

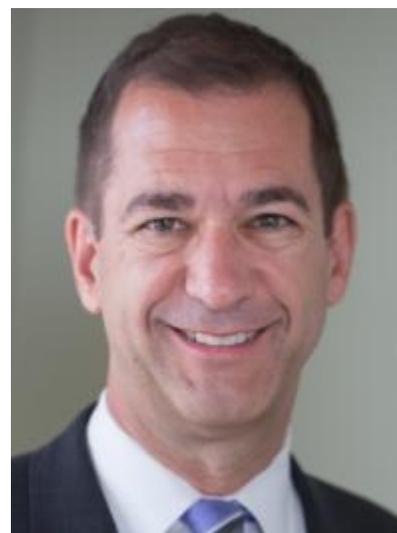
DC Circ.'s Rule Remand Won't Stop EPA On Air Emissions

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On July 28, 2015, a unanimous panel of the D.C. Circuit in *EME Homer City Generation LP v. U.S. Environmental Protection Agency* remanded the Cross-State Air Pollution Rule ("CSAPR") to the EPA after finding that the rule impermissibly overcontrolled sulfur dioxide and nitrogen oxide 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 NO_x 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 D.C. Circuit ruled that the 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.



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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 NO_x budgets remain in place and enforceable, and the program — which affects 27 states — will continue to be implemented while the EPA re-examines and revises those budgets. In this regard, the court appeared mindful that, following a judicial stay and years of litigation, the CSAPR was implemented by the EPA at the beginning of 2015.

The D.C. Circuit 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 the EPA's authority). Since the CSAPR 2014 emission budgets were previously "rolled forward" by three years following the U.S. Supreme Court's decision in *EPA v. EME Homer City Generation LP*, 134 S. Ct. 1584 (2014), the court's ruling can be interpreted to apply to "Phase 2" of the CSAPR, which is due to begin on Jan. 1, 2017. See 79 Fed. Reg. 71,633 (Dec. 3, 2014).

A State's Emission Budget 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 the 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 overcontrol, and specified that individual states could challenge the application of the budgets through "particularized, as-applied change[s]." *Id.* at 1609.

In the decision, Circuit Judge Brett Kavanaugh, writing for a panel that also included Circuit Judges Judith Rogers and Thomas 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 the CSAPR imposed controls costing \$500 per ton. Thus, on remand, the EPA was directed to "consider cost thresholds below \$500/ton and [the EPA] must justify its final calculation consistent with the directions set forth by the Supreme Court [and the D.C. Circuit]." See *EME Homer City Generation LP 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 the EPA properly issued federal implementation plans to implement the state budgets provided in the CSAPR. It upheld the EPA's procedure to impose the federal implementation plans by correcting "errors" in state implementation plans that had been submitted to the agency for the Clean Air Interstate Rule — the CSAPR's predecessor, which the D.C. Circuit ordered replaced in 2011 for problems arising from upwind pollution contributors — and it upheld them even though the "corrections" were made through a rule-making lacking notice and comment.

The D.C. Circuit also declined to second-guess the EPA's modeling decisions, which relied on pre-2007 emission data. The court considered the EPA's approach to modeling future years reasonable and accepted that there could be "discrepancies" between model predictions and actual generation and emissions. The court also determined that the 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, the EPA can continue to implement the CSAPR for the foreseeable future, including imposing state emission budgets for SO₂ and NO_x that have now been ruled invalid. In the longer term, the D.C. Circuit has indicated that it "expect[s] and urge[s] the EPA to move promptly on remand," warning that if this does not occur, petitioners may bring another action for failure to perform a nondiscretionary duty. *Slip op.* at 24. In this regard, the EPA would presumably be required to perform additional modeling analysis to conform the CSAPR state budgets to the court's decision.

It should be noted, however, that the EPA is also proceeding with analysis that will eventually result in additional "post-CSAPR" transport rules. In January, the EPA issued a memorandum providing information to states concerning state implementation plan requirements to address interstate transport with regard to the 2008 ozone national ambient air quality standards. CSAPR budgets, on the other hand, are based on the 1997 ozone NAAQS and on the 1997 and 2006 fine particulate NAAQS. Because the 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.

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