ADMINISTRATIVE LAW

Should the Supreme Court Stay the Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards?

CASE AT A GLANCE

As part of its responsibilities under the Clean Air Act, the Environmental Protection Agency (EPA) establishes national air quality standards, including its "Good Neighbor Plan." Under this authority, the EPA disapproved the proposed state implementation plans for a number of states. The Supreme Court is now asked to stay the federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards while that plan is challenged in the D.C. Circuit.

Ohio v. EPA, Kinder Morgan, Inc. v. EPA,
American Forest & Paper Assn. v. EPA, and ***U.S. Steel Corp. v. EPA***
Docket Nos. 23A349, 23A350, 23A351, 23A384

Argument Date: **February 21, 2024** From: **The D.C. Circuit**

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Introduction

Title I of the Clean Air Act requires the Environmental Protection Agency (EPA) to establish national ambient air quality standards for certain air pollutants at levels to protect the public health and welfare. 42 U.S.C. §§ 7408, 7409.

The Clean Air Act directs states to submit to the EPA state implementation plans within three years after the promulgation of a national ambient air quality standard. 42 U.S.C. § 7410(a). The state implementation plans must include, among other things, "adequate provisions (i) prohibiting…any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard…." 42 U.S.C. § 7410(a)(2)(D)(i)(I). This balancing of interests between upwind and downwind states is referred to as the Clean Air Act's "good neighbor" provision.

If the EPA determines that a state implementation plan does not meet the minimum criteria under the Clean Air Act, then it must issue a federal implementation plan within two years after making that determination. 42 U.S.C. § 7410(c)(1).

This case started with the EPA disapproval of the state implementation plans of 23 upwind states for the 2015 Ozone National Ambient Air Quality Standards; it then promulgated a federal "Good Neighbor Plan." 88 Fed. Reg. 36654 (June 5, 2023).

Issue

Should the Supreme Court stay the federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards while that plan is challenged in the D.C. Circuit?

Facts

In October 2015, the EPA revised the National Ambient Air Quality Standard for Ozone, thus starting the three-year time frame for the states to respond with their state implementation plans. 80 Fed. Reg. 65292 (October 26, 2015). The states submitted their state implementation plans in 2018 and 2019. On February 22, 2022, the EPA proposed to disapprove 19 good neighbor state implementation plans. On April 6, 2022, the EPA proposed a federal "Good Neighbor Plan." 87 Fed. Reg. 20036. The next month, on May 24, 2022, the EPA proposed to disapprove four additional good neighbor state implementation plans. On February 13, 2023, the EPA promulgated a final rule disapproving of the 23 states' good neighbor state implementation plans. 88 Fed. Reg. 9336. Several states filed petitions in the federal courts of appeals to challenge the EPA's disapprovals. On June 5, 2023, the EPA promulgated a final federal "Good Neighbor Plan," which became effective on August 4, 2023. 88 Fed. Reg. 36654.

Before the effective date, several states and members from multiple affected industries filed petitions in the D.C. Circuit challenging the federal "Good Neighbor Plan" as arbitrary and capricious under the Administrative Procedure Act. The petitioners moved to stay the federal "Good Neighbor Plan" pending judicial review. On September 25, 2023, the D.C. Circuit denied the stay applications.

The petitioners then filed stay applications in the Supreme Court. On December 20, 2023, the Court consolidated the applications and, rather than staying the "Good Neighbor Plan" immediately, set oral argument for February 21, 2024. The Court's unsigned order states: "Arguing counsel should be prepared to address, among other issues related to the challenge based on the SIP [state implementation plan] disapprovals, whether the emissions controls imposed by the Rule are reasonable regardless of the number of States subject to the Rule."

Case Analysis

The applicants and the EPA do not agree on what standard applies. The applicants argue that they are entitled to a stay if they can establish four factors: (1) that they are likely to succeed on the merits; (2) that they will be irreparably harmed absent a stay; (3) that the issuance of the stay will not substantially injure the other interested parties; and (4) that issuance of the stay is in the public interest.

The EPA argues that the applicants are really seeking an injunction against enforcement of a federal rule, which requires a "significantly higher justification," and that the applicants have not met that burden.

As to the first stay factor, the state applicants argue that they are likely to succeed on the merits for several reasons. They argue that in disapproving the state implementation plans, the EPA did not rely upon statutory factors or its own earlier guidance, and instead relied upon data unavailable to the states. The state applicants and industry applicants further argue that the federal "Good Neighbor Plan" cannot serve its intended purpose when only 11 of the original 23 states are currently subject. Because other courts of appeals have stayed the EPA's disapprovals of 12 of the state implementation plans, the EPA's "Good Neighbor Plan" only applies to the remaining 11 states, which collectively represent less than 25 percent of the emissions that the federal "Good Neighbor Plan" sought to regulate. According to U.S. Steel, one of the applicants, this means that the federal "Good Neighbor Plan" "is legally and factually unsound and likely to be vacated in its entirety. It was built on the premise that EPA could impose the Plan on every State that contributes significantly to downwind ozone concentrations. This was a foundation of sand that has now washed away." Put another way by the state applicants, "The EPA's desire to force a square peg (a federal air-quality plan) into a round hole (a cooperative, state-driven system) was always going to be a poor fit. Because the EPA failed to confront that reality, it failed to engage in the reasoned decisionmaking required under the Administrative Procedure Act."

The EPA argues that the stays of some of the state-plan disapprovals in other litigation does not retroactively render the federal "Good Neighbor Plan" invalid. The EPA states: "it would contradict both the Act and the Rule to allow one State's significant contributions to continue unabated merely because EPA's efforts to abate pollution from other States have been stayed."

A group of pipeline industry applicants argue that they are likely to succeed on the merits because, among other things, the EPA's compliance timeline for gas-fired reciprocating internal combustion engines to achieve certain emissions-rate limits by May 1, 2026, is unachievable. The pipeline industry applicants further argue that the EPA did not consider the impacts on natural gas reliability when promulgating the federal "Good Neighbor Plan."

The EPA counters that it accounted for natural gas reliability when developing the compliance schedule, including commissioning a report on the installation timing needs entitled NOx Emission Control Technology Installation Timing for Non-EGU Sources: Final Report (March 14, 2023). EPA argues that the reviewing court should defer to the EPA's "technical, predictive judgment" regarding natural gas reliability.

As to the second stay factor, the states argue that they will be irreparably harmed by the economic injury that the federal "Good Neighbor Plan" inflicts, as well as the electric-grid emergencies that the federal "Good Neighbor Plan" is likely to cause. The pipeline applicants argue that absent a stay, pipeline operators will be forced to take pipeline engines offline, spend hundreds of millions of dollars to retrofit the engines, and cause natural gas supply interruptions during the retrofitting period. Other industry applicants argue that they will be irreparably harmed by having to immediately spend hundreds of millions to install emissions controls or be forced to buy emissions allowances, decrease production, or cease operations.

The EPA argues that the applicants have not demonstrated that they will be irreparably harmed, stating that many of the challenged aspects of the federal "Good Neighbor Plan" do not go into effect until 2026. The EPA's analysis is that the near-term capital expenditures do not need to be extensive and continued implementation of the federal "Good Neighbor Plan" will not endanger natural-gas supply or power-grid operations. Instead, the EPA argues that staying the federal "Good Neighbor Plan" will significantly harm the public interest, the third and fourth stay factors, by delaying the control of unhealthy air pollution impacting downwind states.

The state and industry applicants argue that it is in the public interest for the EPA to comply with the law. They further argue that it is in the public interest to have reliable supplies of electricity and natural gas.

Significance

This case came to the Supreme Court from the emergency docket, also referred to as the shadow docket, which the Court is increasingly using to decide consequential cases. Critics of the uptick in the Court's shadow docket rulings, which began in President Trump's administration and continues to this day, argue that such rulings are often political and impossible to interpret. In its unsigned order granting oral argument, the Court appears to indicate its willingness to consider the merits of this case.

Looming in the background is the Court's pendulum shift away from deference to agency decision-making. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), federal courts defer to agencies' reasonable interpretation of ambiguous statutes. *Chevron* recognizes that agencies have technical, scientific, and other specialized expertise and are better suited than Congress to fill statutory gaps. The Court has recently eroded *Chevron* by invoking the "major questions doctrine" when agencies promulgate regulations with great "economic or political significance," requiring agencies in such instances to have "clear congressional authorization." *West Virginia v. EPA*, 597 U.S. ___ (2022). This case presents another opportunity for the Court to signal its willingness to limit agency decision-making power.

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