Testimony of William Yeatman
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on
"EPA's Regional Haze Program"
before the
Subcommittee on Environment
Committee on Science, Space, & Technology

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Chairman Jim Bridenstine, Ranking Member Bonamici, Members of the Subcommittee, thank you for inviting me to testify before you today about the Environmental Protection Agency's Regional Haze program. My name is William Yeatman, and I'm a Senior Fellow at the Competitive Enterprise Institute. We are a non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. CEI specializes in regulatory policy. We accept no government funding and rely entirely on individuals, corporations, and charitable foundations for our financial support.

1. **As Administered since 2009, the Regional Haze Regime Has Been an Affront to Clean Air Act Cooperative Federalism**

The 95th Congress that created the Regional Haze program nearly forty years ago (as part of the 1977 Clean Air Act amendments) would not recognize the 'federal-first' rule that has been implemented by the EPA during the administration of President Barack Obama. When it drafted the Regional Haze provision, Congress's clear intent was for the States to be in charge of the program, due to its being an aesthetic regulation, rather than a public health one. In floor debate in 1977, Congress unequivocally said that states would have the authority to decide how much value to assign to an aesthetic benefit, and the resulting language of the Clean Air Act reflects this fact.

Since 2009, however, the EPA has run roughshod over the States rightful authority under the Regional Haze rule. In fact, EPA has rejected 15 state plans for Regional Haze and imposed in their stead federal implementation plans (FIPs) costing at least $5 billion. Under the Clean Air Act's cooperative federalism structure, a FIP is the most drastic and aggressive action the EPA can take against a state government. In practice, a FIP represents a seizure of the state's authority. Simply put, Clean Air Act FIPs are a big deal. For comparison's sake, consider that the previous three presidential administrations (*i.e.*, George H.W. Bush, Bill Clinton, and George W. Bush) together imposed five total Clean Air Act FIPs. Obama's EPA, in contrast, has imposed 54 total Clean Air Act FIPs, of which, again, fifteen pertain to Regional Haze.

For more, see:

- William Yeatman, "How the EPA Is Undermining Cooperative Federalism under the Clean Air Act," Competitive Enterprise Institute, On Point No. 197 (2014) link: http://cei.org/sites/default/files/William%20Yeatman%20-How%20the%20EPA%20Is%20Undermining%20Cooperative%20Federalism.pdf
- William Yeatman, "EPA's Regional Haze Regime Imposes Big Costs for Invisible Benefits," Written Testimony before the House Subcommittee on Technology, Information Policy,

Intergovernmental Relations and Procurement Reform, June 28, 2012, link: https://cei.org/news-releases/epas-regional-haze-regime-imposes-big-costs-invisible-benefits

2. Regional Haze Costs Are Wholly Incommensurate with Its Invisible "Benefits"

EPA uses a metric known as a "deciview" to measure visibility improvement. A deciview value of 0 represents the clearest possible visibility, *i.e.*, the view is unaffected by haze. As the deciview number increases, visibility becomes progressively poorer. According to peer-reviewed research, it would require an improvement of five to ten deciviews in order for the average person to perceive the difference in visibility with certainty, depending on conditions. With this referent in mind, consider the fact that in December of 2015, the EPA imposed a federal plan on Texas that would entail almost $2 billion in compliance costs in order to achieve a maximum visibility benefit of about .5 deciviews. Peer-reviewed science tells us there is a mere ten percent probability that the average person would detect this difference, which is the justification for nearly $2 billion in compliance costs.

Thanks to computer software, we can model the visibility "benefit" of EPA's Regional Haze FIPs over the State plans, and thereby compare the visibility improvements associated with the state and federal plans. For example, the largest deciview improvement achieved by any of EPA's fifteen Regional Haze takeovers (relative to the state plans) occurred in Oklahoma. There, the agency imposed a FIP that amounted to a 2.89 deciview improvement over the Oklahoma plan, at a cost of almost $1.8 billion. For my oral testimony, I hope to depict side-by-side images comparing the difference in visibility between the EPA plan and the Oklahoma plan to Members present. Otherwise the images are available online. Indeed, the images are indistinguishable! That is, the difference between the two plans is literally invisible. And, as noted above, the Oklahoma federal taekover represents the greatest degree of visibility improvement of any of the federal plans. Every other federal plan amounts to less than a two deciview "improvement."

While the benefits of EPA's Regional Haze takeovers are demonstrably non-existent, the costs are all too real. In Oklahoma, ratepayers are on the hook for $1.8 billion. In Texas, the capital costs are almost $2 billion. In New Mexico, costs exceed $700 million. In Wyoming, ratepayers face about $650 million in capital costs. EPA is soon to finalize a FIP in Arkansas that threatens to impose almost $275 million in upfront expenses. Of course, the regulatory burden will fall heaviest on the poorest, for whom energy costs occupy a higher share of their personal (often fixed) income. Crucially, none of these costs will bring about a perceptible change in visibility. The "benefit" to ratepayers is nothing.

For more, see:

- William Yeatman, "EPA's New Regulatory Front: Regional Haze and the Takeover of State Programs," U.S. Chamber of Commerce (2012), link: https://www.uschamber.com/sites/default/files/legacy/reports/1207_ETRA_HazeReport_lr.pdf
- Ronald C. Henry, "Estimating the Probability of the Public Perceiving a Decrease in Atmospheric Haze," Journal of the Air & Waste Management Association, 55(11), 1164 figure 3 (2005)

3. The Unfortunate Role of "Sue and Settle" Litigation in EPA's Regional Haze Regime

It is no exaggeration that every EPA disapproval of a state Regional Haze submission and every EPA regulatory takeover of a state Regional Haze program has occurred pursuant to a "sue and settle" lawsuit with environmental special interests.

Beginning in 2009, a group of nonprofit environmental advocacy organizations—Sierra Club, WildEarth Guardians, Environmental Defense Fund, National Parks Conservation Association, Montana Environmental Information Center, Grand Canyon Trust, San Juan Citizens Alliance, Our Children's Earth Foundation, Plains Justice, and Powder River Basin Resource Council—filed lawsuits against EPA alleging that the agency had failed to perform its nondiscretionary duty to act on state submissions for regional haze. Rather than defend these cases, EPA simply chose to settle. In five Consent Decrees negotiated with environmental groups and, importantly, without notice to the states that would be affected—EPA agreed to commit itself to various deadlines to act on all states' visibility improvement plans.

States are frequently caught off guard by these sue-and-settle agreements, because the EPA doesn't inform them about the ongoing settlement negotiations. For example, the Florida Department of Environmental Protection's Brian Accardo told a U.S. House of Representatives Committee that he only found out about a citizen suit settlement affecting his state's regional haze planning when a notice appeared in the Federal Register—despite years of haze-related planning efforts. He said, "I was drinking my coffee and reading the Register and I became aware."

In blatant contravention of the principles of cooperative federalism, the EPA and green groups have gone so far as to exclude States from negotiations resulting from these lawsuits, and, in at least one instance, EPA teamed up with green groups to litigate to keep a State from intervening. When North Dakota Attorney General Wayne Stenehjem learned that his state was subject to FIP pursuant to an EPA settlement with WildEarth Guardians in an Oakland federal court, he tried to gain intervention into the lawsuit, so that North Dakota could have a voice. The EPA opposed Stenehjem's motion to intervene, and won a court order that kept North Dakota out of negotiations.

And because States are not afforded a voice in these "sue and settle" discussion, EPA and special interests are free to impose unreasonable deadlines on the regulatory process. Rushed rules, in turn, deprive States of meaningful input. For example, Arkansas Attorney General Leslie Rutlege recently commented to the EPA regarding the too-fast pace of the agency's Regional Haze rulemaking in Arkansas resulting from a sue and settle deadline. According to AG Rutlege, "I do not believe that five months is an adequate time period for the EPA to fully analyze and respond to the public comments … a rushed process that fails to fully review all considerations will lead to an arbitrary and capricious decision."

For more, see:

- William Yeatman, The U.S. Environmental Protection Agency's Assault on State Sovereignty, American Legislative Exchange Council (2013), link: https://cei.org/studies/us-environmental-protection-agencys-assault-state-sovereignty
- William Yeatman, "Al 'Crucify' Armendariz Emails Indicate Collusive 'Sue & Settle' Shenanigans on Regional Haze," GlobalWarming, 20 June 2014, link:

http://www.globalwarming.org/2014/06/20/primary-document-dump-fridays-al-crucify-armendariz-emails-indicate-collusive-sue-settle-shenanigans/

4. Using "Independent" Contractors To Usurp State Decisions

Among the most disconcerting elements of the EPA's Regional Haze regime has been the manner in which the agency has gone about disapproving state plans. In second-guessing state decisions on Regional Haze, the agency has relied on the same "independent" contractor as have the green special interests behind the "sue and settle" lawsuits. In this fashion, the EPA's approach seems to raise serious conflict of interest issues.

States spend considerable resources putting together Regional Haze implementation plans, which routinely exceed a thousand pages. In order to disapprove a state implementation plan, the agency needs a reason to object. And in at least five States—New Mexico, Oklahoma, Nebraska, North Dakota, and Texas—the EPA has employed a supposedly independent consultant, Dr. Phyllis Fox, to second-guess state determinations regarding the cost of controls. In large part on the basis of Dr. Fox's input, the agency has rejected these state plans and imposed federal plans that cost billions of dollars more.

There is substantial cause to doubt Dr. Fox's "independence" as a consultant. For starters, she routinely serves as a witness for the very same environmental groups who sued to obtain the Regional Haze consent decrees. More to the point, she worked for these same groups on the Regional Haze regulation during the Obama administration—the same period she has been employed by the EPA to work on Regional Haze. For example, only months before she was hired by EPA to review Oklahoma's Regional Haze plan, Dr. Fox was employed by the Sierra Club as a consultant in the group's pursuit of stringent Regional Haze controls at the Four Corners Power Plant within the Navajo Nation reservation. And in 2012, Dr. Fox was employed by the Sierra Club as a consultant to help the group achieve costly Regional Haze controls in Montana.

The Sierra Club subsequently has relied on Dr. Fox's prior work (from the rulemaking for the Montana Regional Haze FIP) to press for tighter emissions limits for the EPA's federal implementation plan in Arkansas and Texas. At the same time, the EPA itself hired Dr. Fox to review the Texas Regional Haze submission. This means that Dr. Fox's services were effectively employed by both the Sierra Club and the EPA in the same rulemaking to impose a Regional Haze FIP on Texas. The Sierra Club, of course, is one of the green litigation groups whose "sue and settle" suit (see D.D.C. No. 1:11-cv-01548) led to the Texas FIP to begin with. Thus, the EPA and Sierra Club are supposed adversaries over implementation of the Regional Haze before the judicial system, yet they both use the services of Dr. Fox in the regulatory process. The extent of these conflicted relationships appears to belie this contractor's "independence."

5. What Should Be Done?

The Regional Haze program, as it has been implemented over the last seven years, is broken. Congress intended for States to be in charge. Yet EPA has usurped the State's rightful role through a number of seemingly dubious administrative means, including "sue and settle" litigation and also the employment of the environmental special interests' go-to Regional Haze consultant to second guess state decisions. Congress should seek to restore the proper balance between States and the EPA under the cooperative

federalism framework established by the Regional Haze provision. To this end, I recommend that Congress should undertake two policies:

First, the Congress should pass a law stipulating that States, and not the EPA, are the primary decision-makers under the Regional Haze program, and, as such, Article III Courts should defer to States rather than the agency on all factual determinations made pursuant to the Regional Haze program. To date, the U.S. Courts of Appeals have upheld the agency's use of a hired consultant to second guess of state determinations regarding the costs and visibility improvements of Regional Haze controls. In so doing, the courts have reasoned that they must defer to EPA factual determinations. However, the courts' justification fails to hold water; EPA does not merit deference in implementing the Regional Haze program. In fact, Congress delegated to the States the primary authority to implement the Regional Haze program. In the execution of this delegation, the States invest significant resources into crafting highly complex implementation plans. From a practical standpoint, it makes no sense for States to do all the work of drafting a Regional Haze plan in the execution of a congressional delegation of authority, yet for courts to defer to a review of that plan conducted by a single consultant of arguable independent who was employed by the agency on an *ad hoc* basis. Congress would remedy this nonsensical situation by expressly affording States judicial deference for factual determinations rendered in the course of implementing the Regional Haze rule.

Second, the Congress should afford States intervention of right whenever a State seeks to participate in a sue and settle lawsuit. As I noted above, EPA has actually litigated to prevent States from joining these suits, which is an outrageous affront to the Clean Air Act's design of cooperative federalism. EPA's opposition to state participation in sue and settle negotiations flies in the face of reason, given that States are the regulated entities. Congress should ensure States are never again shut out of litigation pertinent to their own interests by the EPA, which is supposed to be an equal partner in implementing the Clean Air Act.