

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1019

September Term, 2019

FILED ON: OCTOBER 1, 2019

STATE OF NEW YORK, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY AND ANDREW WHEELER, IN HIS OFFICIAL CAPACITY AS
ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS

HOMER CITY GENERATION, L.P., ET AL.,
INTERVENORS

Consolidated with 19-1020, 19-1047

On Petitions for Review of Final Action by the
United States Environmental Protection Agency

Before: ROGERS, GRIFFITH, and KATSAS, *Circuit Judges*

J U D G M E N T

These consolidated cases involve a challenge to an Environmental Protection Agency regulation known as the Close-Out Rule. The rule addresses the obligation of upwind states to reduce their contribution of ozone precursors to downwind states, which must attain an ozone pollution standard by certain statutory deadlines. The rule did not require these reductions to be made by 2021, the next applicable attainment deadline. Recently, we reaffirmed that the Clean Air Act requires upwind states to make such reductions. Accordingly, we grant the petitions for review in these cases.

The Clean Air Act regulates air pollution in four ways relevant here. First, the Act requires the EPA to set National Ambient Air Quality Standards (NAAQS) for certain harmful air pollutants, including ground-level ozone. 42 U.S.C. § 7409(a), (d)(1). In 2008, the agency revised the ozone standard to 75 parts per billion. National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436, 16,436 (Mar. 27, 2008).

Second, governors must designate areas in their states as nonattainment, attainment, or unclassifiable, based on whether they meet the NAAQS. 42 U.S.C. § 7407(d)(1)(A), (4)(A)(i). After approving or altering those designations, the EPA promulgates them. *Id.* § 7407(d)(1)(B), (4)(A)(ii). At the time of designation, the agency must classify ozone nonattainment areas as either marginal, moderate, serious, severe, or extreme, based on by how much they exceed the ozone standard. *Id.* § 7511(a)(1). Marginal areas have 3 years to achieve the standard, moderate areas 6, serious 9, severe 15, and extreme 20. *Id.* Petitioners New York, Connecticut, and New Jersey have serious nonattainment areas that must meet the ozone standard by 2021. Determinations of Attainment for the 2008 Ozone Standards, 84 Fed. Reg. 44,238, 44,238 (Aug. 23, 2019).

Third, every state must submit a State Implementation Plan (SIP) to the EPA within three years of a new NAAQS. 42 U.S.C. § 7410(a)(1). States with nonattainment areas must submit SIPs that will produce compliance with the standard by the statutory deadlines. *Id.* § 7410(a)(2)(A). Because air pollution blows from upwind states into downwind states, the Act's "Good Neighbor Provision" requires SIPs to prohibit emissions that will "contribute significantly to nonattainment in, or interfere with maintenance by, any other State." *Id.* § 7410(a)(2)(D)(i)(I). For the 2008 ozone NAAQS, 24 upwind states failed to submit a SIP by the 2011 deadline. Findings of Failure to Submit a SIP for Interstate Transport for the 2008 Ozone Standards, 80 Fed. Reg. 39,961, 39,965 (July 13, 2015).

Fourth, if a state's SIP is inadequate, the EPA must promulgate a Federal Implementation Plan (FIP) for the state within two years. 42 U.S.C. § 7410(c)(1). FIPs must satisfy the same requirements as SIPs, including the Good Neighbor Provision. Because 24 states failed to submit timely SIPs, the EPA had to issue FIPs on their behalf.

The EPA promulgated two rules related to this requirement. In 2016, it issued the Cross-State Air Pollution Rule Update (CSAPR Update) on behalf of 22 upwind states. 81 Fed. Reg. 74,504 (Oct. 26, 2016). This rule imposed emissions reductions that the EPA said would diminish, but not eliminate, the states' significant contributions to downwind nonattainment by the 2018 moderate area attainment deadline. *Id.* at 74,506. In 2018, the EPA followed up with the Close-Out Rule. Determination Regarding Good Neighbor Obligations for the 2008 Ozone National Ambient Air Quality Standard, 83 Fed. Reg. 65,878 (Dec. 21, 2018). This rule purported to fully resolve the Good Neighbor obligations of 20 upwind states for the 2008 ozone standard. *Id.* at 65,879. The EPA found that it would not be feasible to impose any cost-effective emissions reductions before 2023—two years after the serious area attainment deadline in 2021. *Id.* at 65,904–05. The EPA further found that all downwind states would reach attainment by 2023, even without further reductions from upwind states. *Id.* at 65,917. For those reasons, the Close-Out Rule required no further upwind reductions beyond those set forth in the CSAPR Update. *Id.* at 65,921.

The CSAPR Update and the Close-Out Rule came under parallel lines of attack. *Wisconsin v. EPA*, No. 16-1406 (D.C. Cir. Sept. 13, 2019), involved a challenge to the CSAPR Update. There, one downwind state and several environmental groups argued that the Good Neighbor Provision requires the EPA to eliminate, not just reduce, upwind states' excess emissions by the

next attainment deadline. Here, in challenging the Close-Out Rule, six downwind states, a downwind city, and seven environmental groups made the same argument.

In *Wisconsin*, this Court agreed with the challengers. Specifically, we held that the Good Neighbor Provision “require[s] upwind States to eliminate their significant contributions in accordance with the deadline by which downwind States must come into compliance with the NAAQS,” *Wisconsin*, slip op. at 13, without regard to questions of feasibility, *see id.* at 14–15, 24. We observed that this “conclusion follows from our decision in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008),” which “considered essentially the same question.” *Wisconsin*, slip op. at 13. As the EPA acknowledges, the Close-Out Rule “relied upon the same statutory interpretation of the Good Neighbor Provision” that we rejected in *Wisconsin*. EPA Suppl. Br. 4. Thus, the agency’s defense of the Close-Out Rule in these cases is foreclosed.

Even after *Wisconsin*, the EPA still retains some flexibility in administering the Good Neighbor Provision. First, in determining what constitutes a significant contribution to downwind nonattainment, the agency can consider the amount of upwind states’ contributions and the cost of abating them. *Wisconsin*, slip op. at 26. Second, the EPA can grant one-year extensions to downwind states in certain circumstances, which may permit the agency to make a corresponding extension for upwind states. *Id.* Third, the agency can try to show that it would be impossible to eliminate excess upwind emissions by the downwind deadline. *Id.* at 24, 26. Fourth, the Good Neighbor Provision may permit some deviation between upwind and downwind deadlines “under particular circumstances and upon a sufficient showing of necessity.” *Id.* at 27.

The EPA has not argued that any of these possibilities would support affirmance of the Close-Out Rule on the record before us. The EPA acknowledges that under the rule, upwind states will continue contributing significantly to downwind nonattainment in 2021. *See, e.g.*, EPA Resp. Br. 36. The agency has not granted an extension to any of the downwind states facing 2021 ozone attainment deadlines. And it concedes that the Close-Out Rule does not attempt to demonstrate impossibility or make a “sufficient showing of necessity.” EPA Suppl. Br. 4 n.1. We express no opinion on whether or how any of these circumstances might apply to any action that the EPA might take on remand.

To decide whether to vacate the Close-Out Rule, we must balance the seriousness of its deficiencies against the disruptive consequences of ordering a change that may itself be changed on remand. *See North Carolina*, 531 F.3d at 929; *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). As shown, the Close-Out Rule rests on an interpretation of the Good Neighbor Provision now rejected by this Court. At the same time, the rule imposes no obligations, so vacating it will cause no disruption. Thus, vacatur is appropriate.

The EPA has informed us that it may seek rehearing or rehearing *en banc* in *Wisconsin*. Likewise, it may also seek rehearing or rehearing *en banc* of this decision. In view of the impending 2021 attainment deadline, we shorten the deadline to seek rehearing of this decision to October 28, 2019, the due date for the EPA to seek rehearing in *Wisconsin*. *See Fed. R. App. P.* 40(a); D.C. Cir. R. 35(a).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any petition for rehearing or petition for rehearing *en banc* filed on or before October 28, 2019. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

PER CURIAM

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk