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**D.C. Circuit Upholds EPA Regulation Limiting Interstate Ozone Pollution**

In *Appalachian Power Co. v. EPA*, the D.C. Circuit Court of Appeals upheld most aspects of a rule designed to reduce the effects of interstate ozone pollution. It also resolved tension between the Clean Air Act's (CAA) requirement of EPA deference to states in regards to the means used to attain national ambient air quality standards (NAAQS) and a CAA provision authorizing EPA to control sources directly in certain circumstances.

*Appalachian Power Co.* arose as a result of EPA's controversial enforcement of two related provisions in the CAA, § 110(a)(2)(D) and § 126. In 1998, recognizing growing evidence that ozone emissions from certain midwestern and southeastern states were contributing to NAAQS nonattainment in downwind northeastern states, the Environmental Protection Agency (EPA) acted under the requirements of CAA § 110(a)(2)(D) and finalized a rule calling for twenty-two states and the District of Columbia to revise their state implementation plans (SIPs) to meet new EPA-mandated nitrogen oxide (NOx) emissions limits.

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1. 249 F.3d 1032 (D.C. Cir. 2001)
5. Section 110(a)(2)(D) requires state implementation plans (SIPs) to include adequate provisions prohibiting "any source or other type of emissions activity" within a state from emitting any air pollutant in amounts that "contribute significantly to nonattainment in, or interfere with maintenance by" any other state. 42 U.S.C. § 7410(a)(2)(D) (1994).
6. EPA's action under §110 is commonly referred to as a NOx SIP call.
8. Nitrogen oxide combines with volatile organic compounds (VOCs) in the atmosphere to form ozone.
While EPA was formulating this rule, the agency received petitions under § 126 of the CAA from eight northeastern states, requesting that EPA make a finding that NOx emissions from coal-burning utilities and industrial boilers in certain midwestern and southeastern states were "significantly contributing" to the northeastern states' nonattainment of the NAAQS. Since the two statutory actions had similar requirements, EPA decided to coordinate them. This coordination was disrupted, however, when the D.C. Circuit Court stayed the implementation of the § 110 NOx SIP call in *Michigan v. EPA*, pending further order of the court.\(^1\)

In response, EPA decided to forgo coordination between the two rules, and issued a new rule under § 126, which granted the petitions of four of the eight states\(^3\) and listed sources (mainly large electric utilities and industrial boilers in twelve states\(^4\)) whose emissions contribute to ozone nonattainment in the downwind states.\(^5\) Predictably, numerous petitioners (including upwind states, operators of electric generating facilities, and several individual companies) filed suit to challenge aspects of the § 126 rule. It was this suit that became *Appalachian Power Co. v. EPA*.

The central issue in *Appalachian Power Co.* was whether EPA was required to refrain from making § 126 findings while the § 110 NOx SIP call (which was postponed by the *Michigan v. EPA* court) was ongoing. The petitioners argued that the language of §

\(^{10}\) Section 126(b) allows any state to petition EPA for a finding that "any major source or group of stationary sources" in an upwind state "emits or would emit any air pollutant in violation" of §110(a)(2)(D). 42 U.S.C. § 7426(b) (1994). If EPA makes such a finding with respect to any source or group of sources, the sources must comply with EPA emissions limitations or shut down within a period of at most three years. *Id.*

\(^{11}\) *Appalachian Power Co.*, 249 F.3d at 1039 (citing *Michigan v. EPA*, No. 98-497 (D.C. Cir. May 25, 1999)).

\(^{12}\) In *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), the court responded to challenges by midwestern states and utilities to the NOx SIP call, upholding the rule in most respects, and declaring it to be effective as of May 31, 2004. The court upheld EPA's methodology for determining which upwind states contributed significantly to nonattainment of NAAQS in downwind states, and its use of cost-effectiveness criteria in determining which specific upwind sources contributed significantly to nonattainment in downwind states.

\(^{13}\) The four states whose petitions were granted are Connecticut, Massachusetts, New York and Pennsylvania. *Appalachian Power Co.*, 249 F.3d at 1038.

\(^{14}\) The twelve states are Delaware, Indiana, Kentucky, Maryland, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Virginia and West Virginia. *Id.*

110(a)(2)(D) and § 126 did not authorize EPA to hold states' NOx emitting sources in violation of § 126 while the states were additionally under a legal obligation to adopt adequate SIP provisions under § 110(a)(2)(D) and had not defaulted on that obligation. The court rejected this argument, holding that it was reasonable for EPA to regard a state as violating a separate functional provision of the CAA, while also being under a legal obligation to revise its plan.

The court also held that the doctrine of "cooperative federalism" embodied in the CAA did not prevent EPA from making § 126 findings while an SIP call was ongoing. According to the court, the principle of "cooperative federalism" allows EPA to determine the NAAQS, but requires EPA to defer to the judgments of states regarding the means of achieving the NAAQS. The court recognized the tension between this principle and the requirement under §126 that EPA directly regulate sources within a state when the state significantly contributes to nonattainment in another state. The court resolved this tension by holding that while EPA was obligated to give §110 a meaning consistent with cooperative federalism, it was also obligated to give §126 a reasonable interpretation, and that EPA's interpretation that the two sections were "independent statutory tools" was reasonable. In support of this proposition, the court cited Connecticut v. EPA, in which the Second Circuit concluded that "as the substantive inquiry for decision is the same in both [the § 110 and § 126] proceedings, an argument that one proceeding must be completed as a prerequisite to a final decision in the other makes no sense."

The Appalachian Power Co. court also noted that three critical provisions of § 126 would lose their force if the lengthened timetable for the NOx SIP call required a suspension of the § 126 process.

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17. Appalachian Power Co., 249 F.3d at 1046-47.
18. Id. at 1046
19. Id. at 1046-48.
20. Id. at 1048.
22. The provisions the court identified included: (1) the requirement under § 126 that any source found to contribute to downwind nonattainment may not be permitted to operated for more than three years after such a finding (a suspension would have exceeded the three year period); (2) relief under § 126 does not depend on action by the upwind states, in contrast to the state action required in the re-formulation of an SIP under § 110; and (3) relief under § 126 is not a function of
This holding is significant because it follows Michigan v. EPA\(^2\) in limiting the application of Virginia v. EPA.\(^2\)\(^4\) The Appalachian Power Co. court stated that while Virginia continued to stand for the proposition that EPA may not dictate to a state "source-specific means" of achieving the NAAQS as part of the § 110 process, it did not suggest that states may develop their plans under § 110 free of any extrinsic legal constraints.\(^2\)\(^5\) While § 126 places concrete limits on the emissions of certain sources, it does not dictate the overall choices of how the state will achieve its NAAQS.

In addition to addressing the tension between EPA's deference to the states under the principle of cooperative federalism and its regulatory responsibility under §126, the court upheld EPA's methodology for determining a "significant contribution" to downwind states' NAAQS nonattainment under § 126.\(^2\)\(^6\) EPA chose to use the same methodology that it had used in issuing the §110 NOx SIP call, which the D.C. Circuit had previously upheld.\(^2\)\(^7\) Although the requirements of § 110 and § 126 differed in some significant respects,\(^2\)\(^8\) the court held that EPA's decision to place restrictions on particular sources within a state that are contributing significantly to downwind state nonattainment as a whole met the standards for Chevron deference.\(^2\)\(^9\) The court found that EPA did not need to make the independent determination that the sources it was choosing to regulate created a "significant contribution" by themselves.\(^3\)\(^0\)

Another significant holding from Appalachian Power Co. is that § 126 allows EPA to prohibit construction of, or regulate

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\(^2\) EPA's discretionary policy preferences; the agency must act on a request for a § 126 finding within 60 days. Appalachian Power Co., 249 F.3d at 1047.

\(^2\)\(^3\) In Michigan, the court held that a model created to determine NOx emission limits for several upwind states under § 110(a)(2)(D), which was based on "highly cost-effective control measures." left states with reasonable (although possibly more costly) choices in implementing their SIPs, and was thus not a violation of the CAA's principle of "cooperative federalism." Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000).

\(^2\)\(^4\) 116 F.3d 499 (D.C. Cir. 1997).

\(^2\)\(^5\) Appalachian Power Co., 249 F.3d at 1046.

\(^2\)\(^6\) Id. at 1048-51.

\(^2\)\(^7\) See Michigan v. EPA, 213 F.3d at 674-80.

\(^2\)\(^8\) Under § 110, each state is required to achieve a total NOx cutback, but is free to choose how it does so. 42 U.S.C. § 7410 (1994), while under §126, EPA is mandating cutbacks from specific sources. 42 U.S.C. § 7426 (1994). Additionally, § 110 allows a "significant contribution" finding from aggregate emissions from each state. § 126 requires a "significant contribution" from a "major source or group of stationary sources."


\(^3\)\(^0\) Appalachian Power Co., 249 F.3d at 1048-51.
emissions from future unproposed sources. Applying *Chevron*, the court found that § 126 did not unambiguously prevent the regulation of emissions from future sources, and that EPA’s interpretation of the section was reasonable. The court rejected petitioners’ argument that while § 126(c) allowed EPA to regulate future, proposed sources, it could not regulate future, unproposed sources. The court noted that § 126(c) addressed existing and proposed source violations of § 126 findings, and that by definition, an unproposed source could not be in violation of any standard.

Finally, the court left one important question unanswered by the decision. EPA may only make findings under § 126 if a major source or group of sources is in “violation of the prohibition of § 110(a)(2)(D)(i).” Since the latter section requires a SIP to “contain adequate provisions prohibiting” interstate emissions that would lead to nonattainment of NAAQS in downwind states, EPA could plausibly have read §126 to refer only to violations of restrictions already incorporated in state and federal implementation plans. EPA instead read § 126 to apply to the principle of § 110(a)(2)(D)(i) (prohibiting emissions which contribute significantly to nonattainment of NAAQS in downwind states) rather than only to the application of §110(a)(2)(D)(i) in actual SIPs. The distinction is significant. Under the former interpretation, EPA could use § 126 only to force the states to follow their approved SIPs. Under the latter, EPA must use § 126 anytime upwind states are significantly contributing to nonattainment in downwind states.

As applied to *Appalachian Power Co.*, the former interpretation would mean that EPA could not make § 126 findings until the states involved in the NOx SIP call had finalized their SIPs and had them approved by EPA. The court did not decide this question, however, because petitioners did not raise it in their brief. While it remains an open question, the ambiguity of the reference in §126, coupled with the fact that the provision can be logically interpreted one way or the other, indicates that a future court faced with the question should apply *Chevron* and defer to EPA’s interpretation.

31. *Id.*
32. *Id.* at 1056-58.
33. *Id.*
34. 42 U.S.C. § 7426(b).
35. See *Appalachian Power Co.*, 249 F.3d at 1045 n.4.
36. *Id.*
Appalachian Power Co. represents a significant victory for EPA and the downwind states in their attempt to reduce transboundary air pollution. By holding that §126 findings may be made while a SIP call is ongoing, the decision allows states and EPA to continue to approach the problem with a two-pronged strategy. The decision may also put states not initially covered by the § 126 rule on notice to meet CAA transboundary pollution requirements before they too have §126 requirements imposed upon them. Given EPA's past difficulties in addressing transboundary ozone pollution,\textsuperscript{37} this type of approach may be necessary to achieve the transboundary pollution goals of the CAA.

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