The Court Takes Up Cross-State Air Again—but on Shadow Docket

Bethany A. Davis Noll is executive director at NYU Law's State Energy & Environmental Impact Center: bethany.davisnoll@nyu.edu.

In February, the Supreme Court heard argument on the shadow docket in a case about EPA's recent rule regarding air pollution that crosses state borders. Since the Court upheld a substantially similar rule less than 10 years ago, in *EME Homer City v. EPA,* it may be surprising that the justices would take the invitation to weigh in again so soon. But the composition of the high court has changed markedly since 2014. It will be interesting to see if the new lineup leads to a different result or whether the Court will stick to its own precedent. At press time, no decision on whether to grant a stay had come out.

Some background sheds light on the importance of this litigation. Under the Clean Air Act, EPA regulates ozone through a "national primary ambient air quality standard." In 2015, EPA updated that standard for ozone, triggering a duty for states to submit plans that will ensure they meet the new standard. As part of that plan, they must control any emissions that "contribute significantly" to air pollution problems in downwind states.

If EPA disapproves of a state's plan, the federal agency has two years to issue a plan that will regulate the sources directly. In this case, downwind states sued EPA to force a decision about whether upwind states had submitted adequate plans to control pollution that affected them. Ultimately, in February 2023, EPA made its decision in compliance with a court-ordered deadline. The federal agency found that 21 states had submitted plans that were inadequate; two other states failed to submit plans. That finding triggered EPA's duty to issue a federal plan regulating sources in those 23 states, which it did in March 2023.

This disapproval plan has some novel features. First, it includes non-power plant sources, such as natural-gas pipelines and cement kilns. Second, it contains a trading system that tightens up if any of the sources that are part of the scheme close down.

On this second feature, previously the scheme set the total number of available allowances, which must be purchased to continue emitting, after an analysis of the number of sources in a particular state and the reductions that are possible at those sources through cost-effective technology. Thus, if a source closes down, the allowances that are allocated to that source would be added back to the market, enabling other sources to keep polluting. This tightening of the allowance market prevents that.

Now, after a series of challenges brought in courts of appeal across the country, EPA's disapproval decision has been stayed in 12 states: Alabama, Arkansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nevada, Oklahoma, Texas, Utah, and West Virginia. Those circuit courts cited concerns about the modeling data EPA used to make its decision, the factors that the agency considered, and the new features of the rule. The CAA directs petitioners to file any challenges to "nationally applicable" regulations in the D.C. Circuit. EPA has argued that the cases should be moved there. Decisions on venue and decisions on the merits in those cases remain pending.

Decisions on venue and on the merits of petitioners' arguments remain

This case does not have to do with the disapproval decision, though—at least not directly. Instead, Indiana, Ohio, and West Virginia, along with industry petitioners, have challenged the federal plan, arguing that EPA should have considered the fact that its plan would not go into effect in all 23 states, because of the arguments in those courts of appeal where the case has been stayed.

With that argument, petitioners have asked the Supreme Court to stay the rule for the rest of the 23 states: California, Illinois, Indiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, Virginia, and Wisconsin. Yet many of the states on that list support EPA's decision and appeared to oppose the stay, including Illinois, Maryland, New Jersey, New York, Pennsylvania, and Wisconsin. Those states have argued that EPA's federal plan is necessary to address the severe consequences of ozone-forming pollutants.

When the Supreme Court decided *EME Homer City* 10 years ago, it reversed a decision authored by Judge Kavanaugh, then of the D.C. Circuit. The high court held that EPA was not required to give states guidance on their plans before the federal agency disapproved one, and that EPA had reasonably considered costs when deciding on its rule's emissions reductions.

In 2014, Justices Ginsburg and Kennedy helped make up the six-member majority upholding EPA's decision. Now Justices Kavanaugh and Coney Barrett have replaced them. Yet, even though the conservative majority might lead to an EPA loss, the Court did not grant the stay requests reflexively. Instead, it left the rule in place and ordered oral argument on whether it should grant a stay. The impact of the new Court and its decision to hear oral argument on the shadow docket are both interesting features to watch in this case.