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Environmental Protection Agency v. EME Homer City Generation L.P.

Lindsey M. West
University of Montana School of Law

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***Environmental Protection Agency v. EME Homer City Generation L.P.*, ___ U.S. ___,
134 S. Ct. 1584, 188 L. Ed. 2d 775 (2014).**

Lindsey West

ABSTRACT

The U.S. Supreme Court determined the Environmental Protection Agency properly interpreted the “Good Neighbor Provision” of the Clean Air Act in adopting the Transport Rule. The Court found, contrary to the D.C. Circuit Court of Appeals decision to vacate the rule entirely, the EPA did not act arbitrarily and capriciously by integrating a cost-effective allocation of emission reductions or by disallowing states a second opportunity to file a State Implementation Plan before promulgating a Federal Implementation Plan.

I. INTRODUCTION

In *Environmental Protection Agency v. EME Homer City Generation L.P.*,¹ the U.S. Supreme Court affirmed the Environmental Protection Agency’s (EPA) Cross-State Air Pollution Rule, known as the Transport Rule, and reversed the D.C. Circuit Court of Appeals decision vacating the rule in its entirety.² In a six to two decision with Justice Alito not participating, the Court found that the Transport Rule was a permissible construction of the Clean Air Act’s (CAA) Good Neighbor Provision³. The Good Neighbor Provision delegates authority to the EPA to regulate interstate pollution that travels from upwind States, who are economically benefitting from the pollution, to downwind states, who lack the authority to regulate the pollution.⁴ The Transport Rule addressed twenty-seven upwind states that “contribute significantly” to downwind states’

¹ 134 S. Ct. 1584 (2014).

² *Id.* at 1593.

³ 42 U.S.C. § 7410(a)(2)(D)(i) (2012).

⁴ *Id.* at 1593.

non-attainment of national ambient air quality standards (NAAQS) and triggered the need for the states to complete a State Implementation Plan (SIP), or, if necessary, a Federal Implementation Plan (FIP).⁵ After criticizing the D.C. Circuit Court of Appeals for attempting to improve upon the law rather than apply the plain text, the Court upheld the EPA's policy of disallowing states a second chance to implement a SIP after issuing Good Neighbor Provision obligations.⁶ Moreover, the Court found that the CAA did not preclude the Transport Rule from integrating cost considerations, instead of exclusively considering each upwind State's proportionate responsibility for nonattainment of NAAQS.⁷ Lastly, the Court applied *Chevron*⁸ in according deference to EPA's reasonable interpretation of the CAA's ambiguous Good Neighbor Provision.⁹

II. FACTUAL BACKGROUND

The Good Neighbor Provision has caused the EPA grief for nearly two decades, particularly in trying to delineate when upwind states "contribute significantly" to downwind states' non-attainment of NAAQS.¹⁰ EPA's 1998 attempt was known as the NOX SIP Call, and regulated NOX (Nitrogen Oxide) emissions in 23 upwind States.¹¹ The Transport Rule giving rise to this litigation was EPA's attempt to remedy flaws with the Clean Air Interstate Rule (CAIR).¹² The D.C. Circuit Court of Appeals initially vacated CAIR;¹³ however, on rehearing, the court reinstated the rule and instead

⁵ *Id.* at 1596-97.

⁶ *EPA*, 134 S. Ct. at 1600-01.

⁷ *Id.* at 1607.

⁸ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984).

⁹ *EPA*, 134 S. Ct. at 1603.

¹⁰ *Id.* at 1595.

¹¹ *Id.*

¹² *Id.* at 1596.

¹³ See *North Carolina v. EPA*, 531 F. 3d 896 (D.C. Cir. 2008).

encouraged EPA to “act with dispatch” in remedying flaws.¹⁴ CAIR regulated the nonattainment of NOX and SO2 (Sulfur Dioxide) emissions by upwind States, as does the Transport Rule, while additionally regulating PM2.5 (ozone and fine particulate matter) levels measured on a daily basis.¹⁵

III. PROCEDURAL BACKGROUND

In a two to one decision, the U.S. Court of Appeals, D.C. Circuit held that the Transport Rule exceeded the EPA’s statutory authority, and vacated the rule in its entirety.¹⁶ The court had two major objections to the rule: (1) EPA could not promulgate FIPs without allowing states a second chance to implement the quantifiable Good Neighbor Provision obligations; and (2) EPA could not resort to a cost-allocation method resulting in potential over-regulation by requiring states to reduce more than their proportionate contributions.¹⁷

IV. ANALYSIS

A. FIP Promulgation

The U.S. Supreme Court rejected the United States Court of Appeals, D.C. Circuit’s holding that the EPA must give states an opportunity to issue a SIP after determining its Good Neighbor Provision obligations.¹⁸ Additionally, the Court scolded the appeals court for attempting to re-write the CAA instead of respecting Congress’ silence on a deferment period.¹⁹ Instead, the Court held that the CAA clearly mandates

¹⁴ *EPA*, 134 S. Ct. at 1595.

¹⁵ *Id.* at 1596-97.

¹⁶ *Id.* at 1598.

¹⁷ *EME Homer City Generation, L.P. v. Environmental Protection Agency*, 696 F.3d 7, 12 (D.C. Cir. 2012).

¹⁸ *EPA*, 134 S. Ct. at 1597.

¹⁹ *Id.* at 1601.

FIP promulgation “at any time” within two years of finding a SIP to be inadequate.²⁰

Therefore, regardless of the fact that states’ existing SIPs were made without knowledge of the Transport Rule’s Good Neighbor obligations, they were nevertheless inadequate; and as such, EPA was required to promulgate FIPs.²¹

B. Proportional Obligations Requirement

The Court continued to affirm the Transport Rule by rejecting the D.C. Circuit’s insistence that the Good Neighbor Provision requires the EPA to reduce emissions in a “manner proportional” to each State’s contribution.²² The “realities of interstate pollution” prevent a proportional requirement because upwind States contribute varying amounts to various downwind States.²³

C. Cost-allocation

Lastly, the Court affirmed the EPA’s reliance on cost in determining significant contribution to nonattainment by applying *Chevron* deference to EPA’s reasonable interpretation of an ambiguous statute.²⁴ The cost-allocation method “sensibly” eradicates the cheaper pollution, and although over-control is a possibility, it is incidental to acquiring attainment of NAAQS, consistent with the CAA.²⁵

D. Dissent

Agreeing with the United States Court of Appeals, D.C. Circuit’s invalidation of the Transport Rule, Justice Scalia dissented with Justice Thomas joining.²⁶ The dissent’s main contention arose out of the fierce opposition to the cost-benefit analysis approach

²⁰ *Id.* at 1600.

²¹ *Id.*

²² *Id.* at 1605.

²³ *EPA*, 134 S. Ct at 1605.

²⁴ *Id.* at 1603-05.

²⁵ *Id.* at 1607-08.

²⁶ *Id.* at 1610.

employed by the EPA, and asserted the merits of a proportional-reduction rule.²⁷ Moreover, the dissent argued the EPA's promulgation of FIPs without first notifying states of their obligations ignores the CAA's federalism mandate by not offering states a meaningful opportunity to issue SIPs.²⁸ Thus, the dissent argues the Transport Rule exceeds the CAA's congressional authority, and EPA abused its discretion in promulgating it.²⁹

V. CONCLUSION

In upholding the Transport Rule, the U.S. Supreme Court afforded the EPA deference under *Chevron* to retain discretion in choosing a reasonable option for promulgating rules. In justifying the EPA's promptness in promulgating FIPs simultaneously with the Good Neighbor obligations, the Court established that a grace period is unnecessary for the provisions within the CAA. Further, the Court allowed for potential over-regulation because it would be incidental to downwind State's attainment of NAAQS, prioritizing clean air over industry, state, and labor objections. At this point, the EPA has filed a motion to lift the stay of the Transport Rule, which the United States Court of Appeals, D.C. Circuit is presently considering.³⁰

²⁷ *Id.*

²⁸ *EPA*, 134 S. Ct. at 1617.

²⁹ *Id.* at 1620.

³⁰ Respondent's motion to lift the stay entered into on December 30, 2011 (June 26, 2014).