

To: Our Clients and Friends

July 22, 2011

EPA Issues The Cross-State Air Pollution Rule To Reduce Power Plant Emissions In the Eastern United States

On July 6, 2011, the U.S. Environmental Protection Agency (EPA) issued the Cross-State Air Pollution Rule (Cross-State Rule), requiring power plants in 27 states to reduce their emissions of nitrogen oxides (NO_x) and power plants in 23 of these states to also reduce their emissions of sulfur dioxide (SO₂). On the same date, EPA proposed to extend the Cross-State Rule's ozone-related NO_x reductions to six additional states; the comment period on this proposed rule ends August 22, 2011. The purpose of the rulemaking (and proposed extension to additional states) is to ratchet down power plant emissions that contribute to elevated concentrations of ozone and fine particulates (PM_{2.5}) in downwind states. The rule replaces the Clean Air Interstate Rule (CAIR), which the D.C. Circuit remanded to EPA in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir.), *modified*, 550 F.3d 1176 (D.C. Cir. 2008).

This Client Alert summarizes the relevant provisions of the Clean Air Act, the superseded CAIR regime and the new Cross-State Rule.

1. The Clean Air Act's "Good Neighbor" Provision

The "good neighbor" provision of the Clean Air Act (CAA § 110(a)(2)(D)(i), 42 U.S.C. § 7410(a)(2)(D)(i)) requires each state to promulgate a State Implementation Plan (SIP) that contains "adequate provisions ... prohibiting ... any source ... 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 National Ambient Air Quality Standard (NAAQS). The good neighbor provision is enforceable by the SIP call procedure (CAA § 110(k)(5), 42 U.S.C. § 7410(k)(5)), which allows EPA to declare a SIP to be substantially inadequate and to require that it be revised. Upon receiving the SIP call, the state is required to revise its air quality regulations to remedy the state's substantial contribution to nonattainment or interference with NAAQS maintenance in a downwind state. Ultimately, if EPA is dissatisfied with the state's efforts to revise its SIP, it may promulgate, by rule, a

This Client Bulletin is published for the clients and friends of Bryan Cave LLP. Information contained herein is not to be considered as legal advice. This Client Bulletin may be construed as an advertisement or solicitation. © 2011 Bryan Cave LLP. All Rights Reserved.

federal implementation plan (FIP) to impose additional controls within the state. CAA § 110(c), 42 U.S.C. § 7410(c). EPA has promulgated the Cross-State Rule as a FIP for the affected states, but has provided that a state may displace the Cross-State Rule with a SIP provision that achieves equivalent emission reductions.

2. The Clean Air Interstate Rule

EPA promulgated CAIR in 2005. It sought to regulate power plant SO₂ and NO_x emissions as contributors to the long-range transport of PM_{2.5} and to include further controls of power plant NO_x emissions as a contributor to the long-range transport of ozone. The rule applied to 28 states and the District of Columbia. CAIR required power plants in the affected upwind states to participate in one or more of three separate emissions cap and trade programs that cover annual SO₂ emissions, annual NO_x emissions and ozone-season NO_x emissions. The emission reductions required by CAIR were ambitious, reducing emissions by 3.9 million tons of SO₂ and 1.5 million tons of NO_x annually by 2015.

In 2008, the D.C. Circuit remanded CAIR to EPA (without vacatur) based on what it determined to be “fatal flaws” in the rulemaking. The most fundamental flaw in CAIR identified by the court was that it did not comply with the requirement of the good neighbor provision that sources “within the [upwind] State” not “contribute significantly to nonattainment in ... any other State.” The court came to this conclusion because under the cap and trade regime CAIR adopted, the sources in a particular upwind state might purchase allowances from another state rather than reduce their emissions contributing to nonattainment in a downwind state. A second flaw, according to the court, was that in establishing the emission reductions required of the upwind states, EPA ignored the separate requirement of the good neighbor provision that sources “within the [upwind] State” not “interfere with maintenance by ... any other State with respect to any [NAAQS].” The D.C. Circuit also found other flaws in the rulemaking.

3. The Cross-State Air Pollution Rule

Like CAIR, the Cross-State Rule applies only to power plant emissions in affected states.

Ozone-season NO_x reductions are required in 20 states (Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia and West Virginia), but this would be augmented to 26 states (with the addition of Iowa, Kansas, Michigan, Missouri, Oklahoma and Wisconsin) if EPA finalizes its proposal to extend the Cross-State Rule to these additional states.

SO₂ and NO_x emission reductions required to reduce downwind PM_{2.5} concentrations are applicable in 23 states (Alabama, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia and Wisconsin).

As with CAIR, the Cross-State Rule establishes ambitious emission reduction targets, reducing emissions by 6.4 million tons of SO₂ and 1.4 million tons of NO_x annually by 2014 (compared to a 2005 baseline).

This Client Bulletin is published for the clients and friends of Bryan Cave LLP. Information contained herein is not to be considered as legal advice. This Client Bulletin may be construed as an advertisement or solicitation. © 2011 Bryan Cave LLP. All Rights Reserved.

These cuts would represent annual emission reductions from the power plant sector in the affected states of 73% for SO₂ and 54% for NO_x from 2005 levels. (Some of these reductions are due to other final state and EPA rulemakings.) EPA has estimated that the Cross-State Rule will improve air quality for over 240 million Americans resulting in \$120 to \$280 billion in annual benefits, including the value of avoiding 13,000 to 34,000 premature deaths each year. These benefits are expected to result in costs to the power sector of in excess of \$2 billion annually.

Finally, as with CAIR, the key mechanism for achieving the requisite emission reductions are cap and trade regimes applicable to several different categories of air pollutants subject to the rule. On the date it issued its final rule (a 1,323-page behemoth), EPA also released a spreadsheet (available at www.epa.gov/airtransport/pdfs/UnitLevelAllocData.xls) identifying the allowances allocated to existing power plants.

4. Next Steps

The first phase of compliance begins January 1, 2012 for annual SO₂ and NO_x reductions and May 1, 2012 for ozone-season NO_x reductions. More stringent SO₂ reductions begin January 1, 2014 for “Group 1” states (Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and Wisconsin).

EPA expects power plants to achieve the necessary emission reductions by maintaining and operating already installed control equipment, using low sulfur coal, increasing generation from relatively cleaner units, installing control equipment (such as low NO_x burners, scrubbers or dry sorbent injection) and fuel switching to cleaner fuels. The Cross-State Rule is also likely to encourage the retirement of older, less efficient coal-fired units that have not been upgraded with modern pollution control equipment.

For questions or further information concerning the Cross-State Air Pollution Rule, please ask your Bryan Cave contact, or one of our air attorneys:

Philip E. Karmel
(212) 541-2311
pekarmel@bryancave.com

J. Kevin Healy
(212) 541-2311
jkhealy@bryancave.com

Steven J. Poplawski
(314) 259 2610
sjpoplawski@bryancave.com

Thor W. Ketzback
(312) 602 5111
thor.ketzback@bryancave.com

Brandon W. Neuschafer
(314) 259 2317
bwneuschafer@bryancave.com

Megan I. Lennox
(602) 364 7033
megan.lennox@bryancave.com