

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

December 17, 2024

No. 16-60118

Lyle W. Cayce
Clerk

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; COLETO CREEK POWER, L.L.C.; NRG TEXAS
POWER, L.L.C.,

Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY;
MICHAEL S. REGAN, *in his official capacity as Administrator of THE*
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

Petition for Review from an Order of the
Environmental Protection Agency
Agency No. 81 Fed. Reg. 296

PUBLISHED ORDER

Before ELROD, *Chief Judge*, and CLEMENT and SOUTHWICK, *Circuit Judges*.

PER CURIAM:

Respondents United States Environmental Protection Agency and Michael S. Regan, in his official capacity as Administrator of the United States Environmental Protection Agency (“EPA”), seek an order vacating: (1) EPA’s disapprovals of portions of the regional haze state implementation plans submitted by Texas and Oklahoma, and (2) the issuance of federal implementation plans establishing a long-term strategy and reasonable progress goals for Texas, and reasonable progress goals for Oklahoma. *See* Federal Implementation Plan for Regional Haze, 81 Fed. Reg. 296 (Jan. 5, 2016) (to be codified at 40 C.F.R. pt. 52) (“Final Rule”). EPA asserts that because key documents in the administrative record are no longer in EPA’s possession, the administrative record does not contain statutorily required information necessary for judicial review of the Final Rule, nor can the Final Rule be explained or defended. As such, EPA concedes that the Final Rule should be vacated.

Because EPA concedes that the administrative record lacks key evidence to support the Final Rule, any explanation for EPA’s actions in the Final Rule would run “counter to the evidence before the agency.” *Tex. Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 933 (5th Cir. 1998) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Therefore, absent record evidence that EPA admits is key in adjudicating the Final Rule, EPA’s Final Rule is arbitrary and capricious and must be vacated. *See Texas v. EPA*, 829 F.3d 405, 424–25 (5th Cir. 2016); 5 U.S.C. § 706(2)(A); *Data Mktg. P’ship, LP v. U.S. Dep’t of Lab.*, 45 F.4th 846, 859–60 (5th Cir. 2022).

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IT IS ORDERED that Respondents' opposed motion to vacate agency actions is GRANTED, and EPA's Final Rule is VACATED.