

Last Friday, the D.C. Circuit decided [Wisconsin v. EPA](#). The federal appeals court rejected industry attacks on a regulation dealing with interstate air pollution but accepted an argument by environmental groups that the regulation was too weak. Last week also featured depressing examples of the drumbeat of Trump Administration rollbacks, so it was especially nice to have some good news.

I hesitated about whether to write something about the case because the opinion makes for dull reading, unless you happen to have been deeply involved in the case. As I thought about it, however, I decided that the undramatic features of the case — the ways in which it was pretty routine — were themselves worth writing about. The opinion shows what it looks like when smart, capable judges apply themselves to complex technical issues. It's not glamorous but it's crucial to the successful workings of government.

Let me begin right at the top of page 1. Immediately under the name of the court is a line that reads:

“Argued October 3, 2018      Decided September 13, 2019.”

So almost a year went by between the oral argument and the court's decision. That's a fairly average delay for this kind of case. What wasn't average was the delay between issuance of the rule (Oct. 26, 2016) and the oral argument. It doesn't take *that* long for lawyers to write briefs! But the case seems to have gotten hung up, like many others, by the transition from Obama to Trump. Apparently it took the Trump Administration a long time to decide whether to defend the regulation. Putting that issue aside, the eleven month time to write the opinion doesn't seem to be that unusual for the court in a complex case. That means that if the Trump Administration wants a D.C. Circuit opinion to come down before Election Day, they may need to issue the regulation very soon, and in fact it may already be getting too late.

Next on the page comes the name of the case and a long list of lawyers who appeared on behalf of various parties. That's followed by the names of the three judges. The noteworthy thing there is that there were two Democratic appointees and one Republican appointee, but the three agreed to all sixty pages of the opinion. That's also not unusual. We tend to focus on court cases involving big divisive issues, but decisions by the courts of appeals more often focus on more technical legal issues and are generally unanimous.

When we get to the statement of facts, we learn that this case doesn't stand alone. During the Bush Administration, EPA made a first effort at implementing what's called the “Good Neighbor” provision of the Clean Air Act. This provision applies when pollution from an

upwind state “substantially interferes” with the ability of a downwind state to meet the deadline for achieving national air quality standards. In this case, the standard applies to ozone pollution caused by emissions from power plants. Designing a standard was difficult because there are many upwind states whose emissions contribute to air pollution problems on the eastern seaboard. The D.C. Circuit rejected the Bush Administration’s effort, and the Obama Administration went back to the drawing board. When the new version of the regulation came out, the D.C. Circuit rejected that too, but the Supreme Court reversed that ruling in the [EME Homer](#) case. (You can find an extensive discussion of the ruling and Justice Scalia’s dissent [here](#).) The Supreme Court sent the case back down to the D.C. Circuit to consider some remaining issues. That court decided that EPA had made mistakes in how it divided responsibility among different upwind states for cutting emissions. EPA then came again with an amended version, which is what was now before the court.

This, too, is far from unusual. Administrative agencies often take repeated passes at the same problem for a variety of reasons — but mostly because the regulatory problem is too tough to fix completely the first time around. In addition, the decision by the upwind states themselves to litigate rather than comply added to the delay.

When I say most of the opinion is dull reading, that’s partly because the judges didn’t make any particular effort at colorful prose or humor, but it’s mostly because the case involves technical issues that don’t have broad repercussions outside of the case itself. For example, here’s the court’s brief discussion of one of the simpler issues discussed early in the opinion:

“Delaware also claims that EPA impermissibly relied on only one year of modeling data to designate downwind problem receptors. That argument mischaracterizes EPA’s methodology. The Update Rule relies on a weighted average of three design values (from 2009–2011, 2010–2012, and 2011–2013) in order to compute projected concentrations at each downwind receptor for 2017. See 81 Fed. Reg. at 74,532. Delaware’s challenge thus fails.”

That seems really persuasive but relevant only for this one case. There are many pages of similar discussion, much of it on issues more complex than this one. Reading thirty or forty pages of similar detail isn’t something anyone would do for fun. But it’s important that those details be analyzed, and analyzed well.

The most notable part of the opinion concerns the issue won by environmental groups. The Clean Air Act sets deadlines for states to attain the national air quality standards. It also

requires upwind states to stop any substantial interference with those efforts, but it doesn't explicitly say what the deadline is for the interference to stop. The EPA regulation before the court didn't set a deadline. Environmentalists argued that the upwind states needed to stop interfering by the deadline for the downwind states to meet their standards. Otherwise, the downwind states would be penalized for missing a deadline that was the fault of the upwind states, not of them. This strikes me as a very persuasive argument. In addition, precedent in the D.C. Circuit supported the environmentalists. But EPA and the upwind states made a series of counter-arguments in favor of EPA's refusal to provide a deadline. As a result, it takes the court seventeen pages to dispose of the deadline issue.

At the end of the opinion, the court has to decide what remedy to provide. Courts in some parts of the country might have simply set aside the regulation and told EPA to try again. The D.C. Circuit doesn't do that in this kind of case. When an environmental group has challenged a regulation for not being strong enough, it seems perverse to void the regulation and thereby leave even less protection for the public than the agency provided, when the point of the opinion is that the agency should have done even more. So the D.C. Circuit uses something called "remand without vacatur," leaving the regulation in place but telling the agency to strengthen the defective part. That's another way in which the case is notable only as an example of the court's routine practices.

What we see in *Wisconsin v. EPA* is basically a very careful, detailed analysis by a court of whether an agency did its homework. I doubt the judges and their law clerks got up every morning and thought about how excited they were to work on this case. But we misunderstand the important role of the judiciary if we only think in terms of the hot-button cases that make the front page of the newspapers.