

RECENT CASES

FEDERAL STATUTES — CLEAN AIR ACT — D.C. CIRCUIT HOLDS THAT EPA CANNOT PREVENT STATE AND LOCAL AUTHORITIES FROM SUPPLEMENTING INADEQUATE EMISSIONS MONITORING REQUIREMENTS IN THE ABSENCE OF EPA REGULATION. — *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008).

Due to new environmental problems and Congress's hesitance to pass new regulatory statutes, judicial review of agency inaction serves an increasingly important function in policing agency action.¹ For a court to invoke the doctrine governing review of agency inaction, however, it must first decide that it is reviewing an instance of agency inaction, as opposed to action. Recently, in *Sierra Club v. EPA*,² the D.C. Circuit held that the Environmental Protection Agency (EPA)'s 2006 rule prohibiting states and local authorities from supplementing inadequate monitoring procedures in emissions permits violated Title V of the Clean Air Act.³ The majority held that, because the statute required "[e]ach permit"⁴ to include adequate monitoring requirements and the EPA had not "fixed all inadequate monitoring requirements" itself, the EPA could not bar state and local authorities from supplementing inadequate monitoring procedures.⁵ While the majority approached the case as one involving review of agency action, the suit could also have been characterized as judicial review of agency inaction, because the court held that the EPA's 2006 rule violated the Clean Air Act only due to the EPA's inaction in implementing sufficient monitoring provisions. By approaching the case as one involving review of agency action, the majority's approach has the promising potential to sidestep many of the difficulties inherent in judicial review of agency inaction.

In 1990, Congress added Title V to the Clean Air Act,⁶ requiring that major stationary sources of air pollution obtain permits from state and local authorities, such that:

Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a require-

¹ See Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 500–03 (2008) (arguing that litigation seeking to force agencies to respond to new environmental problems such as global warming has become increasingly important because Congress has not enacted statutes to address these problems).

² 536 F.3d 673 (D.C. Cir. 2008).

³ *Id.* at 677 (citing 42 U.S.C. § 7661a(b) (2000)).

⁴ *Id.* (quoting 42 U.S.C. § 7661c(c)).

⁵ *Id.* at 678.

⁶ Clean Air Act Amendments of 1990, Pub. L. No. 101-549, tit. V, 104 Stat. 2399, 2635–48 (codified at 42 U.S.C. §§ 7661a–7661f).

ment that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.⁷

The statute charges the EPA with supervising the program:

[T]he Administrator shall approve or disapprove such program, in whole or in part. The Administrator may approve a program to the extent that the program meets the requirements of this chapter, including the regulations issued under subsection (b) of this section. If the program is disapproved, in whole or in part, the Administrator shall notify the Governor of any revisions or modifications necessary to obtain approval.⁸

To implement this statute, the EPA passed the Part 70 Rules,⁹ which specify the steps state and local authorities may take in issuing emissions permits.¹⁰ If a proposed permit includes sufficient monitoring requirements, the rules allow the state or local authority to issue the permit; if a proposed permit does not include any monitoring requirement, the rules require state or local authorities issuing permits to create adequate monitoring requirements.¹¹ If the proposed permit includes monitoring requirements, but the requirements are not sufficient to ensure compliance with the Clean Air Act, the rule does not specify whether the state or local authority can take action.¹²

After first taking the position that the Part 70 Rules allowed state and local authorities to supplement inadequate monitoring requirements, the EPA reversed its course and issued the 2006 rule¹³ interpreting the Part 70 Rules to prohibit state and local authorities from adding monitoring requirements to proposed permits with insufficient monitoring regimes.¹⁴ Environmental groups challenged the rule, ar-

⁷ 42 U.S.C. § 7661c(a). The emission limits in these permits were drawn from preexisting law. *Sierra Club*, 536 F.3d at 674; *id.* at 681 (Kavanaugh, J., dissenting).

⁸ 42 U.S.C. § 7661a(d)(1).

⁹ 40 C.F.R. § 70 (2008).

¹⁰ *See id.*

¹¹ *Sierra Club*, 536 F.3d at 675.

¹² *See id.* For instance, the majority stated that a requirement of “annual testing [would not be sufficient to] assure compliance with a daily emission limit.” *Id.*

¹³ 71 Fed. Reg. 75,422 (Dec. 15, 2006).

¹⁴ *See Sierra Club*, 536 F.3d at 675–77. Interestingly, this interpretation was reached as a settlement from a previous lawsuit. In 2002, the EPA proposed a regulation interpreting 40 C.F.R. § 70.6(c)(1) to allow state and local authorities to supplement inadequate monitoring procedures. After an industry group filed suit against the EPA challenging the proposed regulation, the EPA settled the lawsuit and adopted a rule prohibiting state and local authorities from supplementing inadequate monitoring procedures. *Sierra Club*, 536 F.3d at 676. The rule was vacated by the D.C. Circuit because the agency did not hold a notice-and-comment rulemaking proceeding, *Env'tl. Integrity Project v. EPA*, 425 F.3d 992, 998 (2005), and the EPA then held a notice-and-comment proceeding and adopted an identical rule in 2006. *Sierra Club*, 536 F.3d at 676–77.

guing that it violated the language of the Clean Air Act and was arbitrary and capricious.¹⁵

The D.C. Circuit¹⁶ agreed that the EPA's 2006 rule violated the Clean Air Act.¹⁷ Writing for the majority, Judge Griffith¹⁸ argued that the statute unambiguously foreclosed the EPA's 2006 rule, and the rule was thus invalid under step one of *Chevron*.¹⁹ The Clean Air Act requires that "[e]ach permit" have "monitoring . . . requirements to assure compliance with the permit terms and conditions."²⁰ The court emphasized that the EPA had conceded in its brief that the monitoring requirements in some existing permits did not assure proper monitoring.²¹ The court held that "somebody must fix these inadequate monitoring requirements," and that because the EPA had not done so, it could not bar states from supplementing permits.²²

The court did not hold that the Clean Air Act unconditionally mandates that state and local authorities be allowed to "creat[e] . . . new monitoring requirements."²³ Instead, Judge Griffith noted that:

Had EPA used its § 7661c(b) power to fix inadequate monitoring requirements *prior to the issuance of any permits*, those newly-adequate requirements would bind state and local authorities under § 7661c(c). But EPA did no such thing. . . . EPA has offered nothing more than vague promises to act in the future. Under the "[e]ach permit" mandate, state and local authorities must be allowed to cure these monitoring requirements before including them in permits.²⁴

Thus, the combination of the EPA's inaction and the 2006 rule violated the Clean Air Act. The court acknowledged that it would have upheld the 2006 rule if the EPA had adopted it after first supplementing all inadequate monitoring requirements.

Environmental groups also challenged the monitoring requirements of the Part 70 Rules, arguing that if they forbid state and local authorities from supplementing insufficient permit monitoring programs, they violate the Clean Air Act.²⁵ The court differentiated the Part 70 Rules

¹⁵ *Sierra Club*, 536 F.3d at 677.

¹⁶ Pursuant to the Clean Air Act's judicial review provision, 42 U.S.C. § 7607(b)(1) (2000), the action proceeded directly to the appellate court instead of beginning in a trial court.

¹⁷ *Sierra Club*, 536 F.3d at 677-78.

¹⁸ Judge Griffith was joined by Chief Judge Sentelle.

¹⁹ *Sierra Club*, 536 F.3d at 677 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The court did not reach the question of whether the action would be arbitrary and capricious if it did not violate the statute's language. *See id.* at 677 n.4.

²⁰ 42 U.S.C. § 7661c(c).

²¹ *Sierra Club*, 536 F.3d at 678.

²² *Id.* at 676.

²³ *Id.* at 678.

²⁴ *Id.*

²⁵ *Id.* at 679.

from the EPA's 2006 rule. It upheld the Part 70 Rules because they could be interpreted consistently with the Clean Air Act.²⁶

Judge Kavanaugh dissented, arguing that "the relevant statutory language supports EPA's 2006 rule."²⁷ He disagreed with the majority about both the question presented by the case and its outcome. He contended that the case's primary question was whether the EPA or state and local authorities could decide if the preexisting monitoring requirements were sufficient.²⁸ To resolve this question, Judge Kavanaugh pointed to the language immediately following that relied on by the majority, which states that any requirements "shall conform to any applicable regulation"²⁹ and that the EPA "may prescribe procedures and methods for determining compliance *and for monitoring*."³⁰ Acting under this authority, the "EPA has determined that the permitting process is not the time and place for state and local permitting authorities to add new periodic monitoring requirements."³¹ The EPA should be the one to add provisions to the underlying monitoring plan in a programmatic manner, if additional monitoring is necessary.³² Judge Kavanaugh also noted that the majority's decision is narrow as it applies "only in those cases where EPA itself concludes that the preexisting applicable monitoring requirements are not adequate and EPA has taken no action. That is likely to be a small percentage of overall permit decisions."³³

The D.C. Circuit's decision in *Sierra Club* reviewed an agency action, the EPA's issuance of the 2006 rule, which was inextricably linked to agency inaction, the EPA's failure to establish sufficient monitoring requirements for some permits. The majority held that the EPA's 2006 rule violated the Clean Air Act because of the EPA's inaction in implementing monitoring requirements. The majority, however, did not characterize the decision as a review of agency inaction. Instead, the court reviewed agency action against the backdrop of inaction. As a remedy, the majority was able to strike down the action, whereas if it had approached the issue as one of agency inaction, it would have had to wait for the EPA to remedy the problem. Although courts have elaborated very different standards for judicial review of agency action and inaction, *Sierra Club* highlights the fine line between these two forms of review. By allowing state and local authori-

²⁶ *Id.* at 679–80.

²⁷ *Id.* at 681 (Kavanaugh, J., dissenting).

²⁸ *Id.*

²⁹ *Id.* (quoting 42 U.S.C. § 7661c(c) (2000)).

³⁰ *Id.* (quoting 42 U.S.C. § 7661c(b) (emphasis added)).

³¹ *Id.* at 681–82.

³² *See id.*

³³ *Id.* at 682.

ties to implement the statute, the majority found a way around the tricky law governing judicial review of agency inaction and presented a possible avenue for future litigants to take in challenging agency inaction in the area of environmental law.

While judicial review of agency inaction has garnered recent attention from the Supreme Court,³⁴ this area of law remains “a confused and uncertain field.”³⁵ There are two primary problems in reviewing agency inaction. First, agency decisions to act are based on complex calculations dealing with resource allocation and priorities, and courts are not well situated to review agencies’ setting of priorities.³⁶ Thus, courts have difficulty determining if an agency’s decision not to act is improper, as the decision not to act may have been necessitated by competing priorities.³⁷ Second, even if a court decides that the agency has violated the statute’s mandate by not acting, the court’s role in forcing the agency to act is far from clear. Courts usually refrain from forcing an agency to take action and instead mandate that the agency reconsider its inaction.³⁸ The court lacks information about the agency’s competing priorities and is thus ill-suited to order specific action.³⁹ And, arguably, such an order would encroach on the agency’s power to execute the laws.⁴⁰

A court’s decision to review agency inaction presumes that a court is able to determine whether the petitioner is challenging agency action or inaction. This question, however, is not as straightforward as it may appear.⁴¹ When faced with situations that could be framed as agency inaction or action, some courts have utilized both applicable

³⁴ See *Massachusetts v. EPA*, 127 S. Ct. 497 (2007); see also Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. COLLOQUY 1, 2 (2007) (noting that the Court’s decision in *Massachusetts v. EPA* was significant for its confirmation of the reviewability of agency inaction and the detail with which it scrutinized the EPA’s decision to refrain from regulating greenhouse gases).

³⁵ Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 4 (2008). Professor Biber also notes that judicial review of agency inaction is a field where “fundamental questions are still undecided.” *Id.*

³⁶ *Cf. id.* at 22–25 (arguing that courts must adopt a balance between deferring to agency decisions concerning resource allocation and holding agencies to their statutory obligations).

³⁷ See *id.* at 16–21.

³⁸ See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 562–68 (1985). On remand, the agency would reconsider its inaction, perhaps by holding a rulemaking on the issue. However, courts typically do not mandate that the rulemaking result in any final action. See *id.* at 563–64.

³⁹ See *id.* at 564.

⁴⁰ See *id.* at 564–65. Mandating that an agency reconsider its inaction does not infringe on the executive’s responsibilities. In contrast, if a court were to force the agency to act in a particular fashion or to consider specific actions, the court would be infringing on the agency’s discretion in executing the laws. See *id.*

⁴¹ See Biber, *supra* note 35, at 10–13.

standards of review,⁴² while others have accepted the petitioner's characterization.⁴³ In *Sierra Club*, the court took the latter approach: it accepted the petitioner's characterization that it was challenging the EPA's action, the 2006 rule, and not its inaction in failing to adopt sufficient monitoring provisions. This framing of the issue had a significant impact on the court's choice of remedy. If the court had framed the issue in *Sierra Club* as one of agency inaction, the majority would likely have adopted a remedy mandating that the EPA reconsider its inaction. And, if the EPA did not make good on its "vague promises"⁴⁴ to do so, the court would have been forced to decide whether agency action had been "unlawfully withheld"⁴⁵ despite the agency's discretion to implement the statute as it sees fit. Instead, the majority's opinion avoided this difficult issue by allowing states to step into the regulatory gap and supplement insufficient monitoring programs themselves. As a result, only if the EPA succeeds in establishing programmatic requirements for monitoring can it bar states from interfering in this process.

The majority's decision in *Sierra Club* provides future litigants seeking to enforce environmental regulations with a creative means of avoiding the unhelpful confrontation between the court and the agency that arises when the court must review agency inaction. Because many environmental programs rely on a structure of cooperative federalism to implement national legislation,⁴⁶ there is a potential conflict between the federal and state governments over the adequate level of environmental protection.⁴⁷ If litigants believe that the federal gov-

⁴² See, e.g., *Minier v. CIA*, 88 F.3d 796 (9th Cir. 1996). In this FOIA claim, the court pointed to both the section of the Administrative Procedure Act governing inaction, which allows courts to review agency action "unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1) (2006), and the "arbitrary and capricious" test governing agency action, 5 U.S.C. § 706(2)(A). *Minier*, 88 F.3d at 799 n.2, 803.

⁴³ See, e.g., *Clouser v. Espy*, 42 F.3d 1522, 1536 (9th Cir. 1994) (applying § 706(1) to a claim that the Forest Service unlawfully withheld motor vehicle access to a mining claim). The court in *Clouser* characterized the withholding of access as inaction, but it could have treated the Forest Service's withholding of access as action and characterized it as an affirmative decision to limit access.

⁴⁴ *Sierra Club*, 536 F.3d at 678.

⁴⁵ 5 U.S.C. § 706(1).

⁴⁶ For example, numerous provisions of the Clean Air Act and the Clean Water Act make federal financial support available to states that meet or exceed the federal requirements. See Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 189 (2005). In fact, states implement most federal environmental regulations. Jonathan H. Adler, *The Green Aspects of Printz: The Revival of Federalism and Its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 576 (1998) ("[M]ost major federal environmental statutes establish environmental standards at the national level but encourage a significant degree of enforcement and implementation at the state or local level.").

⁴⁷ See John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1184-85 (1995).

ernment is doing an inadequate job of environmental protection and is using its supervisory power to prevent state intervention, they now have two options in suing the federal agency. They can invoke the confused doctrine underlying agency inaction cases and ask the court to force the agency to reconsider its decision. Or they can argue that the agency's rules do not comply with the statute, because the statutory scheme as a whole is not satisfied and thus the agency should allow states to implement additional requirements in the absence of agency action. Of course, the scope of this remedy is limited, as courts will not allow states to take over regulatory functions exclusively delegated to federal agencies. But the *Sierra Club* court did override the EPA's discretionary authority that Congress explicitly granted the EPA under Title V of the Clean Air Act. If a statute authorizes enforcement at both federal and state levels, future courts may look to this decision as prioritizing a statute's enforcement over an agency's authority to supervise the statutory scheme.

While the majority's remedy presents a useful new option for litigants attempting to enforce environmental laws despite agency restrictions on state and local action, courts should be cautious in their enthusiasm to override an agency's discretion in determining how best to enforce a statute. First, this solution may only avoid the problem of dealing with agency inaction in the short term. If some states do not comply with the law at issue, courts are left to deal with inaction by two levels of government. While some blame shifting may occur among the parties, the EPA is ultimately responsible for supervising the program, and thus courts would be in the same position of evaluating the agency's inaction. Second, states may choose to implement differing levels of minimum permitting requirements, undermining the EPA's goal of uniformity and raising Judge Kavanaugh's question in dissent: who decides if a monitoring requirement is adequate?⁴⁸ Professor John Dwyer notes that those states that establish their own implementation standards will have to establish their own bureaucracies, with their attendant goals and policies.⁴⁹ The potential for differences in opinion over the correct prescription for monitoring requirements underscores the potential for conflict over the question of who decides whether additional monitoring requirements are appropriate. In dissent, Judge Kavanaugh concluded that "the statute grants EPA the authority to determine whether state and local authorities can impose

⁴⁸ See *Sierra Club*, 536 F.3d at 681 (Kavanaugh, J., dissenting).

⁴⁹ Dwyer, *supra* note 47, at 1224 ("States that want to assume administrative responsibilities under federal environmental statutes — and most states do — must establish agencies with an adequate number of trained staff and adequate resources and legal authority. As they grow in size and sophistication, the state agencies in turn become centers of environmental policy-making, which set their own goals and priorities." (footnote omitted)).

additional requirements.”⁵⁰ However, the majority did not answer the question of what would happen if the EPA and state and local authorities disagreed over what was an adequate monitoring requirement,⁵¹ leaving the situation unclear for regulated parties, at least in the short term. Judge Kavanaugh’s dissent also suggests that the majority’s decision is unimportant, because an agency would concede that its implementation is insufficient in a very small number of cases.⁵² But the majority did not conclude that agency implementation is unreviewable without the agency’s concession that its current implementation is inadequate.⁵³ Thus, the case may still implicate all future decisions where there is a question of agency implementation of a policy.

The majority opinion in *Sierra Club* illustrates the difficulty of separating judicial review of agency action from inaction and opens the possibility for an alternative remedy in the area of agency inaction. In a statutory scheme employing both states and federal authorities, a court can avoid reviewing an agency’s inaction by holding that states must also be allowed to remedy any problems in statutory enforcement. While this remedy may help courts that are attempting to enforce some environmental statutes, it is not a panacea for the problem of nonenforcement. If states refrain from acting, courts may ultimately have to confront reticent agencies. But if states do act, courts may have to resolve disputes between the states and federal agencies concerning who has the authority to decide whether a statute is being properly implemented. Despite these potential problems, the characterization of the problem as one of action, instead of inaction, shows promise as a means of overcoming the difficult problem of remedying agency inaction in deciding environmental law cases.

⁵⁰ *Sierra Club*, 536 F.3d at 681 (Kavanaugh, J., dissenting).

⁵¹ *Id.* at 678–79 (majority opinion).

⁵² *Id.* at 682 (Kavanaugh, J., dissenting).

⁵³ *See id.* at 678–79 (majority opinion).