IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	**Case No. 16-60118**
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and GINA McCARTHY, Administrator, United States Environmental Protection Agency,	)	
	)	
Respondents.	)	

JOINT REPLY IN SUPPORT OF MOTION TO STAY
FINAL RULE OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY
BY LUMINANT GENERATION COMPANY LLC,
SOUTHWESTERN PUBLIC SERVICE COMPANY,
AND COLETO CREEK POWER, LP

April 18, 2016

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Texas Energy Petitioners have demonstrated that EPA's unprecedented and unlawful rule necessitates a stay pending judicial review. EPA "does not dispute" that the rule will impose unrecoverable costs on Texas Energy Petitioners "in the near-term," Doc. 00513456692 at 26 ("EPA Resp."), which Texas Energy Petitioners established to be at least $450 million.[1] EPA does not dispute that the U.S. Supreme Court and other Courts of Appeals have granted stays of EPA Clean Air Act rules with *the same* compliance timelines (and indeed longer), yet in many cases involving *less costs* than the rule here.[2] *Id.* at 34 n.22. EPA, remarkably, concedes that it views as "meaningless" the fact that the $2 billion of total costs imposed by the rule are not necessary to meet EPA's progress goals (goals EPA concedes are already met). *Id.* at 24. And EPA admits that it calculated its revised goals for Texas based on the assumption that emission controls "would be installed by the end of 2018," *id.* at 9, even though it now concedes that is not accurate, *id.* at 18. These concessions alone prove that the rule is unlawful, Petitioners suffer irreparable harm, and the public interest requires a stay.

The remainder of EPA's response seeks to distract from the issues at hand. EPA insinuates that Texas power plants have failed to make emission reductions "that plants elsewhere, including in Oklahoma," have made. *Id.* at 1. But EPA both fails to explain that the Texas plants at issue here are already complying with an emission

[1] Doc. 00513405269 at 18 ("Jt. Mot. to Stay").

[2] *Id.* at 19.

control program that EPA itself has found is "better than" the program implemented on sources in Oklahoma[3] and fails to mention that those Oklahoma limits were stayed by the Tenth Circuit.[4] EPA further complains that a stay should be denied because its rule is "long-overdue." *Id.* But the only delay here has been EPA's five-year delay, and it fails to explain how a much shorter stay would cause harm to the environment or any protected resource. Finally, EPA asks the Court to "decline to consider the stay motions" because it thinks the case should be transferred to the D.C. Circuit. *Id.* But under the applicable statutory procedures, the correct order of decision is for the Court to first consider the stay motions and then address the issue of transfer. *See* 28 U.S.C. § 2112(a)(4), (5). In any case, this Court is the proper forum.

ARGUMENT

I. Petitioners Are Likely to Succeed on the Merits

A. EPA applied an unlawful standard to Texas's plan. EPA concedes—as it must—that it would be unlawful for EPA to disapprove Texas's plan because Texas conducted its reasonable progress analysis on a source category basis and not a source-specific basis. EPA Resp. at 13. The Tenth Circuit made this clear in

[3] EPA is presumably referring to "Best Available Retrofit Technology" ("BART") sulfur dioxide ("SO_2") limits that some Oklahoma sources must meet. *See* 76 Fed. Reg. 81,728 (Dec. 28, 2011). But Texas sources have been complying with SO_2 budgets that EPA itself has found are "better than BART" and that Oklahoma sources do not have to meet. 77 Fed. Reg. 33,642, 33,648 (June 7, 2012). Thus, the very goals that EPA claims to be seeking in its rule here have already been met due to SO_2 reductions from Texas. 79 Fed. Reg. 74,818, 74,843, 74,870 (Dec. 16, 2014).

[4] Doc. 00513406105 at 228-29 ("App. to Jt. Mot. to Stay").

WildEarth Guardians,[5] ***after*** EPA had completed its work with its outside contractor on its "individual source" analysis[6]—unfortunate timing for EPA.

Instead of going back to the drawing board to comply with *WildEarth Guardians*, EPA bends over backwards to now claim that it did not disapprove Texas's SIP on that unlawful basis. But the rulemaking record contradicts EPA's claim. EPA "disapprove[d] Texas' analysis of the reasonable progress factors," 79 Fed. Reg. at 74,841, because "individual sources were not considered by the TCEQ" and TCEQ did not "assess the potential benefit of controlling individual sources." *Id.* at 74,838-39. Indeed, the record demonstrates this was EPA's primary reason for disapproval. *Id.* EPA's rule must be judged "solely on the basis of the agency's stated rationale at the time of its decision," not on "*post hoc* rationalizations." *Luminant Generation Co. LLC v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012). So judged, the rule is unlawful.

Even EPA's *post hoc* rationalizations confirm that the agency applied an unlawful source-specific standard. EPA argues in its brief that it disapproved Texas's plan because Texas "aggregated sources" "with very small visibility impacts together with sources with very large impacts." EPA Resp. at 13. This only uses different words to say the same thing—EPA applied a source-specific standard. A source *category* analysis will necessarily "aggregate[ ] sources," and there will be variations in

[5] *WildEarth Guardians v. EPA*, 770 F.3d 919, 944 (10th Cir. 2014) ("Neither the [CAA] nor the Regional Haze Rule requires source-specific analysis in the determination of reasonable progress.").

[6] Final ENVIRON Modeling Report at 1 & n.1 (transmitting to EPA final modeling results for "[l]ist of selected sources [in Texas] provided by EPA").

impacts among sources in the category, with some having larger impacts and some smaller. EPA's regional haze guidance specifically permitted Texas's source category approach and reflects the fact that states have no obligation to assess or show reasonable progress on a source-specific basis.[7] Indeed, the individual-source analysis that EPA applied here is the very type of analysis EPA said states are "not" required to conduct in assessing reasonable progress, in contrast to some other regional haze programs like the BART program. EPA Regional Haze Guidance at 9.

B. EPA acted outside its limited authority. EPA does not dispute that its federal plan imposes control measures that are entirely outside of the first regulatory 10-year planning period (2008-2018). EPA Resp. at 18. Instead, EPA claims—for the first time ever—that it can impose a 15-year planning period on Texas, *id.* at 20, even though it has never done so before and the regulations themselves prohibit it.

Ignoring its own regulations, EPA claims that the 10-year planning periods are merely "organizational in nature" and have no substantive meaning. *Id.* But the plain language of the regulations is prescriptive in nature: "In establishing the reasonable progress goal ["RPG"], the State must consider . . . the emission reduction measures needed to achieve it *for the period covered by the implementation plan*." 40 C.F.R. § 51.308(d)(1)(i)(B) (emphasis added). Here, that "period" is established by the

[7] EPA Regional Haze Guidance at 9 ("Unlike the technical demonstration for . . . BART, the reasonable progress demonstration involves a test of a strategy. . . . Modeling occurs with a strategy and is not a source-specific demonstration like the BART assessment. . . . Reasonable progress is not required to be demonstrated on a source-by-source basis.").

binding regulations as 2008-2018. *Id.* § 51.308(b), (f). And, by regulation, it is not until it prepares it plan for the second 10-year period that a state must "evaluate" controls for that period. *Id.* § 51.308(f).[8]

While EPA is correct (EPA Resp. at 20) that the statute says that the agency is to "promulgate regulations" that require each state's plan to include "a long-term (ten to fifteen years) strategy," 42 U.S.C. § 7491(a)(4), (b)(2)(B), EPA's promulgated regulations selected 10-year, not 15-year, planning periods. Thus, EPA has already exercised whatever discretion it may have had to set a planning period other than 10 years, and it cannot now, in its brief, effectively amend the regulations.[9] Indeed, in this very rulemaking, EPA took the position that "10 year planning periods" "are specified by the RHR [regional haze rule]." EPA RTC at 186 n.112. EPA's brief is the first time it has argued for a 15-year period, that argument is made only by EPA counsel, and counsel's post-rulemaking litigation position should be rejected. *Luminant Generation*, 675 F.3d at 925.

EPA also completely fails to address the clear statutory limits on its authority.

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[8] Outside of this case, EPA has consistently confirmed that the planning periods provide substantive limits on the extent of the emission controls to be considered. Indeed, in issuing its regulations implementing the regional haze program, EPA explained: "[T]he final rule requires control strategies to cover an initial implementation period extending to the year 2018, with a reassessment and revision of those strategies, as appropriate, every 10 years." 64 Fed. Reg. 35,714, 35,734 (July 1, 1999); *see also* 77 Fed. Reg. 30,248, 30,251 (May 22, 2012) ("The LTS [long-term strategy] is the compilation of all control measures a state will use *during the implementation period of the specific SIP submittal* to meet applicable RPGs." (emphasis added)).

[9] *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (courts do not follow agency positions that are "plainly erroneous or inconsistent with the regulation").

As explained in the joint stay motion, the CAA defines a federal implementation plan as "a plan . . . promulgated by the Administrator ***to fill all or a portion of a gap*** . . . in a State implementation plan." 42 U.S.C. § 7602(y) (emphasis added). Thus, because Texas's 2008-2018 plan was limited to "the emission reduction measures needed to achieve [goals] for the period covered by the implementation plan," 40 C.F.R. § 51.308(d)(1)(i)(B), so too is EPA.[10] EPA has no response. Its violation of clear statutory limits means the rule is unlawful.[11]

Finally, EPA claims that its own delay in acting on Texas's plan does not cause EPA to "lose its authority." EPA Resp. at 19. But no party here has argued that EPA lost its authority simply because it violated statutory deadlines. EPA's authority is and always has been limited by the statute and EPA's own regulations to the first planning period.[12] EPA's argument actually asserts that its delay *expands* the agency's authority here to beyond the first planning period. But that cannot be—EPA "is a creature of statute" and has "only those authorities conferred upon it by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

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[10] EPA concedes that its federal plan authority is subject to the same limitations as are the state plan it replaces. 77 Fed. Reg. 40,150, 40,164 (July 6, 2012) ("At the point EPA becomes obligated to promulgate a FIP, EPA steps into the State's shoes, and must meet the same requirements[.]").

[11] Thus, regardless of what other "independent reasons" EPA claims for its disapproval of the Texas plan, EPA Resp. at 12, EPA's lack of statutory authority for its federal plan are grounds alone for vacatur of the rule and thus grounds for a stay.

[12] EPA's related argument that the statute and regulations do not require "that the entire long-term strategy be implemented by the end of the first planning period," *id.* at 19, is likewise irrelevant. Even assuming *arguendo* that EPA's position is correct, here, ***none*** of the strategy EPA imposed can be implemented by 2018—it is all outside of the regulatory planning period and thus all ultra vires.

C. EPA concedes that it did not consider costs versus benefits. EPA concedes it did "not compare the total cost of all controls against the [Reasonable] Progress Goals[.]" EPA Resp. at 23. By failing to do so, EPA obscured the fact that its rule irrationally imposes $2 billion in costs for undetectable visibility benefits.

Irrational decisionmaking like this is what led the U.S. Supreme Court to hold unlawful EPA's Mercury and Air Toxics Standards Rule in *Michigan v. EPA*, 135 S. Ct. 2699 (2015). EPA would limit the holding in *Michigan* to situations where EPA "fail[ed] to consider costs at all," EPA Resp. at 21 n.13, but the decision is not so limited. The Supreme Court required—as a prerequisite to "reasonable regulation"—that EPA consider costs *in relation to* the expected benefits, which EPA failed to do here. *Michigan*, 135 S. Ct. at 2707 ("One would not say that it is even rational . . . to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."). The statutory provision here requires the same thing: "in determining reasonable progress there shall be taken into consideration the costs of compliance[.]" 42 U.S.C. § 7491(g)(1).[13] EPA cannot determine "*reasonable* progress" without considering the costs of regulation in relation to any benefits.

In any case, as in *Michigan*, EPA failed to consider the costs of the rule here. Instead, it looked at what it calls "cost-effectiveness"—that is, whether the controls are "affordable" in terms of dollars spent per ton of emissions reduced (but not in

[13] EPA looks for support in two decisions discussing "cost-effectiveness" under the BART requirements. EPA Resp. at 22. But the BART requirements, which are not at issue here, are different from the "*reasonable* progress" provisions, and thus those decisions do not help EPA here.

terms of visibility improvement).[14] That too is irrational and bears no relationship to the issue at hand—"reasonable progress" in visibility improvement. Under EPA's approach, EPA would presumably contend that $10 billion, or $20 billion, or even $100 billion of total costs were acceptable for the same imperceptible visibility "benefit," so long as each control was "cost-effective" at each plant in terms of tons of emissions removed—a patently irrational result.

II. Petitioners Suffer Imminent and Irreparable Harm

Petitioners have clearly demonstrated an array of immediate harms from EPA's illegal rule, including substantial near-term costs to meet the rule's compliance deadlines. Jt. Mot. to Stay at 17-18. EPA does not dispute that the rule's compliance deadlines require immediate action by Petitioners, and it "does not dispute that Luminant, Southwestern, and Coleto Creek will incur some costs in the near-term" because of the rule. EPA Resp. at 26.[15] EPA also does not dispute that Luminant and Coleto Creek (both of which operate in a competitive power market) have no recourse to recover their losses. These conceded facts demonstrate irreparable harm. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and in the judgment) ("[C]omplying with a regulation later held invalid almost

[14] 81 Fed. Reg. 296, 324 (Jan. 5, 2016); EPA Resp. at 22-23.

[15] EPA quibbles with the total amount of harm that Petitioners suffer by suggesting that the case will be resolved within the Court's ten-month *average* for all cases. EPA Resp. at 26 n.16. But this case is not average, and the resolution of multi-party CAA SIP cases like this one takes much longer. *See*, *e.g.*, *Luminant Generation Co. LLC*, No. 10-60934 (5th Cir.) (27 months from filing petition to final decision). In any case, Luminant alone demonstrated $135 million of unrecoverable costs over just a 12-month period. App. to Jt. Mot. to Stay at 131.

always produces the irreparable harm of nonrecoverable compliance costs.").[16]

EPA wrongly argues that financial loss cannot be irreparable harm and that Petitioners' losses are too insignificant. EPA Resp. at 26. This Circuit's precedent (which EPA ignores) holds that "monetary" loss is "sufficient to show irreparable injury," and that "it is not so much the magnitude but the irreparability that counts[.]" *Enter. Int'l Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472-73 (5th Cir. 1985). In any event, the D.C. Circuit has also recognized that "[f]inancial injury" ***is*** irreparable harm where it cannot be recovered in the litigation, as here. *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015).

EPA also dismisses the fact that the additional expense of the rule will likely force the closure of some of the plants and result in the loss of jobs, claiming such harm would only occur after the rule is reviewed by the Court. EPA Resp. at 27. But the declarations establish that the plants are already under significant economic pressure due to depressed power prices and that the incremental costs of the rule

[16] EPA argues that Southwestern Public Service Company's ("SPS") ability to *request* recovery of costs from its customers through a state rate recovery process means it does not suffer irreparable harm. EPA Resp. at 27. But, such rate recovery is not certain. As SPS explained, cost recovery is available from retail customers only after a lengthy process of review and approval of the costs by the appropriate state public utility commissions. App. to Jt. Mot. to Stay at 86-87. Even then, it is not certain that full recovery of costs would be available. *Id.* It is not correct for EPA to assert that SPS will be able to recover all of its costs—such a conclusion cannot be reached before such proceedings are begun, let alone completed. If the rule is found to be unlawful, SPS and/or its customers will have expended substantial sums that would be unnecessary, and SPS would have no recourse against EPA to recover these costs for itself and/or on behalf of its customers. *Id.* at 88. EPA's own cases explain that costs constitute irreparable harm where they are not recoverable "in the ordinary course of litigation." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). This Court cannot order EPA to pay SPS back for unnecessary compliance costs.

would make them "uneconomic to operate ***at all***." App. to Jt. Mot. to Stay at 71 (emphasis added). EPA's admitted failure to consider the "substantial economic pressures" affecting these plants, EPA Resp. at 28, in its own assessment of the costs of the rule is yet another flaw in the rule and basis for a stay.

III. The Balance of Harms and the Public Interest Favor a Stay

EPA points to no environmental harm that would occur during the period of a stay, and there is none. EPA only invokes the general proposition "that Congress requires reasonable progress toward achieving natural visibility conditions." *Id.* at 35. But the visibility goals that EPA itself considers "reasonable" ***are already met***, Jt. Mot. to Stay at 11, tbl. 1, and EPA does not show otherwise.

Intervenor Sierra Club falsely contends that a stay "would result in 158 deaths." Doc. 00513456729 at 10. Public health is protected by other CAA rules with which Texas Energy Petitioners comply and that will not be affected by the stay; the regional haze program is about *visibility protection only*. Even EPA, in responding to comments on the rule, dismissed Sierra Club's health argument as irrelevant and not deserving of a response. EPA RTC at 414 ("[T]o the extent that the focus of [Sierra Club's] report was to address the health effects of our proposal, we do not specifically respond to it as our Regional Haze program targets visibility impairment only.").

CONCLUSION

For these reasons, the Court should grant the motions to stay.

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Respectfully Submitted,

s/ P. Stephen Gidiere III
P. Stephen Gidiere III
David W. Mitchell
BALCH & BINGHAM LLP
1901 6th Ave. N., Ste. 1500
Birmingham, Alabama 35203
205-251-8100
sgidiere@balch.com

Stephanie Z. Moore
Vice President and General Counsel
Luminant Generation Company LLC
1601 Bryan Street
22nd Floor
Dallas, Texas 75201

Daniel J. Kelly
Vice President and Associate General Counsel
Energy Future Holdings Corp.
1601 Bryan Street
43rd Floor
Dallas, Texas 75201

Counsel for Luminant Generation Company LLC, Big Brown Power Company LLC, Luminant Mining Company LLC, Big Brown Lignite Company LLC, and Luminant Big Brown Mining Company LLC

s/ Debra J. Jezouit
Debra J. Jezouit
William M. Bumpers
BAKER BOTTS L.L.P.
The Warner
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2400
202-639-7728 (phone)
202-585-1032 (fax)
debra.jezouit@bakerbotts.com
william.bumpers@bakerbotts.com

Ann M. Seha
XCEL ENERGY SERVICES INC.
414 Nicollet Mall
5th Floor
Minneapolis, MN 55401-1993
612-215-4619 (phone)
612-215-4544 (fax)
ann.m.seha@xcelenergy.com

Counsel for Southwestern Public Service Company

s/ Derek McDonald
Derek McDonald
Carlos R. Romo
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
Suite 1500
Austin, Texas 78701
512-322-2667 (phone)
512-322-8342 (fax)
derek.mcdonald@bakerbotts.com

Counsel for Coleto Creek Power, LP

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on this 18th day of April, 2016.

s/ P. Stephen Gidiere III
Counsel for Luminant Petitioners