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High Court Ruling Dooms EPA Smog Plan, DC Circ. Told

By **Madeline Lyskawa**

Law360 (July 30, 2024, 7:35 PM EDT) -- The U.S. Supreme Court's recent decision to halt the U.S. Environmental Protection Agency's plan to reduce smog-forming emissions across several states is reason enough for the D.C. Circuit to invalidate the rule, several states, industry groups and energy companies argued.

In two reply briefs filed on Monday, the states, industry groups and companies cited the Supreme Court's **June 27 majority opinion**, which said the EPA failed to address the concern that the point at which pollution-control measures could deliver cost-effective air quality improvements in downwind states could shift if upwind states fall out of the "Good Neighbor" smog reduction plan.

"EPA should have considered '[w]hat happens — as in fact did happen — when many of the upwind states fall out of the planned [federal implementation plan].' EPA failed to answer that critical question. Now, the [federal implementation plan] must be reversed," a six-state coalition led by Utah and Ohio said in its brief.

Expressing similar sentiments, the industry group and energy company petitioners, which include Kinder Morgan Inc., the National Mining Association and the Interstate Natural Gas Association of America, among others, told the D.C. Circuit in their brief "that error is prejudicial and is by itself reason to vacate the rule."

But that wasn't the agency's only error, the industry groups and energy companies said.

"EPA also violated its 'statutory duty to avoid over-control,' by imposing 'enhancements' on the trading program for [electric generating units] that will force substantial reductions in statewide emissions budgets without any analysis showing that these reductions will not result in over-control," they said. "These 'enhancements' also constrain [electric generating units]' ability to keep costs at the level EPA found to be cost-effective — another reality EPA failed to analyze."

Since the EPA's nationwide smog reduction plan was finalized, it has faced challenges in the D.C., Tenth, Fourth and Fifth circuits, among others. Although the plan's rollout 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.

While the justices merely considered whether a motion for stay should have been granted by the D.C. Circuit, and not whether the plan itself should be invalidated, the six states further argued in their brief that the "high court's 'resolution ... ultimately turn[ed] on the merits' given the significant harms and equities each side raised." In reaching their decision, the justices also received and reviewed more than 400 pages of briefing and held more than an hour of oral argument on the applications, the states said.

"Thus, this weighty merits issue, though viewed through a 'stay' lens, was treated on par with other 'cases [the court] hear[s]' solely on the merits," the states said, in an attempt to impart greater weight to the justices' decision on the outcome of the case.

Wisconsin, which did not join the six states' brief and hardly cited the Supreme Court's decision, conversely argued in a third brief filed on Monday that the D.C. Circuit should remand the EPA's plan

in order for the agency to implement particularized remedies as to the remaining emissions from states upwind of Wisconsin, which the state said have gone unaddressed.

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 Jay Jackson Jr.

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