

DC Circuit Vacates and Remands the Cross-State Air Pollution Rule

On August 21, 2012, the US Court of Appeals for the DC Circuit in a 2-1 ruling vacated the Cross-State Air Pollution Rule (“Transport Rule”) because it exceeded EPA’s statutory authority. As the name suggests, the Transport Rule was designed to control air pollution from 28 power-producing states that effects air quality in downwind states. Under the Clean Air Act, the federal government sets air quality standards (NAAQS) to protect public health and then states submit State Implementation Plans (SIPs) to impose controls that will achieve those standards. At issue here was a “good neighbor” provision that requires states to prohibit emissions that “contribute significantly” to air quality problems in other states. The Transport Rule was designed to implement the good neighbor requirement and replace the Clean Air Interstate Rule (CAIR), which was invalidated in 2008.

In vacating the Transport Rule, the court held that EPA exceeded its statutory authority in two separate ways. First, the Transport Rule required “massive” emissions reductions from upwind states without regard to the amount or proportion of a state’s contribution to downwind nonattainment. Second, EPA overstepped its role by implementing the Transport Rule in a way that prevented state control determinations. These findings have significant ramifications, both on EPA’s efforts to replace the Transport Rule and beyond.

Overregulation by EPA

As the first basis for vacating the Transport Rule, the court found that EPA’s methodology required upwind states to reduce emissions by more than their “fair share.” The court explained that “the collective burden must be allocated among the upwind States in proportion to the size of their contributions to the downwind State’s nonattainment. Otherwise, EPA would violate the statute ...” Further, the statute is not a “blank check,” or a “free-standing tool” for EPA to seek air quality reductions to levels well below the NAAQS.

EPA performed a two-step evaluation to qualify each state’s obligations under the good neighbor provision. EPA first determined whether a state emits amounts that will contribute significantly to a downwind state’s nonattainment of the NAAQS. While that modeling-based evaluation primarily determined whether a given state contributed to downwind nonattainment elsewhere, it also indicated the relative amount of that contribution as compared to other upwind states. EPA then determined how much pollution reduction could be achieved within a given cost-per-ton threshold. That evaluation was then used to set an emissions budget for each contributing state during 2012, 2013, and 2014. Additionally, EPA created an interstate trading program to allow states to buy and sell “allowances” so that sources can meet the budgetary limits.

As the court noted, “by using a numerical threshold at the initial stage – and thereby creating a floor below which ‘amounts’ of downwind pollution were not significant – EPA defined the ‘mark.’ EPA could not then ignore that mark and redefine each State’s ‘significant contribution’ in such a way that an upwind State’s required reductions could be more than its own significant contribution to a downwind State.” The court also found that the rule runs afoul of the statute’s proportionality requirement: EPA has “no authority to force an upwind state to share the burden of reducing other upwind states’ emissions.” Finally, the court found that EPA also failed to ensure that the collective obligations of upwind states, when aggregated, did not unnecessarily over-control emissions.

Overstepping EPA's Role

In a scathing analysis, the court held that EPA disregarded the states' primary role in implementing air quality determinations. Specifically, it criticized EPA's decision to issue Federal Implementation Plans (FIPs) before giving the states an initial opportunity to develop their own plans to implement the good neighbor provisions. Under the Clean Air Act, EPA is authorized to establish the standards to be met, but states retain the right to develop the strategy for meeting the standard within their borders. The issue, as stated by the court, was whether a SIP can be deficient even before EPA quantifies the nature of the state's underlying obligation. EPA contended that the statute required a "FIP-first" approach and that states had long been on notice of their SIP obligations.

The court rejected that approach explaining that "EPA pursues its reading of the statutory text down the rabbit hole to a wonderland where EPA defines the target after the States' chance to comply with the target has already passed." The court found a key distinguishing feature in the fact that the good neighbor provision does not provide for a clear numerical target for states to meet, describing EPA's position as essentially asking states to take a "stab in the dark."

What Happens Next?

One immediate question is whether the DC Circuit's decision will stand. The decision was not unanimous and included a 44 page dissent that sharply attacked the majority's reasoning. Judge Rodgers called the majority's decision a "redesign of Congress's vision of cooperative federalism ... based on the court's own notions of absurdity and logic that are unsupported by a factual record, a trampling on this court's precedent on which [EPA] was entitled to rely." This vocal dissent may well entice EPA to seek rehearing of the case or appeal to the US Supreme Court. Moreover, environmental groups have already been quoted as throwing their support behind a potential appeal.

Another key impact is the court's decision to allow CAIR to remain in place, thereby indeterminately extending the life of a rule deemed invalid in 2008. Despite its "fundamental flaws," the court found that preserving CAIR on an interim basis "would at least temporarily preserve the environmental values covered by CAIR." The court hinted at the implications of this tortured rulemaking, stating that "[v]acating CAIR now would have ... consequences that ... indeed might be more severe now, in light of the reliance interests accumulated over the intervening four years."

Finally, this decision will have a ripple effect on many other EPA rules. EPA recently determined that states could use the Transport Rule to satisfy regional haze requirements for electric generating units rather than by installing Best Available Retrofit Technology (BART). In so doing, EPA told states it could not fully approve regional haze SIPs relying on the temporary reductions from CAIR. Approvable regional haze SIPs may now require source-specific BART determinations for electric generating units. EPA also relied on the Transport Rule to support attainment designations for the ozone and PM2.5 NAAQS in several areas of the country, which may now be vulnerable to challenge.

For additional information regarding the decision, please contact one of the Squire Sanders lawyers listed in this Alert or one of the Squire Sanders lawyers with whom you routinely work.

Contact

Karen A. Winters
+1 614 365 2750
karen.winters@squiresanders.com

Allen A. Kacenjar, Jr.
+1 216 479 8296
allen.kacenjar@squiresanders.com

Katy M. Franz
+1 216 479 8368
katy.franz@squiresanders.com

Doug McWilliams
+1 216 479 8332
douglas.mcwilliams@squiresanders.com

Gary L. Pasheilich
+1 614 365 2730
gary.pasheilich@squiresanders.com