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100 Congress Avenue
Suite 1100
Austin, TX 78701

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901 Main Street
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San Angelo, TX 76903

San Antonio
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Suite 2400
San Antonio, TX 78205

Cross-State Air Pollution Rule Vacated by Court of Appeals for the D.C. Circuit

By Mike Nasi and Jacob Arechiga[1]

On August 21, 2012, the U.S. Court of Appeals for the D.C. Circuit, in a 2-1 decision, vacated EPA's Cross-State Air Pollution Rule (CSAPR). This much-anticipated ruling strikes down one of the current Administration's most controversial and heavily litigated environmental rules.

Summary of the D.C. Circuit's Opinion

The Clean Air Act (CAA) allows for rules to be promulgated to control upwind emissions, and also outlines a process to allow states to be the first to propose a plan to make these reductions; if the plans do not meet federal criteria, then the EPA may assume this responsibility. On August 8, 2011, EPA finalized CSAPR as its most recent attempt at a rule to set emissions caps for nitrogen oxides (NOx) and/or sulfur dioxide (SO_2) in 28 states with the purpose of reducing impacts to downwind states' ability to comply with fine particulate matter ($PM_{2.5}$) and ozone standards.

The Court vacated CSAPR, finding that EPA exceeded its CAA statutory authority by: 1) establishing emissions limits that may require upwind states to make disproportionate and inequitable emissions reductions and 2) never allowing the states an opportunity to establish their own standards to make these reductions.

Inequitable and Excessive Emissions Reductions

Summarizing the Court's interpretation of the good neighbor provision, the Court states that "[p]ut simply, the statute 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). EPA's "authority to force reductions on upwind States ends at the point where the affected downwind State achieves attainment," and ultimately, "EPA may not force any upwind State to 'share the burden of reducing other upwind states' emissions." (citing its decision in *North Carolina v. EPA*, 531 F.3d 896, 921 (D.C. Cir. 2008). The Court found that EPA's methodology of assigning States' emissions reduction requirements in CSAPR directly violated these requirements, and that there were at least three independent legal flaws in EPA's approach to the good neighbor provision:

1. The "requirement that EPA imposed on upwind States was not based on the 'amounts' from upwind States that 'contribute significantly to nonattainment' in downwind States, as required by the statute and [the Court's] decision in *North Carolina*."
2. CSAPR "runs afoul of the statute's proportionality requirement as described in [the Court's] decision in *North Carolina*: EPA has 'no authority to force an upwind state to share the burden of reducing other upwind states' emissions....[The rule] made no attempt to calculate upwind States' required

reductions on a proportional basis."
3. EPA "failed to ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary over-control in the downwind States."

The Court also noted the impact that the rule would have had on Texas and other states, finding:

> "As one would expect, this "significant contribution" threshold produced some close cases at the margins. For example, Maryland and Texas were covered for annual PM2.5 based on downwind contributions of 0.15 and 0.18 μg/m3, respectively – just barely meeting the 0.15 μg/m3 threshold. See id. at 48,240. And Texas exceeded the annual PM2.5 threshold at just a single downwind receptor, in Madison, Illinois. See id. at 48,241.5. By contrast, Minnesota and Virginia, with maximum downwind contributions of 0.14 and 0.12 μg/m3, respectively, just missed being covered for annual PM2.5. See id. at 48,240."

EPA Bypassing States' Ability to Promulgate Their Own Plan

In order to implement CSAPR, the EPA promulgated Federal Implementation Plans (FIPs) imposing the rules' requirements on states. EPA bypassed the states' ability to propose its own State Implementation Plans (SIPs).

The Court noted that "the Clean Air Act ordinarily gives States the initial opportunity to implement a new air quality standard on sources within their borders" through SIPs and by "preemptively issuing FIPs, EPA denied the States that first opportunity to implement the reductions required under their good neighbor obligations." Essentially, EPA punished "the States for failing to meet a standard that EPA had not yet announced and the State did not yet know." The Court rejected EPA's argument that it had made earlier findings that the States had failed to meet their good neighbor obligations because "those findings came before [CSAPR] quantified the States' good neighbor obligations." Referencing *Alice in Wonderland*, the Court added that "EPA pursues its reading of the statutory text down the rabbit hole to a wonderland where EPA defines the target *after* the States' chance to comply with the target has already passed." (emphasis in original).

Historical Background & Summary of CSAPR

CSAPR was EPA's second attempt at promulgating national regulation of power plant's impacting downwind regions. The first was Clean Air Interstate Rule (CAIR), finalized in 2005, which was overturned by the same court in 2008. The rule was ultimately allowed to remain in place while EPA promulgated a replacement. CSAPR was EPA's attempt at this replacement.

At the CSAPR proposal phase, Texas was only included for a limited, seasonal, NOx program and no proposed emission reduction budgets were proposed that contemplated inclusion of Texas in the much more significant "annual" NOx and SO_2 programs. Without notice, EPA included provisions in the final rule that forced Texas to comply with both the NOx and SO_2 annual programs effective January 1, 2012.

With just four months to comply, Texas was asked to reduce its SO_2 emissions by 47% and account for over 26% of the nationwide SO_2 emissions reductions in 2012. It was estimated that it would increase electricity prices by at least $1 billion per year in Texas.

In the wake of this unprecedented move by EPA, lignite and coal-fired power plant operators announced that CSAPR would force the retirement of units and closure of mines. Others predicted a likelihood of additional deratings/closures as the rule became effective. There simply was not sufficient time to install control technologies, switch to low-sulfur coals, and/or purchase affordable allowances by the January 1, 2012, compliance date. The Electric Reliability Council of Texas (ERCOT) predicted that the rule would

cause between 1,200 to 1,400 MW of lost power during the peak summer demand periods of 2012 and between 3,000 to 6,000 MW of reductions during nonpeak times. ERCOT concluded that if the rule had been in effect in the summer of 2011, there would have been rolling blackouts.

EPA attempted to address some technical problems in an October 6, 2011, proposed revision, and although EPA granted slightly higher emissions budgets for SO_2 and NOx, the key problems and ultimate impacts of the rule remained unchanged. On December 30, 2011, in response to motions filed by some of the most significantly impacted parties, including the State of Texas, the D.C. Circuit issued a stay that blocked the implementation of the rule pending final resolution of the legal challenges.

What's Next?

Parties may request a hearing before all of the judges of the Court of Appeals for the D.C. Circuit, rather than the judge panel which made this ruling. While it is likely that this request will be made, it is still not clear if the Court will grant a full-panel hearing. If this decision stands, CAIR will continue to remain in place while EPA is once again instructed to promulgate a new rule complying with the Court's decision and the Clean Air Act.

If you have any questions regarding this e-Alert, please contact **Mike Nasi** at 512.236.2216 or **mnasi@jw.com** or **Jacob Arechiga** at 512.236.2049 or **jarechiga@jw.com**.

[1] Mr. Nasi and Mr. Arechiga were involved in the CSAPR case as counsel to San Miguel Electric Cooperative, the sole intervenor in support of the petitioners challenging the rule.

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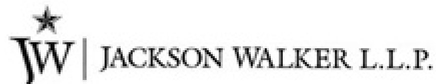

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