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Appeals Court Tosses Out EPA Rule on Ozone-Forming Pollution (1)

By Amena H. Saiyid Oct 1, 2019

A federal appeals court on Oct. 1 tossed out a 2018 EPA rule designed to curb significant transport of ozone-forming pollution across state lines—an action that a legal analyst involved in the case labeled “a significant defeat” for the agency.

The U.S. Circuit of Appeals for the District of Columbia said the 2018 update to the Cross-State Air Pollution Rule—also known as the Close-Out Rule—rested on an interpretation of a Clean Air Act provision that the court has already rejected.

The three judges—Judith W. Rogers, Thomas B. Griffith and Gregory G. Katsas—were referring to the D.C. Circuit’s Sept. 13 ruling in *Wisconsin v. EPA*, which rejected the Environmental Protection Agency’s 2016 update to its rule regulating interstate transport of nitrogen oxides, a chemical precursor of ozone. The earlier decision directed the EPA to ensure that any forthcoming rule address how significant contributions of upwind pollution be eliminated.

The EPA said it is reviewing the opinion. The agency had already told the court it would decide by Oct. 29 whether it would rewrite the 2018 rule in the wake of the Sept. 13 ruling.

But the judges weren’t prepared to wait until then. In scrapping the rule, they told the EPA it has until Oct. 28 to either remand the rule for a rewrite, or to seek a rehearing.

The judges said the Clean Air Act’s Good Neighbor provision requires upwind states like Pennsylvania and Ohio that are home to coal-fired power plants to “eliminate” their significant contribution of nitrogen oxides, which are causing states downwind of them to violate federal ozone standards.

Nitrogen oxides contribute to the formation of ground-level ozone that causes asthma and other related illnesses, especially in children and the elderly.

The 2018 rule was challenged by six states, led by New York, and a coalition of environmental groups. The Institute for Policy Integrity at the New York University School of Law supported the states and the environmental groups in challenging the rule.

‘Consistently Flouted’

The decision is good news for public health in many parts of the country because a core obligation of the EPA under the Clean Air Act is to protect the air quality of downwind states that suffer from excessive upwind pollution, Richard Revesz, director of the Institute of Policy Integrity, said in a statement.

“The Trump administration has consistently flouted this obligation and has now suffered a significant defeat in federal court,” Revesz said.

He also said this ruling would serve as a harbinger of further defeats for the EPA in a number of pending cases, including ones brought by New York that accuses the agency of failing to take action against upwind states.

Ariel Solaski, the Chesapeake Bay Foundation's litigation attorney, also lauded the ruling, saying it would lead to less nitrogen pollution from upwind sources. The foundation was one of the groups involved in the litigation.

"It is important here in the Chesapeake Bay region, where air pollution supplies roughly a third of the nitrogen pollution damaging the Chesapeake Bay," Solaski said in a statement.

The case in question is [New York v. EPA](#), D.C. Cir., No. 19-1019, 10/1/19 .

—With assistance from Ellen M. Gilmer.

(Adds EPA comment in fourth paragraph.)

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