By Richard Lazarus

# Redo the Analysis From the Ground Up

Success has many parents, but failure is an orphan. The wisdom of this observation is not foreign to environmental law. When the D.C. Circuit concluded in *American Trucking Ass'n v. Whitman* case a few years ago that the Clean Air Act suffered from serious nondelegation problems, attorneys for industry raced to claim credit for raising an issue that almost none in fact raised. And, more recently, after the Supreme Court in *Massachusetts v. EPA* handed environmentalists one of their biggest wins, green groups competed to claim credit, when in fact almost all of them vigorously opposed seeking Supreme Court review.

In the aftermath of the D.C. Circuit's ruling this July in *North Carolina v. EPA*, however, it was success, not failure, that found itself quickly orphaned. The court handed down a sweeping decision striking down the Bush Administration's highly touted Clean Air Interstate Rule. CAIR had been the centerpiece of the administration's effort to reform air pollution regulation.

CAIR sought to eliminate the interference of upwind states with the ability of downwind states to comply with the national ambient air quality standard for fine particulate matter. CAIR required upwind states to reduce emissions originating from their states that significantly contributed to downwind state noncompliance, but without requiring sources within each state to decrease their emissions by a specified amount. Instead, CAIR created a regional interstate trading program that allowed sources in upwind states to receive credit for emissions reductions by paying sources in other states to reduce their own emissions. The policy underlying CAIR is that such market transactions allow for overall regional reductions to be achieved by those sources that can do so least expensively.

What made CAIR unique is environmental community support of this administration effort. Many prominent environmental leaders agreed with the administration that this kind of reform was the best way to achieve the reductions necessary to address the interstate air pollution problem. Indeed, several groups formally intervened to file briefs in support of the CAIR program.

Those challenging CAIR were North Carolina and a host of utilities. Each found fault in some aspect of the rule. North Carolina argued that CAIR failed to provide the statutorily required assurances that upwind state emissions will abate their emissions sufficiently to eliminate their significant contribution to downwind state attainment. Several utilities contended, among other things, that EPA had erred in calculating the allowances that the agency had budgeted for individual states.

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The D.C. Circuit found merit in some of petitioners' complaints and sharply cut back on EPA's authority to reform federal air pollution control programs in the absence of statutory amendment. Thus, the court agreed with North Carolina that "individual state contributions to downwind state nonattainment areas do matter" even if EPA would prefer to achieve overall regional reductions at the lowest possible cost. "All the policy reasons in the world cannot justify reading a substantive provision out of a statute." The court likewise faulted EPA for basing the allowances it budgeted for states on extra-statutory factors, including cost-effectiveness, equity, and the need to preserve the viability of the agency's other clean air programs. The court ridiculed EPA's "appeals to 'logic,' admonishing that "lest EPA forget, it is 'a creature of statute,' and has 'only those authorities conferred upon it by Congress.'"

But what was truly extraordinary about the appellate court's ruling was its remedy. Although each of the individual petitioners purported to challenge only isolated parts of CAIR, the court concluded that the sweep of their legal theories could not be so readily confined. Reasoning that "CAIR is a single, regional program, as EPA has always maintained, and all of its components must stand or fall together," the court ruled that here "they must fall." "EPA's approach — regionwide caps with no state-specific quantitative contribution determinations or emissions requirements — is fundamentally flawed" and "EPA must redo its analysis from the ground up."

No one seemed willing to don the laurel wreath. One industry petitioner, Duke Energy, announced that "it was not the intent of Duke Energy's participation in this litigation to overturn" CAIR. A spokesman for another, Entergy, quickly made clear its lack of intent to throw "the baby out with the bathwater." Nor was North Carolina willing to take credit, or blame, for the regulatory twilight zone that the successful petitioners had created.

The lesson to be learned? For those racing to the courthouse: Carefully consider the broader implications of your legal arguments. For EPA: There are no regulatory shortcuts for reforming federal environmental law, whether designed to strengthen or relax existing requirements. Statutes cannot be amended by agency regulation. Only by Congress.

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