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Environmental Law Alert - Which Way Is The Wind Blowing? U.S. Supreme Court Upholds EPA's Cross-State Air Pollution Rule

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On April 29, 2014, the U.S. Supreme Court issued a decision upholding EPA's Cross-State Air Pollution Rule (also known as the Transport Rule). The Transport Rule restricts air emissions from upwind states that in EPA's judgment contribute significantly to nonattainment of the National Ambient Air Quality Standards (NAAQS) in downwind states. According to EPA's regulatory impact analysis, the Rule is expected to have significant cost implications for electric generating utilities, and much of the costs could occur in Midwestern and Southern states that were identified in the Transport Rule as contributing to nonattainment of the NAAQS for states along the East Coast.

The Transport Rule was promulgated pursuant to what is often called the "Good Neighbor" provision of the Clean Air Act. In the Rule, EPA established a two-step approach for restricting emissions in upwind states. First, EPA used air modeling to determine which upwind states contributed more than one percent to the NAAQS for 8-hour ozone and PM2.5 in downwind states. Second, EPA determined the level of emission reductions that could be achieved in downwind states based on cost estimates for reducing emissions. For example, EPA concluded that significant emission reductions could be obtained for a cost of $500 per ton of NOx reduced, but that at greater than $500 per ton the emission reductions were minimal. The Agency then translated those cost estimates into the amount of emissions that upwind states would be required to eliminate. Lastly, EPA developed a Federal Implementation Plan (FIP) detailing how states were to comply with the emission budgets assigned under the Transport Rule.

As we previously reported in August 2012, the Transport Rule had been struck down by the U.S. Court of Appeals for the District of Columbia on Aug. 21, 2012. The Court of Appeals struck down the rule primarily for two reasons. First, the court found the cost estimates that EPA used as a basis to justify emission reductions would in some cases result in requirements for upwind states to reduce their emissions more than necessary to eliminate "significant" contributions to nonattainment in downwind states. The court held that EPA could only require reductions proportionate to a specific upwind state's contribution to a downwind state's nonattainment status. Second, the court held that states should have been given an opportunity to develop their own implementation plans before EPA required states to follow the FIP in the Transport Rule.

In reversing the Court of Appeals, the U.S. Supreme Court concluded that the Clean Air Act does not require EPA to mandate only proportionate reductions in emissions from upwind states. The court argued that the "proportionality approach could scarcely be satisfied in practice" because

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there are multiple upwind states that each affect multiple downwind states. The Court concluded that the proportionality approach would mean that "each upwind State will be required to reduce emissions by the amount necessary to eliminate that State's largest downwind contribution," but that would result in cumulative emission reductions and "costly overregulation." The court also concluded that it was appropriate for EPA to use cost as a means of allocating emissions, instead of the proportionality approach favored by the D.C. Circuit.

Regarding the FIP approach, the court held that after EPA issues a NAAQS, each state is required to propose a State Implementation Plan (SIP), including requirements to satisfy the Good Neighbor provision of the Clean Air Act. Therefore, the Court held it was appropriate for EPA to establish a FIP because the statutory deadline to propose SIPs that complied with the Good Neighbor provision had passed. The court rejected the D.C. Circuit's conclusion that it was premature to establish a FIP before EPA had made a determination regarding each upwind state's contribution to downwind states' nonattainment.

Supreme Court Justice Antonin Scalia, joined by Justice Clarence Thomas, authored a dissent in the case agreeing with the D.C. Circuit that costs are not contemplated as a basis for reducing emissions under the Good Neighbor provision. Further, the dissent addressed the majority opinion's assertion that the proportionality approach would result in "costly overregulation." The dissent stated, "over-control is no more likely to occur when the required reductions are apportioned among upwind States on the basis of amounts of pollutants contributed than when they are apportioned on the basis of cost." The dissent went on to note, "the solution to over-control under a proportional-reduction system is not difficult to discern. In calculating good-neighbor responsibilities, EPA . . . would set upwind States' obligations at levels that, after taking into account those reductions, suffice to produce attainment in all downwind States. Doubtless, there are multiple ways for the Agency to accomplish that task in accordance with the statute's amounts-based, proportional focus."

At this juncture, it is unclear whether EPA will need to promulgate additional rules to implement the Transport Rule as many of the Transport Rules' deadlines have already expired. Additionally, it is unclear whether other legal challenges to the Transport Rule, including challenges to whether the Rule satisfies regional haze emission requirements, will delay final implementation of the Rule. Those challenges have been stayed since the D.C. Circuit Court of Appeals vacated the rule in 2012 but appear to be able to proceed now that the vacatur has been overturned by the U.S. Supreme Court. There are also questions as to whether the Transport Rule, which was designed to help meet the 1997 ozone NAAQs of 80 ppb, will need to be reworked by EPA to meet the stricter 2008 ozone NAAQs of 75 ppb. It is also possible that estimates of emission cuts expected from the original the Transport Rule will change given the move by several power plants to convert from coal to natural gas in recent years.

A copy of the U.S. Supreme Court's decision is available here.

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