American Corn Growers Association v. EPA: The Unclear Future of the Haze Rule - A Successful Challenge and a Major Setback

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AMERICAN CORN GROWERS ASSOCIATION V. EPA: THE UNCLEAR FUTURE OF THE HAZE RULE — A SUCCESSFUL CHALLENGE AND A MAJOR SETBACK

I. INTRODUCTION

In 1977, Congress sought to improve visibility in large national parks and wilderness areas under the Clean Air Act (CAA).1 Visibility in these areas, designated by the government as mandatory Class I Federal areas and specially protected in their natural states, was rapidly deteriorating.2 In response, Congress delegated the task of improving visibility in these areas to the Environmental Protection Agency (EPA).3 Over the next two decades, EPA developed the Regional Haze Rule (Haze Rule), which ultimately went into effect in 1999.4 In 2002, twenty-five years after visibility became an official federal concern, the goal of improved visibility suffered a major setback in American Corn Growers Association v. EPA.5

In Corn Growers, various industry petitioners and intervenors challenged EPA’s Haze Rule, arguing that the rule contradicted CAA.6 The primary issue involved the Haze Rule’s best available retrofit technology (BART) provisions, which required existing stationary sources to “procure, install, and operate” such technology


2. See Chevron U.S.A., Inc. v. United States Environmental Protection Agency, 658 F.2d 271, 272 (5th Cir. 1981) (detailing history of 1977 CAA amendments). Class I areas are all international parks, national wilderness areas more than 5,000 acres, national memorial parks more than 5,000 acres, and national parks larger than 6,000 acres. See Regional Haze Regulations, 64 Fed. Reg. 35714, 35,715 (July 1, 1999) (to be codified at 40 C.F.R. pt. 51); see 42 U.S.C. § 7472(a).

In addition to visibility deterioration, haze affects health and environmental issues, such as increased illness and acid rain formation. See U.S. Env’t’l Prot. Agency, What is Visibility Impairment?, at http://www.epa.gov/air/visibility/what.html (last updated Mar. 29, 2002) [hereinafter Visibility Impairment Website] (explaining that serious health problems and environmental damage are linked to air pollutants).


6. See id. at 5 (listing claims made against Haze Rule by various petitioners).
in order to combat regional haze. The D.C. Circuit Court ultimately remanded that part of the Haze Rule for further review by EPA. In order for the Haze Rule to comply with the ruling, EPA must now develop regulations that measure BART on a source-by-source rather than a group basis, something they previously found impractical. Unfortunately, visibility in Class I areas will continue to deteriorate while EPA attempts compliance, affecting the millions who visit these parks as our nation’s natural landmarks.

This Note begins by detailing the numerous claims against the Haze Rule brought by petitioners and addressed by the D.C. Circuit Court. Next, section III sets out general background law, putting forth foundational statutory and case law analysis for the Haze Rule and CAA. Looking first at the CAA and its implementation of visibility improvement as a national goal, the Note then follows the development of the Haze Rule, from its inception to its final implementation in 1999. Focusing on the statutory analysis, section IV of the Note analyzes the court’s decision, concluding that several arguments could be raised against the determination that EPA’s interpretation of CAA was unambiguously contrary to the plain language of the statute. Finally, this Note discusses the impact the court’s decision will have on regional haze deteriora-

7. See Corn Growers, 291 F.3d at 5 (detailing petitioners’ claim that EPA acted contrary to law in “establishing a group rather than a source-by-source approach to BART determinations.”). Section 159A(b)(2)(A) of CAA includes a requirement that certain sources install the “best available retrofit technology,” known as BART, in order to make reasonable progress towards meeting the national goal. See Regional Haze Regulations, 64 Fed. Reg. at 35,737. Regulations issued by EPA in 1980 defined BART as “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 facility.” Id. at 35,738.

8. See Corn Growers, 291 F.3d at 8-9 (holding that Haze Rule’s BART provisions contradicted text, structure and history of CAA).


11. For a discussion of the claims brought against EPA, see infra notes 18-20 and accompanying text.

12. For a discussion of the background of the Haze Rule, see infra notes 26-56 and accompanying text.

13. For a discussion of the CAA Amendments of 1977 and development of the Haze Rule, see infra notes 32-56 and accompanying text.

14. For a discussion of the court’s analysis, see infra notes 71-126 and accompanying text.
tion and the millions of people who will be unable to enjoy our national parks in their natural state.\textsuperscript{15}

II. FACTS

American Corn Growers Association is an organization of farmers and ranchers "formed to represent members on matters of public policy, including matters of environmental regulation."\textsuperscript{16} Two years after EPA implemented the Haze Rule, American Corn Growers Association and various petitioners sought a review of the Haze Rule in the United States Court of Appeals for the District of Columbia Circuit.\textsuperscript{17} First, industry petitioners and intervenors claimed that EPA acted contrary to CAA by requiring a group analysis of BART determinations rather than a source-by-source approach.\textsuperscript{18} Second, industry petitioners argued that the "natural visibility" goal and the "no degradation requirement" of the rule were arbitrary and capricious, and that EPA acted without legal authority to implement them.\textsuperscript{19} Third, petitioner Sierra Club claimed that "EPA failed to set reasonable criteria for measuring or assuring reasonable progress, and that EPA acted contrary to law by extending the statutory deadline for submission of state haze control plans."\textsuperscript{20}

\textsuperscript{15} For a discussion of the impact of the court's decision, see infra notes 127-143 and accompanying text.


\textsuperscript{17} See Am. Corn Growers Ass'n v. EPA, 291 F.3d 1, 3 (D.C. Cir. 2002) (challenging EPA's Haze Rule). The petitioners and petitioner-intervenors in this case also included individual electric utilities, two electric trade associations, the National Mining Association (a mining trade association), and the State of Michigan. See Brief of Industry Petitioners, supra note 16 (Corporate Disclosure Form). Maine, New Hampshire and Vermont intervened as Respondents, along with various environmental defense groups. See id.

\textsuperscript{18} See Corn Growers, 291 F.3d at 5-6 (arguing "that the language, statutory structure, and legislative history of [CAA] § 169A make it clear that the Haze Rule runs afoul of the Act."). A source-by-source analysis requires a state to determine the specific contribution to visibility impairment for each particular source. See Regional Haze Regulations, 64 Fed. Reg. 35714, 35,740 (July 1, 1999) (to be codified at 40 C.F.R. pt. 51). A group analysis, on the other hand, requires BART implementation for any source that causes or contributes to regional haze "within a geographic area from which pollutants can be emitted and transported downwind to a Class I area." Id.

\textsuperscript{19} See id. at 5, 9 (arguing that natural visibility and no degradation of visibility were not viable goals). For an explanation of the "natural visibility" goal and "no degradation" requirement, see infra note 125.

\textsuperscript{20} Corn Growers, 291 F.3d at 5, 13 (claiming Haze Rule did not satisfy EPA's requirements under 42 U.S.C. §§ 7491(a)(4), 7492(c)(1) (2000), and 5 U.S.C.
With regard to the BART issue, the D.C. Circuit Court granted the petition for review and vacated the BART rules, remanding the issue to EPA. The court found no merit in the second claim, that the "natural visibility" goal and the "no degradation requirement" were arbitrary and capricious, and dismissed these challenges. The court addressed Sierra Club's claims and found that: (1) the claim that EPA failed to set reasonable criteria was not ripe as a result of the court's decision to remand the BART requirements, and (2) the deadline-extension issue should be remanded for review along with the BART requirements. EPA filed a request for a rehearing on July 8, 2002. On September 19, 2002, the Court of Appeals denied the rehearing.

III. BACKGROUND

A. Regional Haze

Haze has deteriorated visibility in most of this country's national parks. Haze is created when sunlight hits fine particles in the air, which absorb some of the sunlight and scatter more of it away before the remaining light reaches the observer. Some of

§ 706(2)(A) (2000)). Pursuant to 5 U.S.C. § 706(2)(A), EPA is obligated not to act in an "arbitrary or capricious" matter. See id. at 13. Sierra Club is a national nonprofit organization "dedicated to exploring, enjoying, and protecting the wild places of the earth, and to protecting and restoring the quality of the natural and human environment." Final Joint Brief of Petitioner Sierra Club, Am. Corn Growers Ass'n v. EPA, 291 F.3d 1 (D.C. Cir. 2002) (No.99-1348). Sierra Club challenged the adequacy of the Haze Rule in meeting CAA requirements. See id. at 2. Sierra Club claimed that the Haze Rule actually prolonged manmade visibility improvement, rather than improved it. See id.

21. See Corn Growers, 291 F.3d at 6 (holding for industry petitioners). For a discussion of the court's analysis, see infra notes 71-85 and accompanying text.

22. See id. at 9 (denying industry petitioners' challenges to Haze Rule).

23. See id. at 13-15 (permitting EPA to reconsider decision to extend deadline "at the same time that it decides what form the substantive requirements of a revised Haze Rule should take.").

24. Telephone Interview with Tim Smith, EPA's Office of Air Quality Planning and Standards (Sept. 11, 2002) (explaining that EPA was awaiting court's decision on whether it would rehear case). Petitioner Sierra Club and intervenors Vermont, Maine, and New Hampshire also petitioned for a rehearing en banc. See id.


26. See Corn Growers, 291 F.3d at 3 (explaining average visual range in Class I areas in western United States is one-half to two-thirds what visual range would be without man-made air pollution and one-fifth what it should be in eastern states).

27. See Visibility Impairment Website, supra note 2 (giving general information about visibility impairment and haze).
these particles originate from direct emissions of industrial and manufacturing processes, automobile emissions, burning related to forestry and agriculture, and electric power generation.28 Other particles form when gases emitted into the air carry downwind.29 The aggregate of the particles becomes regional haze and is able to move over large geographical areas.30 Beginning in the 1970's, regional haze increased awareness of visibility deterioration in many places in the United States, including national and wilderness parks.31

B. The Clean Air Act

In 1955, Congress established the Federal Clean Air Act (CAA) to address air quality protection.32 Before 1977, CAA did not address "protection of visibility as an air-quality related value."33 In response to a growing concern regarding visibility deterioration in

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29. See id. Examples of such gases include sulfate (formed from sulfur dioxide) and nitrates (formed from nitrogen oxides). See id.

30. See Regional Haze Regulations, 64 Fed. Reg. 35,714, 35,715 (July 1, 1999) (to be codified at 40 C.F.R. pt. 51). Regional haze was the term used by EPA. See id. EPA defined "Regional Haze" as "visibility impairment that is produced by a multitude of sources and activities which emit fine particles . . . and which are located across a broad geographic area." Id.; see also Corn Growers, 291 F.3d at 3 (citing EPA's definition of regional haze); see Skrzycki, supra note 28, at E1 (stating that gases, emissions and smoke "know no boundaries").

31. See Chevron U.S.A., Inc. v. EPA, 658 F.2d 271, 272 (5th Cir. 1981) (noting that 1977 amendments to CAA required "'aggressive steps' to remedy existing visual deterioration, and to prevent future impairment" in Class I areas); see also Michael T. Palmer, The Regional Haze Rule: EPA's Next Phase in Protecting Visibility Under the Clean Air Act, 7 ENVTL. LAW. 555, 559 (2001) (stating that air pollution impairs visibility in all areas managed by National Park Service in lower forty-eight states on regular basis); Don Hopay, A Poor View of the Vistas: Regional Haze Means Visitors Can't Take in the Long View of America's Scenic Areas, PITTSBURGH POST - GAZETTE, March 26, 2001, at A6 (stating that regional haze has reduced average visual range to only 15 to 30 miles throughout eastern U.S.).

32. See Federal Clean Air Act of 1955, 42 U.S.C. § 7401 (2001). The stated purpose of the original 1955 Act was "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Id. § 7401(b). CAA gave states the responsibility to assure air quality within its borders. See Kristen Thall Peters, Legislative Note, The Clean Air Act and the Amendments of 1990, 8 SANTA CLARA COMPUTER & HIGH TECH L.J. 233 (1992). States were required to submit State Implementation Plans (SIPs) to EPA which specified how the state would meet the standards set forth by CAA. See id.

areas set aside for special protection, such as wilderness areas and national parks, Congress amended CAA in 1977. In the 1977 amendments, Congress established a national goal to improve air visibility in those areas.

Further, the 1977 amendments required EPA, as administrator, to establish regulations to “assure reasonable progress toward meeting the national goal.” These regulations, in turn, were to be implemented by the states. One primary condition required states to determine which sources emitted “any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area.” Once this determination was made, Congress instructed the states to ascertain and install the best available retrofit technology, BART, for controlling emissions from each source. Congress allowed for the exemption of any major stationary source that EPA found did not or would not emit pollutants that might reasonably contribute to visibility impairment in Class I areas.

In 1980, EPA issued regulations addressing visibility impairment issues. Ten years later, Congress amended CAA again, emphasized its commitment to regional haze issues, and urged EPA to

34. See id. (explaining significance of amendments). Concern for the country’s national parks and wilderness areas provided the major incentive for congressional action in the 1977 amendments of CAA. See Palmer, supra note 31, at 559. Congress also amended CAA to include programs to prevent deterioration in states whose air already enjoyed clean air. See Peters, supra note 32, at 254.

35. See 42 U.S.C. § 7491. The 1977 amendments of the Clean Air Act added section 169A to respond to visibility deterioration and declared “the 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” a national goal. See id. § 7491(a)(1).

36. See id. § 7491(a)(4) (requiring Administrator’s regulations to also comply with requirements of CAA).

37. See id. § 7491(b)(2) (instructing EPA to provide guidelines to states and require each state to submit SIP’s, which would contain measures necessary to comply with CAA’s national goal).

38. Id. § 7491(b)(2)(A) (limiting analysis of stationary sources to those which existed from 1962-1977).

39. See id. § 7491(g)(2) (dictating that state must consider five factors when determining implementation of BART requirements: “costs of compliance, 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.”).

40. See 42 U.S.C. § 7491(c)(1) (instructing EPA about exempting sources from BART provisions).

41. See Visibility Protection for Federal Class I areas, 45 Fed. Reg. 80,084 (Dec. 2, 1980) (to be codified at 40 C.F.R. pt. 51) (applying to states with at least one Class I area). This regulation, however, did not address regional haze “attributable to multiple sources located across broad geographic regions because there was
further address these concerns. The amendment required EPA to “conduct research to identify and evaluate sources and source regions” of both visibility impaired areas as well as Class I areas with relatively clean air. In response to this research, EPA proposed a Regional Haze Rule in 1997. Two years later, EPA published the final rule.

C. The Haze Rule

On July 1, 1999, EPA published the Regional Haze Regulations in order to address the continuing problem of regional haze not corrected by the 1980 visibility impairment regulations. The final Haze Rule applied to all fifty states because the agency found that all states contain sources whose emissions contribute to regional haze. The Rule did not specify what type of program a state must

 insufficient data regarding the relationship between emitted pollutants, pollutant transport and visibility impairment.” Id. at 80,086.

42. See Am. Corn Growers Ass’n v. EPA, 291 F.3d 1, 4 (D.C. Cir. 2002) (detailing 1990 amendments to CAA).

43. See 42 U.S.C. § 7492 (instructing EPA more specifically to conduct research to identify sources of visibility impairment). Congress granted EPA $8,000,000 per year for five years to conduct this research. See id.


45. See Regional Haze Regulations, 40 C.F.R. § 51.308 (1999). EPA finalized the rule after receiving and responding to comments to the proposal. See e.g., Regional Haze Regulations, 64 Fed. Reg. 35,714, 35,728 (July 1, 1999) (to be codified at 40 C.F.R. pt. 51) (stating proposed rule, comments received, and final rule for each element of Haze Rule).


47. See 64 Fed. Reg. at 35,721 (applying rule to all fifty states and explaining reasons why). EPA considered three factors in making this decision. See id. First, EPA looked at the statutory language of CAA. Section 169A(b)(2) of CAA required SIPs from states where emissions “may reasonably be anticipated to cause or contribute to any impairment of visibility” in the Class I areas. See 42 U.S.C. § 7491(b)(2); see also 64 Fed. Reg. at 35,721 (supporting decision to apply Haze Rule to all fifty states). The Ninth Circuit interpreted this phrase in Central Arizona Water Conservation District v. EPA as it pertained to BART requirements and found that the language established an “extremely low triggering threshold” for requiring a source to control emissions. See id.; see also Central Arizona Water Conservation, 990 F.2d 1531, 1541 (9th Cir. 1993). EPA believed they could apply this interpretation to program applicability of the Haze Rule. See 64 Fed. Reg. at 35,721.

[G]iven that the court believed this ‘low triggering threshold’ was sufficient to require a source to control its emissions under BART, EPA believe[d] it [was] reasonable that a similarly low or even lower threshold appli[de] to whether States should be required to engage in air quality planning and analysis as a prerequisite to determining the need for control of emissions from sources within the State.

Id. EPA also used the language of section 169A(a)(1) of CAA to support its decision to apply the Haze Rule to all fifty states, because the preventative language
establish in the first State Implementation Plans (SIPs) for regional haze. Instead, the Haze Rule gave each state discretion to determine its program once the state considered the factors involved, as required by CAA. CAA did, however, require the SIPs to include "a long-term strategy and provisions for BART for certain major stationary sources.”

In promulgating the Haze Rule, EPA found CAA’s BART requirements to be a principal element of visibility protection. Once a state identified BART-eligible sources, the state then determined whether these sources could “reasonably be anticipated to cause or contribute to any impairment of visibility” in Class I areas. According to EPA, a state could best make this determination by focusing on visibility impairment caused by numerous required all states to address "future growth in emissions from new sources or other activities that could impair visibility." Id.

Second, EPA factored in strong evidence that demonstrated how long-range transportation of polluting particles affected visibility in Class I areas. See id. at 37,721-22. One study found that the range of fine particle transport is hundreds of thousands of kilometers. See id. at 35,722.

Third, current monitored conditions in Class I areas led EPA to conclude that all states must implement the Haze Rule. See id. Some reports showed that even when a state did not have a Class I area, it had emissions that contributed to impairment in at least one downwind area. See id.

48. See id. at 35,721 (leaving this determination to states). SIP’s must contain the measures a state will pursue to comply with national goal of CAA. See id.

49. See 42 U.S.C. § 7491(g)(2) (discussing five factors to be considered by states).

50. 64 Fed. Reg. at 35,727 (stating that at minimum, CAA calls for SIPs to include "long-term strategy and provisions for BART for certain major stationary sources."); see also 42 U.S.C. § 7491 (b)(2)(A). Section 169A(b)(2)(A) of CAA required each major stationary source in existence from 1962-1977, 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 such area, to install and maintain] the best available retrofit technology.” Id.

In order for states to make reasonable progress to meet the national goal to reduce visibility impairment, the Haze Rule requires states to: “(1) provide for an improvement in visibility in the 20 percent most impaired days; (2) ensure that there is no degradation in visibility during the 20 percent clearest days; and (3) determine the annual rate of visibility improvement that would lead to ‘natural visibility’ conditions in 60 years.” Corn Growers Ass’n, 291 F.3d 1, 4 (D.C. Cir. 2002); see also Regional Haze Regulations, 40 C.F.R. § 51.308(d)(1) (1999) (stating that goals are reasonable and provide for improved visibility); 64 Fed. Reg. at 35,734 (providing explanations for requirements). EPA wrote the Haze Rule focusing on both hazy and clear days “to help ensure that emissions strategies improve and protect overall visibility conditions rather than simply shift[ ] visibility effects from one day to another.” Patton, supra note 10, at 320.

51. See 64 Fed. Reg. at 35,737 (listing source categories potentially subject to BART requirements). EPA found that "a major concern motivating the adoption of the visibility provisions was 'the need to remedy existing pollution in the Federal mandatory class I areas from existing sources.'” Id.

52. See id. at 35,739 (believeing this determination should not require costly or lengthy studies of contribution of specific sources to regional haze); see also 42
sources in a large geographic area, using a group analysis instead of a state-by-state analysis. If a source emitted pollutants "within a geographic area from which pollutants can be emitted and transported downwind to a Class I area," BART should be implemented for that source.

EPA's use of a group analysis of BART-eligible sources followed a similar approach utilized in acid rain and ozone programs. In addition, EPA believed that such a group analysis was necessary to determine the degree of visibility improvement achieved by using BART.

D. Precedent on Statutory Interpretation

Government agency interpretation of a federal statute, such as EPA's interpretation of CAA in this case, is not always supported by those whom the statute affects. In 1984, the Supreme Court addressed the interpretation of a challenged statute in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*. The Court established a

U.S.C. § 7491 (b)(2)(A) (mentioning requirements for controlling emissions that contribute to haze).

53. See 64 Fed. Reg. at 35,740 (arguing it would be inappropriate to focus on contributions of specific sources). In advancement of this argument, EPA made two main points: "First, the States will not face the same need to define the precise contribution from one particular source to the visibility problem. Second, establishing the contribution from one particular source to the problem of regional haze would require lengthy and expensive studies and pose substantial technical difficulties." Id.

54. Id. (believing this test to be most appropriate way to determine whether source reasonably contributes or could contribute to regional haze).

55. See id. (using these programs as examples to support EPA's group-analysis decision). These programs "focus efforts on developing cost-effective solutions to reducing emissions over a broad area that is regional or national in scope" and do not require specific source contributions to be determined. Id. (concluding similar approach to regional haze should be adopted). "Where emissions from a region are considered to contribute to regional haze in a Class I area, any emissions from BART-eligible sources in that region should also be considered to cause or contribute to the regional haze problem." Id.

56. See id. at 35,740-41. EPA interpreted the "from the use of such technology" language of section 169A(g)(2) of CAA to refer to application of BART to all sources subject to BART. See id. at 35,741; see also Regional Haze Regulations, 40 C.F.R. § 51.308(e)(1)(ii)(B) (1999) (requiring of states "an analysis of the degree of visibility improvement that would be achieved in each mandatory Class I Federal area as a result of the emission reductions achievable from all sources subject to BART.").

57. See e.g., *Corn Growers*, 291 F.3d 1, 3 (challenging EPA's interpretation of CAA to develop Haze Rule).

two-step analysis to evaluate an agency's statutory interpretation. First, a court must decide whether Congress had explicitly and unambiguously addressed the specific question at issue. If Congress's intent was clear, the court and the agency must follow that intent. If the court found, however, that Congress had not explicitly addressed the issue in question and the statute was ambiguous or silent on the issue, the court then must decide "whether the agency's answer [was] based on a permissible construction of the statute." When evaluating whether an agency's interpretation was permissible under law, the court must give deference to that agency's interpretation, "unless [it was] arbitrary, capricious, or manifestly contrary to the statute." As long as the agency's construction of the statute is reasonable, the court must uphold it and not replace the agency's interpretation with its own.

In addition to interpreting the language of a statute, an agency may struggle with how to evaluate statutory factors within its regulation when Congress failed to specify what weight to assign to each factor. The District of Columbia Circuit addressed this issue in

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59. See id. at 842 (explaining two questions to be answered under Chevron analysis).
60. See id. (detailing first step in Chevron analysis).
61. See id. (explaining judiciary is final authority on issues of statutory construction and "must reject administrative constructions that are contrary to clear congressional intent"); see also id. at 872 n.19 (detailing legislative process behind bills).
62. Id. at 843 (clarifying that court did not need to conclude that agency's interpretation was only one available or that court would have reached same interpretation).
63. Chevron v. NRDC, 467 U.S. at 843-44 (recognizing considerable weight should be given to executive department's construction of statute it is "entrusted to administer").
64. See id. (citing, in support of this conclusion, National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Labor Board v. Hearst Publications, Inc., 322 U.S. 111 (1944)). The Chevron Court also cited United States v. Shimer, 367 U.S. 374, 382-83 (1961), which found: "If this choice [of interpretation] represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." Chevron v. NRDC, 467 U.S. at 845. The Court recently cited Chevron in United States v. Mead Corporation, 533 U.S. 218, 227-28 (2001) (noting that when considering deference to be applied to agency's statutory construction, court must consider agency's care, consistency, formality and relative expertise).
65. For a discussion of how to weigh statutory factors, see infra notes 66-70 and accompanying text.
Weyerhaeuser Co. v. Costle and New York v. Reilly. The D.C. Circuit Court found in Costle that when Congress did not specify a particular weight to be applied to the statutory factors, it left EPA with the responsibility to decide how to account for such factors. Similarly, in Reilly, the D.C. Circuit Court discussed factors for EPA to consider under the CAA to determine the best technology for limiting harmful emissions. Again, the court found that because Congress did not assign the factors a specific weight for EPA to consider, EPA was "free to exercise . . . discretion in this area."

IV. Analysis

A. Narrative Analysis

1. Majority Opinion

   a. BART issues

   The Corn Growers court first addressed petitioners' claims that EPA violated specific authority by requiring a group rather than a source-by-source analysis to determine whether a particular source was subject to the best available retrofit technology. The court noted that of the five factors to be considered by the states, only four factors were considered on a source-specific basis; however, the Haze Rule required states to consider the fifth factor on a group basis. EPA argued that CAA permitted this distinction because section 169A(g)(2) of CAA was vague as to the analysis a state should employ when determining potential visibility improve-

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66. 590 F.2d 1011, 1045-46 (D.C. Cir. 1978) (instructing what to do when Congress did not require specific weight to be applied to factors of statute).
67. 996 F.2d 1147, 1150 (D.C. Cir. 1992) (giving EPA discretion to determine weight of factors when Congress did not do so).
68. See Costle, 590 F.2d at 1045 (upholding EPA's discretion to decide how to evaluate factors in statute). In Costle, Congress had specifically mandated a particular weight to other factors in the statute; by omitting such a mandate with these particular factors, the court found intent for EPA to decide their weight. See id.
69. See Reilly, 969 F.2d at 1150 (listing factors to be considered by EPA as mandated by Congress).
70. Id. (citing Center for Auto Safety v. Peck, 751 F.2d 1336, 1342 (D.C. Cir. 1985)).
71. See Corn Growers, 291 F.3d 1, 6 (D.C. Cir. 2002). Petitioners argued "that the language, statutory structure, and legislative history of [CAA] § 169A" was contrary to CAA. Id.
72. See id. The four factors considered on a source-by-source basis consisted of "the costs of compliance, the environmental impacts of compliance, any existing pollution control technology in use at the source, and the remaining useful life of the source." Id.; see also, 42 U.S.C. § 7491(g)(2) (listing factors). The fifth factor, to be considered on a group basis, is an analysis of the degree in improvement on the geographic area in question. See Corn Growers, 291 F.3d at 6; see also, 42 U.S.C. § 7491(g)(2) (listing factors).
The court, however, disagreed with EPA and held that the "Haze Rule’s splitting of the statutory factors [was] consistent with neither the text nor the structure of the statute."74

Under a textual analysis of section 169A(g)(2) of CAA, the court found that the listed factors informed "the states’ inquiries into what BART controls are appropriate for particular sources."75 According to the court, analyzing visibility improvement on a group basis violates the language of CAA.76 Additionally, the Corn Growers court found problems with a group analysis when it considered the "costs of compliance" and "existing pollution control technology in use at the source" factors.77 In particular, the court held that a state must look at each particular source’s impact on visibility in order to assess those factors completely.78

In addition to finding the BART requirements contradictory to CAA, the Corn Growers court also agreed with petitioners that the Haze Rule "unlawfully constrain[ed] the states’ authority because under the Act it is the states — not EPA — who must determine which BART-eligible sources should be subject to BART."79 To support this conclusion, the court looked at the language of CAA and found that in several sections, Congress authorized various responsibilities to the states that the Haze Rule ultimately removed.80

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73. See Corn Growers, 291 F.3d at 6 (citing Chevron v. NRDC, 467 U.S. 837, 842-43 in support of EPA’s argument).
74. Id. at 6 (looking at CAA § 169A(g)(2) and finding that factors were clearly meant to be considered together by states).
75. Id. (elaborating that factors were meant to be considered together by states and that statute can be read no other way).
76. See id. at 6-7 (stating that 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.”).
77. Id. (noting problems with factors).
78. Corn Growers, 291 F.3d at 7. The court remarked on the possibility that a source may spend millions of dollars on new technology that will have no effect on visibility. See id. The court also questioned how a source could determine whether its current technology was sufficient enough without measuring the source’s specific contribution. See id.
79. Id. (citing Brief for Industry Petitioners and Intervenor at 17-18, Am. Corn Growers’ Ass’n v. EPA, 291 F.3d 1 (D.C. Cir. 2002) (No. 99-1348)).
80. See 42 U.S.C. § 7491(b)(2)(A) (requiring “each major stationary source . . . which, as determined by the State, . . . emits any air pollutant . . .”). Id.
In support of the D.C. Circuit Court's decision that the Rule's BART provisions "impermissibly constrain state authority," the court cited the Conference Reports of the 1977 Amendments to CAA.\(^81\) According to the court, these reports showed that Congress intended the states to determine which sources harm visibility and what BART restrictions to apply to those sources.\(^82\) The court determined that the BART provisions of the Haze Rule violated congressional intent and, therefore, could not be upheld.\(^83\)

The *Corn Growers* court further concluded that the BART provisions were impermissible because the Haze Rule's "benefit calculation and its infringement on states' authority under the Act" was "contrary to the text, structure and history of [section] 169A of the Act."\(^84\) The court remanded this portion of the Rule to EPA for reevaluation.\(^85\)

### b. The "Reasonable Progress" Criteria and the Extension of the Statutory Deadline

The *Corn Growers* court also addressed the claims of Sierra Club, who, contrary to the other petitioners, argued EPA had not done *enough* to meet the statutory requirements under CAA.\(^86\) Sierra Club first claimed that EPA failed to assure reasonable progress.\(^87\) The court dismissed this claim as unripe due to the court's decision to invalidate the group-BART provisions.\(^88\) Sierra Club's

\(\S\) 7491(g)(2) (declaring "the State...shall take into consideration" the five factors listed).

81. *See Corn Growers*, 291 F.3d at 8 (finding this report reinforced court's decision) (citing, H.R. CONF. REP. No. 95-564, at 533-35 (1977)).

82. *See id.* The report showed that the Senate agreed "to reject the House bill's provisions giving EPA power to determine whether a source contributes to visibility impairment and, if so, what BART controls should be applied to that source." *Id.*

83. *See id.* (finding that Haze Rule deprived states of some statutory authority, in violation of CAA).

84. *Id.* at 8-9 (refusing to decide broad issue of whether concept of group-wide BART determination could ever be consistent with CAA).

85. *Id.* at 6 (granting petition for review, vacating BART rules and remanding to EPA).

86. *See Corn Growers*, 291 F.3d at 13-14. Sierra Club made two claims: (1) the Rule did not satisfy CAA's requirement that EPA develop regulations to assure reasonable progress in meeting the goal of the Act and (2) EPA acted "contrary to law in extending the statutory deadline for submission of state haze control plans." *Id.* at 5; *see also id.* at 13.

87. *See id.* at 13 (citing to CAA § 169A(a)(4) and § 169B(e)(1) that require EPA to assure reasonable progress).

88. *See id.* at 14 (noting that EPA may, on remand, "retain its current criteria for evaluating reasonable progress or adopt others," thus making official ruling on matter moot point for this court).
second claim challenged EPA's deadline-extension provision.\(^9\) The court decided to remand this provision along with the group-BART provisions, giving EPA the opportunity to reconsider the deadline-extension provision when it revised other sections of the Haze Rule.\(^90\) Therefore, a decision on the matter by the court was unnecessary.\(^91\)

2. The Dissent

In the dissent, Judge Garland first addressed the *Chevron* Court's analysis, arguing that the D.C. Circuit Court erred when it determined that CAA was not ambiguous and must be read in a manner favorable to the petitioners.\(^92\) The dissent concluded that CAA's language contained nothing that barred EPA's approach to regional haze and, in fact, the Haze Rule "rest[ed] on a reasonable interpretation of the statutory language."\(^93\)

The dissent focused on the sections of CAA which it found ambiguous, yet reasonably interpreted by EPA.\(^94\) Judge Garland first analyzed section 169A(b)(2) of CAA.\(^95\) Although the court interpreted that section as unambiguously referring to how a particular source contributed to visibility impairment, Judge Garland found the words to be ambiguous, "virtually invit[ing] the reader to adopt the construction favored by EPA."\(^96\) The dissent also looked at the

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\(^{89}\) See id. at 14 (referring to Haze Rule provision that allows state to extend deadline for submitting SIP from one to three years).

\(^{90}\) See id. at 15 (urging EPA to "reconsider its decision to extend the deadline at the same time that it decides what form the substantive requirements of a revised Haze Rule should take.").

\(^{91}\) See *Corn Growers*, 291 F.3d at 15 (declining to vacate provision "in light of the uncertainty that our decision invalidating the group-BART provisions of the Haze Rule will cast upon the contents of the SIPs required of the states.").

\(^{92}\) See id. at 15-17 (Garland, J., concurring in part and dissenting in part) (detailing *Chevron* steps and reviewing both sides of argument on how to interpret CAA).

\(^{93}\) Id. at 17 (claiming to follow Supreme Court's direction set forth in *Chevron*).

\(^{94}\) See id. at 17-21 (analyzing statutory language of CAA sections referred to by court).

\(^{95}\) See id. at 17 (analyzing statutory language of § 169A(b)(2)). Section 169A(b)(2) of CAA requires states to impose BART on any source that "emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any [Class I] area . . . ." 42 U.S.C. § 7491(b)(2)(A) (2001).

\(^{96}\) See *Corn Growers*, 291 F.3d at 18 (interpreting phrase "may reasonably be anticipated."). "The phrase 'may reasonably be anticipated' suggests that Congress did not intend to require EPA to show a precise relationship between a source's emissions and all or a specific fraction of the visibility impairment within a Class I area." Central Ariz. Water Conservation Dist. v. EPA, 990 F.2d 1531, 1541 (9th Cir. 1993).
statutory language of section 169A(g)(2) and found that nothing required a source-by-source analysis of the fifth factor, the degree of improvement of visibility anticipated to result from BART. Judge Garland concluded that because CAA did not specify how the statute should consider the factors, EPA was not barred from using a group, rather than a source-by-source, analysis when considering the benefits of implementing BART. To support his conclusion that EPA reasonably interpreted section 169A(g)(2) of CAA, Judge Garland found support in the language of other sections of the Act.

If a source is one of several that emit pollutants into an upwind area, and if pollution from that area is transported downwind to a national park, then it can hardly be unreasonable to conclude that the pollutants issued by the source “may reasonably be anticipated” to “contribute” to “any” impairment in the park.

Corn Growers, 291 F.3d at 18 (footnotes omitted).

97. See id. at 19 (acknowledging that Rule does require source-by-source consideration of first four factors, but finding nothing requiring such consideration in fifth factor).

The first four factors are different in kind from the fifth: the first four all go to the cost of imposing controls on a particular source and permit a determination of the most cost-effective control technology for each source. The fifth factor, by contrast, goes to the benefit to be derived from using the most cost-effective controls.

Id.

98. See id. (arguing for EPA discretion in regulation). The dissent referred to Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978) for support, which held that EPA had discretion to decide how to account for factors when Congress did not specify any particular weight for those factors. Id.; see also New York v. Reilly, 969 F.2d 1147, 1150 (D.C. Cir. 1992) (“Because Congress did not assign the specific weight the Administrator should accord each of these factors, the Administrator is free to exercise his discretion in this area.”).

In addition to precedent, Judge Garland found support against a source-by-source analysis in CAA § 169A(a)(1). See Corn Growers, 291 F.3d at 21. Section 169 A(a)(4) of CAA instructed EPA to develop regulations to “assure reasonable progress toward meeting the national goal of restoring natural visibility conditions.” Id.; see also 42 U.S.C. § 7491 (a)(4) (2001). EPA’s findings, that it was not practicable to assess visibility impairment on a source-by-source basis, persuaded Judge Garland that the national goal could not be met through specific source assessments. See Corn Growers, 291 F.3d at 21 (focusing on EPA’s findings that they could not meet national goal if source-by-source determinations were required). Judge Garland refused to believe that Congress would determine a national goal and then make it impracticable, within the CAA, to achieve that goal. See id. (stating that court “should not lightly assume that Congress enacted a statute that makes it impracticable to achieve the same statute’s stated goal.”).

99. See Corn Growers, 291 F.3d at 22 (finding support for position in other sections of statute); see 42 U.S.C. §§ 7491(a)(3), 7491(b)(1), 7942 (a)(1) (2001). Section 169A (a)(3) of CAA requires EPA to complete a study on methods for implementing the national goal. See § 7491(a)(3) (2001). This study also must identify “the classes or categories of sources and the types of air pollutants which, alone or in conjunction with other sources or pollutants, may reasonably be anticipated to cause or contribute” to visibility impairment. Id. Section 169A (b)(1) requires EPA to take into consideration the report from section (a)(3) and pro-
The dissent then addressed petitioners' claim that the Haze Rule retracted state authority authorized by the Act. Judge Garland referred to section 169A of CAA to demonstrate that Congress gave EPA authority to make specific guidelines for the states pertaining to improving visibility. In fact, Judge Garland noted the amount of authority ultimately retained by the states under the Rule.

B. Critical Analysis

The Corn Growers court's conclusion that the Haze Rule's best available retrofit technology controls do not survive the first step of a Chevron analysis is perplexing. The court was correct to apply a Chevron analysis in this case because Chevron is the leading Supreme Court precedent on the issue of statutory interpretation. Following Chevron, the D.C. Circuit Court concluded that the language of section 169A(g)(2) of CAA "can be read in no other way" than that "the factors were meant to be considered together by the states."


100. See Corn Growers, 291 F.3d at 21 (showing that only one state intervened as petitioner; five states filed briefs in support of EPA).

101. See id. at 22 (finding that CAA expressly delegated to EPA authority to set regulations); see also 42 U.S.C. § 7491(a)(4) (2001) (directing EPA to establish regulations to meet national goal).

102. See Corn Growers, 291 F.3d at 22 (arguing that states retain specific authority). In particular, the dissent noted that states had the authority to determine which sources may reasonably affect visibility impairment and which sources were subject to BART requirements. See id. In addition, the states also held the responsibility to consider the five statutory factors and best determine BART for each source. See id.

Under the Rule, it is the state rather than EPA that identifies the sources that impair visibility, and it is the state that determines the best available retrofit technology for each such individual source. All that the group-BART provisions of the Rule do is effectuate EPA's authority to provide guidelines to the states' for making these determinations regarding particular sources.

Id. at 23.

103. See id. at 6 (disagreeing with EPA that CAA § 169A(g)(2) is ambiguous about how state must analyze anticipated visibility improvement).

104. For a discussion of Chevron analysis, see supra notes 58-64 and accompanying text.

105. Corn Growers, 291 F.3d at 6 (recognizing that Congress did not assign weight to factors). The court interpreted this statutory language to conclude that Congress did not mandate four of the listed factors to be considered on a source-by-source basis while the fifth was analyzed on a group basis. See id. (finding that treating one factor so differently from other four "distorts the judgment Congress directed the states to make for each BART-eligible source.")
The language of section 169A(g)(2), however, is not clear. The phrase "which may reasonably be anticipated to result" is ambiguous with respect to how a state must determine the degree of improvement which will result from BART. While the language makes it clear that the state must consider the five listed factors, it does not make clear how this is to be done.

The Haze Rule would have been upheld had the court applied the second Chevron step because the court would have likely found EPA's interpretation of CAA reasonable. Had the court ultimately found the statutory language ambiguous, the court would be required, under Chevron, to evaluate and give deference to EPA's interpretation of CAA. The court must only determine that EPA's statutory interpretation is permissible, and therefore not contrary to law. Following Castle and Reilly, the court is required to defer to EPA's discretionary decision of how to account for the five factors and how much weight to give each factor. As previously noted, EPA's decision to use a group-analysis was specific and supported. Therefore, the court would have likely deferred to EPA's Haze Rule.

106. See 42 U.S.C. § 7491(g)(2) (2001) (listing factors to be considered by states). For a discussion of the statutory factors, see supra note 99 and accompanying text.

107. See Corn Growers, 291 F.3d at 18 (Garland, J., concurring in part and dissenting in part) (quoting Central Ariz. Water Conservation Dist. v. EPA, 990 F.2d 1531, 1541 (9th Cir. 1993) ("The phrase 'may reasonably be anticipated' suggests that Congress did not intend to require EPA to show a precise relationship between a source's emissions and all or a specific fraction of the visibility impairment within a Class I area.").

108. See id. at 19 (Garland, J., concurring in part and dissenting in part) (stating that EPA is not barred from using group rather than source-by-source analysis in considering benefits because statute does not specific how factors should be taken into consideration).

109. For a discussion of EPA's reasonable interpretation, see supra note 99 and accompanying text.


111. See id. at 843 (discussing second step of Chevron analysis).

112. See Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1045-46 (D.C. Cir. 1978) (instructiong what to do when Congress did not require specific weight to be applied to factors of statute); see also New York v. Reilly, 969 F.2d 1147, 1150 (D.C. Cir. 1992) (giving EPA discretion to determine weight of factors when Congress did not do so).


114. See generally supra notes 62-64 and accompanying text (noting that agency's reasonable interpretation is permissible).
The court's conclusion that the Haze Rule "unlawfully constrains the states' statutory authority" was also unclear.\textsuperscript{115} Under CAA, EPA was specifically instructed to put forth regulations to guarantee reasonable progress toward meeting the national goal of future visibility improvement.\textsuperscript{116} In doing so, the Haze Rule gave states the responsibility to improve visibility as required by Congress and supplied guidelines for meeting the requirements.\textsuperscript{117} For example, a state is responsible for submitting a SIP that determines all BART-eligible sources within that state and making a determination of BART for each such source.\textsuperscript{118} In the Haze Rule, EPA was simply "promulgating regulations" instructing states how to make these determinations, through authority provided by section 169A(a)(4) of CAA.\textsuperscript{119}

In arguing that the Rule removes too much authority from the states, the court's reliance on the source exemption provision is misguided.\textsuperscript{120} Under CAA, Congress provided the Administrator, rather than the states, with the authority to exempt a BART-eligible source.\textsuperscript{121} As such, if Congress intended the states to have the authority to make exemptions, it would not have specifically delegated that authority to the Administrator.\textsuperscript{122} EPA could not have unlawfully constrained state authority to exempt sources if EPA wrote the source exemption provision directly in compliance with CAA.\textsuperscript{123}

\textsuperscript{115} Corn Growers, 291 F.3d 1, 7-8 (D.C. Cir. 2002) (concluding so because under CAA, states must determine which BART-eligible sources should be subject to BART, not EPA).


\textsuperscript{117} See e.g., 40 C.F.R. 51.308(d)(1)(i)(A)-(B) (1999) (providing framework for states to establish goals that provide for reasonable progress of meeting national visibility conditions).

\textsuperscript{118} See 40 C.F.R. § 51.308(e)(1) (requiring states to submit SIP for schedules of compliance with BART).

\textsuperscript{119} See 42 U.S.C. § 7491(a)(4) (instructing administrator to "promulgate regulations" that assure reasonable progress toward meeting national goal of improving visibility conditions).

\textsuperscript{120} See Corn Growers, 291 F.3d at 8 (arguing that if Haze Rule contained mechanism for state to exempt BART-eligible source upon finding that it did not contribute to visibility impairment, then "perhaps the plain meaning of the Act would not be violated.").

\textsuperscript{121} See 42 U.S.C. § 7491(c)(1) (giving Administrator this authority "upon his determination that such source does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to a significant impairment of visibility" in class I area).

\textsuperscript{122} See id. (noting that Congress granted authority to Administrator to make exceptions to requirements).

\textsuperscript{123} See id. (noting that EPA interpretation complied with CAA).
For the future of the regional haze program, the court made an important distinction about the validity of the program. In addressing one claim that EPA exceeded its authority in establishing “natural visibility” as the goal of the regional haze program, the Corn Growers court held that the goal was an “eminently reasonable elucidation of the statute.” Although the court had already vacated the specific BART provisions of the Haze Rule in the first part of the opinion, this holding showed that the court generally approved of EPA’s regional haze program and goals.

V. Impact

Congress’s national goal of remedying current impairment and preventing future deterioration of visibility in Class I areas was greatly compromised by the D.C. Circuit Court’s recent decision in Corn Growers. Requiring EPA to abide by this decision will mean that the agency must create a source-by-source analysis to determine how each BART-eligible source specifically contributes to visibility in the area. Yet, the National Academy of Sciences advised EPA, during the writing of the Haze Rule, that “any approach in the regional haze rule that required the assessment of the visibility improvement attributed to an individual source . . . was doomed to

124. See Corn Growers, 291 F.3d at 9. In the Corn Growers decision, the court addressed a third challenge by the “Reconsideration Petitioners” against EPA, that the “natural visibility goal” and “no degradation” requirement of the Haze Rule should be vacated as “arbitrary and capricious” and otherwise not in accordance with law.” Id. The natural visibility goal challenged by petitioners was the statutory goal of section 169A(a)(1) of CAA, “the prevention of any future, and the remedying of any existing, impairment of visibility.” 42 U.S.C. § 7491(a)(1). The “no degradation” requirement referred to was the Haze Rule’s requirement that the state must “provide for an improvement in visibility for the most impaired days over the period of implementation plan and ensure no degradation in visibility for the least impaired days over the same period.” 40 C.F.R. § 51.308(d)(1). Ultimately, the court found the Reconsideration Petitioners’ claims meritless. See Corn Growers, 291 F.3d at 9-13 (discussing merits of claims).

125. See Corn Growers, 291 F.3d at 10 (rejecting claim that natural visibility goal is “manifestly contrary to statute” and “arbitrary or capricious in substance.”).

126. See id. (“There is no material inconsistency between the statutory and regulatory goals, for the latter merely elucidates the former.”).


128. See E-mail from Tim Smith, EPA’s Office of Air Quality Planning and Standards (Sept. 30, 2002) (on file with author) [hereinafter Smith Email Interview] (explaining that this needs to be done in next six months or so).
failure.” Therefore, this decision leaves EPA with the significant responsibility of writing a source-by-source approach to the BART requirements of the Haze Rule (something EPA found initially impracticable) while still making reasonable progress toward meeting the national goal, as required by CAA. Some experts believe that it will take at least until mid-2003 to re-propose the language of the Haze Rule.

Requiring EPA to apply BART regulations based on a source-by-source analysis will greatly impact the states. In support of EPA’s decision to analyze BART determinations on a group basis, the agency concluded that determining the impact of a specific source on regional haze would involve serious technical difficulties. In particular, the court’s decision will require states “to engage in lengthy, expensive, and likely fruitless studies to trace pollutants from specific sources into specific Class I areas.”

Delay in implementing the Haze Rule also adversely affects recreational, economic, health and other environmental issues. The 280 million annual visitors to these national parks will be directly and adversely affected by the “veil of white or brown haze” that hangs in the air throughout much of the year, blurring the

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129. *Corn Growers*, 291 F.3d at 21 (Garland, J., concurring in part and dissenting in part) (concluding that source-by-source analysis is impracticable in light of national goal). For a discussion of EPA’s decision to use a group analysis for BART determinations, see supra notes 53-56 and accompanying text.

130. See 42 U.S.C. § 7491(a)(4) (2001) (requiring EPA to develop regulations that both assure reasonable progress of meeting national goal and complying with requirements of CAA). In rewriting the BART provisions, EPA may have to give more power to the states to develop their own way of determining contribution of each source. See generally *Corn Growers*, 291 F.3d at 8. EPA may also have to give states the authority to exempt sources for being low contributors to pollution. See generally id. (concluding that plain meaning of CAA might not be violated if states given mechanism to exempt BART-eligible source on basis of individualized contribution determination).

131. See Smith Email Interview, supra note 128 (describing EPA’s next move in response to court’s decision).

132. *Corn Growers*, 291 F.3d at 21 (Garland, J., concurring in part and dissenting in part) (declaring court’s decision barring states and EPA from using group-BART principles imposes “an enormous unfounded mandate on the states.”).

133. See Regional Haze Regulations, 64 Fed. Reg. 35,713, 35,740 (July 1, 1999) (to be codified at 40 C.F.R. pt. 51) (supporting decision that it would be inappropriate for Haze Rule to focus on source-by-source contributions of pollutants).

134. *Corn Growers*, 291 F.3d at 21 (Garland, J., concurring in part and dissenting in part) (referring to State of Maine’s brief in which Maine protested that adopting source-by-source BART principles would impose great burdens on states).

135. For a discussion of the impact of the court’s decision on these issues, see infra notes 136-37 and accompanying text.
view of the scenic areas. In addition, haze impacts health and other environmental issues, including increased illness and acid rain formation. Such concerns would diminish by applying the Haze Rule and are, therefore, adversely affected by delay of the rule’s application.

Visibility improvement, as a general goal, is not impossible, nor is the Haze Rule inapplicable after the Corn Growers decision. The “teeth” of the Haze Rule, determining BART provisions for BART-eligible sources, however, has been dramatically set back. Until EPA can ascertain a way to measure source-by-source contributions of particular sources, these sources will continue to pollute the air without major restriction. The BART provisions need to be rewritten and applied as quickly as possible in order to prevent

136. See Visibility Impairment Website, supra note 2 (explaining that most of haze is unnatural air pollution); see also Patton, supra note 10, at 302 (finding these parks to have been “set aside for their intrinsic value, and the enjoyment of present and future generations.”) “For visitors to the United States’ national parks and wilderness areas, haze prevents or diminishes the ability to enjoy the unique and dramatic scenic vistas for which these areas are famous.” Palmer, supra note 31, at 559 (stating that air pollution impairs visibility in all areas managed by National Park Service in lower forty-eight states on regular basis).

In addition to the parks’ recreation value, visibility protection in these Class I areas has economic value. See Patton, supra note 10, at 302. Specifically, conducted studies demonstrate “a significant economic value... given to improving and protecting visibility by the people who visit these areas as well as those who have not visited but value knowing that the scenic vistas exist and are protected.” Id. (citing to studies evaluating economic value of visibility protection in Class I areas).

137. See Visibility Impairment Website, supra note 2 (explaining that some pollutants that form haze have been linked to serious health problems and environmental damage.”). For example, “exposure to very small particles in the air has been linked with increased respiratory illness, decreased lung function, and even premature death.” Id. (noting dangerous health implications); see also Regional Haze Regulations, 64 Fed. Reg. at 35,715 (explaining that fine particulate matter that contributes to visibility impairment “can cause serious health effects and mortality in humans.”). Additionally, nitrate and sulfate particles “contribute to acid rain formation which makes lakes, rivers, and streams unsuitable for many fish, and erodes buildings, historical monuments, and paint on cars.” See Visibility Impairment Website, supra note 2 (discussing other environmental implications of haze); see also Regional Haze Regulations, 64 Fed. Reg. at 35,715 (clarifying that fine particulate matter can also contribute to environmental effects such as acid deposition and eutrophication.

138. See generally id. (emphasizing importance of Haze Rule).

139. See Smith Email Interview, supra note 128 (stating that congressional goal of improving air quality is still feasible because court did not eliminate requirement for SIPs to address visibility). Mr. Smith conceded, “it remains to be seen how effective the BART provision will become.” Id.

140. See id. (referring to BART provisions as “teeth” of Haze Rule).

141. For a discussion of how long it will take for EPA to measure contributions on a source-by-source basis, see supra notes 128-31 and accompanying text
future visibility deterioration. The question is when, if not whether, this will be feasible.

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142. For a discussion of the impact of regional haze on visibility, see supra notes 127-38.
143. For a discussion of how EPA must validate Haze Rule, see supra notes 128-34.

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