

CONCISE STATEMENT OF ISSUES AND THEIR IMPORTANCE

The Environmental Protection Agency's Regional Haze Rule (RHaze Rule) was promulgated by EPA to implement the Clean Air Act's express goal of remedying and preventing impairment of visibility in national parks and wilderness areas that results from manmade air pollution. 42 U.S.C. ' 7491. In part, this goal is to be effectuated through installation of best available retrofit technology (BART) on each older source of pollution that emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area 42 U.S.C. ' 7491(b)(2)(A). In the Haze Rule, EPA determined that the quoted language requires the States to mandate the installation of BART at a major stationary source even without a determination of that particular source's direct contribution to visibility impairment in the protected area, so long as the source is emitting a pollutant of concern into an area from which pollutants are likely to be transported downwind into a protected area. Significantly, the National Academy of Sciences had earlier determined that the alternative approach B requiring a source-specific mapping of contributions to visibility impairment in protected areas B is prohibitively costly and time-consuming, and is doomed to failure.

On May 24, 2002, a divided panel of this Court (Judges Edwards and Randolph, with Judge Garland dissenting) declined to decide whether EPA's collective contribution approach is permissible under section 7491(b)(2)(A). American Corn Growers Ass'n v. EPA, No. 99-1348, slip op. at 13-14 (D.C. Cir. May 24, 2002) (hereafter "Slip op."). From a practical standpoint, however, the panel majority effectively decided that question by rejecting EPA's interpretation of a related BART provision B 42 U.S.C. ' 7491(g)(2) B and finding that the statute unambiguously requires a source-by-source determination of visibility improvement from

proposed BART controls before BART-based emission limits can be imposed on a source. Id. at 10. The majority also found an impermissible constraint on state authority in the portions of the Haze Rule concerning State implementation of the BART requirements of section 169A, 42 U.S.C. ' 7491. The panel majority held that the Act unambiguously gives the States broad authority over BART determinations,⁶ slip op. at 12, and that A[t]he Haze Rule attempts to deprive states of some of this statutory authority in contravention of the Act.⁶ Id. at 13.

The issues presented by this petition for rehearing en banc are:

1. Whether the panel majority erred in construing section 169A(g)(2) of the Act, 42 U.S.C. ' 7491(g)(2), as unambiguously requiring States, in determining what emission controls major sources of air pollution must install to prevent impairment of visibility in national parks and other protected areas, to consider the degree of visibility improvement achievable through the use of emission controls on a source-specific (rather than collective) basis;

2. Whether the panel majority erred in holding that the Haze Rule impermissibly constrains state authority to determine whether a source is subject to the Act's BART requirements.

The Panel Majority's Holding Is Inconsistent with Decisions of this Court. The majority's decision departs abruptly from the Court's previously-articulated standard for reviewing an agency's interpretation of a statute that requires consideration of specified factors without prescribing how the factors should be considered. See Coal Employment Project v. Dole, 889 F.2d 1127 (D.C. Cir. 1989). Whether EPA's treatment of the visibility benefit factor of section 169A(g)(2) is reasonable is an issue that must be resolved under Step 2 of the Chevron doctrine, and EPA's reading of the statute is sufficiently rational to merit deference. See

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

The Issues Are Of Exceptional Importance. The BART provisions of the Haze Rule are an important element of the Clean Air Act's program for protecting visibility in our national parks and wilderness areas (also known as Class I areas). Visibility in almost all Class I areas has been seriously degraded. Emissions from power plants have cast, or threaten to cast, a pall over areas of breathtaking panorama in places such as the Grand Canyon. H.R. Rep. No. 95-294 at 203-4 (1977), reprinted in 4 A Legislative History Of The Clean Air Act Amendments of 1977, (Comm. Print 1978), at 2670-71. The sources covered by the BART provisions collectively emit more than five million tons of sulfur dioxide, the single biggest contributor to visibility impairment in the East, and a significant component of haze in the West. Pursuant to Congress' mandate to remedy regional haze, EPA developed the Haze Rule to reduce emissions from these sources, whose precise individual contributions to downwind visibility impairment can not be readily quantified. The majority's decision requires the full Court's review because it significantly restricts EPA's ability to fulfill the Act's mandate to remedy visibility impairment. In effect, the panel's opinion would call upon EPA to use a regulatory approach B source-by-source analysis of visibility impairment B that the National Academy of Sciences characterized as Doomed to failure. See EPA Br. at 32, citing JA361.

STATEMENT

1. Section 169A(a)(4) of the Act requires EPA to adopt regulations that will ensure reasonable progress toward the national goal of preventing any future, and remedying any existing, impairment of visibility in mandatory Class I federal areas that results from manmade air pollution. 42 U.S.C. ' 7491(a)(4). Frustrated by the lack of progress in combating regional haze, Congress amended the Act's visibility protection provisions in 1990 to require that EPA take several steps, culminating in a reiteration of the obligation to fulfill its regulatory duties. 42 U.S.C. ' 7492(e). The specific duty at issue here is that in section 169A(b)(2)(A), which obligates EPA to require that state implementation plans (SIPs) include a requirement that each major stationary source [which was placed into operation between 1962 and 1977] . . . which, as determined by the State . . . emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any [Class I area] . . . shall procure, install, and operate . . . the best available retrofit technology to control such emissions. 42 U.S.C. ' 7491(b)(2)(A). Once a State concludes, pursuant to its inquiry under section 169A(b)(2)(A), that a source is subject to BART controls, the State must identify a specific emission control technology appropriate for that source and impose emission limits that correspond to the use of such controls. The Act provides:

In determining best available retrofit technology the State . . . shall take into consideration the costs of compliance, the energy and nonair 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.

42 U.S.C. ' 7491(g)(2). Each State must adopt visibility improvement measures in accordance with EPA regulations and submit them to EPA for SIP approval. 42 U.S.C. ' ' 7491(b) and 7410(a).

2. To guide States in preparing their SIPs, the Haze Rule calls for States to take a collective view of source contributions to both the formation and the reduction of visibility impairment in Class I areas. 64 Fed. Reg. 35,714, 35,740 (July 1, 1999). Under EPA's collective approach, a major stationary source falls within the ambit of the Haze Rule's BART provisions if the State in which that source is situated determines that the source emits visibility-impairing pollutants within a geographic area from which pollutants can be transported downwind to a Class I area. Id. The statute contains no requirement that a State make a quantitative demonstration that the pollutants emitted by that specific source are impairing visibility in the Class I area by any particular amount before it finds that BART applies to that source.^{1/}

In the subsequent step of setting a source-specific emission limit that corresponds with the use of retrofit technology, the Haze Rule provides guidelines to States for considering the five statutory factors in section 169A(g)(2). 64 Fed. Reg. at 35,740-41. The Haze Rule directs the States to consider the four cost factors on a source-specific basis but to consider the fifth factor, which concerns the degree of improvement in visibility at a Class I area expected from the application of BART controls, on an aggregate or collective basis. Id. at 35,741.

^{1/} The statute explicitly authorizes one mechanism for exempting individual sources from control requirements on the basis of their individual contributions to visibility impairment: a source may be excused from the BART provisions if it can demonstrate to the Administrator that it does not contribute in any way to a significant impairment of visibility in a Class I area. See 42 U.S.C. ' 7491(c)(1).

3. a. The panel majority (Judges Edwards and Randolph) concluded, under Step 1 of Chevron, that the language in section 169A(g)(2) is unambiguous and that the splitting of the statutory factors is consistent with neither the text nor the structure of the statute. Slip op. at 10. The language of ' 169A(g)(2) can be read in no other way. To treat one of the five statutory factors in such a dramatically different fashion distorts the judgment Congress directed the States to make for each BART-eligible source. Id.

b. Judge Garland, dissenting, emphasized that "[a]ll that is required is that the state take into consideration the five listed factors. . . . Because the statute does not specify *how* the state should take these factors into consideration, it does not bar EPA from employing a group rather than source-by-source mode of analysis in considering benefits. Dissent at 8. In addition, Judge Garland found other statutory provisions namely 42 U.S.C. ' 7491(a)(3), (b)(1), and (c)(1), and 42 U.S.C. ' 7492(a)(1) that support EPA's reading of section 169A(g)(2) as at least permitting, if not inviting, a region-wide view of the BART requirements. Id. at 8-10.

c. With respect to petitioners' contention that the Haze Rule's BART provisions constrain state authority, the majority found, again under Step 1 of Chevron, that EPA failed to give sufficient effect to the statutory phrase "as determined by the State," as it is used in section 169A(b)(2)(A). See 42 U.S.C. ' 7491(b)(2)(A). According to the majority, "Congress intended the states to decide which sources impair visibility and what BART controls should apply to those sources. The Haze Rule attempts to deprive states of some of this statutory authority, in contravention of the Act." Slip op. at 13.

d. Judge Garland argued in dissent that the Haze Rule does not contravene the statutory commands regarding determinations to be made by the States under the BART provisions of the

Act. Dissent at 12. Judge Garland concluded that the text of section 169A gives EPA ample authority to promulgate guidelines requiring states to use group-BART principles to determine both the sources that are subject to BART requirements and the kinds of controls those sources must install. @ Id. at 13.

e. The Court remanded the BART provisions of the Haze Rule to EPA. In doing so, the Court suggested that the requisite degree of state authority might be supplied through a provision allowing a State to exempt a source based on its individual contribution to visibility impairment. Slip op. at 12.

ARGUMENT

I. SECTION 169A(g)(2) OF THE CLEAN AIR ACT DOES NOT UNAMBIGUOUSLY REQUIRE STATES TO QUANTIFY, ON A SOURCE-SPECIFIC BASIS, THE VISIBILITY IMPROVEMENTS FROM THE USE OF BART CONTROLS.

A. The Act is Silent As To How Visibility Improvement Should Be Assessed.

The majority's holding attributes to Congress the specific intent that EPA promulgate regulations requiring an individualized determination of the visibility benefit obtained through the use of BART at each source. Without citing any specific text, or otherwise finding that Congress has directly spoken to the precise question at issue, @ Chevron, 467 U.S. at 842, the Court summarily concluded that the language of section 169A(g)(2) can be read in only one way. Slip op. at 10.

Two of the five criteria listed in section 169A(g)(2) are on their face limited to source-specific consideration. 42 U.S.C. ' 7491(g)(2).^{1/} In stark contrast, no similar language

^{2/} The two are: Any existing pollution control technology in use at the source and the remaining useful life of the source. @ 42 U.S.C. ' 7491(g)(2) (emphasis added).

constrains consideration of the fifth criterion: the Adegree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.@ Id. The statute simply does not say whether that factor may be considered in the aggregate or must be considered on a source-by-source basis. Thus, nothing in the statute confines the discretion of EPA to choose among reasonable evaluation methods for States to use in considering the visibility benefit factor. Moreover, nothing suggests that Congress intended for States to apply each of the five factors on an individualized basis in determining an appropriate level of BART controls for each source. As Judge Garland noted in dissent, AAlthough the court says that the statute itself does not permit any of the five factors to be treated differently from any of the others, the statute itself does not say so.@ Dissent at 7.

The majority=s decision to resolve the section 169A(g)(2) issue under Step 1 of Chevron is inconsistent with this Court=s precedent on the appropriate standard for reviewing an agency=s interpretation of a statutory provision that commands consideration of enumerated factors. In Coal Employment Project, 889 F.2d 1127, the Court resolved under Step 2 of Chevron a challenge to an agency=s non-individualized analysis of statutory criteria because the statute did not Amandate specific formulas or methodologies for taking account of the criteria.@ Id. at 1131.

The Court explained:

While we agree with petitioners that the cited language shows that Congress intended [the agency] to base all of its penalties on consideration of all of the statutory factors, we do not find that this same language instructs the Secretary to devise a penalty scheme that adopts an individualized approach to all six penalty criteria. In the absence of a more precise statement of intent on the question, we

are thrust into a Chevron II analysis, under which we defer to the Secretary's interpretation of the Mine Act, so long as that interpretation is reasonable.

Id. at 1131-32. The Court found no conflict between the agency's non-individualized view of some of the factors and the text of the statute. Instead, the Court held, "So long as they appropriately take account of the statutory criteria and principal congressional purposes, non-individualized determinations are properly within the Secretary's discretion." Id. at 1134.

Subsection 169A(g)(2) is silent with respect to the methodology to be used in considering the visibility improvement from the use of BART. Accordingly, judicial review of EPA's choice as to how this factor should be evaluated is quintessentially an inquiry under Step 2 of Chevron.

B. The Issue Is Vitally Important to EPA's Visibility Program.

This issue holds great significance for the future of EPA's implementation of the Clean Air Act's visibility program. The BART provisions are a key element of the Haze Rule, which in turn is the central pillar implementing the visibility protection provisions of the Clean Air Act. The primary difficulty arising from the panel majority's construction of section 169A(g)(2) is that it appears to compel States to adopt a highly quantitative, source-by-source approach to the BART provisions, notwithstanding that precisely such an approach was deemed unworkable by EPA and the National Academy of Sciences.

EPA's collective approach to implementing the Act's BART provisions is grounded in Congress's directive setting a low threshold for BART applicability and in the very complex chemistry and physics of haze formation. See 64 Fed. Reg. at 35,740. Haze is primarily made up of particulate matter formed in the atmosphere from a variety of precursor compounds emitted from numerous sources. Id. at 35,715. Both the precursors and secondary particulates can be

transported very long distances through the atmosphere. Id. at 35,718. Since visibility impairment is an optical effect, accurate visibility modeling requires an understanding of the physics of light absorption and reflection. Id. Because of these complexities, the National Academy of Sciences believed that a precisely quantified source-by-source approach to regulating haze was impracticable.^{3/} Id. Indeed, the record contains the Academy's opinion that such an approach would be likely to fail, largely because the studies needed to assess an individual source's specific contribution to downwind haze take many years to complete and are prohibitively expensive. EPA concluded that, based on present monitoring and modeling capabilities, a collective rather than individualized approach was the only practical means of effectively implementing the Act's BART provisions in sections 169A(b)(2)(A) and 169A(g)(2). Thus, if allowed to stand, the panel majority's decision would likely frustrate efforts to address visibility impairment in Class I areas. As Judge Garland aptly noted, "There is certainly nothing in the language of the Clean Air Act that requires us to adopt such a self-defeating construction." Dissent at 11.

^{3/} As an example, the effort to trace the contribution of the Navajo Generating Station to haze in the Grand Canyon took eight years, cost approximately \$8 million, and yielded inconclusive results. See Dissent at 3, n.5; EPA Br. at 38, citing JA1109.

II. THE HAZE RULE DOES NOT IMPERMISSIBLY CONSTRAIN STATE AUTHORITY.

A. The Majority Failed to Recognize the Significant Authority the Act Confers Upon EPA to Promulgate Regulations That Will Assure Reasonable Progress Toward the National Visibility Goal.

In finding that the Haze Rule was inconsistent with the Act's provisions giving the States broad authority over BART determinations,¹² the majority misunderstood the Act's basic structure, entirely ignoring the requirement that EPA issue regulations that ensure that States achieve meaningful improvements in visibility. The panel's opinion eviscerates the Act's structure and fundamental goal by attributing to Congress an intent to allow States the unfettered discretion to determine which sources are subject to BART. In fact, the statutory design clearly directs EPA to supply reasoned principles as necessary to ensure that state discretion is exercised in a manner consistent with statutory purposes. The statute reserves to EPA the right to make source-specific determinations exempting particular sources from the BART requirements.

The panel's broad conclusion that EPA's Haze Rule unduly constrains state authority is flawed in several respects. Most notably, a specific Clean Air Act provision B section 169A(a)(4) B requires EPA to Apromulgate regulations to assure reasonable progress toward meeting the national goal specified in [section 169A(a)(1)].¹³ 42 U.S.C. ' 7491(a)(4). Another provision B section 169A(b)(1) B expressly requires EPA to Aprovide guidelines to the States . . . on appropriate techniques and methods for implementing this section.¹⁴ 42 U.S.C. ' 7491(b)(1). It is therefore evident from the text of the Act that Congress did not intend for States to have

unfettered authority in implementing the Act's BART provisions.

Indeed, in every other area in which the Clean Air Act gives States the primary responsibility to select controls and implement the Act, the statute leaves EPA with oversight authority to ensure that the States meet the minimum requirements of the Act. The Act's visibility provisions are no different. For example, Congress granted EPA the authority to determine whether the measures contained in each State's SIP are sufficient to meet the requirements of the Act. See 42 U.S.C. ' 7410(a)(2)(A)-(K); Michigan v. EPA, 213 F.3d 663, 687 (D.C. Cir. 2000) (AGiven EPA's authority to ensure that submitted SIPs adequately prohibit significantly contributing emissions, EPA permissibly relied on its general rulemaking authority to prospectively inform the states of EPA's significance determinations.); see also Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 79 (1975) (AUnder ' 110(a)(2), the Agency is required to approve a state plan which . . . also satisfies that section's other general requirements.). One of the Act's general requirements is that each state implementation plan shall Ameet the applicable requirements of . . . part C of this subchapter (relating to . . . visibility protection).@ 42 U.S.C. ' 7410(a)(2)(J). Thus, in addition to the visibility statute, the broader SIP provisions of the Act clearly contemplate an important oversight role for the federal government.

Moreover, in concluding that A[t]he Haze Rule ties the states' hands and forces them to require BART controls at sources without any empirical evidence of the particular source's contribution to visibility impairment in a Class I area,@ slip op. at 12, the majority failed to recognize that nothing in the statute requires empirical evidence of the precise contribution from any particular source. The majority's singular focus on the phrase Aas determined by the State@

caused it to improperly dismiss equally relevant but ambiguous language in the same sentence of section 169A(b)(2)(A), 42 U.S.C. ' 7491(b)(2)(A), which suggests that the focus of the State=s inquiry is on whether a source emits any air pollutant,@ which pollutant, in turn, may reasonably be anticipated to contribute to any visibility impairment. These words Apile ambiguity upon ambiguity and virtually invite the reader to adopt the construction favored by EPA.@ Dissent at 5. EPA=s interpretation of section 169A(b)(2)(A) gives effect to all of the terms of the provision in a way that furthers Congress= clearly expressed intent that EPA provide methods for implementing the section that will assure reasonable progress toward the goal of remedying existing visibility impairment from manmade air pollution. See 42 U.S.C. ' ' 7491(a)(1), (a)(4), and (b)(1).

Given the panel=s failure to address these provisions, it is not clear what impact the panel=s broad conclusion has on EPA=s basic authorities to promulgate haze regulations and guidelines and to oversee state implementation of the Act. In view of the conflict between the panel=s reasoning and the structure and fundamental premise of the Act, the panel=s conclusion that the Haze Rule improperly invades state authority cannot be justified under a Chevron Step 1 analysis.

B. The Haze Rule's Balancing of Federal and State Power Rationally Addresses the Potential for Interstate Conflict in Remediating a Regional Problem and Preserves the Federal Floor for Visibility Protection.

Like all Clean Air Act programs involving the interstate transport of pollutants, the Haze Rule depends for its success on a strong federal component. Conflicts among States are likely to arise as each State chooses between improving visibility in distant national parks (in other States) and minimizing the imposition of costs on local industry. Thus, in section 169A(c)(1), Congress expressly delegated to EPA and federal land managers the authority to exempt from the Act's BART requirements any source that does not, by itself or in combination with other sources, emit any pollutant that may reasonably be anticipated to cause or contribute to a significant impairment of visibility in any Class I area.^{4/} 42 U.S.C. ' 7491(c)(1). Limiting source-by-source exemption authority to the federal government ensures that States do not compete unfairly for industry by granting such broad or numerous exemptions that their haze programs are insufficient to bring about the air quality improvements mandated by the Act. See Duquesne Light Co. v. EPA, 698 F.2d 456, 471 (D.C. Cir. 1983).

Moreover, the Haze Rule's balancing of federal and state power comports with Congress's intent that the Clean Air Act establish a federal floor for air quality protection. States are generally free to impose more stringent obligations if they choose. 42 U.S.C. ' 7416. Yet if the

^{4/} Because Congress expressly conferred authority upon EPA to grant source-specific exemptions, the panel majority's suggestion that EPA might authorize a state exemption mechanism, slip op. at 12, is inherently problematic.

panel majority is correct that section 169A(b)(2)(A) gives States the unfettered right to make individualized determinations as to whether a specific source may cause or contribute to visibility impairment in a Class I area, then the only purpose for EPA's similar authority under section 169A(c)(1) would be to exempt sources that the State has already determined must be included. Thus, contrary to the general thrust of the Act, in this one respect, the States would not be free to set more stringent standards than required by the Act. EPA's source-specific exemption authority makes far more sense if the State's BART-applicability determination is conducted on a collective basis in a structured manner consistent with the very low threshold established in section 169A(b)(2)(A). EPA's construction assigns separate roles to the States and to itself: the States must identify the upwind sources that may reasonably be anticipated to contribute to regional haze, and thus included in the Haze Rule's reach; and EPA determines, on a source-by-source basis, whether a particular source may be excluded on the grounds that its emissions are not expected to contribute to a significant impairment of visibility in a Class I area.

In sum, the Haze Rule does not establish precise criteria that preclude the appropriate exercise of state discretion in choosing which sources are subject to BART or what BART emission limits are appropriate for any individual source. The Rule also preserves the States' right to adopt provisions that are more stringent than the minimum federal standards. The balancing of State and federal power in the Haze Rule is therefore entirely consistent with Congress' intent.

CONCLUSION

For the foregoing reasons, the Court should vacate the portions of the panel opinion addressing the BART requirements and grant rehearing en banc.

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ADDENDUM