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## EME Homer City Generation, L.P. v. E.P.A.: Restraining the Federal Government's Leadership Role in Stopping Interstate Air Pollution

Matt Jones

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**EME HOMER CITY GENERATION, L.P. V. E.P.A. : RESTRAINING THE  
FEDERAL GOVERNMENT’S LEADERSHIP ROLE IN STOPPING  
INTERSTATE AIR POLLUTION**

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**I. Interstate Air Pollution**

Rapid advancement in industrialization and urbanization demands unprecedented amounts of electricity use in modern day America. Although technological innovation has fueled the use of clean forms of energy, the vast majority of electricity is still generated from the combustion of fossil fuels such as coal, natural gas, and oil. This combustion releases a multitude of pollutants into the environment.

The source of air pollution is identifiable and measurable within the borders of each state. Air pollution itself, however, is indifferent to state boundaries. Air currents, wind, and air pressure systems drive pollutants generated in one state into the atmosphere of other, downwind states. Congress, mindful of this deleterious problem, enacted a provision within the Clean Air Act called the Good Neighbor Provision.<sup>1</sup>

Under the Clean Air Act, the Federal Government sets air quality standards, but states may choose to retain the primary responsibility of deciding how to attain those standards within their borders.<sup>2</sup> The Environmental Protection Agency (EPA) is charged

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<sup>1</sup> 42 U.S.C. § 7410(a)(2)(D) (2012) (requiring upwind states to prohibit their pollutant emissions from affecting downwind states NAAQS).

<sup>2</sup> See *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 11 (D.C. Cir. 2012), *cert. granted in part*, 12-1182, 2013 WL 1283839 (U.S. June 24, 2013), *cert. granted in part*, 12-1183, 2013 WL 1283840 (U.S. June 24, 2013).

with setting National Ambient Air Quality Standards (NAAQS), which prescribe the maximum permissible levels of common pollutants in the ambient air.<sup>3</sup> After much scientific experimentation and testing, the EPA designates “nonattainment” areas within each state where the level of pollutants exceeds the NAAQS.<sup>4</sup> Once nonattainment areas are designated within the states, each state then formulates a State Implementation Plan (SIP) outlining how it will achieve compliance with the NAAQS.<sup>5</sup> The Good Neighbor Provision is an element of the SIPs, and requires that the SIPs make “adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any such national primary or secondary ambient air quality standard . . . .”<sup>6</sup>

The Clean Air Act seeks to regulate air pollutants under a cooperative federalism scheme.<sup>7</sup> That is, both the Federal Government and the states exercise responsibility for maintaining and improving air quality.<sup>8</sup> The general division of labor provides that the Federal Government determine the level of air pollutants acceptable for the health and well-being of its peoples, and that the states have primary responsibility for implementing this standard based on an individual assessment of its technical and economic feasibility factors.<sup>9</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> 42 U.S.C. § 7407(d)(1)(A)(i).

<sup>5</sup> *Id.* § 7410(a)(1).

<sup>6</sup> *Id.*

<sup>7</sup> *See* Am. Trucking Ass’n., Inc. v. EPA, 600 F.3d 624, 625 (D.C. Cir. 2010).

<sup>8</sup> *See id.*

<sup>9</sup> *See* Union Elec. Co. v. EPA, 427 U.S. 246, 256-57 (1976).

Congress entrusted the EPA with the authority to promulgate and enforce regulations for the Clean Air Act.<sup>10</sup> In 2011, the EPA finished crafting the Cross-State Air Pollution Rule (the Transport Rule) in an effort to enforce the Good Neighbor Provision.<sup>11</sup> In August of 2012, the D.C. Circuit struck down the Transport Rule in *EME Homer City Generation, L.P. v. EPA*.<sup>12</sup> The court gave two separate reasons why the Transport Rule violates the Clean Air Act. This Comment analyzes the cooperative federalism reasoning given by the court. In the second part, this Comment explores the court's analysis and argues that, in light of the underlying purposes of the Clean Air Act, the court unnecessarily narrows the Federal Government's role in enhancing the public's health and well-being through the reduction in interstate transport of air pollutants.

## **II. Facts and Holding**

In 2008, the D.C. Circuit struck down the Clean Air Interstate Rule (CAIR), a cap-and-trade program designed by the EPA in 2005 to reduce the interstate transport of harmful pollutants.<sup>13</sup> The vacatur led the EPA to revisit the Transport Rule in 2011.<sup>14</sup> In August of 2012, various states, local governments, industry groups, and labor organizations' petitions were reviewed by a panel of three judges for the D.C. Circuit.<sup>15</sup>

This Comment will analyze the court's vacatur of the Transport Rule based on its reasoning that the rule gives the Federal Government too much preemptive authority in

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<sup>10</sup> See *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 13 (D.C. Cir. 2012), *cert. granted in part*, 12-1182, 2013 WL 1283839 (U.S. June 24, 2013), *cert. granted in part*, 12-1183, 2013 WL 1283840 (U.S. June 24, 2013).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *North Carolina v. EPA*, 531 F.3d 896, 930 *on reh'g in part*, 550 F.3d 1176 (D.C. Cir. 2008).

<sup>14</sup> See *EME Homer City Generation, L.P.*, 696 F.3d at 23.

<sup>15</sup> *Id.*

implementing plans for compliance.<sup>16</sup> Executive agencies, such as the EPA, may only exercise rule-making authority conferred upon them statutorily and may not transgress statutory limits on that authority.<sup>17</sup> The Clean Air Act vested the EPA with the responsibility of implementing the Act, and further, gave the EPA the authority to promulgate rules to further the purposes of the good neighbor provision.<sup>18</sup> This administrative law doctrine limits the EPA to enacting rules that are consistent with the provisions of the enabling statute from which the EPA derives its authority.

Under the Transport Rule as written, the EPA gave itself authority to establish each upwind state's good neighbor obligation while *simultaneously* administering Federal Implementation Plans (FIPs) for those respective upwind states.<sup>19</sup> The EPA did this without giving the states an initial opportunity to meet those obligations themselves through their own SIPs.<sup>20</sup>

It is undisputed that the EPA is the first initiator in regulating air pollutants under the Clean Air Act.<sup>21</sup> The Act also requires the EPA to promulgate NAAQS for common pollutants, and mandates that states comply with those standards.<sup>22</sup> After this initial step, Section 110 of the Clean Air Act<sup>23</sup> lists many elements that states must include within their SIPs to ensure that the plan will be comprehensive enough to enable the state to

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> 42 U.S.C. § 7410(a)(2)(D)(i)-(ii) (2012).

<sup>19</sup> *EME Homer City Generation, L.P.*, 696 F.3d at 15.

<sup>20</sup> *Id.*

<sup>21</sup> 42 U.S.C. § 7409(a).

<sup>22</sup> *Id.*

<sup>23</sup> The Clean Air Act, 42 §§ U.S.C. 7401–7626 (2012), consists of Public Law 159 (Act of July 14, 1955, ch. 360, 69 Stat. 322) and the amendments made by subsequent enactments.

attain its NAAQS.<sup>24</sup> The Good Neighbor Provision is one of these required elements.<sup>25</sup> In addition to Section 110 prescribing state action for the attainment of NAAQS, this section mandates that the EPA promulgate a FIP in those cases where the SIP failed to make a required submission or was deficient.<sup>26</sup>

This “federal backstop” in Section 110 forms the crux of the majority’s holding.<sup>27</sup> The court reasons that by requiring the EPA, in the Transport Rule, to issue FIPs simultaneously with the air quality standards set by each state, Section 110 of the Clean Air Act is invoked, rendering each state’s SIP deficient before the state has even had a chance to comply with applicable air standards.<sup>28</sup> The court reads Section 110 as allowing the EPA to issue FIPs *only* when a SIP does not meet the requisite standards.<sup>29</sup>

### **III. Legal Background**

Prior to 1970, the regulation of air pollution was left to the states.<sup>30</sup> Growing concerns over the nation’s air quality led to the first federalized air pollution control measure—the Clean Air Act.<sup>31</sup> The Clean Air Act laid the foundation for the cooperative interplay between the EPA and the states from which each would begin to develop environmental policy over the years.

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<sup>24</sup> 42 U.S.C. § 7410(a)(2).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* § 7410(c)(1).

<sup>27</sup> *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 17, 31 (D.C. Cir. 2012), *cert. granted in part*, 12-1182, 2013 WL 1283839 (U.S. June 24, 2013), *cert. granted in part*, 12-1183, 2013 WL 1283840 (U.S. June 24, 2013).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Jennifer A. Davis Foster, *EPA Oversight in Determining Best Available Control Technology: The Supreme Court Determines the Proper Scope of Enforcement*, 69 MO. L. REV. 1157, 1165-66 (2004).

<sup>31</sup> *Id.*

## A. Clean Air Act (1970)

In 1970, Congress declared that growth in the amount and complex nature of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles posed a threat to the public health and welfare.<sup>32</sup> To address these pollution concerns, Congress enacted the Clean Air Act to protect and enhance the quality of the Nation's air resources, promote public health, and [insert verb of choice here] the productive, flourishing capacity of its population.<sup>33</sup>

The original enactment of the Clean Air Act comprised three arms. The first arm of the Clean Air Act required the EPA to set National Ambient Air Quality Standards (NAAQS) for particular air pollutants known to adversely affect the health of individuals.<sup>34</sup> The second arm of the Clean Air Act prescribed a cooperative federalism framework, allowing states to retain regulatory and policy making decisions through State Implementation Plans (SIPs) by which the states would outline how they planned to comply with the NAAQS imposed by the first arm of the Act.<sup>35</sup> The third arm authorized the EPA to regulate pollution standards from various sources and to that end, to establish air-quality standards for these sources.<sup>36</sup> Each arm relies on the others and creates a comprehensive, and interwoven regulatory scheme.

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<sup>32</sup> 42 U.S.C. § 7401(a)-(c) (2012).

<sup>33</sup> *Id.*

<sup>34</sup> *See id.* § 7408(a)-(b) (requiring administrator to establish list of air pollutants anticipated to endanger public health, and to issue air quality criteria reflecting latest scientific knowledge of effects of pollutants in ambient air); *see also id.* § 7409(a)-(d) (requiring administrator to establish primary and secondary NAAQS).

<sup>35</sup> *See id.* § 7410(a)(2).

<sup>36</sup> *Id.* § 7521.

With regard to the first arm of the Clean Air Act, the EPA is required to establish air quality standards for “criteria pollutants.” There are currently six criteria pollutants, including Sulfur Dioxide and Nitric Oxide.<sup>37</sup> The EPA must establish maximum levels of criteria pollutants that are needed to protect the public health while “allowing an adequate margin of safety.”<sup>38</sup> Congress granted the EPA discretion to set policy objectives relating to health matters, but prohibited the EPA from considering economic costs and technological feasibility when implementing NAAQS.<sup>39</sup>

Once the EPA establishes the NAAQS for criteria pollutants, it monitors areas throughout the United States to compare their air quality with those prescribed by the standards. After these comparisons are quantified, each area is assigned one of three designations: attainment, nonattainment, or unclassifiable.<sup>40</sup> Central to the Transport Rule in the case at hand is NAAQS compliance.

With regard to the second arm of the Clean Air Act, Congress designed a cooperative federalism framework that imposed upon the states the responsibility to ensure that all areas within its borders meet the NAAQS.<sup>41</sup> The states must promulgate SIPs describing how they will meet the NAAQS.<sup>42</sup> If nonattainment areas are identified within a state, the SIP will be more extensive, requiring the state to adopt stringent

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<sup>37</sup> See *What Are the Six Common Air Pollutants?*, EPA.GOV, <http://www.epa.gov/oaqps001/urbanair> (last visited June 27, 2013) (other pollutants include Ozone, Particulate Matter, Carbon Monoxide, and Lead).

<sup>38</sup> 42 U.S.C. § 7409(b)(1).

<sup>39</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465 (2001) (holding that plain language of CAA “does not permit the EPA to consider costs in setting the [national ambient air quality] standards. The language . . . is absolute . . . . Nowhere are the costs of achieving such a standard made part of that initial calculation.”).

<sup>40</sup> See 42 U.S.C. § 7407(d)(1)(A).

<sup>41</sup> See *id.* § 7407(a).

<sup>42</sup> *Id.* § 7502(c)(1).

technology controls for all stationary sources of pollution and to show how the nonattainment areas are reasonably progressing towards attainment.<sup>43</sup>

Although the EPA's requirements may impose stringent obligations upon the states, the states retain discretion in how they will meet those standards through the SIP. The SIP is an air quality planning document used to determine the quality of the air in a state and determine how the state will meet the NAAQS. Additionally, the SIP is a regulatory instrument that assigns responsibility for air pollution control through a variety of EPA-approved methods, such as technology requirements, state regulations, and local ordinances. As long as a state can show that it meets the requirements imposed by the EPA, substantial deference will be given to the SIP to determine compliance with the NAAQS.<sup>44</sup>

### **B. Acid Rain Program (1990)**

In 1990, Congress amended the Clean Air Act to include Title IV, a program designed to control acid rain.<sup>45</sup> Health and environmental studies prompted Congress to find that the presence of acidic compounds and their precursors in the atmosphere represented a threat to natural resources and public health.<sup>46</sup> These findings recognized that the emissions from the combustion of fossil fuels were the contributing factor to these environmental and health problems. Notwithstanding these negative findings,

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<sup>43</sup> *Id.*

<sup>44</sup> *See, e.g., id.* § 7410(a)(2).

<sup>45</sup> Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

<sup>46</sup> 42 U.S.C. § 7651(a)(1).

Congress remained optimistic that developing economically feasible technologies would be effective in battling the pollution.<sup>47</sup>

The Acid Rain Program sought to drastically reduce emissions of Sulfur Dioxides from power plants.<sup>48</sup> Specifically, the Acid Rain Program aspired to reduce emissions of Sulfur Dioxide by forty-one percent of 1980 levels.<sup>49</sup>

The Acid Rain Program implemented a market-based emissions trading program, permitting power plants to buy and sell allowances based on their individual needs and costs.<sup>50</sup> Through this minimally intrusive governmental measure, the Acid Rain Program mandated an annual tonnage limit of Sulfur Dioxide emissions from each power plant and directed the EPA to allocate allowances among the various power plants in conformity with its tonnage cap.<sup>51</sup> Thus, a market emerged in which power plants could buy, sell, or trade allowances in the manner most cost effective to their operational structure. The Acid Rain Program has generally been viewed as a success by environmental groups and the government, for reducing acid-rain producing emissions and the economic costs of regulatory compliance.<sup>52</sup>

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<sup>47</sup> *Id.* § 7651(a)(2).

<sup>48</sup> *Id.* § 7651(b) (“The purpose of this subchapter is to reduce the adverse effects of acid deposition through reductions in annual emissions of sulfur dioxide of ten million tons from 1980 emission levels . . .”).

<sup>49</sup> See EPA, ACID RAIN PROGRAM: 2005 PROGRESS REPORT 5 (Pub. No. EPA-430-R-06-015, 2006), available at <http://www.epa.gov/airmarket/progress/docs/2005report.pdf>.

<sup>50</sup> See 42 U.S.C. § 7651b(b).

<sup>51</sup> *Id.* § 7651b(a) (“[T]he Administrator shall allocate annual allowances for the unit, to be held or distributed by the designated representative of the owner or operator of each affected unit . . .”).

<sup>52</sup> See Harry Moren, *The Difficulty of Fencing in Interstate Emissions: EPA's Clean Air Interstate Rule Fails to Make Good Neighbors*, 36 *ECOLOGICAL L.Q.* 525, 530 (2009) (“EPA views the NOx program as successful in reducing pollution from NOx.”).

### **C. Nitric Oxide SIP Call (1995)**

In 1995, the Ozone Transport Commission (OTC) sought to achieve the regional reduction of Nitric Oxide (NO<sub>x</sub>) pollution.<sup>53</sup> The OTC established a cap-and-trade program, but the eastern states were still finding it difficult to achieve the required NAAQS mandated by the Clean Air Act. A significant contributing factor to this nonattainment was the transport of pollutants from upwind states. As a result, the EPA replaced the cap-and-trade program of the OTC with the NO<sub>x</sub> SIP Call Program.<sup>54</sup>

Pursuant to the Good Neighbor Provision in the Clean Air Act, this program required states in the eastern United States to revise their SIPs to ensure that their NO<sub>x</sub> emissions did not “contribute significantly to nonattainment in, or interference with maintenance” of the downwind state’s ozone NAAQS.<sup>55</sup>

Although the EPA set maximum emission level standards for the states, the EPA left it up to the states to determine how to achieve these standards. Several industry and environmental groups urged the states to develop a market-based trading framework to achieve the emissions limitations. In response to the findings of these groups, the EPA developed a model cap-and-trade program and declared that all states that developed a similar program would receive EPA approval. All the states implicated in the NO<sub>x</sub> SIP Call Program eventually chose to adopt the model framework. As a result of this

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<sup>53</sup> See OZONE TRANSPORT COMM'N, NO<sub>x</sub> BUDGET PROGRAM: 1999-2002 PROGRESS REPORT 4 (EPA Pub. No. EPA-430-R-03-900, 2003), *available at* <http://www.epa.gov/airmarkt/progsregs/nox/docs/otcreport.pdf>.

<sup>54</sup> See *Nitrogen Oxides Control Regulations: EPA's Ozone Transport NO<sub>x</sub> SIP Call*, EPA.GOV, <http://www.epa.gov/region1/airquality/nox.html#sipcall> (last visited June 27, 2013).

<sup>55</sup> 42 U.S.C. § 7410(a)(2)(D)(i)(I).

program, states were successful in reducing NO<sub>x</sub> emissions by a significant amount since the program's enactment in 2005.<sup>56</sup>

#### **D. Clean Air Interstate Rule (2005)**

Despite the successes of the Acid Rain and NO<sub>x</sub> SIP call programs, Congress enacted the Clean Air Interstate Rule (“CAIR”) in 2005, to mitigate the continuing nonattainment of ozone and fine particulate matter NAAQS, due in part to the interstate effects of Sulfur Dioxide (SO<sub>2</sub>) and NO<sub>x</sub> emissions.<sup>57</sup> The EPA suggested that the new program merge with and piggyback off of the successes of the prior market based cap-and-trade programs. Accordingly, the EPA adopted a model trading program, and issued a FIP to be used by the states until they were able to submit their own SIPs.<sup>58</sup>

The federal model rule established three separate trading programs: (1) an annual NO<sub>x</sub> program, (2) an annual SO<sub>2</sub> trading program, and (3) a seasonal NO<sub>x</sub> program.<sup>59</sup> The EPA program caps the amount of SO<sub>2</sub> and NO<sub>x</sub> each state may emit at a reduced allowance based on the number of power plants existing within each state.<sup>60</sup> To calculate each state’s proportionate allocation, the EPA provided an estimate based on the best available control technology that each power plant could implement. Over time, the cap imposed on the states gradually decreases into phases. Although the EPA retains the

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<sup>56</sup> See OFFICE OF AIR & RADIATION, EPA, NO<sub>x</sub> BUDGET TRADING PROGRAM: 2006 PROGRAM COMPLIANCE AND ENVIRONMENTAL RESULTS 13 (Pub. No. EPA-430-R-07-009, 2007), available at <http://www.epa.gov/airmarket/progress/docs/2006-NBP-Report.pdf>.

<sup>57</sup> See Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule), 70 Fed. Reg. 25,162 (May 12, 2005).

<sup>58</sup> Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 71 Fed. Reg. 25,328-01 (Apr. 28, 2006).

<sup>59</sup> See Mack McGuffey & Gary R. Sheehan, Jr., *Taking Care of CAIR*, NAT. RESOURCES & ENV'T, Summer 2005, at 67, 70 (vol. 20, no. 1) (providing a quick, simplified description of CAIR).

<sup>60</sup> See 40 C.F.R. § 51.123(e)(2) (2012) (listing annual NO<sub>x</sub> emission budgets for states regulating power plants); see also *id.* § 51.124(e)(2) (listing annual SO<sub>2</sub> emission budgets for states regulating power plants).

power to impose the maximum amount of emissions allowable by the states, the states retain the authority to allocate emission credits as they see fit, according to their own scheme.<sup>61</sup> Once the allowances have been allocated, individual power plants have great flexibility in choosing how to comply with the standards imposed upon them. The plants can install new technologies that reduce emissions, or they can purchase an allowance from other power plants and continue emitting pollutants at the same rate.

Following the enactment of CAIR, the D.C. Circuit received several petitions challenging the rule. The court chose to consider the petitions jointly, and consolidated the various contentions into a single case.<sup>62</sup> The most important issue decided by the court involved North Carolina's objection that the rule failed to ensure that offending upwind states' emissions would actually decline.<sup>63</sup> First, the court determined that to satisfy the Good Neighbor Provision, the EPA must measure each upwind state's significant contribution to nonattainment in downwind states and ensure that CAIR, whether via a trading program or another mechanism, would eliminate these significant contributions.<sup>64</sup> The court then found that CAIR only provided a cost-effective mechanism to reduce emissions without meeting this requirement.<sup>65</sup> Second, the court found that in determining which states to include in CAIR, the EPA failed to give the "interfere with maintenance" prong of the Good Neighbor Provision independent effect, and improperly failed to consider attainment areas that are in danger of lapsing into

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<sup>61</sup> See Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule), 70 Fed. Reg. 25,162, 25,278 (May 12, 2005).

<sup>62</sup> North Carolina v. EPA, 531 F.3d 896, 901 (D.C. Cir. 2008).

<sup>63</sup> See *id.* at 906.

<sup>64</sup> See *id.* at 907-08.

<sup>65</sup> *Id.* at 907.

nonattainment due to emissions from upwind areas.<sup>66</sup> The third most significant finding of the court was that the EPA relied on cost-effective rationales that were not consistent with the Good Neighbor Provision in determining state budgets under CAIR.<sup>67</sup>

Ultimately, the court found that CAIR was so “fundamentally flawed that no amount of tinkering or revising [would] transform it into an acceptable rule,” vacated the entire rule, and remanded it to the EPA to redevelop.<sup>68</sup>

Out of concern that a regulatory gap would emerge, the EPA petitioned the court to stay the vacatur for two years while a new rule was formulated. The D.C. Circuit granted the EPA a remand without the vacatur so that downwind states would still retain some protection until a new rule was enacted. In response to the remand, the EPA promulgated the Transport Rule to enforce the Good Neighbor Provision of the Clean Air Act.<sup>69</sup>

#### **IV. The Instant Decision**

In *EME Homer City Generation, L.P. v. E.P.A.*, the D.C. Circuit clarified the respective roles of the states and the EPA in implementing and enforcing the Transport Rule under the Clean Air Act. Addressing the specific cooperative federalism issue head on, the court asked “whether the EPA may use its rulemaking authority to quantify states’ obligations under Section 110(a)(2)(D)(i)(I) of the Clean Air Act and *simultaneously* issue Federal Implementation Plans, without giving states a first opportunity to comply?”

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<sup>66</sup> *Id.* at 907-11.

<sup>67</sup> *See id.* at 907-08, 916-17.

<sup>68</sup> *Id.* At 901.

<sup>69</sup> *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 11 (D.C. Cir. 2012), *cert. granted in part*, 12-1182, 2013 WL 1283839 (U.S. June 24, 2013), *cert. granted in part*, 12-1183, 2013 WL 1283840 (U.S. June 24, 2013).

A majority of the three judge panel held that the Transport Rule violated the Clean Air Act's Good Neighbor provision because the rule did not give states the first opportunity to implement a plan to comply with federally mandated air quality standards.<sup>70</sup>

### **A. The Majority Opinion**

The court began its analysis by noting that Congress created a cooperative federalism framework in the Clean Air Act, for the maintenance and improvement of air quality.<sup>71</sup> According to the Clean Air Act, the Federal Government establishes air quality standards, but the States have primary responsibility for attaining these standards within their borders.<sup>72</sup> The court emphasizes that this statutory division of labor is a strict federalism bar, giving the EPA "no authority to question the wisdom of a State's choice[] of emission limitations,' so long as the State's SIP submission would result in 'compliance with the [NAAQS].'"<sup>73</sup> The policy reason behind this particular federalism division is that Congress desires states to be the primary implementers of pollutant control through their assessment of technical and economic feasibility factors unique to each individual state.<sup>74</sup>

After explaining the Act's cooperative federalism foundation, the court then analyzed the two statutory provisions within the Clean Air Act that the EPA relied upon to argue that it may issue FIPs preemptively. First, as required by Section 109, the EPA must promulgate NAAQS for common air pollutants.<sup>75</sup> The court added that once the EPA defines the numerical standards, the responsibility for implementation shifts from

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<sup>70</sup> *Id.* at 37.

<sup>71</sup> *Id.* at 11.

<sup>72</sup> *Id.* at 12.

<sup>73</sup> *Id.* at 29 (citing *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (2007)).

<sup>74</sup> *See id.* at 29-30.

<sup>75</sup> 42 U.S.C. § 7409(a)(1)(A) (2012).

the federal government to the states.<sup>76</sup> Second, Section 110(c)(1) provides that the federal government must issue FIPs for states whose SIP failed to make a required submission or contained a deficiency.<sup>77</sup> The court here emphasized that Congress intended Section 110 to be a “federal backstop” to states, implicated only after noticeable failure from the states.<sup>78</sup> The EPA in this litigation, however, insisted that the text of Section 110(c)(1) compelled its FIP-first approach. Unconvinced, the court stated that the “EPA pursues its reading of the statutory text down the rabbit hole to a wonderland where EPA defines the target *after* the States’ change to comply with the target has already passed.”<sup>79</sup>

With regard to the FIP-first approach, the court adamantly declared that the statutory text should not be read in isolation, but rather “with a view to [its] place in the overall statutory scheme.”<sup>80</sup> According to the EPA's interpretation of the statute, the EPA can define the numerical pollutant standard for the good neighbor provision of the Clean Air Act "and *simultaneously* issue federal plans to implement them."<sup>81</sup> The court rejected this approach, which allowed the Federal Government to be in charge in both steps. Instead, the court viewed the Clean Air Act as having “triggering events.” When the EPA quantified the level of reductions required for each state, the court saw this moment as the statutorily imposed triggering event that invoked Section 110(a)(1) of the Clean Air Act, allowing the states a period during which they may submit appropriate SIPs.<sup>82</sup>

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<sup>76</sup> *EME Homer City Generation, L.P.*, 696 F.3d at 12.

<sup>77</sup> *Id.* at 30.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 33.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

In sum, the Majority recognized that the Federal Government's role for implementing and enforcing the Good Neighbor provision of the Clean Air Act is limited to setting macro-level air pollutant emission standards and providing guidance to states whose plans fail to meet those standards. Emphasizing Congress' intent in the Clean Air Act to give states the *first* attempt to implement federally mandated air quality standards, the court held that the Federal Government may not *simultaneously* impose standards upon the states and issue a FIP accompanying those standards.<sup>83</sup>

### **B. The Dissenting Opinion**

The Dissent attacked the Majority's statutory analysis of the cooperative federalism issue on the grounds that it gave no regard to the plain text and structure of the Clean Air Act.<sup>84</sup> The seminal statutory construction case declares that courts must give effect to congressional intent "on the precise question at issue."<sup>85</sup> Consequently, the first step in statutory interpretation is to determine whether Congress has spoken directly to the issue in question.<sup>86</sup> If, after applying traditional tools of statutory construction, the court determines the statute is silent or ambiguous with respect to that issue, the court will then defer to an agency's statutory interpretation, provided it "is based on [a] permissible construction of the statute."<sup>87</sup>

The Dissent argues that the Majority rewrote the text of the Clean Air Act when it held that the EPA is *required* to prospectively inform states of their good neighbor

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 46.

<sup>85</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984).

<sup>86</sup> *Id.* at 842.

<sup>87</sup> *Id.* at 843.

emission reduction requirements before imposing FIPs.<sup>88</sup> The Dissent suggests that nothing in Section 110 of the Clean Air Act requires the EPA to do this, and further argues that the Majority turns “may” into “must.”<sup>89</sup> In addition, they critique the opinion of the court as “speculative.” The Dissent rejects both the court’s conclusion that it would have been a shot in the dark for states to submit adequate SIPs prior to the implementation of the Transport Rule, and the court’s corresponding speculation that the EPA would inevitably disapprove of such submissions.<sup>90</sup>

In sum, the Dissent believes that the Majority did not properly invoke the *Chevron Doctrine* in its statutory interpretation of the Clean Air Act. They emphasize that if a statute is silent or ambiguous on an issue, deference must be given to an agency’s statutory interpretation if it is reasonable.<sup>91</sup> Consequently, they find fault with the Majority’s interpretation of the Clean Air Act, which bypassed the agency’s interpretation and speculated as to Congress’ intent, with little to no corroboration.<sup>92</sup>

## V. Comment

The D.C. Circuit’s decision in *EME Homer City* bolsters the states’ rights in environmental regulation. Although the court correctly reasoned that Congress intended the good neighbor provision of the Clean Air Act to operate within a cooperative federalism framework, it gave an overly strict interpretation of the interplay between the states and the Federal Government. The court should not construct such a narrow

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<sup>88</sup> See *EME Homer City Generation, L.P.*, 696 F.3d at 45-46.

<sup>89</sup> *Id.* at 48.

<sup>90</sup> *Id.* at 51.

<sup>91</sup> See *id.* at 48.

<sup>92</sup> See *id.* at 51.

interpretation of what the Good Neighbor provision permits the EPA to initiate through the Clean Air Act.

Section 110 of the Clean Air Act requires the EPA to promulgate a FIP, upon the failure of a state to submit an acceptable SIP.<sup>93</sup> Section 109 of the Clean Air Act gives the EPA the authority to promulgate NAAQS.<sup>94</sup> Once those standards are binding on the states, the states then have the opportunity to devise a plan to comply with the EPA standards.<sup>95</sup> The court recognizes the obvious chronological mandate in Section 109, giving the EPA the initiating role of defining the standards to be imposed upon the states. However, the court is guilty of judicially constructing a chronological interplay between Section 109 and Section 110 that cannot be supported by recognized principles of statutory construction. The court states that EPA promulgation of the NAAQS is the “trigger,” prompting states to begin devising a compliance plan.<sup>96</sup> On one level, this is a rational deduction, considering that states would otherwise have no standard against which to craft their individual SIPs. However, the court views this triggering event as freezing the EPA from assisting the states until a SIP comes back to them deficient.<sup>97</sup> Instead, the statute *mandates* that the states get a chance to devise their own plan to comply with the NAAQS, but is *permissive* in allowing the EPA to assist the states with this compliance.

Second, Congress, in its *Findings and Declaration of Purpose* for the Good Neighbor provision of the Clean Air Act, stated "that air pollution prevention (that is, the

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<sup>93</sup> 42 U.S.C. § 7410(c)(1) (2012).

<sup>94</sup> *Id.* § 7409(a)(1)(A).

<sup>95</sup> *Id.* § 7410(a)(1).

<sup>96</sup> See *EME Homer City Generation, L.P.*, 696 F.3d at 30-31.

<sup>97</sup> *Id.* at 31.

reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and [] that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.”<sup>98</sup> This clarifies Congress’ intent that the Clean Air Act requires Federal *leadership*. The court's opinion does not contemplate the possibility that states will still have the opportunity to draft their own implementation plans under the proposed Transport Rule. Otherwise stated, the rule’s FIP-first approach merely puts the EPA in a leadership role, and does not foreclose any opportunity for the states to determine how they will comply with federally mandated air quality standards.

## **VI. Conclusion**

The court in *EME Homer City Generation, L.P. v. E.P.A.* unnecessarily strengthens states’ rights in environmental regulation by interpreting the Good Neighbor provision of the Clean Air Act to create a procedure that chronologically defines when the EPA can act and when the states should act. The court’s ruling prohibits the EPA from properly fulfilling its statutorily sanctioned leadership role, even when it does not affect a state’s opportunity to comply with air quality standards as they deem advisable. The decision makes it clear that the EPA must first set air quality standards, then completely surrender control until the individual states formulate plans to comply with those standards. At this point, the EPA may only reenter the process if the plans prove inadequate. As a result of the D.C. Circuit’s ruling, the EPA will have a difficult time

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<sup>98</sup> 42 U.S.C. §7401(a)(3)-(4).

enforcing the Good Neighbor provision of the Clean Air Act, given the D.C. Circuit's unwillingness to give the EPA a meaningful leadership role in reducing interstate air pollution.