

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

STATE OF TEXAS, et al.,

Petitioners,

v.

No. 16-60118

UNITED STATES
ENVIRONMENTAL
PROTECTION AGENCY and
GINA McCARTHY, Administrator,
U.S. EPA,

Respondents.

EPA'S STATUS REPORT

On August 18, 2016, the Court entered an order in which it granted the parties' joint motion for a 90-day stay in order to accommodate the parties' settlement discussions. The 90-day period extends to this date, November 28, 2016. While the Court did not order the parties to file status reports at the end of the 90-day stay period, EPA respectfully provides the following status report.

1. Petitioners seek review of EPA's final action under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, titled: "Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State

Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze” (hereinafter the “Final Rule”). The Final Rule was published at 81 Fed. Reg. 296 (Jan. 5, 2016).

2. Under the CAA and EPA’s regulations, States are required to submit state implementation plans (“SIPs”) containing emission limits, schedules of compliance, and other measures necessary to make reasonable progress towards the national goal of preventing future, and remedying existing, anthropogenic impairment of air visibility at certain national parks and other designated areas known as “Class I areas.” *See* 42 U.S.C. § 7491. In the Final Rule, EPA partially approved a SIP submitted by the State of Texas, but also disapproved parts of SIPs submitted by Texas and Oklahoma. Also in the Final Rule, EPA promulgated a Federal Implementation Plan (“FIP”) to replace the parts of the Texas and Oklahoma SIPs that EPA disapproved.

3. Petitioners have all challenged EPA’s Final Rule, and all of the petitions for review have been docketed together with this case, No.

16-60118.¹ Balanced Energy for Texas and Texas Mining and Reclamation Association, Texas Association of Business et al., and IBEW Local Union 2337 intervened as Petitioner-Intervenors. The Sierra Club and the National Parks Conservation Association have intervened as Respondent-Intervenors.

4. On March 3, 2016, Petitioners Luminant Generation Company LLC et al., Southwestern Public Service Company, and Coletto Creek Power, LP, filed a motion to stay the Final Rule and to toll all compliance deadlines pending completion of judicial review of the Final Rule. On March 17, 2016, the State of Texas, TCEQ, and PUCT also filed a motion to stay the Final Rule and to toll all compliance deadlines pending completion of judicial review of the Final Rule.

5. On March 22, 2016, EPA moved to dismiss the petitions for review in this Court for lack of jurisdiction, or, alternatively, to transfer the petitions to the District of Columbia Circuit.

6. On July 15, 2016, this Court issued its Non-Dispositive Published Opinion (“July 15 Opinion”), in which it denied EPA’s motion

¹ Petitions for review of EPA’s Final Rule have also been filed in the United States Courts of Appeals for the D.C. Circuit and the Tenth Circuit.

to dismiss or transfer, and granted the motions to stay EPA's Final Rule in its entirety, including the emission control requirements, pending completion of judicial review.

7. The parties subsequently requested a stay of the proceedings in order to accommodate the parties' settlement discussions, and the Court granted the requested stay. The parties' attempts to achieve a global settlement of these cases and the cases pending in the Tenth and D.C. Circuits were not successful.

8. In light of the Court's July 15 Opinion and the fact that the parties' settlement discussions were unsuccessful, EPA intends to seek a voluntary remand of the final rule in this Court.² EPA anticipates filing its motion for a voluntary remand this week. EPA intends to seek a voluntary remand to the extent the final rule disapproved elements of the Texas and Oklahoma SIPs and promulgated a FIP in place of the disapproved SIP elements.³

² EPA has or will inform the Tenth and D.C. Circuits of its intended motion for remand in this Court.

³ No party has challenged EPA's final rule to the extent that it approved elements of the Texas and Oklahoma SIPs and there is therefore no need for EPA to seek a remand of the approval decisions.

Respectfully submitted,

DATED: November 28, 2016

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s/ David A. Carson
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing EPA's Status Report was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record, who are required to have registered with the Court's CM/ECF system.

Date: November 28, 2016

/s/ David A. Carson
DAVID A. CARSON