IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

EPA'S MEMORANDUM IN SUPPORT OF MOTION TO AMEND THE CONSENT DECREE

The Consent Decree entered in this matter requires that, by September 9, 2017, Defendant Scott Pruitt, Administrator, United States Environmental Protection Agency ("EPA") sign a notice of final rulemaking pursuant to the Clean Air Act's ("CAA") regional haze program, 42 U.S.C. § 7491, to meet the "best available retrofit technology" ("BART") requirement for electric generating units ("EGUs") in Texas. Consent Decree ¶ 4.a.i and ii. EPA may meet this obligation by: (1) promulgating a federal implementation plan ("FIP"); (2) approving a state implementation plan ("SIP"); or (3) promulgating a partial FIP and approving a partial SIP that together meet the relevant requirements. *Id.*

EPA hereby moves the Court to extend the September 9, 2017 deadline until December 31, 2018. For years, efforts by EPA to address the BART requirements for Texas EGUs have

been disrupted by litigation. *See infra* at 5-6. Circumstances have changed significantly over the past several months and weeks as EPA and Texas have engaged in a productive level of dialogue that has not occurred in many years. Declaration of Sam Coleman, Acting Regional Administrator, EPA Region 6, ¶¶ 18, 19 (August 15, 2017) (Exhibit 1) ("Decl."); *see also id.* ¶ 15. These discussions have allowed EPA and Texas, and specifically the Texas Commission on Environmental Quality ("TCEQ"), to commit in writing to a cooperative approach – memorialized in a Memorandum of Agreement dated August 14, 2017 ("MOA") - to develop an approvable SIP to address BART for EGUs that would be more consistent with the CAA's preference for cooperative federalism, and would produce a plan that more effectively addresses concerns raised by the State. (The MOA is Attachment A to Mr. Coleman's Declaration). The SIP development approach memorialized in the MOA would also produce an implementation plan to address the interstate transport of pollutants as required by the CAA, 42 U.S.C. § 7410(a)(2)(D)(i)(II).[1] Decl. ¶16.

As explained by Mr. Coleman, the MOA provides for Texas to submit a SIP that will address, among other things, the BART requirements for EGUs. Decl. ¶¶ 14-16 and Attachment A (the MOA). The MOA establishes a process whereby the SIP will be submitted and EPA will take final action to approve or disapprove the SIP in whole or in part no later than December 31, 2018. The MOA represents the type of cooperative federalism that is the foundation of the CAA. *See EPA v. EME Homer City Generation, L.P*, 134 S. Ct. 1584, 1602 n.14 (2014) ("recognizing that "cooperative federalism" is a "core principle" of the CAA"). Mr. Coleman further explained, "[t]he recent collaborations between TCEQ and EPA Region 6 have been the closest

[1] As discussed in more detail *infra* at 8-9, the consent decree entered in *Sierra Club v. EPA*, Case No. 10-cv-01541 (CKK) requires EPA to take related actions with respect to these requirements by September 9, 2017. EPA is concurrently filing a motion in that matter seeking the same extension it seeks here.

and most productive discussions in the past five years." Decl. ¶ 19. The commitments in the MOA are an outgrowth of a year of "concerted effort" between EPA and Texas to develop a SIP revision to address these requirements, including BART for EGUs. *Id*. ¶ 15. These discussions were redoubled in Spring 2017 and then began to yield fruit and ultimately culminated in the MOA. *Id*. Allowing time for this process to be completed will promote federalism consistent with the CAA and should more effectively accomplish the goals of the regional haze program. *See* Decl. ¶ 13.

On August 14, 2007, the Governor of the State of Texas and the Chairman of the TCEQ sent a letter to the Administrator of EPA affirming Texas' commitment to establish an approved SIP by end of 2018. The letter states that Texas will "bring the full weight and resources of the State of Texas to bear on" the development of an approvable SIP revision. Letter from Gov. Abbott and B. Shaw, Chairman, TCEQ, to Administrator Pruitt, at 1 (Aug. 4, 2017) (Attachment B to Coleman Decl.) ("Abbott Letter"). *See* Decl. ¶ 18 (discussing the Governor's letter).

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." 42 U.S.C. § 7401(b)(1). Congress intended that the states would have the primary responsibility for establishing the plans that will implement the requirements necessary to meet the national ambient air quality standards promulgated by EPA, as well as certain other goals specified by Congress. "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the [NAAQS], the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. Nat. Res. Def. Council, Inc*., 421 U.S. 60, 79 (1975).

A. Implementation Plans

` The states are responsible for adopting 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 fails to meet the requirements of the CAA. *Id.* § 7410(k)(3). The CAA imposes a duty on EPA to promulgate a 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).

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 . . . [BART]." 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 a state to develop an alternative to BART, such as a trading program, if the state can

demonstrate that the alternative provides for greater reasonable progress towards natural visibility conditions. 40 C.F.R. § 51.308(e)(2)-(6). The Regional Haze Rule required states to submit their regional haze SIP revisions to EPA by December 17, 2007. *Id*. § 51.308(b).

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 EPA's Clean Air Interstate Rule ("CAIR"), which EPA had promulgated to address a separate CAA provision regarding the interstate transport of pollutants, as an alternative to requiring the state's EGUs to install BART. *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 the Texas regional haze SIP in 2012. 77 Fed. Reg. 33,642, 33,653 (June 7, 2012).[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.

[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, but an argument date has not been set. *Util. Air Regulatory Grp. v. EPA*, Case No. 12-1342 (D.C. Cir.) and consolidated cases.

In 2014, EPA proposed to take action on the remainder of the Texas regional haze SIP. 79 Fed. Reg. 74,818 (Dec. 16, 2014). With respect to BART for EGUs, EPA proposed to rely on EPA's replacement for CAIR, the Cross-State Air Pollution Rule ("CSAPR"), as an alternative to requiring the state's EGUs to install BART. *Id.* at 74,823. Texas and other states, as well as private parties, petitioned for review of CSPAR. In 2015, the D.C. Circuit largely upheld CSAPR, but invalidated and remanded to EPA certain of the rule's emissions budgets, including those for Texas, holding that EPA had "over-controlled" Texas's emissions, requiring greater emissions reductions of certain pollutants than was necessary to mitigate Texas's emissions' effect on downwind states' air quality. *EME Homer City Generation, L.P v. EPA*, 795 F.3d 118, 138 (D.C. Cir. 2015).[3] Because the *EME Homer* decision required EPA to reassess the proposed FIP, the 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 took final action on its 2014 proposal, EPA deferred action 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).[4]

[3] EPA has not yet completed action on the remand.

[4] In this final rule, EPA did partially approve 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 Court granted EPA's motion for a voluntary remand. EPA has not yet completed its response to the remand.

In January 2017, EPA issued a new proposal that would (1) require certain Texas EGUs to install BART controls (or maintain existing controls) to reduce the emissions of two visibility-impairing pollutants (referred to as "source-by-source controls") and (2) rely on EPA's recent update to CSAPR as an alternative to requiring BART for another visibility-impairing pollutant. 82 Fed. Reg. 912, 945-47 (Jan. 4, 2017).[5] The comment period on EPA's proposal ended on May 5, 2017. 82 Fed. Reg. 11,516 (Feb. 24, 2017). EPA has not yet taken final action on the proposed rule.

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[6] to provide in pertinent part that:

[5] Petitions for review of EPA's update to CSPAR are pending in the D.C. Circuit. *State of Wisconsin v. EPA*, Case No. 16-1406 (D.C. Cir.) and consolidated cases.

[6] 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.

> (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.
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> (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 is now September 9, 2017.

Paragraph 7 of the Consent Decree provides that a request for an extension of any deadline by more than 60 days "may be approved by the Court 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." EPA's present motion is filed pursuant to Paragraph 7.

For the Court's information, EPA is also moving to extend a deadline in a separate consent decree entered in *Sierra Club v. EPA*, Case No. 10-cv-01541 (CKK). Under that consent decree, by September 9, 2017, EPA is required to promulgate a FIP or approve a SIP that meets the requirements of CAA section 110(a)(2)(D)(i)(II), 42 U.S.C. § 7410(a)(2)(D)(i)(II), that implementation plans contain adequate provisions prohibiting emissions that will interfere with

measures in other states related to the protection of visibility for the 1997 ozone and PM2.5 national ambient air quality standards ("NAAQS") (referred to as "visibility transport plans"). EPA has proposed a FIP that would rely on the Agency's proposed BART determinations for the state's EGUs to address visibility transport. 82 Fed. Reg. at 917. *See also* ¶ Decl. 12. Therefore, the Agency, with the approval of the courts, has sought to maintain the same deadline for final action with respect to the implementation plans in both the *Sierra Club* consent decree and the consent decree in the present matter. EPA's motion to amend the Sierra Club consent decree is based on the same grounds as the instant motion to this Court.

STANDARD OF REVIEW

This lawsuit was filed because EPA did not meet a statutory deadline created by Congress. When EPA fails to meet such a deadline, one remedy is for a court to exercise its "equity powers" to establish a schedule for EPA to complete its obligations. *Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 704-05 (D.C. Cir. 1974). Pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure, "[o]n motion and just terms, the court may relieve a party" from such a court-ordered schedule because it is no longer equitable that the judgment should have prospective application.

The Supreme Court has set forth a two-pronged inquiry for Rule 60(b)(5) motions. *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992). First, the party seeking modification "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id*. Second, "the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Id*. "The party seeking relief bears the burden of establishing that changed circumstances warrant relief, but once a party carries this burden, a court abuses its discretion 'when it refuses to modify an injunction or consent decree in light of

such changes.'" *Horne v. Flores*, 557 U.S. 433, 447 (2009) (quoting *Agostini v. Felton*, 521 U.S. 203, 215 (1997)) (internal citations omitted); *see also United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) ("A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need."); *Train*, 510 F.2d at 713 n.106 (quoting *Sys. Fed'n No. 91, Ry. Employees v. Wright*, 364 U.S. 642, 647 (1961), stating that "[t]here is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances . . . have changed, or new ones have since arisen.").

A particularly flexible approach to a requested consent decree modification is called for when the decree regulates the conduct of government agencies and affects the public interest. *Cronin v. Browner*, 90 F. Supp. 2d 364, 373 (S.D.N.Y. 2000). As the Supreme Court stated in addressing a request to modify a decree governing prison operations, "such decrees 'reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.'" *Rufo*, 502 U.S. at 381 (quoting *Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989)).

ARGUMENT

The EPA obligations at issue here arise under Title I of the CAA. Under Title I, Congress plainly left with the States . . . the power to determine which sources would be burdened by regulation and to what extent." *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976). Thus, Congress' plain intent was that the States would take the primary role in developing and implementing implementation plans. *See EME Homer City*, 134 S. Ct. at 1602 n.14; *EME Homer City Generation, L.P. v. EPA*, 795 F.3d at 124) ("The Clean Air Act regulates air quality through a federal-state collaboration"). After EPA entered the Consent Decree at issue here, the Supreme Court, in 2014, observed and reiterated in EME Homer that "cooperative federalism" is

a "core principle" of the CAA. 134 U.S. at 1602 n.14 While Congress did provide for the promulgation of FIPs, it is plain that FIPs are intended to be a back-stop, to be used only when the state in question is unwilling or unable to submit a SIP that can be approved. FIPs are not required until the SIP process has run its course, and they terminate immediately when a SIP revision is approved.

For the reasons explained by Mr. Coleman, in this particular case, the goals of the CAA's visibility provisions and state-first approach with respect to implementation plans can best be met by allowing time for the TCEQ to submit a SIP revision to EPA that addresses the BART requirements for EGUs and for EPA to take final action on that SIP revision. For nearly a decade, states and EPA have sought to rely on the flexibilities inherent in the Agency's interstate trading programs, CAIR and CSAPR, to satisfy the BART requirements for EGUs. Indeed, Texas developed its original regional haze SIP submittal with CAIR in mind, as allowed by the Regional Haze Rule at that time, 77 Fed. Reg. at 33,653, but the D.C. Circuit invalidated CAIR as insufficiently stringent before Texas submitted its SIP. *North Carolina*, 531 F.3d at 929-30. Therefore, EPA published a limited disapproval of this SIP submittal. 77 Fed. Reg. at 33,653. EPA later proposed to rely on CSAPR to satisfy the BART requirements for EGUs in Texas, 79 Fed. Reg. at 74,823, but the D.C. Circuit held that Texas' emissions budgets were too stringent before EPA could finalize its proposal. *EME Homer City*, 795 F.3d at 138.

On January 4, 2017, EPA proposed to address the BART requirements for EGUs in Texas through source-specific control determinations. 82 Fed. Reg. at 945-47. In its comment on that proposal, however, TCEQ indicated that it still prefers the flexibilities inherent in a trading program and believes that it can develop an intrastate trading program that will succeed where efforts to rely on CAIR and CSAPR have failed. Decl. ¶ 13. EPA supports TCEQ's

commitment to develop an intrastate trading program, as the Agency has long supported many states' efforts to rely on trading programs and other alternatives to satisfy the CAA's BART requirements. *See, e.g.*, *WildEarth Guardians v. EPA*, 770 F.3d 919 (10th Cir. 2014) (upholding EPA's approval of regional haze SIPs that established a trading program as a BART alternative for three western states). With this new common purpose in view, TCEQ and EPA have recently developed a more productive working relationship than the agencies have had in many years. Decl. ¶ 19. Many months of cooperative efforts have culminated in TCEQ and EPA signing the August 14, 2017 MOA. *Id.* ¶ 14-15. This is a significant change in the relationship between EPA and the state and represents a unique opportunity to realize the Act's goal of protecting air quality through the cooperative-federalism approach. The Agency and state have in the past been adversaries in litigation. *See e.g.*, *Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016); *EME Homer City Generation, L.P. v. EPA*, 795 F.3d at 118. Indeed, EPA's performance of the Consent Decree obligation regarding the BART requirements for EGUs was complicated and delayed in part by that litigation, which involved related final actions. *See supra* 5-6.

The MOA establishes a concrete process and expeditious timeline under which Texas will develop a SIP revision that includes an intrastate trading program as a BART alternative and under which EPA will act upon that SIP revision pursuant to CAA section 110(k)(3), 42 U.S.C. § 7410(k)(3). Specifically, by March 31, 2018, the TCEQ staff will submit to the TCEQ Commissioners a proposed SIP revision that addresses the BART requirements for EGUs through the aforementioned intrastate trading program. Decl. ¶ 16. The proposed SIP revision will also address the interstate pollution transport requirements at issue in the *Sierra Club* discussed *supra* 8-9. Decl. ¶ 16.

EPA will expedite its review of the proposed SIP revision by parallel processing,[7] which means that "if EPA determines that it will propose approval of the Texas SIP submittal, EPA will begin its public notice-and-comment process concurrent with the State's public notice-and-comment process." *Id*. Texas will complete its administrative process consistent with state law and submit the SIP revision to EPA by October 31, 2018. *Id*. Due to the parallel processing, EPA will be able to take final action on the SIP revision by December 31, 2018. *Id*. If EPA does not unconditionally approve the SIP, under the Consent Decree, EPA must either (1) promulgate a FIP or (2) promulgate a partial FIP and unconditionally approve a portion of the SIP so that the BART requirements for EGUs are fulfilled by December 31, 2018.

On August 14, 2017, the Governor of the State of Texas and the Chairman of the TCEQ signed a letter to the Administrator of EPA pledging Texas' resources and affirming their commitment to work with EPA to establish an approved SIP by end of 2018. Abbott Letter; *see also* Decl. ¶ 18.

While a state can submit a SIP revision to replace a FIP at any time, in this instance, it is important that TCEQ be given an opportunity to submit a new SIP revision before EPA finalizes its proposal. As Mr. Coleman explains, "[t]he source-by-source controls in the proposed FIP would require installation of pollution control equipment, likely at a substantial cost." *Id.* ¶ 13. Furthermore, "the planning and lead time to install equipment may be months or years ahead of the actual installation, and certain EGUs could currently be at the stage where they would need to execute planning." *Id.* In contrast, an intrastate trading program would provide the EGUs with the flexibility to purchase allowances rather than install new control equipment. *Id.*

[7] EPA has used parallel processing on a number of occasions in the past. This process does not entail any shortcuts in the rulemaking process. In particular, it does not limit the opportunity for the public to participate as they would in any CAA rulemaking. Decl. ¶¶ 16-17.

In sum, EPA proposes to extend the existing deadline in the Consent Decree for EPA to take final action with respect to the BART requirement for EGUs in Texas from September 9, 2017, to December 31, 2018. Specifically, EPA asks the Court to replace Paragraph 4.a.ii.a and .b with the following:

> No later than December 31, 2018, 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.

EPA's motion satisfies the Rule 60(b) standard for amending a consent decree. First, policy changes legitimately instituted by the new administration led to a breakthrough in the relationship between EPA and Texas, and ultimately to the MOA discussed above. This breakthrough, as well as the Governor's firm commitment to "bring the full weight and resources of the State of Texas to bear on" the development of an approvable SIP revision, Abbott Letter at 1, represent the type of "significant change in circumstances" that warrants relief. *Rufo*, 502 U.S. at 383. Second, "the proposed modification is suitably tailored to the changed circumstances," *id.*, because it seeks to extend the deadline in the Consent Decree by only as much time as is necessary for EPA and TCEQ to carry out the expeditious schedule in the MOA.

CONCLUSION

The Consent Decree should be modified to allow EPA until December 31, 2018, to meet its obligations with respect to the BART requirements for EGUs in Texas.

Respectfully submitted,

JONATHAN BRIGHTBILL
Deputy Assistant Attorney General
Environment and Natural Resources
Division

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

Of Counsel:

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