NO. 16-60118

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and GINA McCARTHY, Administrator,
United States Environmental Protection Agency,

Respondents.

RESPONDENT-INTERVENORS SIERRA CLUB AND NATIONAL PARKS CONSERVATION ASSOCIATION'S RESPONSE IN OPPOSITION TO PETITIONER AND PETITIONER-INTERVENORS' JOINT CROSS-MOTION FOR SUMMARY VACATUR AND JOINT CROSS-MOTION TO ENFORCE AND CLARIFY THE COURT'S STAY ORDER

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INTRODUCTION

Respondent-Intervenors Sierra Club and National Parks Conservation Association ("NPCA") submit this response in opposition to Petitioners' and Petitioner-Intervenors' (hereinafter "Petitioners") cross-motion for "summary vacatur" and cross-motion to enforce and clarify this Court's stay order. Doc. 00513803891 ("Cross-Mots.").[1] Both motions urge the Court to depart radically from settled law and would effectively preclude the U.S. Environmental Protection Agency ("EPA") from fulfilling its mandatory duties under the Clean Air Act ("CAA") to issue federal implementation plans ("FIPs") correcting deficient Texas plans. Moreover, despite having persuaded this Court that the rule under review is not nationwide in scope and effect, Petitioners seek a permanent, nationwide injunction prohibiting EPA from relying on "*any aspect*" of the rule in other rulemakings not before this Court. Cross-Mots. at 5 (emphasis added).

The first cross-motion seeks to vacate portions of the Final Rule "Approval and Promulgation of Implementation Plans; Texas and Oklahoma," 81 Fed. Reg. 296 (Jan. 5, 2016) ("Final Rule"), without full merits briefing, Cross-Mots. at 4, even though this Court found its analysis of the likelihood of success of Petitioners' claims in the stay order was not binding on a merits panel and was for

[1] The Texas Petitioners and all the Industry Petitioners, except NRG Texas Power LLC, join the cross-motions.

the purposes of the stay only. *Texas v. EPA*, 829 F.3d 405, 425 n.29 (5th Cir. 2016). To the extent this Court denies EPA's request for a voluntary remand, the parties should be granted the opportunity for full briefing and argument before a merits panel. "Summary vacatur" at this early stage is neither warranted nor supported by law.

The second cross-motion filed by Petitioners seeks to have this Court constrain EPA's discretion in pending rulemakings by prohibiting EPA "from relying on any of its SIP disapprovals or FIP actions *and related findings* in the Final Rule in any subsequent rule or action," Cross-Mots. at 20 (emphasis added). In particular, Petitioners seek to invalidate (1) the proposed rule for "best available retrofit technology" ("BART") for Texas electric generating units ("EGUs") (hereinafter "the Texas BART Proposal"), 82 Fed. Reg. 912 (Jan. 4, 2017) and (2) the final revisions to the Regional Haze Rule, 82 Fed. Reg. 3078 (Jan. 10, 2017).

Petitioners' second cross-motion confuses the consequences of a stay with those of an injunction, as EPA may continue to work on other regional haze rulemakings while the stay is in place. With respect to the Texas BART Proposal, Petitioners inappropriately and unlawfully seek to preclude EPA from fulfilling its mandatory duties under the CAA and complying with a separate court order to promulgate BART requirements by a date certain. In addition, the waiver of sovereign immunity allowing Petitioners to challenge a final rule does not extend

to proposed rules, an opinion regarding a rule that has not yet been finalized would be a prohibited advisory opinion, and Petitioners lack standing to challenge the proposal.

With respect to the Regional Haze Rule, Petitioners' cross-motion effectively would enjoin the recently-finalized revisions to the nationwide rulemaking on regional haze—which clarify certain provisions of the regulations instructive in the second and future rounds of regional haze plans and, in part, address issues raised by this Court in the stay ruling. After arguing the Final Rule is not of nationwide significance, Petitioners now reverse course seeking a nationwide injunction to preclude EPA from addressing many of the Court's concerns in the national rule revision—a bold request.

Petitioners' second cross-motion is also inconsistent with their simultaneous request to vacate portions of the Final Rule, as vacatur is a final, appealable order resolving the litigation and would moot the current stay.

For the reasons below, Sierra Club and NPCA respectfully request this Court deny the Cross-Motions in their entirety.

BACKGROUND

This proceeding involves challenges to an EPA CAA implementation plan for Texas and Oklahoma that will improve air quality in 19 national parks and wilderness areas and save billions in public health costs every year across the south

central United States by requiring emission reductions from some of the nation's most polluting power plants. 81 Fed. Reg. 296; *see also* Doc. 00513457087 at DEC 80-90.

The Final Rule addresses Texas's failure to submit approvable state implementation plans ("SIPs") addressing several independent requirements under the CAA including (1) elements of the regional haze program requiring states to ensure "reasonable progress" toward the national visibility goals for Class I areas and (2) separate provisions of the CAA that require the state to ensure Texas pollution does not interfere with measures required to protect visibility in any other state for several National Ambient Air Quality Standards ("NAAQS"). 81 Fed. Reg. at 302. In the Final Rule, EPA took no action regarding the CAA requirements for BART for EGUs. *Id.* at 301-02.

Petitioners filed petitions for review of the Final Rule in this Court, and EPA moved to dismiss or transfer the Fifth Circuit petitions to the D.C. Circuit, while Petitioners moved to stay the rule's compliance deadlines pending judicial review. On July 15, 2016, the panel denied EPA's motion to dismiss or transfer and granted the motion to stay. *See Texas*, 829 F.3d 405.

The Final Rule would produce significant clean air benefits to Texas and the southeast United States, and an approvable haze plan for Texas is nine years overdue. However, EPA now seeks a "voluntary remand of those portions of

EPA's Final Rule disapproving the Texas and Oklahoma SIPs and imposing FIPs" to reconsider aspects of the Final Rule in light of this Court's stay decision and the Texas BART Proposal. Doc. 00513783027 at 17-18. EPA consents to the continuation of the current stay pending appeal through the completion of agency action on reconsideration but asks the Court to lift the stay for the portions of the Final Rule not challenged by the Petitioners, including EPA's approval of Texas's BART determinations for sources other than EGUs, such as refineries. *Id.*; *see* 81 Fed. Reg. at 301.

On December 19, 2016, the parties filed their responses to EPA's motion for remand, and Petitioners filed a cross-motion for "summary vacatur" and a cross-motion "to enforce and clarify the Court's stay order," Cross-Mots., in an attempted end run around the CAA rulemaking and judicial review provisions.

ARGUMENT

Petitioners want this Court to vacate, without merits briefing, EPA's disapproval of several provisions of different Texas CAA SIPs and the promulgation of the FIP correcting the deficiencies. Petitioners further seek an order enjoining EPA from relying on "any aspect" (factual or legal finding) of the Final Rule—regardless of whether those provisions were challenged—in any subsequent rule or action. Cross-Mots. at 5, 20. This is an unprecedented and far-reaching request that would turn a stay order—meant merely to preserve the status

quo during litigation—into both a merits decision and a permanent injunction, preventing EPA from doing its work under separate statutory and regulatory provisions and implicating rulemakings not before this Court. The Court should deny Petitioners' cross-motions in their entirety.

I. THE COURD SHOULD DENY THE CROSS-MOTION FOR "SUMMARY VACATUR."

This Court has held that "[e]mbedded in an agency's power to make a decision is its power to reconsider that decision." *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 832 (5th Cir. 2010). Instead of recognizing this binding precedent, Petitioners argue, "remand without vacatur may be considered only where two conditions are met: (1) when the agency would likely be able to substantiate its original decision given the opportunity to do so; *and* (2) when vacating the rule would be disruptive." Cross-Mots. at 9 (citing *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000)). Petitioners are wrong on the facts and law. As an initial matter, Petitioners do not cite a single case supporting "summary vacatur" *before* a court reaches a decision on the merits. Instead, in each of the cases cited by Petitioners, the court determined whether vacatur was appropriate *after* addressing the merits.[2] In this case, EPA has asked for voluntary remand

[2] What this Court held in *Central and South West Services, Inc.*, 220 F.3d 683, was that remand without vacatur – **after a full merits briefing** – is permitted under the Administrative Procedure Act ("APA"), something many courts have recognized. *See, e.g., Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012);

before any merits briefs have been submitted to the Court; there are many examples of courts granting an agency's request for remand before reaching the merits of a challenge to agency action. *See, e.g.*, *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993) (noting "the tradition of allowing agencies to reconsider their actions where events pending appeal draw their decision in question"); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (holding "even if there are no intervening events, the agency may request a remand (without confessing error) in order to reconsider its previous position"); *see also Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004) (noting that it can be "an abuse of discretion to prevent an agency from acting to cure the very legal defects asserted by plaintiffs challenging federal action").[3]

Rather than acknowledging the well-established case law favoring remand as a way for agencies to reconsider final actions, Petitioners rely on a single Fifth Circuit case from 1969 to support their request for "summary disposition." Cross-Mots. at 16 (citing *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158 (5th Cir.

Cent. Me. Power Co. v. Fed. Energy Regulatory Comm'n, 252 F.3d 34, 48 (1st Cir. 2001); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993).

[3] Contrary to Petitioners' claims, Cross-Mots. at 1, EPA has not made the sort of "novel, last second motion to remand," *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998), that could indicate bad faith.

1969)).[4] In *Groendyke*, this Court held that "expedited disposition by summary proceedings on briefs but without oral argument is called for and proper," 406 F.2d at 1160, where the legal question presented was thoroughly considered on the merits and the parties filed extensive motions, briefs, reply briefs, and supplemental briefs, *id.* at 1163 & n.10. This Court explained, "[t]he usual thing is for submission with oral argument," *id.* at 1161, but determined "nothing in the constitutional concept of due process forbids special, summary disposition without all of the marks of a traditional submission," *id*. at 1162.

The question currently before the Court is not whether oral argument is required for submission but whether the Court should vacate the Final Rule and make findings on the merits of the Final Rule without affording the parties a full

[4] The only other case Petitioners cite to support their request for "summary vacatur" is a Third Circuit holding that, in reviewing a district court's denial of motion for preliminary injunction, the appellate court may reach a "pure question of law that is intimately related to the merits of the grant [or denial] of preliminary injunctive relief," *OFC Comm Baseball v. Markell*, 579 F.3d 293, 300 (3d Cir. 2009) (internal quotations omitted). Cross-Mots. at 16. As noted, this Court explicitly limited its holding on the likelihood of success on the merits for the purposes of the stay only. *See Texas*, 829 F.3d at 425 n.29. Further, the stay motion before the Court was not equivalent to appellate review of a denial of preliminary injunction where there were no material facts in dispute. The case before this Court is a petition for review of a CAA rulemaking subject to the APA standard of review. *See Luminant Generation Co. v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012) (standard of review of CAA actions tracks standards provided by APA, 5 U.S.C. § 706).

and fair opportunity to submit briefing.[5] The Court should decline to do so and either grant EPA's motion for voluntary remand or order the parties to submit merits briefs. Contrary to Petitioners' claim that, "[f]urther briefing and argument on these issues would be largely academic," Cross-Mots. at 16, given the word limit and number of issues to address in a stay response, a full opportunity to respond to Petitioners' challenges could result in a different outcome at the merits stage, a possibility the motions panel recognized. *See Texas*, 829 F.3d at 425 n.29.

Finally, contrary to Petitioners' suggestion, this Court and the Supreme Court have observed that, even after full consideration on the merits, "only in 'rare circumstances' is remand for agency reconsideration *not* the appropriate solution." *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 239 (5th Cir. 2007) (emphasis added) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). Indeed, in Petitioners' principal case, this Court concluded remand

[5] It is worth noting that, while EPA has not moved for vacatur, even if it had, courts are wary of granting an agency's request for vacatur before a merits decision – even where the government has admitted error – because the APA requires agencies to follow certain procedures, including providing for notice and comment, before enacting or amending a rule, 5 U.S.C. § 553(b), (c). *See, e.g.*, *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 135-36 (D.D.C. 2010) (denying government's request to vacate the 2008 Critical Habitat Designation of the spotted owl because it "would allow the Federal defendants to do what they cannot do under the APA, repeal a rule without public notice and comment, without judicial consideration of the merits" (citation omitted)); *NPCA v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009) (denying the Secretary's request to vacate and remand an amendment to stream buffer zone regulations, which the government alleged was legally deficient, because it would allow an end run around APA procedures).

without vacatur is not only permitted under the APA, but "generally appropriate" when there is "at least a serious possibility" the agency will be able to substantiate its decision on reconsideration, and when vacating would be "disruptive." *Cent. & S.W. Servs., Inc.*, 220 F.3d at 692 (citations and quotation marks omitted) (after addressing the merits, remanding EPA's rule without vacatur because the agency "may well be able to justify its decision to refuse to promulgate a national variance for the electric utilities and it would be disruptive to vacate a rule that applies to other members of the regulated community").

EPA's request for remand meets both of these criteria. First, the agency seeks to reconsider its final rule in light of this Court's stay decision and the impending BART proposal to determine if a different course of action is appropriate. EPA will provide parties with a new opportunity to provide comment and then, "issue a new rule that takes into account the comments received and any changed factual circumstances that could warrant different outcomes." Doc. 00513783027 at 21. Luminant claims that "EPA has not committed to fully reconsider the Final Rule," Doc. 00513834371 at 1, but EPA stated that it is "granting reconsideration of the Final Rule." *Id.* at Ex. 1. EPA's reconsideration may result in a changed reasonable progress analysis, since certain facilities covered by the Final Rule – like Big Brown, Monticello, and Martin Lake – are also proposed to have controls in the Texas BART Proposal. Thus, there is "at

least a serious possibility" that EPA can either substantiate its decision on remand, *Cent. & S.W. Servs., Inc.*, 220 F.3d at 692 (citations and quotation marks omitted), or revise the Final Rule consistent with applicable legal requirements. *See Citizens Against Pellissippi Parkway Extension, Inc.*, 375 F.3d at 416 (reversing district court order denying agency motion for remand and observing, "when an agency seeks a remand to take further action consistent with correct legal standards, courts should permit such a remand in the absence of apparent or clearly articulated countervailing reasons"); *see also Radio–Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 888 & n.23 (D.C. Cir. 1999) (after addressing the merits, remanding Federal Communications Commission rule and observing that "a new rulemaking, accomplished expeditiously, would permit the FCC to work from a relatively clean procedural slate, consider modern factual and legal developments, and obtain comments on specific proposals to modify the rules").

Second, Petitioners' requested relief would, in fact, be disruptive. In the Final Rule, EPA approved certain aspects of the SIP, including the state's BART determinations for non-EGUs, such as refineries, cement kilns, and chemical and petroleum sources. *See* 81 Fed. Reg. at 301. Partial vacatur, coupled with an indefinite stay of the remaining portions of the Final Rule, would undo those

approvals and require EPA to reevaluate the possibility of requiring pollution controls for those sources. [6]

For these reasons, the Court should deny the cross-motion for "summary vacatur."

II. THE COURT SHOULD DENY THE CROSS-MOTION TO ENFORCE AND CLARIFY THE STAY ORDER.

Under the pretense of a "clarification" of a stay of a single rule pending appeal, Petitioners are attempting to obtain a far-reaching injunction that will implicate at least two EPA rulemakings, neither of which is before this Court. Such an injunction would have widespread implications, since all future SIPs must flow from the revised Regional Haze Rule and states already have begun work for the second planning period. Petitioners ask this Court to "clarify" that EPA may not rely on "any aspect" of the Final Rule in any other action—regardless of whether such findings were challenged or ruled upon. Cross-Mots. at 5, 20.

Petitioners' cross-motion confuses the consequences of a stay with the consequences of an injunction. Moreover, the CAA requires EPA to issue a BART rule for Texas, and EPA is under a court order to do so by September 9, 2017.

[6] Petitioners' argument that this Court should not grant EPA's motion to lift the stay for the portions of the Final Rule that were not challenged because "Texas prepared and submitted its SIP to EPA as one integrated plan," is without merit. Cross-Mots. at 4. There is no requirement that EPA approve or disapprove a SIP submittal in a single action. To the contrary, the CAA expressly permits EPA to approve or disapprove a plan "in part." 42 U.S.C. § 7410(c)(1), (k)(3); *see also Ass'n of Irritated Residents v. EPA*, 423 F.3d 989, 997 (9th Cir. 2005).

EPA's mandatory duty to issue a Texas BART rule did not arise as a result of any finding in the Final Rule that this court stayed. EPA's duty arose because Texas failed to submit an approvable BART plan after EPA disapproved Texas's reliance on a separate rule which was invalidated by the D.C. Circuit. This Court may not issue an advisory opinion on a proposed rule or turn a stay order into an injunction that implicates other rules beyond that before the Court.

A. Petitioners Confuse a Stay With an Injunction.

There is no rationale or precedent that would allow this Court to constrain EPA's action on these separate and independent rulemakings through "clarification" of the stay order. A stay temporarily suspends a court order, an agency order, or an agency rulemaking while the order or rulemaking is reviewed by a court or reconsidered by the agency. *See* 5 U.S.C. § 705 (authorizing courts and agencies to stay agency actions during judicial review); 42 U.S.C. § 7607(d)(7)(B) (authorizing EPA to stay its own rules under the CAA while reconsidering them). An injunction, however, is an affirmative order by a court requiring an entity to take some action or refrain from taking some action; an injunction "directs the conduct of a party, and does so with the backing of its full coercive powers." *Nken v. Holder*, 556 U.S. 418, 428 (2009).

The Supreme Court has recognized the distinction between a stay and an injunction, noting that a stay "prevent[s] some action before the legality of that

action has been conclusively determined . . . by temporarily suspending the source of authority to act," whereas an injunction "directs the conduct of a party, and does so with the backing of [a court's] full coercive powers." *Id.* at 428-29. A stay pending appeal "ordinarily is not considered an injunction." *Id.* at 430 (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988)). This Court does not have authority to grant Petitioners' request to turn its stay order into an injunction that would constrain EPA's actions in independent rulemakings.

B. The Stay Cannot Be Used to Constrain EPA's Action in a Separate, Proposed Rulemaking.

1. BART and "Reasonable Progress" are Separate Legal Requirements under the Regional Haze Program.

The Final Rule at issue in this case is independent from BART requirements for Texas EGUs. *See, e.g.*, 81 Fed. Reg. at 346 ("We are not taking action on 40 CFR 51.308(e) concerning Texas EGU BART."). The Final Rule instead addresses the statutory and regulatory requirement to make "reasonable progress" toward eliminating haze. *See* 42 U.S.C. § 7491(b)(2), (g)(1); 40 C.F.R. § 51.308(d). BART is a separate, mandatory CAA requirement that applies to particular categories of sources constructed during a specific time frame. *See* 42 U.S.C. § 7491(b)(2)(A), (g)(2); 40 C.F.R. § 51.308(e); *see also Util. Air Regulatory Grp. v. EPA*, 471 F.3d 1333, 1340 (D.C. Cir. 2006) (holding that – in

addition to the mandatory BART requirement – a regional haze plan's reasonable progress "must be sufficient to attain natural visibility conditions at every single Class I area by 2064").

BART is defined as "an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant which is emitted by an existing stationary facility." 40 C.F.R. § 51.301. When determining BART, the states and EPA must analyze "the best system of continuous emission control technology available" by taking into consideration five factors: (1) the costs of compliance, (2) the energy and non-air quality environmental impacts of compliance, (3) existing pollution controls at the source, (4) the remaining useful life of the source, and (5) the degree of visibility improvement from pollution controls. *Id.* § 51.308(e)(1)(ii)(A). BART is an essential component of the regional haze program because Congress largely grandfathered these antiquated sources into many of the CAA requirements. *See* 70 Fed. Reg. 39,104, 39,111 (July 6, 2005). BART compels these older, disproportionately-polluting sources to install up-to-date and cost-effective pollution controls.

Petitioners note in the Texas BART Proposal, EPA "applies some of the same statutory factors and analysis as in the Final Rule," Cross-Mots. at 2, but fail to acknowledge the CAA requires some of the same factors to be considered under

reasonable progress and BART, **which are two separate statutory elements of any Regional Haze SIP**. The statutory definitions of reasonable progress and BART share three common factors: "the costs of compliance," "the energy and nonair quality environmental impacts of compliance," and "the remaining useful life" of the source. *Compare* 42 U.S.C. § 7491(g)(1), *with id.* § 7491(g)(2). In other words, EPA "applies some of the same statutory factors and analysis" when evaluating reasonable progress and BART because the statute requires EPA to do so. If this Court were to grant Petitioners' "cross-motion to enforce and clarify the Court's stay order," then, as a practical matter, EPA would be unable to comply with its independent CAA obligation to evaluate BART and would be in violation of the consent decree pending in federal court in the District of Columbia.

2. EPA is Obligated to Issue a Texas EGU BART Rule.

Petitioners' insinuation that there was something untoward about EPA issuing the Texas BART Proposal "a week [after]" its voluntary remand of the Final Rule at issue here is thus entirely unfounded. Cross-Mots. at 7. EPA had long been required, under a consent decree, to meet the December 2016 deadline for the Texas BART Proposal. Moreover, the legal obligation to issue a Texas EGU BART rule stemmed not from the now-stayed Final Rule at issue in this case, as Petitioners claim, Cross-Mots. at 8 n.7, 18-19, but from an EPA action taken in 2012.

The correct history is as follows: In 2009, Texas submitted a SIP which relied on a federal emissions trading rule – the Clean Air Interstate Rule ("CAIR") – to satisfy the BART requirements for EGUs.[7] *See* 2009 Texas Haze SIP at 9-1[8] ("Texas has made the determination that participation in CAIR is equivalent to BART. This exempts EGUs impacted by CAIR from a BART analysis for SO_2 and NO_X."). The D.C. Circuit subsequently remanded CAIR after finding it violated

[7] In 2005, EPA issued CAIR, which required 28 states, including Texas, and the District of Columbia to reduce emissions of sulfur dioxide ("SO_2") and nitrogen oxides ("NO_X") that significantly contribute to, or interfere with maintenance of, the 1997 NAAQS for ozone and fine particulate matter. 70 Fed. Reg. 25,162 (May 12, 2005). EPA subsequently determined that those states could also rely on CAIR's cap-and-trade emissions trading program to meet their obligations under the Regional Haze Rule to address BART for EGUs. 70 Fed. Reg. 39,104 (July 6, 2005). A number of states, including Texas, relied on CAIR in their regional haze plans as an alternative to BART for EGUs. In 2008, however, the D.C. Circuit invalidated several aspects of CAIR. *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir.), *reh'g granted in part*, 550 F.3d 1176 (D.C. Cir. 2008). In response to the D.C. Circuit's decision, EPA withdrew CAIR and issued a different emissions trading rule called the Cross State Air Pollution Rule ("CSAPR"). 76 Fed. Reg. 48,208 (Aug. 8, 2011). As with CAIR, EPA issued a separate rule allowing states to rely on CSAPR as an alternative to BART for EGUs. 77 Fed. Reg. 33,642 (June 7, 2012). In the rule under review, EPA had proposed to satisfy that statutory duty by replacing CAIR with CSAPR for BART-eligible sources. 81 Fed. Reg. at 301-302. Before EPA finalized the rule, however, the D.C. Circuit invalidated the CSAPR emission budgets for a number of states, including Texas. As a result, EPA determined in the Final Rule that it could not rely on CSAPR as an alternative to BART for Texas EGUs. *Id.* On June 27, 2016, EPA issued a memorandum giving states the choice to voluntarily adopt its remanded CSAPR SO_2 budget, which Texas declined. *See* Supplemental Notice By EPA at ¶¶ 1-2, 4, *Sierra Club v. United States EPA*, No. 1:10-CV-01541 (CKK) (D.D.C. Dec. 5, 2016) (ECF Doc. 87).

[8] *Available at* Docket ID No. EPA-R06-OAR-2014-0754-0002, TX166-002-05_Recomendation_178_pages_3_1_MB_m4p.pdf.

the CAA. *See North Carolina v. EPA*, 531 F.3d 896, 930 (D.C. Cir.), *reh'g granted in part*, 550 F.3d 1176, 1178 (D.C. Cir. 2008). In response to the D.C. Circuit's ruling, in 2012, EPA disapproved the haze plans of 14 states, including Texas, which had relied on CAIR to satisfy the BART requirements. 77 Fed. Reg. at 33,653.

Since that 2012 disapproval, Texas has failed to submit a revised plan to address the EGU BART requirements. Under the CAA, that leaves EPA with no choice but to develop a FIP. *See* 42 U.S.C. § 7410(c)(1). EPA states in the Texas BART Proposal: "We believe, however, it is preferable for states to assume primary responsibility for implementing the Regional Haze requirements as envisioned by the CAA. We will work with the State of Texas if it chooses to develop a SIP to meet these overdue Regional Haze requirements and replace or avoid a finalized FIP." 82 Fed. Reg. at 915. But because Texas has not submitted a plan for addressing EGU BART, the CAA requires EPA to develop a FIP, and EPA is under a court order to do so by September 9, 2017, *see* Order, *NPCA v. EPA*, No. 1:11-cv-01548 (ABJ) (D.D.C. Dec. 15, 2015) (ECF Doc. 86).

The Texas BART Proposal makes clear that EPA's disapproval in 2012—taken long before the Final Rule at issue in this case—is the basis for the proposed BART limits for EGUs. 82 Fed. Reg. at 917 ("Beginning in 2012, following the limited disapproval of the Texas Regional Haze SIP, EPA had the authority and

obligation to promulgate a FIP to address BART for Texas EGUs for NO_X and SO_2."). EPA made the same point in the stayed Final Rule:

> In our 2012 action, we issued a limited disapproval of the SIP revision because of Texas' reliance on CAIR to satisfy SO_2 and NO_X BART and to meet the long-term strategy requirements for its EGUs. As explained in that action, our limited disapproval of Texas' regional haze SIP (and the SIPs of thirteen other states addressed in the 2012 action) was the result of a decision by the D.C. Circuit remanding CAIR to the EPA.

81 Fed. Reg. at 297 (footnotes omitted).

Moreover, with respect to BART for particulate matter ("PM"), the proposed BART Rule does not rely on any disapproval actions taken in the rule this Court stayed. In the Final Rule, EPA deferred action on PM BART. *See* 81 Fed. Reg. at 302 ("Because of the [CSAPR] remand and resulting uncertainty regarding SO_2 and NO_X BART for EGUs, we have also decided not to finalize our proposed approval of Texas' PM BART determination. We will address PM BART for EGUs in Texas in a future rulemaking as well.").

3. The Court's Jurisdiction Does Not Extend to Proposed Rules Such as the Texas BART Proposal.

Petitioners' radical request is an attempted end run around the fundamental principles that: (1) sovereign immunity is waived for final agency actions only, *see Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); (2) a party must have standing to sue, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); and (3) a court should not issue advisory opinions, *see Lewis v. Cont'l Bank Corp.*, 494 U.S. 472,

477 (1990). The proper method for Petitioners to raise objections to the Texas BART Proposal is to submit comments on the proposal—not to use a "clarification" of the stay order as a thinly-veiled attempt to derail a separate rulemaking in progress. *See* 42 U.S.C. § 7607(d)(5); 5 U.S.C. § 553.

The CAA authorizes parties to petition for review "*final* action[s] of the Administrator." 42 U.S.C. § 7607(b)(1) (emphasis added); *see* 5 U.S.C. § 704 (authorizing judicial review of final agency action). No law authorizes Petitioners to obtain review of a proposed rule such as the Texas BART Proposal, nor does the Court have jurisdiction to enjoin EPA's behavior with respect to the proposed rule. *See Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."); *Sierra Club v. EPA*, 699 F.3d 530, 534 (D.C. Cir. 2012) ("provision for review of 'final action' by the agency imposes a jurisdictional requirement"); *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001) ("With a few exceptions, if there is no final agency action, there is no basis for review of the government's decision or policy."). "In effect, petitioners are asking . . . to review the legality of a proposed EPA rule so as to prevent EPA from issuing a final rule." *In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015). But "a proposed EPA rule 'is not final agency action subject to judicial review.'" *Id.*

Petitioners also lack Article III standing to seek relief regarding the proposed BART rule for Texas in the form of enjoining EPA's decisions as to what information is relevant for finalizing that rule. Precisely because it is merely a proposal, the Texas BART Proposal imposes no requirements on any of the Petitioners, thus Petitioners have not demonstrated any concrete injuries from the proposed rule—nor could they. *See generally Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) ("To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" (quoting *Lujan*, 504 U.S. at 560)). Petitioners cannot circumvent the fundamental principle that this Court has jurisdiction over only challenges to final rules where a petitioner demonstrates standing.

Furthermore, Petitioners' requested "clarification" runs afoul of the fundamental Constitutional limitation on federal courts' jurisdiction: "Article III of the Constitution confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013); *see also Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." (quoting C. Wright, Federal Courts 34 (1963))). Petitioners

are asking this Court to issue an advisory opinion regarding hypothetical rules which EPA might finalize.

The Texas BART Proposal was published on January 4, 2017, and the comment period remains open until March 6, 2017. 82 Fed. Reg. 912. Given that EPA has not finalized the Texas BART Proposal, the content of the final rule is "a hypothetical state of facts." *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (quoting *Lewis*, 494 U.S. at 477). "Federal courts may not . . . give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'" *Id.* In short, this Court has no jurisdiction to render advisory opinions about what EPA can or cannot do in hypothetical final rules such as the Texas BART rule. *See, e.g.*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 139 (2007) ("The declaratory judgment procedure . . . may not be made the medium for securing an advisory opinion in a controversy which has not arisen." (quoting *Coffman v. Breeze Corp.*, 323 U.S. 316, 324-25 (1945)).

If Petitioners have objections to the Texas BART Proposal, they can include such objections in their comments on the proposed rule, including objections that the rule is inconsistent with this Court's prior orders. *See* 42 U.S.C. § 7607(d)(5) ("In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information . . . ."). When the rule is finalized, if Petitioners' comments are not addressed to their

satisfaction, they may file a petition for review in this Court. *See id.* § 7607(b)(1). But what they cannot do is use a stay pending appeal of an entirely separate rule to preempt the normal course of agency rulemaking.

C. THE REVISED REGIONAL HAZE RULE IS NOT BEFORE THIS COURT.

Like the Texas BART Proposal, EPA's final revisions to the Regional Haze Rule, targeted by Petitioners, is outside this Court's jurisdiction. Nothing in this Court's stay order suggests that EPA must halt work on other haze rulemakings that overlap with issues involved in the Final Rule this Court stayed pending appeal. To the contrary, this Court expressly recognized EPA was undertaking a separate rulemaking to revise the Regional Haze Rule, *see Texas*, 829 F.3d at 416, and relied on that rulemaking for its holding that the Final Rule at issue here would not impact haze plans considered in the next round of planning because "EPA has proposed revisions of the exact portions of the Regional Haze Rule that EPA claims to have definitively interpreted in the Final Rule."[9] *Id.* at 424. After having persuaded this Court the Final Rule is not of nationwide significance, Petitioners now reverse course and want this Court to impose a nationwide permanent injunction based on the motion panel's preliminary view of the merits.

[9] The Court also noted Petitioners' argument regarding whether emissions controls must be implemented within the period covered by the plan "would be much less compelling" under the proposed Regional Haze Rule revisions. *Texas*, 829 F.3d at 430 n.35.

Petitioners are trying to enjoin EPA from implementing the recently finalized revisions to the Regional Haze Rule, 82 Fed. Reg. 3078, under the auspices of a "clarification" of this Court's stay order. They want this Court to hold that EPA is barred from implementing the regional haze program, even though any challenge to the revised Regional Haze Rule will be reviewed in the Court of Appeals for the District of Columbia Circuit, because the rule is a national rule, applicable to all states. *See* 42 U.S.C. § 7607(b)(1). This is the precise conflict EPA warned this Court could arise because the revisions codify the Final Rule's clarified interpretation of the interstate consultation requirements, Doc. 00513485025 at 8 n.6, and the Court should decline Petitioners' invitation to opine about the merits of a final rule not before this Court.

Finally, Petitioners' second cross-motion is inconsistent with their simultaneous request to vacate portions of the Final Rule. Vacatur is a final, appealable order resolving the litigation and would moot the current stay. *See Powell v. McCormack*, 395 U.S. 486, 496 (1969) (defining mootness); *see also Oklahoma v. EPA*, 723 F.3d 1201,1224 (10th Cir. 2013) (lifting stay at conclusion of merits decision).

CONCLUSION

For the foregoing reasons, NPCA and Sierra Club respectfully request the Court deny Petitioners' cross-motions in their entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel states that this response complies with FED. R. APP. P. 27(d)(2)(A) because it contains 5,198 words, excluding the caption and signature blocks, as counted by a word processing system and, therefore, is within the word limit. This response also complies with 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.

Dated: January 13, 2017

/s/ Mary Whittle
MARY WHITTLE

Counsel for Sierra Club and National Parks Conservation Association

CERTIFICATE OF SERVICE

On this 13th day of January, 2017, a true and correct copy of the foregoing was filed with the electronic case filing (ECF) system of the U.S. Court of Appeals for the Fifth Circuit, which currently provides electronic service on the counsel of record listed below.

s/ Mary Whittle
Mary Whittle

CERTIFICATIONS UNDER ECF FILING STANDARDS

Pursuant to paragraph A(6) of this Court's ECF Filing Standards, I hereby certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R.25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: January 13, 2017 *s/ Mary Whittle*
Mary Whittle