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Strike Two on Interstate Air Pollution: DC Circuit Vacates CSAPR

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On August 21, 2012, the US Court of Appeals for the DC Circuit, in a 2-1 ruling, issued a critical rebuke of US EPA's "Transport" or Cross-State Air Pollution Rule (CSAPR). See *EME Homer City Generation, L.P. v. US EPA, et al.*, Case No. 11-1302 (August 21, 2012). The court found that CSAPR exceeded the agency's statutory authority under the Clean Air Act (CAA). The CAA requires that emissions from one state must not "contribute significantly" to any other state's inability to meet air quality standards. The CSAPR was adopted by US EPA in an effort to control air pollution that travels across state boundaries. The rule was a replacement for the Clean Air Interstate Rule (CAIR), a previous rule addressing interstate transport of air pollution that was remanded to US EPA in 2008. *See N.C. v. EPA*, 531 F.3d 896 (D.C. Cir. 2008). The CSAPR would have required significant emission reductions from power-producing states, including reduction of sulfur dioxide emissions from 2005 levels by 73 percent and nitrogen oxide by 54 percent at coal-fired power plants.

CSAPR's adoption, however, sparked numerous petitions for review from upwind states, local governments and various industry and labor groups, while several downwind states and environmental groups intervened on US EPA's behalf. In vacating CSAPR, the DC Circuit determined that the rule exceeds the agency's statutory authority in two independent respects: 1) CSAPR requires "massive" emissions reductions from upwind states without regard to the amount or proportion of a state's contribution to downwind nonattainment, and 2) CSAPR violates the principle of cooperative federalism between the states and US EPA.

Proportionality

US EPA's methodology required upwind states to reduce emissions by more than their "fair share." However, under the CAA, "the collective burden must be allocated among the upwind states in proportion to the size of their contributions to the downwind state's nonattainment." Thus, the DC Circuit found that the CAA is not a "blank check," nor a "free-standing tool" for US EPA to seek reductions to levels well below the national air quality standards. Instead, the court held that US EPA has "no authority to force an upwind state to share the burden of reducing other upwind states' emissions." Further, US EPA must ensure that the collective obligations of upwind states, when aggregated, do not unnecessarily over-control emissions either.

Cooperative Federalism

US EPA also violated federalism principles by issuing Federal Implementation Plans (FIPs) before giving states an opportunity to develop their own plans to implement the CSAPR requirements. Thus, the FIPs disregarded the states' primary role in implementing air quality determinations under the CAA, where US EPA is authorized to establish the standards, but states retain the right to develop the strategy for meeting them within their borders.

In its rebuke, the court also found that US EPA failed to first establish a numeric standard under the CSAPR before mandating with the FIPs how states were to achieve reductions – a factor that was

key to the DC Court's rejection of US EPA's approach. Instead, the DC Circuit declined to follow US EPA's argument "down the rabbit hole to a wonderland where EPA defines the target after the states' chance to comply with the target has already passed."

Implications

The immediate question is whether the DC Circuit's decision will stand. The decision was not unanimous and included a 44-page dissent that called the majority's decision a "redesign of Congress's vision of cooperative federalism." In fact, based largely upon the objections framed in the dissent, US EPA filed a petition for rehearing on October 5, 2012 seeking to reinstate the rule.

Until the rehearing is decided, however, the court's decision allows CAIR to remain in place, thereby 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." If the rule is not reinstated on appeal, US EPA has work to do and will be obligated to go back to the drawing board and develop a new rule. That is no simple matter and would likely take years, even before the time necessary for full notice-and-comment period. Further, given US EPA's failed attempts at both CAIR and CSAPR, it is unclear whether US EPA would stay the course in terms of its market-based trading approach, or revert to a more traditional command-and-control approach. Many factors may influence this decision not the least of which may be a potential shift in the political landscape after November.

However, one thing is certain: this decision will have a ripple-effect on many other US EPA rules. One example is in the Regional Haze Program, where US EPA just recently determined that states could use CSAPR to satisfy regional haze requirements through emissions trading rather than by installing Best Available Retrofit Technology (BART). For many affected states, US EPA also engaged in a FIP process strikingly similar to that criticized in the decision. Another example is US EPA's use of the rule to support attainment redesignations for the ozone and PM2.5 NAAQS in several areas of the country. It is unclear whether these designations will stand in the wake of the DC Circuit's decision. The battle on this front is already underway in the Third and Eighth Circuits, where both parties are challenging US EPA's approval of state regional haze plans that rely on CSAPR.

Arizona State Trust Lands Lack Federally Reserved Water Rights

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In a unanimous decision on September 12, 2012, the Arizona Supreme Court ruled that the state of Arizona could not claim federal reserved water rights on its "State Trust Lands." *In Re General Adjudication,* Case No. WC-11-0001-IR (September 12, 2012). This decision helps to resolve a very significant source of uncertainty with regard to water rights in Arizona, as the claims that could have been brought by the state under a reserved rights theory could have disrupted the water rights of tens of thousands of other public and private claimants. Federal reserved rights claims brought by Native American tribes, US federal parks and preserves, and other federal reservations have been a major factor in ongoing water rights adjudications throughout the Western US and, as such, this decision will have major significance in other Western states as well.

The federal reserved water rights doctrine (commonly known as the "Winters Doctrine") was first recognized in *Winters v. U.S.,* 207 U.S. 564 (1908). In *Winters*, the US Supreme Court found that while Congress had not explicitly reserved water rights for an Indian reservation, the reservation of those water rights was implied by Congress because they were necessary to sustain the reservation community. The Court later applied the doctrine to other federal lands, and in *Cappaert v. U. S.,* 426 U.S. 128 (1976), the Court explained that a federal reservation of water rights requires that the land must have been withdrawn from the public domain and reserved for a public purpose, with an

intention that appurtenant, unappropriated water was to be reserved for that public purpose.

Arizona acquired more than 10.5 million acres of land from the federal government upon statehood, pursuant to the Arizona-New Mexico Enabling Act of 1910 (Enabling Act), for the express purpose of supporting various public institutions including the public school system. As in most other Western states, these State Trust Lands are now held in trust by the state and are managed and disposed of for the benefit of those institutions. Relying on the logic of *Winters*, *Cappaert* and other federal reserved rights cases, the Arizona State Land Department had long argued in the *Gila River* and *Little Colorado River* adjudications that by virtue of the nature of this land grant, State Trust Lands qualified as a federal withdrawal or reservation serving a federal purpose of providing income for public schools and other public institutions.

Had this argument been upheld, the Arizona State Land Department could potentially have claimed millions of acre-feet worth of reserved surface water and/or groundwater rights throughout Arizona, giving its lands a priority for access to water for farming, ranching, industry and future development dating back 100 years or more. As such, federally reserved water rights would give State Trust Lands throughout the state – even where such lands were remote or previously undeveloped – considerably more value than similarly situated lands held by non-federal claimants that are required to prove up rights to water under the state's regular prior appropriations system.

In its decision, the Arizona Supreme Court indicated that it was not persuaded by the state's application of the facts to the *Cappaert* test. First, the court found that State Trust Lands were never withdrawn from the public domain due to the fact that withdrawal would have prohibited the federal government from conveying the lands to the state in the first place. Second, the court found that the federal government did not reserve those lands for a federal purpose of funding specific public institutions; rather, the court noted that while funding public institutions is a noble endeavor that serves the public interest, it does not rise to the level of a federal purpose. The court went on to point out that even though the federal government retains some oversight of the State Trust Lands for the purpose of enforcing trust obligations on the state, it does not have authority to make policy and management decisions over the State Trust Lands, much less retain any ownership rights. And in any case, said the court, Congress could have explicitly withdrawn and reserved the State Trust Lands for a federal purpose but chose not to. The court concluded that there was no evidence that Congress had ever intended to reserve water rights for the State Trust Lands and, in fact, chose to compensate Arizona for the "relatively low value" of the land by granting additional land, not by reserving federal water rights.

For Arizona, this decision confirms that the state must rely on the regular prior appropriations doctrine under state law to prove up water rights on State Trust Lands in the two glacially paced water rights adjudications in Arizona. It also opens the door to water rights claims on State Trust Lands being deemed invalid due to non-use. While the decision is clearly not what the state was hoping for, it should assist the state in planning for future dispositions of State Trust Lands and help guide the acquisition of alternative water sources to serve State Trust Lands that have uncertain water rights claims. For other parties, it's one less senior priority water right holder to be concerned with.

Courts Continue to Narrow Options for Bringing Greenhouse Gas-Related Nuisance Claims

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Plaintiffs seeking to impose civil liability on major emitters of greenhouse gases have been pressing their claims under the rubric of common law nuisance over the last several years. While the results of these efforts were initially mixed, the last two years have seen the tide clearly turn against such nuisance theories.

The first and only case to reach the US Supreme Court was *American Electric Power Company, Inc. v. Connecticut*, 131 S.Ct. 2527 (2011), which dealt a decisive blow to the plaintiffs' theory of relief, finding that the Clean Air Act (CAA) had displaced the federal common law of nuisance with respect to climate change claims for injunctive relief. But the Court's opinion left the door open for subsequent plaintiffs to argue that their claims were distinguishable based on either the relief requested (damages versus injunctive relief) or on the source of the rights being enforced (federal common law versus state common law claims). Since *American Electric,* however, neither distinction has found much success.

The argument that *American Electric* could be distinguished based on the nature of the relief sought was rejected by the Ninth Circuit this September in *Native Village of Kivalina v. Exxon Mobil Corp.*, 2012 U.S. App. LEXIS 19870; 42 ELR 20195 (9th Cir. 2012). In that case, a city and other plaintiffs sued several oil and power companies under the federal common law of public nuisance for damages allegedly caused by the reduction of sea ice due to global climate change that had shielded the city from flooding and erosion. Plaintiffs argued that, while federal injunctive relief was displaced by the CAA under the *American Electric* decision, a gap remained for federal common law to fill with respect to private injuries caused by global climate change because the CAA did not provide for private damages suits. The Ninth Circuit rejected the argument, finding that prior Supreme Court precedent demonstrated that "the remedy asserted is not relevant to the applicability of the doctrine of displacement." As a result, *American Electric* constituted "direct Supreme Court guidance" that the plaintiffs' federal common law nuisance claims, regardless of whether they sought damages or injunctive relief, were displaced by the CAA.

Plaintiffs may still petition for *certiorari* and the Ninth Circuit is the only circuit court to have addressed this issue at the present time; but barring review and reversal by the US Supreme Court or an *en banc* review by the Ninth Circuit, however,[1] it is likely that plaintiffs will turn their attention to state common law actions rather than continue to pursue federal common law claims in light of the *American Electric* and *Kivalina* decisions.

However, with regard to such state law nuisance theories, plaintiffs have also suffered a two significant defeats this year, in *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012) and *Bell v. Cheswick Generating Station*, 2012 U.S. Dist. LEXIS 147232 (W.D. Pa. October 12, 2012). In *Comer*, the plaintiffs filed a class action alleging that the defendant oil, coal, chemical and utility companies had injured the plaintiffs by emitting greenhouse gases that contributed to global warming, which in turn contributed to the ferocity of Hurricane Katrina. The case had originally been filed in 2005, where it was dismissed by the district court on justiciability grounds. This dismissal was reversed by the Fifth Circuit, but due to a procedural quirk the panel decision was vacated and plaintiffs were left with no further recourse in the courts of appeals. The plaintiffs then returned to the district court, refilling the current action, which the district court again dismissed, this time on grounds of *res judicata*, lack of standing, lack of justiciability, statute of limitations and, most notably, displacement of the plaintiffs' federal claims and preemption of the plaintiffs' state law nuisance claims by the CAA. That decision has been appealed and is now before the Fifth Circuit. In *Bell*, the plaintiffs sought to bring a class action on behalf of people living or owning property within one mile of the defendant's coal-fired power plant. The plaintiffs sought damages under state common law theories of nuisance, negligence, trespass and strict liability for odors, coal dust and fly ash deposits that the plaintiffs alleged were the result of either improper design or improper operation of the facility. The Western District of Pennsylvania dismissed the plaintiffs' complaint, finding the plaintiffs' claims preempted by the CAA and the regulations and permits that governed the defendant's facility.

While plaintiffs initially gained some acceptance of the potential for a federal common law of public nuisance addressing greenhouse gas emissions in both the Second and Fifth Circuits, those decisions have since been vacated. Combined with the recent decisions in *Kivalina* in the Ninth

[1] The plaintiffs have filed a petition for review *en banc*. At the time of printing the briefing of this petition is still ongoing.

Circuit, and *Comer* and *Bell* at the district court level, plaintiffs have now raised and lost the two key questions left open by *American Electric*. With the appeals process still ongoing in two of these cases, and an appeal possible in the third, it will likely be some time yet before the future of greenhouse gas nuisance litigation become clear. Nonetheless, such recent decisions represent a turn in the tide.

Sue and Settle: US EPA's Questionable Approach to CAA Rulemaking

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In recent years many advocates, including the US Chamber of Commerce and the US House of Representatives, have raised concerns about a rulemaking tactic of US EPA, known colloquially as "sue and settle" rulemaking. Sue and settle concerns arise under the Clean Air Act (CAA) when an environmental group files suit against US EPA, but rather than defend the suit US EPA agrees as part of a negotiated settlement to expedited deadlines for rule or plan development. Thus, the deal reached by the US EPA and the environmentalists often undercuts meaningful opportunities to develop and present evidence supporting a competing viewpoint on substantive issues during the rulemaking process. While the court overseeing the settlement has a responsibility to consider the effect the settlement may have on the public interest, if other viewpoints are not represented in the deadline case, the court may approve and enter the settlement with little consideration of affected business interests. Thus, US EPA has used sue and settle consent decree deadlines to justify imposing federal action in state-delegated domains, shortening rulemaking comment periods and denying extensions of time to develop data in support business interests. Based on our recent experience, these sue and settle tactics are adversely affecting informed and balanced rulemaking under the CAA.

The sue and settle tactic has been most notably used in the context of Regional Haze regulation.[2] Under the CAA, states are provided primary authority to define Regional Haze emissions limits and retrofit controls for the sources located within their borders. US EPA promulgated regulations to guide state efforts, but those regulations were effectively challenged. States waited for US EPA to promulgate lawful rules to provide guidance on the development of acceptable regional haze state implementation plans (SIPs). In the meantime, however, environmental organizations sued US EPA for missing its statutory deadline to approve regional haze SIPs in 34 states. US EPA entered into a consent decree with environmental petitioners agreeing to aggressive deadlines by which the agency was required to accept or reject SIPs or promulgate federal implementation plans (FIPs) to supplant the state action. Approvable SIPs were developed and presented in many states, but faced with the court-ordered deadline US EPA chose to bypass the SIP process and propose FIPs as an expedited path to impose US EPA's more aggressive and more expensive Regional Haze solutions. Absent the consent decree deadline, US EPA would be hard pressed to justify this circumvention of the Regional Haze provisions of the CAA, which unquestionably delegate primary responsibility to the states for developing and implementing Regional Haze plans. Courts will ultimately decide whether this is a proper exercise of federal authority.

A clear example of this occurred with regard to the Regional Haze FIP for the taconite industry in Minnesota and Michigan. After investing resources and thousands of staff hours on development of a SIP in Minnesota, the state was understandably frustrated when US EPA imposed a FIP on its

[2] *See, e.g., Nat'l Parks Conservation Ass'n v. Jackson*, No. 1:11-CV-01548(ABJ) (D.D.C., 2011); *Sierra Club v. Jackson*, No. 1:10-CV-02112-JEB (D.D.C., 2010); *Wildearth Guardians v. Jackson*, No. 1-11-CV-0001-CJA-MEH (D. Colo., 2011); *Wildearth Guardians v. Jackson*, No. 10-CV-01218-REB-BNB (D. Colo, 2011); *Wildearth Guardians v. Jackson*, No. 4:09-CV-02453-CW (N.D. Cal., 2009).

unique taconite industry. US EPA's FIP bypassed the states' superior understanding of the taconite furnaces subject to Regional Haze requirements and the state's proposed plan for case-by-case evaluation of retrofit technologies. US EPA did not even take time to conduct the modeling required to demonstrate whether investing hundreds of millions of dollars in additional controls would generate any perceptible improvement to visibility in affected Class I areas. Instead, US EPA's deadline-driven action left business interests scrambling to educate the agency on their industry sector and to produce the data necessary to counter US EPA's flawed assumptions that threatened devastating quality and energy penalties. This is not the Regional Haze process that Congress intended when it delegated Minnesota and Michigan primary authority to regulate the Regional Haze emissions of the sources within their borders.

Further, when US EPA proposed its Regional Haze FIP for the taconite industry, US EPA allowed just 45 days to comment on a rule that would impose more than US$300 million in controls not included in the states' SIPs. US EPA then rejected requests for extensions of time (even to the 60 days recommended by Executive Order) on the sole basis that it would cause the agency to violate a court-ordered deadline for final promulgation of a FIP. It did not seem to matter to the agency that the additional time was necessary to generate the vendor quotes and regional modeling critical to a proper evaluation of the proposed FIP and its visibility improvement. Therefore, as US EPA rushes toward final action without this information, the adverse effect of sue and settle tactics on deliberative rulemaking could not be more apparent.

In direct reaction to these types of examples, members of Congress are responding to sue and settle tactics with proposed legislation. This legislation in the House of Representatives would require US EPA to collect comments on its consent decrees before submission of the consent decree to the court for approval. *See Sunshine for Regulatory Decrees and Settlements Act*, H.R. 3862, 112th Cong. (2012). The bill would also establish a right for affected parties to intervene in litigation prior to entry of a consent decree. The bill is before the House Committee on the Judiciary, and has been placed on the House calendar. Further, the Republican party platform statement seeks "an end to the [US]EPA's participation in 'sue and settle' lawsuits, sweetheart litigation brought by environmental groups to expand the Agency's regulatory activities against the wishes of Congress and the public," giving this issue national prominence going into the November elections.

However, unless a divided Congress is able to act on this or similar legislation, industries covered by US EPA regulations may still find themselves subject to additional requirements stemming from consent decrees between the government and environmental groups. Indeed, according to the Congressional statement of support for H.R. 3862, sue and settle cases have already led to new or modified standards for cement manufacturers, coal miners, oil and gas companies, electric utilities and solid waste facilities. With sue and settle rulemaking occurring with more frequency, companies must remain vigilant and work closely with counsel to identify strategies for mitigating the adverse effect of deadline suits and other potential sue and settle litigation that may threaten business interests and quality rulemaking efforts. These strategies may include:

1. Seeking court approval to allow affected business interests to intervene in deadline suit litigation and to object to unreasonable settlements that inadequately protect stakeholders.
2. Identifying opportunities to comment on proposed settlements to alert courts to non-party interests affected by the terms of the settlement. Some consent decrees are lodged with a court and then published for public comment before final entry so the court has the benefit of public input before deciding on whether the settlement is in the public interest.
3. Challenging US EPA's use of court-ordered deadlines to compromise the rulemaking process or to usurp state authority.

Business interests seeking to intervene in deadline suits today will benefit from Congressional testimony and numerous articles identifying material adverse effects produced from deadline suit settlements.

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