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Supreme Court Rejects D.C. Circuit Vacatur of Cross-State Air Pollution Rule

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Kyle Danish, Stephen Fotis, Avi Zevin

On Tuesday, April 29, 2014, the U.S. Supreme Court overturned a prior decision by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), EME Homer City Generation v. EPA, 696 F.3d 7 (D.C. Cir. 2012), that had vacated the Environmental Protection Agency's (EPA) Cross-State Air Pollution Rule (CSAPR). EPA v. EME Homer City Generation, No. 12-1182 and American Lung Assoc. v. EME Homer City Generation, No. 12-1183. The 6-2 Supreme Court opinion written by Justice Ginsburg sends the CSAPR back to the D.C. Circuit for further consideration. Because the D.C. Circuit, and therefore the Supreme Court, had only evaluated two of the many challenges to the rule, many uncertainties about implementation of the CSAPR remain.

CSAPR Regulatory and Procedural History

Section 110(a) of the Clean Air Act, the "Good Neighbor Provision," requires states to ensure that their State Implementation Plans (SIPs) prohibit in-state sources from "significantly contributing" to nonattainment of National Ambient Air Quality Standards (NAAQS) in downwind states.

In 2005, EPA promulgated the Clean Air Interstate Rule (CAIR), which found that 27 upwind states and the District of Columbia in the Eastern United States were failing to comply with the Good Neighbor Provision, and required certain emission reductions from these upwind states. The D.C. Circuit held that the CAIR was invalid in several respects and remanded the rule.

EPA intended the CSAPR to be the replacement for the CAIR. The CSAPR addresses the interstate transport of two air pollutants, nitrogen oxides (NO_x) and sulfur dioxide (SO_2), which are emitted by power plants in 28 upwind states. In the CSAPR, EPA found that such emissions impair the ability of numerous "downwind" states to comply with three NAAQS—specifically, the 1997 8-hour ozone NAAQS, the 1997 Annual $PM_{2.5}$ (fine particulate matter) NAAQS, and the 2006 24-hour $PM_{2.5}$ NAAQS. NO_x emissions from upwind states during the May-September ozone season contribute to ozone formation, and both annual NO_x and SO_2 emissions contribute to formation of $PM_{2.5}$.

The CSAPR used a two-step methodology to determine the extent to which upwind states were not complying with the Good Neighbor Provision. First, EPA used air quality measurements to identify those states that contribute at least 1 percent of downwind states' nonattainment. Second, for each downwind state that met the 1 percent screening test, EPA assigned "budgets" for power plant emissions of SO_2 and NO_x. These budgets were based on EPA's calculations of the NO_x and SO_2 reductions achievable on a "cost-effective" basis (*i.e.*, at a given cost per ton). Simultaneously with these determinations, the rule included Federal Implementation Plans (FIPs) establishing how individual power plants would meet these obligations.

CSAPR was challenged by a number of states, labor unions, non-profit organizations, and corporations. The D.C. Circuit, in a 2-1 opinion written by Judge Kavanaugh, vacated CSAPR on two grounds. First, it found that the Good Neighbor Provision required EPA to provide states covered by CSAPR an opportunity to revise an inadequate SIP after EPA had quantified the state's contribution (*i.e.*, by setting the state's emission budget) but before issuing a FIP. Second, it held that EPA's two-step methodology —and particularly its assignment of state emission budgets based on calculation of the quantity of cost-effective reductions rather than on a physical determination of the actual contribution of downwind state nonattainment—violated the plain language of section 110(a) of the Clean Air Act. The majority opinion held that section 110 requires each state to eliminate no more than its proportional share of

multi-state "significant contribution." The majority further found that the CSAPR cost-based methodology could require an upwind state to control more than its share (to "overcomply") or reduce its contribution below the 1 percent screening threshold. By vacating the rule on these two grounds, the D.C. Circuit did not need to reach additional claims filed against CSAPR.

Court Decision

Writing for the majority, Justice Ginsburg emphasized that the D.C. Circuit erred by failing to grant EPA sufficient deference pursuant the *Chevron v. NRDC* framework, under which she said that the court "routinely accord[s] dispositive effect to an agency's reasonable interpretation of ambiguous statutory language." Chief Justice Roberts and Justices Kennedy, Breyer, Sotomayor, and Kagan joined the majority. Justice Scalia, writing for himself and Justice Thomas, dissented on the grounds that EPA was barred by the plain meaning of the Clean Air Act from using costs to set state budgets. Justice Alito recused himself.

CSAPR's "FIP First" Approach. The Court held that, contrary to the D.C. Circuit's holding, EPA's decision to issue FIPs at the same time as it issued SIP disapprovals was consistent with the text of the Clean Air Act. The Court emphasized that the text of the Good Neighbor provision directs EPA to issue a FIP "at any time" within two years of a SIP disapproval. Accordingly, EPA was not required by the clear text of the Clean Air Act to first allow the states to revise their SIPs after EPA quantified their emissions reduction obligations. And a simultaneous SIP disapproval/FIP issuance was not arbitrary given the Agency's prior actions giving states an opportunity to correct the deficiency and the D.C. Circuit's prior admonition that the Agency issue a new rule to replace the reinstated CAIR "with dispatch." Justice Ginsburg also emphasized that EPA's actions were predicated on a proper disapproval of a SIP—an action not challenged by the parties in this case.

CSAPR Methodology for Determination of Good Neighbor Obligations. The Court determined that the text of the statute is sufficiently ambiguous to provide EPA with discretion in determining how to measure each state's contribution to nonattainment in downwind states (and therefore its emissions budgets), so long as the methodology is reasonable. The Court further found that that a methodology based on determining each upwind state's proportional share of contribution to downwind states—as the D.C. Circuit and Justice Scalia's dissent would mandate—is neither mandatory nor even mathematically possible for a multi-state transport rule given the "interwoven contributions of multiple upwind states."

In affirming the Agency on this point, the Court found that the approach adopted in the CSAPR is efficient because it requires reductions at least-cost and that it is equitable by imposing uniform cost thresholds across states, thereby limiting the "free riding" of states that have yet to impose comparable emission reductions on sources within their states. Finally, while the Court agreed with the D.C. Circuit that a state should not be forced to over-comply or reduce its contribution below the 1 percent screening threshold for *all* downwind states, it did not agree that the mere risk of such a scenario is sufficient to vacate the entire CSAPR rule. Instead, a state actually in either of these situations should bring an "as-applied" challenge to the rule.

Dissent. Justice Scalia, joined by Justice Thomas, would have upheld the D.C. Circuit opinion on both the FIP-first and the budget allocation methodology grounds. Justice Scalia focused primarily on the issue of whether the Agency was permitted by the text of the statute to use costs as a means of allocating state budgets. Justice Scalia would have ruled that the text of the statute is clear—EPA must use a proportional allocation of each state's contribution of pollution—and therefore EPA's cost-effectiveness methodology would be foreclosed. He emphasized that the words of the Good Neighbor Provision require elimination of "*amounts* of pollutants," reading this to clearly require elimination by proportion of amount emitted rather than by the cost of emission reduction.

Implications and Possible Next Steps

The Supreme Court reversal of the D.C. Circuit does not immediately reinstate CSAPR but instead sends the rule back to the D.C. Circuit for further action consistent with the Supreme Court's opinion. While

the D.C. Circuit may ultimately rule that EPA can move forward in implementing CSAPR, the court and the Agency will first have to work through a number of potentially complicated legal issues. Finally, even beyond resolving the immediate legal and regulatory issues, EPA will likely have to decide whether and how to modify the CSAPR to address recent and future revisions to the relevant NAAQs for which additional emissions reductions may be necessary to remedy interstate transport of air pollution.

Further Consideration of Previously Unconsidered Challenges. While the D.C. Circuit vacated CSAPR on two grounds that have now been rejected by the Supreme Court, the initial lawsuit against the rule included many more challenges. These challenges were not necessary for the D.C. Circuit to consider once it had already found grounds to vacate the rule. However, the D.C. Circuit is likely to request briefing from the parties to determine whether and how to address those other legal challenges on remand. Among these outstanding challenges are a challenge by Texas to its inclusion in the rule, and EPA's imposition of FIPs on several upwind states whose SIPs EPA previously approved under the CAIR.

Resolution of Additional Litigation. In addition to more fully considering challenges that had already been made before the D.C. Circuit, a number of other cases had been stayed pending the Supreme Court's resolution of EPA's authority that may now be revived. Justice Ginsburg explicitly did not rule on whether EPA's determination that state SIPs failed to meet the Good Neighbor Provision was consistent with the law. However, three challenges, for Ohio, Kansas and Georgia, to that EPA decision have been held in abeyance while the Supreme Court considered *EME Homer*. These cases will now likely move forward in light of the Supreme Court's decision. *Ohio v. EPA*, No. 11–3988 (6th Cir.); *Kansas v. EPA*, No. 11–1333 (D.C. Cir.); *Georgia v. EPA*, No. 11–1427 (D.C. Cir.). If the courts overturn EPA's disapproval of those particular SIPs, the CSAPR would no longer be applicable in those states.

In addition, subsequent to EPA's initial promulgation of CSAPR, the Agency issued three rules making technical corrections and modifications to CSAPR. The legal challenges to these rules from industry have been held in abeyance pending resolution of *EME Homer*. *See Public Service Company of Oklahoma v. EPA*, No. 12-1023 (D.C. Cir.); *Wisconsin Public Serv. Corp.* v. EPA, No. 12-1163 (D.C. Cir.); *Utility Air Regulatory Group v. EPA*, No. 12-1346 (D.C. Cir.).

EPA also published a second June 2012 rule allowing power plants to demonstrate compliance with the Best Available Retrofit Technology (BART) emission standard of the Regional Haze program—a regulatory program under a separate section of the Clean Air Act, which is aimed at increasing visibility at national parks and wilderness areas—through participation in CSAPR. This rule was challenged by several environmental organizations, but their lawsuits have been held in abeyance pending final disposition of the CSAPR litigation. *See, e.g. National Parks Conservation Association v. EPA*, No. 13-14977 (11th Cir.). At the same time, industry filed lawsuits when EPA rejected state SIP regional haze provisions that were compliant with CAIR but not CSAPR, which are also stayed pending the Supreme Court's opinion in *EME Homer*. *Luminant Generation Co. v. EPA*, No. 12-60617 (5th Cir.).

Establishing New Compliance Deadlines. Even if the D.C. Circuit resolves the other challenges in EPA's favor, EPA will not be able to merely implement the rule as it was originally written. The original CSAPR rule had a compliance start date of January 1, 2012, and imposed deeper reductions starting in 2014. Because these dates have already passed, EPA may have to revisit the rule to determine an appropriate new compliance deadline(s). Without such a revision, states might be vulnerable to challenges under the citizen suit provisions of the Clean Air Act. Any EPA modifications to the compliance deadlines likely would require another notice-and-comment rulemaking.

Updating CSAPR to Implement Revised NAAQS. The original CSAPR rule was designed to address the 1997 8-hour ozone NAAQS, the 1997 Annual $PM_{2.5}$ NAAQS, and the 2006 24-hour $PM_{2.5}$ NAAQS. However, since the rule was issued, EPA has updated and is expected to further update these NAAQS. EPA issued a new ozone NAAQS in 2008 and a new more stringent $PM_{2.5}$ NAAQS in 2012, neither of which have been incorporated into the CSAPR budgets. In addition, EPA is currently reviewing the 8-hour ozone NAAQs, for which it is already behind the schedule the Clean Air Act lays out requiring it to review and consider revising NAAQs every 5 years. A Federal District Court in the Northern District of

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California recently ordered EPA to propose a revised ozone NAAQS by December 1, 2014 and finalize the revised NAAQS by October 1, 2015. *Sierra Club v. EPA*, N.D. Cal., No. 13-2809. It remains to be seen whether and how these additional NAAQS would be incorporated into the CSAPR or its successor. Again, EPA likely could not extend the coverage of the CSAPR without undertaking a new notice-and-comment rulemaking.

For More Information

Van Ness Feldman closely monitors and counsels clients on air, water, and other environmental regulatory developments. If you would like more information about the Supreme Court reversal or CSAPR, please contact Kyle Danish, Stephen Fotis, Britt Fleming, or any member of the firm's Environmental Practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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