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HOW THE D.C. CIRCUIT MADE DOWNWIND ATTAINMENT UNATTAINABLE IN *HOMER CITY*

In October 1948, a dense fog of air pollution formed over the industrial town of Donora, Pennsylvania.¹ The cloud remained for five days, killed 20 people, and resulted in the development of respiratory problems in 6,000 of the 14,000 town residents.² A subsequent investigation revealed extraordinary levels of several pollutants, including sulfur dioxide, fluorides, and soluble sulphants in the air.³ The atmospheric contamination was caused by various sources, including a nearby zinc smelting plant, a sulphuric acid plant, and coal burning steam locomotives.⁴

In December 1952, a "Killer Fog" consumed London.⁵ The condition was caused by an especially cold November and the resultant burning of records amounts of coal.⁶ The smog was so thick, and visibility so poor, that buses had to be escorted by guides carrying flashlights.⁷ As a result, at least 3,000 people had perished.⁸

It was events such as the above that led to the enactment of the Clean Air Act (CAA) in 1970.⁹ While the above events are not at risk of recurring, the United States Environmental Protection Agency (EPA), the agency tasked with implementing the CAA, continues to pursue

¹ EPA.GOV., *Understanding the Clean Air Act*, <http://www.epa.gov/air/peg/understand.html> (last visited January 10, 2013).

² *Id.*; see also Papers of James H. Duff, *The Donora Smog Disaster* (October 31, 1948) (on file with Pennsylvania State Archives), available at <http://www.donorasmog.com/archivesdonorasmogdisaster.htm>.

³ Duff, *supra* note 2.

⁴ *Id.*

⁵ EPA.GOV., *supra* note 1.

⁶ John Metcalf, *Dec. 9, 1952: 'Killer Fog' smothers up to 12,000 Londoners*, STORM WATCH 7 WEATHER BLOG (Dec. 9, 2011, 2:57 PM), <http://www.wjla.com/blogs/weather/2011/12/dec-9-1952-killer-fog-smothers-4-000-people-in-london-13893.html>.

⁷ EPA.GOV., *supra* note 1; see also Metcalf, *supra* note 6.

⁸ *Id.*

⁹ 42 U.S.C. § 7401 (2006).

its statutory mandate to improve air quality in the United States. The EPA's efforts often trigger legal challenges by states and industry. In the past fifteen years this has been particularly true with respect to the subject of this Comment—cross-state air pollution.¹⁰ Pollutants can travel great distances and thereby affect health not only locally but regionally.¹¹ "The transport of these pollutants across state borders makes it difficult for downwind states to meet health-based air quality standards" set by the EPA.¹² The EPA's efforts to prevent such effects have been litigated each step of the way, as the EPA has tried to achieve the requisite environmental gains in a cost effective manner, as required by the spirit of the 1990 amendments to the CAA. As the following explains in detail, the EPA lost the most recent battle, and possibly the war, in *EME Homer City Generation, L.P. v. E.P.A.* ("*Homer City*")¹³ where the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit")¹⁴ eviscerated the EPA's cost-based approach, as well as any likelihood that cross-state air pollution will be controlled in the foreseeable future.

INTRODUCTION

"[A]ir quality in a particular location - even close to a source like a power plant - is due to a combination of local emissions and emissions from upwind sources hundreds of miles away. This long-distance transport of pollution across state lines makes it difficult for downwind states to" meet the minimum air quality standards set by United States Environmental Protection Agency (EPA)¹⁵, even if a downwind state is adequately regulating sources within its borders. To deal with the problem of upwind states adversely affecting air quality in downwind states, the Clean Air Act (CAA) includes language, known as the Good Neighbor provision, which

¹⁰ *Michigan v. EPA* 213 F.3d 663 (D.C.Cir.2000); *North Carolina v. E.P.A.*, 531 F.3d 896 (D.C. Cir. 2008); *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7 (D.C. Cir. 2012).

¹¹ EPA.GOV., *Interstate Air Pollution Transport*, <http://www.epa.gov/airtransport/> (last visited March 2, 2013).

¹² *Id.*

¹³ *EME Homer City Generation, L.P. v. E.P.A.* 696 F.3d 7 (D.C. Cir. 2012).

¹⁴ Court of Appeals for the District of Columbia Circuit.

¹⁵ EPA.GOV., *Where You Live*, <http://www.epa.gov/airtransport/whereyoulive.html> (last visited January 6, 2013).

prohibits an upwind state from emitting pollutants that will "contribute significantly" to a downwind states failure to meet the minimum air quality standards.¹⁶ Under the authority of this provision, the EPA promulgated the Transport Rule, also known as the Cross-State Air Pollution Rule (CSAPR),¹⁷ in August 2011.¹⁸ The Transport Rule requires power plants in twenty-seven states to reduce their emissions of nitrogen oxides (NO_x) and sulfur dioxide (SO₂) because their emissions "significantly affect the ability of downwind states to attain and maintain" minimum air quality standards.¹⁹ Upon legal challenge, however, the Transport Rule was struck down in *Homer City* by the D.C. Circuit as exceeding the statutory authority of the EPA.²⁰ This Comment examines the *Homer City* decision.

Many different states contribute to air quality in a given downwind location and the EPA is faced with the complicated task of first determining which of the upwind states are "significantly" impacting downwind air quality in a particular downwind state (such states are hereinafter referred to as "significant contributors") and second deciding the degree to which each so identified state must reduce its pollution emissions to rectify the problem.²¹ Deciding which states are significant contributors is not and has never been controversial. Apportioning the necessary emission reductions among the significant contributors, however, is the sticking point.²² The cap-and-trade programs²³ historically implemented by EPA have focused on

¹⁶ 42 U.S.C. § 7410 (2006).

¹⁷ *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 11 (D.C. Cir. 2012).

¹⁸ Transport Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011).

¹⁹ *Id.* at 48,208–09.

²⁰ *Homer City*, 696 F.3d at 11.

²¹ *See generally* Transport Rule 76 Fed. Reg. 48,208.

²² *See generally Homer City* 696 F.3d 7; *Michigan v. U.S. E.P.A.*, 213 F.3d 663 (D.C. Cir. 2000); *N. Carolina v. E.P.A.*, 531 F.3d 896 (D.C. Cir. 2008).

²³ "Cap and trade is a market-based policy tool for protecting human health and the environment by controlling large amounts of emissions from a group of sources. A cap and trade program first sets an aggressive cap, or maximum limit, on emissions. Sources covered by the program then receive authorizations to emit in the form of emissions allowances, with the total amount of allowances limited by the cap. Each source can design its own compliance strategy to meet the overall reduction requirement, including the sale or purchase of allowances, installation of pollution controls, and implementation of efficiency measures, among other options. Individual control requirements

ensuring that emission reductions are achieved in a cost-effective manner.²⁴ The Transport Rule is one such program and through the Transport Rule the EPA made cost-effectiveness even more of a focus. That is, the Transport Rule only requires an upwind state to reduce emissions so long as it can be done cheaply.²⁵ The effect of this cost-based approach is that those states that can reduce emissions cheaply are required to dramatically reduce their emissions, while those states for which achieving reductions would be expensive are allocated a lesser burden.²⁶ The degree to which a state must reduce its emissions, therefore, is not directly tied to the extent that its emissions affect air quality in downwind areas, but is rather tied to its costs of reducing its emissions. Thus, the critical question regarding the Transport Rule is whether the EPA can require certain states to bear a greater burden of the necessary emission reductions, solely because they can do so more cheaply than another.²⁷ In *Homer City*, the D.C. Circuit answered this question in the negative.²⁸ The court found that the Transport Rule, in effect, shifts the burdens of overall compliance from those states that most detrimentally affect downwind areas,

are not specified under a cap and trade program, but each emission source must surrender allowances equal to its actual emissions in order to comply. Sources must also completely and accurately measure and report all emissions in a timely manner to guarantee that the overall cap is achieved.

A well-designed cap and trade program delivers:

- Greater environmental protection at lower cost
- Broad regional reductions, facilitating state efforts to address local impacts
- Early reductions, a result of allowance banking and market incentives
- Environmental integrity and transparent operations and results
- Fewer administrative costs to government and industry
- Efficiency and innovation incentives
- Incentives for doing better and consequences for doing worse
- Accounting for all emissions
- Partnership with existing requirements to ensure protection of the local population and environment"

EPA.GOV, *Basic Information*, <http://www.epa.gov/captrade/basic-info.html> (last visited March 1, 2013).

²⁴ Ed Dolan, *Court Rejects EPA Cross-State Air Pollution Rule. Where to Next?*, <http://www.economonitor.com/dolanecon/2012/08/27/court-rejects-epa-cross-state-air-pollution-rule-where-to-next/>, (last visited January 10, 2013).

²⁵ See *Transport Rule* at 48,246–48.

²⁶ *Homer City*, 696 F.3d at 11 ("[U]nder the Transport Rule, upwind States may be required to reduce emissions by more than their own significant contributions to a downwind State[] . . .").

²⁷ *Id.*

²⁸ *Id.*

to those upwind states that can achieve emission reductions most cheaply.²⁹ This, the D.C. Circuit found impermissible.³⁰

The Transport Rule was also struck down on a second ground. Under the CAA, the states are provided the first opportunity to regulate the emitters of pollution within its borders.³¹ The EPA determines the degree of reductions that must be achieved within a state to promote public health and welfare, but it is the state that first decides how those reductions will be accomplished.³² A state is provided the opportunity to do so through a State Implementation Plan (SIP).³³ It is only after a state fails to promulgate a sufficient SIP that the EPA can intercede and directly regulate the sources of pollution through a Federal Implementation Plan (FIP).³⁴ Through the Transport Rule, however, the EPA promulgated FIPs, which directly regulate sources within the subject states, without providing the states the first opportunity to implement the required emission reductions via SIPs.³⁵ To the court, this approach by the EPA impermissibly encroached on the role first reserved to the states by the cooperative federalism³⁶ structure of the CAA.³⁷

Part I of this Comment provides background to the CAA generally, and the Good Neighbor provision specifically. Part II discusses the seminal cases interpreting the Good

²⁹ *Id.* at 27 ("[W]hen EPA asks one upwind State to eliminate more than its statutory fair share, that State is necessarily being forced to clean up another upwind State's share of the mess in the downwind State").

³⁰ *Id.* at 11.

³¹ *Id.* at 28.

³² *Id.*

³³ See 42 U.S.C. §§ 7407(a), 7410(a)(1) (2006).

³⁴ 42 U.S.C. § 7410(c)(1) (2006).

³⁵ Transport Rule 76 Fed. Reg. at 48,208.

³⁶ Cooperative federalism is where "state and local governments administer and implement federal programs. Many state-administered programs are funded by the federal government, in whole or, more often, in part. Others take the form of conditional preemption, meaning that the states may choose to administer the federal program or else, cede the regulatory field to the federal government. Cooperative federalism covers an enormous array of regulatory fields, from the environment to education to welfare" Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 558 (2000)

³⁷ *Homer City*, 696 F.3d at 34 ("In sum, the text and context of the statute, and the precedents of the Supreme Court and this Court, establish the States' first-implementer role under [and] [w]e decline to adopt a reading of . . . that would blow a hole in that basic structural principle").

Neighbor provision prior to the Homer City decision. Part III details the Transport Rule and the judicial holdings of the Homer City case. Part IV critically analyzes the application of the case law and statutory principles to the Transport Rule in Homer City. Part V discusses how to resolve this judicial debacle. Part VI concludes.

This Comment argues that although the *Homer City* rejection of the EPA's cost-based approach can be reconciled with the literal text of the CAA, because the EPA's approach may also be reconciled with the CAA and is consistent with the D.C. Circuit's Good Neighbor provision precedent, the EPA's interpretation should have been upheld as permissible. Furthermore, because the *Homer City* decision effectively prevents the EPA's use of cost-based factors, a reversion to a command-and-control³⁸ approach to cross-state air pollution is inevitable. This result can only be avoided through a change in course by the judiciary, which can only be achieved via Supreme Court review³⁹ or a statutory amendment to the CAA expressly authorizing the EPA to use cost-considerations while implementing the Good Neighbor provision. With respect to the EPA's practice of directly regulating state sources of pollution through FIPs, this Comment argues that the plain language of the statute allows the EPA this flexibility wherever the states have utterly failed to address their obligations.

I. BACKGROUND AND BASIC STRUCTURE OF THE CAA—AIR POLLUTANTS, NAAQS, COOPERATIVE FEDERALISM, AND THE GOOD NEIGHBOR PROVISION

Under Title I of the CAA, the EPA is required to establish minimum air quality standards, necessary to protect the public from the adverse effects of air pollution.⁴⁰ In statutory jargon, these air quality standards are known as national ambient air quality standards

³⁸ "'Command and control' regulations focus on preventing environmental problems by specifying how a company will manage a pollution-generating process. This approach generally relies on detailed regulations followed up by an ongoing inspection program." Ralph Stuart, Command and Control Regulation, http://www.eoearth.org/article/Command_and_control_regulation (last visited March 2, 2013).

³⁹ The EPA's petition for rehearing en banc was denied on January 24, 2013. See <http://www.winston.com/index.cfm?contentID=19&itemID=168&itemType=25&postid=1248>.

⁴⁰ 42 U.S.C. § 7409(b)(2) (2006).

("NAAQS").⁴¹ The NAAQS are the "centerpiece" of the CAA.⁴² NAAQS must be established for each air pollutant "which may . . . endanger public health or welfare . . ."⁴³ and are to be established at a level necessary to protect the public from "known or anticipated adverse effects associated with the presence of . . . air pollutant[s] in the ambient air."⁴⁴ "Ambient air is the air to which the general public has access, as opposed to air within a facility or at a smokestack."⁴⁵ The EPA has established NAAQS for six common air pollutants: nitrogen dioxide (NO₂), carbon monoxide (CO), lead (Pb), SO₂, particulate matter (PM), and ozone (O₃).⁴⁶

The CAA also requires the EPA to divide the country into areas designated as "nonattainment," "attainment," or "unclassifiable" with regards to each air pollutant, depending on whether the area meets the NAAQS.⁴⁷ A geographic area that meets the NAAQS is an attainment area; areas that do not meet the NAAQS or contribute pollution to nearby areas that do not meet the NAAQS, are called nonattainment areas.⁴⁸ "An area may be designated attainment for some pollutants and nonattainment for others."⁴⁹ An unclassifiable area is an area that cannot be classified on the basis of available information.⁵⁰

While it is the EPA's responsibility to set the NAAQS for each of these pollutants,⁵¹ each state, not the EPA, is charged with initial authority to regulate the emitters within its borders to

⁴¹ 42 U.S.C. § 7408(a)(1)(A), (B) (2006).

⁴² Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2347 (1996).

⁴³ 42 U.S.C. § 7408(a)(1)(A), (B) (2006).

⁴⁴ 42 U.S.C. § 7409(b)(2) (2006).

⁴⁵ EPA.GOV, *Air Quality Management - National Ambient Air Quality Standards (NAAQS) for Criteria Pollutants*, <http://www.epa.gov/apti/course422/apc4a.html> (last visited January 10, 2013).

⁴⁶ *Id.*

⁴⁷ 42 U.S.C. § 7407(c), (d)

⁴⁸ EPA.GOV, *supra* note 45.

⁴⁹ EPA.GOV, *supra* note 45.

⁵⁰ EPA.GOV, *supra* note 45.

⁵¹ The pollutants subject to the NAAQS derive from various sources. Carbon Monoxide (CO) is a colorless, odorless gas formed when carbon in fuel is not burned completely. Motor vehicle exhaust, industrial processes, residential wood burning, and forest fires all contribute CO to the atmosphere. Sulfur Oxides (SO_x) are colorless gases formed by burning sulfur and is formed when fuel containing sulfur (e.g. coal and oil) is burned, and when gasoline is extracted from oil. Over 65% of SO₂ released to the air comes from electric utilities. Nitrogen oxides

ensure attainment of the NAAQS.⁵² Each state must develop a SIP demonstrating how it will regulate sources within its borders to attain and maintain each NAAQS.⁵³ Specifically, "[e]ach State shall . . . adopt . . . within 3 years . . . after the promulgation of a [NAAQS], a plan which provides for implementation, maintenance, and enforcement of such . . . standard . . . within [the] State."⁵⁴ But if a state is untimely in submitting a compliant SIP, the obligation to regulate emission sources within that state vests in the EPA, which must promulgate a FIP for the state to follow.⁵⁵ Specifically, the EPA "shall promulgate a [FIP] at any time within 2 years after [it] finds that a State has failed to make a required submission or finds that the plan . . . does not satisfy the minimum criteria . . ."⁵⁶ The EPA must also promulgate a FIP if it "disapproves a [SIP] . . . unless the State corrects the deficiency, and [EPA] approves the plan . . . before [it] promulgates such [FIP]."⁵⁷ In short, the states are provided the first opportunity to decide how they will attain the NAAQS.⁵⁸ If, within the prescribed timeframe—three years—a state fails to effectively regulate the polluters within its borders, then the EPA must determine which emitters

(NO_x) are a group of highly reactive gases that are involved in the formation of ozone. Nitrogen oxides form when fuel is burned at high temperatures. The primary sources of NO_x are motor vehicles, electric utilities, and other industrial, commercial, and residential sources that burn fuels. Ozone (O₃) is a gas composed of three oxygen atoms and is not usually emitted directly into the air, but at ground level is created by a chemical reaction between oxides of nitrogen (NO_x) and volatile organic compounds (VOCs) in the presence of heat and sunlight. The concentration of ozone in a given locality is influenced by many factors, including the concentration of NO₂ and VOCs in the area, the intensity of the sunlight, and the local weather conditions. Ozone and the chemicals that react to form it can be carried hundreds of miles from their origins, causing air pollution over wide regions. Lead (Pb) is a metal found naturally in the environment as well as in manufactured products. The major sources of lead emissions have historically been motor vehicles (such as cars and trucks) and industrial sources. The highest levels of lead in air are generally found near lead smelters. Particulate Matter is the general term used for a heterogeneous mixture of solid particles and liquid droplets found in the air, including dust, dirt, soot, smoke, and liquid droplets. Particles can be suspended in the air for long periods of time. They come from a variety of sources such as cars, trucks, buses, factories, construction sites, tilled fields, unpaved roads, stone crushing, burning of wood, and the combustion in motor vehicles, at power plants, and in other industrial processes. PM_{2.5} describes the "fine" particles that are less than or equal to 2.5 μm in diameter. PM₁₀ refers to all particles less than or equal to 10 μm in diameter (about one-seventh the diameter of a human hair).

⁵² See 42 U.S.C. §§ 7407(a), 7410(a)(1) (2006).

⁵³ 42 U.S.C. § 7410(a)(1) (2006).

⁵⁴ 42 U.S.C. § 7410 (2006).

⁵⁵ 42 U.S.C. § 7410(c)(1) (2006).

⁵⁶ *Id.*

⁵⁷ 42 U.S.C. § 7410 (2006).

⁵⁸ *Id.*

in the state will be regulated, and to what extent.⁵⁹ This practice, by which the states implement federal programs, is known as cooperative federalism.⁶⁰

The SIP/FIP dynamic discussed above also applies where emissions of a state travel downwind and result in a downwind state's inability to meet the NAAQS for one or more criteria pollutants.⁶¹ Under the Good Neighbor provision of the CAA, added as an amendment in 1990,⁶² each SIP (or FIP) must "contain adequate provisions—prohibiting . . . any source . . . within the State from emitting any air pollutant in amounts which will contribute significantly to nonattainment in . . . any other State with respect to any such [NAAQS]"⁶³ It is this language—determining how to regulate those emissions that "contribute significantly to nonattainment" in a downwind state—that has proven problematic for the D.C. Circuit and EPA.

II. PAST EPA EFFORTS TO APPLY THE GOOD NEIGHBOR PROVISION

Some sources of air pollution are well positioned to reduce emission levels, while others are not. For those that can only reduce air emissions through implementation of costly measures, compliance with mandated emission reduction requirements can be financially crippling. Because the effect of these regulations can disproportionately affect different emission sources, the regulatory scheme historically employed by the EPA⁶⁴ has recognized the utility of achieving emission reductions in the most cost-effective manner.⁶⁵ The Transport Rule pushed the use of this cost-based approach to its furthest end yet. The EPA's predominant consideration in deciding who is required to effect necessary emission reductions, through the Transport Rule and under the auspices of the Good Neighbor provision, was whether a state could achieve emissions

⁵⁹ *Id.*

⁶⁰ Greve, *supra* note 36.

⁶¹ 42 U.S.C. § 7410 (2006).

⁶² *Michigan v. U.S. E.P.A.*, 213 F.3d 663, 669 (D.C. Cir. 2000).

⁶³ 42 U.S.C. § 7410 (2006).

⁶⁴ EPA's approach is known as cap-and-trade. See *supra*, note 23.

⁶⁵ *Id.*

cheaply,⁶⁶ rather than the effect of those emissions on downwind NAAQS.⁶⁷ Such an approach effectively shifted the burdens from those states that were most detrimentally affecting downwind areas, to those states that could achieve emission reductions cheaply. In determining that such an approach is impermissible, the precedent of the D.C. Circuit was controlling.

Homer City was the culmination of a decade's worth of doctrinal narrowing. The contours of the EPA's authority have taken shape through the decisions of the D.C. Circuit.⁶⁸ This process commenced in *Michigan v. EPA*,⁶⁹ continued in *North Carolina v. EPA*,⁷⁰ and came to a head in *Homer City*. What started as a seeming endorsement of cost-based apportioning of emission reduction obligations, has now taken a one hundred and eighty degree turn, jeopardizing a decade's worth of regulation and the resultant environmental gains. The remainder of this section traces the seminal cases, *Michigan* and *North Carolina*, whose doctrinal interpretations were put to work in *Homer City*.

A. *Michigan v. EPA*

In *Michigan v. EPA*, twenty-two states challenged the EPA's 1998 NO_x Rule,⁷¹ which quantified their Good Neighbor obligations under the 1997 ozone NAAQS.⁷² These states argued that the EPA exceeded its statutory authority by impermissibly using cost-considerations in determining to what extent each state must reduce its emissions.⁷³

⁶⁶ EME Homer City Generation, L.P. v. E.P.A., 696 F.3d 7, 17 (D.C. Cir. 2012).

⁶⁷ See Transport Rule 76 Fed. Reg. 48,208, 46–48.

⁶⁸ *Michigan v. EPA* 213 F.3d 663 (D.C.Cir.2000); *North Carolina v. E.P.A.*, 531 F.3d 896 (D.C. Cir. 2008); EME Homer City Generation, L.P. v. E.P.A., 696 F.3d 7 (D.C. Cir. 2012).

⁶⁹ 213 F.3d 663 (D.C.Cir.2000).

⁷⁰ *North Carolina v. E.P.A.*, 531 F.3d 896, 903-04 on reh'g in part, 550 F.3d 1176 (D.C. Cir. 2008)

⁷¹ See 63 Fed.Reg. 57,356–58.

⁷² *Michigan v. U.S. E.P.A.*, 213 F.3d 663, 670 (D.C. Cir. 2000).

⁷³ *Id.* at 669.

The 1998 NOx Rule utilized a two-step process to determine each state's Good Neighbor obligation. First, the EPA determined those states that were "significant contributors,"⁷⁴ and, as such, were required to reduce their ozone emissions.⁷⁵ The significant contributors were identified as those states that contributed more than two parts per billion (ppb) of ozone to a downwind non-attainment area.⁷⁶ The D.C. Circuit in *Michigan* described this amount as a "very low threshold."⁷⁷ Determining which states were significant contributors was not controversial.

After determining which states would be subject to a Good Neighbor obligation, the EPA's next step was to determine the extent of that obligation.⁷⁸ Rather than requiring each state to reduce its emissions down to the two ppb threshold that was utilized to define those states as significant contributors, the EPA required those states to reduce their emissions by the amount that could be achieved through "highly cost-effective controls."⁷⁹ Therefore, although two ppb was the threshold for determining whether a state was a significant contributor, this threshold was not determinative in defining each state's Good Neighbor obligation.⁸⁰ If a state could not cost-effectively reduce its emissions to the two ppb threshold, EPA would not compel the state to do so.⁸¹

The D.C. Circuit upheld the rule, including the EPA's cost-based approach, finding that the EPA may "consider differences in cutback costs, so that, after reduction of all that could be cost-effectively eliminated, any remaining 'contribution' would not be considered 'significant.'"⁸² Therefore, "the ultimate line of 'significance,' whether measured in volume of NOx emitted or

⁷⁴ *Id.* at 679.

⁷⁵ *Id.* at 675-80.

⁷⁶ *Id.* at 675.

⁷⁷ *Id.*

⁷⁸ *Michigan v. U.S. E.P.A.*, 213 F.3d 663, 675-80 (D.C. Cir. 2000).

⁷⁹ *Id.* at 675; 63 Fed. Reg. at 57,403.

⁸⁰ *Michigan*, 213 F.3d at 675.

⁸¹ *Id.*

⁸² *Id.* at 677-79.

arriving in nonattainment areas, would vary from state to state depending on variations in cutback costs."⁸³ Although not explicitly noted by the *Michigan* court, it is later made clear in *Homer City*, that critical to the 1998 NOx Rule being upheld was that even though the cost-based approach served to lessen the potential obligations of those upwind states that could not reduce emissions cheaply, no evidence was presented to suggest that these lessened burdens resulted in a corresponding increased burden to those upwind states that could reduce their emissions more cheaply.

B. *North Carolina v. EPA*

In *North Carolina v. EPA* the D.C. Circuit reviewed the EPA's 2005 Clean Air Interstate Rule (CAIR).⁸⁴ CAIR established the Good Neighbor obligations of twenty-eight states with respect to the 1997 ozone and fine particulate matter NAAQS.⁸⁵ The first step for the EPA in establishing the Good Neighbor obligations, just as it was with the 1998 NOx Rule upheld in *Michigan*, was to determine which states were significant contributors.⁸⁶ The thresholds for being deemed a significant contributor were set at .2 micrograms per cubic meter for fine particulate matter and two ppb for ozone.⁸⁷ After utilizing these thresholds to determine which states would have a Good Neighbor obligation, the EPA proceeded to define that obligation—which mirrored the process employed by the 1998 NOx Rule.⁸⁸ The Good Neighbor obligations, however, were established on a region-wide, rather than state by state basis,⁸⁹ and included a trading program.⁹⁰

⁸³ *Id.* at 675.

⁸⁴ See 70 Fed.Reg. 25,162 (May 12, 2005).

⁸⁵ *North Carolina v. E.P.A.*, 531 F.3d 896, 903 (D.C. Cir. 2008).

⁸⁶ *Id.*

⁸⁷ *North Carolina*, 531 F.3d at 903-04.

⁸⁸ *Id.*

⁸⁹ *Id.* at 904.

⁹⁰ "[Trading] programs display the following key features:

With respect to fine particulate matter, the EPA set the total emission budget for the region to mirror the fine particulate matter allowances that state power plants received under Title IV of the CAA.⁹¹ The pre-existing Title IV allowances had been established by Congress to address an acid rain problem.⁹² Although the Title IV program involved regulating the same pollutant that was the subject of the NAAQS—fine particulate matter—the Title IV allowances were *not* established based on downwind non-attainment of NAAQS.⁹³ Furthermore, the EPA never established a relationship between the pre-existing Title IV allowances and attainment of the downwind NAAQS for fine particulate matter.⁹⁴ Essentially, the EPA already had a system in place for regulating the emission of fine particulate matter, i.e. the Title IV allowances, and rather than independently evaluating whether this system was sufficient to ensure attainment of downwind NAAQS, it simply assumed so.⁹⁵ Because the EPA did not establish a connection between pre-existing power plant allowances under Title IV and attainment of downwind NAAQS, the court struck down the EPA's approach as arbitrary and capricious.⁹⁶ Of relevance here is that the EPA apparently believed the approach to be a cost-effective way to achieve the NAAQS.⁹⁷

An emissions 'cap': A limit on the total amount of pollution that can be emitted (released) from all regulated sources (e.g., power plants); the cap is set lower than historical emissions in order to reduce emissions.

Allowances: An authorization to emit a fixed amount of a pollutant.

Measurement: Accurate tracking of all emissions.

Flexibility: Sources can choose how to reduce emissions, including whether to buy additional allowances from other sources that reduce emissions.

Allowance trading: Sources can buy or sell allowances on the open market. Because the total number of allowances is limited by the cap, emission reductions are assured.

Compliance: At the end of each compliance period, each source must own at least as many allowances as its emissions." EPA.GOV., *Allowance Trading Basics*, <http://www.epa.gov/airmarkt/trading/basics.html> (last visited March 3, 2013).

⁹¹ *Id.* at 917.

⁹² *Id.* at 902.

⁹³ *Id.* at 917.

⁹⁴ *Id.* at 918.

⁹⁵ *Id.*

⁹⁶ *North Carolina v. E.P.A.*, 531 F.3d 896, 917 (D.C. Cir. 2008).

⁹⁷ CAIR, 70 Fed.Reg. at 25,199 (quoting Proposed CAIR, 69 Fed.Reg. 4566, 4612 (Jan. 30, 2004)).

With respect to establishing Good Neighbor obligations for the ozone NAAQS, the EPA also established a regional cap for upwind states.⁹⁸ The manner in which the regional cap was established was not challenged.⁹⁹ The manner in which the emission allowances were then distributed, however, was challenged.¹⁰⁰ In determining the emission allowances that would be distributed to each state, the EPA used a methodology unrelated to each state's contribution to downwind non-attainment; it was based on the goal of "achieving a reasonable balance of regional and local controls to provide a cost-effective and equitable governmental approach to attainment."¹⁰¹ To achieve this goal of cost-effectiveness, the EPA allocated the emission allowances based on how cheaply a state could reduce its emissions.¹⁰² States that could reduce their emissions more cheaply received less allowances; those that could only do so expensively received more.¹⁰³ Thus, rather than explaining how its distribution of credits related to each states' significant contributions to downwind non-attainment, the EPA simply asserted that the distribution would create an equitable balance of controls.¹⁰⁴ So again, as with the SO₂ caps, the EPA did not link its distribution of credits to each states contribution to downwind non-attainment.¹⁰⁵ The EPA determined a cap for the region and then "evaluated it to assure that it is highly cost-effective."¹⁰⁶ Moreover, the EPA chose this approach because it "reflect[ed] the inherently higher emissions rate of coal-fired plants, and consequently the greater burden on coal plants to control emissions," thereby creating "a more equitable budget distribution."¹⁰⁷ In short, because it would be more difficult for states with coal-fired power plants to meet lower emission

⁹⁸ North Carolina v. E.P.A., 531 F.3d 896, 917 (D.C. Cir. 2008).

⁹⁹ *Id.* at 919.

¹⁰⁰ *Id.* at 918.

¹⁰¹ *Id.* (quoting Proposed CAIR, 69 Fed.Reg. at 4612).

¹⁰² *Id.* at 920.

¹⁰³ *Id.* at 920.

¹⁰⁴ North Carolina v. E.P.A., 531 F.3d 896, 919 (D.C. Cir. 2008).

¹⁰⁵ *Id.*

¹⁰⁶ CAIR, 70 Fed. Reg. at 25,206.

¹⁰⁷ *Id.* at 25,231.

thresholds, the EPA gave such states more emission credits, irrespective of how the various states contributed to downwind non-attainment.

The *North Carolina* court acknowledged that the EPA's determination of each state's Good Neighbor obligation may include cost considerations.¹⁰⁸ However, because CAIR involved a regional trading program, the EPA's application of the Good Neighbor provision in CAIR did not directly link each state's Good Neighbor obligation to its own cost of reducing emissions.¹⁰⁹ Rather, the EPA made one state's Good Neighbor obligation dependent on *another* state's cost of eliminating emissions.¹¹⁰ States burning clean fuels were punished because other state's burned dirty fuels, not because of their own significant contribution to downwind non-attainment of NAAQS.¹¹¹ With these findings, the court found that the Good Neighbor provision did not give the EPA the authority to force an upwind state to share the burden of reducing other upwind states' Good Neighbor obligations.¹¹² Instead, each state must eliminate its own significant contribution to downwind pollution.¹¹³ Because CAIR shifted the burden of emission reductions solely in pursuit of equity among upwind states, the resulting state budgets were arbitrary and capricious.¹¹⁴

III. THE TRANSPORT RULE AND *HOMER CITY*

A. The Transport Rule

¹⁰⁸ *North Carolina v. E.P.A.*, 531 F.3d 896 (D.C. Cir. 2008) citing *Michigan*, 213 F.3d at 677-79.

¹⁰⁹ *North Carolina*, 531 F.3d at 896.

¹¹⁰ For example, Louisiana's power plants use more gas and oil than most states. Consequently, instead of the budget of 42,319 tons per year that would be Louisiana's proportional share of the region-wide cap without fuel adjustment, the State only received 29,593 tons per year. The rest of those credits went to states with more coal-fired EGUs than average, which necessarily received "larger NOx emissions budgets" than their unadjusted proportional shares.

¹¹¹ CAIR, 70 Fed.Reg. at 25, 231.

¹¹² *North Carolina*, 531 F.3d at 921.

¹¹³ *Id.*

¹¹⁴ *Id.* at 918-21.

On August 8, 2011, the EPA issued the Transport Rule,¹¹⁵ its replacement for CAIR—the rule struck down in *North Carolina*.¹¹⁶ The Transport Rule required SO₂ and NO_x emission reductions from power plants in twenty-seven states.¹¹⁷ The required emission reductions, expressed as state emission budgets, were intended to address each state's contribution to non-attainment of NAAQS in downwind states.¹¹⁸ Just as it did with the 1997 NO_x Rule and with CAIR, the EPA again used a two-step process to quantify each state's Good Neighbor obligation.¹¹⁹ The first step defined which states were significant contributors, based upon whether the state emits “amounts which will . . . contribute significantly” to a downwind state's nonattainment of the NAAQS.¹²⁰ This initial threshold was established at (i) 0.8 ppb for ozone, (ii) 0.15 µg/m³ for annual PM_{2.5}, and (iii) 0.35 µg/m³ for 24-hour PM_{2.5}.¹²¹ If modeling showed that a state would send more than those amounts into a downwind state's air, the upwind state was deemed a significant contributor.¹²² States contributing amounts greater than the above thresholds were subject to Good Neighbor obligations; states contributing less were not required to reduce their emissions under the Good Neighbor provision.¹²³

After determining which states would be subject to Good Neighbor obligations, the Transport Rule next determined the extent of that obligation for each state, which was established using a cost-based standard.¹²⁴ Each state with a Good Neighbor obligation was required to reduce its emissions to the extent that its power plants could achieve the reductions at

¹¹⁵ Transport Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011).

¹¹⁶ *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 15 (D.C. Cir. 2012).

¹¹⁷ *Id.* at 11.

¹¹⁸ EPA Issues Replacement for Clean Air Interstate Rule, 21 Air Pollution Consultant 4.1 (2011)

¹¹⁹ *Homer City*, 696 F.3d at 15.

¹²⁰ Transport Rule, 76 Fed.Reg. at 48,236.

¹²¹ *Homer City*, 696 F.3d at 15.

¹²² *Id.* at 15–16.

¹²³ *Id.* at 16.

¹²⁴ *Id.* at 16–17.

a specified cost per ton.¹²⁵ Thus, the emissions reductions imposed on the states, once they were determined to be significant contributors, was not actually linked to the amount of emissions that had been determined to contribute to non-attainment of NAAQS downwind.¹²⁶ Rather, the Good Neighbor obligation was based on how much could be reduced cost effectively.¹²⁷ These figures were then used to generate emission budgets for each pollutant in each state subject to a Good Neighbor obligation.¹²⁸ "The budget is the maximum amount of each pollutant that a State's power plants may collectively emit in a given year, beginning in 2012."¹²⁹

To ensure that each state would stay within these budgets, the EPA simultaneously promulgated FIPs.¹³⁰ The FIPs required power plants in upwind states to make the SO₂ and NO_x reductions needed to comply with each upwind state's emissions budget.¹³¹ The FIPs also created an interstate trading program to allow regulated sources to comply as cost-effectively as possible.¹³² The FIPs converted each state's emissions budget into "allowances," which were allocated among power plants in the state.¹³³ Under the FIPs, it was the EPA, and not the states, that decided how to distribute the allowances among the power plants in each state.¹³⁴

The Transport Rule retained a limited, secondary role for SIPs.¹³⁵ States were given the option of submitting SIPs that modify some elements of the FIPs.¹³⁶ States could also replace the FIPs wholesale as long as the SIP prohibited the amounts of NO_x and SO₂ emissions

¹²⁵ Transport Rule 76 Fed. Reg. at 48,260.

¹²⁶ *Homer City*, 696 F.3d at 17.

¹²⁷ *Id.*

¹²⁸ *See* Transport Rule at 48,259–63.

¹²⁹ *Id.*

¹³⁰ *Id.* at 48,208.

¹³¹ *Id.*

¹³² *Id.* at 48,271.

¹³³ *Id.* at 48,212.

¹³⁴ *See* Transport Rule 76 Fed. Reg. at 48,284–88.11.

¹³⁵ *See Id.* at 48,327–28.

¹³⁶ *Id.*

specified by the EPA.¹³⁷ Each SIP was to be reviewed by the EPA "on a case-by-case basis."¹³⁸ However, the states were not provided a post-Transport Rule opportunity to avoid FIPs by submitting a SIP or SIP revision, but rather the FIPs "remain[ed] fully in place in each [] state until a state's SIP [was] submitted and approved by EPA to revise or replace a FIP."¹³⁹

B. Homer City

As the EPA continued its efforts to finalize and implement the Transport Rule, various electric utilities, industry trade associations, and states filed petitions challenging the rule.¹⁴⁰ After consolidating the petitions, the D.C. Circuit issued an order staying implementation of the Transport Rule pending resolution of the petitions.¹⁴¹ Under the order, the CAIR remained in effect pending resolution of the Transport Rule challenge.¹⁴² Congress also entertained various legislative initiatives to repeal or postpone the Transport Rule. In September 2011, for example, the House of Representatives passed the Transparency in Regulatory Analysis of Impacts on the Nation Act¹⁴³ which would have delayed the Transport Rule pending further study; no action was taken on the bill in the Senate. In November 2011, Senator Rand Paul introduced a resolution to repeal the Transport Rule that was defeated by a vote of 56 to 41.¹⁴⁴ In *Homer City*, the D.C. Circuit reviewed the Transport Rule on the merits.

i. Homer City Majority

a. The EPA's use of Cost-Considerations

The majority in *Homer City* struck down the Transport Rule on two grounds. Firstly, the majority found that the Transport Rule fell outside of the EPA's statutory authority under the

¹³⁷ *See Id.* at 48,328.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir. Dec. 30, 2011).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ H.R. 2401

¹⁴⁴ Clean Air Act Handbook § 3:10 (2012)

CAA because the Good Neighbor obligations assigned to upwind states were not based on the emissions from those states that actually "contribute[d] significantly to nonattainment" in downwind states.¹⁴⁵ When the EPA first established a threshold to determine those states that were significant contributors, the majority came to see that threshold as a "floor" below which any contribution must be viewed as insignificant, and as such, the Good Neighbor provision could not be used to mandate reductions below that threshold.¹⁴⁶ Despite this, the Transport Rule did, in some cases, require states to reduce their contributions to levels below that floor.¹⁴⁷ This resulted because the Transport Rule required states to eliminate all emissions that could be achieved at a specified cost per ton.¹⁴⁸ The Transport Rule did not cap these reductions at any particular numerical emission threshold, but instead states were required to continue to reduce emissions until further reductions were no longer cost effective. To the majority, when the EPA ignored this initial threshold in determining each state's Good Neighbor obligation, it served to "redefine each State's 'significant contribution' in such a way that an upwind State's required reductions could be more than its own significant contribution to a downwind State."¹⁴⁹ In other words, "if amounts below a numerical threshold do not contribute significantly to a downwind State's nonattainment, EPA may not require an upwind State to do more."¹⁵⁰ Because the EPA did just that, the court found that the Transport Rule exceeded the EPA's statutory authority under the CAA.¹⁵¹

¹⁴⁵ *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 23 (D.C. Cir. 2012).

¹⁴⁶ *Id.* at 25–26.

¹⁴⁷ *Id.* at 25.

¹⁴⁸ Transport Rule 76 Fed. Reg. at 48,260.

¹⁴⁹ *Homer City*, 696 F.3d at 25–26.

¹⁵⁰ *Id.* at 26.

¹⁵¹ *Id.*

Relatedly, the majority found that the Transport Rule violated the "proportionality requirement" as described in *North Carolina*.¹⁵² Specifically, the court found that the EPA has "no authority to force an upwind state to share the burden of reducing other upwind states' emissions."¹⁵³ In the majority's view, when a state is required to reduce its emissions to a level below that which contributes significantly to non-attainment downwind, the additional burdens serve to compensate for *reduced* Good Neighbor obligations conferred to *other* states.¹⁵⁴ That is, just as the EPA's cost-based approach required states that could cheaply reduce emissions to "exceed the mark," the cost-based approach simultaneously served to limit the Good Neighbor obligations of those states that could only reduce emissions through costly measures.¹⁵⁵ The majority did acknowledge that, under *Michigan*, the EPA may rely on cost factors to reduce the Good Neighbor obligations of those states where it would be very expensive for them to hit the numerical threshold.¹⁵⁶ For the majority, the EPA's reliance on cost factors could not also extend to require a state to eliminate *more* "than its statutory fair share," because "that State is necessarily being forced to compensate for another upwind State's downwind contribution."¹⁵⁷ The court found this result—the EPA's failure to allocate the required reductions on a proportional basis—to be impermissible under both the statute and *North Carolina*.¹⁵⁸

Thirdly, and again relatedly, the majority found that the EPA failed to ensure that the cumulative Good Neighbor obligations of the various upwind states did not produce unnecessary *over-control* in the downwind States.¹⁵⁹ The court found the EPA's statutory authority to be

¹⁵² *Id.* at 26.

¹⁵³ *Id.* quoting *North Carolina v. E.P.A.*, 531 F.3d 896, 921 (D.C. Cir. 2008).

¹⁵⁴ *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 26–27 (D.C. Cir. 2012).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* citing *Michigan v. E.P.A.*, 213 F.3d 663, 675 (D.C. Cir. 2000).

¹⁵⁷ *Homer City*, 696 F.3d at 27.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 27.

limited to merely attaining the NAAQS in the downwind states,¹⁶⁰ and as such, the EPA could not require the upwind states to do more than necessary to accomplish that goal.¹⁶¹ Because the Transport Rule did not take steps to avoid such over-control, the majority deemed it impermissible under the CAA.¹⁶²

b. The EPA's Use of FIP's

The majority also vacated the Transport Rule on a second, entirely independent ground. While establishing each upwind state's Good Neighbor obligation, the EPA simultaneously issued FIPs to implement emission reduction measures directly on sources in those states, to enforce those Good Neighbor obligations.¹⁶³ The EPA did so without giving the states the initial opportunity to promulgate SIP's to implement the obligation themselves.¹⁶⁴ The majority concluded that such a practice is not authorized by the CAA.¹⁶⁵

In supporting its position that the EPA did not have the authority to implement the emission reduction measures through FIPs prior to giving the states the opportunity to submit SIPs, the majority first pointed to uncontested principles regarding the structure of the CAA.¹⁶⁶ Under the CAA, the EPA has authority to set NAAQS, but the role of first-implementer is reserved for the states.¹⁶⁷ It is only after a state fails to submit a sufficient SIP that the EPA may promulgate FIPS.¹⁶⁸ Here, the EPA conceded that the state has three years to implement its SIP.¹⁶⁹ Despite this the EPA argued that the three year period available to the state began to run at the establishment of the NAAQS (i.e. 1997), not when the EPA gets around to quantifying the

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Homer City*, 696 F.3d at 28; Transport Rule 76 Fed. Reg. at 48,208.

¹⁶⁴ *Homer City*, 696 F.3d at 28.

¹⁶⁵ *Id.* at 33.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 28.

¹⁶⁸ *Id.* at 30.

¹⁶⁹ *Id.*

state's numerical obligation under the Good Neighbor provision.¹⁷⁰ Under such a construction, the states were required to develop SIPs that incorporate their Good Neighbor obligation by 2000.¹⁷¹ Because the states did not effectively develop SIPs satisfying their Good Neighbor obligations, the EPA contended that it was authorized to promulgate FIPs at any time thereafter.¹⁷² The majority, however, found that the three year period for implementing a SIP began to run when the EPA quantified the Good Neighbor obligations of the various states and notified them of the same.¹⁷³ In the view of the majority, the "EPA's approach punishes the States for failing to meet a standard that EPA had not yet announced and the States did not yet know."¹⁷⁴

The relevant statutory language can be found in Section 110 of the CAA, which governs SIPs.¹⁷⁵ Section 110(a)(1) requires states to submit SIPs to implement each new or revised NAAQS.¹⁷⁶ Section 110(a)(2) lists many elements that a SIP must contain to enable the state to attain the NAAQS, and measures to satisfy the states Good Neighbor obligation is one such required element.¹⁷⁷ Furthermore, the statute requires that when the EPA finds that a state "has failed to make a required submission" or "disapproves a [SIP] submission in whole or in part," the EPA must "promulgate a [FIP]" within two years, "unless the State corrects the deficiency" in the interim, in a manner approved by the EPA.¹⁷⁸

The majority defined the issue as whether a state's implementation of its Good Neighbor obligation can be considered part of the state's "required submission" in its SIP, or whether the

¹⁷⁰ *Id.* at 32.

¹⁷¹ *Id.*

¹⁷² *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 32 (D.C. Cir. 2012).

¹⁷³ *Id.* at 33.

¹⁷⁴ *Id.* at 28.

¹⁷⁵ *Id.* at 30.

¹⁷⁶ *See* 42 U.S.C. § 7410(a)(1) (2006).

¹⁷⁷ *See* 42 U.S.C. § 7410(a)(2) (2006).

¹⁷⁸ 42 U.S.C. § 7410(c)(1) (2006).

SIP can be deficient for failing to incorporate the Good Neighbor obligation, even *before* the EPA quantifies the state's Good Neighbor obligation.¹⁷⁹ In the majority's view, a state cannot be required to address its Good Neighbor obligation as part of the initial SIP submission.¹⁸⁰ Rather, it is the EPA's quantifying of a state's Good Neighbor obligation is what "require[d]" the state to make a "submission" implementing the Good Neighbor obligation on sources within the state.¹⁸¹ It is only after the EPA had set the relevant emissions budgets for each state that it may require states to submit new or revised SIPs.¹⁸² After the EPA defined a state's Good Neighbor obligation, the state must have been provided reasonable time to implement that requirement on sources within the state.¹⁸³ It was uncontroverted that the triggers for a FIP are the EPA's finding that a SIP fails to contain a "required submission" or the EPA's disapproving a SIP because of a "deficiency."¹⁸⁴ The majority, however, found that a SIP cannot be deemed to lack a required submission or be deemed deficient for failing to implement the Good Neighbor obligation until after the EPA had defined the state's Good Neighbor obligation.¹⁸⁵ "The regulated entities—here, the upwind States—need more precise guidance to know how to conform their conduct to the law. A SIP logically cannot be deemed to lack a 'required submission' or deemed to be deficient for failure to meet the [G]ood [N]eighbor obligation before EPA quantifies the [G]ood [N]eighbor obligation."¹⁸⁶

In concluding that a state cannot be required to address its Good Neighbor obligation until the EPA determines what that obligation is, the majority relied on the canon of statutory construction that the words of a statute must be read in context and with a view of their place in

¹⁷⁹ *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 30 (D.C. Cir. 2012).

¹⁸⁰ *Id.* at 30–31.

¹⁸¹ *Id.*

¹⁸² *Id.* at 31.

¹⁸³ *Id.* at 31.

¹⁸⁴ *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 30–31 (D.C. Cir. 2012).

¹⁸⁵ *Id.* at 31.

¹⁸⁶ *Id.* at 32.

the overall statutory scheme.¹⁸⁷ In the majority's view, determining the level of reductions required under the Good Neighbor provision is analogous to setting a NAAQS, and it is such a determination that triggers the period during which states may submit SIPs or SIP revisions.¹⁸⁸

That approach fits comfortably within the statutory text and structure. In both situations—setting a NAAQS and defining States' good neighbor obligations—EPA sets the numerical end goal. And in both cases, once the standards are set, 'determining the particular mix of controls among individual sources to attain those standards' remains 'a State responsibility.'¹⁸⁹

The majority also relied on the fact that the EPA has applied the Good Neighbor provision in the past, exactly as the majority here construes the statute.¹⁹⁰ Based on these principles, the majority vacated the Transport Rule and the Transport Rules FIPs and remanded the proceeding to the EPA.¹⁹¹ It also directed the EPA to continue administering CAIR pending the promulgation of a valid replacement.¹⁹²

ii. *Homer City* Dissent

a. The EPA's Use of Cost-Considerations

With respect to the majority's position regarding the use of cost-based standards to establish each state's Good Neighbor obligation, the dissent only challenged this position on jurisdictional, not substantive, grounds.¹⁹³ This Comment only addresses substantive issues, and therefore the dissent offers nothing significant in this regard.

b. The EPA's Use of FIP's

¹⁸⁷ *Id.* at 33.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* citing 1998 NOx Rule, 63 Fed. Reg. 57,356, 57,369 (Oct. 27, 1998).

¹⁹⁰ *Homer City*, 696 F.3d at 32–33.

¹⁹¹ *Id.* at 38.

¹⁹² *Id.*

¹⁹³ *Id.* at 40–41 (Rogers, J., dissenting).

With respect to the EPA's FIP first approach, the dissent evaluated its validity by focusing on the strict statutory language.¹⁹⁴ The language of the CAA unquestionably requires the EPA to issue a FIP within two years after a state fails to make a "required submission" or submits a deficient SIP.¹⁹⁵ As noted above, the majority held that a state could not be required to incorporate its Good Neighbor obligation into a SIP until after the EPA quantified that obligation.¹⁹⁶ To the dissent, this holding misleadingly suggested that the text of the CAA actually requires the EPA to establish Good Neighbor obligations in the first instance, in which case the promulgation of a SIP addressing the states Good Neighbor obligation could not logically be required until the thresholds are set by the EPA.¹⁹⁷ The dissent viewed this as a falsity and therefore reproduced the relevant statutory language, emphasizing the critical language:

- (a)(1) Each State *shall* . . . adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) *after the promulgation of a [NAAQS]* (or any revision thereof) . . . a plan which provides for implementation, maintenance, and enforcement of such [] standard . . . within such State.
- (2) Each implementation plan submitted by a State under this chapter . . . *shall*
.
.
.
(D) contain adequate provisions—
 - (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—
 - (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such [NAAQS].¹⁹⁸

¹⁹⁴ *Id.* at 46–47.

¹⁹⁵ 42 U.S.C. § 7410(c)(1) (2006).

¹⁹⁶ *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 30–31 (D.C. Cir. 2012).

¹⁹⁷ *Id.* at 48–49.

¹⁹⁸ *Id.* at 47.

To the dissent, the plain text required that within three years of the EPA's promulgation of a NAAQS, states were required to submit their SIPs, and those SIPs were required to include adequate Good Neighbor provisions.¹⁹⁹ The dissent believed that this plain reading represented the unambiguous chronology established by Congress—the EPA has the initial burden to set the NAAQS, and then the states have a series of follow-up duties to ensure attainment of the NAAQS; one such duty clearly assigned to the states being the inclusion of adequate Good Neighbor provisions in SIPs.²⁰⁰ Notably absent from the statute, in the dissent's view, is any requirement that the EPA quantify each state's Good Neighbor obligation.²⁰¹ The dissent found the failure of the unambiguous text to impose such a requirement on the EPA to dramatically undermine the majority position that it was such action by the EPA that triggered "the period during which States may submit SIPs."²⁰² Furthermore, the dissent found that, even if the statute were ambiguous, the court would be required to defer to the EPA's interpretation that states have an independent obligation to include Good Neighbor provisions in their SIPs within three years of the promulgation of the NAAQS because such an interpretation is permissible under the statute.²⁰³

The dissents conclusion is predicated upon the canons of statutory construction that the court must begin with the language of the statute²⁰⁴ and "[w]hen the words of a statute are unambiguous, then . . . judicial inquiry is complete."²⁰⁵ Applying these principles to the actions of the EPA as an administrative agency, the first step in statutory interpretation requires a determination of "whether Congress has directly spoken to the precise question at issue. If the

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 48 (D.C. Cir. 2012) (Rogers, J., dissenting).

²⁰³ *Id.* citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

²⁰⁴ *Homer City*, 696 F.3d at 46 citing *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002).

²⁰⁵ *Homer City*, 696 F.3d at 46 quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."²⁰⁶ If, however, "the statute is silent or ambiguous with respect to the specific issue," the court must defer to an agency's statutory interpretation if it "is based on a permissible construction of the statute."²⁰⁷

The dissent went on to contend that even though the EPA, in previous instances, implemented the SIP/FIP process with respect to Good Neighbor obligations as the majority now required, the EPA was not restricted to its previous policy choices.²⁰⁸ For the dissent, so long as the EPA acknowledged that it was taking a different approach, presented "good reasons" for doing so, and its new approach was "permissible under the statute," then it could in fact take a different approach.²⁰⁹ "Agencies 'need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one.'"²¹⁰ The dissent stressed that the EPA acknowledged its previous approach and explained its decision in "response to comments" requesting states be given time to submit SIPs before EPA imposed the FIPs.²¹¹ The EPA explained its decision on the grounds that it had "no authority to alter the statutory deadlines for SIP submissions and that the CAA did not require it to issue a rule quantifying States' '[G]ood [N]eighbor' obligations."²¹² Moreover, "the court in *North Carolina*, in remanding rather than vacating CAIR, 'emphasized EPA's obligation to remedy [CAIR's] flaws expeditiously' and thus 'EPA d[id] not believe it would be appropriate to establish a lengthy transition period to the rule which is to replace CAIR.'"²¹³ Because the EPA explained why it was departing from its

²⁰⁶ *Homer City*, 696 F.3d at 46 citing *Chevron*, 467 U.S. at 842–44.

²⁰⁷ *Homer City*, 696 F.3d at 46 citing *Chevron*, 467 U.S. at 843.

²⁰⁸ *Homer City*, 696 F.3d at 50.

²⁰⁹ *Homer City*, 696 F.3d at 50 quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

²¹⁰ *Homer City*, 696 F.3d at 50.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

previous approach, the dissent believed that the FIP first approach was within the EPA's authority.²¹⁴

IV. INDEPENDENT ANALYSIS OF THE DIVERGING OPINIONS

As detailed above in Section III, the Transport Rule was struck down on two grounds. First, the majority found that EPA's cost-based approach to apportioning Good Neighbor obligations inconsistent with the statute and the D.C. Circuit precedent on the issue.²¹⁵ Secondly, the majority found the FIP first approach to be counter to the statutory text.²¹⁶ In contrast, the dissent believed the EPA acted within its authority.²¹⁷ This section analyzes the legal bases on which the court relied to reach these conclusions.

A. Validity of the EPA's Cost-Based Approach

To determine whether the EPA's cost-based approach to assigning Good Neighbor obligations was appropriate, courts must correctly interpret and apply the principles laid out in *Michigan* and *North Carolina*. Engaging in such an analysis demonstrates that although the *Homer City* holding can be reconciled with the pure statutory text, the holding is inconsistent with precedent, and therefore EPA's interpretation of the Good Neighbor provision should have been deemed permissible under the *Chevron* analysis. The *Homer City* holding significantly restricts the EPA's ability to use cost-based factors in apportioning Good Neighbor obligations. This regression by the D.C. Circuit places the EPA in an untenable position if the EPA is to continue to achieve air quality gains in an efficient manner.

As detailed in Section II above, the two main cases interpreting the Good Neighbor provision are *Michigan* and *North Carolina*. These cases interpreted the "significantly contribute

²¹⁴ *Id.*

²¹⁵ *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 26 (D.C. Cir. 2012).

²¹⁶ *Id.* at 33.

²¹⁷ *Id.* at 50.

to non-attainment" language that is the focal point of the Good Neighbor provision. Equal weight, however, should not be conferred unto to the analyses of each case. *Michigan* is much more on point because the Transport Rule is essentially an extension of the rule reviewed in *Michigan*. Additionally, *North Carolina* struck down CAIR primarily on arbitrary and capricious grounds, not on the merits of the rule as applied to the CAA. Therefore, the D.C. Circuit's substantive application of *North Carolina* to support its Good Neighbor analysis is misplaced.

In several respects, the rule that was reviewed in *Michigan* is structurally similar to the Transport Rule. Both rules established a base-line threshold for determining which states were significant contributors.²¹⁸ In both instances, the process by which the EPA established this base-line threshold was not challenged. After determining which states were significant contributors, both rules then utilized a cost-based analysis to quantify the Good Neighbor obligations of those states.²¹⁹ In these respects, the two rules appear to operate almost identically. There is, however, one critical operative distinction that led the court to uphold the rule in *Michigan*, but to strike down the Transport Rule—proportionality.

In *Michigan*, operation of the rule in question led to a *reduction* in the Good Neighbor obligations of some significant contributors.²²⁰ The use of cost considerations, however, *only* served to reduce potential Good Neighbor obligations and there was no evidence that any states saw a corresponding gain in obligations.²²¹ Although the framework of the Transport Rule was similar, it resulted in some significant contributors being tasked with greater Good Neighbor

²¹⁸ *Michigan v. U.S. E.P.A.*, 213 F.3d 663, 670 (D.C. Cir. 2000); Transport Rule, 76 Fed.Reg. at 48,236.

²¹⁹ *Michigan v. U.S. E.P.A.*, 213 F.3d 663, 675 (D.C. Cir. 2000); *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 17 (D.C. Cir. 2012).

²²⁰ *Michigan v. U.S. E.P.A.*, 213 F.3d 663, 677–79 (D.C. Cir. 2000).

²²¹ *Id.*

obligations then would have applied absent use of the cost-based factors.²²² It was this distinction that led the majority to conclude that the Transport Rule was invalid because the result was to effectively shift the burden of reducing emissions from states that could not do so cost effectively, to those that could—a factor not related to actual contribution to downwind non-attainment.²²³

This line of analysis by the majority in *Homer City* places great weight on use of the term "significant." When the majority uses the term "significant," it uses it as a direct parallel to the manner in which significant is used in the statute—the significance of emissions being defined solely in terms of its absolute impact on non-attainment downwind.²²⁴ But a different approach was taken by the court in *Michigan*. In *Michigan*, the court viewed significance more plially, finding that the EPA may "consider differences in cutback costs, so that, after reduction of all that could be cost-effectively eliminated, any remaining 'contribution' would not be considered 'significant.'"²²⁵ Thus, in *Michigan*, the D.C. Circuit took the position that the EPA's initial threshold for determining which states were significant contributors could be detached from the ultimate determination of the required reductions.²²⁶ The EPA tried to utilize this very same approach with the Transport Rule by first defining which states were significant contributors and then using independent criteria—cost-based factors—to determine the extent of the required reductions.²²⁷ Although, as a framework, this is entirely consistent with *Michigan*, the *Michigan* court was not faced with some states being tasked with increased burdens through the use of the independent cost-based criteria. Therefore, in context, the *Homer City* court's refusal to adopt

²²² EME Homer City Generation, L.P. v. E.P.A., 696 F.3d 7, 26 (D.C. Cir. 2012).

²²³ *Id.*

²²⁴ *Id.* at 25–26.

²²⁵ *Michigan v. U.S. E.P.A.*, 213 F.3d 663, 679 (D.C. Cir. 2000).

²²⁶ *Id.*

²²⁷ EME Homer City Generation, L.P. v. E.P.A., 696 F.3d 7, 26 (D.C. Cir. 2012).

"significant" as expansively as the court in *Michigan* is understandable, and in applying *Michigan*, it can be seen how the Transport Rule was struck down. The Transport Rule undoubtedly extended the use of cost-based factors beyond the use in *Michigan* and the *Homer City* court decided that the extent of the EPA's latitude was defined in *Michigan*. The *Homer City* court, however, did not rely on *Michigan* alone.²²⁸ And it is the D.C. Circuit's application of the principles from *North Carolina* that leaves its interpretation of the EPA's authority under the Good Neighbor provision inconsistent and severely constraining.

Homer City makes clear that not only is the EPA unable to use cost-based factors to increase a state's Good Neighbor obligation, but the EPA must also ensure that its program does not result in over-control in the downwind states.²²⁹ Applying this second principle, the severe constrictions on the EPA become apparent. Certainly, the EPA must minimally ensure that the Good Neighbor obligations it establishes are sufficient to ensure attainment of the NAAQS. But at the same time, its measures must not result in over-control.²³⁰ Abstractly, these two requirements create a level of emissions reductions that the EPA must achieve; not too much or over control results, and not too little because the downwind states won't meet their NAAQS. Superficially, this appears reasonable. The EPA's ability to consider cost factors to reduce Good Neighbor obligations, however—a practice which remains authorized following *Homer City*—has not yet been considered in conjunction with these mandates. Cost factors have become engrained in the EPA's approach to compliance with the CAA.²³¹ The court in *Michigan* endorsed this approach by upholding the EPA's practice of reducing the Good Neighbor

²²⁸ *Id.* at 26–28.

²²⁹ *Id.* at 27.

²³⁰ *Id.*

²³¹ *Michigan v. EPA* 213 F.3d 663 (D.C.Cir.2000); *North Carolina v. E.P.A.*, 531 F.3d 896 (D.C. Cir. 2008); *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7 (D.C. Cir. 2012).

obligations of various states based on cost factors.²³² *Homer City*, however, implicitly precludes this same practice.

If the EPA reduces a states' Good Neighbor obligations pursuant to *Michigan*, but cannot achieve a corresponding gain from another state, for how will the reduced Good Neighbor obligations be accounted? Based on the majority analysis in *Homer City*, the reduced Good Neighbor obligations cannot be accounted for elsewhere. So even assuming that the EPA could initially strike the appropriate balance of "not too much, not too little," this balance would be destroyed when the EPA reduces Good Neighbor obligations based on cost factors, as allowed by *Michigan*. The EPA's use of cost-based factors to only reduce the Good Neighbor obligations of some states, without a corresponding gain elsewhere, would result in under-control and a failure to attain downwind NAAQS. In short, under *Homer City*, the EPA's options are to only *reduce* Good Neighbor obligations based on cost-based factors as allowed by *Michigan*, with the understanding that downwind NAAQS will not be attained, or to ignore cost considerations altogether in apportioning Good Neighbor obligations, thereby abandoning over a decade of regulatory development.

In *Michigan*, the court allowed the EPA to consider cost factors.²³³ The EPA ran with this leeway and made cost factors the linchpin behind its approach to implementing the Good Neighbor provision.²³⁴ Moving forward, the restriction of this discretion by the D.C. Circuit in *Homer City* will make it exceedingly difficult, if not impossible, for the EPA to achieve its mission in a practical way. Somewhat ironically, the D.C. Circuit's approach in *Homer City* is entirely consistent with the plain language of the CAA. It is only when the import of *Homer City*

²³² *Michigan v. EPA* 213 F.3d 663, 667–79 (D.C.Cir.2000).

²³³ *Id.*

²³⁴ *See Michigan v. EPA* 213 F.3d 663 (D.C.Cir.2000); *North Carolina v. E.P.A.*, 531 F.3d 896 (D.C. Cir. 2008); *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7 (D.C. Cir. 2012).

is read in conjunction with *Michigan*, that the absurdity of the D.C. Circuit's Good Neighbor provision jurisprudence becomes apparent.

B. Validity of the EPA's FIP first approach

The issue presented with respect to the SIP/FIP dynamic of the Good Neighbor provision is a classic *Chevron* deference issue. Under *Chevron*, where the statute speaks directly to the question at issue, the court will afford no deference to the EPA's interpretation, but rather "must give effect to the unambiguously expressed intent of Congress."²³⁵ But where the statute does "not directly address[] the precise question at issue, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute," and the court will only reverse that determination if it is "arbitrary, capricious, or manifestly contrary to the statute."²³⁶ An action is "arbitrary and capricious" if the agency implementing the regulation in question has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.²³⁷

With these background principles in mind, the dissent convincingly undermines the majority's interpretation of the statutory text with respect to the SIP/FIP dynamic. The text of the statute plainly provides significant contributors three years from the establishment of the NAAQS to implement SIPs.²³⁸ Furthermore, the statute clearly requires that the SIPs include several components, including measures to satisfy the states Good Neighbor obligations.²³⁹ If

²³⁵ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

²³⁶ *Id.* at 843.

²³⁷ *North Carolina v. E.P.A.*, 531 F.3d 896, 906 on reh'g in part, 550 F.3d 1176 (D.C. Cir. 2008)

²³⁸ 42 U.S.C. § 7410(c)(1) (2006).

²³⁹ *Id.*

the state fails to do so, the obligation shifts to the EPA to promulgate adequate FIPS.²⁴⁰ There is nothing in the plain and unambiguous sequence laid out in the statute suggesting that the states may delay the promulgation of a sufficient SIP, while it awaits the establishment of a numerical Good Neighbor obligation by the EPA. In fact, as the dissent points out, the CAA does not require the EPA to quantify Good Neighbor obligations at all. Although the CAA does not require the EPA to establish numerical Good Neighbor obligations, the majority requires that the EPA do so before the states can be expected to promulgate SIPs incorporating Good Neighbor obligations. Thus, it is not a reading of the plain text, nor can it be, that leads the majority to this conclusion. The majority, however, fails to recognize that it must first identify ambiguity or absurdity before moving beyond the plain language of the statute.

The majority, rather, relies on the structure of the CAA. Based on this perspective, "determining the level of reductions required under [the Good Neighbor provision] is analogous to setting a NAAQS."²⁴¹ Here the majority ignores a critical point; the statute specifically calls for the EPA to set NAAQS, but it does not call for the EPA to determine the level of reductions required under the Good Neighbor provision. So, while the majority can, in a conclusory manner, analogize between the setting of a NAAQS and the establishment of numerical Good Neighbor obligations, Congress expressly established the process for setting the NAAQS and did not do so for the establishment of the Good Neighbor obligations.

Because of the above flaws in the majority reasoning, the Transport Rule should have been upheld, as within the statutory authority of the EPA, and as consistent with the D.C. Circuit precedent interpreting the contours of the Good Neighbor provision.

V. REGULATORY VS. STATUTORY FIX

²⁴⁰ *Id.*

²⁴¹ *EME Homer City Generation, L.P. v. E.P.A.*, 696 F.3d 7, 33 (D.C. Cir. 2012).

The EPA cannot reconcile the principles laid out by the *Homer City* majority with the continued use of cost considerations to establish Good Neighbor obligations. Therefore, any future rule promulgated by the EPA must quantify actual downwind contributions that significantly contribute to non-attainment and simply require each state to eliminate that quantity of emissions. The EPA could easily amend the Transport Rule in this manner to arrive at a rule compliant with the *Homer City* majority's view of the CAA. When the EPA establishes a numerical threshold identifying those states that are significant contributors, this threshold must be such that were every significant contributor to reduce its emissions to that level, all downwind states would attain the NAAQS, but not result in over-control on the upwind states. It appears as though this is precisely what the EPA did with step one of the Transport Rule. However, what departs from the process employed by the Transport Rule is that the EPA must then require all significant contributors to reduce their emissions to that threshold, irrespective of the costs involved. The result would strike the appropriate balance required by the *Homer City* majority. With respect to the FIP first approach that was struck down, the solution is even simpler. The EPA must provide the state's the first opportunity to implement the necessary reductions through their SIPs. Therefore, the EPA could relatively easily amend the Transport Rule to be compliant with the *Homer City* majority's construction of the CAA.

The above solution, however, only demonstrates that the EPA *could* promulgate a rule within the confines imposed by the *Homer City* majority. Practicality, however, dictates that cost considerations must be included in the analysis. Implementing an economical approach to pollution control was identified as one of goals of the CAA Amendments of 1990.²⁴² It was those amendments that established the emission trading programs that now supplement the

²⁴² William K. Reilly, EPA JOURNAL, January/February 1991, *The New Clean Air Act: An Environmental Milestone*, <http://www.epa.gov/aboutepa/history/topics/caa90/03.html> (last visited January 19, 2013).

traditional command-and-control approach to pollution control.²⁴³ The objective of this economic shift in environmental policy was to ensure that expensive regulatory measures achieve commensurate benefits "in terms of reducing threats to health and the environment."²⁴⁴ Only a finite number of resources can be committed to pollution control; that is not a brush aside of the need for environmental progress, but is a reality. Environmental gains are more difficult to come by now than they were in 1970 when the CAA was first passed. The "low hanging fruit" has been picked. The past occurrences in Donora, Pennsylvania and London, England are not at risk of recurring. Progress is no longer easy, so for the EPA to achieve the most significant gains, it must ensure that resources are used effectively. And simply promulgating a rule that reverts to the tired "command-and-control" approach is not enough. For that reason a statutory amendment appears necessary.

The statutory amendment could be relatively simple and still provide the EPA the flexibility that it requires to continue making environmental headway. The amendment could consist of deeming *all* contributions to a downwind non-attainment area as "significant." Such a provision would make clear that if a state is contributing to a downwind non-attainment area, the EPA has the authority to require that state to eliminate all of its downwind contributions. The amendment would not, however, alter the limits set by the NAAQS. So although the EPA would have the technical authority to require a state to eliminate all downwind contributions, this authority would be tempered by the judicial mandate to avoid over control. That is, the EPA could only require a state to reduce downwind contributions as necessary to attain the NAAQS. Deeming all downwind contributions as "significant" would provide the EPA the discretion to reduce a state's Good Neighbor obligations based on cost-considerations without risk of violating

²⁴³ *Id.*

²⁴⁴ *Id.*

the judicially announced "proportionality" standard. That is because deeming all contributions as "significant" would effectively eliminate the proportionality requirement. Because all contributions would be "significant," any use of cost-based factors by the EPA would serve to reduce, and only reduce, that state's obligation—there would be no corresponding increased obligation elsewhere.

Such a statutory amendment would recognize air pollution as a problem of all states that can only be managed through cooperation. It would limit the costs of environmental gains, ensure that such gains are actually accomplished, and stop the continual delays that result from incessant litigation.

VI. CONCLUSION

The D.C. Circuit has created an untenable situation for the EPA. As the statute and doctrine stands, the EPA is unable to formulate a rule that will satisfy its statutory mandate in an efficient, practical manner. There are two ways to alleviate this problem. The Supreme Court can grant a writ of certiorari and announce a CAA interpretation that does not so severely constrain the EPA's flexibility. In the alternative, an amendment to the CAA is necessary. Absent one of these circumstances, the EPA will be left to address its statutory mandate without the tools to do so consistent with the intent of the 1990 CAA Amendments.