CLIENT ALERT

D.C. Circuit Again Invalidates EPA's 'Good Neighbor' Air Pollutant Transport Rule

Jul.29.2015

On July 28, 2015, a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remanded the Cross-State Air Pollution Rule (CSAPR) to the Environmental Protection Agency (EPA) after finding that the rule impermissibly over-controlled sulfur dioxide (SO2) and nitrogen oxide (NOx) emissions in 14 states. Specifically, the D.C. Circuit held that the 2014 SO2 emission budgets for Texas, Alabama, Georgia, and South Carolina and the 2014 ozone-season NOx budgets for Florida, Maryland, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Virginia, and West Virginia were invalid on an "as-applied" basis. The court ruled that EPA's "uniform cost" approach to determining the individual states' emission reduction obligations resulted in emission reductions in excess of what each of the identified states was obligated to achieve to avoid contributing to nonattainment in every other state to which its emissions are linked.

The Transport Rule Budgets Will Remain Effective While EPA Reconsiders

While the D.C. Circuit *invalidated* the CSAPR emission budgets, it conspicuously did not *vacate* them. For now at least, CSAPR's state SO2 and summertime NOx budgets remain in place and enforceable, and the program—which affects 27 states—will continue to be implemented while EPA reexamines and revises those budgets. In this regard, the court appeared mindful that, following a judicial stay and years of litigation, CSAPR was implemented by EPA at the beginning of 2015. The court reasoned that the unusual remedy of remand without vacatur was appropriate in this case, as vacatur would disrupt operation of the program (including emission trading markets) and also forego environmental benefits that were justified (*i.e.*, those emission reductions that were not in excess of EPA's authority). Since CSAPR 2014 emission budgets were previously "rolled forward" by three years following the Supreme Court's decision in *EPA v. EME Homer City Generation, L.P.,* 134 S. Ct. 1584 (2014), the court's ruling can be interpreted to apply to "Phase 2" of CSAPR, which is due to begin on January 1, 2017. *See* 79 Fed. Reg. 71,633 (Dec. 3, 2014).

A State's Emission Budgets Must Not be More Stringent than Necessary to Ensure Attainment or Maintenance in All Linked Downwind States

The D.C. Circuit applied the Supreme Court's ruling in *EME Homer City* that CSAPR violates the Clean Air Act to the extent that it "requires an upwind State to reduce emissions by more than the amount necessary to achieve attainment in *every* downwind State to which it is linked." The court found that EPA's CSAPR methodology, which applied uniform cost thresholds in determining the required emission reductions, could result in such over control, and specified that individual States could challenge the application of the budgets through "particularized, as-applied change[s]." *Id*. at 1609.

In the decision, Judge Kavanaugh, writing for a panel that also included Judges Rogers and Griffith, pointed to several states whose CSAPR state emission budgets either were not needed to provide for attainment in downwind states, or imposed a level of control beyond that which was necessary to achieve attainment in all states to which a particular upwind state's emissions are linked. For example, the court found that Texas was "linked" to downwind nonattainment in only one area in Illinois, but that

emission controls costing only $100 per ton could alleviate this problem, while CSAPR imposed controls costing $500 per ton. Thus, on remand, EPA was directed to "consider cost thresholds below $500/ton and [EPA] must justify its final calculation consistent with the directions set forth by the Supreme Court [and the D.C. Circuit]." *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 at 16, nt. 6.

Additional Challenges to Transport Rule Rejected

The D.C. Circuit rejected several additional challenges to the rule that had remained pending during the Supreme Court's review. The court found that EPA properly issued federal implementation plans (FIPs) to implement the state budgets provided in CSAPR. It upheld EPA's procedure to impose the FIPs by correcting "errors" in state implementation plans (SIPs) that had been submitted to EPA for the Clean Air Interstate Rule (CAIR), and it upheld them even though the "corrections" were made through a rulemaking lacking notice and comment.

The court also declined to second-guess EPA's modeling decisions, which relied on pre-2007 emission data. The court considered EPA's approach to modeling future years reasonable and accepted that there could be "discrepancies" between model predictions and actual generation and emissions. The D.C. Circuit also determined that EPA's approach in CSAPR gave sufficient attention to the "maintenance" prong of Clean Air Act requirements on interstate transport (under which states must ensure that their emissions do not interfere with the attainment *or maintenance* of air quality standards in other states). Finally, the court declined to consider certain arguments that it considered to have been raised for the first time on remand from the Supreme Court.

Implications and Next Steps

In sum, EPA can continue to implement CSAPR for the foreseeable future, including imposing state emission budgets for SO2 and NOx that have now been ruled invalid. In the longer term, the D.C. Circuit has indicated that it "expect[s] and urge[s] EPA to move promptly on remand," warning that if this does not occur, petitioners may bring another action for failure to perform a non-discretionary duty. *Slip op*. at 24. In this regard, EPA would presumably be required to perform additional modeling analysis to conform CSAPR state budgets to the court's decision.

It should be noted, however, that EPA is also proceeding with analysis that will eventually result in additional "post-CSAPR" transport rules. In January, EPA issued a memorandum providing information to states concerning SIP requirements to address interstate transport with regard to the *2008* ozone national ambient air quality standards (NAAQS). CSAPR budgets, on the other hand, are based on the 1997 ozone NAAQS and on the 1997 and 2006 fine particulate NAAQS. Because EPA revised the fine particulate NAAQS in 2012 and is scheduled to revise the ozone NAAQS this October, the Agency could conceivably develop a different interstate transport rule that addresses the more recent NAAQS utilizing the methodology prescribed by the Supreme Court and D.C. Circuit.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas A. Lorenzen
Partner – Washington, D.C.
Phone: +1 202.624.2789
Email: tlorenzen@crowell.com

Robert Meyers
Partner – Washington, D.C.
Phone: +1 202.624.2967
Email: rmeyers@crowell.com