

On the Merits:

EME HOMER CITY GENERATION, L.P., et al.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND
LISA P. JACKSON, ADMINISTRATOR,

Respondents.

No. 11-1302

**U.S. Court of Appeals for the
District of Columbia Circuit**

Oral Argument: April 13, 2012

Question Presented:

Whether the U.S. Environmental Protection Agency ("EPA") acted outside the scope of its authority under the Clean Air Act, 42 U.S.C §§ 7401-7671q, in promulgating a rule (the "Transport Rule") to address the interstate transport of sulfur dioxide ("SO₂") and nitrogen oxides ("NO_x"), without first allowing individual states an opportunity to develop their own implementation plans to achieve applicable national ambient air quality standards ("NAAQSs")?

Summary of the Case:

EPA promulgated the Transport Rule on August 8, 2011. See 76 Fed. Reg. 48,208. The Rule establishes federal statewide standards in furtherance of the Clean Air Act's limits on the amount of SO₂ and NO_x each state may emit under 42 U.S.C § 7410(a)(2)(D)(i)(I). It also imposes a specific federal implementation plan ("FIP") for achieving those standards. Among other things, the FIP imposes limits on how much SO₂ and NO_x may be emitted by individual electric generating units ("EGUs") within a state, and it establishes penalties on EGUs that exceed their allowable emission limits.

Petitioner EME Homer City Generation, L.P., conducts electric generation operations in the State of Pennsylvania. On August 23, 2011, it filed a Petition with the U.S. Court of Appeals for the District of Columbia Circuit to obtain judicial review of the Transport Rule. Petitioner thereafter filed a motion to stay the Rule pending review or, in the alternative, to obtain expedited review by the court. The court granted the motion to stay on December 30, 2011, and ordered the parties to propose expedited briefing schedules that would allow the case to be heard by April 2012.

**On The Merits:
Petition Granted
Kevin Haroff
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For 40 years, the Clean Air Act has stood as a model of federalism in our nation's approach to environmental protection. Under this model, the federal government is primarily charged with developing general standards that individual states can choose to implement in different ways to meet the specific needs and preferences of their local electorates. Only where states fail

to take appropriate action to comply with applicable standards or fail to take action at all on a timely basis, does the federal government have the ability to step in and assume responsibility to implement the law at a local level.

In the present case, however, EPA has *not* established that states have failed to discharge their responsibilities to implement plans to achieve NAAQSs for ozone and particulate matter (“PM”) in areas where nonattainment is caused (in part) by emissions crossing interstate boundaries. Indeed, the agency cannot do so, because the states have not been given a sufficient opportunity to develop appropriate implementation plans for that purpose. Consequently, EPA’s federal interstate Transport Rule, which both sets statewide limits on interstate emissions and imposes a federal plan for achieving those limits, is outside the scope of EPA’s authority under the CAA and is arbitrary and capricious.

Congress has authorized EPA to impose an FIP only under two circumstances: (1) upon a finding “that a State has failed to make a required submission” (or that the submission is incomplete); or (2) when EPA “disapproves a State implementation plan [“SIP”] submission in whole or in part.” 42 U.S.C. § 7410(c)(1)(A), (B). EPA contends here that for each state covered by the Transport Rule, it has either made the requisite finding of a failure to submit or disapproved the relevant SIP submission. But this contention presupposes that EPA has given states a meaningful opportunity to propose a SIP in response to new federal standards. In fact, no such opportunity has been allowed. Rather, EPA has set new emissions standards and *at the same time* imposed a federal plan for achieving them. Without giving states a legitimate opportunity to develop their own implementation plan, EPA has no authority under the statute to act independently.

This Court’s holding in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), does not affect this conclusion. In *North Carolina*, this Court struck down the 2005 Clean Air Interstate Rule (“CAIR”), which was the predecessor to EPA’s Transport Rule, on the ground that CAIR’s region-wide cap-and-trade structure for controlling interstate NO_x and SO₂ emissions did not properly address the effects of emissions from particular states on downwind jurisdictions. EPA apparently believes that the Court’s decision to remand CAIR for further administrative proceedings effectively abrogated SIPs that EPA previously approved and that it thereby opened the door for the exercise of the agency’s FIP authority. Such a position ignores the fact that this Court in *North Carolina* agreed to remand “without vacatur,” so that CAIR would “remain in effect” until it was replaced by a new rule. 550 F.3d at 1178. Thus, the Court effectively allowed the previously approved SIPs to continue as well. Moreover, by approving some SIPs based on CAIR, including Pennsylvania’s, after the Court’s remand order in *North Carolina*, EPA effectively relinquished any authority it might otherwise have had to adopt an FIP.

EPA has argued that under 42 U.S.C. § 7410(k)(6), it has authority to “correct” its prior SIP approvals and retroactively disapprove them. That provision however, only offers a mechanism for EPA to correct its own errors in approving a SIP, not to undo a SIP approval that was in fact perfectly appropriate at the time the approval was given. Moreover, nothing in the statute authorizes EPA to act unilaterally to remedy a deficient SIP without first directing states to take such action through a SIP call. Under 42 U.S.C. § 7410(k)(5), EPA must direct states to revise a SIP as necessary whenever it finds that the SIP “is substantially inadequate to attain or maintain the relevant [NAAQS], to mitigate adequately the interstate pollutant transport . . . , or to otherwise comply with any requirement of this Act.” EPA’s interpretation of the subsection as authorizing it to rescind prior appropriate SIP approvals would effectively render subsection (k)(5) nugatory.

The dissent suggests that the majority’s view is somehow premised on acceptance of Petitioner’s challenges to the methodology EPA used in developing the Transport Rule. The dissent points out, not unjustifiably, that the interstate transport of air pollution is a “complex and multidimensional problem” which “all but demands” deference to EPA’s expertise in this area. The dissent also contends that the methodology EPA came up with is “eminently reasonable.” That may or may not be true; but, in either event, these contentions miss the fundamental point. EPA surely enjoys special expertise to evaluate air pollution matters, but so do individual states, as Congress indeed acknowledged by directing states, in the first instance, to prepare and implement their own regulatory plans under the Clean Air Act. There is no reason to assume that EPA’s approach is necessarily superior to those proposed by the states, especially where—as here—EPA previously approved state programs as fully compliant with then-governing requirements of federal law.

The model of federalism adopted in the Clean Air Act means that EPA cannot “force particular control measures on the states” in the first instance. *Virginia v. EPA*, 108 F.3d 1297, 1410 (D.C. Cir. 1997). Just as EPA cannot require particular control measures in SIPs, neither can it impose particular control measures through an FIP, at the same time that

it “inform[s] the states” of new statewide standards without a SIP call. See *Michigan v. EPA*, 213 F.3d 663, 687 (D.C. Cir. 2000). Because the Transport Rule purports to do just that, it cannot be sustained. Accordingly, the Petition must be granted.

Dissenting View:
Amanda Leiter
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I respectfully dissent. EPA’s Transport Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011), addresses one of the thorniest air pollution problems facing federal and state regulators: the interstate transport of air pollution. That transport thwarts downwind states’ ability to protect their citizens from the serious dangers of breathing dirty air, because downwind states lack jurisdiction to regulate upwind but out-of-state pollution sources.

Congress attempted to address this issue in the Clean Air Act’s “good neighbor” provision, which requires that states “prohibit[] any source . . . 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 national . . . ambient air quality standard[s].” 42 U.S.C. § 7410(a)(2)(D)(i)(I). In other words, if an upwind state is home to pollution sources whose emissions will prevent a downwind state from achieving EPA-designated air quality standards for a particular pollutant, or will hamper the downwind state’s efforts to achieve those standards, the upwind state has a statutory obligation to control its sources’ emissions.

Promulgated pursuant to the good neighbor provision, the Transport Rule regulates upwind states’ emissions of ozone and small particulate matter (“PM2.5”). These deadly air pollutants cause serious respiratory and cardiovascular harms. EPA estimates that in 2005 (a representative year for which data are available) exposure to these two pollutants accounted for more than six percent of “total deaths from *all causes* in the continental U.S.,” in addition to “almost 200,000 non-fatal heart attacks, 90,000 hospital admissions[, and] 2.5 million cases of aggravated asthma among children.” 76 Fed. Reg. at 48,309 (emphasis added). If fully implemented, the Transport Rule would significantly alleviate this problem, vastly improving public health in affected, downwind population centers and avoiding “between 13,000 and 34,000 PM2.5-related premature deaths, 15,000 non-fatal heart attacks, . . . and 400,000 cases of aggravated asthma.” *Id.*

Petitioners do not dispute these stark realities. Rather, they challenge EPA’s methodology in developing the Transport Rule. The majority apparently finds these challenges persuasive. I do not, for three key reasons.

First, interstate transport of air pollution is a complex and multidimensional problem. Determining how emissions controls at one upwind source will affect air quality in a downwind community requires sophisticated modeling that not only predicts wind patterns and other climatic variables, but also takes account of the potential effects of emissions controls that might or might not be installed at *other* upwind sources. A problem this “technical, complex, and dynamic” all but demands our deference to the agency’s expert judgment about appropriate solutions. *National Cable & Telecomm. Ass’n v. Brand X Internet Svcs.*, 454 U.S. 967, 1002-03 (2005).

Second, despite Petitioners’ arguments to the contrary, EPA did not have the choice to allow upwind states to devise their own regulatory solution to the problem of interstate transport of pollution. Petitioners note, correctly, that the Clean Air Act gives states “primary responsibility for assuring” *intrastate* air quality. 42 U.S.C. § 7407(a). EPA, however, retains authority to regulate a state’s emissions if the agency is not satisfied with the state’s regulatory efforts, either because the state is not adequately protecting its own citizens or, as happened here, because the state is not adequately protecting residents of downwind states. Indeed, the language of the Clean Air Act leaves little room for EPA to do otherwise: the Act provides that the Administrator “*shall*” issue federal pollution control regulations “at any time *within 2 years* after [she] ... finds that a State has failed” to implement adequate state-based controls. 42 U.S.C. § 7407(c)(1).

Third, EPA’s methodology in classifying and regulating upwind states was eminently reasonable. The agency first identified areas whose air quality is adversely affected by upwind sources. EPA then divided the states upwind of affected areas into two categories: those whose emissions contribute too little to be considered “linked” to the downwind pollution

problem, and those whose emissions are significantly “linked” to at least one downwind affected area. EPA entirely excluded states in the former category from regulation under the Transport Rule.

For states in the latter category, EPA considered the costs of various emissions control technologies, and asked a simple question: What level of control could be achieved if the linked, upwind states were required to install pollution control devices costing less than X-dollars per ton of pollution. For so-called “Group 2” states, linked to somewhat less severe downwind air quality problems, a \$500/ton pollution control threshold proved sufficient—adopting pollution controls costing less than \$500/ton would render these states “good neighbors.” For “Group 1” states, whose pollution is linked to more severely affected downwind areas, the cost of becoming a good neighbor proved higher—\$2,300/ton.

This methodology and the resulting dollar figures are hard to evaluate devoid of context. How do we know whether it is appropriate to consider costs when regulating public health hazards as serious as ozone and PM2.5? How do we determine whether \$500/ton of pollution (or \$2,300/ton) is a reasonable figure, or absurdly low, or arbitrarily and capriciously high? We must keep three facts in mind. First, in a case from this Circuit in 2000, *Michigan v. EPA*, this Court expressly held that the Clean Air Act’s good neighbor provision allows EPA to consider pollution control costs in determining upwind states’ obligations. 213 F.3d 663, 679 (D.C. Cir. 2000). Second, the dollar figure this Court approved in that case, \$2,000/ton, is in the same ballpark as the figures at issue here. Third, the Clean Air Act allows EPA to err on the side of caution. Nothing in the Act requires that the agency set upwind states’ pollution control obligations at the minimum level necessary to allow downwind states to come into compliance with national standards. Quite the contrary, the good neighbor provision requires that upwind states prohibit pollution that merely *interferes* with downwind states’ ability to protect the air their citizens must breathe. That is what the Transport Rule would do, it would do so reasonably, and it merits our deference. Accordingly, I would deny the Petition.

Kevin Haroff is a partner in the San Francisco office of Marten Law PLLC, where he specializes in complex litigation concerning environmental law, toxic torts, and oil, gas, and alternative energy matters. **Amanda Cohen Leiter** is an associate professor at American University’s Washington College of Law in Washington, D.C., where she teaches courses in administrative law, environmental law, and torts.

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