IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, et al.,	)	
	)	
Petitioners,	)	No. 16-60118
	)	
v.	)	
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and GINA McCARTHY, Administrator, U.S. EPA,	)	
	)	
Respondents.	)	
	)	

RESPONDENTS' (1) REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL VOLUNTARY REMAND AND (2) OPPOSITION TO PETITIONERS' AND PETITIONER-INTERVENORS' JOINT CROSS-MOTIONS FOR SUMMARY VACATUR AND TO ENFORCE AND CLARIFY THE COURT'S STAY ORDER

Dated: Jan. 13, 2017

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES:

REGULATIONS:

FEDERAL REGISTER:

Respondents United States Environmental Protection Agency and Administrator Gina McCarthy (collectively, "Respondents" or "EPA") submit the following (1) reply in support of their Motion for Partial Voluntary Remand ("Remand Motion") filed December 2, 2016, and (2) opposition to the Joint Cross-Motion for Summary Vacatur and Joint Cross-Motion to Enforce and Clarify the Court's Stay Order filed by all Petitioners and Petitioner-Intervenors[1] (collectively, "Petitioners") ("Pet. Response") on December 19, 2016.

SUMMARY

EPA seeks voluntary remand of the Agency's disapprovals of portions of the regional haze state implementation plans ("SIPs") submitted by Texas and Oklahoma, and the issuance of federal implementation plans ("FIPs") establishing a long-term strategy and progress goals for Texas, and progress goals for Oklahoma in the final rule issued by EPA on January 5, 2016 ("Final Rule"). 81 Fed. Reg. 296. Finding that Petitioners had shown a likelihood of success on the merits, the Court stayed the Final Rule pending the outcome of this petition for

[1] With the exception of Petitioner NRG Texas Power, Pet. Response at 1, n. 1.

review by Order of July 15, 2016 ("Stay Order"). *Texas v. U.S. E.P.A.*, 829 F.3d 405 (5th Cir. 2016).

EPA seeks voluntary remand of the Final Rule's partial SIP disapprovals and FIPs so that it may reconsider those actions in light of the Court's discussion regarding likelihood of success on the merits and in light of EPA's grant of an administrative petition for reconsideration of the Final Rule, signed on December 13, 2016. (Exhibit A hereto). EPA did not seek vacatur of those actions, but consented to the continuation of the stay pending appeal until EPA completes final action on remand. Remand Motion at 1-2. EPA also requested that the Court modify the stay pending appeal as to portions of the Final Rule partially approving portions of the Texas and Oklahoma SIPs, which were not challenged in these petitions for review. *Id*. at 2.

In response, Petitioners: (1) opposed remand without vacatur and moved for summary vacatur of the entire Final Rule, Pet. Response at 9-17; (2) opposed EPA's requested modification of the stay, *id*. at 17-18; and (3) moved for clarification and enforcement of the Stay Order. *Id*. at 18-19.

EPA first notes that the question of whether a court should exercise its discretion to allow voluntary remand is distinct from whether a court should also order vacatur. If an agency's "concern is substantial and legitimate, a remand is usually appropriate," *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417 (6th Cir. 2004) (citation omitted), and voluntary remand is appropriate when the request is reasonable and timely. *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002). In light of the Court's findings regarding Petitioners' likelihood of success on the merits, the Court should exercise its discretion to grant voluntary remand so that EPA may reconsider its Final Rule.

Because there has been no final adjudication of the merits, EPA does not believe grounds exist for vacatur.[2] EPA submits that there is

[2] *See, e.g.*, 42 U.S.C. § 7607(d)(9) (A) (court may "reverse" CAA actions such as a FIP following a finding, on the merits, that the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); 5 U.S.C. § 706(2)(A) (court may "hold unlawful and set aside" actions found, on the merits, to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). While the challenged FIP is subject to the special CAA standard of review set forth at 42 U.S.C. § 7607(d)(9), the SIP disapprovals are subject to the general Administrative Procedure Act ("APA") standard of review in 5 U.S.C. § 706. *See* 42 U.S.C. § 7607(d)(1) (listing FIPs, but not SIP approvals and disapprovals, as actions subject to Section 7607(d), and noting in the last sentence that actions subject to Section 7607(d) are

little if any practical difference to Petitioners between maintaining the stay of the rule pending remand (which EPA has already consented to) and vacating the rule pending remand (the alternative sought by Petitioners). If, however, the Court concludes that sufficient grounds do exist for vacatur of the challenged disapprovals and the FIPs, EPA has no practical objection to that relief. However, grounds to vacate the SIP *approvals* cannot possibly exist, as the approvals were not challenged.

Should the Court agree with EPA's suggested relief, and simply maintain the stay pending further agency action on remand, EPA also requests that the stay be modified to exclude the EPA-approved portions of the Texas and Oklahoma regional haze SIPs. As noted above, the approvals were not challenged in the petitions for review and the Stay Order did not address the substance of the approvals in any way. Petitioners state that they "are requesting vacatur of only the SIP disapprovals and FIP in the Final Rule . . . ." Pet. Response at 3. As discussed below, the approvals have independent utility and should not be stayed when Petitioners have not challenged them.

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not subject to the APA's judicial review provisions). However, as indicated above, the pertinent sections of the APA and CAA judicial review provisions are functionally equivalent.

Petitioners also cross-move for "summary vacatur," based upon the Court's finding of substantial likelihood that Petitioners would prevail on four points of law. Pet. Response at 15-17. As discussed below, such a preliminary determination on matters that in fact may ultimately be heard by a different merits panel does not constitute a definitive finding that there can be no substantial question as to the outcome of the case, which is this Court's standard for summary disposition. If the Court denies Respondents' motion for partial remand, EPA must be allowed the opportunity to brief the merits of the case.

Finally, the Court should deny Petitioners' cross-motion to "clarify and enforce the Court's Stay Order." Pet. Response at 18-20. This cross-motion is a meritless attempt to hobble EPA's proposed action setting separate "Best Available Retrofit Technology" ("BART") SO_2 emission limits for a number of electrical generating units ("EGUs") located in Texas,[3] by preventing 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, including a subsequent rule or action to impose virtually

[3] Proposed Rule, "Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan," 82 Fed. Reg. 912 (Jan. 4, 2017) ("BART Proposal").

the same emissions control requirements that are presently stayed" (*i.e.*, the BART Proposal). *Id*. at 19 (emphasis supplied). EPA has incorporated some technical and factual material from the Final Rule administrative record into the record for the BART Proposal. 82 Fed. Reg. at 916 n. 24. EPA did not propose to rely on any part of the Final Rule under challenge. EPA has a distinct and independent basis (and, indeed, statutory obligation) to make BART determinations for eligible sources in Texas -- the requirement that EPA make a BART determination is not a result of the stay of the Final Rule. Petitioners' seeming attempt to broaden the stay to prevent the use of technical and factual material gathered or developed in the Final Rule rulemaking in other EPA proceedings is overreaching, particularly since the Court has not held that those materials themselves are suspect. In any case, the BART Proposal is exactly that -- a proposal. The public, including Petitioners, will have the opportunity to comment on whether the technical and factual material included in the BART Proposal administrative record supports EPA's decisions in that rulemaking.

ARGUMENT

A. The Court Should Grant EPA's Motion for Partial Voluntary Remand for Reconsideration Where EPA's Concern Regarding the Final Rule is Substantial and Legitimate and Remand is Reasonable and Timely.

Petitioners argue that EPA's Remand Motion should be denied as an attempt to circumvent the Court's prior rulings in the case and to avoid judicial review. Pet. Response at 1. They claim that EPA's proposed remand is apparently designed "to facilitate EPA's continued reliance on the Final Rule and its legal underpinnings to support" other regional haze rulemakings. *Id*. at 2. This is not true.

Petitioners' opposition to remand is based primarily on the fact that EPA did not seek vacatur of the Final Rule. Their objections to EPA's Remand Motion are that (a) remand without vacatur would be contrary to precedent, Pet. Response at 9-12; (b) remand without vacatur is not appropriate because EPA has not confessed error, *id*. at 12-14, and (c) remand without vacatur would not promote judicial efficiency. *Id*. at 14-15.

EPA does not dispute that the standard for whether an agency decision should or should not be vacated is as set forth in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir.

1993): *i.e.*, the decision to vacate depends on the court's analysis of "the seriousness of the . . . deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." (Citation omitted). Petitioners also argue that remand without vacatur should only be allowed where the agency may be able to substantiate its original decision on remand. *Central and South West Services, Inc. v. EPA*, 220 F.3d 383, 692 (5th Cir. 2000).

EPA did not request vacatur of the SIP disapprovals and FIPs in the Final Rule, but instead proposed that the current stay pending appeal be continued in force until after EPA takes final action on the remand. While the effects of vacatur of the EPA actions versus stay of the EPA actions are not identical, there is practical overlap in that the operation of the Final Rule is suspended while EPA reconsiders its original action. As noted above, EPA does not believe there is an adequate merits foundation for a grant of vacatur at this juncture. However, if the Court concludes that adequate grounds do in fact exist to exercise the Court's authority to vacate the rule pending remand, EPA has no practical objection to that relief. With or without vacatur,

however, EPA's request for a voluntary remand clearly is a reasonable one that will promote judicial and administrative efficiency.

EPA seeks voluntary remand so that it may reconsider its challenged Final Rule actions in light of the conclusion reached by the Court in the Stay Order that Petitioners have shown a likelihood of success on the merits. If an agency's concern is "substantial and legitimate," remand is normally appropriate. *SKF USA Inc. v. U.S.*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). EPA's concern here is not frivolous or a makeweight to avoid judicial review, but is grounded in the Court's findings on likelihood of success on the merits if the case goes forward. In any case, an agency need not confess error as a prerequisite to voluntary remand. *Citizens Against the Pellissippi Parkway Extension*, 375 F.3d at 417; *Ohio Valley Envt'l Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009).

In addition, as indicated in EPA's Remand Motion at 21-22, Luminant Generation Company LLC ("Luminant") submitted a request for administrative reconsideration to EPA pursuant to 42 U.S.C. § 7607(d)(7)(B), Ex. A to the Remand Motion, arguing, among other things, that EPA should have first finalized its proposal to rely on the Cross-State Air Pollution Rule ("CSAPR") to satisfy BART for Texas

EGUs, but instead deferred that action and finalized its proposed long-term strategy and progress goals for Texas in the Final Rule first. On December 13, 2016, EPA granted Luminant's request for reconsideration with regard to EPA's having finalized a long-term strategy and progress goals for Texas EGUs before determining BART. A copy of the letter granting reconsideration is attached hereto as Exhibit A. EPA will be considering this fundamental issue as part of the remand of the Final Rule, which provides further justification for voluntary remand.

Finally, voluntary remand in this case would promote judicial efficiency. In addressing regional haze obligations that apply in Texas and Oklahoma on remand, EPA will have the benefit of the Court's views on substantive issues as set forth in the Stay Order and will consider the issues raised by Luminant's request for reconsideration. While the stay remains in place during that period, the entities regulated pursuant to the Final Rule will not be required to comply with its provisions until EPA takes action on the remand, and they will have the opportunity to comment on any proposed action on remand. Vacatur would lead to essentially the same results. Judicial economy would be served by allowing the Agency to reconsider the rule on remand in light of the

Court's concerns and guidance to date, rather than proceeding through further briefing and argument. If the matter did go to merits briefing, and the merits panel reached the same conclusions as the motions panel, the remedy would be remand and possible vacatur in any case. Voluntary remand promotes judicial economy by allowing an agency to reconsider and rectify a possibly erroneous decision without further expenditure of judicial resources. *NRDC v. U.S. Dep't of the Interior*, 275 F.Supp.2d 1136, 1141 (C.D. Cal. 2002); *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993).

B. The Court Should Lift the Stay Pending Appeal as to Those Portions of the Final Rule that Partially Approved the Texas SIP, or if the Court Grants Respondents' Motion for Partial Voluntary Remand but with Vacatur, the Court Should Not Vacate the Portions of the Texas Regional Haze SIP Approved By EPA.

In its Final Rule, EPA partially approved the Oklahoma regional haze SIP and the Texas regional haze SIP as satisfying numerous requirements of the regional haze program that are not challenged here. For example, the Texas SIP was found to appropriately address "the Best Available Retrofit Technology (BART) requirements for facilities other than Electric Generating Units (EGUs)." 81 Fed. Reg. at 296, 301.

EPA did not receive any public comments opposing that approval; in fact, the Texas Commission on Environmental Quality ("TCEQ") submitted a comment "support[ing] EPA's intention to approve TCEQ's BART determination." AR Doc. 0056, Att. 2, at 13. EPA also approved Texas's BART rules, with the exception of one subsection relating to reliance on the vacated CAIR rule to meet BART requirements. 81 Fed. Reg. at 301.

In the Remand Motion, Respondents ask the Court to modify the stay pending appeal so that the approved portions of the Final Rule are no longer stayed. Petitioners oppose this request, stating that EPA "has not shown how a 'limited stay' is necessary, [*Texas*, 829 F.3d] at 435, nor has it explained why it seeks to have limited provisions of the Texas SIP go into immediate effect in isolation." Pet. Response at 17. Citing *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1035-37 (7th Cir. 1984), Petitioners argue that EPA "cannot, through partially approving some provisions of a SIP and disapproving others, create a SIP the state did not intend." *Id*. at 17-18.

Petitioners' arguments completely ignore the fact that the Clean Air Act *expressly* authorizes EPA to partially approve and partially disapprove proposed SIPs, 42 U.S.C. § 7410(k)(3), and to promulgate a

FIP to replace the disapproved portion. *Id.* § 7410(c)(1)(B). EPA's partial approval and disapproval here followed precisely the process specified by Congress, and neither Petitioners nor any other party have raised any specific substantive challenge to the partial approval. This alone precludes the grant of any judicial relief as to that portion of EPA's action. Simply put, the properly-issued and unchallenged partial approval cannot be stayed (or vacated) for the sole reason that it was issued in conjunction with the partial disapproval for which a voluntary remand is being sought, which is ultimately all Petitioners' argument on this point amounts to.

Moreover, EPA's partial approvals did not make the state's regulations more stringent, the critical context for the decision in *Bethlehem Steel*. TCEQ supported the approval. The approval included a finding that certain Texas sources are NOT subject to BART requirements, with approval of the supporting Texas analysis. Continuing to stay the approval simply puts the affected facilities into limbo until a remand is completed or a decision on the merits is reached. In addition, stay or vacatur of Texas's BART rule could hamper Texas's ability to make future BART determinations.

Petitioners seek a continued stay of the entire Final Rule, even though they "are requesting vacatur of only the SIP disapprovals and FIP in the Final Rule . . . ." Pet. Response at 4. Their ground for opposition is that EPA may "selectively use certain portions of the Final Rule in other actions . . . ." *Id*. Petitioners provide no detail to substantiate that concern.

Given that Petitioners did not object to the partial approvals during the rulemaking, did not cite the partial approvals as supporting their motions for stay pending appeal, and have stated here that they would not seek vacatur of the approvals, the Court should modify the stay to exclude operation of the approved portions of the Texas regional haze SIP; alternatively, if the Court grants EPA's Remand Motion, but with vacatur, it should not vacate the approvals.

C. The Court Should Deny Petitioners' Cross-Motion for Summary Vacatur Because the Prerequisites for Summary Disposition Are Not Present in this Case.

Petitioners cross-move for "summary vacatur," arguing that "vacatur of the Final Rule's SIP disapprovals and FIPs by the Motions Panel would be appropriate without additional briefing or arguments, based on the four legal errors on which the Panel found Petitioners were likely to succeed on the merits." Pet. Response at 16. They cite

Groendyke Transp., Inc. v. Davis, 406 F.2d 1158, 1162 (5th Cir. 1969), for the proposition that "[s]ummary disposition is proper where 'the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case[.]'" Pet. Response at 16.

Petitioners' cross-motion for summary vacatur should be denied. First, the only judicial determination thus far is the motion panel's finding that Petitioners have shown a likelihood of success on the merits of their challenge to the Final Rule; the Court stated that "[o]ur determination of Petitioners' likelihood of success on the merits is for the purposes of the stay only and does not bind the merits panel." *Texas v. EPA*, 829 F.3d at 437 n. 29. It is therefore possible that after full merits briefing, the present panel or a different merits panel[4] might reach differing conclusions on some or all of the alleged "four legal errors" after full briefing and argument on the merits.

[4] If remand is not granted and the petitions for review proceed to merits briefing and oral argument, the merits panel may be different than the motions panel. *See*, Fed. R. App. Pro. with Fifth Circuit Rules and Internal Operating Procedures, I.O.P. found listed after Fifth Circuit Rules 27.5 and 34.13.

Finally, the issues presented in these petitions for review do not come close to the *Groendyke* standard that summary disposition may be granted where the "position of one of the parties is clearly right as a matter of law so that there can be no substantial question" regarding the dispute. 406 F.2d at 1162. The complexity of the Clean Air Act and the regional haze program is well known, and Respondents respectfully suggest that reasonably differing opinions could exist as to the four points upon which the Court determined that Petitioners have shown a likelihood of success on the merits. This is not a matter in which there could be "no substantial question" regarding the outcome sufficient to justify depriving Respondents of the opportunity of participating in full briefing and oral argument. If the Court denies EPA's motion for partial remand, Respondents must be given the opportunity to brief the case.

D. Petitioners' Cross-Motion to Clarify and Enforce the Stay Order Should be Denied as Unnecessary, Overly Broad, and Lacking Merit.

Petitioners move the Court "to clarify and enforce its Stay Order." Pet. Response at 18. They claim that EPA states in the BART Proposal that EPA has an obligation to promulgate a new FIP based on the disapprovals contained in the stayed Final Rule, *id*., and that "clarification of the Stay Order's scope and effect is necessary to ensure

that any new regulations that EPA may promulgate do not rest on an improper and illegal foundation." *Id.* Petitioners argue that the Court should clarify that it intended the scope of the Stay Order "to extend to all aspects of the Final Rule, including *all* the disapproval and FIP actions in the Final Rule without exception . . . ." *Id*. at 18-19 (emphasis in original). As discussed below, EPA's obligation to issue the BART Proposal arises from independent provisions of the Clean Air Act regarding BART requirements, and was not necessitated by the stay of EPA's Final Rule. In addition, Petitioners' request that the stay be "clarified" to indicate that materials developed with regard to issuance of the Final Rule may not be used in subsequent rulemakings is untenable. As a result, no "clarification" of the stay is necessary or appropriate.

1. To Begin With, This Court Only Has Authority to Review the Particular Agency Actions Before It.

As a threshold matter, to the extent Petitioners are asking the Court to grant relief that would essentially enjoin future agency decisionmaking, Petitioners' request goes far beyond the relief this Court is authorized to grant in this action. Under the Clean Air Act and the Administrative Procedure Act, the scope of judicial review in this

case is limited to "reversing" (under the CAA) or "set[ting] aside" (under the APA) the particular agency actions that are the subject of the petitions for review, *i.e.*, the partial SIP approvals/disapprovals and corresponding FIP (as noted above, the former are subject to the APA standard of review and the latter is subject to the CAA standard of review). This Court has no authority in this action to grant relief with respect to other agency actions that are not the subject of the petitions for review, nor does it even have any authority to grant relief with respect to *these* actions that go beyond that authorized under the judicial review provisions of the APA and the CAA. For example, the Court can remand (and potentially vacate) these actions for further consideration in light of the Court's decisions to date, but it cannot specify the substance of the decision the Agency is to take on remand. If Petitioners are concerned that, in the future, EPA may take action that Petitioners believe to be at odds with this Court's decisions, they can seek judicial review of those future decisions based on a concrete record at that time, but they may not ask the Court to essentially enjoin future actions based solely on Petitioners' present speculation regarding the form those future actions might take. In any event, as explained in the following sections, Petitioners' substantive concerns

are misplaced, as the agency actions they allude to are based on statutory duties wholly distinct from those at issue here.

2. EPA's Obligation to Establish BART Requirements for Eligible Texas EGUs Arises Independently of EPA's Action Regarding the Final Rule and the Stay.

Petitioners request that the Court clarify that "the Stay Order's effect is to prohibit EPA, while the stay is in place, from relying on any of its SIP disapprovals or FIP actions and related findings in the Final Rule in any subsequent rule or action, including a subsequent rule or action to impose virtually the same emissions control requirements that are presently stayed." *Id*. at 19.

EPA's proposal to establish BART emission requirements for certain Texas EGUs is based upon CAA requirements and prior regulatory actions that exist independently of the CAA's and Regional Haze Rule's reasonable progress and interstate visibility transport provisions that were at issue in the Final Rule. The reasonable progress requirements of the regional haze program stem from Section 169A(b)(2)(B) of the Clean Air Act, 42 U.S.C. § 7491(b)(2)(B), and 40 C.F.R. § 51.308(d) of the Regional Haze Rule, while the BART requirements originate in Section 169A(b)(2)(A), 42 U.S.C. § 7491(b)(2)(A), and 40 C.F.R. § 51.308(e). Interstate visibility transport

requirements are found in the provision of the Act governing SIPS, at 42 U.S.C. § 7410(a)(2)(D)(i)(II) and EPA guidance.

Pursuant to 42 U.S.C. § 7491(e)(2)(A), EPA was directed to issue regulations providing that visibility protection SIPs must include a provision that a major stationary source built between 1962 and 1977 that "emits any air pollutant which may reasonable be anticipated to cause or contribute to any impairment of visibility" in a Class I federal area must install "best available retrofit technology," or BART.

Instead of requiring source-specific BART, a state may submit a SIP which provides for an emissions trading program or other alternative that would achieve greater reasonable progress than BART. 40 C.F.R. § 51.308(b)(2). In 2005, EPA issued the Clean Air Act Interstate Rule ("CAIR"), which required 28 states, including Texas, to reduce SO_2 and NO_X emissions. 70 Fed. Reg. 25,162 (May 12, 2005). The CAIR rule was remanded by the D.C. Circuit without vacatur in 2008. *North Carolina v. EPA*, 550 F.3d 1176. In 2009, Texas submitted a regional haze SIP to EPA that relied on CAIR as a BART alternative for SO_2 and NO_X. In 2011, EPA promulgated the Cross-State Air Pollution Rule ("CSAPR") to replace CAIR. 76 Fed. Reg. 48,208 (Aug. 8, 2011). In 2012, EPA amended the Regional Haze Rule to provide that

participation in the CSAPR program (rather than CAIR) would qualify as a BART alternative for EGUs. 40 C.F.R. § 51.308(e)(4).

With regard to this matter, on June 7, 2012, EPA issued a limited disapproval of the Texas regional haze SIP because of the state's reliance on the CAIR rule.[5] 77 Fed. Reg. 33,641, 33,651. This limited disapproval triggered EPA's obligation to issue a BART FIP for Texas within two years of the disapproval, unless Texas first submitted a SIP revision that EPA approved. 42 U.S.C. § 7410(c)(1).

EPA later issued a proposal to rely on CSAPR to address the deficiencies in Texas' prior BART submissions. 79 Fed. Reg. 74,818, 74,823 (Dec. 16, 2014). However, in 2015, the D.C. Circuit generally upheld CSAPR, but remanded the Texas CSAPR annual SO_2 budget and ozone-season NO_X budget. *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015). In the January 5, 2016, Final Rule, due to the uncertainties raised by the CSAPR remand, EPA did not take final action on the part of the Texas SIP submittal that was intended to satisfy BART requirements. 81 Fed. Reg. 296.

[5] This action, along with others, is the subject of pending petitions for review in the D.C. Circuit. *Utility Air Regulatory Group v. EPA*, No. 12-1342 (and consolidated cases) (D.C. Cir.)

As a result of these various rulemakings, EPA is still under a CAA obligation to issue a FIP regarding BART emission limits for BART-eligible sources in Texas.[6] This obligation is a function of independent statutory and regulatory requirements, and is not dependent on or a consequence of the Court's stay of the Final Rule.

Because EPA's obligation to issue a BART FIP is not based upon or dependent on the stayed Final Rule SIP, there is no need for a "clarification" of the Stay Order to address the BART Proposal or otherwise. EPA is well aware of the scope of the Stay Order and has no intention to violate the letter or the spirit of the stay.

3. Petitioners' Request that EPA be Barred from Using Factual and Technical Information Cited in the Final Rule in Other Rulemakings Must Be Denied.

In addition, Petitioners seek to prevent the use of "related findings" from the Final Rule as part of the BART Proposal rulemaking process. However, there is no reason that factual and technical

[6] In addition, EPA was under a consent decree obligation in *Nat'l Parks Conserv'n Ass'n v. EPA,* Case. No. 11-cv-1548 (D.D.C.) to issue, by December 9, 2016, a "new notice of proposed rulemaking" for Texas to meet "the BART requirements for EGUs that were due by December 17, 2007. . . ," and to issue a final rule by September 9, 2017. Order at 2, ECF No. 86, a copy of which is attached as Exhibit B.

information from the administrative record of the Final Rule should not be cited or employed where appropriate in other rulemakings, including the BART Proposal. The docket for EPA's BART Proposal contains certain materials that were also used in the Final Rule proceedings, such as information regarding the technical feasibility of certain SO_2 scrubber upgrades, 82 Fed. Reg. at 924; the control efficiencies of certain SO_2 scrubber technologies, *id*. at 925; and certain calculations used to make cost-effectiveness judgments regarding scrubber upgrades, *id*. at 927. EPA suggested in the BART Proposal that readers should refer to the Final Rule rulemaking "for additional background regarding the CAA, regional haze, and our Regional Haze Rule." *Id*. at 916. The agency also noted a list of materials from the Final Rule docket that were included in the "technical support document" for the BART Proposal docket. *Id*. at 916, n. 24. The Stay Order, which is based upon asserted legal infirmities in the Final Rule, should not be read to prohibit the use of background, factual, and technical materials referenced in the Final Rule in other rulemaking proceedings. Of course, as noted above, Petitioners will have the opportunity to seek judicial review of any final action taken that utilizes these technical materials.

E. Environmental Intervenors' Ultra Vires Request for "Clarification" Should be Denied.

The Environmental Intervenors "ask this Court to clarify" that EPA must provide status updates regarding EPA's progress on remand to the parties to a consent decree entered in the District Court for the District of Columbia. Doc. 513803794 at 14; *see supra* n. 5. The Environmental Intervenors fail to explain how this Court would have the authority to issue an order pertaining to a consent decree in the D.C. District Court. Nor do they explain why it would be permissible for this Court to issue an advisory opinion to "clarify" EPA's obligations under that consent decree. The Court should therefore deny this request.

Moreover, EPA fulfilled the relevant requirements of the consent decree when it promulgated the Final Rule. Because EPA has promulgated the Final Rule and the consent decree does not provide that the district court has continuing jurisdiction to provide further relief with respect to the Final Rule, EPA is no longer required to provide status reports. *Keepseagle v. Vilsack*, 815 F.3d 28, 35 (D.C. Cir. 2016). Regardless, the application of *Keepseagle* to the consent decree is a matter to be resolved by the D.C. District Court, not this Court.

CONCLUSION

For the foregoing reasons, the Court should grant Respondents' Motion for Partial Voluntary Remand and deny Petitioners' and Petitioner-Intervenors' cross-motions for summary vacatur and to clarify the stay pending appeal.

Respectfully submitted,

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Dated: Jan. 13, 2017 By: *s/ Daniel Pinkston*
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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 27(d)(2)(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 27(d)(1)(e) because it has been prepared in 14-point Cambria, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains 5,157 words, excluding the caption and signature blocks, according to the count of Microsoft Word.

s/ Daniel Pinkston
Daniel Pinkston
Senior Trial Attorney

Exhibit A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 13 2016

OFFICE OF
AIR AND RADIATION

Ms. Stephanie Zapata Moore
Vice President & General Counsel
Luminant Generation Company LLC
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Dear Ms. Zapata Moore:

I am responding to your petition dated March 2, 2016, to the U.S. Environmental Protection Agency Administrator Gina McCarthy, filed on behalf of the Luminant Generation Company LLC (Luminant), requesting that we grant reconsideration of the final rule titled, "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," published January 5, 2016 (81 FR 295) (Final Rule). The Administrator has asked me to respond to this petition on her behalf.

As you know, to comply with the Clean Air Act's (CAA) reasonable progress mandate, the EPA partially disapproved Texas's regional haze state implementation plan and finalized sulfur dioxide emission limits for nine electric generating units owned and operated by Luminant—Big Brown Units 1 and 2; Martin Lake Units 1, 2, and 3; Monticello Units 1, 2, and 3; and Sandow Unit 4. These emission limits were based on the performance of flue gas desulfurization retrofits or upgrades. Luminant's petition seeks reconsideration and an administrative stay of the Final Rule pursuant to section 307(d)(7)(B) of the CAA. Among other things, Luminant asserts that the EPA proposed to rely on the EPA's Cross-State Air Pollution Rule to satisfy the CAA's Best Available Retrofit Technology (BART) requirement, but did not finalize this aspect of the proposal. Luminant asserts that, by deferring action on BART, "EPA is fundamentally changing the manner in which it will evaluate BART controls for Texas and how reasonable progress is evaluated." Petition at 2.

In response to your petition, I am granting reconsideration of the Final Rule. At this time, we are not acting on your request for a stay because the United States Court of Appeals for the Fifth Circuit has already issued a judicial stay of the Final Rule.

If you have questions regarding this petition response, please contact Suzanne Smith at (214) 665-8027.

Sincerely,

Janet G. McCabe
Acting Assistant Administrator

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL PARKS CONSERVATION ASSOCIATION, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 11-1548 (ABJ)
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	
Defendants.	)	

ORDER

The Court has considered EPA's Unopposed Motion to Amend the First Partial Consent Decree. It is hereby

ORDERED that the motion is granted and that the First Partial Consent Decree is revised as follows:

1. Paragraph 4 and Table A of the First Partial Consent Decree are amended to delete all requirements applicable to Texas.

2. A new paragraph, number 4.a.i and ii, as set forth below, will be added to the First Partial Consent Decree.

i. Except as provided in subparagraph ii below, no later than December 9, 2015, EPA shall sign a notice(s) of final rulemaking promulgating a FIP for Texas to meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations, except where, by such deadline EPA has, for Texas, signed a notice of final rulemaking unconditionally approving a SIP or promulgating a partial FIP and unconditional approval of a portion of a SIP, that collectively meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations.

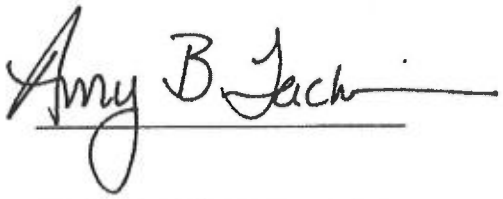
ii. The requirement of subparagraph i. above shall not apply to the regional haze implementation plan requirements for the determination and adoption of requirements for best available retrofit technology ("BART") for electric generating units ("EGUs") in Texas. Instead, the following requirements shall apply:

a. No later than December 9, 2016, EPA shall sign a notice of final rulemaking promulgating a FIP for Texas to meet the BART requirements for EGUs that were due by December 17, 2007 under EPA's regional haze regulations, except where, by such deadline EPA has, for Texas, signed a notice of final rulemaking unconditionally approving a SIP, or promulgating a partial SIP, that collectively meet the BART requirements that were due by December 17, 2007 under EPA's regional haze regulations.

b. The December 9, 2016 deadline in subparagraph 'a' for signature of a notice of final rulemaking shall be extended to September 9, 2017, if by December 9, 2016, EPA signs a new notice of proposed rulemaking in which it proposes approval of a SIP; promulgation of a FIP; partial approval of a SIP and promulgation of a partial FIP; or approval of a SIP or promulgation of a FIP in the alternative, for Texas, that collectively meet the regional haze implementation plan requirements for BART and EGUs that were due by December 17, 2007 under EPA's regional haze regulations.

The parties shall confer by telephone regarding the progress in the required rulemaking at 60-day intervals until the required notices of final rulemaking applicable to Texas has been signed. The calls will be scheduled for a mutually convenient time by counsel for EPA.

SO ORDERED.



AMY BERMAN JACKSON
United States District Judge

DATE: December 15, 2015