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The Supreme Court Upholds EPA's Cross-State Air Pollution Rule

Decision in* EME Homer City *upholds CSAPR, but additional legal challenges and EPA revisions may still significantly alter CSAPR and delay its implementation.

On Tuesday, April 29, the United States Supreme Court upheld EPA's Cross-State Air Pollution Rule (**CSAPR**) in a 6-2 decision.[1] The Court's ruling in *EPA v. EME Homer City Generation* follows a long and highly contentious regulatory process that included: EPA's development of a prior rule regulating interstate transport of air pollution, the Clean Air Interstate Rule (**CAIR**) in 2005; the U.S. Court of Appeals for the D.C. Circuit's (**D.C. Circuit**) rejection of CAIR in 2008; EPA's development of CSAPR as a replacement rule in 2011; and the D.C. Circuit's decision to vacate CSAPR in August 2012. The Supreme Court's decision on Tuesday overturns the D.C. Circuit's 2012 ruling and reinstates CSAPR. EPA has announced that CAIR will continue to remain in place pending EPA's review of the Court's recent holding.[2]

Overview of the Decision

The majority opinion in *EME Homer City*, authored by Justice Ruth Bader Ginsberg,[3] includes two key holdings: (1) EPA was not required to provide the States another opportunity to develop state implementation plans (**SIPs**) allocating in-state emissions of air pollutants after EPA set emissions budgets for the States in CSAPR and could proceed to issue a federal implementation plan (**FIP**) without States' input; and (2) EPA's decision to allocate emission reductions in upwind States on the basis of control costs rather than proportional contributions of pollution to downwind States was a reasonable interpretation of the Clean Air Act's Good Neighbor Provision and EPA's decision is therefore entitled to *Chevron* deference.[4]

Justice Antonin Scalia issued a vocal dissent,[5] arguing EPA was required to provide the States a meaningful opportunity to allocate air emission reductions within their own borders before issuing a FIP, and arguing the Good Neighbor Provision provided no basis for EPA's consideration of control costs, rather than proportional allocation.

Background

Cross-Border Emissions Regulation under Section 110 of the Clean Air Act

The Cross-State Air Pollution Rule regulates cross-border emissions of criteria air pollutants including sulfur dioxide (**SO_2**) and nitrogen oxides (**NO_X**), as well as their byproducts, fine particulates (**$PM_{2.5}$**) and ozone, under Section 110 of the Clean Air Act.[6] Section 110 of the Clean Air Act requires States to create SIPs[7] to limit emissions from sources that "contribute significantly" to noncompliance with primary and secondary National Ambient Air Quality Standards (**NAAQS**) for the criteria air pollutants.[8] If the ambient levels of criteria air pollutants are above the NAAQS threshold set by EPA, a region is considered to be in

"nonattainment" for that pollutant and EPA applies more stringent control standards for sources of air emissions located in the region. The Good Neighbor Provision, found in Section 110(a)(2)(D)(i) of the Clean Air Act, requires SIPs to contain adequate provisions to prohibit "any source or other types 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)(i).

CAIR

According to EPA, as the result of SO_2 and NO_x moving across state borders and breaking down into fine particulates and ozone, some downwind States have been in nonattainment for air pollutants despite their own measures to control these pollutants. EPA claimed that these cross-border impacts were caused, in part, by upwind States that were not implementing adequate measures to reduce emissions. In 2005, EPA addressed interstate transport of air pollution with CAIR, which regulated NOx and SO_2 emissions, and created a market for trading emission credits. EPA permitted the States to develop SIPs in response to proposed allocations under CAIR. In 2008, the D.C. Circuit rejected CAIR, in part, on the basis of the Court's findings that EPA had failed to establish links between air pollution in upwind States and nonattainment with NAAQS in downwind States.[9] The Court left CAIR temporarily in place, but instructed EPA to "redo its analysis from the ground up."[10]

CSAPR

EPA issued CSAPR as a replacement rule in 2011. CSAPR regulates interstate transport of SO_2 and NO_x and $PM_{2.5}$ in 28 Eastern states. EPA used a two-step approach to allocate interstate emission reductions under CSAPR. First, EPA used a screening analysis to eliminate any upwind State that contributed less than one percent of the NAAQS for SO_2 and NO_x and $PM_{2.5}$ to downwind receptor States. If the upwind State contributed less than one percent of the NAAQS to all downwind States, EPA determined that the State had not "contributed significantly" to interstate pollution and was not subject to the Good Neighbor Provision. Second, EPA generated a "cost-effective" allocation of emissions reductions based on the cost per ton of reducing emissions. Finally, after compiling these data points, EPA created a budget or allocation of SO_2 and NO_X emissions for each source in the upwind States and issued a FIP. EPA did not permit the States an opportunity, as it had done under CAIR, to issue SIPs in response to EPA's emission allocations.

EPA's allocations depend wholly on emission reductions from electrical generating units (**EGUs**).[11] No other emitting sources were targeted. In the final version of CSAPR, EPA allocated emissions at sources on the basis of heat input, rather than just the cost-effectiveness of reductions, allegedly resulting in some sources receiving more emission allowances than they needed, and others falling far short of the allocations needed to continue operating.

CSAPR also establishes a market for trading SO_2 and NO_x emission allowances. Facilities are permitted to trade emission allowances with other sources in the same state. Interstate trading is also permitted, but is subject to significant limitations, including a cap on the amounts of emission credits that can be traded with out-of-state sources.[12] The first phase of the emissions trading program began in January 2012, with the second phase slated to start in January 2014.

Vacatur of CSAPR

In August 2012, in a split 2-1 decision, the D.C. Circuit vacated CSAPR on two independent grounds:[13] (1) EPA could only require States to reduce their significant contributions to downwind States and could not consider costs in allocating emission reductions under CSAPR; and (2) EPA was required to provide States a reasonable opportunity to review EPA's proposed allocation of emissions and develop SIPs prior

to EPA issuing a FIP implementing CSAPR. The prices of NO_x and SO_2 emission allowances dropped precipitously following the D.C. Circuit's decision.[14] Following CSAPR's vacatur, EPA reinstated the CAIR program on a temporary basis. EPA and the American Lung Association appealed the D.C. Circuit's decision and the Supreme Court granted certiorari on June 24, 2013.

The Supreme Court's Decision

EPA Did Not Have to Provide States Another Opportunity to Promulgate SIPs

In the first of its two key holdings, the Supreme Court reversed the D.C. Circuit's decision that EPA was required to provide the States an opportunity to develop SIPs and allocate emission reductions within their own borders after EPA developed state emissions budgets for air pollutants under CSAPR. The Supreme Court held that EPA was not required under the plain language of Section 110 of the Clean Air Act, to give the States an opportunity to review EPA's emissions budgets for the States and issue new SIPs prior to EPA issuing a FIP.

The Supreme Court held that Section 110 included no requirement that EPA provide the States another opportunity to develop a SIP after EPA rejected the initial SIP. Section 110 allows EPA to issue a FIP "at any time" within two years after it rejects the SIP. Nothing in Section 110 of the Act "places EPA under an obligation to provide specific metrics to States before they undertake to fulfill their good neighbor obligations." *Id*. at 17. Justice Scalia's dissent, echoing the D.C. Circuit's opinion, criticized EPA's approach as inconsistent with the principles of cooperative federalism and EPA's past practice with the NO_x SIP call[15] and CAIR.[16]

The majority acknowledged that EPA did provide the States an opportunity to review their emissions budgets prior to finalizing their SIPs under the NO_x SIP call and CAIR, but EPA was under no similar obligation to do so again when it issued CSAPR: "Whatever pattern the Agency followed in its NO_x SIP call and CAIR proceedings, EPA retained discretion to alter its course provided it gave a reasonable explanation for doing so." *Id.* at 17. In this case, EPA decided to act "expeditiously" because CAIR had been invalidated by the D.C. Circuit and EPA decided it was "inappropriate" for the Agency to undertake the "lengthy transition period" required for States to propose new or amended SIPs addressing EPA's CSAPR emissions budgets.

EPA's Decision to Allocate Emissions Using Cost is Entitled to *Chevron* Deference

The Supreme Court then turned to EPA's decision to allocate emissions among the States, not based on proportional contributions to air pollution, but based on the relative costs of reducing air pollution. Citing the *Chevron* case,[17] the Court held that because Congress had been silent on allocating emission reductions under the Good Neighbor Provision and EPA's cost allocation approach to apportionment was reasonable, EPA's approach should be afforded administrative deference and upheld.

The majority described EPA's task under Section 110 of the Act as a difficult one: "How should EPA allocate among multiple contributing upwind States responsibility for a downwind State's excess pollution?" *Id*. at 21. While the Good Neighbor Provision prohibits only those emissions from upwind States that "contribute significantly" to downwind attainment with the NAAQS, EPA had to determine what quantity of emissions should be reduced from each contributing State. EPA's solution to this problem was first to screen out any State that contributed less than one percent of the relevant NAAQS in a nonattainment, downwind State. For the States not screened out, EPA then determined which "amounts" of air pollution could be cost-effectively reduced. The Supreme Court held that EPA's methodology was an "efficient and equitable solution" to the excess emissions problem because it reduced the overall costs

of compliance with CSAPR and "subjects to stricter regulation those States that have done relatively less in the past to control their pollution." *Id*. at 27.

The Court rejected the respondents' arguments, the D.C. Circuit, and the dissenting Justices, that EPA could not consider costs in determining which emissions should be reduced because costs were not mentioned in the Good Neighbor Provision. The Court also rejected the argument that the Good Neighbor Provision required EPA to allocate responsibility for reducing emissions in "a manner proportional to each State's contribution to the problem." *Id.* at 22. In the Court's words, "Nothing in the text of the Good Neighbor Provision propels EPA down this path." *Id.* at 23. Indeed, according to the Court, the D.C. Circuit's "proportionality edict" does not work "mathematically" or "in practical application." *Id.* at 23. Finally, the Court rejected respondents' concerns that EPA's cost-allocation approach could lead to over-control of emissions in upwind States.[18] However, the Court left open the possibility that States falling below EPA's one percent threshold for control might bring individual challenges to the application of CSAPR.

Dissent

Justice Scalia's dissent, which he read in part from the bench, rebuked the majority opinion. The dissent began with a sharp jab at EPA and the Obama Administration: "Too many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress." Slip Op., Dissent at 1. Contrary to the majority's holding, Justice Scalia argued that there was no gap in the Good Neighbor Provision that permitted EPA to consider costs and that the majority had essentially approved EPA's "undemocratic revision of the Clean Air Act." *Id.* at 2. Justice Scalia expressed concern that the majority did not address EPA's primary argument that the phrase "significantly" in the statute was ambiguous and could be interpreted to allow EPA to consider costs. Instead, the majority relied on an "imaginary gap" in the Good Neighbor Provision to sanction EPA's cost allocation approach. *Id.* at 7.

The dissent also agreed with the D.C. Circuit that Section 110 of the Clean Air Act could only be interpreted to require the proportional reduction of air pollution from upwind States. There was no ambiguity or gap in the statute that allowed cost considerations. Congress could have, as it has done with many other environmental statutes, required EPA to consider costs, but Congress chose not to include such language. Justice Scalia disagreed that a proportional-reduction approach was impossible to apply. If it was impossible to apply, EPA must let the law fail: "I know of no legal authority that and no democratic principle that would derive from it the consequence that EPA could rewrite the statute, rather than the consequence that the statute would be inoperative." *Id.* at 7. Finally, as noted above, Justice Scalia criticized EPA's decision to abandon the principle of "cooperative federalism" and issue a FIP without providing the States "a meaningful opportunity to allocate reduction responsibilities among the sources within their borders." *Id.* at 15.

Implications of Decision

While the Supreme Court's decision upholding CSAPR represents a significant victory for EPA, the implications of the Court's ruling for regulating interstate transport of air pollution remain somewhat unclear.[19] The *EME Homer City* case will be remanded to the D.C. Circuit. The D.C. Circuit may request supplemental briefing and review additional challenges to CSAPR that were not considered in its initial decision setting aside the rule (and therefore not reviewed by the Supreme Court). If CSAPR remains in place, clarifications will be required — possibly in the form of new rulemakings — in light of the deadlines in the rule for implementing the rule's NO_x and SO_2 trading programs that passed while the rule was under review by the D.C. Circuit and Supreme Court. EPA may also significantly revise its emissions allocations in light of major changes in emissions following recent large-scale conversions of coal-fired

EGUs to natural gas, improvements in available emission control technologies, and EPA's pending release of a new NAAQS for ozone — although EPA may not be inclined to do so.

The Supreme Court's decision allowing EPA to dismiss SIPs and issue a FIP on the basis of requirements in CSAPR not yet announced and not subject to public notice or comment, may represent a dramatic shift away from the principles of cooperative federalism engrained in the Clean Air Act.[20] While the Court's decision may be interpreted as a limited exception[21] to the normal SIP process in which States have an opportunity to work with EPA to implement Clean Air Act standards, the decision may also be interpreted as recognizing EPA's virtually unfettered authority to deny a SIP and impose air regulations on its own. Several challenges to EPA's SIP disapprovals under CSAPR are still pending following their stay during the Supreme Court's review of the *EME Homer City* case. These cases will now be heard[22] and could limit EPA's authority to regulate under CSAPR without the input of the States. The outcome of these cases and others will almost certainly have a significant impact on CSAPR and its implementation.

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Endnotes

[1] *EPA v. EME Homer City Generation*, No. 12-1182, Slip op. (April 29, 2014).

[2] U.S. Environmental Protection Agency, Interstate Air Pollution Transport, *available at* http://www.epa.gov/airtransport/ ("At this time, CAIR remains in place and no immediate action from States or affected sources is expected.") (last visited May 2, 2014).

[3] Chief Justice John Roberts and Justices Anthony Kennedy, Stephen Breyer, Sonia Sotomayor, and Elena Kagan joined the majority opinion.

[4] The Court also rejected a jurisdictional challenge EPA brought relating to respondents' comments on CSAPR. *EME Homer City*, at 18-19.

[5] Justice Clarence Thomas joined the dissent. Justice Samuel Alito recused himself from the case.

[6] Six additional States – Iowa, Kansas, Michigan, Missouri, Oklahoma and Wisconsin — are required to make additional reductions in NO_X emissions during the summertime (ozone season) under CSAPR.

[7] Under Section 110 of the Act, if a State does not implement an acceptable control plan to comply with the NAAQS within three years, EPA must promulgate a FIP for the State within the next two years.

[8] Criteria air pollutants include lead, particulate matter (PM), ozone, sulfur dioxide, nitrogen oxides, and carbon monoxide.

[9] *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).

[10] *Id.* at 929.

[11] Facilities may reduce emissions by burning low sulfur coal, increasing generation at more efficient units, or by installing control technologies including low NO_X burners, scrubbers (flue gas desulfurization), or dry sorbent injection systems.

[12] Limitations on interstate trading in CSAPR resulted in a highly inefficient emissions trading market in which sources left short on emission credits were required to buy allowances from competitors with few incentives to sell them, or curtail generation.

[13] 15 of the 28 States subject to regulation under CSAPR challenged the Rule. Coral Davenport, *Justices Back Rule Limiting Coal Pollution*, NY Times, April 29, 2014, *available at* http://www.nytimes.com/2014/04/30/us/politics/supreme-court-backs-epa-coal-pollution-rules.html.

[14] Following the D.C. Circuit's decision striking down CSAPR, prices dropped precipitously in allowance trading markets, falling from $150-$275/ton for Group 1 SO_2 allowances and $150-$300/ton for Group 2 SO_2 allowances to $10-$50/ton after the decision was announced.

[15] EPA finalized the NO_x SIP Call rule in September 1998, which required 22 States and the District of Columbia to submit SIPs that addressed regional transport of ground-level ozone. The rule required the States to put NO_x emission reduction measures into place by May 1, 2003. U.S. Environmental Protection Agency, Technology Transfer Network, NAAQS Ozone Implementation, *available at* http://www.epa.gov/ttn/naaqs/ozone/rto/sip/ (last accessed May 1, 2014).

[16] The D.C. Circuit previously held that EPA essentially "set the States up to fail" by failing to provide them with the emissions budgets prior to review of their initial SIPs and the Agency was required to provide the States with a "reasonable" period of time to review the budgets and propose implementation of the rule. *EME v. Homer City Generation*, 696 F.3d 7, 36-37 (D.C. Cir. 2012) (rev'd and remanded).

[17] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[18] The Court held that some "incidental" over-control might be necessary because EPA has a mandate to achieve attainment in every downwind state. Respondents identified few examples of potentially unnecessary emissions reductions and EPA was entitled to some leeway in fulfilling its statutory mandate. *EME Homer City*, at 31.

[19] Combined with existing state and EPA rules, EPA estimates CSAPR requires power plants in 23 States covered by the rule to reduce SO_2 emissions by 73 percent and NO_X emissions by 54 percent from 2005 levels. U.S. Environmental Protection Agency, EPA Fact Sheet, *available at* http://www.epa.gov/airtransport/CSAPR/pdfs/CSAPRFactsheet.pdf (last visited April 30, 2014).

[20] *See Michigan v. EPA*, 268 F.3d 1075, 1078 (D.C. Cir. 2001) (describing the Clean Air Act as an "experiment in federalism.").

[21] The Supreme Court indicated that immediate issuance of the FIP was reasonable in these circumstances given the D.C. Circuit's vacatur of CAIR and EPA's desire to avoid a lengthy delay in issuing a new rule. *EME Homer City*, at 18.

[22] Indeed, the Supreme Court specifically left open these avenues for individual sources and States to bring particularized challenges to CSAPR. *Id.* at 31.