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## EPA Seeks DC Circ. Remand Of Good Neighbor Plan

By **Madeline Lyskawa**

Law360 (August 6, 2024, 8:46 PM EDT) -- The U.S. Environmental Protection Agency asked the D.C. Circuit to let it take a second look at its plan to reduce smog-forming emissions across several states, arguing a remand is necessary to solve issues recently identified by the U.S. Supreme Court.

The agency's motion for partial voluntary remand comes shortly after the **justices said in a June 27 opinion** that the EPA likely failed to explain "whether or why the same emissions control measures it mandated would continue to further the [Good Neighbor Plan's] stated purpose of maximizing cost-effective air-quality improvement if fewer states remained in the plan."

"In light of the Supreme Court's conclusion that this issue was properly raised in comments but likely not adequately responded to, EPA seeks a partial voluntary remand in order to appropriately consider, and respond to, those comments. EPA would thus be addressing the likely deficiency the Supreme Court identified," the agency said in its motion filed on Monday.

Since the EPA's nationwide smog reduction plan was finalized, the agency has faced a number of challenges in the D.C., Tenth, Fourth and Fifth circuits, among others. While the plan's roll-out had been effectively blocked in 12 states in response to other circuit courts pausing its implementation, the D.C. Circuit **declined motions to stay** it, leading the plan's opponents to file **emergency stay applications** with the U.S. Supreme Court in late February.

In response to the justices' decision granting the emergency applications, industry groups, companies and a six-state coalition led by Utah and Ohio challenging the Good Neighbor Plan **have since asserted** that the D.C. Circuit must vacate the plan, with the states saying because the EPA failed to answer the critical question identified by the Supreme Court the federal plan must be reversed.

However, contrary to the challengers' assertions, "it is well established that agency decisions are judged by the adequacy of their explanations, and permitting an agency to proactively provide further explanation is preferable to reviewing a record with a likely deficiency," the EPA said, pointing to the D.C. Circuit's 1993 decision in [Ethyl Corp. v. Browner](#) .

As a result, the D.C. Circuit and others "routinely grant requests for voluntary remand to allow an agency to address potential deficiencies in an administrative record," the agency said.

Once the EPA finishes reviewing the rule on remand, the agency said the court can consider its "more thorough explanation and reach the ultimate question whether the Good Neighbor Plan is severable, instead of considering whether EPA provided adequate explanation," thereby allowing for "judicial review of EPA's decision to proceed efficiently" without prejudicing the interests of any party.

Representatives for the parties did not immediately respond to requests for comment Tuesday.

The EPA is represented by Todd Kim, Chloe H. Kolman, Elisabeth H. Carter and Zoe Palnik of the U.S. Department of Justice Environment and Natural Resources Division and Daniel P. Schramm, Kyle Durch and Rosemary H. Kaban of the EPA Office of General Counsel.

The states are represented by their attorneys general. Utah is additionally represented by William L. Wehrum of Wehrum Environmental Law LLC and Emily C. Schilling, Kristina R. Van Bockern and Aaron B. Tucker of Holland & Hart LLP.

The industry groups are represented by Hogan Lovells LLP, Womble Bond Dickinson LLP, Sidley Austin

LLP, McGuire Woods LLP, Steptoe & Johnson PLLC, Lehotsky Keller Cohn LLP, Bracewell LLP, Baker Botts LLP, Squire Patton Boggs LLP, Hunton Andrews Kurth LLP, BakerHostetler LLP, Beveridge & Diamond PC, The McQueen Firm PLLC and Shumaker Loop & Kendrick LLP.

The case is State of Utah et al. v. U.S. Environmental Protection Agency et al., case number 23-1157, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Additional reporting by Keith Goldberg, Katie Buehler and Juan-Carlos Rodriguez. Editing by Vaqas Asghar.

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