

D.C. Circuit Vacates CSAPR, Instructs USEPA to Continue Administering CAIR

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In a 2-1 decision, the Court of Appeals for the D.C. Circuit vacated the United States Environmental Protection Agency's ("USEPA") Cross-State Air Pollution Rule ("CSAPR" or the "Transport Rule"), USEPA's attempt to "fix" the Clean Air Interstate Rule ("CAIR") to regulate downwind state air pollution under the Clean Air Act ("CAA"). [*EME Homer City Generation LP v. EPA*, D.C. Cir. No. 11-1302 \(Aug. 21, 2012\)](#). In 2008, the D.C. Circuit struck down and remanded CAIR, with instructions to USEPA to continue administration of the CAIR until the replacement rule was implemented. Here, in light of the vacatur of the CSAPR, the D.C. Circuit has instructed USEPA to "continue administering CAIR pending [USEPA's] promulgation of a valid replacement."

By way of background, USEPA promulgated the Transport Rule in August 2011 in response to the court's order in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) remanding the CAIR, and to address the 2006 24-hour national ambient air quality standard ("NAAQS") for fine particulate matter. The Transport Rule established an interstate program to require power companies in 28 "upwind" states to reduce emissions of sulfur dioxide ("SO₂") and nitrogen oxides ("NO_x") to enable downwind states to achieve and maintain NAAQS for ozone and fine particulate matter. Following challenges by affected states and industry, the D.C. Circuit stayed the Transport Rule on December 30, 2011. The stay remained in effect until today's decision on the merits, where the D.C. Circuit provided two independent grounds for vacatur.

First, the court found that USEPA exceeded its statutory authority granted under Section 110(a)(2)(D), the so-called "good neighbor" provisions of the CAA, by potentially requiring an upwind state to reduce emissions in excess of its contribution to a downwind states exceedance of air quality standards. In so ruling, the court explained that USEPA may require an upwind state to "eliminate only its own 'amounts which will . . . contribute significantly' to a downwind State's 'nonattainment,'" and "may not require any upwind State to 'share the burden of reducing other upwind states' emissions." Moreover, while the court acknowledged that USEPA may consider the cost of pollution reductions to lessen the burden upon an upwind state, it may not, as the court found USEPA did in establishing emission reductions under the Transport Rule, use cost considerations to impose pollution reduction obligations above and beyond what was necessary for downwind states to meet air quality standards.

Second, the D.C. Circuit struck USEPA's decision to require that each state comply with a federal

implementation plan ("FIP") to implement the emission reductions mandated by the Transport Rule rather than allowing each state to determine how best to achieve the reductions within the state, i.e., the FIP-first approach included in the Transport Rule. By imposing a FIP prior to allowing states to implement their own plans, USEPA had usurped a role that was clearly designated by statute to the states. With regard to the "good neighbor" provision, the court held that USEPA must first inform states of their reduction obligations and then provide the states time to develop and submit SIPs, just as it does for new NAAQS. USEPA may not impose a FIP that directs each state on how to achieve the requirements of the Transport Rule without first providing each state a "reasonable time to implement that requirement [under a state implementation plan] with respect to sources within the State."

The D.C. Circuit advised that its "decision ... should not be interpreted as a comment on the wisdom or policy merits of EPA's Transport Rule" and that USEPA should "proceed expeditiously" to promulgate yet another replacement for CAIR consistent with this decision and, presumably, with the *North Carolina* decision. The decision in this case further clarifies USEPA's role and obligations regarding identifying states' air quality impacts on downwind states. It also emphasizes that the cooperative federalism concept embodied in the CAA is vital to successful implementation of the Act.

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