

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Respondents.

POWDER RIVER BASIN RESOURCE
COUNCIL, et al.,

Intervenors.

POWDER RIVER BASIN RESOURCE
COUNCIL, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.

Respondents.

STATE OF WYOMING; et al.,

Intervenors.

Case No. 14-9529

Case No. 14-9530

BASIN ELECTRIC POWER
COOPERATIVE

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Respondents.

POWDER RIVER BASIN RESOURCE
COUNCIL, et al.

Intervenors.

PACIFICORP,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Case No. 14-9533

Case No. 14-9534

Respondents.

POWDER RIVER BASIN RESOURCE
COUNCIL; et al.,

Intervenors.

**EPA’S OPPOSITION TO CONSERVATION ORGANIZATIONS’ SECOND
MOTION TO PROCEED SEPARATELY AND/OR FOR PARTIAL
RECONSIDERATION OF ORDER ABATING PROCEEDINGS**

On January 13, 2016, this Court denied a motion by Petitioners Powder River Basin Resource Council, National Parks Conservation Association, and Sierra Club (the “Conservation Organizations”) to sever their petition for review against Respondent Environmental Protection Agency (“EPA”) from other consolidated petitions brought by the State of Wyoming, Basin Electric Power Cooperative (“Basin”), and PacifiCorp (collectively, “Industry and State Petitioners”). *See* DN 10334089. Additionally, on May 17, 2017, over the vigorous opposition of the Conservation Organizations, the Court granted motions to abate proceedings in all four petitions during the performance of obligations under a settlement agreement entered into by EPA, Basin, and Wyoming. *See* DN 10467868. The Conservation Organizations are now asking a second time to proceed separately or, in the alternative, for partial reconsideration of the Court’s May 17 Order. *See* DN 10471913 (“Second Motion”). EPA hereby opposes the Conservation Organizations’

request for the same reasons EPA opposed the Conservation Organizations' first motion:

1. All four petitions in this case challenge one comprehensive final rule, which addresses the Clean Air Act's ("CAA") regional haze requirements for the State of Wyoming. *See* "Approval, Disapproval and Promulgation of Implementation Plans; State of Wyoming; Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze," 79 Fed. Reg. 5032 (Jan. 30, 2014) ("Final Rule"). The Final Rule is "lengthy and far-reaching[,]" assessing best available retrofit technology requirements for twenty of the State's electric generating units in addition to addressing the CAA's reasonable progress requirements for the State. DN 10255387 ("EPA Brief") 23.

2. Industry and State Petitioners make threshold arguments regarding the standard of review and extent of EPA's authority under the CAA's visibility provisions, *see* DN 10255003 ("WY Brief") 31-32; DN 10255059 ("Basin Electric Brief") 14-20; DN 10254784 ("PacifiCorp Brief") 14-21. They also challenge specific best available retrofit technology disapprovals and determinations. *See* WY Brief 47-59; Basin Electric Brief 20-43; PacifiCorp Brief 23-42. The Conservation Organizations challenge a specific best available retrofit technology approval as well as certain reasonable progress determinations. *See* DN 10254825 ("Conservation Organization Brief") 28-56.

3. In defense of the Final Rule, EPA submitted a nearly 200-page Final Brief. In EPA's Final Brief, EPA argued that "EPA's approach was straightforward and internally consistent across all facilities addressed in the Final Rule." EPA Brief 23. EPA prepared several overview charts in order to illustrate that point. *Id.* at 25-35. And throughout the brief, EPA cross-referenced its decisions in other parts of the Final Rule in order to defend the decisions at issue, including in response to the Conservation Organizations' arguments. *See, e.g., id.* at 59, 67-68 (stating that "[a]fter reviewing the revised costs and visibility information [for Naughton Units 1 and 2], EPA ultimately concluded that the visibility improvements that would be gained through [installation of the most stringent control] did not justify the incremental cost effectiveness figures, which were extremely high compared to costs of installing [that control] on other units" and specifically referencing the Jim Bridger facility also covered by the Final Rule), 68 n.42 (referring to Dave Johnston Unit 4).

4. The Conservation Organizations also referenced other parts of the Final Rule in order to support their specific arguments. *See, e.g.,* Conservation Organization Brief 51-52 (comparing costs of controls for the oil and gas source category to costs for the Jim Bridger, Laramie River, and Wyodak Units); 53 n.22 (noting EPA's assessment of visibility improvement from installation of controls for Dave Johnston Units 1 and 2).

5. After the parties had submitted merits briefs, EPA and Basin began settlement discussions through the Circuit Mediation Office regarding settlement of the issues related to Basin's Laramie River Units. As the Court is aware, those discussions culminated in a final Settlement Agreement addressing claims by Basin and Wyoming with respect to the Laramie River Units. *See* DN 10463732, Ex. A. Should Wyoming submit a revised state plan pursuant to the Settlement Agreement that is approved by EPA, that action should moot or at least substantially narrow many of those petitioners' claims in this case. However, while EPA fully hopes and expects the framework outlined in the Settlement Agreement will prove successful, it bears noting that the Settlement Agreement will terminate if the State of Wyoming does not submit a revised state plan to address the Laramie River Units within 12 months or if EPA disapproves the submitted revised plan. *Id.* at ¶ 10. In that event, Basin and Wyoming's sole remedy under the Settlement Agreement is to ask the Court to lift the stay of the consolidated cases and proceed on a schedule proposed by the parties and approved by the Court. *Id.* Thus, it is possible that the Court could be called upon to review the entire Final Rule, including the provisions applicable to the Laramie River Units, if the Settlement Agreement is terminated.

6. The Conservation Organizations' arguments regarding the Final Rule are distinct in that they are not joined by any other party, but as those claims are presently briefed, this Court must review the Final Rule as a whole in order to fully understand

the arguments of the parties. Additionally, the Court must apply the same standard of review and interpretation of EPA's authority under the statute to its review of all challenges to the Final Rule.

7. Therefore, if the Court proceeds as the Conservation Organizations request, the Court and the parties could be required to litigate overlapping or related aspects of the Final Rule on separate occasions. Specifically, if the Court were to adjudicate the merits of the Conservation Organization's claims now, as requested, the Court may later still need to resolve the claims by Wyoming, Basin, and PacifiCorp that are either not addressed by the Settlement Agreement or that are reopened following any possible termination of the Settlement Agreement. Accordingly, neither judicial economy nor conservation of governmental resources would be served by parsing out the Conservation Organizations' arguments for separate review.

8. In contrast, if EPA and Wyoming perform their obligations under the Settlement Agreement, judicial economy would be served because the Court would not need to consider the challenges related to the Laramie River Units in order to resolve the petitions for review, nor would EPA need to defend against those challenges at argument. *See* EPA Brief 88-125, 150-61 (addressing Basin Electric's Laramie River Units).

9. Moreover, the Conservation Organizations will not be unfairly prejudiced by a delay in scheduling a comprehensive argument. The Conservation

Organizations contend that a delay may “foreclose any meaningful remedy” for their claims for the period covered by the Final Rule, which ends in 2018. *See* Second Motion 6-7. But even if the abeyance were lifted today and oral argument was scheduled immediately, a decision favorable to the Conservation Organizations would not result in the installation of additional controls before the end of 2018. EPA would be required to engage in rulemaking on remand first, and any compliance deadlines would run from the effective date of that final rule. *See, e.g.*, 42 U.S.C. §§ 7491(b)(2)(A) (requiring the installation of best available retrofit technology “as expeditiously as practicable”); 7491(g)(2) (defining “as expeditiously as practicable” as “in no event later than five years after the date of approval of a plan revision . . . or promulgation of such a plan revision . . . by the Administrator”). Thus, the Conservation Organizations in fact will have an adequate remedy after the abeyance is lifted. And the Conservation Organizations will have a separate opportunity to challenge any final action issued pursuant to the terms of the Settlement Agreement if they so choose.

Accordingly, the Conservation Organizations’ motion to proceed separately should be denied.

June 12, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on all counsel of record by the Court's ECF system on June 12, 2017.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made per 10th Cir. R. 25.5;
- (2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;
- (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Forefront Quiet Security 1.177.698.0 and according to the program are free of viruses.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d), this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft WORD in 14 point Times New Roman.

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