IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL PARKS CONSERVATION ASSOCATION, et al. Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and SCOTT PRUITT, Administrator, United States Environmental Protection Agency, Defendants.	)	Case No.: 1:11-CV-01548-ABJ

EPA'S OPPOSITION TO PLAINTIFF'S MOTION TO ENFORCE DECREE
AND
MEMORANDUM IN SUPPORT OF CROSS-MOTION
TO TERMINATE THE DECREE

INTRODUCTION

Defendants, the United States Environmental Protection Agency and Scott Pruitt, Administrator (jointly referred to as "EPA"), move to terminate the Partial Consent Decree (Mar. 30, 2012) ("Consent Decree" or "Decree"). ECF 21. Paragraph 18 of the Decree provides that EPA may move for such relief when the Agency has satisfied the last requirement of Paragraphs 3-6 of the Consent Decree. EPA met its last obligation under those Paragraphs by signing, on September 29, 2017, the final rule entitled, "Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan" (the "Final Rule"), which has now been published in the Federal Register. 82 Fed. Reg. 48,324 (Oct. 17, 2017). Therefore, the Consent Decree should be terminated.

On October 13, 2017, Plaintiffs filed a notice stating their position that the Final Rule "does not satisfy the requirements of the Consent Decree because EPA failed to comply with the applicable requirements for notice and comment before signing the Final Rule." Plaintiffs' Statement of Position and Motion to Enforce Decree, 3 (Oct. 13, 2017) (Pltf. Mot."). ECF 103. Plaintiffs concurrently moved to enforce the Consent Decree. *Id.* Plaintiffs' motion first asks the Court to rule that the Final Rule "is not a lawful final action" due to EPA's alleged failure to comply with the notice-and-comment requirements of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7607(d)(1)(B), (2)-(6). Plaintiffs further request that, after finding that the Final Rule is invalid, the Court order EPA to, within 30 days, "adopt a final rule based on [EPA's 2017] proposal." Pltf. Mot. at 16.

Plaintiffs' argument should be rejected. The Court's jurisdiction in this matter is premised on the CAA's citizen-suit provision, which authorizes this Court only to compel the Agency to perform a nondiscretionary duty, 42 U.S.C. § 7604(a)(2). Plaintiffs, however, are not seeking to require EPA to perform an as-yet unperformed action. They are instead seeking this Court's review of the procedures leading to promulgation of the Final Rule to determine if EPA's final action was lawful. But the CAA gives the circuit courts of appeals exclusive jurisdiction to review final action by EPA, including procedural objections to such actions. *Id.* § 7607(b), (d)(8). Thus, Plaintiffs' fundamental argument – that the Final Rule is "not a lawful final action", Pltf. Mot. at 3, – is within the exclusive jurisdiction of the courts of appeals and cannot be decided here. Likewise, Plaintiffs' requested remedy, an order compelling EPA to adopt a rule based on the 2017 Proposal, impermissibly asks the Court to dictate the *content* of the Agency's final action. The CAA's citizen-suit provision, however, only authorizes courts to issue orders with respect to the *timing* of the Agency's performance of a non-discretionary action. Finally, Plaintiffs' invitation for this Court to

engage in a "logical outgrowth" inquiry to assess whether EPA complied with the CAA's procedural requirements before signing the Final Rule is inconsistent with the D.C. Circuit's recent holdings that such arguments must be first presented to the Agency through the CAA's petition for reconsideration process before they can be subject to review by the circuit courts.

For these reasons, the Court should deny Plaintiffs' motion to enforce. In addition, the Court should grant EPA's motion to terminate the Consent Decree because the Agency has signed all the final rules required by Paragraphs 3-6 of that Decree.[1]

BACKGROUND

I. STATUTORY BACKGROUND

The CAA, 42 U.S.C. §§ 7401-7671q, is the principal federal statute designed to "protect and enhance the quality of the Nation's air resources." *Id.* § 7401(b)(1). "Air quality regulation under the CAA is an exercise in cooperative federalism." *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013); *see also National Parks Conservation Ass'n v. EPA*, 803 F.3d 151, 153 (3d Cir. 2015) (petition for review of regional haze action).

A. Implementation Plans

` The states are responsible for adopting State Implementation Plans ("SIPs"), but SIPs must be reviewed by EPA to ensure that they meet the requirements of the CAA. Once a state submits a SIP, EPA must determine within six months whether the SIP is complete. 42 U.S.C. § 7410(k)(1)(A)-(B). If EPA determines that the submission is complete or the submission is deemed complete by operation of law, EPA must take final action within 12 months to approve or disapprove the SIP, in whole or in part. *Id.* § 7410(k)(2)-(3). EPA may disapprove a SIP only if it

[1] The matter cannot yet be dismissed. The Court has allowed Plaintiffs until December 12, 2017, to file a motion for attorneys' fees. Minute Order (Sept. 13, 2017). Accordingly, EPA is limiting the relief requested to termination of the Consent Decree.

fails to meet the requirements of the CAA. *Id.* § 7410(k)(3). The CAA imposes a duty on EPA to promulgate a Federal Implementation Plan ("FIP") at any time within two years of EPA's finding that a state has failed to submit a required SIP (or that a SIP is incomplete), or after EPA's disapproval of a SIP. *Id.* § 7410(c)(1). EPA's actions with respect to implementation plans are subject to the CAA's procedural requirements, including the provisions for public notice and comment prior to rulemaking. *Id.* §§ 7607(d)(1)(B), (2)-(6).

B. Visibility Requirements

Congress added section 169A to the CAA in 1977 to address visibility impairment in certain national parks and wilderness areas that is caused by manmade air pollution (commonly referred to as "regional haze"). *Id.* § 7491(a)(1). Congress required EPA to promulgate regulations requiring states to revise their SIPs to include "such emission limits, schedules of compliance, and other measures as may be necessary to make reasonable progress toward meeting" Congress' national visibility goal. *Id.* § 7491(b)(2). One such measure that Congress deemed necessary was a requirement that certain older, often uncontrolled, major stationary sources "procure, install, and operate . . . the best available retrofit technology [BART]." *Id.* § 7491(b)(2)(A). EPA in turn promulgated regulations requiring states, including Texas, to submit SIP revisions addressing the CAA's visibility requirements, including BART. *See* 64 Fed. Reg. 35,714, 35,737 (July 1, 1999) (*codified* at 40 C.F.R. §§ 51.300-309) (the "Regional Haze Rule"). Among other things, the Regional Haze Rule allows states or EPA to develop an alternative to BART, such as a trading program, if the state or EPA can demonstrate that the alternative provides for greater reasonable progress towards natural visibility conditions. 40 C.F.R. § 51.308(e)(2)-(6). *See National Parks Conservation Ass'n v. McCarthy*, 816 F.3d 989, 994 (8th Cir. 2016) (upholding state's reliance on the trading provisions of EPA's Cross-State Air Pollution Rule ("CSAPR") as an alternative to BART); *WildEarth Guardians v.*

EPA, 770 F.3d 919, 923 (10th Cir. 2014) (upholding a regional cap-and-trade program as an alternative to BART). The Regional Haze Rule required states to submit their regional haze SIP revisions to EPA by December 17, 2007. *Id.* § 51.308(b).

C. Judicial Review

The CAA bifurcates jurisdiction over actions against EPA between the district courts and the circuit courts of appeals. The federal district courts have jurisdiction to hear claims that EPA has failed to perform a duty that is not discretionary under the CAA or that the Agency has unreasonably delayed in performing a required duty. 42 U.S.C. § 7604(a)(2). A district court, however, is without jurisdiction "to address the content of EPA's conduct, [or] issue substantive determinations of its own." *Sierra Club v. Browner*, 130 F. Supp. 2d 78, 90 (D.D.C. 2001), *aff'd*, 285 F.3d 63 (D.C. Cir. 2002). Only the circuit courts of appeals have jurisdiction to review the substance of a final action by the Agency under the CAA. *Id.* (citing 42 U.S.C. § 7607(b)). Judicial review of an implementation plan that is locally or regionally applicable may be filed only in the court of appeals where the plan applies. 42 U.S.C. § 7607(b)(1). "The sole forum for challenging procedural determinations" made in connection with such final action is the appropriate circuit court. *Id.* § 7607(d)(8). The appropriate circuit court reviews the final action not only to determine whether it is substantively invalid, i.e., arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law, *see id.* § 7607(d)(9)(A), but also whether the rule is "without observance of procedure required by law . . . ." *Id.* § 7607(d)(9)(D).

In evaluating whether EPA has complied with the procedural requirements for public notice and comment, the courts consider the "logical outgrowth" principle. As explained by the D.C. Circuit, "the 'logical outgrowth' test normally is applied to consider whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that

could persuade the agency to modify its rule." *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000) (internal quotations and emphasis omitted), *cited in Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007).

D. Administrative Reconsideration

Under the CAA, the relevant court of appeals can consider only issues that were "raised with reasonable specificity during the period for public comment." *Id.* § 7607(d)(7)(B). This same section provides an avenue to present objections that could not have been raised during that period by establishing a procedure for reconsideration. If the petitioner can demonstrate that it was "impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule," EPA must reconsider the rule in a proceeding that "provide[s] the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." *Id.*

II. ADMINISTRATIVE BACKGROUND

In 2009, EPA made a finding that a number of states, including Texas, had failed to submit SIPs to address regional haze. 74 Fed. Reg. 2392, 2393 (Jan. 15, 2009). This finding triggered EPA's obligation to promulgate a FIP at any time within two years to meet the requirements of the CAA and EPA's Regional Haze Rule unless Texas submitted a SIP that EPA then approved. 42 U.S.C. § 7410(c)(1).

On March 31, 2009, Texas submitted a regional haze SIP to EPA that relied on the trading provisions of EPA's Clean Air Interstate Rule ("CAIR") as an alternative to requiring the state's electric generating units ("EGUs") to install BART. EPA had promulgated CAIR to address a separate CAA provision regarding the interstate transport of pollutants. *See* 77 Fed. Reg. 33,642,

33,653 (June 7, 2012). However, the D.C. Circuit Court of Appeals had invalidated CAIR in 2008 and remanded the rule to EPA (without vacatur) with instructions to develop a replacement. *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) (*modified by North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008)). As a result, EPA issued a limited disapproval of portions of the Texas regional haze SIP in 2012. 77 Fed. Reg. at 33,653.[2] EPA did not finalize a FIP for Texas at that time, however, to allow more time for EPA to assess the current Texas SIP submittal "due to the variety and number of BART-eligible sources and the complexity of the SIP." *Id.* at 33,654.

In 2014, EPA proposed to take action on the remainder of the Texas regional haze SIP. 79 Fed. Reg. 74,818 (Dec. 16, 2014) ("2014 Proposal'). EPA proposed to rely on the trading provisions of CSAPR, EPA's replacement for CAIR, as an alternative to requiring the state's EGUs to install BART. *Id.* at 74,823. In 2015, the D.C. Circuit ruled on pending legal challenges to CSAPR, largely upholding the rule, but invalidating and remanding to EPA certain of the rule's emissions budgets, including those for Texas. *EME Homer City Generation, L.P v. EPA*, 795 F.3d 118, 138 (D.C. Cir. 2015). Because the *EME Homer City* decision affected EPA's 2014 proposal to rely on CSAPR as a BART alternative for EGUs in Texas, this Court extended EPA's deadline for final action under the Consent Decree (with respect to the BART requirements for EGUs in Texas) from December 9, 2015, to September 9, 2017. *See* EPA's Unopposed Motion to Amend the First Partial Consent Decree (Dec. 7, 2015), ECF 85; Order (Dec. 15, 2015) (granting EPA's motion), ECF 86. Consequently, when EPA finalized other aspects of the 2014 Proposal in 2016, EPA deferred action

[2] Texas has petitioned the D.C. Circuit for review of the Agency's action. This petition, which was consolidated with others, remains pending. All briefs have been filed, and an argument date has been set for November 16, 2017. *Util. Air Regulatory Grp. v. EPA*, Case No. 12-1342 (D.C. Cir.) and consolidated cases.

on the Agency's proposed reliance on CSAPR as an alternative to requiring the state's EGUs to install BART. 81 Fed. Reg. 296, 302-03 (Jan. 5, 2016) ("2016 Final Rule").[3]

In January 2017, EPA issued a new proposal to (1) require certain Texas EGUs to install BART controls (or maintain existing controls) to reduce their emissions of sulfur dioxide ("SO_2") and (2) rely on EPA's recent update to CSAPR[4] as an alternative to requiring BART for oxides of nitrogen ("NO_X"). 82 Fed. Reg. 912, 945-47 (Jan. 4, 2017) ("2017 Proposal"). EPA stated that the option for a trading program as a BART alternative exists: "Rather than requiring source-specific BART controls, states also have the flexibility to adopt an emissions trading program or alternative program as long as the alternative provides greater reasonable progress towards improving visibility than BART." *Id.* at 914. EPA received a substantial number of comments on the 2017 Proposal. After considering the comments, the Administrator of EPA signed the Final Rule on September 29, 2017. *See* 82 Fed. Reg. at 48,332-53 ("Summary and Analysis of Major Issues Raised by Commenters").

[3] In the 2016 Final Rule, EPA partially approved elements of the Texas SIP, including the BART requirements for facilities other than EGUs. EPA disapproved other portions of the Texas SIP and promulgated a FIP to address the requirements pertaining to "reasonable progress, the long-term strategy, and the calculation of natural visibility conditions." 81 Fed. Reg. at 296. Petitions for review of that action were filed with the Fifth Circuit. *State of Texas v. EPA*, No. 16-60118 (5th Cir.). On March 22, 2017, the Fifth Circuit granted EPA's motion for a voluntary remand. EPA has not yet completed its response to the remand.

[4] The update to CSAPR addressed, among other things, the D.C. Circuit's remand in *EME Homer City* of the ozone-season NO_X budgets for certain states, including Texas. 81 Fed. Reg. 74,504 (Oct. 26, 2016). Petitions for review of EPA's update to CSAPR are pending in the D.C. Circuit. *State of Wisconsin v. EPA*, Case No. 16-1406 (D.C. Cir.) and consolidated cases. The update to CSAPR did not address the D.C. Circuit's remand of Texas' SO_2 budget. EPA addressed that portion of the D.C. Circuit's remand in a separate action by removing Texas from CSAPR's trading program for annual emissions of SO_2. 82 Fed. Reg. 45,481 (Sept. 29, 2017).

In the Final Rule, EPA explained that the Texas Commission on Environmental Quality and the Public Utility Commission of Texas had submitted timely comments urging the Agency to forgo requiring the proposed source-by-source controls and instead adopt as a BART alternative "the concept of emission caps using CSAPR allocations" to address the SO_2 BART requirement for EGUs in Texas. *Id.* at 48,327. Luminant and American Electric Power, the owners of several BART-eligible EGUs, also supported such an approach. *Id.* After considering these comments, and recognizing that the Agency had originally sought to rely on CSAPR in the never-withdrawn 2014 Proposal, EPA adopted the commenters' approach by finalizing a Texas-only intrastate trading program that "will achieve SO_2 emission levels that are functionally equivalent to those projected for Texas' participation in the original CSAPR program," without running afoul of the D.C. Circuit's decision in *EME Homer City*. *Id.* at 48,327-29; *see also id.* at 48,333 (discussing comments in more detail). EPA found that, "because this BART alternative will result in SO_2 emissions from Texas EGUs that will be similar to emissions anticipated under CSAPR, the alternative is an appropriate approach for addressing Texas' SO_2 BART obligations." *Id.* at 48,327. EPA addressed the NO_X BART requirement for EGUs in Texas by finalizing the Agency's proposed reliance on the update to CSAPR. *Id.* at 48,331-32.

III. LITIGATION BACKGROUND

Plaintiffs filed this lawsuit on August 29, 2011, alleging that EPA had failed to perform a non-discretionary duty to promulgate FIPs for Texas and 33 other states within two years of EPA's January 15, 2009 finding. ECF 1. To resolve Plaintiffs' claims, EPA and Plaintiffs entered into a Consent Decree, which this Court entered on March 30, 2012. ECF 21. The Court has extended the deadlines applicable to EPA's obligations under the Consent Decree by granting a series of unopposed motions. ECF Nos. 36, 68, and 71; Minute Order (June 10, 2014); Minute Order (June

15, 2012). On December 15, 2015, this Court entered the most recent amendment to the Consent Decree. ECF 86. This amendment modified Paragraph 4.a.ii[5] to provide in pertinent part that:

> (a) **No later than December 9, 2016, EPA shall sign a notice of final rulemaking** promulgating a FIP for Texas to meet the BART requirements for EGUs that were due by December 17, 2007 under EPA's regional haze regulations, except where, by such deadline EPA has, for Texas, signed a notice of final rulemaking unconditionally approving a SIP, or promulgating a partial FIP and unconditional approval of a portion of a SIP, that collectively meet the BART requirements that were due by December 17, 2007 under EPA's regional haze regulations.
>
> (b) **The December 9, 2016 deadline in subparagraph 'a' for signature of a notice of final rulemaking shall be extended to September 9, 2017, if by December 9, 2016, EPA signs a new notice of proposed rulemaking** in which it proposes approval of a SIP; promulgation of a FIP; partial approval of a SIP and promulgation of a partial FIP; or approval of a SIP or promulgation of a FIP in the alternative, for Texas, that collectively meet the regional haze implementation plan requirements for BART for EGUs that were due by December 17, 2007 under EPA's regional haze regulations.

Id. (emphases added). Because EPA timely signed the notice of proposed rulemaking referenced in Paragraph 4.a.ii.b of the stipulation, 82 Fed. Reg. 912 (Jan. 4, 2017), the deadline for EPA to sign the notice of final rulemaking referenced in Paragraph 4.a.ii.a was extended to September 9, 2017. That deadline was later extended again to September 30, 2017, in connection with Hurricane Harvey. Minute Order (Sept. 6, 2017); Stipulation (Sept. 6, 2017), ECF 97. After EPA timely signed the Final Rule and so notified the Court, Joint Status Report (Oct. 2, 2017) (ECF 100), Plaintiffs filed their Statement of Position and Motion to Enforce Decree (Oct. 13, 2013) (ECF 103).

[5] On August 9, 2017, the Court granted a motion to correct a scrivener's error in the Order as entered in 2015. ECF 91. This quotation includes the correction.

ARGUMENT

I. THE CONSENT DECREE SHOULD BE TERMINATED

Paragraph 18 of the Consent Decree provides that EPA may move to terminate the Consent Decree after EPA has signed the notices of final rulemaking required by Paragraphs 3-6 of the Consent Decree. Because this condition has been met, the Court should terminate the Consent Decree.

Plaintiffs do not contend that EPA has failed to sign any of the notices of final rulemaking required by Paragraphs 3-6. They assert only that the Final Rule, promulgated in the most recent notice, is "not a lawful final action" because EPA allegedly failed to sufficiently comply with certain requirements for public notice and comment. Pltf. Mot. at 3. In making this argument, Plaintiffs tacitly accept that EPA has taken "final action." They only challenge the procedural and substantive validity of that action. Challenges to whether the Final Rule is "lawful" are outside the scope of the Court's jurisdiction under the CAA's citizen-suit provision. *Infra* 12-17. This Court's statutory authority is limited to that conferred under 42 U.S.C. § 7604(a)—as relevant here, to compel the Agency to perform nondiscretionary duties imposed by the CAA. The D.C. Circuit has rejected the theory that a mandate for EPA to promulgate a regulation can be construed, for purposes of a citizen-suit provision, as including a mandatory duty that the substance of the regulation comply with the appropriate legal standards. *Sierra Club v. Thomas*, 828 F.2d 783, 792 (D.C. Cir. 1987) ("We long ago rejected, as inconsistent with congressional intent in enacting [CAA] sections 304 and 307, the convoluted notion that EPA is under a nondiscretionary duty--for purposes of section 304(a)(2)-- not to abuse its discretion."). By the same reasoning, Plaintiffs' claim that EPA did not comply with applicable procedural requirements cannot be addressed through this mandatory duty suit.

As explained below, challenges to the procedural and substantive lawfulness of the Final Rule must be addressed either through the appropriate court of appeals under 42 U.S.C. § 7607(b)(1), or a petition to the Agency for reconsideration under section 7607(d)(7)(B). For purposes of the present motions, the dispositive fact is that EPA has signed each of the notices of final rulemaking required by Paragraphs 3-6 of the Consent Decree. Plaintiffs do not contend otherwise.

II. PLAINTIFFS' MOTION TO ENFORCE SHOULD BE DENIED

A. This Court Has No Jurisdiction to Hear Plaintiffs' Objections to The Final Rule.

Under the citizen-suit provision of the CAA, this Court's jurisdiction to grant relief is limited to "order[ing] the Administrator to perform [an] act or duty" required by statute or "to compel . . . agency action unreasonably delayed." 42 U.S.C. § 7604(a) (last paragraph).

> Under the CAA, the Court can only order EPA to take nondiscretionary actions required by the statute itself. *See* 42 U.S.C. § 7604(a). The Act expressly limits the Court's authority in this regard and does not envision other types of relief. *Notably, the CAA does not allow district courts to address the content of EPA's conduct, issue substantive determinations of its own, or grant other forms of declaratory relie*f.

Sierra Club v. Browner, 130 F. Supp. 2d at 90 (emphasis added) ("The district court adhered to the limits of its jurisdiction by ordering EPA to perform the nondiscretionary function [at issue]."); *see also NRDC, Inc. v. Reilly*, 781 F. Supp. 806, 811 (D.D.C. 1992) ("While this Court has jurisdiction to enforce the Consent Decree and to hear claims that the Administrator has failed to fulfill a mandatory duty to promulgate regulations, it is not our domain to judge what should be included in the regulations."). Once EPA has taken the action at issue, "the Court is without power to grant meaningful relief," and the claim is moot. *Browner*, 130 F. Supp. 2d at 83. The Court, "which must

remain vigilantly aware of its constitutional limitations," must dismiss the claim "even if it is possible that some later, independent action may dispel any mootness." *Id.*

Like the Plaintiffs in this case, who seek both substantive and procedural relief, the plaintiff in *Browner* asked the district court to impose "an array of declaratory and injunctive relief," including orders that EPA perform certain procedural steps. *See id.* at 87 (listing the requested relief, which included an order that "EPA publish notice of the [nonattainment area's] nonattainment and the resulting classification" and "requiring that the notice be published *nunc pro tunc* as of the statutorily imposed deadline"). The court rejected the plaintiff's request, concluding that "doing so would necessarily embroil the Court in an assessment of the substance of EPA's actions or omissions," which is "expressly reserved for the appropriate court of appeals." *Id.* at 90.

Indeed, "once the Agency takes a final action and performs a non-discretionary act, the Court of Appeals for the appropriate Circuit has exclusive jurisdiction to review the substance and validity of the Agency's final action." *Sierra Club v. Whitman*, No. 1:00-cb-02206 (CKK) (D.D.C. July 10, 2002) ("July 10, 2002 Mem. Op.") (Pltf. Mot., Ex. D) at 6; *see also* 42 U.S.C. § 7607(b)(1). Under the CAA, the appropriate circuit reviews the final action not only to determine whether it is substantively invalid, *i.e.*, arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law, *see* 42 U.S.C. § 7607(d)(9)(A), but also whether the rule was adopted "without observance of procedure required by law . . . ." *Id.* § 7607(d)(9)(D).

Here, the only nondiscretionary act at issue is EPA's statutory duty, with respect to Texas,[6] to promulgate a final regional haze FIP. Complaint ¶¶ 34, 38. The Consent Decree addressed this duty, requiring EPA to either "sign a notice of final rulemaking promulgating a FIP for Texas to

[6] The Complaint and the Consent Decree both addressed EPA's obligations with respect to a number of states. Plaintiffs' current motion is limited to EPA's obligations for Texas.

meet the BART requirements for EGUs that were due by December 17, 2007 under EPA's regional haze regulations," or "sign a notice of final rulemaking unconditionally approving a SIP, or promulgating a partial FIP and unconditional approval of a portion of a SIP, that collectively meet the BART requirements." Paragraph 4(d)(ii). Plaintiffs do not argue that the Final Rule is incomplete or that any of the elements necessary under EPA's regulations were omitted. Rather, Plaintiffs object to the substance of the Final Rule and the procedures by which it was promulgated. Pltf. Mot. at 9-10; 13-14. The remedy they seek is an order dictating the procedure by which EPA must take further action and the substance of that action (finalization of the 2017 Proposal). *Id.* at 16-17. Such relief would exceed the jurisdiction provided to this Court by the CAA's citizen-suit provision. 42 U.S.C. § 7604(a).[7] The CAA vests jurisdiction over the procedure and substance of final agency actions solely in the courts of appeals. *See* 42 U.S.C. § 7607(b)(1), (8). Because Plaintiffs' Motion to Enforce the Consent Decree necessarily asks this Court to encroach on the exclusive jurisdiction of the appropriate court of appeals by determining whether the Final Rule was "lawful," it must be denied.

The two cases Plaintiffs cite to support their argument that the Court has jurisdiction to provide the requested relief are inapposite. In *Sierra Club v. Whitman*, an unpublished memorandum opinion, the plaintiff claimed that EPA had failed to make determinations as to whether certain areas had attained the national ambient air quality standards and moved for partial summary judgment. EPA cross-moved to dismiss, arguing that EPA had in fact made the determinations in

[7] This remedy would also be inconsistent with the language of Paragraph 11 of the Consent Decree, which, in relevant part, states: "[N]othing in this Consent Decree shall be construed to limit or modify any discretion accorded EPA by the CAA or by general principles of administrative law in taking the actions which are the subject of this Consent Decree."

various Federal Register notices published *several years* before the case was filed. Recognizing its jurisdictional limitations, the court stated:

> *It is clear that this Court does not have jurisdiction to determine whether final actions undertaken by EPA are valid or lawful.* However, the Court retains jurisdiction to determine whether the actions taken by EPA are in fact final actions.

July 10, 2002 Mem. Op. at 6 (emphasis added). With respect to one area, the court found that EPA had not taken final action on the attainment determination. The court explained that the final rule which EPA claimed constituted such final action was actually a response to a request for redesignation of the area from nonattainment to attainment that did not specifically refer to an attainment determination either in the title or the text. The court concluded that the public could not have known that either the proposed or final rule would have included the attainment determination, particularly because EPA never cited the relevant statutory section and was promulgating the rule to meet a different statutory obligation.

Whitman is inapposite. The rulemaking at issue there was subject to the requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, not the CAA, 42 U.S.C. § 7607(d).[8] This distinction is crucial because, as explained below, the D.C. Circuit has held that objections to the adequacy of notice in a section 7607(d) rulemaking must be presented first to EPA in a petition for reconsideration before a petition for review can be filed. Moreover, in *Whitman* the court found that EPA failed to provide *any* notice in the proposal or even the final rule that the Agency was taking action to meet its obligations with respect to the attainment determination. The court's notice inquiry was limited to ascertaining whether the Agency was correct in contending that the final

[8] Section 7607(d) applies only to the categories of rulemaking identified in that provision; a list that includes "the promulgation or revision of an implementation plan by the Administrator under section 7410(c)," 42 U.S.C. § 7607(d)(1)(B), but does not include final action on an attainment determination or a redesignation request. Rulemakings not identified in section 7607(d) are subject to the requirements of the APA, 5 U.S.C. § 553. *See Sierra Club v. EPA*, 699 F.3d at 531.

action on the redesignation request, which predated the litigation by seven years, was actually a final action on the attainment demonstration as well. In the present case, Plaintiffs' own motion makes clear that they were well aware that both the 2017 Proposal and the Final Rule addressed the BART requirements for EGUs in Texas. Indeed, the notices on their face make the Agency's purpose perfectly clear. *See* 82 Fed. Reg. at 912 (summarizing proposed BART determinations) (Proposed Rule); 82 Fed. Reg. at 48,324 ("[T]he EPA is finalizing determinations regarding best available retrofit technology (BART) for electric generating units (EGUs) in the State of Texas.") (Final Rule). In light of the notices, although Plaintiffs are dissatisfied with the Final Rule, they cannot seriously dispute the fact that the Agency took final action to fulfill the nondiscretionary duty that was the subject of this lawsuit. Thus, *Whitman* does not support their claim that this Court has jurisdiction to determine whether the Agency's final action was lawful; indeed, the *Whitman* court explicitly recognized that such a determination was *beyond* its jurisdiction). July 10, 2002 Mem. Op. at 6 ("It is clear that this Court does not have jurisdiction to determine whether final actions undertaken by EPA are valid or lawful.).

Sierra Club v. McCarthy, 61 F.Supp.3d at 35, is even more off point, and properly read, undermines Plaintiffs' own argument. There, EPA issued a "brief determination notice" in order to comply with a court-ordered deadline to perform a non-discretionary duty. *Id.* at 38. The plaintiff then challenged the determination notice in the D.C. Circuit. The D.C. Circuit held that the determination notice was procedurally invalid because EPA had not complied with notice-and-comment requirements. *Sierra Club v. EPA*, 699 F.3d 530, 535 (D.C. Cir. 2012). When it appeared that EPA did not plan to reissue the determination in accordance with the D.C. Circuit's decision, the plaintiff filed a motion to enforce the district court's order. The district court held that because the *D.C. Circuit* had found EPA's determination notice invalid, the district court's original order

remained unsatisfied and ordered EPA to comply. 61 F. Supp. 3d at 40. This decision does not support Plaintiffs' argument for the simple reason that the district court did not address the notice issue or otherwise inquire into whether the determination notice was lawful or not. Instead, the notice question was decided by the D.C. Circuit in a petition for review pursuant to 42 U.S.C. § 7607(b). The district court, in the motion to enforce, simply applied the D.C. Circuit's holding. Therefore, *McCarthy* supports EPA's position that the review of procedural objections to final agency action under section 7607(d) lies exclusively in the courts of appeals.

In summary, there is no support for Plaintiffs' position that this Court can consider whether the Final Rule was not a lawful one. Any challenge to the validity of the Rule must be addressed to EPA or the appropriate circuit court, depending on the nature of the particular objection.[9] As such, the Court should not order EPA to promulgate a new final rule in 30 days based on the 2017 Proposal. Instead, this Court should carefully observe the limitations that Congress has placed on its jurisdiction and deny Plaintiffs' motion to enforce. *See Sierra Club*, 130 F. Supp. 2d at 83.

B. The D.C. Circuit Recognized That Objections to the Agency's Notice-and-Comment Procedures Must Be Presented through a Petition for Reconsideration Before Judicial Review Is Available.

Under the CAA, 42 U.S.C. § 7607(d)(7)(B), the relevant court of appeals "may hear objections to EPA rules or procedures only if the objections were raised with reasonable specificity during the period of public comment." *EME Homer City Generation,* 795 F.3d at 137 (D.C. Cir. 2015) (internal quotations omitted). If it was "impracticable" to do so because "the grounds for the objection arose after that period, parties must still petition EPA for administrative reconsideration before raising the issue" before the court of appeals. *Id.* This requirement "serves the important

[9] In a footnote, Plaintiffs assert that they reserve the right to pursue a number of objections. Pltf. Mot. at 15 n.28. The proper forum depends on the nature of the objection at issue.

function of assuring that the agency has had an opportunity to explicate and evaluate objections" before judicial review. *Mexichem Specialty Resins, Inc.*, 787 F.3d at 553.

The D.C. Circuit has unambiguously held that a petitioner claiming that EPA failed to comply with section 7607(d)'s procedural requirements (including the requirements for public notice and comment) in promulgating a final rule must be presented to the agency for reconsideration before a claimant can petition for judicial review. *EME Homer City*, 795 F.3d at 137. Indeed, the alleged procedural violation at issue in *EME Homer City* was the same violation that Plaintiffs allege here: "[T]he petitioners argue[d] that EPA violated the Clean Air Act's notice and comment requirements by significantly amending the Rule between the proposed and final versions without providing additional opportunity for notice and comment." *Id.* The D.C. Circuit concluded that "the only appropriate path for petitioners to raise this issue is through an initial petition for reconsideration to EPA," and that the court was "without authority at th[e] time to reach this question." *Id.* (citing *Utility Air Regulatory Group v. EPA*, 744 F.3d 741, 747 (D.C. Cir. 2014). The CAA expressly limits judicial review to issues raised during the comment period. Obviously, a complaint that the proposed rule did not give adequate notice of the terms in the final rule could not be raised during the comment period, but only after the rulemaking was completed. Therefore, section 7607(d)(7)(B) requires that the objection be presented to the Agency in the first instance. *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d at 553 (an objection that the final rule was not a "logical outgrowth" of the proposed rule cannot be raised in a petition for review in the first instance, but must first be addressed in a petition for reconsideration).

Petitioners cannot circumvent this precedent by bringing their claim to this Court under the guise of enforcing the Consent Decree. If Plaintiffs cannot bring their "logical outgrowth" argument before the courts of appeals without first bringing it before the Agency, it follows *a fortiori*

that, even if this Court had jurisdiction to review the substance and procedure of the Final Rule (which it does not), Plaintiffs cannot bring their argument in this Court without following the same administrative process first. Plaintiffs may complain that the reconsideration process is unnecessarily burdensome and time-consuming, but binding precedent squarely holds that this is the scheme that Congress designed. The D.C. Circuit recognized that the reconsideration process "may sometimes seem a roundabout procedure, but that is what the statute requires and what we therefore must insist upon." *EME Homer City*, 795 F.3d at 137. Plaintiffs cannot ask this Court to recognize a new avenue to judicial review as a means of avoiding perceived inconveniences associated with the remedies provided by Congress. Accordingly, *EME Homer City* and the other cases cited above reinforce EPA's argument that this Court has no jurisdiction to consider Plaintiffs' allegations that EPA failed to comply with notice-and-comment procedures.

CONCLUSION

Plaintiffs forthright admit that EPA's Final Rule was, in fact, a "final action." And that is the only issue that this Court has jurisdiction to decide. Because Plaintiffs' arguments regarding the adequacy of notice, "logical outgrowth," and other contentions are within the exclusive jurisdiction of the appropriate court of appeals, Plaintiff's motion to enforce should be denied and EPA's motion to terminate the Consent Decree should be granted.

Respectfully submitted,

JONATHAN BRIGHTBILL
Deputy Assistant Attorney General
Environment & Natural Resources Division

Dated: October 25, 2017

/s/ Eileen 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
(202) 564-5571
anderson.lea@epa.gov