IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, Rick Perry, Governor of Texas, Greg Abbott, Attorney General of Texas, Texas Commission on Environmental Quality, Texas Department of Agriculture, Texas Railroad Commission, Texas General Land Office, Texas Public Utility Commissioners Barry Smitherman, Donna Nelson, and Kenneth Anderson, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	Case No. 10-60961

RESPONDENT THE ENVIRONMENTAL PROTECTION AGENCY'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TRANSFER TO THE D.C. CIRCUIT

Petitioners, the State of Texas and various Texas officials and agencies (collectively, "Texas"), purport to seek review in this Court of final action of the Environmental Protection Agency ("EPA" or "the Agency") entitled, "Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call ("GHG SIP Call"), 75 Fed. Reg. 77,698 (Dec. 13, 2010). Texas's petition, however, along with its subsequently-filed Motion for Stay, reveal this case for what it is: an improper attempt to re-litigate before this Court its unsuccessful arguments, rejected only last week by the United States Court of Appeals for the District of Columbia Circuit,[1] seeking a stay of EPA's efforts to implement its greenhouse gas regulations pending review of those regulations by that court. Texas mounts this attempt in the form of a challenge to a nationwide rulemaking – the GHG SIP Call – that affects thirteen States (none of which, other than Texas, is within this Circuit), ignoring the fact that such a rulemaking may only be challenged in the D.C. Circuit under section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b). Such a maneuver should not be countenanced by this Court. For the reasons stated herein, the petition should be dismissed or, in the alternative, transferred to the D.C. Circuit.[2]

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[1] See Coalition for Responsible Regulation v. EPA (D.C. Cir.), No. 09-1322 (and consolidated cases), Order of Dec. 10, 2010 (per curiam), denying inter alia Texas' motions to stay EPA's various greenhouse gas regulations. (Attached as Exhibit 1.)

[2] Respondent has contacted counsel for Petitioners, who has indicated that they will file an opposition to this motion.

STATEMENT OF THE FACTS

I. Statutory and Regulatory Framework

A. Initial EPA Greenhouse Gas Regulation

The GHG SIP Call is one of several rules promulgated by EPA in the wake of the Supreme Court's decision in Massachusetts v. EPA, 549 U.S. 497 (2007), which held that greenhouse gases are "air pollutants" under the CAA. Pursuant to the Supreme Court's decision, EPA concluded in late 2009 that motor vehicle emissions of greenhouse gases are subject to regulation under CAA section 202(a)(1), 42 U.S.C. § 7521(a)(1), because they contribute to air pollution that is reasonably anticipated to endanger public health and welfare, due to effects of greenhouse gases on climate. See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 Fed. Reg. 66,496 (Dec. 15, 2009). Consequently, EPA was required to issue regulations regarding motor vehicle greenhouse gas emissions under CAA section 202. The Agency did so in the "Vehicle Rule," establishing emission standards for cars and light trucks for model years 2012-2016. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010).

B. The Prevention of Significant Deterioration Program

1. Application to Greenhouse Gases

By operation of statute, EPA's issuance of the Vehicle Rule brought greenhouse gases within the ambit of another part of the CAA: the prevention-of-

significant-deterioration ("PSD") preconstruction permit provisions. See 42 U.S.C. §§ 7470-7492. The PSD provisions apply to areas of the country designated "attainment" or "unclassifiable." 42 U.S.C. §§ 7407(d)(1)(A), 7471, 7475(a). Within these covered areas, the PSD provisions apply to any "major emitting facility," defined as a stationary source that emits or has the potential to emit 100 or 250 tons per year ("tpy") (depending on the type of source) of "*any* air pollutant." Id. § 7479(1) (emphasis added). Such a facility may not initiate construction or major modification of its facility in such an area without first obtaining a PSD permit.[3] See 42 U.S.C. §§ 7475(a)(1), 7479(1), 7479(2)(C).

For the last thirty years, EPA has interpreted these provisions to require that PSD permits address "any air pollutant" that is "subject to regulation under the CAA" (except for a pollutant for which an area has been designated non-attainment). See 43 Fed. Reg. 26,380, 26,383/2, 26,404/2 (June 19, 1978); see also Alabama Power Co. v. EPA, 636 F.2d 323, 361 n.90, 405-07 (D.C. Cir. 1979); 45 Fed. Reg. 52,676, 52,710-12 (Aug. 7, 1980). In 2002, EPA reaffirmed that the PSD program "applies automatically to newly regulated NSR pollutants . . . ." 67 Fed. Reg. 80,186, 80,240, 80,264 (Dec. 31, 2002). The definition of "regulated NSR pollutant" includes, among other things, "[a]ny pollutant that otherwise is subject to regulation under the Act." 40 C.F.R. § 52.21(b)(50)(iv); id. § 51.166(b)(49)(iv).

[3] A modification of a major emitting facility is likewise defined as a physical change or change in the method of operation that results in an increase in the amount of "any air pollutant" emitted by that source. 42 U.S.C. §§ 7479(2)(C), 7411(a)(4).

In its April 2, 2010 "Timing Decision," EPA determined that greenhouse gases would become "subject to regulation under the Act," within the meaning of the statute and the Agency's longstanding regulations, thus triggering the automatic application of the PSD provisions to major emitting facilities that emit greenhouse gases, as of January 2, 2011, when the first new motor vehicles subject to the Vehicle Rule can enter the market. Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs," 75 Fed. Reg. 17,004, 17,006, 17,019/3, 17,023 (April 2, 2010). Likewise, EPA explained that on the same date greenhouse gas-emitting sources will become subject to Title V of the CAA, a separate stationary source permitting program. See 42 U.S.C. §§ 7661a(a), 7661(2), 7602(j); 75 Fed. Reg. at 17,022-23.

2. The Tailoring Rule

EPA recognized that immediately implementing PSD and Title V permit requirements for *all* of the sources meeting the statutory thresholds of 100/250 tpy for greenhouse gas emissions would "overwhelm[ ] the resources of permitting authorities and severely impair[ ] the functioning of the program[ ]." 75 Fed. Reg. at 31,514. EPA therefore promulgated the "Tailoring Rule" to establish an effective administrative process by which PSD and Title V permit requirements for greenhouse gases can be phased in after January 2, 2011. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010). The

Tailoring Rule established a series of steps by which PSD and Title V permit requirements may be phased in over a period of time. See id. at 31,523-25, 31,586-88.

The four EPA actions discussed above – the Endangerment Finding, the Vehicle Rule, the Timing Decision, and the Tailoring Rule – are the subjects of numerous petitions for review currently pending in the D.C. Circuit sub nom. Coalition for Responsible Regulation v. EPA (Nos. 09-1322, 10-1073, and 10-1092, and consolidated cases). Texas is a petitioner in each of those cases. The petitioners in those cases, Texas among them, filed four separate motions seeking to stay the challenged EPA actions pending review, either in whole or in part. As previously noted, supra n.1, on December 10, 2010, the D.C. Circuit denied those motions in their entirety. The petitions are now awaiting establishment of a merits briefing and argument schedule.

C. State Implementation Plans

While Congress and EPA establish the standards to be achieved in the PSD program, the States predominantly manage the program to achieve these standards through State implementation plans ("SIPs"). See 42 U.S.C. §§ 7410, 7471; 40 C.F.R. § 51.166 (criteria for EPA approval of a State PSD program). A SIP is a set of State-promulgated (and EPA-approved) regulations that provides for implementation and enforcement of emissions standards under the various CAA programs administered by EPA. The standards set by States may be no less stringent than those required by the CAA and EPA's implementing regulations. 42 U.S.C. § 7410(k)(1)(A). Inter alia,

SIPs must include a PSD program that "meet[s] the applicable requirements" of the PSD provisions and "contain emissions limitations and such other measures as may be necessary, as determined under regulations promulgated under" the CAA PSD provisions. Id. §§ 7410(a)(2)(C), 7410(a)(2)(J), 7471.

EPA may instruct a State to revise its SIP, in what is commonly referred to as a "SIP Call," anytime the Agency determines the existing SIP is "substantially inadequate to . . . comply with any requirement of" the CAA. See 42 U.S.C. § 7410(k)(5). EPA may then establish a "reasonable deadline" for the State to provide the Agency with the required SIP submission; such a deadline is "not to exceed 18 months after the date of . . . notice [of substantial inadequacy]." Id. If a State fails to submit a required SIP submission by such a deadline, or if EPA disapproves such a submission in whole or in part, the Agency must, within two years thereafter (including, at EPA's discretion, immediately), issue federal regulations in the form of a Federal Implementation Plan ("FIP") that will apply within that State until a SIP is approved. Id. § 7410(c); 40 C.F.R. § 52.21(a)(1).

D. The GHG SIP Call

The self-executing PSD provisions of the CAA described above will automatically apply to major emitting facilities that emit greenhouse gases as of January 2, 2011, independent of any obligations imposed by the applicable SIP or FIP. This is because, under CAA section 165(a), "[n]o major emitting facility . . . may be constructed [or modified] in any area" subject to the PSD provisions unless:

> (1) a permit has been issued for such proposed facility in accordance with this part [(the PSD provisions)] setting forth emission limitations for such facility which conform to the requirements of this part; [and] . . .
>
> (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility . . . .

42 U.S.C. § 7475(a); see also 42 U.S.C. § 7479(1) (defining a "major emitting facility" as one that emits "any air pollutant"). Accordingly, under both the CAA and longstanding EPA interpretation, starting January 2, 2011, where a person intends to construct or modify a facility and that facility's greenhouse gas emissions exceed the applicable threshold, that person may not begin construction or modification without obtaining a PSD permit addressing greenhouse gas emissions.

However, not all existing SIPs will automatically incorporate the greenhouse gas permitting requirement. Absent revision of such a SIP, the State will be unable to issue federally-approved PSD permits consistent with the CAA PSD provisions after January 2, 2011. If the applicant for a PSD permit for a major emitting facility that emits greenhouse gases is thus unable to obtain a permit from the relevant State authority, or if the permit issued by the State authority does not conform to the requirements of the CAA because it does not address greenhouse gas emissions, the applicant will be unable to commence construction or modification of the facility.

1. The Proposed GHG SIP Call and FIP

Having identified the possibility of such difficulties should States fail to expeditiously revise their SIPs as necessary, on September 2, 2010, EPA issued two proposed rules that, once finalized, would ensure that if a given State is not in a position to implement the PSD permitting requirements for greenhouse gases by January 2, 2011 under its own SIP, *EPA* can perform that task for that State until such time as the State is able to revise its SIP. Specifically, EPA issued a proposed "GHG SIP Call" in which it proposed to find the SIPs of 13 States, including Texas, "substantially inadequate" under CAA § 110(k)(5) based on these States' apparent lack of authority to issue PSD permits to greenhouse gas-emitting sources and their consequent inability to comply with the CAA's PSD requirements. See Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Proposed Rule, 75 Fed. Reg. 53,892 (Sept. 2, 2010). EPA thus proposed a SIP Call directing these States to amend their SIPs, in order to ensure that their PSD programs provide adequate authority to issue permits covering greenhouse gases. Id. at 53,902-03. At the same time, EPA issued an accompanying Proposed FIP Rule that, once finalized, would provide the authority to issue the requisite permits; that authority could be exercised either by EPA or, preferably, by the States themselves as delegates for EPA. 75 Fed. Reg. 53,883.

In accordance with section 110(k)(5)'s mandate to EPA to set a "reasonable deadline (not to exceed 18 months . . .)" for submission of the SIP revision required

by the SIP Call, the Agency called on the relevant States to submit corrective revisions within 12 months. 75 Fed. Reg. at 53,896. To prevent a gap in the availability of permitting authority while the State prepared such a revision or while the revision awaited approval, however, EPA told covered States that they could choose not to object to a much shorter deadline, as early as December 22, 2010. Id. If the State chose December 22, 2010 as its deadline and did not submit the required revision by that date, EPA would, as authorized by section 7410(c), immediately issue a FIP for the State under which "EPA will be responsible for acting on permit applications for only the GHG portion of the permit, and the State will retain responsibility for the rest of the permit." Id. at 53,890. The FIP would take effect before January 2, 2011, and thereby "fill the gap" to prevent any lapse in PSD permitting for the State in question. Id. at 53,901, 53,904-05.

2. The Final GHG SIP Call

On December 2, 2010, EPA notified States that it had signed the final version of the GHG SIP Call, which is the action challenged here.[4] Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule, 75 Fed. Reg. 77,698 (Dec. 13, 2010). In the final rule, EPA issued findings of substantial inadequacy for the SIPs of thirteen states:

[4] EPA is taking similar steps to ensure that State Title V permitting programs are able to timely permit greenhouse gas sources.

Arizona, Arkansas, California, Connecticut, Florida, Idaho, Kansas, Kentucky, Nebraska, Nevada, Oregon, Texas, and Wyoming. EPA based its substantial inadequacy findings on the above States' inability to permit greenhouse gas-emitting sources, despite the fact that, as of January 2, 2011, such sources are required by the CAA to obtain a PSD permit for any eligible construction or modification project. See 75 Fed. Reg. at 77,705-06 (citing 42 U.S.C. §§ 7410(a)(2)(C), 7410(a)(2)(J), 7471). The Agency included the full, state-by-state analysis of substantial inadequacy in a Supplemental Information Document as part of the rulemaking docket. Doc. ID EPA-HQ-OAR-2010-0107-0129 (available at www.regulations.gov).

EPA also finalized its proposal to set a deadline of 12 months for States to submit the necessary SIP revisions, except where the State informed EPA it would not object to a specified shorter deadline. 75 Fed. Reg. at 77,710. EPA noted that the 12 month deadline was consistent with deadlines set in a prior 1998 SIP call; the Agency's experience regarding the time necessary to accomplish SIP revisions; and the representations of most States subject to the SIP call that they would be able to submit a SIP revision within this timeframe. Id. at 77,710-11. The Agency explained that, "though expedited," these deadlines were reasonable because of the pressing need to minimize any permitting "gaps" when greenhouse gas-emitting sources would be subject to PSD permit requirements but no permitting authority would be available to act on their permit applications, and because the deadlines of less than 12 months were the product of consent by the relevant state. Id. The Agency directed each

State, by its respective deadline, to submit a SIP revision "that applies PSD to GHG [greenhouse gas]-emitting sources." Id. at 77,713.

Seven of the thirteen States elected not to object to EPA's offer of a December 22, 2010 SIP revision deadline and, so long as the SIP Call remains in effect, should have a FIP in place by January 2, 2011. See 75 Fed. Reg. at 77,705, 77,712. Five of the thirteen chose somewhat later dates, but are projected to have completed their SIP revisions either by January 2, 2011 or shortly thereafter and do not expect any sources to seek permits before their SIPs are revised, thus obviating the need for a FIP to ensure the continuance of complete permitting authority. Id. at 77,712-13. Texas, alone among the affected states, did not respond to EPA's request to identify a submittal deadline; thus Texas alone is subject to the default submission deadline of December 1, 2011, over 11 months from now.

D. CAA Section 307(b)(1)

Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), governs judicial review of certain specified EPA actions or "any other final action" taken by EPA under the Act. See generally Harrison v. PPG Industries, 446 U.S. 578 (1980). This provision specifies that a petition for review challenging one of the listed actions, or any "nationally applicable regulations," may be filed "*only* in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607(b)(1) (emphasis added). Petitions for review of final agency action that is "locally or regionally applicable," meanwhile, "may be filed only in the United states Court of Appeals for the

appropriate circuit." Id. However, regardless of whether a petition for review concerns final action that is locally or regionally applicable, it still "may be filed only in the [D.C. Circuit] if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination." Id.

In the GHG SIP Call, EPA expressly notified all interested persons that judicial review under section 307(b)(1) would be available only "by filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit . . . ." 75 Fed. Reg. at 77,719/3. Texas chooses to ignore this notice entirely.

II. Texas's Greenhouse Gas Petitions

On December 15, 2010, Texas filed a petition in this court, seeking review of the GHG SIP Call pursuant to CAA section 307(b)(1), 42 U.S.C. § 7601(b)(1). Texas Pet. for Review at 1. The next day, Texas moved for a stay of the GHG SIP Call pending review of its petition. Texas Mot. for Stay.

ARGUMENT

Section 307(b)(1) of the CAA is unambiguous: Petitioners may seek review of both "nationally applicable regulations" and actions "based on a determination of nationwide scope or effect" *only* in the D.C. Circuit. The vesting of exclusive review of such actions in the D.C. Circuit is designed "to ensure uniformity in decisions concerning issues of more than purely local or regional impact." Natural Res. Def. Council, Inc. v. EPA, 512 F.2d 1351, 1357 (D.C. Cir. 1975). Moreover, the proper

application of section 307(b)(1) in this case is straightforward, given that Congress's adoption of section 307(b)(1) was explicitly premised on recommendations stating that SIP-related agency actions implicating questions of national import, or involving SIPs of multiple states, should be challenged in the D.C. Circuit. H. Rep. No. 95-294 at 323-24, 1977 U.S.C.C.A.N. 1077, 1402-03 (1977) (citing 41 Fed. Reg. 56,767-69 (Dec. 30, 1976)). The GHG SIP Call meets both of these criteria.

The GHG SIP Call is centered on the interpretation of nationally applicable CAA provisions and EPA's implementing regulations. It applies to multiple States (none of which, other than Texas, are located within this Circuit); Texas's own stay motion, if granted, would immediately and adversely impact the permitting authority of several other States included in the SIP call. Moreover, Texas expressly challenges the GHG SIP Call based on disputes with EPA's broad regulatory approach, not based on EPA's application of that approach to Petitioners' purely regional circumstances. The SIP Call is therefore a nationally applicable action, and Texas is barred from challenging it in this Court.[5] Texas's petition should be dismissed, or in the alternative, the Court should transfer the petition to the D.C. Circuit.[6]

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[5] Petitioners may quibble with whether EPA's statement regarding exclusivity of judicial review of the GHG SIP Call should be filed in the D.C. Circuit constitutes a sufficient "determination of nationwide scope and effect" for purposes of that prong of the section 307(b)(1) analysis. See 42 U.S.C. § 7607(b)(1). Although EPA does not concede any inadequacy in its determination, the Agency principally contends that the GHG SIP Call is an action of "national applicability" rather than "based on a determination of nationwide scope or effect," and thus is subject to exclusive review

I. Section 307(b)(1) Was Expressly Intended to Ensure Uniform, D.C. Circuit Review of Precisely This Type of Agency Action.

The legislative history of section 307(b)(1) speaks directly to the issue of SIP-related determinations that also implicate national issues. Congress's determination regarding which courts should review national versus local regulations rested on recommendations from the Administrative Conference of the United States ("ACUS") that recognized the possibility that even "approval and promulgation of State implementation plans . . . sometimes involve generic determinations of nationwide scope or effect." 41 Fed. Reg. at 56,768-69. Explicitly approving this particular discussion (contained in a separate statement accompanying the ACUS recommendations), Congress endorsed the view that such hybrid actions are

> virtually identical to promulgation of 'national standards',[FN] as to which [ACUS's] recommendation A.1. expresses a preference for review in the D.C. Circuit. [FN: "As with national standards, such actions typically involve *establishment or application of uniform principles for all States, are taken on a single administrative record, and do not involve factual questions unique to particular geographical areas*."]

41 Fed. Reg. at 56,769 (emphasis added) (cited in H. Rep. No. 95-294 at 323-24, 1977 U.S.C.C.A.N. 1077, 1402-03 (1977)).

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within the D.C. Circuit under the first prong of section 307(b). Consequently, no such determination by the Administrator was necessary in this case.

[6] There is as of yet no definitive ruling on whether section 307(b)(1) represents a jurisdictional requirement or simply a venue provision. Compare, e.g., Monongahela Power Co. v. Reilly, 980 F.2d 272, 275 (4th Cir. 1998) (jurisdictional) with Texas Mun. Power Agency v. EPA, 89 F.3d 858, 867 (D.C. Cir. 1996) (per curiam) (venue). That distinction is irrelevant to the outcome of this Motion.

The GHG SIP Call fits this description to a tee. First, it involves "establishment or application of uniform principles for all states": For one thing, EPA solicited comment on the same, uniform question with respect to each and every SIP program – whether that program was consistent with the requirements of the CAA PSD provisions regarding greenhouse gas-emitting facilities – before deciding that only the thirteen States identified above had substantially inadequate SIPs that would require amendment to be consistent with national PSD requirements. See 75 Fed. Reg. at 53,892 (soliciting comment on every approved SIP PSD program as to whether those programs "do or do not apply to GHG-emitting sources"); 75 Fed. Reg. 31,526/1 (June 3, 2010) (seeking input from all states regarding their authority to apply the PSD provisions to greenhouse gases under the terms of their current SIPs).

Additionally and most importantly, the SIP Call itself subjects each State to the same revision requirements, because EPA's goal in proposing the GHG SIP Call was specifically to ensure that all States are in alignment, by January 2, 2011, with *national* PSD requirements for regulation of greenhouse gases:

> Beginning on January 2, 2011, certain stationary sources that construct or undertake modifications will become subject to the CAA requirement to obtain a PSD permit for their GHG emissions. This is because of . . . [certain nationally applicable] statutory and EPA regulatory requirements . . . . This rulemaking concerns whether [ ] approved SIP PSD programs include GHG-emitting sources and, for those that do not, the steps that EPA will take to assure that a PSD permit program that includes GHGs is in place.

75 Fed. Reg. at 53,898.

Second, the SIP Call was also taken on a "single administrative record" and "do[es] not involve factual questions unique to particular geographical areas": EPA's analysis in the final GHG SIP Call, including the substantial inadequacy finding and setting of a reasonable deadline for revision, was the same for each of the thirteen States. For the most part, the Agency's description of its "final action" and the comments regarding that action concerned only the general application of the CAA to greenhouse gas regulation, without any regard to issues of local or regional concern.[7] 75 Fed. Reg. at 77,705-17. The (relatively minimal) discussion of the States' particular SIPs was collateral enough that it is contained only in a Supplemental Information Document lodged in the rulemaking docket but not published in the Federal Register.

[7] Notably, challenges to the last major multistate SIP call conducted by EPA were heard by the D.C. Circuit as involving questions of national applicability. In 1998, EPA undertook the "NOx SIP call" in order to deal with a nationwide air pollution issue, the interstate transport of ozone. Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed.Reg. 57,356 (Oct. 27, 1998). The rule required several "upwind" States from which ozone pollution was travelling to "downwind" States to revise their SIPs to impose additional controls on NOx emissions. Sees North Carolina v. EPA, 587 F.3d 422, 424-25 (D.C. Cir. 2009). The petitions challenging that rule were consolidated and reviewed by the D.C. Circuit in Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000). One parallel petition came before the Fourth Circuit, but it was transferred to the D.C. Circuit based upon the application of section 307(b)(1). West Virginia Chamber of Commerce v. Browner, 166 F.3d 336 (4th Cir. 1998) (unpublished table decision). Despite the petitioners' arguments that the SIP call was "regional or local because it is nothing more than numerous separate EPA actions on state-specific implementation plans," the Fourth Circuit panel recognized that "the nationwide scope and interdependent nature of the problem, the large number of states, spanning most of the country, being regulated, the common core of knowledge and analysis involved in formulating the rule, and the common legal interpretation advanced of section 110 of the Clean Air Act, all combine to make this a nationally applicable rule." Id. at *5-*7.

See Doc. ID EPA-HQ-OAR-2010-0107-0129. Furthermore, the fact that EPA considered the particular facts and circumstances of each State does not diminish the nationwide character of the rule, which relies on an analytical approach that EPA applied consistently across the country. Cf. Puerto Rican Cement Co. v. EPA, 889 F.2d 292, 300 (1st Cir. 1989) (finding challenged regulations to be "national" where they applied to any SIP of a certain type). This is especially true given that Texas does not challenge EPA's analysis of its SIP.

Finally, the GHG SIP Call Rule literally applies across the nation, to States ranging from California to Connecticut, rather than to any particular region. See New York v. EPA, 133 F.3d 987, 990 (7th Cir. 1998) ("Determining whether an action by the EPA is regional or local on the one hand or national on the other should depend on the location of the persons or enterprises that the action regulates . . . .").

II. Texas's Arguments Regarding the Validity of the Rule Simply Echo Those It Made Before the D.C. Circuit Regarding Other Nationally Applicable Actions Pertaining to Greenhouse Gas Regulation.

While the GHG SIP Call must, by its very nature, contain at least some local aspects, Texas's statements in its petition and its Motion for Stay demonstrate that it is interested in challenging only EPA's *national* regulatory initiative regulating greenhouse gas emissions. Texas itself freely lumps the GHG SIP Call together with EPA's other greenhouse gas regulations in its critique of the Agency's actions. See, e.g., Texas Mot. for Stay at 13-14 (citing "dubious legality" of Endangerment Finding, Vehicle Rule, Timing Decision, and Tailoring Rule as bolstering Texas's merits

arguments against the GHG SIP Call) and 15-16 (attacking EPA's application of PSD to greenhouse gases, despite acknowledging that "[t]hat issue is properly pending in the D.C. Circuit," as basis for questioning the Agency's substantial inadequacy determination). Meanwhile, Petitioners' stay motion contains not a single reference to EPA's individual discussion of Texas's SIP in the Supplemental Document to the GHG SIP Call.

Texas asserts as the grounds for its petition in its stay motion that EPA violated 42 U.S.C. § 7410(i) by undertaking a plan revision through the GHG SIP Call; that the GHG SIP Call is contrary to the CAA's architecture of cooperative federalism as identified in the congressional findings of 42 U.S.C. § 7401(a)(3); that the SIP call exceeds EPA's authority under section 110(k)(5) by subjecting Texas to requirements that were not in place when it developed and submitted its SIP to EPA for approval; that the GHG SIP Call "rests on" previously promulgated, unlawful regulations currently the subject of challenges in the D.C. Circuit; and that EPA's basis for its finding of substantial inadequacy is invalid because the CAA does not require regulation of greenhouse gases under the PSD program. Texas Mot. for Stay at 11-20. There is one thing that these myriad arguments all have in common: they relate only to EPA's general, nationwide interpretation of the CAA and EPA's implementing regulations. Indeed, Texas seeks an undifferentiated stay of the GHG SIP Call's application to all States, rather than contesting the specific application of the rule to Texas and its SIP. Compare Madison Gas & Elec. Co. v. EPA, 4 F.3d 529,

530 (7th Cir. 1993) (allowing challenge to EPA's acid rain regulations to go forward outside the D.C. Circuit, where petitioner specifically challenged the application of a national program "based upon an entirely local factor" that "if successful will have no impact on the overall program").

Frankly, the name of any of the thirteen states subject to the GHG SIP Call could be substituted for that of Texas in Petitioners' Motion for Stay without requiring any change in the substance of their arguments. That prospect adds to the problematic nature of considering this to be a mere "locally or regionally applicable" action. If Texas may assert these arguments here, California may do so in the Ninth Circuit, and Connecticut in the Second Circuit, and son on, since the grounds for the petition do not depend in the slightest on Texas's local characteristics; yet, as described above, section 307(b) is designed precisely to forestall the potential for such scattered challenges to nationally applicable actions in different circuits.

IV. Texas Presents the Same Arguments It Made Before the D.C. Circuit in Its Challenges to Nationwide Greenhouse Gas Rules.

Several of the above arguments are strikingly similar to those presented by Texas to the D.C. Circuit in its other petitions for review of the various nationally applicable greenhouse gas rules described above. In the D.C. Circuit cases, Texas filed two stay motions, one seeking a stay of the Endangerment Finding, the Vehicle Rule, and the Timing Decision ("the EF Stay Motion") (No. 10-1041, Doc. 1266089), and the other seeking to stay the Tailoring Rule ("the TR Stay Motion") (No. 10-1222,

Doc. 1266086). A few examples demonstrate the parallels between the legal arguments in those motions and those that Texas seeks to press before this Court:

- In the TR Stay Motion at 13, Texas argued that the Tailoring Rule violated the Clean Air Act because it would accomplish a SIP revision without abiding by the procedures set forth in section 110(i); compare Texas Mot. for Stay at 11.

- In the TR Stay Motion at 14, Texas attacked the Tailoring Rule for failing to give States three years to revise their SIPs in accordance with 40 C.F.R. 51.166(a)(6); compare Texas Mot. for Stay at 12.

- Texas unabashedly folds its arguments regarding the lawfulness of the Endangerment Finding, Vehicle Rule, Timing Decision, and Tailoring Rule into its motion for stay in this case; of the six pages discussing the merits of Petitioners' arguments, almost four relate only to those rules rather than the GHG SIP Call.

For Texas to pursue these arguments, which relate only to national CAA issues, for a second time in this Court would contravene the core purpose of section 307(b)(1): creating a single forum where all such national issues can be decided uniformly. Furthermore, such a result would sanction Petitioners' attempt to circumvent the *res judicata* effect of the denial of their stay motions in the pending D.C. Circuit petitions.

CONCLUSION

For the foregoing reasons, the Court should either dismiss Texas's petition without prejudice to refiling in the proper forum or, alternatively, transfer the petition to the D.C. Circuit. In either case, the Court should not consider Texas's motion for stay, which implicates national regulatory questions that are solely within the purview of the D.C. Circuit and over which this Court lacks jurisdiction.

Respectfully submitted,

DATED: December 17, 2010

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Respondent's Motion to Dismiss, or in the Alternative, to Transfer to the D.C. Circuit was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record, who are required to have registered with the Court's CM/ECF system.

Date: December 17, 2010

/s/ Thomas A. Lorenzen
Thomas A. Lorenzen
Counsel for Respondent EPA

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1322 **September Term 2010**

EPA-74FR66496
EPA-75FR49556

Filed On: December 10, 2010

Coalition for Responsible Regulation, Inc., et al.,

Petitioners

v.

Environmental Protection Agency,

Respondent

Consolidated with 10-1024, 10-1025, 10-1026, 10-1030, 10-1035, 10-1036, 10-1037, 10-1038, 10-1039, 10-1040, 10-1041, 10-1042, 10-1044, 10-1045, 10-1046, 10-1234, 10-1235, 10-1239, 10-1245, 10-1281, 10-1310, 10-1318, 10-1319, 10-1320, 10-1321

No. 10-1073

Coalition for Responsible Regulation, Inc., et al.,

Petitioners

v.

Environmental Protection Agency,

Respondent

Consolidated with 10-1083, 10-1099, 10-1109, 10-1110, 10-1114, 10-1115, 10-1118, 10-1119, 10-1120, 10-1122, 10-1123, 10-1124, 10-1125, 10-1126, 10-1127, 10-1128, 10-1129, 10-1131, 10-1132, 10-1145, 10-1147, 10-1148, 10-1199, 10-1200, 10-1201, 10-1202, 10-1203, 10-1205, 10-1206, 10-1207, 10-1208, 10-1209, 10-1210, 10-1211, 10-1212, 10-1213, 10-1215, 10-1216, 10-1218, 10-1219, 10-1220, 10-1221, 10-1222

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1322 **September Term 2010**

No. 10-1092

Coalition for Responsible Regulation, Inc., et al.,

Petitioners

v.

Environmental Protection Agency,

Respondent

Consolidated with 10-1094, 10-1134, 10-1143, 10-1144, 10-1152, 10-1156, 10-1158, 10-1159, 10-1160, 10-1161, 10-1162, 10-1163, 10-1164, 10-1166, 10-1172, 10-1182

BEFORE: Ginsburg, Tatel, and Brown, Circuit Judges

ORDER

Upon consideration of the motions to stay, the response thereto, and the replies; the motion for leave to file a response, the opposition thereto, and the reply; the motion for leave to file declarations under seal; the motion to file a sur-reply, the response thereto, and the reply; the motion for coordination of related cases, the responses thereto, and the reply; and the Rule 28(j) letters and responses thereto, it is

ORDERED that the motion for leave to file a response be granted. The Clerk is directed to file the lodged response of the Chamber of Commerce of the United States of America. It is

FURTHER ORDERED that the motion to file declarations under seal be granted. It is

FURTHER ORDERED that the motion to file a sur-reply be granted. The Clerk is directed to file the lodged sur-reply. It is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1322 **September Term 2010**

FURTHER ORDERED that the motions to stay be denied. Petitioners have not satisfied the stringent standards required for a stay pending court review. See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Circuit Handbook of Practice and Internal Procedures 32 (2010). Specifically, with regard to each of the challenged rules, petitioners have not shown that the harms they allege are "certain," rather than speculative, or that the "alleged harm[s] will directly result from the action[s] which the movant[s] seeks to enjoin." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). It is

FURTHER ORDERED that these cases be scheduled for oral argument on the same day before the same panel.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk