

May 1, 2014

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## Facing Two Strikes, EPA Gets a Hit: Supreme Court Upholds EPA Cross-State Air Pollution Rule

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Two years ago, we reported that the D.C. Circuit vacated and remanded the U.S. Environmental Protection Agency's ("EPA's") second attempt at regulating air pollution crossing state borders.<sup>1</sup> Facing two strikes, EPA swung for the fences, and on April 29, 2014, in a 6-2 ruling,<sup>2</sup> the Supreme Court reversed the D.C. Circuit, holding that EPA's cross-border air pollution rule (the "Transport Rule")<sup>3</sup> did not violate the Clean Air Act ("CAA") by establishing a new federal scheme for regulating upwind emissions that drift over state lines. The decision likely will impact those power plants in "upwind states" that contribute to cross-border air pollution by imposing more stringent air emission limits for those facilities. However, the decision may also spur an increase in development of renewable energy and lower-emission, natural gas-fired plants.

The Transport Rule establishes good neighbor obligations among 28 states for three primary pollutants: NO<sub>x</sub>, SO<sub>2</sub>, and ozone, and EPA has established National Ambient Air Quality Standards ("NAAQS") for each of these pollutants.<sup>4</sup> Any state whose ambient air quality exceeds the NAAQS is considered in "non-attainment." The CAA requires that upwind states whose emissions cause or contribute to exceedances of NAAQS in downwind states control their emissions to the extent required to avoid such contribution. The Transport Rule is made up of two basic components: it quantifies each state's emission reduction levels under the good neighbor provision and imposes Federal Implementation Plans ("FIPs") to implement those reductions at the state level.

EPA calculated the necessary emissions reductions in a two-stage approach. The first stage screens from its requirements all upwind states that contribute less than 1% of any downwind state's non-attainment.<sup>5</sup> The second stage applies a multi-factor assessment to set reductions in those upwind states on a cost-per-ton reduction basis (which relied on the costs to install pollution reduction technology) distributed across all power plants in the upwind states.<sup>6</sup> 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.<sup>7</sup> Since EPA found that many State Implementation Plans ("SIPs") did not properly provide for these emissions budgets, EPA invalidated those SIPs and instead required those states to comply with new state-specific FIPs. It did so without giving the states an opportunity to correct their SIPs based upon EPA's objections, and (at least according to some) without giving the states guidance on how to address those objections.

The Supreme Court reviewed the D.C. Circuit's conclusion that the Transport Rule exceeded EPA's statutory authority to impose more stringent air quality requirements through the good neighbor provisions of the CAA. First, the D.C. Circuit determined that the Transport Rule exceeded CAA authority because the good neighbor provision could impose emissions reductions on upwind states that could go beyond those states' significant contribution to

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downwind air pollution in other states. 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 without first providing the states an opportunity to correct their SIPs.

The Supreme Court overturned the D.C. Circuit decision, concluding that EPA reasonably interpreted the good neighbor provision and that the CAA did not require EPA to give states a grace period to file revised SIPs.

As to the FIP/SIP issue, the Supreme Court observed that “[a]fter EPA has disapproved a SIP, [it] can wait up to two years to issue a FIP, during which time the State can ‘correc[t] the deficiency’ on its own. But EPA is not obliged to wait two years or postpone its action even a single day: The Act empowers [EPA] to promulgate a FIP ‘at any time’ within the two-year limit.”<sup>8</sup> The states argued that they could not reasonably write SIPs to address the good neighbor provision until they knew how EPA would interpret that provision. The Supreme Court disagreed, noting that the CAA “does not require EPA to furnish upwind States with information of any kind about their good neighbor obligations before a FIP issues.”<sup>9</sup> As such, the Supreme Court held that EPA acted within its discretion to establish emission reduction criteria under the good neighbor provision, invalidate SIPs that did not meet the good neighbor provision, and immediately impose FIPs on those states without allowing states the opportunity to amend their SIPs to address EPA’s new criteria.<sup>10</sup>

More importantly, the Supreme Court also showed substantial deference to EPA’s statutory interpretation of the good neighbor provision itself, largely because of the highly technical approach EPA took. The good neighbor provision requires upwind states to reduce any emissions that “significantly contribute” to downwind states’ nonattainment of the NAAQS.<sup>11</sup> The parties disputed whether EPA could allocate emission reduction criteria among several upwind states based upon cost-effectiveness, rather than on each state’s individual emission contribution. In addition, the parties disputed whether the Transport Rule might require a state to reduce emissions in an amount greater than necessary to enable a downwind state to achieve attainment. While the D.C. Circuit agreed with the states that a cost-effective analysis did not comply with the CAA, the Supreme Court deferred to EPA’s judgment, concluding that Congress had not expressly stated how EPA should allocate emission reductions. The Supreme Court “read Congress’ silence as a delegation of authority to EPA to select from among reasonable options.”<sup>12</sup> Despite arguments that the cost of preventing emissions is wholly unrelated to the actual amount of air pollution contributed by an upwind state, the Supreme Court upheld the belief that “[e]liminating those amounts that can cost-effectively be reduced is an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires [EPA] to address.”<sup>13</sup>

The Supreme Court did not, however, grant EPA blanket license to regulate pollutants, and—mindful of the potential for over-control—the Court stated that “[i]f EPA requires an upwind State to reduce emissions by more than the amount necessary to achieve attainment in every downwind State to which it is linked, the Agency will have overstepped its authority.”<sup>14</sup> Should such an overstep occur, the Supreme Court explained that an affected state could “bring a particularized, as-applied challenge to the Transport Rule, . . . .”<sup>15</sup>

Given the technical nature of the Transport Rule and the fact that reasonable minds could disagree as to the correct approach, it is not surprising that the Supreme Court deferred to

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EPA's approach. Two aspects of the decision, however, may present more profound implications, one relating to CAA policy and the other to judicial review of EPA decisions.

As to CAA policy, the Supreme Court clearly deferred to EPA's restriction of states' authority to set attainment standards. Although the CAA gives EPA up to two years to replace a defective SIP with a FIP, in this case, it did so immediately, without giving states the ability to correct the deficiencies or instructing them in advance on how it should be met. As to judicial review, the Supreme Court held that EPA's immediate FIP promulgation complied with the CAA's "plain text and structure establishing a clear chronology of federal and state responsibilities."<sup>16</sup> Because the CAA is "clear," the Supreme Court did not even reach step two of the *Chevron* deference analysis asking whether EPA's interpretation was based on a permissible construction of the statute. Under the Supreme Court's review, EPA's authority to invalidate a SIP and *immediately* promulgate a FIP rises from the *clear text* of the CAA rather than from EPA's interpretation of the statute.

Deferring to EPA in this manner raises two primary issues. First, for states that rely on fossil fuel power, EPA's exercise of authority in this manner substantially reduces their ability to support those forms of energy production. It clearly represents a victory for EPA's efforts to discourage use of fossil fuel by increasing its cost, thus making renewable alternatives more competitive.

Although the Supreme Court technically left open the possibility that states may bring "as-applied" challenges to the Transport Rule (rather than simply challenging the Transport Rule in its entirety), individual state-by-state challenges to FIPs may be more akin to playing "whack-a-mole" since, although the FIP decision for each state is separate, all FIP decisions are inherently linked because they address interstate pollution.

Second, and more broadly, the Supreme Court's deference to EPA (by agreeing that the CAA's text clearly authorized immediate FIP promulgation) raises the issue of what it really means to say Congress has "directly spoken to the issue" for purposes of *Chevron* Step I. This holding shows great deference to an agency's reading of a statute in the face of multiple parties, Circuit Courts, and even some Supreme Court justices' belief that the statute's text does *not* show that Congress has directly spoken to an issue.

Questions remain as to whether this decision will embolden EPA as it pursues other policies. Seemingly, the more technical and complicated EPA makes its justification for a particular rule, the more deference the Supreme Court will grant it. How will the Supreme Court react, for instance, in the face of a technically complex rule requiring some form of cap and trade to address greenhouse gases?

Moreover, significant issues lie ahead for EPA related to regulatory impacts and legal implications for the Transport Rule. For example, the Transport Rule's technical start date—January 1, 2012—is already two years past, so the agency will likely issue new regulations to modify implementation dates. Likewise, EPA may need to adjust the Transport Rule to address revisions and updates to air quality standards for ozone and particulate matter. And finally, EPA may face further litigation that was stayed in light of the D.C. Circuit decision, or litigation related to technical revisions to the Transport Rule during the stay.<sup>17</sup>

Despite these challenges, the Supreme Court decision establishes a broad basis for EPA to regulate cross-border air pollutants, which will likely accelerate the adoption of new pollution

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control technologies or the replacement of fossil fuel energy production with alternatives that do not emit—or emit far less of—these criteria pollutants.

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<sup>1</sup> For additional information on the decision underlying the Supreme Court's decision, see our prior alerts on this topic: [D.C. Circuit Calls Strike Two on EPA's Cross-State Air Pollution Rule](#) and [Homer City - Has the D.C. Circuit Signaled an Alternate Approach to Judicial Review of Agency Regulations?](#).

<sup>2</sup> Justice Alito did not participate. Justices Scalia and Thomas joined in dissent.

<sup>3</sup> Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011).

<sup>4</sup> For additional details on the regulated pollutants, see 76 Fed. Reg. 48,208.

<sup>5</sup> *EME Homer City Generation LP v. EPA*, 696 F.3d 7, 11 (D.C. Cir. Aug. 21, 2012).

<sup>6</sup> *Id.* at 11-12.

<sup>7</sup> *Id.* at 12.

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<sup>8</sup> *EPA v. Homer City*, No. 12-1182, slip op. at 16 (April 29, 2014) (“Homer City”) (internal citations omitted).

<sup>9</sup> *Id.* at 16.

<sup>10</sup> *Id.* at 14-17.

<sup>11</sup> 42 U.S.C. § 7410(a)(2)(D)(i).

<sup>12</sup> *Homer City* at 22.

<sup>13</sup> *Id.* at 26.

<sup>14</sup> *Id.* at 29 (emphasis in original).

<sup>15</sup> *Id.* at 31.

<sup>16</sup> *Id.* (citations omitted).

<sup>17</sup> See, e.g., *Util. Air Regulatory Grp. v. EPA*, No. 12-1346 (D.C. Cir. Sept. 27, 2012); *Wisconsin Pub. Serv. Corp. v. EPA*, No. 12-1163 (D.C. Cir. April 6, 2012).