



By Richard Lazarus

Long Struggle for an Interstate Rule

There's a charm? No doubt EPA hopes so after its stunning loss before the D.C. Circuit this summer in *EME Homer City Generation v. EPA*, striking down its latest effort to control interstate air pollution.

The Clean Air Act has long promised that no state can permit facilities within its borders from emitting pollutants that significantly contribute to a downwind state's inability to achieve national ambient air quality standards. But that is far easier said than done. A downwind state's excess pollution invariably results from multiple sources in many upwind states as well as the downwind state's own sources. Determining how much each source must reduce its pollution is mired in scientific uncertainty, cost-effectiveness concerns, and raw politics.

It was not until 1998 that EPA finally addressed interstate air pollution in a meaningful way by issuing its NO_x SIP Call. In that rulemaking, the agency determined the responsibility of 22 upwind states to ensure that downwind states achieved national ozone standards. And, the agency rejected an approach that would have fixed each state's emissions based on air pollution scientific modeling alone, in favor of an approach that reflected that some air pollution sources could reduce emissions more cost effectively.

In 2000, moreover, when the D.C. Circuit in *Michigan v. EPA* upheld

EPA's action, there was good reason to believe the agency had authority to craft a comprehensive, flexible, and cost-effective program for interstate air pollution. The *Michigan* court held that EPA could consider cost-effectiveness in determining the extent to which an upwind state had to reduce pollution from its sources to prevent those sources from significantly contributing to violations of air quality standards in downstream states. Such agency authority, the court agreed, extended to considering that sources in some states could reduce costs less expensively.

But EPA's subsequent efforts to apply the *Michigan* precedent have been unsuccessful. The agency has twice spent years developing ambitious programs to address interstate air pollution consistent with the ruling. But each time the D.C. Circuit has rejected EPA's argument, leaving the interstate air pollution program largely in regulatory limbo.

First, in 2008, the D.C. Circuit in *North Carolina v. EPA* held unlawful EPA's 2005 Clean Air Interstate Rule. That rule, which enjoyed widespread support from both industry and environmentalists, had promised to be the Bush administration's signature environmental achievement, effectively balancing the need for environmental protection and cost sensitivity in defining the interstate responsibilities of 28 states. But, in a decision *sub silentio* retreating from its *Michigan* ruling, the court faulted EPA's new rule for placing excessive weight on cost in determining a state's pollution reduction responsibilities and thereby departing from the act's requirement that each state not significantly contribute to another's downwind pollution.

For three years, EPA worked on a new rule and in August 2011, the Obama administration promulgated the Cross-State Air Pollution Rule, which sought to define anew the interstate emission reduction responsibilities for 28 states, but without the problems

found in *North Carolina*. But, the agency was no more successful. At the end of August, the D.C. Circuit in *EME Homer City* faulted EPA for potentially requiring states to reduce pollution beyond their "significant" contribution because they could achieve greater reductions cost effectively. And the court held that EPA had failed to allow the states ample opportunity to determine how best to achieve whatever reductions were required.

Neither ruling lacked effective response. With regard to the first, EPA argued that no such specific concern had been raised in the rulemaking and, had it been, the agency could have demonstrated that, in actual practice, such further reductions would not have been mandated below the statutory limit of "significant" contributions. And, with regard to the latter, EPA had a strong argument that the states had, prior to this final rulemaking, been provided sufficient opportunity to develop their own methods for reduction.

EPA's efforts over four decades to address a central reason for the act's passage — interstate pollution — remain stymied. A rule that EPA calculated provided a net annual benefit of \$100–280 billion, including pre-

venting tens of thousands of premature deaths annually, has been invalidated. And the only reason there is still some law to apply is that the D.C. Circuit decided, on rehearing in *North Carolina*, to let the 2005 rule remain in force "until it is replaced by a rule consistent with our opinion."

Industry often faults environmentalists, sometimes correctly, for insisting on extreme readings of language to the exclusion of EPA's ability to craft balanced, sensible policy. On this occasion, at least, the shoe seems to be on the other foot.

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