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D.C. Circuit Vacates EPA's Cross-State Air Pollution Rule

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On August 21st, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit" or "Court"), in a 2-1 split decision, vacated the U.S. Environmental Protection Agency's ("EPA") Cross-State Air Pollution Rule ("CSAPR" or the "Transport Rule"), which regulates emissions from upwind states that contribute to air quality problems in downwind states. *EME Homer City Generation v. EPA*, No. 11-1302 (D.C. Cir. Aug. 21, 2012). The Court, in an opinion written by Judge Brett Kavanaugh and joined by Judge Thomas Griffith, held that EPA exceeded its statutory authority under the federal Clean Air Act ("CAA" or the "Act") because the Transport Rule required emissions reductions beyond what is required to attain the relevant National Ambient Air Quality Standards ("NAAQS"). In addition, the D.C. Circuit held that, by simultaneously promulgating Federal Implementation Plans ("FIPs") applicable to all upwind states for the Transport Rule, EPA impermissibly denied states the opportunity to implement CSAPR. Based on these two independent flaws, the Court vacated and remanded CSAPR. The Court also ordered EPA to continue administering the Clean Air Interstate Rule ("CAIR"), which EPA has been implementing since the D.C. Circuit stayed CSAPR in December 2011 and which CSAPR was designed to replace due to the flaws in CAIR identified by the D.C. Circuit in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).

EPA's Significant Contribution Analysis Ran Afoul of the Good Neighbor Provision by Requiring Some States to Exceed the Mark

Under the Act's "good neighbor" provision, each state is required, as part of its State Implementation Plan ("SIP"), to prevent sources within its borders from emitting "amounts" of pollution that travel across state lines and "contribute significantly" to a downwind state's attainment of the NAAQS. 42 U.S.C. § 7410(a)(2)(D). To implement the good neighbor provision in light of the D.C. Circuit's vacatur and remand of its predecessor rule in *North Carolina*, EPA promulgated CSAPR, which defines emissions reduction responsibilities for 28 upwind states based on those states' contributions to downwind states' air pollution. In particular, CSAPR requires reductions in sulfur dioxide (SO_2) and nitrogen oxide (NO_x) emissions from upwind states' electric generating units.[1]

In the first stage of EPA's analysis, EPA determined which upwind states were contributing significantly to downwind nonattainment and maintenance problems through dispersion modeling and source apportionment. An upwind state was linked to a downwind nonattainment or maintenance area if EPA's modeling projected that, absent reductions, the upwind state's contribution to the downwind receptor would exceed a specific numerical threshold calculated as one percent (1%) of the relevant NAAQS for ozone and fine particulate matter ($PM_{2.5}$).

In the second stage of its analysis, EPA determined how much pollution each upwind state's electric generating units could eliminate if they applied all emissions controls available at or below a given cost-per-ton threshold. EPA then evaluated whether such reductions would eliminate most of the downwind nonattainment and maintenance problems and set each upwind state's budget at the amount of emissions remaining, after all electric generating units had reduced their emissions to those cost thresholds. EPA defended its use of cost to identify significant contribution in this manner based on the D.C. Circuit's decision in a case involving a similar EPA rule, known as the "NOx SIP Call," *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000)

The Court held that EPA's reliance upon cost thresholds as the basis for determining "significant contribution" was invalid under the CAA. In particular, the Court found that CSAPR was flawed because (1) EPA's emissions reduction requirements imposed on upwind states do not correspond with the "amounts" of emissions from upwind states that "contribute significantly to nonattainment" in downwind states, as required by the CAA and the D.C. Circuit's decision in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008); (2) the Transport Rule runs afoul of the CAA's proportionality requirement as described in *North Carolina*; and, (3) the Transport Rule does not ensure that the collective obligations of the various upwind states, when aggregated, do not produce unnecessary over-control in the downwind states. In essence, the Court found that the CAA only required states to eliminate their significant contributions, equivalent to the amount the state contributed above the 1% numerical threshold to downwind nonattainment or maintenance problems; EPA could not cause a state to eliminate more than that amount.

EPA's FIP-First Approach Ran Afoul of the Clean Air Act's System of Cooperative Federalism

The Court also found a "second, entirely independent problem with the Transport Rule" resulting from what it and the state petitioners characterized as EPA's "FIP-first approach."

EPA's chosen manner of implementing CSAPR was to simultaneously promulgate FIPs to achieve the Tranport Rule's emissions reductions in upwind states. The FIPs require power plants in covered upwind states to make the SO_2 and NO_x reductions needed to comply with each upwind state's emissions budget. In turn, the FIPs convert each state's emissions budget into allowances, which EPA allocates among power plants in each state and may be traded in an interstate allowance market.

The Court determined that the simultaneous creation of FIPs along with the substantive requirements of the Transport Rule, without an opportunity for states to first create SIPs to achieve the Transport Rule's emissions reductions, violated the Act and its system of cooperative federalism. As the Court notes, EPA has authority to set standards, but the CAA reserves the "first-implementer role" for the states. That division of labor, the Court states, applies not just to the NAAQS but also to the good neighbor provision in CAA section 110(a)(2)(D)(i)(I). When EPA defines upwind states' good neighbor obligations, it must give the states the first opportunity to implement the new requirements, according to the Court.

The state petitioners essentially argued that EPA's approach required them to be "clairvoyant" because they would have had to guess at how EPA would define "significant contribution" and develop a SIP to reduce that contribution, before EPA had established the target. The Court agreed with petitioners' argument and found that the CAA did not require states to make such "stabs in the dark."

Conclusion

While the D.C. Circuit vacated CSAPR, it did so in 2-1 split decision. Judge Judith Rogers wrote a strong dissent in the case, stating that "[t]he result [of the majority decision] is an unsettling of the consistent precedent of this court strictly enforcing jurisdictional limits, a redesign of Congress's vision of cooperative federalism between the States and the federal government in implementing the CAA based on the court's own notions of absurdity and logic that are unsupported by a factual record, and a trampling on this court's precedent on which the [EPA] was entitled to rely in developing the Transport Rule rather than be blindsided by arguments raised for the first time in this court."

Judge Rogers objected to the Court's consideration of the merits of petitioners' arguments, which she contends were not raised with adequate specificity during the development of CSAPR and amounted to an impermissible collateral attack on EPA's prior disapprovals of state SIPs implementing the good neighbor provision. Judge Rogers also argues forcefully that the Court misapplies its own precedents in *Michigan* and *North Carolina* in concluding that EPA's approach for identifying and eliminating states' significant contributions required some states to "exceed the mark" and therefore ran afoul of the good neighbor provision.

Based on the fact that this decision is split and EPA's significant dedication of resources in developing and defending CSAPR to date, EPA could very well decide to seek a rehearing *en banc*. If rehearing is not sought or granted, however, EPA must continue to implement CAIR while it creates a replacement for CSAPR. How EPA would then go about crafting a replacement for CSAPR – and for CAIR, which CSAPR was designed to replace – would be challenging, to say the least, in light of the Court's instructions that EPA can require no state to do more than eliminate its significant contribution to downwind nonattainment or maintenance problems, as quantified based solely on air quality considerations. While many of the tools and technical analyses used in developing CSAPR could no doubt find application in developing its replacement, EPA would likely need to overhaul its approach significantly – much as did after the Court's remand of CAIR – to satisfy the Court's mandate, which may only suggest that a replacement is unlikely to be proposed by EPA in the near-term. Further, in light of the Court's earlier remand of CAIR, the decision may also suggest that developing a market-based program is so fraught with risk that EPA might choose to rely upon more traditional pollution regulations instead, like its Mercury Air Toxics Standards, to make measurable progress towards reducing interstate pollution.

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[1] The Transport Rule addresses states' good neighbor obligations with respect to three NAAQS: the 1997 annual $PM_{2.5}$ NAAQS, the 1997 8-hour ozone NAAQS, and the 2006 24-hour $PM_{2.5}$ NAAQS.