
ENVIRONMENTAL LAW — CLEAN AIR ACT — D.C. CIRCUIT REJECTS EPA'S ATTEMPT TO QUANTIFY AND IMPLEMENT INTERSTATE AIR POLLUTION REDUCTIONS. — *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), *reh'g and reh'g en banc denied*, No. 11-1302 (D.C. Cir. Jan. 24, 2013).

The Clean Air Act¹ (CAA) embodies “cooperative federalism,”² an arrangement in which the federal government sets national air quality standards while the states enforce those standards.³ But the allocation of state and federal responsibilities blurs in the context of interstate air pollution. The Environmental Protection Agency’s 2011 Transport Rule⁴ quantified upwind states’ “significant contribution[s]” to downwind air quality problems and implemented a federal program to achieve the necessary emissions reductions.⁵ Recently, in *EME Homer City Generation, L.P. v. EPA*,⁶ the D.C. Circuit vacated and remanded the Transport Rule, holding that the Rule (1) improperly required upwind states to reduce emissions by more than the amount necessary to prevent their own significant contributions to nonattainment downwind and (2) improperly gave the federal government rather than the states the first opportunity to implement those reductions.⁷ While the panel was correct in its first holding, the reasoning underlying its second holding was flawed. In looking past the plain text of the statute, the court overstated the absurdity of the EPA’s interpretation of the CAA and applied the Act’s “federalism bar”⁸ too rigidly.

Under the CAA, the EPA sets National Ambient Air Quality Standards (NAAQS), which establish minimum allowable concentrations of certain air pollutants.⁹ Each state then has “primary responsibility”¹⁰ for achieving these NAAQS by promulgating State Implementation Plans (SIPs) designed to cut in-state emissions.¹¹ If a state fails to submit an adequate SIP by the statutory deadline, the EPA must

¹ 42 U.S.C. §§ 7401–7671q (2006 & Supp. V 2011).

² *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1046 (D.C. Cir. 2001) (internal quotation marks omitted).

³ See Will Reisinger et al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?*, 20 DUKE ENVTL. L. & POL’Y F. 1, 6–7 (2010).

⁴ Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (to be codified at 40 C.F.R. pts. 51, 52, 72, 78, and 97) [hereinafter Transport Rule].

⁵ *Id.* at 48,210–11.

⁶ 696 F.3d 7 (D.C. Cir. 2012).

⁷ See *id.* at 11–12.

⁸ *Id.* at 29.

⁹ See 42 U.S.C. § 7409(a)–(b) (2006).

¹⁰ *Id.* § 7407(a).

¹¹ See *id.* § 7410(a)(1).

promulgate a replacement Federal Implementation Plan (FIP).¹² Because certain pollutants cross into downwind states,¹³ the CAA's "good neighbor" provision¹⁴ requires that SIPs prevent in-state emissions that "contribute significantly to nonattainment in . . . any other State."¹⁵

The EPA has had mixed success implementing the good neighbor provision. In *Michigan v. EPA*,¹⁶ the D.C. Circuit upheld the Agency's use of cost considerations to reduce an upwind state's good neighbor obligations.¹⁷ But eight years later, in *North Carolina v. EPA*,¹⁸ the D.C. Circuit rejected the EPA's Clean Air Interstate Rule¹⁹ (CAIR), holding that while cost considerations could *reduce* each state's good neighbor obligation, they could not *increase* a state's obligations beyond the state's individual contribution to downwind nonattainment.²⁰ Rather than vacate CAIR, the court ultimately left it in place as a backstop while the EPA devised a new rule.²¹

The EPA finalized CAIR's replacement, the Transport Rule, in 2011. The Rule first designated as significant contributors all those upwind states whose individual emissions contributed at least one percent of the NAAQS pollutant concentration in downwind nonattainment areas.²² The EPA then quantified each significant contributor's "significant contribution" based on multi-state regional emissions modeling, taking the cost of reducing emissions into account.²³ Significant contribution quantities were based on the emissions a state could eliminate at a designated, cost-effective cost-per-ton threshold for its region.²⁴

The states that the EPA had deemed to be significant contributors had already submitted SIPs to achieve the NAAQS for ozone and fine particle pollution, but those SIPs failed to address adequately the Transport Rule's newly quantified good neighbor requirements.²⁵ Accordingly, the EPA promulgated replacement FIPs in the Transport

¹² See *id.* § 7410(c).

¹³ See Craig N. Oren, *Clean Air and Interstate Transport: Seeing the Big Picture*, 10 N.Y.U. ENVTL. L.J. 196, 196 (2002).

¹⁴ *Homer City*, 696 F.3d at 11.

¹⁵ 42 U.S.C. § 7410(a)(2)(D)(i)(I).

¹⁶ 213 F.3d 663 (D.C. Cir. 2000) (per curiam).

¹⁷ See *id.* at 677-79.

¹⁸ 531 F.3d 896 (D.C. Cir. 2008) (per curiam), *remanded without vacatur on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam).

¹⁹ Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call, 70 Fed. Reg. 25,162 (May 12, 2005).

²⁰ See *North Carolina*, 531 F.3d at 919-21.

²¹ See *North Carolina*, 550 F.3d at 1178.

²² Transport Rule, *supra* note 4, at 48,236.

²³ See *id.* at 48,246-53.

²⁴ See *Homer City*, 696 F.3d at 17-18.

²⁵ See *id.* at 41-42 (Rogers, J., dissenting).

Rule.²⁶ The FIPs would go into effect immediately, but the states could submit replacement SIPs.²⁷ Various state and local governments and industry groups petitioned the D.C. Circuit for direct review of the Transport Rule,²⁸ and the court stayed the Rule pending a decision on the merits.²⁹

A divided panel of the D.C. Circuit vacated and remanded the Transport Rule for exceeding the EPA's authority under the CAA.³⁰ Writing for the majority, Judge Kavanaugh³¹ held that the Rule's quantification of individual states' good neighbor obligations violated the CAA by requiring upwind states "to reduce emissions by more than their own significant contributions to a downwind State's nonattainment"³² and that the Rule's promulgation of FIPs was invalid because "it did not allow the States the initial opportunity to implement [those] reductions."³³

First, the court held that the EPA's methodology for calculating each state's good neighbor obligation exceeded the Agency's statutory authority. According to the court, the EPA's first-step threshold for determining which states would be covered by the Transport Rule — a contribution of at least one percent of the NAAQS of a pollutant in any downwind nonattainment area — also defined the upwind state's total significant contribution.³⁴ Therefore, the court held that the EPA had the authority to require each state to reduce *only* that amount of pollutant emission.³⁵ But the EPA had gone on to define each state's significant contribution according to a region-wide, multifactor, cost-influenced test.³⁶ The court held that the EPA could not "redefine each State's 'significant contribution'" in this way.³⁷ The court also held that considering cost-effectiveness to set standards across a region violated *North Carolina*, because the practice might force states "to share the burden of reducing other upwind states' emissions."³⁸

²⁶ See *id.* at 42.

²⁷ See Transport Rule, *supra* note 4, at 48,326–29; see also *Homer City*, 696 F.3d at 18–19.

²⁸ The CAA authorizes direct review of many EPA actions by the D.C. Circuit. See 42 U.S.C. § 7607(b)(1) (2006).

²⁹ See *Homer City*, 696 F.3d at 19.

³⁰ *Id.* at 12, 37. The court left the previously remanded, but not vacated, CAIR undisturbed pending the EPA's development of a "valid replacement." *Id.* at 38.

³¹ Judge Kavanaugh was joined by Judge Griffith.

³² *Homer City*, 696 F.3d at 11.

³³ *Id.*; see *id.* at 11–12.

³⁴ See *id.* at 23.

³⁵ See *id.* at 23–26.

³⁶ See *id.* at 23, 25.

³⁷ *Id.* at 25.

³⁸ *Id.* at 26 (quoting *North Carolina v. EPA*, 531 F.3d 896, 921 (D.C. Cir. 2008) (per curiam)) (internal quotation mark omitted).

Second, the court held that the EPA's method of implementing the required reductions via FIPs violated the CAA's statutory scheme by denying states "an initial opportunity to implement the obligations themselves" via SIPs.³⁹ The EPA had argued that states must address their interstate pollution as part of the standard SIP process following the promulgation of a NAAQS — even before federal quantification of good neighbor requirements — and that failure to do so required the EPA to impose FIPs.⁴⁰ The *Homer City* panel rejected that position, holding that the EPA's interpretation of the CAA was invalid according to the doctrine set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁴¹ The "FIP-first approach"⁴² was "contrary to the text and context of the statute" or "absurd"⁴³ at *Chevron* step one;⁴⁴ in the alternative, it was "unreasonable"⁴⁵ at step two.⁴⁶

The court reasoned that the CAA contains a "core two-step process" in which "the Federal Government sets end goals and the States choose the means to attain those goals."⁴⁷ The court relied on the "federalism bar"⁴⁸ that had been read into the CAA by both the Supreme Court⁴⁹ and the D.C. Circuit,⁵⁰ concluding that this allocation of authority gives states the right to take the first crack at implementing required emissions reductions.⁵¹ The court employed a contextual reading to determine that, although the text of the statute does not say so explicitly, promulgating a regulation defining a state's good neighbor obligations must be treated like promulgating a NAAQS and trigger an opportunity for states to submit compliant SIPs.⁵² Otherwise, the court reasoned, the regulatory scheme would not be "logical[,]," as it would allow the EPA to deem SIPs insufficient for failing to implement a good neighbor obligation that the EPA had not yet defined.⁵³ Moreover, it reasoned that requiring states to devise and implement their own definitions of "significant contribution" prior to the

³⁹ *Id.* at 28.

⁴⁰ *See id.* at 32–33.

⁴¹ 467 U.S. 837 (1984).

⁴² *Homer City*, 696 F.3d at 33.

⁴³ *Id.* at 34 n.32.

⁴⁴ At step one, the court must determine "whether Congress has directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842, by employing "traditional tools of statutory construction," *id.* at 843 n.9.

⁴⁵ *Homer City*, 696 F.3d at 34 n.32.

⁴⁶ At *Chevron* step two, the court will defer to an agency's interpretation of the statute if it "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

⁴⁷ *Homer City*, 696 F.3d at 33.

⁴⁸ *Id.* at 29.

⁴⁹ *See Train v. Natural Res. Def. Council*, 421 U.S. 60, 79 (1975).

⁵⁰ *See Virginia v. EPA*, 108 F.3d 1397, 1410 (D.C. Cir. 1997).

⁵¹ *See Homer City*, 696 F.3d at 29, 35.

⁵² *See id.* at 33.

⁵³ *Id.* at 32.

promulgation of the EPA's authoritative definition, which the majority characterized as the "stab-in-the-dark approach,"⁵⁴ would violate the CAA's guiding principle of cooperative federalism.⁵⁵

Judge Rogers filed a lengthy and spirited dissent. She argued both that the court did not have jurisdiction to hear several of the issues raised⁵⁶ and that the majority was wrong on the merits. On the validity of the FIP-first implementation scheme, Judge Rogers maintained that the statute unambiguously permits such an arrangement.⁵⁷ The CAA "establish[es] a clear chronology"⁵⁸: the EPA promulgates a NAAQS, which triggers each state's responsibility to submit a SIP, and that SIP must satisfy the good neighbor obligations of § 7410(a)(2)(D)(i).⁵⁹ If the SIP is found wanting — even under a good neighbor requirement quantified by the EPA only subsequently — then the EPA must provide a replacement FIP.⁶⁰ Moreover, Judge Rogers argued, even if the statute were ambiguous, the court owes deference to the agency's interpretation of that statute per *Chevron*.⁶¹

While the *Homer City* court presented a compelling case for its first holding, the reasoning behind the court's rejection of the FIP-first implementation scheme was incomplete. The plain text of the CAA supports the EPA's interpretation. The proposed scheme was not absurd, but a feasible and reasonable policy. Furthermore, the court's argument that this interpretation violated the CAA's federalism bar did not sufficiently consider that states were given both the initial and final implementation opportunities. These neglected considerations should have steered the court past *Chevron* step one and counseled a different outcome at step two.

The plain text of the statute, which is of preeminent importance in statutory interpretation,⁶² supports the EPA's interpretation. According to § 7410(a)(1), "[e]ach State shall . . . adopt and submit [a SIP] to the Administrator, within 3 years . . . after the promulgation of a [primary NAAQS] (or any revision thereof)."⁶³ Each SIP "shall . . . contain adequate provisions" fulfilling its good neighbor obligations,⁶⁴ and the

⁵⁴ *Id.* at 36.

⁵⁵ *See id.* at 36–37.

⁵⁶ Judge Rogers argued that petitioners failed to challenge the Final SIP Rules within the necessary sixty days and failed to challenge the EPA's two-step approach to calculating significant contributions during the rulemaking process. *Id.* at 39–40 (Rogers, J., dissenting).

⁵⁷ *See id.* at 47.

⁵⁸ *Id.*

⁵⁹ *See id.*

⁶⁰ *See id.* at 45–46.

⁶¹ *See id.* at 48.

⁶² *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says . . .").

⁶³ 42 U.S.C. § 7410(a)(1) (2006) (emphasis added).

⁶⁴ *Id.* § 7410(a)(2) (emphasis added).

EPA “shall promulgate a [FIP] . . . within 2 years” of finding that a SIP is insufficient.⁶⁵ Thus, the text of the statute seems to require states to take a “stab in the dark”⁶⁶ and design SIPs that satisfy good neighbor obligations, regardless of whether the EPA has yet quantified them; the EPA must then impose FIPs for delinquent states. The *Homer City* panel never directly refuted the argument that the statute’s plain text supported the EPA. Instead, it relied on two major contentions to look past the text: that this interpretation would be “absurd”⁶⁷ because states’ attempts to meet good neighbor obligations prior to EPA quantification would be “bound to fail,”⁶⁸ and that this outcome would violate the CAA’s federalism bar.⁶⁹

But requiring states to consider interstate effects in their initial SIPs is not an absurd outcome; it is a feasible and sensible policy. According to D.C. Circuit precedent, “[a] statutory outcome is absurd if it defies rationality.”⁷⁰ The EPA’s interpretation of the CAA does not reach this threshold. True, the EPA’s interpretation could be inconvenient for the states, whose initial interstate air pollution reductions may fall short of the EPA’s eventual standard. However, as Judge Rogers noted in dissent, states possess the technical capability to model interstate pollution;⁷¹ reasonable assessments of states’ good neighbor obligations are in no way “bound to fail.” In fact, Delaware succeeded at just such a “stab in the dark,” submitting a SIP prior to the promulgation of the Transport Rule that the EPA later accepted as fulfilling the state’s obligations.⁷² Thus, requiring a state to take a “stab in the dark” has proven to be feasible.

Moreover, there are several reasonable potential rationales for designing the good neighbor provision as the EPA envisioned. For example, the EPA’s interpretation would encourage states to err on the side of caution when considering interstate pollution, thereby better safeguarding the environment.⁷³ States, knowing that their SIPs would

⁶⁵ *Id.* § 7410(c)(1) (emphasis added).

⁶⁶ *Homer City*, 696 F.3d at 47, 49 (Rogers, J., dissenting) (quoting *id.* at 35 (majority opinion)).

⁶⁷ *See id.* at 34 n.32 (majority opinion).

⁶⁸ *See id.* at 36.

⁶⁹ *Id.* at 35.

⁷⁰ *Landstar Express Am., Inc. v. Fed. Mar. Comm’n*, 569 F.3d 493, 498 (D.C. Cir. 2009); *see also* *Barnhart v. Thomas*, 540 U.S. 20, 28–29 (2003) (holding that an agency’s statutory interpretation is not absurd if there is a “plausible reason” that Congress may have intended the outcome of that interpretation); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003) (defining an absurd result as “an outcome so contrary to perceived social values that Congress could not have ‘intended’ it”).

⁷¹ *See Homer City*, 696 F.3d at 49 (Rogers, J., dissenting).

⁷² *See* Approval and Promulgation of Air Quality Implementation Plans, 76 Fed. Reg. 53,638 (Aug. 29, 2011) (to be codified at 40 C.F.R. pt. 52).

⁷³ *Cf.* Robert T. Grolnick, Casenote, *National Mining Association v. EPA: Industry Breathes a Sigh of Relief over the Determination of a Site’s Potential to Emit Pollutants Under the Clean Air*

be replaced by FIPs if they did not at least match the EPA's eventual good neighbor requirements, would be incentivized to minimize their interstate air pollution to the extent feasible.⁷⁴ Moreover, the EPA's interpretation would serve as a deliberation-forcing mechanism, prompting swifter action to address interstate pollution: states would be incentivized to consider their interstate pollution up front, rather than shirking responsibility until forced to confront the issue by EPA action.⁷⁵ Finally, states may have better information about their in-state emissions than the EPA has and therefore may be in a better position to make the first attempt at defining their interstate impact. Successful state methodologies could also serve as models for future good neighbor standards.⁷⁶ Given these sensible justifications, the EPA's interpretation of the good neighbor provision was far from irrational.

The court's second argument for rejecting the EPA's interpretation — that the FIP-first approach violated the CAA's "federalism bar" — also should not have foreclosed the EPA's plain-text interpretation, as the federalism bar was cleared when the states were given the initial opportunity to design SIPs. The CAA federalism bar originated in *Train v. Natural Resources Defense Council, Inc.*,⁷⁷ in which the Supreme Court held that the EPA had no right to dictate "the specific, source-by-source emission limitations" of a SIP so long as those choices satisfied the EPA's air quality standards.⁷⁸ In *Virginia v. EPA*⁷⁹ the D.C. Circuit extended this rule to "SIP calls," in which the EPA requires states to revise existing SIPs to comply with new federal standards, per § 7410(k)(5).⁸⁰ Under the SIP process, the federalism bar establishes a

Act Amendments of 1990, 8 VILL. ENVTL. L.J. 519, 520 (1997) (characterizing the 1977 CAA amendments, which include what is now § 7410(a)(2)(D), as "a new and more aggressive [pollution] control program").

⁷⁴ This goal would be in some tension with the court's first holding, forbidding the EPA from requiring a state to eliminate any more pollution than its significant contribution to downwind nonattainment. See *Homer City*, 696 F.3d at 23–25. However, that holding addressed the EPA's power to set binding standards, not to create incentives. Moreover, such a goal would be in line with one of the stated purposes of the CAA: "to protect and enhance the quality of the Nation's air resources." 42 U.S.C. § 7401(b)(1) (2006); cf. *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1155 (D.C. Cir. 1980) (finding that the CAA's "precautionary and preventive orientation" required the EPA "to err on the side of" environmental protection in setting air quality standards).

⁷⁵ Cf. Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 565 (2005) (describing the traditional argument in favor of the rule of lenity canon: that it encourages otherwise reluctant legislators to deliberate openly about criminal punishment); Note, *Desuetude*, 119 HARV. L. REV. 2209, 2216 (2006) (describing a similar argument in favor of desuetude).

⁷⁶ Cf. Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1099–1100 (2009) (describing California's role as a model for federal emissions standards).

⁷⁷ 421 U.S. 60 (1975).

⁷⁸ *Id.* at 79.

⁷⁹ 108 F.3d 1397 (D.C. Cir. 1997).

⁸⁰ *Id.* at 1404, 1407–10.

division of labor (“the Federal Government sets end goals and the States choose the means to attain those goals”⁸¹) and a timeline (the states take the first shot at designing an implementation plan⁸²).

However, the federalism bar is not “absolute,”⁸³ and the D.C. Circuit had never before addressed the applicability of the federalism bar to the promulgation of FIPs per § 7410(c). The FIP process serves as a “federal backstop”⁸⁴ to the SIP framework, ensuring that states cannot evade their air quality responsibilities. To that end, the EPA’s power and duty to enact FIPs vest only upon a finding of SIP inadequacy.⁸⁵

In the promulgation of the Transport Rule the process worked as statutorily designed. Each state was given an initial opportunity to submit a SIP⁸⁶ — and, as discussed above, each state possessed the technical capability to account for its interstate pollution impact.⁸⁷ Per the dictates of the federalism bar, the states were given the “first crack”;⁸⁸ the federal government stepped in only after the EPA found the SIPs either absent or wanting and put the states on notice that FIPs would be forthcoming.⁸⁹ Moreover, the Transport Rule adhered to the principle of cooperative federalism by allowing states to submit subsequent SIPs to meet their good neighbor obligations.⁹⁰ Thus, states retained authority over the final means of implementation.

A fuller treatment of the absurdity canon and federalism bar would have had significant implications for the court’s *Chevron* analysis. At step one, the non-absurdity of the EPA’s interpretation and the satisfaction of the federalism bar should have demonstrated that the statutory text did not foreclose this interpretation. At step two, the interpretation’s feasibility and its policy justifications would have been important considerations in a reasonableness inquiry. Particularly in light of the broad purposes of the CAA, these neglected considerations would have counseled an outcome more harmonious with the judicial deference required by *Chevron*.

⁸¹ *Homer City*, 696 F.3d at 33.

⁸² *Virginia*, 108 F.3d at 1407 (“The Act expressly gave the states *initial* responsibility for determining the manner in which air quality standards were to be achieved.” (emphasis added)).

⁸³ *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1046 (D.C. Cir. 2001).

⁸⁴ *Homer City*, 696 F.3d at 30.

⁸⁵ See 42 U.S.C. § 7410(c)(1) (2006).

⁸⁶ See *Homer City*, 696 F.3d at 41–42 (Rogers, J., dissenting).

⁸⁷ See, e.g., *North Carolina ex rel. Cooper v. TVA*, 593 F. Supp. 2d 812, 820–28 (W.D.N.C. 2009) (finding, on the basis of technical modeling by North Carolina, that multiple out-of-state power plants “contribute very significantly to ozone levels” in North Carolina, *id.* at 825), *rev’d on other grounds*, 615 F.3d 291 (4th Cir. 2010).

⁸⁸ *Homer City*, 696 F.3d at 35.

⁸⁹ See *id.* at 43 (Rogers, J., dissenting).

⁹⁰ See Transport Rule, *supra* note 4, at 48,326–29.