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THE EPA CROSS-STATE AIR POLLUTION RULE – GONE WITH THE WIND

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Today, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit struck down the Obama Administration's Cross-State Air Pollution Rule (CSAPR – or "Transport Rule"). In a 2-1 sharply divided decision, the Court didn't just remand the rule to EPA for "reworking," it vacated the rule in toto and sent EPA back to the drawing board. The foundation of the decision is very basic – EPA extended its regulatory grasp well beyond its statutorily authorized reach.

On June 26, 2012, this same Court upheld EPA's determination that greenhouse gas (GHG) emissions "endanger public health and welfare by contributing to climate change," and that new major sources of air emissions and major modifications of existing sources must implement "best available control technology" (BACT). The next weapon in the Administration's arsenal of new Clean Air Act regulations was the Transport Rule, and strident supporters were exuberantly confident that this critical component of EPA's current, unbridled regulatory pursuits in the air pollution arena would likewise find favor with the Court. Thus, reports that came flooding in after the decision was announced resoundingly showed that even the most vocal advocates were, to put it mildly, stunned.

For context, this decision must be framed against another decision of this Court – the 2008 strikedown of the Bush Administration's Clean Air Interstate Rule (CAIR). Like CSAPR, CAIR would have imposed major new, mandatory reductions of Sulfur Dioxide (SO2) and Nitrogen Oxide (NOx) emissions from power plants, mainly those fueled by coal. It was the first really serious effort to throttle back these emissions from these sources since passage of the Clean Air Act Amendments of 1990.

In July 2008, the D.C. Circuit vacated CAIR, finding that the rules "didn't go far enough" to protect downwind states from emissions in upwind states. However, in a remarkable reversal of its ruling, the

Court subsequently decreed in December 2008 that CAIR would not be vacated. Rather, the rule was remanded to EPA to remain in place until the agency produced a substitute "consistent with the Court's opinion." The ultimate substitute – CSAPR (the Transport Rule).

A boiled-down comparison of CSAPR to CAIR is that the SO2 and NOx reductions would be significantly greater; the cap-and-trade maze would be remarkably more difficult to navigate; the interstate emissions trading options would essentially be eliminated; and the authority of the States to develop State Implementation Plans (SIPs) would be trounced and supplanted by EPA-dictated Federal Implementation Plans (FIPs) (until, theoretically, the states could make a case to trump the federal plans – a very heavy burden).

Today's decision moots all of these comparisons, leaving, ironically, the Bush Administration CAIR rule in place and giving EPA yet another "bite at the apple." The situation mimics what happened to the Obama Administration in its attempt to block and ratchet down the 2008 Bush Administration revision of the National Ambient Air Quality Standard (NAAQS) for ground-level ozone. As that debacle skidded out of control, even the President saw the handwriting on the political wall and wisely shut down EPA's new approach – without consulting with his EPA Administrator, to boot. Now, the Administration is in the throes of resuming implementation of the 2008 Bush revisions to the ozone NAAQS.

EPA and the Department of Justice now have to mull over what to do next, and there are three options. First, EPA could Petition for Rehearing before the same three-judge panel. Second, EPA could Petition for Rehearing en Banc (before all D.C. Circuit judges). And third, EPA could appeal directly to the Supreme Court. Doubtless, it won't be long before one of these options is chosen.

In its CAIR decision in 2008, the D.C. Circuit said the Bush EPA didn't go far enough. In its CSAPR decision today, the same Court said the Obama EPA went too far. One can't help but be reminded of that very similar situation in *Goldilocks and the Three Bears* and wonder, when will EPA get it "just right?" For the Court, the answer to this question is quite simple. It hearkens back to the immortal words of Mr. Justice Potter Stewart in the 1964 United States Supreme Court *Jacobellis* obscenity decision, when he wrote, "I can't define it, but I know it when I see it."

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