

2013

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### Recommended Citation

Bryan Dooley, *EME Homer City Generation, L.P. v. EPA: The Search for Meaningful Regulation of Interstate Pollution Under the Clean Air Act*, 14 MINN. J.L. SCI. & TECH. 893 (2013).

Available at: <http://scholarship.law.umn.edu/mjlst/vol14/iss2/10>

*The Minnesota Journal of Law, Science & Technology* is published by the University of Minnesota Libraries Publishing.

## Comment

### ***EME Homer City Generation, L.P. v. EPA: The Search for Meaningful Regulation of Interstate Pollution Under the Clean Air Act***

*Bryan Dooley\**

In August 2011, the Federal Environmental Protection Agency (EPA) promulgated the Cross-State Air Pollution Rule (also known as the Transport Rule or CAIR Replacement Rule),<sup>1</sup> which is the EPA's most recent attempt to regulate interstate air pollution under the "good neighbor provision" of the Clean Air Act.<sup>2</sup> The rule set emission-reduction requirements for twenty-eight eastern states, primarily targeting fossil-fuel-fired power plants, and simultaneously issued federal implementation plans to implement the reductions in each affected state.<sup>3</sup> A number of state and local governments, industry groups, and labor organizations opposed to the rule petitioned for its review.<sup>4</sup> On August 21, 2012, a divided panel of the United States Court of Appeals for the District of Columbia Circuit issued an opinion vacating the rule, holding that the EPA had exceeded its congressionally granted authority under the Clean Air Act.<sup>5</sup> The court denied a petition by the EPA for rehearing of the case en banc.<sup>6</sup>

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1. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (to be codified at 40 C.F.R. pt. 51, 52, 72, 78, and 97) [hereinafter CSAPR].

2. 42 U.S.C. § 7410(a)(2)(D) (2006); *see also* *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 11 (D.C. Cir. 2012).

3. *EME Homer City Generation*, 696 F.3d at 11.

4. *Id.*

5. *Id.* at 7.

6. *See* Petition for Rehearing En Banc, *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir. Jan. 24, 2013); *D.C. Circuit Declines to*

*EME Homer City Generation, L.P. v. EPA* illustrates the difficulty the EPA faces as it attempts to formulate effective and efficient regulation of cross-border environmental harm within the boundaries created by the Clean Air Act. The decision imposes new limitations on the EPA's ability to enact and enforce regional solutions to what is a fundamentally regional problem.<sup>7</sup> Meanwhile, downwind states continue to bear the public health and regulatory burdens resulting from upwind contributions to poor air quality.<sup>8</sup>

This Comment will analyze the implications of *EME Homer City Generation* for future attempts at meaningful regulation of interstate air pollution. Part I will briefly examine the historical failures of federal regulation to adequately address the problem and recent attempts to regulate under the Act. Part II will discuss the Cross-State Air Pollution Rule, the *EME Homer City Generation* decision, and prospects for future regulation in detail. This Comment concludes that the EPA should appeal the decision to the Supreme Court and it should be overturned. If the decision is allowed to stand, amendment of the Clean Air Act is necessary to allow regulation of interstate air pollution that is effective and not unnecessarily burdensome.

## I. HISTORY OF FEDERAL REGULATION OF INTERSTATE AIR POLLUTION

The Supreme Court began hearing common-law disputes involving interstate air pollution in the early twentieth century.<sup>9</sup> Courts—though frequently reluctant to tackle the factual complexity and uncertainty inherent in evaluating the competing scientific and technical claims involved in such cases—remained the primary avenue for states seeking

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*Rehear Decision Vacating EPA Cross-State Air Rule*, BLOOMBERG BNA (Jan. 25, 2013), <http://www.bna.com/dc-circuit-declines-n17179872026/>.

7. See discussion *infra* Part II.B.

8. *Protecting Clean Air and Public Health*, CARPER.SENATE.GOV, <http://www.carper.senate.gov/public/index.cfm/protecting-clean-air-and-public-health-in-congress> (last visited Apr. 14, 2013).

9. See Noah D. Hall, *Political Externalities, Federalism, and a Proposal for an Interstate Environmental Impact Assessment Policy*, 32 HARV. ENVTL. L. REV. 49, 62–68 (2008) (discussing early cases implicating interstate environmental harm).

abatement of interstate environmental harm until passage of the substantial environmental legislation of the 1970s.<sup>10</sup>

The federal government took its first tentative steps into the realm of air quality regulation in 1955, its role limited to providing assistance in research, training, and technical matters to state and local authorities.<sup>11</sup> Congress gradually expanded this role through a series of legislative acts during the 1960s,<sup>12</sup> including the passage of the Clean Air Act of 1963.<sup>13</sup> The Act authorized expansion of research efforts and grants of federal funds to state environmental quality agencies.<sup>14</sup> It also allowed direct federal intervention, via litigation on behalf of the United States, for abatement of interstate pollution where other procedures outlined in the legislation failed to produce adequate corrective action at the state level.<sup>15</sup> The Air Quality Act of 1967 created additional federal supervisory and enforcement responsibilities, but left determinations as to acceptable levels of air pollution and how and when they should be realized largely to state discretion.<sup>16</sup> While pre-1970 legislation included some limited room for federal enforcement, it addressed disputes involving interstate pollution primarily by providing for interstate conferences intended to promote cooperative state action, with the federal government acting as a mediator and facilitator.<sup>17</sup>

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10. *See id.* at 69.

[T]he factfinding process we are asked to undertake is, to say the least, formidable. . . . Indeed, Ohio is raising factual questions that are essentially ones of first impression to the scientists. The notion that appellate judges, even with the assistance of a most competent Special Master, might appropriately undertake at this time to unravel these complexities is, to say the least, unrealistic. Nor would it suffice to impose on Ohio an unusually high standard of proof. That might serve to mitigate our personal difficulties in seeking a just result that comports with sound judicial administration, but would not lessen the complexity of the task of preparing responsibly to exercise our judgment, or the serious drain on the resources of this Court it would entail.

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 503–04 (1971).

11. *See Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 63 (1975).

12. *See id.* at 63–64.

13. Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (1963).

14. *See Train*, 421 U.S. at 64.

15. § 5, 77 Stat. at 396–99.

16. Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967); *see Train*, 421 U.S. at 64.

17. Geoffrey L. Wilcox, *New England and the Challenge of Interstate Ozone Pollution Under the Clean Air Act of 1990*, 24 B.C. ENVTL. AFF. L. REV.

## A. CLEAN AIR ACT AMENDMENTS OF 1970 AND 1977

Dissatisfaction with the failure of the previous decade's legislation to spur meaningful progress toward cleaner air prompted Congress to enact the Clean Air Amendments of 1970.<sup>18</sup> The amendments called for a more active federal role and established the backbone of the modern regulatory scheme, under which the EPA sets uniform, health-based standards for harmful pollutants (National Ambient Air Quality Standards, or NAAQS).<sup>19</sup> The legislation required states to submit a state implementation plan (SIP) for implementation, maintenance, and enforcement of NAAQS for each air quality control region within the state and authorized the EPA to impose a federal implementation plan (FIP) if a SIP is not submitted or the EPA deems it unsatisfactory.<sup>20</sup>

The 1970 amendments addressed the problem of interstate air pollution in section 110(a)(2)(E), the earliest incarnation of the "good neighbor provision."<sup>21</sup> The provision required that SIPs contain "adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance" of NAAQS in out-of-state areas.<sup>22</sup> In spite of the statute's "measures necessary to insure" language, the EPA interpreted the section as intended by Congress primarily to facilitate communication and information-sharing.<sup>23</sup> Like the ineffectual pre-1970 system of conferences, the EPA's rule implementing this interpretation relied in large part on the voluntary cooperation of states.<sup>24</sup> The United States Court of Appeals for the Eighth Circuit upheld this interpretation against a challenge by environmental groups.<sup>25</sup>

In retrospect, the Clean Air Amendments of 1970 may have

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1, 13–14 (1996).

18. Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676; see *Train*, 421 U.S. at 64.

19. Clean Air Amendments of 1970 § 109 (current version at 42 U.S.C. § 7409 (2006)).

20. *Id.* § 110 (current version at 42 U.S.C. § 7410 (2006)).

21. *Id.* § 110(a)(2)(E) (current version at 42 U.S.C. § 7410(a)(2)(D) (2006)).

22. *Id.*

23. Wilcox, *supra* note 17, at 15.

24. *Id.* at 13–14.

25. *Natural Res. Def. Council, Inc. v. U.S. EPA*, 483 F.2d 690, 692–93 (8th Cir. 1973); see Wilcox, *supra* note 17, at 15.

actually encouraged states to export air pollution. The federal framework created an incentive for states, which had not previously imposed extensive regulation on polluters but were now pushed to do so, to externalize both the negative environmental effects of air pollution and the new regulatory burdens created by the Act.<sup>26</sup> In the absence of any meaningful regulatory disincentive, some states designed SIPs to allow polluters to decrease their local environmental impact by building taller exhaust stacks—which disperse pollutants more widely—rather than reducing emissions.<sup>27</sup> Judicial rejection of the EPA’s approval of one such SIP in 1974 prompted the EPA to issue regulations limiting the benefit of tall stacks toward achievement of regulatory goals.<sup>28</sup> Congress directly addressed this issue in the Clean Air Act Amendments of 1977.<sup>29</sup> The amendments denied credit toward required air pollution controls for the portion of any stack constructed after enactment of the Clean Air Act of 1970 extending above the height called for by “good engineering practice,” as defined by the EPA.<sup>30</sup>

In an effort to reroute the course of regulation under the EPA and judicial interpretation, the 1970 amendments also contained a significant revision of section 110(a)(2)(E), the good neighbor provision.<sup>31</sup> The new language required SIPs to contain provisions “prohibiting any stationary source within the State from emitting any air pollutant in amounts which will . . . prevent attainment or maintenance by any other State” of NAAQS.<sup>32</sup> The section’s textual limitation to individual

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26. See Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2351–52 (1996).

27. *Id.* At least fifteen SIPs submitted in response to the initial NAAQS contained such provisions. The number of stacks taller than 500 feet increased from two in 1970 to more than 180 in 1985, with twenty-three at least 1000 feet tall. *Id.* at 2351–53.

28. *Id.* at 2354.

29. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 121, 91 Stat. 685, 721–22 (current version at 42 U.S.C. § 7423 (2006)). Among other things, the 1977 amendments also added separate, specific regulatory requirements for areas designated nonattainment and those in attainment of NAAQS, key elements of the modern regulatory regime. *Id.* §§ 127, 129 (current version at 42 U.S.C. §§ 7470, 7502 note (2006)).

30. Clean Air Act Amendments of 1977 § 121 (current version at 42 U.S.C. § 7423 (2006)).

31. See Wilcox, *supra* note 17, at 18.

32. Clean Air Act Amendments of 1977 § 108 (current version at 42 U.S.C.

stationary sources and failure to define key words such as “prevent” again left difficult decisions as to how the language could and should be applied.<sup>33</sup> As a result, the amended language ultimately granted little relief to downwind states.<sup>34</sup>

The amendments further attempted to address interstate pollution with the addition of section 126, which contained two important provisions.<sup>35</sup> Section 126(a) required upwind states to give notice and disclose certain information related to proposed new or modified stationary sources expected to “significantly contribute to levels of air pollution” in excess of NAAQS in out-of-state areas.<sup>36</sup> This notice provision provided downwind states with emissions data that would otherwise be difficult to obtain and allowed states that might be adversely affected by proposed projects to mount early challenges.<sup>37</sup> Section 126(b) created a new enforcement mechanism, under which states could petition the EPA “for a finding that any major source emits or would emit any air pollutant in violation of the prohibition of section 110(a)(2)(E)(i).”<sup>38</sup> Upon such a finding, section 126(c) granted the EPA authority to block construction of a proposed new or modified source or to shut down an existing source within three months.<sup>39</sup> A combination of technological limitations on the ability of states to trace quantifiable amounts of pollution to a single out-of-state source, statutory limitations on the types of sources subject to enforcement, and the EPA reticence, however, made the new enforcement mechanism effectively useless.<sup>40</sup> No state effectively petitioned the EPA for redress under section 126 until 1998, eight years after substantial revisions to relevant portions of the Act in 1990.<sup>41</sup>

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§ 7410(a)(2)(D) (2011)).

33. See Wilcox, *supra* note 17, at 19–22 (discussing EPA and judicial interpretation of the amended section 110(a)(2)(E)).

34. *Id.* at 22–24.

35. Clean Air Act Amendments of 1977 § 123 (current version at 42 U.S.C. § 7426 (2006)).

36. *Id.*

37. Wilcox, *supra* note 17, at 23.

38. Clean Air Act Amendments of 1977 § 123 (current version at 42 U.S.C. § 7426 (2006)).

39. *Id.*

40. Wilcox, *supra* note 17, at 23–27.

41. Hall, *supra* note 9, at 72; see generally Wilcox, *supra* note 17, at 24–27 (discussing judicial challenges to the EPA’s denial of state petitions under

## B. CLEAN AIR ACT AMENDMENTS OF 1990

The Clean Air Act Amendments of 1990 contained numerous significant changes to the statute, most of which are beyond the scope of this Comment.<sup>42</sup> These changes included new programs aimed squarely at the issue of regional pollution. First, the amendments established Title IV, an expansive program intended to mitigate the harmful environmental effects of acid rain.<sup>43</sup> Title IV targets emissions of sulfur dioxide and nitrogen oxides, which are the primary contributors to the formation of acid rain.<sup>44</sup> It regulates electrical utilities, which were responsible for seventy percent of national emissions when Congress enacted the 1990 amendments.<sup>45</sup> The program regulates sulfur dioxides through a market-based cap-and-trade system, under which utility generators receive a set number of allowances each year permitting emission of one ton of sulfur dioxide during the year.<sup>46</sup> A regulated source can comply by reducing emissions to match its number of allowances, purchasing allowances for additional emissions, or reducing more than its necessary emissions and either selling excess allowances to another source or “banking” them for later use.<sup>47</sup>

Second, among a number of new provisions aimed at ozone pollution, the amendments established an “ozone transport region,” comprised of eleven Northeast states and the District of Columbia,<sup>48</sup> and allowed for establishment of additional transport regions.<sup>49</sup> States included in ozone-transport regions

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section 126 and the resulting development of the relevant statutory interpretation).

42. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399.

43. Clean Air Act Amendments of 1990 § 401 (current version at 42 U.S.C. § 7651–51o (2006)).

44. *Id.*; 42 U.S.C. § 7651(a)(2), (b) (2006).

45. Byron Swift, *How Environmental Laws Work: An Analysis of the Utility Sector’s Response to Regulation of Nitrogen Oxides and Sulfur Dioxide Under the Clean Air Act*, 14 TUL. ENVTL. L.J. 309, 319 (2001).

46. *Overview—The Clean Air Act Amendments of 1990*, EPA, [http://epa.gov/oar/caa/caaa\\_overview.html#titleIV](http://epa.gov/oar/caa/caaa_overview.html#titleIV) (last updated Dec. 19, 2008).

47. Swift, *supra* note 45, at 320–21. Sources that emit in excess of their allowances are subject to a \$2,000-per-ton penalty; must offset excess emissions, generally during the following year; and receive reduced future allowances equal to their excess emissions. 42 U.S.C. § 7651j (a)–(c) (2006).

48. 42 U.S.C. § 7511c (2006).

49. *Id.* § 7506a.



must adopt specified measures targeting ozone precursors as SIP provisions.<sup>50</sup> Regional commissions, by a majority vote of governors of member states, may also petition the EPA to require additional control measures.<sup>51</sup> If the EPA approves a recommended control measure after a notice and comment period, the statute requires all member states to revise their SIPs to include the measure.<sup>52</sup>

The 1990 amendments also altered the existing provisions governing interstate pollution, including the good neighbor provision (section 110(a)(2)(D) of the amended Act).<sup>53</sup> The amended provision applies to “any source or other type of emissions activity within the State”<sup>54</sup> that will emit pollutants in amounts that “contribute significantly to nonattainment in, or interfere with maintenance by, any other State.”<sup>55</sup> Congress expanded the enforcement section of section 126 to allow states to petition the EPA for a finding that “any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of section 7410(a)(2)(D)(ii).”<sup>56</sup>

Congress has set strict limitations on judicial review of some EPA decisions under the Clean Air Act. First, section 307(b)(1) requires a petition for judicial review to be filed within sixty days of publication of a final rule in the Federal Register.<sup>57</sup> Second, section 307(d)(7)(B) restricts eligibility for judicial review of a rule or procedure to those objections “raised with reasonable specificity during the period for public comment . . . .”<sup>58</sup>

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50. *Id.* § 7511c(b).

51. *Id.* § 7511c(c).

52. *Id.*

53. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, §101(b), 104 Stat. 2399, 2404 (current version at 42 U.S.C. § 7410(a)(2)(D) (2006)).

54. *Id.*; *cf.* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 108, 91 Stat. 685, 693 (1977) (applying only to “any stationary source”).

55. Clean Air Act Amendments of 1990 §101(b); *cf.* Clean Air Act Amendments of 1977 § 108 (applying to emissions “prevent attainment or maintenance by any other State”). Congress may have intended to codify the interpretation of the 1977 Act’s “prevent” language developed by EPA through the section 126 petition cases. Wilcox, *supra* note 17, at 31–32.

56. 42 U.S.C. § 7426(b) (emphasis added).

57. 42 U.S.C. § 7607(b)(1). This section also establishes the United States Court of Appeals for the District of Columbia Circuit as the exclusive forum for initial review of many EPA actions pursuant to the Act. *Id.*

58. 42 U.S.C. § 7607(d)(7)(B).

The 1990 amendments suggest that Congress was aware of and intended to address historical difficulties of interstate air quality regulation under the Clean Air Act. The EPA has previously made two substantial attempts to promulgate rules under the revised good neighbor provision.<sup>59</sup> Both were challenged in the United States Court of Appeals for the District of Columbia Circuit, with the disputes centering largely around the EPA's interpretation of the phrase "contribute significantly."<sup>60</sup>

### C. THE NO<sub>x</sub> SIP CALL AND THE CLEAN AIR INTERSTATE RULE

#### 1. The NO<sub>x</sub> SIP Call and *Michigan v. U.S. EPA*

In 1998 the EPA promulgated a rule requiring twenty-two states and the District of Columbia to revise their SIPs for ozone<sup>61</sup> due to a finding of failure to meet the obligations imposed by the good neighbor provision.<sup>62</sup> In order to determine which states were "significantly contributing" to downwind ozone pollution under the good neighbor provision, the EPA first relied on environmental modeling.<sup>63</sup> Rather than base its determination purely on emission contributions indicated by modeling, however, the EPA also examined the types of pollution sources found in each state and the amount of pollution that could be reduced using specified control measures identified as "highly cost-effective."<sup>64</sup> One such control measure identified by the EPA was a cap-and-trade system for electricity-generating and other large boilers and

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59. See discussion *infra* Part I.C.

60. See discussion *infra* Part I.C.

61. The Clean Air Act grants EPA the authority to require states to revise SIPs found to be inadequate under provisions of the Act. 42 U.S.C. § 7410(k)(5).

62. Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (Oct. 27, 1998) (to be codified at 40 C.F.R. pts. 51, 72, 75, 96) [hereinafter NO<sub>x</sub> SIP Call].

63. *Michigan v. U.S. EPA*, 213 F.3d 663, 673, 687 (D.C. Cir. 2000); see Patricia Ross McCubbin, *Cap and Trade Programs Under the Clean Air Act: Lessons from the Clean Air Interstate Rule and the NO<sub>x</sub> Sip Call*, 18 PENN ST. ENVTL. L. REV. 1, 6 (2009).

64. McCubbin, *supra* note 63, at 6. The EPA defined "highly cost-effective" control measures as those that would cost no more on average than \$2,000 per ton of pollution reduced. NO<sub>x</sub> SIP Call, 63 Fed. Reg. at 57,377-78.

turbines.<sup>65</sup> The rule set each state's significant contribution for purposes of the good neighbor provision at the amount of reduction obtainable by highly cost-effective control measures.<sup>66</sup>

Eight affected states and numerous industrial entities challenged the rule on a variety of grounds in *Michigan v. U.S. EPA*.<sup>67</sup> A majority of the court held, among other things, that nothing in the text, structure, or legislative history of the good neighbor provision precluded the EPA from considering cost in its definition of significant contribution.<sup>68</sup> The eight states also challenged the use of the EPA-defined highly cost-effective control measures to calculate state emission budgets because they intruded on states' statutory rights to select their own control measures.<sup>69</sup> In rejecting this challenge, the court held that, while the EPA relied on identified highly cost-effective control measures to establish each state's obligation, the rule did not restrict the state's discretion to meet that obligation by any other combination of measures.<sup>70</sup>

## 2. The Clean Air Interstate Rule and *North Carolina v. EPA*

The EPA promulgated the Clean Air Interstate Rule (CAIR), the EPA's second attempt to implement the good neighbor provision, in 2005.<sup>71</sup> CAIR called on twenty-eight states and the District of Columbia to revise their SIPs to provide for reductions to sulfur dioxide (SO<sub>2</sub>) and nitrous oxide (NO<sub>x</sub>) emissions determined to contribute significantly to air quality problems in downwind states.<sup>72</sup>

CAIR identified the obligations of covered upwind states in two stages. First, based on environmental modeling, the EPA

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65. NO<sub>x</sub> SIP Call, 63 Fed. Reg. at 57,378.

66. *Id.*

67. McCubbin, *supra* note 63, at 7 (citing *Michigan v. U.S. EPA*, 213 F.3d 663, 667–68 (D.C. Cir. 2000)).

68. *Michigan v. U.S. EPA*, 213 F.3d at 669, 676–79.

69. *Id.* at 686–87.

70. *Id.* at 688.

71. Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call, 70 Fed. Reg. 25,162 (May 12, 2005) (to be codified in scattered parts of 40 C.F.R.) [hereinafter Clean Air Interstate Rule].

72. *Id.* at 25,167. NO<sub>x</sub> is an important precursor to ground-level ozone, while both NO<sub>x</sub> and SO<sub>2</sub> contribute to atmospheric formation of fine particulate matter (PM<sub>2.5</sub>). *Id.*

identified states that met certain thresholds for contribution to downwind air quality degradation.<sup>73</sup> Both CAIR and the NO<sub>x</sub> SIP Call relied on output-based control rates for electric generating units based on the number of pounds of NO<sub>x</sub> emitted per million British thermal units of energy generated (lbs/mmBtu).<sup>74</sup> Instead of relying on state-by-state determinations of actual contribution to set reduction targets, however, CAIR took a regional approach.<sup>75</sup> To determine the regional NO<sub>x</sub> budget (the total amount of NO<sub>x</sub> to be eliminated throughout the CAIR region), the EPA multiplied the combined average annual heat input of all power plants in states above the contribution threshold by the control rate, which was determined to reflect implementation of “highly cost-effective” control technology.<sup>76</sup> The EPA then divided this budget among the states according to each state’s contribution to the regional total, modified based on the proportion of oil-, coal-, and gas-fired plants within the state.<sup>77</sup> EPA identified adjustment factors of 1.0 for coal, 0.4 for gas, and 0.6 for oil, which were intended to reflect the differing reduction burdens and associated costs associated with each fuel type.<sup>78</sup> CAIR called for an initial NO<sub>x</sub> control rate to take effect in 2009, with a more stringent limit slated for 2015.<sup>79</sup> SO<sub>2</sub> budgets were based on the number of allowances issued under the existing Title IV cap-and-trade program and were to be reduced by fifty percent in 2010 and sixty-five percent in 2015.<sup>80</sup>

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73. *Id.* at 25,191. A state met the threshold for PM<sub>2.5</sub> contribution if modeling determined the state’s downwind contribution amounted to at least 0.2 micrograms per cubic meter (µg/m<sup>3</sup>), which is approximately one percent of the relevant NAAQS. *Id.* The significance threshold for ozone was more complicated. First, to be subject to CAIR a state’s contribution based on modeling had to exceed two parts per billion (ppb). *Id.* Second, a state’s relative contribution to a downwind area’s total concentration of ozone above the NAAQS had to exceed one percent. *Id.* States that met both criteria were then further evaluated based on the magnitude, frequency, and relative amount of contribution to determine whether they significantly contributed to downwind nonattainment. *Id.* at 25,191–92.

74. See NO<sub>x</sub> SIP Call, 63 Fed. Reg. 57,356, 57,362 (Oct. 27, 1998) (to be codified at 40 C.F.R. pts. 51, 71, 75, and 96); Clean Air Interstate Rule, 70 Fed. Reg. at 25,176.

75. Clean Air Interstate Rule, 70 Fed. Reg. at 25,230.

76. *Id.*

77. *Id.* at 25,230–31.

78. *Id.* at 25,231.

79. *Id.* at 25,176.

80. *Id.* at 25,229.

In the second stage, like the NO<sub>x</sub> SIP Call, CAIR left states the option of whether to require the highly cost-effective measures identified by the EPA or to submit SIPs containing other measures that would result in the same levels of pollution reduction.<sup>81</sup> For states that chose to meet their obligations by regulating electricity generating units, the rule created optional cap-and-trade programs for NO<sub>x</sub> and SO<sub>2</sub>.<sup>82</sup> The EPA intended the trading programs to be consistent with and expand upon existing regimes created pursuant to the NO<sub>x</sub> SIP Call and the Title IV acid deposition program.<sup>83</sup> While CAIR was not projected to eliminate all interstate transport, the EPA expected implementation of the rule to result in significant economic, health, and other benefits at a relatively low cost.<sup>84</sup> CAIR was similar in some respects to the NO<sub>x</sub> SIP Call, but important differences ultimately proved fatal to the new rule.<sup>85</sup> A number of states, electrical utilities, and other groups petitioned the United States Court of Appeals for the District of Columbia Circuit for review of CAIR on a variety of grounds, consolidated in the case *North Carolina v. EPA*.<sup>86</sup> The court ultimately found the rule sufficiently flawed that it should be

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81. *Id.* at 25,165.

82. *Id.* at 25,273–85.

83. *Id.* at 25,273. The rule required states that chose to regulate electric generating units, but not to participate in the CAIR trading program, to retire Title IV allowances in excess of their CAIR budgets. *Id.* at 25,259.

84. *Id.* at 25,165–66. EPA projected CAIR would result in attainment in fifty-two of seventy-nine counties otherwise projected to be in nonattainment for PM<sub>2.5</sub> in 2010, and fifty-seven of seventy-four counties otherwise projected to be in nonattainment for PM<sub>2.5</sub> in 2015. *Id.* at 25,165. The Agency expected attainment by three of forty counties otherwise projected to be in nonattainment for eight-hour ozone in 2010, and six of twenty-two counties for 2015. *Id.* at 25,165–66. Expected health benefits related to reductions in PM<sub>2.5</sub> included approximately 17,000 fewer premature fatalities, 8700 fewer cases of chronic bronchitis, 22,000 fewer non-fatal heart attacks, 10,500 fewer hospital admissions, and 1.7 million fewer work-loss days. *Id.* at 25,166. Projected ozone-related benefits included 2800 fewer hospital admissions for respiratory illnesses, 280 fewer emergency room admissions for asthma, 690,000 fewer days with restricted activity levels, and 510,000 fewer days of missed school due to child illness. *Id.* At full implementation in 2015, EPA projected the rule would have quantifiable economic benefits ranging from \$86.3 billion to \$101 billion annually, at an estimated annual cost of between \$2.6 billion and \$3 billion. *Id.*

85. See *North Carolina v. EPA*, 531 F.3d 896, 930 (D.C. Cir.), *reh'g granted in part*, 550 F.3d 1176 (D.C. Cir. 2008).

86. See *generally id.*; Elizabeth Kruse, Comment, *North Carolina v. Environmental Protection Agency*, 33 HARV. ENVTL. L. REV. 283, 287 (2009).

vacated in its entirety.<sup>87</sup> Most important to the analysis in this case are two elements of the decision: the court's rejection of CAIR's cap-and-trade program<sup>88</sup> and its methodology for setting NO<sub>x</sub> and SO<sub>2</sub> budgets.<sup>89</sup>

The court found that the cap-and-trade program, designed to address upwind contribution to downwind air pollution on a region-wide basis, failed to effectuate the mandate established by the good neighbor provision.<sup>90</sup> The court interpreted the statutory language to create a duty to ensure that each state addresses its own "significant contribution" to downwind nonattainment.<sup>91</sup> By allowing sources to purchase allowances throughout the region, the EPA left open the possibility that a state could achieve its CAIR budget without reducing its transport to downwind states at all.<sup>92</sup> The court held that because the trading program failed to require reductions based on each state's quantified "significant contribution," it exceeded the scope of the EPA's statutory authority.<sup>93</sup>

The court also held the EPA's systems for establishing state budgets for both NO<sub>x</sub> and SO<sub>2</sub> to be arbitrary and capricious.<sup>94</sup> The court found that the EPA failed to adequately establish a connection between CAIR's percentage-based reduction in the number of Title IV allowances each state would receive and individual states' "significant contribution" under the good neighbor provision.<sup>95</sup> Further, the court found

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87. *North Carolina*, 531 F.3d at 930.

88. *Id.* at 903.

89. *Id.* at 916–21.

90. *Id.* at 907–08 (noting that the lawfulness of the cap-and-trade program that survived *Michigan v. U.S. EPA* was never reviewed because it was not challenged in that case).

91. *Id.* at 907–08 ("Section 110(a)(2)(D)(i)(I) prohibits sources 'within the State' from 'contribut[ing] significantly to nonattainment in . . . any other State . . .'. Yet under CAIR, sources in Alabama, which contribute to nonattainment of PM<sub>2.5</sub> NAAQS in Davidson County, North Carolina, would not need to reduce their emissions at all. Theoretically, sources in Alabama could purchase enough NO<sub>x</sub> and SO<sub>2</sub> allowances to cover all their current emissions, resulting in no change in Alabama's contribution to Davidson County, North Carolina's nonattainment." (emphasis in original) (citations omitted)).

92. *Id.* at 907.

93. *Id.* at 908.

94. *Id.* at 918, 921.

95. *Id.* at 917–18 ("EPA . . . explains that it chose Title IV as a starting point 'to preserve the viability and emissions reductions of the highly successful title IV program.' This goal may be valid, but it is not among the

the EPA's identification of these reductions as achievable by "highly cost-effective controls" inconsistent with the consideration of cost approved in *Michigan v. EPA*.<sup>96</sup> *Michigan* approved the EPA's use of cost to reduce a state's obligation by requiring elimination of only the portion of the state's emissions that could be achieved by implementing "highly cost-effective controls."<sup>97</sup> The CAIR SO<sub>2</sub> budgets, however, began by establishing across-the-board, percentage-based reductions targets based on historic Title IV allowances, which the EPA then verified could be met by implementing controls identified as "highly cost-effective."<sup>98</sup> The court found that an approach in which the EPA simply "pick[s] a cost for a region, and deem[s] 'significant' any emissions that sources can eliminate more cheaply . . . would not necessarily achieve something measurable toward the goal of prohibiting sources 'within the State' from contributing significantly to downwind nonattainment."<sup>99</sup>

The EPA's allocation of NO<sub>x</sub> budgets was challenged for its reliance on fuel-adjustment factors to allocate emission allowances between states.<sup>100</sup> The EPA likely intended the fuel-adjustment factors to create a more coherent application of its "highly cost-effective controls" standard to different types of power producers, by virtue of their taking into account the variations in baseline emission rates and the cost, availability, and potential reductions of measures associated with different fuel types.<sup>101</sup> The court found this approach an impermissible

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objectives in section 110(a)(2)(D)(i)(I). And if it is somehow compatible with states' obligations to include 'adequate provisions' in their SIPs, prohibiting emissions 'within the State from . . . contribut[ing] significantly' to downwind nonattainment, then EPA should explain how. It has failed to do so." (internal citations omitted)).

96. *Id.* at 917.

97. *Id.* at 918 (citing *Michigan v. U.S. EPA*, 213 F.3d 663, 675 (D.C. Cir. 2000)).

98. *Id.*

99. *Id.*

100. *Id.* at 916. Although petitioners did not directly challenge the regional NO<sub>x</sub> budget, the court wrote that, as with the SO<sub>2</sub> budgets, the EPA's approach did not tailor each state's significant contribution to cost considerations, but instead established a regionwide reduction target and then determined the reductions to be achievable through highly cost-effective control measures. *Id.* at 919.

101. See McCubbin, *supra* note 63, at 14–15 ("If EPA required *all* power plants to emit no more than, say, 0.15 pounds of NO<sub>x</sub> per million Btus (lbs/mmBtu), coal-fired power plants might have to spend as much as \$2,000

attempt to equitably distribute the burden of reducing NO<sub>x</sub> emissions among upwind states.<sup>102</sup> The court indicated willingness to defer to reasonable EPA interpretations of what constitutes a “significant contribution” under the good neighbor provision, and reiterated the *Michigan* court’s holding that cost can be considered as a factor of significance.<sup>103</sup> The *North Carolina* court made clear, however, that an interpretation consistent with the statute “cannot extend so far as to make one state’s significant contribution depend on another state’s cost of eliminating emissions.”<sup>104</sup> Each state must be responsible for eliminating or reducing its own “significant contribution” to downwind nonattainment or pollution;<sup>105</sup> to survive judicial scrutiny, any rule promulgated under the good neighbor provision must not “require some states to exceed the mark.”<sup>106</sup>

The court’s decision to vacate CAIR in its entirety shocked all parties, even those opposed to portions of the rule, and caused widespread concerns about the potential disruption and regulatory uncertainty that would result.<sup>107</sup> The EPA petitioned the court for rehearing of the case, or, in the alternative, remand without vacatur.<sup>108</sup> The same three-judge panel that had decided the original case agreed to the latter request, determining that leaving the rule in place until the EPA could promulgate a replacement “would at least

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per ton of reduced emissions, whereas natural gas-fired plants would spend less than half that. Or, putting it another way, if a natural gas-fired power plant were required to spend \$2,000 per ton of avoided NO<sub>x</sub>, its emissions rate would be roughly 0.06 lbs/mmBtu, far lower than the rate of 0.15 lbs/mmBtu achieved at a coal-fired facility for the same cost.” (citation omitted)).

102. *North Carolina*, 531 F.3d at 919–21.

103. *Id.* at 919.

104. *Id.* at 919–20.

105. *Id.* at 921.

106. *Id.*

107. Some of the parties that initially challenged CAIR pushed for its reinstatement after this decision, and worried that the court had “thrown out the baby with the bathwater.” Matthew D. Tait, Note, *A Remedy Even the Plaintiffs Don’t Like: The D.C. Circuit’s Vacatur of the Clean Air Interstate Rule*, 16 MO. ENVTL. L. & POL’Y REV. 552, 568 (2009) (discussing immediate reactions from petitioners, industry representatives, and others to the decision).

108. *North Carolina v. EPA*, 550 F.3d 1176, 1177 (D.C. Cir. 2008), *vacating in part* 531 F.3d 896 (D.C. Cir.).



temporarily preserve the environmental values covered by CAIR.”<sup>109</sup>

## II. EME HOMER CITY GENERATION, L.P. V. EPA

### A. THE CROSS-STATE AIR POLLUTION RULE

In August 2011 the EPA published the Cross-State Air Pollution Rule (CSAPR).<sup>110</sup> The Agency promulgated the new rule in response to the decision in *North Carolina*, and intended it to be consistent with the holding in that case.<sup>111</sup> Like CAIR, CSAPR focuses primarily on large electric generating units.<sup>112</sup> Like both CAIR and the NO<sub>x</sub> SIP Call, the rule uses a two-stage approach to identify covered states and to determine their reduction obligations.<sup>113</sup> First, the EPA identified states whose measured emissions at any downwind receptor exceeded a threshold amount, set at one percent of the relevant NAAQS.<sup>114</sup> A total of twenty-seven states met or exceeded these threshold levels for one or more NAAQS.<sup>115</sup> The EPA then, using a multi-factor analysis taking into account both air quality impact and cost, determined each state’s emissions that were a significant contribution to nonattainment or interference with maintenance.<sup>116</sup> CSAPR retained a limited role for emissions trading, but “the Rule also maintain[ed] State-specific limits by means of assurance provisions that ‘ensure that the necessary emission reductions occur within each covered state.’”<sup>117</sup> In a substantial departure

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109. *Id.* at 1178.

110. CSAPR, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (to be codified at 40 C.F.R. pt. 51, 52, 72, 78, and 97).

111. *Id.* at 48,211 (“EPA’s approach in the Transport Rule . . . is guided by and consistent with the Court’s opinion in *North Carolina* . . .”).

112. *Id.*

113. *Id.*

114. *Id.* at 48,236. The EPA used threshold levels of 0.15 µg/m<sup>3</sup> for annual PM<sub>2.5</sub>, 0.35 µg/m<sup>3</sup> for twenty-four-hour PM<sub>2.5</sub>, and 0.8 ppb for eight-hour ozone. *Id.*

115. *Id.* at 48,209. Eighteen states met or exceeded the threshold level for annual PM<sub>2.5</sub>. *Id.* at 48,240. Twenty-two states were included for 24-hour PM<sub>2.5</sub>. *Id.* at 24,242. Twenty-six states exceeded threshold contributions for ozone. *Id.* at 24,245.

116. *Id.* at 48,211.

117. Brief for Respondents at 10, *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012) (No. 11-1302) (quoting CSAPR, 76 Fed. Reg.

from its approach in the NO<sub>x</sub> SIP Call and CAIR, the EPA issued FIPs concurrently with CSAPR.<sup>118</sup> A number of states, local governments, industry groups, and labor organizations petitioned the United States Court of Appeals for the District of Columbia Circuit for review of CSAPR, arguing that the EPA had exceeded the scope of its statutory authority.<sup>119</sup>

#### B. THE DECISION

On December 30, 2011, the court granted an order temporarily staying CSAPR.<sup>120</sup> The order instructed the EPA to continue to administer CAIR pending a resolution of the challenges to the new rule.<sup>121</sup> On August 21, 2012, two members of the three-judge panel held that the EPA had again exceeded its statutory authority and the rule should thus be vacated in its entirety.<sup>122</sup> Judge Rogers issued a lengthy and vigorous dissent, arguing that the court did not have jurisdiction to hear the case and that, even if the case were appropriately before the court, the majority decided it incorrectly.<sup>123</sup>

The majority, pointing primarily to the decision in *North Carolina* and the text of the Clean Air Act, laid out three requirements for any implementation of the good neighbor provision to survive review.<sup>124</sup> First, the EPA may not require a

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48,208, 48,271 (Aug. 8, 2011) (to be codified at 40 C.F.R. pt. 51, 52, 72, 78, and 97)).

118. CSAPR, 76 Fed. Reg. at 48,208. CAIR gave states eighteen months to submit SIPs complying with its requirements. Clean Air Interstate Rule, 70 Fed. Reg. 25,162, 25,263 (May 12, 2005). The EPA promulgated FIPs pursuant to the rule about a year later, but made clear the FIPs were intended as a “backstop” and that the agency did not intend to interfere with timely and adequate SIPs. Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone, 71 Fed. Reg. 25,328, 25,341 (Apr. 28, 2006).

119. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 11 (D.C. Cir. 2012).

120. *Id.* at 19.

121. *Id.*

122. *Id.* at 37.

123. *Id.* at 38 (Rogers, J., dissenting). Notably, Judge Rogers sat on the panels that decided both *Michigan* and *North Carolina*, while neither of the two judges in the majority, Judge Kavanaugh and Judge Griffith, participated in deciding either of the two previous cases interpreting the good neighbor provision. See *Michigan v. U.S. EPA*, 213 F.3d 663, 669 (D.C. Cir. 2000); *North Carolina v. EPA*, 531 F.3d 896, 901 (D.C. Cir. 2008).

124. *EME Homer City Generation*, 696 F.3d at 20–22.

state to reduce more than its own “significant contribution.”<sup>125</sup> If the EPA defines some level of contribution as insignificant, the statute does not authorize the EPA to require emission reductions that would reduce transport below that threshold.<sup>126</sup> To require further reductions, the majority found, would be an attempt to use the statute as “a blank check for EPA to address interstate pollution on a regional basis without regard to an individual upwind State’s actual contribution to downwind air quality.”<sup>127</sup> Second, each state’s required reduction must be proportional, taking into account the magnitude of the contribution relative to those of other upwind states and of the affected downwind state.<sup>128</sup> Specifically, the majority stated, “the collective burden must be allocated among the upwind States in proportion to the size of their contributions to the downwind State’s nonattainment.”<sup>129</sup> Third, the “end goal” of the statute is attainment in downwind states, and the EPA may not require more reductions than are necessary to meet that goal.<sup>130</sup> Any rule promulgated under the good neighbor provision must not “produce more than necessary ‘over-control’ in the downwind States—that is, [the EPA must ensure] that the obligations do not go beyond what is necessary for the downwind States to achieve the NAAQS.”<sup>131</sup>

The majority held that by using a numerical threshold for inclusion in the rule, the EPA established a “floor”—and any level of transport below that threshold is presumptively not “significant” for purposes of the good neighbor provision.<sup>132</sup> By then ignoring this “floor” when it considered cost to calculate each state’s “significant contribution,” the EPA created the possibility that a state “may be required to reduce its emissions by an amount greater than the ‘significant contribution’ that brought it into the program in the first place.”<sup>133</sup> The majority

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125. *Id.* at 20–22, 25.

126. *Id.* 20–22.

127. *Id.*

128. *Id.*

129. *Id.* at 21.

130. *Id.* at 20.

131. *Id.* at 22.

132. *Id.* at 23.

133. *Id.* at 25. The court relied on *North Carolina’s* requirement that the EPA cannot require some states to “exceed the mark.” *Id.* (citing *North Carolina v. EPA*, 531 F.3d 896, 921 (D.C. Cir. 2008)). The court determined by

also found CSAPR inconsistent with the requirement of proportionality “because it made no attempt to calculate upwind States’ required reductions on a proportional basis that took into account contributions of other upwind States to the downwind States’ nonattainment problems.”<sup>134</sup> Finally, the majority held the EPA’s approach “failed to ensure” that the aggregate reductions required of upwind states would not lead to “over-control” in downwind states.<sup>135</sup> The EPA “may not require upwind States to do more than necessary for the downwind States to achieve the NAAQS.”<sup>136</sup>

The majority also found fault with CSAPR’s issuance of FIPs concurrently with the reduction requirements set forward in the rule, rather than giving states an opportunity to satisfy the requirements with SIPs and avoid direct federal regulation.<sup>137</sup> It based its conclusion that CSAPR exceeded the EPA’s statutory mandate in this respect on the longstanding notion that regulatory authority under the Clean Air Act is firmly divided between the federal government and the states.<sup>138</sup> The EPA is responsible for promulgation of air quality standards, but each state has “primary responsibility for attaining those standards within its own borders.”<sup>139</sup> The court has interpreted this rule to create a strict “federalism bar” that precludes the EPA from using the SIP process to require a state to implement specific mitigation measures.<sup>140</sup>

The EPA argued CSPAR was justified by previous findings

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setting a numerical threshold for conclusion, the EPA had defined the “mark.”  
*Id.*

134. *Id.* at 26–27 (“To be sure, under *Michigan*, EPA may rely on cost-effectiveness factors in order to allow some upwind States to do *less* than their full fair share. But when EPA asks one upwind State to eliminate *more* than its statutory fair share, that State is necessarily being forced to clean up another upwind State’s share of the mess in the downwind State. Under the statute and *North Carolina*, that is impermissible.” (internal citations omitted)).

135. *Id.* at 27.

136. *Id.*

137. *Id.* at 37.

138. *Id.* at 29.

139. *Id.* (citing *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 63–67 (1975); *Am. Trucking Ass’ns v. EPA*, 600 F.3d 624, 625 (D.C. Cir. 2010); and *Virginia v. EPA*, 108 F.3d 1397, 1406–10 (D.C. Cir. 1997)).

140. *Id.* (citing *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1046 (D.C. Cir. 2001) (citing *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 95 (1975); *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997); and *Michigan v. U.S. EPA*, 213 F.3d 663, 687 (D.C. Cir. 2000))).

issued to the affected states for failures to either submit SIPs or obtain EPA approval of SIP submissions.<sup>141</sup> The majority found, however, that states have no obligation under the good neighbor provision until the EPA defines each state's "significant contribution"—the amount of pollution a state must address in its SIP provision for the SIP to be acceptable.<sup>142</sup> It rejected arguments by the EPA that the good neighbor provision contained in section 110 of the Clean Air Amendments of 1970, which lays out minimum requirements for SIPs, creates an obligation for states to independently include adequate provisions in SIPs to prohibit "pollution in amounts which will 'contribute significantly to nonattainment' or 'interfere with maintenance' of the new NAAQS in a downwind State."<sup>143</sup> The opinion points to prior EPA statements suggesting that coherent implementation of the good neighbor provision requires the EPA to first define state obligations, and finds EPA rulemaking approaches consistent with these statements in CAIR and the NO<sub>x</sub> SIP Call.<sup>144</sup>

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141. *Id.* at 31.

142. *Id.* at 32 ("[T]he good neighbor obligation is not a clear numerical target—far from it—until EPA defines the target. Even after EPA sets a NAAQS, an upwind State's good neighbor obligation for that pollutant is nebulous and unknown. The statutory standard is 'amounts' of pollution which will 'contribute significantly to nonattainment' or 'interfere with maintenance' of the new NAAQS in a downwind State. There is no way for an upwind State to know its obligation without knowing levels of air pollution in downwind States and then apportioning its responsibility for each downwind State's nonattainment. Therefore, the upwind State's obligation remains impossible for the upwind State to determine *until EPA defines it*. Without further definition by EPA, a prohibition on 'amounts which will . . . contribute significantly' is like a road sign that tells drivers to drive 'carefully.' The regulated entities—here, the upwind States—need more precise guidance to know how to conform their conduct to the law. A SIP logically cannot be deemed to lack a 'required submission' or deemed to be deficient for failure to meet the good neighbor obligation before EPA quantifies the good neighbor obligation." (emphasis in original) (alteration in original) (citation omitted)).

143. *Id.* The EPA argued that under Clean Air Act section 110(c)(1), it was required here to promulgate a FIP within two years of finding a SIP deficient in implementing the state's good neighbor obligation. *Id.* at 30–31. See 42 U.S.C. § 7410(c)(1) (2006).

144. *EME Homer City Generation*, 696 F.3d at 34–36 ("The task of determining the reductions necessary to meet section 110(a)(2)(D) involves allocating the use of the downwind States' air basin. This area is a commons in the sense that the contributing State or States have a greater interest in protecting their local interests than in protecting an area in a downwind State over which they do not have jurisdiction and for which they are not politically accountable. Thus, in general, it is reasonable to assume that *EPA may be in a*

The majority ultimately found that, due to these flaws it perceived in CSAPR, the appropriate remedy was vacatur and remand to the EPA.<sup>145</sup>

### C. THE MAJORITY DECISION IN *EME HOMER CITY GENERATION* SHOULD BE OVERTURNED

#### 1. Petitioners' Objections to the EPA's Interpretation of the Good Neighbor Provision Were Not Properly Before the Panel

If the EPA chooses to appeal and the Supreme Court agrees to hear the case, the Court will face difficult questions—first and foremost is whether the panel should have heard key arguments in the case at all.

In her dissent, Judge Rogers argues that neither the statutory objections to the EPA's definition of each state's obligations under CSAPR nor the issue of the EPA's decision to utilize FIPs were properly preserved for review.<sup>146</sup> Judge Rogers argues that the limitations on judicial review imposed by Clean Air Act sections 307(b)(1) and 307(d)(7)(B) exist for two important reasons: “[T]o enforce repose so that the rulemaking process is not crippled by surprise challenges to matters that were rightfully presumed settled, and to guarantee an agency's expert consideration and possible correction of any flaws in its rules *before* the matter reaches a court.”<sup>147</sup> The statutory filing period created by section 307(b)(1), she argues, has been strictly construed as “jurisdictional in nature”—if petitioners fail to comply with it, the court cannot address their claims.<sup>148</sup> Judge Rogers cites a

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*better position to determine the appropriate goal, or budget, for the contributing States, while leaving [it] to the contributing States' discretion to determine the mix of controls to make the necessary reductions.*” (emphasis added by the court) (quoting NO<sub>x</sub> SIP Call, 63 Fed. Reg. 57,356, 57,370 (Oct. 27, 1998) (to be codified at 40 C.F.R. pts. 51, 72, 75, 96))).

145. *Id.* at 37–38.

146. *Id.* at 38–40 (Rogers, J., dissenting).

147. *Id.* at 38 (emphasis in original).

148. *Id.* at 40 (quoting *Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011)); *see also Slinger Drainage, Inc. v. EPA*, 237 F.3d 681, 682 (D.C. Cir. 2001) (“The Supreme Court has explained that ‘judicial review provisions are jurisdictional in nature and must be construed with strict fidelity to their terms. This is all the more true of statutory provisions specifying the timing of review, for those time limits are, as we have often stated, mandatory and jurisdictional, and are not subject to equitable tolling.’” (alterations omitted) (citations omitted) (quoting *Stone v.*

long line of cases for the proposition that section 307(d)(7)(B)'s requirement that any objection be raised "with reasonable specificity during the public comment period" is equally important, and has thus been interpreted very strictly, especially when the challenge at issue is to an agency's interpretation of its governing statute.<sup>149</sup>

The majority relies on two comments, the decision in *North Carolina v. EPA* and the administrative record in that earlier case, to support its conclusion that the statutory challenges to CSAPR's reduction obligations were adequately preserved for review.<sup>150</sup> The comments cited by the majority, which were submitted by Tennessee and Wisconsin during the notice and comment rulemaking process, do not raise the statutory objection addressed by the court.<sup>151</sup> The majority finds, however, that the comments were reasonably specific under the particular circumstances of CSAPR's promulgation to give the EPA notice that they might provide the basis for a challenge in court.<sup>152</sup>

The majority argues that, because the EPA promulgated CSAPR directly in response to the District of Columbia Circuit's remand in *North Carolina* and its instruction to craft a new rule "consistent with our opinion," the EPA was aware of that decision—specifically, the requirement that once the EPA defines each upwind state's "significant contribution," it may not "require some states to exceed the mark."<sup>153</sup> As Judge

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Immigration & Naturalization Serv., 514 U.S. 386, 405 (1995)) (internal quotation marks omitted).

149. *EME Homer City Generation*, 696 F.3d at 52 (Rogers, J., dissenting) (quoting 42 U.S.C. § 7607(d)(7)(B) (2011)); see also *Cement Kiln Recycling Coal v. EPA*, 255 F.3d 855, 860 (D.C. Cir. 2001) ("While there are surely limits on the level of congruity required between a party's arguments before an administrative agency and the court, respect for agencies' proper role in the *Chevron* framework requires that the court be *particularly careful* to ensure that challenges to an agency's interpretation of its governing statute are first raised in the administrative forum." (quoting *Natural Res. Def. Council, Inc. v. U.S. EPA*, 25 F.3d 1063, 1074 (D.C. Cir. 1994))).

150. *EME Homer City Generation*, 696 F.3d at 24 n.18.

151. See *id.* at 53 (Rogers, J., dissenting) ("[Tennessee's] comment does not suggest that EPA is statutorily barred from following its approach . . . Wisconsin's comment also does not demonstrate the statutory authority challenge now advanced by petitioners in this court was preserved.").

152. *Id.* at 24–25 n.18 (majority opinion).

153. *Id.* (quoting *North Carolina v. EPA*, 531 F.3d 896, 921 (D.C. Cir. 2008)).

Rogers points out, however, the *North Carolina* court expressly left the specific approach challenged here—the EPA’s two-pronged analysis to determine initial inclusion in its rule and each state’s obligations—undisturbed.<sup>154</sup> The majority also points to the EPA’s dismissal of a similar comment during the development of the Clean Air Interstate Rule.<sup>155</sup> The majority argues the rejection of a similar argument in a prior rulemaking was “highly relevant.”<sup>156</sup> Judge Rogers argues inclusion of this comment in the record is suspect for a number of reasons. First, the comment was not introduced to the present case until rebuttal oral argument.<sup>157</sup> Furthermore, in *American Petroleum Institute v. U.S. EPA*, the EPA had incorporated the prior rulemaking docket into the record of the regulation at issue, which was something that was not done in this case.<sup>158</sup> Finally, like the comments submitted during the CSAPR rulemaking, the previous comment expressed a policy preference, not a direct challenge to the EPA’s statutory authority.<sup>159</sup> Because the EPA was never given an opportunity during the comment period to directly address the statutory challenge at issue in this case, Judge Rogers argues, the question was not properly preserved for review.<sup>160</sup>

Judge Rogers’ arguments are persuasive. The problems with the majority’s reach for jurisdiction are evident in the conditional language used in its decision: “[U]nder the Rule, a State then *may* be required to reduce its emissions by an amount greater than the ‘significant contribution’ that brought it into the program in the first place.”<sup>161</sup> This language reflects the failure of petitioners to submit any modeling projections or other data to support the conclusion that such a result would

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154. *Id.* at 54–55 (Rogers, J., dissenting) (citing *North Carolina v. EPA*, 531 F.3d 896, 916–17 (D.C. Cir. 2008)).

155. *Id.* at 24–25 n.18.

156. *Id.* (citing *Am. Petroleum Inst. v. U.S. EPA*, 52 F.3d 1113, 1120 n.1 (D.C. Cir. 1995)).

157. *Id.* at 55 (Rogers, J., dissenting) (“This comment . . . cannot carry the weight the court assigns to it . . .”).

158. *Id.* at 56 (“The CAIR comment that EPA rejected in the other rulemaking is therefore not ‘the same argument’ that petitioners belatedly attempt to raise now.”); *see also* *Am. Petroleum Inst. v. U.S. EPA*, 52 F.3d 1113, 1120 n.1 (D.C. Cir. 1995).

159. *EME Homer City Generation*, 696 F.3d at 56 (Rogers, J., dissenting).

160. *Id.* at 57.

161. *Id.* at 25 (majority opinion) (emphasis added).



actually occur.<sup>162</sup> Petitioners instead relied on simplistic hypotheticals that fail to adequately communicate the complexity and fundamentally regional nature of the problem.<sup>163</sup> If the issue had been properly raised during the comment period, the EPA could have directly analyzed it.<sup>164</sup> Even without direct study, the EPA determined that record evidence strongly supports the conclusion that the feared result would be “extremely unlikely” under the rule.<sup>165</sup> Despite any concrete evidence to the contrary, the majority accepts the hypothetical risk of over-regulation presented by petitioners as sufficient justification to send the EPA back to the drawing board.

## 2. The Panel’s Decision Imposes an Overly Restrictive Interpretation of the Good Neighbor Provision That Is Not Required by the Statute

Even if the court finds the challenges to CSAPR were within the court’s jurisdiction, the challenges should be rejected. In addition to the requirement that the EPA consider any quantified threshold contribution for inclusion in a rule a floor for significance, the panel decision creates two new restrictions on the EPA’s authority.

First, the majority bases its establishment of both its threshold-as-floor and proportionality requirements in language included in the *North Carolina* court’s discussion of state NO<sub>x</sub> budgets under CAIR.<sup>166</sup> At issue there was the EPA’s decision, after setting a regional NO<sub>x</sub> budget based on the product of the total regional heat input of all power plants and a control emissions rate the EPA determined was achievable by all power plants via implementation of “highly cost-effective” controls, to determine state-by-state allocations of trading allowances based on a fuel-adjustment factor.<sup>167</sup> The court

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162. Brief for Respondents, *supra* note 117, at 33.

163. For an example of such a hypothetical, see Final Brief of Industry and Labor Petitioners at 22–23, *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012) (No. 11-1302).

164. See Brief for Respondents, *supra* note 117, at 33–34 n.20 (“Due to the lack of comments, this was not an issue that EPA analyzed in a direct fashion for the Rule.”).

165. *Id.* at 33.

166. *EME Homer City Generation*, 696 F.3d at 20–22.

167. *North Carolina v. EPA*, 531 F.3d 896, 918–19 (D.C. Cir.), *reh’g granted in part*, 550 F.3d 1176 (D.C. Cir. 2008).

determined this system, which granted more allowances to states with a higher proportion of coal-fired power plants, was an impermissible attempt to equitably distribute the burden of reducing pollution among upwind states.<sup>168</sup> There was a very real danger that some states would “share the burden of reducing other upwind states’ emissions.”<sup>169</sup> Because CAIR relied exclusively on a regional trading system, the court found that “[t]he net result will be that states with mainly oil- and gas-fired [electric generating units (EGUs)] will subsidize reductions in states with mainly coal-fired EGUs.”<sup>170</sup> This approach was held contrary to the statute, which “requires each state to prohibit emissions ‘within the State’ that contribute significantly to downwind pollution, not to pay for other states to prohibit their own contributions.”<sup>171</sup> CSAPR presents no such difficulties. Each state is required to reduce emissions “within the state” in accordance with its own “significant contribution,” as defined by the EPA in the rule.<sup>172</sup> While CSAPR retains a limited role for emissions trading, “the Rule also maintains State-specific limits by means of assurance provisions that ‘ensure that the necessary emission reductions occur within each covered state,’”<sup>173</sup> and the trading provisions were not challenged.<sup>174</sup> The majority here, however, would stretch the language applied by the *North Carolina* court to effectively create a restrictive definition of “significant contribution.”<sup>175</sup> This may be a logical extension of the holding in *North Carolina*. It is certainly one reasonable interpretation

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168. *Id.* at 921 (“Because the fuel-adjustment factors shifted the burden of emission reductions solely in pursuit of equity among upwind states—an improper reason—the resulting state budgets were arbitrary and capricious.”).

169. *Id.*

170. *Id.*

171. *Id.* (quoting 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2006)).

172. See CSAPR, 76 Fed. Reg. 48,208, 48,211 (Aug. 8, 2011) (to be codified at 40 C.F.R. pt. 51, 52, 72, 78, and 97) (“EPA believes this methodology [in CSAPR] addresses the [*North Carolina*] court’s concern that the approach used in CAIR was insufficiently state-specific.”).

173. Brief for Respondents, *supra* note 117, at 10 (quoting CSAPR, 76 Fed. Reg. 48,208, 48,271 (Aug. 8, 2011) (to be codified at 40 C.F.R. pt. 51, 52, 72, 78, and 97)).

174. The court in *EME Homer City Generation* opines that “interstate trading is generally permitted.” *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 18 n.11 (D.C. Cir. 2012).

175. See *id.* at 25 n.19.

of the statutory text, but it is not, as the majority suggests, one that is demanded by the statute.

The majority cites no authority for its position that “the end goal of [section 110 of the Clean Air Act] is attainment in the downwind State.”<sup>176</sup> It also, somewhat ironically, completely neglects in its discussion of potential over-regulation the “interference with maintenance” prong of the good neighbor provision, which the court in *North Carolina* expressly instructed the EPA to give independent effect in any replacement rule.<sup>177</sup> The EPA designed its rule and defined each state’s significant contribution based on the complicated relationships between states.<sup>178</sup> Most upwind states contribute to pollution in multiple downwind states, and most downwind states are affected by multiple upwind states.<sup>179</sup> Many states are both “upwind” and “downwind” for purposes of the good neighbor provision; they both contribute to other states’ pollution problems and suffer from problems caused by out-of-state pollution.<sup>180</sup>

The *EME Homer City Generation* majority acknowledges that “there may be some truly unavoidable over-control in some downwind States that occurs as a byproduct of the necessity of reducing upwind States’ emissions enough to meet the NAAQS in other downwind States.”<sup>181</sup> The majority opinion fails, however, to offer any insight as to how the EPA might craft an effective and practicable rule in line with the new restrictions the decision places on the Agency. The EPA’s approach is a reasonable attempt to effectuate the Clean Air Act’s good neighbor provision, and to address the complex web of linkages between upwind and downwind states. The statutory language is sufficiently ambiguous that a reasonable interpretation by the EPA should be afforded deference.<sup>182</sup>

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176. *Id.* at 20.

177. *North Carolina v. EPA*, 531 F.3d 896, 910–11 (D.C. Cir.), *reh’g granted in part*, 550 F.3d 1176 (D.C. Cir. 2008).

178. Brief for Respondents, *supra* note 117, at 37–38.

179. *Id.*

180. *Id.*

181. *EME Homer City Generation*, 696 F.3d at 22 .

182. *Cf. Chevron, U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984) (holding that where an agency’s governing statute is silent or ambiguous as to a given issue, an agency interpretation is entitled to deference as long as the interpretation is based on a permissible construction of the statute).

### 3. The Challenge to EPA's Issuance of FIPs was Both Improperly Reached and Incorrectly Decided as a Matter of Statutory Interpretation

Judge Rogers argues that the court's decision to address objection to CSAPR's utilization of FIPs was similarly inappropriate.<sup>183</sup> Affected states were put on notice of the EPA's express intent to issue a FIP within two years of when the agency published findings of their failure to submit adequate SIPs.<sup>184</sup> The proper time to object to promulgation of a FIP, Judge Rogers asserts, was within sixty days of that publication.<sup>185</sup>

Again, even if the court finds the decision to hear the case was appropriate, the majority advances as mandatory an interpretation of the relevant statutory language that has no textual basis. The majority's interpretation would create a distinct process, initiated by EPA rulemaking to define each state's "significant contribution," that requires states to first submit a SIP containing provisions to address transport.<sup>186</sup> This is not how the statute is written. Every state, in every SIP, is required to provide "adequate . . . provisions" to satisfy the requirements of the good neighbor statute.<sup>187</sup> Upon a finding of failure to submit an adequate SIP, the EPA is required, within two years, to promulgate a FIP unless the state addresses the deficiencies.<sup>188</sup>

While it may be preferable from a cooperative federalism standpoint to allow states a first attempt at any targeted reductions, this is not required by the statute. The majority would replace the language and structure of the statute with its own policy-based rule.<sup>189</sup> The FIP provisions are intended to address state failure to act. In issuing its findings of failure to submit adequate SIPs and in promulgating CSAPR, the EPA

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183. *EME Homer City Generation*, 696 F.3d at 43 (Rogers, J., dissenting) ("[T]he court reaches the merits of this issue despite its lack of jurisdiction.").

184. *Id.* at 41 (citing Failure to Submit Good Neighbor SIP Finding, 75 Fed Reg. 32,673, 32,674 (June 9, 2010)).

185. *Id.* at 41–42.

186. See *supra* note 143 and accompanying text.

187. *EME Homer City Generation*, 696 F.3d at 47 (Rogers, J., dissenting).

188. *Id.* at 46.

189. *Id.* at 48 ("The court's 'role is not to correct the text so that it better serves the statute's purposes . . .'" (quoting Va. Dep't of Med. Assistance Servs. v. U.S. Dep't of Health & Human Servs., 678 F.3d 918, 926 (D.C. Cir. 2012))).

made a determination, within its statutory authority, that the failure of states to adequately address transport issues warranted direct federal intervention.

Allowing the majority decision in *EME Homer City Generation* to stand would significantly limit the EPA's ability to address the fundamentally regional problem of interstate air pollution. The rules outlined by the court severely curtail the EPA's discretion to define what constitutes each state's significant contribution to downwind pollution by requiring the EPA to tailor each state's obligation to its precise, proportional share of the quantity of pollution above a downwind attainment threshold.<sup>190</sup> The decision allows for costs to be considered, but only after defining a state's baseline obligation determined by the aforementioned criteria. This would effectively leave the EPA three options: 1) impose incredibly burdensome, if not unachievable, obligations on certain states;<sup>191</sup> 2) require only minimal reductions and leave a large portion of the problem unaddressed; or 3) rely on alternative Clean Air Act provisions that address the problem in a piecemeal fashion and have otherwise proved ineffective.<sup>192</sup> If the decision and its restrictive reading of the good neighbor provision are allowed to stand, the Clean Air Act must then be amended to allow for meaningful regulation of interstate air pollution.

### CONCLUSION

The majority decision in *EME Homer City Generation* imposes an unnecessarily burdensome reading of the Clean Air Act's good neighbor provision that drastically curtails the ability of the EPA to address interstate air pollution. The decision should be overturned and CSAPR implemented for two reasons. First, the majority reached key issues despite a failure by petitioners to adequately raise and preserve the issues during the relevant notice and comment rulemaking period. Second, the majority based its decision on questionable

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190. Brief for Respondents, *supra* note 117, at 13 ("From a technical perspective, EPA explained why an air quality-only approach . . . would not be an effective or efficient *overall* response to the complex collective-contribution problem presented here, and this analysis stands essentially undisputed.")

191. *Id.* at 29 ("[T]he resulting limitations in certain States would be so onerous as to make the control regime practically unworkable.")

192. For a discussion of the Clean Air Act's statutory structure and its effectiveness, see *supra* notes 16–52 and accompanying text.

readings of the relevant statutory language and failed to grant the EPA the deference it is due under well-established principles of statutory interpretation. If the decision is allowed to stand, the Clean Air Act must be amended to give the EPA adequate discretion to achieve the statute's goal.