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Texas Regional Haze: Fifth Circuit Grants EPA's Motion to Remand the Texas Regional Haze FIP

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On March 22, 2017, the U.S. Court of Appeals for the Fifth Circuit allowed EPA to revise and change the Texas Regional Haze Federal Implementation Plan (FIP) when it granted EPA's motion to remand the plan to EPA for revision. FIPs are issued when EPA does not agree with the measures taken by States in their State Implementation Plan (SIP) and when EPA second-guesses a State's regulatory decision making. The Obama Administration issued FIPs and overruled State judgment more than any other previous Administration. The Trump Administration has vowed to use FIPs less and defer much more to states' judgment in regulating air quality.

In January 2016, EPA partially disapproved the Texas SIP and promulgated a regional haze FIP for Texas. EPA's regional haze plan calls for reductions in sulfur dioxide (SO_2) from a number coal-fired electric generating units (EGUs) in Texas.

The State of Texas and a number of other parties challenged the regional haze FIP for Texas, and requested that the court stay implementation of the FIP while the challenges were pending. In July 2016, the Fifth Circuit ruled that it had jurisdiction over the regional haze FIP challenge (denying EPA's motion to transfer the case to the D.C. Circuit) and granted the petitioners' motion to stay the rule pending review. In granting the stay, the Fifth Circuit found that the State of Texas and industry petitioners "demonstrated a substantial likelihood" that EPA has exceeded its authority under the Federal Clean Air Act in issuing the Texas regional haze FIP.

Following the Fifth Circuit's decision to stay the implementation of the FIP and recognizing that the EPA will likely lose the court battle, EPA requested that the court allow EPA to remand the plan for further revision. The petitioners objected, and requested that the court vacate the plan altogether.

On March 22, the Fifth Circuit granted EPA's request to remand the regional haze plan for reconsideration and revision, and denied the petitioners' motion to vacate the plan. EPA now has the opportunity to revise the Texas regional haze FIP in a way that will pass judicial scrutiny. On remand, we expect the new Administration to be more deferential to the State of Texas with a view of the state-federal relationship under the Clean Air Act that differs sharply from the previous Administration.

While the Fifth Circuit granted EPA's motion for remand, the court denied EPA's motion to lift the stay on the plan. The court's ban on implementation of the Texas regional haze FIP remains in effect.

Click here to access a copy of the Fifth Circuit's March 22, 2017 order.