UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

POWDER RIVER BASIN RESOURCE COUNCIL; NATIONAL PARKS CONSERVATION ASSOCIATION; SIERRA CLUB; WYOMING OUTDOOR COUNCIL; BASIN ELECTRIC POWER COOPERATIVE; PACIFICORP; AMERICAN COALITION FOR CLEAN COAL ELECTRICITY; and ARCH COAL, INC.,

Intervenors.

No. 14-9529

POWDER RIVER BASIN RESOURCE COUNCIL, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

No. 14-9530

90-5-2-3-20131

Respondents.

STATE OF WYOMING; BASIN ELECTRIC POWER COOPERATIVE; PACIFICORP; AMERICAN COALITION FOR CLEAN COAL ELECTRICITY; ARCH COAL, INC.; and IDAHO POWER COMPANY,

Intervenors.

BASIN ELECTRIC POWER COOPERATIVE,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

POWDER RIVER BASIN RESOURCE COUNCIL; NATIONAL PARKS CONSERVATION ASSOCIATION; SIERRA CLUB; WYOMING OUTDOOR COUNCIL; and PACIFICORP,

Intervenors.

PACIFICORP,

Petitioner,

v.

No. 14-9533

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

POWDER RIVER BASIN RESOURCE COUNCIL; NATIONAL PARKS CONSERVATION ASSOCIATION; SIERRA CLUB; WYOMING OUTDOOR COUNCIL; and BASIN ELECTRIC POWER COOPERATIVE,

Intervenors.

No. 14-9534

CONSERVATION ORGANIZATIONS' MOTION TO PROCEED SEPARATELY AND LIFT STAY OF CASE NO. 14-9530 AND/OR FOR PARTIAL RECONSIDERATION OF ORDER ABATING PROCEEDINGS

Jenny K. Harbine
Katherine K. O'Brien
EARTHJUSTICE
313 East Main Street
Bozeman, Montana 59715
(406) 586-9699 | Phone
(406) 586-9695 | Fax
jharbine@earthjustice.org
kobrien@earthjustice.org

John Barth
Attorney at Law
P.O. Box 409
Hygiene, Colorado 80533
(303) 774-8868
barthlawoffice@gmail.com

Counsel for Petitioners Powder River Basin Resource Council, National Parks Conservation Association, and Sierra Club

INTRODUCTION

Petitioners Powder River Basin Resource Council, National Parks Conservation Association, and Sierra Club (the "Conservation Organizations"), hereby move this Court to allow Powder River Basin Resource Council, et al. v. EPA, No. 14-9530 (the "Conservation Organizations' petition"), to proceed separately from the three consolidated cases filed by the State of Wyoming, Basin Electric Power Cooperative ("Basin"), and PacifiCorp (collectively, "state and industry petitions") due to the inequitable delay associated with the Court's stay of the Conservation Organizations' petition and the distinct legal issues presented in that case. On May 17, 2017, this Court granted a motion by the State of Wyoming, Basin, and PacifiCorp (collectively, "state and industry parties") to abate proceedings in all four consolidated petitions for review challenging the Wyoming Haze Rule.[1] Order, Doc. 01019811474 (May 17, 2017). However, that motion did not present this Court with the distinct question of whether to allow the Conservation Organizations' petition to proceed while staying only the state and industry petitions. The Conservation Organizations now move to proceed separately in Case No. 14-9530 to prevent ongoing and unnecessary harm to them. In light of this prejudice and the fact that the Conservation Organizations' petition

[1] Final Rule, Approval, Disapproval and Promulgation of Implementation Plans; State of Wyoming; Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze, 79 Fed. Reg. 5,032 (Jan. 30, 2014).

involves legal claims that are wholly distinct from those advanced in the state and industry petitions, this motion should be granted.

To the extent this motion requires partial reconsideration of the Court's May 17, 2017 Order abating proceedings in the consolidated cases, the Conservation Organizations request such relief on grounds that the Court misconstrued or overlooked the requisite "balancing of competing interests" with respect to the Conservation Organizations' petition. Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc., 713 F.2d 1477, 1484 (10th Cir. 1983); see also Fed. R. App. P. 27(b) (providing for reconsideration of procedural motions); 10th Cir. R. 40.1 (providing for rehearing "if a significant issue has been overlooked or misconstrued by the court"). Because the state and industry parties failed to "make a 'strong showing' that the injunction was necessary and that 'the disadvantageous effect on others would be clearly outweighed'" with respect to the Conservation Organizations' petition, reconsideration is appropriate to enable the Conservation Organizations to litigate their case. Span-Eng Assocs. v. Weidner, 771 F.2d 464, 468 (10th Cir. 1985) (quoting Commodity Futures Trading Comm'n, 713 F.2d at 1484).

Pursuant to 10th Cir. R. 27.3(C), undersigned counsel has conferred with counsel for Respondent and Respondent-Intervenors. Respondent U.S.

Environmental Protection Agency ("EPA") and Respondent-Intervenors Basin, PacifiCorp, and State of Wyoming oppose this motion.

ARGUMENT

The Conservation Organizations filed their challenge to several aspects of the Wyoming Haze Rule in 2014 and it has been fully briefed for more than two years. Resolution of the Conservation Organizations' challenge has been stymied by protracted settlement negotiations between EPA and Basin to resolve claims in a separate case—No. 14-9533—pertaining only to emissions limits for Basin's Laramie River Station. Now that a settlement has finally been reached, Basin—joined by Wyoming and PacifiCorp—sought and obtained a stay of all of the consolidated petitions for review for a period of at least two additional years. Although the state and industry parties argued that a stay would promote judicial economy and prevent harm to Basin from piecemeal resolution of overlapping legal issues in the state and industry petitions, they presented no argument that similar considerations favor a stay of the Conservation Organizations' petition. Because the Conservation Organizations' petition challenged aspects of the Wyoming Haze Rule and raised legal issues that are distinct from the issues argued in the state and industry petitions, litigation of the Conservation Organizations' petition could not harm the state and industry parties nor inflict any inconvenience on the parties or the Court.

More fundamentally, the Conservation Organizations will suffer significant prejudice if their request to proceed separately is not granted. If the current stay of the Conservation Organizations' petition is not lifted, the additional two-plus year delay would, as a practical matter, deprive the Conservation Organizations of their right to judicial review under the process established by Congress in the Clean Air Act and the opportunity to obtain significant pollution reductions they argue are legally required.

I. THE CONSERVATION ORGANIZATIONS SHOULD BE ALLOWED TO PROCEED SEPARATELY IN CASE NO. 14-9530 TO PREVENT HARM TO THEIR MEMBERS AND THE PUBLIC INTEREST

A stay of the Conservation Organizations' case inequitably harms the Conservation Organizations and the public interest. While resolution of the Conservation Organizations' case has already been significantly delayed, the Court's stay will further delay adjudication of the case for at least two years while the Settlement Agreement between Basin and EPA is implemented. Settlement Agreement, Doc. 01019802299 (filed April 28, 2017) ("Settlement Agreement").[2] In actuality, the delay could be substantially longer, because the terms of the Settlement Agreement allow unlimited extensions of the settlement's internal

[2] The Settlement Agreement requires Wyoming to submit a revised State Implementation Plan to EPA within 12 months, Settlement Agreement, ¶ 9 , requires EPA to publish a proposed rule in the Federal Register within 6 months thereafter, id. ¶ 5, and publish its final rule after another six months, id. ¶ 8.

deadlines by agreement of the settling parties. Id. ¶ 15 ("The Parties may extend the dates set forth in this Settlement Agreement or otherwise modify this Settlement Agreement by a written agreement executed by counsel for the Parties."). This Court has recognized "that '[t]he right to proceed in court should not be denied except under the most extreme circumstances.'" Commodity Futures Trading Comm'n, 713 F.2d at 1484 (quoting Klein v. Adams & Peck, 436 F.2d 337, 339 (2d Cir. 1971)) (emphasis added). The circumstances here do not support additional years of delay in the adjudication of the Conservation Organizations' petition for review.

The Clean Air Act grants citizens the right to hold EPA accountable when they are harmed by an EPA action under the Clean Air Act's requirements to reduce regional haze pollution. 42 U.S.C. § 7491(b)(2) (requiring implementation plans to establish emissions limits to address regional haze); id. § 7607(b)(1) (providing for judicial review of implementation plans). Congress's decision to require such legal challenges to be initiated in the Court of Appeals in the first instance within 60 days after final agency action, id. § 7607(b)(1), reflects an intent "to maintain the integrity of the time sequences provided throughout the Act." S.

Rep. No. 91-1196, at 41 (1977).[3] The need for timely resolution of litigation is particularly strong when the challenged agency action affects environmental quality and public health, as it does here.

The delay in the Conservation Organizations' petition undermines this legislative intent because it obstructs compliance with the requisite deadlines for emissions reductions required under the Regional Haze program. As EPA observed in the Wyoming Haze Rule, regulations governing regional haze implementation plans "require[] control strategies to cover an initial implementation period extending to the year 2018." Wyoming Haze Rule, 79 Fed. Reg. at 5,037; see also id. at 5,055 ("BART is required in the first planning period, which ends in 2018, and is required to be installed as expeditiously as practicable, but in no event later than five years after the effective date of this final notice.").[4] Staying the Conservation Organizations' case until 2019, when the Settlement Agreement is expected to be fully implemented, may therefore foreclose any

[3] The 1970 amendments to the Clean Air Act added 42 U.S.C. § 7607(b)(1), governing judicial review, including in it a requirement that petitions for review must be filed within 30 days of the challenged agency action. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1708. In 1977, Congress extended the window for review from 30 days to 60 days. Clean Air Act Amendments of 1977, Pub. L. No. 95–95, 91 Stat. 685.

[4] Identifying BART involves a source-specific analysis of five factors, including the cost effectiveness and visibility improvement expected from various emissions-control options on a particular source. See 40 C.F.R. § 51.308(e)(1)(ii)(A) (describing BART analysis); 40 C.F.R. pt. 51, App. Y (EPA guidelines for source-specific BART determinations).

meaningful remedy for their claims that Wyoming's strategies in the first implementation period for controlling emissions from Naughton and the oil and gas sector are inadequate.

Moreover, while this case is pending, harmful pollutant emissions from the Naughton Power Plant and oil and gas sources continue unabated, despite the Conservation Organizations' claims that emissions reductions are legally required. Particularly with respect to Wyoming oil and gas sector emissions, which are predicted to increase significantly in coming years, see Pets.' Final Opening Br., Doc. 01019398200, at 14 (Mar. 13, 2015), the delayed resolution of the Conservation Organizations' case translates to a significant lost opportunity to reduce pollution. As a result, regional haze continues to cloud Wyoming's spectacular public lands and the public continues to breathe unnecessarily polluted air.

Already, more than three years have passed since EPA finalized the Wyoming Haze Rule and the Conservation Organizations filed their petition for review. To ensure that the Conservation Organizations' opportunity for meaningful judicial review is not thwarted by unnecessary delay, this Court should

grant this motion to proceed separately from the state and industry petitions and lift the stay of the Conservation Organizations' case.[5]

II. LITIGATION OF THE CONSERVATION ORGANIZATIONS' PETITION WILL NOT IMPEDE JUDICIAL ECONOMY OR PREJUDICE ANY PARTY

In addition, a stay of the Conservation Organizations' case is not necessary to promote judicial economy or prevent harm to any other party. In arguing for a stay in the recent abatement proceeding, the state and industry parties did not even attempt to support an argument of inconvenience or hardship with respect to the continued litigation of the Conservation Organizations' petition. As described below, there is none.

In their motion to abate these consolidated proceedings, the state and industry parties claimed that staying all four petitions for review while the Settlement Agreement is implemented is necessary to "conserve the Court's and parties' resources." Mot. to Abate, Doc. 01019803258, at 2 (May 1, 2017). However, this Court has held that "'considerations [of judicial economy] should

[5] In December, 2015, the Conservation Organizations diligently sought to protect their interests by severing their petition for review from the State and industry petitions and proceeding to oral argument. See Conservation Orgs.' Mot. to Proceed Separately, Doc. 01019540671 (Dec. 16, 2015). At the time the Court denied that motion, Order, Doc. 01019553173 (Jan. 13, 2016), Basin, Wyoming, and EPA had not yet reached a settlement agreement and the Court therefore could not predict whether any final settlement eventually would be reached or whether the settlement would encompass aspects of the Conservation Organizations' petition. It is now clear that the Settlement Agreement does not resolve or encompass any claims raised in the Conservation Organizations' petition.

rarely if ever lead to such broad curtailment of the access to the courts.'" Span-Eng Assocs., 771 F.2d at 469 (quoting Commodity Futures Trading Comm'n, 713 F.2d at 1485). Here, regardless of the Court's finding that overriding judicial economy interests warrant a stay of the state and industry petitions, no efficiency is gained by staying the Conservation Organizations' petition.

First, the Settlement Agreement has no effect on the merits of the Conservation Organizations' claims, which address different facilities and raise distinct legal issues. In their petition for review, the Conservation Organizations challenged (1) EPA's failure to include in the Wyoming Haze Rule incremental visibility-improvement goals and an estimate of the time that will be required to restore natural visibility conditions in affected federal lands under the Rule; (2) EPA's determination of the "best available retrofit technology," or "BART," for reducing nitrogen oxide pollution from Units 1 and 2 of the Naughton coal-fired power plant; and (3) EPA's failure to impose any requirements at all for reducing nitrogen oxide pollution from Wyoming's oil and gas production sector. The Settlement Agreement resolves claims related only to emissions limits for the Laramie River Station. See Settlement Agreement, Doc. 01019802299, ¶ 5 (filed April 28, 2017) (describing EPA's agreement to proposed revisions to the Wyoming Haze Rule, which pertain only to Laramie River Station and not other aspects of the Rule). The agreement expressly prohibits EPA from altering other

aspects of the Wyoming Haze Rule in its proposed rulemaking, including those challenged by the Conservation Organizations. Id. ¶ 6 ("Aspects of the Final Rule affecting Basin Electric that are not directly implicated by the terms of this Settlement Agreement (including, without limitation, other emissions limits, recordkeeping, and other requirements) shall not be altered in EPA's proposed rulemaking.").

Because the Settlement Agreement does not and cannot affect the Conservation Organizations' claims, their case is "merely being delayed, but not obviated" by the Settlement Agreement and stay. Commodity Futures Trading Comm'n, 713 F.2d at 1485. "Hence the conservation of judicial efforts by delaying the [Conservation Organizations'] suit[] will likely be negligible." Id.

Second, separate adjudication of the Conservation Organizations' claims could proceed based on the existing briefing and record. To support their motion to abate the consolidated proceedings, the state and industry parties emphasized the extent to which their briefs supporting the state and industry petitions overlap. See, e.g., Mot. to Abate, Doc. 01019803258 (May 1, 2017); see also Order on Joint Status Report, Doc. 01019250447, at 5 (May 15, 2014) (directing, in recognition of uniquely interrelated nature of state and industry petitions for review, that "the state and industry parties in particular[] are strongly encouraged to consolidate briefing whenever possible and to maximize the opportunity provided by the

staggered briefing schedule ...."). In particular, the state and industry parties cited their arguments regarding "[t]he wide discretion afforded to the States in assessing BART;" "[t]he level of deference EPA must give to a State's BART determination;" the role of the BART Guidelines; appropriate methods for addressing BART cost and visibility factors; EPA's consideration of "pre-existing pollution controls;" and "inconsistencies in EPA's treatment of BART at different facilities." Id. at 8-10. Notably absent, however, were citations to any briefing by the Conservation Organizations or EPA on these issues. See id. Therefore, to the extent that such overlap in arguments that support the state and industry petitions counsels against allowing those petitions to proceed absent Basin, no such considerations apply to the Conservation Organizations' motion.

Further, even if there were overlapping issues between the state and industry cases and the Conservation Organizations' case, the briefing record in the latter case stands on its own. The Conservation Organizations' briefs in support of their petition address only their challenges to the Wyoming Regional Haze Rule and do not cross-reference any briefing in support of the state or industry petitions. The intervenor-response briefs filed by PacifiCorp and the State of Wyoming,[6] as well

[6] Respondent-Intervenor Basin Electric elected not to file a response brief in opposition to the Conservation Organizations' petition for review, underscoring that Basin's interests are not affected by the claims raised in the Conservation Organizations' petition.

as the amicus briefs filed by the American Petroleum Institute and the Petroleum Association of Wyoming, likewise address only the claims raised in the Conservation Organizations' petition. While EPA's response brief addresses the claims advanced in all four petitions for review, the portions of EPA's brief that respond to the Conservation Organizations' claims are discrete and readily segregable from EPA's other arguments. See EPA Br., Doc. 01019399553, at 57-73 (responding to Conservation Organizations' Naughton arguments), 170-88 (responding to Conservation Organizations' oil and gas arguments), 188-93 (responding to Conservation Organizations' arguments regarding reasonable progress goals) (Mar. 16, 2015). Accordingly, neither the parties nor the Court would be burdened by confusion or re-briefing if the Conservation Organizations' case is allowed to proceed.

For these same reasons, separate adjudication of the Conservation Organizations' petition will not prejudice any party. Because the Conservation Organizations' petition raises issues that are distinct from those in the state and industry petitions, adjudication of the Conservation Organizations' case would not resolve legal issues that are essential to the adjudication of the state and industry petitions. Further, any attempt by the state and industry petitioners to inject those issues into the Conservation Organizations' case would be flawed because EPA's "'action must be upheld, if at all, on the basis articulated by the agency itself'"—

not on any independent basis advanced by state and industry parties. Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co., 463 U.S. 29, 50 (1983))

CONCLUSION

To ensure that the Conservation Organizations are not deprived of their right to litigate their challenge to the Wyoming Haze Rule, the Conservation Organizations respectfully request that this Court grant their motion to proceed separately from the state and industry petitions that are held in abeyance. If the Court finds it necessary to reconsider any findings in the order granting the state and industry parties' motion to abate, the Conservation Organizations respectfully request that the Court do so on grounds that it overlooked or misconstrued the harm to the Conservation Organizations from staying their case and the lack of inefficiency or prejudice from proceeding.

Respectfully submitted this 6th day of June, 2017,

s/Jenny K. Harbine
Jenny K. Harbine
Katherine K. O'Brien
EARTHJUSTICE
313 East Main Street
Bozeman, Montana 59715
(406) 586-9699 | Phone
(406) 586-9695 | Fax
jharbine@earthjustice.org
kobrien@earthjustice.org

John Barth
Attorney at Law
P.O. Box 409
Hygiene, Colorado 80533
(303) 774-8868
barthlawoffice@gmail.com

Counsel for Petitioners/Respondent-Intervenors Powder River Basin Resource Council, National Parks Conservation Association, and Sierra Club; and Respondent-Intervenor Wyoming Outdoor Council

CERTIFICATION FOR ECF PLEADING

I hereby certify with respect to the foregoing that all required privacy redactions have been made; that if required to file hard copies with the clerk's office, the ECF submission is an exact copy of those documents; and that the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program and according to the program is free of viruses.

Respectfully submitted June 2, 2017.

s/ Jenny K. Harbine

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 2,850 words, which complies with the limit of 5,200 words for motions in Fed. R. App. P. 27(d)(2)(A). I relied on my Microsoft Word word-processing tool to obtain the count.

I certify that the information in this certificate is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

Respectfully submitted June 2, 2017.

s/ Jenny K. Harbine

CERTIFICATE OF SERVICE

I certify that on this 2nd day of June, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system, which will send notification of this filing to all attorneys of record.

s/ Jenny K. Harbine