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D.C. Circuit Strikes Down EPA Cross-State Air Pollution Rules (Again)

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In a 2-1 split decision, the D.C. Circuit Court of Appeals rejected EPA's most recent attempt to regulate cross-state air pollution from the electric power, natural gas, and coal industries. *EME Homer City Generation v. EPA*, No. 11-1302, 2012 WL 3570721 (D.C. Cir. Aug. 21, 2012). EPA's Cross-State Air Pollution Rule (CSAPR or Transport Rule) was drafted to fix deficiencies in a 2005 rule (the Clean Air Interstate Rule, or CAIR) that was struck down by the same court in 2008. Both CAIR and the Transport Rule were designed, in different ways, to compel upwind States to restrict emissions from within their borders that adversely affect air quality in downwind States. The second time, however, was not the charm. Reviewing the Transport Rule, the DC Circuit sent EPA back to the drawing board for two independent reasons – one pertaining to EPA's calculation of States' "good neighbor" obligations, and one pertaining to EPA's imposition of Federal Implementation Plans, or "FIPs."

The court held that the Transport Rule was unlawful because it would require some upwind States to reduce their emissions by more than their own contribution to air quality exceedances in downwind States. The court also held that EPA impermissibly denied States the opportunity to implement the Transport Rule through their own state-level plans, as required by the Clean Air Act's cooperative federalism structure. In doing so, the court offered a full-throated defense of the principles of federalism that underlie the Clean Air Act and other major federal environmental laws. The D.C. Circuit recently deferred to EPA's technical expertise in a number of controversial air quality cases, including the agency's greenhouse gas Tailoring Rule, and new national

standards for nitrous oxide (NO2) and SO2.[1] But *EME Homer* makes clear that federal courts are reluctant to defer to EPA when there are concerns that the agency has exceeded its statutory authority. In such cases, courts will continue to take a very hard look at EPA's actions.

I. Background

The Clean Air Act establishes a cooperative framework under which EPA and the States regulate air quality. At the federal level, EPA is required to establish limits on the concentrations of air pollutants allowable in various parts of the country, while States are primarily responsible for implementing those standards within their borders via EPA-approved State Implementation Plans (SIPs).[2] EPA must develop a FIP for states that are untimely in submitting a compliant state-level plan.[3]

At issue in *EME Homer* was the Clean Air Act's "good neighbor" requirements. Under those requirements, SIPs must include provisions that prohibit the emissions from sources within a State from "contribut[ing] significantly" to the nonattainment of, or interfering with the maintenance of, air quality standards in "downwind" States.[4] Each upwind State's SIP must include provisions adequate to ensure compliance with its good neighbor obligation.

EPA's prior efforts to implement the good neighbor requirements met with mixed success. In 2000, the D.C. Circuit decided *Michigan v. EPA*,[5] which upheld a 1998 EPA

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[1] *See Coalition for Responsible Regulation v EPA*, No. 09-1322 (D.C. Cir. June 26, 2012) (approving EPA's "endangerment finding" and regulations limiting emissions of CO_2 and other greenhouse gases); *American Petroleum Institute v. EPA*, No. 10-1079 (D.C. Cir. July 17, 2012) (approving EPA's new one-hour NAAQS for NO_2); and *National Environmental Development Association v. EPA*, No. 10-1252 (D.C. Cir. July 20, 2012) (approving EPA's NAAQS for SO_2).

[2] 42 U.S.C. § 7410(a).

[3] 42 U.S.C. § 7410(c)(1).

[4] 42 U.S.C. § 7410(a)(2)(D). The good neighbor provision specifically provides, in relevant part, that each SIP must contain adequate provisions:

> Prohibiting . . . any source or other type of emission 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 [NAAQS].

(emphasis added).

[5] *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000).

rule[6] that established the good neighbor obligations for 22 states for 1997 ozone standards. The court held that the Clean Air Act did not prohibit EPA from considering cost when calculating good neighbor obligations – so long as EPA used cost considerations to *lower* an upwind State's good neighbor obligations.

In 2008, the court decided *North Carolina v. EPA*,[7] and rejected the Transport Rule's predecessor, CAIR.[8] That rule established the good neighbor obligations of 28 States with respect to ozone and PM2.5. The court held that CAIR was unlawful because it required certain States, based in part on cost considerations, to potentially reduce their emissions beyond their own "significant contribution" to downwind pollution. The court explained that the good neighbor provision "gives EPA no authority to force an upwind state to share the burden of reducing other upwind state's emissions . . . [EPA] may not require some states to exceed the mark." The court also explained that "EPA can't just pick a cost for a region, and deem 'significant' any emissions that sources can eliminate more cheaply." Thus, EPA may use costs, but only to *lower* an upwind State's good neighbor obligation. The court remanded CAIR to EPA, but left it in place until the agency developed a new rule consistent with its opinion.

II. *EME Homer*

In August 2011, EPA finalized the Transport Rule,[9] which was the agency's response to the court's remand instructions in *North Carolina*. The Transport Rule established good neighbor obligations for three NAAQS: 1997 annual PM2.5, 1997 ozone, and 2006 24-hour PM2.5. Based on cost modeling, EPA developed emission budgets for each upwind State. The budgets established the maximum amount of pollution that a State's power plants could emit in a year.

EPA simultaneously issued FIPs, which converted each States' emission budgets into tradable allowances. The FIPs established, among other things, how emission allowances would be distributed to regulated sources within each State. The rule provided that States could modify or replace the FIPs. The FIPs, however, would remain in place in the first instance until a SIP was submitted to, and approved by, EPA.

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[6] 63 Fed. Reg. 57,356 (Oct. 27, 1997).
[7] 531 F.3d 896 (D.C. Cir. 2008).
[8] 70 Fed. Reg. 25,162 (May 12, 2005).
[9] 76 Fed. Reg. 48,208 (Aug. 8, 2011).

In a 2-1 split decision, the Court of Appeals rejected the Transport Rule on two independent bases – one pertaining to EPA's calculation of States' good neighbor obligations, and one pertaining to EPA's imposition of FIPs.

The majority first held that the good neighbor calculations exceeded EPA's statutory authority. The court concluded that the emission budgets were not based solely on the amounts of emissions from upwind States that contribute significantly to nonattainment in downwind states. Thus, the court found that the rule ran "afoul of the statute's proportionality requirements" because it required some upwind States to reduce more than their "significant contribution" to downwind pollution.[10] As the court explained:

> But when EPA asks one upwind State to eliminate *more* than its statutory fair share, that State is necessarily being forced to clean up another upwind State's share of the mess in the downwind State. Under the statute and *North Carolina*, that is impermissible.[11]

The court next addressed the bounds of EPA's authority under the Clean Air Act's cooperative federalism structure. Generally speaking, the statute requires EPA to develop air quality standards, while the States are considered "first implementers" responsible for achieving those standards. The court held that EPA exceeded its authority by imposing FIPs on the States, rather than providing the States with an opportunity, in the first instance, to develop compliant SIPs. EPA justified its determination that existing SIPs lacked a "required submission" (i.e. a correct good neighbor provision), arguing that there was no difference between the States' compliance obligations with respect to NAAQS and their compliance obligations with respect to the good neighbor provisions.

The court rejected that distinction, noting that there was a "glaring" difference between NAAQS and good neighbor obligations – NAAQS is a "clear numerical target" and a State "knows precisely what numerical goal its SIP must achieve," while good neighbor obligations are "not clean numerical target[s]" and that there is "no way for an upwind State to know its obligation without knowing levels of air pollution in downwind States."[12] The court explained that an "upwind State's obligation remains impossible for the upwind State to determine *until EPA defines it*."[13] Therefore, the court held that a "SIP logically cannot be deemed to lack a 'required submission' or deemed to be

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[10] Slip Op. at 37.
[11] Slip Op. at 38 (emphasis in original).
[12] Slip Op. at 47.
[13] Slip Op. at 47 (emphasis in original).

deficient for failure to meet the good neighbor obligation before EPA qualifies the good neighbor obligation."[14]

According to the court, EPA's reading of the statute took it "down the rabbit hole to a wonderland where EPA defines the target *after* the States' chance to comply with the target has already passed."[15] The court concluded that EPA's approach was inconsistent with the basic principle that States, not the Federal Government, are the primary implementers of the requirements of the Clean Air Act once EPA completes its primary statutory role in setting NAAQS for the States to meet.
Circuit Judge Rogers penned a vigorous and lengthy dissent, writing that the majority's holdings were:

> [A]n unsettling of the consistent precedent of this court strictly enforcing jurisdictional limits, a redesign of Congress's vision of cooperative federalism between the States and the federal government in implementing the CAA based on the court's own notions of absurdity and logic that are unsupported by a factual record, and a trampling on this court's precedent on which the [EPA] was entitled to rely in developing the Transport Rule rather than be blindsided by arguments raised for the first time in this court.[16]

Judge Rogers focused primarily on procedural issues, arguing that the petitioners were barred from challenging aspects of the Transport Rule in the Court of Appeals because they had failed raise similar challenges during EPA's administrative proceedings.

III. Conclusion

The D.C. Circuit is not alone in admonishing EPA to be more mindful of the line separating its role in carrying out federal environmental policy from that of the States. In *Texas v. EPA*, No. 10-60614 (5th Cir. Aug. 13, 2012), the Fifth Circuit recently repudiated EPA's recent attempt to wrest control of the State of Texas' new source review (NSR) permitting program. EPA disapproved the program sixteen years after it had been submitted to EPA as part of a proposed revision to the Texas SIP, "unraveling" (as the court put it) approximately 140 permits issued by Texas consistent with the proposed revision pursuant to state law. The administrative record reflected that EPA's rejection of the program was based on the Agency's preference for a different drafting style in developing the program, and not on standards as Congress

[14] Slip Op. at 48.
[15] Slip Op. at 50.
[16] Slip Op. (Dissent) at 1.

provided for in the statute. According to the court, such action "disturbs the cooperative federalism" that the Clean Air Act envisions and as such, it clearly was arbitrary and capricious.

In both the *EME Homer* and *Texas* cases, EPA argued that the courts should defer to its decisions because of its special expertise in addressing complex technical issues under the federal environmental laws. That principle may be true, but both courts found it irrelevant. States have such expertise, too, and there is no reason to assume that EPA's approach is necessarily superior, particularly where EPA previously approved relevant state regulatory plans (as in *EME Homer*) or allowed such plans to be implemented over many years without acting to disapprove them (as in *Texas*). As the D.C. Circuit previously stated, the model of federalism adopted in the Clean Air Act means that EPA cannot "force particular control measures on the states" in the first instance. *See Virginia v. EP*A, 108 F.3d 1297, 1410 (D.C. Cir. 1997). Where EPA acts inconsistent with this principal, its actions have been routinely rejected by the courts.

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