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WHAT ABOUT *WHITMAN*?: THE SUPREME COURT'S DECISION IN *EPA v. HOMER* TO AUTHORIZE COST CONSIDERATION IN ENVIRONMENTAL REGULATION CONTRADICTS ITS OWN PRECEDENT

DEVON APPLIGATE*

Abstract: In 2011, in response to the ongoing problem of interstate air pollution, EPA promulgated the Transport Rule to restrict emissions in upwind states in order to achieve attainment of certain national ambient air quality standards in downwind states. State and local governments and industry and labor groups, unhappy with EPA's process of determining which states would be regulated under the Transport Rule, challenged the rule on the grounds that EPA had exceeded its authority under the Clean Air Act. In 2014, in *EPA v. EME Homer City Generation, L.P.*, the Supreme Court of the United States held that the Transport Rule is a permissible construction of the Good Neighbor Provision of the Clean Air Act. This Comment argues that the Transport Rule, because it permits cost consideration in determining emission reductions for upwind states with no textual authority to do so, is an impermissible interpretation of the Good Neighbor Provision by EPA. The Court's holding in *Homer* authorizes EPA to force states to implement *any* measures it deems cost-effective, even if the measures require states to decrease their emissions by more than their share of pollution.

INTRODUCTION

Environmentalist groups celebrated and applauded the decision of the Supreme Court of the United States in *EPA v. EME Homer City Generation, L.P.* as a victory for the Environmental Protection Agency (EPA) and environmental protection generally.¹ Individuals paying electric bills in upwind

* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2014–2015.

¹ See Jonathan H. Adler, *Further Thoughts on the EME Homer City Decision*, WASH. POST (May 2, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/02/further-thoughts-on-the-eme-homer-city-decision/>, archived at <http://perma.cc/6QGF-GD4U>. In a statement released on April 29, 2014, EPA Administrator Gina McCarthy stated, “[t]oday’s Supreme Court decision is a resounding victory for public health and a key component of EPA’s efforts to make sure all Americans have clean air to breathe.” Andrew Childers, *Challenges Remain Despite Supreme Court Decision Reinstating EPA Cross-State Rule*, BLOOMBERG BNA (Apr. 30, 2014), <http://www.bna.com/challenges-remain-despite-n17179890025/>, archived at <http://perma.cc/T8ZE-NJXR>.

states, however, may not be as enthusiastic about the holding.² Brian Potts, an attorney who represented an electric and gas utility in the case, explained that as a result of the decision, EPA may add a new charge to monthly electric bills in states that send air pollution downwind.³ He referred to the new charge as EPA's "good-neighbor fee."⁴ According to Potts, the "good-neighbor fee" is the amount that must be paid to clean up the pollution emitted from the bill payer's state, which travels to neighboring states.⁵

The specific rule at issue in *Homer* is the Cross State Air Pollution Rule, also known as the Transport Rule, which utilizes a cost-based approach to regulate interstate air pollution.⁶ Under the Transport Rule as it stands, the fee for residents in *lesser* polluting states could be higher than the fee for those in *higher* polluting states.⁷ Potts contends that the Rule is unfair because it can require a lesser polluting state to reduce its pollution more than a higher polluting state simply because it is *cheaper* for the lesser polluting state to do so.⁸ He stated that "[i]f you live in a lesser-polluting state—such as New York, Iowa, [or] South Carolina[—] . . . your good neighbor fee is higher than it would be if the EPA were simply comparing cross-state emission levels."⁹

This Comment argues that although the Transport Rule is arbitrary in its operation, it should have been invalidated on the ground that EPA exceeded its statutory authority by promulgating the rule.¹⁰ Specifically, EPA impermissibly interpreted the Good Neighbor Provision ("GNP") of the Clean Air Act ("CAA") by promulgating the Transport Rule, which considers costs in determining emission reductions for upwind states.¹¹

I. FACTS AND PROCEDURAL HISTORY

If interstate air pollution is left unregulated, upwind states reap the benefits of economic activity that causes downwind pollution, without bear-

² Brian H. Potts, *The EPA's Golden Rule: No Good Neighbor Goes Unpunished*, WALL ST. J. (Dec. 20, 2013, 6:23 PM), <http://online.wsj.com/news/articles/SB10001424052702303932504579258291708181228>, archived at <http://perma.cc/89LW-YSCL>.

³ *See id.*

⁴ *Id.*

⁵ *Id.*

⁶ *See* EPA v. EME Homer City Generation, L.P. (*Homer II*), 134 S. Ct. 1584, 1593 (2014); Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals (Transport Rule), 76 Fed. Reg. 48,208, 48,208–09 (Aug. 8, 2011) (to be codified at 40 C.F.R. pts. 52, 72, 78, 97).

⁷ *See Homer II*, 134 S. Ct. at 1593.

⁸ *See id.*

⁹ Thus, the rule may arbitrarily hurt certain upwind states. *Id.*

¹⁰ *See infra* notes 73–113 and accompanying text.

¹¹ *See infra* notes 73–113 and accompanying text.

ing the costs.¹² Furthermore, downwind states are unable to attain cleaner air due to the pollution emitted from upwind states.¹³ To address this problem, Congress included the GNP in the CAA, and pursuant to it, EPA adopted the Transport Rule.¹⁴ The GNP requires states to prohibit in-state sources “from emitting any air pollutant in amounts which will . . . contribute significantly” to downwind states’[s] “nonattainment . . . , or interfere with maintenance,” of any EPA-promulgated national air quality standard.¹⁵

Using the GNP as its authority, EPA promulgated the Transport Rule in August 2011.¹⁶ The Rule embraces a two-step process.¹⁷ First, EPA decides which states to cover by evaluating each state’s significant contribution to nonattainment in downwind states.¹⁸ To evaluate state contributions, EPA uses air quality models to identify downwind areas of nonattainment for certain national ambient air quality standards (“NAAQS”).¹⁹ EPA then identifies upwind states that contribute more than one percent of the applicable NAAQS to one or more downwind states.²⁰ In the second step, EPA determines the emissions budgets for the contributing states.²¹ It calculates the quantity of emissions a state could eliminate at multiple cost thresholds,²² and generates complex models to “establish the combined effect the upwind reductions projected at each cost threshold would have on air quality in downwind states.”²³ Then based on these models, EPA identifies the cost thresholds where a “noticeable change occurred in downwind air quality,

¹² See *Homer II*, 134 S. Ct. 1584, 1592–93 (2014); Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2343 (1996).

¹³ See *Homer II*, 134 S. Ct. at 1592–93. In a 1989 Senate Report, the Senate Committee on Environment and Public Works pointed to interstate travel of air pollution as a significant reason for the non-attainment of air quality standards in downwind states. See S. REP. NO. 101-228, at 48, 289 (1989), reprinted in 1990 U.S.C.C.A.N. 3385, 3434, 3672.

¹⁴ See Clean Air Act, 42 U.S.C. § 7410 (2012); *Homer II*, 134 S. Ct. at 1593; Transport Rule, 76 Fed. Reg. at 48,208–09.

¹⁵ 42 U.S.C. § 7410 (a)(2)(D)(i).

¹⁶ Transport Rule, 76 Fed. Reg. at 48,208–09; see *Homer II*, 134 S. Ct. at 1592–93 (noting that EPA relied on the GNP in promulgating the Transport Rule).

¹⁷ *Homer II*, 134 S. Ct. at 1596.

¹⁸ Transport Rule, 76 Fed. Reg. at 48,236–37; see *Homer II*, 134 S. Ct. at 1596; Jeremy Feigenbaum, *Becoming Good Neighbors After EME Homer City Generation*, L.P. v. EPA, 38 HARV. ENVTL. L. REV. 259, 265 (2014).

¹⁹ Transport Rule, 76 Fed. Reg. at 48,236–37; Respondents’ Certificate of Counsel at 17, *EME Homer City Generation, L.P. v. Env’tl. Prot. Agency*, 696 F.3d 7 (D.C. Cir. 2012) (No. 11-1302); Feigenbaum, *supra* note 18, at 265.

²⁰ Respondents’ Certificate of Counsel, *supra* note 23, at 17; see *Homer II*, 134 S. Ct. at 1596 (noting that if a state contributes less than the one percent threshold it would be exempt from regulation under the Transport Rule).

²¹ *Homer II*, 134 S. Ct. at 1597.

²² *Id.* at 1596; see Transport Rule, 76 Fed. Reg. 48,208, 48,248–49 (Aug. 8, 2011) (to be codified at 40 C.F.R. pts. 52, 72, 78, 97).

²³ *Homer II*, 134 S. Ct. at 1596; see Transport Rule, 76 Fed. Reg. at 48,249.

such as . . . where large upwind emission reductions become available because a certain type of emissions control strategy becomes cost-effective.”²⁴ It then converts the chosen cost thresholds into required emissions reductions for upwind states.²⁵

State and local governments and industry and labor groups petitioned for review of the Transport Rule in the U.S. Court of Appeals for the D.C. Circuit.²⁶ The Transport Rule treats all regulated upwind states alike, regardless of their individual contribution to the larger problem.²⁷ According to the petitioners, cost thresholds would require states to decrease their emissions by more than their share of downwind-state pollution.²⁸ Petitioners further challenge that because EPA’s emission budgets were based upon cost alone, EPA failed to protect upwind states from sharing the burden of reducing other upwind states’ emissions.²⁹

On August 21, 2012, the D.C. Circuit vacated EPA’s Transport Rule in a two-to-one split decision.³⁰ The court cited its holding in *North Carolina v. EPA* in concluding that a state must bear sole responsibility for eliminating its own significant contributions to nonattainment and that no state may be required to reduce its interstate emissions by more than the amount of its own contributions.³¹ During the cost analysis phase of the Transport Rule, EPA ignores the floor threshold it establishes in the first phase.³² This opens the door for the possibility that a state “may be required to reduce its emissions by an amount greater than the ‘significant contribution’ that brought it into the program in the first place.”³³ Furthermore, a state may be required to reduce its emissions by more than it contributes to nonattainment in

²⁴ *Homer II*, 134 S. Ct. at 1596; see Transport Rule, 76 Fed. Reg. at 48,249.

²⁵ *Homer II*, 134 S. Ct. at 1597.

²⁶ See *EME Homer City Generation, L.P., v. EPA (Homer I)*, 696 F.3d 7, 11 (D.C. Cir. 2012), *rev’d*, 134 S. Ct. 1584 (2014). The D.C. Circuit has exclusive jurisdiction over challenges to EPA rulemaking pursuant to the CAA. 42 U.S.C. § 7607(b)(1) (2012); see Cory Lewis, *One-Step Forward: The D.C. Circuit Provides Clarity to the Incremental Approach to Rulemaking*, 41 B.C. ENVTL. AFF. L. REV. 541, 545 (2014).

²⁷ See *Homer I*, 696 F.3d at 23.

²⁸ See *id.* (noting that cost thresholds are not based on the amount of pollution an upwind state contributes to a downwind state).

²⁹ *Id.* at 26.

³⁰ See *id.* at 11, 12.

³¹ See *id.* at 14–15 (citing *North Carolina v. EPA*, 531 F.3d 896, 921 (D.C. Cir. 2008)); Bryan Dooley, *EME Homer City Generation, L.P. v. EPA: The Search for Meaningful Regulation of Interstate Pollution Under the Clean Air Act*, 14 MINN. J.L. SCI. & TECH. 893, 909–10 (2013) (explaining in detail the D.C. Circuit’s holding).

³² See *Homer I*, 696 F.3d at 24; Dooley, *supra* note 31, at 910.

³³ *Homer I*, 696 F.3d at 25.

downwind states.³⁴ Thus, according to the D.C. Circuit, EPA exceeded its authority under the CAA.³⁵

According to the court, EPA used the GNP as a mechanism to force states to implement whatever measures the agency deemed cost-effective.³⁶ The court embraced the premise established by the Supreme Court in *Whitman v. American Trucking Associations, Inc.*, that Congress would not “‘alter the fundamental details of a regulatory scheme . . . in ‘ancillary provisions’ or ‘hide elephants in mouseholes.’”³⁷ The court was thus confident that Congress would not delegate an authority with great economic and political significance in such a cryptic manner.³⁸

On June 24, 2013, the Supreme Court granted certiorari to decide if the D.C. Circuit accurately construed EPA’s authority under the CAA by prohibiting cost consideration under the Transport Rule.³⁹ On April 29, 2014, the Supreme Court reversed the D.C. Circuit’s decision and remanded the case for further proceedings.⁴⁰ The Court issued four holdings: (1) EPA is not required to give states a second opportunity to file a State Implementation Plan after promulgating each state’s emission budget under the CAA; (2) the GNP grants EPA authority to determine how to divide responsibility for reducing emissions among downwind states; (3) the Transport Rule was a permissible construction of the GNP; and (4) although the Transport Rule might exceed EPA’s authority, the entire Rule will not be invalidated on these grounds.⁴¹

II. LEGAL BACKGROUND

Over the past fifty years, Congress has tried vigorously to combat interstate air pollution.⁴² In 1970, it amended the Clean Air Act (“CAA”) by directing the Environmental Protection Agency (EPA) to establish national

³⁴ See Dooley, *supra* note 31, at 910 (noting that the obligations imposed on upwind states by the GNP must not “go beyond what is necessary for the downwind States to achieve the NAAQS”). Cf. *Homer I*, 696 F.3d at 14–15 (noting that the CAA requires “every upwind State to clean up at most *its own* share of the air pollution in a downwind State—not other States’ shares”).

³⁵ See *Homer I*, 696 F.3d at 11; Julie D. Carter, *EME Homer City Generation, L.P. v. EPA: The D.C. Circuit Strikes Down Another EPA Attempt to Make Good Neighbors Through Interstate Air Pollution Regulation*, 26 TUL. ENVTL. L.J. 123, 128 (2012).

³⁶ See *Homer I*, 696 F.3d at 28; Feigenbaum, *supra* note 18, at 269.

³⁷ See *Homer I*, 696 F.3d at 28 (quoting *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001)).

³⁸ See *id.* (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

³⁹ *Homer I*, 696 F.3d 7, *cert. granted*, 81 U.S.L.W. 3567 (U.S. June 24, 2013) (No. 12-1182); see *Homer II*, 134 S. Ct. 1584, 1599 (2014) (noting the subject matter of the Court’s review).

⁴⁰ *Homer II*, 134 S. Ct. at 1610.

⁴¹ See *id.* at 1609–10.

⁴² See *EPA v. EME Homer City Generation, L.P. (Homer II)*, 134 S. Ct. 1584, 1594 (2014).

ambient air quality standards (“NAAQS”) for pollutants at levels that will protect public health.⁴³ The CAA also requires EPA to designate nonattainment areas—areas where the concentration of a regulated pollutant exceeds the NAAQS.⁴⁴ Under the CAA, each state must submit a State Implementation Plan (“SIP”)—in compliance with the NAAQS—to EPA within three years of any new or revised NAAQS.⁴⁵ A SIP must include adequate provisions that prohibit an upwind state from emitting amounts of air pollutants that “contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any . . . [NAAQS].”⁴⁶ This requirement is known as the Good Neighbor Provision (“GNP”).⁴⁷

EPA promulgated its first interstate pollution plan in 1998.⁴⁸ The plan—known as the NO_x SIP Call—created a two-step process to determine the amount of an upwind states’s pollution that had significantly contributed to a downwind states’s noncompliance with NAAQS.⁴⁹ The first step was to determine if an upwind state contributed certain amounts of pollutants to a downwind state that had failed to meet CAA ozone standards.⁵⁰ If a state passed this threshold requirement, it was required to participate in a designated program.⁵¹ Costs were taken into account in determining how much of each state’s pollution budget was to be allocated to the program.⁵²

In 2000, the U.S. Court of Appeals for the D.C. Circuit, in *Michigan v. EPA*, upheld the NO_x SIP Call in a two-to-one split decision.⁵³ States and environmental groups had challenged the rule by arguing that the CAA prohibits EPA from considering costs when implementing the GNP.⁵⁴ The petitioners argued that because the CAA mentions air quality as a factor to be used in determinations of “significant contributions” and does not mention

⁴³ Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1679–1680 (codified as amended at 42 U.S.C. §§ 7408, 7409 (2012)).

⁴⁴ See Clean Air Act, 42 U.S.C. § 7407(d) (2012).

⁴⁵ If EPA determines that a state has not submitted an adequate SIP, the CAA requires the agency to implement a Federal Implementation Plan onto the state within two years of the determination. See *id.* § 7410(a)(1), (c)(1).

⁴⁶ *Id.* § 7410(a)(2)(D)(i)(I).

⁴⁷ *Homer II*, 134 S. Ct. at 1595.

⁴⁸ See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone (NO_x SIP Call), 63 Fed. Reg. 57,356, 57,358 (Oct. 27, 1998) (to be codified at 40 C.F.R. pts. 51, 72, 75, 96).

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ *Id.*; see *Michigan v. EPA*, 213 F.3d 663, 675 (D.C. Cir. 2000).

⁵² See NO_x SIP Call, 63 Fed. Reg. at 57,358.

⁵³ 213 F.3d at 690.

⁵⁴ See *id.* at 674.

cost, the cost-of-criterion was unlawful.⁵⁵ Contrary to this interpretation, the court deferred to EPA's interpretation and authorized the use of costs in implementing the provision, stating "there is nothing in the text, structure, or history of [the CAA GNP] that bars EPA from considering cost in its application."⁵⁶ The D.C. Circuit based its deferral on the Supreme Court's now-famous holding in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, which instructs that "[i]f . . . [a] court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute"⁵⁷

EPA promulgated a second interstate pollution plan in 2005.⁵⁸ This plan—known as the Clean Air Interstate Rule ("CAIR")—also created a two-step process to determine the amounts of upwind states' pollution that contribute significantly to downwind states' noncompliance with NAAQS.⁵⁹ Similar to the NO_x SIP Call, CAIR required states to first pass a threshold test in order to be deemed a significant contributor to downwind nonattainment.⁶⁰ If a state contributed a certain level of pollution, the state was required to participate in a designated program.⁶¹ Costs were again considered in determining each state's pollution budget.⁶²

States and environmental groups challenged various aspects of CAIR including its consideration of costs.⁶³ In 2008, in *North Carolina v. EPA*, the D.C. Circuit reversed and remanded CAIR, finding that EPA had exceeded its statutory authority.⁶⁴ The court relied on the United States Supreme Court's holding in *Whitman v. American Trucking Associations, Inc.*, which

⁵⁵ See *id.*; see also Carter, *supra* note 35, at 126 (reviewing the petitioners' claims in *Michigan v. EPA*).

⁵⁶ See *Michigan v. EPA*, 213 F.3d at 679; Carter, *supra* note 35, at 126. Courts routinely defer to an agency's reasonable interpretation of ambiguous statutory language. See generally *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (encapsulating the standard for judicial deference to administrative agency statutory interpretation upon ambiguity).

⁵⁷ See *Chevron*, 467 U.S. at 843. The Court further held that, "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

⁵⁸ Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule), 70 Fed. Reg. 25,162 (May 12, 2005) (to be codified at 40 C.F.R. pts. 51, 72, 73, 74, 77, 78, 96).

⁵⁹ *Id.* at 25,162, 25,165; see *North Carolina v. EPA*, 531 F.3d 896, 903–04 (D.C. Cir. 2008) (considering a challenge to the legality of CAIR).

⁶⁰ Clean Air Interstate Rule, 70 Fed. Reg. at 25,162.

⁶¹ See *id.* at 25,174–75, 25,191.

⁶² See *id.* at 25,174–75.

⁶³ See *North Carolina v. EPA*, 531 F.3d at 901, 903.

⁶⁴ See *id.* at 929–30; Feigenbaum, *supra* note 18, at 264.

held that EPA cannot “go over the edge of reasonable interpretation.”⁶⁵ In 2001, in *Whitman*, the Supreme Court held that section 109(a) of the CAA does not permit EPA to consider implementation costs in setting NAAQS.⁶⁶ Section 109(b)(1) instructs EPA to set primary ambient air quality standards, “the attainment and maintenance of which . . . are requisite to protect the public health.”⁶⁷ The Court reasoned that the CAA often explicitly grants EPA authority to consider implementation costs, and thus, where the authority is not express, the inference will not be made.⁶⁸ Numerous other provisions in the CAA expressly permit or require costs to be taken into account in implementing air quality standards.⁶⁹ Additionally, provisions of the CAA have been amended to explicitly direct the EPA Administrator to consider costs.⁷⁰ The *Whitman* Court found “it implausible that Congress would give to . . . EPA[,] through . . . modest words[,] the power to determine whether implementation costs should moderate national air quality standards.”⁷¹ The language of the statute is absolute and the Court did not find that ambiguous sections of the CAA implicitly granted EPA authority to consider costs.⁷²

III. ANALYSIS

The Supreme Court of the United States, in *EPA v. EME Homer City Generation, L.P.*, held that the Clean Air Act’s (“CAA”) Good Neighbor Provision (“GNP”), which delegates authority to the Environmental Protec-

⁶⁵ See *North Carolina v. EPA*, 531 F.3d at 910 (quoting *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 485 (2001)) (explaining that EPA could not read its own substantive provision into the CAA).

⁶⁶ See 531 U.S. at 471.

⁶⁷ 42 U.S.C. § 7409 (2012).

⁶⁸ See *Whitman*, 531 U.S. at 467 (citing *Union Elec. Co. v. EPA*, 427 U.S. 246, 257 (1976)).

⁶⁹ *Id.* In *Whitman*, the Court noted,

Section 111(b)(1)(B), for example, commanded the Administrator to set “standards of performance” for certain new sources of emissions that as specified in [section] 111(a)(1) were to “reflec[t] the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.” Section 202(a)(2) prescribed that emissions standards for automobiles could take effect only “after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.”

Id. at 467.

⁷⁰ See *id.* (referencing 42 U.S.C. §§ 7545(k)(1), 7547(a)(3)).

⁷¹ *Id.* at 468.

⁷² See *id.* at 467; see also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (outlining the levels of deference federal courts must show to administrative agencies).

tion Agency (EPA) to determine how to allocate responsibility for a downwind state's pollution in excess of national ambient air quality standards ("NAAQS"), gave EPA the authority to consider costs when promulgating the Transport Rule, governing the amount of emissions that can flow from other upwind states.⁷³ The Court rejected the U.S. Court of Appeals for the D.C. Circuit's determination that the GNP requires upwind states to disregard costs and reduce emissions in a manner proportional to their contribution to pollution in downwind states.⁷⁴ The Court reasoned that, based on the plain language of the statute, that EPA was neither required nor prohibited from considering costs.⁷⁵ The Court thus upheld the Transport Rule as a reasonable interpretation of a statutory ambiguity in the GNP—under *Chevron* deference—because the GNP does not command a cost-blind construction.⁷⁶

The Court essentially interpreted congressional silence as a delegation of authority to EPA to consider and choose from reasonable methods.⁷⁷ EPA's task under the CAA is to reduce upwind pollution in "amounts" that cause a downwind state's pollution concentrations to exceed the established NAAQS.⁷⁸ EPA was tasked with determining how to "allocate among multiple contributing upwind [s]tates responsibility for a downwind [s]tate's excess pollution."⁷⁹ In the Court's view, EPA sensibly chose to reduce the amounts that are easier and less costly to eradicate, a choice, it held, not precluded by the text of the GNP.⁸⁰

Contrary to the Court's opinion, however, the statutory ambiguity at issue in *Chevron* is unlike that in *Homer*.⁸¹ Unlike in *Chevron*, the statute is not at all ambiguous about whether "amounts" of pollution that "contribute significantly" include costs of compliance.⁸² The Court read Congress's silence in *Chevron* as a delegation of authority to EPA to choose from reasonable interpretations of the term "source."⁸³ In *Homer*, the Court read

⁷³ EPA v. EME Homer City Generation, L.P. (*Homer II*), 134 S. Ct. 1584, 1592–94 (2014); see Clean Air Act, 42 U.S.C. § 7410 (2012).

⁷⁴ See *Homer II*, 134 S. Ct. at 1592–94 (reversing the D.C. Circuit's judgment that only a consideration of proportional responsibility was allowed in the Transport Rule, by the GNP).

⁷⁵ See 42 U.S.C. § 7410; *Homer II*, 134 S. Ct. at 1604.

⁷⁶ See *Homer II*, 134 S. Ct. at 1592–94, 1603–04.

⁷⁷ See *id.* at 1589 (citing *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)).

⁷⁸ See 42 U.S.C. § 7410; *Homer II*, 134 S. Ct. at 1603–04.

⁷⁹ *Homer II*, 134 S. Ct. at 1603–04.

⁸⁰ *Id.* at 1607.

⁸¹ Compare *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 860 (1984) (considering EPA's interpretation of a single ambiguous statutory term), with *Homer II*, 134 S. Ct. at 1604 (considering whether EPA read a substantive provision into the CAA).

⁸² See 42 U.S.C. § 7410 (2012); *Homer II*, 134 S. Ct. at 1611 (Scalia, J., dissenting).

⁸³ See *Homer II*, 134 S. Ct. at 1604 (majority opinion) (citing *Mead*, 533 U.S. at 229, and *Chevron*, 467 U.S. at 844–45).

Congress's silence as a delegation of authority to EPA to choose among reasonable methods to determine "amounts" that "significantly contribute."⁸⁴

EPA argued that the word "significant" is ambiguous and thus it deserves deference in its interpretation of the GNP.⁸⁵ Even if "significant" is ambiguous, the word should not "be interpreted to include emissions for which a state is not individually responsible."⁸⁶ Congress intended that the creation of State Implementation Plans ("SIPs") be an individual duty bestowed upon states, not a collective duty among multiple states.⁸⁷ In arguing that "significant" is ambiguous, EPA relied on the D.C. Circuit's holding in *Michigan v. EPA* to support its interpretation.⁸⁸ Although the court in *Michigan v. EPA* held that the word "significant" is ambiguous within the meaning of the GNP, the D.C. Circuit did not hold that this ambiguity permitted EPA to force a state to reduce its emissions by more than its own contribution to another state's nonattainment.⁸⁹

The Supreme Court's reasoning in *Homer* is also difficult to understand in light of *Whitman v. American Trucking Associations, Inc.* and the D.C. Circuit's reliance on *Whitman* in its own holding in *North Carolina v. EPA*.⁹⁰ Cost is not mentioned explicitly or implicitly in the GNP.⁹¹ The Court transmogrified a statute that assigns responsibility on the basis of amounts of pollutants to authorize EPA to reduce interstate pollution in the most *efficient* manner.⁹² In his dissent, Justice Scalia emphasized that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."⁹³ In light of the statute's history, Justice Scalia believed that "significantly" in the context of contributing to

⁸⁴ See *id.* at 1603–04.

⁸⁵ Brandon Dittman, *How to Be a Good Neighbor: The Failure of CAIR and CSAPR, Uncertainty, and the Way Forward*, 25 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 199, 221 (2014).

⁸⁶ *Id.* at 222.

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See *Michigan v. EPA*, 213 F.3d 663, 674–79 (D.C. Cir. 2000); Dittman, *supra* note 85, at 222.

⁹⁰ See *Homer II*, 134 S. Ct. at 1612 (Scalia, J., dissenting) (citing *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001), and *North Carolina v. EPA*, 531 F.3d 896, 910, 929 (D.C. Cir. 2008)) (noting that agencies are not to read substantive provisions into statutes).

⁹¹ See 42 U.S.C. § 7410 (2012); *Whitman*, 531 U.S. at 468 (holding that respondents must show a clear textual commitment of authority to EPA to consider costs in setting standards); *North Carolina v. EPA*, 531 F.3d at 919 (quoting *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854 (D.C. Cir. 1987)) (finding that EPA must act within the bounds of its statutory authority and must not "substitute new goals in place of the statutory objectives without explaining how [doing so comports with] the statute").

⁹² See *Homer II*, 134 S. Ct. at 1612 (Scalia, J., dissenting); see also *Whitman*, 531 U.S. at 468 (holding that EPA has no authority to consider costs because Congress does not vaguely write statutes to allow agencies to alter the statute's fundamental aspects).

⁹³ See *Homer II*, 134 S. Ct. at 1612 (Scalia, J., dissenting) (citing *Whitman*, 531 U.S. at 468).

non-attainment downwind “is not code for feel free to consider compliance costs.”⁹⁴ There are numerous CAA provisions that explicitly permit costs to be taken into account.⁹⁵ In fact, the CAA is textually quite clear.⁹⁶ The Court in *Whitman* required a textual commitment granting authority to EPA to consider costs and the GNP drastically fails to meet this requirement.⁹⁷ The holding in *Homer* is thus irreconcilable with the holding in *Whitman*.⁹⁸

The majority attempted to reconcile the differences between *Homer* and *Whitman* by finding that the relevant text of the GNP is not absolute and does not preclude other considerations.⁹⁹ The language of the GNP grants EPA discretion to eliminate “amounts [of pollution that] . . . contribute significantly to nonattainment downwind.”¹⁰⁰ The majority stated that the statute is silent on the particular “amounts” that qualify for elimination.¹⁰¹ Thus, “unlike the provision at issue in *Whitman* which provides express criteria by which EPA is to set NAAQS, the GNP . . . fails to provide

⁹⁴ *See id.*

⁹⁵ *See, e.g.*, 42 U.S.C. §§ 7404(a)(1), 7521(a)(2) (stating that automobile emission standards are only effective “after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period”), 7545(c)(2), 7547(a)(3) (permitting emission reduction standards for non-road vehicles to be set based upon cost consideration), 7554(b)(2), 7571(b), 7651c(f)(1)(A); *Homer II*, 134 S. Ct. at 1616; *see also* 42 U.S.C. 7545(k)(1) (granting the power to reformulate gasoline to require reductions in emissions by considering the cost of achieving the reductions); *Whitman*, 531 U.S. at 467 (finding that other provisions in the CAA expressly permit or require agencies to consider costs in implementing air quality standards). The Court in *Whitman* cites section 111 of the CAA, which states that the Administrator must set emission standards for new sources that “reflec[t] the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.” *See* 42 U.S.C. § 7411(a)(1); *Whitman*, 531 U.S. at 467. Other sections of the CAA have similar limiting language as it applies to interim standards, fuel additives, and aircraft emission standards, respectively. *See* 42 U.S.C. §§ 7521, 7545, 7571.

⁹⁶ *See* Supreme Court Leading Case Comment, *Clean Air Act—Cost Considerations—EPA v. EME Homer City Generation, L.P.*, 128 HARV. L. REV. 351, 358 (2014).

⁹⁷ *See* 42 U.S.C. § 7410 (2012); *Whitman*, 531 U.S. at 468.

⁹⁸ *See Homer II*, 134 S. Ct. at 1616 (Scalia, J., dissenting) (claiming that the majority “turns its back upon” *Whitman*). *Compare id.* at 1607 (majority opinion) (holding that the CAA’s GNP, which does not expressly permit cost consideration, permits EPA to consider costs in setting emission reduction standards), *with Whitman*, 531 U.S. at 468 (holding that the relevant text of the CAA, which does not expressly permit cost consideration, prohibits EPA from considering costs in setting NAAQS). Further, the decision is inconsistent with the D.C. Circuit’s decision in *North Carolina v. EPA*, where the court reasoned that EPA is not permitted to “just pick a cost for a region, and deem ‘significant’ any emissions that sources can eliminate more cheaply” because this approach does not necessarily prohibit sources *within* a state from contributing significantly to nonattainment in downwind states. *See* 531 F.3d 896, 918 (D.C. Cir. 2008).

⁹⁹ *See Homer II*, 134 S. Ct. at 1607 n.21.

¹⁰⁰ 42 U.S.C. § 7410; *see Homer II*, 134 S. Ct. at 1607 n.21.

¹⁰¹ *See Homer II*, 134 S. Ct. at 1607 n.21.

any metric by which EPA can differentiate among the contributions of multiple upwind states.”¹⁰²

The majority attempted to articulate a distinction between setting NAAQS at levels “requisite to protect the public health” with “an adequate margin of safety” in *Whitman*, and eliminating “amounts [that] . . . contribute significantly to nonattainment downwind” in *Homer*.¹⁰³ It stated that the text of the provision in *Whitman*, unlike the text of the GNP, was absolute and provided express criteria for setting standards.¹⁰⁴ The distinction between the relevant statutory language in *Whitman* that the majority describes as absolute and the text of the GNP, which the majority views as ambiguous, is unclear and unconvincing.¹⁰⁵ Whether the D.C. Circuit’s proportional allocation method is a permissible and feasible interpretation of the GNP will remain unknown for now.¹⁰⁶ The current method of apportionment under the Transport Rule, however, is not a permissible construction of the statute.¹⁰⁷

The Court’s decision in *Homer* is a blatant challenge to its own precedent in *Whitman*.¹⁰⁸ Nothing in the GNP expressly precludes cost consideration and thus the majority’s holding in *Homer* will open the doors for administrative agencies to exercise broader lawmaking authority than what was delegated to them by Congress.¹⁰⁹ The decision begs the question: Is EPA’s power limitless?

The Court has not only left this question unanswered, but it has also produced inconsistent case law that will lead to greater uncertainty.¹¹⁰ The decision “signals a troubling shift toward the permissibility of cost considerations in environmental regulation.”¹¹¹ Were the overarching goal of the GNP to decrease air pollution in the most cost-effective manner, rather than to allocate obligations based on the proportion of each state’s contribution,

¹⁰² See *id.*

¹⁰³ See *id.* (citing *Whitman*, 531 U.S. at 457, 465, 471).

¹⁰⁴ See *id.* (citing *Whitman*, 531 U.S. at 457, 465, 471).

¹⁰⁵ See *id.* at 1616 (Scalia, J., dissenting) (describing the relevant statutory language, not as express and absolute, but as modest and vague, and stating that Congress would not give EPA the power to consider costs in determining air quality standards through modest words); *Whitman*, 531 U.S. at 468.

¹⁰⁶ See *Homer II*, 134 S. Ct. at 1589 (vacating the D.C. Circuit’s decision, which required proportional allocation of emissions reduction). See generally *EME Homer City Generation, L.P., v. Evtl. Prot. Agency (Homer I)*, 696 F.3d 7 (D.C. Cir. 2012), *rev’d*, 134 S. Ct. 1584 (2014) (outlining a proportional allocation method).

¹⁰⁷ See *Homer II*, 134 S. Ct. at 1621 (Scalia, J., dissenting); *Whitman*, 531 U.S. at 468; *North Carolina v. EPA*, 531 F.3d 896, 918 (D.C. Cir. 2008).

¹⁰⁸ See *Homer II*, 134 S. Ct. at 1616 (Scalia, J., dissenting); *Whitman*, 531 U.S. at 468; *North Carolina v. EPA*, 531 F.3d at 918.

¹⁰⁹ See 42 U.S.C. § 7410 (2012); *Homer II*, 134 S. Ct. at 1610 (Scalia, J., dissenting).

¹¹⁰ Compare *Homer II*, 134 S. Ct. at 1609–10 (majority opinion) (allowing EPA’s use of cost considerations), with *Whitman*, 531 U.S. at 486 (invalidating EPA’s use of cost considerations).

¹¹¹ Supreme Court Leading Case Comment, *supra* note 96, at 351.

the holding in *Homer* would perhaps be more understandable.¹¹² The statutory text does not, however, lend support for such a goal.¹¹³

CONCLUSION

Where the Supreme Court of the United States will draw the line and limit the Environmental Protection Agency's (EPA) authority under the Clean Air Act ("CAA") remains to be seen. According to the Court's decision in *EPA v. EME Homer City Generation, L.P.*, EPA is permitted to consider the costs of reducing emissions when promulgating rules governing the amount of emissions that can flow from one state to another. The decision in *Homer* is irreconcilable with the Court's precedent. The Court attempted to craft a coherent, outcome determinative distinction between the facts in *Homer* and *Whitman v. American Trucking Associations, Inc.*, but no such distinction existed.

EPA improperly used the Good Neighbor Provision ("GNP") of the CAA as an instrument to force states to implement any measures the agency deems cost-effective in the context of its 2011 Transport Rule. The CAA's legislative history and numerous provisions that explicitly permit cost to be considered, however, do not warrant EPA's cost consideration under the Transport Rule. The Court, as it did in *Whitman*, should have required a textual commitment by Congress to grant such authority to consider costs. Had it done so, the vacatur of the Transport Rule as an impermissible construction of the GNP by the U.S. Court of Appeals for the D.C. Circuit, would have been upheld and Congress's intent in passing the CAA GNP would have been honored.

¹¹² See Adler, *supra* note 1.

¹¹³ See 42 U.S.C. § 7410; Adler, *supra* note 1.