Mercer Law Review

Volume 64
Number 4 *Eleventh Circuit Survey*

Article 13

7-2013

Bad Neighbors and a Luckless Landlord: How the Clean Air Act Doomed the Environmental Protection Agency

Michael S. Weldon Jr.

Casenote

Bad Neighbors and a Luckless Landlord: How the Clean Air Act Doomed the Environmental Protection Agency

I. INTRODUCTION

Air pollution emissions pay little deference to state borders: emissions generated in upwind *State A* may travel to affect the air quality of downwind *State B*.[1] As a result of this inevitability and its unfair implications for the downwind state, under the Clean Air Act,[2] upwind states have a "good neighbor" responsibility.[3] Through the good neighbor provision, the upwind state may initially develop a State Implementation Plan (SIP) to determine its own mechanism for restricting emissions that contribute to a downwind state's nonattainment of federal regulations.[4] In August of 2011, however, the Environmental Protection Agency (EPA) took matters into its own hands to enforce the good neighbor provision by establishing the "Transport Rule" or "Cross State Air Pollution Rule," targeting emissions from coal and natural gas power plants in twenty-eight upwind states, including Georgia.[5] In *EME Homer City Generation, L.P. v. Environmental Protection Agency*,[6] the United States Court of Appeals for the District of Columbia held that the Transport Rule exceeded federal government authority in two ways: (1) it required upwind states to reduce their emissions "by more than their own significant contributions to a downwind State's nonattainment"; and (2) it denied the states the initial opportunity to comply via SIPs by establishing the good neighbor

1. *See* EME Homer City Generation, L.P. v. Environmental Protection Agency, 696 F.3d 7, 11 (D.C. Cir. 2012).
2. 42 U.S.C. §§ 7401-7671 (2006 & Supp. III 2009).
3. *See EME Homer City Generation, L.P.*, 696 F.3d at 11.
4. *Id.*
5. *Id.*
6. 696 F.3d 7 (D.C. Cir. 2012).

responsibilities while simultaneously establishing Federal Implementation Plans (FIPs) to effectuate their goals.[7] This holding throws a lasso around the runaway bull that is EPA. As a meaningful display of the separation of powers and judicial review, the court attempted to pay deference to federalism and congressional intent. Judge Kavanaugh wisely notes: "It is not our job to set environmental policy. Our limited but important role is to independently ensure that the agency stays within the boundaries Congress has set. EPA did not do so here."[8]

II. FACTUAL BACKGROUND

Under the statutory authority of the Clean Air Act,[9] the federal government established standards for states' air quality.[10] With this approach, Congress envisioned a federalism-based system for control of air pollution. Specifically, EPA determines National Ambient Air Quality Standards (NAAQS) for pollutants with which states must comply. However, states maintain authority for determining how they will meet those standards. After three years of the newly revised NAAQS and only after a state fails to present a SIP for attainment may the federal government step in to enforce its own plan for that state.[11] Of concern are "nonattainment areas"–places inside a state where the pollution levels exceed the NAAQS.[12]

After recognizing that pollution from upwind states may affect nonattainment areas in downwind states, Congress established the good neighbor provision.[13] The United States Court of Appeals for the District of Columbia explained the good neighbor provision as "requir-[ing] upwind States to bear responsibility for their fair share of the mess in downwind States."[14] Congress wanted the upwind state, through its SIP, to reduce emissions causing nonattainment in downwind states.[15] According to Congress, states would rely on the expertise and resources of EPA to determine the NAAQS levels and to calculate each state's upwind nonattainment-causing responsibility, with which the state's SIP would then comply. If, after learning of its responsibility, a state failed

7. *Id.* at 11-12.
8. *Id.* at 12.
9. 42 U.S.C. §§ 7401-7671 (2006 & Supp. III 2009).
10. *EME Homer City Generation, L.P.*, 696 F.3d at 12.
11. *Id.* at 12-13.
12. *Id.* at 13.
13. *Id.*
14. *Id.*
15. *Id.*

to submit an adequate SIP to EPA, the federal government may enact FIPs to force the state to meet its responsibility.[16]

In 2005, EPA established the Clean Air Interstate Rule (CAIR). EPA wanted to define "good neighbor responsibilities" for twenty-eight states in regard to 1997 NAAQS levels, using cost considerations to regionally define upwind states' good neighbor responsibility.[17] In *North Carolina v. Environmental Protection Agency*,[18] the United States Court of Appeals for the District of Columbia held that such a process for determining good neighbor responsibilities exceeded EPA's statutory authority.[19] That court "remanded CAIR without vacatur, leaving CAIR in place 'until it is replaced by a rule consistent with our opinion.'"[20] The 2011 Transport Rule is EPA's attempted replacement of CAIR.[21]

To establish emissions reduction obligations for each state, EPA is charged with determining amounts of upwind state emissions that "contribute significantly" to a downwind state's nonattainment.[22] The Transport Rule relied on a two-pronged approach to accomplish this charge.[23] With the first prong, EPA demonstrated an upwind state's link and significant contribution to a downwind state's nonattainment.[24] Next, EPA established levels of pollutants based on NAAQS, and "[i]f modeling showed that an upwind State would send more than those amounts into a downwind State's air, . . . the upwind State was deemed a 'significant contributor' to the downwind State's air pollution problem."[25] In spite of this scientific analysis, the second prong of EPA's approach to determine a state's obligation relied on another cost-

16. *Id.*

17. *Id.* at 14.

18. 531 F.3d 896 (D.C. Cir. 2008).

19. *Id.* at 901. EPA picked a cost and corresponding reduction level that it deemed manageable for a region and used that as the measuring stick for an upwind State's responsibility under the good neighbor provision. *EME Homer City Generation, L.P.*, 696 F.3d at 14 (citing *North Carolina*, 531 F.3d at 918).

20. *EME Homer City Generation, L.P.*, 696 F.3d at 15 (quoting North Carolina v. Environmental Protection Agency, 550 F.3d 1176, 1178 (D.C. Cir. 2008)).

21. *Id.*

22. *Id.* (internal quotation marks omitted); *see also* 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2006).

23. *EME Homer City Generation, L.P.*, 696 F.3d at 15.

24. *Id.* ("EPA identified the significantly contributing upwind States based on 'linkages' between each upwind State and specific downwind 'nonattainment' or 'maintenance' areas–that is, downwind areas that EPA modeling predicted would not attain . . . the NAAQS." (quoting Transport Rule, 76 Fed. Reg. 48208-01, 48,236 (Aug. 8, 2011))).

25. *Id.* at 15-16.

consideration analysis.[26] EPA used the "could reduce" approach to determine the reduction levels such that, if mechanisms for power plants to reduce emissions were below a cost threshold, the amounts reduced with that cost threshold would be the level with which the state must comply.[27] Consequently, "how much pollution each upwind State was required to eliminate was not tied to how much the upwind State contributed to the downwind States' air pollution problems."[28]

The second part of the Transport Rule issued FIPs to implement the new guidelines.[29] These individualized plans were labeled as "allowances" for each power plant, and then EPA, through its FIP, "decide[d] how to distribute the allowances among the power plants in each State."[30] Under the rule, states maintained a secondary role whereby they were allowed to submit SIPs that change certain aspects of the FIPs or replace the FIPs entirely, so long as the end results were the same as the FIPs.[31]

In opposition to the Transport Rule, states, local governments, power companies, coal companies, labor unions, and trade associations petitioned the United States Court of Appeals for the District of Columbia for review. The court stayed the Transport Rule on December 30, 2011 to evaluate its merits, and EPA was ordered to continue its implementation of CAIR until the review was complete.[32] The completion of that review–the two-to-one decision in *EME Homer City Generation, L.P. v. Environmental Protection Agency*[33] by the United States Court of Appeals for the District of Columbia–vacated the Transport Rule and the FIPs, and remanded to EPA for a new good neighbor provision plan.[34] Moreover, CAIR was left in place until EPA presented a new alternative.[35]

---

26. *Id.* at 16.
27. *Id.* at 16-17.
28. *Id.* at 17.
29. *Id.* at 18. The FIPs mandate power plants within an offending upwind state to meet individualized reduction standards so that the state may comply with its newly established emissions budget. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 19.
33. 696 F.3d 7 (D.C. Cir. 2012).
34. *Id.* at 38.
35. *Id.*

III. LEGAL BACKGROUND

The struggle gripping the court in *EME Homer City Generation, L.P. v. Environmental Protection Agency*[36] is a familiar one. In October 1998, EPA mandated twenty-two states and the District of Columbia to revise their respective SIPs to compensate for interstate pollution emissions, and litigation in *Michigan v. U.S. Environmental Protection Agency*[37] ensued. A 1990 amendment to the Clean Air Act[38] was the basis for the mandate.[39] Prior to this amendment, EPA could only regulate an upwind state's emissions upon a downwind state if that upwind state *prevented* the downwind state from complying with attainment.[40] This standard made EPA regulation of upwind state emissions more difficult.[41] The 1990 amendment replaced "prevent attainment" with "contribute significantly to nonattainment," and the petitioner states in *Michigan* challenged the interpretation of "significant," arguing for an interpretation akin to the old "prevent attainment" standard.[42]

EPA fought for the interpretation of "significant" that was colored by cost-effective reductions by offending states in the downwind emissions.[43] States, power companies, and labor organizations objected to this cost-analysis interpretation of "significant."[44] The petitioners fought for considerations of science or health to predominate as factors for interpreting "significant," but ultimately the court held that cost effectiveness could play a major role in allowing EPA to determine whose contribution was "significant."[45]

---

36. 696 F.3d 7 (D.C. Cir. 2012).

37. 213 F.3d 663 (D.C. Cir. 2000).

38. 42 U.S.C. §§ 7401-7671 (2006 & Supp. III 2009).

39. *Michigan*, 213 F.3d at 669.

> The . . . 1990 amendment to the Clean Air Act which requires that SIPs contain "adequate provisions" prohibiting "any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard."

Id.; *see also* 42 U.S.C. § 7410(a)(2)(D)(i)(I).

40. *Michigan*, 213 F.3d at 674.

41. *See id.*

42. *Id.*

43. *Id.* at 675. The reductions, according to EPA, would be modest: more states would be required to comply under the new standard, but the compliance would be affordable and effective. *Id.*

44. *Id.*

45. *Id.* at 676-77, 679.

In *Appalachian Power Co. v. Environmental Protection Agency*,[46] EPA found itself again defending a rule regulating midwestern and southeastern state emissions. Previously, many northeastern states petitioned EPA to control emissions coming from outside the states.[47] EPA forced the offending states to comply with regulations, and the petitioners in *Appalachian Power Co.* challenged the new rule "as inconsistent with the Clean Air Act, arbitrary and capricious, and technically deficient."[48] Section 126 of the Clean Air Act allows downwind states to request EPA action regulating upwind state pollution.[49] Thus, the issue in the case was the extent to which EPA could regulate upwind state emissions.[50]

Just like in *Michigan*, the petitioners' claims focused on the interpretation of "significant."[51] EPA's methodology for determining significant contribution and the responsibility of offending states relied upon "computer modeling to determine whether a state's manmade NOx emissions perceptibly hindered a downwind state's attainment," and "[f]or any state exceeding EPA's threshold criteria, EPA then defined as 'significant' those emissions that could be eliminated through application of 'highly cost-effective' controls."[52] EPA created state-by-state pollution estimations for the year 2007, developed via computer models with data from the previous decade. Petitioners attacked this analysis as arbitrary.[53] The court in *Appalachian Power Co.* noted that, generally, EPA may set standards for reduction based on their emission projections, but only when it "adequately responded to comments and explained the basis for its decisions."[54] Consequently, the court held that some of the models and their applications were not sufficiently explained, and therefore those that were not must be remanded back to EPA for further explanation and defense.[55] The court stressed the importance of specificity and detailed explanation behind EPA decisions in order to achieve accurate and fair judicial review.[56]

Finally, in *North Carolina v. Environmental Protection Agency*,[57] the United States Court of Appeals for the District of Columbia set the

46. 249 F.3d 1032 (D.C. Cir. 2001).
47. *Id.* at 1036.
48. *Id.*
49. *Id.* at 1037; *see also* 42 U.S.C. § 7426(c) (2006).
50. *Appalachian Power Co.*, 249 F.3d at 1037.
51. *Id.* at 1048.
52. *Id.* at 1048-49.
53. *Id.* at 1051.
54. *Id.*
55. *Id.*
56. *Id.* at 1054-55.
57. 531 F.3d 896 (D.C. Cir. 2008).

immediate groundwork for the Transport Rule and the controversy in *EME Homer City Generation, L.P.* Petitioners there challenged CAIR, of which the court found many fatal flaws.[58] EPA's CAIR was derived from the need to compel states to create SIPs to validate the good neighbor provision of the Clean Air Act.[59] Finding twenty-eight states and the District of Columbia contributed significantly to downwind state nonattainment, CAIR required those states and the District of Columbia to revise their SIPs so their emissions no longer "contributed significantly" to the detriment of downwind states.[60] Once again, the definition of "contribute significantly" was at the center of the litigation. EPA had to define what amounts of emissions qualified as contributing significantly to a downwind state's nonattainment.[61] The agency used many factors to resolve the question: "one state's impact on another's air quality, the cost of 'highly cost-effective' emissions controls, fairness, and equity in the balance between regional and local controls."[62] The first factor–an upwind state's effect on the quality of air in a downwind state–required a threshold analysis to determine whether the upwind state was subject to the rule, with other factors utilized to help EPA quantitatively determine requisite emissions reductions.[63]

Under CAIR, EPA took a regional approach to reducing emissions instead of evaluating each state's individual contribution to another's nonattainment. EPA's reasoning was based on efficiency and cost effectiveness.[64] As a result of this regional analysis, EPA "never measured the 'significant contribution' from sources within an individual state to downwind nonattainment areas."[65] EPA's "apportionment decisions" with CAIR were consideration for each state's "significant contribution," and as such CAIR ran counter to the intent of Congress, to whom "individual state contributions to downwind nonattainment areas do matter."[66] According to the court in *North Carolina*, CAIR must reduce pollution contributing to downwind nonattainment areas, and this requires measuring each state's significant contribution to the downwind nonattainment.[67] If EPA cannot measure each state's significant contribution, the rule fails to accomplish "the statutory

58. *Id.* at 901.
59. *Id.* at 903.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 907.
65. *Id.*
66. *Id.*
67. *Id.* at 908.

mandate of prohibiting emissions moving from one state to another, leaving EPA with no statutory authority for its action."[68] EPA tried to use the cost considerations in the manner allowed by *Michigan*, but CAIR failed that test with its regional, aggregate approach.[69] The court in *North Carolina* concluded CAIR must be vacated because the regional cap approach, devoid of state-specific analysis of nonattainment contribution, was "fundamentally flawed."[70] As a result, the court sent EPA back to the drawing board, where it drew the Transport Rule.[71]

IV. COURT'S RATIONALE

The United States Court of Appeals for the District of Columbia, in a two-to-one decision in *EME Homer City Generation, L.P. v. Environmental Protection Agency*,[72] vacated the Transport Rule because it violated federal law for two independent reasons.[73] First, the court held that, under the Transport Rule, states may be required to reduce emissions going to downwind states more than their own individual contribution, violating the good neighbor provision of the Clean Air Act[74] and placing EPA outside of its statutory authority.[75] Second, the court held that, counter to the Clean Air Act–which gives states the first crack at complying with NAAQS through their own SIPs–the Transport Rule issued guideline requirements while simultaneously issuing FIPs that deprive states of the statutory right to act first.[76] According to the majority, the Transport Rule cannot survive this deadly combination of two statutory violations.[77]

The good neighbor provision is Congress's recognition that upwind state pollution will likely affect downwind state nonattainment of federal regulations under the NAAQS.[78] According to Judge Kavanaugh, there were "several red lines that cabin[ed] EPA's authority" under the good neighbor provision.[79] The first "red line" rested within the language of the good neighbor provision: Kavanaugh determined that "amounts which will . . . contribute" to nonattainment in a downwind state "are at

68. *Id.*
69. *Id.* at 917.
70. *Id.* at 929.
71. *See EME Homer City Generation, L.P.*, 696 F.3d at 11.
72. 696 F.3d 7 (D.C. Cir. 2012).
73. *Id.* at 12.
74. 42 U.S.C. §§ 7401-7671 (2006 & Supp. III 2009).
75. *EME Homer City Generation*, 696 F.3d at 11.
76. *Id.* at 11-12.
77. *Id.* at 12.
78. *Id.* at 13.
79. *Id.* at 19.

most those amounts that travel beyond an upwind State's borders and end up in a downwind State's nonattainment area."[80] Accordingly, Congress did not intend the good neighbor provision to remedy regional pollution carte blanche, but rather meant the provision to be understood narrowly with regard to one state's specific failings affecting another.[81] States are not to eliminate emissions more than the amount of their own "significant" contribution to another state's nonattainment, which is what the Transport Rule attempted to accomplish.[82]

Additionally, EPA's right to compel reductions in upwind states' emissions ceased once the offended downwind state reached attainment.[83] Since "[e]ach upwind State must bear its own fair share" for downwind nonattainment areas, "the 'significance' of each upwind State's contribution cannot be measured in a vacuum . . . ."[84] Instead, the good neighbor provision divides the burden of reducing emissions proportionally to the amount in which a state's individual contributions led to the nonattainment in the downwind state.[85] Furthermore, EPA may consider cost as a factor, but only in a manner that helps states avoid excessive and exorbitant costs rather than increasing a state's obligation simply because it could afford to do so.[86]

According to the majority, the Transport Rule failed the principles above.[87] Under the rule, a state could be subjected to good neighbor obligations if it contributed a certain threshold amount to downwind pollution.[88] EPA applied region-wide air quality models that could force restrictions upon a state disproportionately to its individual contribution.[89] EPA created a floor by which a state above the thresh-

---

80. *Id.* at 20.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 20-21.
85. *Id.* at 21. The court provided a helpful illustration:
> Suppose the NAAQS is 100 units, but the downwind State's nonattainment area contains 150 units. Suppose further that the downwind State contributes 90 units, and three upwind States contribute 20 units each. Because the upwind States are responsible for the downwind State's exceeding the NAAQS by 50 units, the downwind State is entitled to at most 50 units of relief from the upwind States so that the downwind State can achieve attainment of the NAAQS. Distributing those obligations in a manner proportional to their contributions, each of the three upwind States' significant contribution would be, at most, 16 2/3 units.

Id.
86. *Id.* at 21-22.
87. *Id.* at 23.
88. *Id.*
89. *Id.* at 25.

old was labeled as a "significant contributor."[90] According to Judge Kavanaugh, however, the proper analysis should be a ceiling for downwind nonattainment, which, if a state exceeded, it would only be required to reduce proportionally the amount in excess of that ceiling to facilitate attainment.[91] Furthermore, in regard to the Transport Rule's cost considerations, Judge Kavanaugh wrote, "It seems inconceivable that Congress [consented to] an open-ended authorization for EPA to effectively force every power plant in the upwind States to install every emissions control technology EPA deems 'cost-effective.'"[92] As a result, the Transport Rule exceeded its statutory boundaries and could not stand.[93]

To the court, the Transport Rule also failed for its "unprecedented" interpretation of the good neighbor provision.[94] In addition to developing reduction obligations for upwind states, EPA simultaneously decreed FIPs for sources of pollution that upwind states had to obey.[95] Therefore, EPA stripped the states of their statutory right to the first crack at compliance.[96] EPA acknowledged that the Transport Rule appeared to adopt a new "FIP-first" approach, but in actuality, the FIPs were merely responses to past SIP failures, which fell within EPA's statutory authority.[97] The court, however, rejected EPA's argument.[98] The SIP failures occurred before EPA issued the new obligations under the Transport Rule, and as a result, "EPA's approach punishe[d] the States for failing to meet a standard that EPA had not yet announced and the States did not yet know."[99]

The court interpreted the Clean Air Act and Congress's intent as establishing a division of labor between federal regulation and state action to comply within its own borders.[100] According to the court, this approach is explicitly within the language of the Act.[101] This division of labor is strict, and the federalism-based partnership envisioned by Congress and outlined within the Clean Air Act cannot be willfully

90. *Id.* at 23.
91. *Id.* at 25-26.
92. *Id.* at 28.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 29.
101. *Id.*

abandoned nor creatively sidestepped.[102] Kavanaugh wrote: "The terms of that partnership are clear: EPA sets the standards, but the States 'bear primary responsibility for attaining, maintaining, and enforcing these standards.'"[103]

The court described the new approach by EPA as novel, because EPA precedent applying the good neighbor provision has always been consistent with the SIP-first requirement for the good neighbor provision.[104] With the 1998 pollution regulations addressed in *Michigan*, EPA gave states a year to develop and submit SIPs for compliance.[105] According to the court, EPA persuasively and "explicitly assured States that the [1998] Rule did not intrude on their authority to choose the means to achieve the EPA-defined end goal."[106] Furthermore, the 2005 Clean Air Interstate Rule allowed states the first opportunity to develop means of compliance.[107] When EPA offered FIPs a year later to help implement CAIR, it assured all interested parties that the FIPs were merely "[f]ederal backstop[s]" for the SIPs, taking effect only after SIP failure.[108]

In the face of this precedent, EPA argued it gave the states the first chance at implementation and that the states had three years to submit SIPs for the 2006 regulations.[109] However, the court found this argument unpersuasive because the aforementioned three years "expired *before* EPA issued the Transport Rule and defined the good neighbor obligations of upwind States."[110] EPA's answer to this concern was summarily rejected by the majority.[111] EPA argued that the states should have developed their own methodology and modeling for their own interpretations of their significantly contributing amounts of nonattainment-causing emissions and then submitted that to EPA as a SIP, with such a failure on the part of the states triggering EPA's right to FIPs.[112] Essentially, in the court's view, EPA argued that the states should have developed their "own stab in the dark" to define an amount that caused nonattainment areas downwind.[113] Yet, without knowing

---

102. *Id.*
103. *Id.* at 30 (quoting Am. Lung Ass'n v. EPA, 134 F.3d 388, 389 (D.C. Cir. 1998)).
104. *Id.* at 34.
105. *Id.*
106. *Id.*
107. *Id.* at 35.
108. *Id.* (quoting CAIR FIPs, 71 Fed. Reg. 25328, 25330 (Apr. 28, 2006)).
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*

which amount level EPA would ultimately establish and accept in a SIP, states had no way of knowing if their SIP would comply, and in fact, "every Transport Rule State that submitted a good neighbor SIP for the 2006 [regulations] was disapproved" by EPA.[114] As a result, the court vacated the Transport Rule because it, like its predecessor CAIR, was flawed beyond repair.[115]

V. DISSENT

According to Judge Rogers's dissent, the court's holding in *EME Homer City Generation, L.P. v. Environmental Protection Agency*[116] was flawed because it ignored congressional limitations upon the court's jurisdiction, misinterpreted the Clean Air Act,[117] and disregarded the "court's settled precedent interpreting the same statutory provisions" at the heart of the controversy.[118] With this flawed holding and vacatur of the Transport Rule, the dissent claimed EPA was "blindsided" by considerations made for the first time before the court, paying little deference to the precedents and rules which EPA rightfully believed were appropriate.[119]

Judge Rogers claimed that judicial review of EPA rules and regulations has been limited by Congress in two important and relevant ways.[120] The dissent relied upon statutory provisions within the Clean Air Act that state "petitions for judicial review must be filed within sixty days of promulgation of a final rule."[121] Additionally, Judge Rogers claimed that only the objections raised within that sixty-day period may be considered for judicial review by the court.[122] Consequently, the dissent clearly indicated its belief that the majority "reach[ed] the merits of this issue despite its lack of jurisdiction."[123]

The second flaw in the majority's decision, according to Judge Rogers, was its poor analysis of plain text and structure of the Clean Air Act, along with its lack of deferential treatment to EPA interpretations of the statute when Congress is relatively silent on an ambiguous issue.[124] Given that the plain language of the Act requires states to submit SIPs

---

114. *Id.* at 36.
115. *Id.* at 37.
116. 696 F.3d 7 (D.C. Cir. 2012).
117. 42 U.S.C. §§ 7401-7671 (2006 & Supp. III 2009).
118. *EME Homer City Generation, L.P.*, 696 F.3d at 38 (Rogers, J., dissenting).
119. *Id.*
120. *Id.*
121. *Id.*; *see also* 42 U.S.C. § 7607(b)(1).
122. *EME Homer City Generation, L.P.*, 696 F.3d at 38.
123. *Id.* at 43.
124. *Id.* at 46.

within three years of EPA-established NAAQS, Rogers agreed with EPA that the states' failures to do so in response to their 2006 NAAQS triggered the agency's rights to issue FIPs via the Transport Rule.[125] To the dissent, a clear chronology of federal and state action existed, but the majority misinterpreted EPA's response to the state inaction to the 2006 levels.[126] In response to the majority's contention that states would fail if required to take a "stab in the dark" at SIP submission, Rogers noted this contention is not based on evidence and underestimated an individual state's ability to determine legitimate courses of action for SIP submission.[127] Rogers underscored both of her considerations in her dissent (the court's lack of jurisdiction combined with its misinterpretation of the chronology of EPA's action) with the fact that the majority ignored settled precedent established in previous cases before the court.[128]

VI. IMPLICATIONS

The decision in *EME Homer City Generation, L.P.* is a blow to EPA. This holding sends EPA back to the drawing board, again, to determine a way to monitor cross-state air pollution. Some observers, however, have lauded the holding as a victory for states. Texas Attorney General Greg Abbott opined that by "[v]indicating [Texas's] objections to EPA's aggressive and lawless approach, [the] decision is an important victory for federalism and a rebuke to a federal bureaucracy run amok."[129] Alabama's Attorney General Luther Strange joined in Abbott's sentiments.[130] Calling the Transport Rule "intrusive and overreaching," Strange said the court's ruling "upholds major principles of fair play."[131] Georgia Attorney General Sam Olens also applauded the court's decision.[132] Olens characterized the Transport Rule as "another overt power grab by the Obama Administration from the States" relying

125. *Id.* at 47.

126. *Id.* at 47-48.

127. *Id.* at 49.

128. *Id.* at 38.

129. Bill Mears, *Court Throws Out New Air Pollution Rules*, CNN U.S. (Aug. 21, 2012, 1:23 PM), http://www.cnn.com/2012/08/21/us/appeals-court-air-pollution-rules/index.html.

130. News Release, Office of the Att'y Gen., State of Alabama, AG ANNOUNCES INVALIDATION OF EPA RULE REGARDING AIR EMISSIONS ACROSS STATES (Aug. 21, 2012), *available at* http://www.ago.state.al.us/News-245.

131. *Id.*

132. Press Advisory, Office of the Att'y Gen., State of Georgia, D.C. Circuit Sides with Georgia and Invalidates Onerous EPA Regulation (Aug. 21, 2012), *available at* http://law.ga.gov/press-releases/2012-08-21/dc-circuit-sides-georgia-and-invalidates-onerous-epa-regulation.

upon "executive fiat" to "mandate[] job-killing requirements on the States."[133] Some who share this interpretation of the court's decision believe the deference shown to the Clean Air Act's federalism provisions is more important than even the practical monetary benefits for private coal and energy companies.[134] These individuals claim the holding affirms the fact that states are the main vehicle for implementing the nation's environmental laws, and such an affirmation checks future intermeddling by federal regulators.[135]

Of little surprise, energy companies also view the court's decision in *EME Homer City Generation, L.P.* favorably.[136] The decision gives companies more time and wiggle room to cut down coal pollution in ways most favorable to their bottom dollar.[137] Under the Transport Rule, power companies were projected to face increases of as much as $800 million per year.[138] Dallas, Texas's Luminant Generation Company projected that EPA's Transport Rule would have required the energy company to shut down power plants and coal mines, costing at least 500 of its employees their jobs.[139] As a result of this ruling, energy companies claim they can operate their coal-burning power plants without added expenses that would ultimately be passed along to the consumer.[140] Southern Company, an Atlanta-based utilities giant and a party in *EME Homer City Generation, L.P.*, was pleased with the outcome, stating that the Transport Rule "would have imposed unreasonable timeliness and costs on our customers."[141] According to Georgia Power, a subsidiary of Southern Company, the new scrubbers that EPA would have mandated through the Transport Rule would have

---

133. *Id.*

134. Kevin T. Haroff, *EME Homer City v. EPA Affirms Role of Federalism in Environmental Regulation,* WASH. LEGAL FOUND. (Sept. 10, 2012), http://wlflegalpulse.com/2012/09/10/eme-homer-city-v-epa-affirms-role-of-federalism-in-environmental-regulation/.

135. *Id.*

136. *See* Mark Drajem and Julie Johnsson, *Coal Plants' Victory Over EPA Is Muted by Low Gas Prices,* BLOOMBERG (Aug. 22, 2012), http://www.bloomberg.com/news/2012-08-22/coal-plants-victory-over-epa-is-muted-by-low-gas-prices.html.

137. *Id.*

138. *Report of the Environmental Regulation Committee*, 32 ENERGY L.J. 637, 646 (2011).

139. Tom Fowler and Puneet Kollipara, *Texas Sues EPA to Block New Pollution Rule,* HOUS. CHRONICLE (Sept. 21, 2011), http://www.chron.com/business/energy/article/Texas-sues-EPA-to-block-new-pollution-rule-2182573.php.

140. Kristi E. Swartz, *Federal Court Strikes Down Pollution Rule,* THE ATLANTA JOURNAL-CONSTITUTION (Aug. 21, 2012), http://www.ajc.com/news/business/federal-court-strikes-down-pollution-rule/nRMNk/.

141. *Id.*

cost hundreds of millions of dollars to install promptly.[142] The court's decision also rallied coal stocks, and with a projected timetable of years for which it might take EPA to submit another plan to regulate cross state air pollution, one utilities analyst notes "[t]he court's decision might be a short-term stay of execution for some facilities."[143] Although there is nothing from the majority in *EME Homer City Generation, L.P.*, to suggest that these considerations were relevant to their decision, power companies are ecstatic that the status quo ante remains in place, saving them millions of dollars.

Coal producers and the thousands who owe them their jobs are also thankful for the court's decision. Even Democrats in coal-rich states decry the Obama Administration's approach to clean air through EPA regulations.[144] The United Mine Workers of America, a labor union that endorsed President Obama in 2008, refused to do so in 2012 as a result of EPA regulations like the Transport Rule.[145] Those who rely on coal production for their livelihoods prefer less burdensome regulations on power companies: the court's holding in *EME Homer City Generation, L.P.* may equate to more job security for them in the immediate future.

Despite positive results for some states, energy companies, and the individuals employed by coal production, there are real implications for the environment as a result of this court's ruling. Under the Transport Rule's SIPs and FIPs, EPA estimated that by 2014, sulfur dioxide emissions from power plants would have been reduced by seventy-three percent from the levels of 2005.[146] EPA also estimated nitrogen oxide emissions would have been reduced by fifty-four percent as a result of the Transport Rule and ensuing regulations.[147] EPA estimated that the Transport Rule would have improved the air quality for the vast majority of Americans, leading to healthcare cost reductions of hundreds of billions of dollars per year while saving tens of thousands of lives per year.[148]

---

142. *Id.*

143. Sara Forden and Tom Schoenberg, *Obama Curbs on Coal Pollution Rejected by U.S. Court,* BUSINESSWEEK (Aug. 21, 2012), http://www.businessweek.com/news/2012-08-21/u-dot-s-dot-appeals-court-overturns-cross-state-air-pollution-rule (internal quotation marks omitted).

144. Donna Cassata, *Coal State Dems Diverge on Obama Policies,* THE CHRISTIAN SCIENCE MONITOR (Oct. 12, 2012), http://www.csmonitor.com/Environment/Latest-News-Wires/2012/1012/Coal-state-Dems-diverge-on-Obama-policies.

145. *Id.*

146. *Report of the Environmental Regulation Committee, supra* note 138, at 646.

147. *Id.*

148. *Id.*

These EPA projections for the benefits of the Transport Rule are quite startling. According to EPA, 13,000 to 34,000 premature deaths would have been avoided per year due to regulations of the Transport Rule.[149] EPA also claimed that by 2014, the country would save as much as $280 billion dollars in health costs combined with environmental benefits gained.[150] In specific regard to Georgia, EPA estimated that 400 to 2,000 lives would be saved from premature death along with avoided costs of tens of billions of dollars per year.[151]

Perhaps as a result of these weighty considerations, on October 5, 2012, EPA asked for a rehearing en banc of the three member panel's decision in *EME Homer City Generation, L.P.*[152] A lawyer for the United States Justice Department wrote in her filing for rehearing, "The panel's decision upends the appropriate relationship of the judicial, legislative, and executive branches of government by rewriting clear legislation, ignoring explicit statutory jurisdictional limits, and stepping into the realm of matters reserved by Congress and the courts to the technical expertise of administrative agencies."[153]

Unfortunately, these problems appear to be here to stay. The United States Court of Appeals for the District of Columbia granted only one rehearing en banc last term.[154] As the country seeks to fuel itself, and as those responsible for guarding the nation's air quality continue to pursue that charge to the fullest, more litigation in this area is practically guaranteed. Hopefully balance and compromise will win in the end.

MICHAEL S. WELDON, JR.

---

149. ENVIRONMENTAL PROTECTION AGENCY, CROSS-STATE AIR POLLUTION RULE, *available at* http://www.epa.gov/airtransport/.

150. *Id.*

151. *See* ENVIRONMENTAL PROTECTION AGENCY, LARGE MAP OF PUBLIC HEALTH AND ENVIRONMENTAL BENEFITS, *available at* http://www.epa.gov/airtransport/benefitsmap.html.

152. Tom Schoenberg, *EPA Seeks Rehearing of Cross-State Air Pollution Ruling*, BLOOMBERG (Oct. 5, 2012), http://www.bloomberg.com/news/2012-10-05/epa-seeks-rehearing-of-cross-state-air-pollution-ruling.html.

153. *Id.* (internal quotation marks omitted).

154. *Id.*