

## *Supreme Court Resurrects EPA's Cross-State Air Pollution Rule*

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On April 29th, the United States Supreme Court, in a 6-2 decision, reinstated the U.S. Environmental Protection Agency's ("EPA's") 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.<sup>1</sup>

The majority decision, penned by Justice Ginsburg, held that EPA has authority under the federal Clean Air Act ("CAA" or the "Act") to consider cost-effectiveness, not just strict proportional responsibility, when allocating emission reduction obligations in upwind states that are necessary to ensure that downwind states attain the relevant National Ambient Air Quality Standards ("NAAQS"). In addition, the majority held that EPA is not obligated to provide states with an opportunity to revise inadequate State Implementation Plans ("SIPs") prior to issuing remedial Federal Implementation Plans ("FIPs"), even though the criteria for determining the amounts of interstate pollution that significantly contribute to downwind nonattainment might not be clear until EPA has acted. This opinion overturned the D.C. Circuit's split decision in *EME Homer City Generation v. EPA*,<sup>2</sup> which vacated CSAPR.

The immediate ramifications of the decision are unclear, given that EPA and the states continue to implement CSAPR's predecessor, the Clean Air Interstate Rule ("CAIR"), pursuant to the stay issued by the D.C. Circuit, and it is unlikely that CSAPR could be implemented in any respect for only a portion of a calendar year or ozone season. (Indeed, a short note published on EPA's website states merely that, "[a]t this time, CAIR remains in place and no immediate action from States or affected sources is expected."<sup>3</sup>)

Moreover, other rulemakings may largely obviate the need for the reductions to be achieved through CSAPR to achieve the existing NAAQS, most notably EPA's Mercury and Air Toxics Standards ("MATS"), which was recently [upheld](#) by the D.C. Circuit. However, in the wake of a series of lower court losses rejecting its efforts to implement the Good Neighbor Provision (and roughly characterizing its efforts as those of the gang who couldn't shoot straight), the Supreme Court's decision should provide EPA a strong and well-needed shot-in-the arm. This should embolden EPA to take whatever actions are needed at this time to salvage some of the reductions that CSAPR was designed to achieve and leverage the well-developed template reflected by CSAPR to achieve even deeper reductions that will undoubtedly be required by forthcoming revisions to the NAAQS.

## Do Good Fences Make for Good Neighbors?

Under the CAA's Good Neighbor Provision, each state is required, as part of its 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 potential to exceed the NAAQS or interfere with its ability to maintain the NAAQS.<sup>4</sup> EPA has attempted several times over the years, with checkered success, to implement this provision by further defining how an upwind state "contributes significantly" to nonattainment in a downwind state. Most recently, EPA promulgated CSAPR to replace CAIR, which was a Good Neighbor Provision implementation rule adopted by EPA in 2005<sup>5</sup> that the D.C. Circuit ordered EPA to replace in 2008.<sup>6</sup> CSAPR defines emissions reduction responsibilities for 27 upwind states based on those states' contributions to downwind states' air pollution. In particular, CSAPR requires reductions in sulfur dioxide ("SO<sub>2</sub>") and nitrogen oxide ("NO<sub>x</sub>") emissions from upwind states' electric generating units.<sup>7</sup>

The approach taken by EPA when establishing the CSAPR reductions consisted of two stages. In the first stage, 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<sub>2.5</sub>, which is generated when SO<sub>2</sub> and NO<sub>x</sub> react in the atmosphere).

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 another predecessor of the CSAPR known as the "NOx SIP Call" rule.<sup>8</sup>

While this may sound simple, in practical application, it is anything but. If the links between states that contribute to downwind nonattainment and/or interfere with maintenance of the NAAQS downwind were mapped, the map would look like nothing less than the most convoluted airline's map of its domestic routes. In truth, it would look more like a bowl of spaghetti, particularly because most downwind states are also upwind states. In sum, EPA's task in implementing the Good Neighbor Provision and resolving interstate pollution transport has always been vexing, at best.

## The "Red Lines" the D.C. Circuit Found EPA to Have Crossed

In *EME Homer City Generation*, the D.C. Circuit held that EPA's reliance on cost thresholds as the basis for determining "significant contribution" amounts was invalid under the CAA. Specifically, the court reasoned that CSAPR was flawed because EPA traversed three apparently clear "red lines", according to the lower court:

- (1) EPA's emissions reduction requirements imposed on upwind states did 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*;<sup>9</sup>

- (2) CSAPR ran afoul of the CAA's proportionality requirement as described in *North Carolina v. EPA*; and
- (3) CSAPR did not ensure that the collective obligations of the various upwind states, when aggregated, do not produce unnecessary over-control in the downwind states.<sup>10</sup>

In sum, the lower court interpreted the CAA to only require that states 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. This decision ignored the inconvenient complexity that individual upwind states are often contributors to nonattainment in several downwind states and are often themselves a downwind state.

The D.C. Circuit also found CSAPR flawed due to what it and the state petitioners characterized as EPA's "FIP-first approach."<sup>11</sup> Essentially, the D.C. Circuit held that imposing FIPs, without providing an opportunity for states to first create their own SIPs to achieve the required reductions, violated the CAA and its system of cooperative federalism. The D.C. Circuit fully bought into petitioners' arguments that states couldn't realistically proceed to develop a SIP that would satisfy the Good Neighbor Provision, unless and until EPA first established the criteria for determining what amount of pollution constituted a "significant contribution" to downwind nonattainment or would interfere with maintenance in downwind states. The task was likened by petitioners to EPA asking the states to play the game of pin the tail on the donkey, with the lights out.

### **"The Wind Bloweth Where It Listeth, and Thou Hearest The Sound Thereof, But Canst Not Tell Whence It Cometh, and Whither It Goeth."**

In no uncertain terms, the majority's April 29, 2014 opinion reversed the D.C. Circuit's decision on the two central merits arguments described above. Quoting the King James Version of the Holy Bible for the proposition that determining where emissions of NOx and SOx are taken by the wind and transformed into ozone and PM<sub>2.5</sub> is technically complex and worthy of deference,<sup>12</sup> the Court resoundingly endorsed EPA's authority to tackle a complex problem that traverses state boundaries. At bottom, the Court revived EPA's authority and ability to do what it was charged with doing in the CAA.

Regarding the challenge to the FIP-first approach taken by EPA, the Supreme Court soundly rejected the D.C. Circuit's decision with respect to the supposed logical problem of requiring states to implement the Good Neighbor Provision in a SIP before EPA has defined the contours of that obligation.<sup>13</sup> The Court observed that "[h]owever sensible (or not) the Court of Appeals' position, a reviewing court's 'task is to apply the text [of the statute], not to improve upon it.'"<sup>14</sup> The CAA plainly imposes on states an obligation to adopt a SIP that complies with the Act, including the Good Neighbor Provision, within three years of EPA's issuance of new or revised NAAQS.<sup>15</sup> If EPA determines that the SIP fails to satisfy the Good Neighbor Provision, then the CAA empowers and indeed obligates EPA to issue a FIP sometime within the following two years.<sup>16</sup>

On the legality of the cost-based approach to imposing emissions reduction obligations on upwind states, the Supreme Court's decision acknowledged the deference due to EPA under *Chevron* and its progeny in handling a "thorny causation problem."<sup>17</sup> While the D.C. Circuit treated EPA's task as a simple matter of "allocat[ing] responsibility for reducing emissions in 'a manner proportional to' each State's 'contributio[n]' to the problem," the Supreme Court recognized that this was easier said than done.<sup>18</sup> After exploring hypotheticals of increasing complexity, the Court concluded that "proportionality becomes all the more elusive" when "as is generally true, upwind States contribute

pollution to more than two downwind receptors . . . .”<sup>19</sup> The CAA failed to provide guidance on how to untangle a complex web of joint responsibility—in essence, the spaghetti bowl of linkages—and the Court determined that EPA did an admirable job in constructing an elegant solution that is both efficient and equitable.<sup>20</sup>

As to the question of “over-control”, the Court observed that EPA has a statutory obligation to avoid “under-control” and that, in balancing the possibilities of under-control and over-control, “EPA must have leeway in fulfilling its statutory mandate.”<sup>21</sup> In light of the “degree of imprecision [that] is inevitable in tackling the problem of interstate air pollution,” where downwind impacts can change with a slight shift in the breeze,<sup>22</sup> the Court was willing to tolerate the possibility of over-control and observed that, if any state were, in fact, forced to reduce its emissions more than necessary to bring all areas into attainment, “that State may bring a particularized, as-applied challenge to the Transport Rule, along with other as-applied challenges it may have.”<sup>23</sup> The Court noted that, in a voluminous record, the respondents had pointed to “only a few instances of ‘unnecessary’ emission reductions, and even those are contested by EPA.”<sup>24</sup> The absence of more instances was telling to the majority and the Court therefore found that the mere possibility of over-control did not warrant throwing out the rule in its entirety.

In a predictably pitched dissent, Justice Scalia, joined by Justice Thomas, lamented the majority’s approval of an “undemocratic revision of the Clean Air Act.”<sup>25</sup> In contrast to the majority’s praise of the EPA’s equitable, efficient and sensible approach to fulfilling the Good Neighbor Provision’s obligations, the dissent puzzled over how “a statute that assigns responsibility on the basis of amounts of pollutants emitted” could be interpreted to allow “EPA to reduce interstate pollution in the manner that it believes most efficient.”<sup>26</sup> Justice Scalia’s dissent pays disrespect to his decision in *American Trucking*, however, by characterizing the decision in that case as yet another check on EPA’s unfettered authority, when in fact it was a rejection of *industry’s* argument that EPA must take cost into account in setting NAAQS. (The error has since been corrected.) Regarding EPA’s issuance of the FIPs, the dissent predictably decried the erosion of “a federalism-focused regulatory strategy”, without acknowledging the realities of solving a Rubik’s Cube as complex as the bowl of spaghetti EPA was served up.<sup>27</sup>

## **Mending Good Fences, Making Good Neighbors and Amending CSAPR**

The path forward is unclear for EPA. CSAPR was already supposed to be implemented for more than two years and entered its more stringent phase. EPA cannot simply order CSAPR implemented in the middle of a calendar year and on the eve of another ozone season, when the lower court has not yet lifted its stay and CAIR remains in place. However, the real significance of CSAPR, in light of the more substantive reductions that are required by MATS and secular changes taking place in the electric power sector in light of the cost and availability of natural gas, is not in the actual budgets charted out in the FIPs for the current NAAQS, but in the template CSAPR establishes for EPA to require deeper reductions needed to achieve forthcoming NAAQS.

At the very least, the Court’s decision represents an inoculation against the arguments EPA has previously faced and will likely face in its efforts to implement the Good Neighbor Provision. Now, when EPA proceeds on a decidedly complex, uncharted path to require those reductions from sometimes recalcitrant upwind states, it will be armed with a Supreme Court decision that speaks of the equity, efficiency and reasonableness of its choices and admonishes the D.C. Circuit to grant due deference to EPA’s efforts to fulfill its obligations under the CAA. So armed, EPA is well poised to develop whatever amendments to CSAPR are needed to fulfill those obligations.



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<sup>1</sup> 76 Fed. Reg. 48208 (Aug. 8, 2011).

<sup>2</sup> 696 F.3d 7 (D.C. Cir. 2012).

<sup>3</sup> <http://www.epa.gov/airtransport/> (under "What's New").

<sup>4</sup> 42 U.S.C. § 7410(a)(2)(D).

<sup>5</sup> 70 Fed. Reg. 25162.

<sup>6</sup> *North Carolina v. U.S. Env'tl. Protection Agency*, 531 F.3d 896 (D.C. Cir. 2008).

<sup>7</sup> The Transport Rule addresses states' good neighbor obligations with respect to three NAAQS: the 1997 annual PM<sub>2.5</sub> NAAQS, the 1997 8-hour ozone NAAQS, and the 2006 24-hour PM<sub>2.5</sub> NAAQS.

<sup>8</sup> *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000).

<sup>9</sup> 531 F.3d at 896.

<sup>10</sup> *EME Homer City Generation*, 696 F.3d at 23-28.

<sup>11</sup> *Id.* at 28.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.* at 31.

<sup>14</sup> *U.S. Env'tl. Protection Agency v. EME Homer City Generation*, No. 12-1182, slip op. at 15 (Apr. 29, 2014) (citing *Pavelic & LeFlore v. Marvel Entm't Group, Div. of Cadence Indus. Corp.*, 493 U.S. 120, 126 (1989)).

<sup>15</sup> 42 U.S.C. § 7410(a).

<sup>16</sup> *Id.* § 7410(c). It is worth emphasizing that, as noted by the Court, EPA can issue a FIP *any time* after the rejection of a SIP. Were it not for the D.C. Circuits order in *North Carolina v. EPA*, directing EPA to act expeditiously to remedy the shortcomings of the CAIR, EPA might not have acted as aggressively and issued FIPs concurrently with a new rule. Simply because EPA has this authority does not mean it will court controversy and exercise it whenever it can.

<sup>17</sup> *Id.* at 21.

<sup>18</sup> *Id.* at 22.

<sup>19</sup> *Id.* at 24.

<sup>20</sup> *Id.* at 26-27 (noting, in particular, that the rule is equitable because "[u]pwind States that have not yet implemented pollution controls of the same stringency as their neighbors will be stopped from free riding on their neighbors' efforts to reduce pollution").

<sup>21</sup> *Id.* at 31.

<sup>22</sup> *Id.* at 30.

<sup>23</sup> *Id.* at 31.

<sup>24</sup> *Id.*

<sup>25</sup> *U.S. Env'tl. Protection Agency v. EME Homer City Generation*, No. 12-1182, dissent at 2 (Apr. 29, 2014).

<sup>26</sup> *Id.* at 4-5.

<sup>27</sup> *Id.* at 14.