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CSPAR Gets Zapped: *EME Homer City Generation, L.P. v. EPA*

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SIPRAC

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Background

- **EPA's long-running efforts to address interstate transport**
 - **CAA “Good Neighbor” clause (§110(a)(2)(D))**
 - **State pressure (esp. Northeast states)**
 - **NO_x SIP call (1998)**
 - **CAIR (Clean Air Interstate Rule) (2005)**
 - **CSAPR (Cross-State Air Pollution Rule) (2011)**

Background: CAIR

- **CAIR basics**
 - **Intended focus: Electricity generating units (EGUs)**
 - **Defined 28 states' "good neighbor" obligations re: NO_x and SO₂ (for 1997 O₃ NAAQS and 1997 PM_{2.5} NAAQS)**
 - **Cap: State emission budgets based on cost/ton of controls**
 - **Trade: EPA-administered interstate trading**

- **CAIR fatal flaws (per federal court, 2008):**
 - EPA used cost to increase state's reduction obligations beyond state's "significant" interstate contribution
 - Trading: Insufficient link to downstate attainment goal; improper overlap with acid rain program
- Court (ultimately) sent CAIR back to EPA for replacement, but did not strike it down
 - So, CAIR has remained in effect

CAIR 2.0: CSAPR

- **EGUs only**
- **Adopted mid-2011; to take effect Jan. 1, 2012 ...**
- **... but stayed on Dec. 30, 2011**

CSAPR Basics

1. Emission reductions

a. Applicability: Based on transport and downwind impact

- “Significant contribution” states defined as causing >1% of relevant NAAQS in downwind state, per modeling
 - PM_{2.5}: 18 states (annual), 22 states (24-hr.)
 - O₃ (1997): 26 states
 - Connecticut not listed

CSAPR: Affected States



- States controlled for both fine particles (annual SO_2 and NO_x) and ozone (ozone season NO_x) (20 States)
- States controlled for fine particles only (annual SO_2 and NO_x) (3 States)
- States controlled for ozone only (ozone season NO_x) (5 States)
- States not covered by the Cross-State Air Pollution Rule

b. Emission reductions: Based on costs

- EPA assessed individual and aggregate state reductions under various cost-based control scenarios (*i.e.*, installation of controls set at or below various \$/ton levels)
- EPA then modeled downwind air quality effects, and selected optimal \$/ton per “multi-factor assessment”
 - NO_x: \$500/ton (ozone season and annual)
 - SO₂: \$500/ton for several states, \$2,300/ton elsewhere
- Resulting reductions set as state-specific annual budgets

- **Fatal flaw (per court): Required reductions not tied to (and potentially surpass) each state's contribution level**
 - *i.e.*, no “collective punishment” of upwind states – collective impact of upwind states on downwind state must be allocated (to the extent feasible) among upwind states in proportion to impact of each on downwind state

2. FIP

- **EGUs in each subject state required to make SO₂ and NO_x reductions need to comply with state's budget**
 - **Via allowances to be distributed by EPA**
- **Interstate trading program (“fresh start,” but more limited than CAIR)**
- **States could submit SIP to modify or replace FIP, subject to EPA approval**

- **Fatal flaw (per court): “FIP-first” approach**
 - EPA disregarded states’ primary role under CAA to implement through SIP (“cooperative federalism”)

What's Next?

- **Not so fast : Blistering, lengthy dissent → will EPA seek rehearing by full court? review by Supreme Court?**

- **Fallout, if CSAPR is down and out:**
 - **Challenges of meeting state-based approach as directed by court**
 - **Bodes ill for further market-based programs?**
 - **Impacts on EPA regional haze rule**

- **Fallout, if CSAPR is down and out:**
 - **Downwind states’ prospects for attainment with O₃, PM NAAQS (and coming revisions?)**
 - **Increase in CAA Section 126 petitions by states to EPA?**
 - Target specific upwind sources
 - **Nonattainment “super-areas”?**
 - **Increase in direct action (lawsuits against upstate emitters by NGOs, downwind states)?**



DISCLAIMER

This presentation summarizes select aspects of complex legal programs and issues. It is not legal advice or a substitute for legal advice.