IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL PARKS CONSERVATION ASSOCIATION, MONTANA ENVIRONMENTAL INFORMATION CENTER, GRAND CANYON TRUST, SAN JUAN CITIZENS ALLIANCE, OUR CHILDREN'S EARTH FOUNDATION, PLAINS JUSTICE, POWDER RIVER BASIN RESOURCE COUNCIL, SIERRA CLUB, AND ENVIRONMENTAL DEFENSE FUND	)	CIVIL ACTION NO. 1: 11-cv-01548 (ABJ)
Plaintiffs,	)	
v.	)	
SCOTT PRUITT, in his official capacity as Administrator United States Environmental Protection Agency,	)	
Defendant.	)	

NOTICE OF SUPPLEMENTAL FILING

Defendant Scott Pruitt, Administrator, United States Environmental Protection Agency ("EPA"), has moved to amend the Consent Decree in this matter to extend the deadline by which EPA must complete the final action required by Paragraph 4.a.i. and ii. of that Decree, as amended, from September 9, 2017, to December 31, 2018. ECF 93. The EPA informed the Court that Agency was simultaneously moving to amend the Partial Consent Decree in *Sierra Club v. EPA*, Case No. 10-cv-01541 (CKK), to extend the deadline for EPA to complete its obligations under Paragraph 2(d) of that Partial Consent Decree from September 9, 2017, to December 31, 2018. EPA's Memorandum in Support of Motion to Amend the Consent Decree, 8-9 (Aug. 18, 2017), ECF 93-1. As EPA explained, the Agency anticipates addressing the obligations in both cases in a single rulemaking and therefore is seeking to maintain the same deadlines in both cases. *Id.*

After EPA's motion was filed in *Sierra Club*, that Court ordered EPA to file a supplement explaining:

> (1) why such a lengthy extension is required (for example, why is TCEQ not able to submit a SIP sooner than March 31, 2018?), (2) if an extension were not granted, is the EPA prepared to sign for publication a notice promulgati ng the FIP by September 9, 2017?

Minute Order (Aug. 18, 2017). EPA is submitting the Agency's response to the *Sierra Club* Order for this Court to consider as appropriate. Attachment 1.

Respectfully submitted,

JONATHAN BRIGHTBILL
Deputy Assistant Attorney General
Environment and Natural Resources
Division

/s/ EILEEN T. MCDONOUGH
Environmental Defense Section
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-3126
eileen.mcdonough@usdoj.gov

Of Counsel:

M. LEA ANDERSON
MATTHEW MARKS
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and E. SCOTT PRUITT, Administrator, United States Environmental Protection Agency, Defendants.	)	Case No.: 1:10-CV-01541-CKK

I, Samuel J. Coleman, affirm and declare that the following statements are true and correct to the best of my knowledge, information, and belief, under penalty of perjury. These statements are based on my own personal knowledge or on information contained in records of the United States Environmental Protection Agency (EPA), or supplied to me by EPA employees.

1. I am the Acting Regional Administrator of EPA Region 6. On August 18, 2017, the United States filed a motion to extend a partial consent decree deadline with the United States District Court for the District of Columbia in Case No.: 1:10-CV-01541-CKK. In support of the motion, the United States filed a Declaration that I signed on August 15, 2017 ("First Declaration").
2. On August 18, 2017, the Court issued a Minute Order, instructing the United States to answer the following questions:

"(1) why such a lengthy extension is required (for example, why is TCEQ not able to submit a SIP sooner than March 31, 2018?), (2) if an extension were not granted, is the EPA prepared to sign for publication a notice promulgating the FIP by September 9, 2017?"

I am now providing this declaration ("Second Declaration") as part of the response to the Court's questions.

I. Question 1: TCEQ

3. On August 23, 2017, Bryan Shaw, Chairman of the Texas Commission on Environmental Quality (TCEQ), sent a letter to EPA further explaining the basis for TCEQ's timeline provided in the EPA – TCEQ Memorandum of Agreement (MOA) (which was signed by the agencies on August 14, 2017 and attached to the First Declaration), including why the March 31, 2018 date for submission of the proposed state implementation plan (SIP) is an extremely expedited schedule. This SIP will address certain outstanding requirements for Regional Haze and Interstate Visibility Transport, as described further in the First Declaration. The August 23, 2017 letter from Chairman Shaw is attached hereto.

4. In the August 23, 2017 letter, TCEQ explained the process where, by no later than March 31, 2018, it will propose a SIP revision and associated rulemaking. TCEQ labeled this "an aggressive timeline by any measure" and noted that in past actions, proposing SIP revisions have taken up to forty-eight months (or even longer). Therefore, according to the timeline in the MOA, TCEQ will have less than seven months to complete the technical work associated with the SIP, draft the trading program regulations and the SIP narrative, perform outreach to interested parties, and

perform legal and management review, prior to proposing the action before the TCEQ Commissioners.

5. TCEQ also explained the nuances of "parallel processing." While it can result in an action on a SIP submission that takes place faster than the traditional process, it also means that Texas' final SIP likely must closely match its proposed SIP. Therefore, TCEQ will need to "severely front-load its regulatory work on this rule and have it all but done by the time the SIP revision is proposed" by March 31, 2018.

6. If the TCEQ Commissioners approve the TCEQ Executive Director's request to propose approval, TCEQ must perform certain requirements that are required by state and federal law, including providing public review periods, and an opportunity for public notice and comment. After this occurs, TCEQ must "compile, summarize, and respond to all comments received and make any necessary [SIP] revisions…based on those comments [and] additional technical work may also be required." This work usually takes four months after the comment period closes. In order for TCEQ to take final action on its proposal, the documents must go back before the TCEQ Commissioners for final approval before submission to EPA. According to TCEQ, the process described in this paragraph usually takes twelve months, yet here the process is expedited to be completed by October 31, 2018.

7. In the MOA, EPA and TCEQ committed to working together to develop a program that is based on intrastate trading. In its letter, TCEQ noted that it has had past experience working to implement trading programs, and it usually takes much longer than seven months because of the work involved. TCEQ provided a recent example of

implementing a trading program where it took seventeen months to propose the program.

II. Question 1: EPA

8. Taking final action by December 31, 2018, is the most expeditious schedule possible that EPA Region 6 can meet to act on a SIP revision for Texas given the procedural requirements for both TCEQ and EPA. This schedule reflects the work needed to meet the rulemaking requirements set forth in the federal Administrative Procedure Act (APA), and to fulfill the requirements of the Clean Air Act (CAA). It also reflects requirements applicable to TCEQ as found in the Texas APA (located in the Texas Government Code), the Texas Health and Safety Code, and the Texas Water Code.

9. EPA will "parallel process" this SIP submittal, which is the most expedited manner to process a SIP submittal. To parallel process here, EPA will be working on two fronts. First, EPA will be assisting Texas throughout the process, including working closely with TCEQ leading up to March 31, 2018 to facilitate development of its proposed SIP submittal. In the following months, EPA will work with TCEQ to facilitate development of its final SIP submittal leading up to October 31, 2018.

10. On the second front for parallel processing, EPA will take contemporaneous steps to satisfy its own requirements, including developing Technical Support Documents (TSDs) and proposed and final *Federal Register* rulemaking notices, both of which may be lengthy and technically and legally complex. Following receipt of TCEQ's March 31, 2018 proposed SIP, and presuming that the necessary CAA requirements are satisfied, EPA will proceed with issuing a Notice of Proposed Rulemaking by June 2018. After close of the 30-day public comment period, EPA will evaluate and

prepare responses to comments, and prepare a Notice of Final Rule for issuance by December 31, 2018, which is two months after TCEQ's October 31, 2018 final SIP submittal.

III. Question 2

11. EPA's Office of the Administrator has been closely involved with development of the MOA with TCEQ to provide for a SIP to address certain outstanding Texas regional haze BART and visibility transport requirements. The requested extension would allow EPA to meet the CAA's state-first goals by allowing EPA and TCEQ to focus resources on implementing the MOA and thereby seek to attain a measure of certainty and permanency that is warranted, particularly given the level of resources the State and EPA will continue to commit in putting in place a SIP. The Office of the Administrator advises me that the agency would meet the terms of the Partial Consent Decree and be prepared to sign for publication a notice promulgating a federal implementation plan (FIP), in the absence of an extension. However, a FIP would not be the agency's preferred course of action as it would divert agency resources away from the CAA's state-first cooperative federalism approach, and result in duplication of effort between EPA and TCEQ and other inefficiencies. Given the State's commitment to developing a SIP and the substantive progress that has developed in a matter of months with the State of Texas, continuing down the SIP pathway is more faithful to the cooperative federalism design of the CAA.

I declare that the above stated matters are true and correct to the best of my knowledge, information, and belief, under penalty of perjury.

Dated: 8/23/17

Samuel J. Coleman
Acting Regional Administrator
EPA Region 6

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Jon Niermann, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 23, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator Pruitt:

The Texas Commission on Environmental Quality ("TCEQ") is grateful that your administration is willing to work with the States rather than against them. And, the State of Texas is particularly grateful for the opportunity to provide a revision to its State Implementation Plan ("SIP") to address outstanding Federal Clean Air Act requirements for Best Available Retrofit Technology ("BART") and visibility transport. I understand that a federal district judge has asked for additional information regarding the timing of that SIP revision. This letter provides that information.

As indicated in the August 14 Memorandum of Agreement between TCEQ and the U.S. Environmental Protection Agency ("EPA"), TCEQ will propose a SIP revision and associated rulemaking no later than March 31, 2018. This is an aggressive timeline by any measure. Historically, the process for proposing a SIP revision has taken up to 48 months or even longer. Here, TCEQ has committed to doing it in less than 7. That means that in less than 7 months, TCEQ will complete all of the technical work associated with the BART SIP (*e.g.*, creating budgets for a new trading program and demonstrating the lawfulness of those budgets), draft the rules for that new trading program, draft the SIP narrative, conduct informational meetings with environmental groups, citizen groups, electricity generators, and electric grid operators, and conduct all of the legal and management reviews required by state and federal law.

The March 31, 2018 deadline for proposing this SIP revision is particularly aggressive because the TCEQ-EPA MOA also commits both agencies to "parallel processing." That means almost immediately after TCEQ proposes its SIP revision, EPA will begin its regulatory process for approving it. The upside of that procedure is that it creates regulatory certainty much faster than the traditional SIP-revision process. The downside is that the final SIP must closely match the proposed one. As a consequence, TCEQ will be forced to severely front-load its regulatory work on this rule and have it all but done by the time the SIP revision is proposed in March.

Proposing this SIP revision in less than 7 months (as opposed to 48 or more) is a significant lift. For example, Texas's 2009 SIP revisions for the Regional Haze Rule took more than 7 *years* to finalize and over 5 *years* just to propose. EPA started by designating five Regional Planning Organizations to assist with the coordination and cooperation needed to address visibility and haze issues. Texas was assigned to the Central Regional Air Planning Association ("CENRAP"). In 2002, Texas started working with CENRAP on several aspects in developing the Texas regional haze plan including the development of a common emissions inventory of pollutants that can impact visibility. These emissions were then used in conjunction with meteorological inputs and chemical reaction calculations in complex photochemical models to estimate pollutant concentrations and impacts across a wide geographic area. The pollutant concentrations could then be converted to estimated visibility impairment impacts. In addition, the determination of visibility impairment due to natural conditions and determining the

estimated timeline for Texas areas to reach natural visibility conditions is a time consuming and complex task. The TCEQ then had to evaluate what additional controls might be possible, the anticipated cost, and the visibility benefit of those potential controls. The TCEQ held SIP-related consultation meetings and invited participation from federal land managers for the Texas Class I areas as well as federal land managers in surrounding states Class I areas, tribes in Texas and adjacent states, other surrounding states that may have an impact on Texas Class I areas, and the EPA. This process, beginning with initial internal meetings on developing a rulemaking for BART in July 2005 to the commission considering proposal of the Regional Haze SIP in December 2007, took roughly 29 months. Again, Texas has committed to proposing this BART SIP in less than 7.

That timeline is made still more aggressive by the fact that TCEQ and EPA have committed to implementing BART through a trading program. Historically, it takes much longer than 7 months to set up a trading program because it requires an enormous amount of work to identify program participants, requirements and restrictions on who can and who must participate, emission allowances, rules for trading or selling allowances, life of allowances, use of allowances, contingency requirements, reporting and compliance requirements, penalty requirements, and tracking mechanisms. For example, TCEQ is in the process of implementing a trading program for the Area and Mobile Source Credit Generation Rule ("AMSCGR"). It took TCEQ 17 months to propose the AMSCGR trading program. During that time, TCEQ conducted numerous meetings with EPA, the Environmental Defense Fund, industry representatives, and other representatives from groups such as the port authority and other governmental entities. This collaboration resulted in the development of a draft strategy and paved the way for staff to begin work on a rule proposal, a database contract to develop tracking mechanisms, and procedures for ensuring that the credits satisfy federal law—in particular, that the credits are real, surplus, permanent, enforceable, and quantifiable.

Likewise, it took TCEQ 17 months to propose the Highly Reactive Volatile Organic Compound Emissions Cap and Trade ("HECT") Program. To implement that program, TCEQ used information from an intensive study that included more than two hundred scientists working on ozone and other pollution issues. That study alone took a year to complete.

Proposing a statewide trading program to satisfy the Regional Haze BART requirements is, if anything, even more complicated and difficult. It is only because you have committed to working with us and because the State has committed the full weight of its resources to this issue that I am confident we can propose a SIP revision on the virtually unprecedented timeline specified in our MOA.

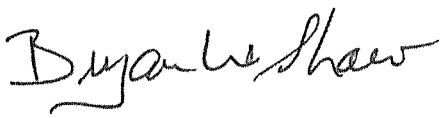
In addition to the technical and administrative work that must be done to propose a SIP revision and rule, there are also public review periods and notice and comment requirements that must be met in accordance with state and federal law to finalize a SIP. (An addendum summarizing the relevant state law requirements for the SIP revision is attached.) Under state law, TCEQ must provide at least seven days for public notice prior to commission consideration of any issue. For any revision to the SIP, the state is also required to provide at least 30 days for the public to review and comment. TCEQ must then compile, summarize, and respond to all comments received and make any necessary revisions to SIP based on those comments. Depending on comments, additional technical work may also be required. The work associated with this research, response to comments, and subsequent review process for the adoption packet has historically taken approximately 4 months after the 30-day comment period closes. These documents must then go before the commission again, with an additional seven-day notice, for final approval before submittal to the EPA. This entire process, which is designed to ensure adequate opportunity for public input and internal development and review, routinely takes 12

months and in some cases more than 4.5 years, depending on the complexity of the subject. In this case, however, TCEQ has committed to finalizing the proposed rule within 7 months of proposing it. Again, for something as big and complicated as a statewide Regional Haze BART trading program, that is breakneck speed.

Finally, I would like to emphasize why TCEQ has committed to such an aggressive timetable for proposing and finalizing this SIP revision. TCEQ has done so because the Clean Air Act envisions a process of cooperative federalism where your agency and mine work together to promote clean air in a lawful and responsible way. TCEQ also agreed to the August 14 MOA because it wants to set an example for the nation of how cooperative federalism can work and to correct some of the mistakes that have been made in the past. TCEQ did *not* sign the MOA because it thinks the absence of Regional Haze BART rules constitutes an emergency. As you know, the Fifth Circuit recently stayed and remanded the reasonable progress part of the Regional Haze Rule, so as of today, it is not even clear what are the appropriate targets for restoring natural visibility by 2064. What is clear is that Texas is *already* below the glide path that was previously established by EPA. TCEQ is confident that, if our agencies cooperate on this SIP revision, we can make even better strides in more efficient ways.

We again congratulate you on your approach to these regulatory matters. And we trust that this information is responsive to the judge's question. If I or my office can be of further assistance, please do not hesitate to contact me. TCEQ looks forward to working with you on this and many other matters in the years to come.

Sincerely,



Bryan W. Shaw, Ph.D., P.E.
Chairman
Texas Commission on Environmental Quality

Enclosure

Addendum: Texas Legal Requirements for Proposal and Adoption of Rules

The Texas Commission on Environmental Quality ("TCEQ") is an Executive Agency of the State of Texas subject to the procedural rulemaking requirements of the Texas Administrative Procedure Act (Texas APA)[1] in addition to other general requirements for rulemaking found in its enabling authority.[2] In adopting rules that are intended to address the requirements of the Federal Clean Air Act ("FCAA"), 42 U.S.C. §§7401 - 7515, States are also required to meet similar federal requirements, including requirements for public notice, public hearing, response to comment and other procedural submission requirements.[3]

The Texas APA requires the TCEQ to meet specific requirements for public input prior to adoption of a rule. Texas agencies are required to give at least 30 days' notice of their intention to adopt a rule before it adopts the rule, and is required to file notice of the proposed rule with the Secretary of State for publication in the Texas Register.[4] The Texas APA requires specific public notice of the proposed rules including a brief explanation of the proposed rule, the text of the proposed rule prepared in a manner to indicate any words to be added or deleted from the current text,[5] a statement of statutory authority or other authority for the proposed rule and the statutory provision affected by the proposed rule, a fiscal analysis assessing the anticipated implementation cost of the proposed rule for state and local government for each year of the first five years that the rule will be in effect, a statement regarding public benefits and costs of compliance for the public for each year of the first five years the rule will be in effect, a request for public comment on the proposed rule and any other statement required by law.[6] Additionally, separate regulatory analyses regarding local employment impact statements,[7] major environmental rules,[8] and takings impacts[9] and are also required, if applicable. TCEQ is also required to hold a public hearing on proposed rules.[10] The notice of proposed rulemaking is required to provide an opportunity for the public to submit comment on the proposed rules for consideration by the commission prior to any adoption of the rules.[11]

Texas agencies are required to provide an explanation of the proposed rule that is sufficient to apprise the public of the rule's purpose. Although not required in the proposal, the TCEQ regularly includes, as part of the brief explanation of the rule, a statement of the rule's factual basis or reasons for the rule. This information is beneficial in assisting both the commission and the public in understanding the proposed rule in addition to facilitating the development of the rule's reasoned justification required for rule adoption. The required statement of authority is a concise explanation of the particular statutory provision of law that authorizes the agency to adopt the rule. Also, the agency must identify that portion of its enabling statute or other provision of law that the proposed rule is intended to implement.

The Texas Third Court of Appeals has held that section 2006.002 of the Government Code requires agencies to conduct an analysis in a proposed rule's preamble to determine whether the rule will have an adverse economic effect on small businesses.[12] If a rule may have an adverse

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[1] Tex. Gov't Code, §§ 2001.021-2001.041.
[2] Tex. Health & Safety Code, §382.017; Tex. Water Code, §5.103.
[3] Federal Clean Air Act (FCAA), 42 U.S.C. §7410(a)(1)-(2); 40 C.F.R. §§51.100 - 51.105.
[4] Tex. Gov't Code, §2001.023.
[5] Tex. Gov't Code, § 2002.014.
[6] Tex. Gov't Code, §2001.024.
[7] Tex. Gov't Code, §2001.022.
[8] Tex. Gov't Code, §2001.0225.
[9] Tex. Gov't Code, §2001.043.
[10] Tex. Gov't Code, §2001.029, Tex. Health & Safety Code, §382.017 and 40 C.F.R. §51.102.
[11] Tex. Gov't Code, §2001.029, Tex. Health & Safety Code, §382.017, Tex. Water Code, §5.103.
[12] *Unified Loans, Inc. v. Pettijohn*, 955 S.W.2d 649, 654 (Tex. App.—Austin, 1997, no pet.); *see also* Tex. Gov't Code, §2006.002.

economic effect on these businesses, an agency must prepare and include in the proposed rule an economic impact statement, as described in the provision, and a regulatory flexibility analysis, that includes alternative methods of achieving the purpose of the rule to lessen the effect on small or micro-businesses. Also, a copy of the proposed rule that is submitted to the Texas Register must be provided to the Senate and House standing committees that are charged with reviewing the proposed rule.[13]

An agency may not adopt a proposed rule sooner than 30 days or later than six months after it is published in the Texas Register.[14] A proposed rule is automatically withdrawn six months after its publication in the Texas Register if the agency does not publish an order adopting or withdrawing the rule before that time.[15] Texas agencies must consider fully all written and oral submissions concerning the proposed rule.[16] The agency order adopting a rule must include a reasoned justification of the rule, a statement of the authority under which the rule is adopted, and a legal certification.[17] The agency's justification must explain "how and why it reached the conclusions it did."[18] The agency must present its justification "in a relatively clear, precise, and logical fashion."[19] The justification must include: 1) a summary of comments received from parties interested in the rule that shows the names of interested groups or associations offering comment on the rule and whether they were for or against its adoption; 2) a summary of the factual basis for the rule as adopted that demonstrates a rational connection between the factual basis for the rule and the rule as adopted; and 3) the reasons why the agency disagrees with party submissions and proposals.[20] After the commission approves the order adopting a rule, the adopted rule text is forwarded to the Secretary of State for publication in the Texas Register.[21] Adopted rules are effective 20 days after they are filed with the Secretary of State.[22]

For rules concerning requirements specified in the Federal Clean Air Act, such as the regional haze and interstate visibility transport, including best available control technology, States must also meet similar public notice, comment, hearing and submission requirements.[23]

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[13] Tex. Gov't Code, § 2001.024(a)(3)(C).
[14] Tex. Gov't Code, §§ 2001.023, .027.
[15] Tex. Gov't Code, § 2001.027.
[16] Tex. Gov't Code, §§ 2001.029(c), .033.
[17] Tex. Gov't Code, § 2001.033.
[18] *Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins.*, 925 S.W.2d 667, 669 (Tex. 1996)
[19] *Id.* at 669; *Lambright v. Tex. Parks & Wildlife Dep't*, 157 S.W.3d 499, 504-05 (Tex. App.—Austin 2005, no pet.).
[20] Tex. Gov't Code, §2001.033(a)(1).
[21] Tex. Gov't Code, §2001.036.
[22] Tex. Gov't Code, §2001.036.
[23] FCAA, 42 U.S.C. §7410(a)(1) and (2); 40 C.F.R. §§51.100 - 51.105.