UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF ARKANSAS, *Petitioner*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents.*	No. 16-4270 (and consolidated cases)

NATIONAL PARKS CONSERVATION ASSOCIATION'S AND SIERRA CLUB'S MOTION FOR RECONSIDERATION OF ORDER DATED MARCH 7, 2018

Under Eighth Circuit Rule 27A(d), Petitioners National Parks Conservation Association ("NPCA") and Sierra Club (collectively, "Conservation Groups") move for reconsideration of the Order dated March 7, 2018 granting a stay of a rule issued by the United States Environmental Protection Agency ("EPA") to reduce harmful and haze-causing sulfur dioxide ("SO_2") pollution from Arkansas electric generating units ("EGUs"). Doc. 4636668.

A court may issue a stay pending appeal only if the moving party satisfies four factors. An agency's non-opposition to a stay request does not alter the legal standard for a stay. Here, the Court's Order granting Entergy's request for a stay pending appeal does not make findings on any of the four stay factors. The

Conservation Groups respectfully request that the Court reconsider its Order and issue a written opinion analyzing whether Entergy has satisfied each of the four stay factors, in light of the Conservation Groups' brief demonstrating that Entergy did not satisfy any of the four factors.

BACKGROUND

Petitioners seek review of the final action entitled "Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan," 81 Fed. Reg. 66,332 (Sept. 27, 2016) ("Final Rule"). The Final Rule is designed to meet Clean Air Act standards for reducing visible air pollution, otherwise known as haze. The same pollutants that cause haze also cause premature death and a range of diseases, such as asthma, heart attacks, and chronic bronchitis.[1] By reducing emissions that cause haze, the Final Rule avoid 137 premature deaths, thousands of asthma-related events, tens of thousands of lost work days, and more than $1.3 billion in public health costs every year across 14 states. Thurston Decl. at 42-43, tbls.1 and 2 (Ex. 2 to Conservation Groups' Oct. 31, 2017 Status Report, Doc. 4595708).

[1] *See, e.g.*, EPA, Regulatory Impact Analysis for the Final Regional Haze Rule (Apr. 22, 1999), *available at* https://www3.epa.gov/ttnecas1/docs/ria/visibility-rule_ria_final-reg-haze-rule_1999-04.pdf (last visited March 21, 2018); EPA, Fact Sheet for Final Amendments to the Regional Haze Rule at 1, 3 (2005), *available at* https://www.epa.gov/sites/production/files/2016-02/documents/fs_2005_6_15.pdf (last visited March 21, 2018).

On December 15, 2017, the State of Arkansas filed its Amended and Substituted Motion for Stay of Final Rule seeking to stay the Final Rule and toll compliance deadlines. Doc. 4611194. On January 11, 2018, Conservation Groups filed their Amended Response, Doc. 4619422, demonstrating in detail that the State of Arkansas was not likely to succeed on the merits (at 2-15) and had not provided evidence of irreparable harm (at 16-18). Conservation Groups further argued that a stay would cause injury to the public health and the public's interest in clean air, and that the State of Arkansas had not offered any evidence in support of its own public interest claims (at 18-22).

On January 11, 2018, Entergy filed an Amended and Substituted Motion for Stay, Doc. 4619424, seeking to stay the Final Rule and to toll applicable compliance deadlines. On January 25, 2018, Conservation Groups filed a Response to the Amended and Substituted Motion to Stay. Doc. 4623528. In their Response, Conservation Groups demonstrated in detail that Entergy was not likely to succeed on the merits (at 2-16), that Entergy had not demonstrated irreparable harm (at 16-19), and that a stay would injure other parties and harm the public interest (at 19-22).[2]

[2] The Conservation Groups seek reconsideration of the Order's grant of a stay as to the sulfur dioxide portions of the Arkansas haze rule. Thus, this motion will not discuss the nitrogen oxides portions of the plan.

On March 7, 2018, the Court issued an Order granting Entergy's motion as to the sulfur dioxide requirements in the final rule. Doc. 4636668. The Court did not reach the State of Arkansas' stay motion.

STANDARD OF REVIEW

Under the traditional standard for a stay pending appeal, a court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder,* 556 U.S. 418, 425-26 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other." *Nken*, 556 U.S. at 438 (Kennedy, J., concurring).

ARGUMENT

Under Eighth Circuit Rule 27A(d), parties adversely affected by orders of the Court or clerk may file a motion for reconsideration. By granting a stay that Conservation Groups opposed, the Court's Order of March 7, 2018 adversely affected the Conservation Groups, which hereby seek reconsideration.

I. THE COURT SHOULD RECONSIDER ITS ORDER BECAUSE THE ORDER LACKS FINDINGS ON THE FOUR STAY FACTORS.

Despite extensive briefing from the parties on a stay, the Court's Order of March 7, 2018 does not contain findings on the four factors that a movant must satisfy in order to obtain a stay pending appeal. The Court should reconsider its Order because it is well established that a court can stay a final rule pending appeal only if the movant satisfies each of the four stay factors. *See Nken*, 556 U.S. at 434. "A stay is not a matter of right, even if irreparable injury might otherwise result." *Id.* at 433 (citation omitted). Here, EPA did not oppose the stay, but "EPA's consent is not alone a sufficient basis for us to stay or vacate a rule." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015). Thus, the Conservation Groups respectfully submit that the Court should reconsider its Order of March 7, 2018 and issue a ruling that addresses the four factors that are at issue in a stay.

II. UPON RECONSIDERATION, THE MOTIONS FOR AMENDED AND SUBSTITUTED STAY SHOULD BE DENIED AS TO SULFUR DIOXIDE.

Upon reconsideration, the Court should find that both Entergy's and the State of Arkansas' motions failed to satisfy any of the four stay factors. The Conservation Groups respectfully refer the Court to the briefs they filed opposing the amended stay motions for a detailed discussion of the failure of the amended stay motions to satisfy the four stay factors. *See* Resp. to Entergy's Am. Stay

Mot., Doc. 4623528; Resp. to Arkansas' Am. Stay Mot., Doc. 4619422. As explained in the Conservation Groups' responses in opposition to the motions filed by Entergy and Arkansas, a stay of the compliance deadlines in this case is unwarranted.

A. Neither Entergy nor Arkansas Demonstrated a Likelihood of Success on the Merits of Their Challenges to EPA's SO_2 Emission Limits.

Entergy's challenges to EPA's emission limits for SO_2 pollution are without merit. First, contrary to Entergy's claims, no provision in the Clean Air Act or Regional Haze Rule requires EPA to conduct a BART analysis using the "remaining useful life" inputs that the owner of a plant prefers EPA to use. Moreover, Entergy and the State of Arkansas proposed three different, conflicting remaining useful lives for White Bluff, which confirms that EPA had a rational basis for concluding that the BART analysis should assume that the units would continue to operate indefinitely. 81 Fed. Reg. at 66,356-57.

Second, contrary to Entergy's argument, the controls required for Independence are lawful even if they cannot be installed before the end of the first planning period in 2018. Nothing in the Clean Air Act demonstrates an intent to deprive EPA of its authority to require pollution controls merely because EPA acts tardily. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003) ("Nor, since *Brock*, have we ever construed a provision that the Government 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later.").

Third, Entergy's argument that EPA's required controls for Independence are unnecessary because Arkansas is already achieving what is called the "uniform rate of progress" is without merit. Entergy Am. Stay Mot. at 15-16, Doc. 4619424. In determining the emission reductions necessary to ensure reasonable progress, the Clean Air Act mandates that EPA consider four factors, 42 U.S.C. § 7491(g)(1), and the "uniform rate of progress" is not one of them. Here, EPA determined, based on the statutory factors, that requiring SO_2 pollution reductions from Independence would be cost-effective and would significantly improve visibility at affected Class I areas. That is all that is required.

Finally, Entergy makes the meritless assertion that EPA should have used in Arkansas the reasonable progress analysis it used in Texas. Entergy ignores the significant differences between Texas and Arkansas. In Texas, EPA had to develop a system for screening "more than 1,600 point sources," 81 Fed. Reg. 296, 333 (Jan. 5, 2016), whereas there was no need to follow that process in Arkansas because it is a much smaller state, with far fewer sources. Moreover, Independence is by far the single largest, uncontrolled source in Arkansas of the air pollutants which contribute to haze. 80 Fed. Reg. 18,944, 18,991-92 (Apr. 8, 2015). Accordingly, EPA rationally decided to analyze controls for Independence using the reasonable progress factors in the statute, 42 U.S.C. § 7491(g)(1).

The State of Arkansas' challenges to the final rule are similarly meritless. First, EPA had a rational basis for concluding that the final rule will improve visibility, and the State's contrary argument, Arkansas' Am. Stay Mot. at 10-13, Doc. 4611194, has no basis in the record. Here, EPA followed the approach to considering visibility benefits that is prescribed by the regulations and has been upheld elsewhere. *See Arizona ex rel. Darwin v. EPA*, 815 F.3d 519, 539 (9th Cir. 2016) (upholding EPA's approach to considering visibility benefits where EPA stated that "[s]maller improvements [than 0.5 deciviews] from controls should be considered in BART *determinations*, since they can be beneficial in considering effects from controls on multiple sources" (citation omitted)). As explained in the Conservation Groups' response, for every facility, EPA's final rule will produce visibility benefits far exceeding the 0.5 deciview threshold that EPA has consistently used for determining whether a facility should be regulated under the BART requirements. Resp. to Arkansas' Am. Stay Mot. at 5-6, tbl.1, Doc. 4619422.

Second, the State makes the meritless argument that it is on track to meet the visibility goals that the State set in the plan EPA disapproved, and therefore the additional controls in EPA's plan are unnecessary. This is both inaccurate and irrelevant. By reducing haze pollution by at least 72,000 tons per year,[3] the rule

[3] *See* 80 Fed. Reg. at 18,971, 18,973, 18,993, 18,996.

will necessarily improve visibility. In any event, EPA *disapproved* the State's reasonable progress goals, 77 Fed. Reg. 14,604 (Mar. 12, 2012), and the State chose not to challenge that disapproval. As a result, it is legally irrelevant whether Arkansas is on track to meet goals that have been properly disapproved by EPA.

Third, contrary to Arkansas' assertions, EPA complied with all applicable legal requirements in considering the costs of the final rule. Courts have upheld haze rules with costs similar to the cost of this rule. *See Oklahoma v. EPA*, 723 F.3d 1201, 1206 (10th Cir. 2013) (rejecting arguments that the rule was unlawful because it would require utilities to "spend more than one-billion dollars to install unnecessary technology"); *Arizona ex rel. Darwin*, 815 F.3d at 540-41 (upholding EPA haze plan for Arizona against challenges that the costs were excessive).

Arkansas also claims, incorrectly, that the monetary costs of the rule exceed its benefits. As an initial matter, neither the Clean Air Act nor the implementing regulations require EPA to conduct a formal cost-benefit analysis. And even if it did, EPA's rule easily meets that test. Using EPA's own methodology, Dr. George Thurston calculated that the public health benefits of the rule are approximately $1.3 billion every year, Thurston Decl. at 43-44, 47 (Doc. 4595708),[4] far outweighing the one-time "one billion" in capital costs the State cites.

[4] This number represents only one category of benefits; it does not account for many other economic benefits of the final rule, such as increased tourism.

Finally, the State raise challenges to EPA cost and modeling methodologies. As the Conservation Groups explained in their response, each of these arguments misses the mark. Resp. to Arkansas' Am. Stay Mot. at 14-15, Doc. 4619422.

B. Entergy and Arkansas Failed to Demonstrate Any Concrete and Imminent Harm, Let Alone Irreparable Harm.

As the moving parties, Entergy and the State bear the burden of coming forward with specific evidence of concrete and imminent irreparable harm absent a stay. *See Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996). "[S]imply showing some possibility of irreparable injury" is insufficient. *Nken*, 556 U.S. at 434. Here, neither Entergy nor Arkansas submitted any evidence of imminent and irreparable harm.

Entergy makes the remarkable claim that it will suffer irreparable harm from voluntarily deciding not to comply with the final rule. *See* Castleberry Decl. ¶ 15 (Ex. 10 to Entergy Am. Stay Mot., Doc. 4619424) (Entergy "is not currently expending resources to design, procure, or install FGD at White Bluff and Independence."). But "self-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chicago, Ill.*, 333 F.3d 846, 850 (7th Cir. 2003). Accordingly, any harms flowing from Entergy's voluntary decision not to begin planning to for compliance with the Final Rule are self-inflicted harms, and cannot constitute irreparable injury.

Similarly, the State failed to offer evidence of irreparable harm. In

particular, the State offered speculation, not admissible evidence, that electricity rates may increase from the rule. *Cf. United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 835-37 (8th Cir. 2009) (in a Clean Water Act enforcement action requiring a water district to invest in pollution reductions, an association of businesses lacked standing to intervene because "possibility of increased sewer rates is not an imminent injury").

C. A Stay Would Substantially Injure Conservation Groups' Members and the Public Interest in Reducing Air Pollution.

The Final Rule would reduce pollution from the largest sources in Arkansas by at least 72,000 tons every year.[5] Using EPA's own methodology, Dr. George Thurston calculated that the pollution reductions required by the final rule would avoid 137 premature deaths, thousands of asthma attacks, tens of thousands of lost work days, and more than $1.3 billion in public health costs annually across fourteen states. Thurston Decl. at 42, tbl.1 (Doc. 4595708). The $1.3 billion in annual health benefits vastly exceeds the one-time costs of the rule, which the State estimates at $1 billion. Moreover, the overwhelming majority of the air pollution reductions, and corresponding health benefits, result from the sulfur dioxide requirements in the final rule. *See id.*

[5] *Supra*, n.3.

By improving visibility, the final rule would improve public use and enjoyment of public lands, *see* Resp. to Arkansas' Am. Stay Mot. at 21-22, Doc. 4619422 (citing declarations), as the regional haze program is intended to do, see 42 U.S.C. § 7491(a)(1). Thus, a stay of the final rule deprives the Conservation Groups' members of the health and recreation benefits of reducing harmful air pollution. The public interest lies in implementing a long-overdue plan that will improve visibility and public health at a cost comparable to other states' haze plans.

CONCLUSION

For these reasons, the Court should reconsider its Order of March 7, 2018, and should issue an opinion denying Entergy's and the State of Arkansas' motions to stay the sulfur dioxide requirements in the Final Rule.

Respectfully submitted this 21st day of March, 2018.

/s/ Charles McPhedran
Charles McPhedran
Earthjustice
1617 JFK Boulevard, Suite 1130
Philadelphia, PA 19103
(215) 717-4521
cmcphedran@earthjustice.org

Matthew Gerhart
3639 N. Clayton St.
Denver, CO 80205
(510) 847-7721
megerhart@gmail.com

Attorneys for National Parks Conservation Association and Sierra Club

Tony Mendoza
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5589
tony.mendoza@sierraclub.org

Joshua D. Smith
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5560
joshua.smith@sierraclub.org

Attorneys for Sierra Club

CERTIFICATE OF COMPLIANCE

The undersigned counsel states that this document complies with Fed. R. App. P. 27(d)(2)(A) because it contains 2,580 words, excluding the parts exempted by Fed. R. App. P. 32(f), as counted by a word processing system and, therefore, is within the word limit. This motion also complies with the typeface requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

The electronic file comprising this motion and filed with the Court has been scanned and is virus-free, as set forth in 8th Cir. R. 28A(h)(2).

Dated: March 21, 2018

/s/ Charles McPhedran
Charles McPhedran

Counsel for National Parks Conservation Association and Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Charles McPhedran
Charles McPhedran

Counsel for National Parks Conservation Association and Sierra Club