MJB & A

CONCORD, MA - WASHINGTON, DC

47 Junction Square Drive
Concord, MA 01742

978-369-5533
www.mjbradley.com

April 30, 2014

Supreme Court Upholds Cross-State Air Pollution Rule (CSAPR)

On April 29, 2014, the Supreme Court reversed the D.C. Circuit's 2012 vacatur of the Cross-State Air Pollution Rule (CSAPR; also referred to as the Transport Rule). To illustrate the challenge EPA faced in addressing interstate air pollution, the Court cited the King James Bible to note that "[t]he wind bloweth where it listeth, and thou hearest the sound thereof, but canst not tell whence it cometh, and whither it goeth." Overall, the Court disagreed with the D.C. Circuit's decision that EPA was required to specifically and proportionally determine each state's contribution to another downwind state's impairment of air quality. The Supreme Court also disagreed that EPA was required to allow states the opportunity to design state implementation plans (SIPs) to address the identified contributions before implementing CSAPR. Thus, the Court reversed and remanded the decision to the D.C. Circuit for further proceedings consistent with the opinion, including issues that the D.C. Circuit has not yet addressed. The Clean Air Interstate Rule (CAIR) remains in place until the D.C. Circuit lifts its vacatur of the rule, and it is currently unclear what steps EPA will take following that action.

Background

The Clean Air Act requires EPA to establish national ambient air quality standards (NAAQS) for pollutants and, once established, states must submit SIPs that demonstrate how an area will achieve or maintain attainment of the relevant NAAQS. As part of the SIP process, the Clean Air Act requires states to "contain adequate provisions...prohibiting...any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will...contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any ...[NAAQS]." 42 U.S.C. §7410(a)(2)(D). This obligation is often referred to as the "Good Neighbor Provision".

Over several decades and through several rules, EPA has worked to address this provision and the complex issue of interstate transport of air pollution. In 2008, the D.C. Circuit remanded the Clean Air Interstate Rule (CAIR) in *North Carolina v. EPA* and in response to that decision, EPA developed CSAPR. On July 7, 2011, EPA published the final CSAPR NOx and SO_2 trading rule for coal-, oil-, and natural gas-fired power plants with the intention of beginning implementation on January 1, 2012. CSAPR established budgets for EGU emissions in 28 states that contribute to the ability of downwind states to attain and/or maintain the 1997 and 2006 $PM_{2.5}$ NAAQS and the 1997 ozone NAAQS. On December 30, 2011, the D.C. Circuit stayed the program pending litigation, keeping CAIR in place, and on August 21, 2012, the court vacated CSAPR in its entirety, ordering EPA to continue implementing CAIR while developing a replacement rule.

The Supreme Court heard oral arguments in *EPA, et al. v. EME Homer City Generation, L.P., et al.* on December 10, 2013.

The Decision

Justice Ginsburg wrote the opinion for the Court, with Chief Justice Roberts and Justices Kennedy, Breyer, Sotomayor, and Kagan joining. Justice Scalia authored the dissent, which Justice Thomas joined. Justice Alito recused himself. Regarding the two general issues before the Court, Justice Ginsberg explained that "the CAA does not command that States be given a second opportunity to file a SIP after EPA has quantified the State's interstate pollution obligations. We further conclude that the Good Neighbor Provision does not require EPA to disregard costs and consider exclusively each upwind State's physically proportionate responsibility for each downwind air quality problem. EPA's cost-effective allocation of emission reductions among upwind States, we hold, is a permissible, work-able, and equitable interpretation of the Good Neighbor Provision." (Page 32) Thus, "the judgment of the United States Court of Appeals for the D.C. Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion." (Page 32)

SIP/FIP Obligations

The D.C. Circuit held that EPA was required to give states an opportunity to file a SIP after EPA calculated that state's interstate transport obligations, regardless of how much time had passed since states' SIP deadlines.[1] Lacking such a determination from EPA, the D.C. Circuit reasoned that states could not be required to calculate their individual obligation and address transport and, therefore, EPA could not issue a FIP prior to giving states their reduction requirements. However, the Supreme Court disagreed and held that a plain text reading of the statute requires states to submit SIPs addressing interstate transport regardless of EPA action. The Court noted that the Clean Air Act includes specific timelines for completion of SIPs and FIPs, and Congress did not include any exceptions for that timing in the Good Neighbor Provisions.

The Court explained that:

> However sensible (or not) the Court of Appeals' position, a reviewing court's 'task is to apply the text [of the statute], not to improve upon it...Nothing in the Act differentiates the Good Neighbor Provision from the several other matters a State must address in its SIP. Rather, the statute speaks without reservation: Once a NAAQS has been issued, a State "shall" propose a SIP within three years, §7410(a)(1), and that SIP "shall" include, among other components, provisions adequate to satisfy the Good Neighbor Provision, §7410(a)(2)...As Judge Rogers observed in her dissent from the D.C. Circuit's decision, the Act does not require EPA to furnish upwind States with information of any kind about their good neighbor obligations before a FIP issues....Instead, a SIP's failure to satisfy the Good Neighbor Provision, without more, triggers EPA's obligation to issue a federal plan within two years. §7410(c). (Pages 15-16)

The Court concluded that "nothing in the statute places EPA under an obligation to provide specific metrics to States before they undertake to fulfill their good neighbor obligations....The D.C. Circuit, we hold, had no warrant thus to revise the CAA's action-ordering prescriptions." (Page 17)

"Significant Contribution" and Consideration of Costs

With respect to the process EPA developed to determine the emission reductions required for each state, the D.C. Circuit held that the Clean Air Act requires upwind states to reduce their emissions in a manner

[1] The Court disagreed with EPA that it could not consider exercise of the Agency's FIP authority without subjecting EPA's final SIP disapprovals to untimely review. The Court determined that challenges focused on the timing of FIP issuance, not any particular disapproval, with the exceptions noted below as pending before the D.C. Circuit.

proportional to their contributions to pollution in downwind states.[2] The D.C. Circuit also held that EPA failed to ensure that the rule did not mandate upwind states to reduce pollution unnecessarily given that emissions budgets were based on cost. However, the Supreme Court disagreed and noted that "[w]e routinely accord dispositive effect to an agency's reasonable interpretation of ambiguous statutory language. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), is the pathmarking decision, and it bears a notable resemblance to the cases before us." (Page 20) Similar to *Chevron*, the Court reasoned that the Good Neighbor Provision delegates authority to EPA to determine what contributions are significant.

Thus, the Court noted that the Act leaves to EPA a "thorny" problem of how to allocate responsibility among upwind states and that the statute's text "does not answer that question for EPA." (Pages 21-22) Thus, under *Chevron*, the Court reads Congress's "silence as a delegation of authority to EPA to select from among reasonable options." (Page 22) The Court included several hypothetical contribution scenarios to highlight the challenges of the analysis EPA faced. In response to the D.C. Circuit's decision and the dissent, the Court noted that the "Court of Appeals' proportionality edict...appears to work neither mathematically nor in practical application." (Page 23)

With regard to EPA's selection of costs as the basis for assigning reduction obligations to upwind states, the Court noted that:

> The Agency has chosen, sensibly in our view, to reduce the amount easier, i.e., less costly, to eradicate, and nothing in the text of the Good Neighbor Provision precludes that choice. Using costs in the Transport Rule calculus, we agree with EPA, also makes good sense. Eliminating those amounts that can cost-effectively be reduced is an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address. Efficient because EPA can achieve the levels of attainment, i.e., of emission reductions, the proportional approach aims to achieve, but at a much lower overall cost. Equitable because, by imposing uniform cost thresholds on regulated States, EPA's rule subjects to stricter regulation those States that have done relatively less in the past to control their pollution. Upwind States that have not yet implemented pollution controls of the same stringency as their neighbors will be stopped from free riding on their neighbors' efforts to reduce pollution. They will have to bring down their emissions by installing devices of the kind in which neighboring States have already invested. (Pages 26-27)

The Court also highlighted the effect of not considering costs on states that have already installed controls:

> Suppose, for example, that the industries of upwind State A have expended considerable resources installing modern pollution-control devices on their plants. Factories in upwind State B, by contrast, continue to run old, dirty plants. Yet, perhaps because State A is more populous and therefore generates a larger sum of pollution overall, the two States' emissions have equal effects on downwind attainment. If State A and State B are required to eliminate emissions proportionally (i.e., equally), sources in State A will be compelled to spend far more per ton of reductions because they have already utilized lower cost pollution controls. State A's sources will also have to achieve greater reductions than would have been required had they not made the cost-effective reductions in the first place. State A, in other words, will be tolled for having done more to reduce pollution in the past. EPA's cost-based allocation avoids these anomalies. (Page 27; fn omitted)

[2] The Court declined to address the jurisdictional question raised by EPA as to whether the respondents raised their objections to CSAPR during the comment period with the "specificity" required for preservation. The Court noted that EPA did not pursue the argument vigorously before the D.C. Circuit and thus the Court was not prevented from addressing the merits of the two-step interpretation of CSAPR.

Thus, in light of the statute's silence on how to determine significance of contribution, the Court held EPA's approach to be reasonable.

Lastly, the Court addressed the D.C. Circuit's concern that EPA's approach would result in over-control. On this point, the Supreme Court agreed with the D.C. Circuit that "EPA cannot require a State to reduce its output of pollution by more than is necessary to achieve attainment in every downwind State or at odds with the one-percent threshold the Agency has set." (Page 29) However, the Court determined that "[n]either possibility, however, justifies wholesale invalidation of the Transport Rule." (Page 29)

Thus, "[s]atisfied that EPA's cost-based methodology, on its face, is not 'arbitrary, capricious, or manifestly contrary to the statute," the Court upheld CSAPR. The Court concluded that the "possibility that the rule, in uncommon particular applications, might exceed EPA's statutory authority does not warrant judicial condemnation of the rule in its entirety." (Page 31)

Pending Challenges

The decision specifically highlighted two pending challenges that may now proceed:

- The Supreme Court decision does not address whether EPA could impose FIPs on upwind states whose SIPs had been previously approved under CAIR. EPA changed those approvals to disapprovals when it issued CSAPR, and several states argued that the process by which EPA did so was improper. The D.C. Circuit can now consider this issue on remand.

- Related to, but separate from this case, are three states' challenges to EPA's specific SIP disapprovals in Ohio, Kansas, and Georgia. These were held in abeyance in the Sixth and D.C. Circuits and can now proceed. (Page 10, footnote 11)

Next Steps

The case will now return to the D.C. Circuit for the court to decide remaining issues, including those noted above. Until the D.C. Circuit lifts the vacatur, CAIR remains effective. We expect that EPA will proceed with current efforts to propose by this October a rule identifying upwind states' ozone contribution obligations with regard to the 2008 ozone standard, which CSAPR did not address.

Contacts

For additional information on this decision or related CSAPR or litigation concerns, please contact:

Carrie Jenks
Senior Vice President
cjenks@mjbradley.com
(978) 405-1265

Kathy Robertson
Senior Policy Analyst
krobertson@mjbradley.com
(978) 405-1267

About Us

MJB&A provides strategic consulting services to address energy and environmental issues for the private, public, and non-profit sectors. MJB&A creates value and addresses risks with a comprehensive approach to strategy and implementation, ensuring clients have timely access to information and the tools to use it to their advantage. Our approach fuses private sector strategy with public policy in air quality, energy, climate change, environmental markets, energy efficiency, renewable energy, transportation, and advanced technologies. Our international client base includes electric and natural gas utilities, major transportation fleet operators, investors, clean technology firms, environmental groups and government agencies. Our seasoned team brings a multi-sector perspective, informed expertise, and creative solutions to each client, capitalizing on extensive experience in energy markets, environmental policy, law, engineering, economics and business. For more information we encourage you to visit our website, www.mjbradley.com.