Looking Back at 20 Clean Air Act Cases in the Past 20 Years

The occasion of *EM*’s 20th anniversary prompts this whirlwind look back at 20 U.S. Clean Air Act (CAA) cases decided during the past two decades.

My case selection for this article was inspired by my memory of a “Bagels with Bob” breakfast hosted by Bob Perciasepe shortly after he became the head of the U.S. Environmental Protection Agency’s (EPA) Air Office in the late 1990s. In response to a question about what his priorities would be in his new job, Assistant Administrator Perciasepe said that he would be facing different problems than those faced by his predecessors. They had implemented provisions of the 1990 Clean Air Act Amendments for which the U.S. Congress had provided clear implementation roadmaps (e.g., the Title IV Acid Rain Program). He and his colleagues, though, were being asked to address issues for which Congress had provided only the sketchiest of roadmaps or had provided no roadmaps at all. And one of the realities of working on such issues was that no matter what actions he might take, those actions were highly likely to precipitate litigation. As demonstrated by the following discussion of 20 cases in the past 20 years, Assistant Administrator Perciasepe was right in predicting the increase in litigation arising from EPA’s efforts to adopt rules or take other actions where the law is unclear.
A Cluster of Climate Change Cases
Following years of debate on whether EPA has authority under the CAA to regulate greenhouse gases (GHGs), the U.S. Supreme Court, in 2007, held that GHGs are within the scope of “air pollutants” as defined by the CAA and that the CAA authorizes EPA to regulate GHG emissions from new motor vehicles if EPA were to determine that such emissions meet the “endangerment” test for regulations under CAA Section 202(a)(1) (Massachusetts vs. EPA, 548 U.S. 903 (2007)).

Armed with the knowledge that it had discretion to regulate GHGs, EPA chose to do so, embarking on the development of a series of rules that—in combination—regulate GHG emissions from both mobile and stationary sources. Although the U.S. Court of Appeals District of Columbia Circuit (D.C. Circuit) dismissed all challenges to the rules for lack of jurisdiction (Texas vs. EPA, 726 F.3d 190, 183 (2013)), the Supreme Court agreed to review the rationale that EPA had used to regulate GHGs from stationary sources through changes to the CAA’s preconstruction permitting program (i.e., the program for the prevention of significant deterioration of air quality, or PSD) and Title V operating permit program for GHGs. The changes that EPA made to those permitting programs included changes to the thresholds for triggering such programs, making the triggers tens of thousands of tons rather than 100 or 250 tons, as set out in the CAA. Although EPA claimed that it had to increase the triggering thresholds because its regulatory program would otherwise be impossible to administer, the Supreme Court, in UARG vs. EPA, 134 S. Ct. 418 (2014), disagreed. While upholding Massachusetts, the court held that there was nothing in Massachusetts or in the CAA that compelled EPA to regulate GHGs under the PSD and Title V programs in the manner that the agency had chosen.

Where EPA goes next is unfolding now. Again, Congress has not given EPA a roadmap, but the agency doesn’t have unfettered discretion as it takes its next steps: the Supreme Court has noted that it is permissible to interpret the PSD and Title V programs’ triggering thresholds to “encompass only pollutants emitted in quantities that enable them to be sensibly regulated at the statutory thresholds” and to “exclude those atypical pollutants that, like [GHGs], are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written.”

Wrangling with Regional Air Pollution
EPA’s attempts to regulate where Congress has not spoken clearly have also spawned litigation—and created interesting law—in the area of interstate transport of pollution. Since the mid-1990s, EPA has adopted three major rules designed to address the contribution of interstate transport of ozone (O₃) and fine particulate matter (PM₂.₅) precursors to O₃ and PM₂.₅ nonattainment in the eastern United States: the 1998 rule to revise State Implementation Plans (SIPs) in order to reduce nitrogen oxide (NOₓ) emissions thought to contribute significantly to high downwind O₃ levels (the NOₓ SIP Call), the 2005 Clean Air Interstate Rule (CAIR), and the 2011 Cross-State Air Pollution Rule (CSAPR). Parties challenged all three rules, and that produced three not-easy-to-reconcile cases from the D.C. Circuit: Michigan vs. EPA, 213 F.3d 663 (2000); North Carolina vs. EPA, 531 F.3d 896 (2008); and EME Homer City Generation vs. EPA, 696 F.3d 7 (2012). At issue in all three cases is whether and, if so, how EPA can require the reduction of emissions in upwind states in order to address air quality problems in downwind states.

Now that the Supreme Court has weighed in—in EPA vs. EME Homer City Generation, LP, 134 S. Ct. 1584 (2014)—some things are clearer. First, EPA may, in adopting regional transport rules, take cost-effectiveness into consideration. Also, EPA may impose federal implementation plans on upwind states even if those states have not yet had a meaningful opportunity to address their contributions to downwind nonattainment. However, EPA does not have unfettered discretion to regulate emitters in upwind states. Rather, EPA has authority to require reductions of only those upwind-state emissions that significantly contribute to nonattainment in other states. Here again, how EPA responds to such direction by the Supreme Court—and in the absence of further direction by Congress—is not now clear; but it is likely to play out in the relatively near future.
The CAA’s New Source Review (NSR) preconstruction permitting requirements apply to the construction of major new sources and to major modifications of existing sources (i.e., the making of physical or operational changes resulting in significant net emissions increases). The NSR permitting program started out as relatively simple and straightforward rules crafted by EPA in 1974 in response to a court decision. When Congress amended the CAA in 1977, it added a preconstruction permitting program that was based upon EPA’s 1974 rules, but that included more bells, whistles, and complications. And by the time EPA implemented Congress’ 1977 program and started applying those rules in the 1980s, the process of applying for and getting a preconstruction permit had become amazingly complex, burdensome, and time-consuming. As a result, source owners had good reasons for trying to avoid triggering the NSR permitting process if they could legitimately do so. And many thought they could legitimately do so by ensuring that the projects they undertook did not result in net emissions increases and/or were excluded from preconstruction review under other provisions of EPA’s NSR rules.

While source owners may have thought they were doing nothing wrong, EPA came to believe that its on-the-books rules did not contain broad exemptions from the NSR preconstruction permitting process. Thus, in EPA’s view, many projects undertaken at existing sources over the past 20 years were major modifications that should have gone through the NSR permitting process.

Wanting to encourage more sources to go through the NSR permitting program, EPA began its NSR Enforcement Initiative in 1999. The Initiative called for EPA to identify industrial sectors where, in EPA’s view, many sources owners had made major modifications to their existing sources without first going through the NSR permitting process. Once it identified such projects, EPA issued document production requests (to get more information about the projects) and then filed suits against the owners of the targeted projects. In those lawsuits, EPA sought monetary penalties and injunctive relief (e.g., the installation of control technologies that EPA believed would be required by the NSR permitting process).

Many targeted source owners believed that EPA’s actions were an attempt to unlawfully narrow the scope of those parts of the NSR rules that allowed source owners to bypass the preconstruction permitting process for projects that did not result in emissions increases and/or that were otherwise excluded from NSR because, for example, they were routine maintenance, repair, or replacement projects. Those source owners chose to defend themselves vigorously in many of the NSR enforcement cases that EPA brought throughout the country, and in their defenses, they have often argued that (a) the EPA-targeted projects took place more than five years earlier and thus EPA’s lawsuits were in violation of the statute of limitations; or (b) the targeted projects were excluded or exempt from the NSR preconstruction permitting process because they did not result in significant net emissions.

To date, there have been many court decisions on NSR enforcement issues, and the courts have been split almost down the middle on the validity of EPA’s claims that so many sources have violated the CAA’s NSR provisions. For example, my most recent review of NSR cases turned up 33
decisions addressing statute of limitations defenses, with judges in 20 cases agreeing with the defendant source owners that the statute of limitations applies (see for example, *U.S. vs. Midwest Generation* (7th Cir. 2013); *U.S. vs. Homer City* (3rd Cir. 2013); *U.S. vs. DTE* (6th Cir. 2013); *Sierra Club vs. Otter Tail Power* (8th Cir. 2010); and *U.S. vs. Cinergy* (S.D. Ind. 2007)); and 13 cases agreeing with EPA that the statute of limitations does not apply (see for example, *NPCA vs. TVA* (6th Cir. 2007); *U.S. vs. Cemex* (D. Colo. 2012); *U.S. vs. Ohio Edison* (S.D. Ohio 2003); and *U.S. vs. Louisiana Generating* (M.D. La. 2011)).

My review also turned up nine cases concerning the scope of the NSR rule’s exclusion for routine maintenance/repair projects, with judges in five cases holding that targeted projects were routine and excluded from the NSR process (see for example, *Pennsylvania vs. Allegheny Power* (W.D. Pa. 2008) and *NPCA vs. TVA* (E.D. Tenn. 2009)); and judges in four cases holding that the projects were not routine (see for example, *U.S. vs. AEP* (S.D. Ohio 2007) and *U.S. vs. SIGECO* (S.D. Ind. 2003)).

Most recently, courts have started issuing decisions on how—one under the NSR rules—one is supposed to calculate whether or not a targeted project has produced a significant emissions increase. These decisions reveal that there are many methodologies for making such calculations and almost as many different views by the courts on which methodologies may be used. Cases on this point to watch in the next year include *U.S. vs. DTE Energy* (6th Cir.) and *U.S. vs. Ameren Missouri* (E.D. Mo.).

**Conclusion**

Just because the CAA has not been amended in over 20 years does mean that all of the act’s provisions have been implemented and there is no further controversy on CAA issues. To the contrary, some of the CAA programs that EPA is now developing and implementing—particularly in areas where Congress has not provided clear roadmaps—are controversial, are ending up in complex litigation, and are likely to lead to many more interesting court decisions on CAA issues over the next 20 years.