COMMENTARY

ENVIRONMENTAL LAW

BY DAVID G. MANDELBAUM
Special to the Law Weekly
MANDELBAUMD@GTLAW.COM

Supreme Court's Cross-State Air Pollution Decision

On April 29, the U.S. Supreme Court resurrected the Environmental Protection Agency's Cross-State Air Pollution Rule that the U.S. Court of Appeals for the D.C. Circuit had struck down last year. Justice Ruth Bader Ginsburg's opinion can be read as a remarkable acknowledgement that Congress really has not provided clear direction on how the EPA and the states should regulate air pollution sources. Given the extent to which the Clean Air Act affects economic activity and energy investment, this case should give many pause.

Environmental Protection Agency v. EME Homer City Generation, No. 12-1182 (U.S. Apr. 29, 2014), considered challenges by certain electric power producers and certain states to the EPA's Cross-State Air Pollution Rule, or CSAPR. The CSAPR implements the "good neighbor" provision of the federal Clean Air Act. The Clean Air Act requires each state to adopt a state implementation plan, or SIP, that will, among other things, ensure attainment of national ambient air quality standards, or NAAQS. NAAQS are maximum concentrations of pollutants that are permitted in the environment at all times. The SIP must impose controls on sources of air pollution sufficient to attain the NAAQS.

Air pollution that crosses state lines poses a problem under the Clean Air Act. If the controls on sources that other provisions of the statute require do not suffice to allow a downwind state to attain a NAAQS, the downwind state has no direct regulatory power to impose controls on the upwind source. Therefore, Section 110 of the Clean Air Act requires each SIP to include provisions "prohibiting ... any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will ... contribute significantly to nonattainment in, or interfere with maintenance by, any other state with" a NAAQS.

Some large power plants in the Midwest emit oxides of nitrogen and sulfur dioxide in concentrations that make achievement of some of the NAAQS in downwind eastern states difficult, especially the NAAQS for ground-level ozone and fine particulates. For this purpose, Pennsylvania is both an upwind state and a downwind state. It receives pollution from states to the west and contributes pollution to states to the east and north. Perhaps that foot-in-both-camps position explains an oddity of press coverage pointed out to me May 3 by Glenn Unterberger of Ballard Spahr, who was involved in the case: The New York Times carried a story about the Supreme Court's decision on the front page, but neither The Philadelphia Inquirer nor The Legal covered it at all.

The EPA has been struggling for a decade to get all states in the eastern half of the country to adopt provisions in their SIPs that ratchet down emissions from their sources sufficient to satisfy the good-neighbor provision, Section 110(a)(2)(D)(i)(I). The courts have not been friendly, as in *North Carolina v. Environmental Protection Agency*, 531 F.3d 896 (D.C. Cir. 2008), which vacated the Clean Air Interstate Rule. The CSAPR is the latest iteration of the EPA's efforts.

The CSAPR imposes emissions budgets on states and specifically on large electricity-generating units within states calculated by the EPA. The EPA imposed a budget on an upwind state if sources within it contributed at least 1 percent of a downwind concentration that violates a NAAQS. The controls are those that the EPA calculates can be achieved at a uniform price per ton of pollution removed.

The D.C. Circuit had held in *EME Homer City* that the CSAPR violated the Clean Air Act because it found that the statute precluded the EPA from requiring more than a proportional reduction in any upwind state's emissions. So, if upwind State A causes 10 percent of the exceedance of a NAAQS, the court reasoned that the EPA could not impose more than a 10 percent reduction on the emissions from State A. The CSAPR imposes controls based upon the cost of removed pollution.

Ginsburg's opinion for the majority found no such proportionality restriction in the Clean Air Act. Congress merely requires SIPs to prohibit emissions from sources that contribute "significantly" to non-attainment of a NAAQS in another state. Congress did not provide additional guidance as to what amounts to a significant contribution. The regulators generally can specify a reduction from any source together with reductions from other sources in-state and out-of-state that would result in attainment of a NAAQS. Does that make that out-of-state source's contribution significant? Is it significant if it is a lot? Is it significant if it would be inexpensive to control? Congress has not said.

> If regulation is to have any effect, it must require actions different from what would have taken place were no regulation in place.

Further, Ginsburg carefully picks apart the idea that controls have to be "proportional." One source can affect multiple downwind states. A reduction proportionate to its contribution to non-attainment in one downwind state would probably not be proportionate to the contribution from the source in another downwind state.

The Supreme Court, therefore, held that Congress intended to delegate to the EPA the decision of what counts as a significant contribution and how much emission reduction the good-neighbor provision requires. The court went on to decide that the EPA had not abused its discretion by selecting a 1 percent threshold and a $500 per ton cost of removal criterion. Ginsburg in particular endorsed selecting controls by cost of removal on the theory that it promotes economic efficiency.

Justice Antonin Scalia in dissent criticized the majority for accepting the EPA's cost-effectiveness rationale. As has become notorious over the past few weeks, he even initially attributed a cost-effectiveness position to the EPA in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), when, in fact, the EPA was resisting having to do cost-benefit analysis in that case; that portion of his dissent was later revised. A conservative critique of attention to cost-effectiveness is, at a minimum, surprising.

Other critics of this decision have characterized it as a victory for the Obama administration's "war on coal." The primary targets of CSAPR regulation are large electricity-generating stations. The ones with the highest emissions of oxides of nitrogen and sulfur dioxide tend to burn coal.

But if regulation is to have any effect, it must require actions different from what would have taken place were no regulation in place. Regulation always picks winners and losers. Sometimes it does so by name, and sometimes it does so indirectly. To be sure, the administration has stated explicitly that it knows that the CSAPR and other Clean Air Act regulations tend to select older, coal-fired power plants as losers. We would properly criticize the regulators if they did not know which sources their regulations would affect. We cannot at the same time criticize the regulators for understanding the consequences of their rules.

But notice that emissions from large power plants vary not only with pollution controls but also with markets. One could reduce air pollution by reducing consumption of electricity. A tax on power, a recession or a conservation program might have the same effect as fuel-switching or pollution-control equipment. That means that the cost-effectiveness rationale endorsed by Ginsburg is not necessarily correct. The EPA considered pollution-control costs, not broader demand measures.

All of this should make clear that the Clean Air Act delegates tremendous authority over economic and energy policy to the EPA and the states in their capacities as environmental regulators. The regulators exercise that authority with limited and confusing guidance from Congress. Indeed, the conceptual model of air pollution employed by the statute seems to assume that one can even know with any degree of certainty which sources will have what effect on attainment, and that demand fluctuations will not have important impacts that themselves have to be managed. The task is unimaginably daunting. The EPA does not really have discretion not to undertake it. One wonders if the EPA is equipped to decide which power plant should be built, which dispatched, and what tools should be used to accomplish those results. •

David G. Mandelbaum is national co-chair of the environmental practice group of Greenberg Traurig. His principal office is in Philadelphia. He teaches "Oil and Gas Law" and "Environmental Litigation: Superfund" in rotation at Temple University's Beasley School of Law, and serves as vice chair of the Pennsylvania Statewide Water Resources Committee. Follow him on Twitter @mandelbaumd.