IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.	No. 17-60088 (and consolidated cases)

STATUS REPORT

Respondents the United States Environmental Protection Agency, et al. ("EPA"), respectfully submit this Status Report pursuant to the Court's Order of October 12, 2017 (Doc. 00514194243).

The status of this case is as follows:

1. On February 13, 2017, Petitioners filed these consolidated challenges to EPA's final action entitled: "Air Quality Designations for the 2010 Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard—Supplement to Round 2 for Four Areas in Texas: Freestone and Anderson Counties, Milam County, Rusk and Panola Counties, and Titus County." 81 Fed. Reg. 89,870 (Dec. 13, 2016) ("Supplemental Rule").

2. Also on February 13, 2017, Vistra Energy Corporation (corporate parent of Petitioner Luminant) submitted a petition for administrative

reconsideration and administrative stay to the then-Acting Administrator of EPA. *See* Ex. 1 to EPA's Motion to Hold Proceedings in Abeyance (Doc. 00514179751). The administrative petition requested that EPA reconsider and immediately stay the effective date of the Supplemental Rule for the three areas in Texas designated as nonattainment for the 2010 SO_2 Primary National Ambient Air Quality Standard. *See id.* at 1.

3. On September 21, 2017, then-Administrator Pruitt responded by letter to that administrative petition. The Administrator explained that EPA intends "to undertake an administrative action with notice and comment to revisit" the three nonattainment designations. The Administrator noted that, in the interim, the nonattainment designations remain effective. The Administrator also explained that "EPA is considering a variety of administrative options for revisiting [the nonattainment designations], some of which may alleviate associated and pending planning obligations." EPA's intent, the Administrator continued, is "to provide clarity regarding any potential changes before [Texas or Luminant] expend resources investing in regulatory obligations that are currently required." The Administrator closed by inviting continued dialogue with Texas and Luminant.

4. Based on these developments, EPA asked this Court to hold these consolidated challenges to the Supplemental Rule in abeyance pending the outcome of EPA's administrative proceedings and to order the Agency to file

status reports every 90 days thereafter. The Court issued an order to that effect on October 12, 2017.

5. On November 2, 2017, the D.C. Circuit transferred petitions for review of the Supplemental Rule filed in that Court by the State of Texas, industry challengers, and the Sierra Club to this Court. Order, No. 16-1314, Doc. 1702751 (D.C. Cir.). This Court then consolidated those petitions with the above-captioned cases. No. 17-60088, Docs. 00514242669, 00514242712, and 00514242730 (Nov. 17, 2017).

6. On December 11, 2017, the State of Texas petitioned EPA to reconsider the designations of the three areas designated as nonattainment based, in part, on new information. *See* Ex. 1 to EPA's April 12, 2018 Status Report (Doc. 00514427585).

7. In response to the petitions for reconsideration, on August 22, 2019, EPA published a Proposed Rule that, if adopted in final form, would revise the designations of the three subject areas from nonattainment to unclassifiable. *See* "Error Correction of the Area Designations for the 2010 1-Hour Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard (NAAQS) in Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas," 84 Fed. Reg. 43,757 ("Error Correction").

8. If finalized, the Error Correction would significantly impact the claims in this case, perhaps making them moot, as areas that are determined to be unclassifiable are not subject to the statutory and regulatory requirements that apply to areas determined to be nonattainment for the NAAQS.

9. The public comment period on the Error Correction proposed rule closed on September 23, 2019. EPA is now in the process of reviewing and analyzing all comments and data submitted therewith.

10. Given the above, the Agency continues to believe that this case should remain in abeyance pending the conclusion of administrative proceedings addressing the Error Correction. Consistent with the Court's October 12, 2017 Order, EPA proposes that it file an updated status report in ninety days, unless the Agency's administrative proceedings conclude earlier, whereupon EPA will inform the Court of such action.

Respectfully submitted,

DATED: Oct. 1, 2019

/s/ Perry M. Rosen
PERRY M. ROSEN
U.S. Department of Justice
Environment & Nat'l Res. Div.
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
(202) 353-7792
perry.rosen@usdoj.gov

Counsel for Respondents

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITS

I hereby certify that the foregoing Status Report complies with Federal Rules of Appellate Procedure 32(g)(1), 27(d)(2)(A), 32(a)(5) and 32(a)(6), in that this document is proportionately spaced using Microsoft Word 2016, has a typeface of Times New Roman 14 point, and contains 660 words, exclusive of those parts exempted by Federal Rule of Appellate Procedure 32(f).

Date: Oct. 1, 2019

/s/ Perry M. Rosen
PERRY M. ROSEN

Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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: Oct. 1, 2019

/s/ Perry M. Rosen
PERRY M. ROSEN

Counsel for Respondents