued that the *Oklahoma* decision is not persuasive authority because it misapplied the standard of review set out by the United States Supreme Court in *Alaska*.[90] Broadly speaking, those states contend that according to the holding in *Alaska*, courts must defer to state judgments of reasonableness, not EPA's.[91] Further, they allege that EPA bears the burden of showing that a state's BART determinations are unreasonable.[92] This argument is based on the language in *Alaska* explaining that when a court reviews an EPA disapproval of a state's best available control technology ("BACT") determination "the production and persuasion burdens remain with EPA and the underlying question a reviewing court resolves remains the same: Whether the state agency's BACT determination was reasonable, in light of the statutory guides and the state administrative record."[93]

Despite these arguments, the *Oklahoma* court properly applied the analysis in *Alaska* because the SIP failed to follow the statutorily required BART guidelines.[94] The flaws in Oklahoma's cost analysis prevented the state from meaningfully considering the cost factor required by the CAA; therefore, EPA appropriately determined that the SIP was not "reasonably moored" to the statute.[95] Additionally, EPA does not bear the burden of

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[89] *See* Notification of Supplemental Authority, Arizona v. EPA, No. 13-70366 (9th Cir. filed July 24, 2014).

[90] *See* Brief of Amicus Curiae States of Arizona et al., *supra* note 15, at 8–9; *see also* Final Opening Brief of Petitioner State of Arizona at 20–21, Arizona *ex rel.* Arizona Dep't of Envtl. Quality v. U.S. Envtl. Prot. Agency, No. 13-70366 (9th Cir. 2015); North Dakota Petition for Writ of Certiorari at 25–29, North Dakota v. Envtl. Prot. Agency, 134 S. Ct. 2662 (2014) (No. 13-940), 2014 WL 491629, at *25–29.

[91] *See* Brief of Amicus Curiae, *supra* note 15, at 9. This accompanies state arguments that EPA is undermining the cooperative federalism framework by unlawfully seizing power from the states. *See supra* note 13 and accompanying text.

[92] *See* Oklahoma Petition for Writ of Certiorari, *supra* note 15, at 20. The dissenting opinion in *Oklahoma* reflects this argument, stating that EPA did not deserve deference because it failed to provide evidentiary support for its conclusion to reject the SIP. *See* 723 F.3d at 1225; *see also* Brief of Amicus Curiae, *supra* note 15, at 13 n.7.

[93] *See* Alaska Dep't of Envtl. Conservation v. Envtl. Prot. Agency, 540 U.S. 461, 494 (2004); Brief of Amicus Curiae, *supra* note 15, at 10.

[94] *See Oklahoma*, 723 F.3d at 1207–08, 10; *see also* Nebraska v. U.S. Envtl. Prot. Agency, No. 12-3084, 2016 WL 403655, at *3–5 (8th Cir. Feb. 3, 2016); *North Dakota*, 730 F.3d at 760–61 (rejecting petitioners' argument that EPA is required to approve BART determinations "neither reasoned nor moored to the CAA's provisions").

[95] *See Alaska*, 540 U.S. at 485; *see also North Dakota*, 730 F.3d at 760–61 (rejecting petitioners' argument that EPA is required to approve BART determinations "neither reasoned nor moored to the CAA's provisions"). The *Oklahoma* decision discusses a number of ways in which

showing the unreasonableness of a state's determinations because the *Alaska* court limited that portion of the decision to "either an EPA-initiated civil action or a challenge to an EPA stop-construction order filed in state or federal court."[96] By upholding EPA's action to review and reject the SIP for compliance with the statutorily required BART guidelines, the court in *Oklahoma* preserved EPA's "limited but vital role" in the cooperative federalism framework.[97]

## CONCLUSION

The Environmental Protection Agency's efforts to implement the visibility protection provisions of the Clean Air Act have been met with various court challenges by state governments and private industry across the country. Although some states fear that the federal agency is undermining the cooperative federalism framework by reviewing and rejecting the substance of state plans to reduce haze, the Tenth Circuit affirmed EPA's authority to review and reject implementation plans that do not follow the statutory guidelines. The decision supports EPA's vital role in enforcing the visibility protection provisions of the Clean Air Act. In doing so, the court ensured that visibility at areas such as the Wichita Mountains will improve for years to come.

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Oklahoma failed to follow the BART guidelines, such as failing to provide certain documentation or not using specific costing methods set out in the regulation. *See* 723 F.3d at 1212–14.

[96] *Alaska*, 540 U.S. at 494.

[97] *See id.* at 485, 490–91; Guidelines for BART Determinations Under the Regional Haze Rule, 70 Fed. Reg. 39,156, 39,156–39,172 (promulgated at 40 C.F.R. pt. 51, app.Y (2015)); *supra* note 84–96 and accompanying text.