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CLIENT UPDATE

WIND BLOWING AGAINST COAL

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In a decision that constitutes a significant defeat for the coal industry, on April 29, 2014 the US Supreme Court upheld the US Environmental Protection Agency's (the "EPA") new rule implementing the Good Neighbor Provision of the Clean Air Act (the "CAA"). The case, *EPA v. EME Homer City Generation, L.P.*, indicates that the Supreme Court is unlikely to block the EPA's ongoing efforts to curb coal emissions.

BACKGROUND

Under the CAA, the EPA establishes national ambient air quality standards ("NAAQS") for pollutants at levels designed to protect public health. Once the NAAQS have been set, the EPA must then designate "nonattainment" areas where the concentrations of one or more pollutants exceed those standards. The burden then shifts to the individual states, which have three years to submit a State Implementation Plan ("SIP") to the EPA to bring any nonattainment areas into compliance. If the EPA determines that a SIP is inadequate, the EPA then has two years to issue a Federal Implementation Plan ("FIP").

The Good Neighbor Provision of the CAA requires that SIPs prohibit emissions within the state that "contribute significantly" to nonattainment of NAAQS in any other state. It was this requirement, and, in particular, the EPA's interpretation of the words "contribute significantly," that was at issue in *EME Homer City*.

THE TRANSPORT RULE

The particular pollutants at issue – nitrogen oxide and sulfur dioxide – are released into the atmosphere by emissions from many sources, including coal-fired plants. More specifically, coal-fired plants that have not been equipped with effective (but costly) pollution controls are viewed as a major obstacle in achieving the air quality targets set by the EPA. Many (but not all) such plants are located in the Midwest, where the prevailing winds carry the pollutants emitted there to the east.

A group of fourteen midwest and southern states joined by local governments and various industry groups ("plaintiffs") challenged the EPA's latest attempt to define what is required by upwind states relative to downwind states under the Good Neighbor Provision of the CAA. Under the regulation that the EPA designed, known as the Transport Rule, the EPA engages in a two-step analysis. First, it determines through modeling whether an upwind state's emissions contribute more than one percent to the nonattainment of certain NAAQS of any downwind state. If it does not, that state is excluded from regulation under the Transport Rule. If, however, a state is found to be a significant contributor at step one, then it and all other upwind states that contribute more than one percent to any downwind state's nonattainment of the NAAQS are subject to a control analysis pursuant to which the EPA seeks a cost-effective allocation of emission reductions among those upwind states. In essence, this step requires that energy plants in states that have historically paid less in updating pollution controls now pay more.

The plaintiffs objected to the Transport Rule on two grounds. First, they argued that a state found to be in non-compliance with respect to downwind states should have another opportunity to revise its SIP, rather than have the EPA impose a FIP. Second, they contended that the cost analysis step of the EPA's process was contrary to the language Congress included in the Good Neighbor Provision. That is, the words "contribute significantly" could not be interpreted to include a cost component. While the DC Circuit Court agreed with the plaintiffs and invalidated the Transport Rule in its entirety, the Supreme Court reversed and upheld the EPA's rule as a valid interpretation of ambiguous statutory language.

THE HOLDING

In a 6-2 decision, the Supreme Court rejected both arguments the DC Circuit Court used to invalidate the Transport Rule. First, based on the plain language of the CAA, the Supreme Court held that nothing in the CAA required that an upwind state receive a second opportunity to file a SIP after the EPA has quantified that state's obligations. Recognizing

that such an opportunity may seem fair, the Supreme Court nonetheless relied on its prior precedents holding that it was for Congress to improve laws, not the courts.

As to the argument that a cost component cannot be fairly read into the meaning of the words "contribute significantly," the Court held that such an interpretation was reasonable and within the discretion of the EPA in the absence of guidance from Congress. The Court reasoned that by requiring businesses in states that had not invested heavily in modern pollution prevention technology to do more before requiring further expenditures from energy producers in states that had invested more in this regard was a reasonable solution. In arriving at its decision, the Court noted the complexity of ascertaining wind-blown pollution's contribution to nonattainment of NAAQS in other states and the otherwise intractable task of devising a fair method to allocate costs among several offending states.

The plaintiffs have stated that enforcement of the FIPs will force certain facilities to close and will result in significant cost increases to energy consumers. They also view the Transport Rule as part of what they perceive as a "war on coal" by the current administration. Whether or not significant energy cost increases come to pass, this decision may embolden the EPA to become more aggressive as it crafts rules to address greenhouse gases and other air pollutants from a range of sources.

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We will continue to monitor developments with respect to the EPA's efforts to reduce air emissions.

Please do not hesitate to contact us with any questions.

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