IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

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

March 3, 2016

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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GLOSSARY

BART	Best Available Retrofit Technology
CAA	Clean Air Act
CENRAP	Central Regional Air Planning Association
EPA	United States Environmental Protection Agency
ERCOT	Electric Reliability Council of Texas
FIP	Federal Implementation Plan
LTS	Long-Term Strategy
RPG	Reasonable Progress Goal
RPO	Regional Planning Organization
SIP	State Implementation Plan
SO_2	Sulfur Dioxide
TCEQ	Texas Commission on Environmental Quality
URP	Uniform Rate of Progress

Pursuant to Federal Rule of Appellate Procedure 18(a), Petitioners Luminant Generation Company LLC and its co-petitioners, Southwestern Public Service Company, and Coleto Creek Power, L.P. (collectively "Texas Energy Petitioners") jointly move the Court to stay the final rule of the U.S. Environmental Protection Agency ("EPA") published at 81 Fed. Reg. 296 (Jan. 5, 2016) and to toll all compliance deadlines in the rule for the period of judicial review.[1] Texas Energy Petitioners own and operate the power plants in Texas that are subject to the rule's costly requirements and impending deadlines.[2] They face irreparable harm if the rule is not immediately stayed. EPA has denied a request to stay the rule and suspend the compliance deadlines, 81 Fed. Reg. at 315, and thus Texas Energy Petitioners' only recourse is with the Court.

INTRODUCTION

This case concerns an action by EPA under the Clean Air Act's ("CAA") regional haze program that EPA itself describes as ***unprecedented*** in the nearly 40-year history of the program.[3] The regional haze program was added to the CAA to address visibility in national parks and other federal "Class I areas." 42 U.S.C. § 7491. Congress "declare[d] as a national goal the prevention of any future, and the

[1] A copy of EPA's final rule and supporting exhibits are included in the sequentially-numbered Appendix to this motion, with pinpoint citations ("App. at ##") provided in this motion.

[2] Collectively, Texas Energy Petitioners' power plants provide over 18,800 megawatts of generating capacity. Smith Decl. ¶6 (App. at 62); Hudson Decl. ¶5 (App. at 85); Stevens Decl. ¶5 (App. at 96). As perspective, Luminant's Martin Lake facility has 2,250 MW of capacity, which generates enough electricity to power about 1.125 million homes. Smith Decl. ¶7 (App. at 62).

[3] Coleman Decl. ¶17 (EPA's approach to Texas is "without . . . prior precedent") (App. at 218).

remedying of any existing, impairment of visibility in [these] areas." *Id.* § 7491(a)(1). This long-term goal is to be achieved through a series of 10-year, state programs that make "reasonable progress" toward "natural visibility" conditions by 2064.

At issue here is Texas's ***first*** 10-year plan (addressing the 2008-2018 planning period), which was submitted to EPA in 2009, but on which EPA delayed action until 2016, when it disapproved the plan in the rule at issue here. By EPA's own calculations, compared to the Texas plan, the EPA federal plan will impose approximately ***$2 billion of costs*** on the Texas Energy Petitioners over the next few years, but will achieve no discernible benefit. EPA concedes that its plan:

- Imposes $2 billion of costs in the next few years even though federal air quality monitors show that actual visibility conditions at Class I areas already meet EPA's goals ***now*** without these costs.
- Provides ***zero*** benefits by the end of the first planning period (2018) despite the exorbitant costs; and
- Rejects Texas's plan based on speculative modeled visibility "improvements" ***that are a fraction of what the human eye could even detect***.

EPA's action is the epitome of unlawful, arbitrary and capricious agency action, and the rule should be stayed pending judicial review to prevent irreparable harm.

The regional haze program is designed and intended to be implemented gradually over the next 50-plus years, in 10-year intervals, to account for natural retirements of existing plants, new generation, changes in the economy, and evolving science. Yet EPA seeks to front-load in the first planning period the most costly

emission controls conceivable, in a poorly-veiled attempt to shut the plants down.[4]

Not only is the result misguided, EPA reaches its result through unlawful means. EPA rejects Texas's plan by retroactively imposing new and unlawful "interpretations" of the rules, six years after Texas submitted its plan.[5] For example, EPA claims that Texas was required to review the "reasonable progress" factors in the statute[6] on a source-specific basis, a position rejected by the Tenth Circuit. *See WildEarth Guardians v. EPA*, 770 F.3d 919, 944 (10th Cir. 2014) ("Neither the Clean Air Act nor the Regional Haze Rule requires source-specific analysis in the determination of reasonable progress."). EPA's plan also unlawfully imposes requirements that cannot be implemented in the first regulatory planning period, arbitrarily claiming that reasonable progress ***by 2018*** is achieved by measures that cannot be implemented ***until 2019 or 2021***—the second planning period. But Texas's plan for the second planning period is not even due until 2018.

EPA's rule is all the more arbitrary because EPA concedes that Texas's plan, in place since 2008, has ***already achieved*** "***better visibility conditions*** . . . than the numerical reasonable progress goals [EPA is] establishing for these Class I areas" for

[4] EPA Response to Comments at 397 ("[F]aced with the expense of installing controls and other business considerations, facilities could conceivably decide to retire units instead of installing the controls. Such a situation does not, in and of itself, conflict with the CAA or our Regional Haze Rule."). *See also* Frenzel Decl. ¶27 (explaining that the rule is likely to force the closure of the Luminant's Big Brown and Monticello plants) (App. at 79-80).

[5] EPA admits that it is using its rule for Texas as a "vehicle to clarify to the States our interpretation of various statutory and regulatory requirements." EPA Response to Comments at 71.

[6] *See* 42 U.S.C. § 7491(g)(1) (setting out four factors).

2018. 81 Fed. Reg. at 341 (emphasis added). In other words, Texas's plan has worked, and a stay of EPA's rule would have ***no*** negative impact on visibility.

In contrast, the immediate and unnecessary harm caused by EPA's rule is substantial and irreversible. Unless this Court grants a stay, as courts have done in other recent regional haze cases,[7] Texas Energy Petitioners will be forced to expend hundreds of millions of dollars in sunk costs while this case is being decided because of a rule that is manifestly illegal. Smith Decl. ¶14 (App. at 66); Davidson Decl. ¶17 (App. at 92); Stevens Decl. ¶16 (App. at 98). Further, the Electric Reliability Council of Texas ("ERCOT"), the regulatory body charged by law with ensuring grid reliability for 90% of the State of Texas, has found that the rule would force the closure of multiple generating units in the state and therefore "would have a significant local and regional impact on the reliability of the ERCOT transmission system." ERCOT Transmission Report at 9 (App. at 166). And as detailed in supporting declarations, these plant closures would cause substantial job losses, Pierce Decl. ¶10 (loss of hundreds of union jobs at Luminant plants) (App. at 103), Stevens Decl. ¶15 (loss of eighty jobs at Coleto Creek Plant) (App. at 98), Hudson Decl. ¶15 (potential loss of at least 109 jobs at Tolk Plant) (App. at 87); and irreversible harm to local Texas

[7] *See* 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) (App. at 228-29); 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) (App. at 233-35); 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) (App. at 237).

communities and businesses, Shultz Decl. ¶¶8-9 (loss of tax revenue and community services) (App. at 120-21), Vandiver Decl. ¶14 (lost revenue of $20-25 million annually from lost fuel contracts) (App. at 116). The balance of equities weighs heavily in favor of a stay while the legality of EPA's unprecedented rule is reviewed by the courts.

BACKGROUND

I. The Clean Air Act's Regional Haze Program

Regional haze is "impairment of visual range or colorization caused by emission of air pollution produced by numerous sources and activities, located across a broad regional area." 77 Fed. Reg. 30,248, 30,249 (May 22, 2012). Visibility is measured in "deciviews," and any change less than 1.0 deciview is imperceptible to the human eye.[8] To address regional haze, the CAA requires states to set visibility goals for Class I areas within their borders and to work with neighboring states to develop strategies to achieve reasonable progress toward those goals. The program uses "a phased approach to visibility protection,"[9] under which states develop plans to make "reasonable progress" in 10-year intervals toward the goal of natural visibility conditions. Thus, state plans establish interim "reasonable progress" goals for the end of each planning period that include emission limits for that planning period. Goals and emission limits for later periods are established in subsequent plans.

[8] *See* 77 Fed. Reg. at 30,250 ("[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.").

[9] 45 Fed. Reg. 80,084, 80,085 (Dec. 2, 1980).

A state's plan has three primary components: (1) reasonable progress goals ("RPG") for Class I areas in the state; (2) a long-term strategy ("LTS"); and (3) implementation of "best available retrofit technology" ("BART") for certain stationary sources. Only the RPG and LTS requirements are at issue in this case.[10]

As to the RPG requirement, a state must establish an RPG, expressed in deciviews, for each Class I area within its borders using four factors: (1) "costs of compliance;" (2) "the time necessary for compliance;" (3) "the energy and nonair quality environmental impacts of compliance;" and (4) "the remaining useful life of any existing sources subject to such requirements." *Id.* § 7491(g)(1); *accord* 40 C.F.R. § 51.308(d)(1)(i)(A). To set an RPG, the state must "[a]nalyze and determine the rate of progress needed to attain natural visibility conditions by the year 2064,"40 C.F.R. § 51.308(d)(1)(i)(B), which is called the "uniform rate of progress" or "URP." Under EPA's regulations, the URP need not be achieved in practice, and a "reasonable" rate of progress may extend well past 2064.[11] After determining the URP, the state considers the four statutory factors and "the emission reduction measures needed to achieve [reasonable progress] *for the period covered by the implementation plan*." 40 C.F.R.

[10] In contrast to the RPG and LTS requirements, the BART requirements call for individual emission controls on individual generating units "which may reasonably be anticipated to cause or contribute to any impairment of visibility in [a Class 1 area]." 42 U.S.C. § 7491(b)(2)(A).

[11] For example, in 2011, EPA approved California's regional haze State Implementation Plan ("SIP") and gave California ***until the year 2307*** to achieve "natural conditions" at Desolation Wilderness and Mokelumne Wilderness Areas in that state. *See* 76 Fed. Reg. 34,608 (June 14, 2011); 76 Fed. Reg. 13,944, 13,951 (Mar. 15, 2011).

§ 51.308(d)(1)(i)(B) (emphasis added). The RPG "is a *goal* and not a mandatory standard which must be achieved by a particular date." 64 Fed. Reg. 35,714, 35,733 (July 1, 1999) (emphasis in original).

In addition to RPGs for in-state areas, states must develop a LTS to address both in-state and out-of-state Class I areas. 40 C.F.R. § 51.308(d)(3). The LTS includes "enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals established by States having mandatory Class I Federal areas." *Id.* For out-of-state areas, "the State must consult with the other State(s) in order to develop coordinated emission management strategies." *Id.* § 51.308(d)(3)(i). EPA encourages states "to work together" in regional planning organizations ("RPOs") "to develop a common technical basis and apportionment for long-term strategies that could be approved by individual State participants." 64 Fed. Reg. at 35,732, 35,735. When a state joins an RPO, the state must include in its LTS "all measures needed to achieve its apportionment of emission reduction obligations agreed upon through that process." 40 C.F.R. § 51.308(d)(3)(ii). And the state may meet the requirement to document the technical basis for its LTS "by relying on technical analyses developed by the regional planning organization and approved by all State participants." *Id.* § 51.308(d)(3)(iii).

II. Texas's Regional Haze Plan

Texas began work on its 10-year plan for the first planning period (2008-2018) in 1999. Texas has two Class I areas: Big Bend National Park, bordering Mexico, and

Guadalupe Mountains National Park. Both are in far West Texas, hundreds of kilometers from Texas Energy Petitioners' facilities. Frenzel Decl. ¶13 (providing map) (App. at 74).

Texas, Oklahoma, and seven other states worked together through an RPO—the Central Regional Air Planning Association ("CENRAP")—to develop the technical bases for their plans. Texas Regional Haze SIP at 3-3. CENRAP modeled 2018 visibility conditions for all of the participating states' Class I areas and provided comparisons with the URP. *Id.* at app. 8-1, app. D. Texas repeatedly and over several years consulted with Oklahoma, home to one Class I area (Wichita Mountains). Oklahoma did not request any further reductions from Texas beyond those already included in the modeling by CENRAP.[12]

Using the CENRAP technical analysis, Texas evaluated the four "reasonable progress" factors to develop its goals for Big Bend and Guadalupe Mountains. Texas used the CENRAP data to estimate the nature and cost of potential additional emission reductions at Texas sources beyond those already expected from existing regulatory requirements. Texas Regional Haze SIP at app. 10-1. Texas then used CENRAP's modeling to estimate "likely visibility improvements resulting from the point source control strategy" for all Class I areas: all were below 0.5 deciview. *Id.* at 10-5 & app. 10-2, tbl.5. Texas also considered the cost of the additional controls in

[12] Oklahoma Consultation Letter at 1 (stating that Oklahoma's goal for the Wichita Mountains "does not anticipate emissions reductions beyond those that [Texas] already plan[s] to implement and upon which CENRAP modeling studies have relied.").

relation to the likely benefits, and concluded that the controls would produce "no perceptible visibility benefit," *id.* at 10-7, particularly given the overwhelming influence of emissions originating from Mexico, which Texas cannot regulate. Paine Decl. ¶¶24-26 (App. at 150-52).

III. EPA's Delayed Action on Texas's Plan

Texas submitted its plan to EPA on March 31, 2009, yet EPA delayed final action on the plan for more than six years. 79 Fed. Reg. 74,818, 74,818 (Dec. 16, 2014). In the interim, Texas submitted its five-year progress report to EPA showing that the emission reductions in Texas's plan have already achieved "better visibility conditions" than the goals EPA would now impose for 2018—*without* the additional $2 billion in costs.[13]

Although EPA agrees its 2018 goals for the areas have already been met, EPA disapproved Texas's plan for the 2008-2018 period, claiming Texas did not conduct the four-factor analysis correctly or have meaningful consultation with Oklahoma. EPA found that the RPGs were deficient because, according to EPA, Texas was *required* to analyze the four statutory factors in 42 U.S.C. § 7491(g)(1) on an individual "source-by-source basis," specifically for Texas Energy Petitioners' facilities. 79 Fed. Reg. at 74,838-39. EPA further disapproved Texas's LTS because it found that,

[13] 81 Fed. Reg. at 341 ("[W]e acknowledge that recent monitoring data from IMPROVE monitors indicate that the more recent five-year average measurements of visibility extinction at Texas and Oklahoma Class I areas on the 20% worst days . . . are lower (*i.e.*, indicate better visibility conditions) than the numerical reasonable progress goals we are establishing for these Class I areas.").

despite years of cooperation and technical analysis through CENRAP, Texas and Oklahoma did not "adequately" consult about their plans. *Id.* at 74,823. ***Never*** in the history of the regional haze program has EPA disapproved an interstate regional haze agreement between states. *See* 81 Fed. Reg. at 313 ("We have not disapproved other states' reasonable progress/long-term strategy consultation processes[.]").

To address these putative shortcomings, EPA imposed stringent new emission limitations on 14 electric generating units in Texas—all located hundreds of kilometers from any Class I area. According to EPA, its new limitations would require the installation of new emission controls for sulfur dioxide ("SO_2") (called "scrubbers") on seven units and the upgrade of existing scrubbers on seven additional units. The combined capital and operating costs for the controls add to approximately $2 billion.[14] EPA found that "typical SO_2 scrubber installations can take up to five years to plan, construct and bring to operational readiness" and thus "we cannot assume that the SO_2 controls we are [requiring] will be installed and operational within this planning period, which ends in 2018." 79 Fed. Reg. at 74,874. As to upgrades, EPA found they "may be installed within three years." EPA Response to Comments at 187. As a result, EPA set emission limitations beginning in 2019 (for the upgrades) and 2021 (for the new scrubbers), both of which are outside the first regulatory planning period.

[14] 79 Fed. Reg. at 74,876-77. The estimated upgrade costs are aggregated because the unit-level values are confidential data. The estimated total cost can be calculated by multiplying EPA's $600 cost/ton value with the total tons removed. *Id.*

Even though ***none*** of the emission reductions could be achieved by 2018, EPA imposed "new reasonable progress goals for 2018" for the three areas, claiming that its goals "reflect only the additional estimated visibility benefit from the required controls anticipated to be in place by 2018, which are the scrubber upgrades." 81 Fed. Reg. at 307. Based on this false premise, EPA set new RPGs for the three Class I areas, shown in the table below as compared to the states' goals and actual monitored visibility. As Table 1 shows, actual conditions are already ***better*** than the goals EPA established for 2018—without the additional costs imposed in the rule.

TABLE 1: Comparison of State and EPA Goals and Actual Conditions

Class I Area	State Established RPG (2018)	EPA Proposed RPG (2018)[15]	Difference Between State RPG and EPA Proposed RPG	Actual Monitored Conditions (2009-13)[16]
Big Bend	16.60 dv	16.57 dv	0.03 dv	16.3 dv
Guadalupe Mountains	16.30 dv	16.26 dv	0.04 dv	15.3 dv
Wichita Mountains	21.47 dv	21.33 dv	0.14 dv	21.2 dv

STANDARD OF REVIEW

The Court considers four factors in determining whether to stay agency action pending review: (1) the likelihood of success on the merits, (2) irreparable harm to the movant, (3) the balance of the harms between the petitioner and respondent, and (4)

[15] 79 Fed. Reg. at 74,887 tbl.43.

[16] *Id.* at 74,843, 74,870.

whether relief would serve the public interest. *Ignacio v. INS*, 955 F.2d 295, 299 (5th Cir. 1992)*; see also Winter v. Natural Res. Def. Council,* 555 U.S. 7, 20 (2008).

ARGUMENT

I. Petitioners Are Likely To Succeed on the Merits

The Court is likely to set aside EPA's final rule based on any one of the many fundamental legal flaws in the rule, three of which are discussed below.

A. EPA's Disapproval Applies an Unlawful Standard

As a threshold matter, EPA's final rule is based on an unlawful standard for applying the four statutory factors for "reasonable progress." The lynchpin of EPA's disapproval is its position that Texas was required to conduct its reasonable progress four-factor analysis on ***a source-specific basis***. According to EPA, Texas was *required* to review and analyze the four statutory factors in 42 U.S.C. § 7491(g)(1) on a "source-by-source" basis for a small group of facilities and to determine the visibility benefit from adding individual controls at individual facilities.[17]

EPA's approach is squarely contrary to the statute and was rejected by the Tenth Circuit. The Clean Air Act does ***not*** require a state to conduct a source-specific analysis of cost-effective controls or the visibility benefits from controlling individual sources as part of its "reasonable progress" plan. 42 U.S.C. § 7491(g)(1).

[17] 79 Fed. Reg. at 74,838 ("[B]ecause the TCEQ did not evaluate controls on a source-by-source basis, source-specific factors related to the evaluation of the reasonable progress four factor analysis could not be considered."); *id.* at 74,839 ("Because individual sources were not considered by TCEQ, we found it necessary to conduct an additional analysis[.]").

Instead, the individual source analysis that EPA is requiring of Texas is performed under the statute's BART provisions, which are not at issue here. *See supra*, note 10.

The Tenth Circuit made it abundantly clear: "Neither the Clean Air Act nor the Regional Haze Rule requires source-specific analysis in the determination of reasonable progress." *WildEarth Guardians*, 770 F.3d at 944. Indeed, until this unprecedented rulemaking, EPA's own position, as stated in its regional haze guidance, was that "[r]easonable progress ***is not required to be demonstrated on a source-by-source basis***." EPA Regional Haze Guidance at 9 (emphasis added). EPA has abandoned its long-standing approach.

It is black letter law that EPA may not impose an extra-statutory requirement on Texas as a condition for approval of its plan, and certainly not on a retroactive basis. EPA's requirement that Texas analyze "reasonable progress" at the source level can be found nowhere in the statute or the regulations and thus is not a lawful basis for EPA's disapproval. As this Court held in setting aside another of EPA's actions on Texas's state plan: "With regard to implementation, the Act confines the EPA to the ministerial function of reviewing [state plans] *for consistency with the Act's requirements*." *Luminant Generation Co. LLC v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012) (emphasis added) (citing and quoting 42 U.S.C. § 7410(k)(3)). Here, as in that prior case, "EPA [has] overstepped the bounds of its narrow statutory role in the [plan] approval process" and acted "ultra vires" by relying on a "factor[ ] which Congress has not intended [the EPA] to consider." *Id.* at 925, 926 (internal citations and

quotations omitted). On this basis alone, the rule should be set aside.

B. EPA's Reasonable Progress Analysis is Fundamentally Flawed

Not only did EPA err in disapproving Texas's reasonable progress analysis, EPA's replacement analysis is fundamentally flawed and contrary to EPA's own findings. EPA concludes that "[o]ur new reasonable progress goals for 2018 reflect only the additional estimated visibility benefit from the required controls anticipated to be in place by 2018, which are the scrubber upgrades." 81 Fed. Reg. at 307. But ***none*** of the controls needed to meet the limits that EPA is imposing will be in place by 2018. Based on EPA's own finding of what is achievable, the scrubber upgrades are not required ***until 2019***, and the new scrubbers are not required ***until 2021***. *Id.* at 298. Thus, EPA's revised goals ***for 2018*** are fundamentally flawed because they are based on emission limits that will not be in place until ***after*** the goal has passed.

This is a critical error. Texas was not required at this time to consider controls that might be implemented in later planning periods. The regional haze requirements are "iterative [in] nature" and only require states to address visibility ***incrementally*** at 10-year benchmarks. *See id.* at 311. The only relevant visibility goal for this first planning period that Texas must address is the interim goal for 2018. 79 Fed. Reg. at 74,888. As EPA has explained: "The [regional haze rule] requires control strategies to cover an initial implementation period extending to the year 2018, with a comprehensive reassessment and revision of those strategies, as appropriate, every 10

years thereafter."[18] The only emissions controls that could be considered for reasonable progress ***in this rule*** are those that can be implemented and improve visibility by 2018. Controls to be implemented after 2018 are a matter for the next regulatory planning period, for which state plans are not due until 2018.[19]

This is a fundamental legal flaw in EPA's rule. The statute defines a federal implementation plan as "a plan (or portion thereof) promulgated by the Administrator ***to fill all or a portion of a gap*** or otherwise correct all or a portion of an inadequacy in a State implementation plan." 42 U.S.C. § 7602(y) (emphasis added). There is no gap in Texas's 2008-2018 plan that requires emission controls in 2019 or 2021, nor do such controls address any "inadequacy" in Texas's plan. The required scope of the state's plan extended only to achieving interim reasonable progress goals in 2018 (which are already met), and EPA's authority extends no further.[20] Because EPA "is a creature of statute" and has "only those authorities conferred upon it by Congress," its rule here "is plainly contrary to law and cannot stand." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). *Cf. EPA v. EME Homer Generation LP*, 134 S. Ct. 1584, 1608 (2014) (EPA has "statutory duty to avoid over-control.").

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[18] 77 Fed. Reg. at 30,252; *see also id.* at 30,251 ("The LTS [long-term strategy] is the compilation of all control measures a state will use *during the implementation period of the specific SIP submittal* to meet applicable RPGs." (emphasis added)).

[19] *See* 40 C.F.R. § 51.308(d)(1)(i)(B) (state plan must consider "the emission reduction measures needed to achieve [RPG] *for the period covered by the implementation plan*") (emphasis added).

[20] *See* 64 Fed. Reg. at 35,734 (explaining that EPA's regulations "require[] control strategies to cover an initial implementation period extending to the year 2018, with a reassessment and revision of those strategies, as appropriate, every 10 years.").

C. EPA Failed to Conduct a Rational Cost-Benefit Analysis

EPA's failure to conduct a rational cost-benefit analysis further 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 statute directs that "the costs of compliance" be considered in determining "*reasonable*" progress. 42 U.S.C. § 7491(g)(1) (emphasis added). 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 that $2 billion of costs is justified for miniscule, *modeled* visibility changes that cannot be seen and, because of modeling limitations, cannot even be reasonably expected to

occur. Paine Decl. ¶31 (App. at 155-56). EPA estimated visibility benefits in 2018 of 0.03 dv at Big Bend and 0.04 dv at Guadalupe Mountains, changes that are so small that EPA rounds them down to zero.[21] Even the *largest* improvement (0.14 deciview), which EPA estimates for Wichita Mountains in Oklahoma in 2018, is only about one-eighth of the level that is humanly perceptible. In all events, EPA's own air quality data show that these locations ***already satisfy*** the "reasonable" progress goals EPA has set for 2018. Paine Decl. Tbl. 2 & Figs. 2-4 (App. at 140, 142-43). It is irrational, and thus unlawful, to require billions of dollars in expenditure to achieve a goal that has already been met. *Michigan*, 135 S. Ct. at 2706-07; *Entergy Corp.*, 556 U.S. at 225-26. Nor did EPA consider the "disadvantages" of its rule, including the plant closures and job losses that are likely to occur. *Michigan*, 135 S.Ct. at 2707; *see also* Frenzel Decl. ¶¶27-28 (plant closures) (App. at 79-80); Pierce Decl. ¶10 (job losses) (App. at 103); Shultz Decl. ¶¶8-9 (App. 120-21) (community harm).

II. Petitioners Will Suffer Imminent and Irreparable Harms Absent a Stay

The rule is presently causing an array of irreparable harms. O'Neal Decl. ¶¶19-20 (harm to economic development from the rule's mischaracterization of air quality at Texas parks) (App. at 110); Smith Decl. ¶15 (work on planning for new scrubbers) (App. at 66-67); Stevens Decl. ¶11 (same) (App. at 97); Frenzel Decl. ¶29 (changed investment decisions and market impacts) (App. at 80-81); Hudson Decl. ¶¶14, 17

[21] EPA BART Alternative TSD at 24 n.24 ("Calculating visibility changes to the nearest tenth of a deciview (rather than the nearest hundredth) is consistent with the practice for implementing the reasonable progress goals under the Regional Haze rule.").

(work on development of replacement generation or new scrubbers) (App. at 87). The harms will accelerate in the coming months. Construction of the new scrubbers that EPA's rule mandates involves massive expenditures, extensive coordination, and long lead-times for planning, design, engineering, procurement, permitting, and actual construction. Carstens Decl. ¶15 (App. at 127-28); Smith Decl. ¶15 (App. at 66-67); Davidson Decl. ¶¶14, 15 (App. at 91-92). EPA's rule provides the bare *minimum* amount of time for completing this work, and the clock has already starting ticking.[22] Carstens Decl. ¶14 (App. at 127); Smith Decl. ¶12 (App. at 65); Davidson Decl. ¶¶14, 15 (App. at 91-92); Stevens Decl. ¶14 (App. at 97-98). Texas Energy Petitioners are being forced to *immediately* make substantial expenditures to meet the deadlines, expenditures which cannot be recovered from EPA.[23] Smith Decl. ¶¶14-15 (App. at 66-67); Davidson Decl. ¶17 (App. at 92); Stevens Decl. ¶14 (App. 97-98). In 2016 and 2017 alone, these costs would total at least $450 million for the Texas Energy Petitioners at their various plants. Smith Decl. ¶15 (App. at 66-67); Davidson Decl. ¶17 (App. at 92); Stevens Decl. ¶16 (App. at 98); Carstens Decl. ¶17 (App. at 130). Texas Energy Petitioners cannot recover these costs from EPA if the Court finds the rule to be unlawful, and thus the irreparable harm factor is met. *See Thunder Basin Coal*

[22] EPA concedes that the scrubber upgrades and new scrubbers would take three and five years, respectively, to plan, engineer, bid, procure, construct, and bring on-line. FIP TSD at 7; *see also* 81 Fed. Reg. at 298 (establishing three- and five-year compliance deadlines).

[23] Economic injury is irreparable "where no adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (internal quotation marks and citation omitted).

Co. v. Reich, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and in the judgment) ("[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs.").

Other Courts of Appeals have granted stays of EPA regional haze rules involving the same compliance obligations and timeline as here, even where the total costs at issue were far less. *See supra*, note 7. And the U.S. Supreme Court recently issued a stay, pending judicial review, of another EPA rule that would have impacted these same plants (EPA's "Clean Power Plan"), where the emission limits did not become applicable until 2022, in recognition of the immediate harm that such rules can cause. *See* Order, *West Virginia v. EPA*, No. 15A733 (Feb. 9, 2016) (App. at 239).

Additionally, the rule threatens the closure of many of the plants at issue. Frenzel Decl. ¶27-28 (App. at 79-80); Hudson Decl. ¶8 (App. at 86). Such closures will increase costs to consumers, Hudson Decl. ¶16 (App. at 87); cause substantial job losses, Pierce Decl. ¶10 (union job losses) (App. at 103); and result in economic harm to the surrounding local communities. Shultz Decl. ¶¶8-9 (loss of tax revenue and community services) (App. at 120-21). This too is irreparable harm. *See Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 242 (D.D.C. 2014) (economic harm is irreparable where "the loss threatens the very existence of the movant's business").

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

The final stay factors are clearly met here. There is no possibility of harm to others or the environment if a stay is granted. The regional haze program is about

visibility—it is not an issue of public health. *See* 42 U.S.C. § 7491(a)(1). This weighs in favor of a stay. *See Tate Access Floors, Inc. v. Interface Architecture Res., Inc.*, 279 F.3d 1357, 1364 (Fed. Cir. 2002) (noting the absence of a public health threat as a significant factor favoring a preliminary injunction). And as to visibility, the undisputed data show that EPA's visibility goals for 2018 have already been met by current regulatory requirements, *see supra* Table 1, and a stay will not change that. Paine Decl. Figs. 5, 9-10 (App. at 144, 147) (showing trend in reduced SO_2 emissions).

By contrast, if a stay is not granted, there is a substantial risk to the economic viability of the units at issue and the reliability of the electric grid in Texas. According to ERCOT's assessment, "EPA's [] Regional Haze FIP is likely to result in the retirement of coal units due to the costs associated with upgrading and retrofitting scrubbers,"[24] and "would have a significant local and regional impact on the reliability of the ERCOT transmission system."[25] For this reason alone, a stay is warranted. *Cf. Sierra Club v. Ga. Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999) ("[A] steady supply of electricity during the summer months, especially in the form of air conditioning to the elderly, hospitals and day care centers, is critical.").

CONCLUSION

For all these reasons, the Court should stay the rule pending judicial review and toll all of its compliance deadlines.

[24] ERCOT Regulatory Impact Report at 36 (App. at 209).

[25] ERCOT Transmission Report at 9 (App. at 166).

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on this 3rd day of March, 2016. Additionally, a copy of this document has been served by first-class mail, postage prepaid, on March 3, 2016, upon the following:

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Additionally, pursuant to Federal Rule of Appellate Procedure 18(a)(2)(C), the undersigned gave reasonable notice of their motion to Respondents' counsel via electronic mail on March 3, 2016.

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