ARGUED DECEMBER 10, 2013
DECIDED APRIL 15, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

WHITE STALLION ENERGY CENTER, LLC, et al., **Petitioners,** **v.** **U.S. ENVIRONMENTAL PROTECTION AGENCY,** **Respondent.**	**Case No. 12-1100** **(and consolidated cases)**

JOINT REPLY BRIEF OF THE STATE, LOCAL GOVERNMENT, AND PUBLIC HEALTH RESPONDENT-INTERVENORS

As State, Local Government, and Public Health Respondent-Intervenors have shown, the Air Toxics Rule should be remanded to EPA without vacatur. State/NGO Mot. (ECF No. 1574820).[1] The Rule is already delivering substantial public health benefits that would be disrupted by vacatur or a stay, and EPA has committed to act promptly to re-examine its "appropriateness" finding by considering costs. Despite the extensive demonstration in our motion and supporting documents (and in EPA's), Petitioner-Movants devote a scant two and a

[1] The State, Local Government, and Public Health movants are enumerated in footnotes 1 and 2 of our motion.

half pages of nearly sixty pages of briefing to the public health effects of vacating or staying the Rule, baldly asserting that neither would be disruptive or harmful. *See* Pet'r Joint Mot. (ECF No. 1574809) at 16; Pet'r Joint Resp. (ECF No. 1579194) at 9; Tri-State Mot. at 11, 17-18 (ECF No. 1574817); Tri-State Resp. (ECF No. 1579227) at 4.

Incredibly, Petitioner-Movants assert that EPA and Respondent-Intervenors have "fail[ed] to identify," Pet'r Joint Resp. at 9, any disruptive effects of vacatur, or "anyone [who] would be harmed by" a stay for units with extensions. Tri-State Resp. at 4. Those claims are contradicted by the administrative record and the eight declarations filed by EPA and the State and Public Health Respondent-Intervenors, demonstrating that vacatur or a stay would be extremely disruptive, because, among other things, either remedy would result in large emissions of highly toxic pollutants that otherwise would be avoided if the Rule remained in effect. *See* State/NGO Mot., Exs. 1-6; EPA Mot. (ECF No. 1574825), McCabe Decl.; State/NGO Resp. (ECF No. 1579245), Ex. 1.

For its part, the Utility Air Regulatory Group ("UARG") seeks neither vacatur nor a stay, but requests that the Court instruct EPA as to how it should take public comment and conduct the remand proceedings. UARG Resp. (ECF No. 1579258) at 7. UARG provides no reason why EPA should not be permitted to make such determinations in the first instance.

ARGUMENT

I. State and Industry Movants Fail to Respond to the Comprehensive Demonstration of Serious Health and Environmental Harms that Vacatur of the Air Toxics Rule Would Cause.

In their response, State and Industry Movants fail to even attempt to meet their burden to rebut the evidence presented by EPA and Respondent-Intervenors demonstrating the harms that would result from vacating the Rule. Those harms stem from the release of many thousands of tons of extremely toxic pollution—including mercury; hydrogen chloride, hydrogen fluoride, hydrogen cyanide, and chlorine gases; and arsenic, chromium, cadmium, and other non-mercury metals associated with primary and secondary particulate matter[2]—that would be prevented by the Rule. State/NGO Mot., Ex. 3, Sahu Decl. ¶¶ 7-9 (estimating that vacatur would result in forgoing 59 to 72 percent of the mercury reductions and 61

[2] Contrary to State and Industry Movants' suggestions (Pet'r Joint Resp. at 6-8), EPA is not improperly regulating fine particulate matter. The Rule properly regulates cancer-causing and other dangerous metals using particulate matter as a surrogate, and harmful acid gases using hydrochloric acid (or alternatively sulfur dioxide) as a surrogate. Whether emitted directly from power plants or formed secondarily from the emitted acid gases, particulates are associated with toxic metals and harm human health. State/NGO Mot., Ex. 4, Levy Decl. ¶¶ 7-9, 11, Ex. 5, Dockery Decl. ¶¶ 7, 12. Further, despite their complaint that particulate matter is regulated by the national ambient air quality standards (NAAQS) of Section 109 of the Act, Pet'r Joint Resp. at 7-8, State and Industry Movants do not—and cannot—dispute that vacatur-related increases in particulate matter emissions will be harmful, particularly to those living closest to power plants. *See* NGO/State Mot., Ex. 5, Dockery Decl. ¶¶ 10-11 (incremental reductions in fine particulate matter below NAAQS levels confer important incremental health benefits); *id.*, Ex. 6, Rosenstein Decl. ¶¶ 22-24, 31 (those living closest to power plants are the most exposed to the health threats posed by acid gas and other air toxics emissions).

to 75 percent of the acid gas and particulate matter reductions expected by April 2016 from the Rule).

That pollution would cause serious public health and environmental harms, as described in EPA's record and the detailed scientific and public health expert declarations submitted by EPA and State and Public Health Respondent-Intervenors. The public health damages at issue include increased risk of permanent neurological damage, cancers, respiratory disease, and premature death, among other harms. *Id.*, Ex. 1, Grandjean Decl. ¶¶ 15-17, 30 (mercury); Ex. 2, Miller Decl. ¶¶ 5, 20 (mercury); Ex. 4, Levy Decl. ¶¶ 16, 20 (particulate matter); Ex. 5, Dockery Decl., ¶¶ 7-12, 24 (sulfur dioxide and particulate matter); Ex. 6, Rosenstein Decl. ¶¶ 7, 19, 31-32 (acid gases); EPA Mot., McCabe Decl. ¶¶ 12-17, 26-29.

Rather than refute this evidence, State and Industry Movants fall back to their claim that the hazardous air pollution limited by the Rule must be insignificant because EPA quantified only a "modest" $4-6 million in benefits in the Regulatory Impact Analysis. Pet'r Joint Resp. at 9; *see also* Pet'r Joint Mot. at 5, 19. But this figure reflects only a "small subset of the benefits of reducing [mercury] emissions," 77 Fed. Reg. 9304, 9428 (Feb. 12, 2012), and does not include the benefits of reducing the other air toxics controlled by the Rule. *Id.* at

9426-32; *see also* State/NGO Resp. at 14 n.10; State/NGO Mot., Ex. 1, Grandjean Decl. ¶¶ 26-27.

State and Industry Movants attempt to deny any relevance of the health harms by claiming, once again, that a supposed Administrative Procedure Act ("APA") automatic-vacatur rule applies, rather than the analysis under *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993). Pet'r Joint Resp. at 3-4. Putting aside the irreconcilability of Movants' APA theory with this Court's precedent, *e.g.*, *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002) (remanding without vacating despite finding violations of substantive statute and APA), review of the Air Toxics Rule is governed by Section 307(d) of the Clean Air Act, not the APA. State/NGO Resp. at 6 n.3; EPA Resp. at 2-3.[3]

In the alternative, Movants assert that the first *Allied-Signal* prong alone controls the Court's decision, claiming that "when there is no possibility an agency can clarify or explain its action . . . any disruptive consequences of vacatur deserve no weight." Pet'r Joint Resp. at 2; *see id*. at 8-9. The first prong of *Allied-Signal*, however, asks whether it is possible the agency could "reach[] the same

[3] State and Industry Movants also claim that EPA's interpretive error "directly parallels" an "ultra vires injunction" issued by a court without "jurisdiction," Pet'r Joint Resp. at 3-4, a notion that the Supreme Court has rejected as a "mirage." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-69 (2013) (rejecting as "misconception" efforts to extend to agencies "the very real division between the jurisdictional and nonjurisdictional that is applicable to courts").

result," *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013), including when it has committed a statutory error. *See* State/NGO Resp. at 5-9. Here, there is far more than a "possibility" that EPA can consider costs as part of its "appropriate" determination, consistent with the Supreme Court's instruction, and reach the same result on remand.[4] The first prong of *Allied-Signal* strongly supports remand without vacatur here.

II. Tri-State Has Failed to Support Its Request for Injunctive Relief for All Extended Power Plants or Its Own Nucla Station.

In its response, Tri-State reiterates its request to suspend the Air Toxics Rule's compliance obligations for all power plants with future compliance deadlines.[5] Tri-State Resp. at 8. Like the State and Industry Movants, Tri-State ignores the large emissions of dangerous air pollution such a stay would cause. Compared to full implementation of the Rule by April 2016, the requested stay would eliminate 34 to 42 percent of the Rule's mercury reductions, 43 to 52 percent of its hydrochloric acid gas reductions, and roughly the same percentage of its secondary fine particulate pollution reductions during each year that the stay is

[4] In sharp contrast to this case, in *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009) (cited in Pet'r Joint Resp. at 8-9) the agency had "twice tried and twice failed to justify" its decision, making it unlikely it could "rehabilitate its rationale" on remand. 579 F.3d at 9.

[5] Although Tri-State characterizes its requested relief as "maintaining the status quo," Tri-State Resp. at 5, it would substantially alter the status quo to remove regulatory requirements with which most plants, by Tri-State's own account, are prepared to comply. *Id*. at 3.

in effect. *See* State/NGO Resp. at 17, Ex. 1, Sahu Resp. Decl. ¶¶ 5-7. Rather than attempting to rebut these estimates, Tri-State continues to allege that only a "small number of power plants . . . received compliance extensions." Tri-State Resp. at 2. In fact, at least 184 of the 460 coal-fired power plants affected by the Air Toxics Rule received extensions. State/NGO Resp. at 17.

Moreover, Tri-State erroneously asserts that Respondents' motions "focus entirely on whether power plants might turn off the pollution control devices that have already been installed" and that no one claims that anyone would be harmed by Tri-State's request for a partial stay. Tri-State Resp. at 4. To the contrary, Dr. Sahu's initial declaration estimated significant emissions associated with switching off existing controls, as well as from "[p]lants that received extensions and have not yet installed controls." State/NGO Mot. at 13, Ex. 3, Sahu Decl. ¶¶ 7-8. Tri-State also inaccurately claims that concerns regarding existing controls are "speculative" because they "disregard the potential that some facilities may be required to continue to run such controls for other reasons (e.g., to comply with State obligations)." Tri-State Resp. at 5 n.4.[6] Dr. Sahu's analysis recognized, however, that plants subject to state-imposed mercury limits will continue to run their mercury controls to meet those limits. Sahu Decl. ¶ 7. Finally, Dr. Sahu's response declaration specifically assessed the likely pollution impacts of Tri-

[6] Moreover, any plants required to run their controls regardless of the Rule would suffer no harm from the Rule.

State's requested stay for power plants with future compliance deadlines, and demonstrated that it would result in substantially increased emissions of dangerous air pollutants. State/NGO Resp. at 17; Sahu Resp. Decl. ¶¶ 5-7.

While a stay of the Air Toxics Rule's future compliance deadlines will harm public health, keeping the April 2016 deadlines in place will not cause widespread irreparable injury to power-plant owners because any significant capital expenditures to comply with the Rule have already been made or contractually committed. *See* State/NGO Resp. at 18; Industry Respondent-Intervenors Mot. (ECF No. 1574838) at 9; Tri-State Resp. at 3 (noting that "many" other plants "have already made irreversible decisions about whether to install control equipment or shut down"). Indeed, Tri-State concedes that it is "not aware" of any other power plants that still face a choice whether to install controls, as Tri-State claims its own Nucla Station does. Tri-State Resp. at 2 n.1, 5 n.6. In the absence of an adequate factual showing, Tri-State's request for sweeping, nationwide relief should be denied. *See Lewis v. Casey*, 518 U.S. 343, 359 (1996); *see also State of Neb. Dep't of Health & Human Servs. v. Dep't of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006) ("[A]n injunction must be narrowly tailored to remedy the specific harm shown.") (citation and internal quotation marks omitted).

Tri-State's response, likewise, fails to justify its request for a stay applicable only to its Nucla Station plant. *See* Tri-State Resp. at 2 n.1, 8 n.6. As EPA and

Respondent-Intervenors have previously explained: (1) Tri-State has an available administrative remedy—EPA's Enforcement Response Policy—which it has not exhausted, *see* EPA Resp. at 16-17; (2) the cost of complying with the rule (estimated at $1.1 million, NGO Opp. to 2nd Emerg. Mot. (ECF No. 1570376) at 16) is not irreparable injury to a company with annual operating revenues of $1.4 billion;[7] and (3) Tri-State is wrong in asserting that the Nucla Station's hydrochloric acid gas emissions pose no health risks, *see* 76 Fed. Reg. 24,976, 25,004-05 (May 3, 2011); *see also* State/NGO Mot., Ex. 6, Rosenstein Decl. ¶¶ 7-19 (describing health effects of exposure to acid gases emitted by power plants).

III. UARG's Request that the Court Instruct EPA on How to Conduct Its Remand Proceedings Should Be Denied.

UARG—which describes its purpose as protecting "the interests of electric generators," UARG Docketing Statement, Sec.6.e. (ECF No. 1375567)—tellingly does not seek vacatur of the Air Toxics Rule or support Tri-State's motion to enjoin it as to units operating under compliance extensions. Nor does UARG contest EPA's and Respondent-Intervenors' demonstrations that either of those remedies would pose serious hazards for public health, complicate the implementation of other environmental protection programs, and cause significant

[7] Tri-State attempts to distinguish its situation from that in *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 556 (D.C. Cir. 2015), where the economic impact of the rule at issue amounted to approximately 0.7 percent of the affected manufacturers' revenues. Tri-State Resp. at 7. Yet here the percentage is even lower, amounting to approximately 0.08 percent of Tri-State's annual revenues.

disruption for the electricity-generation industry. *See* EPA Mot. at 12-18; State/NGO Mot. at 10-20; Industry Respondent-Intervenors Mot. at 13-17.

Rather, UARG dedicates its entire response to arguing that, on remand, EPA should allow public comment, and that this Court should instruct EPA about precisely how to proceed. But EPA has already committed to a "public notice and comment process," EPA Mot. at 12; *see also* McCabe Decl. ¶ 19, in which UARG (like all other stakeholders) may submit its views and any information it wishes concerning how EPA should consider cost and what the agency should decide. UARG does not identify anything in the Supreme Court's decision that requires pre-remand guidance from this Court. *See Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015) ("It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost."). Nor does it offer any reason to depart from what normal principles of administrative law would indicate, namely, that EPA should decide "in the first instance," *Negusie v. Holder*, 555 U.S. 511, 523 (2009), how cost should factor into the "appropriateness" inquiry.

CONCLUSION

The motions to vacate the Air Toxics Rule or to stay it in part should be denied, and the Rule should be remanded without vacatur.

Respectfully submitted,

Dated: November 4, 2015

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[8] Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), counsel hereby represents that the other parties listed in the signature blocks have consented to the filing of this motion.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Joint Motion of the State, Local Government, and Public Health Respondent-Intervenors for Remand Without Vacatur has been served through the Court's CM/ECF system on all registered counsel. I further certify that a copy has been served by first-class U.S mail on all counsel not registered in the Court's CM/ECF system.

DATED: November 4, 2015

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