Case Archive

# Chapter 13: Regulation and the Courts

## From the Front Lines of Regulation

In November 2002, New York Attorney General Eliot Spitzer put the Bush administration squarely in his sights when he announced plans to sue the Environmental Protection Agency for failing to enforce the nation’s air pollution laws.

“The Bush Administration is attacking the Clean Air Act, which has been a cornerstone of our national commitment to environmental cleanup for two generations,” Spitzer charged. “The Bush Administration is again putting the financial interests of the oil, gas and coal companies above the public's right to breathe clean air. It is incumbent on the states to take action to ensure that the public health and environment are protected.”[[1]](#endnote-1)

Spitzer quickly found allies. Massachusetts Attorney General Thomas Reilly explained his state was joining the suit because the new rules “threaten . . . millions of Americans in the coming years with . . . dirtier air, more smog and pollution.” The result, the American Lung Association estimated, was that thousands of Americans a year died from pollution that should have been prevented, and thousands more suffered from asthma.[[2]](#endnote-2) Within months, attorneys general for 10 more states (Connecticut, Maine, Maryland, New Hampshire, New Mexico, New Jersey, Pennsylvania, Rhode Island, Vermont and Wisconsin) joined the action. They found support as well from legal officers in New York City, Washington, D.C., San Francisco, and New Haven, CT.

Why the suit—and why the concentration of legal action in northeastern states? The litigation was rooted in the Clean Air Act’s requirements that set strict requirements for each state to design and implement regulations that reduced the air pollution within its borders. If a state failed to meet the standard, the act allowed the federal government to freeze its highway funds or the EPA could impose its own plan on the state. The standards were thus a high-stakes game.

New England states argued that they faced an unfair disadvantage in playing that game. Much of their air pollution, they said, blew in from factories and, especially, coal-fired power plants in other states. They risked bearing the economic costs of cleaning up pollution caused elsewhere. They argued that they faced tough penalties that ought to be imposed on the polluters.

The battle—between the EPA and the states and among several states—had its root in the strategy Congress followed in passing the Clean Air Act in 1970. At the time, it was clear that air pollution was killing people. Air pollution was even responsible for unsafe water in some communities. In some rural lakes miles from any factory, dead fish floated to the surface. Pollutants from factories and power plants had risen into the clouds and fallen hundreds of miles away as “acid rain,” killing fish and causing other pollution problems.

Through public events like Earth Day and other environmental campaigns in the late 1960s that drew wide-spread attention to these looming environmental problems, activists had convinced Congress of the need for tougher air pollution regulations. But Congress faced tough choices. The technology was available for reducing air pollution. Factories and power plants, for example, could be forced to burn cleaner coal. They could be required to install “scrubbers” in their smokestacks and other special equipment, which would reduce air pollution dramatically.

But coal producers argued that this would put thousands of employees out of work. The manufacturers and power producers contended that they could not afford huge investments in the short term. Power producers added that the nation’s electricity supply would be crippled if all the coal-burning plants had to be taken off line at once to install the new equipment.

So Congress fashioned a clever compromise. Whenever a company built a new factory, it had to install the best available air pollution control technology. Whenever it remodeled an existing factory that created a new source of pollution, it had to do the same (and this became known as the “new source review”). Congress expected that, over a decade or two, the natural life cycle of building new plants would bring all of the nation’s factories and power plants up to the best standards. Companies could install the equipment when the facilities were off line anyway. It seemed the most effective and efficient solution.

However, Congress had not counted on the ingenuity of the companies or the complexity of the regulatory process. Some companies raised a logical question: Did the new source review apply to *any* change in the facility, no matter how small? Corporate executives complained that it would be ridiculous if even small items of routine maintenance triggered a massive review of the plant’s air pollution. The EPA decided to grant an exemption for such routine maintenance, even though the law appeared to be clear that it applied in fact to any change. To enforce such a tight standard, EPA officials reasoned, would quickly prove ridiculous.

But some power companies used the routine maintenance exclusion to make big changes over time while their plants were off-line for maintenance. Gradually, these changes produced an almost-new plant, which could continue operating long into the future: far longer than Congress had anticipated and without undergoing the environmental review Congress had expected.

If these loopholes helped the companies skirt the Clean Air Act’s requirements, they also created substantial air pollution. Some of it blew into northeastern states, which made it far more difficult for those states to meet their Clean Air Act targets.

When the Bush administration came into office, it faced pressure from the companies to expand the routine maintenance exemption. They claimed it was hard for them to tell what truly counted as “maintenance” and which maintenance was “routine.” The uncertainties, many companies complained, led them to avoid making needed improvements in their operations, sometimes cost them a lot of money to conduct air pollution studies, and added tremendous uncertainty.[[3]](#endnote-3)

The Bush administration responded with new regulations that substantially expanded the amount of change that industries could make without triggering the new source review requirements. Spitzer and his colleagues argued that the Clean Air Act provided no authority for such a change, and that the EPA’s new rules would unfairly punish certain states for pollution produced elsewhere.

In December 2003, a three-judge federal panel of the U.S. Circuit Court of Appeals for the District of Columbia, one of the most active circuits for issues of administrative law, agreed with the attorneys general. The court issued an order blocking EPA’s regulations from going into effect until the case was heard on appeal. Thus it began its slow trek through the federal judiciary.

## Questions to Consider

1. Review the regulatory strategy that Congress created in the new source review program. How did the policy become translated into action? How did Congress’s strategy depend on the discretion exercised by the EPA in its regulatory efforts?

2. How did the new source review program evolve over its life? What forces shaped the changes?

3. What role are the states playing in shaping federal policy for new source review? What implications does their role have for the regulatory process?

4. What role are the courts playing in shaping clean air policy?

1. Press release, “Spitzer to Sue Bush Administration for Gutting Clean Air Act” (November 22, 2002), at http://www.oag.state.ny.us/press/2002/nov/nov22b\_02.html [↑](#endnote-ref-1)
2. Quoted by Hebert, “States Sue EPA over New Clean Air Rules.” [↑](#endnote-ref-2)
3. For a close analysis of the issues in “new source review,” see National Academy of Public Administration, <I>A Breath of Fresh Air: Reviving the New Source Review Program</I> (Washington: NAPA, 2003), at www.napawash.org. [↑](#endnote-ref-3)