By Richard Lazarus

Redo the Analysis From the Ground Up

Success has many parents, but failure is an orphan. The wisdom of this observation is not foreign to environmental law. When the D.C. Circuit concluded in American Trucking Ass'n v. Whitman case a few years ago that the Clean Air Act suffered from serious nondelegation problems, attorneys for industry raced to claim credit for raising an issue that almost none in fact raised. And, more recently, after the Supreme Court in Massachusetts v. EPA handed environmentalists one of their biggest wins, green groups competed to claim credit, when in fact almost all of them vigorously opposed seeking Supreme Court review.

In the aftermath of the D.C. Circuit’s ruling this July in North Carolina v. EPA, however, it was success, not failure, that found itself quickly orphaned. The court handed down a sweeping appellate court’s ruling this July in North Carolina v. EPA, however, it was success, not failure, that found itself quickly orphaned. The court handed down a sweeping appellate court’s ruling this July in North Carolina v. EPA, however, it was success, not failure, that found itself quickly orphaned. The court handed down a sweeping appellate court’s ruling this July in North Carolina v. EPA, however, it was success, not failure, that found itself quickly orphaned. The court handed down a sweeping appellate court’s ruling this July in North Carolina v. EPA, however, it was success, not failure, that found itself quickly orphaned. The court handed down a sweeping appellate court’s ruling this July in North Carolina v. EPA, however, it was success, not failure, that found itself quickly orphaned. The court handed down a sweeping appellate court’s ruling this July in North Carolina v. EPA, however, it was success, not failure, that found itself quickly orphaned. The court handed down a sweeping appellate court’s ruling this July in North Carolina v. EPA, however, it was success, not failure, that found itself quickly orphaned. The court handed down a sweeping appellate court’s ruling this July in North Carolina v. EPA, however, it was success, not failure, that found itself quickly orphaned. The court handed down a sweeping appellate court’s ruling this July in North Carolina v. EPA, however, it was success, not failure, that found itself quickly orphaned.

The D.C. Circuit found merit in some of petitioners’ complaints and sharply cut back on EPA’s authority to reform federal air pollution control programs in the absence of statutory amendment. The court agreed with North Carolina that “individual state contributions to downwind state nonattainment areas do matter” even if EPA would prefer to achieve overall regional reductions at the lowest possible cost. “All the policy reasons in the world cannot justify reading a substantive provision out of a statute.” The court likewise faulted EPA for basing the allowances it budgeted for states on extra-statutory factors, including cost-effectiveness, equity, and the need to preserve the viability of the agency’s other clean air programs. The court ridiculed EPA’s “appeals to logic,” admonishing that “lest EPA forget, it is ‘a creature of statute,’ and has ‘only those authorities conferred upon it by Congress.’”

But what was truly extraordinary about the appellate court’s ruling was its remedy. Although each of the individual petitioners purported to challenge only isolated parts of CAIR, the court concluded that the sweep of their legal theories could not be so readily confined. Reasoning that “CAIR is a single, regional program, as EPA has always maintained, and all of its components must stand or fall together,” the court ruled that here “they must fall.” “EPA’s approach — regionwide caps with no state-specific quantitative contribution determinations or emissions requirements — is fundamentally flawed” and “EPA must redo its analysis from the ground up.”

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No one seemed willing to don the laurel wreath. One industry petitioner, Duke Energy, announced that “it was not the intent of Duke Energy’s participation in this litigation to overturn’ CAIR. A spokesman for another, Entergy, quickly made clear its lack of intent to throw “the baby out with the bathwater.” Nor was North Carolina willing to take credit, or blame, for the regulatory twilight zone that the successful petitioners had created.

The lesson to be learned? For those racing to the courthouse: Carefully consider the broader implications of your legal arguments. For EPA: There are no regulatory shortcuts for reforming federal environmental law, whether designed to strengthen or relax existing requirements. Statutes cannot be amended by agency regulation. Only by Congress.

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