

Clients & Friends Alert

The DC Circuit Court Vacates Cross-State Air Pollution Rule

August 21, 2012

Today, in a 2-1 [decision](#), the U.S. Court of Appeals for the D.C. Circuit issued its [decision](#) vacating the Environmental Protection Agency's (EPA) Cross-State Air Pollution Rule (CSAPR), which requires significant reductions in emissions from power plants in certain states that contributed to "downwind" ozone or fine particle pollution in other states. For more information on CSAPR, please see our previous Clients and Friends Memo available [here](#).

Judge Kavanaugh wrote the majority opinion, joined by Judge Griffith (both appointed by President George W. Bush) ruling that the EPA, in promulgating CSAPR, exceeded its statutory authority under the Clean Air Act by: (1) requiring upwind states to reduce their emissions by more than their own significant contributions to a downwind state's nonattainment; and (2) not giving states the opportunity to initially implement a system for reductions for sources within their boundaries before imposing an EPA-designed Federal Implementation Plan. The majority explicitly rules that EPA must continue to administer CAIR pending EPA's issuance of a new replacement rule in conformance with the court's decision.

Judge Rogers (one of the "liberals" on the D.C. Circuit, appointed by President Clinton) filed a lengthy and impassioned dissenting opinion (45 pages). This split decision (as well as the lineup of the various states for and against CSAPR) evince the political overtones to the decision in this highly charged area of environmental regulation, which could well play out in the presidential election. At a minimum, the D.C. Circuit's decision is likely to provide significant extensions for power plants to continue operating status quo, albeit several other environmental regulations affecting power plants remain in force with compliance deadlines looming. For Texas, however, this could represent a significant development as the Public Utility Commission there grapples with resource adequacy issues.

EPA (and the Obama Administration) have several choices regarding next steps. The decision can be appealed -- indeed, EPA and the Obama Administration may petition for en banc review by the full D.C. Circuit and/or file a petition for certiorari to the U.S. Supreme Court. Notably, any new federal or state regulatory responses are expected to take years to finalize before becoming effective, which may be a further incentive to the EPA to seek appellate review. The EPA could

restructure CSAPR, but will probably not be able to require equally significant reductions in emissions unless this DC Circuit decision is modified. States might act on the court's observations by revising their State Implementation Plans to ratchet down permitted emissions.

This decision will obviously have significant impact on electrical generators, coal miners, and other industries. To view the DC Circuit decision, [click here](#).

* * * *

Please contact any of the following Cadwalader attorneys for more detailed analysis of the implications of this decision.

Kenneth W. Irvin	+1 202 862 2315	ken.irvin@cwt.com
David F. Williams	+1 202 862 2308	david.williams@cwt.com
Jonathan R. Stone	+1 202 862 2270	jonathan.stone@cwt.com
Sohair Ahmadi	+1 202 862 2278	sohair.ahmadi@cwt.com