Nos. 16-9542, 16-9543, 16-9545 (Consolidated with 16-9541)

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 16-9541
STATE OF UTAH, Petitioner,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.

No. 16-9542
PACIFICORP, Petitioner,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.

No. 16-9543
UTAH ASSOCIATED MUNICIPAL POWER SYSTEM, Petitioner,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.

No. 16-9545
DESERET GENERATION & TRANSMISSION CO-OPERATIVE, Petitioner,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS AND VACATUR OF FINAL EPA RULE

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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 in several end-of-administration rulemakings, EPA has sought to impose massive expenditures and economic harm on

* Pursuant to Federal Rule of Appellate Procedure 29(a), the Chamber has filed a motion for leave of Court to file this *amicus curiae* brief. The Chamber further certifies that all parties have expressly consented to the filing of the Chamber's *amicus curiae* brief, except for intervenors National Parks Conservation Association, Sierra Club, Utah Physicians for a Healthy Environment, and Heal Utah, which take no position on the Chamber's motion for leave. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), 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.

business in Utah and other States, 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 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 on business and economic development of EPA's 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 and remanded that rule to EPA for reconsideration, based on many of the same errors that exist in the rule here and the economic harm that rule would cause. *See Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016).

ARGUMENT IN SUPPORT OF PETITIONERS

The Chamber respectfully files this *amicus curiae* brief in support of Petitioners and their request that the Court vacate EPA's final rule insofar as it disapproves Utah's Best Available Retrofit Technology ("BART") Alternative and issues a Federal Implementation Plan ("FIP") in its place.[1] The economic impact of EPA's final rule in this case is enormous—and drastically out of proportion to the "visibility" benefits that EPA claims will result from the rule. In addition to ignoring costs in contravention of the statute and regulations, EPA's action in this rulemaking creates needless uncertainty for business and discourages pro-active business-initiated solutions to environmental issues. For these reasons, and the many legal flaws in the rule as demonstrated by Petitioners, the Court should vacate EPA's disapproval and FIP in the final rule.

EPA's rule here is one of several end-of-administration actions by EPA that departs from the traditional approach to regional haze taken by EPA in prior actions, 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), EPA's disregard for principles of federalism and state flexibility, and the often new and novel positions taken by EPA, EPA's recent rules are coming under substantial scrutiny and are being challenged in several venues. Indeed, in a case involving similar

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

issues as presented here, 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 rule here and remanding that rule to EPA for reconsideration in light of those legal shortcomings. *See Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016) (staying and tolling deadlines for installation of controls costing an estimated $2 billion); *see also* Order, *Texas v. EPA*, No. 16-60118 (5th Cir. Mar. 22, 2017) (continuing stay and remanding to EPA for reconsideration in light of Petitioners' probability of success in showing that the rule exceeded EPA's authority). Here, EPA's disapproval of Utah's BART Alternative and EPA's FIP are unlawful and should be vacated by the Court.

I. EPA's Refusal to Consider Costs in Evaluating the State of Utah's Alternative Is Contrary to the Statute and Well-Established Precedent

It is undisputed that EPA's rule here involves massive costs but very small so-called "visibility benefits"—so small that the human eye could not detect them. 81 Fed. Reg. 2,004, 2,023 (Jan 14, 2016) (average comparative benefit of 0.14 deciviews between Alternative and FIP). Nevertheless, EPA steadfastly refused to give "any weight" to "cost considerations" in its review and evaluation of Utah's BART Alternative, *id.* at 43,901, which substantially improves visibility at much lower costs. EPA's refusal is unlawful and constitutes grounds for finding that portion of the Final Rule to be invalid. The Regional Haze provisions of the Clean Air Act and the implementing regulations specifically require consideration of costs. Indeed, the very

design of the Regional Haze Program by Congress is built around the principle of reducing costs by achieving the statutory objective of improved visibility over decades, not a few years, as EPA contends. For at least three specific reasons, EPA's refusal to consider costs is unlawful.

First, it is a bedrock principle of administrative law that Federal agencies must engage in "reasoned decisionmaking," *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998), and this includes the obligation to conduct a reasonable assessment of costs versus benefits. "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.* The Supreme Court has repeatedly confirmed the principle that EPA may not lawfully impose costs without considering 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.").

Here, EPA's action fails that test. EPA refused to reasonably consider costs, and looked instead to *only* the visibility benefits of EPA's FIP. 81 Fed. Reg. at 43,897 (explaining that EPA "did not give [cost] information any weight in [its] evaluation" of the State's submittal and refusing to consider any "metrics [that] do not evaluate *visibility* benefits" (emphasis in original)). For this reason alone, EPA's action is unlawful. Moreover, if EPA had engaged in the required analysis of the BART Alternative, it would have been apparent that the FIP's required pollution controls were not justified or reasonable, and, for that reason too, the rule is unlawful. It is contrary to any notion of reasoned decisionmaking to conclude that over $500 million in costs ($700 million by industry's estimate) are reasonable to obtain, by EPA's best estimate, only 0.14 deciview in claimed comparative visibility benefit over Utah's BART Alternative. *Id.* at 43,898-99. The human eye can only detect changes in visibility of at least 1.0 deciview.[2] In contrast, the costs are massive[3] and, for at least one of the Petitioners, potentially debilitating.[4] It is irrational to require hundreds of millions of dollars in expenditures to achieve a goal that no person will be able to

[2] *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.").

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

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

detect, and EPA's disapproval and FIP here should be found unlawful for that reason. *Michigan*, 135 S. Ct. at 2706-07; *Entergy Corp.*, 556 U.S. at 225-26.

Second, in the present case, the requirement for a rational cost-benefit assessment is not only a baseline requirement of reasoned agency decisionmaking, it is hard-wired into the applicable statute and regulations. The State of Utah is expressly authorized to implement an alternative to BART, so long as its alternative would achieve "greater reasonable progress" than BART. 40 C.F.R. § 51.308(e)(2)(i)(E). In the Final Rule, EPA takes the unsupportable position that this provision *excludes* consideration of costs and requires that EPA evaluate *only* visibility benefits. 81 Fed. Reg. at 43,897. EPA's reading is in direct conflict with the statute. The statute directs that four factors be considered by the State in determining "reasonable progress." 42 U.S.C. § 7491(g)(1). All of those factors relate either directly or indirectly to some form of costs. *Id.* ("[I]n determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements[.]"). Indeed, in other regional haze rulemakings, EPA has conceded that "visibility is *not* one of the four mandatory factors explicitly listed for consideration in [42 U.S.C. § 7491(g)(1)]" used to determine "reasonable progress." 81 Fed. Reg. 296, 309 (Jan. 5, 2016) (emphasis added). Yet, here, EPA would make it the only factor. EPA's position is both contrary to the statutory language and fails to consider the factors that Congress

intended, and is thus unlawful. *Motor Vechicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Third, a consideration of costs is innately part of the regulatory program that Congress designed to tackle the complex societal issue of regional haze. "Regional haze" is the "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. at 30,249 (emphasis added). Thus, regional haze is not caused by one source or even one industry, nor can it be solved by one type of equipment or technology. Further, much of regional haze is caused by natural sources like fires and dust storms, not manmade emissions or human activities. In recognition of this, Congress did not mandate that industrial facilities reduce their contributions to regional haze all at once and without regard to cost, but instead set a long-term "national goal" of remedying and preventing regional haze. 42 U.S.C. § 7491(a)(1). EPA was directed to study "available methods for implementing the national goal," *id.* § 7491(a)(3), after which EPA issued regulations that established 2064 as the target date for achieving "natural" visibility conditions at all Class I areas. Indeed, EPA's regulations allow for longer periods—sometimes much longer periods—for States to reduce their haze contribution.[5]

[5] For example, in 2011, EPA approved California's regional haze plan and gave California until the year 2307 to achieve "natural conditions" at Desolation

This deliberate and incremental approach was designed to *reduce* the costs of eliminating regional haze. The intent is to make "*reasonable* progress" toward improved visibility—not through improvement for improvement's sake at whatever the cost—but through "cost-effective control measures," reliance on "other air quality programs," "innovations in control technologies" that produce reductions without added expense, and the periodic, natural phase-out of older sources over time. 64 Fed. Reg. 35,714, 35,732 (July 1, 1999). EPA's action on Utah's BART Alternative takes the opposite approach. EPA's rejection of Utah's BART Alternative—based on EPA's dismissal as immaterial any of the "metrics [that] do not evaluate *visibility* benefits," 81 Fed. Reg. at 43,897 (emphasis in original)—is the antithesis of the incremental, cost-sensitive approach designed by Congress and reflected in the regional haze regulations. For this reason, too, EPA's disapproval of Utah's alternative is unlawful.

II. EPA's Rejection of Utah's Alternative Creates Needless Uncertainty for States and the Business Community and Discourages Efficient Solutions

The Clean Air Act, and the Regional Haze Program in particular, are specifically designed to empower States to develop efficient and tailored solutions to achieving the goals of the statute. The Clean Air Act "establishes a comprehensive program for controlling and improving the nation's air quality through state and

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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).

federal regulation." *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 821–22 (5th Cir. 2003). Congress chose a "cooperative federalism" structure to implement the statute, dividing authority between the federal government and the States. *Oklahoma v. EPA*, 723 F.3d 1201, 1204 (10th Cir. 2013); *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."). Within this division, "air pollution prevention . . . is the primary responsibility of States and local governments." 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[.]"). "This division of responsibility between the states and the federal government reflects the balance of state and federal rights and responsibilities characteristic of our federal system of government." *Texas*, 829 F.3d at 411 (internal quotations omitted).

In this instance, that cooperative federalism structure is reflected in the regulations that provide the State of Utah with the opportunity and option to develop an "alternative" compliance solution to the requirement that individual eligible sources install costly BART controls. *See* 40 C.F.R. § 51.308(e)(2); *see also Yazzie v. EPA*, No. 14-73100, 2017 WL 1046117, at *3 (9th Cir. Mar. 20, 2017) ("A State can bypass BART with a 'better than BART' alternative."). The regulations specifically provide that "a State *may opt*" to select a BART alternative so long as the "alternative

measure will achieve greater reasonable progress than would have resulted from the installation and operation of BART[.]" 40 C.F.R. § 51.308(e)(2)(i) (emphasis added). In making a demonstration of reasonable progress, the regulations "provide[] States *flexibility* in determining the amount of progress that is 'reasonable' in light of the statutory factors, and also provides flexibility to determine the best mix of strategies to meet the reasonable progress goal they select." 64 Fed. Reg. at 35,736 (emphasis added). Thus, given the flexibility and choice that is specifically delegated to the states, EPA's review is correspondingly limited.

Here, the State of Utah plainly developed its alternative in accordance with applicable CAA requirements. The State crafted an alternative cost-effective solution to achieving emission reductions through a mix of strategies, including reductions from a non-BART unit and the permanent closure of two other non-BART units, to achieve greater overall progress than BART alone. Doc. 01019777502 at 3, 11. This was Utah's prerogative under the statute and the regulations. *See Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) ("[T]he State is at liberty to adopt *whatever mix* of emission limitations it deems best suited to its particular situation." (emphasis added)). And in exercising this flexibility, the State achieved early emission reductions at lower costs, consistent with the goals of the Regional Haze Program and Congress's national goal—a result this Court has previously endorsed. *See WildEarth Guardians v. EPA*, 770 F.3d 919, 927 (10th Cir. 2014) (upholding EPA's approval of BART alternative that "encourag[ed] early cuts in emissions").

But instead of evaluating the State's alternative against the statutory requirements, as the law requires, EPA would deny Utah this flexibility, impose a one-size-fits-all approach, and create disincentives to early reductions. By ignoring the authority granted to the State, EPA assumed the State's role and "assessed the relative strengths and weaknesses of each of the State's metrics to determine whether it was reasonable[.]" 81 Fed. Reg. 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.[6] It is not EPA's role under the statutory design to second-guess the State's reasoned analysis, just so it can impose the most costly and stringent controls possible. *See North Dakota*, 730 F.3d at 768 ("[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 selection of emission controls complies with the statutory requirement to achieve *reasonable* progress and, if so, 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, EPA's disapproval and FIP are unlawful. *See Texas*, 829 F.3d at 426-27 (staying EPA Regional Haze rule for Texas and Oklahoma because EPA usurped state authority to assess the emission controls necessary for reasonable progress).

[6] Thus, EPA's action here does not turn on whether the State of Utah complied with EPA's BART guidelines. *Cf. 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).

CONCLUSION

For these reasons, the Court should hold unlawful and vacate those portions of the Final Rule that disapprove Utah's BART Alternative and impose a BART FIP.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel states that this brief complies with Fed. R. App. P. 29(a)(5) because it contains 3,079 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) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Garamond font.

Dated: March 24, 2017

s/ P. Stephen Gidiere III
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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made pursuant to 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

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Dated: March 24, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2017, 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: March 24, 2017

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