

EPA Loses Cross-State Air Pollution Ruling

By Pamela S. Goodwin

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SUMMARY

In a third loss for the EPA in as many weeks, a federal appellate court struck down the Cross-State Air Pollution rule, holding that EPA exceeded its authority by imposing massive emissions reduction requirements on upwind states and erred by not allowing the states to establish their own plans to implement the required reductions within their borders.

In a 2-1 split decision with a vigorous dissent, the D.C. Circuit struck down the Cross-State Air Pollution Rule this week, to the chagrin of Eastern states that bear the brunt of crosswinds transporting pollution from the West to the East. EPA promulgated the rule, known as CSAPR, to implement the good neighbor provision in the Clean Air Act. That provision authorizes EPA to require upwind states to reduce their significant contributions to air pollution in downwind states. While recognizing the merit and legitimacy of the good neighbor provision in the law, the Court determined that EPA exceeded its authority and violated the Clean Air Act by imposing massive emissions reduction requirements on upwind states in a manner incompatible with the language of the law. In addition, in recognition of individual states' rights, the Court found that EPA erred by not allowing the states to establish their own plans to implement the required reductions within their borders.

CSAPR required upwind states to substantially reduce the sulfur dioxide and nitrogen oxide emissions from their power plants, without consideration of each individual state's actual contribution to downwind air quality.

The rule was finalized last summer and stayed by the Court in December pending the outcome of the challenge brought by a coalition of states led by Texas, industry groups and other stakeholders. A number of Eastern states intervened in support of the rule, including New York, Delaware, Maryland, Massachusetts and the District of Columbia. Pennsylvania, with its heavy reliance upon coal fired power plants was an obvious outlier, but New Jersey Governor Christie's decision not to join was more controversial. EPA data indicates that New Jersey is among the top 20 smoggiest areas in the country, due in significant part to cross-state pollution. Nonetheless, the Court's decision is consistent with Christie's espoused views in favor of states' rights.

EPA is currently evaluating whether to appeal the decision or promulgate an alternative rule. In the meantime, the Clean Air Interstate Program, known as CAIR, will remain in effect. Ironically, the D.C. Circuit ruled in 2008 that CAIR was not aggressive enough in achieving the goals of the Clean Air Act, but let the rule stand pending replacement rulemaking.

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Judge Judith Wilson wrote a lengthy dissent. She criticized the majority for disregarding precedent on EPA jurisdiction and redesigning Congress' vision of how the states and federal government are supposed to jointly implement the Clean Air Act.

This Alert was written by Pamela S. Goodwin, a member of the firm's Environment and Natural Resources Practice. Pamela can be reached at 609.452.3109 or pgoodwin@saul.com. This publication has been prepared by the Environment and Natural Resources Practice for information purposes only.

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