Fair Winds: Enforcement of the Good Neighbor Provision after *Wisconsin v. EPA*

INTRODUCTION

To steer a ship, sailors cannot direct the wind, but they can adjust the sails. Likewise, the Environmental Protection Agency (EPA) cannot direct where air pollution drifts, but it can adjust the rules for combating interstate air pollution between states. The "good neighbor provision" of the Clean Air Act (CAA) does this by prohibiting upwind states from substantially interfering with the ability of a downwind state to meet National Ambient Air Quality Standards (NAAQS) requirements.[1] In 2016, EPA promulgated the Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS (CSAPR Update) to regulate interstate air transport of nitrous oxides (NO_x), a pollutant that forms ozone.[2] Yet, the CSAPR Update provided no deadline for upwind state elimination of interstate air pollution, leaving open the potential of persistent downwind interference.[3] Three years later, in *Wisconsin v. Environmental Protection Agency*, the D.C. Circuit reviewed the CSAPR Update and held that the deadline for upwind states to stop any substantial interference must align with the deadline for downwind states' NAAQS compliance.[4]

Wisconsin has important implications for air quality regulation because aligning deadlines for upwind and downwind states improves EPA enforcement of the good neighbor provision. When upwind and downwind compliance deadlines are aligned, the good neighbor provision becomes more effective because EPA can better balance administrative certainty and flexibility.

DOI: https://doi.org/10.15779/Z384J09Z22

1. Good Neighbor Provision, 42 U.S.C. § 7410(a)(2)(D)(i) (2018).
2. Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016) (codified at 40 C.F.R. pts. 52, 78, 97) [hereinafter "CSAPR Update"].
3. Wisconsin v. EPA, 938 F.3d 303, 312–13 (D.C. Cir. 2019) ("The Update Rule does not require upwind States to eliminate their significant contributions to downwind ozone pollution by that date—or by any date, for that matter.").
4. *Id.*

I. BACKGROUND

Interstate air pollution is an externality that challenges EPA's enforcement of the CAA through traditional regulatory mechanisms.[5] Unimpeded NO_x emissions follow prevailing winds; they drift across state borders from the Midwest to the Mid-Atlantic and up the East Coast to the region between Delaware and New York known as "America's tailpipe."[6] On the way, NO_x reacts with sunlight and volatile organic compounds to create ozone, which is associated with aggravated asthma, chronic bronchitis, heart attacks, and premature death.[7]

EPA enforces the CAA by creating NAAQS and approving state implementation plans (SIPs).[8] The CAA requires NAAQS for six common and widespread "criteria pollutants," including NO_x.[9] EPA designates nonattainment areas within states that do not meet NAAQS levels.[10] States then design specific SIPs for nonattainment areas, which detail how the state will attain compliance with NAAQS requirements.[11] States in attainment also create general SIPs to show the state has capacity to maintain NAAQS requirements.[12] As NAAQS deadlines approach, states must show that "reasonable further progress" is being made towards attainment.[13] SIPs include traditional control measures like emission limits and compliance schedules.[14] States then implement control measures; these include mandating installation of reasonably available control technology for stationary pollution sources and adopting state vehicle inspection and maintenance programs.[15]

Air pollution ignores borders, but under the basic SIPs process NAAQS implementation ends at the state line. Downwind states can implement control measures within their own territorial jurisdiction, but they lack legal authority to regulate emissions from upwind sources.[16] If upwind states ignore their interstate

---

5. KATE C. SHOUSE, CONG. RESEARCH SERV , R45299, THE CLEAN AIR ACT'S GOOD NEIGHBOR PROVISION: OVERVIEW OF INTERSTATE AIR POLLUTION CONTROL 1 (2018).

6. Alex Guillen, *New York sues EPA for answer to upwind pollution petition*, POLITICO (Apr. 12, 2019), https://www.politico.com/states/new-york/albany/whiteboard/2019/04/12/new-york-sues-epa-for-answer-to-upwind-pollution-petition-9126867.

7. SHOUSE, *supra* note 5, at 1.

8. 42 U.S.C. § 7409 (2018).

9. *NAAQS Table*, EPA, https://www.epa.gov/criteria-air-pollutants/naaqs-table (last visited Mar. 8, 2020).

10. *NAAQS Designations Process*, EPA, https://www.epa.gov/criteria-air-pollutants/naaqs-designations-process (last visited Mar. 9, 2020).

11. *SIP Requirements in the Clean Air Act*, EPA, https://www.epa.gov/air-quality-implementation-plans/sip-requirements-clean-air-act (last visited Mar. 9, 2020).

12. 42 U.S.C. § 7410 (2018).

13. 42 U.S.C. § 7501(1) (2018) (defining reasonable further progress); 42 U.S.C. § 7502(c)(2) (2018) (requiring reasonable further progress).

14. CONG. RESEARCH SERV., RL30853, CLEAN AIR ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 8 (2020).

15. *Id.* at 5–7.

16. Brandon Dittman, *How to Be a Good Neighbor The Failure of CAIR and CSAPR, Uncertainty, and the Way Forward*, 25 COLO. NAT. RES., ENERGY, & ENVTL. L. REV. 199, 204 (2014).

emissions, then downwind states must absorb the additional cost of upwind emissions on public health, the natural environment, and economic productivity.[17]

The good neighbor provision of the CAA addresses this externality by requiring upwind states to design SIPs that prohibit emissions that "significantly contribute" to nonattainment or "interfere with maintenance" of NAAQS in a downwind state.[18] To enforce the provision, downwind states may petition EPA to issue a finding that upwind emissions from "any major source or group of stationary sources" violate the good neighbor provision.[19] EPA rejects SIPs that fail to address significant interstate pollution and will issue a Federal Implementation Plan (FIP) if the deficiency is not cured.[20] This rule forces upwind states to internalize the externality created by their own interstate air pollution.[21]

In 2008, EPA tightened the NAAQS for NO_x and promulgated the Cross-State Air Pollution Rule (CSAPR), under the authority of the good neighbor provision, to enforce the updated emissions standards.[22] Through CSAPR, EPA created an optional market-based cap-and-trade program called "Clean Air Markets," where states bought and sold NO_x emission allowances with other states.[23] As part of their NO_x SIP, states voluntarily elected to participate in the marketplace.[24] EPA required states with FIPs to participate.[25] The D.C. Circuit vacated CSAPR in 2012, but the U.S. Supreme Court upheld the rule in 2014.[26] On remand, the D.C. Circuit invalidated the NO_x budgets for thirteen states due to EPA "overcontrol."[27] In 2016, EPA promulgated the CSAPR Update to address the invalidated NO_x budgets.[28]

The CSAPR Update recalculated upwind NO_x requirements and created a market-based emissions trading system through a four-part process.[29] First, EPA

17. *See* Harry Moren, *The Difficulty of Fencing in Interstate Emissions EPA's Clean Air Interstate Rule Fails to Make Good Neighbors*, 36 ECOLOGY L.Q. 525, 527 (2009).

18. 42 U.S.C. § 7410(a)(2)(D)(i) (2018).

19. 42 U.S.C. § 7426(b) (2018).

20. Wisconsin v. EPA, 938 F.3d 303, 312 (D.C. Cir. 2019)

21. Dittman, *supra* note 16, at 203.

22. CSAPR Update, *supra* note 2.

23. *Clean Air Markets - Programs*, EPA, https://www.epa.gov/airmarkets/clean-air-markets-programs (last visited Mar. 10, 2020) (ignoring the irony of buying and selling pollution on so-called "Clean Air Markets").

24. Jeremy Feigenbaum, *Becoming Good Neighbors after* EME Homer City Generation, L.P. v. EPA, 38 HARV. ENVTL. L. REV. 259, 265 (2014).

25. *Id.*

26. EME Homer City Generation, L.P. v. EPA, 696 F.3d 7 (D.C. Cir. 2012), *rev'd and remanded*, 572 U.S. 489 (2014).

27. Wisconsin v. EPA, 938 F.3d 303, 312 (D.C. Cir. 2019) (explaining that "overcontrol" occurs when an upwind state is required to reduce its emissions more than called for by the good neighbor provision).

28. CSAPR Update, *supra* note 2.

29. *Wisconsin*, 938 F.3d at 310–11.

identified all states in nonattainment with the updated NAAQS.[30] Second, EPA identified "significantly" interfering upwind states by screening out upwind states that contributed less than 1 percent of total NO_x emissions in any downwind state.[31] Third, EPA calculated necessary NO_x reductions for each state to eliminate significant downwind NAAQS interference without overcontrol.[32] Finally, EPA created state NO_x budgets "by calculating the emissions amount that would occur under $1,400/ton cost controls," and dividing the total budget into tradable allowances.[33] Through the marketplace, states can sell NO_x allowances if they reduce their emissions below NAAQS requirements.[34] Alternatively, states can emit up to 121 percent of their annual NAAQS by buying up additional allowances.[35] The CSAPR Update provided an interstate marketplace to reduce aggregate interstate NO_x levels by allowing individual states to reduce emissions relative to their cost sensitivity.[36] States, environmental groups, and industry groups directly petitioned the D.C. Circuit for judicial review of the CSAPR Update.[37]

II. ANALYSIS

A. Procedural History and Case Analysis

In 2019, the D.C. Circuit ruled in *Wisconsin* that the CSAPR Update was "inconsistent" with the CAA because upwind states faced no deadline for reducing significant interstate NO_x emissions.[38] The court determined the Update Rule was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[39] In *Wisconsin*, environmental groups and downwind states argued that EPA should adopt a "more stringent" Update Rule.[40] They noted that the CAA requires that the good neighbor provision be read consistent with provisions for NAAQS attainment, so EPA must require upwind state elimination of significant interstate air pollution by the same deadline as downwind NAAQS attainment.[41] EPA argued it was only required to "consider" NAAQS deadlines when enforcing the good neighbor provision,

30. *Id.*

31. The 1-percent threshold marks the "contribute significantly" and "interfere with" standard under the CAA. *Id.*

32. *Id.*

33. *Id.* at 311 ("EPA concluded that the cost-control level of $1,400 per ton represented the point at which upwind 'NO_x reduction potential and corresponding downwind ozone air quality improvements are maximized with respect to marginal cost' — that is, the point at which EPA would get the biggest bang for its buck." (quoting Cross-State Air Pollution Rule Update 81 Fed. Reg. at 74,504-01)).

34. *Id.*

35. *Id.*

36. SHOUSE, *supra* note 5, at 10.

37. *Wisconsin*, 938 F.3d at 309.

38. *Id.*

39. *Id.*; *see also* 42 U.S.C. § 7607(d)(9) (2018).

40. *Wisconsin*, 938 F.3d at 312.

41. *Id.* at 315.

which it did by requiring "some level of good neighbor reductions by that [NAAQS deadline] date."[42]

In its decision, the court cited precedent from *North Carolina v. EPA*, which concerned the Clean Air Interstate Rule, a CSAPR Update precursor.[43] Under that rule, states faced a NO_x NAAQS attainment deadline of 2010.[44] EPA required upwind states to begin incrementally reducing interstate NO_x emissions before 2008, but the final deadline for complete elimination of significant interference was not until 2015.[45] Even though EPA required initial upwind NO_x reductions in 2008, the court held that permitting upwind states to continue any significant interference beyond the 2010 NAAQS deadline was inconsistent with the CAA.[46]

The court in *Wisconsin* held that the CSAPR Update violated the good neighbor provision because downwind states continued to face significant interference from upwind states that made attainment unfairly burdensome.[47] Similar to *North Carolina*, where the Clean Air Interstate Rule set deadlines for upwind states' elimination of significant interference after the NO_x NAAQS attainment deadline for downwind states, the CSAPR Update set no deadline by which upwind states had to eliminate significant interference.[48] The court held that no reasonable interpretation of the good neighbor provision allowed significant interference to go on "with no deadline at all."[49] Therefore, it concluded that the deadline for upwind state elimination of significant interference must "align" with the deadline for downwind states' NAAQS attainment.[50]

B. Aligning Deadlines Improves Administrative Effectiveness

EPA can more effectively implement the good neighbor provision when deadlines for upwind and downwind states are aligned. Traditional administrative theory suggests that effective deadlines must be certain.[51] Yet, limited deadline flexibility may help states reach full compliance in some

42. *Id.* at 314.
43. *Id.* at 313 (citing North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008)).
44. *Id.*
45. *Id.*
46. *Id.* at 314.
47. *Id.* at 316.
48. *See id.* at 314 ("Indeed, CAIR at least imposed *some* deadline for upwind States to fully satisfy their good neighbor obligations, albeit a deadline we held was too late. Here, by contrast, EPA established no deadline at all for upwind States to eliminate their significant contributions.").
49. *Id.*
50. *Id.* at 318.
51. *See* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923 (2008).

cases.[52] Aligning deadlines improves states' good neighbor provision compliance by increasing certainty without sacrificing flexibility.

1. Improved Certainty

EPA enforcement of the good neighbor provision is an example of cooperative federalism, which relies on certain deadlines to operate effectively.[53] Aligning deadlines between upwind and downwind states increases certainty by making policy signaling clearer, smoothing administrative cycles, and making deadline litigation more effective.

Under cooperative federalism, the three branches of the federal government and the states each play a role in implementing the CAA.[54] First, Congress, under its Commerce Clause authority, regulates air quality by writing NAAQS deadlines into law.[55] Second, EPA sets updated NAAQS emissions reductions on a five-year cycle.[56] Third, individual states attain NAAQS compliance by implementing valid SIPs by statutory deadlines.[57] Finally, states and individuals may file "citizen suits" to challenge emissions deadlines in court.[58] The Supreme Court holds that statutory attainment deadlines are "the heart" of the CAA because they bring urgency and accountability to this cooperative policy implementation process.[59]

a. Clear Signaling

Aligning deadlines will more clearly signal the good neighbor provision timeline to states that are designing SIPs.[60] Administrative theory suggests that deadlines "signal to affected parties that regulations should be expected sooner rather than later, so they can begin to plan accordingly."[61] Aligning deadlines will signal to upwind states that elimination of significant interstate air emissions and NAAQS attainment are concurrent requirements. With this connection drawn, upwind states can make "prioritizing decisions" to create SIPs that

52. William Boyd, *The Clean Air Act's National Ambient Air Quality Standards A Case Study of Durability and Flexibility in Program Design and Implementation*, *in* LESSONS FROM THE CLEAN AIR ACT: BUILDING DURABILITY AND ADAPTABILITY INTO U.S. CLIMATE AND ENERGY POLICY 15, 45–47 (Ann Carlson & Dallas Burtraw eds., 2019).

53. 42 U.S.C. § 7401(a)(4) (2018) (establishing the framework "for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution").

54. Gabriel Pacyniak, *Making the Most of Cooperative Federalism What the Clean Power Plan Has Already Achieved*, 29 GEO. ENVTL. L. REV. 301, 315 (2017).

55. *See* U.S. CONST. art. I, § 8.

56. 42 U.S.C. § 7409(d)(2)(B) (2018).

57. 42 U.S.C. § 7409 (2018).

58. William W. Buzbee, *Clean Air Act Dynamism and Disappointments Lessons for Climate Legislation to Prompt Innovation and Discourage Inertia*, 32 WASH. U. J. L. & POL'Y 33, 46 (2010).

59. Train v. Nat. Res. Def. Council, Inc., 421 U.S. 60, 66 (1975).

60. Daniel A. Farber, *Racing the Clock Deadlines, Conflict, and Negotiation in Lawmaking, in* THE TIMING OF LAW MAKING 87, 105 (Frank Fagan & Saul Levmore eds., 2017).

61. *Id.*

achieve interstate emissions reductions on time.[62] Signaling may also "drive conflicting parties toward agreement" when resolution of their disagreement is mandatory by a deadline.[63] Therefore, upwind and downwind states facing a common deadline are likely more willing to act cooperatively when creating SIPs when they face similar timing incentives.[64] For example, if there is an emissions dispute between an upwind state and a downwind state, a common deadline incentivizes the states to settle their dispute by the same time to avoid being penalized by EPA. A single deadline clearly signals the link between upwind and downwind states, which is fundamental to understanding interstate air pollution and enforcing the good neighbor provision.

b. Ease Administrative Burdens

Aligning deadlines for upwind and downwind states will ease administrative burdens because EPA can evaluate and administer deadline compliance on a more predictable cycle. The NAAQS review and update process operates on a five-year cycle.[65] When upwind and downwind states are accountable to the same timeline, "long-term signaling" is likely more effective.[66] EPA can better compare SIPs and emissions budgets from upwind and downwind states when they are submitted and processed together.[67] For example, if EPA issues a SIP Call after a five-year NAAQS cycle, upwind states can anticipate updating their interstate air emission efforts by the time downwind states must satisfy their updated NAAQS.[68] New rules are finalized, nonattainment areas designated, and emissions budgets created following this five-year cycle.[69] The regulatory durability of the CAA is strengthened when states can make predictions based on the "continuous ratchet" of stricter guidelines every five years.[70] When deadlines are aligned, the five-year NAAQS cycle is more effective because upwind and downwind states organize and deliver information to EPA along complementary timelines.

Aligning deadlines between upwind and downwind states will reduce litigation because outcomes are clearer and more efficient. When deadlines proliferate, their efficacy decreases.[71] New court-imposed deadlines require

62. *Id.*

63. *Id.* at 106.

64. Daniel A. Farber, *The Implementation Gap in Environmental Law*, 16 J. OF KOREAN L. 3, 15–16 (2016).

65. 42 U.S.C. § 7409(d)(2)(B) (2018).

66. Boyd, *supra* note 52, at 42.

67. *Id.* at 44.

68. Dittman, *supra* note 16, at 212 n.94 ("A SIP call is a procedure set forth in Section 110(k)(5) where the Administrator can require a state to revise a SIP that is 'substantially inadequate' as necessary to correct inadequacies.").

69. *Process of Reviewing the National Ambient Air Quality Standards*, EPA, https://www.epa.gov/criteria-air-pollutants/process-reviewing-national-ambient-air-quality-standards (last visited Mar. 26, 2020).

70. Boyd, *supra* note 52, at 51.

71. Farber, *supra* note 60, at 105.

significant resources to enforce because EPA relies on willing participation from the state being regulated.[72]

Wisconsin avoids this problem, as the court did not create new deadlines. Instead, the court repurposed prior existing NAAQS deadlines by applying them to upwind states' good neighbor provision obligations.[73] This aligned deadline will not result in the same level of litigation as inconsistent deadlines. EPA can simultaneously shift the internal allocation of litigation resources to create and enforce court-imposed deadlines because they apply equally to upwind and downwind states.[74] Also, aligned deadlines will not overly burden EPA enforcement as the agency has institutional experience with the timeline.[75]

Court-imposed deadlines also provide EPA "political cover" for rulemaking actions.[76] For example, suppose EPA litigation results in a new court-imposed deadline in a downwind state. EPA can use the *Wisconsin* precedent to enforce the good neighbor provision in upwind states by requiring alignment with the new downwind deadline. Likewise, if an upwind state produces emissions that significantly interfere with NAAQS attainment in a downwind state, it should anticipate addressing their interstate emissions by the new court-imposed deadlines. EPA can point to court-ordered deadline alignment to "move forward" emissions reductions in upwind states, which tend to be politically conservative and opposed to EPA regulation.[77] Aligning deadlines makes litigation more effective because EPA resources are used more efficiently, and the impact of court-imposed deadlines is made more clearly applicable to both upwind and downwind states.[78]

2. Shared Flexibility

The SIPs process and cooperative federalism add flexibility to the CAA.[79] *Wisconsin* builds on flexibility by creating a mechanism for reciprocal flexibility between upwind and downwind states. The NAAQS program has reduced ozone pollution across the United States.[80] Yet, states still regularly miss NAAQS deadlines.[81] This suggests NAAQS deadlines are either ineffective or that NO_x

72. *Id.* at 91.
73. *See* Wisconsin v. EPA, 938 F.3d 303, 320 (D.C. Cir. 2019).
74. *See* Gersen & O'Connell, *supra* note 51, at 973.
75. *Id.* at 974–75.
76. Boyd, *supra* note 52, at 51.
77. *See id.* at 37–38.
78. *See* New York v. Envtl. Prot. Agency, 781 F. App'x 4, 6–7 (D.C. Cir. 2019).
79. Boyd, *supra* note 52, at 43.
80. *Progress Report*, EPA, https://www3.epa.gov/airmarkets/progress/reports/emissions_reductions_nox html#figure1 (last visited Mar. 14, 2020) (showing that between 2000 and 2010, annual NO_x emissions fell from 5.13 million tons to 2.09 million tons and that since implementation in 2010, NO_x emissions under CSAPR have fallen to 1.02 million tons).
81. Howard Crystal et al., *Returning to Clean Air Act Fundamentals A Renewed Call to Regulate Greenhouse Gases Under the National Ambient Air Quality Standards (NAAQS) Program*, 31 GEO. ENVTL. L. REV. 233, 258 (2019).

emission reductions could be even greater if states regularly met NAAQS deadlines.[82] The flexible nature of NAAQS deadlines suggests the latter is likely true.[83] Limited deadline flexibility allows states to address local concerns and make partial emissions reductions, as opposed to an all-or-nothing reduction.[84] However, flexibility is harmful if upwind states can exploit it by shifting interstate emissions onto downwind states.[85] Aligning deadlines will bring accountability to flexibility by creating a shared mechanism for linking upwind good neighbor provision deadlines to downwind NAAQS deadlines.

Upwind and downwind states will mutually share the benefits of flexibility when deadlines are aligned. One-year extensions are a common form of deadline flexibility.[86]

In dicta, the court in *Wisconsin* noted that "if a modified attainment deadline applies to downwind States, EPA may be able, if justified, to make a corresponding extension for an upwind State's good neighbor obligations."[87] Flexibility would then equally apply to both upwind and downwind states. In *Wisconsin*, the court maintained that an upwind state must "provide a sufficient level of protection to downwind States."[88] Upwind states could pay a penalty to EPA to offset the cost of unaddressed interstate air pollution on human health and the economy.[89] If both states benefit from pursuing reciprocal deadline extensions, shared flexibility may also incentivize interstate cooperation.[90] Flexibility and certainty are not mutually exclusive. Aligning deadlines between upwind and downwind states helps strike a balance between these two important regulatory factors.

CONCLUSION

Aligning deadlines for upwind and downwind states is a simple and effective way to improve EPA enforcement of the good neighbor provision. The *Wisconsin* ruling clarifies deadline requirements and preserves flexibility no matter the strength of EPA enforcement. Strict enforcement requires upwind states to eliminate significant interference by a set downwind NAAQS deadline. If EPA enforcement is weak, then downwind states and environmental interests have a new precedent to cite as they challenge significant upwind emissions in

82. *See* Farber, *supra* note 64, at 9.
83. *See* Boyd, *supra* note 52, at 17.
84. Farber, *supra* note 60, at 92.
85. Farber, *supra* note 64, at 29.
86. 42 U.S.C. § 7511(a)(5) (2018).
87. *See* Wisconsin v. EPA, 938 F.3d 303, 317 (D.C. Cir. 2019).
88. *Id.* at 320 (quoting North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008)).
89. Emily Sangi, *The Gap-Filling Role of Nuisance in Interstate Air Pollution*, 38 ECOLOGY L.Q. 479, 521 (2011).
90. Michael C. Naughton, *Establishing Interstate Markets for Emissions Trading of Ozone Precursors The Case of the Northeast Ozone Transport Commission and the Northeast States for Coordinated Air Use Management Emissions Trading Proposals*, 3 N.Y.U. ENVTL. L.J. 195, 203–04 (1994).

court. Downwind states can also reciprocally benefit when deadline extensions are granted for upwind states. Either way, the *Wisconsin* precedent provides a steady keel for enforcement of the good neighbor provision to navigate the endless winds of interstate air pollution.

Jacob Gerrish