EME Homer City Generation, L.P. v. EPA: The D.C. Circuit Strikes Down Another EPA Attempt To Make Good Neighbors Through Interstate Air Pollution Regulation

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I. OVERVIEW

When air pollutants cross state lines, the Clean Air Act's (CAA) "good neighbor provision" limits the impact that emissions from an upwind State may have on its downwind neighbors.[1] The U.S. Environmental Protection Agency (EPA) promulgated the Cross-State Air Pollution Rule, commonly known as the "Transport Rule," as well as associated federal implementation plans (FIPs), to address the "complex regulatory challenge" that arises when one state's power plant emissions become another state's health hazards and hazy skies.[2] The Transport Rule requires reductions in emissions of nitrogen oxides (NO_X) and sulfur dioxide (SO_2) by power plants in upwind states based on a two-tier analysis:[3] first, the EPA determines which states must reduce emissions by setting a "numerical air quality threshold"[4]; and second, a cost-of-reduction standard determines the amounts of reductions for which each qualifying state is responsible.[5] The associated FIPs establish the manner in which emissions allowances are to be allocated among the various power plants within each state in order to achieve the state's overall reduction requirements.[6]

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1. EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 13 (D.C. Cir. 2012).
2. *Id.* at 11-12.
3. *Id.* at 11.
4. *Id.* at 15-16 (citing Transport Rule, 76 Fed. Reg. 48,208, 48,236 (Aug. 8, 2011)). Under the Transport Rule, the EPA sets the numerical air quality threshold at one percent of the established national ambient air quality standards (NAAQS) for a given pollutant. *Id.* at 15 (citing Transport Rule, 76 Fed. Reg. at 48,236). Where air pollution "sent from the upwind State into the downwind State's air" exceeded one percent of the allowable amount of pollutants under the NAAQS, the upwind state was deemed a "significant contributor" to the downwind state's failure to meet the standard. *Id.* at 15-16 (citing Transport Rule, 76 Fed. Reg. at 48,236).
5. *Id.* at 16-17.
6. *Id.* at 18.

Multiple state and local governments, coal and power companies, and labor organizations petitioned for review of the Transport Rule.[7] The United States Court of Appeals for the District of Columbia Circuit *held*, first, that the Transport Rule exceeded the EPA's statutory authority under the good neighbor provision of the CAA in three ways: it permitted an individual state's emissions reduction requirements to exceed the amount of its own significant contribution to a downwind states' nonattainment of national ambient air quality standards (NAAQS), permitted the collective reduction requirements of all significantly contributing states to exceed the amount necessary for attainment in a downwind state, and allocated reduction requirements disproportionally among all contributing polluters; second, that the EPA exceeded its authority by issuing FIPs before the states had guidance with which to issue state implementation plans (SIPs) pertaining to their responsibilities under the good neighbor provision. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 11-12, 26-27 (D.C. Cir. 2012).

II. BACKGROUND

The CAA[8] is the regulatory scheme devised by Congress to address the health hazards and other problems presented by air pollution.[9] The EPA is the regulatory agency that Congress charged with administration of the CAA.[10] One of the EPA's principal regulatory mechanisms provided for in the CAA is the authority to determine permissible levels of common air pollutants and establish NAAQS in accordance with those levels.[11] In response to any new or revised NAAQS released by the EPA, a state must submit a SIP that sets forth its manner of compliance.[12]

In its administrative role, the EPA enjoys discretion to make determinations under the terms of the CAA.[13] Its authority, however, is not unlimited: it is well settled that, per the terms of the CAA, "[s]tates have the primary responsibility to attain and maintain NAAQS within their borders."[14] The CAA specifies that states have "the primary

7. *Id.* at 11, 19.

8. 42 U.S.C. §§ 7401-7671 (2006).

9. *See* Clean Air Act § 101, 42 U.S.C. § 7401; *see also* Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 63-68 (1975) (describing the history of the CAA).

10. *See* 42 U.S.C. §§ 7601(a), 7602(a); *Train*, 421 U.S. at 87.

11. *See* 42 U.S.C. § 7409; *Train*, 421 U.S. at 65-67, 79.

12. *See* 42 U.S.C. § 7410(a)(1); Michigan v. U.S. EPA, 213 F.3d 663, 669 (D.C. Cir. 2000) (per curiam) (citing 42 U.S.C. § 7410(a)(1) (1994)).

13. *See* 42 U.S.C. § 7601(a)(1) (2006); Appalachian Power Co. v. EPA, 249 F.3d 1032, 1051-52 (D.C. Cir. 2001) ("Agency determinations based upon highly complex and technical matters are entitled to great deference." (internal quotations marks omitted)).

14. *Michigan*, 213 F.3d at 671 (citing Clean Air Act § 107(a), 42 U.S.C. § 7407(a)).

responsibility for assuring air quality" within their respective borders and gives them the opportunity to "submit[] a[] [SIP] which will specify the manner in which [NAAQS] will be achieved."[15] The United States Supreme Court has held that the CAA gives the EPA "no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of [the CAA]."[16] This limitation on the authority afforded the EPA comes to light particularly in cases involving SIPs and interstate pollution.[17]

The CAA addresses SIP requirements pertaining to interstate pollution in the section commonly referred to as the "good neighbor provision."[18] Under this provision, a state's SIP must include "adequate provisions" to prohibit emissions originating within the state in "amounts which will . . . contribute significantly" to downwind states' "nonattainment" of NAAQS.[19] There has been a significant amount of litigation concerning the EPA's interpretation of this provision.[20] Generally, under any provision of the CAA that is open to interpretation, the EPA has discretion to promulgate regulations according to its own understanding of the text, provided that the terms of the regulation remain within the meaning of the statute.[21] Despite this discretionary authority, a court may review and will set aside such an EPA regulation where it is, inter alia, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations."[22]

For example, in *Michigan v. U.S. EPA*, the D.C. Circuit held that the EPA acted within its statutory authority in its interpretation of the good neighbor provision where it based its determinations of "significant" contributions to downwind nonattainment on both quantity of emissions

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15. 42 U.S.C. § 7407(a).

16. *Train*, 421 U.S. at 79.

17. *See, e.g.*, *id.*; North Carolina v. EPA, 531 F.3d 896 (D.C. Cir.) (per curiam), *modified*, 550 F.3d 1176 (D.C. Cir. 2008).

18. 42 U.S.C. § 7410(a)(2)(D); *see Michigan*, 213 F.3d at 669 (quoting 42 U.S.C. § 7410(a)(2)(D)(i)).

19. 42 U.S.C. § 7410(a)(2)(D)(i).

20. *See, e.g.*, *North Carolina*, 531 F.3d at 903 (a consolidation of thirty-two cases) (noting that many of the cases raise the issue of how to define "contribute significantly"); *Michigan*, 213 F.3d at 674-81 (a consolidation of twenty-eight cases) (discussing the meaning of "contribute significantly").

21. *See North Carolina*, 531 F.3d at 906 ("Where the statute speaks to the direct question at issue, we afford no deference to the agency's interpretation of it and 'must give effect to the unambiguously expressed intent of Congress.'" (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984))).

22. 5 U.S.C. §§ 706(2)(A), 706(2)(C) (2006).

and cost of emissions reductions.[23] The petitioners in *Michigan* challenged an EPA call for revised SIPs from twenty-two states, arguing that the cost-of-reduction criterion was unlawful because the CAA mentions air quality as a factor but does not mention cost.[24] The EPA considered air quality to determine which states qualified as significant contributors based on the "magnitude, frequency, and relative amount of each state's ozone contribution to a nonattainment area"; this preliminary stage thus drew the "dividing line" between the states that would be subject to the SIP call and those that would not.[25] The EPA then determined the amount of reductions required of each state by setting a "ceiling" for cost-per-ton of emissions reductions, above which an upwind state's contribution to downwind nonattainment would be deemed insignificant.[26] The court reasoned that because the good neighbor provision provided no "criterion for classifying 'emissions activity' as 'significant,'" the EPA was entitled to deference in its interpretation of the statute.[27]

The D.C. Circuit again reviewed the EPA's interpretation of the good neighbor provision in *North Carolina v. EPA*.[28] The regulation at issue was the Clean Air Interstate Rule (CAIR), promulgated "to reduce or eliminate the impact of upwind sources on out-of-state downwind nonattainment" by requiring SIPs in twenty-eight upwind states and the District of Columbia to include plans for reduction of SO_2 and NO_X.[29] CAIR also established a FIP requiring adherence where a state lacked an approved SIP.[30] Like the regulation in *Michigan*, CAIR relied on a two-tier analysis to interpret the part of the good neighbor provision that requires SIPs to prohibit interstate emissions from "contribut[ing] significantly" to a downwind state's nonattainment of pollution standards.[31] Under CAIR's analysis, the EPA first identified those states that contribute significantly to downwind nonattainment based on a threshold numerical quantity of interstate emissions; second, it determined the amount of emissions reductions that would be required of those upwind states based on a series of factors, including cost and

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23. 213 F.3d at 677-79.
24. *Id.* at 669, 675-77.
25. *Id.* at 675.
26. *Id.* at 669, 675, 677.
27. *Id.* at 674, 679.
28. 531 F.3d 896, 901-03 (D.C. Cir.) (per curiam), *modified*, 550 F.3d 1176 (D.C. Cir. 2008).
29. *See id.* at 903.
30. *Id.*
31. *Id.*

"fairness[] and equity in the balance between regional and local controls."[32] Unlike in *Michigan*, however, the EPA assessed the cost-effectiveness of CAIR's emissions reductions on a region-wide, rather than a state-specific basis.[33] The court found that CAIR exceeded the bounds of the CAA's good neighbor provision because the EPA's region-wide approach failed to provide measurable results, which were necessary to ensure that sources within one specific state did not "contribute significantly" to a downwind state's nonattainment of the EPA's established air quality standards.[34] The *North Carolina* court subsequently remanded the case and CAIR for formulation of a new rule in accordance with its decision, leaving CAIR in place until the promulgation of such a rule.[35]

III. THE COURT'S DECISION

In the noted case, the D.C. Circuit vacated the EPA's replacement for CAIR, the Cross-State Air Pollution Rule, commonly known as the Transport Rule.[36] The court focused on the good neighbor provision's requirement that SIPs contain provisions prohibiting emissions in "amounts which will . . . contribute significantly" to a downwind state's failure to meet air quality standards.[37] From this language, the court identified three statutory "requirements" that limit the EPA's authority to enforce the good neighbor provision and with which the Transport Rule failed to comply.[38] The court rejected the EPA's argument that its findings of inadequacy or failure to submit SIPs warranted simultaneous release of FIPs associated with the Transport Rule.[39] The court emphasized the CAA's explicit reservation of "the first-implementer role for the States" in holding that the FIPs were premature; it reasoned that, "logically, a SIP cannot be deemed . . . deficient for failing to implement the good neighbor obligation," given that "an upwind State will not know what it needs to do to meet its good neighbor obligation" until the EPA tells it what to do.[40]

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32. *Id.* at 903-04 (citing CAIR, 70 Fed. Reg. 25,162, 25,174-75 (May 12, 2005)).
33. *Id.* at 907.
34. *Id.* at 907-08.
35. North Carolina v. EPA, 550 F.3d 1176, 1178 (D.C. Cir 2008) (upon rehearing, modifying the original decision to remand CAIR without vacatur).
36. EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 38 (D.C. Cir. 2012).
37. *Id.* at 13 (quoting 42 U.S.C. § 7410(a)(2)(D)(i) (2006)).
38. *Id.* at 20-22 (laying out three requirements); *id.* at 22-27 (analyzing failure to meet three requirements).
39. *Id.* at 28-37.
40. *Id.* at 13, 28-29, 31.

The court first emphasized the importance both of the individual role of the state in determining the manner in which it will adhere to NAAQS and of the EPA's role in "gathering information about air quality in the downwind States, calculating . . . obligation[s], and transmitting that information to the upwind State."[41] Against that backdrop, the court turned to a brief review of the precedent established in *Michigan* and *North Carolina*. The court interpreted the holding in *Michigan* as follows: "EPA could use cost considerations to lower an upwind State's obligations under the good neighbor provision."[42] In its interpretation of *North Carolina*, the court found a requirement that each state must bear sole responsibility for eliminating its own significant contributions to the nonattainment of downwind states and that no state may be required to "exceed the mark"—that is, to reduce its interstate emissions by more than the amount of its own contributions.[43]

Based on its interpretation of *Michigan* and *North Carolina*, the court drew "several red lines" that limit the EPA's authority to enforce the good neighbor provision and, according to the court, are derived from the decisions in *Michigan* and *North Carolina*.[44] These red lines led the court to conclude that the EPA exceeded its authority under the CAA in promulgating the Transport Rule.[45] As the first red line, the court held that the EPA may compel an upwind state to reduce only those emissions above the amount determined to be significant.[46] The court reasoned that the initial stage of analysis—deeming states significant contributors if their emissions crossed a numerical threshold—established a floor for significant emissions, thus setting the mark beyond which no state may be required to further reduce emissions.[47] In so doing, the EPA drew a line, which, the court determined, it then crossed, because the Transport Rule's cost-based analysis may require emission reductions below the floor—that is, below the threshold amount.[48]

The second red line on EPA authority identified by the court is the requirement that the significance of an upwind state's contribution be assessed relative to the contributing emissions of other upwind states and

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41. *Id.* at 13.

42. *Id.* at 14.

43. *Id.* at 14-15 (quoting North Carolina v. EPA, 531 F.3d 896, 921 (D.C. Cir.) (per curiam), *modified*, 550 F.3d 1176 (D.C. Cir. 2008) (internal quotation mark omitted)).

44. *Id.* at 19.

45. *Id.* at 28.

46. *Id.* at 20 ("[O]nce EPA reasonably designates some level of contribution as 'insignificant' . . . it may not force any upwind State to reduce more than its own contribution . . . minus the insignificant amount." (footnote omitted)).

47. *Id.* at 23-26 (citing *North Carolina*, 531 F.3d at 921).

48. *Id.* at 26.

of the downwind state itself, and that obligations be allocated proportionally.[49] Relying again on *North Carolina*, the court held that the Transport Rule was contrary to the CAA "because it made no attempt to calculate upwind States' required reductions on a proportional basis that took into account contributions of other upwind States."[50] As the third red line, the court asserted that the EPA's authority was further limited in that total emissions reductions of all significantly contributing upwind states may not exceed the amount required to achieve attainment in the downwind state.[51] EPA's failure to "try to take steps to avoid such over-control" was a fatal flaw and another reason supporting vacatur of the Transport Rule.[52]

Finally, the court addressed the issuance of the FIPs that accompanied the Transport Rule.[53] The court acknowledged that the EPA previously issued guidance to the states on how to determine their obligations under the good neighbor provision and that the agency gave notice to the states that SIPs should include plans for adherence to the provision.[54] The court further recognized that the EPA made findings that SIPs either had not been submitted or were inadequate, but identified fault in the findings themselves for "punish[ing] the States for failing to meet a standard that EPA had not yet announced and the States did not yet know."[55] In the court's own words, the issue here was "whether a State's implementation of its good neighbor obligation can be considered part of the State's required submission in its SIP . . . even before EPA quantifies the State's good neighbor obligation."[56] The court answered in the negative.[57] According to the court, the diametric regulatory relationship through which the EPA sets standards and the states submit SIPs in response applies not only to the NAAQS procedure, but also to the standards specific to the good neighbor provision[58]; therefore, the states are entitled to fill the "first-implementer role" in executing the good neighbor provision as well.[59]

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49. *Id.* at 20-21.
50. *Id.* at 27.
51. *Id.* at 22.
52. *Id.* at 27.
53. *Id.* at 28.
54. *Id.* at 35 n.33.
55. *Id.* at 28, 31-32.
56. *Id.* at 30 (internal quotation marks omitted).
57. *Id.*
58. *Id.* at 33-34.
59. *Id.* at 28. The court went on: "In our view, determining the level of reductions required under [the good neighbor provision] is analogous to setting a NAAQS." *Id.* at 33.

The court found further support for its position on the states' first-implementer role in "[o]ther contextual and structural factors."[60] First, the good neighbor provision's location in the section of the CAA pertaining to SIPs and state responsibilities "strongly suggests that Congress intended *States* to implement" the provision's obligations.[61] The court further cited a CAA provision that establishes a procedure under which states may petition the EPA for a finding that a particular source's emissions violate a separate CAA requirement relating to interstate pollution.[62] The absence of similar specific authority accorded to the EPA to hear and act on petitions regarding violations of the good neighbor provision led the court to conclude that Congress intended to equate obligations under the good neighbor provision to those obligations under the CAA's provisions regarding NAAQS.[63] Finally, the court addressed the issue of an appropriate remedy. It vacated the Transport Rule and associated FIPs, remanded the rule for the EPA to replace it with one consistent with the court's opinion, and left CAIR in place during the interim.[64]

Circuit Judge Rogers filed a lengthy dissenting opinion, critiquing every finding made by the majority as an improper exercise of jurisdiction, a conclusion contrary to precedent or to statutory law, and in some cases all three.[65] The dissent first took issue with the court's exercise of jurisdiction—an issue addressed by the majority only in a footnote—and argued that the petitioners failed to state their claim with sufficient specificity during the public comment period for the Transport Rule to preserve the issue for judicial review.[66] Next, the dissent critiqued the majority's dismissal of the EPA's argument that its prior final rulings disapproving SIPs justified the simultaneous promulgation of FIPs with the Transport Rule.[67] Judge Rogers asserted that the majority's reasoning was baseless, apart from "its own speculative conclusion that the process Congress adopted is 'impossible' for States to follow."[68] Finally, Judge Rogers faulted the majority's finding that the EPA's two-tier approach was prohibited, arguing that the court's interpretation and application of the good neighbor provision were

60. *Id.* at 33-34.
61. *Id.* at 34.
62. *Id.*
63. *Id.*
64. *Id.* at 37-38.
65. *Id.* at 38 (Rogers, J., dissenting).
66. *Id.* at 38-39, 51-54.
67. *Id.* at 44-46.
68. *Id.* at 39.

flawed in regard to precedent, the CAA, and the Transport Rule administrative record.[69]

IV. ANALYSIS

In the noted case, the D.C. Circuit held that the EPA exceeded its authority under the CAA in its promulgation of the Transport Rule and the associated FIPs.[70] While the EPA likely overreached to some extent in promulgating the Transport Rule, the court did likewise in striking it down. The decision diverges from precedent in multiple instances and leaves important questions unresolved. Furthermore, the case makes it clear that the court will read the CAA narrowly and represents a significant limitation on EPA's authority to regulate interstate air pollution. As a practical matter, the case is also significant in that the regulatory framework promulgated through CAIR is once again in effect.[71] This significance may be short-lived, however; the EPA filed a petition for rehearing en banc on October 5, 2012.[72]

The question of whether the decision is consistent with precedent highlights a few interesting subtleties at the outset. First, both *Michigan* and *North Carolina* were decisions per curiam, but the noted case is not. Second, Judge Rogers was the only panel member common to all three opinions, and in her dissent, she disagreed with the majority's interpretation of both prior opinions, on which the majority principally relied.[73] Judge Rodgers's first-hand experience in those decisions lends weight to her interpretation, and she could therefore have a significant influence on the other circuit justices if the petition for rehearing is granted. Beyond these preliminary observations, the court's decision represents a divergence from precedent in many respects, although the court cites those very precedents in support of its holdings.

The court's interpretation of the decision in *Michigan* is narrow to a fault. Whereas the court in *Michigan* found that the CAA lacks any "clear congressional intent to preclude consideration of cost" and thus upheld a two-tier analysis that consisted of a quantitative threshold followed by a cost-based assessment,[74] the court in the noted case held

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69. *Id.* at 39-40 (citing North Carolina v. EPA, 531 F.3d 896, 916-17 (D.C. Cir.) (per curiam), *modified*, 550 F.3d 1176 (D.C. Cir. 2008)).

70. *Id.* at 37 (majority opinion).

71. *Id.* at 38.

72. Petition for Rehearing En Banc, EME Homer City Generation, L.P. v. EPA, No. 11-1302 (D.C. Cir. filed Oct. 5, 2012), 2012 WL 4748805.

73. *See EME Homer City*, 2012 WL 3570721, at 48, 54-55 (Rogers, J., dissenting).

74. *Id.* at 14 (majority opinion) (quoting Michigan v. U.S. EPA, 213 F.3d 663, 667 (D.C. Cir. 2000) (per curiam) (internal quotation marks omitted)).

that the EPA's comparable approach in the Transport Rule exceeded "the boundaries Congress has set."[75] Furthermore, although the court in *Michigan* held that the EPA did not "act irrationally in setting the level of significance without regard for varying levels of downwind impact,"[76] the court in the noted case ignored this precedent and insisted that the text of the CAA requires "proportionality," citing *North Carolina* as support.[77] However, the court in *North Carolina* also recognized that the EPA's measurements of each upwind state's significant contribution need not "directly correlate with [its] individualized air quality impact on downwind nonattainment relative to other upwind states."[78] Instead of adhering to its precedent that allowed deference to the EPA's interpretation of the good neighbor provision, the court purported to analogize the Transport Rule's cost analysis to that in CAIR and found *Michigan*'s bounds for cost analysis similarly exceeded.[79]

The court successfully distinguished *Michigan* on one ground only: the approach in *Michigan* created a floor beneath which emissions were deemed insignificant and further reductions were not required, but the Transport Rule fails to do so.[80] The court in the noted case thereby adequately defended its position that the Transport Rule's failure to establish such a floor was contrary to the text of the statute.[81] The success of this argument is clear from the dissent's treatment of it; whereas the dissent found fault in the substantive analysis underlying each of the court's remaining holdings, it challenged this holding principally on jurisdictional grounds.[82] The court left many questions unanswered:

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75. *Id.* at 12.

76. 213 F.3d at 677 n.4, 679-80.

77. *EME Homer City*, 2012 WL 3570721, at 26 (citing North Carolina v. EPA, 531 F.3d 896, 921 (D.C. Cir.) (per curiam), *modified*, 550 F.3d 1176 (D.C. Cir. 2008)). The court went so far as to quote petitioners' brief which complained that the "EPA 'did not even consider the *relative* contributions of the various States.'" *Id.* (quoting Final Brief of Industry and Labor Petitioners at 33, *EME Homer City*, 2012 WL 3570721 (D.C. Cir. Aug. 21, 2012) (No. 11-1302), 2012 WL 894498 at *33).

78. 531 F.3d at 908 (citing *Michigan*, 213 F.3d at 679); *see also EME Homer City*, 2012 WL 3570721, at *42 (Rogers, J., dissenting).

79. *EME Homer City*, 2012 WL 3570721, at 14, 23-26 (citing *Michigan*, 213 F.3d at 675, 677).

80. *Id.* at 23-26; *see Michigan*, 213 F.3d at 675.

81. *See EME Homer City*, 2012 WL 3570721, at 20; Clean Air Act § 110(a)(2), 42 U.S.C. § 7410(a)(2)(D) (2006) ("[SIPs] shall . . . contain adequate provisions . . . prohibiting . . . emissions activity within the State from emitting any air pollutant *in amounts which will . . . contribute significantly to [another's state's] nonattainment*." (emphasis added)).

82. *EME Homer City*, 2012 WL 3570721, at 39-40 (Rogers, J., dissenting) ("[T]he Transport Rule administrative proceedings say[] nothing about whether EPA would have refused to . . . mak[e] the inclusion threshold of step-one a floor for reductions under the cost approach of step-two.").

Would establishing such a floor have satisfied the court's exacting scrutiny and allowed the Transport Rule to survive? If not, what must the EPA do, or not do, to satisfy the court's exacting but ill-defined standard so that it will succeed when inevitably haled before the court to defend yet another try at enforcing the CAA's good neighbor provision? May cost really be a factor? The court offered little guidance on these questions, if any.[83] If the EPA does indeed "pursue[] its reading of the statutory text down the rabbit hole to a wonderland,"[84] as the court accused, the court itself is the rabbit that dug the hole.

The court's remaining reasons for finding that the EPA exceeded its scope of authority in promulgating the Transport Rule are tenuous at best. For example, the court found a fatal flaw in the EPA's decision to issue FIPs simultaneously with the promulgation of the Transport Rule.[85] In support, as stated in the dissent, the court relied on its own notions of logic to interpret Congress's meaning. However, standards of statutory interpretation precluded the need for the court to resort to its own notions of what makes sense—where a statute is ambiguous, courts are to accord great deference to regulatory agency interpretation.[86] The good neighbor provision appears in the list of things that SIPs "shall" include,[87] and no other portion of the CAA requires the EPA to provide guidance about a state's obligation under the provision prior to requiring submission of a SIP. Thus, although the court seems to reject the EPA's findings of inadequacies in the states' SIPs as pretextual,[88] the EPA's procedure at least adhered to the terms of the statute. A proper review according deference to the EPA's interpretation would therefore likely come out differently.

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83. The court attempts to draw the line, but does so once more only by arguing that the Transport Rule may not require reductions beyond those equal to a state's significant contributions to downwind nonattainment: "EPA may rely on cost-effectiveness factors . . . to allow some upwind States to do *less* than their full fair share. But when EPA asks one upwind State to eliminate *more* than its statutory fair share . . . that is impermissible." *Id.* at 27 (majority opinion) (citations omitted).

84. *Id.* at 33.

85. *Id.* at 28.

86. *See id.* at 48 (Rogers, J., dissenting) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

87. 42 U.S.C. § 7410(a)(2) (2006).

88. *See EME Homer City*, 2012 WL 3570721, at 31-33, 36-37 ("EPA claims the statute requires each State to take its own stab in the dark at defining . . . ['contribute significantly' . . . . EPA clearly does not believe the stab-in-the-dark approach would really permit States to avoid FIPs . . . .").

V. CONCLUSION

The holding in the noted case is inconsistent at least in part with prior jurisprudence, despite the fact that the court cited such decisions in support of its holding. By vacating yet another attempt by the EPA to enforce the good neighbor provision of the CAA, and in offering little guidance as to what might be an allowable interpretation of the provision beyond a purely quantitative bar, the court reinstated the previously-vacated, unlawful CAIR and sent the EPA back to start. The court narrowly interpreted the CAA and accorded the EPA little to no deference in analyzing its interpretation of "contribute significantly"; the decision therefore represents a significant step by the D.C. Circuit to limit the EPA's authority under the good neighbor provision and the CAA as a whole. With a petition for rehearing en banc currently pending before the court, the good neighbor provision of the CAA, as well as the scope of the EPA's regulatory authority over interstate air pollution generally, drift in a haze of uncertainty.

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