



Northeastern States Seek to Force Upwind States to Join the Ozone Transport Region

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Stating that they “face pervasive ozone nonattainment problems,” eight Northeastern states on December 9, 2013 petitioned the U.S. Environmental Protection Agency (“EPA”) to add nine upwind states to the Ozone Transport Region (“OTR”). Delaware, Connecticut, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont joined the petition to add Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Tennessee, Virginia, and West Virginia to the OTR in order to force the upwind states to reduce air pollutants, namely volatile organic compounds (“VOC”) and nitrogen oxides (“NOx”), that may contribute to ozone problems.

The petition was filed just one day before the U.S. Supreme Court heard oral argument on whether to reverse an appellate court ruling that scrapped EPA’s 2011 Cross-State Air Pollution Rule (“CSAPR”). That rule was EPA’s latest attempt to impose limits on upwind states whose emissions hinder the ability of downwind states to attain the federal national ambient air quality standard (“NAAQS”) for ozone. The petition appears to be a move by the downwind states to cover their bets in the event the Court fails to resurrect CSAPR.

Background

Pursuant to Section 184 of the federal Clean Air Act, the OTR was created to address pervasive ozone nonattainment air quality problems in the Northeastern United States by placing emissions reduction requirements on member states. The OTR presently consists of the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont and the Consolidated Metropolitan Statistical Area consisting of the District of Columbia and portions of Northern Virginia. Section 184 of the Clean Air Act requires states newly added to the OTR to submit, within nine months, a State Implementation Plan that contains the minimum VOC and NOx emission control requirements applicable to OTR states. Such requirements include new source review permitting and reasonably available control technology implementation.

Section 176A of the Clean Air Act allows the Governor of any state to petition the EPA Administrator to add any state or portion of a state to the OTR whenever the Administrator has reason to believe that the interstate transport of air pollution from the target state significantly contributes to a violation of the NAAQS for ozone in the OTR. Petitioner States on the December 9 petition argue that the target nine upwind states contribute significantly to violations of the 2008 ozone NAAQS within the OTR. Petitioners included with their petition an analysis in support of that argument in addition to citing EPA modeling. Petitioners claim that, although they have taken measures to reduce air pollutants within their states, elevated ozone days are largely caused by air emissions carried by prevailing winds from other, upwind states. “We’re sick and tired of being the tailpipe for the polluters to our west and to the south,” Vermont Governor Peter Shumlin (D) told reporters on December 9.

Supreme Court Review of CSAPR

EPA is required to respond to the petition within 18 months. However, if the U.S. Supreme Court reverses the appellate court ruling and breathes new life into CASPR, it’s quite possible the petition will be withdrawn or denied by EPA. Eight justices heard the case, with Justice Alito recusing himself. Veteran court watchers appear to believe that all four liberal justices favored EPA’s position while there was some division among the Court’s four conservative justices. If the court splits 4-4, that means the lower court decision stands, and CSAPR won’t be resurrected. As is so often the case, Justice Kennedy is thought to be the swing vote. How he views the case is likely to determine the outcome. A decision is expected by June, 2014.

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