

INSIGHTS

## Supreme Court Upholds EPA's Cross State Air Pollution Rule (CSAPR)

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In a 6-2 decision, the United States Supreme Court upheld EPA's justification for the Cross State Air Pollution Rule (CSAPR), breathing life back into the rule that had been vacated by the DC Circuit. The Court made several significant holdings under the Clean Air Act and raised some issues that could mean CSAPR could see some more legal action. Even with the prospect of more litigation over the Rule, it is possible that the CSAPR requirements could be reinstated by January 2015, at least in most states. For this to happen, however, the DC Circuit would need to lift the current stay and EPA would need to go through a new rulemaking to establish new compliance deadlines for CSAPR.

- The Court upheld EPA's issuance of a FIP (Federal Implementation Plan) simultaneous with the disapproval of state SIPs (State Implementation Plans). The court held that the Clean Air Act does not condition the duty to promulgate a FIP on EPA's having first quantified a State's obligations under the Good Neighbor provisions of the Act.
- The Court held that EPA's chosen cost-effective emission reduction allocation method is a "permissible construction of the statute" even if that means that some states over-control and some states benefit from other states' controls.
- The Court opened the door to further legal challenges to CSAPR brought by specific States, noting that "[i]f any upwind State concludes it has been forced to regulate emissions below the one-percent threshold or beyond the point necessary to bring all downwind States into attainment, that State may bring a particularized, as applied challenge to the Transport Rule, along with any other as-applied challenges it may have." Supreme Court Slip op. at 31. This will allow states to challenge their CSAPR budgets on a case-by-case basis.
- The Court directed the DC Circuit to address the still-unanswered question whether EPA acted properly when it retroactively corrected its prior approvals of State SIPs implementing the CAIR rule.
- On a procedural note, the Court held that the requirement that a party object to an agency rule with "reasonable specificity" during the comment period will not prevent the

party from making that challenge in court. In other words, the court itself may not prevent someone from litigating due to lack of reasonable specificity during the rulemaking proceedings. Instead, the government must challenge the lack of specificity of a party's comment, and must make that claim in the course of litigation.

The case will now be remanded to the D.C. Circuit for additional proceedings consistent with the Supreme Court opinion. This does not mean that EPA can begin immediate implementation of CSAPR - additional process is necessary at the D.C. Circuit and potentially EPA. For example, the Supreme Court explicitly left open the argument "that EPA could not impose FIPs on several upwind States whose SIPs had been previously approved by the Agency under CAIR... for the Court of Appeals to consider in the first instance on remand." Supreme Court Slip op. at 14, n. 12. The D.C. Circuit did not address this issue, deciding that "[b]ecause the Transport Rule must be vacated in any event, we need not address here whether EPA's 'corrections' of CAIR SIP approvals exceeded its authority under Section 110(k)(6). *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 31 n. 29 (2012). EPA may also issue new guidance or rulemaking to establish a pathway to implementation of CSAPR, considering the long time period between promulgation of the rule and the Supreme Court decision.