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United States Court of Appeals
Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: No. 16-60118 – *State of Texas, et al. v. EPA, et al.*
USDC No. 81 Fed. Reg. 296

Dear Court,

The Sierra Club and the National Parks Conservation Association ("NPCA") respectfully submit this letter brief in response to the Court's direction to the parties in advance of oral argument to address the motion to dismiss or transfer and, to the extent the parties feel necessary, the motions for a stay.

Summary of Argument

This proceeding involves challenges to a Clean Air Act plan for Texas and Oklahoma issued by the Environmental Protection Agency ("EPA") that will improve visibility in 19 national parks and wilderness areas across the south central United States by requiring emission reductions from some of the nation's most polluting power plants. The rule also clarifies certain

3904 BONNELL DRIVE AUSTIN, TX 78731

T: 512.537.2791 F: 212.918.1556 MWHITTLE@EARTHJUSTICE.ORG WWW.EARTHJUSTICE.ORG

provisions of the Clean Air Act itself and the Regional Haze Rule, regarding interstate consultation to ensure national uniformity.[1]

The Clean Air Act requires these petitions for review of EPA's rule to be filed only in the United States Court of Appeals for the District of Columbia because (1) the rule is based on a determination of nationwide scope or effect and (2) EPA found and published that its rule is based on such a determination. 42 U.S.C. § 7607(b)(1); 81 Fed. Reg. at 345-46. Accordingly, this Court should dismiss or transfer these cases to the D.C. Circuit and decline to rule on the requests for a stay.

In transferring these cases, the Court need not reach the question of whether the forum provisions in 42 U.S.C. § 7607(b)(1) are jurisdictional or whether they relate only to venue because Congress clearly intended rules of nationwide scope and effect to be reviewed in the D.C. Circuit regardless.

Nor does the Court need to reach the question of whether EPA's finding of "nationwide scope and effect" is a reviewable agency action as Petitioners assert, Pet'rs' Joint Opp'n to EPA's Mot. to Dismiss or Transfer at 6 (Doc. 00513469930), because, assuming it is reviewable, EPA's published finding is eminently reasonable, comports with the statutory requirements, and should be upheld. First, in evaluating the Texas and Oklahoma regional haze plans at issue here, EPA was confronted with "intricately intertwined" plans that, unlike previous regional haze plans, required clarification of regulatory provisions which govern all state regional haze

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[1] *See Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze*, 81 Fed. Reg. 296 (Jan. 5, 2016).

plans. 79 Fed. Reg. 74,818, 74,822 (Dec. 16, 2014) (proposed federal plan). EPA provided a clarified interpretation of the Clean Air Act and the Regional Haze Rule's interstate consultation requirements, which will guide the development of all future state and federal regional haze plans, including those currently being developed in states such as Arkansas, Louisiana, and Nebraska. 81 Fed. Reg. at 349; *see also* EPA-R06-OAR-2014-0754-0087 at 482 [Response to Comments]. Second, EPA explained that a determination of nationwide scope and effect is appropriate where, as here, a regionally applicable action "encompasses two or more judicial circuits." 81 Fed. Reg. at 346.

Relying on these two rationales, EPA reasonably concluded that the rule is based on a determination of "nationwide scope and effect," and petitions for review of the rule must be filed in the D.C. Circuit. Accordingly, this Court should dismiss the consolidated petitions or transfer them to the D.C. Circuit.

Background

The purpose of Clean Air Act regional haze plans is to achieve the national goal of eliminating visibility-impairing air pollution caused by humans in national parks, wilderness areas, and other "Class I areas" by 2064. *See* 42 U.S.C. § 7491(a)(1), (b)(2); 40 C.F.R. § 51.308(d)(1), (d)(3). Despite the fact that Texas sources impair visibility at numerous Class I areas in the region, the Texas regional haze plan did not require a single source to install any controls to reduce haze-causing air pollution. 81 Fed. Reg. at 300. Texas sources not only emit more sulfur dioxide than the sources of any state in the country, but the eight power plants subject to the challenged rule together emit more sulfur dioxide than all of the sources in Arkansas,

Oklahoma, and Louisiana combined[2]; this would not have changed under Texas's plan. Texas's outsized sulfur dioxide emissions occur because many Texas power plants lack the pollution controls widely used in other states.[3] For example, the Big Brown plant emits sulfur dioxide pollution at a rate that is as much as 50 times higher than plants with modern technology.[4]

The Texas plan would not have achieved natural visibility conditions at Big Bend and the Guadalupe Mountains National Parks until more than a century after the 2064 natural visibility goal.[5] In addition, the plan would have allowed Texas sources to continue to impair visibility at Oklahoma's Wichita Mountains and other out-of-state national parks and wilderness areas without having to reduce their emissions to the levels required from other states to benefit the same places. *See, e.g.*, *Oklahoma v. EPA*, 723 F.3d 1201, 1207-10 (10th Cir. 2013) (affirming plan to require four power plant units in Oklahoma to reduce emissions). EPA appropriately disapproved several elements of the Texas haze plan as well as the reasonable progress goals in the Oklahoma haze plan as failing to satisfy the Act's requirements. 81 Fed. Reg. at 298-303.

As required by the Clean Air Act, 42 U.S.C. § 7410(c)(1)(B), EPA developed a federal plan to remedy the deficiencies in the State of Texas's plan. EPA used a reasonable and generous approach. Its method for selecting sources for pollution controls was consistent with the method that many states

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[2] *See* EPA, Air Markets Program Data, *available at* https://ampd.epa.gov/ampd/.
[3] *See* EPA-R06-OAR-2014-0754-0008 at 1 [EPA, TSD for the Cost of Controls].
[4] *Compare id.* at Attachment TX166.008-086 (Big Brown Unit 1 maximum monthly emission rate: 2.0 lb SO_2/mmbtu), *with* 81 Fed. Reg. at 321 (modern scrubber vendors regularly guarantee rates of 0.04 lb SO_2/mmbtu).
[5] *See* EPA-R06-OAR-2014-0754-0007, Attachment TX116-007-33 at "2018 RPG calcs" tab [Visibility Modeling Summary Spreadsheet].

have used in their plans and which EPA routinely uses. 81 Fed. Reg. at 303. In fact, EPA's method here was even more deferential to, and conscious of, the complexities of the regional haze problem in Texas because it used additional screening to exempt sources from having to install controls.

The federal plan that EPA issued includes emission limits for eight Texas power plants, resulting in the reduction of 230,000 tons of sulfur dioxide annually, *id.* at 298, 305, and will improve visibility in nineteen national parks and wilderness areas in seven different states, including Texas and Oklahoma.[6] EPA's plan will achieve natural visibility at Guadalupe Mountains approximately 25 years sooner and at Big Bend approximately 30 years sooner than Texas's plan. *Id.* at 323. So, not only will current generations see clearer skies as a result of the rule, an entire additional generation will see clear skies.

The plan also will provide public health and economic benefits to the people that live, work, and breathe the air around these power plants, as well as the thousands of people who visit and work in these national parks and wilderness areas. The same pollutants that cause haze – including sulfur dioxide and associated particulate matter – also cause serious health problems. By reducing these pollutants, the rule will save an estimated 316 lives, prevent thousands of asthma events and hospitalizations, and avoid tens of thousands of lost work days *every year*. Decls. in Supp. of Sierra Club and NPCA's Opp'n to Mots. to Stay at DEC 83-84 (Doc. 00513457087). The economic benefits from these public health benefits exceed $3 billion annually. *Id.*

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[6] *See* Visibility Modeling Summary Spreadsheet; *see also* 79 Fed. Reg. at 74,854-55 (noting Class I areas impacted by Texas emissions).

In terms of costs and benefits, the haze plan is a good deal – even a bargain. EPA has approved reasonable progress determinations for other states that cost more and result in comparatively less visibility improvement. The rule will pay dividends not only by reducing haze but also by improving public health and the economy. Indeed, the economic benefits of the rule far exceed the costs.

The Clean Air Act's Judicial Review Provision, 42 U.S.C. § 7607(b)(1)

As this Court previously explained and Petitioners recognize, "[t]he Clean Air Act's venue provision sorts petitions for review of EPA actions into three types, based on whether the challenged regulation is:

> (1) "nationally applicable";
> (2) "locally or regionally applicable"; or
> (3) a locally or regionally applicable but "based on a determination of nationwide scope or effect," provided that "the Administrator finds and publishes that such action is based on such a determination."

Texas v. EPA, No. 10-60961, 2011 WL 710598, at *3 (5th Cir. Feb. 24, 2011) (unpublished); Pet'rs' Joint Opp'n to EPA's Mot. to Dismiss or Transfer at 7. "A petition for review of regulations of type (1) or (3) may be brought only in the D.C. Circuit. Petitions for review of type (2) regulations must be brought in the relevant regional circuit." *Texas*, 2011 WL 710598, at *3.

Argument

I. The Court Should Dismiss The Petitions Or Transfer Them To The D.C. Circuit Court Of Appeals.

Petitioners argue that the challenged rule is a Type 2 regulation under the Clean Air Act forum provisions because it "addresses only two

neighboring states (Texas and Oklahoma) and imposes compliance obligations on sources in only one state (Texas)." Pet'rs' Joint Opp'n to EPA's Mot. to Dismiss or Transfer at 7. But Section 7607(b)(1) explicitly provides for D.C. Circuit review of actions, like the regional haze plan for Texas and Oklahoma, that are "locally or regionally applicable," but are nevertheless based on determinations of "nationwide scope or effect."

EPA has – in the proposed rule, the final rule, and the response to comments accompanying the final rule – repeatedly and consistently provided two reasonable explanations for concluding that the rule is based on a determination of "nationwide scope or effect." 79 Fed. Reg. at 74,888; 81 Fed. Reg. at 349. First, "EPA's clarified interpretation of its regulations as set forth in this final action . . . is applicable to regional haze actions in all states, not just the specific actions [EPA is] taking here with regard to the regional haze obligations for Texas and Oklahoma." 81 Fed. Reg. at 349. Second, "[t]he scope and effect of this rulemaking extend to Texas and Oklahoma, which are located in two judicial circuits." *Id.*

EPA's clarified interpretation arose in the context of the flawed consultation between Texas and Oklahoma, in which Texas refused to provide Oklahoma sufficient information regarding achievable emissions reductions at Texas sources for Oklahoma to set an approvable reasonable progress goal for Wichita Mountains. *See* 79 Fed. Reg. at 74,866-67 (detailing the Texas and Oklahoma interstate consultation process). Indeed, despite causing "several times" greater visibility impacts at Wichita Mountains than all of Oklahoma's own sources combined, Texas refused to consider, or even disclose, the availability of cost-effective controls at its own point sources. *Id.* at 74,822.

Recognizing the Regional Haze Rule regulations did "not explicitly address" the kinds of "difficulties States can encounter when dealing with" interstate transport, EPA clarified its interpretation of various Clean Air Act statutory and regulatory provisions to make clear that each upwind

state has an obligation to consider the four statutory reasonable progress factors and include in their state implementation plans "emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward the national goal" for each downwind Class I area impacted by its emissions. *Id*. at 74,829; 42 U.S.C. § 7491(b)(2); Response to Comments at 68. EPA's clarified interpretation of the Clean Air Act and the Regional Haze Rule's consultation requirements has "nationwide scope and effect" because that interpretation will apply to all regional haze plans going forward. As EPA explains in the final rule:

> If an upwind state were not required to participate or if emission reductions from upwind sources were not considered in this process, there would be no way for downwind states to set reasonable progress goals that account for all reasonable control measures.

81 Fed. Reg. at 309.

EPA's conclusions as to what constitutes a proper and meaningful consultation under the regional haze program are eminently reasonable. Given the regional, interstate nature of regional haze, it is imperative that states substantively consult with each other and set reasonable progress goals based on sources in other states installing control measures that meet the four factors for reasonable progress. Because EPA's clarified interpretation of the Regional Haze consultation requirements will provide guidance to other states and EPA in the preparation of future regional haze plans, the final rule is based on a determination of "nationwide scope and effect." As a result, the forum provisions of the Clean Air Act, 42 U.S.C. § 7607(b)(1), require review of the rule in the D.C. Circuit.

Petitioners conflate the terms "nationally applicable" with "nationwide scope and effect" in the forum provisions, 42 U.S.C. § 7607(b)(1), arguing that EPA's rule cannot have "nationwide scope or effect" because it does

not affect all, or even most, of the country. But Petitioners' reading of the statute impermissibly renders the "nationwide scope and effect" provision superfluous. All parties agree that the challenged rule is not "nationally applicable" and that only two states are directly impacted by the requirements set forth in the federal plan. It is, therefore, a "locally or regionally applicable" federal plan.

As noted, however, EPA's "locally or regionally applicable" plan for Texas and Oklahoma articulates an interpretation of the Clean Air Act and its implementing regulations that clarifies the manner and degree to which states must exchange information and otherwise consult with each other. Because that interpretation will guide all future regional haze planning, EPA concluded that its Regional Haze plan for Texas and Oklahoma, while locally or regionally applicable, has "nationwide scope and effect." That conclusion is reasonable and fits comfortably into the Type 3 regulations, for which Congress mandated D.C. Circuit review.

Petitioners claim that EPA's clarification of the consultation requirements cannot be a determination of "nationwide scope and effect" because every action on a state implementation plan involves interpretation of nationally applicable regulations. But not every state plan raises novel legal issues that implicate Clean Air Act planning processes throughout the country, as the Texas and Oklahoma plans did. Congress granted EPA the authority to decide when a regionally applicable rule is based on a determination of nationwide scope and effect and therefore should be heard in the D.C.

Circuit. The fact that EPA could conceivably do so for other rules is irrelevant, so long as EPA's decision here was reasonable.[7]

The responsibilities of downwind and upwind states in the interstate consultation process are of nationwide import and will impact a number of other states processes going forward. Because EPA reasonably concluded, and published its finding, that the final rule is based on a determination of "nationwide scope and effect," the Clean Air Act mandates that any petition for review may be filed "only" in the D.C. Circuit Court of Appeals. *See* 42 U.S.C. § 7607(b)(1).

II. Given That The Court Should Dismiss Or Transfer, This Court Has No Occasion To Reach The Motions For A Stay.

Because the forum provisions of the Clean Air Act require dismissal or transfer to the D.C. Circuit, this Court should decline to rule on the requests for a stay. If the Court nonetheless reaches the merits of the stay motions, then the Court should deny the motions.

The balance of equities and the public interest weigh in favor of denying the stay motions. Even one year's delay in the implementation of the final rule would result in hundreds of unnecessary deaths and adversely impact Class I area visibility. Sierra Club and NPCA's Opp'n to Mots. to Stay at 8-12 (Doc. 00513456729).

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[7] Petitioners' repeated claim that EPA's "nationwide scope and effect" determination is "unprecedented" does not withstand scrutiny. In other actions, EPA also concluded that a final action is based on a determination of nationwide scope and effect. *See, e.g.*, 79 Fed. Reg. 46,256, 46,265 (Aug. 7, 2014) ("EPA determines and finds that this is . . . a final action of nationwide scope or effect for purposes of section 307(b)(1) of the Act."); 80 Fed. Reg. 7336, 7340 (Feb. 10, 2015) ("[T]he rule . . . is based on a determination of nationwide scope or effect."). EPA's decision here is consistent with EPA's past practice and should be upheld.

A stay would harm the public interest because it increases the likelihood of the pollution reductions related to upgraded or new controls being correspondingly delayed, along with the associated visibility gains. Sierra Club and NPCA members submitted declarations in support of their intervention motion which describe in detail how they associate visibility with public welfare and how haze has impacted their cultural, historic, spiritual and patriotic enjoyment of these lands belonging to all Americans. Doc. 00513414795 at 15, 24-25, 27-28, 34-36, 49-51, 59.

Further, Dr. George Thurston submitted evidence regarding the grave toll on public health from a delay in implementing the air pollution controls required by the rule. Decls. in Supp. of Sierra Club and NPCA's Opp'n to Mots. to Stay at DEC 80-90. This evidence is uncontroverted. None of the Petitioners has questioned Dr. Thurston's methodology, which followed well-established protocols established by EPA. Nor has any of the Petitioners disputed Dr. Thurston's conclusion as to the lives saved, the heart attacks and respiratory conditions avoided, and the lost work days avoided by implementing the rule. A stay would delay the reduction in those serious public health harms that the rule would achieve.

Petitioners make the meritless argument that because other Clean Air Act programs protect public health, health concerns are irrelevant here. But the fact that other Clean Air Act programs aim to improve public health in no way justifies ignoring the significant benefits the rule will achieve and the severe, real-world impacts to the public that would result from a stay.

Petitioners also contend that because EPA declined to rely specifically on public health benefits in issuing the final rule, this Court cannot consider public health benefits in ruling on a stay.[8] Petitioners conflate what EPA

[8] Petitioners erroneously suggest that EPA dismissed Sierra Club's health arguments as "irrelevant." Joint Reply in Supp. of Mot. to Stay by Luminant Gen. Co. LLC, Sw. Pub.

can consider during the rulemaking with what this Court can consider in ruling on stay motions. But the two inquiries are not the same. Petitioners must show that the equities and the public interest favor a stay, and thus any admissible evidence regarding the public interest is relevant to the Court's consideration of the equities—regardless of whether such evidence could be considered by EPA in the final rule. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (holding courts must consider the balance of harms prior to granting injunctive relief, including harm to the public interest). Whether people will die prematurely and suffer heart attacks and asthma attacks as a result of a stay is vital to this Court's determination of where the public interest lies.

On the other hand, Movants' allegations of harm absent a stay comprise: (1) economic harm from the costs of new scrubbers or replacement generation, (2) impacts from speculative closure of unidentified plants at an unidentified future date, including speculation about potential new transmission line needs, and (3) the "stigma" of the rule and impacts to economic growth. These allegations are wholly insufficient to meet the rigorous showing of concrete and irreparable injury necessary to warrant a stay. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20-23 (2008).

The cost of complying with a federal law during the period of judicial review generally does not constitute irreparable harm. *See Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) ("[O]rdinary compliance costs are typically insufficient to constitute irreparable harm."); *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) ("[I]njury

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Serv. Co., and Coleto Creek Power, LP at 10 (Doc. 00513469785). In fact, EPA "agree[d] that the same emissions that cause visibility impairment can also cause health related problems," and that "in addition to improving visibility, pollution reductions under our proposal will yield significant public health, economic, welfare, and other environmental benefits." Response to Comments at 414. Despite these "co-benefits for public health," EPA noted that in its interpretation of the Clean Air Act, the agency cannot specifically rely on these benefits to support its final rule. *Id*.

resulting from attempted compliance with government regulation ordinarily is not irreparable harm."); *A.O. Smith Corp. v. Fed. Trade Comm'n*, 530 F.2d 515, 527-28 (3d Cir. 1976). Even if the Court considers these costs in its calculus, the costs expected during the pendency of the litigation are not significant when put in context of the multi-billion dollar corporations at issue. Decls. in Supp. of Sierra Club and NPCA's Opp'n to Mots. to Stay at DEC 78; *see GEO Specialty Chems., Inc. v. Husisian*, 923 F. Supp. 2d 143, 151 n.11 (D.D.C. 2013) (in determining whether economic harm is significant enough to warrant preliminary relief, courts consider the magnitude of loss in relation to the movant's worldwide revenues); *A.O. Smith Corp.*, 530 F.2d at 528 (considering magnitude of harm "vis a vis the corporate budget"). For decades, these Texas sources have escaped modern pollution controls that others around the country have installed.[9]

Moreover, EPA's disapproval of portions of the state plans and issuance of the federal plan were compelled by the Clean Air Act and were rationally based on the record and the law. Thus, Movants are unlikely to succeed on the merits, and a stay should not issue.

Conclusion

For these reasons, the Sierra Club and NPCA respectfully request this Court dismiss the petitions for review of the Texas and Oklahoma regional haze rule or, in the alternative, transfer the petitions to the D.C. Circuit. Sierra Club and NPCA also respectfully request that this Court decline to rule on the requested stay and deny Petitioners relief from the rule pending review. If the Court nonetheless rules on the stay requests, the equities tip sharply in favor of denying the stay motions because the compliance costs

[9] *See* EPA, TSD for the Cost of Controls at 1 (13 units at 6 large facilities in Texas do not have scrubbers to control sulfur dioxide pollution).

incurred during the pendency of the litigation are outweighed by the substantial harms to public health and welfare from a stay.

Respectfully submitted,

_/s/ Mary Whittle
Mary M. Whittle
Matthew E. Gerhart
Attorneys for Sierra Club and NPCA

Elena Saxonhouse
Joshua D. Smith
Attorneys for Sierra Club

cc: Counsel of record (via the Court's CM/ECF system)