

Nos. 12-9526, 12-9527

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA EX REL. SCOTT PRUITT, in his official capacity as Attorney
General of Oklahoma, OKLAHOMA INDUSTRIAL ENERGY CONSUMERS, OKLAHOMA
GAS AND ELECTRIC COMPANY,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

SIERRA CLUB,
Intervenor-Respondent.

Petition for Review of a Final Rule of the United States Environmental Protection Agency

REPLY BRIEF OF PETITIONERS

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GLOSSARY

In addition to the abbreviations set forth in Brief of Petitioners (at v), the following abbreviations are used in this brief:

BACT	Best Available Control Technology
IRBr. ____	Brief of Intervenor-Respondent at ____
NAAQS	National Ambient Air Quality Standards
PBr. ____	Brief of Petitioners at ____
RBr. ____	Brief of Respondent at ____

INTRODUCTION

EPA overstepped its authority when it vetoed Oklahoma's BART determination under the Clean Air Act's ("CAA's") Regional Haze program and replaced it with EPA's own analysis. The CAA unequivocally grants Oklahoma the authority to make BART determinations for sources within its borders. *See* 42 U.S.C. § 7491(a)(4), (b)(2)(4). In this case, the State properly exercised that authority and made a BART determination that met its statutory obligations. The State's determination, however, did not satisfy EPA's over-arching desire to have scrubbers installed on coal-fired power plants. EPA thus put itself in Oklahoma's place and hired a consultant, conducted its own BART analysis, and issued a Final Rule requiring scrubbers. EPA had no authority to act in this manner, and, for this reason alone, the Final Rule cannot be sustained. Moreover, EPA's BART determination is arbitrary and capricious in that it departs from EPA's own guidance and is based on novel theories that were not presented for notice-and-comment.

This Court should vacate the portions of the Final Rule in which EPA disapproves of the Oklahoma State Implementation Plan ("SIP") and promulgates a Federal Implementation Plan ("FIP") in its place. This Court should compel EPA to approve Oklahoma's SIP revision in its entirety.

ARGUMENT

I. EPA Lacks Statutory Authority to Reject Oklahoma's BART Determination in Favor of EPA's Own Analysis.

Petitioners showed (PBr. 13-18) that EPA exceeded its statutory authority when, in the Final Rule, EPA discarded Oklahoma's BART determination and replaced it with

its own flawed analysis. The CAA unambiguously vests in the States the exclusive authority to make BART determinations. 42 U.S.C § 7491(b)(2)(A) (referencing the BART “as determined by the State”), 7491(g)(2) (“in determining [BART] the State . . . shall take into consideration [five BART factors]”). Where, as here, a statute “speaks to the direct question at issue, [courts] afford no deference to the agency’s interpretation of it and ‘must give effect to the unambiguously expressed intent of Congress.’” *North Carolina v. EPA*, 531 F.3d 896, 906 (D.C. Cir. 2008) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

The legislative history behind CAA § 169A (codified at 42 U.S.C. § 7491) confirms what the statute itself makes clear: States have the primary authority to make BART determinations. (PBr. 15.) The D.C. Circuit Court, in rejecting EPA’s last attempt to overstep in the regional haze context, specifically highlighted the legislative agreement that was inserted into the language of CAA § 169A “to make it clear that the states—not EPA—would make these BART determinations.” *Am. Corn Growers Ass’n v. EPA*, 291 F.3d 1, 8 (D.C. Cir. 2002). EPA itself has acknowledged that “[t]he State must determine the appropriate level of BART control for each source subject to BART.” Regional Haze Regulations, 70 Fed. Reg. at 39,104, 39,107 (July 6, 2005), codified at 40 C.F.R. pt. 51, subpt. P. The provisions of CAA § 169A that allow States to make this determination would be rendered meaningless, and Congress’s intent would be unfilled, if EPA could override every determination with which it disagrees.

The statute at issue requires only that States weigh the five statutory factors in determining BART. Oklahoma has fulfilled this requirement. EPA thus transgressed the power afforded to it by the CAA when it rejected Oklahoma's determination and forced EPA's preferred emission controls on the State. *See EME Homer City Generation, L.P. v. EPA*, --- F.3d ---, 2012 WL 3570721, at *16 (D.C. Cir. Aug. 21, 2012) (describing the strict statutory division of authority between States and EPA that "prohibits EPA from using the SIP process to force States to adopt specific control measures"). As another court recently determined in vacating EPA's disapproval of a SIP, "if a SIP or a revised SIP meets the statutory criteria of the CAA, then the EPA must approve it." *Texas v. EPA*, 690 F.3d 670, 676 (5th Cir. 2012) (citing 42 U.S.C. § 7410(k)(3)).

In their response briefs, EPA and Intervenor attempt to muddy the waters by equating the Regional Haze program with other CAA programs that have markedly different structures and purposes. These arguments, however, fail in that they: (i) advocate a position that would allow EPA to exceed even the bounds of the authority that it has under such other CAA programs; (ii) neglect to recognize that a proper reading of § 169A still leaves EPA with important oversight authority; and (iii) reference irrelevant interstate transport provisions. None of these arguments can save a Final Rule that violates the plain text of the CAA, its legislative history, and relevant case law.

A. EPA and Intervenor Improperly Conflate the Regional Haze Program with Other Air Programs Under the CAA.

Neither EPA nor Intervenor offer a viable explanation for why this Court should disregard the express command of CAA § 169A for leaving BART determinations to the

States. Nor, for that matter, does either entity address the legislative history that specifically references States' "sole authority" in determining BART controls. (PBr. 15.) Instead, EPA and Intervenor ask this Court to read ancillary provisions from other CAA programs into the plain language of §169A as if the regional haze statutory scheme is indistinguishable from such other programs.

The regional haze program, however, is different. The phrase "as determined by the State" is unique to the regional haze scheme. This language, ignored by EPA and Intervenor, was critical to the D.C. Circuit's decision in *American Corn Growers*, which relied on this very phrase in explaining that the CAA leaves BART determinations to the States. *See* 291 F.3d at 7–8. No similar language appears in other air programs regarding, for example, NAAQS and BACT. Indeed, rather than address the statutory text, EPA attempts to re-write it by adding "but only if EPA agrees" to it. No deference is owed to EPA when it fundamentally changes the balance of the cooperative federalism adopted by Congress for regional haze.

Moreover, the fact that the NAAQS provisions in § 7410 require SIPs to "meet the applicable requirements of" the regional haze provisions in § 7491 does not mean that EPA's roles under each program are the same (RBr. 18-19). *See* 42 U.S.C. § 7410(a)(2)(J). Rather, one can only know what the CAA requires of regional haze SIPs by referring back to the regional haze provisions—complete with the "as determined by the State" language. Nothing in the CAA permits EPA to engraft onto the regional haze provisions its more extensive authority under other CAA programs. EPA's role in the

regional haze context is limited to ensuring that the State has met its obligation to analyze the five statutory BART factors. Nothing more.

EPA's reliance on its ability to conduct BART balancing when issuing a FIP is equally unhelpful. (RBr. 19.) Petitioners do not dispute that the only exception to the "as determined by the State" language in § 7491 is EPA's authority to promulgate a FIP when a State fails to submit a SIP, submits an incomplete SIP, or submits a SIP that does not meet the statutory requirements. *See, e.g.*, 42 U.S.C. §§ 7491(b)(2)(A), 7410(c). These limited exceptions do not apply where, as here, the State conducted a detailed analysis of each of the five statutory BART factors and submitted a complete SIP. *See* § 7491(g)(2). EPA lacks the authority to engage in a BART analysis of its own *unless and until* it has concluded that Oklahoma's analysis failed to apply the five statutory factors. Because Oklahoma submitted a statutorily compliant SIP, EPA's BART-balancing authority for a FIP never comes into play.

The fundamental differences in the various CAA programs readily explain why Congress gave EPA less oversight authority for regional haze, as compared to other CAA programs. Consider, for example, the prevention of significant deterioration program that bars construction or modification of any major air pollutant emitting facility not equipped with BACT. 42 U.S.C. § 7475(a)(4). Unlike BART, which is a one-time, cost-benefit-based, *visibility* standard for sources constructed prior to and unmodified since 1977, BACT is a continually-evolving, *health-driven* emission level applicable to new construction or modification. The CAA defines BACT as "an emission limitation based

on the *maximum* degree of reduction of each pollutant . . . , which . . . is *achievable*.” 42 U.S.C. § 7479(3) (emphasis added). It is only because the BACT provisions used such strong, normative terms as “maximum” and “achievable” that the Supreme Court accepted EPA’s interpretation of its authority under the CAA as encompassing the review of BACT determinations for reasonableness in meeting the statutory threshold. *See Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 484–91 (2004) (“*ADEC*”). Because Congress required a “maximum” “achievable” reduction for BACT determinations, there was no balancing of factors and, thus, no reference to “as determined by the State” in the BACT provisions. These key differences between BACT and BART explain EPA’s more extensive oversight authority in the prevention of significant deterioration program than in the regional haze program. These same differences render wholly inapposite Intervenor’s reliance on the *ADEC* decision as the key case supporting Intervenor and EPA’s interpretation of EPA’s authority to replace the States’ *BART* determinations.

B. EPA Plays an Important Role in Prescribing Guidelines for the States to Follow.

EPA and Intervenor argue that Petitioners’ reading of CAA § 169A leaves EPA with but an “empty, rubber-stamping role.” (RBr. 18; IBr. 7 (contending that Petitioners’ construction “is tantamount to no review at all”)). EPA, however, cannot properly ask this Court to consider an alternative reading of an unambiguous statute simply because it is unhappy with the authority given to it by Congress. The construction of CAA § 169A advocated by Petitioners’ embodies the clear intention of Congress when it said “as

determined by the State.” When Congress speaks clearly, courts do not question the wisdom of legislative choices, especially choices made with respect to complex statutory schemes like the CAA that implicate cooperative federalism. *See North Carolina*, 531 F.3d at 906.

Even more fundamentally, EPA’s argument—that it either has the authority to reject States’ BART determinations in favor of its own or EPA’s role under the CAA loses all meaning—ignores EPA’s actual responsibility for the regional haze program which is at the front end not the back end. The CAA’s regional haze provisions obligate EPA to “provide guidelines to the States, taking into account the recommendations . . . on appropriate techniques and methods for implementing this section.” 42 U.S.C. § 7491(b)(1). Providing guidance to the States is not an insubstantial or meaningless role.

C. The CAA Does Not Give EPA Open-Ended Authorization to Require Its Desired Controls.

Even if EPA could somehow rely on the authority granted to it under other CAA programs, EPA still could not lawfully do what it did here. In developing NAAQS, for example, EPA’s authority is limited. EPA “is relegated by the [CAA] to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met.” *EME Homer City*, 2012 WL 3570721, at *16 (quoting *Train v. Natural Res. Def. Council*, 421 U.S. 60, 79 (1975)).

EPA cannot justify, under any provision of the CAA, its decision to retain a paid consultant to conduct her own independent cost analysis for a BART determination, credit that consultant's analysis over Oklahoma's, and then use that analysis to issue a FIP that forces Oklahoma to require scrubbers on the affected OG&E units. The D.C. Circuit in *EME Homer City* recently rejected a similar attempt by EPA because the court found it "inconceivable that Congress buried in [the CAA] an open-ended authorization for EPA to effectively force every power plant . . . to install every emissions control technology EPA deems 'cost effective.'" *Id.* at *15. EPA cannot use the SIP review process to dictate to the States what specific control measures the States must adopt. *See id.* at *16.

D. Interstate Transport Provisions Have Nothing To Do with This Case.

Attempting to paint a background helpful to its position, EPA references the separate interstate transport provisions set forth in 42 U.S.C. § 7410(a)(2)(D)(i)(II). (RBr. 8.) Those provisions, however, offer no guidance in this case. While EPA had previously indicated that States could meet the interstate transport provisions with a regional haze SIP, the former is not a prerequisite for the latter. *See* Final Oklahoma Bart Rule & FIP, 76 Fed. Reg. 81,728, 81,734 (Dec. 28, 2011) ("an approved RH SIP is not the only possible means to satisfy the requirements of CAA section 110(a)(2)(D)(i)(II) with respect to visibility"). Interstate transport is *not* one of the five statutory factors to be considered in making BART determinations. *See* 42 U.S.C. § 7491(g)(2) (listing the five factors). Moreover, if the assumptions used in regional modeling for the interstate

transport analysis are imported into the BART analysis, that would preclude the *source-specific* evaluation of the five statutory factors for BART determinations, contrary to the CAA's clear requirements. *See Am. Corn Growers Ass'n*, 291 F.3d at 8. Thus, EPA cannot rely on the interstate transport provisions to override Oklahoma's BART determination.

* * * *

Accordingly, nothing in EPA or Intervenor's briefs refutes Petitioners' straightforward reading of the CAA's unambiguous text that leaves BART determinations to the States. By engaging in its own analysis instead of deferring to Oklahoma's, EPA overstepped its statutory authority. For this reason alone, EPA's Final Rule should be vacated.

II. The FIP Is a Result of Arbitrary and Capricious Rulemaking.

Petitioners showed (PBr. 18-39) that EPA's disapproval of Oklahoma's SIP was arbitrary and capricious because EPA failed to consider the 2008 cost estimate, improperly rejected the 2009 cost estimate, and relied instead on its own cost and visibility analyses that contradict EPA guidance and sound engineering principles and are otherwise unsupported. In response, EPA and Intervenor offer further misdirection, attempting to distract this Court from the fact that EPA engaged in a numbers game meant to justify its desire to require scrubbers on the affected OG&E units.

A. EPA's Rejection of Oklahoma's Cost Analysis Is Arbitrary and Capricious.

EPA is mistaken that Oklahoma failed to reasonably consider cost effectiveness. (RBr. 11.) First, EPA still has not adequately explained *why* it disregarded OG&E's 2008 estimates. EPA cannot now disavow its written acknowledgement that "OG&E did utilize the 'EPA Air Pollution Control Cost Manual' when constructing its [2008] cost estimates." (OG&E EPA Comments at Ex. A, cmt. 2, JA 1132.)¹ Contrary to EPA and Intervenor's arguments (RBr. 32; IBr. 14 n.8), a fleeting reference to the 2008 estimates in EPA's response to comments does not justify EPA's failure to substantively consider these estimates in reviewing the Oklahoma SIP.

Second, if EPA simply wanted more documentation on the 2008 estimates, as it now claims (RBr. 35-36; IBr. 14, n.8), then the proper approach would have been for EPA to request that information. EPA did not do that. Instead, EPA requested additional, site-specific cost estimates that went beyond the level of detail required by the CCM, and later attacked those estimates for failing to comply with the CCM. EPA, however, neglects to address its role in the development of the 2009 cost estimates. EPA also does not mention that EPA knew the 2009 cost estimates would be far more detailed than those required by the CCM, thus making an "apples-to-apples" comparison with other BART determinations difficult. (*See* OG&E EPA Comments, JA 1088–1129.)

¹ EPA's arguments with respect to the 2008 cost estimates are outside the administrative record because EPA did not substantively address the 2008 estimates during rulemaking. As such, under the *Chenery* doctrine, EPA counsel's post hoc rationalization should be rejected. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

Both Oklahoma and OG&E readily acknowledged as much. (Oklahoma SIP, JA 145; OG&E EPA Comments, JA 1102.) Indeed, although EPA saw the 2009 estimates when they were developed, it never asserted that they failed to follow the CCM until it became clear that these estimates would confirm that scrubbers are not cost effective on the OG&E units. For EPA to acknowledge receipt of cost estimates that it agreed were in compliance with the CCM, ask for site-specific cost estimates that go beyond the CCM, and then reject those site-specific estimates for not conforming to the CCM exemplifies arbitrary and capricious results-oriented rulemaking.

EPA's improper rejection of the SIP cannot be saved by its new theory that neither the 2008 nor the 2009 estimates complied with the "overnight method" of cost calculation. (RBr. 32.) Given that EPA now claims that the "overnight method" is central to its rejection of the Oklahoma SIP, EPA must be able to explain why it *cannot point to a single instance* where either EPA itself (prior to the Final Rule) or the CCM references this "overnight method." In the Final Rule, EPA relies on a specific definition of "overnight cost" used by the U.S. Energy Information Administration (76 Fed. Reg. at 81,744), but concedes that the CCM itself "does not use the term." (Response to Technical Comments, JA 1235.)² Nonetheless, EPA asserts that the CCM requires the utility industry to estimate costs by assuming that an entire plant could be constructed in

² For electrical generating plants, even the Energy Information Administration does not estimate costs using the overnight method. Instead, the Administration's cost model "explicitly takes account of the time required to bring each generation technology online and the costs of financing construction in the period before a plant becomes operational." U.S. EIA, "Updated Capital Cost Estimates for Electricity Plants," Nov. 2010, at n.2, *available at* http://www.eia.gov/oiaf/beck_plantcosts/?src=email.com.

a single day. (*Id.*) Not only is this method not required by (or even mentioned in) the CCM, but it contradicts EPA’s claim in connection with the proposed rule that “[t]he cost metric estimated in the [CCM] is real or constant-dollar costs in that the effect of inflation has been removed.” (TSD Appendix C, Revised BART Cost-Effectiveness Analysis for FGD, JA 1517.)

Both the 2008 and 2009 cost estimates followed the constant dollar approach required by the CCM and that was advocated by EPA prior to its change of heart in favor of the “overnight method.” EPA argues that the OG&E estimates escalate costs to 2014/2015 dollars compared to other facilities that estimate costs in earlier dollars. (RBr. 34–35.) This is inaccurate. The constant dollar approach commanded by the CCM requires that all future maintenance and operation costs associated with scrubbers be equalized into equal annual payments over the life of the system. This is precisely the approach that OG&E took when calculating costs in both the 2008 and 2009 estimates.

EPA’s unsupported assertion that Oklahoma blindly adopted OG&E’s cost estimates without any critical analysis before determining that such estimates were “credible” (*id.* at 37) is also inaccurate, and again goes well beyond EPA’s limited authority vis-à-vis the State with respect to BART determinations. That Oklahoma thoroughly considered the required factors—particularly the cost effectiveness of scrubbers—is well documented. (*See, e.g.*, Oklahoma SIP, JA 145.) In developing the SIP, Oklahoma had before it both the 2008 cost estimates and the 2009 site-specific estimates, and explained its BART determination for each affected OG&E unit. (*Id.*)

Oklahoma (unlike EPA or its consultant) engaged OG&E and others throughout this process to better understand the technical, engineering, environmental, and economic issues involved in its analysis. It was only after careful consideration that Oklahoma rejected scrubbers as BART because “the cost for [scrubbers] is too high and the benefit too low.” (*Id.*, JA 146.)

B. EPA’s Own Cost Analysis Is Fatally Flawed.

Even if EPA’s rejection of Oklahoma’s cost analysis was proper (and it is not), EPA’s cost effectiveness analysis is arbitrary and capricious in its own right. EPA argues that it was required to make adjustments to the 2009 cost estimates because of a purported mismatch between scrubber size and expected coal sulfur content. (RBr. 45.) EPA thus created two separate approaches to estimating the cost of scrubbers on the OG&E units to address this supposed “conundrum.” (*Id.* at 46.) The only “conundrum,” however, was of EPA’s own creation. EPA could not make the numbers work in its favor if it used both a properly sized scrubber and the method for calculating baseline emission rates that is required by its own guidance.

Thus, EPA’s two cost approaches are both deeply flawed. In the first instance, EPA has *no* technical or engineering basis for its assumption that a smaller sized scrubber would work as retrofit control technology on the affected units. (*See* OG&E EPA Comments, JA 1101–02.) For its part, OG&E conducted a detailed design process for a scrubber that would work on the existing units while assuring compliance with stringent emission rates in light of operating variability and with an adequate margin of safety.

(See Oklahoma SIP, App. 10-4 at Ex. 3, JA 384–430.) EPA, on the other hand, made blind assumptions regarding the feasibility of a smaller scrubber despite the fact that EPA never conducted the engineering analysis necessary to support those assumptions. (RBr. 16–17.) EPA’s guess work in this regard should not distract this Court from the fact that EPA is manipulating numbers to justify the cost of the scrubbers on the OG&E units.

In the second instance, EPA’s departure from its own guidelines regarding baseline emissions is equally problematic. The Regional Haze Rule states that baseline emissions should “represent a realistic depiction of anticipated annual emissions for the source.” 70 Fed. Reg. at 39,167. In accordance with this requirement, EPA has recognized—indeed, *required*—that past actual emissions be used as the baseline for calculating cost effectiveness in other BART determinations. See, e.g., Hawaii Bart Rule & FIP, 77 Fed. Reg. 31,692, 31,704 (proposed May 29, 2012); Colorado BART Rule, 77 Fed. Reg. 18,052, 18,061–71 (Mar. 26, 2012); Nevada BART Rule, 77 Fed. Reg. 17,334, 17,338 (Mar. 26, 2012); Nebraska BART Rule & FIP, 77 Fed. Reg. 40,150 (July 6, 2012); Navajo Nation BART Rule, 74 Fed. Reg. 44,313, 44,321 (proposed Aug. 28, 2009). EPA recently made clear that it “agree[s] that the BART Guidelines provide that for the purpose of calculating the cost of controls, the state may calculate baseline emissions based upon continuation of past practice.” Arkansas BART Rule, 77 Fed. Reg. 14,604, 14,641–43 (Mar. 12, 2012).³

³ EPA uses past actual emissions as the baseline in these and other instances because that is the only way to measure the actual environmental benefit associated with the installation and operation of emissions control technology.

In the Final Rule, however, EPA disregards its own guidance and takes the novel approach of using hypothetical baseline emissions to support its conclusions. Although EPA claims that its position is justified because the sulfur content of OG&E's coal has been trending up over time (RBr. 47), the data shows at most a range in the average monthly percentage of sulfur content from 0.24% to 0.26% between 2004 and 2010. (Response to Technical Comments, JA 1277–79.) That insignificant change cannot reasonably support EPA's assumption that OG&E will burn coal with *double* the sulfur content (0.48%) immediately upon installation of the scrubbers, thereby more than tripling OG&E's baseline emissions, from a historical average of 13,390 tons per year to more than 43,400 tons per year. (*See id.*, JA 1286, 1353.) Furthermore, EPA's position with respect to the “trending up” in the sulfur content of the coal OG&E uses contradicts the position that EPA takes with respect to scrubber size. To support its use of a too-small scrubber in order to artificially lower the cost estimates, EPA argues that it was justified in disregarding as “outliers” emissions data where OG&E burned coal with a higher than average sulfur content. (RBr. 45 n.10.) Regardless of the way EPA argues the issue, there is no applicable exception to the Regional Haze Rule's requirement to use past actual emissions in determining cost effectiveness.

C. EPA Similarly Skews Its Visibility Analysis to Favor Scrubbers.

EPA's attempts to manipulate the visibility side of the cost effectiveness equation also fail. First, EPA misconstrues Petitioners' arguments with respect to imperceptible visibility improvement. Petitioners do not argue, as EPA contends (RBr. 52), that

imperceptible visibility improvement should not be considered in determining whether a unit is subject to BART. Rather, Petitioners contend, and EPA does not dispute, that the imperceptible visibility improvement projected to result from the installation of scrubbers on the OG&E Units⁴ (as measured in terms of \$/dv of improvement) is insufficient to justify the high cost of scrubbers on those units. (PBr. 36–39.)

Second, EPA acknowledges that its own guidelines list \$/dv as a metric “that can be employed . . . to evaluate cost effectiveness.” (RBr. 53.) EPA now claims, however, that the metric is “not an appropriate metric for use as a determining factor for BART because of the complexity of the technical issues surrounding regional haze.” (*Id.*) It is *per se* unreasonable for EPA to issue guidance telling the States that a particular metric is acceptable, let the States use that metric, and then, when they do, claim for the first time in a Final Rule that its use is inappropriate for undefined technical reasons. EPA contends, in part, that its actions are justified because it did not develop thresholds of acceptable costs per deciview. (*Id.* at 53–54.) However, the same is true under any metric of measuring visibility; failure to develop such thresholds does not empower EPA to act arbitrarily and capriciously when presented with a visibility analysis.

Finally, EPA’s visibility assessment arguments are contrary to the Final Rule and leave EPA without any support for its visibility conclusions. Realizing that a cumulative approach to assessing visibility is disallowed under *American Corn Growers*, EPA now disavows that approach. (*Id.* at 54.) EPA also asserts that a number of days approach

⁴ Neither EPA nor Intervenor has disputed the accuracy of the images of the nearly imperceptible projected visibility improvement provided by OG&E in its comments on the Proposed Rule. (See OG&E EPA Comments, JA 1111–12.)

“did not form the basis of EPA’s visibility improvements analysis.” (*Id.* at 57.) The Final Rule contradicts this newly minted position:

As Table 1 indicates, the number of days per year each Class I area is impacted at this level by each facility’s emissions are expected to decrease drastically at each Class I area as the result of installation of SO₂ BART emission controls at the six units.

76 Fed. Reg. 81,736. The argument made by EPA leaves the Court with no basis for understanding how the Agency assessed visibility.⁵ Without the cumulative impacts analysis or the number of days approach in Table 1, the only visibility information remaining in the Final Rule is raw modeling data.

Oklahoma used a metric established by EPA to determine that the nearly imperceptible improvement in visibility that could result from the installation of scrubbers comes at too great a cost. By contrast, EPA has disavowed both of the stated grounds for its visibility assessment because they are not legally supportable, leaving the Court to glean EPA’s current approach to the visibility assessment from morsels of modeling information in the Final Rule. EPA’s visibility assessment is therefore arbitrary and capricious.

D. EPA Did Not Provide Adequate Notice and Opportunity to Comment.

EPA did not give Petitioners the opportunity to comment on two important aspects of its Final Rule: the “overnight method” and EPA’s approach to assessing visibility improvement.

⁵ EPA’s argument also is counsel’s post hoc rationalization, which courts reject pursuant to the *Chenery* doctrine. See *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 50 (“[A]n agency’s action must be upheld, if at all, on the basis articulated by the agency itself.”).

In its response to the fact that the “overnight method” for cost evaluations was newly christened in the Final Rule, thus depriving Petitioners of the right to comment, EPA cites to only one other use of that terminology, which occurred *after* the Final Rule was issued with respect to the Oklahoma SIP. (RBr. 33 n.4.) Similarly, EPA does not refute the fact that Petitioners did not have the opportunity to comment on the “number of days” approach to visibility improvement that appeared for the first time in the Final Rule, but instead disclaims any reliance on that metric. (*Id.* at 57.) Petitioners had a right to comment on these issues, and EPA deprived them of that right in violation of the notice-and-comment requirements.

CONCLUSION

For all these reasons and those in the opening brief, the Court should hold unlawful and vacate EPA’s disapproval of the Oklahoma SIP and promulgation of the FIP, and compel EPA to approve Oklahoma’s SIP revision in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2012, a copy of Reply Brief of Petitioners was served electronically on all parties to this matter via the Court's CM/ECF system.

/s/ Thomas E. Fennell
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**CERTIFICATE OF DIGITAL SUBMISSION
AND PRIVACY REDACTIONS**

The undersigned certifies that:

- (1) All required privacy redactions have been made; and
- (2) This digital submission was scanned for viruses with McAfee VirusScan Enterprise v8.7i, which was last updated on October 8, 2012. According to this program, this submission is free of viruses.

/s/ Thomas E. Fennell
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned certifies, pursuant to Fed. R. App. P. 32(a)(7)(C) and 10th Circuit Rule 32(b), that this brief contains 4,798 words as counted by a word processing system that includes headings, footnotes, quotations, and citations, and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 10th Circuit Rule 32(b), and is therefore within the 7,000-word limit.

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