

Ohio v. EPA - The Answer is Blowin' in the Wind, The Supreme Court Stays EPA's Good Neighbor Plan

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PRACTICES Environmental Litigation, Energy, Power and Natural Resources, Environmental, U.S. Supreme Court

Among the impactful decisions issued by the Supreme Court at the end of its term was [Ohio v. EPA](#), in which the Court granted applications for stays of a number of industry groups and states. The parties are challenging the issuance of a single Federal Implementation Plan, or FIP, for ozone under the Clean Air Act. They requested the stay to allow the D.C. Circuit to determine the validity of the FIP without harming industry in the respective states. The stay prevents the application of the FIP to those states pending a final disposition of applicants' challenge. This decision protects power plants and other emission sources from being subject to the FIP's requirements before the validity of the FIP is finally determined.

Under the Act, states design state implementation plans, or SIPS, for implementing, maintaining, and enforcing the Act's standards. Under the Act's "Good Neighbor Provision," states must design these plans with their neighbors in mind and, in particular, must prohibit emissions "in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State" of the relevant air-quality standard. 42 U.S.C. §7410(a)(2)(D)(i)(I). If a SIP fails to satisfy the Act, including the Good Neighbor provision, EPA "shall" issue a FIP for the noncompliant State—that is, "unless" the State corrects the deficiencies.

To address changes in its ozone national ambient air quality standard, or NAAQS, EPA issued a guidance document advising states that they had "flexibility" in choosing how to address their Good Neighbor obligations. With that and other guidance in hand, many States submitted SIPs; many did not, because, among other things, emissions from the state were not linked to downwind air-quality problems or the states assertedly could identify no additional cost-effective methods of controlling the emissions beyond those they were currently employing.

For over two years, EPA did not act on the SIPs it received, and then, in February 2022, the agency announced its intention to disapprove 19 of them on the ground that the States submitting them had failed to address adequately their obligations under the Good Neighbor Provision, and a few months later, the agency proposed disapproving four more SIPs.

Pursuant to the Act, the agency issued its proposed SIP disapprovals for public comment before finalizing them. In place of the SIPS, the agency proposed a single FIP to bind all 23 States. The Court noted that "rather than continue to encourage 'flexibilit[y]' and different state approaches, EPA now apparently took the view that '[e]ffective policy solutions to the problem of interstate ozone transport' demanded that kind of 'uniform framework' and '[n]ationwide consistency.'"

The proposed FIP targeted the reduction of the emissions of one ozone precursor in particular—nitrogen oxides—and sought to impose control measures for it that "maximized cost-effectiveness in achieving downwind ozone air quality improvements." The agency employed a complex methodology in selecting a "uniform level" of cost, and so a uniform package of emissions-reduction

tools, for upwind states to adopt, and did so on 2 tracks—one for power plants and one for other industries.

EPA determined which emissions-control measures were cost effective at addressing downwind ozone levels based on an assumption that the FIP would apply to all covered States. During the comment period, commenters argued that if the FIP were not applied in some of the states used for the EPA's calculations, the agency would need "to conduct a new assessment and modeling of contribution and subject those findings to public comment." Despite those comments, the agency issued its FIP without accounting for a potential reduction of states, and instead included a severability provision to allow the FIP to remain in place even if states dropped out.

The applicants challenged the remnants of the FIP in the D.C. Circuit, asserting that EPA's decision to apply the FIP to them, even after so many other States had dropped out, was arbitrary or capricious. As part of their challenge, they asked the D.C. Circuit to stay any effort to enforce the FIP against them during their appeal and appealed the DC Circuit Court's denial of their request for a stay.

In its ruling, the Supreme Court explained "an agency action qualifies as 'arbitrary' or 'capricious' if it is not 'reasonable and reasonably explained,'" and in reviewing an agency's action under that standard, a court may not "'substitute its judgment for that of the agency,' . . . [b]ut it must ensure, among other things, that the agency has offered 'a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made' [and importantly, that] an agency cannot simply ignore an important aspect of the problem." The Court agreed with the applicants that the agency had—by not taking into account the fact that, "as 'the mix of states changes, . . . and their particular technologies and industries drop out with them,'" [] the point at which emissions-control measures maximize cost-effective downwind air-quality improvements also shifts"—ignored an important aspect of the problem. The agency made a number of arguments in response, each of which the Court rejected.

The Court also noted that because the parties were likely to succeed in their argument that the single FIP is arbitrary and capricious, a stay of its implementation is appropriate to protect the states' interest. The Court ordered that enforcement of EPA's rule against the applicants be stayed pending the disposition of the applicants' petitions for review in the United States Court of Appeals for the D.C. Circuit and any petition for writ of certiorari if such writ were timely sought. The Court's decision protects the interests of power plants, and other emission sources around the country, until the D.C. Circuit can determine the validity of the FIP.