THE CLEAN AIR ACT: THE END OF A *CHEVRON* ERA?

ERIN MURPHY*

I. INTRODUCTION

Significantly amended in 1970, 1977, and 1990, the mission of the modern version of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[1] Signed by President Nixon on December 31, the 1970 Clean Air Act Amendments marked a significant moment in the history of clean air legislation in the United States.[2] In describing the act, President Nixon stated, "I think that 1970 will be known as the year of the beginning, in which we really began to move on the problems of clean air and clean water and open spaces for the future generations of America."[3] Since then, the federal government, through the Environmental Protection Agency ("EPA"), has regulated air pollutants through legislation and enacted policies that promote the EPA's mission.

The EPA has enjoyed broad authority in regulating emissions under the Clean Air Act for the purpose of improving air quality and promoting public health in the United States.[4] In the seminal United States Supreme Court case, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.* ("Chevron"), the Court deferred to the EPA's interpretation of the Clean Air Act's term "stationary source."[5] The *Chevron* Court held that because Congress had not directly spoken on the issue, the EPA's interpretation need only be reasonable to be accepted.[6] The *Chevron* court noted, "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations 'has been consistently followed by this Court.'"[7] By adopting this lenient reasonableness standard, the court granted the EPA broad judicial deference

---

* Notes Editor, KENTUCKY JOURNAL OF EQUINE, AGRICULTURE, & NATURAL RESOURCES LAW, 2013-2014; B.A. 2011,University of Illinois Urbana-Champaign; J.D./M.B.A expected December 2014, University of Kentucky.

[1] Clean Air Act, 42 U.S.C. § 7401(b)(1) (2006).

[2] *40th Anniversary of the Clean Air Act*, U.S. ENVTL. PROTECTION AGENCY (Sept. 14, 2010), http://www.epa.gov/air/caa/40th.html.

[3] *Id.*

[4] *See* Clean Air Act, 42 U.S.C. §§ 7401-7671q (2006).

[5] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

[6] *Id.* at 845.

[7] *Id.* at 844.

for future interpretations of provisions and terms within the statutes it administers, including the Clean Air Act.

In the period since *Chevron,* the EPA has continually utilized its vast authority to regulate air pollutants in the United States. According to the EPA, emissions of the six principle air pollutants have decreased by more than forty-one percent in the last twenty years.[8] The EPA estimates that by 2020, the Clean Air Act will prevent over 230,000 early deaths due to reductions in air pollution.[9] For decades, the EPA's implementation of the Clean Air Act has enhanced air quality and promoted public health.

In the future, however, the federal judiciary may temper the broad authority the EPA has historically enjoyed. In 2012, the EPA encountered a series of setbacks to its implementation of the Clean Air Act in three United States Courts of Appeal: *Summit Petroleum Corp. v. EPA* ("Summit"),[10] *Texas v. EPA* ("Texas"),[11] *EME Homer City Generation, L.P. v. EPA* ("EME Homer"),[12] and *Sierra Club v. EPA* ("Sierra Club").[13] Although each case involved different claims, the Fifth, Sixth, and D.C. Circuits all vacated and remanded the EPA's interpretation or implementation of the Clean Air Act to the lower courts.[14] In all cases, the federal courts found that the EPA exceeded its authority under the Clean Air Act. These four decisions signal a trend in judicial interpretation away from broad *Chevron* deference toward increased restriction. This recent shift in judicial interpretation may provide an opportunity for continued challenges to the EPA's regulatory authority and may ultimately result in permanent limitations on the EPA's ability to implement the Clean Air Act. However, the outstanding issues may soon be resolved, as the United States Supreme Court has granted the petition for writ of certiorari in the *EME Homer* case which has been consolidated with *American Lung Assn. v. EME Homer City Generation.*[15]

This Note is comprised of eight sections that will present and analyze the recent shift in judicial interpretation. Section II of this Note provides background on the adoption and implementation of the Clean Air

---

[8] UNITED STATES ENVIRONMENTAL. PROTECTION AGENCY, *supra* note 2.

[9] *Benefits and Costs of the Clean Air Act,* U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/air/sect812/prospective2.html (last updated Aug. 15, 2013).

[10] Summit Petroleum Corp. v. EPA, 690 F.3d 733 (6th Cir. 2012).

[11] Texas v. EPA, 690 F.3d 670 (5th Cir. 2012).

[12] EME Homer City Generation, L.P. v. EPA, 696 F.3d 7 (D.C. Cir. 2012).

[13] Sierra Club v. EPA, 699 F.3d 530 (D.C. Cir. 2012).

[14] Summit Petroleum Corp., 690 F.3d at 735 (vacating EPA's final determination and remanding to the EPA to determine whether certain properties are sufficiently adjacent to trigger regulation); Texas, 690 F.3d at 674 (vacating EPA's disapproval of Texas's plan and remanding the case); EME Homer City Generation, 696 F.3d at 12 (vacating EPA's Transport Rule); Sierra Club, 699 F.3d at 531 (vacating the Determination and remanding to the EPA to provide notice and opportunity for comment).

[15] EME Homer City Generation, L.P. v. EPA, 696 F.3d 7 (D.C. Cir. 2012), *cert. granted sub nom.* American Lung Ass'n v. EME Homer City Generation, L.P., 133 S. Ct. 2857 (2013).

Act. Section III provides a substantive review of the four federal cases comprising the shift. Section IV analyzes and investigates the recent trend in judicial interpretation of the Clean Air Act. Section V discusses the EPA's possible options in responding to this trend. Section VI provides a possible counterargument to the Clean Air Act trend theory. Section VII discusses the potential impact this trend could have on states and industry. Finally, Section VIII concludes the analysis and provides hypotheses for future interpretations of the Clean Air Act.

II. HISTORY AND CONTENTS OF THE 1970 CLEAN AIR ACT AMENDMENTS

The Clean Air Act of 1963 was the first federal legislation regulating air pollution control.[16] The Act "established funding for the study and the cleanup of air pollution."[17] The Clean Air Act of 1970 significantly increased the authority of the federal government to regulate air pollution[18] and was "born out of the concern that the patchwork of diverse state environmental standards evolving in the early 1970s would wreak havoc on interstate commerce and create competitive disadvantages for states striving to improve environmental quality."[19] In the same year, the EPA was created and charged with regulating air pollution on a national level to improve public health.[20] The Act further "authorized the development of comprehensive federal and state regulations to limit emissions from both stationary (industrial) sources and mobile sources."[21] In addition, the Act sanctioned the creation of several stationary source regulatory programs: the National Ambient Air Quality Standards (NAAQS), State Implementation Plans (SIPs), New Source Performance Standards (NSPS), and National Emission Standards for Hazardous Air Pollutants (NESHAPs).[22] Together, these programs work to ensure national air quality standards are met within each state. The 1970 Act "'sharply increased federal authority and responsibility in the continuing effort to combat air pollution'... but continued to assign 'primary responsibility for assuring air quality' to the several States."[23] Later amendments to the Clean Air Act in

---

[16] *History of the Clean Air Act,* U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/air/caa/amendments.html (last updated Aug. 15, 2013).

[17] *Understanding the Clean Air Act,* U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/air/peg/understand.html (last updated Mar. 6, 2012).

[18] *Id.*

[19] Stephen M. Meyer, *The Economic Impact of Environmental Regulation*, J. OF ENVTL. L. & POL'Y (Jan. 1, 1995), *available at* http://web.mit.edu/polisci/mpepp/Reports/Econ%20Impact%20Enviro%20Reg.pdf.

[20] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *supra* note 17.

[21] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *supra* note 16.

[22] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *supra* note 16.

[23] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845-46 (1984) (citation omitted).

1990 expanded the federal government's power[24] by providing the EPA "even broader authority to implement and enforce regulations reducing air pollutant emissions."[25]

The Clean Air Act has been described as "extremely complex and multifaceted"[26] due to "the Act's numerous amendments, the non-uniform state implementation of its air quality provisions, and the technical nature of the subject matter."[27] The complexity of the Clean Air Act and the varying approaches used by the federal government and the states in implementing the Act may explain in part, why the federal courts have historically struggled with cohesive and consistent review of the Act.

The disparate judicial review of the EPA's policies may also be a result of the ongoing political debate over appropriate environmental regulation; "[d]riving these efforts is the widely held belief that three decades of creeping environmental controls have strangled the economy and undermined economic competitiveness."[28] While historically the EPA has enjoyed broad power to impose regulations protecting the environment, the complexity of implementing the Clean Air Act and the hostile political environment may be the cause for the recent shift in judicial interpretation.

III. SUBSTANTIVE REVIEW OF THE CASES COMPRISING THE TREND

The recent trend away from broad *Chevron* deference for the EPA's execution of the Clean Air Act toward restraint of the EPA's power is evidenced by: *Summit Petroleum Corp. v. EPA*, *Texas v. EPA*, *EME Homer City Generation, L.P. v. EPA*, and *Sierra Club v. EPA*.[29] Each of the cases, although substantively varied, exemplifies the general wariness of the federal courts in granting the EPA limitless authority under the Clean Air Act. This skepticism has established a movement toward increased judicial restriction of the EPA as the agency continues to utilize its delegated power. A substantive review of the cases comprising this recent trend is necessary to understand the collectiveness and cohesiveness of the recent federal judiciary action taken against the EPA.

First, in *Summit*, the Court addressed when separate and multiple sources of air pollution may be considered a single stationary source for Title V operating permits.[30] In 1990, Congress enacted Title V of the Clean

---

[24] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *supra* note 16.

[25] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *supra* note 17.

[26] Joseph R. Dancy, *The Impact of the Clean Air Act's Ozone Non-Attainment Areas on Texas: Major Problems and Suggested Solutions*, 47 SMU L. REV. 451, 454 (1994).

[27] *Id.* at 455.

[28] MEYER, *supra* note 19.

[29] Summit Petroleum Corp. v. EPA, 690 F.3d 733 (6th Cir. 2012), Texas v. EPA, 690 F.3d 670 (5th Cir. 2012), EME Homer City Generation, L.P. v. EPA, 696 F.3d 7 (D.C. Cir. 2012), Sierra Club v. EPA, 699 F.3d 530 (D.C. Cir. 2012).

[30] Summit Petroleum Corp. v. EPA, 690 F.3d 733 (6th Cir. 2012).

Air Act, which established "an operating permit program to regulate stationary sources of air pollution."[31] A Title V permit requires a major source of air pollution to meet "emission limitations, standards, monitoring requirements, compliance schedules, and other conditions necessary to assure compliance with the CAA."[32] Summit sought guidance from the EPA in determining whether its plant and production wells would be aggregated by the EPA and considered a major source, requiring a Title V permit. Alternatively, the plant and wells could be considered separate stationary sources.[33]

Ultimately, the EPA found the plant and wells to be a single stationary source that required a Title V permit because they were dependent upon each other and adjacent.[34] Summit filed a petition for review with the Sixth Circuit arguing that the EPA's determination that adjacency can be established through functional relatedness was unreasonable under *Chevron* and did not conform to the plain meaning of adjacent.[35] On August 7, 2012, the Sixth Circuit agreed with Summit and found the term "adjacent" in Title V of the Clean Air Act unambiguous and thus, no *Chevron* deference was due to the EPA.[36] The court then found the EPA's interpretation of the term to be inconsistent with the regulatory history of Title V and the guidance memorandums issued by the EPA.[37] By not granting the EPA broad *Chevron* deference, the Sixth Circuit itself determined the appropriate definition of "adjacent" for Title V.

Second, the court in *Texas*[38] reaffirmed the significant role of the states in implementing the Clean Air Act. Per the Clean Air Act, every state must design and execute a State Implementation Plan (SIP), which summarizes the state's plan for meeting the National Ambient Air Quality Standards (NAAQS).[39] Every SIP must include a New Source Review (NSR) plan for pre-construction permits because "[i]f a source does not receive a permit, then it violates the CAA."[40] Sixteen years after Texas revised its SIP, the EPA disapproved the state's plan.[41] The EPA determined that Texas's plan allowed for circumvention of NSR requirements for major sources of air pollution.[42] The state of Texas then sought review of the EPA's ruling.

---

[31] *Id.* at 736.
[32] *Id.*
[33] *Id.* at 737.
[34] *Id.* at 739.
[35] *Id.* at 741.
[36] *Id.*
[37] *Id.* at 746.
[38] Texas v. EPA, 690 F.3d 670 (5th Cir. 2012).
[39] *Id.* at 674.
[40] *Id.*
[41] *Id.* at 673.
[42] *Id.* at 677.

On August 13, 2012, less than a week after the *Summit* decision, the Fifth Circuit agreed with Texas and held the disapproval was improper per the Administrative Procedure Act (APA) because the EPA's reasoning for the ruling was "arbitrary and capricious."[43] Further, the court found that the EPA's disapproval disturbed the "cooperative federalism" envisioned by the Clean Air Act.[44] The court held, "Congress had a specific vision when enacting the Clean Air Act: The Federal and State governments were to work together to ... achieve better air quality. The EPA's final rule disapproving Texas's Flexible Permit Program transgresses the CAA's delineated boundaries of this cooperative relationship."[45] In *Texas*, the Fifth Circuit reiterated the role of states in implementation of Clean Air Act policies and cautioned the EPA from future infringements upon this state authority.

Third, in *EME Homer*,[46] the Court again emphasized the goal of "cooperative federalism" in the execution of the Clean Air Act.[47] The court reviewed the EPA's implementation of the good neighbor provision[48] which requires "upwind States" to "prevent sources within their borders from emitting federally determined 'amounts' of pollution that travel across State lines and 'contribute significantly' to a downwind State's 'nonattainment' of federal air quality standards."[49] To implement this good neighbor requirement, the EPA promulgated the Transport Rule, which established emission reduction requirements for twenty-eight upwind States.[50] Several states, local governments, industries, and labor unions petitioned for review of the Transport Rule.[51] On August 21, 2012, almost a week after the *Texas* decision, the D.C. Circuit held that the EPA's Transport Rule exceeded the agency's authority under the Clean Air Act.[52] Further, the court found the EPA infringed upon the opportunity for states, via the Clean Air Act, to implement emission reductions as required by the good neighbor provision.[53]

The D.C. Circuit acknowledged in the opinion that "this Court has affirmed numerous EPA clean air decisions in recent years...In this case, however, we conclude that EPA has transgressed statutory boundaries."[54] Thus, the court recognized the broad deference historically granted to the

---

[43] *Id.* at 679.
[44] *Id.*
[45] *Id.* at 686.
[46] EME Homer City Generation, L.P. v. EPA, 696 F.3d 7 (D.C. Cir. 2012).
[47] *Id.* at 11.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 12 (citations omitted).

EPA and the need for increased restriction. The court continued, "[i]t is not our job to set environmental policy. Our limited but important role is to independently ensure that the agency stays within the boundaries Congress has set. EPA did not do so here."[55] In *EME Homer*, the court reiterated its authority to curb the EPA and cautioned the agency to stay within the statutory boundaries set by Congress.

Judge Rogers' dissent in *EME Homer* maintained that the decision was "a trampling on this court's precedent on which the Environmental Protection Agency ("EPA") was entitled to rely in developing the Transport Rule rather than be blindsided by arguments raised for the first time in this court."[56]

In the EPA's March 29, 2013 petition for a writ of certiorari, the agency claimed the Court of Appeals erred procedurally by a "collateral invalidation of separate orders not before the court" in holding the EPA could not pass judgment on SIPs until the agency quantified the state's good neighbor obligation.[57] The agency also claimed the court's merit holdings were also incorrect because the court disregarded the EPA's ability to issue FIPs when the agency determines a state has failed to adopt or has incorrectly adopted SIPs with good neighbor provisions.[58] Further, the EPA also maintained the court erred in its interpretation of the ambiguous term "significant contribution."[59]

In their May 29, 2013 Brief in Opposition of Industry and Labor Respondents, respondents argued that the EPA's petition should be denied because the agency failed "to demonstrate any error in the decision below, let alone error warranting review."[60] Rather, respondents maintained, "petitioners argue that the court of appeals erred and that there will be adverse health consequences unless the Transport Rule is reinstated."[61] Further, in their May 29, 2013 Brief for the State and Local Respondents in Opposition, respondents presented a four-part argument against review. The respondents claimed there is no circuit split, the Circuit Court's decision aligns with precedent, the statute, and the EPA's own admissions, the EPA can still implement the CAA, and there are alternative grounds on which to

---

[55] *Id.*

[56] *Id.* at 38.

[57] Petition for a Writ of Certiorari, American Lung Ass'n v. EME Homer City Generation, L.P., 133 S. Ct. 2857 (2013) (No. 12-1182), 2013 WL 1309078 at *11.

[58] *Id* at *12.

[59] *Id* at *11-12.

[60] Brief in Opposition of Industry and Labor Respondents, EPA v. EME Homer City Generation, L.P., 133 S. Ct. 2857 (2013) (Nos. 12-1182, 12-1183), 2013 WL 2366256 at *7.

[61] *Id.*

affirm.[62] Nonetheless, the U.S. Supreme Court granted the petition for writ of certiorari.

Fourth, on November 9, 2012, the D.C. Circuit again vacated and remanded an EPA decision in *Sierra Club*.[63] In *Sierra Club*, the court seized upon the EPA's procedural failure to use proper notice and comment under the guidelines of the Administrative Procedure Act in issuing a "Determination."[64] In finding the Determination constituted rulemaking and was thereby subject to notice and comment requirements, the court held, "this conclusion forces a remand under which the parties can develop a record that will render EPA's legal and technical decisions more transparent and thereby facilitate substantive review...."[65] Therefore, in requiring notice and comment rulemaking, the court required the EPA to restart the process and provide, on the record, information about the "Determination" in order to achieve transparency and allow for potential challenges to the finding.[66]

These four recent decisions all limit the power of the EPA to regulate under the Clean Air Act. Although each decision was based on sections of the Clean Air Act, all of the circuits restricted the authority of the EPA. When viewed together, these decisions signal a trend away from the historic *Chevron* deference granted to the EPA toward an era of more limitations on the EPA's ability to regulate air pollutants.

IV. ANALYSIS OF THE SHIFT IN JUDICIAL INTERPRETATION OF THE CLEAN AIR ACT

Since its inception in 1970, the EPA has benefited from a broad grant of authority by the federal courts. In their 1991 article, "EPA and the Courts: Twenty Years of Law and Politics," Robert Glicksman and Christopher H. Schroeder analyzed the relationship between the EPA and the federal courts from 1970 to 1990.[67] Glicksman and Schroder suggest;

> [t]he stance of the federal courts toward the Environmental Protection Agency has changed substantially during this period. An early mix of enthusiasm for the project of environmental protection, respect for the public policy decisions of the Congress, and a rhetoric of close scrutiny

---

[62] Brief for the State and Local Respondents in Opposition, EPA v. EME Homer City Generation, L.P., 133 S. Ct. 2857 (2013) (Nos. 12-1182, 12-1183), 2013 WL 2366255 at *11, *19, *33, *36.

[63] Sierra Club v. EPA., 699 F.3d 530 (D.C. Cir. 2012).

[64] *Id.* at 531.

[65] *Id.* at 534.

[66] *Id.* at 537.

[67] Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics,* 54 LAW & CONTEMP. PROBS. 249 (1991).

> of EPA's decisionmaking processes has given way to neutrality toward environmental values, skepticism about whether environmental legislation expresses coherent public policy, and a rhetoric of deference toward EPA's decisions.[68]

Glicksman and Schroder postulate that over time the federal courts developed a neutral view of environmental policy and thus readily deferred to expert EPA decisions and interpretations in a "move away from aggressive judicial review."[69] This grant of deference during the early years of the EPA allowed the agency to accomplish significant environmental goals, including the passage of legislation like the Clean Air Act amendments in the year of the EPA's inception.[70] Regarding this period, Glicksman and Schroder's article states, "[t]he *Chevron* test for reviewing an agency's statutory interpretations is the centerpiece of this recent shift in judicial emphasis. But the courts have displayed a similar reluctance to second guess the agency's procedural choices, factual determinations, and, to a somewhat lesser extent, statutory implementation."[71] The neutral attitudes of the federal courts coupled later with *Chevron* in 1984, initially allowed the EPA to enjoy broad judicial deference to enact significant environmental policies under the Clean Air Act.

In 2011, the United States Supreme Court affirmed the value of *Chevron* deference in *American Elec. Power Co., Inc. v. Connecticut* ("American").[72] The Court acknowledged, "[i]t is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator...."[73] The Court further stated that "the expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order."[74] The Court also recognized that it was not the judiciary's role to enact environmental policy but rather to provide review of such policies when needed. This decision reinforced the *Chevron* decision and also provided the EPA with additional affirmation of their regulatory authority.

However, the recent spate of Courts of Appeal cases rejecting the EPA's decisions and interpretations brings into question the continued

---

[68] *Id.* at 249.

[69] *Id.* at 251.

[70] Jack Lewis, *The Birth of EPA,* EPA J., Nov. 1985, at 6, 11, *available at* http://www.epa.gov/nscep/index.html.

[71] GLICKSMAN & SCHROEDER, *supra* note 67, at 295.

[72] American Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011).

[73] *Id.* at 2539.

[74] *Id.* at 2539-40.

validity of *Chevron*, deference. This shift in interpretation by the federal courts may be based, in part, on language from the March 2012 United States Supreme Court decision in *Sackett v. EPA* ("Sackett").[75] Although the *Sackett* decision considered a Clean Water Act issue rather than a Clean Air Act issue, the Court's reasoning may nonetheless be the origin of this trend.[76] In *Sackett*, the Court held the plaintiffs were entitled to APA review of a final EPA action, despite arguments from the EPA that the Clean Water Act precluded APA review.[77] The *Sackett* decision signals a minor shift away from granting *Chevron* deference to decisions of administrative agencies. The *Sackett* Court appeared wary of providing agencies, namely the EPA, with broad power and discretion. The Court held;

> [t]he Government warns that the EPA is less likely to use the orders if they are subject to judicial review. That may be true—but it will be true for all agency actions subjected to judicial review. The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into "voluntary compliance" without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction.[78]

Although the *Sackett* decision merely holds that plaintiffs are entitled to APA review, more broadly, the Supreme Court places a restriction on the EPA's power. This decision may provide a rationale for why courts have recently shifted their view of the scope of authority provided to the EPA by Congress.

This recent trend hampers the scope of the power of the EPA to regulate under the Clean Air Act. Two of the four cases reject the EPA's interpretation of a term within the Clean Air Act. In *Summit*, the court recognized and applied the *Chevron* deference standard but found the EPA's interpretation of the term "adjacent" within the Clean Air Act to be unreasonable.[79] In *Texas*, the court rejected the EPA's interpretation, in part, by applying the APA's "arbitrary or capricious" standard of review.[80] These decisions restrict the ability of the EPA to interpret the terms of the Clean Air Act that they are entrusted to implement. Under *Chevron*, the

---

[75] Sackett v. EPA, 132 S. Ct. 1367 (2012).
[76] *Id.* at 1369.
[77] *Id.* at 1372.
[78] *Id.* at 1374.
[79] Summit Petroleum Corp. v. EPA, 690 F.3d 733, 740-41 (6th Cir. 2012).
[80] Texas v. EPA, 690 F.3d 670, 679-80 (5th Cir. 2012).

EPA's interpretation need only be reasonable and, under the APA, the EPA's interpretation is invalidated only if arbitrary or capricious. These deferential standards have historically provided the EPA the ability to freely interpret terms. The decisions in *Summit* and *Texas*, however, eliminate the previous broad judicial view of *Chevron* and the APA standards. Instead of following the historic trend of holding EPA Clean Air Act interpretations to be reasonable, that is, not arbitrary or capricious, federal courts may now be more apt to restrict the EPA's interpretation because of the precedents established in *Summit* and *Texas*.

In addition to rejecting the EPA's interpretations of terms within the Clean Air Act, the United States Courts of Appeal have also restricted the EPA in an attempt to protect the rights and powers of the states. The D.C. Circuit held in *EME Homer* that the EPA exceeded its authority because the agency had violated the required notion of "cooperative federalism".[81] In explicitly affirming the role of the states in the interpretation and execution of the Clean Air Act, the court signaled to the EPA that the Clean Air Act regulatory power is to be divided equally between the EPA and the states. The court maintained that the EPA does not have sole unrestricted power to devise and implement regulations under the Clean Air Act. *EME Homer* reinforces the requirement that the EPA must defer, when required, to the states or face judicial rejection; "[t]he court narrowly interpreted the CAA and accorded the EPA little to no deference in analyzing its interpretation...the decision therefore represents a significant step by the D.C. Circuit to limit the EPA's authority under the good neighbor provision and the CAA as a whole."[82] If air pollution regulation under the Clean Air Act is to occur, the court notified the EPA that the agency must regulate in tandem with the states.

Lastly, the EPA must also follow the procedural requirements of the APA. In the *Sierra Club* decision, the court held that the EPA failed procedurally because the agency did not provide the required notice and comment for its legislative rulemaking.[83] Although the EPA did not intend to issue a legislative rule, the *Sierra Club* court nonetheless held the "Determination" to be a rule under the APA, thereby requiring notice and comment.[84] Therefore, the EPA must know if its decisions are indeed rules regulated by the APA. Further, after the *Sierra Club* decision, the EPA must now ensure its decisions, if rules, meet the APA requirements of notice and comment. The court's emphasis on procedural precision is

---

[81] EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 11 (D.C. Cir. 2012).

[82] Julie Carter, *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, 134 (2012).

[83] Sierra Club v. EPA, 699 F.3d 530, 531 (D.C. Cir. 2012).

[84] *Id.* at 534.

another obstacle the EPA must overcome in its implementation of Clean Air Act regulations.

These four cases signify a shift in judicial interpretation of deference awarded to the EPA under the Clean Air Act. Based on these decisions, and until the U.S. Supreme Court rules on the issues, the EPA must adhere to restrictions regarding its interpretation of terms within the CAA, regulate in tandem with the states, and follow the procedural requirements in the APA. After these cases, "the scope of the EPA's regulatory authority over interstate air pollution" drifted into "a haze of uncertainty."[85] As emphasized in *American*, the EPA and other administrative agencies are established to operate as experts in a particular field and to implement regulations as are deemed necessary.[86] When the federal courts restrict the ability of these agencies to operate, their productivity diminishes as does their ability to carry out their mission. If this current trend continues, the EPA will face continued challenges to its authority under the Clean Air Act from individuals, states, and industry. If the EPA continues to lose these challenges, as this trend indicates, the agency's mission of protecting "human health and the environment" will become unachievable.[87]

V. EPA'S OPTIONS IN RESPONDING TO THE TREND

The EPA has three ways in which to respond to this recent trend: file a petition for certiorari, file a petition for rehearing, or abide by the court's ruling and accept the restrictions. The EPA has asked the United States Court of Appeals in D.C. for a rehearing en banc of the *EME Homer* decision. In its petition for rehearing, the EPA maintained "the panel's decision upends the appropriate relationship of the judicial, legislative, and executive branches of government by rewriting clear legislation, ignoring explicit statutory jurisdictional limits, and stepping into the realm of matters reserved by Congress and the courts to the technical expertise of administrative agencies."[88] The EPA's petition was denied on January 24, 2013.[89] In addition to its petition, the EPA also reacted "by issuing standards on a state-by-state basis to reduce emissions, though it gave

---

[85] CARTER, *supra* note 82, at 134.

[86] American Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2531 (2011).

[87] *Our Mission and What We Do,* U.S. ENVIRONMENTAL PROTECTION AGENCY, http://www2.epa.gov/aboutepa/our-mission-and-what-we-do (last updated Jun. 3, 2013).

[88] Petition for Rehearing En Banc, EME Homer City Generation, L.P. v. EPA, No. 11-1302 (D.C. Cir. Oct. 5, 2012), 2012 WL 4748805 at *12.

[89] Order, EME Homer City Generation, L.P. v. EPA, No. 11-1302, (D.C. Cir. Jan. 24, 2013), 2013 WL 656247.

polluter states a timetable from 2012 to 2015 to submit their own plans to cut pollution."[90]

Most significantly, the EPA's petition for writ of certiorari in the *EME Homer* case indicates the agency's strong commitment to ending the recent trend. In its petition, the agency argued, "[i]f not corrected, the decision below will have serious adverse consequences."[91] For example, the agency argued the decision could disable the state's ability to comply with NAAQS.[92] The EPA also claimed the decision creates uncertainty about the EPA's implementation of other CAA requirements.[93] And, the agency claimed, "[m]ost fundamentally, the court of appeals' errors will seriously impede the EPA's ability to deal with a grave public health problem."[94]

In response to the *Texas* decision, the EPA approved Texas's SIP plan.[95] The EPA's approval "not only enhances the clarity and enforceability of state issued permits but also provides industry with flexibility to meet CAA requirements."[96] As a result of the Fifth Circuit decision, the EPA opted to approve Texas's SIP plan rather than continue to challenge the contents of the revisions. It remains unanswered whether Texas's revisions will indeed, as the EPA contends, harm the air quality of the state. The EPA's ability to limit air pollution within the confines of the "cooperative federalism" model will continue to diminish if the federal courts follow the *Texas* precedent. Once a court rules against the EPA, the EPA's options for responding are drastically limited and air quality may suffer as a result.

To end this recent trend and continue the effort to reduce air pollutants, the EPA must enact policies that are legally sound and which honor the mission and requirements of the Clean Air Act. In 2007, the EPA was awarded a broad grant of power from the United States Supreme Court in *Massachusetts v. EPA* ("Massachusetts").[97] In *Massachusetts*, the Court held the EPA had the authority to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act.[98] But, as this trend demonstrates, the lower federal courts have interpreted the scope of the authority of the EPA differently. Therefore, the EPA must seize upon the *Massachusetts*

---

[90] Neela Banerjee, *Court strikes down EPA pollution rule*, LOS ANGELES TIMES, Aug. 22, 2012, http://articles.latimes.com/2012/aug/22/nation/la-na-court-epa-20120822.

[91] Petition for a Writ of Certiorari, American Lung Ass'n v. EME Homer City Generation, L.P., 133 S. Ct. 2857 (2013) (No. 12-1182), 2013 WL 1309078 at *12.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *EPA Approves Texas' Air Permitting Program*, POWER ENGINEERING (Oct. 11, 2012), http://www.power-eng.com/articles/2012/10/epa-approves-texas-air-permitting-program.html.

[96] *Id.*

[97] Massachusetts v. EPA, 549 U.S. 497 (2007).

[98] *Id.*at 528.

decision to defend current air pollution regulations and to continue to restrict emission levels.

VI. COUNTERARGUMENT TO THE CLEAN AIR ACT TREND THEORY AND DIFFERENTIATION

Despite this recent spate of federal cases limiting the authority of the EPA, there have been a similar number of cases that appear to support the EPA and protect the agency's authority. In three cases, *U.S. Magnesium, LLC v. EPA* ("U.S. Magnesium"),[99] *Luminant Generation Co. LLC v. EPA* ("Luminant"),[100] and *Desert Citizens Against Pollution v. EPA* ("Desert Citizens"),[101] the United States Courts of Appeal deferred to the stance of the EPA. This portion of this Note will demonstrate how these cases may be differentiated from the trend and do not negate the notion of this recent shift in judicial interpretation.

In the August 6, 2012 *U.S. Magnesium* decision, the Tenth Circuit held the EPA's interpretation of a term within the Clean Air Act was reasonable and thus entitled to *Chevron* deference.[102] The court also held that the agency's reliance on policy statements was not arbitrary and capricious.[103] Although this case is factually similar to *Texas*,[104] in *U.S. Magnesium* Utah's SIP infringed upon the federal power of the EPA.[105] As the federal courts have acknowledged, the Clean Air Act authorizes the EPA to regulate several types of air pollutants.[106] In *U.S. Magnesium*, the problem with Utah's SIP was that it attempted to regulate all pollutants.[107] As in the *Texas* decision, the *U.S. Magnesium* court also discusses the notion of "cooperative federalism" and attempts to protect the distinct roles of states and the federal government.[108] Thus, although the Tenth Circuit denied the petition of U.S. Magnesium to challenge the EPA's decision, the court does not grant the EPA significant deference or power. Rather, the court merely reaffirms the *Texas* decision and attempts to protect the requisite federalism for implementation of the Clean Air Act.

On October 12, 2012, the Fifth Circuit in *Luminant*, deferred to the EPA's partial approval and partial disapproval of the 2006 revision of Texas's SIP.[109] This case directly followed *Texas* in which the Fifth Circuit

---

[99] U.S. Magnesium, LLC v. EPA, 690 F.3d 1157 (10th Cir. 2012).
[100] Luminant Generation Co. v. EPA, 699 F.3d 427 (5th Cir. 2012).
[101] Desert Citizens Against Pollution v. EPA, 699 F.3d 524 (D.C. Cir. 2012).
[102] U.S. Magnesium, 690 F.3d at 1172.
[103] *Id.* at 1159.
[104] Texas v. EPA, 690 F.3d 670 (5th Cir. 2012).
[105] U.S. Magnesium, 690 F.3d at 1159.
[106] *Id.* at 1160.
[107] *Id.*
[108] *Id.* at 1159.
[109] Luminant Generation Co. v. EPA, 699 F.3d 427, 432 (5th Cir. 2012).

ruled against the EPA's disapproval of Texas's SIP. Clearly impacted by the *Texas* decision, the Fifth Circuit in *Luminant* thoroughly discussed the merits of the case and the rationale for its decision. Although the Fifth Circuit ultimately granted deference to the EPA's decision, the EPA's partial approval and partial disapproval was impacted by the trend established in *Texas* prescribing more aggressive judicial review.

Most recently on November 9, 2012, the D.C. Circuit in *Desert Citizens*, deferred to the EPA's decision not to enact stricter regulation of gold mine ore processing and production.[110] The *Desert Citizens* court, in engaging in a *Chevron* analysis, held that the "petitioners' view would seriously risk undercutting the priority that Congress obviously assigned the...HAPs."[111] However, the deference granted to the EPA in *Desert Citizens* does not weaken the theory of a trend in judicial interpretation because the court reviews the "EPA's interpretation of its previous rules even more deferentially than we review its interpretation of statutory ambiguity."[112] Unlike *Summit,* the court was interpreting the EPA's own rules, not the Clean Air Act. Thus, the theory that judicial interpretation of the Clean Air Act by the federal courts has become more stringent remains strong.

VII. POTENTIAL IMPACT OF TREND ON INDIVIDUALS, STATES AND INDUSTRY

In moving away from broad grants of *Chevron* deference, these Courts of Appeal have indirectly impacted individuals, states, and industry. The EPA itself recognizes that compliance with the Clean Air Act requirements will affect individuals in the United States and the nation's larger economy.[113] In its summary report, the EPA stated that the "1990 Clean Air Act programs both shrank the economy relative to what it would have been without these programs, and caused the average household to incur a small decrease in economic well-being."[114] Thus, implementation of Clean Air Act regulations adversely impacts both individuals and the economy at-large.

However, historically the financial benefits of the EPA's regulations have outweighed the financial costs.[115] The White House Office

---

[110] Desert Citizens Against Pollution v. EPA, 699 F.3d 524, 525 (D.C. Cir. 2012).

[111] *Id.* at 528.

[112] *Id.* at 529.

[113] U.S. ENVTL. PROT. AGENCY, OFFICE OF AIR AND RADIATION, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020: SUMMARY REPORT 2 (Mar. 2011), *available at* http://www.epa.gov/air/sect812/feb11/summaryreport.pdf.

[114] *Id.* at 24.

[115] James Bradbury & Stephanie Hanson, *Myths and Facts about U.S. EPA Standards,* WORLD RESOURCES INST. (Apr. 19, 2011), http://www.wri.org/stories/2011/04/myths-and-facts-about-us-epa-standards.

of Management and Budget studied federal clean air and water regulations from October 1, 1999 to September 30, 2009.[116] Its report concluded "the estimated aggregate annual costs of these regulations range from $26 to $29 billion, while benefits range from $82 to $553 billion."[117] Although time is required to accurately assess the impact of the current federal air regulations, the financial benefits of the EPA's regulations should outweigh their costs based on historical information.

In addition to the financial benefits provided by the Clean Air Act, the EPA also highlighted the general benefits provided by a nation with less air pollution. The EPA maintains, "effective air pollution control programs do not simply impose costs on the economy. They also improve air quality, which in turn affects the health and productivity of workers, reduces household medical expenditures...and protects the quality of the environment on which economic activity and growth depend."[118] In addition to the possibility of financial benefits, there is also the prospect that society will enjoy an improved environment, decreased health problems, and safer working conditions.

However, if the trend away from a broad judicial grant of EPA power continues, these impacts may be lessened as the EPA's authority to craft and implement regulations diminishes. This trend would decrease the cost of these clean air initiatives while also decreasing the potential benefits for both the economy and society. In its petition for writ of certiorari, the EPA argued, "[b]y vacating the Transport Rule, while impeding any EPA effort to replace it, the court of appeals' decision will directly and negatively affect the public health."[119] Specifically, the agency cited an EPA study, which found the Transport Rule would annually reduce 13,000 to 34,000 ozone and fine particulate matter related premature deaths.[120] In addition, the agency argued the Transport Rule would prevent "15,000 non-fatal heart attacks, 8,700 incidences of chronic bronchitis, 8,500 hospital admissions, and 400,000 cases of aggravated asthma."[121]

In addition to impacting individuals, the shift in judicial interpretation of the EPA's scope of power under the Clean Air Act will also impact the states. For example, Arizona's Department of Environmental Quality intends to sue the EPA for failing to timely approve the state's SIP.[122] The federal court's move away from deferring to EPA

---

[116] *Id.*

[117] *Id.*

[118] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF AIR AND RADIATION, *supra* note 113, at 24.

[119] Petition for a Writ of Certiorari, American Lung Ass'n v. EME Homer City Generation, L.P., 133 S. Ct. 2857 (2013) (No. 12-1182), 2013 WL 1309078 at *31.

[120] *Id.*

[121] *Id.*

[122] Shar Porier, *State Environment Agency Will Sue Feds*, THE SIERRA VISTA HERALD, Oct. 12, 2012,

Clean Air Act decisions may provide an opportunity for states to fight, and likely win, challenges to EPA action that are contrary to the notion of state power and "cooperative federalism". States will then spend less time and money in efforts to comply with Clean Air Act regulations. Furthermore, if this trend continues, the EPA's power will continue to be eroded and states will realize broader environmental control of their area. However, increased state control may not be positive because "[s]tates with stronger environmental policies tended to have marginally lower business failure rates."[123] Although states will have more control, only those states with strong environmental regulations will realize a benefit to state business.

The Clean Air Act's most controversial area of impact is on industry; "[c]ertain industries have strongly resisted climate regulation."[124] For example, on April 17, 2012, the EPA issued regulations under the Clean Air Act "to reduce harmful air pollution from the oil and natural gas industry while allowing continued, responsible growth in U.S. oil and natural gas production."[125] The United States House of Representatives, under pressure from industry leaders, attempted to counteract these new regulations by passing the "Stop the War On Coal Act" which sought "to weaken and in some cases overturn laws and rules...for clean air, clean water, a stable climate and fair effective regulation of the big polluters, including but not exclusively the fossil fuel industry."[126] The bill, although unlikely to become law, is representative of the disparate political views regarding environmental policy.[127] If the trend in judicial interpretation continues, the impact on industry will be reduced as it is affected by fewer regulations. However, the political battle regarding the role of the EPA in regulating industry will likely continue.

Despite the fear of environmental regulation felt by the oil and gas industry, "the economic costs of environmental regulation turn out to be far from towering...when compared to other business cost factors such as taxes, wages, benefits, and interest rates."[128] Although industry may be impacted by the EPA's ability or lack thereof to institute regulations, any potential impact is minor in comparison to other business expenses. However, "business still does not perceive environment-related costs as ordinary and proper business costs...Environmental costs are seen as a form

---

http://www.svherald.com/content/news/2012/10/12/334082?iframe=true&width=90%&height=90%.

[123] MEYER, *supra* note 19, at 7.

[124] Alice Kaswan, *Climate Change, the Clean Air Act, and Industrial Pollution,* 30 UCLA J. ENVTL. L. & POL'Y 51, 73-74 (2012).

[125] *Regulatory Actions,* U.S. ENVIRONMENTAL PROTECTION AGENCY, http://www.epa.gov/airquality/oilandgas/actions.html (last updated Aug. 5, 2012).

[126] Robert B. Semple, Jr., *'Stop the War on Coal' Act,* TAKING NOTE: THE EDITORIAL PAGE EDITOR'S BLOG (Sept. 20, 2012, 4:52 PM), http://takingnote.blogs.nytimes.com/2012/09/20/stop-the-war-on-coal-act/.

[127] *See id.*

[128] MEYER, *supra* note 19, at 10.

of externally imposed social tax, an illegitimate tax place on business."[129] Therefore, although a slew or a spate of environmental regulations have the potential to only modestly affect industry, any such impact has the potential to be touted as extreme and unfair.

VIII. CONCLUSION

The recent setbacks realized by the EPA in its implementation of the Clean Air Act in *Summit Petroleum Corp. v. EPA, Texas v. EPA, EME Homer City Generation, L.P. v. EPA*, and *Sierra Club v. EPA* demonstrate a shift in judicial interpretation. These recent decisions signal a trend in judicial interpretation of the EPA's power away from broad grants of *Chevron* deference toward an increase in restriction of the EPA's authority. If this trend continues, the EPA's power will continue to dissolve and the agency's ability to enact policies promoting its mission will become impossible.

To counteract this shift and maintain the appropriate level of authority, the EPA must ensure a comprehensive approach is used to implement the Clean Air Act.[130] Such an approach requires the EPA to consider all areas of impact in order to accurately assess both the problem and the proposed solution; "[a] comprehensive approach is appropriate because environmental policies do not operate in a vacuum; they have major social welfare effects. They are designed to control industries, businesses, and individuals and, as such, inevitably have a wide array of economic and environmental impacts."[131] If the EPA operates within its bounds, works in tandem with the states, and enacts policies intended by Congress in the Clean Air Act, a comprehensive approach will be achieved and the judiciary will not likely diminish the scope of EPA power. If however, the EPA continues attempts to infringe on the power of the states under the Clean Air Act, enacts policies not approved by the Act, or incorrectly interprets terms within the Act, the EPA will ultimately lose regulatory authority.

This trend may harm the EPA's ability to properly regulate air pollution. The EPA must reassess its regulatory approach to ensure it complies with the requirements established by the federal judiciary. If the EPA does this in a comprehensive manner, the agency will continue to have the opportunity "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[132]

---

[129] *Id.* at 11.
[130] KASWAN, *supra* note 124, at 57.
[131] *Id.*
[132] 42 U.S.C. § 7401(b)(1) (2013).