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The EPA's cross-state rule imperils state freedom

Posted By [Josiah Neeley](#) On 12:57 PM 12/10/2013 In | [No Comments](#)

Today the Supreme Court of the United States will hear oral arguments in a case with profound implications for the relationship between the federal government and the states.

The case, *American Lung Association v. EME Homer City Generation*, involves a legal challenge to new regulations by the Environmental Protection Agency (EPA) which purport to deal with the problem of interstate pollution. Known alternately as the Cross-State Air Pollution Rule, the Transport Rule, or sometimes just as CSAPR (pronounced "Casper"), the rule requires severe emissions reductions from 27 states based on the theory that emissions from these states are hurting the ability of downwind states to meet federal air-quality standards.

In practice the Cross-State Rule bears little relation to this purpose. EPA included certain states in the rule based on computer models that suggested they were contributing to nonattainment of air-quality standards in another state. EPA then set out specific emissions "budgets" for each of the states under the rule. These budgets, however, were not based on the degree to which emissions from a state were doing harm to other states, but on EPA's judgment about what level of emissions reductions could be achieved at a certain cost.

The result was that some states faced restrictions far out of proportion to their own contribution to the interstate pollution problem. Texas, for example, barely qualified for inclusion in the rule for particulate matter. Yet the Cross-State Rule required Texas to reduce precursor emissions of sulfur dioxide by more than 45 percent, a level similar to states like Illinois and Pennsylvania, even though by EPA's own calculations, those states were contributing more than twice as much to the interstate-pollution problem.

Achieving such steep reductions in so short a time period would require sharp increases the price of electricity, and could even lead to rolling blackouts during periods of peak demand. Reliable electricity is central to the U.S. economy, and a sudden loss of power, whether in a hospital ICU or during a hot summer afternoon, can be a matter of life and death.

All this is despite the fact that, according to EPA's own data, most of the country is already in attainment of the relevant air quality standards. The downwind states targeted in the Cross-State Rule violated the relevant standard for particulate matter less than one-half percent of the time from 2007 to 2009. A 2011 EPA report likewise found that of the 91 nonattainment areas in downwind states for ozone, 89 have reached attainment under the standard the Cross-State Rule purportedly aims to enforce.

As bad as the substance of the Cross-State Rule may be, the manner in which EPA went about implementing it is even worse. EPA's authority to regulate air quality comes from the Clean Air Act, which enacted a clear division of authority between the federal government and the states. Under the Act, the EPA has authority to set national air quality standards, but states retain full authority to determine how best to meet those standards. The law is clear that each state has three years from the implementation of new air quality standards to develop their own plans for how best to comply.

Yet when EPA implemented the Cross-State Rule, it simultaneously imposed its own federal plan on states without giving them any opportunity to decide for themselves how to comply. According to EPA, states were under an obligation to comply with the details of its rule even before they knew what they were. Last year a federal court of appeals rightly called EPA's interpretation of the law "absurd," noting the agency was effectively requiring states to do the impossible.

Now the Supreme Court has the opportunity to put the EPA on notice that it can't just ignore the law in pursuit of its own ideological agenda. Unless EPA is restrained, it could threaten not only America's electrical reliability, but also the separation of powers at heart of our Constitutional

system.

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