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# D.C. Circuit Court Rejects EPA's Multistate Power Plant Rule

On August 21, 2012, two judges on a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit issued an opinion[1] vacating the Cross-State Air Pollution Rule (CSAPR), a complex rule designed by the U.S. Environmental Protection Agency (EPA) to regulate emissions of sulfur dioxide (SO2) and nitrogen oxide (NOx) from multiple power plants across 28 states. The rule was meant to replace the Clean Air Interstate Rule (CAIR), which, although struck down and remanded to the agency in 2008, was left in force pending its replacement. Pending revisions to CSAPR consistent with the court's instructions, CAIR will continue to remain in place.

## Background

CSAPR was promulgated by the EPA under Section 110 of the federal Clean Air Act (CAA) on July 6, 2011. CSAPR was intended to establish a complementary framework of four air pollutant cap-and-trade programs that together would cut interstate transport of emissions contributing to ozone and fine particulate matter pollution from more than 1,000 power plants in 27 states by requiring reductions in SO2 and NOx emissions annually and/or during the ozone season (May–September).[2] CSAPR created tradable allowances for each of the four programs: Group 1 SO2, Group 2 SO2, annual NOx and ozone season NOx. Each state was allocated a specified budget, which contains "assurance provisions" intended to account for fluctuations in generation sector emissions. Subsequent to issuing the final rule, the EPA made several adjustments to CSAPR, including technical corrections, state budget adjustments and a proposal to delay implementation of the assurance penalty provision from 2012 to 2014.

1 EME Homer City Generation LP v. EPA, No. 11-1302.
2 76 Fed. Reg. 48,208 (Aug. 8, 2011).

## The Opinion

The D.C. Circuit rejected CSAPR on two grounds. First, the court determined the EPA overstepped its authority by making the emissions reduction requirements from certain states too stringent. Specifically, Section 110(a)(2)(D)(i)(I) of the CAA, also known as the "good neighbor" provision, provides that state plans for implementing the CAA limits (State Implementation Plans, or "SIPs") must contain adequate provisions to ensure that no sources within that state "contribute significantly to nonattainment in, or interfere with maintenance by, any other State" with applicable air quality standards. The court held that under CSAPR the EPA's reliance on cost-based reduction requirements would have required several upwind states to make disproportionately large emissions cuts than were warranted by their respective "significant" contributions to nonattainment in downwind states.

Second, the court found fault with the EPA's imposition of Federal Implementation Plans, which eliminated states' discretion to adopt their own SIPs. States are typically afforded an opportunity to implement new air quality standards through their own SIPs, and the EPA cannot question the wisdom of those SIPs so long as they would result in achieving compliance with the applicable standards. According to the court, the CAA contains a "federalism bar" that affirmatively "prohibits EPA from using the SIP process to force States to adopt specific control measures." The EPA sought to justify this tack by asserting that the EPA already had rejected SIPs submitted by nearly all the states involved for failing to include good neighbor requirements, but as the court pointed out, the EPA had not yet quantified the states' good neighbor obligations, so they had no way of knowing the quantity of emission reductions

needed. As a result, the court held that the EPA could not preemptively declare that the states had "deficient" SIPs that would justify federal intervention.

### What's Next

It is likely that the EPA will petition for a rehearing before the D.C. Circuit, en banc, due to the strength of a dissenting opinion filed by Judge Rogers and the importance of the issues. Alternatively, the EPA may appeal the decision directly to the U.S. Supreme Court. In either event, the period of time regulated sources would have to plan for necessary controls will be extended pending a resolution of the case. If the ruling is affirmed, then the EPA will have to rework its methodology for deciding upwind states' contribution to downwind states' violations of ambient air quality standards, complete the notice and comment rulemaking, and defend subsequent legal challenges. Also, the court's opinion made clear that the EPA cannot impose a Federal Implementation Plan without honoring the CAA's "cooperative federalism approach" and giving states a chance to first implement their own SIPs to meet the new emissions standards. These plans must be developed and formally adopted at the state level before being submitted for EPA approval. If rejected by the EPA, then the agency would then have two years to issue a FIP mandating upwind states' emission reductions. Each stage of this process will provide opportunities for the public and affected entities to comment on the rulemaking and file administrative and/or judicial challenges as necessary. As a result, barring reversal of this latest ruling by a new panel of the D.C. Circuit or by the Supreme Court, the full impacts of CSAPR on the regulated community's bottom line will not be known for another several years.

Nevertheless, market forces by themselves are driving utilities' decisions to retire coal-fired plants. In particular, abundant supplies of natural gas from Marcellus Shale and other formations have dramatically reduced and stabilized natural gas prices, resulting in a major shift in the economics of the power generation industry. New builds of, or conversions to, combined cycle natural gas plants, which emit substantially less SO2 and NOx, are accelerating. For now, however, the D.C. Circuit's decision may extend for an indeterminate period the economic life span of some of the affected coal plants.