

EPA Proposes New Interstate Transport Rule and Previews Upcoming Regulatory Agenda

By Kyle Danish, Stephen Fotis, and Harold Bulger

On July 6, 2010, the Environmental Protection Agency issued a Notice of Proposed Rulemaking (NPR) that would require a significant reduction in sulfur dioxide (SO₂) and nitrogen oxide (NO_x) emissions from power plants in 31 states located in the Eastern half of the United States. The proposed rule, referred to as the “Transport Rule,” is intended to replace the 2005 Clean Air Interstate Rule (“CAIR”). Comments on the proposal are due within 60 days of its publication in the Federal Register. The final rule is expected in late spring 2011; until that time, the CAIR will continue to remain in effect.

The proposed rule also includes a discussion about and timetable for upcoming rulemakings that will affect the power sector.


A copy of the proposed Transport Rule and other supporting documentation is located at:

<http://www.epa.gov/airtransport/pdfs/TransportRule.pdf>.

BACKGROUND

EPA promulgated the CAIR in 2005 to address interstate transport of SO₂ and NO_x emissions, and the impact of such transport on the ability of “downwind” states to attain National Ambient Air Quality Standards (NAAQS) for ozone and fine particulate matter. SO₂ and NO_x emissions are “precursors” of ozone and fine particulate matter pollution. EPA used the CAIR to establish SO₂ and NO_x emission “budgets” for 28 states (and the District of Columbia) in the Eastern half of the United States. The CAIR would have required the states to meet their budgets over two phases – with compliance deadlines of 2010 and 2015 for SO₂, and 2009 and 2015 for NO_x.

In the summer of 2008, the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit” or “the Court”) vacated the entire CAIR, holding that the CAIR has “more than several fatal flaws.” *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008). The Court classified EPA’s methods of establishing state SO₂ and NO_x budgets as arbitrary and capricious. The Court further held that EPA failed to explain how an interstate trading program would ensure that the emissions from each covered state remain below a specific level that avoids “significant contribution” to nonattainment in downwind states. In addition, the Court rejected EPA’s use of allowances from the Title IV acid rain program for setting the state SO₂ budgets, and for purposes of determining compliance with those budgets. (For additional detail on the Court’s reasoning, see July 14, 2008 Issue Alert at: <http://www.vnf.com/news-alerts-277.html>.)



The D.C. Circuit ultimately decided to hold the requirements of the CAIR in place temporarily, but directed EPA to develop a new rule to address these flaws with the CAIR program.

THE TRANSPORT RULE

EPA has highlighted the following elements of the Transport Rule:

- The proposed rule establishes four control regions, which cover 31 states and the District of Columbia. States would be required to reduce SO₂ and NO_x emissions starting in 2012 (26 states would be subject to ozone season NO_x limits). Some states would have a more stringent SO₂ budget starting in 2014. The compliance deadlines are intended to coordinate with the attainment deadlines for the existing ozone and fine particulate matter National Ambient Air Quality Standards (NAAQS).
- Each state's SO₂ and NO_x budget would be measured with reference to that state's: (1) significant contribution to nonattainment in other states, and (2) interference with maintenance of attainment in other states.
- EPA concluded that unlimited region-wide emission trading is not permissible under the statute, as interpreted by the D.C. Circuit in the *North Carolina* decision. As an alternative, EPA has proposed to allow intrastate trading and limited interstate trading among power plants – consistent with the requirement that each state must meet its individual pollution control obligations. EPA also seeks comments on two other alternatives to its preferred approach:
 - Alternative Approach 1 would allow intrastate trading only.
 - Alternative Approach 2 would specify a limit for each power plant, and allow limited emissions averaging among affected units.
- Each state initially would be subject to an EPA-designed federal implementation plan (“FIP”). States then could replace the FIPs with their own state plans.
- The proposed rule does not allow use of Title IV allowances for compliance. In the proposed rule, EPA acknowledges that, as a result, “Title IV allowance prices are expected to be very low once the Transport Rule is finalized; some analysts suggest a price of nearly zero.”

UPCOMING RULEMAKINGS

In the proposed rule, EPA outlines a series of upcoming rulemakings, including:

- EPA expects to finalize its reconsideration of the ozone NAAQS in August 2010.
- If EPA finalizes a more protective ozone NAAQS, it might have to issue a new transport rule for controlling NO_x



emissions from power plants and perhaps other source categories – which it would propose in Summer 2011 and seek to finalize in Summer 2012.

- For coal-fired electric utility boilers, EPA has agreed to propose Maximum Available Control Technology standards for mercury and other hazardous air pollutants by March 16, 2011, and finalize the standards by November 16, 2011.

NEXT STEPS AND IMPLICATIONS

As discussed above, the comment period for the proposal will last for 60 days after publication of the proposal in the *Federal Register*. EPA also is organizing multiple stakeholder meetings and will hold three public hearings on the proposed rule.

The question remains whether EPA’s approach will meet the legal standards established by the D.C. Circuit when CAIR was remanded. There is also uncertainty about the feasibility of meeting the 2012 and 2014 emission reduction deadlines. Public comment will provide additional insight on these issues.

In addition, the Transport Rule is likely to invite comparison with current congressional initiatives to establish a “multi-pollutant” program for power plant emissions of SO₂, NO_x, and mercury. One such bill is S. 2995, which is co-sponsored by Senators Tom Carper (D-DE) and Lamar Alexander (R-TN). Senator Tom Carper (DE) released a statement on the Transport Rule, describing the regulation as “open to further lawsuits, which would likely cause even more delays in meeting our public health targets.”

FOR ADDITIONAL INFORMATION

Van Ness Feldman counsels clients on air regulatory developments, and is in a strong position to provide expert analysis and advice on emerging agency activity, the surrounding policy and political debate, and the implications for your organization. If you would like more information about the proposed Transport Rule or assistance with participation in this rulemaking, please contact Stephen Fotis, Kyle Danish, Britt Fleming or any member of the firm’s Environmental practice at (202) 298-1800.

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