DC Circuit Says EPA's "Transport Rule" Violates Clean Air Act: Is "Cooperative Federalism on the Rise?"

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Is ‘Cooperative Federalism’ On The Rise?

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August was a bad month for the Environmental Protection Agency in the nation’s federal appellate courts. In the span of just one week, two federal appeals courts held that the EPA exceeded its authority and violated the federal Clean Air Act, 42 U.S.C. § 7401, through impermissibly expansive regulation. On Aug. 13, the 5th U.S. Circuit Court of Appeals reversed the EPA’s disapproval of the Texas Flexible Permit System. Texas v. EPA, No. 10-60614, 2012 WL 3264558 (5th Cir. Aug. 13, 2012). On Aug. 21 the District of Columbia Circuit vacated the EPA’s controversial “transport” rule that was promulgated to regulate “cross-border” air pollution situations. EME Homer City Generation v. EPA, No. 11-1302, 2012 WL 3570721 (D.C. Cir. Aug. 21, 2012).

The transport rule was designed to deal with a recurring situation arising from interstate air pollution, namely, the problems that arise when pollution from one state is blown into another state — thereby increasing the amount of pollution in the neighboring state beyond that allowed under federal air quality standards. When cross-border pollution happens, fairness, and the Clean Air Act, require that the original site of the pollution not escape responsibility. Instead, the Clean Air Act requires that states ensure that the original site reduce its emissions to the extent that they contribute significantly to a neighboring state’s failure to comply with federal standards.

To accomplish these ends, the Clean Air Act allows the EPA to determine the degree to which one state’s cross-border emissions contribute to another state’s failure to meet national standards, and then allows the emitting state to develop a program that will reduce its emissions to eliminate its contribution to its neighbor’s problem. Such programs implement what is commonly called the Clean Air Act’s “good neighbor” requirement. The EPA is permitted to adopt a federal implementation plan for the upwind state only if the state fails or refuses to promulgate its own emissions plan to deal with the issue.

The Clean Air Act’s plan is therefore a cooperative program that places the EPA in an “oversight” role to ensure that each state manages its individual pollution not only to control the level of emissions within its borders, but also to preclude those emissions from causing downwind states to fall out of compliance with federal standards.
Notwithstanding the Clean Air Act’s mandate for cooperation, the EPA decided to adopt a “top down” approach to controlling cross-border pollution — one that eschewed collaboration and consultation. In August 2011 the EPA promulgated the “Cross State Air Pollution Rule,” also known as the “transport rule.”

The new rule defined the extent to which 28 “upwind” states must reduce their contributions to excess pollution in neighboring “downwind” states. The rule principally targeted emissions from electricity generation facilities powered by coal and natural gas because, in the EPA’s estimates, those plants produced unacceptable levels of sulfur dioxide and nitrogen oxides. The EPA’s goal was to force these facilities to reduce the pollutants to levels that would preclude cross-border excesses.

The EPA’s rule took an aggressive turn, however, when the agency decided to impose reductions that exceeded the “upwind” state’s contribution to its neighbor’s non-attainment of federal standards. Essentially, the EPA decided to use the “good neighbor” principle to impose much more drastic cuts on “upwind” states than the Clean Air Act allowed — with the goal of using a regional “cost-based” approach to controlling pollution — as opposed to the “state by state” approach mandated by the statute.

The effect of the EPA’s rule was to require states to reduce emissions by an amount greater than their contribution to downwind states’ pollution problems. Moreover, the EPA appeared to disregard the Clean Air Act’s language that entrusted implementation primarily to the state authorities — not the federal bureaucracy. The transport rule directly imposed requirements without giving states an opportunity to develop their own plans.

Faced with federally mandated reductions that far exceeded the amounts necessary to comply with the Clean Air Act, many states and industries sought review of the transport rule in the D.C. Circuit. They argued that the rule should be vacated because it allowed deeper reductions than the Clean Air Act permitted and violated the statute’s collaborative and deferential requirements.

On Aug. 21 a divided panel of the D.C. Circuit agreed with the petitioners and ruled that the EPA exceeded its statutory authority in passing the transport rule. According to the majority opinion.

“The statutory text grants EPA authority to require upwind states to reduce only their own significant contributions to a downwind state’s nonattainment. But under the transport rule, upwind states may be required to reduce emissions by more than their own significant contributions to a downwind state’s nonattainment,” the majority opinion said.

“EPA has used the good-neighbor provision to impose massive emissions reduction requirements on upwind states without regard to the limits imposed by the statutory text,” the court added. “Whatever its merits as a policy matter, EPA’s transport rule violates the statute.”

The majority then reached the same conclusion about the EPA’s failure to give due deference to state regulators.

“The Clean Air Act affords states the initial opportunity to implement reductions required by EPA under the good-neighbor provision. But here, when EPA quantified states’ good-neighbor obligations, it did not allow the states the initial opportunity to implement the required reductions with respect to sources within their borders,” the panel said.
“Instead, EPA quantified states’ good-neighbor obligations and simultaneously set forth EPA-designed federal implementation plans ... to implement those obligations at the state level. By doing so, EPA departed from its consistent prior approach to implementing the good-neighbor provision and violated the act,” the majority said.

Although the dissenting justice penned a vigorous dissent based on procedural obstacles that, in her view, should have prevented review, her protests did not carry the day. Under the circumstances, therefore, the majority’s ruling will stand in the absence of reversal by an en banc panel or the Supreme Court.

The court left in place an earlier rule, the Clean Air Implementation Rule promulgated during the Bush administration. In 2008 the D.C. Circuit also held that the CAIR failed to comply with Clean Air Act requirements, but the court has allowed CAIR to remain in effect until the EPA can finally craft a rule that complies with statutory requirements.

In an election year, it is tempting to engage in polemics — but we will not go there. From a strictly legal perspective, it appears that the term “cooperative federalism” is emerging as a bedrock principle of air pollution policy under the Clean Air Act. Whatever the merits of that principle may be, both the D.C. Circuit and the 5th Circuit have now recognized that the policy is plainly required by the Clean Air Act — and that this congressional mandate trumps any less deferential policy that the EPA might wish to pursue.

The meaning of the concept in the Clean Air Act is clear — at least in these contexts — and it is intriguing to speculate about new areas to which it may be extended. One thing seems certain, however. As a matter of statutory construction, the concept of “cooperative federalism” cannot be extended further than the language of the Clean Air Act permits. Within those borders, however, it is a powerful tool for restraining the EPA’s authority.

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