



D.C. Circuit Rejects EPA's Interstate Transport Rule (CSAPR)

Contact

On August 21, 2012, a three-judge panel of the U.S. Court of Appeals for the District of Columbia (the "D.C. Circuit") vacated and remanded to the U.S. Environmental Protection Agency ("EPA") the latest attempt by EPA to regulate interstate air pollution in the eastern United States, which is referred to as the "Cross-State Air Pollution Rule" ("CSAPR") or the "Interstate Transport Rule."¹ Yesterday's decision requires EPA to revise and reissue regulations implementing an interstate air pollution control program, while maintaining in force the existing Clean Air Interstate Rule ("CAIR").² Yesterday's decision primarily affects large, fossil-fuel fired electricity generation facilities located east of the Mississippi River.

Robert Lawrence
Of Counsel,
San Francisco
rlawrence@orrick.com
+1 415 773 5520

Daniel Knepper
Managing Associate,
Washington, D.C.
dknepper@orrick.com
+1 202 339 8697

The Interstate Transport Rule was EPA's most recent effort to reduce the adverse impact of upwind states on the air quality of downwind states. The upwind states include states in southern, midwestern and some eastern states, where many large coal-fired power plants are located. Natural air currents transport pollutants from these facilities to "downwind" states, primarily in New England and the mid-Atlantic. The specific pollutants addressed by the Interstate Transport Rule were sulfur dioxide (SO₂) and oxides of nitrogen (NO_x) emitted by large power plants,³ because EPA has found that these pollutants contribute to increased levels of fine particulate pollution and ozone pollution.

Background

The Clean Air Act establishes a federal/state partnership to address air pollution. The Clean Air Act obligates EPA to establish "national ambient air quality standards," or "NAAQS," for air pollutants such as ozone and particulates, and to impose limits upon emissions of regulated pollutants, such as SO₂ and NO_x, to maintain or achieve NAAQS. EPA may direct states to implement the limits on pollutant emissions through state implementation plans, or "SIPs." If a state fails to implement a SIP or the SIP does not meet EPA's requirements, then EPA may issue a Federal implementation plan, or "FIP," to impose direct federal control on emissions sources in that state.

The federal Clean Air Act requires EPA to regulate the interstate transport of air pollutants to achieve federally-mandated air quality standards through what is known as the "good neighbor" provision. As the D.C. Circuit noted in its decision: "the good neighbor provision requires upwind states to bear responsibility for their share of the mess in downwind states."⁴ To regulate interstate air pollution, EPA must seek to reduce emissions within states that "significantly contribute" to violations (non-attainment) of NAAQS, or "interfere with the maintenance of" NAAQS, in other states.

¹ *EME Homer City Generation, LP. v. EPA*, ___ F.3d ___ (11-1302, August 21, 2012).

² CAIR, EPA's previous effort, was invalidated but not vacated by the D.C. Circuit in 2008. In that decision, *North Carolina v. EPA*, the D.C. Circuit ordered CAIR to remain in effect until EPA promulgates an acceptable replacement. The D.C. Circuit re-affirmed in yesterday's decision that CAIR would continue to remain in effect.

³ Covered facilities under the rule include fossil-fuel fired facilities over 25 MW that meet certain output requirements and sell energy to utility grids. Cogeneration facilities and some solid waste incineration facilities are excluded, even if they use fossil fuels and would otherwise be covered.

⁴ *EME Homer City Generation, LP*, at 11.

Both the CAIR program and the Interstate Transport Rule were intended to regulate upwind emissions to achieve and maintain NAAQS in downwind states.

In preparing the Interstate Transport Rule, EPA performed a complex analysis of air pollution impacts between states. EPA first identified states in which emissions could cause significant impacts in downwind states by quantifying the contribution of each upwind state to the air quality impacts in downwind states on a pollutant-by-pollutant basis. Based on this analysis, EPA identified each pollutant for which downwind states experienced difficulty in achieving one or more NAAQS and the effect of each upwind state on that downwind state's air quality. States were determined to "significantly contribute" to interstate violations of NAAQS if sources within their boundaries exceeded a specified impact threshold in a downwind state.

After identifying the upwind states to be regulated, EPA looked to how expensive it would be to reduce the relevant emissions at individual sources in order to identify a cost point at which the greatest pollution reductions per dollar could be achieved. This cost point was then used to establish state emissions budgets (maximum allowable emissions) for each pollutant analyzed, without reference to the impact upon other states. In other words, EPA regulated emissions within states on the basis of a cost-effectiveness analysis related to sources, rather than tying the emissions reductions to impacts on the air quality in other states.

The D.C. Circuit Court's Decision

The D.C. Circuit found that EPA violated the Clean Air Act in determining the emissions budgets for states and allocating emissions reductions among states on the basis of the its cost-effectiveness analysis, for three related reasons:

Overcontrol of States – The D.C. Circuit interpreted the Clean Air Act's interstate pollution provisions to require an upwind state only to reduce its emissions to a point where the impact on downwind states is no longer "significant." Additional emissions reductions imposed on an upwind state are excessive and neither required nor authorized by statute. The D.C. Circuit found that the cost-effectiveness methodology used in the Interstate Transport Rule could impose excessive emission reductions because it did not tie reductions in upwind states to air quality problems in downwind states.

Allocation of Burden – The D.C. Circuit also articulated a principle that the upwind states' emissions reductions should be proportional to the problem. Under this principle, the Clean Air Act requires emissions reductions and related costs to be allocated among the states in proportion to their individual impact upon downwind states. The Interstate Transport Rule targeted emissions reductions to types of sources based on the cost-effectiveness analysis, rather than allocating them among upwind states based on their relative impacts upon downwind states.

Aggregate Overcontrol – The D.C. Circuit found that the cost-based approach to setting emissions budgets and emissions reductions could lead to a situation in which upwind emissions would be controlled more than necessary to achieve NAAQS in downwind states. The Clean Air Act, the D.C. Circuit held, requires EPA to achieve or maintain NAAQS, but does not authorize EPA to impose requirements on upwind states in excess of those necessary to achieve NAAQS in downwind states. The D.C. Circuit ruled that the Interstate Transport Rule could reduce pollutant impacts to a level that is better than NAAQS, a result that is neither required nor authorized by the Clean Air Act.

The D.C. Circuit also struck down EPA's imposition of facility-by-facility emissions reductions through the FIPs that were issued concurrently with the Interstate Transport Rule. EPA argued that states had failed, for many years, to implement effective SIPs, and so FIPs were appropriate enforcement options. The D.C. Circuit disagreed, stating that the states had no obligation to implement a SIP until EPA had determined the amount by which a state had "significantly contributed" to nonattainment in downwind states. Absent this quantitative analysis, the D.C. Circuit explained, a state could not know the amount of emissions reductions that EPA would require in its SIP. EPA did not provide that analysis until it proposed the Interstate Transport Rule, so could not issue a FIP for a state without first providing the state with the opportunity to submit a SIP revision.

Status of Interstate Program

The D.C. Circuit's order invalidated the Interstate Transport Rule, and remanded the rule back to EPA for further proceedings consistent with the decision. The anticipated requirements of the Interstate Transport Rule are therefore not enforceable at present. The requirements of the CAIR program are enforceable, but only until a replacement program can be implemented. The D.C. Circuit expects EPA to issue new regulations "expeditiously."

EPA may choose to ask for a rehearing before the full D.C. Circuit, and may appeal the decision to the Supreme Court. It is therefore possible the panel decision will be overturned and the Interstate Transport Rule reinstated. EPA may also begin revising the rule and preparing to reissue it, a process that is likely to take at least two years in total. Accordingly, the future of interstate regulation of SO₂ and NO_x from fossil-fuel fired electric generating facilities in the eastern United States is likely to remain uncertain for some time to come.