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D.C. Circuit Calls Strike Two on EPA's Cross-State Air Pollution Rule

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On August 21, 2012, the Court of Appeals for the District of Columbia vacated and remanded the U.S. Environmental Protection Agency's "Transport Rule"[1] – an ambitious regulation that sought to impose new limits on sources of certain air pollutants in 28 States.[2] In the 2-1 decision, the majority concluded that EPA went beyond its statutory authority in two separate ways. First, the Transport Rule required States to reduce cross-state emissions by more than was authorized by the Clean Air Act. Second, it violated the Clean Air Act by failing to first let each state implement the necessary emission reductions before implementing federal controls. As a result of this decision, the current 2005 Clean Air Interstate Rule of 2005 ("CAIR") remains in effect. Going forward, EPA faces the choice of seeking a rehearing or Supreme Court review, seeking legislative changes, or again revising the rule.

This alert is part one of a two part series on this topic. Part I discusses the Court's opinion in *Homer City*, how it reached its conclusions, and some of the considerations that will influence whether EPA might seek rehearing en banc and whether the Circuit is likely to grant it if asked. Part II will address some of the broader administrative law issues addressed in the decision and how the decision may impact future challenges to agency rulemakings.

Background

Under the Clean Air Act ("CAA"), EPA sets National Ambient Air Quality Standards ("NAAQS"), which prescribe the maximum levels for common air pollutants.[3] EPA relies on the NAAQS to designate "nonattainment" areas – i.e., areas within each State where the level of an air pollutant exceeds the NAAQS.[4]

Once EPA establishes NAAQS and designates nonattainment areas for the States, the States have the primary responsibility to determine how to implement the NAAQS within their borders through State Implementation Plans ("SIPs").[5] If a State fails to submit an adequate SIP within three years of issuance of the NAAQS, then EPA is required to promulgate a Federal Implementation Plan ("FIP") to implement the NAAQS within that State.[6]

Among the elements that must be included in a SIP are any "good neighbor" emission reductions that "contribute significantly to nonattainment in, or interfere with maintenance by, any other State with

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[1] Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011) ("Transport Rule").

[2] *EME Homer City Generation LP v. EPA*, No. 11-1302, 2012 WL 3570721 (D.C. Cir. Aug. 21, 2012) ("*Homer City*").

[3] *See* 42 U.S.C. § 7409(a)-(b).

[4] *See* 42 U.S.C. § 7407(d).

[5] *See* 42 U.S.C. §§ 7404(a), 7410(a)(1); *see also Train v. NRDC*, 421 U.S. 60, 63-67 (1975); *Virginia v. EPA*, 108 F.3d 1397, 1406-10 (D.C. Cir. 1997).

[6] *See* 42 U.S.C. § 7410(c)(1).

respect to any such national primary or secondary ambient air quality standard."[7] The good neighbor provision of the CAA recognizes that emissions "from 'upwind' regions may pollute 'downwind' regions."[8]

The *Homer City* decision is the third time that the D.C. Circuit has considered EPA's authority to implement the good neighbor provision. In two earlier cases, the D.C. Circuit set the stage for *Homer City*.[9] In *Michigan v. EPA*, the Court approved EPA's approach in its 1998 NO_X Rule.[10] The 1998 NO_X Rule established an upwind State's good neighbor reductions through a two-step process: first, EPA considered what amount of an upwind State's air pollution contributes significantly to a downwind State's air quality; and second, EPA considered how much air pollution could be eliminated by sources in an upwind State if "highly cost-effective" emissions controls were installed at those sources.[11]

Eight years later, in *North Carolina v. EPA*, the Court again addressed the regulation of interstate air pollution, but this time rejected EPA's attempt to distribute upwind reductions among multiple States through the 2005 CAIR. The Court held that EPA has no authority "to force an upwind State to share the burden of reducing other upwind States' emissions[;]" rather "[e]ach state must eliminate its own significant contribution to downwind pollution."[12] The Court emphasized that EPA "may not use cost to increase an upwind State's obligation under the good neighbor provision – that is, to force an upwind State to exceed the mark."[13] While the Court ruled against EPA in *North Carolina*, it left CAIR intact pending a replacement rulemaking consistent with the Court's opinion. EPA's Transport Rule was the agency's attempt to remedy the 2005 CAIR rule in accordance with the Court's ruling in *North Carolina*.

EPA's "Transport Rule"

The Transport Rule establishes good neighbor obligations among 28 States for three pollutants. Generally, the three pollutants addressed under the Rule are NO_X, SO_2, and ozone.[14] The rule is made up of two basic components: each State's emissions reduction under the good neighbor provision and FIPs to implement those reductions at the State level.

In setting good neighbor reductions in the Transport Rule, EPA concluded that if air pollution from an upwind State contributes 1% or more of "an NAAQS-regulated pollutant in a downwind State, then the upwind State contributes significantly to a downwind State's ability to attain or maintain that NAAQS."[15] EPA then applied a multi-factor assessment to set reductions in those upwind States on a

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[7] *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I).

[8] *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1037 (D.C. Cir. 2001).

[9] See Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000) (per curiam) (Sentelle, J., dissenting); North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008) (per curiam).

[10] Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (October 27, 1998) (to be codified at 40 C.F.R. Parts 51, 72, 75, and 96) ("NO_X Rule").

[11] *Michigan*, 213 F.3d at 675. *Michigan* was decided by Circuit Judges Stephen F. Williams, David B. Sentelle, and Judith W. Rogers.

[12] *North Carolina*, 531 F.3d at 921. *North Carolina* was decided by Chief Judge David B. Sentelle, and Circuit Judges Judith W. Rogers, and Janice Rogers Brown.

[13] *Id. (internal quotations omitted); Homer City, 2012 WL 3570721 at *5 ("[p]ut simply, the [good neighbor provision] requires every upwind State to clean up at most its own share of the air pollution in a downwind State – not other States' shares") (emphasis in original).*

[14] For additional details on the regulated pollutants, see 76 Fed. Reg. 48,208.

[15] *Homer City*, 2012 WL 3570721 at *6.

cost-per-ton reduction basis (which relied on the costs to install pollution reduction technology) that was distributed across all power plants in the upwind States.[16] Finally, the Transport Rule proposed to achieve cost-per-ton reductions over multiple years, beginning in 2012 and relying on a maximum budget for each pollutant that a State's power plants may collectively emit through 2014.[17] The Transport Rule implemented the prescribed reductions through FIPs established for each upwind State.

The *Homer City* Decision

In *Homer City*, the majority[18] opinion concluded that the Transport Rule exceeds EPA's statutory authority to impose more stringent air quality requirements through the good neighbor provisions of the CAA on two independent bases.

First, the Court determined that the Transport Rule used the good neighbor provision to impose emissions reductions on upwind States that could go beyond those States' significant contribution to downwind air pollution in other States. As a result, the Court concluded that EPA acted beyond its statutory authority to regulate interstate air pollution because the Transport Rule did not account for the proportional amount each upwind State contributes to a downwind State's nonattainment.

The Court's objections were based on EPA's multi-state approach to setting reductions for individual States that (1) may result in some upwind States having to reduce more than the amount they contribute to downwind States; (2) effectively force upwind States to share the burden of meeting reductions; and (3) provide no safeguard against an upwind State having to make reductions beyond those it actually contributes to a downwind State's air quality.[19]

Second, the Transport Rule failed to provide the States the first opportunity to implement the good neighbor reductions through their own SIPs. Instead, EPA quantified the States' good neighbor reductions and simultaneously set forth EPA-designed FIPs to implement those obligations at the State level.[20] As a result, EPA departed from its typical practice of cooperative federalism when implementing provisions of the CAA.

In the majority's view, EPA's role in implementing the good neighbor provision is to gather information about air quality in the downwind States, calculate each upwind State's good neighbor air pollutant reduction targets, and then transmit that information to the upwind State. With that information, an upwind State can then determine how to meet its good neighbor reduction to a downwind State in a new or revised SIP.[21] The Court objected to EPA's preemptive issuance of the FIPs, holding that an upwind State remains the first-party obligated to develop or revise a plan for implementing the good neighbor reductions at the state level.[22] In reaching that conclusion, the Court deemed EPA's interpretation of the SIP/FIP statutory structure as failing to satisfy established canons of interpretation.[23]

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[16] *Id*. at *7-8.

[17] *Id*. at *8.

[18] The Opinion of the Court was filed by Circuit Judge Brett M. Kavanaugh, joined by Circuit Judge Thomas B. Giffith. The Dissenting Opinion was filed by Circuit Judge Judith W. Rogers.

[19] *Homer City*, 2012 WL 3570721 at *12-14.

[20] *Id*. at *2, 15-23.

[21] *See* 42 U.S.C. § 7410(k)(5).

[22] *Homer City*, 2012 WL 3570721 at *15-23.

[23] Under *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984), step 1 requires determining if Congress' intent is clear on the face of the statute – if so, then a court will not impose an agency's interpretation; but if the

Consequently, the Court viewed EPA's FIP authority as limited to those circumstances where a "revised or new SIP is properly deemed to lack a required submission or is properly deemed deficient" before EPA may "resort to a FIP for the State's good neighbor obligation."[24] Given the facts in *Homer City*, the majority held that it is impossible for a SIP to be deemed deficient until after EPA determined that State's good neighbor obligation.[25]

The *Homer City* Dissent

The dissent, however, argues that the Court did not have jurisdiction to decide the issues before it because the petitioners in this case did not timely challenge the Transport Rule or challenge it with reasonable specificity. Judge Rogers criticizes the majority opinion because it

> is an 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.[26]

Among other concerns, Judge Rogers argues that the petitioners in this case failed to challenge EPA's two-step approach to determining a State's air pollution reduction obligation during the administrative rulemaking process. For example, Judge Rogers objects to the majority's reliance on a comment in another rulemaking first cited by petitioners during rebuttal oral arguments to establish jurisdiction to challenge EPA's statutory authority.[27]

In addition, Judge Rogers asserts that the States were required to submit their "good neighbor" SIPs, regardless of whether EPA had determined the State's air pollution reduction obligations.[28] Consequently, the June 2010 EPA Federal Register notice, which determined that 29 States had failed to submit adequate "good neighbor" SIPs, started the two-year deadline for EPA to promulgate FIPs for those States.[29] If any of those States objected to EPA's SIP determination or the timing for when States must submit a SIP or SIP-revision, Judge Rogers argues, then those States should have raised their objections during that rulemaking process.[30] The majority "fundamentally" disagreed with Judge Roger's reading of the record and the Court's jurisdiction.[31]

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statute is silent or ambiguous then step 2 requires a court to defer to an agency's statutory interpretation if it "is based on a permissible construction of the statute." Here, the *Homer City* Court determined that EPA's interpretation of its FIP authority "is contrary to the text and context of the statute (a *Chevron* step 1 violation)" and "in the alternative is absurd (a *Chevron* step 1 violation), and again in the alternative is unreasonable (thus failing *Chevron* step 2 if we get to step 2)." *Homer City*, 2012 WL 3570721 at *21, n.32.

[24] *Id*. at *18.

[25] *Id*.

[26] *Id*. at *24.

[27] *Id*. at *25, 35-42, 44.

[28] *Id*. at *25,

[29] *Id*. at *27; Failure to Submit Good Neighbor SIP Finding, 75 Fed. Reg. 32,673 (June 9, 2010).

[30] *Homer City*, 2012 WL 3570721 at *26-35, 44.

[31] *Id*. at *3, n. 1.

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Implications

Given the size and scope of this opinion, and the significant dissent, the air has hardly cleared regarding whether EPA will return to the drawing board and redraft its interstate air emission rules based on the Court's interpretation of the CAA's "good neighbor" provisions or seek rehearing or rehearing en banc. Some considerations that may impact whether rehearing is sought and/or granted include:

- Five of the Circuit's judges participated in at least one of these three cases, with Judge Rogers participating in all three.
- Circuit Judge Rogers's 44-page dissent strongly disagreed with the majority's interpretation of *Michigan* and *North Carolina*. She was on both of the panels that issued per curiam opinion in both cases.
- One of the key issues on which there may be some dispute within the Circuit is whether or not certain key issues were adequately raised in the record for the purpose of determining whether they were properly before the Court. The impacts of this ruling could well extend beyond CAA cases.
- EPA and the States will have to address the impacts of the *Homer City* decision on other air rules.

  For example, regional haze reduction rules and trading schemes for power plants – i.e., the best available retrofit technology (BART) requirements for power plants – were modified and tied to the Transport Rule in the "Better than BART" rule. The "Better than BART" rule allows States to rely on the Transport Rule to satisfy BART requirements for power plants.
- Finally, the *Homer City* decision, which focuses on the important role of "cooperative federalism" and the shared responsibilities of the federal and state governments, could well have some impact on how EPA exercises its authority under other similarly structured statutes, such as the Clean Water Act and the Resource Conservation and Recovery Act. These implications could also influence whether rehearing is sought.

Conclusion

There is little doubt that *Homer City* will have an influence on how EPA, and possibly Congress, addresses the issue of interstate air pollution. Stay tuned for Part II, which will evaluate how various aspects of the decision may influence future challenges to agency rulemakings and similar administrative proceedings.

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