No. 16-9541 and Consolidated Cases

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATE OF UTAH, ON BEHALF OF THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF AIR QUALITY,

Petitioner,

v.

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

Respondents.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER STATE OF UTAH'S MOTION FOR STAY

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INTEREST OF *AMICUS CURIAE**

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

This case presents such an issue. This case is of particular concern to the Chamber and its members because it is one of several recent cases resulting from the U.S. Environmental Protection Agency's ("EPA") regulatory overreach under the Clean Air Act ("CAA") and, in particular, the Regional Haze Program. Through its re-interpretation of the Regional Haze requirements, EPA is seeking to impose massive expenditures and economic harm on business in Utah, but the result would be little if any actual benefit in terms of visibility improvements at the federal Class I areas covered by the program. The Chamber is participating in this case—and has a

* Pursuant to Fed. R. App. P. 29(a), the Chamber certifies that all parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(c)(5), the Chamber certifies that: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (c) no person, other than the Chamber, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

long track record of participating in other such cases[†]—to provide the Court with a broader perspective on EPA's overreach and the substantial impact of its new regulatory approach.

[†] For example, the Chamber is currently an intervenor in the consolidated petitions for review in the U.S. Court of Appeals for the Fifth Circuit, in which the Court stayed EPA's Regional Haze rule for Texas and Oklahoma, based on many of the same errors that exist in the rule here. *See State of Texas et al. v. EPA*, 829 F.3d 405 (5th Cir. 2016).

ARGUMENT IN SUPPORT OF STAY

The Chamber respectfully files this *amicus curiae* brief in support of the State of Utah's Motion for Stay. Doc. 01019712378. The economic impact of EPA's final rule in this case[1] is enormous—and drastically out of proportion to the "visibility" benefits that EPA claims will result from the rule. Given this impact, and the many legal flaws in the rule, the Court should grant the Motion for Stay, as requested by the State of Utah and other Petitioners.

EPA's rule here is one of several recent actions by EPA seeking to expand the scope and reach of the Clean Air Act's Regional Haze Program beyond the clear limitations on EPA's authority in the statute. Because of the substantial economic impact from these rules (which EPA has failed to consider) and the often new and novel positions taken by EPA, several Courts of Appeals, including this one, have issued stays in order to allow a full vetting of the issues, without the risk of irreparable harm to the State and impacted companies.[2] Indeed, the U.S. Court of Appeals for the Fifth Circuit recently entered a stay of EPA's Regional Haze rule for the States of Texas and Oklahoma, finding many of the same legal shortcomings that exist in the

[1] 81 Fed. Reg. 43,894 (July 5, 2016).

[2] Order, *Oklahoma v. EPA*, Nos. 12-9526, 12-9527 (10th Cir. June 22, 2012) (staying and tolling deadline for installation of controls costing an estimated $1.2 billion); Order, *Wyoming v. EPA*, Nos. 14-9529, 14-9530, 14-9533, 14-9534 (10th Cir. Sept. 9, 2014) (staying and tolling deadline for installation of controls costing an estimated $700 million); Order, *Cliffs Natural Res. Inc. v. EPA*, Nos. 13-1758, 13-1761 (8th Cir. June 14, 2013) (staying and tolling deadline for installation of controls costing an estimated $200 million).

rule here. *See State of Texas et al. v.* EPA, 829 F.3d 405 (5th Cir. 2016) (staying and tolling deadlines for installation of controls costing an estimated $2 billion). Here, EPA's disapproval of Utah's Regional Haze plan and EPA's replacement federal plan are unlawful and will likely be vacated upon full review by this Court, and thus the Motion for Stay should be granted.

I. EPA's Failure to Reasonably Weigh Costs Against Benefits Renders the Rule Unlawful

EPA's failure to conduct a rational cost-benefit analysis renders the rule unlawful. Federal agencies must engage in "reasoned decisionmaking." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Id.*

Here, the requirement for a rational cost-benefit assessment is hard-wired into the statute and regulations. The State of Utah is expressly authorized to implement a Best Available Retrofit Technology ("BART") "Alternative" in lieu of source-specific BART controls, so long as its alternative would achieve "greater reasonable progress" than BART. 40 C.F.R. § 51.308(e)(2). And the statute directs that "the costs of compliance" and other factors be considered in determining "reasonable progress." 42 U.S.C. § 7491(g)(1). Thus, Congress clearly intended a consideration of whether the costs are reasonable in relation to the expected benefits. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("Consideration of cost reflects the understanding that

reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.") (emphasis in original); *id.* ("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."); *see also Entergy Corp. v. Riverkeeper, Inc.,* 556 U.S. 208, 225-26 (2009) ("[W]hether it is 'reasonable' to bear a particular cost may well depend on the resulting benefits; if the only relevant factor was the feasibility of the costs, their reasonableness would be irrelevant.").

It is contrary to any notion of reasoned decisionmaking for EPA to conclude, as it did here, that over $500 million dollars in costs are reasonable to obtain, by EPA's best estimate, only 0.14 deciview in claimed comparative visibility benefit over Utah's BART Alternative. 81 Fed. Reg. at 43,898-99. The human eye can only detect changes in visibility of 1.0 deciview.[3] In contrast, the costs are massive[4] and, for at least one of the Petitioners, potentially debilitating.[5] It is irrational to require hundreds of millions of dollars in expenditures to achieve a goal that no person will be able to detect, and EPA's rule here will be found unlawful and should be stayed for that reason. *Michigan*, 135 S. Ct. at 2706-07; *Entergy Corp.*, 556 U.S. at 225-26.

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[3] *See* 77 Fed. Reg. 30,248, 30,250 (May 22, 2012) ("[E]ach deciview change is an equal incremental change in visibility perceived by the human eye. Most people can detect a change in visibility at one deciview.").

[4] *See* Declaration of Chad Teply, Doc. 01019712756, ¶21 ($700 million in expenditures).

[5] *See* Declaration of Robert Dalley, Doc. 01019712740, ¶¶14-17 (describing potential for bankruptcy due to massive costs from rule).

II. EPA Unlawfully Usurped the State of Utah's Statutory Authority to Assess "Reasonable Progress"

The Clean Air Act gives the States the primary role and substantial discretion in formulating plans for meeting the statutory goals and requirements, including in particular in the regional haze program. The Clean Air Act "establishes a comprehensive program for controlling and improving the nation's air quality through state and federal regulation."[6] Congress chose a "cooperative federalism" structure to implement the statute, dividing authority between the federal government and the States.[7] Within this division, "air pollution prevention . . . is the primary responsibility of States and local governments."[8]

Consistent with this structure, as to visibility protection, EPA's job is to "promulgate regulations to assure . . . reasonable progress toward meeting the national goal" of preventing future and remedying existing visibility impairment in Class I areas, but it is the state implementation plan ("SIP") that contains the "measures" "necessary to make reasonable progress."[9] EPA's role in reviewing SIP provisions developed by States to implement the Regional Haze program is limited. As one

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[6] *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 821–22 (5th Cir. 2003).

[7] *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001); *see also Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 581 (5th Cir. 1981) ("Congress chose a balanced scheme of state-federal interaction to implement the goals of the [Clean Air] Act.").

[8] 42 U.S.C. § 7401(a)(3). *See also North Dakota v. EPA*, 730 F.3d 750, 760-61 (8th Cir. 2013) ("[T]he CAA grants states the primary role of determining the appropriate pollution controls within their borders . . . .").

[9] 42 U.S.C. § 7491(a)(4), (b)(2).

Court of Appeals has explained: "The great flexibility accorded the states under the Clean Air Act is . . . illustrated by the sharply contrasting, narrow role to be played by EPA."[10] In that narrow role, where a SIP meets the basic requirements *of the statute*, EPA must approve it.[11] Indeed, so long as a SIP "otherwise satisfies the standards set forth in 42 U.S.C. § 7410(a)(2)," the EPA has "no authority" to disapprove the SIP and replace it with a federal plan.[12] The Clean Air Act "supplies the goals and basic requirements of [SIPs], but the states have broad authority to determine the methods and particular control strategies they will use to achieve the statutory requirements."[13]

EPA has also departed here from its own regional haze regulations and guidance, which confirm the States' primary role. EPA's implementing regulations "call[] for states to play the lead role in designing and implementing regional haze programs . . . ."[14] And the regulations, EPA explained at the time of their adoption, are "based on the principle that States should have considerable flexibility in adopting visibility improvement goals and in choosing the associated emission reduction

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[10] *Fla. Power & Light Co.*, 650 F.2d at 587.

[11] *See, e.g.*, 42 U.S.C. § 7410(k)(3) ("[T]he Administrator shall approve [a SIP or SIP revision] as a whole if it meets all of the applicable requirements of this chapter."). *See also State of Oklahoma v. EPA*, 723 F.3d 1201, 1210 (10th Cir. 2013) ("EPA monitors SIPs for compliance with the statute. . . .").

[12] *CleanCOALition v. TXU Power*, 536 F.3d 469, 472 n.3 (5th Cir. 2008).

[13] *BCCA Appeal Grp.*, 355 F.3d at 822. *See also Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 484 (2004) (holding that, under Clean Air Act, States "exercise[] primary . . . responsibility" for determining best available retrofit technology).

[14] *Am. Corn Growers Ass'n. v. EPA*, 291 F.3d 1, 2 (D.C. Cir. 2002).

strategies for making 'reasonable progress' toward the national visibility goal."[15]

Indeed, the Fifth Circuit recently stayed EPA's Regional Haze rule for Texas and Oklahoma because EPA improperly usurped the State of Texas's statutory authority to apply the statutory factors. *State of Texas*, 829 F.3d at 428. Here, EPA made the same error. The critical question here was whether Utah's alternative would achieve greater "reasonable progress" than BART, which is a question of judgment left to the State. The State conducted an extensive analysis in that regard, concluding under multiple metrics that it would. 81 Fed. Reg. at 43,897. Instead of accepting the State's reasoned analysis—or finding that it violated any requirement of the Clean Air Act—EPA assumed for itself the State's authority to "assess[] the relative strengths and weaknesses of each of the State's metrics to determine whether it was reasonable . . . ." *Id.* at 43,897. EPA went so far as to change "the weight [to be] give[n] to each metric" assessed by the State. *Id.* at 43,898.[16] It is not EPA's role under the statutory design to second-guess the State's reasoned analysis. *See North Dakota v. EPA*, 730 F.3d 750, 768 (8th Cir. 2013) ("[T]he CAA requires only that a state establish reasonable progress, not the most reasonable progress."). EPA's role is to determine if the State's submission complies with statutory requirements and, if so,

[15] EPA, *Response to Petition for Reconsideration of Regional Haze Rule*, at 11 (Jan. 10, 2001).

[16] Thus, EPA's action here does not turn on whether the State of Utah complied with EPA's BART guidelines. *Cf. State of Oklahoma*, 723 F.3d at 1210 (holding that EPA could review State's determinations of what constitutes BART (which are not at issue here) for compliance with the statutorily-provided BART guidelines).

to approve it. 42 U.S.C. § 7410(k)(3). EPA did not do that here. Because EPA exceeded the scope of its limited authority to review the State's submission, the rule is unlawful and should be stayed. *See State of Texas*, 829 F.3d at 426-27 (staying EPA Regional Haze rule for Texas and Oklahoma because EPA usurped the State's authority to assess the emission controls necessary for reasonable progress).

CONCLUSION

For these reasons, and those reasons set out in the Motion for Stay filed by the State of Utah and other Petitioners, the Chamber respectfully urges the Court to grant the Motion for Stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the court's CM/ECF system which will send notification of such filing to all attorneys of record.

Dated: November 4, 2016

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CERTIFICATE OF COMPLIANCE

The undersigned counsel states that this brief complies with Fed. R. App. P. 29(d) because it contains 2,214 words, which is less than one-half the maximum length authorized for the principal brief it is supporting. This brief also complies with typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface in 14-point Garamond font.

Dated: November 4, 2016

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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