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Regulatory Quagmire - Supreme Court Gives Life Back to USEPA's Transport Rule in EME Homer City Generation LP v. U.S. EPA (Environmental Protection Agency)

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For more than 10 years, the **United States Environmental Protection Agency ("USEPA")** has attempted to develop a workable solution to address cross-state air pollution. The Court of Appeals for the D.C. Circuit in 2012 had vacated USEPA's Cross-State Air Pollution Rule or CSAPR, also known as the Transport Rule^[1], for regulating upwind state emissions. On April 29, 2014, the United States Supreme Court reversed^[2] the D.C. Circuit's decision and remanded the rule back to that Court for further action consistent with the Supreme Court's opinion.

The Clean Air Act's ("CAA") "good neighbor" provision requires that states reduce emissions that "contribute significantly" to another state's ability to comply with National Ambient Air Quality Standards ("NAAQS"). Under the Transport Rule, USEPA sought to reduce the emissions of sulfur dioxide and nitrogen oxides from 28 upwind states. Rather than allow each state to determine how to best achieve such emission reductions, USEPA required that each state comply with an emission reduction plan established by USEPA through a federal implementation plan ("FIP").

Justice Ginsburg, writing for the majority, found that USEPA's imposition of a FIP was permissible under the authority granted to USEPA by Section 110 of the CAA. The Court relied on a strict reading of the CAA, finding that it granted USEPA authority to impose a FIP once it determined that each state had not implemented rules to address the emission budget requirements established by the Transport Rule. This is significant because USEPA, acting on the D.C. Circuit's direction in the Clean Air Interstate Rule ("CAIR") invalidation to act quickly, had imposed budgets on the states without allowing the states the usual time to develop state implementation plans ("SIPs"). The Court held the FIPs were allowed, even if USEPA had not provided sufficient time or direction for the states to have done so. The majority also upheld USEPA's reliance on cost thresholds to determine the quantity of emissions that each state was required to achieve. Although the Court acknowledged that setting state emission budgets based on the cost to achieve such reductions might result in "over-control" (i.e., the reduction of emissions by multiple upwind states beyond the level necessary for a particular downwind state to comply with the NAAQS), such over-control was permissible to achieve the CAA's goal of attaining NAAQS in every downwind state.

With the Supreme Court's ruling, the Transport Rule returns to the D.C. Circuit for further consideration; however, what the D.C. Circuit - or USEPA for that matter - will do with the Transport Rule is far from certain. USEPA published a brief statement Tuesday noting that it was reviewing the Supreme Court's decision and that, "[a]t this time, CAIR remains in place and no immediate action from States of affected sources is expected."^[3]

We will continue to evaluate the potential ramifications of the Supreme Court's ruling, including:

1. How the D.C. Circuit and USEPA will address emission reduction requirements under the Transport Rule that

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have lapsed or will soon lapse. To date, sources have been complying with CAIR, not the Transport Rule. The first phase of emission reductions under the Transport Rule was set to begin on January 1, 2012, with the second phase of reductions beginning January 1, 2014.

2. How the D.C. Circuit will address the emission reduction requirements set by USEPA under the Transport Rule's FIP. The Supreme Court upheld USEPA's consideration of cost to set emission reduction requirements in upwind states, but it also held that in doing so "U.S. EPA cannot require a state to reduce its output of pollution by more than is necessary to achieve attainment in every downwind State" or below the emission level that subjected the state to the Transport Rule in the first instance.
3. The scope of the D.C. Circuit's review of the Transport Rule on remand. The D.C. Circuit had earlier found it unnecessary to address the challenge asserting that USEPA acted lawfully in imposing a FIP in states where USEPA had previously approved a state implementation plan to address the requirements of CAIR. The Supreme Court noted that the challenge would be before the D.C. Circuit on remand.

[1] Schiff Hardin's August 22, 2012, article on the D.C. Circuit decision. Following vacatur of the Transport Rule, the D.C. Circuit had instructed USEPA to continue administering the Clean Air Interstate Rule ("CAIR") - USEPA's first attempt at regulating interstate pollution, which was similarly struck down by the D.C. Circuit in 2008.

[2] http://www.supremecourt.gov/opinions/13pdf/12-1182_bqm1.pdf

[3] <http://www.epa.gov/airtransport/>

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