

# *CPR Case Brief:*

## *EPA v. EME Homer City Generation, L.P.: Supreme Court's Revival of the Transport Rule Means a Cleaner Chesapeake Bay*

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## **Introduction**

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On April 29, 2014, Justice Ruth Bader Ginsburg, writing for the U.S. Supreme Court, upheld the Environmental Protection Agency's Cross-State Air Pollution Rule (Transport Rule).<sup>1</sup> As a result, in certain states large sources of nitrogen oxide and sulfur dioxide emissions—mostly coal-fired power plants—will be subject to more stringent air pollution requirements. Reversing the U.S. Court of Appeals for the District of Columbia Circuit, the Court deferred to the EPA's interpretation of the portion of the Clean Air Act that requires emission controls in states to ensure that no source “contribute[s] significantly” to violations of air quality standards in another state. The EPA interpreted that directive to require emissions reductions by states based on the availability of cost-effective control methods, a reading of the law that the Court found not only reasonable but also “efficient and equitable.”

The decision has national implications, but holds particular promise for ongoing efforts to restore the Chesapeake Bay. Because more than one-third<sup>2</sup> of the nitrogen pollution in the Bay comes from air pollution, stronger federal air pollution rules should mean that Bay states will see meaningful reductions in pollution coming from upwind and in-state sources.

## **Background**

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Air pollution is a complex problem. For one, it does not adhere to state boundaries: A smokestack in one state can contribute to pollution problems in another, downwind state hundreds of miles away. What's more, air pollution's impacts are not confined to just the air. What goes up must come down, and air pollutants are eventually deposited on the ground where they are washed into rivers, lakes, and streams.

## **Federal Regulation of Air Pollution**

Because air pollution does not respect state lines, the federal government has taken the lead in its regulation rather than the individual states. The Clean Air Act (CAA) of 1970 serves as the foundation of all federal efforts to clean up the air. Congress directed the Environmental Protection Agency (EPA) to establish national ambient air quality standards (NAAQS) for harmful pollutants at levels that would protect public health and the environment.<sup>3</sup> Taking a cooperative federalism approach, the Act left it to the states to propose plans, known as State Implementation Plans (SIPs), to meet the NAAQS within their own borders. Since then, Congress and the EPA have promulgated laws and regulations tightening and clarifying the scope of the law.

By the early 1990s, acid rain was so severe that it was corroding buildings, including the U.S. Capitol itself, and 5 percent of New England lakes had turned acidic. This acid-rain problem and a growing concern over smog prompted lawmakers to amend the CAA. One result was an update to the Act's "good neighbor" provision. The provision, as amended, requires state air pollution plans to "contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment . . . by . . . any other State with respect to any [air quality standard]." <sup>4</sup> The provision addresses nitrogen oxides (NO<sub>x</sub>) and sulfur dioxide (SO<sub>2</sub>), which can react in the atmosphere to form fine particle pollution (PM<sub>2.5</sub>) and ground-level ozone pollution.

The Transport Rule at issue in *EME Homer City* was the EPA's third attempt to delineate the boundaries of the good neighbor provision. The first was the 1998 NO<sub>x</sub> SIP Call, which required 22 eastern states and the District of Columbia to reduce their NO<sub>x</sub> emissions. <sup>5</sup> The jurisdictions had discretion to select the mix of controls to achieve the necessary reductions, and could take the costs of various measures into account. The D.C. Circuit upheld the NO<sub>x</sub> SIP Call in relevant respects. <sup>6</sup> Yet the NO<sub>x</sub> SIP Call, as the name suggests, only addressed NO<sub>x</sub> and ultimately proved inadequate to reduce ozone pollution. The EPA next issued the 2005 Clean Air Interstate Rule (CAIR), <sup>7</sup> which took another look at NO<sub>x</sub> and, in what was the agency's first attempt to address interstate pollution transport for particulate matter, also tackled SO<sub>2</sub> emissions. Affected states and utility groups brought suit against it, prompting the D.C. Circuit to remand CAIR, in part on the grounds that it was insufficiently protective of downwind states. <sup>8</sup> The court left the rule in place while the EPA worked on a new rule. <sup>9</sup>

### The Transport Rule

The Transport Rule responded to the D.C. Circuit's remand of CAIR, addressing the emission of pollutants in 27 upwind states that significantly contributed to downwind states' problems attaining or maintaining the air quality standards for ozone and PM<sub>2.5</sub>. The EPA first looked at the magnitude of a state's contribution, screening out states that contributed less than 1 percent to downwind air quality problems. <sup>10</sup> Then the agency used cost as the basis for what reductions were required. Essentially, if the EPA's models found that a certain pollution-control measure was cost-effective, states would be required to implement it. From this, the agency developed state emissions budgets. A state could not exceed its allocated emissions levels, which represented the quantity of pollution an upwind state would produce in a given year if its in-state sources implemented all the cost-effective pollution controls available. <sup>11</sup>

The agency also determined that the 27 states covered by the Transport Rule had failed to develop SIPs adequate to meet the requirements of the state emissions budget. As it is required to do within two years when a state's SIP falls short, <sup>12</sup> the agency went ahead and immediately developed a Federal Implementation Plan (FIP) for the states.

Various States, local governments, industry groups, and labor organizations challenged the Transport Rule in *EME Homer City Generation v. EPA*. <sup>13</sup> The D.C. Circuit threw out the rule, finding that the EPA erred in how it determined each state's "significant

contribution” to other states’ pollution.<sup>14</sup> The court decided that the CAA required the EPA to make a physical determination of the amount of pollution from each source that blew into another state and divvy up the reductions accordingly. “Each upwind State must bear its own fair share,” the court wrote.<sup>15</sup> The EPA’s approach, which looked at the availability of cost-effective control methods and applied those uniformly to upwind states, was, according to the court, contrary to the statute. The court went on to explain that the EPA’s chosen method would not be fair to upwind states. For one, in developing the Transport Rule, the EPA had screened out any state that contributed less than 1 percent to a downwind state’s air pollution problems.<sup>16</sup> The court found it unfair that, by putting in place all cost-effective controls, a screened-in state’s contribution could dip below that threshold limit.<sup>17</sup> The court also decided that the rule suffered from over-control. Cost-effective reductions could require states to reduce more emissions than necessary for downwind states to attain air quality standards.<sup>18</sup>

Separately, the court also held that the EPA jumped the gun on developing FIPs for the states, finding that the EPA was required to give the states an initial opportunity to implement the emissions budgets through their SIPs.<sup>19</sup> The D.C. Circuit decision temporarily reinstated the earlier Bush-era CAIR.

The Supreme Court heard the case in 2013 and upheld the rule in a decision late April 2014.

### **Implications for the Chesapeake Bay**

Water, like air, does not conform to state lines. The Clean Water Act, like the CAA, allows the EPA to develop the equivalent of a pollution budget to clean up polluted lakes, rivers, and streams. These budgets, known as Total Maximum Daily Loads (TMDLs), impose strict limits on the quantities of pollutants that can be discharged into the polluted body of water and allocate the total permissible amount of each pollutant among the jurisdictions within the watershed. States then develop Watershed Implementation Plans (WIPs) describing how they will meet the requirements.

The Chesapeake Bay is subject to the nation’s largest and most ambitious TMDL, spanning six states and Washington, D.C.<sup>20</sup> Just over one-third of the nitrogen polluting the Bay comes from the air. In fact, atmospheric deposition of nitrogen is the second highest nitrogen input load in the Chesapeake watershed, after fertilizer.<sup>21</sup>

The Bay TMDL splits air deposition into two categories: indirect and direct. Jurisdictions are responsible for cleaning up indirect deposition, that is, nitrogen that is deposited on land and gets washed into the Bay. Once the air-borne nitrogen hits the land, it becomes mixed with nitrogen loadings from the land-based sources and the two become indistinguishable.

The EPA does not require the states to reduce direct deposition beyond what would be accomplished under the CAA. Instead, the EPA determined how many pounds of atmospheric deposition loads would land directly in the Chesapeake Bay and its tributaries and divided that quantity up among the states in the Bay watershed. The states

are not required to do more than follow the CAA to meet their allocation. Any additional nitrogen reductions beyond federal requirements are credited to the individual jurisdictions.

## At Issue

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The Supreme Court first considered whether the EPA was required to give states a second chance to develop a SIP based on the newly issued emissions budget. Second, the Court reviewed the lower court's conclusion that the good neighbor provision required the EPA to disregard costs and divide control requirements in proportion to the upwind state's physical emissions.

## The Court's Reasoning

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### The EPA Was Not Required to Give States More Time to Develop a SIP

The Court first considered whether the EPA was required to give states a second chance to develop a SIP based on the newly issued emissions budget.<sup>22</sup> Under the CAA, once the EPA has found a SIP to be lacking, the agency is required to issue a FIP "at any time" within two years of that determination.<sup>23</sup> Here, it issued FIPs at the same time it came out with the Transport Rule. According to the Court, in requiring EPA to give states a second chance at a SIP after issuing a rule implementing the good neighbor provision, the D.C. Circuit had carved out an unwritten exception to the FIP obligation. While it might make sense for the statute to give states extra time—after all, it did take three contentious rulemakings for the EPA to define the provision—the statute does not require extra time. Courts interpret the law, Justice Ginsburg wrote, it is not their job to improve upon it.<sup>24</sup>

While the EPA had given states additional time to develop SIPs after releasing the NO<sub>x</sub> SIP Call and CAIR rulemakings, Justice Ginsburg was satisfied with the EPA's reason for not doing so this time. Allowing states additional time to develop a new SIP would have kept CAIR in place in the interim. In remanding CAIR, the D.C. Circuit had made it clear that the rule was insufficient.<sup>25</sup> EPA explained that it wanted to act fast to replace it.<sup>26</sup>

### The EPA's Interpretation of the CAA was Reasonable

If a statute is ambiguous, a court is required to defer to an agency's reasonable interpretation.<sup>27</sup> The D.C. Circuit had found that the good neighbor provision was unambiguous in requiring the EPA to allocate emissions reductions proportionally. The Supreme Court disagreed, finding that while Congress had tasked the EPA with reducing upwind pollution, the agency only had to do so in "amounts" that push a downwind state's pollution levels below certain thresholds.<sup>28</sup> How the EPA calculated those amounts was up to the EPA. Moreover, the Court emphasized, the Act would not compel a proportionality standard since it is impossible to meet.<sup>29</sup> As CPR member scholar Daniel Farber at U.C. Berkeley School of Law explained, "No one state causes downwind air quality violations by itself; rather, the violations are the cumulative result

of emissions from many upwind sources. So whether any one state is contributing to a downwind violation depends on what all the other sources are doing.”<sup>30</sup> Determining proportionality when all states’ contributions build upon one another’s is no easy task.

Since the good neighbor provision is ambiguous, the Court next considered whether the EPA’s interpretation was reasonable. To reduce upwind pollution in amounts that maintain healthy air quality in downwind states, as required by the CAA, the agency had relied on magnitude and cost. The majority disagreed with the dissent that “amount” could not equal cost of prevention. Instead, it found that the EPA had to choose how to calculate and reduce the necessary amount of pollution, and it sensibly picked the easiest, least expensive way.<sup>31</sup> Using cost as the basis, the majority explained, was “efficient and equitable”—efficient because states will meet air quality standards at the lowest cost, and equitable because the rule hits hardest the states that have historically done the least to control their pollution.<sup>32</sup>

The Court agreed with the D.C. Circuit that the Transport Rule would violate the CAA if it resulted in over-control or required screened-in states to reduce emissions below the 1-percent threshold. The CAA does not compel upwind states to reduce emissions below what is required for downwind states to maintain clean air. Such “unnecessary” reductions would be over-control. For the rule to have this result, however, *all* downwind states would have to exceed air quality standards, not just one. If all downwind states were meeting standards and the rule still required reductions from upwind states, the Court said, those states could challenge the rule. Likewise, if the upwind state had dipped below the 1-percent threshold yet still had to implement control measures under the rule, that state could also sue.<sup>33</sup>

## **Conclusion: Promise for the Bay**

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The additional reductions in nitrogen spurred by the revival of the Transport Rule should reduce atmospheric deposition of the pollutant into the Chesapeake Bay. The rule is unlikely to have much of an effect on how Bay states tackle direct deposition. To meet their Bay restoration requirements for nitrogen that is deposited directly onto water, states must simply adhere to the CAA. The EPA will update its water-pollution model to account for the additional gains in air quality brought about by the Transport Rule, and states are not likely to get “extra credit” once the rule comes into effect. In contrast, for indirect deposition—nitrogen that it deposited on land and washed into the Bay—the gains brought about by the Transport Rule should make it easier for states to meet their restoration requirements. States will have a decreased amount of nitrogen from air deposition to clean up so their efforts to clean up land-based nitrogen should be more effective.

Indeed, the CAA has already helped improve the state of the Bay. A study by scientists at the University of Maryland Center for Environmental Sciences found that NO<sub>x</sub> emissions in the eastern United States declined by 32 percent from the late 1990s through 2005 as a result of the CAA. The same scientists discovered very little lag time between improved

air quality and improved water quality,<sup>34</sup> suggesting that any air-quality improvements brought about by the Transport Rule will begin to have impact on the Bay in short order.

Even with the Transport Rule revived, the EPA and the states still do not have complete certainty. The rule is already years past its 2012 intended start date. As written, it required few emissions reductions at first, and then required states to meet tougher limits in 2014. The NO<sub>x</sub> emissions were also based on the 1997 ozone NAAQS and not the tougher 2008 ozone NAAQS. Although the deadlines for some reductions in the proposed rule have already passed or become outdated, the agency can still move to implement the rule as fast as possible without a formal rule amendment. In addition, several lawsuits were pending the outcome of the Supreme Court case, and could affect the implementation of Transport Rule.<sup>35</sup>

Nevertheless, the crux of the decision is that the lower court was wrong to vacate the Transport Rule and that the EPA is entitled to considerable deference in how it implements the Clean Air Act's good neighbor provision. The Supreme Court endorsed the EPA's overall approach to reducing interstate air pollution, allowing the regulation to move forward with the promise of cleaner air, and a cleaner Chesapeake Bay.

## Endnotes

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<sup>1</sup> EPA v. EME Homer City Generation, L.P., No 12-1182 (U.S. Apr. 29, 2014) (to be published at 572 U. S. \_\_\_\_ (2014)).

<sup>2</sup> ENVTL. PROTECTION AGENCY, *Chesapeake Bay TMDL*, app. at L-1, available at [http://www.EPA.gov/reg3wapd/pdf/pdf\\_chesbay/FinalBayTMDL/AppendixLAtmosNDe positionAllocations\\_final.pdf](http://www.EPA.gov/reg3wapd/pdf/pdf_chesbay/FinalBayTMDL/AppendixLAtmosNDe positionAllocations_final.pdf) (showing that fertilizer surpassed atmospheric deposition as the largest zload in/ 2005).

<sup>3</sup> 42 U.S.C. §§ 7408, 7409 (2006).

<sup>4</sup> 42 U.S.C. § 7410(a)(2)(D)(i)(I).

<sup>5</sup> 63 Fed. Reg. 57,356 (Oct. 27, 1998).

<sup>6</sup> Michigan v. EPA, 213 F.3d 663, 682 (D.C. Cir. 2000) (per curiam).

<sup>7</sup> 70 Fed. Reg. 25,162 (May 12, 2005).

<sup>8</sup> North Carolina v. EPA, 531 F.3d 896, 908–12 (D.C. Cir. 2008) (remanding and vacating the rule); North Carolina v. EPA, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam) (remanding the rule without vacatur).

<sup>9</sup> North Carolina v. EPA, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam).

<sup>10</sup> 76 Fed. Reg. 48,236.

<sup>11</sup> 76 Fed. Reg. 48,249.

<sup>12</sup> 42 U.S.C § 7410(c)(1).

<sup>13</sup> 696 F.3d 7 (D.C. Cir. 2012).

<sup>14</sup> *EME Homer City*, 696 F.3d at 11.

<sup>15</sup> *Id.* at 25.

<sup>16</sup> 76 Fed. Reg. 48208 (Aug. 8, 2011).

<sup>17</sup> *EME Homer City*, 696 F.3d at 23–24.

<sup>18</sup> *Id.* at 28.

<sup>19</sup> For additional critiques of the D.C. Circuit’s decision in *EME Homer City*, see Victor B. Flatt, *Frozen in Time: The Ossification of Environmental Statutory Change and the Theatre of the (Administrative) Absurd*, 24 FORDHAM ENVTL. L. REV. 126, 145–47 (2013).

<sup>20</sup> CHESAPEAKE BAY PROGRAM, *Chesapeake Bay TMDL*, <http://www.chesapeakebay.net/about/programs/tmdl>.

<sup>21</sup> ENVTL. PROTECTION AGENCY, *Chesapeake Bay TMDL*, app. at L-1, available at [http://www.EPA.gov/reg3wapd/pdf/pdf\\_chesbay/FinalBayTMDL/AppendixLAtmosNDe positionAllocations\\_final.pdf](http://www.EPA.gov/reg3wapd/pdf/pdf_chesbay/FinalBayTMDL/AppendixLAtmosNDe positionAllocations_final.pdf) (showing that fertilizer surpassed atmospheric deposition as the largest load in 2005).

<sup>22</sup> Before the Court could look at the merits of the argument, it first considered EPA’s threshold claim that the Court could not revisit its SIP disapprovals years after the disapprovals were issued. Under the CAA, a state has 60 days to challenge the EPA once it disapproves of that state’s SIP. 42 U. S. C. §7607(b)(1). If the SIP disapproval goes unchallenged, as many did after the EPA announced its Transport Rule, judicial review after those 60 days is untimely. The Court disagreed with the EPA, finding that it was not the content of the SIPs themselves that were at issue, but rather the fact that the EPA did not give states a second chance to develop a SIP based on the EPA’s newly issued emissions budget. EPA v. EME Homer City Generation, L.P., No 12-1182, slip op. at 13 (U.S. Apr. 29, 2014) (to be published at 572 U. S. \_\_\_\_ (2014)).



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<sup>23</sup> 42 U.S.C. § 7410(c)(1).

<sup>24</sup> *EME Homer City*, No. 12-1182, slip op. at 15.

<sup>25</sup> *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam).

<sup>26</sup> 76 Fed. Reg. 48,220.

<sup>27</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>28</sup> *EME Homer City*, No. 12-1182, slip op. at 21 (“The statute requires States to eliminate those ‘amounts’ of pollution that “contribute significantly to nonattainment” in downwind States” (citing 42 U.S.C. § 7410(a)(2)(D)(i))).

<sup>29</sup> *EME Homer City*, No. 12-1182, slip op. at 23.

<sup>30</sup> Dan Farber, *More About EPA’s Victory*, LEGAL PLANET (Apr. 29, 2014), <http://legal-planet.org/2014/04/29/more-about-EPAs-victory/>.

<sup>31</sup> *EME Homer City*, No. 12-1182, slip op. at 26.

<sup>32</sup> *Id.* at 26–27.

<sup>33</sup> *Id.* at 31.

<sup>34</sup> Keith N. Eshleman et al., *Surface Water Quality is Improving Due to Declining Atmospheric Deposition*, ENVTL. SCI. & TECH. (2013), available at [http://www.umces.edu/sites/default/files/Eshleman\\_EST.pdf](http://www.umces.edu/sites/default/files/Eshleman_EST.pdf).

<sup>35</sup> Three states brought lawsuits challenging the EPA’s initial SIP disapprovals. *Ohio v. EPA*, No. 11–3988 (6th Cir.); *Kansas v. EPA*, No. 12–1019 (D.C. Cir.); *Georgia v. EPA*, No. 11– 1427 (D.C. Cir.). Those cases were held in abeyance pending the Supreme Court’s decision.

## About the Center for Progressive Reform

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