UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL PARKS CONSERVATION ASSOCIATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 11-1548 (ABJ)
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,	)	
Defendants.	)	

ORDER

On August 29, 2011, plaintiffs filed this action asking the Court to order the Environmental Protection Agency to comply with its obligations under the Clean Air Act, in particular, its obligation to oversee the states' efforts to reduce pollution and haze, and sustain visibility, in the skies above national parks and other wilderness areas. In 2012, the parties entered into a consent decree establishing a schedule for the approval or creation of plans involving a number of affected states, and there is now one state left: Texas. The EPA is obligated under the consent decree to take action by September 9, 2017, and twenty-two days before that date, it sought leave to extend the deadline by more than fifteen months over plaintiffs' objection. Defendants' motion to amend the consent decree without consent will be denied.

One of the stated national goals of the Clean Air Act is "the prevention of any future, and the remedying of any existing, impairment of visibility" which "results from manmade pollution," in large parks and wilderness areas across the country. 42 U.S.C. § 7491(a)(1). The statute refers

to the parks and wilderness areas involved as "class I Federal areas." *Id.*[1] To achieve the statute's visibility goal, Congress announced in 1977 that states were required to develop plans, known as state implementation plans or SIPs,[2] containing "emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward the national goal." 42 U.S.C. § 7491(b)(2). The statute required that these state implementation plans would include a plan to install the "best available retrofit technology" at large aging pollution sources where emissions "may reasonably be anticipated to cause or contribute to any impairment of visibility" in any mandatory class I Federal area. 42 U.S.C. § 7491(b)(2)(A).

The 2004 amendments to the Clean Air Act set out a detailed process for states to submit, and EPA to review, the implementation plans required by the statute, *see* 42 U.S.C. § 7407, and the agency, at Congress's direction, set a deadline – December 17, 2007 – for states to submit the required plans. 42 U.S.C. § 7410(a)(1); 40 C.F.R. § 51.308(b).

If a state failed to submit a complete plan within six months of the plan's due date, the EPA was required by statute to make a finding to that effect. 42 U.S.C. § 7410(k)(1)(C).

If a state did submit a plan, EPA was required to determine within six months whether the submission was complete. 42 U.S.C. § 7410(k)(1)(B). If the plan was determined to be complete, EPA had one year to determine whether the plan comported with the law and to either approve or disapprove the plan, in whole or in part. 42 U.S.C. § 7410(k)(2)–(3). EPA is not authorized to

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1 The list of the specific parks and wilderness areas considered "class I Federal areas" is available at 40 C.F.R. part 81.

2 The Court of Appeals has cautioned parties to avoid "the use of acronyms other than those that are widely known." Handbook of Practice & Internal Procedures, United States Court of Appeals for the District of Columbia Circuit at 41. While the parties are intimately familiar with the innumerable acronyms in this case, the Court will endeavor to avoid acronyms like "SIP," "FIP," and "BART."

approve a plan "if the revision would interfere with any . . . applicable requirement" of the Clean Air Act. 42 U.S.C. § 7410(l).

In the Clean Air Act, Congress also specifically mandated that if EPA found that a state did not submit a plan by the applicable deadline, submitted an incomplete plan, or submitted a plan that violated the Act, it was required to issue a federal implementation plan, known as a "FIP," within two years of that finding, unless it approves a corrected state plan within that two-year timeframe. 42 U.S.C. § 7410(c)(1)(A)–(B).

In January 2009, EPA made a finding that Texas was one of thirty-four states that failed to submit a state implementation plan to EPA by the 2007 deadline. Finding of Failure to Submit State Implementation Plans Required by the 1999 Regional Haze Rule, 74 Fed. Reg. 2392–01, 2393 (Jan. 15, 2009). That finding "start[ed] the two year clock for the promulgation by EPA of a [federal implementation plan]." *Id.* So, according to the Clean Air Act, EPA was required to promulgate a federal implementation plan for Texas and the other states by January 15, 2011, unless the states submitted compliant state implementation plans in the interim. 42 U.S.C. § 7410(c)(1)(A)–(B).

Plaintiffs, a group of environmental organizations, filed this lawsuit on August 29, 2011 against EPA and the Administrator of the agency, alleging that EPA's failure to abide by its nondiscretionary duty to promulgate a federal implementation plan by the January 15, 2011 deadline violated the Clean Air Act. Compl. [Dkt. # 1]. On March 30, 2012, the parties entered into a partial consent decree, resolving the claims as to each state except for Florida. Partial Consent Decree [Dkt. # 21].[3] The Consent Decree included two significant deadlines related to Texas:

3 The claims against Florida were resolved in a separate agreement.

- **May 15, 2012:** EPA was required to "sign a notice(s) of proposed rulemaking in which it proposes approval of a [state implementation plan], promulgation of a [federal implementation plan], partial approval of a [state implementation plan] and promulgation of a partial [federal implementation plan], or approval of a [state implementation plan] or promulgation of a [federal implementation plan] in the alternative . . . that collectively meet the regional haze implementation requirements that were due by December 17, 2007 under EPA's regional haze regulations."

- **November 15, 2012:** EPA was required to "sign a notice(s) of final rulemaking promulgating a [federal implementation plan] . . . except where, by [that date] EPA has for [Texas] signed a notice of final rulemaking unconditionally approving a [state implementation plan], or promulgating a partial [federal implementation plan] and unconditional approval of a portion of a [state implementation plan], that collectively meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations."

Id. at ¶¶ 4–6, Table A. In the Consent Decree, the parties agreed that those deadlines could be extended for a period up to sixty days by agreement of the parties, but that any extensions for longer than sixty days would require Court approval, "upon motion made pursuant to the Federal Rules of Civil Procedure by EPA and upon consideration of any response by Plaintiffs and reply by EPA." *Id.* ¶ 7.

In the five years since the Consent Decree was entered, the parties have agreed to a number of extensions and amendments of the requirements for Texas.[4] Of particular relevance, on December 15, 2015, the Court granted EPA's unopposed motion to amend the consent decree. The amended consent decree provided that:

- By December 9, 2015, EPA must sign a notice of final rulemaking promulgating a federal implementation plan for Texas, unless EPA has signed by that date a notice of final rulemaking approving a state implementation plan or promulgating a partial federal implementation plan and unconditional approval of a partial state

4 Texas is the sole state with remaining deadlines, and EPA has otherwise fully complied with the terms of the Consent Decree.

implementation plan that collectively meet the requirements of the Clean Air Act.

- The December 9, 2015 deadline would not apply "for the determination and adoption of requirements for best available retrofit technology ('BART') for electric generating units ('EGUs') in Texas." Instead, a final rulemaking promulgating a federal plan for those requirements would be due by December 9, 2016, unless a state plan or a partial state plan was approved and a partial federal plan promulgated by that date.

- The December 9, 2016 deadline could be extended to September 9, 2017 if by December 9, 2016, EPA signed a notice of proposed rulemaking proposing approval of a state plan, promulgation of a federal plan, partial approval of a state and a federal plan, or approval of a state plan or a federal plan in the alternative.

Order (Dec. 15, 2015) [Dkt. # 86].[5] EPA signed a timely notice of proposed rulemaking on January 4, 2017 which proposed to disapprove of certain aspects of Texas's state implementation plan, and proposed to promulgate a federal implementation plan to solve the deficiency, so the September 9, 2017 deadline became the operative date for final action. Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze & Interstate Visibility Transport Federal Implementation Plan, 82 Fed. Reg. 912–01 (Jan. 4, 2017).

With three weeks left to go, on August 18, 2017, EPA filed a motion to amend the deadlines set out in the December 15, 2015 order. The agency seeks an extension of the September 9, 2017 deadline to December 31, 2018. EPA's Mot. to Amend the Consent Decree [Dkt. # 93] ("Mot."); EPA's Mem. in Supp. of Mot. [Dkt. # 93-1] ("Mem."). Plaintiffs oppose the motion, Pl.'s Mem. in Opp. to Mot. [Dkt. # 95], and the agency waived its right to file a reply. EPA's Unopposed Mot. to Expedite Consideration of Mot. [Dkt. # 92] at 1–2.

5 The December 15, 2015 order was amended to correct a typographical error. *See* Order (Aug. 9, 2017) [Dkt. # 91].

Defendants premise their motion on Federal Rule of Civil Procedure 60(b)(5), Mot. at 1, which provides that "on motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding . . . [if] applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). "[A] party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Rufo v. Inmates of the Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992).

While the Supreme Court noted that the standard set forth in *Rufo* applies only "when a party seeks modification of a term of a consent decree that arguably relates to the vindication of a constitutional right," *id.* at 383 n.7, the D.C. Circuit has applied the *Rufo* standard to cases that do not implicate constitutional rights. *See NLRB v. Harris Teeter Supermarkets*, 215 F.3d 32, 35 (D.C. Cir. 2000) ("Although *Rufo* concerned the institutional reform of an instrumentality of government, we have applied the *Rufo* Rule 60(b)(5) equity analysis to other types of cases involving requests for consent decree modification."). According to the Court of Appeals, a district court can exercise its discretion to modify a consent decree: (1) "when changed factual conditions make compliance 'substantially more onerous,'" (2) when a decree "proves to be unworkable because of unforeseen obstacles," or (3) "when enforcement would be detrimental to the public interest." *Id.* at 35, quoting *Rufo*, 502 U.S. at 384; *see also Horne v. Flores*, 557 U.S. 433, 447 (2009).

Defendants have not carried their burden to show that any of the factors from *Rufo* are present here, or that it would be inequitable to enforce the terms of the judgment agreed to by the agency. Defendants point out that a "core principle" of the Clean Air Act is "cooperative

federalism," Mem. at 2, 10–11, citing *EPA v. EME Homer City Generation*, 134 S. Ct. 1584, 1602 n.14 (2014), and they assert that "policy changes legitimately instituted by the new administration led to a breakthrough in the relationship between EPA and Texas," and that, through that new relationship, the Governor of Texas has made a "firm commitment" to "bring the full weight and resources of the State of Texas to bear" on the development of an approvable state implementation plan. Mem. at 14; *see also* Decl. of Samuel J. Coleman [Dkt. # 93-2] at 7 (noting that continued negotiations between the EPA and Texas is the "[p]referred [a]pproach" to resolving EPA's consent decree obligations); Mem. of Agreement Between Texas Comm'n on Envtl. Quality & U.S. EPA [Dkt. # 93-2].

This is not the sort of significant change in circumstance that would warrant relief. Texas has been under the statutory obligation to comply with the Clean Air Act since at least 2007, and it has been on notice of EPA's finding that it had failed to comply with the requirement to submit a state implementation plan since 2009. So there has been quite a period of time during which "cooperative federalism" could take hold. This lawsuit, and the consent decree that followed, flowed directly from the state's delay in the face of its Clean Air Act obligations, and the plaintiffs were willing to agree, several times, to reasonable extensions. Texas has had ample time to develop, submit, and negotiate a compliant state implementation plan if that was its actual preference.

It is true that the cooperative federalism ideal is incorporated into the statutory scheme, which calls for state implementation plans to be the starting point. But the statute also mandates that the federal government *must* step in if a state's submissions are late or insufficient. *See, e.g.*, *Nat. Res. Def. Council v. Browner*, 57 F.3d 1122, 1124 (D.C. Cir. 1995) (holding that when a state fails to submit a compliant implementation plan, the Clean Air Act "rescinds state authority to

make the many sensitive technical and political choices that a pollution control regime demands"); *see also Sierra Club v. EPA*, 356 F.3d 296, 298 (D.C. Cir. 2004) (holding that the EPA "was not authorized to grant conditional approval" to a state implementation plan "that did nothing more than promise to do tomorrow what the [Clean Air] Act requires today"). And here, while Texas has taken some steps to comply with the statute on various occasions, those submissions have repeatedly been deemed to be inadequate by the federal officials.

Moreover, the request for the extension refers to communications between state and federal officials, but it does not indicate that the state's plan is anything other than conceptual at this time, and it does not call for anything to be "proposed" until next March or "submitted" until October 2018. Coleman Decl. ¶ 16. These bare bones of a schedule leave the Court with little assurance that the work will be accomplished.[6]

Finally, EPA has not shown that compliance with the consent decree would be "more onerous" or that the settlement "has proven to be unworkable." EPA has represented that, if its motion is denied, it is ready to move forward with the publication of the final rulemaking on September 9. 2d Decl. of Samuel J. Coleman [Dkt. # 94-1] ¶ 11 (averring 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").

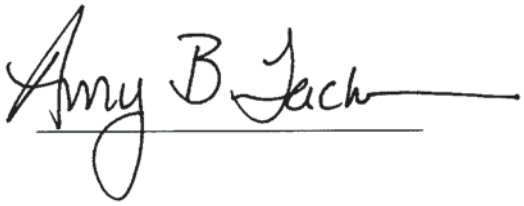
6 The Court's decision is based only on the record before it, including the motion and supporting materials filed by the EPA on August 18 and 24, 2017, and the timing of the Court's decision has been driven by the timing of the EPA's filing and the looming deadline. But the Court would be remiss if it did not observe that the state of Texas is now dealing with a natural disaster of unprecedented scope, and that its officials will be justifiably focused on relief and recovery measures for the foreseeable future.

The federal government must abide by its obligations to promulgate a federal implementation plan by the September 9, 2017 deadline. The motion to amend the judgment in this case over plaintiffs' well-founded objections will be denied.

CONCLUSION

Pursuant to Federal Rule of Civil Procedure 60(b)(5), it is hereby **ORDERED** that defendants' motion to amend the consent decree is **DENIED**. Defendants shall, by September 9, 2017, (1) promulgate a federal implementation plan; (2) unconditionally approve a state implementation plan; or (3) promulgate a partial federal implementation plan and unconditionally approve a partial state implementation plan, to meet the "best available retrofit technology" requirement for electric generating units in Texas.

SO ORDERED.



AMY BERMAN JACKSON
United States District Judge

DATE: August 31, 2017