



3rd Circ. Invigorates Underused EPA Cross-State Air Power

By Sean McLernon

Law360, New York (July 17, 2013, 7:54 PM ET) -- By upholding the U.S. Environmental Protection Agency's ability to limit power plant emissions deemed to drift across state lines, the Third Circuit last week bolstered an infrequently used tool that experts say could provide a new path for significant cross-state air restrictions.

The EPA has struggled with efforts to implement wide-ranging rules for emissions that cross territorial borders. The agency's most recent attempt, the Cross-State Air Pollution Rule, was struck down by the D.C. Circuit last summer as too stringent and burdensome for states.

Targeting specific sources could be a much easier task, however, after the Third Circuit upheld an EPA rule ordering a Pennsylvania generating station to reduce sulfur dioxide emissions by 81 percent over three years based on a petition from New Jersey, which is 500 miles from the plant.

More states could take a cue from New Jersey in the wake of the ruling and turn to the Clean Air Act petition process for addressing problematic pollution from other states, according to Gibson Dunn partner and former EPA assistant administrator Raymond B. Ludwiszewski.

"This reminded states that they have a remedy that could be prompt, and I think it is significant in that the court determined these very stringent reductions were not arbitrary or capricious," Ludwiszewski said.

Cutting emissions from specific sources by granting requests from aggrieved states has been within the agency's power for years.

The government has simply shown an historic reluctance to utilize it, and states have typically been hesitant to take on their neighbors.

That may be starting to change as states become more desperate to find some way to meet federal pollution limits and the Obama administration seeks to cut carbon emissions. The agency is required to respond within 60 days to a petition, providing a quick response rather than drawn-out rulemaking.

Without a comprehensive nationwide cross-state air policy in place, Ludwiszewski said it will be hard for states to resist the temptation to ask the EPA to intervene through a Section 126 petition, named for the provision in the Clean Air Act allowing the states to call for federal help over a cross-border emissions dispute.

States targeted by successful petitions could then turn to their neighbors and seek relief of their own, starting a regional domino effect.

"If you're Pennsylvania, and you've had one of your sources addressed in this way, you might now be looking at Virginia or West Virginia or Ohio," Ludwiszewski said.

Taking on power plants one by one may not be the most efficient approach to tackle climate change, but the Section 126 petition process gives EPA another statutory avenue to tackle emissions in a big way, according to Center For Biological Diversity senior counsel Bill Snape.

"It would obviously take more time and money to do it on a case-by-case basis, but if that's what EPA has to do, that's what EPA is going to do," Snape said.

The EPA will have to clear more hurdles if the agency intends to levy similar emissions restrictions on other facilities, however, according to Richard F. Bulger, co-leader of Mayer Brown LLP's environmental action group.

The agency's own fact sheet on the rule acknowledges that a mix of sources are usually to blame for emissions that move across state lines, which Bulger said makes it difficult to target a single source. In the Third Circuit case, the Portland Generating Station targeted by the EPA was a large facility that was located unusually close to a state line.

Facilities have to contribute significantly to non-attainment before the EPA is allowed to take action, and Bulger noted that it is difficult to prove that particular facilities are responsible for downwind compliance problems all by themselves.

"When you don't have that clear nexus from a particular plant or group of sources, the requirements are almost insurmountable," Bulger said.

Even if the EPA may have a harder time justifying stringent restrictions on other plants, Suffolk University environmental law professor Steven Ferrey said the Third Circuit decision shows that EPA has a wider palate of options available as they struggle to come up with a federal standard that survives judicial scrutiny.

"The EPA has had a handful of these regulations stricken on administrative law grounds," Ferrey said. "This, if nothing else, signals the possibility of a case-by-case approach rather than more generic regulation."

The Third Circuit's rationale also provides more ammunition in the ongoing Cross-State Air Pollution Rule fight, according to Snape. The U.S. Supreme Court agreed to take the case earlier this year, granting EPA's petition for writ of certiorari appealing the D.C. Circuit ruling.

"Both decisions turn on models," Snape said. "That's how both federal agencies and state agencies deal with these cross-state emissions issues. I think the Supreme Court is going to overturn the D.C. Circuit decision precisely on the same ground as the Third Circuit ruled in this case."

The D.C. Circuit unfairly attacked the EPA's scientific process, and the high court could easily rule in a similar fashion, according to Snape, who added that he doubts the justices agreed to take the case in order to uphold the lower court ruling.

"The Third Circuit could not have been more clear that the models EPA used were based upon statutory authority and were scientifically reasonable," Snape said. "I'm hard-pressed to believe that EPA is somehow applying widely different models on cross-state pollution issues."

--Editing by John Quinn and Chris Yates.