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.	)	

PETITIONER-INTERVENORS TEXAS ASSOCIATION OF BUSINESS ET AL.'S RESPONSE IN OPPOSITION TO EPA'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TRANSFER TO THE D.C. CIRCUIT

April 18, 2016

Petitioner-Intervenors[1] respectfully submit this response in opposition to the Environmental Protection Agency's ("EPA's) Motion to Dismiss or, in the Alternative, Transfer to the D.C. Circuit ("EPA Motion"), Doc. No. 513434396. These petitions for review involve challenges to an EPA rule that partially disapproved of regional haze plans of Texas and Oklahoma and imposed costly emission control requirements on fourteen electricity generating units in Texas. 81 Fed. Reg. 296 (Jan. 5, 2016). The rule imposes no obligations on any entity located outside of Texas, and Texas specifically and disproportionately will bear the brunt of the extraordinary harms associated with implementation of the rule. Because there is no question that this rule is locally or regionally applicable, the plain language of the Clean Air Act ("CAA") dictates that it should be litigated in the Fifth Circuit.

[1] Petitioner-Intervenors are the Texas Association of Business, Bay City Chamber of Commerce & Agriculture, Baytown Chamber of Commerce, Cedar Park Chamber of Commerce, Clear Lake Area Chamber of Commerce, Corpus Christi Chamber of Commerce, Frisco Chamber of Commerce, Grapevine Chamber of Commerce, Greater Angleton Chamber of Commerce, Greater Beaumont Chamber of Commerce, Greater Hewitt Chamber of Commerce, Greater Irving-Las Colinas Chamber of Commerce, Greater Waco Chamber of Commerce, Henderson Area Chamber of Commerce, Lake Houston Area Chamber of Commerce, Lubbock Chamber of Commerce, Mineral Wells Chamber of Commerce, Port Arthur Chamber of Commerce, Rockwall Area Chamber of Commerce, San Angelo Chamber of Commerce, South Padre Island Chamber of Commerce, Texas City-La Marque Chamber of Commerce, Tyler Area Chamber of Commerce, Victoria Chamber of Commerce, and the Chamber of Commerce of the United States of America.

I. Petitioner-Intervenors Have An Interest In Ensuring That Regulations That Disproportionately Affect Texas Are Litigated In The Fifth Circuit

Petitioner-Intervenors and their members have a strong interest in ensuring that the Fifth Circuit is an available forum when EPA enacts regulations that are focused on and disproportionately affect Texas entities. Section 307(b) of the CAA states that petitions for review of "nationally applicable regulations … may be filed only in the United States Court of Appeals for the District of Columbia," whereas petitions for review of EPA actions that are "locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b). Petitioner-Intervenors represent a diverse group of large and small businesses across all industrial sectors that collectively form the backbone of Texas' economy. These local businesses are the voice of how rules impact Texas businesses and are committed to promoting the economic health of Texas for themselves, their employees, and for all Texans. To do so effectively, it is imperative that, whenever possible, legal disputes are resolved locally by courts who are familiar with Texas and the unique issues that the State faces.

Here, the rule's impacts will directly and disproportionately harm the State of Texas, far and apart from any other State in the region or nationally. The rule sets new reasonable progress goals specifically for Texas and directs fourteen generating units in Texas to install or upgrade expensive emission controls. These generating units are primarily located within the Electric Reliability Council of Texas ("ERCOT")

grid, which operates a separate and distinct electricity grid located entirely within the State of Texas. Thus, the vast majority of the downstream impacts on electricity consumers will be felt by Texas consumers. No entity outside of Texas is regulated by EPA's rule.[2] As a result, the rule is a quintessentially locally applicable rule that, under the CAA, should be heard in the Fifth Circuit.

II. This Court Has The Authority To Determine Whether Venue Is Appropriate In The Fifth Circuit

Despite the fact that Section 307(b) of the CAA specifically authorizes this Court to hear petitions for review in cases that disproportionately affect Texas, EPA asserts that it has exclusive and unreviewable authority to direct venue to the D.C. Circuit in CAA cases. EPA cannot usurp this Court's authority to decide whether it is the appropriate venue for reviewing EPA regulations.[3]

Specifically, EPA asserts that its determination that the rule is of nationwide scope or effect "is committed to agency discretion by law" and cannot be reviewed by any court. EPA Motion at 15. If EPA were correct, there would be no check on

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[2] Although EPA disapproved of Oklahoma's regional haze plan based on a finding that Oklahoma and Texas failed to adequately consult about their plans, 79 Fed. Reg. 74,818, 74,823 (Dec. 16, 2014), EPA did not impose any emission reduction requirements on Oklahoma sources.

[3] Contrary to EPA's assertions, EPA Motion at 13, the portion of Section 307(b) of the CAA invoked by EPA here relates to venue only and is not jurisdictional. *See Dalton Trucking, Inc.*, 808 F.3d 875, 879 (D.C. Cir. 2015) ("Lest there be any confusion going forward, we reiterate what the Supreme Court made clear thirty-five years ago: Section 307(b)(1) is a 'conferral of jurisdiction upon the courts of appeals.'" (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980))).

EPA's ability to forum shop by deciding whether to make a determination of nationwide scope or effect. Neither the CAA nor well-established principles of judicial review suggests that EPA should have such unbridled power to dictate to courts whether they can hear a case.

EPA cannot overcome the presumption that all final agency action—including a determination of nationwide scope or effect—is reviewable by the courts. *See Lincoln v. Vigil*, 508 U.S. 182, 190 (1993). Nothing in the CAA suggests that Congress intended to insulate such determinations from judicial review. *See Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (holding that an action is committed to agency discretion "when Congress has expressed an intent to preclude judicial review"). Thus, even if the statute were silent with respect to judicial review, as EPA suggests, EPA Motion at 15, this Court would have the authority to determine venue.

Congress, however, was not silent. Section 307(b) requires both a "determination of nationwide scope or effect" and a published EPA finding "based on such a determination." 42 U.S.C. § 7607(b). The only reasonable interpretation of this provision is that locally or regionally applicable rules, such as the rule at issue here, may be reviewed in the D.C. Circuit only if there is a *judicial* determination of nationwide scope or effect and a published EPA finding to the same effect. In sum, there is no reason in the text of the CAA or otherwise to suggest that EPA can eliminate the Court's role from this process and determine venue on its own.

III. EPA's Regional Haze Plan Is A Locally Applicable Rule That Must Be Litigated in the Fifth Circuit

As explained above, this case involves a locally applicable rule that partially disapproved regional haze plans in two adjoining States and imposes emission control requirements on generating units in a single State. EPA has no basis for asserting that the rule has a nationwide scope or effect when virtually all of the impacts of the rule—including downstream effects on Petitioner-Intervenors' members—will occur in Texas.

Indeed, EPA's attempts to argue that the rule has nationwide scope and effect do not withstand scrutiny and suggest that its findings of "nationwide scope and effect" were made to prevent review by this Court. *See* EPA Motion at 18-20. The fact that the rule partially disapproves two regional haze plans from States located in two different circuits does not make EPA's local action one that has "nationwide" effect. Two States (even located in two different circuits) do not comprise the nation. At most, such a rule would be *regionally* applicable and still subject to review in the Fifth Circuit. *See* 42 U.S.C. § 7607(b). In the past, EPA has recognized this and has declined to make a finding of nationwide scope or effect in prior regional haze rulemakings. 78 Fed. Reg. 8706, 8733 (Feb. 6. 2013) (stating that petitions for judicial review of rule establishing federal regional haze plans for Michigan (Sixth Circuit) and Minnesota (Eighth Circuit) "must be filed in the United States Court of Appeals for the appropriate circuit …"). EPA fails to offer any reasoned explanation for adopting

a different approach here, which is an independent basis for rejecting its determination. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009) ("Reasoned decision making … necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent.").

EPA's alternative contention that the rule has nationwide scope and effect because it will have some precedential value, *see* EPA Motion at 19-20, proves too much. Virtually every EPA rulemaking under the CAA involves some interpretation or clarification of the statute or EPA's existing regulations that has the potential to create precedent for future rulemakings. If that were sufficient to give a rule nationwide scope or effect, no EPA rulemaking could be reviewed outside of the D.C. Circuit. Thus, both EPA and the courts have recognized that the potential precedential effect of an EPA action cannot alone support a finding of "nationwide scope or effect." *See, e.g.*, *Am. Road & Transp. Builders Ass'n v. EPA,* 705 F.3d 453, 456 (D.C. Cir. 2013); Resp't Mot. to Dismiss, *Am. Road & Transp. Builders Ass'n v. EPA*, No. 11-1256, at 20 (D.C. Cir. Sept. 8, 2011).

For the foregoing reasons, Petitioner-Intervenors respectfully request that the Court deny EPA's motion and proceed to review the merits of the petitions for review.

Dated: April 18, 2016

Respectfully submitted,

/s/ C. Frederick Beckner III
Roger R. Martella, Jr.
C. Frederick Beckner III
Joel F. Visser
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner-Intervenors

Steven P. Lehotsky
Sheldon Gilbert
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Petitioner-Intervenor the Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

I hereby certify that the copies of the foregoing Petitioner-Intervenors' Response in Opposition to EPA's Motion to Dismiss or, in the Alternative, Transfer to the D.C. Circuit were served, this 18th day of April, 2016, through CM/ECF on all registered counsel.

/s/ C. Frederick Beckner III