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EPA Issues Proposed Revisions to CSAPR Update

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On October 30, 2020, EPA published in the Federal Register a proposed rule to revise its 2016 Cross-State Air Pollution Rule Update (the CSAPR Update) to further reduce interstate air pollution from 12 upwind states. EPA is proposing this revision pursuant to its authority under the Clean Air Act's "Good Neighbor" provision (section 110(a)(2)(D)(i)(I)), which requires upwind states to prevent sources located within their borders from contributing significantly to nonattainment or interfering with maintenance, of the national ambient air quality standards (NAAQS) in downwind states.

As discussed in a previous post, EPA is proposing these revisions to the CSAPR Update in response to a pair of 2019 rulings by the US Court of Appeals for the DC Circuit. Last September, in *Wisconsin v. EPA*, that court remanded the CSAPR Update to EPA for further consideration because EPA was unable to demonstrate that the rule would reduce upwind-state emissions to fully address significant contributions to downwind nonattainment and maintenance problems with respect to the 2008 ozone NAAQS by relevant NAAQS attainment deadlines applicable to downwind states. 938 F.3d 303 (D.C. Cir. 2019). Then, in October 2019, in *New York v. EPA*, the DC Circuit vacated and remanded EPA's 2018 CSAPR Close-Out Rule – in which EPA had determined that the CSAPR Update was a "full remedy" – on similar grounds. 781 Fed. App'x 4 (D.C. Cir. 2019).

NOx Emission Budgets for EGUs

To fully address upwind states' contributions to nonattainment and maintenance problems with respect to the 2008 ozone NAAQS in downwind states, EPA proposes to adopt more stringent ozone-season nitrogen oxide (NOx) emission budgets for fossil fuel-fired electric generating units (EGUs) in 12 states currently subject to the CSAPR Update, beginning in the 2021 ozone season (warm-weather months running from May 1 through September 30). Those 12 states are Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, Virginia, and West Virginia. Under the proposal, the revised ozone-season NOx budgets for most of these 12 states would become increasingly stringent from 2021 to 2024. The proposed budget levels would remain constant at the 2024 levels for the ozone seasons in 2025 and subsequent years.

For nine other states subject to the CSAPR Update – Alabama, Arkansas, Iowa, Kansas, Mississippi, Missouri, Oklahoma, Texas, and Wisconsin – EPA proposes to conclude that these upwind states' emissions (as limited by their existing CSAPR Update budgets) do not contribute significantly to projected downwind nonattainment or maintenance problems for the 2008 ozone NAAQS in 2021, and therefore that no tightening of their ozone-season NOx emission budgets is required to render the CSAPR Update a "full remedy." [1]

EPA proposes to find that limits on NOx emissions from non-EGU sources – which are not regulated under the original 2011 CSAPR or under the CSAPR Update – are not needed to eliminate upwind states' significant contributions to nonattainment and maintenance problems for the 2008 ozone NAAQS. EPA thus does not propose any NOx controls for non-EGU facilities, but it solicits comments on certain issues concerning such facilities.

EPA's Four-Step Process Under the Good Neighbor Provision

In the proposed rule, EPA applies its four-step analytical framework used in the original CSAPR and the CSAPR Update. In the first step, EPA reviews its ozone air quality modeling projections for 2021 and identifies two projected downwind "nonattainment" air quality receptors (both in Connecticut) and two projected downwind "maintenance" receptors (one in Connecticut and one in Houston, Texas) in 2021 for the 2008 ozone NAAQS.

In the second step, EPA estimates each of the respective upwind states' largest modeled ozone "contribution" in 2021 to any of the four downwind nonattainment and maintenance receptors and determines whether that state's modeled contribution exceeds a "screening threshold" that is equivalent to one percent of the 2008 ozone NAAQS (i.e., 0.75 part per billion). Those upwind states that exceed the screening threshold are subject to further analysis under the EPA framework. For the 12 states whose emissions exceed this threshold, EPA proposes the budget revisions discussed above. Tennessee and the remaining nine states whose largest estimated contributions fall below the threshold were not subject to further analysis (though each will remain subject to its existing CSAPR Update emission budget).

In the third step, EPA applies its multi-factor test from CSAPR and the CSAPR Update to identify a uniform NOx emission control stringency level that EPA determines maximizes cost-effective EGU NOx emission reductions and downwind ozone air quality improvements. EPA proposes to use a control stringency level set at a marginal cost of $1,600 per ton of NOx emission reductions – a level that EPA proposes to find reflects optimization of operation of existing "selective catalytic reduction" (SCR) emission control equipment (including turning on and optimizing existing but currently idled SCR equipment) and installation of (or upgrades to) state-of-the-art NOx combustion controls at EGUs. Under the proposed rule, the revised emission budgets for ozone season 2021 reflect only the strategy of optimizing existing SCR controls because EPA proposes to conclude that installation of state-of-the-art NOx combustion controls by the 2021 ozone season is not feasible on a regional scale. EPA proposes to adjust emission budgets to reflect those additional controls beginning with the budgets for the 2022 ozone season.

In the fourth step, EPA addresses features of the emission allowance trading program designed to implement the ozone-season NOx emission budgets, including application of the same 21-percent "variability limit" (and the resulting 121-percent "assurance level") for each state's budget that applies currently under the existing CSAPR Update, as well as a proposal to authorize a one-time conversion of banked CSAPR Update allowances with vintages from 2017 to 2020 into a limited number of allowances that EGUs could use to comply with the new revised budgets. EPA proposes

to create a new “Group 3” ozone-season NOx emission allowance trading program that would include the 12 states subject to more stringent budgets under the proposed rule. States that remain subject to the same ozone-season NOx budgets established in the 2016 CSAPR Update (i.e., the 9 states listed in the proposed rule that would not become subject to stricter budgets, plus Tennessee) would remain in “Group 2,” and Georgia – which is still subject to the same ozone-season NOx budget established originally for that state in CSAPR – would remain in “Group 1.”

EPA will hold a virtual public hearing on the proposed rule on November 12, and written public comments on the proposed rule are due by December 14. Pursuant to an order issued by the US District Court for the Southern District of New York in July, EPA is required to issue a final rule by March 15, 2021. *See New Jersey v. Wheeler*, No. 1:20-cv-01425 (S.D.N.Y. July 28, 2020).

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[1] EPA previously determined that the CSAPR Update would fully satisfy Tennessee’s obligations under the Good Neighbor provision with respect to the 2008 ozone NAAQS. As a result, EPA does not propose changing Tennessee’s CSAPR Update emission budget.

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