D.C. Circuit Clarifies Clean Air Act Good Neighbor Provision Petition Criteria

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The global COVID-19 pandemic has raised awareness, among other things, of the connection between air quality and public health. While the pandemic has also resulted in a decrease in electricity consumption, and along with it a reported decrease in emissions of pollutants such as carbon dioxide, nitrogen dioxide and sulfur dioxide, air quality concerns remain.

To address air quality concerns, the Clean Air Act instructs the U.S. Environmental Protection Agency (EPA) to establish a National Ambient Air Quality Standard (NAAQS) for each air pollutant "which may reasonably be anticipated to endanger public health or welfare." See 42 U.S.C. Section 7408(a)(1)(A). To administer this program, the country is divided geographically into air quality control regions, some of which are within a single state and some of which comprise parts of two or more states. Each such area is then designated as to whether it is in attainment or nonattainment, or it cannot be classified, as to each NAAQS.

Each state must provide a plan for implementing, maintaining, and enforcing the NAAQS within the state, 42 U.S.C. Section 7410(a)(1), and states in nonattainment areas must demonstrate how they will achieve and maintain NAAQS.

However, as the U.S. Court of Appeals for the D.C. Circuit noted last month, "state-level air quality regulation is an inherently complicated endeavor because 'air pollution is transient, heedless of state boundaries. Pollutants generated by upwind sources are often transported by air currents, sometimes over hundreds of miles, to downwind states.'" see Maryland v. Environmental Protection Agency (EPA), — F.3d — (D.C. Cir. 2020) ("Maryland") at *3 (quoting EPA v. EME Homer City Generation, 572 U.S. 489, 496 (2014)).

Recognizing this complication, the Clean Air Act includes the Good Neighbor Provision that requires a state implementation plan to prohibit in-state sources "from emitting any air pollutant in amounts which will … contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to [NAAQS]." If a downwind state feels its own ability to attain or maintain NAAQS is compromised by pollution from an upwind state, Section 126(b) of the Clean Air Act authorizes any such state or political subdivision to petition the EPA for a finding that one or more upwind sources are emitting pollution in violation of the Good Neighbor Provision.

In 2016, Delaware and Maryland filed Section 126(b) petitions with the EPA requesting limitations on upwind sources allegedly contributing to its nonattainment of certain standards, which the EPA denied. The discussion that follows will focus on two elements of the D.C. Circuit's review of the EPA's denial of Delaware's petition.

EPA Erred When It Failed to Consider Out-of-State Monitors

The EPA denied Delaware's Section 126(b) petition, finding that Delaware had failed to demonstrate a current or future in-state air quality problem. In doing so, the EPA did not consider air quality data from non-attaining receptors outside Delaware, even though such receptor was located within the multistate nonattainment area that includes Delaware.

In the EPA's view, the 126(b) petition authority is "limited to states and political subdivisions seeking to address interstate transport of pollution within their geographical borders." Delaware, asserting that the EPA's interpretation is unreasonable, argued that Section 126(b) authorizes it to petition based on out-of-state monitoring data. By Delaware's reckoning, because "any state" can file a 126(b) petition, any state can file a 126(b) petition to determine whether an upwind source is contributing to air pollution in a different state. While the court ultimately found that the use of "any state" in the statute is meaningful, it did so for a different, undisputed reason, namely that a single state within a multistate nonattainment area can file a 126(b) petition based on air pollution within its own borders.

Because the statute is silent on this point, the court proceeded to Chevron step two to determine whether the EPA's interpretation is reasonable considering the Clean Air Act's text, legislative history and purpose.

The D.C. Circuit rejected the EPA's proposed construction of the statute based on the statutory context. First, the EPA argued it is significant that other provisions of the Clean Air Act allow for "any person" to petition the EPA, whereas Section 126(b) petitions may only be brought by states and political subdivisions. The court found that distinction largely without relevance noting that Delaware, in this instance, as a state is plainly authorized to bring a Section 126(b) petition, and "the fact that the section 126(b) petition process is comparatively circumscribed does not mean an otherwise qualified petitioner is thereafter subject to additional implicit limitations."

The EPA's next argument turned on what it means for a state to be "affected." By the EPA's reading, Section 126 as a whole is intended to address interstate pollution "concerns between affected states and upwind sources, not between any third party (even if such party is another state) and upwind sources." See Maryland at *9 (quoting EPA Response to Delaware and Maryland, 83 Fed. Reg. at 50,460). Because Section 126(b) requires upwind sources to provide notice to nearby states where air pollution limits may be affected by such source, the EPA reasons that the state itself must be directly affected by upwind pollution. Because Delaware had not shown an air quality problem within Delaware, according to the EPA Delaware has not shown that it is "affected."

Again, the D.C. Circuit rejected the EPA's position, acknowledging that Section 126(b) contains no analogous limitation to that of the notice requirement. Notably, the court recognized the ambiguity as to "whether all states in a shared nonattainment area are 'affected'—and are therefore owed written notice—regardless of where in the multistate area the offending pollution is measured." Even if the court were to accept EPA's interpretation that only "affected" states

may file a Section 126(b) petition, the court found the plain language of the statute ambiguous as to whether an individual state in a shared nonattainment area is "affected."

In resolving this ambiguity, the court was persuaded by Delaware's position and the "untenability of the EPA's interpretation." The petitioners explained that selectively placed monitors are intended to provide air quality information applicable to the entire multistate area. As the court explained, "a violating monitor anywhere in the shared nonattainment area signals that other locations may face similar problems."

In addition, the court recognized the "very real regulatory consequences" that a nonattaining receptor anywhere in the multistate area can cause for a state. As a result of a nonattaining receptor anywhere in the multistate area, "states must coordinate a collective response irrespective of the offending monitor's location." Without the ability to file a Section 126(b) petition based on an out-of-state monitor, a state would find itself "stuck in regulatory limbo, affected by an upwind source yet unable to avail itself of the intended remedy for addressing upwind contributions to nonattainment."

In sum, the court held it was arbitrary for the EPA to subject Delaware to the burden of limiting its emissions upon nonattainment designation, but to deprive it of access to a potential remedy. Going forward, the EPA will be unable to ignore evidence of a nonattaining receptor beyond a petitioning state's borders yet within a multistate area to which such state belongs.

The Next Future Attainment Deadline

The next issue for the court to resolve was determining for what year the EPA must assess nonattainment in the downwind state at step one of evaluating a Section 126(b) petition. Must the EPA focus on current nonattainment, or nonattainment at the petitioning state's future attainment deadline? Finding the EPA's interpretation of the statute that it must look at future nonattainment reasonable, the court explained why the EPA is not required to consider current nonattainment in the downwind state.

For a state implementation plan to comply with the Good Neighbor Provision, it must prohibit any in-state source "from emitting any air pollutant in amounts which *will* … contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any [NAAQS]." Because a Section 126(b) petition requests a finding that an upwind source violates the Good Neighbor Provision, there is a temporal connection between the two provisions. Based upon its decision in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir.) (per curiam), modified on reh'g in part, 550 F.3d 1176 (D.C. Cir. 2008), the court held that the term "'will'—which denote future tense" confines application of the Good Neighbor provision to "downwind air quality problems (of nonattainment or maintenance) that are currently present and will continue into the future."

In other words, if an upwind source will not contribute to such air quality problems in the future (the relevant date being the next applicable downwind attainment deadline), regardless of its current contribution to present downwind air quality problems, such source does not violate the Good Neighbor Provision.

As states continue to strive for improved air quality for its citizens, it is worth watching how, if at all, an executive order instructing the EPA to relax pollution standard noncompliance enforcement during the pandemic may affect interstate air pollution.

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