IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; PUBLIC UTILITY COMMISSION OF TEXAS; LUMINANT GENERATION COMPANY, L.L.C.; BIG BROWN POWER COMPANY, L.L.C.; LUMINANT MINING COMPANY, L.L.C.; BIG BROWN LIGNITE COMPANY, L.L.C.; LUMINANT BIG BROWN MINING COMPANY; L.L.C.; SOUTHWESTERN PUBLIC SERVICE COMPANY; UTILITY AIR REGULATORY GROUP; COLETO CREEK POWER, L.P.; NRG TEXAS POWER, L.L.C.; NUCOR CORPORATION,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, in his official capacity as Administrator, United States Environmental Protection Agency,

Respondents.

No. 16-60118

EPA'S THIRTEENTH STATUS REPORT ON REMAND

On March 22, 2017, the Court entered an Order in which it granted EPA's motion for a partial voluntary remand and remanded the final rule challenged in these cases to EPA. On April 6, 2017, EPA filed its First Status Report on Remand. On April 7, 2017, the Court granted EPA's unopposed motion to modify the time intervals for status reports on remand to 60 days. EPA now respectfully submits this Twelfth Status Report on Remand.

1. These cases concern 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. As EPA explained in its previous status reports, the initial significant action EPA will take on remand is to publish a notice of proposed rulemaking proposing to reconsider certain aspects of the

Final Rule regarding the CAA's reasonable progress requirements. *See* 42 U.S.C. § 7607(d)(7)(B). As EPA has also previously explained, EPA's intent has been to first publish a final rule on the related but separate CAA Best Available Retrofit Technology ("BART") requirements. EPA's notice of proposed rulemaking regarding the BART requirements was published in the Federal Register on January 4, 2017. 82 Fed. Reg. 912 (Jan. 4, 2017). EPA's BART final rule was published in the Federal Register on October 17, 2017. 82 Fed. Reg. 48,324 (Oct. 17, 2017).

3. EPA's BART final rule has been challenged in this court in *Nat'l Parks Conservation Ass'n, et al. v. EPA,* Case No. 17-60828 (5th Cir.). Those same petitioners have also filed an administrative petition with EPA requesting that EPA reconsider the BART final rule. This Court has held the proceedings in that case in abeyance pending the resolution of the petition for reconsideration and the completion of any reconsideration process of the BART final rule.

4. On April 30, 2018, EPA announced its intention to convene a new rulemaking proceeding to solicit public comment on certain aspects of the final rule. On August 27, 2018, EPA published a notice of proposed rulemaking proposing to affirm its October 17, 2017 BART

final rule, and providing an opportunity for public comment on the proposal and other specified related issues. 83 Fed. Reg. 43,586 (Aug. 27, 2018). EPA held a public hearing in Austin, Texas, on the proposed rulemaking on September 26, 2018. The public comment period on the proposed action closed on October 26, 2018. EPA received approximately 1,500 comment letters and emails from citizens, environmental groups, industry and States.

5. Prior to December 28, 2018, EPA had been reviewing the comments it received on the August 27, 2018, notice of proposed rulemaking, in preparation to draft responses to the comments. On December 28, 2018, the appropriation account that was funding this work lapsed. January 28, 2019, was the first business day that funding was restored to EPA. EPA has resumed the work now that funding has been restored.

6. Accordingly, agency proceedings on remand are ongoing and this case should therefore remain in abeyance.

7. EPA's next status report is due to be filed on or before May 31, 2019.

Respectfully submitted,

DATED: April 1, 2019

Assistant Attorney General
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s/David A. Carson
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document 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: April 1, 2019

/s/ David A. Carson
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