

3 Legal Attacks The Cross-State Air Pollution Rule May Face

By **Juan Carlos Rodriguez**

Law360, New York (September 12, 2016, 3:56 PM ET) -- The U.S. Environmental Protection Agency has bragged that its revised cross-state air pollution rule will help cut summertime nitrogen oxide emissions from power plants by 20 percent over last year's levels, but the rule — which has already been up to the U.S. Supreme Court once — is likely not out of the legal woods yet, experts say. Here, Law360 identifies three parts of the rule that could spark legal challenges from environmental groups, states and industry parties.

Originally finalized in 2011, the cross-state air pollution rule, or CSAPR, implemented 1997 ozone standards but was challenged and eventually struck down by the D.C. Circuit in 2012. The high court revived the rule in 2014, and the newly revised version incorporates 2008 ozone standards, adopting federal implementation plans to reduce nitrogen oxide, or NO_x, emissions from 22 states in the eastern half of the United States.

Despite its victory at the Supreme Court, the EPA may not be done litigating the rule, as environmentalists are already criticizing the rule as being insufficiently stringent. States and industry groups haven't spoken too loudly yet but may also challenge aspects of the rule.

Here are three hot spots to look for in potential CSAPR challenges:

Statewide Budgets

The Sierra Club criticized the final CSAPR soon after it was unveiled and said the EPA focuses on what can states do easily to reduce NO_x emissions, not what is necessary to do to reduce NO_x emissions to resolve ozone problems.

"The D.C. Circuit ... said that EPA has to resolve all interstate transport issues associated with 2008 ozone standards by 2018. EPA's fundamental approach, however, is not to figure out what reductions need to happen in emissions to make sure that that objective is achieved — it was instead to look at what could easily happen during that time period without requiring anybody to install new controls and then put that in the rule," said Zack Fabish, an attorney at the Sierra Club. "So there's a huge gap between what this rule does and what the Clean Air Act requires."

The EPA acknowledged its final rule gets fewer total emission reductions than was estimated in the proposed version, but said the changes still will be "meaningful." In the proposed version, the total emission budget for all 22 states was about 229,500 tons, and in the final version it is almost 316,000

tons.

"The rule was already not going to fully resolve the problem, and increasing the amount of emissions allowed is a step in the wrong direction," Fabish said.

But Thomas Lorenzen, a partner at Crowell & Moring LLP, said the emission budget still requires some significant reductions from current levels, and said some states and industry groups may find those goals to be very hard to reach.

"This rule impacts a lot of people. It still has assurance requirements that are difficult to comply with and that may make it impossible to comply with for some, and it's going to result in more expensive allowances," he said. "I expect there will be challenges on this from all sides."

Allowance Bank

Environmentalists have also taken issue with the EPA's decision to carry over about 100,000 emission credits — each credit equals a ton of emission — accumulated during 2015 and 2016, during the time period CSAPR was being revised.

According to the EPA, based on 2015 emissions data, there would have been approximately 350,000 banked allowances entering the ozone season trading program by the start of the 2017 ozone season control period. The agency said without a reduction, the number of banked allowances would increase the risk of emissions exceeding the CSAPR update emission budgets or assurance levels and would be large enough to let all affected sources emit up to the CSAPR update assurance levels for five consecutive ozone seasons.

Fabish said the EPA shouldn't have carried over any credits.

"Given that EPA thinks that the CSAPR update will only reduce emissions by about 80,000 tons per year, if you've got 100,000 credits baked in at the beginning, that means you won't see much in the way of reductions at all," he said.

Brendan Collins, a partner at Ballard Spahr LLP, said a court may be willing to look into the issue because it implicates both the approach EPA took and the rationales that EPA offered for its decision.

"It's an economic issue, a question of how power plants will change or not change their operations in response to this economic stimulus, and what the scope of that economic stimulus would be. And that's something a court would be more willing to entertain," he said.

Emission Reduction Estimates

In its final rule, the EPA revised its assumption of the reasonably achievable NO_x rate for units that control emissions with selective catalytic reduction — which chemically reduces NO_x molecules into nitrogen and water vapor — moving from an emission rate of 0.075 pounds per million British thermal unit in the proposed rule to 0.10 lbs/mmBtu in the final rule.

Lorenzen said environmentalists could challenge the selective catalytic reduction estimate revision, since it resulted in a weaker reduction goal overall, and that industry groups could argue the final number should have been even higher.

However, he said that would be a tricky area to litigate, because when EPA is setting specific numbers, they tend to get a lot of deference under case law that says the courts are at their most deferential where agencies are making technical and scientific judgments.

"EPA has to have record support for whatever their decision is. That requirement can be challenged by people on both sides of this rule," Lorenzen said.

And Collins said it seems like industry groups have put ample information in the administrative record that supported a higher emission rate.

"EPA was in a position of getting information that the rate they used was too low and could not be achieved by a lot of existing sources, and weighing against that the information that was provided by environmental and public health NGOs that says it's a good rate," Collins said. "This is a matter which is very much within the agency's expertise. So I don't think that's a very promising issue."

--Editing by Katherine Rautenberg and Rebecca Flanagan.