KEY CLEAN AIR ACT SUPREME COURT DECISIONS

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***Environmental Protection Agency v. EME Homer City Generation, L.P. et al.*, 134 S. Ct. 1584, 188 L. Ed. 2d 775 (U.S. 2014)**

Decided: April 29, 2014

Opinion By: Ginsburg, joined by Roberts, Kennedy, Breyer, Sotomayor, and Kagan

In *EME Homer City*, the Court reversed the U.S. Court of Appeals for the D.C. Circuit's 2-1 decision to vacate the Cross State Air Pollution Rule ("CSAPR") in its entirety. CSAPR is the third incarnation of regulations issued by EPA under Section 110(a)(2)(D)(i) of the Clean Air Act (the "Good Neighbor Provision").[1]

The Good Neighbor Provision requires that state implementation plans ("SIPs"):

> (D) contain adequate provisions—
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> (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—
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> (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or
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> (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility[2]

In short, the Good Neighbor Provision requires SIPs that prevent pollution in an upwind state from contributing significantly to nonattainment of air quality standards in a downwind state. In 1998, EPA issued the "NO_X SIP Call" to regulate the emission of NO_X from 23 upwind states.[3] In 2005, EPA issued the Clean Air Interstate Rule ("CAIR") to regulate the emission of

[1] 42 U.S.C. § 7410(a)(2)(D)(i).
[2] *Id.*
[3] *EME Homer City*, 134 S.Ct. at 1595.

NO_X and SO_2 from upwind states. In *North Carolina v. EPA*[4], the DC Circuit initially struck down CAIR, but on rehearing the court decided to leave CAIR in place while directing EPA to address the issues it identified.[5]

In 2011, EPA issued CSAPR[6] to address the issues raised by the DC Circuit in its *North Carolina* decisions. CSAPR employed a two-step approach to determine whether an upwind state contributed pollution to a downwind state requiring action under the Good Neighbor Provision. First, EPA screened out any state that only contributed a *de minimis* less than one percent of the national ambient air quality standard ("NAAQS") to a downwind state.[7] For those that "screened-in," EPA developed a cost-based emissions budget for each state.[8] In issuing CSAPR, EPA issued a federal implementation plan ("FIP") for each state subject to the rule instead of requiring the states to submit a SIP.[9]

The D.C. Circuit vacated the rule for two reasons. First, according to the Court, EPA upset the Clean Air Act's division of responsibility between federal and state governments by issuing the rule as FIP before the states had a chance to propose compliant SIPs.[10] Second, by determining emissions budgets for affected states by cost, EPA failed to ensure that upwind states would only reduce their proportional contributions to downwind states pollution and failed to guard against over reduction by upwind states.[11] The Supreme Court disagreed.

The Court rejected the DC Circuit's conclusion that EPA's issuance of the FIP was improper finding that, under Section 110 of the Clean Air Act, once a NAAQS is issued a state has three years to propose a SIP that complies, among others, with the Good Neighbor

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[4] *North Carolina v. EPA*, 531 F.3d 896 (D.C. Circuit 2008).
[5] *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Circuit 2008) (*per curiam*).
[6] CSAPR was initially called the Transport Rule. EPA changed the name to CSAPR when issuing the final rule.
[7] *EME Homer*, 134 S.Ct. at 1596.
[8] *Id.* at 1596-97.
[9] *Id.* at 1597.
[10] *Id.* at 1598.
[11] *Id.* at 1598-99.

Provision.[12] The Court concluded that because none of the previously submitted SIPs complied with the requirements of the Good Neighbor Provision (thus requiring the CSAPR), EPA properly issued FIPs contemporaneously with CSAPR.[13]

The Court also found the EPA's two-step approach of determining what states would be subject to CSAPR and developing the emissions budget was within the agency's discretion. The Court pointed to a lack of specific implementing instructions in the Good Neighbor Provision in concluding that the agency's interpretation was reasonable under the *Chevron* doctrine.[14] The Court did note that its decision did not preclude an upwind state from bringing an as-applied challenge to CSAPR if it concludes that it has been forced to regulate emissions below the *de minimis* threshold or beyond the point necessary to bring all downwind states into attainment.[15]

As a result of the Court's ruling, regulated upwind states must comply with their CSAPR budgets starting in 2015.

***Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 189 L.Ed. 2d 372 (U.S. 2014)**

Decided: June 23, 2014

Opinion by: Scalia joined by Roberts and Kennedy in full, joined by Thomas and Alito in parts I, II-A, and II-B-1, and joined by Ginsburg, Breyer, Sotomayor, and Kagan in Part II-B-2.

In *Utility Air Regulatory Group*, the Court reversed in part and upheld in part the D.C. Circuit's decision below. On June 26, 2012, the D.C. Circuit rejected the petition of several states and industry groups to a series of EPA actions relating to the regulation of greenhouse gases. The DC Circuit upheld the following EPA actions:

(1) The Endangerment Finding – concluding that EPA's record adequately supported the finding and that there was no need to engage in policy discussions over the impact of

[12] *Id.* at 1601.
[13] *Id.*
[14] *Id.* at 1607.
[15] *Id.* at 1609.

> future regulations, only whether motor-vehicle emissions of greenhouse gases cause or contribute to an endangerment of the public health or welfare.[16]
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> (2) The Tailpipe Rule – concluding that "Having made the Endangerment Finding pursuant to CAA § 202(a), 42 U.S.C. § 7521(a), EPA lacked discretion to defer promulgation of the Tailpipe Rule on the basis of its trigger of stationary-source permitting requirements under the PSD program and Title V."[17]
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> (3) The PSD/Title V Greenhouse Gas Requirements – finding that language of the Clean Air Act and the Supreme Court's Decision in *Massachusetts v. EPA* mandated the inclusion of greenhouse gases into the PSD/Title V program:[18]
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> Petitioners in these cases, along with several other similar cases, sought review of the

D.C. Circuit's decisions before the Supreme Court. The Supreme Court granted certiorari on the following issue only:

> Whether the EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

The question before the Supreme Court related to EPA's regulation of greenhouse gases under the PSD and Title V programs. The D.C. Circuit had found that the definition of "any air pollutant" under the Clean Air Act required the regulation of the greenhouse gases under the PSD/Title V programs:

> In sum, we are faced with a statutory term—"any air pollutant"—that the Supreme Court has determined is "expansive," and "unambiguous[ly]" includes greenhouse gases. *Massachusetts v. EPA*, 549 U.S. at 529. Moreover, the PSD program requires covered sources to install control technology for "each pollutant" regulated under the CAA, 42 U.S.C. § 7475(a)(4), and to establish that they "will not cause, or contribute to, air pollution in excess of any . . . emission standard . . . under [the CAA]." Id. § 7475(a)(3) (emphasis added). These provisions demonstrate that the PSD program was intended to control pollutants regulated under every section of the Act. Finally, Congress's "Declaration of Purpose" expressly states that the PSD program was meant, in part, to protect against adverse effects on "weather" and "climate"—precisely the types of harm caused by greenhouse gases. See id. § 7470(1). Given all this, we have little trouble

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[16] *Coalition for Responsible Regulation, Inc. et al. v. Environmental Protection Agency*, 684 F.3d 102, 118 (D.C. Cir. 2012).
[17] *Id.* at 126.
[18] *Id.* at 136.

> concluding that "any air pollutant" in the definition of "major emitting facility" unambiguously means "any air pollutant regulated under the CAA."[19]

The Court disagreed, finding the D.C. Circuit's decision the result of a flawed syllogism.[20] The Court found that EPA's interpretation of the Clean Air Act that allowed it to regulate sources under the PSD/Title V programs that "but for" their emissions of greenhouse gases would not be considered a major source is inconsistent with the text of the Clean Air Act and doing so would make those programs unworkable.[21] The Court also struck down the "Tailoring Rule" through which EPA altered the threshold requirement for coverage under the PSD/Title V programs from 100 or 250 tons per year (depending on the type of source) to 75,000 or 100,000 tons per year of CO_2 equivalent as impermissible "tailoring" of unambiguous statutory terms to further bureaucratic policy.[22]

While the Court concluded that EPA did not have the authority to regulate sources under the PSD or Title V programs solely based on their greenhouse gas emissions, the Court upheld EPA's authority to require sources that are subject to PSD permitting requirements based on emissions of other pollutants to implement the best available control technologies ("BACT") to control greenhouse gases.[23] It was proper for EPA to require these "anyway" sources to comply with BACT for greenhouse gases because, unlike the permitting threshold question rejected by the Court, the language requiring BACT "for each pollutant subject to regulation under this chapter" supports EPA's interpretation.[24] The Court did limit this ruling by indicating that a

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[19] *Id.* at 136.
[20] *Utility Air Regulatory Group*, 134 S.Ct. at 2439.
[21] *Id.* at 2442.
[22] *Id.* at 2445.
[23] *Id.* at 2448.
[24] *Id.*

source must emit more than a *de minimis* amount of greenhouse gases and that a determination of what constitutes *de minimis* must be rooted in proper grounds.[25]

[25] *Id.* at 2449.