Upwind Battle: The EPA Tests the Limits of Its Statutory Authority again, An

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An Upwind Battle: The EPA Tests the Limits of Its Statutory Authority Again

EME Homer City Generation, L.P. v. Environmental Protection Agency, et al.¹

I. INTRODUCTION

The Transport Rule was promulgated by the United States Environmental Protection Agency ("EPA") in August of 2011 in order to address the emissions reduction responsibilities of upwind states with reference to their contribution of downwind states’ nonattainment of national air quality standards. However, when this rule was challenged, the D.C. Circuit found that the Transport Rule exceeded the EPA’s statutorily designated authority.²

The Court held that the parameters of the rule forced some upwind states to bear more than their responsibility of reducing emissions of a downwind state.³ Additionally, the Transport Rule allowed the EPA to issue Federal Implementation Plans before giving individual states the opportunity to create and adopt State Implementation Plans, which would describe how the state planned to meet the required national air quality standards set by the EPA.⁴ The court found both of these issues to be crucial errors, and thus vacated the Transport Rule in a 2-1 holding.⁵ The result of this vacatur was that the Clean Air Interstate Rule remained intact and operative, although also flawed, since the Transport Rule was the EPA’s solution to make

¹ EME Homer City Generation, L.P. v. EPA, 696 F.3d 7 (D.C. Cir. 2012).
² Id. at 11.
³ Id.
⁴ Id.
⁵ Id. at 12.
the Clean Air Interstate Rule compliant with court precedent and consistent with the EPA’s congressionally delegated authority.\textsuperscript{6}

This case stands as one in a series of cases that serve to illustrate an emerging trend, repetitively holding that the EPA has exceeded its authority with regard to a given rule. The courts have consistently held that the EPA must act within the boundaries of the statutes, showing a certain judicial preference for plain meaning statutory construction and cooperative federalism. This approach serves to define a clear limit on the boundaries of the EPA’s authority.

With such clear judicial guidance on what the EPA can and cannot do, it is difficult to ascertain why the trend has continued. While underlying political motivations may often serve as a possible answer to nearly every question, the answer to this one may be more simple: administrative convenience and expediency. The EPA is a huge agency, with numerous areas of the environment that it regulates. In many cases, it is more simple, and arguably more cost effective, to quickly create a rule, without waiting to conduct scientific research or study court opinions to delineate the limits of an agency’s authority. And although such a results-oriented approach may work in other legal and non-legal spheres, it is abundantly clear that the EPA’s approach in these cases simply does not work.

Instead of achieving results to improve the environment and public health, the EPA has been forced to allocate its time and resources to defending its choices in court and seeing those rules vacated, with no progress being made. The EPA has seen long periods of success in improving the environment through the Clean Air Act (“CAA”) and the Clean Water Act, and it seems as though following the statutory rules would allow the EPA to expend time and resources on actually protecting the environment

\textsuperscript{6} Id. at 37.
and furthering the public health of America, instead of arguing about it in court.

II. FACTS AND HOLDING

In August 2011, the EPA promulgated the Transport Rule, which defines the emissions reduction responsibilities for certain upwind states with reference to their role in the air quality issues of downwind states. In response to the promulgation of this rule, various states, local governments, industry groups, and labor organizations sought judicial review of the rule, arguing that the rule exceeded the EPA’s statutory authority under the CAA.

The Transport Rule seeks to solve a complicated regulatory issue for the EPA: some emissions of air pollutants affect air quality in the area where those pollutants are emitted, while other air pollutants travel and influence the air quality elsewhere, such as a downwind state. In order to regulate and control air pollution, Congress established a “federalism-based system” under the CAA, where the federal government sets specific air quality standards, while the individual states then bear the central obligation of creating a strategy to meet those federal standards within that state. Additionally, upwind states are required to prevent sources within their state from “emitting federally determined ‘amounts’ of pollution that travel across state lines and ‘contribute significantly’ to a downwind state’s

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7 The Transport Rule is synonymous to the Cross State Air Pollution Rule. Id. at 11.
8 Id.
9 Id.
10 Id.
11 Id.
'nonattainment' of federal air quality standards."'\textsuperscript{12} This is referred to as the "good neighbor" provision of the rule.\textsuperscript{13}

Based upon the legal principle that, "absent a claim of constitutional authority (and there is none here), executive agencies may exercise only the authority conferred by statute, and agencies may not transgress statutory limits on that authority;"\textsuperscript{14} the Court held that the Transport Rule exceeded the EPA's statutory authority as a federal agency for two separate reasons.\textsuperscript{15} First, under the Transport Rule, upwind states could be compelled to reduce emissions of air pollutants "by more than their own significant contributions to a downwind state's nonattainment."\textsuperscript{16} The statutory text at issue only granted authority to the EPA to mandate that upwind states reduce "only their own significant contributions to a downwind state's nonattainment."\textsuperscript{17} Additionally, through the CAA, Congress granted the option to the states to implement the federal reduction requirements on their own terms.\textsuperscript{18} If states did not issue a state implementation plan ("SIP") in response to those federal standards, then the EPA would develop a federal implementation plan ("FIP") to implement federal standards for the state.\textsuperscript{19} However, the Transport Rule did not allow states the option of first creating their own SIP; instead, the EPA "quantified states' good neighbor obligations and simultaneously set forth EPA-designed [FIPs]."\textsuperscript{20} The Court held that, for those two reasons, the Transport Rule violated federal statute, and, based on that determination, the Transport Rule was vacated.\textsuperscript{21}

\textsuperscript{12} Id. \\
\textsuperscript{13} Id. \\
\textsuperscript{14} Id. \\
\textsuperscript{15} Id. \\
\textsuperscript{16} Id. (emphasis added). \\
\textsuperscript{17} Id. (emphasis added). \\
\textsuperscript{18} Id. \\
\textsuperscript{19} 42 U.S.C. § 7410(c)(1)(A) (2012). \\
\textsuperscript{20} \textit{EME Homer City Generation}, 696 F.3d at 11-12. \\
\textsuperscript{21} Id. at 12.
III. LEGAL BACKGROUND

The CAA, as amended by Congress in 1990, designates the responsibilities of the EPA in protecting air quality by creating national air quality standards.\textsuperscript{22} Under the CAA, the federal government sets the National Ambient Air Quality Standards ("NAAQS")\textsuperscript{23}, but the states are delegated the primary duty of determining how to reach and maintain those standards within that state.\textsuperscript{24} Therefore, under this framework, individual states may establish "the particular restrictions that will be imposed on particular emitters within their borders."\textsuperscript{25} If a state chooses not to comply or regulate on their own, then the federal government, under the EPA, may intercede to regulate the NAAQS for that state through a FIP.\textsuperscript{26} Ultimately, the EPA designates ‘nonattainment’ areas, which are "areas within each state where the level of the pollutant exceeds the NAAQS."\textsuperscript{27} After the EPA assigns a nonattainment area within a given state, the burden then shifts to that state to apply the NAAQS. Under a SIP, a state will identify the sources of pollutants that must decrease emissions and will designate the amount by which those emissions must be reduced.\textsuperscript{28}

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\textsuperscript{22} ENVIRONMENTAL PROTECTION AGENCY, AIR POLLUTION AND THE CLEAN AIR ACT, EPA.GOV, http://www.epa.gov/air/caa/ (last updated Aug. 15, 2013).\textsuperscript{23} The NAAQS fix the “maximum permissible levels of common pollutants in the ambient air.” EME Homer City Generation, 696 F.3d at 12 (citing 42 U.S.C. § 7409(a)-(b)). The EPA must prescribe NAAQS levels that will guard the protective health. EME Homer City Generation, 696 F.3d at 13 (citing 42 U.S.C. § 7409(b)(1)).\textsuperscript{24} Id. at 12 (citing Train v. NRDC, 421 U.S. 60, 63-67 (1975)).\textsuperscript{25} Id.\textsuperscript{26} Id.\textsuperscript{27} Id. at 13 (citing 42 U.S.C. § 7407(d) (2012)).\textsuperscript{28} EME Homer City Generation, 696 F.3d at 13. The Court elaborates that, for example, a state may have impose varying limits on emissions on “coal-burning power plants, natural gas-burning power plants, and other sources of pollution”, which could include “factories, refineries, incinerators, and agricultural activities.” Id.
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Under § 110 of the CAA, each state is required to create a SIP within three years of the enactment or revision of a NAAQS. Relevant to this case is the “good neighbor” provision, which states that a SIP must incorporate sufficient provisions that will prohibit “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” in reference to any NAAQS. Essentially, this provision requires that an upwind state “bear responsibility for their fair share of the mess in downwind states.” The good neighbor provision, as written, uses an upwind state’s SIP as a mechanism to establish its “good neighbor obligation” to the affected downwind state(s). However, an upwind state’s good neighbor obligations are unknown until the pollution levels of the downwind states are ascertained, and it is the role of the EPA to calculate these levels. Once the EPA determines pollution levels in nonattainment downwind states, the upwind state can then implement a plan to meet the good neighbor obligations by revising or creating a new SIP. If an upwind state does not revise or create a new SIP, incorporating the effects of the good neighbor provision, then the federal government may intervene with a FIP in order to meet the NAAQS.

Prior cases have also addressed the good neighbor provision of the CAA, as well as the EPA’s application efforts. *Michigan v. EPA* addressed the EPA’s NOx Rule, which “quantified the good neighbor obligations of 22 states with

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31 *EME Homer City Generation*, 696 F.3d at 13.
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.*
36 213 F.3d 663 (D.C. Cir. 2000).
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respect to the 1997 ozone NAAQS.” The NO\textsubscript{x} Rule failed to identify “amounts which will . . . contribute significantly to nonattainment” based upon the impact on air quality in downwind states; instead, the EPA looked at the amount of NO\textsubscript{x} that could be reduced based upon the installation of more cost-effective “emissions controls.” In the instant case, it was argued that the statute mandated that the EPA demand emissions reductions “based on air quality impact alone, not cost of reduction.” The court disagreed with that argument, holding that there was “no clear congressional intent to preclude consideration of cost.” Under this rationale, the EPA may use cost of reduction to reduce the good neighbor obligations of an upwind state.

In a second case, North Carolina v. EPA, the court considered issues arising from the EPA’s 2005 Clean Air Interstate Rule (“CAIR”), which piggy-backed the 1998 NO\textsubscript{x} Rule by characterizing the good neighbor obligations of 28 states “with respect to the 1997 ozone NAAQS and the 1997 NAAQS for annual levels of fine particulate matter, or annual PM\textsubscript{2.5}.” CAIR used two separate formulas to calculate an individual state’s good neighbor obligations for SO\textsubscript{2} and NO\textsubscript{x}. The North Carolina majority stated that use of these two formulas exceeded the EPA’s statutory authority because the formulas surpassed the allowances made by the Michigan court to let the EPA use cost reduction as a consideration in determining good neighbor

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37 EME Homer City Generation, 696 F.3d at 14. The NOx Rule is “commonly referred to as the NOx SIP Call.” Id.
38 Id. (citations and internal quotation marks omitted) (citing Michigan, 213 F.3d at 675.).
39 Id.
40 Id. (internal citations omitted).
41 Id.
42 531 F.3d 896 (D.C. Cir. 2008).
43 EME Homer City Generation, 696 F.3d at 14 (citing North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008)).
44 Id.
The court elaborated that the EPA had the authority to use cost considerations to "require termination of only a subset of each state's contribution . . . but [the] EPA can't just pick a cost for a region, and deem 'significant' any emissions that sources can eliminate more cheaply." Furthermore, the statute did not allow the EPA to require an upwind state to "share the burden of reducing other upwind states' emissions." Instead, each state must remove its own contribution of pollutants from downwind states.

Therefore, the effect of North Carolina on Michigan was that the CAA allowed the EPA to consider cost to reduce an upwind state's good neighbor obligations, but the EPA did not have statutory authority to utilize cost to augment an upwind state's good neighbor obligations. Under this precedent, the good neighbor provision only compels each upwind state "to clean up at most its own share of the air pollution in a downwind state—not other states' shares." However, the North Carolina court remanded CAIR without vacating it for revision. Therefore, CAIR remained in place until the EPA replaced it with a new statute that complies with the North Carolina holding.

The Transport Rule—the statute at issue in the instant case—is the EPA's effort to promulgate a rule consistent with North Carolina. The Transport Rule has two parts: first, it defines the emissions reduction obligations of each state, as mandated by the good neighbor provision, and, second, it lays out FIPs that will apply those obligations "at the state level."

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45 Id.
46 Id. (internal quotation marks omitted).
47 Id. (internal quotation marks omitted).
48 Id.
49 Id. at 14-15.
50 Id. at 15.
51 Id.
52 Id.
53 Id.
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IV. THE INSTANT DECISION

In the first section of the 2-1\textsuperscript{54} majority opinion, the court held, under the good neighbor provision, the EPA exceeded its statutory authority in issuing the Transport Rule; the statute limits the EPA to requiring upwind states to reduce "‘amounts which will . . . contribute significantly to nonattainment’ in downwind states."\textsuperscript{55}

The court began its opinion by reiterating that the Transport Rule characterizes the duties of a state under the "good neighbor" provision of the CAA, which defines the necessary parameters of a SIP.\textsuperscript{56} The court reasoned that, although the statute delegates significant discretion to the EPA, statutory text and judicial precedents focus and limit that authority.\textsuperscript{57} The statutory text states that the "amounts which will . . . contribute" to nonattainment in a downwind state are "at most those amounts that travel beyond an upwind state’s borders and end up in a downwind state’s nonattainment area."\textsuperscript{58} Therefore, the statute does not allow the EPA to regulate air pollution on a regional

\textsuperscript{54} Judge Rogers wrote a lengthy dissent, which formed a framework for the arguments that the EPA advanced in their petition for rehearing en banc: "to vacate the Transport Rule, the court disregards limits Congress placed on its jurisdiction, the plain text of the [CAA], and this court’s settled precedent interpreting the same statutory provisions at issue today...The result is an unsettling of the consistent precedent of this court strictly enforcing jurisdictional limits, a redesign of Congress’s vision of cooperative federalism between the states and the federal government in implementing the CAA based on the court’s own notions of absurdity and logic that are unsupported by a factual record, and a trampling on this court’s precedent on which the [EPA] was entitled to rely in developing the Transport Rule rather than be blindsided by arguments raised for the first time in this court.” \textit{See id.} at 38-61 (Rogers, J., dissenting).

\textsuperscript{55} \textit{Id.} at 19 (citing 42 U.S.C. § 7410(a)(2)(D)(i) (2012)).

\textsuperscript{56} \textit{Id.} The "good neighbor" provision is Section 110(a)(2)(D)(i)(I) of the Clean Air Act.

\textsuperscript{57} \textit{EME Homer City Generations}, 696 F.3d at 19.

\textsuperscript{58} \textit{Id.} at 20 (citing 42 U.S.C. § 7410(a)(2)(D)(i)(I)).
level without focusing on the pollutant contributions of individual states.\textsuperscript{59} Furthermore, under the precedent of \textit{North Carolina}, the EPA cannot mandate that any upwind state "share the burden of reducing other upwind states' emissions."\textsuperscript{60} The statutory text and precedent serve as a restraint on the EPA's authority: but for contributions of upwind states, if a downwind state could meet the NAAQS, then the upwind states' combined share of contributions is the full amount by which the NAAQS have been exceeded; when the EPA apportions that combined contribution burden among the upwind states, the EPA cannot compel any individual upwind state to share that burden of the emissions of another upwind state.\textsuperscript{61} Instead, each upwind state may take on only its own share of the excess emissions.\textsuperscript{62} Under this analysis, according to the court, the "'significance' of each upwind state's contribution cannot be measured in a vacuum, divorced from the impact of the other upwind states."\textsuperscript{63}

In applying these principles to the EPA's Transport Rule, the court noted that the authority of the EPA, as an administrative industry, is limited to that granted by Congress.\textsuperscript{64} In promulgating the Transport Rule, the EPA used a "two-stage approach to define 'amounts which will . . . contribute significantly' to downwind attainment problems."\textsuperscript{65} The first stage identified the upwind states that were deemed to be significant contributors to the nonattainment of certain downwind

\textsuperscript{59} EME Homer City Generations, 696 F.3d at 20.
\textsuperscript{60} Id. (citing North Carolina v. E.P.A., 531 F.3d 896 (D.C. Cir. 2008). Under \textit{North Carolina}, the part of an upwind state's contribution that "contributes significantly" to a downward state's nonattainment is dependent on the "relative contributions of that upwind state, of other upwind state contributors, and of the downwind state itself." \textit{Id.}
\textsuperscript{61} Id. at 20-21.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id. at 22 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)).
\textsuperscript{65} Id. at 23.
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Any upwind state that surpassed the "significant threshold" was included in the second stage of the EPA's analysis. In the second stage, the EPA undertook a cost-based analysis of emissions reductions, requiring power plants in each state to "cut all of the emissions they could eliminate at a given cost per ton of pollution reduced—regardless of the 'amounts' of the state's emissions [the] EPA deemed to 'contribute significantly' at stage one and regardless of the relative contributions of the other upwind states and the downwind state."

The court notes three problems with this approach by the EPA. First, the Transport Rule is defective because it does not comply with North Carolina, since the EPA mandate placed on upwind states is not based on the amounts that the individual states contribute significantly to nonattainment of downwind states. As the court explains, the EPA determined that a state was subject to the good neighbor provision if it contributed at least a certain threshold amount to air pollution in a downwind state. But [the] EPA then imposed restrictions based on region-wide air quality modeling projections; those restrictions could require upwind states to reduce emissions by more than the amount of that contribution.

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66 Id.
67 Id. The EPA concluded that an upwind state's contribution to nonattainment of a downwind state was significant if it exceeded the following "air quality thresholds:" 0.8 ppb for ozone, 0.15 g/m³ for annual PM₂.₅, and 0.35 g/m³ for 24-hour PM₂.₅. See Transport Rule, 76 Fed. Reg. 48,236 (Aug. 8, 2011).
68 EME Homer City Generation v. EPA, 696 F.3d at 23.
69 Id.
70 Id.
71 Id. at 25.
The court determined that this approach did not comport with the statutory and precedential requirements that the EPA cannot force a state to account for more than their share of the downwind state’s emissions.\(^7\)

The court added that the Transport Rule is flawed under a second related rationale: it “runs afoul of the statute’s proportionality requirement.”\(^7\) Under *North Carolina*, the EPA does not have authority to require an upwind state to share the burden of reducing the pollutant emissions of another upwind state.\(^7\) It is not allowed for one upwind state to eliminate “more than its statutory fair share” because that state is essentially being required to “clean up another upwind state’s share of the mess in the downwind state.”\(^7\) Because the Transport Rule did not “calculate upwind states’ required reductions on a proportional basis that took into account contributions of other upwind states to the downwind states’ nonattainment problems,” which violates the statute—the EPA must take into account the downwind state’s own contribution, and include it with the contributions of the upwind states.\(^7\)

In the second half of its opinion, the court discusses another separate problem with the Transport Rule: it fails to give states the initial opportunity to implement the federal standards through SIPs; instead, the Transport Rule simultaneously created FIPs to implement the good neighbor obligations for the states.\(^7\) The CAA allows states to first implement the air quality standards through a SIP.\(^7\) “By preemptively issuing FIPs,” the EPA deprived the states of that option, while also “punishing the states for failing to meet a standard that the EPA had not yet

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\(^7\) *Id.* at 26.
\(^7\) *Id.*
\(^7\) *Id.* (citing *North Carolina v. EPA*, 531 F.3d 896, 921 (D.C. Cir. 2008)).
\(^7\) *Id.* at 27.
\(^7\) *Id.*
\(^7\) *Id.* at 28.
\(^7\) *Id.*
announced and the state[s] did not yet know” since the EPA’s “findings came before the Transport Rule quantified the states’ good neighbor obligations.”

The Court elaborated that the CAA delegates the responsibilities of preserving air quality between the federal and state governments, creating a certain division of labor between these authorities. Under this careful balance, the federal government is tasked with creating air quality standards, while the states are given the first opportunity for determining how to meet those standards. However, this division has been described by courts as “erecting a statutory ‘federalism bar’ under § 110 of the [CAA], . . . [which] prohibits [the] EPA from using the SIP process to force states to adopt specific control measures;” this ‘federalism bar’ thus puts the EPA in a secondary role in terms of enforcing the air quality standards.

The relevant inquiry in the instant case therefore becomes whether the EPA can use this authority to quantify a state’s good neighbor obligations while simultaneously issuing a FIP, thereby bypassing the state’s opportunity to first develop a SIP. The Court noted that the CAA establishes a “federal backstop” if a state fails to create a SIP: if the EPA finds that a state fails to submit a SIP or if the EPA rejects the SIP, then the EPA is allowed two years to issue a FIP if the state fails to correct the deficient SIP. Under this statutory structure, the Court stated that a state’s implementation of its good neighbor obligations cannot “be considered part of the state’s ‘required submission’ in

79 Id.
80 Id. at 29.
81 Id. (citing Virginia v. EPA, 108 F.3d 1397 (D.C. Cir. 1997)).
82 EME Homer City Generation, 696 F.3d at 29 (citing Virginia, 108 F.3d 1397; Train v. NRDC, 421 U.S. 60, 63, 67 (1975); American Trucking Ass’ns. v. EPA, 600 F.3d 624, 625 (D.C. Cir. 2010)).
83 EME Homer City Generation, 696 F.3d at 30.
84 Id.
its SIP (or whether the SIP can be deficient for failing to implement the good neighbor obligation) even before the EPA quantifies the state’s good neighbor obligation.”\textsuperscript{85} Instead, the EPA may only mandate that states revise or create a new SIP after the EPA has established the emissions obligations for the states, and the EPA cannot find that a SIP is deficient until after the EPA has defined the good neighbor obligations.\textsuperscript{86} Similarly, the EPA must allow the states a “reasonable amount of time to implement that requirement with respect to sources within the state.”\textsuperscript{87}

In this case, the EPA rejected SIPs on a finding of deficiency or failure to submit because the EPA made its findings before it informed the states “what emissions reductions their SIPs were supposed to achieve under the good neighbor provision.”\textsuperscript{88} Unlike other NAAQS,\textsuperscript{89} the good neighbor obligation is not a “clear numerical target;” instead, the states cannot know their good neighbor obligation until the EPA defines it.\textsuperscript{90} The court disagreed with the EPA’s FIP-first approach, stating the “EPA pursues its reading of the statutory text down the rabbit hole to a wonderland where [the] EPA defines the target after the States’ chance to comply with the target has already passed.”\textsuperscript{91} Instead, the court held that a statute “cannot be construed in a vacuum, . . . [and] the FIP-first approach is incompatible with the basic text and structure of the [CAA].”\textsuperscript{92} As a result, the court held that the “deficiency [of the Transport Rule] is too fundamental to permit us to ‘pick and choose portions’ of the rule to preserve” and that the

\textsuperscript{85} Id.
\textsuperscript{86} Id. at 31.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 31-32.
\textsuperscript{89} By comparison, the NAAQS for PM\textsubscript{2.5} is 15 μg/m\textsuperscript{3}. Id. at 32.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 33 (emphasis added) (citing FCC v. Fox Television Stations, 132 S.Ct. 2307, 2317).
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“fundamental flaws foreclose [the] EPA from promulgating the same standards on remand.” The court therefore vacated the Transport Rule, leaving the EPA to continue administering CAIR while working to develop a legally proper replacement for CAIR.

V. COMMENT

In the instant case, the majority panel explicitly stated that the EPA had exceeded its statutory authority in promulgating the Transport Rule; however, this case is neither the first nor most recent case where a court has made this finding. Instead, this language referencing the EPA stepping outside of its congressionally authorized boundaries has become somewhat of a moniker, as well as a pattern that has begun to emerge in recent years. The reasons for this trend likely vary, ranging from political battles between liberal and conservatives, to a general sluggishness or sloppiness in rulemaking on the part of the EPA. The implications of this pattern are also wide-ranging, but court opinions have set clear boundaries on EPA authority, with an underlying theme that touts “cooperative federalism” in place of strict agency deference to the EPA and its whims.

A. Parallel Cases: Other Courts Find That the EPA Exceeded Its Authority

In Sierra Club v. EPA, the most recent case to follow this trend, the D.C. Circuit held that the EPA lacked the authority to promulgate a rule that would exempt various sources from requirements of the CAA. The controversy surrounded a final rule issued by the EPA under § 166 of the CAA that created

93 Id. at 37 (citing North Carolina v. EPA, 531 F.3d 896, 929 (D.C. Cir. 2008)).
94 Id. at 38.
95 705 F.3d 458 (D.C. Cir. 2013).
regulations for the pollutant PM$_{2.5}$. The rule set Significant Impact Levels ("SILs") and a Significant Monitoring Concentration ("SMC") for PM$_{2.5}$. SILs and SMCs are mechanisms that the EPA can use to screen whether certain sources can be exempted from various requirements of the CAA. The Sierra Club petitioned the court, arguing the EPA lacked the authority to promulgate such a rule. Interestingly, and uncommonly, the EPA conceded that the SILs failed to show the EPA's "intent in promulgating" them and thus requested vacatur in order to make the necessary revisions; however, the EPA still maintained that the portion of the rule that established the SMC was a valid use of authority.

While the court granted the EPA's request to vacate and remand the portion of the rule concerning SILs, the court disagreed that the SMC for PM$_{2.5}$ was appropriate. The court agreed with the Sierra Club that the EPA lacked the "de minimis authority to promulgate the SMC" for PM$_{2.5}$, which could be employed to "exempt an owner of a proposed source or modification from undertaking the year-long pre-construction air quality monitoring requirement under § 165(e)(2)" of the CAA. The court noted that Congress was "extraordinarily rigid" in mandating pre-construction air quality monitoring, and that the EPA thus exceeded its authority in attempting to promulgate rules that would circumvent this requirement. In an appropriate showing of deference to congressional intent, the court added that "Congress provided a clear mandate that the EPA does not have the authority to disregard, even if the

96 Id. at 459.
97 Id. at 459-60. PM$_{2.5}$ is particulate matter that is smaller than 2.5 micrometers. Id. at 459.
98 Id. at 459-60.
99 Id. at 460.
100 Id.
101 Id. at 464.
102 Id. at 469.
103 Id. at 466.
104 Id.
mandated requirements appear to be superfluous;” if Congress had wanted to grant discretion to the EPA to bypass those requirements, they would have explicitly stated that intent.105

In *Mingo Logan Coal Company, Inc. v. EPA*,106 the court found the EPA exceeded its statutory allowances. On January 22, 2007, the Army Corps of Engineers (“Corps”) authorized a permit under § 404 of the Clean Water Act (“CWA”) to Mingo Logan Coal Company; this permit allowed Mingo Logan to “discharge fill material from its Spruce No. 1 coal mine into nearby streams, including the Pigeonroost and Oldhouse Branches, and their tributaries.”107 However, on September 3, 2009, the EPA sent a letter to the Corps, asking that the permit be suspended, revoked, or modified based upon “downstream water quality impacts that were not adequately addressed by the permit.”108 When the Corps refused the EPA’s request, the EPA issued a Final Determination, touting the withdrawal of the permit that allowed the two streams to be used as disposal sites.109 This withdrawal effectively invalidated Mingo Logan’s permit; such withdrawal of “the specification of discharge sites after a permit has been issued is unprecedented in the history of the [CWA].”110

Mingo Logan filed suit, claiming that the EPA lacked the authority to withdraw the permit.111 After a statutory and legislative history review, the court agreed that the EPA exceeded their authority delegated by § 404 of the CWA.112 More

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105 Id. at 467-69.
107 Id. at 133-34.
108 Id. at 137.
109 Id.
110 Id. at 134.
111 Id.
112 Id.
specifically, the court held that the EPA could not invalidate a permit once the Corps had issued it.\textsuperscript{113} The court conceded that, although the relevant statute is ambiguous, even when considering the ambiguity of the statute and the typical deference granted to an agency, the “EPA’s interpretation of the statute to confer this power on itself is [still] not reasonable.”\textsuperscript{114} In elaborating on this holding, the court gave the EPA a tongue-lashing for its nonsensical argument in defense of its actions:

EPA claims that it is not revoking a permit—something it does not have the authority to do—because it is only withdrawing a specification. Yet EPA simultaneously insists that its withdrawal of the specification effectively nullifies the permit. To explain how this would be accomplished in the absence of any statutory provision or even any regulation that details the effect that the EPA’s belated action would have on an existing permit, EPA resorts to magical thinking. It posits a scenario involving the automatic self-destruction of a written permit issued by an entirely separate federal agency after years of study and consideration. Poof! Not only is this non-revocation revocation logistically complicated, but the possibility that it could happen would leave permittees in the untenable position of being unable to rely upon the sole statutory touchstone for measuring their [CWA] compliance: the permit. It is further unreasonable to sow a lack of certainty into a system that was expressly intended to provide finality.\textsuperscript{115}

Based upon these findings, the court held that when the EPA sought to invalidate Mingo Logan’s permit, it exceeded its

\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.} at 152.
authority that was granted by § 404 of the CWA because this section does not allow the EPA to withdraw a permit once the Corps has already issued that permit. Additionally, though the statute may be ambiguous, the EPA’s "interpretation of the statute to confer [the power to withdraw the permit] on itself is not reasonable."

Yet again, in *Virginia Department of Transportation v. EPA*, the EPA faced a challenge regarding whether it had exceeded its authority in reference to the regulation of stormwater. The specific issue raised was whether the CWA allowed the EPA to regulate pollutant levels in a creek by creating a Total Maximum Daily Load ("TMDL") for the flow of nonpollutants into a creek. The EPA set TMDLs for Accotink Creek in Fairfax County, Virginia as a result of previous and unrelated litigation. The Accotink Creek was found to have "benthic impairments," and the TMDLs would seek to improve the overall health of those organisms living in the creek. The specific TMDL for Accotink Creek purported to regulate the amounts of sediment in the creek, which the EPA assumed to be "a primary cause of the benthic impairment." While both parties agreed that sediment qualified as a pollutant, which the EPA has authority to regulate, the point of contention was whether stormwater flow could be categorized as a pollutant.

Although the EPA argued that stormwater could be classified as a pollutant based on it being a "surrogate" for sediment, the court was not persuaded. In looking to the explicit

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116 *Id.* at 134.
117 *Id.*
119 *Id.* at 2.
120 *Id.* at 1. "Benthic impairments" means that the organisms living in the creek "were not as numerous or healthy as they should [have been.]" *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
language of the statute, as well as legislative history, the court found little support for the EPA’s “surrogate” analysis:

Stormwater runoff is not a pollutant, so EPA is not authorized to regulate it via TMDL. Claiming that the stormwater maximum load is a surrogate for sediment, which is a pollutant and therefore regulable, does not bring the stormwater within the ambit of EPA’s TMDL authority. Whatever reason EPA has for thinking that stormwater flow rate TMDL is a better way of limiting sediment load than a sediment load TMDL, EPA cannot be allowed to exceed its clearly limited statutory authority.  

The Court stated that the statutory language was explicit in allowing the EPA to set TMDLs in order to regulate pollutants, and “pollutants are carefully defined.”

B. Cooperative Federalism

These four cases, as well as the instant case, clearly demonstrate the reality of an emerging pattern of the EPA exceeding its statutorily proscribed authority. Aside from the four separate holdings indicating that the EPA has exceeded its power, these four holdings also have a lingering undertone of a sharp judicial reprimand for the EPA’s seemingly constant decisions to go outside of the explicit boundaries created by the plain language of the statute. Instead of adhering to the widely recognized judicial preference for following the plain language of a statute when defining its meaning, the EPA often relies on the amorphous claim of “agency deference” and “implied authority.” The courts have repeatedly stated that deference to an agency is a relevant consideration, however it is not a sole reason to grant the EPA unlimited authority. Instead, as the cases above

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124 Id. at 5.
125 Id.
demonstrate, the courts have consistently stated that the EPA’s rationale must be statutorily reasonable. Furthermore, the opinions in these cases have expressly stated that if Congress intended to authorize the EPA to take the challenged actions, then they would have stated it in the statute. Protests by the EPA of implied authority, traditional agency deference, and statutory semantics and textual contrivances are simply not sufficient.

Through this strict adherence to the plain meaning of the statute and deference to congressional intent, a judicial preference for cooperative federalism has materialized. In the instant case, the deference for this principle was clearly overwhelming. In *EME Homer City Generation*, the majority held the Transport Rule’s simultaneous promulgation of FIPs that would govern all upwind states was an impermissible usurpation of the states’ powers. A cornerstone of the CAA is its cooperative approach, which allows individual states to manage pollution within their borders. Under the CAA, states are unconditionally given the “initial opportunity to implement reductions required by [the] EPA under the good neighbor obligation.” Meanwhile, the CAA “places the EPA in an ‘oversight’ role to ensure that each state manages its individual pollution not only to control the level of emissions within its borders, but also to preclude those emissions from causing downwind states to fall out of compliance with federal standards.”

However, under the Transport Rule, in an “unprecedented application of the good neighbor provision,” the EPA adopted

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127 *Id.* at 29.
128 *Id.* at 11.
130 *EME Homer City Generation*, 696 F.3d at 28.
a top-down method to manage cross-border emissions.\textsuperscript{131} This quantified the good neighbor obligations without first allowing the states the opportunity to develop SIPs in order to implement those mandatory reductions.\textsuperscript{132} FIPs are only to be issued if and when a state refuses or fails to create and submit a SIP.\textsuperscript{133} The net result of these measures was that the Transport Rule "directly imposed requirements without giving states an opportunity to develop their own plans."\textsuperscript{134} Additionally, the Transport Rule employed an overly aggressive method in calculating the necessary emissions reductions. Rather than holding each upwind state responsible for its own contribution to a downwind states' nonattainment, the EPA chose to enforce reductions that exceeded an upwind state's contribution to a downwind state's nonattainment, holding individual states responsible for more than their share of a downwind state's pollution. In effect, "the EPA decided to use the 'good neighbor' principle to impose much more drastic cuts on 'upwind' states than the [CAA] allowed—with the goal of using a regional 'cost-based' approach to controlling pollution—as opposed to the 'state by state' approach mandated by the statute."\textsuperscript{135} This approach undermines and disregards the inherent federalism-based themes of the CAA: collaboration and cooperation.\textsuperscript{136}

The court found these two blunders to be crucial flaws in the Transport Rule.\textsuperscript{137} The court reinforced a preference for cooperative federalism by noting that the statute only granted the EPA the authority to compel states to reduce emissions to the extent of their own contributions to a downwind state's nonattainment, noting that "[the] EPA has used the good-neighbor provision to impose massive emissions reduction

\begin{thebibliography}{99}
\bibitem{131} Id.
\bibitem{132} Id.
\bibitem{133} Id.
\bibitem{134} Faulk, supra note 129, at 2.
\bibitem{135} Id.
\bibitem{136} EME Homer City Generation, 696 F.3d at 11.
\bibitem{137} Faulk, supra note 129, at 2.
\end{thebibliography}
AN UPWIND BATTLE: THE EPA TESTS THE LIMITS OF ITS STATUTORY AUTHORITY AGAIN

requirements . . . without regard to the limits imposed by the statutory text. Whatever its merits as a policy matter, EPA’s Transport Rule violates the statute. 138 This holding, despite a forceful dissent, buttresses the argument that cooperative federalism has materialized as a “bedrock principle of air pollution policy.” 139 This court, and others, 140 have acknowledged that this policy is proscribed by the statute and thus outweighs any other policy of the EPA—political or otherwise. The emergence of cooperative federalism is a recent trend, and it is unclear how far courts will extend this policy; however, within the parameters of the statutory language, courts have undoubtedly proven that “it is a powerful tool for restraining the EPA’s authority.” 141

C. Reasons for the Trend

While this trend itself is interesting, the more productive inquiry is the reason for this trend. The cases listed above, as well as the instant case, raise at least one pertinent question: what is the EPA doing? All of the cases described belabor the point that, within the borders of the statutory language of the CWA or the CAA, the EPA has exceeded its authority. In each of the cases, the courts are not undertaking novel or unusual methods of statutory interpretation, nor are they going through somersaults to contort the language of the statute to justify the result that the court may subjectively desire. 142 Rather, the courts are

138 Faulk, supra note 129, at 2.
139 Faulk, supra note 129, at 3.
140 See generally, Sierra Club v. EPA, 705 F.3d 548 (D.C. Cir. 2013); Mingo Logan Coal Co. v. EPA, 850 F.Supp.2d 133 (D.C. Cir. 2012); Virginia Dept. of Transp. v. EPA, 2013 WL 53741; see also, Texas v. EPA, 690 F.3d 670 (5th Cir. 2012) (A 5th Circuit case with a similar holding that follows this trend.).
141 Faulk, supra note 129, at 3.
142 See EME Homer City Generation, 696 F.3d at 7; Mingo Logan Coal Co., 850 F.Supp.2d 133; Virginia Dept. of Transp., 2013 WL 53741.
employing the judicial ‘gold standard’ of looking to the plain meaning of the statute.

While there could certainly be political objectives underlying this recent trend, there may also be a simpler explanation: regulatory expediency. It takes time and money to conduct research to determine what is contaminating stormwater, or how much a state has contributed to a downwind state’s nonattainment. Scientific studies and research can take years to figure out the cause of contamination, as can allowing a state the time to create and adopt its own SIP.\textsuperscript{143} Nevertheless, mandating regulations without actually fixing the problem is far less time consuming and expensive to bypass than scientific studies and research. While it is admirable that the EPA is trying to achieve measurable results quickly, perhaps that outcome is not the best for the government or for the environment, especially when such results are the consequence of an interest in administrative convenience and expediency, rather than truly solving the problem and repairing or improving the environment. Additionally, when a regulation is challenged in court, any time and money once saved is immediately lost in the judicial process.

As these cases stack up, with the same results each time, the question lingers of why the EPA cannot fix the air or water pollution problems while promulgating statutes and laws that can still withstand a court challenge. The CAA, CWA, and the EPA are all crucial to the well-being and public health of Americans. The CAA and CWA have had amazing success in improving the air and water quality through regulation by the EPA,\textsuperscript{144} but the

\textsuperscript{143} The Court in EME Homer City Generation noted that the EPA was required to allow states a "reasonable amount of time" to submit an SIP. \textit{EME Homer City Generation}, 696 F.3d at 30-31. Only after a state failed to timely submit a SIP, or if the EPA rejected it for inadequacy, could the EPA step in and promulgate a FIP. \textit{Id.} If a SIP was rejected for inadequacy, the EPA was required to allow the state time to revise and re-submit that SIP. \textit{Id.}

EPA should still have to play by the rules. If the EPA could manage to create rules that adhere to the statutory requirements, then that would give them more time to fix the environment and more time to achieve their regulatory objectives, without wasting time and resources in court, arguing in favor of rules that cannot possibly be held to comport with congressional and statutory mandates.

D. Implications of the Trend

The immediate and most narrow implications of the trend in the instant case are that, since the court vacated the Transport Rule, CAIR is still in place, and the EPA has once again been sent back to the drawing board to draft a new rule that is consistent with the holding in the instant case, as well as with North Carolina and Michigan. CAIR itself is flawed although still operative, because it does not "ensure that upwind emissions reductions would be sufficient to help downwind states meet air standards."145 With CAIR still intact, the saga for the EPA to create a rule that will withstand judicial scrutiny continues.

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145 See Jessica Coomes, D. C. Circuit Vacates Cross-State Rule, Orders EPA to Keep Bush-Era Rule in Place, BNA ENVIRONMENT REPORT (Aug. 22, 2012), http://www.bna.com/dc-circuit-vacates-n12884911323/. Under the 1998 NO\textsubscript{X} SIP Call rule, the EPA "developed an emissions cap-and-trade program to address the interstate transport of nitrogen oxides. Id. CAIR replaced this rule
Additionally, the court’s decision to vacate the Transport Rule may leave tremors throughout the industries involved. Aside from the Transport Rule being outside of the EPA’s authority to enact, the rule itself had a legitimate economical and environmental purpose. Natural gas prices have decreased dramatically in recent years, and the Transport Rule could have boosted those prices:

If [the Transport Rule] had gone into effect . . . the additional demand from generators seeking to lower emissions by switching to the relatively cleaner natural gas may have helped to balance supply and demand. However, without the regulatory boost from [the Transport Rule], already rock bottom prices for natural gas could drop even further. Ironically, such low prices for natural gas could ultimately lead to a major increase in price volatility for both natural gas and electricity by forcing natural gas producers to cut back sharply on drilling, setting the stage for steep future price increases which could have been avoided if market conditions were more stable . . . At least for a period of several years, extremely low natural gas prices could have a substantial effect on the nascent renewable energy industry and sharply inhibit energy efficiency efforts.\textsuperscript{146}

While the effect on natural gas prices and energy efficiency efforts is certainly detrimental for environmentalists, other energy-intensive industries may also be affected.\textsuperscript{147} With these additional economic and environmental implications of the decision, it becomes even more imperative that the EPA revise


\textsuperscript{147} Id.
the rule so that it comports with the CAA, as well as the majority opinion in the instant case.

Perhaps encouraged by the vigorous dissent by Judge Rogers, on October 5, 2012, the EPA petitioned the U.S. Court of Appeals for the D.C. Circuit for a rehearing en banc of the decision in the instant case. In its petition, the EPA first argued that the three-judge panel "lacked jurisdiction to hold that [the] EPA had no authority to promulgate FIPs." Additionally, the EPA stated that "the panel ignored the plain language of the [CAA] requiring states to submit SIPs by a certain date," that the majority's analysis regarding significant contributions violated "well-settled waiver and exhaustion principles," and finally that the majority "wrongfully chose its own construction of the ambiguous statutory term 'contribute significantly' over the EPA's own construction, which had previously been upheld." In this petition for rehearing, the EPA received support from various intervenors, making public health and policy arguments that the Transport Rule would save lives, improve air quality, and save "$110 to $280 billion in annual net social benefits."

As if the majority opinion was not sufficiently clear in its designation of the boundaries of EPA authority, unmistakably holding that the EPA's authority is limited to the plain meaning of the statute as mandated by Congress, the D.C. Circuit summarily denied the EPA's petition for rehearing on January 24, 2013. Not only did the seven-judge panel deny a rehearing en banc, the D.C. Circuit also affirmed the majority's conclusion that the EPA had no authority to promulgate FIPs.

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149 Id.
150 Id.
151 Id.
152 See EME Homer City Generation v. EPA, 696 F.3d 7 (2012).
banc, the original three-judge panel also denied the EPA’s request for rehearing.\textsuperscript{153} This denial serves as an unambiguous message to the EPA, it also means that the only options remaining for the EPA are to make a new rule or appeal to the Supreme Court of the United States.\textsuperscript{154}

The majority opinion in the instant case, as well as the other cited cases, serve as a warning to the EPA for future cases. The Court is clear in its language that the EPA must follow the statutory designations of authority, regardless of whatever policy concerns the EPA may deem to be important when promulgating a rule. This message is important for future rules devised by the EPA, and it has relevant implications for the wider field of environmental law. While the EPA may have admirable and lofty motivations for creating a rule—saving lives, improving public health, enhancing national air and water quality, saving taxpayers’ money—those policy considerations must yield to the plain meaning of the statute, and the EPA must follow those statutory rules.

\textbf{VI. CONCLUSION}

The results of the EPA continuing this trend of having rules struck down because the EPA exceeded its own authority could be harrowing. While the EPA claims all of the aforementioned policy considerations, if the EPA cannot find a way to draft rules that can survive a judicial challenge, then the EPA will never achieve those policy objectives. The CAA and CWA have been successful in improving the environment and the


\textsuperscript{154} See id.; Jeffery Holmstead, former EPA assistant administrator, stated that an appeal to SCOTUS seemed unlikely, given that the Solicitor General’s office is “pretty careful about using its credibility with the court,” and that, even if there were a petition for \textit{certiorari}, the case would be unlikely to “interest the justices because it focuses on obscure issues, not overarching legal or policy issues.” \textit{Id.}
nation's public health, but those improvements cannot continue when courts are consistently forced to vacate rules because the EPA does not have the power to implement a given rule. It becomes an unbreakable cycle of the EPA claiming that a given rule is necessary for environmental and public health standards, but those standards cannot be achieved if the EPA's rules cannot escape challenge or withstand judicial scrutiny. Rather, time and resources are wasted in litigation concerning the meaning of statutes, instead of putting the same time and resources into the same environmental goals that the statute seeks to improve.

If this trend continues, progress will never be made. The courts in the series of cases listed above have given the EPA clear instructions on the boundaries of the agency's authority, and it now becomes crucial for the EPA to stay within those parameters, rather than sloppily drafting rules touting public health considerations, when, in reality, the justification appears to be administrative convenience and expediency.  

Elizabeth Moeller

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155 Scott Segal, the director of the Electric Reliability Coordinating Council, commented "when the EPA takes liberties with its legal authority, the result is higher prices for consumers, businesses, schools, and hospitals. At a time of economic recession, the country cannot afford sloppy rulemaking of this sort. The EPA can and should do better." See Frederic J. Frommer, *Appeals Court Rules That EPA Exceeds Statutory Authority*, GOPUSA.COM (Aug. 22, 2012), http://www.gopusa.com/news/2012/08/22/appeals-court-rules-that-epa-exceeds-statutory-authority/.  

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