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## Clearing the Air: The Misguided Ruling of *EME Homer* and the Future of Interstate Pollution Regulation

“Administrative law is not for sissies.”<sup>1</sup>

### INTRODUCTION

Justice Scalia is right—administrative law is certainly not for sissies. The ever-expanding role of the federal government means amplified power for our federal agencies, those entities responsible for implementing the policy goals of our government.<sup>2</sup> This increased responsibility of federal agencies comes from congressionally passed statutes increasing or modifying the authority of the particular agency it pertains to. Many of these agencies regulate pursuant to exceedingly wordy and confusing statutes that deal with very complex issues; these statutes define the metaphorical “red tape.” Indeed, administrative law is not for sissies.

The Supreme Court, in *Chevron U.S.A., Inc. v. Natural Defense Resource Council Inc.*, formulated one of the most important judicial principles in the administrative law realm.<sup>3</sup> The seminal legal doctrine that emerged from that case stressed judicial deference to “reasonable” agency interpretations of ambiguous statutory texts.<sup>4</sup> A basic rationale used in support of judicial deference, both before and after the *Chevron* decision, is that agencies, because of their expertise in their regulatory area, are more likely than a court to reach a correct result policy-wise.<sup>5</sup> It is also true, however, that many federal judges consider it their duty to say what the law is. Thus, in the years since *Chevron*, many courts have rolled back the degree of judicial deference in many areas of administrative law.<sup>6</sup>

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1. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 511 (1989).

2. See Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1464 (2000).

3. *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

4. *Id.* at 845.

5. Scalia, *supra* note 1, at 514.

6. See Jack M. Beermann, *End the Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 35 WTR ADMIN. & REG. L. NEWS 3, 4 (2010) (stating that “[p]erhaps the greatest problem in the application of the *Chevron* doctrine is that the Court very quickly abandoned the original, apparently highly deferential, version of the doctrine and replaced it with multiple versions that, if followed, can lead to different results.”).

The Clean Air Act was enacted by Congress in 1970 as the principal source of Environmental Protection Agency (EPA) authority in regulating the country's air pollution.<sup>7</sup> Because of the vast amount of regulations the national environment demands, Congress, through the Clean Air Act, delegated a large amount of power to the EPA in setting air quality standards.<sup>8</sup> Interstate pollution, or the transport of fine particulate matter pollutants across state lines, is an area of utmost importance in environmental regulatory efforts.<sup>9</sup> Research suggests that these sorts of pollutants cause the premature deaths of thousands of people annually,<sup>10</sup> as well as causing drastic increases in healthcare costs from respiratory illness.<sup>11</sup> The EPA's authority to regulate interstate pollution is derived from the Clean Air Act's good neighbor provision,<sup>12</sup> a statute that Congress has periodically amended in order to give the EPA a greater amount of regulatory authority over such pollution.<sup>13</sup> However, the D.C. Circuit, in invalidating the last two major EPA regulatory schemes addressing the issue, has proven to be a significant barrier to its effective regulation.

The D.C. Circuit's most recent opinion concerning interstate pollution, *EME Homer City Generation, L.P. v. EPA*, likely posits the most significant setback yet to EPA regulatory efforts. The D.C. panel's majority opinion misapplied prior case law to substantiate a rationale and ruling that clearly appeared to conflict with congressional intent regarding interstate pollution.<sup>14</sup> The holding further muddles the D.C. Circuit's stance with regard to an already complex statutory framework, and thus harms all parties with an interest in future interstate pollution regulation.

While the panel's ruling was likely welcomed by those who consider increased environmental regulation to be a hindrance upon future economic development, a closer reading of the majority opinion suggests that some states, including Louisiana, may be

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7. 42 U.S.C. § 7410 (1970).

8. John P. Dwyer, *The Practice of Federalism Under The Clean Air Act*, 54 MD. L. REV. 1183, 1191–92 (1995).

9. See Christina C. Caplan, Comment, *The Failure of Current Legal and Regulatory Mechanisms to Control Interstate Ozone Transport: The Need for New National Legislation*, 28 ECOLOGY L.Q. 169, 170–71 (2001).

10. See CONRAD SCHNEIDER & JONATHAN BANKS, CLEAN AIR TASK FORCE, THE TOLL FROM COAL 4 (Marika Tatsutani, ed., 2010), [http://www.catf.us/resources/publications/files/The\\_Toll\\_from\\_Coal.pdf](http://www.catf.us/resources/publications/files/The_Toll_from_Coal.pdf).

11. Craig N. Oren, *Clean Air Interstate Transport: Seeing the Big Picture*, 10 N.Y.U. ENVTL. L.J. 196, 203 (2002).

12. See discussion *infra* Part I.A.2.

13. *Id.*

14. See *infra* Part IV.A.

subject to far harsher interstate pollution regulations in the future.<sup>15</sup> The court focused on alerting the EPA as to what data the agency must gather in order to permissibly regulate interstate air pollution of the states under the Clean Air Act.<sup>16</sup> Specifically, the panel held that the EPA may only require each state to reduce its own precise contribution to the interstate pollution problem.<sup>17</sup> To be sure, while it is unclear whether it is even possible for the EPA to make such determinations, this “relativity requirement” poses serious concerns to Louisiana.<sup>18</sup>

Louisiana’s status as a state that both contributes to, and receives, interstate air pollution suggests that the state will suffer all of the drawbacks from the *EME Homer* ruling while gaining none of the benefits.<sup>19</sup> Moreover, as natural gas and coal-fired power plants are the principal sources of interstate air pollution, it stands that Louisiana’s electricity sources will likely be subject to far heavier future regulations in the wake of the ruling.

The prospect of far greater emissions restrictions on Louisiana’s electricity sources would have significant damaging effects upon the state due to the character of its major industries. Louisiana’s economy relies heavily on energy-intensive industries, such as petrochemical manufacturing<sup>20</sup> and petroleum refining and production,<sup>21</sup> making the state among the highest in per capita energy consumption.<sup>22</sup>

This Comment argues that the future successful regulation of interstate air pollution is now clearly in jeopardy because of the D.C. Circuit’s decision to replace the EPA’s reasonable approach to the problem with its own misguided policy choices. Part I provides an overview of the regulatory process under the Clean Air Act and the specific provisions addressing interstate pollution. Part II examines the three most recent D.C. Circuit decisions over transport pollution

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15. See *infra* Part III.C.3.

16. *Id.*

17. See *infra* Parts III.C.1, III.C.3, IV.

18. See *infra* Part III.C.3.

19. *Id.*

20. See *Louisiana Industry*, DIVISION OF ADMIN. (last visited Oct. 13, 2013), [http://www.doa.louisiana.gov/about\\_industry.htm](http://www.doa.louisiana.gov/about_industry.htm) (“Louisiana produces 25 percent of the nation’s petrochemicals. Total value of Louisiana chemical shipments is more than \$14 billion a year.”).

21. See *id.* (“Louisiana is America’s third largest producer of petroleum and the third leading state in petroleum refining.”).

22. *Louisiana: State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN. (last updated July 2012), <http://www.eia.gov/state/?sid=LA> (“In 2010, Louisiana ranked third among the States in total energy consumption per capita, primarily because of the heavy use in the industrial sector, which includes many refineries and petrochemical plants.”).

regulations. Part III critically analyzes the *EME Homer* panel's erroneous interpretation of the Clean Air Act, the court's misapplication of prior case law, and explores the adverse consequences this most recent decision poses. Part IV reviews the legislative history behind congressional statutes involving interstate pollution and summarizes its apparent conflict with the D.C. Circuit's ruling. This part also suggests possible regulatory approaches the EPA might take to adhere to both the panel's ruling and the legislative intent. Part V concludes that, absent the chance of a successful appeal or legislative revision, the EPA will likely be unable to implement effective interstate pollution regulations in the aftermath of *EME Homer*.

#### I. THE EPA'S REGULATORY ROLE UNDER THE CLEAN AIR ACT

The Clean Air Act of 1970 established the federal government's powerful role in air pollution regulation.<sup>23</sup> Prior to the Act, the federal government's function regarding the country's environment was largely centered on research.<sup>24</sup> While proponents acknowledged that the federal role in air pollution control would drastically increase at the expense of the states, it was also stressed that state participation as implementers of federal standards was crucial to the Act's success.<sup>25</sup>

The Supreme Court, in *Train v. Natural Resources Defense Council, Inc.*, reiterated these distinct and separate roles of the states and the EPA under the Clean Air Act.<sup>26</sup> From the plain text of the Act, the Court reasoned that the EPA is charged to set national air quality standards.<sup>27</sup> These air standards are to be set at pollution levels that the EPA deems necessary to protect the public health.<sup>28</sup> However, the Court noted that the statute aimed to limit the EPA to a secondary role in implementing these air quality standards.<sup>29</sup>

Because the Act stated that "each State shall have the primary responsibility of assuring air quality within its boundaries," the Court concluded that Congress intended to allow states "considerable latitude" when implementing these standards.<sup>30</sup> Thus, through the Clean Air Act, Congress devised a cooperative approach

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23. Dwyer, *supra* note 8, at 1191.

24. *Id.* at 1190-91.

25. *Id.* at 1191-92.

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

27. *Id.* at 60.

28. *Id.* at 78.

29. *Id.* at 79.

30. *Id.* at 86-87.

toward pollution control, where both the federal government and states play important roles.<sup>31</sup>

#### *A. State Implementation of National Air Quality Standards*

Under the Clean Air Act, states assure air quality within their own boundaries by implementing and enforcing state implementation plans.<sup>32</sup> A state implementation plan, or “SIP,” is the overall regulatory scheme through which a state controls pollution.<sup>33</sup> States revise their plans either on their own initiative or in response to federal mandates, such as when the EPA modifies air quality standards.<sup>34</sup> These revisions are then submitted to the EPA, which must then approve or disapprove of these revisions.<sup>35</sup>

In some state submittals, the EPA may determine that a group of submitted state plans are substantially inadequate to meet the national air quality standards, and thus significant changes are necessary.<sup>36</sup> This process, known as a “SIP Call,”<sup>37</sup> allows the EPA to require states to address these shortcomings.<sup>38</sup> The EPA is obligated to notify these states and afford them an opportunity to correct inadequacies.<sup>39</sup> In the event a state fails to submit an acceptable plan, the EPA is required to create a federal implementation plan for that state within two years of finding the state plan inadequate.<sup>40</sup>

#### *B. The Good Neighbor Provision*

The good neighbor provision requires that states’ implementation plans include adequate measures which will prevent any “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 . . . .”<sup>41</sup> In other words,

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31. See, e.g., *EME Homer City Generation, L.P. v. Envtl. Prot. Agency*, 696 F.3d 7, 11 (2012), *cert. granted in part*, *Am. Lung Ass’n v. EME Homer City Generation, L.P.*, 133 S. Ct. 2857 (2013).

32. See, e.g., *Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 586–87 (5th Cir. 1981).

33. Steven G. McKinney & Stephen Gidiere, *A (Mostly) Civil War over Clean Air Act SIPS*, 27-SUM NAT. RESOURCES & ENV’T 3, 3 (2012).

34. *Id.*

35. 42 U.S.C. § 7410(k) (2006).

36. 42 U.S.C. § 7410(k)(5).

37. McKinney & Gidiere, *supra* note 33, at 2.

38. *Id.*

39. *Id.*

40. 42 U.S.C. § 7410(c)(1).

41. 42 U.S.C. § 7410(a)(2)(D)(i)(I).

states are prohibited from interfering with any other state's ability to meet national air quality standards. Such interference occurs through the process of transport pollution or when a state emits air pollutants that are then blown into other states' territories.<sup>42</sup>

The original Clean Air Act of 1970 casually addressed this problem through a statutory requirement that states engage in "intergovernmental cooperation" to reduce pollution transport.<sup>43</sup> However, this original measure proved completely incapable of effectively addressing interstate pollution.<sup>44</sup> Thus, in 1977, Congress amended the provision by requiring that states, in their state implementation plans, prohibit emissions from certain pollution sources that would "prevent [another state's] attainment" of federal air quality standards.<sup>45</sup> This revision also proved unsuccessful in preventing pollution transport. The statutory language required actual evidence that a polluting state was responsible for another state's nonattainment, which was essentially impossible for the EPA because of the complexity of interstate pollution.<sup>46</sup>

It was the "downwind" states in the Northeast that, suffering the brunt of the negative effects posed by transport pollution, pushed for the current good neighbor provision, which was added to the Clean Air Act of 1990.<sup>47</sup> Specifically, these states experienced increases in health problems linked to deteriorating air quality<sup>48</sup> caused by the interstate transport of particulate matter pollutants from heavy polluting coal-burning utilities in the Midwest.<sup>49</sup> The heavier polluting, "upwind" states, in turn argued that, while interstate air pollution was a significant problem, the burden of reducing such pollution needed to be shared equally among all states.<sup>50</sup> In response, Congress replaced the "prevent attainment" requirement with the "significantly contribute" language in order to strengthen

42. See Caplan, *supra* note 9, at 171.

43. 42 U.S.C. § 1857c-5(a)(2)(E) (1970).

44. See William H. Rodgers, Jr., ENVIRONMENTAL LAW: AIR AND WATER § 3.16, at 316 (noting that the 1970 provision "contained some blandishments on 'intergovernmental cooperation' that even determined advocacy could not turn into an enforceable commitment.").

45. 42 U.S.C. § 7410(a)(2)(E) (1977) (current version at 42 U.S.C. § (a)(2)(D) (2006)).

46. See *id.* (noting that "[t]he process reasons for finding few teeth in [the 1977 provision's] standard of 'prevention' of attainment stem from the extreme difficulties of calculation attending the assessment.").

47. 42 U.S.C. § 7410(a)(2)(D) (1990).

48. See Oren, *supra* note 11, at 203 (pointing out that the Harvard School of Public Health recently linked three hundred premature death and thousands of emergency room visits to emissions from nine power plants in Chicago).

49. Caplan, *supra* note 9, at 171.

50. See *infra* Part IV.

the enforceability of the good neighbor provision.<sup>51</sup> This revision allowed the EPA to address interstate pollution as a collective problem, as opposed to the state-specific approach, which the “prevent attainment” language suggested.<sup>52</sup>

Because of the complexity associated with interstate pollution, the problem is not solely a struggle between the Midwestern polluting states and the affected Eastern states.<sup>53</sup> Rather, several states are both contributors and recipients of transport pollution.<sup>54</sup> Predictably, despite Congress’s 1990 statutory change, the successful enforcement of the good neighbor provision has been rife with problems for a number of reasons.<sup>55</sup> States often have conflicting social and economic interests with regard to interstate pollution, resulting in varied degrees of willingness to solve the problem.<sup>56</sup>

Moreover, the overall make-up of the Clean Air Act has expectedly made successful regulation more problematic by assigning the task of implementing federal standards to the states.<sup>57</sup> Specifically, federal regulation of the interstate pollution problem is difficult because states have tended to aggressively challenge regulations that they deem contrary to their interests. EPA regulations that are less restrictive on the polluting states are predictably challenged by the downwind states for not going far enough to solve the problem; likewise, upwind states challenge good neighbor regulations they deem to be overly harsh.<sup>58</sup>

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51. Geoffrey L. Wilcox, *New England and the Challenge of Interstate Ozone Pollution Under the Clean Air Act of 1990*, 24 B.C. ENVTL. L. REV. 1, 28 (1996).

52. See *Michigan v. U.S. Env’t. Prot. Agency*, 213 F.3d 663, 674 (D.C. Cir. 2000) (rejecting the petitioners’ argument that equating the “old standard—‘prevent attainment’—with the new standard: ‘contribute significantly to nonattainment.’”).

53. Oren, *supra* note 11, at 203.

54. *Id.* at 201.

55. See Caplan, *supra* note 8, at 188 (arguing that the complicated rulemaking process under the Clean Air Act, the failures of voluntary negotiations between states, and the consistent availability of judicial review over EPA actions have all hindered successful regulation of interstate pollution).

56. See *id.* at 196 (Caplan illustrates that, due to interstate pollution, Midwestern states do not suffer much of the drawbacks of cheap dirty power; thus, utilities in these states “have been able to produce electricity at a cheaper price, and have thus profited at the expense of the strictly controlled utilities in the Northeast.”).

57. See *id.* at 191 (pointing out that “the stream of litigation [regarding interstate pollution] raises a fundamental question about the nature of the current administrative law system . . . . If every delegation of rulemaking authority to EPA and every corresponding agency action is challenged in court, the very purposes and efficiency of delegation are thwarted.”).

58. Compare *Michigan v. U.S. Env’t. Prot. Agency*, 213 F.3d 663 (D.C. Cir. 2000) (where Michigan challenged the EPA rule as exceeding its authority to

However, when states have sought court protection, judicial intervention has, more often than not, increased uncertainty in the application of the good neighbor provision due to the D.C. Circuit's inconsistent interpretations of the statute's "significantly contribute" language.<sup>59</sup> Scholars have noted the difficulty in finding a suitable definition of "significantly contribute" in the realm of interstate pollution due to the complexity of transport pollution.<sup>60</sup> Indeed, over the past twelve years, the last three major interstate regulatory schemes have ended up in the D.C. Circuit, with the court failing to provide the EPA with a clear understanding as to what is permissible under the good neighbor provision.

## II. D.C. CIRCUIT CASE LAW: THE GOOD NEIGHBOR PROVISION

### A. Michigan v. EPA

In *Michigan v. EPA*, the court considered a Final EPA Rule, or "SIP Call," which directed twenty-two states, who the EPA deemed "significant contributors," to revise their state implementation plans to eliminate nitrogen oxide emissions by amounts that could be removed for \$2,000 or less per ton.<sup>61</sup> The State of Michigan contended that the rule exceeded the EPA's statutory authority under the Clean Air Act.<sup>62</sup> Michigan argued that the EPA's decision to set a uniform, cost-based reduction for all upwind states would force some states to reduce their emissions beyond what was required by the good neighbor provision.<sup>63</sup> Further, Michigan asserted that the EPA's new procedure of notifying upwind states of their good neighbor obligations before they were to submit their

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regulate the states under the good neighbor provision), *with* North Carolina v. Envtl. Prot. Agency, 531 F.3d 896 (D.C. Cir. 2008) (where North Carolina argued the EPA rule did not go far enough in ensuring that upwind states would adequately reduce their significant contributions as required by the good neighbor provision).

59. See Matthew D. Tait, Note, *A Remedy Even the Plaintiffs Don't Like. The D.C. Circuit's Vacatur of the Clean Air Interstate Rule*, 16 MO. ENVTL. L. & POL'Y REV. 552, 572 (arguing that the D.C. Circuit case law involving interstate pollution has "created a large amount of confusion, disarray, and many additional problems").

60. See Oren, *supra* note 11, at 204–07.

61. *Michigan v. EPA*, 213 F.3d at 669.

62. See *id.* at 663.

63. See *id.* at 679 (where petitioners argued that, under the uniform cost-based reduction, "even the small contributors must make reductions equivalent to those achievable by highly cost-effective measures").

state implementation plans interfered with the states' statutory right to choose how to meet these requirements.<sup>64</sup>

### *1. The Majority Opinion*

The court rejected Michigan's cost argument, holding that this assertion ignored congressional intent behind the amended 1990 good neighbor provision.<sup>65</sup> The panel reasoned that the legislature's shift added a greater amount of ambiguity to the statute,<sup>66</sup> suggesting that Congress did not purport to require that the EPA determine polluting states solely from their emission levels.<sup>67</sup> Moreover, the majority pointed out that the good neighbor provision contained no express exclusion of considerations of costs.<sup>68</sup> Thus, given the statute's silence on the issue, the court held that the EPA's use of costs was permissible under the good neighbor provision.<sup>69</sup>

The court also considered Michigan's assertion that the nitrogen oxide budget program infringed on the statutory right of the states to choose how they meet the federal requirements.<sup>70</sup> To substantiate their argument, the petitioners pointed to an earlier D.C. Circuit decision, *Virginia v. EPA*, where the court held that the EPA may not compel states to adopt a specific approach to achieve their obligations under the Clean Air Act.<sup>71</sup> The Michigan court rejected this argument and held that the budget program did not violate state autonomy because the rule was merely an EPA recommendation, not a requirement; therefore, the states were still free to decide how to meet these emission limits.<sup>72</sup>

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64. *Id.* at 686.

65. *Id.* at 674.

66. *See id.* The majority strongly emphasized Congress's replacement of the pre-1990 good neighbor provision's requirement that EPA may only regulate interstate emissions that "prevent attainment" with the 1990 language allowing EPA to regulate states that "contribute significantly" to another state's nonattainment. The panel reasoned that the shift towards to a more ambiguous standard aimed to afford the EPA greater leeway in defining and regulating states that contribute to interstate pollution.

67. *Id.* at 677.

68. *Id.* at 678–79.

69. *Id.* at 679.

70. *Id.* at 687–88.

71. *See Virginia v. Env'tl. Prot. Agency*, 108 F.3d 1397, 1409 (D.C. Cir. 1997) (The Act is not a "grant of authority to EPA to require states to insert in their plans control measures the EPA has selected").

72. *Michigan v. EPA*, 213 F.3d at 687–88.

## 2. Judge Sentelle's Dissent

In his dissent, Judge Sentelle took strong issue with the majority's willingness to accept the EPA's consideration of costs in determining a state's significant contribution.<sup>73</sup> He argued that, as indicated by the text of the good neighbor provision, Congress clearly intended that such significant contributions be determined based solely on state emissions that affected the pollution levels in other states.<sup>74</sup> In support of this argument, Judge Sentelle cited the circuit's decision in *Ethyl Corp. v. EPA*, where the court struck down an EPA rule, holding that where "[t]he plain language of the provision makes [it] clear that . . . decisions are to be based on one criterion," the EPA cannot base its decision on another criteria.<sup>75</sup>

### B. North Carolina v. EPA

In *North Carolina v. EPA*, petitioners challenged the EPA's Clean Air Interstate Rule and its method for quantifying state contributions.<sup>76</sup> In the rule, the EPA did not measure each upwind state's actual contributions, but instead assigned the states initial emission targets based on each particular state's costs of reduction. Further, the rule established a cap-and-trade system of interstate allowance trading which enabled all major power plants to freely trade emission allowances in order to comply with emission standards.<sup>77</sup>

North Carolina, as a downwind state, argued that the Clean Air Interstate Rule did not adequately ensure that the significant contributions to the pollution levels of downwind states would be eliminated.<sup>78</sup> Principally, North Carolina argued that the EPA's regional approach toward eliminating upwind pollution, by not requiring elimination on a state-by-state basis, did not go as far as the good neighbor provision required.<sup>79</sup>

The court unanimously struck down the rule for exceeding the EPA's authority under the good neighbor provision.<sup>80</sup> The court reasoned that, because the rule's cap-and-trade system allowed unlimited allowance trading between states, it failed to ensure that

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73. *Id.* at 695 (Sentelle, J., dissenting).

74. *Id.* at 696.

75. *Ethyl Corp. v. Env'tl. Prot. Agency*, 51 F.3d 1053, 1058 (D.C. Cir. 1995).

76. *North Carolina v. Env'tl. Prot. Agency*, 531 F.3d 896, 906 (D.C. Cir. 2008).

77. *Id.* at 903.

78. *Id.* at 906–07.

79. *Id.* at 906.

80. *Id.* at 921.

each state's respective significant contribution would be eliminated as statutorily required.<sup>81</sup> The court aptly pointed out that a state could evade its good neighbor obligation if the power plants within that state simply purchased enough emission credits.<sup>82</sup>

Further, the court stated that the Clean Air Interstate Rule's system of allocating emissions credits was based on impermissible cost considerations.<sup>83</sup> The program allocated fewer emission credits to states that could control emissions more cheaply.<sup>84</sup> As a result, states with gas-fired and oil-fired power sources, whose emissions were less costly to control, were shouldered with greater reduction obligations than those with coal-fired sources.<sup>85</sup> The court considered such a system impermissible when the statute required that each state individually eliminate its own contribution.<sup>86</sup>

The *North Carolina* decision raised serious doubts as to whether the EPA could maintain a cap-and-trade system under the good neighbor provision.<sup>87</sup> To be sure, the ruling certainly suggested that the EPA must restrict interstate allowance trading and place actual emission limits on state contributions for such a system to be lawful.<sup>88</sup> Moreover, the D.C. panel's rejection of the Clean Air Interstate Rule posed an extremely difficult challenge for the EPA in formulating a permissible interstate rule under the Clean Air Act. Specifically, the EPA was required to replace the Rule with interstate regulations that would not be considered overbearing towards the upwind states while simultaneously ensuring that the new regulations would adequately protect the downwind states as the good neighbor provision required.

### C. EME Homer City Generation L.P. v. EPA

In response to the *North Carolina* ruling, the EPA formulated the Transport Rule, its most recent effort to issue regulations in compliance with the good neighbor provision.<sup>89</sup> The EPA, through air quality monitoring, first determined the states that would be

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81. Elizabeth Kruse, Case Comment, *North Carolina v. Environmental Protection Agency*, 33 HARV. ENVTL. L. REV. 283, 287 (2009).

82. *North Carolina v. EPA*, 531 F.3d at 907.

83. *Id.* at 921.

84. *Id.* at 920.

85. *Id.*

86. *Id.* at 921.

87. Brian H. Potts, *The Dirty Climate Debate*, 120 YALE L.J. ONLINE 1, 5 (2010).

88. *Id.*

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

considered significant contributors.<sup>90</sup> Next, the EPA established a uniform, cost-based reduction scheme similar to the nitrogen oxide budget program in *Michigan*.<sup>91</sup> These cost-based thresholds were determined through computer modeling, which suggested the thresholds in which downwind states' air quality problems would be alleviated.<sup>92</sup>

The Transport Rule also limited the ability of power plants to trade allowances using three important measures.<sup>93</sup> First, the rule included strict penalties for power plants that exceeded their allowable pollution levels.<sup>94</sup> This induced utilities to hold on to their allowances in order to avoid penalties if they exceeded emission levels.<sup>95</sup> Next, the rule severely restricted the buying and selling of allowances between different states.<sup>96</sup> Lastly, the EPA prohibited utilities from using allowance credits from the Clean Air Interstate Rule to meet the early emission requirements of the Transport Rule.<sup>97</sup>

As the EPA stated in its published Transport Rule, the agency considered its approach to comply with both the *Michigan* and *North Carolina* interpretations of the good neighbor provision.<sup>98</sup> First, the EPA claimed it had "faithfully responded to the cited aspects of *North Carolina*" by refraining from setting emission budgets based on the states' pollution control costs and severely limiting the interstate trading of allowances.<sup>99</sup> Moreover, the Transport Rule's approach was consistent with the *Michigan* decision, as it used air-quality monitoring at the outset to determine

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90. *EME Homer City Generation, L.P. v. Env'tl. Prot. Agency*, 696 F.3d 7, 15–16 (2012), *cert. granted in part*, *Am. Lung Ass'n v. EME Homer City Generation, L.P.* 133 S. Ct. 2857 (2013).

91. *See id.* at 16–18. EPA imposed a \$500 cost per ton threshold on all upwind states. For sulfur dioxide, the EPA divided the upwind states into two groups, as computer modeling suggested one group contributing significantly more sulfur dioxide in transport. The EPA imposed a \$2,300 cost per ton threshold for the heavier polluting group and a \$500 cost per ton threshold for the lesser polluting group. *Id.*

92. *Id.* at 17.

93. Brian H. Potts, *The Practical, Legal and Equitable Problems with EPA's New Cross-State Air Pollution Rule*, 24 *ELECTRICITY J.* 8, 13 (2011).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 *Fed. Reg.* 48,208, 48, 211 (Aug. 8, 2011) (codified at 40 C.F.R. pts. 51, 52, 72, 78, 97).

99. Brief for Respondents at 24, *EME Homer Generation L.P. v. Env'tl. Prot. Agency*, 696 F.3d 7 (D.C. Cir. 2012) (No. 11-1302), 2012 WL 4754616, at \*24.

which states were significant contributors.<sup>100</sup> Furthermore, the EPA's use of uniform-cost reductions was consistent with the regulations approved in the *Michigan* decision.<sup>101</sup>

The EPA also deviated from its previous approaches by concurrently releasing states' significant contributions and the federal plan stipulating how the states were to reduce these contributions.<sup>102</sup> Unlike the rules at issue in *Michigan* and *North Carolina*, the Transport Rule ultimately never gave states the opportunity to choose how they would meet these emission requirements. Instead, these states became subject to the mandatory federal requirements in the Transport Rule following its promulgation.<sup>103</sup>

In defending this approach, the EPA pointed to the states' clear failure to submit adequate state implementation plans as required by the Clean Air Act.<sup>104</sup> The EPA emphasized that nothing in the Clean Air Act made these state plan submissions dependent on any prior action by the EPA.<sup>105</sup> The EPA also pointed to the Clean Air Act's mandate that the EPA promulgate an adequate federal implementation plan in the event the states fail to do so.<sup>106</sup> Lastly, the EPA pointed to the *North Carolina* panel's directive to the agency to quickly remedy the flaws in the Clean Air Interstate Rule.<sup>107</sup> Nevertheless, a number of power and coal companies, labor unions, trade associations, states, and local governments petitioned for judicial review following the Transport Rule's issuance.<sup>108</sup>

### 1. *The Majority Opinion*

The majority struck down the Transport Rule.<sup>109</sup> First, the court held that the Transport Rule exceeded EPA authority under the Clean Air Act according to the prior statutory interpretations in *Michigan* and *North Carolina*.<sup>110</sup> The court acknowledged that,

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100. *Id.* at 40.

101. *Id.*

102. *EME Homer City Generation L.P. v. Env'tl. Prot. Agency*, 696 F.3d 7, 18–19 (D.C. Cir. 2012), *cert. granted in part*, *Am. Lung Ass'n v. EME Homer City Generation, L.P.* 133 S. Ct. 2857 (2013).

103. *Id.*

104. Brief for Respondents, *supra* note 96, at 28–30.

105. *Id.* at 40.

106. 42 U.S.C. § 7410(c)(1) (2006).

107. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208, 48,211 (Aug. 8, 2011) (codified at 40 C.F.R. pts. 51, 52, 72, 78, 97).

108. *EME Homer*, 696 F.3d at 19.

109. *Id.* at 38.

110. *Id.* at 23.

while the *Michigan* court allowed the EPA to consider costs in determining significant contributions, the *North Carolina* decision qualified this ruling by holding that cost considerations could be used only to lower an upwind state's obligation.<sup>111</sup> The court reasoned that the Transport Rule, by imposing uniform cost requirements on all states no matter the actual amount of their significant contributions, could result in some states making reductions in excess of that required by the statute.<sup>112</sup>

Second, the majority argued that the EPA's simultaneous release of significant contributions and the federal implementation plan conflicted with the cooperative aim of the Clean Air Act.<sup>113</sup> In support, the court noted that the good neighbor provision was located in the section of the Clean Air Act relating to the states, which suggested Congress intended this to be a state responsibility.<sup>114</sup> Furthermore, the court cited the *Virginia* decision, where the court interpreted this section as a "federalism bar" that prevents the EPA from using the state implementation plan process to compel states to adopt specific control measures.<sup>115</sup> Since this EPA action essentially made it impossible for states to submit an adequate plan by which to meet these good neighbor requirements, the court held that it infringed upon the states' delegated role under the Act.<sup>116</sup>

Lastly, the panel held that the EPA's method of determining significant contributions violated the good neighbor provision's mandate that a state be required to only make reductions equal to its own "significant contribution."<sup>117</sup> The panel's "relativity requirement" meant that the EPA, in determining an upwind state's contribution to a downwind state's nonattainment, must factor in the relative contributions of other upwind states to that nonattainment, as well as the downwind state's own contribution to its nonattainment.<sup>118</sup> The court reasoned that the EPA's uniform cost determination method clearly failed to account for these other considerations.<sup>119</sup>

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111. *Id.* at 21.

112. *Id.* at 25.

113. *Id.* at 28.

114. *Id.* at 34.

115. *Id.* at 29.

116. *Id.* at 28.

117. *Id.*

118. *Id.* at 27.

119. *Id.*

## 2. Judge Rogers' Dissent

Judge Rogers penned a heated dissent in which she argued that the court lacked jurisdiction to hear the case because the petitioners raised an untimely challenge.<sup>120</sup> Furthermore, she stressed that, even if jurisdiction had been proper, the invalidation of the Transport Rule was based on a faulty construction of the Clean Air Act and prior case law.<sup>121</sup>

In her jurisdictional argument, Judge Rogers pointed to the clear judicial petition requirements of the Clean Air Act: petitioners wanting to challenge a final EPA determination must do so within sixty days of receiving such notice.<sup>122</sup> In Judge Rogers' view, the time to bring a challenge to the Transport Rule occurred when the EPA published its findings that the state implementation plans were inadequate in meeting good neighbor contributions.<sup>123</sup> She further emphasized that these published findings rejected state objections that the EPA was statutorily required to notify the states of their good neighbor obligations before releasing a mandatory federal implementation plan.<sup>124</sup> Since the sixty-day period had long since expired before the EPA implemented the Transport Rule, she argued that the petitioners had lost their chance for judicial review.<sup>125</sup> Judge Rogers warned that the majority opinion ignored the two important policy reasons behind these strict procedural rules.<sup>126</sup> First, these rules "enforce repose," so that agency rulemaking is not hindered by unexpected challenges.<sup>127</sup> Second, the statute aims to ensure an agency's assessment and subsequent corrections of the rule before the issue goes to court.<sup>128</sup>

Judge Rogers also disagreed with the majority rationale that the EPA was mandated to prospectively alert states of their significant contributions in light of the *Michigan* decision.<sup>129</sup> She emphasized that, in *Michigan*, the court only held that the EPA acted permissibly in choosing to alert the states of their significant contributions before state implementation plans were to be submitted for agency review.<sup>130</sup> Thus, she considered the majority to have erroneously

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120. *Id.* at 38 (Rogers, J., dissenting).

121. *Id.* at 40.

122. *Id.*

123. *Id.* at 39.

124. *Id.*

125. *Id.*

126. *Id.* at 38.

127. *Id.*

128. *Id.*

129. *Id.* at 48.

130. *Id.*

applied *Michigan* as its basis for holding that the EPA was now required to prospectively alert states of their significant contributions before reviewing state implementation plans.<sup>131</sup>

Judge Rogers further rejected the majority's statutory analysis that concluded that the Clean Air Act required the EPA to prospectively alert the states.<sup>132</sup> She argued that the majority, in effect, rewrote 42 U.S.C. Section 7410(c) by finding such a requirement when nothing in that provision expressly includes such an obligation.<sup>133</sup> Judge Rogers stressed that such an analysis conflicted with the established judicial interpretive principal regarding administrative statutes, in which the court is "not to correct the text so that it better serves the statute's purposes."<sup>134</sup> In her view, the majority application conflicted with the congressional aims behind the 1990 Clean Air Act amendments, which intended to strengthen EPA regulatory authority because the states themselves had consistently failed to curb interstate pollution.<sup>135</sup>

While Judge Rogers conceded that the EPA had previously allowed states the opportunity to submit state plans after releasing contribution amounts, she stressed that an agency may depart from previous rule interpretations if it presents "good reasons" for doing so.<sup>136</sup> She argued that there were such reasons to support the EPA's interpretive change in this instance.<sup>137</sup> Justice Rogers particularly focused on the fact that the court in *North Carolina* had remanded rather than struck down the Clean Air Interstate Rule and that it "emphasized EPA's obligation to remedy [the Rule's] flaws expeditiously."<sup>138</sup>

Because of the complex nature of interstate air pollution, there is a common link between these three most recent D.C. Circuit decisions over the matter: all three cases involved judicial examination of immensely detailed EPA regulations relating to a

131. *Id.*

132. *Id.* at 45–46.

133. *Id.* at 46.

134. *Id.* at 48 (citing *Virginia Dep't of Med. Assistance Servs. v. U.S. Dep't of Health & Human Servs.*, 678 F.3d 918, 926 (D.C. Cir. 2000) (internal quotation marks omitted)).

135. *Id.* at 60.

136. *Id.* at 50.

137. *See id.* (emphasizing that the EPA chose to issue the federal plan because "it had no authority to alter the statutory deadlines for SIP submissions and that the [Clean Air Act] did not require it to issue a rule quantifying States' good neighbor obligations.").

138. *Id.* at 50–51 (quoting *Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals*, 76 Fed. Reg. 48,208, 48,211 (Aug. 8, 2011) (codified at 40 C.F.R. pts. 51, 52, 72, 78, 97) (internal quotation marks omitted)).

multi-faceted environmental problem. For these reasons, a concrete legal standard as to what is permissible under the good neighbor provision has not emerged after over a decade of jurisprudence over the issue.

### III. THE INCONSISTENCY OF THE *EME HOMER* RULING

This Comment will now analyze the D.C. panel's arguably flawed interpretation and application of the good neighbor provision in the *EME Homer* ruling, will relate it to the prior *Michigan* and *North Carolina* decisions, and discuss how that decision creates a number of adverse effects for successful future regulations.

The majority opinion in *EME Homer* serves to bring further confusion to an already inconsistent body of case law regarding the good neighbor provision. Such a decision reiterates the idea that the D.C. Circuit has continually failed to ascertain, or even agree on, the true congressional intent behind this provision. This is evident from the fact that the *EME Homer* panel frequently referred to the *Michigan* ruling though a substantially similar rule was upheld in that case.<sup>139</sup> Moreover, the court in *EME Homer* cited extensively to *North Carolina* for support despite the fact that the Transport Rule differs significantly from the Clean Air Interstate Rule addressed in that previous case.<sup>140</sup> This uncertainty was further exacerbated by the majority's erroneous use of both decisions to substantiate its rejection of the Transport Rule.

#### A. Applying Michigan

The court often referenced *Michigan* in its rejection of the EPA's cost-based approach in the Transport Rule as a primary reason for disproving the EPA's simultaneous release of the federal implementation plan and the states' contributions.<sup>141</sup> It must be pointed out, however, that the *EME Homer* court failed to explain how the *Michigan* court's belief that the 1990 Clean Air Act Amendments expanded EPA regulatory authority over interstate pollution did not conflict with its current opinion, which severely restricted EPA authority over the same subject.<sup>142</sup>

First, the majority's use of *Michigan* to support the principle that the EPA may only consider costs to "further lower an individual

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139. *Id.* at 27-30.

140. *Id.* at 25-27.

141. *Id.* at 27-30.

142. *See id.* at 48 (Rogers, J., dissenting) (arguing that the majority holding was "entirely at odds with the holding in *Michigan*").

State's obligations,"<sup>143</sup> wholly ignores the *Michigan* court's substantive discussion on that issue. The *Michigan* court concluded that, only in the absence of legislative preclusion, the EPA could factor in cost considerations to determine significant contributions.<sup>144</sup> The *Michigan* ruling never suggested that such considerations might only be used to lower a state's good neighbor obligation as the majority concluded. Moreover, several petitioners in *Michigan* unsuccessfully argued that, since the program imposed a uniform cost reduction requirement on all upwind states, those states with minimal contributions would be forced to shoulder a greater reduction obligation.<sup>145</sup> The fact that the *Michigan* court actually considered and rejected the same argument clearly indicates the decision is antithetical to the majority's proposition.

Next, the majority asserted that the EPA is obligated under the Clean Air Act to prospectively inform states of their contributions before requiring submissions of state implementation plans for review.<sup>146</sup> It was reasoned that, since the *Michigan* court held that the EPA acted permissibly under the statute when it alerted the states before requiring submissions, the EPA was now required to take this approach in determining good neighbor obligations.<sup>147</sup> The majority decision held that what was deemed a permissible EPA action under *Michigan* was now a mandatory obligation of the EPA. However, this again underscores the court's flawed understanding and application of that decision.

### *B. Applying North Carolina*

The court often pointed to the *North Carolina* holding as a basis for rejecting the Transport Rule.<sup>148</sup> Principally, the majority relied on *North Carolina* to further support its point that the EPA could not

143. *Id.* at 21–22.

144. *Michigan v. U.S. Env'tl. Prot. Agency*, 213 F.3d 663, 679 (D.C. Cir. 2000).

145. *Id.*

146. *See EME Homer*, 696 F.3d at 28 (noting that, “[w]hen the EPA defines States’ good neighbor obligations [under the Clean Air Act], it must give the States the first opportunity to implement the new requirements”).

147. *Compare Michigan v. EPA*, 213 F.3d at 687 (“EPA *permissibly* relied on its general rule rulemaking authority to prospectively inform the states of EPA’s significance determinations), *with EME Homer*, 696 F.3d at 28 (“When EPA defines States’ good neighbor obligations, it *must* give the States the first opportunity to implement the new requirements”).

148. *EME Homer*, 696 F.3d at 23 (“The Transport Rule is flawed because the requirement that EPA impose on upwind States was not based on the ‘amounts’ from upwind States that ‘contribute significantly to nonattainment’ in downwind States, as required by the statute and our decision in *North Carolina*.”).

use costs in a way that would increase a state's obligation under the good neighbor provision.<sup>149</sup> Again, such an application misconstrues the actual holding in *North Carolina*.

The *North Carolina* court's invalidation of the Clean Air Interstate Rule centered around the issue that the EPA assigned emission reduction requirements based solely on how cheaply a state could make such reductions.<sup>150</sup> Under the rule, states with more oil- and gas-powered utilities (states that could reduce emissions more cheaply) were subject to larger reduction requirements than states with mainly coal-fired utilities whose reductions were more costly.<sup>151</sup> The court argued that the result of such an allocation method would be that "states with mainly oil- and gas-fired [utilities] will subsidize reductions in states with mainly coal-fired [utilities]."<sup>152</sup>

The majority in *EME Homer* applied the *North Carolina* holding to support its own conclusion that cost considerations could never be used to increase an upwind state's obligation; rather, cost considerations could be used only to reduce a state's obligation.<sup>153</sup> Such reasoning obviously misconstrues the *North Carolina* decision and the Clean Air Interstate Rule it addressed. The *North Carolina* court simply made the sensible point that, as a result of cost considerations, the rule as it stood would unfairly shift the reduction burden to the detriment of certain states.<sup>154</sup>

The burden-shifting element of the Clean Air Interstate Rule was notably absent from the Transport Rule, which imposed nearly uniform cost reductions on all upwind states.<sup>155</sup> However, the majority in *EME Homer* still reasoned that the *North Carolina* decision was entirely relevant to reject the Transport Rule.<sup>156</sup> Moreover, the majority undermined its own application of *North Carolina* when remarking that the *Michigan* decision, in upholding the nitrogen oxide budget rule with similar uniform cost requirements, stood for the legitimate proposition that the EPA may use costs "in a way that benefits some [] States more than others."<sup>157</sup>

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149. *Id.* at 21.

150. *North Carolina v. Env'tl. Prot. Agency*, 531 F.3d 896, 919–20 (D.C. Cir. 2008).

151. *Id.* at 919–20.

152. *Id.* at 921.

153. *EME Homer*, 696 F.3d at 21.

154. *North Carolina v. EPA*, 531 F.3d at 921.

155. *EME Homer*, 696 F.3d at 16.

156. *Id.* at 23.

157. *Id.* at 21–22 (citing *Michigan v. EPA*, 213 F.3d 663, 679 (D.C. Cir. 2000)).

However the *EME Homer* court failed to explain why this *Michigan* principle was not also furthered in the very similar Transport Rule.

### *C. Potential Effects in the Aftermath of EME Homer*

While the challengers of the Transport Rule likely viewed the *EME Homer* decision as an important victory against overly intrusive federal regulation, the ruling poses serious concerns regarding the future success of interstate pollution regulation. First, the decision forces the EPA to begin from scratch in devising a new transport pollution plan, which will likely take several years to develop and implement.<sup>158</sup> Such an extensive delay will likely have significant economic effects as electric utilities will likely be discouraged from investing in emissions reductions due to the uncertainty of future regulation. Moreover, by invalidating the Transport Rule, the *EME Homer* decision created clear winners and losers between the states, with Louisiana potentially being among the biggest losers.<sup>159</sup> Such a plethora of serious problems evidences a clear need for substantial changes in interstate pollution regulation.

#### *1. Effects on EPA Transport Pollution Regulations*

The EPA is now charged with formulating a new transport pollution rule that fits under the Clean Air Act's statutory framework as interpreted by the *EME Homer* panel. Specifically, this means complying with the following three principal directives emphasized by the court. First, the EPA must determine states' good neighbor initial emission requirements based on the states' total significant contributions to non-attainment in other states.<sup>160</sup> Next, under the *EME Homer* majority's proportionality requirement,<sup>161</sup> an upwind state's contribution must be adjusted in light of the other states' share of contributions, as well as a downwind state's relative contributions to its own non-attainment.<sup>162</sup> Lastly, the EPA must abandon its federal implementation plan approach by giving the states a chance to implement the reduction requirements.<sup>163</sup> The

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158. See Brian H. Potts, *The Court Kills EPA's Cross State Air Pollution Rule-But What States Really Won?*, 25 *ELECTRICITY J.* 36, 40 (2012) ("Unless Congress intervenes with new legislation or an EPA appeal is successful, the replacement rule will . . . probably not require actual compliance until sometime between 2016 and 2018.").

159. *Id.* at 42.

160. *Id.* at 41.

161. *EME Homer*, 696 F.3d at 26–27.

162. Potts, *supra* note 158, at 41.

163. *Id.* at 40.

*EME Homer* panel's questionable rejection of the Transport Rule clearly begs the question of whether it is even possible for the EPA to implement a rule that would survive judicial review.

An issue of particular concern in future successful regulation is the panel's proportionality directive. Specifically, the EPA, from its own analyses of alternative transport control methods, has questioned whether such a requirement is even feasible.<sup>164</sup> In her dissent, Judge Rogers made the very logical point that the requirement that the EPA engage in such detailed air quality analysis conflicted with the majority's larger holding that the EPA avoid collective "over-control" within the states.<sup>165</sup> Lastly, such a requirement further burdens the EPA's already difficult task of regulating an immensely complex problem.

Further, absent the slim chance of new federal legislation or a successful EPA appeal, the panel's mandate that the EPA give states the initial opportunity to submit state implementation plans pushes back the timeline for new transport regulation.<sup>166</sup> It is likely that the EPA will give the states at least two or three years to submit plans for approval after it finalizes a new rule.<sup>167</sup> As a result, states will likely not need to be in compliance with the new regulations until sometime between 2016 and 2018.<sup>168</sup>

## 2. *Effects on Pollution Control Investments*

The *EME Homer* decision will also likely discourage utility company investments in emission controls for the foreseeable future. This is largely because the decision creates uncertainty as to the character and direction of transport pollution regulation.<sup>169</sup> It is impossible to determine what risk such expenditures entail in the face of unknown regulations, so companies will refrain from making capital investments in power plant environmental controls.

In contrast to the common belief that power companies lose money when having to invest in pollution controls, many utilities often profit by making prudent capital pollution control

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164. Petition for Rehearing En Banc, *EME Homer City Generation L.P. v. Env'tl. Prot. Agency*, 696 F.3d 7 (D.C. Cir. 2012) (No. 11-1302), 2012 WL 4748805, at \*14.

165. *EME Homer*, 696 F.3d at 40 (Rogers, J., dissenting).

166. Potts, *supra* note 158, at 40.

167. *Id.*

168. *Id.*

169. See Potts, *supra* note 87, at 2 ("Without knowing the specifics of climate change regulation and how it will affect their plants' economic lives, it is difficult, if not impossible, for utilities and state commissions to decide whether and when . . . pollution controls should be installed").

investments.<sup>170</sup> However, in order for these companies to determine whether this spending is worthwhile, detailed analyses must be conducted in order to predict the costs and expected benefits of employing new emissions controls.<sup>171</sup> The most important factors in making such determinations include fuel prices, cost per ton amounts, and pollutant allowance prices.<sup>172</sup> Because changes in environmental regulation could drastically affect these factors, companies must know the extent of EPA rules governing power plants to determine whether such investments are economically prudent.<sup>173</sup> Thus, the regulatory unpredictability in the wake of *EME Homer* will deter the installation of pollution controls by the utility companies.

### 3. *Effects on Louisiana*

The *EME Homer* panel's directive that the EPA, in determining a state's significant contribution, must account for the relative contributions of the other states, creates clear winners and losers in the wake of the decision.<sup>174</sup> More importantly, the decision suggests the likelihood of drastically increased pollution regulation in a few of the biggest losing states,<sup>175</sup> including Louisiana.

Specifically, these states share three characteristics indicating that they will be subject to the heaviest regulations under the *EME Homer* panel's "relativity" requirement. First, these states contribute substantially to pollution levels in other states.<sup>176</sup> Second, these states are also recipients of transport pollution from other states.<sup>177</sup> Lastly, these states have a substantial part in their own failures to meet national air quality levels because of their high in-state emissions.<sup>178</sup>

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170. *See id.* at 5. State utility commissioners set rates based largely on the operating costs and capital costs of utilities. Operating costs include such expenses as employee salaries, fuel costs and taxes and are generally passed on to the consumers. Capital costs are the capital utilities invest in their plants, including pollution control investments. For these costs, utilities are allowed to include a return on the non-depreciated value of their capital assets. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Potts, *supra* note 158, at 41.

175. *See id.* at 42 (noting that "Ohio, West Virginia, Indiana, Illinois, Alabama, and Louisiana are the biggest losers as between the states under the [*EME Homer*] decision").

176. *Id.*

177. *Id.*

178. *Id.*

Louisiana, as the nation's largest ozone contributor to other states nonattainment,<sup>179</sup> along with playing a large part in the states' failure in meeting its own ozone level,<sup>180</sup> may possibly be the biggest loser from the *EME Homer* decision. Consequently, the state can expect that, if the EPA indeed promulgates a rule in compliance with the court's holding, far greater reduction requirements in future regulations will follow. The prospect of harsher restrictions upon Louisiana's pollution sources would likely have significant effects upon both the state and the country as a whole. Increased emissions reductions would jeopardize the viability of the Louisiana economy due to the energy intensive industries upon which the state depends.<sup>181</sup> Because of Louisiana's national importance as a leading producer of both petrochemicals<sup>182</sup> and petroleum,<sup>183</sup> increased regulations would also have widespread impacts around the country.

Indeed, the *EME Homer* ruling (and the rationale supporting it) harms both the regulators and the regulated with regards to interstate pollution. The court's muddled application of statutory and case law casts an uncertain cloud on future regulation, to the detriment of all interested parties.

#### IV. THE CONGRESSIONAL AIM BEHIND THE GOOD NEIGHBOR PROVISION

The Congressional Reports regarding the 1990 Clean Air Act Amendments provide a meaningful glimpse into the legislators' respective intentions of the revisions involving interstate air pollution. Senator Joseph Lieberman of Connecticut, a downwind state, argued that the expansion of the EPA's regulatory authority over interstate pollution was necessary to incentivize the states into reducing pollution that affected other states.<sup>184</sup> In opposing the revisions, Senator Rockefeller of West Virginia, an upwind state, emphasized that the proposed changes placed too great a burden on

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179. *See id.* (noting that Louisiana, which contributes 8.0 (ppb) in transport pollution, is the highest upwind contributor of ozone to the levels in downwind states).

180. *See id.* at 43 (noting that Louisiana contributes the largest amount to its own failure to meet air quality levels for ozone, emitting 39.7 (ppb) to its own non-attainment).

181. *See supra* notes 20-22.

182. *See supra* note 20.

183. *See supra* note 21.

184. *See* 136 Cong. Rec. S16895-01 (remarking that the Amendments "put[] some responsibility on the States to be good neighbors. . . . This provision guarantees that if the States sending pollution into Connecticut are not doing their jobs in controlling pollution, Connecticut will be assured that the Federal Government will step in and do the job." (quoting Senator Lieberman)).

the polluting states requiring that they “pay more than [their] fair share.”<sup>185</sup>

The Amendments passed, indicating that, by 1990, Congress understood that interstate air pollution was a serious problem requiring a substantial policy change. The good neighbor provision’s amended language reflected this view.<sup>186</sup> By adopting the more ambiguous “contribute significantly” language and expanding the provision’s application to a greater amount of emissions activities, Congress intended a greater federal regulatory role.<sup>187</sup>

*A. The D.C. Circuit Failed to Defer to the Environmental Protection Agency’s Delegated Authority*

With the 1990 Amendments, Congress aimed to approach interstate air pollution as a nationwide problem. The *EME Homer* court, by strongly reiterating the states’ role within the Clean Air Act,<sup>188</sup> appeared to blatantly ignore this specific legislative intent. The court’s decision to disregard Congress’ focus on a nationwide solution was further accompanied by the court’s willingness to ignore established principles of judicial restraint within administrative law.<sup>189</sup>

The Supreme Court ruling in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, served as a natural reaction to the general character of judicial review in the area of administrative law during the 1970s and 1980s.<sup>190</sup> During that period, the lower federal

185. *Id.*

186. See Wilcox, *supra* note 49, at 30 (“The changes Congress enacted in the 1990 CAA indicate that it was aware of the significant problem caused by ozone transport.”).

187. Compare 42 U.S.C. 7410(a)(2)(E) (1977) (“prohibiting [emissions from] any stationary source within the state . . . which will . . . prevent attainment or maintenance by any other State”) (emphasis added), with 42 U.S.C. 7410(a)(2)(D)(i)(I) (1990) (“prohibiting, consistent with the provisions of this [subchapter], any source or other type of emissions activity within the State . . . which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State”) (emphasis added).

188. *EME Homer*, 696 F.3d at 28.

189. See *Virginia Dep’t of Med. Assistance Servs. v. U.S. Dept. of Health & Human Servs.*, 678 F.3d 918, 926 (“Our role is not to correct the text so that it better serves the statute’s purposes; nor under *Chevron* may we avoid the Congressional intent clearly expressed in the text simply by asserting that [our] preferred preference would be better policy.” (quoting *Engine Mfrs. Ass’n v. U.S. Evt. Prot. Agency*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)) (internal quotation marks omitted).

190. Ronald J. Krotoszynski, Jr., *Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 739 (2002) (“In 1984,

courts, particularly the D.C. Circuit, often struggled in clearly defining the scope of review regarding administrative regulations.<sup>191</sup> In *Chevron*, the Court aimed to reign in the lower courts from exercising overly intrusive judicial review over regulations that either complied with, or did not conflict with, congressional intent behind administrative statutes.<sup>192</sup>

The Court thus formulated a two-step approach designed to increase judicial deference toward agency rulemaking authority.<sup>193</sup> First, the court is to determine whether “Congress has directly spoken to the precise question at issue.”<sup>194</sup> If so, then the reviewing court must enforce that clear legislative intent.<sup>195</sup> However, in the event that the intent is not clear from the statute, the reviewing court must uphold the agency’s interpretation if it is “reasonable.”<sup>196</sup> Moreover, even if the court does not consider the agency interpretation to be the best policy in addressing the specific issue, the court still must uphold a reasonable agency rule.<sup>197</sup> The Court reasoned that the “wisdom of such policy choices” is not judicial, but political questions, and should be resolved in the political branches.<sup>198</sup>

By holding the Transport Rule impermissible under the Clean Air Act and instructing the EPA to formulate a rule according to its own interpretation of the good neighbor provision, the *EME Homer* panel blatantly ignored the *Chevron* principle. The legislative history of the 1990 Clean Air Act unquestionably shows that Congress, in recognizing the severity and complexity of the interstate pollution problem, intended to accord the EPA greater authority in its regulation.

The *EME Homer* panel’s rejection of the Transport Rule replaces the EPA’s policy choices with the court’s own. Further, the unelected panel’s infringement on the EPA’s policy-making role is

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the Supreme Court restated the general rule that agencies, and not courts, enjoy responsibility for interpreting ambiguous statutes.”).

191. Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1216 (1992) (“The Circuit struggled throughout the 1970’s and 80’s to discharge its administrative review functions capably.”).

192. *See id.* at 1218 (“In three landmark cases the Court has reversed the Circuit for engaging in unduly intrusive review. In *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, the Court instructed reviewing courts to defer strongly to an agency’s interpretation of its statute.”).

193. *Id.* at 842.

194. *Id.*

195. *Id.* at 842–43.

196. *Id.* at 843.

197. *Id.* at 865–66.

198. *Id.* at 866.

only worsened by the fact that the court's own preferences, particularly the panel's "relativity requirement," appear unsupported by Congress.

The *EME Homer* panel's requirement that the EPA, in determining a specific state's significant contribution must take into account the relative emissions from all other upwind and downwind states, failed to consider the impact of the 1990 good neighbor provision. As the *Michigan* court alluded, by adopting the "contribute significantly" standard, Congress moved away from the causation-based approach in order to expand state and EPA authority to regulate in this area.<sup>199</sup> The D.C. Circuit's failure to understand the complexity involved in the interstate pollution problem is evident considering that the EPA argued that such an approach is likely impossible. Moreover, this relativity requirement, if allowed to stand, leaves the EPA far more vulnerable to future challenges, as the agency will be burdened with expressly showing how it determined each precise significant contribution level through environmental data.

#### *B. The EME Homer Panel's Ruling Incentivizes States to Challenge Future Regulation*

The *EME Homer* court's emphasis on the cooperative nature of the Clean Air Act suggests that future interstate pollution regulation will be consistently hampered by judicial challenges. Indeed, Congress envisioned a cooperative relationship between the states and the federal government, acknowledging that both were needed to reduce air pollution.<sup>200</sup> However, it is also true that Congress recognized that some air pollution problems, because of their national scope, are often better solved through increased federal involvement.<sup>201</sup> The particular nature of transport pollution clearly places it in this latter category.

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199. See Wilcox, *supra* note 51, at 32 (arguing that, under the 1977 provision, "EPA arguably could not halt emissions of a pollutant in one state unless it was the sole cause of nonattainment in another." However, the 1990 provision indicates "that EPA may halt emissions that are simply a contributing factor in another state's nonattainment.").

200. See Dwyer, *supra* note 8 at 1191-92 ("The legislators who championed the 1970 amendments contemplated that the federal regulatory role would increase substantially at the expense of the states, but they also ensured that the states would have a substantial role in implementing and enforcing the federal program.").

201. An example is the acid rain trading program included in the 1990 Clean Air Act Amendments. That program established a nationwide flexible cap-and-trade program for sulfur dioxide allowances resulting in drastic reductions in nationwide emissions levels. *Cap and Trade: Acid Rain Program Results*, U.S.

Interstate pollution is not only a national problem, but because of the various effects it poses to different states and regions, legislative measures addressing the problem are highly controversial. Since states have different incentives in regulating interstate pollution,<sup>202</sup> compromise is often difficult or impossible. It logically follows that a cooperative-based approach will be inefficient to solve such a problem. Congress recognized this issue and opted to shift greater authority towards the federal government in order to better solve trans-boundary pollution.

The *EME Homer* court's reliance on the state's role within the good neighbor provision ignores the clear legislative intent in the 1990 good neighbor provision. The panel continually emphasized that the EPA acted impermissibly in simultaneously releasing the significant contribution amounts and the federal implementation plan.<sup>203</sup> However, as the EPA remarked, the federal implementation plan was largely in response to the complete failure of the upwind states in making adequate reductions.<sup>204</sup> This clear unwillingness on the part of the states was precisely what Congress aimed to remedy through the 1990 Amendments.<sup>205</sup> In reinforcing the states' role within the Clean Air Act, the panel's decision provides the states with substantial leverage in future judicial disputes over the good neighbor provision. In this light, the decision ignites a major problem involved in interstate pollution, which Congress clearly aimed to remedy.

### *C. Salvaging Interstate Pollution Regulation and Congressional Intent*

Absent legislative clarification or a reversal of the *EME Homer* panel, the EPA must now formulate a new transport rule pursuant to the strict direction of the D.C. Circuit. It appears that the EPA's best chance of formulating a rule within the court's relativity requirement

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ENVTL. PROT. AGENCY (last visited October 9, 2013), <http://www.epa.gov/capandtrade/documents/ctresults.pdf>.

202. See Caplan, *supra* note 9, at 195.

203. *EME Homer City Generation, L.P. v. Env'tl. Prot. Agency*, 696 F.3d 7, 28–32 (D.C. Cir. 2012), *cert. granted in part*, *Am. Lung Ass'n v. EME Homer City Generation, L.P.* 133 S. Ct. 2857 (2013).

204. See *id.* at 31 (“EPA here made ‘a finding of failure to submit and/or disapproved a SIP submission’ for each State with respect to each NAAQS for which that State would be covered. . . . On the basis of those findings, EPA asserted authority to issue the Transport Rule FIPs.”).

205. *Id.* at 60 (Rogers, J., dissenting).

would incorporate a “command and control” method of regulation.<sup>206</sup> Under such an approach, the EPA would carefully detail the exact emissions reductions of each upwind state, and then mandate those states meet those emissions caps. However, such regulation programs are routinely criticized by economists because of their high administrative costs and for being far less efficient than incentive-based programs such as emissions trading.<sup>207</sup>

The EPA may also be able to implement a permissible transport scheme involving intrastate emissions credit trading programs. Under these programs, pollution sources could undertake projects that reduce emissions and then obtain EPA approval to sell those emissions to other sources within the same state that cannot meet emission standards. This would allow certain states a limited amount of flexibility in meeting the state-focused reduction budgets mandated in *EME Homer*. However, such a trading program would only work in those states with diversified pollution sources where those who can reduce emissions more cheaply are encouraged to invest in pollution control and sell surplus emissions to other sources. Moreover, these sorts of programs contain several drawbacks not shared in traditional cap-and-trade systems.<sup>208</sup>

Lastly, the EPA could possibly incorporate a modified cap-and-trade scheme into the next Transport Rule. For such a system to comply with *EME Homer*, trading would have to be strictly limited between states. The trading system could allow upwind states to only purchase excess allowances from the downwind states they pollute. Thus, in the event an upwind state pollution source exceeded its allowable emissions and needed to purchase allowances to cover this excess, forcing the source to purchase from a downwind source would offset this increased contribution. However, such a trading program is likely unfeasible, as it would add greater complexity to the EPA’s already immensely difficult task after *EME Homer*.

The limited amount of expensive and inefficient regulatory schemes from which the EPA must choose after *EME Homer* further suggests that the decision conflicts with both legislative intent and

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206. Potts, *supra* note 158, at 43.

207. Byron Swift, *U.S. Emissions Trading: Myths, Realities and Opportunities*, 20 NAT. RESOURCES & ENV’T 3, 8–9 (2005).

208. *See id.* at 8–9. The author points to three problems with credit trading programs. First, it is not certain whether the emissions source would have made the reduction anyway; thus, in the event the credit is given, emissions levels are increased, undermining the environmental legitimacy of the program. Second, measurement protocols are often not standard, so the regulators generally end up having to accept the trader’s proposed methodology. Lastly, transaction costs of trading are usually high which discourages the amount of trading between sources.

common sense. It would be absurd to assume that Congress, in addressing interstate pollution, intended to burden the EPA with unnecessary hurdles. Rather, Congress saw interstate pollution for what it was: a nation-wide problem, demanding a collective approach. What also must be acknowledged, and something Congress very likely understood, is that many heavy polluting industries are of vital national importance. Thus, by allowing the EPA to address interstate pollution through nationally- or regionally-based trading programs, certain polluters would be encouraged to make emissions reductions that benefit industry while also effectively addressing the pollution problem. The *EME Homer* panel apparently did not agree.

#### CONCLUSION

Time and again, judicial review in the administrative realm is described as inconsistent and uncertain. The Court, in *Chevron*, aimed to remedy this inconsistency by creating a presumption of judicial deference towards agency action. Alas, courts have reverted back to replacing an agency's policy choices with its own in the review of administrative actions despite the twenty-five-year-old decision of *Chevron*. Such behavior characterized the *EME Homer* panel's decision to put its own spin on the good neighbor provision's "significantly contribute" language. Thus, the EPA is sent back to the drawing board in attempt to formulate a rule consistent with the court's, not the legislature's, definition of that language. So now who is deferring to whom?

Alexander Bickel, in his critique of judicial activism tells us that "[t]he root difficulty is that judicial review is a counter-majoritarian force in our system."<sup>209</sup> Nowhere is the principal of judicial restraint more important than in the administrative law context. Congress accords substantial powers to the EPA because the agency is faced with addressing nationwide environmental issues. As such, the EPA is charged with formulating policies that protect the environmental health of the country without crippling the energy-intensive industries that are vital to a healthy economy. It is both a difficult and delicate task, which is certainly not aided by overly intrusive judicial review.

*Spencer King\**

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209. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1962).

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