GOVERNOR GREG ABBOTT

April 20, 2015

Mr. Guy Donaldson
Chief, Air Planning Section (6PD-L)
Environmental Protection Agency
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

**Re: Docket No. EPA-R06-OAR-2014-0754**

Dear Mr. Donaldson:

Big Bend and the Guadalupe Mountains are two of the most beautiful places on earth. For centuries, Texans and non-Texans alike have flocked to both areas to enjoy their majestic vistas. And as the Governor of Texas, I could not be prouder that our State is home to these national treasures.

But EPA's proposed decision to partially disapprove Texas's state implementation plan ("SIP") and to promulgate a federal implementation plan ("FIP") would do nothing to improve visibility in Big Bend or the Guadalupe Mountains. Moreover, EPA's proposed actions would impose more than $2 billion in compliance costs on Texans. Whatever EPA's motivation, the results of the "regional haze" rule are absurd, arbitrary, capricious, and contrary to law.

**1.** This dispute boils down to a fight over so-called "deciviews"—or, more accurately, a fight over *fractions* of a "deciview." "A deciview is a haze index derived from calculated light extinction, such that uniform changes in haziness correspond to uniform incremental changes in perception across the entire range of conditions, from pristine to highly impaired." 40 C.F.R. § 51.301. The human eye only can detect a change in haziness of 1.0 or more deciviews. *E.g.*, 79 Fed. Reg. 58,302, 58,303. EPA nonetheless proposed to FIP the State of Texas because it wanted to reduce haziness at Big Bend by merely *0.12 deciviews* and at the Guadalupe Mountains by merely *0.15 deciviews*—reductions that fall dramatically below the threshold of visibility. 79 Fed. Reg. 74,818, 74,887 tbl. 44.

On its own terms, EPA's actions are unlawful. The Clean Air Act gives EPA authority only over the "impairment of visibility." 42 U.S.C. § 7491(a)(1). And "visibility," of course, extends only

to the things that humans can see with their naked eyes. *E.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2557 (1981) ("visible" means "capable of being seen"; "visibility" means "the degree or extent to which something is visible . . . [by] the observer's eye unaided by special optical devices"). The statute obviously does not give EPA authority to regulate *invisible* haze, which falls far below the 1.0-deciview threshold.

Moreover, EPA's premises are wrong. Because EPA took almost six years to act on Texas's proposed SIP, EPA did not have the up-to-date facts when it decided that the State was not doing enough to regulate visibility. And if EPA had bothered to look, it would have discovered that the haziness conditions in Big Bend and the Guadalupe Mountains are much better today than Texas projected way back in 2009. And those conditions will continue to improve even without EPA's costly-but-ineffectual regulations.

Indeed, cost alone renders the FIP unlawful. EPA has a statutory obligation to "take[] into consideration the costs of compliance." 42 U.S.C. § 7491(g)(1). Yet EPA's FIP makes no mention of how much its additional controls will cost. EPA staff have confirmed that those controls will cost at least *$2 billion*—all for reductions in haziness that are 1/8th the magnitude that would be visible to the naked eye. EPA cannot comply with Section 7491(g)(1) by asking its staff to make informal, back-of-the-envelope guesstimates. Nor can it comply with the statute by dictating such unreasonably large expenditures for invisibly small benefits.

**2.** Second, EPA's actions are irrationally and arbitrarily discriminatory against the State of Texas. *Cf. Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (emphasizing "our historic tradition that all the States enjoy equal sovereignty" (internal quotation marks omitted)). It appears that EPA has devised one set of rules for States it likes and another set for States it dislikes.

For example, in 2011, EPA approved California's "regional haze" SIP. *See* 76 Fed. Reg. 34,608 (2011). In doing so, EPA gave the State of California until the year 2307 to eliminate "regional haze" at Desolation Wilderness and Mokelumne Wilderness, until the year 2106 to eliminate "regional haze" at Joshua Tree National Park, and until the year 2096 to eliminate "regional haze" at Sequoia National Park. Apparently, for a State like California, EPA thinks that up to 300 years constitutes "reasonable progress." 42 U.S.C. § 7491.

But EPA took a dramatically disparate approach to Texas's SIP. After it gave California up to 300 years to eliminate "regional haze," EPA faulted Texas's plan to eliminate regional haze *even faster*. In particular, Texas proposed to eliminate "regional haze" in the Guadalupe Mountains by 2081 and in Big Bend by 2155. While that rate of haze-elimination clearly would have been "reasonable" in California, EPA determined that it was "not reasonable" in Texas. 79 Fed. Reg. at 74,843.

EPA's capricious discrimination violates the "fundamental norm of administrative procedure [that] requires an agency to treat like cases alike. If the agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases." *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007). EPA has done nothing to explain why one set of rules applies to California while another, stricter set applies to Texas. This is the definition of arbitrary.

The only self-evident explanation for EPA's discrimination is that California has fewer coal-fired power plants than does Texas. According to the latest data I have seen, Texas has 40 coal-fired electric generating units ("EGUs") while California only has 10. But Part C of the Clean Air Act does not give EPA the power to conduct a witch hunt against coal; it only allows EPA to "protect visibility." And Texas's SIP would reduce the same amount of visible haze as EPA's FIP while costing $2 billion less, and it would reduce haze faster than California's plan would. EPA cannot premise its FIP authority on its dislike of coal and/or its desire to play favorites between States.

**3.** Third, EPA's FIP violates the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. The Commerce Clause gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Ibid.* While modern court decisions have expanded that text far beyond its plain or original meanings, the Clause still imposes meaningful limits on what Congress and administrative agencies can do. As the Fifth Circuit has held:

> Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that . . . Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce. . . . To accept [such an] analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.

*GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622, 634 (5th Cir. 2003).

Yet that is exactly what EPA has interpreted the Clean Air Act to allow. EPA concedes that the majority of "regional haze" in Big Bend and the Guadalupe Mountains comes from non-regulated conduct—namely, emissions from Mexico and from natural sources (such as dust storms and fires). *See* 79 Fed. Reg. at 74,844 ("Approximately half of the 2002 visibility impairment at Big Bend is due to Mexico and other international sources."); *id.* at 74,885 ("We agree that dust storms and other blown dust from deserts are a significant contributor to visibility impairment at the Texas Class I areas that may not be captured accurately by our default method."). EPA cannot then turn around and regulate "regional haze" on the theory that

regulated conduct—like carbon emissions from coal-fired power plants—will have some effect on interstate commerce.

**4.** Fourth, EPA's "regional haze" rule suffers from a non-delegation problem. The Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States." U.S. Const. art. I, § 1. If Congress wants to delegate its power to an administrative agency, then Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). Put differently, Congress cannot enact "a statute creating the Goodness and Niceness Commission and giv[e] it power 'to promulgate rules for the promotion of goodness and niceness in all areas within the power of Congress under the Constitution.'" Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994). And where Congress transgresses that line, the agency cannot "cure [the] unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute." *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 472 (2001).

EPA has crowned itself the proverbial Goodness and Niceness Commission. In the Clean Air Act, Congress "declare[d] as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in" places like Big Bend and the Guadalupe Mountains. 42 U.S.C. § 7491(a)(1). That is a vacuous delegation, and EPA has exacerbated it by exercising standardless discretion to approve some SIPs and disapprove others based on illegitimate criteria, inaccurate science, and faulty methods.

**5.** Finally, EPA has commandeered the States in violation of the Fifth Amendment. "[T]he question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers"—and the Framers emphatically rejected the idea. *New York v. United States*, 505 U.S. 144, 163 (1992). Thus, in New York, the Court invalidated a statute that purported to give the States "latitude . . . to implement Congress' plan" for disposing of nuclear waste. *Id.* at 176. In particular, the statute at issue gave the States a "choice" to either take title to the waste or to enact a series of state regulations. But the Court held that was no "choice" at all because "[n]o matter which path the State chooses, it must follow the direction of Congress." *Id.* at 177; *see also, e.g.*, *NFIB v. Sebelius*, 132 S. Ct. 2566, 2601-05 (2012); *Printz v. United States*, 521 U.S. 898, 926 (1997).

So too here. EPA has purported to offer the State a "choice" between two unpalatable and federally controlled outcomes. First, the State can submit a SIP that EPA will scrutinize like a teacher grading a pupil's exam answers, approving some and disapproving others. By turning the SIP-FIP process into a paper-grading exercise, EPA has effectively turned the States into subordinate administrative agencies—in direct contravention of the Framers' constitutional design. *See New York*, 505 U.S. at 163. Second, the State can forgo a SIP and face draconian penalties—including the loss of highway funds, loss of support for air pollution planning and control programs, and so-called "offset penalties." *See* 42 U.S.C. § 7509. Moreover, if the State

chooses to forgo the SIP process, the statute (and EPA's implementation of it) blurs the accountability for clean-air regulations by making it appear that the State is somehow responsible for not staving off EPA's draconian response. *See Printz*, 521 U.S. at 929-30 (Tenth Amendment forbids statutory schemes that shift costs and perceived responsibilities to the States). That is precisely the sort of coercion that the Tenth Amendment's anti-commandeering principle forbids. *See NFIB*, 132 S. Ct. at 2601-05.

For all of these reasons, in addition to those submitted by the Texas Commission on Environmental Quality, EPA's proposed action is unlawful.

Sincerely,

Greg Abbott
Governor