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EPA's New Approach To Interstate Air Pollution Under CAA

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The phrase “interstate transport” may conjure images of planes, trains and trucks carrying people and goods cross-country. But, under the federal Clean Air Act, or CAA, the term is often used to refer to interstate air pollution — emissions from factories, power plants, motor vehicles, refineries and other sources that are transported by prevailing winds across state lines, sometimes over hundreds of miles. The interstate transport phenomenon often has posed for the U.S. Environmental Protection Agency what the U.S. Supreme Court has called “a thorny causation problem: How should EPA allocate among multiple contributing upwind States responsibility for a downwind State’s excess pollution?”¹

The EPA’s efforts to address this issue have yielded, over the last two decades, a series of complex federal regulatory programs imposing increasingly stringent controls on emissions in most states in the eastern half of the country — first the “NOx SIP Call” Rule in 1998, then the Clean Air Interstate Rule in 2005, followed by the Cross-State Air Pollution Rule, or CSAPR, in 2011 and, most recently, the 2016 “CSAPR Update” Rule. Now, however, the EPA — while defending the CSAPR Update Rule against pending litigation challenges in the D.C. Circuit² — is signaling a fresh approach for potential future interstate transport regulation, an approach that involves greater deference to states’ analyses and determinations and that may eschew additional broad regulatory mandates imposed by the EPA.

In March 2018, the EPA issued a memorandum providing guidance and describing information relevant to “state implementation plans,” or SIPs, sometimes called “good neighbor” SIPs, that address interstate transport with respect to the EPA’s newest national ambient air quality standard, or NAAQS — a more stringent air quality standard that the EPA adopted in 2015 for ground-level ozone. The CAA requires states to submit to the EPA, for its approval or disapproval, good neighbor SIPs addressing that NAAQS. The EPA’s March 2018 memorandum, which is titled “Information on the Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards under Clean Air Act Section 110(a)(2)(D)(i)(I),”³ sets out (in its Attachment A) a “Preliminary List of Potential Flexibilities Related to Analytical Approaches for Developing a Good Neighbor State Implementation Plan.” Despite its seemingly technical language, and notwithstanding its caveat that the “EPA is not at this time making any determination that the ideas discussed” in the guidance memorandum “are consistent with the requirements of the CAA,” the document outlines a number of areas in which the EPA appears to recognize states’ discretion to use approaches that vary from those reflected in the EPA’s past interstate transport regulations.

For instance, the March 2018 memorandum suggests that states may consider the effects that

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international emissions — emissions from sources located outside the United States — have in increasing ozone concentrations in many states. In apparent recognition of the reality that no state has authority to control those emissions, the EPA memorandum says that states may choose to consider if “air quality, cost, or emission reduction factors should be weighted differently in areas where international contributions are relatively high.”

In addition, the memorandum suggests that states (and, at least by implication, the EPA) may want to take into account the “potential value of considering different [air-quality computer] modeling tools or analyses in addition to EPA’s.” Along similar lines, the memorandum notes that, in their good neighbor SIP analyses, states may consider whether to use “appropriate alternate base years” — that is, years different from those that the EPA has used in its own interstate transport modeling analyses. And the memorandum says that “[c]onsideration of state-specific information in identifying emissions sources ... and [emissions] controls” may be appropriate in states’ development of their good neighbor SIPs.

Regarding analyses designed to identify the upwind state or states that may make significant contributions to ozone air quality problems in downwind states, the memorandum — without making any specific recommendations — signals that the EPA recognizes that states have at least some leeway to adopt approaches that differ from those the EPA has used. A particular issue listed in the EPA’s memorandum concerns the “threshold” for state-to-state air quality contributions that may be applied in determining whether a state’s emissions have a big enough effect on downwind states’ air quality to make those emissions a potential candidate for additional regulatory controls. In CSAPR and the CSAPR Update Rule, the EPA used a contribution threshold equal to one percent of the applicable NAAQS (which, for the 2015 ozone NAAQS of 70 parts per billion, or ppb, would be 0.70 ppb), a level that many states and regulated parties have criticized as unjustifiably low. The March 2018 memorandum opens the door for states’ consideration of “different contribution thresholds.” In fact, a subsequent EPA guidance document, issued on Aug. 31, 2018,⁴ provides an analysis supporting the conclusion that using “a threshold of 1 ppb” — still quite low, but nearly 50 percent higher than a 0.70-ppb, one-percent-of-the-NAAQS threshold — “may be appropriate for states to use” in developing good neighbor SIPs for the 2015 ozone NAAQS.

According to information on the EPA’s website, as of mid-October, the EPA had received formally submitted good neighbor SIPs for the 2015 ozone NAAQS from several states. The EPA has already approved one of those, a SIP submitted by the state of Washington in which that state determined that its sources’ emissions will not contribute significantly to ozone air quality problems elsewhere. (Most of the other SIPs listed on the EPA’s website were submitted to the EPA in September 2018, and the EPA had not yet taken any public action on them.) Notably, in a July 23, 2018, proposed rule to approve the Washington SIP⁵ — an action that the EPA made final in a Sept. 20 Federal Register notice⁶ — the EPA reiterated some of the points about state flexibility that it included in its March 2018 memorandum.

Additional states, including several in the eastern half of the country that are already subject to CSAPR and the CSAPR Update Rule, are at various stages of developing good neighbor SIPs for the 2015 ozone NAAQS. A number of these SIPs likely will be submitted to the EPA in the near future. These state plans — and upcoming EPA decisions regarding approval of them — can be expected to reveal more about the extent to which the EPA’s recent guidance concerning state discretion in this area will be put into practice.

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Notes

¹ *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1604 (2014).

² *State of Wisconsin, et al. v. EPA*, No. 16-1406 and consolidated cases (oral argument held Oct. 3, 2018).

³ <https://www.epa.gov/airmarkets/2015-ozone-naaqs-memo>

⁴ <https://www.epa.gov/airmarkets/analysis-contribution-thresholds-memo>

⁵ 83 Fed. Reg. 34,813 (July 23, 2018).

⁶ 83 Fed. Reg. 47,568 (Sept. 20, 2018).

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