

MOG Update

CIBO Quarterly Energy & Environment Meeting

December 11, 2019

CSAPR Litigation

Wisconsin v. EPA, No. 16-1406

CSAPR Update Decision

- Per Curium – Unanimous Decision issued September 13, 2019.
- CSAPR Update is inconsistent with the Act: “it allows upwind States to continue their significant contributions to downwind air quality problems beyond the statutory deadlines by which downwind States must demonstrate their attainment of air quality standards. In all other respects, though, we determine that EPA acted lawfully and rationally.” Slip Op. p. 5.

Flexibility – Good Neighbor SIPs & Significant Contribution

- “While EPA has not justified its failure to align the deadline for upwind States to eliminate significant contributions with the deadline for downwind areas to attain the NAAQS, the agency retains some flexibility in administering the Good Neighbor Provision. We acknowledge that the “realities of interstate air pollution . . . are not simple,” and EPA faces its share of “thorny . . . problem[s]” in regulating it. *EME Homer II*, 572 U.S. at 514-16. EPA, though, possesses a measure of latitude in defining which upwind contribution ‘amounts’ could as ‘significant[]’ and thus must be abated. *See id.* at 518; 520 n.21. And the Supreme Court has indicated that EPA can take into account, among other things, “the magnitude of upwind States’ contributions and the cost associated with eliminating them.” *Id.* at 518. Additionally, in certain circumstances, EPA can grant one-year extensions of the nonattainment deadlines to downwind States. 42 USC 7511(a)(5). EPA grants those extensions fairly commonly.” Slip Op. p. 26.

International Sources

- “. . .Industry Petitioners are simply wrong that the Rule “identif[ies] as ‘problem’ receptors many whose problems were actually attributable not to upwind -state but non-U.S. emissions.” That logic incorrectly assumes that an upwind State “contributes significantly” to downwind nonattainment only when its emissions are the sole cause of downwind nonattainment. But an upwind State can “contribute” to downwind nonattainment even if its emissions are not the but-for cause.” Slip Op. p. 35.

Remedy

- The Update Rule is invalidated in one respect, it “allows upwind States to continue their significant contributions to downwind air quality problems beyond the statutory deadlines by which downwind States must demonstrate their attainment of air quality standards.”
- “As a general rule, we do not vacate regulations when doing so would risk significant harm to the public health or the environment.” Vacatur is inappropriate and the case is remanded. Slip Op. 59-60.
- “We decline Environmental Petitioners’ request, however, to impose a six-month timeframe on EPA’s promulgation of a revised rule. But of course, “we do not intend to grant an indefinite stay of the effectiveness of this court’s decision . . . And Environmental Petitioners could attempt to “bring a mandamus petition to this court in the event that EPA fails to modify [the Rule] in a manner consistent with our . . . opinion.” Slip Op. p. 60.

CSAPR Close-Out Rule Status

Judgment Issued - Vacated

- On October 1 2019, the D.C. Circuit issued its decision vacating the CSAPR Close-Out Rule.
- The Court acknowledged that by EPA's own admission, the CSAPR Close-Out rule relied on the same statutory interpretation of the Good Neighbor provisions as the Court rejected in the *Wisconsin* case involving the CSAPR Update Rule.
- The Court noted several alternatives that EPA might be able to pursue; however, the Court observes that none of those have yet to be invoked by EPA.
- Recognizing that a petition for rehearing in the CSAPR Update Rule must be filed by October 28, 2019, the Court has set the same date for petitions for rehearing in connection with the CSAPR Close-Out Rule case.

126 PETITIONS

1. Delaware/Maryland
 - a. Petition
 - b. EPA Denial
 - c. Litigation
2. New York
 - a. Petition
 - b. EPA Denial
3. Litigation

DELAWARE/MARYLAND

DELAWARE

- Four Clean Air Act §126 Petitions filed between July and November of 2016
- Cite violations of CAA §110(a)(2)(D)(i)
- Plants cited include
 - Homer City (Pennsylvania)
 - Conemaugh (Pennsylvania)
 - Brunner Island (Pennsylvania)
 - Harrison (West Virginia)

EPA final action denying all four Delaware petitions (83 Fed Reg 50444, October 5, 2018)

MARYLAND

- §126 Petition filed November 16, 2016
- Cites violation of CAA §110(a)(2)(D)(i)
- Cites 36 EGUs located in Indiana, Kentucky, Ohio, Pennsylvania, and West Virginia, alleging that emissions “contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to [the 2008 Ozone NAAQS].”.
- EPA final denial of Maryland petition (83 Fed Reg 50444, October 5, 2018)

Basis For MD/DE Denial

1. Air quality modeling of ozone levels in 2017 from the Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS (CSAPR Update) and more recent air quality modeling of ozone levels in 2023 show no air quality problems in Delaware with respect to the 2008 and 2015 ozone NAAQS.
2. For both the Delaware and Maryland, the agency has already evaluated ozone transport issues and NOx control strategies in CSAPR Update
3. EPA is denying Delaware's petitions based on the failure to meet its burden under CAA section 126(b) to establish a basis for the finding requested.
4. EPA additionally is denying both Delaware's and Maryland's petitions based on the agency's own independent analysis of the interstate transport of ozone pollution conducted for the CSAPR Update.
5. EPA is also denying Delaware's petitions for the 2015 ozone NAAQS based on its own recent analyses projecting emissions levels to a relevant future year, which found no expected nonattainment or maintenance problems in Delaware for that NAAQS.
6. The EPA is finalizing the denial based on the EPA's independent assessment there are no additional cost-effective reductions relative to the CSAPR Update for the sources named in Maryland's petition.
7. Maryland's petition did not allege that a source or group of sources emit or would emit in violation of CAA section 110(a)(2)(D)(i)(I) for the 2015 ozone NAAQS, but rather merely alleged that emissions reductions resulting from Maryland's requested remedy could influence the 2015 ozone designations.

Appeal of EPA MD/DE Denial

Maryland, et al v EPA, D.C. Circuit, Case No. 18-1285. Briefing complete; oral argument not scheduled.

EPA Brief filed July 2, 2019:

NEW YORK

NEW YORK PETITION

- Filed: March 12, 2018
- 348 Facility Targets: 123 EGUs; 166 “non-electric generating units”; 59 oil and gas facilities
- State Targets: Illinois, Indiana, Kentucky, Maryland, Michigan, Ohio, Pennsylvania, Virginia and West Virginia.
- Requested relief: Daily emission limits of 0.15 lb/mmBtu

EPA Denial of NY Petition

EPA Final Denial of New York 126 petition; 84 Fed. Reg. 56058, October 18, 2019. Principal reasons for denial include:

1. With respect to the 2008 ozone NAAQS, EPA denied the petition at step 1 because (a) the petition does not provide sufficient information to indicate that the NYMA should be considered a nonattainment or maintenance receptor pursuant to the good neighbor provision and (b) EPA's own independent analysis indicates that there is not in 2023 an air quality problem in New York.
2. With respect to the 2015 ozone NAAQS, EPA's 2023 modeling shows a relevant downwind air quality problem, and, thus, the EPA is not denying this portion of the petition with respect to step 1.
3. EPA is denying the petition as to all areas for the 2008 and 2015 NAAQS at step 3 (i.e., whether, considering cost and air quality factors, emissions from sources in the named state(s) will significantly contribute to nonattainment or interfere with maintenance of a NAAQS at a receptor in another state).
4. EPA has not deferred action on New York's petition until its action on the good neighbor SIPs (for the named upwind states) has concluded. Therefore, by acting on New York's CAA section 126(b) petition regarding the 2015 ozone NAAQS before concluding action on CAA section 110 SIPs, the EPA believes it has given CAA section 126(b) independent meaning as intended by Congress and the courts.
5. Although the EPA explained that the Determination Rule concluded that the emissions reductions required by the CSAPR Update would fully address covered states' good neighbor obligations for the 2008 ozone NAAQS, the EPA did not rely on these rules (i.e., the CSAPR Update and the Determination Rule) alone to propose denial of the petition.

EPA Denial of NY Petition

6. Challenges to EPA's basis for selecting 2023 as an analytic year to assess good neighbor obligations for the 2008 ozone NAAQS in prior rulemaking actions, such claims are not properly raised in this rulemaking action.

7. EPA is finalizing a determination that material elements in New York's assessment of step 3 are insufficient, such that the EPA cannot conclude that any source or group of sources in any of the named states will significantly contribute to nonattainment or interfere with maintenance in Chautauqua County or the NYMA relative to the 2008 and 2015 ozone NAAQS.

8. EPA is finalizing its denial of the petition because New York has not met its burden to demonstrate that the sources emit or would emit in violation of the good neighbor provision with respect to either the 2008 or 2015 ozone NAAQS. Although the EPA already has identified a sufficient basis to deny the petition as to Chautauqua County (for the 2008 and 2015 ozone NAAQS) and NYMA (for the 2008 ozone NAAQS) at step 1 of the four-step interstate transport framework, the EPA is also relying on its assessment of step 3 as an additional and independent basis for denial as to the petition's claims for these areas.

Implications of CSAPR Decisions on NY Denial

In CSAPR Update Rule litigation, the Court held that the Good Neighbor Provision “require[s] upwind States to eliminate their significant contributions in accordance with the deadline by which downwind States must come into compliance with the NAAQS,” As EPA acknowledges, the Close-Out Rule “relied upon the same statutory interpretation of the Good Neighbor Provision” that was rejected in Wisconsin. Thus, EPA’s defense of the Close-Out Rule is foreclosed.

EPA still retains some flexibility in administering the Good Neighbor Provision.

1. significant contribution
2. one-year extensions to downwind states
3. impossibility of eliminating excess upwind emissions by the downwind deadline
4. showing of necessity

EPA's Assessment of Implications of CSAPR Decisions on NY Denial

“The court held [in the CSAPR Update case] that the rule is inconsistent with the CAA because it does not fully address upwind states’ obligations under the good neighbor provision by the relevant attainment date for downwind areas. ... EPA is finalizing its denial of New York’s CAA section 126(b) petition, in part, because the petitioner did not meet its burden to demonstrate both that there is a relevant downwind air quality under the good neighbor provision in a relevant future year in either Chautauqua County or the NYMA, and that there are cost-effective emissions reductions available at the named sources. This basis for denial based on Petitioner’s failure to meet its burden is independent and severable from any portion of the denial based on the EPA’s discretionary evaluation of downwind air quality in New York using the Agency’s 2023 modeling data. The EPA may make any necessary or appropriate modifications to this final action subsequently to reflect its understanding of the court’s holding in Wisconsin.”

LITIGATION

NY, NJ and NYC Challenge

2019 October 29, New York, New Jersey and New York City filed petition for judicial review.

MOG has filed to intervene

CIBO is funder in intervention