

Most Challenges to EPA NOx Rule Rejected by Court

In a 2-1 decision rendered on March 3, 2000, the United States Court of Appeals for the District of Columbia Circuit denied most of the challenges that had been filed by Michigan and several other states and industry groups against a United States Environmental Protection Agency (EPA) regulation concerning emissions of nitrous oxides (NOx). The decision was surprising, because the court had previously issued an order temporarily directing EPA not to implement the NOx SIP Call, suggesting that the court believed the challenges to the NOx SIP Call had a significant likelihood of succeeding.

In October 1998, EPA issued the regulation, known as the “NOx SIP Call,” requiring Michigan and 21 other states and the District of Columbia to reduce NOx emissions in an attempt to alleviate ozone smog pollution in the northeastern United States. NOx is believed to form ozone smog after exposure to sunlight and other atmospheric conditions. EPA found that NOx emissions were carried by the wind from Michigan and other midwestern and southern states to the northeastern United States and contributed to poor air quality in the northeast. Consequently, EPA issued the NOx SIP Call to require Michigan and the other states to require emission sources within those states to reduce NOx emissions in order to improve air quality in the northeast. A “SIP Call” is a regulation by EPA directing one or more states to make revisions to the State Implementation Plan, which implements the CAA in each state.

Michigan and other challengers opposed the NOx SIP Call, arguing that EPA did not have a valid scientific basis for concluding that the midwestern and southern states contributed to poor air quality in the northeast and that EPA lacked statutory authority to issue the NOx SIP Call. Most of these arguments were rejected by the court.

The court first considered the argument that EPA was not authorized by the Clean Air Act (CAA) to issue a rule like the NOx SIP Call without first convening a “transport commission” to study the issue, as provided for in the CAA. Section 176A of the CAA allows EPA to designate an interstate air pollution transport reason whenever EPA believes that the interstate transport of air pollution contributes significantly to violations of national air quality standards and to establish a transport commission to make recommendations concerning interstate pollution transport. Furthermore, Section 184 of the CAA designated an ozone transport reason for the northeast and required EPA to convene a transport commission for that region. The court ruled that EPA was not limited by the CAA to employing the transport commission procedure to address interstate air pollution issues. Accordingly, the court held that EPA has authority to issue rules such as the NOx SIP Call without first convening a transport commission to address the issue.

The court next considered arguments that EPA had failed to evaluate each state affected by the NOx SIP Call adequately. The court ruled that additional air dispersion modeling performed by EPA to simulate the transportation of pollutants from each state after objections were raised when the NOx SIP Call was first proposed by EPA were adequate to support the EPA rule.

Several arguments were raised to the effect that EPA had inappropriately determined that the southern and midwestern states contributed “significantly” to the ozone air quality problems in the northeast, which is a prerequisite for EPA to issue a regulation such as the NO_x SIP Call. First, the states argued that EPA had deviated from past precedent as to what constituted “significant” contribution to air pollution, but the court found that the states failed to demonstrate that EPA had adopted a prior precedent for making such determinations. Therefore, the court ruled that EPA had not deviated from past precedent in determining that the midwestern and southern states contributed significantly to ozone air quality problems in the northeast.

Second, several parties claimed that EPA improperly considered the cost of air pollution control when determining that emission sources in the midwestern and southern states contribute “significantly” to the air quality problems in the northeast. The parties pointed out that EPA supported the specific emission reductions that were required for each state by arguing that the necessary emission reductions could be achieved in a “highly cost-effective” manner. The states and other parties argued that the cost-effectiveness of available controls bore no relation to whether emissions from the southern and midwestern states “contribute significantly” to air quality problems in the northeast. Therefore, EPA’s reliance on the alleged cost-effectiveness of NO_x emission reduction control technology, it was argued, was not consistent with the CAA. The court rejected this argument, finding that the word “significantly” in the CAA did not clearly preclude EPA from considering cost-effectiveness when issuing a rule such as the NO_x SIP call. The court found that its conclusion that the word “significantly” was ambiguous was supported by the fact that the states and the industry groups that raised this argument made several changes to their arguments and their interpretations of the CAA in various documents filed with the court.

Third, several parties argued that EPA improperly required each state subject to the NO_x SIP call to achieve approximately the same degree of NO_x emission reductions even though some states farther away from the northeast, such as Indiana, would be expected to contribute less to air quality problems in the northeast than closer states, such as Virginia. The court held that EPA’s analysis that a non-uniform approach to regulating NO_x emissions from the various states provided neither a significant improvement in air quality nor a substantial reduction in costs supported EPA’s decision to adopt a uniform approach.

Fourth, the states argued that EPA’s interpretation of the CAA in issuing the NO_x SIP Call violated the non-delegation doctrine, which limits the extent to which Congressional authority can be delegated to an administrative agency. The states relied largely on the D.C. Circuit’s recent decision in the *American Trucking Associations v. EPA* case, in which the court struck down significant portions of a 1997 EPA regulation establishing new national ambient air quality standards for ozone and particulate matter. The court ruled against the states on this point, noting that, although EPA’s authority under the SIP Call provision is very broad, it is not as broad as EPA’s interpretation of its authority to set national ambient air quality standards that was struck down in the *American Trucking Associations* case. The court found that EPA’s powers to issue SIP Calls is limited by three requirements before EPA may issue a SIP Call: (1) EPA must find that there is emissions activity within a state; (2) EPA must show with modeling or other evidence that such emissions are migrating to other states; and (3) EPA must show that the interstate emissions are contributing to a failure to attain compliance with national ambient

air quality standards. Because EPA's authority is limited by these three requirements, the court ruled that EPA's authority to issue the NOx SIP Call did not violate the non-delegation doctrine.

Several states raised individual arguments that were unique to those states. The court agreed with Wisconsin that EPA had failed to produce any evidence directly linking pollutant emissions in Wisconsin to air quality problems in any other state, Wisconsin should be removed from the NOx SIP Call rule. The court rejected a similar argument by South Carolina that its contribution to air quality problems in other states was "miniscule." The court found that EPA had provided sufficient evidence that South Carolina emission contributed to air quality problems in other states to justify including South Carolina in the NOx SIP Call rule.

Industry representatives from two states, Missouri and Georgia, argued that EPA improperly included the entire states of Missouri and Georgia in the NOx SIP call even though the air emission modeling data relied upon by EPA demonstrated only that emissions from the eastern portion of Missouri and the northern portion of Georgia contributed to air quality problems in other states. The court agreed that the underlying modeling data did not support including the entire states of Missouri and Georgia in the NOx SIP Call. Therefore, the court overturned the NOx SIP Call rule with respect to Missouri and Georgia and directed EPA to reconsider that rule. A similar argument would apply to Michigan because the data used by EPA does not show that emissions from the Upper Peninsula and the northern portion of the Lower Peninsula contribute to air quality problems in other states. This argument was not considered by the court, however, because no Michigan industry groups or other parties raised it.

The court rejected arguments that the NOx SIP Call impermissibly intruded on the states' authority to decide how to achieve compliance with the CAA, ruling that the NOx SIP Call left the states free to determine how to achieve the emission reductions mandated by the NOx SIP call by regulating various industries and/or other sources on NOx emissions, such as automobiles. The court also concluded that EPA properly determined that the Regulatory Flexibility Act did not require EPA to assess the impact of the NOx SIP Call on small businesses because the NOx SIP Call does not directly regulate any small businesses. Rather, the states are directed to develop regulations to achieve the goals set by the NOx SIP Call and it is the state rules implementing the NOx SIP Call, not the NOx SIP Call itself, that may impact small businesses.

The court ruled against several additional, technical challenges to the NOx SIP Call rule, except that the court agreed that EPA improperly changed the definition of "electric generating unit" in the rule without providing adequate opportunity for public notice and comment on the change. Therefore, the court directed EPA to reconsider its definition of "electric generating unit."

Judge Sentelle dissented from the majority opinion in this case. Judge Sentelle disagreed that it was proper for EPA to consider the cost-effectiveness of emission controls in determining whether emissions "contribute significantly" to air quality problems in other states. Judge Sentelle argued that nothing in the statute indicated cost-effectiveness was a relevant consideration in determining whether emissions from one state contribute "significantly" to poor air quality in another. Judge Sentelle would have struck down the NOx SIP Call on this basis,

but this view was not supported by the other two judges on the panel. Therefore, the court ruled against most of the challenges to the NOx SIP Call.

Michigan v. United States Environmental Protection Agency, No. 98-1497, D.C. Cir. (March 3, 2000).

This article was prepared by S. Lee Johnson, a partner in our Environmental Department, and previously appeared in the March, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.