

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

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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)
 - NOx 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 SO_2 (for 1997 O_3 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



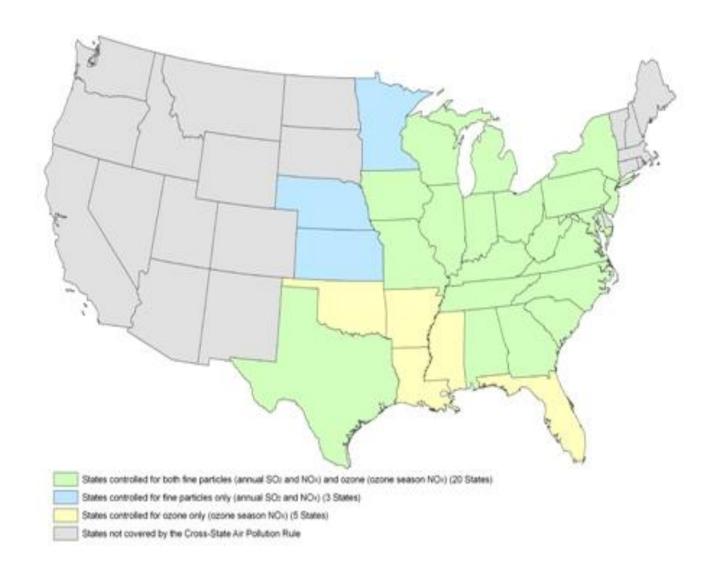
CSAPR Basics

1. Emission reductions

- a. <u>Applicability</u>: 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.)
 - O_3 (1997): 26 states
 - Connecticut not listed



CSAPR: Affected States





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



- <u>Fatal flaw (per court)</u>: 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. <u>FIP</u>

- EGUs in each subject state required to make SO2 and NOx 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.