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U.S. EPA RELEASES FINAL RULE TIGHTENING EMISSIONS LIMITS FOR POWER PLANTS IN 12 STATES

To Our Clients and Friends:

On March 15, 2021, the U.S. Environmental Protection Agency (“EPA”) issued a final rule that requires electric generating units (“EGUs,” *i.e.*, power plants) in 12 states to reduce ozone season nitrogen oxides (“NO_x”) emissions. This final rule, issued pursuant to a court-ordered deadline, is the first significant regulatory action finalized by the Biden EPA.

Background. In 2008, EPA set new National Ambient Air Quality Standards (“NAAQS”) for ozone (the “2008 ozone NAAQS”).^[1] This action triggered a requirement for states to submit State Implementation Plans (“SIPs”) to EPA addressing, in part, obligations under the Good Neighbor Provision of the Clean Air Act, pursuant to which SIPs must:

contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS].^[2]

The Good Neighbor Provision effectively “requires upwind States to eliminate their significant contributions to air quality problems in downwind States.”^[3] In general, states with non-attainment areas classified as Moderate or higher must submit SIPs to EPA to bring those areas into attainment according to the statutory schedule.^[4] Under the 2008 ozone NAAQS, downwind states were required to comply with the NAAQS by July 20, 2018 (for areas in Moderate non-attainment) and by July 20, 2015 (for areas in Marginal non-attainment).^[5]

Section 110(c)(1) of the Clean Air Act requires EPA to promulgate a Federal Implementation Plan (“FIP”) within two years after EPA: (1) finds that a state has failed to make a required SIP submission, (2) finds an SIP submission to be incomplete, or (3) disapproves an SIP submission.^[6]

In 2011, EPA promulgated the Cross-State Air Pollution Rule (“CSAPR”), identifying emissions in 28 states that significantly affected the ability of downwind states to comply with 1997 and 2008 ozone NAAQS and the 2006 NAAQS for PM_{2.5}, and limiting these emissions by setting sulfur oxide (“SO_x”) and annual and seasonal NO_x “budgets.” EPA then promulgated FIPs for each of the 28 states covered by CSAPR that required EGUs in the covered states to participate in regional trading programs to achieve the necessary emission reductions.^[7]

In 2016, EPA promulgated an update to CSAPR to revise seasonal ozone NO_x emissions budgets for 22 states (the “CSAPR Update”).^[8] The CSAPR Update implemented the budgets through FIPs requiring sources to participate in a revised CSAPR NO_x ozone season trading program beginning with the 2017 ozone season, but did not require the upwind states to eliminate their significant contributions to downwind non-attainment by any specific date.^[9] The CSAPR Update also did not address emissions

from non-EGUs.[10] In 2018, EPA promulgated the CSAPR “Close-Out,” which determined that no further reductions in NO_x emissions were required with respect to the 2008 ozone NAAQS for 20 of the states covered by the CSAPR Update.[11]

A host of environmental groups and states challenged the CSAPR Update in the D.C. Circuit, alleging that the rule either over-controlled or under-controlled upwind emissions.[12] The court upheld the CSAPR Update in most respects; however, the court rejected EPA’s argument that Clean Air Act Sections 110(a)(2)(D)(i) and 111, 42 U.S.C. §§ 7410(a)(2)(D)(i) & 7511, when read together, do not require Good Neighbor emissions reductions by a particular deadline.[13] The court held that because the rule did not require upwind states to eliminate their significant contributions to downwind ozone by the deadlines for downwind states to comply with the 2008 ozone NAAQS (or by any date at all), the CSAPR Update was inconsistent with the requirements of the Clean Air Act.[14] The court remanded the CSAPR Update to EPA without vacatur.[15] Shortly thereafter, a different panel of the D.C. Circuit vacated the CSAPR Close-Out because it “rest[ed] on an interpretation of the Good Neighbor Provision now rejected.”[16]

Following these D.C. Circuit decisions, certain downwind states filed suit against EPA in the Southern District of New York on the basis that, due to remand of the CSAPR Update and the vacatur of the Close-Out Rule, EPA had failed to perform its statutory duty to promulgate FIPs for upwind states addressing the Good Neighbor obligations for the 2008 ozone NAAQS.[17] The court agreed with the states and directed EPA to issue a final rule regarding the required FIPs by March 15, 2021.[18]

October 2020 Proposed Rule. On October 30, 2020, EPA published a proposed rule in response to these cases—the Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS (the “Revised CSAPR Update Proposed Rule”).[19] The key elements of the proposed rule are:

- A finding that the projected 2021 emissions from 9 upwind states do not significantly contribute to non-attainment or maintenance problems in downwind states and that the CSAPR Update FIPs for these states fully addressed the Good Neighbor obligations of these states.
- A determination not to impose further obligations (i.e., budget reductions) on these 9 states.
- A finding that the projected 2021 emissions for 12 upwind states significantly contribute to non-attainment or maintenance problems in downwind states.
- Promulgation of new or amended FIPs to revise state NO_x emission budgets reflecting additional emissions reductions from EGUs.
- No limits on ozone season NO_x emissions from non-EGU sources.

Some commenters to the Revised CSAPR Update Proposed Rule have asserted that the Proposed Rule over-controls upwind emissions and requires reductions in an unreasonably short amount of time, while other commenters asserted that the Proposed Rule under-controls upwind emissions and should require emissions reductions from non-EGU sources.

Final Rule and Key Takeaways. Consistent with the deadline set by the Southern District of New York, on March 15, 2021, EPA issued its final rule (the “Revised CSAPR Update”).^[20] The final rule closely tracks the October proposal. The key elements of the final rule are:

- A finding that further ozone season NO_x emissions reductions to address Good Neighbor obligations as to the 2008 ozone NAAQS are necessary for 12 of the 21 states for which the CSAPR Update was found to be only a partial remedy. As such, EPA promulgated new or revised FIPs for these states that include new EGU NO_x ozone season emissions budgets, with implementation of these emissions budgets beginning with the 2021 ozone season. These states are: Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, Virginia, and West Virginia.^[21]
- A determination that it is feasible for EGUs to comply with the enhanced stringency of the budgets and there is sufficient time before the effective date of the rule to prepare to meet these budgets by either undertaking emissions control measures (other than installation of state-of-the-art combustion controls, which take effect for the 2022 ozone season) or through a new Trading Program.^[22]
- Implementation of new state-level, ozone season emissions budgets through a new CSAPR NO_x Ozone Season Group 3 Trading Program comprising these 12 states. As part of establishing the Group 3 Program, EPA is permitting the creation of a limited initial bank of allowances by converting allowances banked in 2017–2020 under the existing Group 2 Trading Program at a conversion ratio of 8:1 (and certain additional conversions at a ratio of 18:1).^[23]
- A conclusion that the final rule resolves the interstate transport obligations of 21 states under the Good Neighbor Provision for the 2008 ozone NAAQS.^[24]
- A conclusion that limits on ozone season NO_x emissions from non-EGU sources are not required to eliminate significant contribution to non-attainment or interference with maintenance in downwind states under the 2008 ozone NAAQS.^[25]

The Revised CSAPR Update is likely EPA’s first use of a revised approach to calculate the social cost of carbon in a final regulatory action. According to EPA, climate benefits of the rule were based on the reductions in CO₂ emissions and calculated using four different estimates of the social cost of carbon: model average at 2.5 percent, 3 percent, and 5 percent discount rates, and 95th percentile at a 3 percent discount rate.^[26]

Looking to the future, the Revised CSAPR Update did not address any state’s obligations under the 2015 ozone NAAQS, which set lower primary and secondary standards for ground-level ozone.^[27] EPA noted in the Revised CSAPR Update that it is working separately to address Good Neighbor obligations under the 2015 ozone NAAQS, “including consideration of any necessary control requirements for EGU and non-EGU sources.”^[28] As environmental groups continue to push for emissions reductions from non-EGU sources, and as EPA continues to consider this issue (including whether emissions reductions become available at a comparable cost threshold to that of EGUs), it is possible that future rulemakings will seek to implement more stringent emissions reductions or emissions reductions from non-EGUs.

Litigation challenging the Revised CSAPR Update in the D.C. Circuit appears likely, including the potential for motions seeking a stay of the rule pending judicial review based on the requirement for affected facilities to begin compliance with the more stringent emissions budgets when the rule becomes effective 60 days after publication.^[29]

[1] National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16436 (Mar. 27, 2008).

[2] 42 U.S.C. § 7410(a)(2)(D)(i)(I). EPA has historically referred to SIP submissions made for the purpose of satisfying the applicable requirements of CAA sections 110(a)(1) and 110(a)(2), 42 U.S.C. § 7410(a)(1)–(2), as “infrastructure SIP” submissions.

[3] *Wisconsin v. Env'tl. Prot. Agency*, 938 F.3d 303, 309 (D.C. Cir. 2019).

[4] 42 U.S.C. § 7511a.

[5] *Wisconsin*, 938 F.3d at 313.

[6] 42 U.S.C. § 7410(c).

[7] Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48208 (Aug. 8, 2011).

[8] Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74504 (Oct. 26, 2016).

[9] *Id.* at 74504.

[10] *Id.* at 74542.

[11] Determination Regarding Good Neighbor Obligations for the 2008 Ozone National Ambient Air Quality Standard, 83 Fed. Reg. 65878, 65921 (Dec. 21, 2018).

[12] *Wisconsin*, 938 F.3d at 303.

[13] *Id.* at 312–15.

[14] *Id.* at 313.

[15] *Id.* at 336.

[16] *New York v. Env'tl. Prot. Agency*, 781 F. App'x 4, 7 (D.C. Cir. 2019) (per curiam).

[17] *New Jersey v. Wheeler*, 475 F. Supp. 3d 308, 319 (S.D.N.Y. 2020).

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[18] *Id.* at 334.

[19] Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 85 Fed. Reg. 68964 (proposed Oct. 30, 2020).

[20] Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS (March 15, 2021) (“Revised CSAPR Update”), *prepublication version available at* <https://www.epa.gov/csapr/final-rule-revised-cross-state-air-pollution-rule-update>.

[21] *Id.* at 13.

[22] *Id.* at 14.

[23] *Id.* at 14, 24-25.

[24] *Id.* at 9.

[25] *Id.* at 21.

[26] *Id.* at 26-27.

[27] National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65292 (Oct. 26, 2015).

[28] Revised CSAPR Update at 40.

[29] *See id.* at 14.



Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm’s Environmental Litigation and Mass Tort practice group, or the following authors in Washington, D.C.:

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