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## Control thy Neighbor: The Third Circuit Upholds Direct Federal Control of Interstate Air Polluters in *Genon Rema LLC v. EPA*

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2014]

CONTROL THY NEIGHBOR: THE THIRD CIRCUIT UPHOLDS  
DIRECT FEDERAL CONTROL OF INTERSTATE AIR  
POLLUTERS IN *GENON REMA LLC V. EPA*

“On some days even if we shut down the entire state, we would be in violation of some health standards because of pollution coming over from other states.”<sup>1</sup>

I. INTRODUCTION

The above statement, uttered by late New Jersey Senator, Frank Lautenberg, describes an ongoing pollution control problem: interstate air pollution.<sup>2</sup> Lautenberg lamented the inequitable transport of air pollution into New Jersey from neighboring states.<sup>3</sup> Air pollution hinders not only states’ ability to meet standards promulgated by the Environmental Protection Agency (EPA), but also contributes to two hundred thousand premature deaths in the United States annually.<sup>4</sup> Interstate air pollution occurs when emissions in one state travel with the wind and adversely affect air quality and public health in another state.<sup>5</sup>

Due to cross-continental wind patterns, interstate air pollution significantly affects Northeastern and Mid-Atlantic states.<sup>6</sup> The

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1. *Smother My Neighbour*, *ECONOMIST* (Sept. 4, 2013, 5:24 PM), <http://www.economist.com/blogs/democracynamerica/2013/09/interstate-pollution> (quoting late Senator Frank Lautenberg) (noting problem of upwind states transmitting air pollution to downwind states).

2. *Id.* (discussing interstate pollution). For background material and an overview of the jurisprudence pertaining to interstate air pollution in the United States, see *infra* notes 43-157 and accompanying text.

3. See *id.* For a discussion of New Jersey’s most recent attempt to regulate interstate air pollution, see *infra* notes 24-42 and accompanying text.

4. Susan C. Anenberg *et al.*, *An Estimate of the Global Burden of Anthropogenic Ozone and Fine Particulate Matter on Premature Human Mortality Using Atmospheric Modeling*, 118 *ENVTL. HEALTH PERSP.* 1189, 1194-95 (Sept. 2010), available at <http://ehp.niehs.nih.gov/wp-content/uploads/118/9/ehp.0901220.pdf> (stating number of annual deaths attributable to air pollution in United States).

5. See *A Plain English Guide to the Clean Air Act, Interstate and International Air Pollution*, *ENVTL. PROT. AGENCY*, [http://www.epa.gov/airquality/peg\\_caa/interstate.html](http://www.epa.gov/airquality/peg_caa/interstate.html) (last updated Mar. 6, 2012) (noting air pollution travels great distances with wind). Taller smoke stacks have the ability to release pollutants into wind currents that carry pollutants thousands of miles. *Id.*

6. See generally *Clean Air Interstate Rule, Where You Live*, *ENVTL. PROT. AGENCY*, <http://www.epa.gov/cair/where.html> (last updated July 31, 2012) (providing mapping tool to show states’ emission contribution to nonattainment). The EPA mapping tool provides users with information for NAAQS attainment in each state. *Id.* For example, New Jersey receives ground-level Ozone from Delaware, Maryland,

states most involved in efforts to combat interstate air pollution are members of the Ozone Transport Commission (OTC), an organization of twelve Northeastern and Mid-Atlantic states who attempt to improve air quality in the region.<sup>7</sup> For years, OTC “downwind states,” states that receive pollution from out-of-state, attempted to compel the EPA to regulate “upwind states,” states that transport air pollution.<sup>8</sup>

The EPA attempted to mitigate interstate air pollution with its most recent transport rule, the Cross-State Air Pollution Rule (CSAPR).<sup>9</sup> However, the D.C. Circuit struck down CSAPR in 2012, and CSAPR’s fate awaits the Supreme Court’s decision.<sup>10</sup> Without a multi-state air transport regulation such as CSAPR, OTC states must wage difficult case-by-case fights against upwind states that interfere with their ability to meet National Ambient Air Quality Standards (NAAQS).<sup>11</sup> A recent case, however, offers downwind states an al-

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the District of Columbia, Massachusetts, Michigan, New York, Ohio, Pennsylvania, Virginia, and West Virginia. *See id.*

7. *What is the Ozone Transport Commission*, OZONE TRANSPORT COMM’N, <http://www.otcair.org/about.asp> (last visited Oct. 20, 2013) (listing member states and goals of OTC). The OTC members include: Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Virginia. *Id.* The goal of the OTC is to “bring[ ] together the states from Virginia to Maine to coordinate reductions in air pollution that benefit the whole region.” *Id.*

8. *See, e.g., AGs to Sue Bush Administration for Cutting Clean Air Act: EPA Plans to Exempt Half of Air Pollution Sources from Key Clean Air Rules*, U.S. SENATE COMM. ON ENV’T. & PUB. WORKS (Nov. 22, 2002), [http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=bc838bf9-2db1-4ab1-b043-ae3adf558cd](http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=bc838bf9-2db1-4ab1-b043-ae3adf558cd) (announcing Attorney Generals’ plan to sue over new pollution rules). The AGs from New York, Connecticut, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont jointly planned to file suit against the EPA for changing its New Source Review standard, which the AGs believed would disproportionately impact the Northeast. *Id.* Connecticut AG Richard Blumenthal stated, “Today’s message from the Bush Administration seems to be: Northeast Drop Dead. The Administration is literally sacrificing the lives of people in the Northeast to appease the energy industry.” *Id.* For a discussion of prior attempts by OTC states to regulate interstate air pollution, see *infra* notes 61-76 accompanying text.

9. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208, 48,208 (Aug. 8, 2011) (to be codified at 40 C.F.R. Pt. 51, 52, 72) [hereinafter CSAPR] (prescribing rules governing NO<sub>x</sub> and SO<sub>2</sub> in twenty-seven states). For a discussion of regulations addressing interstate air pollution and resulting court cases, see *infra* notes 61-76 and accompanying text.

10. *See United States v. EME Homer City Generation, L.P.*, 696 F.3d 7, 7 (3d Cir. 2012), *cert. granted*, 2013 U.S. LEXIS 4801 (Mar. 29, 2013) (vacating CSAPR). As this Note was going to press, the Supreme Court upheld CSAPR in *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1610 (2014).

11. For a discussion of NAAQS and how they are implemented, see *infra* notes 43-60 and accompanying text.

ternative avenue to address air pollution transport while they wait for the Supreme Court to weigh in on CSAPR.<sup>12</sup>

In *GenOn REMA L.L.C. v. EPA*,<sup>13</sup> the United States Court of Appeals for the Third Circuit upheld the EPA's direct control of sulfur dioxide (SO<sub>2</sub>) emissions from a coal-fired power plant based on a Clean Air Act (CAA) Section 126(b) petition by a downwind state.<sup>14</sup> SO<sub>2</sub>, a precursor to acid rain, negatively affects human health, agriculture, wildlife, and water bodies through a process known as acid deposition.<sup>15</sup> Furthermore, SO<sub>2</sub> is one of the six criteria air pollutants for which NAAQS exist, although those NAAQS are difficult for OTC states to attain.<sup>16</sup> *GenOn REMA* marks the second-ever use of a Section 126(b) petition to control interstate air pollution and is a decision of magnified importance given the uncertainty surrounding CSAPR.<sup>17</sup>

This Note examines the Third Circuit's analysis in *GenOn REMA* concerning the CAA and predicts the decision's impact on downwind states' ability to hold upwind states accountable for inter-

12. For a background, analysis, and discussion of states' alternative avenues to regulate air pollution, see *infra* notes 77-95 and accompanying text.

13. 722 F.3d 513 (3d Cir. 2013).

14. *Id.* at 515 (denying petitioner's request for review). Section 126(b) states, "Any State or political subdivision may petition the Administrator for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of section 7410(a)(2)(D)(ii) of this title or this section." 42 U.S.C. § 7426.

15. See *GenOn REMA*, 722 F.3d at 517 (citing *Am. Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998)) (describing effects of acid rain). SO<sub>2</sub> has negative health effects, especially in individuals with respiratory illnesses such as asthma. *Id.* See also PHILIP WEINBERG & KEVIN A. REILLY, UNDERSTANDING ENVIRONMENTAL LAW 84-86 (2d ed. 2008) (explaining history and effects of acid rain). The first evidence of acid rain was discovered in the 1970s, when scientists observed fish kills in lakes and streams in the Northeastern United States not attributable to water pollution. *Id.* Scientists eventually determined the cause was sulfates entering the water through rain and snow with high levels of NO<sub>x</sub> and SO<sub>2</sub>. *Id.* Acid rain has far-reaching effects beyond fish kill; it damages forests and stonework and acidifies soil. *Id.* The chief cause is SO<sub>2</sub> and NO<sub>x</sub> emissions from power plants and other stationary sources burning coal with high sulfur content. *Id.*

16. For a discussion of NAAQS, criteria pollutants, and states' problems with meeting standards, see *infra* notes 43-76 and accompanying text.

17. See *GenOn REMA*, 722 F.3d at 513 (upholding second ever Section 126(b) petition). The first ever EPA grant of Section 126(b) petition was in *Appalachian Power Co. v. EPA*, 249 F.3d 1032 (D.C. Cir. 2001). For a discussion of *Appalachian*, see *infra* notes 90-95 and accompanying text.

state air pollution.<sup>18</sup> Part II summarizes the facts in *GenOn REMA*.<sup>19</sup> Next, Part III provides background of the CAA and relevant court decisions that led to *GenOn REMA*'s result.<sup>20</sup> Part IV reviews the Third Circuit's legal analysis in *GenOn REMA*.<sup>21</sup> Part V then considers the court's decision in light of prior jurisprudence and the language of the CAA.<sup>22</sup> Finally, Part VI predicts *GenOn REMA*'s impact on interstate air transport, NAAQS regulation, and State Implementation Plans (SIPs).<sup>23</sup>

## II. NEW JERSEY DEMANDS PENNSYLVANIA FENCE IN ITS AIR POLLUTION: THE FACTS OF *GENON REMA*

In *GenOn REMA*, the United States Court of Appeals for the Third Circuit determined whether the EPA acted within its authority under the CAA when it promulgated a rule placing direct emission limits on the Portland Generating Station (Portland) in response to a CAA Section 126(b) petition filed by the State of New Jersey.<sup>24</sup> The energy company GenOn operates Portland in Upper Mount Bethel Township, Pennsylvania.<sup>25</sup> Portland sits on the banks of the Delaware River, only five hundred feet from Pennsylvania's border with New Jersey.<sup>26</sup> Due to Portland's close proximity to New Jersey, significant portions of its SO<sub>2</sub> emissions travel across the Delaware River into New Jersey.<sup>27</sup> The State of New Jersey, therefore,

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18. For a narrative analysis of *GenOn REMA*, see *infra* notes 123-157 and accompanying text. For a critical analysis of the *GenOn REMA* holding, see *infra* notes 158-190 and accompanying text. For a discussion of the potential impact *GenOn REMA* may have on the future of interstate air transport regulation, see *infra* notes 191-215 and accompanying text.

19. For a summary of the facts and issues presented in *GenOn REMA*, see *infra* notes 24-42 and accompanying text.

20. For background material pertaining to the CAA, see *infra* notes 43-60 and accompanying text. For an overview of interstate transport regulations in the United States, see *infra* notes 61-122.

21. For a discussion of the Third Circuit's rationale, see *infra* notes 123-157 and accompanying text.

22. For a critical analysis of Third Circuit's holding, see *infra* notes 158-190 and accompanying text.

23. For a discussion of the future impacts of *GenOn REMA*, see *infra* notes 191-215 and accompanying text.

24. *GenOn REMA, LLC v. EPA*, 722 F.3d 513, 513 (3d Cir. 2013) (addressing EPA's promulgation of rule at request of State of New Jersey).

25. *Id.* at 515 (providing information concerning GenOn REMA's operation).

26. *Id.* at 515-16 (describing factual background that led New Jersey to petition EPA).

27. *Id.* at 518 (stating emissions from Portland traveled directly into New Jersey).

posited Portland directly interfered with its attainment of the new one-hour SO<sub>2</sub> NAAQS required by the CAA.<sup>28</sup>

On September 17, 2010, the New Jersey Department of Environmental Protection (NJ DEP) filed a petition under Section 126(b) of the CAA.<sup>29</sup> The NJ DEP filed the petition because “despite the air quality problems [Portland] has caused [New Jersey] for years, New Jersey ha[d] no regulatory authority to require Portland to install air pollution controls.”<sup>30</sup> The petition requested the EPA to promulgate a rule restricting Portland’s SO<sub>2</sub> emissions because it “significantly contribute[d] to nonattainment or interfere[d] with maintenance of the 1-hour SO<sub>2</sub> [NAAQS] in New Jersey.”<sup>31</sup>

Based on the NJ DEP’s petition, the EPA determined that SO<sub>2</sub> from Portland “*alone*, caused downwind violations of the 1-hour SO<sub>2</sub> NAAQS in New Jersey.”<sup>32</sup> The EPA, thereafter, issued a Proposed

28. *Id.* (stating basis for filing petition).

29. *GenOn REMA*, 722 F.3d. at 517-18 (providing date NJ DEP filed petition). See Clean Air Act, 42 U.S.C. § 7426(b) (2012) (stating statutory language). Section 126 provides:

Petition for finding that major sources emit or would emit prohibited air pollutants Any State or political subdivision may petition the Administrator for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of section 7410(a)(2)(D)(ii) of this title or this section. Within 60 days after receipt of any petition under this subsection and after public hearing, the Administrator shall make such a finding or deny the petition.

42 U.S.C. § 7426(b) (2012). In *Appalachian*, the cross-reference to “section 7410(a)(2)(D)(ii),” cited above, was determined to be a scrivener’s error; the correct cross-reference, therefore, is 42 U.S.C. § 7410(a)(2)(D)(i). See *GenOn REMA*, 722 F.3d. at 517 n.3 (identifying error). The parties in *GenOn REMA*, further, agreed with the correction. *Id.*

30. Final Brief of Intervenor-Respondent, *GenOn REMA, LLC v. EPA*, 722 F.3d 513 (3d Cir. 2013) (No. 12-1022), 2012 WL 4194550, at \*1 (discussing reasons for lodging petition).

31. See *GenOn REMA*, 722 F.3d at 518 (reciting arguments made in New Jersey’s petition to EPA). The EPA supported its position by submitting its own air quality and aerial dispersion modeling to show that emissions from Portland caused violations in four New Jersey counties. *Id.* See also Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed. Reg. 35,520, 35,521 (June 22, 2010) (codified at 40 C.F.R. pts. 50, 53, 58) [hereinafter 1-hour SO<sub>2</sub> NAAQS] (providing new standards and dates for SO<sub>2</sub> NAAQS). The new 1-hour NAAQS lowered the threshold concentration for SO<sub>2</sub> to seventy-five parts per billion based on the 3-year average of the annual 99th percentile of 1-hour daily maximum concentration. *Id.* at 35,523. The deadline for SIP submission was June 2013. *Id.* at 35,557. States must achieve attainment of the 1-hour SO<sub>2</sub> NAAQS level by August 2017. *Id.*

32. Final Response to Petition from New Jersey Regarding SO<sub>2</sub> Emissions from the Portland Generating Station, 76 Fed. Reg. 69,052, 69,057 (Nov. 7, 2011) [hereinafter Portland Rule] (emphasis added) (providing summary of modeling conducted by NJ DEP). The EPA stated further in the Portland Rule:

Rule on April 7, 2011, imposing direct federal limits on Portland's emissions in addition to a schedule of restrictions to reduce its contribution to air pollution within three years.<sup>33</sup> The Proposed Rule sought to "bring the plant into compliance as expeditiously as practicable with the CAA," while allowing the plant to continue operation.<sup>34</sup>

As per Administrative Procedure Act (APA) requirements, the EPA gave notice and received public comments from various individuals, government officials, environmental groups, the Commonwealth of Pennsylvania, the NJ DEP, GenOn, and the American Lung Association, among others.<sup>35</sup> Following the notice and comment period, the EPA issued its Final Rule (the Portland Rule) on November 7, 2011, granting the petition and unequivocally stating "Portland's [SO<sub>2</sub>] emissions significantly contribute[d] to nonattainment and interfere[d] with maintenance of the 1-hour SO<sub>2</sub> NAAQS in New Jersey."<sup>36</sup> The Portland Rule, moreover, required Portland to reduce emissions by eighty-one percent in three years, two years before Pennsylvania's deadline to attain the new one-hour SO<sub>2</sub> NAAQS.<sup>37</sup>

GenOn, Portland's owner, along with the Utility Air Regularity Group (UARG), petitioned the Court of Appeals for the Third Cir-

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Given the magnitude of the modeling violations, which were nearly seven times the 1-hour SO<sub>2</sub> NAAQS based on AERMOD modeling of maximum allowable emissions, and the fact that significant exceedances of the NAAQS were also shown based on modeling of estimated actual emissions, the EPA concluded that the NJDEP had clearly shown that SO<sub>2</sub> emissions from Portland cause violations of the 1-hour SO<sub>2</sub> NAAQS in New Jersey.

Portland Rule, *supra*, at 69,057.

33. Response to Petition from New Jersey Regarding SO<sub>2</sub> Emissions from the Portland Generating Station, 76 Fed. Reg. 19,662, 19,662 (Apr. 7, 2011) [hereinafter Proposed Rule] (supporting petition from New Jersey and proposing reductions of emissions from Portland).

34. *See id.* at 19,664 (stating purpose of granting proposed rule).

35. *See* Portland Rule, *supra* note 32, at 69,064-65 (addressing participants' comments). Many comments favored the Proposed Rule; the Pennsylvania Department of Environmental Protection submitted a comment acknowledging that residents of Pennsylvania would realize public health and environmental benefits from a reduction in SO<sub>2</sub> emissions but suggested some alterations to the proposed compliance schedule. *Id.* Despite having commented, the state of Pennsylvania did not participate in GenOn's petition of EPA rulemaking. *Id.*

36. *Id.* at 69,052-53 (stating findings based on EPA's own modeling). The Portland Rule states it could have forced the plant to cease operation in three months, but instead it granted an extension. *Id.*

37. *Id.* at 69,053 (discussing emission limitations placed on Portland facility). Compare 1-hour SO<sub>2</sub> NAAQS, *supra* note 31, at 35,557 (requiring NAAQS attainment by 2017), with Portland Rule, *supra* note 32, at 69,052-53 (requiring emission limitations by 2015).

cuit to review the Portland Rule and challenged the EPA's authority to impose direct regulations before Pennsylvania completed its Section 110 SIP process for the new one-hour SO<sub>2</sub> NAAQS.<sup>38</sup> GenOn alleged the EPA must still adhere to the CAA's Section 110 when granting a Section 126(b) petition.<sup>39</sup> Conversely, the EPA contended it could make a finding on Section 126(b) independently of the Section 110 SIP process.<sup>40</sup> The Third Circuit adopted the EPA's viewpoint and, by applying the framework set forth in *Chevron USA v. Natural Resources Defense Council*,<sup>41</sup> held the EPA could directly regulate emissions from Portland before Pennsylvania completed its Section 110 SIP for the new one-hour SO<sub>2</sub> NAAQS.<sup>42</sup>

### III. BACKGROUND

#### A. The Clean Air Act and Cooperative Federalism

Recognizing air quality as essential to human health, President Richard Nixon and Congress concurrently created the EPA and enacted major CAA Amendments in 1970.<sup>43</sup> The CAA obligates the EPA to promulgate NAAQS for criteria pollutants.<sup>44</sup> Criteria pollutants are pollutants the EPA determines will "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>45</sup> The EPA, therefore, sets NAAQS at levels "requisite to protect the public health."<sup>46</sup> The CAA requires NAAQS implementation through "cooperative federalism," which

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38. See *GenOn REMA, LLC v. EPA*, 722 F.3d 513, 519 (3d Cir. 2013) (stating basis for GenOn's petition).

39. For a discussion of GenOn and the UARG's arguments, see *infra* notes 123-157 and accompanying text.

40. *GenOn REMA*, 722 F.3d at 519 (asserting EPA can find 126(b) petitions independently of Section 110).

41. 467 U.S. 837, 842-43 (1984). For an explanation of the *Chevron* two-prong framework for statutory interpretation of agency action, see *infra* notes 106-122 and accompanying text.

42. See *GenOn REMA*, 722 F.3d at 526-27 (concluding EPA had authority to promulgate Portland Rule).

43. See Clean Air Act Extension of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. § 7401) (creating EPA and greatly extending CAA).

44. 42 U.S.C. § 7409(2) (2012) (directing EPA to promulgate air quality standards).

45. *Id.* § 7408(a)(1)(A) (requiring NAAQS standard protect public health and establish criteria for pollutants). The other five criteria pollutants are ozone, particulate matter, carbon monoxide, NO<sub>x</sub>, and lead. See *What are the Six Common Air Pollutants?*, ENVTL. PROT. AGENCY, <http://www.epa.gov/oaqps001/urbanair> (last updated Apr. 20, 2012) (providing information pertaining to criteria pollutants).

46. 42 U.S.C. § 7409(b)(1) (2012) (stating purpose of NAAQS).



makes “the States and the Federal Government partners in the struggle against air pollution.”<sup>47</sup>

Cooperative federalism requires the EPA to promulgate NAAQS and each state to develop a SIP.<sup>48</sup> SIPs, required in part by CAA Section 110, are the primary mechanism by which states provide for the “implementation, maintenance, and enforcement” of NAAQS.<sup>49</sup> Through their SIPs, states determine the pollution control requirements and emission limitations needed to meet NAAQS.<sup>50</sup>

After creating a SIP, the state must submit it to the EPA for review.<sup>51</sup> On review, the EPA can approve, reject, or conditionally approve the submission.<sup>52</sup> If the EPA approves the SIP, it becomes enforceable as federal law.<sup>53</sup> Alternatively, if the EPA finds the SIP is inadequate to maintain a NAAQS, or the SIP is in noncompliance with the CAA, the EPA may issue a “SIP Call,” which requires the

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47. See Brief for Respondents, *GenOn REMA LLC v. EPA*, 722 F.3d 513 (3d Cir. 2013) (No. 12-1022), 2012 WL 2956694, at \*5 (citing *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990)) (discussing relationship between states and federal government for implementation of NAAQS); see also 42 U.S.C. § 7407(a) (2012) (providing states with discretion to determine air quality control). The Statute provides states with “the primary responsibility for assuring air quality within the entire geographic area comprising such State by [specifying] . . . the manner in which . . . air quality standards will be achieved and maintained.” *Id.* But cf. Jamie Gibbs Pleune, *Do We CAIR About Cooperative Federalism in the Clean Air Act?*, 2006 UTAH L. REV. 537, 537 (2006) (arguing EPA upsets state and federal balance of cooperative federalism in CAA). Pleune focuses on the statutory basis for CAIR and argues the EPA’s requirement that states amend their SIPs “contravenes cooperative federalism by usurping state authority to make policy decisions left to state discretion in their implementation plans.” Pleune, *supra*, at 537.

48. See 42 U.S.C. § 7410(1) (2012) (requiring states to adopt and submit SIPs).

49. *Id.* § 7410(1)(a) (requiring state’s SIP to provide for proper NAAQS standards in each air quality control region). Air quality control regions contain three possible designations for NAAQS of each six criteria pollutants: attainment, nonattainment, and unclassifiable. *Id.* § 7407(d)(1)(B)(iii) (listing three possible area designations). First, an area in attainment is an area that meets the NAAQS for a criteria pollutant. *Id.* § 7407(d)(1)(A)(ii). Second, an area in nonattainment is “any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet)” the NAAQS for the pollutant. *Id.* § 7407(d)(1)(A)(i). Third, an area is unclassifiable if the area “cannot be classified on the basis of available information as meeting or not meeting” the NAAQS for the pollutant. *Id.* § 7407(d)(1)(A)(iii). It is possible, however, for an area to be in nonattainment for one NAAQS and be in attainment of another. *Id.*

50. *Id.* § 7410(2)(a) (requiring enforceable emission limitations and other control measures).

51. *Id.* § 7410(a)(1) (requiring state to submit SIP to EPA within three years after promulgation of NAAQS or NAAQS revision).

52. *Id.* § 7410(b)(3)(B) (requiring EPA to review SIPs as soon as practicable).

53. 42 U.S.C. § 7413 (2012) (stating requirements of federal enforcement).

state to submit a revised SIP to correct its inadequacies.<sup>54</sup> If the state fails to correct such inadequacies or submit a revised SIP, the CAA compels the EPA to promulgate a Federal Implementation Plan (FIP) that replaces the state's SIP and will directly control the sources of air pollution in that state.<sup>55</sup>

Section 110 also contains subsection (a)(2)(d), known colloquially as the "Good Neighbor Provision."<sup>56</sup> The Good Neighbor Provision obligates a state's SIP to prohibit pollution sources within its borders that "contribute significantly" to the nonattainment of, or "interfere with maintenance" of, NAAQS in other states.<sup>57</sup> Prior to 1990, the Good Neighbor Provision proved ineffective at curbing air transport because it lacked a clear standard of review and implementation.<sup>58</sup> The 1990 amendments attempted to clarify the CAA by adding the language "contribute significantly" as a standard to measure upwind states' impact on downwind states.<sup>59</sup> This standard, however, did little to alleviate the problems frustrating EPA regulations, as illustrated in CSAPR.<sup>60</sup>

## B. Prior Attempts at Interstate Transport Rules

While the EPA promulgated some lasting rules, more comprehensive transport rules promulgated under the Good Neighbor Provision's authority failed.<sup>61</sup> The Clean Air Interstate Rule (CAIR), promulgated in 2005, was the first expansive multi-pollu-

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54. *Id.* § 7410(k)(5) (requiring state to resubmit its SIP to EPA in response to SIP call). The EPA must notify the state of the SIP's inadequacies and establish a reasonable deadline no longer than eighteen months for the submission of a revised plan. *Id.*

55. *Id.* §7410(c) (directing EPA to promulgate FIP). The CAA requires the EPA to promulgate a FIP within two years following a finding a state failed to revise its SIP. *Id.* §7410(c)(1).

56. *Id.* § 7410(a)(2)(D)(i) (requiring states' SIPs to contain provisions addressing interstate air pollution).

57. *Id.* (providing standards for states regarding interstate air pollution).

58. See H.R. REP. NO. 95-294, at 330 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077 (discussing shortcomings of good neighbor provision). The 1977 hearings noted, "The problem of interstate pollution remains a serious one that requires a better solution." *Id.* The Committee further stated "an effective program must not rely on prevention or abatement action by the State in which the source of the pollution is located, but rather by the State . . . which receives the pollution and the harm, and thus which has the incentive and need to act." *Id.*

59. 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2012) (requiring upwind states to not significantly contribute to downwind pollution).

60. For a discussion of problems regulations face from "significant contribution," see *infra* notes 61-76 and accompanying text.

61. For more information on CAIR and CSAPR, the two largest regulations to address interstate air pollution, both of which were vacated, see *infra* notes 62-76 and accompanying text.

tant rule enforcing the Good Neighbor Provision.<sup>62</sup> It included twenty-eight states and expanded an earlier trading program for nitrogen oxide (NO<sub>x</sub>) trading by including SO<sub>2</sub>.<sup>63</sup> Created in response to the Clear Skies campaign advocated for by the market-oriented Bush Administration, CAIR created a permit market for SO<sub>2</sub> and NO<sub>x</sub>-emitting facilities.<sup>64</sup> At its most basic level, CAIR functions as a cap and trade program for SO<sub>2</sub> and NO<sub>x</sub>.<sup>65</sup> The program operates by issuing facilities a finite amount of permits for “the right to emit” SO<sub>2</sub> and NO<sub>x</sub> that facilities can then trade amongst themselves.<sup>66</sup>

In the same year, the D.C. Circuit remanded CAIR in *North Carolina v. EPA*<sup>67</sup> because the rule failed to address what emission level constituted a “significant contribution” to downwind states’ NAAQS nonattainment as required by the Good Neighbor Provision.<sup>68</sup> The court remanded the rule without vacatur, though; the

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62. Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call, 70 Fed. Reg. 25,162, 25,162 (May 12, 2005) (codified at 40 C.F.R. Pt. 51, 72, et al.) [hereinafter CAIR] (establishing multi-state transport rule for SO<sub>2</sub>)

63. *Id.* at 25,168 (explaining trading program).

64. See Pleune, *supra* note 47, at 545. (citations omitted) (discussing impact of President Bush’s Clear Skies Program on creation of CAIR); see also *Clear Skies: Basic Information*, ENVTL. PROT. AGENCY, [www.epa.gov/air/clearskies/basic.html](http://www.epa.gov/air/clearskies/basic.html) (last updated May 18, 2012) (summarizing changes proposed by Clear Skies Act). The Clear Skies Act sought to reduce SO<sub>2</sub> emissions by 73%, reduce NO<sub>x</sub> emissions by 67%, and reduce mercury emissions by 69%. *Id.* However, the EPA never enacted the Clear Skies Program, due to disapproval of its New Source Review Program. Pleune, *supra* note 47, at 545 (stating history that influenced CAIR’s promulgation).

65. Pleune, *supra* note 47, at 549 (stating CAIR was cap and trade program). The rule built on prior regulations such as the Acid Rain Program and NAAQS SIP Call. *Id.* CAIR operated through the Good Neighbor Provision, partially to solve the ongoing pollution control problems in OTC states. *Id.*

66. See *id.* at 551 (explaining CAIR’s cap and trade program). Pleune provides a simple explanation of cap and trade:

Once the emissions credits have been allocated, individual power plants enjoy flexibility to determine how they will meet their pollution allowance. Plants can either install technology to reduce their emissions or purchase pollution credits from other sources with excess credits. If power plants reduce more emissions than required by their allowance, they can either sell the additional credits or bank them. Sources can use their banked credits later when the cap ratchets down allowable emissions.

*Id.* at 552

67. 531 F.3d 896 (D.C. Cir. 2008).

68. *Id.* at 907 (stating one reason for vacatur). In CAIR, the state of North Carolina and a coalition of electric utility providers challenged aspects of the rule’s SO<sub>2</sub> provisions. *Id.* at 905. Environmental groups, alternatively, intervened on behalf of the EPA. *Id.* The court in *North Carolina* unanimously struck down CAIR on five grounds. First, the EPA did not give significance to the phrase “interfere

ruling compelled the EPA to promulgate a new rule enforcing the Good Neighbor Provision.<sup>69</sup> The new rule, however, as CAIR had been before it, would be short-lived.<sup>70</sup>

Promulgated by the EPA in 2011, CSAPR employed air dispersion modeling similar to CAIR to determine a state's specific contribution to downwind nonattainment and assigned each state a budget to eliminate its "significant contribution" to nonattainment in downwind states.<sup>71</sup> Unlike CAIR, however, CSAPR "prescribe[d] [FIPs] to implement those obligations at the State level," rather than first allowing states' SIPs to implement reductions.<sup>72</sup> In its August 21, 2012, decision in *EME Homer v. EPA*,<sup>73</sup> the D.C. Circuit held CSAPR exceeded the EPA's statutory authority.<sup>74</sup> The basis for vacatur included CSAPRs over-control of states in violation of the Good Neighbor Provision and its premature imposition of FIPs on states before states implemented their own SIPs.<sup>75</sup> The EPA continues to be eluded by regulatory implementation of the Good Neigh-

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with maintenance." *Id.* at 929. Second, the EPA must decide the date for states to eliminate their significant contribution to downwind nonattainment. *North Carolina*, 531 F.3d at 929. Third, the EPA failed to connect a measurement of significant contribution to downwind nonattainment. *Id.* Fourth, reductions in SO<sub>2</sub> only related to the Title IV trading program. *Id.* at 930. Five, the SO<sub>2</sub> caps were arbitrary because the EPA based them on the irrelevant factors. *Id.*

69. *See id.* at 907 (remanding CAIR without vacatur); *see also* CSAPR, *supra* note 9, at 48,2011 (explaining reason for promulgating CSAPR is in response to *North Carolina* remanding CAIR without vacatur).

70. *Compare* CSAPR, *supra* note 9, at 48,208 (noting effective date of rule as October 7, 2011), *with* *EME Homer City Generation, LP v. EPA*, 696 F.3d 7, 7 (D.C. Cir. 2012) (striking down CSAPR in 2012).

71. *See* CSAPR, *supra* note 9, at 48,211 (noting similarities to CAIR). The EPA stated it would keep aspects of CAIR that worked while responding to the court decision in *North Carolina*. *Id.*

72. Carla M. Gray, Comment, *What Now? The Future of EPA Transport Programs Following Vacatur of the Cross-State Air Pollution Rule*, 14 N.C.J.L. & TECH. ON. 103, 114 (2012) (quoting *EME Homer*, 696 F.3d at 15) (noting differences between CAIR and CSAPR).

73. 696 F.3d 7 (D.C. Cir. 2012).

74. *Id.* at 11 (noting CSAPR exceeded authority of Good Neighbor Provision). As this note was going to press, the Supreme Court of the United States decided *EPA v. EME Homer City Generation L.P.*, 134 S. Ct. 1584, 1610 (2014), which overturned the D.C. Circuit's ruling and upheld CSAPR.

75. *See id.* (discussing reason for vacating CSAPR). The court's substantive holding to vacate CSAPR relied on EPA overstepping authority granted under good neighbor provision. *Id.* The court gave two reasons: First, the court held that the EPA improperly used the good neighbor provision because CSAPR required reductions in upwind states beyond those required by good neighbor provision. *Id.* Essentially, the dual regulation of upwind and downwind states resulted in "over control." *Id.* Second, the court stated the EPA departed from the usual enforcement of the Good Neighbor Provision, which allows states to first implement SIPs before being required by the EPA to follow a FIP. *Id.*

bor Provision, although Section 126 exists to facilitate its regulatory implementation.<sup>76</sup>

### C. The Seldom Granted Section 126(b) Petition

Although promulgating a lasting transport rule proves problematic for the EPA, an alternative mechanism exists to enforce the Good Neighbor Provision.<sup>77</sup> Enacted concurrently with the modern Good Neighbor Provision in 1990, Section 126, in pertinent part, allows downwind states to petition the EPA to find “any major source or group of stationary sources” in an upwind state that “emits or would emit any air pollutant [to be] in violation of [The Good Neighbor Provision].”<sup>78</sup> The EPA must make a finding within sixty days of receiving a Section 126(b) petition; further Section 126(c) requires no major source operate longer than three months following a 126(b) finding against it.<sup>79</sup> If the EPA grants a downwind state’s 126(b) petition, it can impose a FIP on a single pollution source in an upwind state without going through the normal SIP process in Section 110.<sup>80</sup> OTC states, resultantly, attempted to evoke Section 126 petitions since Section 126’s enactment, though the EPA has seldom found in their favor.<sup>81</sup>

Beginning as early as 1981, downwind states petitioned the EPA, albeit unsuccessfully, under Section 126(b) to control upwind states’ emissions.<sup>82</sup> In *Connecticut v. EPA*,<sup>83</sup> Connecticut and New Jersey argued that because Section 110 requires SIPs to comply with Section 126, a possible violation of Section 126 is a prerequisite for the EPA’s approval of a SIP revision under Section 110.<sup>84</sup> The Sec-

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76. For a discussion of the alternative, Section 126(b) statute, see *infra* notes 77-95 and accompanying text.

77. For a discussion of other ways states can invoke the Good Neighbor Provision, see *infra* notes 78-95 and accompanying text.

78. 42 U.S.C. § 7426(b) (2012) (stating section’s requirements).

79. *Id.* § 7426(c)(2) (providing timeline for regulation after Section 126(b) finding has been made).

80. For critical analysis of whether Section 126(b) operates independently of the Good Neighbor Provision, see *infra* notes 158-189 and accompanying text.

81. For a discussion of the reason for the seldom use of section 126(b), see *infra* notes 82-95 and accompanying text.

82. See *Connecticut v. EPA*, 656 F.2d 902, 902 (2d Cir. 1981) (responding to Section 126(b) petition); see also, Kay M. Crider, *Interstate Air Pollution: Over A Decade of Ineffective Regulation*, 64 CHI.-KENT L. REV. 619, 651 (1988) (discussing history of 126(b) usage).

83. 656 F.2d 902, 902 (2d Cir. 1981).

84. *Id.* at 907 (stating Connecticut and New Jersey’s argument). To date, courts and the EPA disfavor the view that Sections 126 and 110 operate as the same proceeding. See Crider, *supra* note 82, at 626 (discussing unwillingness for court and EPA to accept dual construction of Section 126(b)).

ond Circuit disagreed, concluding Section 126 existed primarily to resolve disputes when a state failed to revise its SIP.<sup>85</sup> The trend to petition continued in a 1988 case, *New York v. EPA*,<sup>86</sup> in which New York petitioned the D.C. Circuit to review the EPA's denial to grant its Section 126(b) petition.<sup>87</sup> New York argued a 126(b) petition obligated the EPA to review an upwind state's SIP.<sup>88</sup> The court, again, sided with the EPA and found no affirmative duty requiring the EPA to review a SIP in response to a 126(b) petition.<sup>89</sup>

The EPA granted a 126(b) petition to downwind states in only one instance prior to *GenOn REMA*: the 1998 case, *Appalachian Power Co. v. EPA*.<sup>90</sup> In *Appalachian*, eight northeastern states filed Section 126(b) petitions seeking FIPs to control pollution from upwind states.<sup>91</sup> The D.C. Circuit determined whether the EPA could limit an upwind state's emissions under Section 126 while concurrently requiring SIP revisions under Section 110.<sup>92</sup> The D.C. Circuit upheld the petition, stating that the EPA acted reasonably concerning a state violating a separate functional provision of the CAA, while also being under a legal obligation to revise its plan.<sup>93</sup> Further, the court held that its view did not violate the "cooperative federalism" approach of the CAA because treating the provisions as separate was reasonable.<sup>94</sup> Downwind states, therefore, successfully

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85. See *Connecticut*, 656 F.2d at 907 (reasoning no affirmative duty is present in Section 126). The court's reasoning was as follows:

When § 110(a)(2)(E)(ii) requires a [ ] SIP to insure compliance with § 126, it clearly refers to subsection (a) only and not to the petition procedure set forth in subsection (b). Subsection (a) of § 126 is really an extension of § 110(a)(2) in that it describes further pollution-control measures which must be present in every SIP. It is thus altogether natural that § 110(a)(2)(E) would incorporate it by reference.

*Id.*

86. 852 F.2d 574, 574 (D.C. Cir. 1988).

87. *Id.* at 578 (stating basis for claim).

88. *Id.* (detailing petitioner's argument).

89. *Id.* at 579 (stating court's rationale for holding). The court stated Congress's silence is significant here because Congress often directly requires the EPA to act. *Id.*

90. 249 F.3d 1032 (D.C. Cir. 2001).

91. *Id.* at 1038 (identifying states that filed petitions). The twelve states included Delaware, Indiana, Kentucky, Maryland, Michigan, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Virginia, and West Virginia. *Id.* The EPA, however, only granted the petitions of Connecticut, Massachusetts, New York, and Pennsylvania. *Id.*

92. *Id.* at 1036-37 (stating issues present in case).

93. *Id.* at 1046-47 (explaining Sections 126 and 110 are separate functional provisions).

94. *Id.* (articulating that in at least some instances section 126 will directly regulate sources in state).

controlled upwind states' pollution through the 126(b) petition for the first time.<sup>95</sup>

#### D. Courts' Deference to the EPA

Courts usually grant the EPA great deference in making regulatory decisions.<sup>96</sup> For instance, in *Connecticut* and *New York*, the courts deferred to the EPA's determination that it did not need to grant Section 126(b) petitions.<sup>97</sup> In *Appalachian*, alternatively, the D.C. Circuit upheld the EPA's decision to grant a Section 126(b) petition.<sup>98</sup> Such deference is the product of a widely used judicial doctrine: *Chevron* deference.<sup>99</sup>

##### 1. *The Hard Look Doctrine*

The CAA standard of review mirrors the APA's in that EPA actions may only be overturned if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>100</sup> The test, articulated by the Supreme Court in *Kleepe v. Sierra Club*,<sup>101</sup> requires courts to take a "hard look" at the environmental effects of

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95. Arnold W. Reitze, Jr., *Air Quality Protection Using State Implementation Plans - Thirty-Seven Years of Increasing Complexity*, 15 VILL. ENVTL. L.J. 209, 342 (2004) (discussing downwind states' use of 126(b) petitions). Perhaps more important than downwind states' Section 126(b) petition success is that "[t]he court upheld EPA's interpretation that CAA sections 110 and 126 are independent statutory tools to address interstate pollution transport; therefore, EPA may deploy them either singly or in tandem." *Id.* at 341-42.

96. Jason J. Czarneski, *An Empirical Investigation of Judicial Decision-Making, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 771 (2008) (stating *Chevron* is standard of deference provided to federal agencies). In more complicated EPA actions, "The circuits have shown, however, a strong willingness to defer, under any doctrine or framework, to agency action when environmental scientific expertise is required." *Id.*

97. See *Connecticut v. EPA*, 656 F.2d 902, 909 (2d Cir. 1981) (accepting EPA's promulgation of rule); see also *New York v. EPA*, 852 F.2d 574, 579 (D.C. Cir. 1988) (stating court must defer highly to agency action). In regard to scientific determinations, the *New York* court stated, "It is well established that when a court is reviewing predictions within an agency's area of special expertise, at the frontiers of science, the court must generally be at its most deferential." *New York*, 852 F.2d at 580 (quoting *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983)) (internal quotation marks omitted).

98. See *Appalachian*, 249 F.3d at 1048 (applying second step of *Chevron* framework).

99. For a discussion of the hard look test and the *Chevron* framework, see *infra* notes 100-122 and accompanying text.

100. 42 U.S.C. § 7607 (2012) (establishing standard of review for EPA actions).

101. 427 U.S. 390 (1976) (citing *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)) (providing standard of review to measure whether agency actions are arbitrary and capricious).

an agency's proposed action.<sup>102</sup> Surmounting the hard look standard requires agencies to explain factors it considered in the decision-making process and the weight given those factors.<sup>103</sup> The hard look doctrine ultimately is deferential to agency decision-making.<sup>104</sup> It is "a narrow standard of review in which a court cannot substitute its judgment for that of the agency."<sup>105</sup>

## 2. *Chevron Deference*

In *Appalachian* and *GenOn REMA*, the courts applied the oft-used deference test created in *Chevron*.<sup>106</sup> In *Chevron*, the Supreme Court unanimously created a two-prong test concerning judicial review of an agency's statutory interpretation of a statute the agency administers.<sup>107</sup> *Chevron* concerned the EPA's interpretation of a "stationary source" under the 1977 CAA.<sup>108</sup> The EPA initially used dual interpretations to define a stationary source as applying to either an individual pollution-emitting device at a facility or to the emitting facility itself.<sup>109</sup> In 1981, however, the EPA promulgated a regulation that adopted a strictly plant-wide definition of the term.<sup>110</sup>

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102. *Morton*, 458 F.2d at 837 (stating hard look is merited for scientific determinations of agency action).

103. See Todd S. Aagaard, *Factual Premises of Statutory Interpretation in Agency Review Cases*, 77 GEO. WASH. L. REV. 366, 377 (2009) (explaining arbitrary and capricious standard). Professor Aagaard states, "Under the 'arbitrary and capricious' standard, the court's review is deferential to the agency, but the court must be satisfied that the agency has examined the relevant data and explained the basis for its action." *Id.*

104. *GenOn REMA, LLC v. EPA*, 722 F.3d 513, 525 (3d Cir. 2013) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (stating standard of review).

105. *Id.* (citing *State Farm*, 463 U.S. at 43) (indicating courts give agency expert opinions great deference). To overrule a scientific standard, the agency's determination must be "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43 (stating how expert determinations can fail in limited circumstances).

106. See *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1048 (D.C. Cir. 2001) (applying second step of *Chevron* framework); *GenOn REMA*, 722 F.3d at 519-23 (applying both steps of *Chevron* framework).

107. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (creating two-prong test for statutory interpretation).

108. *Id.* at 840 (stating basis for case).

109. *Natural Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718, 723-24 (D.C. Cir. 1982) (describing prior EPA regulatory interpretation concerning stationary polluting sources).

110. *Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans*, 46 Fed. Reg. 50,766, 50,766 (Oct. 14, 1981) (to be codified at 40 C.F.R. Pts. 51, 52) (implementing new definition of plant-wide source).



In upholding the EPA's action, the Court articulated a new deference test for agency interpretation of a statute.<sup>111</sup> First, a court should use statutory construction tools to determine "whether Congress has directly spoken to the precise question at issue."<sup>112</sup> If Congress has spoken to the issue, "that is the end of the matter."<sup>113</sup> If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."<sup>114</sup>

Notably, the degree of judicial deference granted "to the agency's interpretation of an ambiguous statutory provision depends on circumstances" surrounding the agency's interpretation.<sup>115</sup> If the agency's interpretation is authoritative, such as in the promulgation of a regulation, "courts will give the interpretation controlling weight as long as the interpretation is reasonable."<sup>116</sup> If the agency's interpretation is non-authoritative, "such as in an opinion letter, courts will defer to the interpretation only to the extent it is persuasive, taking into account the context in which the interpretation was made."<sup>117</sup> An agency, therefore, possesses the ability to influence possible court decisions with the weight of its own authority.<sup>118</sup>

*Chevron's* impact on environmental law cannot be understated: It is "the most cited case in modern public law."<sup>119</sup> In fact, *Chevron*

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111. *Chevron*, 467 U.S. at 843 (articulating two-step deference test given to agency interpretations of statutes). The Supreme Court indicated that statutory interpretations confront courts with two questions: First, is "whether Congress has directly spoken to the precise question at issue." *Id.* Second, if "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

112. *Id.* at 842 (stating first step of *Chevron*).

113. *Id.* (explaining that if Congress's intent is clear, further inquiry is unnecessary).

114. *Id.* at 843-44 (articulating second step of *Chevron* deference).

115. Aagaard, *supra* note 103, at 378 (citing *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001)) (explaining circumstances where deference is given).

116. *Id.* (citation omitted) (providing example of agency action that receives great deference).

117. *Id.* (citation omitted) (providing example of agency action that receives less deference).

118. *See id.* (noting deference depends on how agency delivers its interpretation).

119. Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 (2006) (explaining prevalence of *Chevron* deference in public law). Professors Miles and Sunstein note, "In the past quarter century, the Supreme Court has legitimated agency authority to interpret regulatory legislation, above all in *Chevron U.S.A., Inc v Natural Resources Defense Council, Inc*, the most cited case in modern public law." *Id.* *See also* Czarnecki, *supra* note 96, at 782-83 (noting *Chevron's* effect on agency law).

is so widely used, one can make predictions about case outcomes when courts employ it.<sup>120</sup> When using *Chevron* with ambiguous EPA administered statutes, for example, courts will usually grant deference and uphold agency actions.<sup>121</sup> If the statute, however, is unambiguous, courts are less likely to uphold the agency's action.<sup>122</sup>

#### IV. NARRATIVE ANALYSIS

##### A. *Chevron* Step-One: 126(b) Is Unambiguously Independent of the Good Neighbor Provision

The Third Circuit began its decision in *GenOn REMA* by addressing whether the prohibition against interstate air pollution in Section 126(b) applied only to emission limitations in Section 110 SIPs, or more broadly to all interstate air pollution.<sup>123</sup> GenOn and the UARG asserted the former, while the EPA and the NJ DEP argued the latter.<sup>124</sup> The Third Circuit followed the *Chevron* framework, aligned with the EPA, and held Section 126(b) provides recourse for all forms of interstate air pollution.<sup>125</sup>

The Third Circuit noted GenOn's position failed to account for the entire statutory scheme because "Section 126(b) contains no temporal limitation on a state's right to petition the EPA."<sup>126</sup> The Court further reasoned that it would be unreasonable for the

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120. See Czarnezki, *supra* note 96, at 782-83 (explaining outcome of empirical analysis concerning usage of *Chevron* deference). Professor Czarnezki noted three outcomes from *Chevron*:

First, *Chevron* has increased the likelihood of affirmance of agency interpretations of law, with deference rates above [sixty percent] or higher . . . Second, while both Democratic and Republican judges are likely to uphold agency interpretations, judges are more likely to support interpretations consistent with their perceived policy preferences. And finally, voting outcomes are influenced by panel effects (i.e., homogenous ideological panels are more likely to reverse agency action inconsistent with their ideological views, including in the environmental law context).

*Id.* at 783-84

121. See *id.* at 790 (noting outcomes in environmental cases where EPA was primary litigant). On average, the EPA's actions are upheld 72.9% of the time. *Id.*

122. See *id.* at 796 (noting outcomes in cases where courts found EPA actions unambiguous). Professor Czarnezki states, "[W]hen judges found a statutory provision unambiguous, they reversed agency action at a rate of 65.56%." *Id.* If the statute, however, is ambiguous, courts will uphold agency action over 85% of the time. *Id.* at 797.

123. *GenOn REMA, LLC v. EPA*, 722 F.3d 513, 519 (3d Cir. 2013) (noting issue is whether Section 126(b) relates to limitations contained in Section 110, or more generally to all interstate air pollution).

124. *Id.* (noting disposition of parties involved).

125. *Id.* at 522 (stating EPA can make Section 126 finding independently of Section 110 SIP process).

126. *Id.* at 520 (dismissing GenOn's argument). The court noted, "When we consider the applicable language of the Clean Air Act in light of the overall statute

EPA to wait several years for a Section 110 SIP revision, as suggested by GenOn's argument, in light of the sixty-day requirement present in 126(b).<sup>127</sup> In furtherance of its position, the Third Circuit examined Section 126(c), which provides that it is a violation of Section 126 and the applicable SIP "for any major existing source to operate more than three months after such [Section 126(b)] finding has been made with respect to it."<sup>128</sup> Consequently, the court determined reading 126(b) as corollary to Section 110 would render Section 126 ineffectual.<sup>129</sup>

To bolster its position, the court cited *Appalachian*, which indicated that 126(b) allows for direct control of emission sources in an upwind state.<sup>130</sup> Acceptance of GenOn's position, the court stated, would render three subparts of Section 126 superfluous.<sup>131</sup> First, an emission source would remain operational for more than three years following a CAA Section 126(b) finding.<sup>132</sup> Second, during an upwind state's SIP revision, Section 126 would not provide an

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and its interplay with other related sections, we conclude that the relevant language of the statute is unambiguous." *Id.*

127. *Id.* (stating EPA must act quickly after receiving petition or it would be unreasonable). The court went on to agree with the EPA's determination in the Portland Rule that "nothing in the statutory language in section 126 prohibits a downwind state from filing a section 126 petition until after an upwind state, in which the source or sources are located, has submitted, or is required to submit, a section 110(a)(2)(D) SIP to the EPA for approval." *Id.* (quoting Portland Rule, *supra* note 32, at 69,055).

128. *GenOn REMA*, 722 F.3d at 520 (citing 42 U.S.C. § 7426(c) (2012)) (noting Section 126(c) of CAA further supports reasoning 126(b) acts independently of 110).

129. *Id.* at 520-21 (concluding GenOn's view would be superfluous). For further support, the court relied on *TRW Inc. v. Andrews*, which stated, "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) (internal quotation marks omitted).

130. *GenOn REMA*, 722 F.3d at 521 (citing *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1032 (D.C. Cir. 2001)) (relaying *Appalachian* reasoning).

131. *See id.* (citing *Appalachian*, 249 F.3d at 1047) (mirroring argument, alternative view of Section 126 would render statute ineffective). According to the *Appalachian* court, "[T]hree critical provisions of § 126 would lose their force if, as the petitioners suggest, the lengthened timetable of the NO<sub>x</sub> SIP call were to suspend the § 126 process." *Appalachian*, 249 F.3d at 1047.

132. *GenOn REMA*, 722 F.3d at 521 (citing *Appalachian*, 249 F.3d at 1047) (stating first provision of 126(b) would be rendered ineffective if 126 process suspended by SIP process). According to the court in *Genon REMA*, "Section 126's requirement that a source contributing to downwind nonattainment may not operate for more than three years after such finding would be eliminated if the EPA had to wait for completion of the SIP process to make Section 126 findings." *Id.*

independent form of relief for downwind states.<sup>133</sup> Third, Section 126 would not provide an independent form of relief outside of the EPA's discretionary policies because the EPA must act on the CAA Section 126(b) petition within sixty days.<sup>134</sup>

In responding to GenOn's argument that the court's reading would offend Section 110 by interfering with SIP implementation, the court again relied on *Appalachian*.<sup>135</sup> The court found that nothing in Section 110 suggests states may "develop their plans free of extrinsic legal constraints."<sup>136</sup> The Third Circuit, therefore, in applying *Chevron* step-one, concluded the plain language of the statute in its context unambiguously expressed Congressional intent for Section 126(b) to provide an independent means for the EPA to take immediate action.<sup>137</sup>

#### B. *Chevron* Step-Two: the Limit of Cooperative Federalism and the Independent Federal Mechanism

Although the Third Circuit found the EPA correctly implemented the statute under step-one of the *Chevron* framework, the court proceeded to step-two due to "the novelty of the issue."<sup>138</sup> First, the court addressed GenOn and the UARG's position that the legislative history of the CAA "emphasizes the concept of cooperative federalism, including states' primary responsibility in imple-

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133. *Id.* (citing *Appalachian*, 249 F.3d at 1047) (relaying second argument posed by *Appalachian*). The *GenOn REMA* court articulated, "Section 126 provides for relief independent of any action by the upwind state, while a SIP revision requires action from that state." *Id.*

134. *Id.* (citing *Appalachian*, 249 F.3d at 1047) (relaying third argument presented by *Appalachian*). The Third Circuit in *GenOn REMA* further noted, "[R]elief under Section 126, unlike SIP calls, is independent of the discretionary policy preferences of the EPA since it must act on a petition within sixty days." *Id.* It concluded, "These provisions support our view that the statute unambiguously allows the EPA to make a Section 126 finding independently of the Section 110 SIP process." *Id.*

135. *Id.* at 522 (disagreeing with GenOn's argument).

136. *Id.* (quoting *Appalachian*, 249 F.3d at 1074) (internal quotation marks omitted) (responding to petitioner's argument). The court in *Appalachian* explained, "SIP development, like any environmental planning process, commonly involves decisionmaking subject to various legal constraints. That § 126 imposes one such limitation—and it is surely not the only independent provision of federal law to do so—does not affect a state's discretion under § 110." *Id.* (quoting *Appalachian*, 249 F.3d at 1074) (internal quotation marks omitted).

137. *GenOn REMA*, 722 F.3d at 522 (concluding language of 126(b) is unambiguous). The Third Circuit reached this conclusion largely on the belief that "[a]ny other interpretation would defeat the underlying objective of the 126(b) petition process." *Id.*

138. *See id.* (stating novelty merited second step of *Chevron*). The court went on to state, "Even if the relevant language of the Clean Air Act were deemed ambiguous, we still find that the EPA's action was proper." *Id.*

menting regulations promulgated by the EPA.”<sup>139</sup> The Third Circuit, while acknowledging cooperative federalism played a role in the CAA, determined it did not aid in examining the rationale behind Section 126(b).<sup>140</sup>

Ultimately, the court found Congress enacted Section 126(b) because “the law prior to 1977 had inadequately addressed the problem of interstate air pollution and that an effective program must rely on the state that actually receives the pollution and has an incentive and need to act.”<sup>141</sup> Section 126(b) thus allows any state to petition the EPA to find “any new, modified, or existing stationary source in any other State is (or would be) emitting pollutants which cause or contribute to impermissible interstate air pollution.”<sup>142</sup> The court further agreed with the EPA that Congress identified Section 126 as an alternative method for states to address interstate air pollution.<sup>143</sup>

The court concluded that the CAA’s legislative history established Congress’ intent for the federal government to play an essential role in mitigating interstate air pollution, despite that states also play a role.<sup>144</sup> Congress thus intended Section 126(b) to allow the EPA to intervene as a federal regulator when states fail to carry out pollution control.<sup>145</sup> The Third Circuit even employed the D.C. Circuit’s contention in *EME Homer* that Section 126 is “a separate

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139. See *id.* (noting structure of cooperative federalism present in CAA).

140. See *id.* (stating position that cooperative federalism does not aid in examination of Section 126(b)).

141. *Id.* at 522-523 (quoting H.R. 6161, 95th Cong. § 683 (1977) (internal quotation marks omitted), reprinted in 4 LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, at 2797 (1977) [hereinafter Section 126 Legislative History] (providing congressional intent behind Section 126(b)). The court noted the legislative history states:

[A Section 126] petition process is intended to expedite, not delay, resolution of interstate pollution conflicts . . . . [T]he committee intends to create a second and entirely alternative method and basis for preventing and abating interstate pollution. The existing provision prohibiting any stationary source from causing or contributing to air pollution which interferes with timely attainment or maintenance or a national ambient air standard (or a prevention of significant deteriorating or visibility protection plan) in another State is retained. A new provision prohibiting any source from emitting any pollutant after the Administrator has made the requisite finding and granted the petition is an independent basis for controlling interstate air pollution.

*GenOn REMA*, 722 F.3d at 522-23 (citing Section 126 Legislative History, *supra*, at 311) (emphasis in original).

142. *GenOn REMA*, 722 F.3d at 524 (citation removed) (acknowledging House of Representatives’ view).

143. *Id.* at 524 (agreeing with EPA).

144. *Id.* (noting legislative history recognizes Section 126(b) as independent federal mechanism).

145. *Id.* at 523 (stating EPA can intervene when states fail).

provision [from Section 110] that explicitly contemplates direct EPA regulation of specific sources that generate interstate pollution.”<sup>146</sup> The Third Circuit further held that the EPA’s interpretation of 126(b), in light of its plain language and legislative history, was both permissible and reasonable, therefore meriting deference.<sup>147</sup>

### C. A Hard Look at the Portland Rule

The court reviewed the Portland Rule and determined it was not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>148</sup> The court acknowledged that such a standard was narrow and did not allow the court to substitute its judgment for that of the agency.<sup>149</sup> While the court indicated that the EPA must “examine [ ] the relevant data and articulate [ ] a satisfactory explanation for its action,” the court noted that its review of an EPA action is “highly deferential,” especially concerning scientific determinations.<sup>150</sup>

GenOn contended the rule was arbitrary and capricious because it required a reduction in SO<sub>2</sub> emissions at Portland before it required similar reductions from sources in New Jersey and before Pennsylvania had to complete a new SIP for the new one-hour SO<sub>2</sub> NAAQS.<sup>151</sup> The court disagreed however, finding the language of 126(b) “clearly dictates that direct federal regulation of a single source or facility is justified when the EPA makes a Section 126(b)

146. *Id.* at 524 (quoting *United States v. EME Homer City Generation, L.P.*, 696 F.3d 7, 34 (3d Cir. 2012)) (finding Section 126 separate from Section 110). GenOn tried to use *EME Homer* as part of its argument against *Chevron* step-two, believing it established that FIPs could not be imposed without first giving the state a chance to revise its SIP. *Id.* The Third Circuit however, turned the argument around on GenOn by using *EME Homer* for support. *Id.*

147. *GenOn REMA*, 722 F.3d at 524 (holding in light of legislative history language of 126(b), Portland Rule comports with CAA under *Chevron*). While the court next discussed whether the EPA consistently interpreted the term “prohibition,” it is not relevant to the discussion here so it has been omitted from analysis. *Id.* at 524-25. The court, however, held the EPA consistently interpreted the term “prohibition,” and even if they had not, the court still would have given the EPA *Chevron* Deference. *Id.*

148. *Id.* at 525 (citing 42 U.S.C. § 7607(d)(9)(A) (2012)) (articulating standard of review).

149. *Id.* (citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983)) (identifying standard of review as narrow).

150. *Id.* at 525 (quoting *Prometheus Radio Proj. v. FCC*, 373 F.3d 372, 389-90 (3d Cir. 2004); *N.J. Envtl. Fed. v. U.S. Nuclear Regulatory Comm’n*, 645 F.3d 220, 228 (3d Cir. 2011)) (establishing hard look doctrine with regard to EPA’s scientific determinations).

151. *See id.* (discussing GenOn’s position).

finding.”<sup>152</sup> The Third Circuit, moreover, determined that the EPA articulated a satisfactory explanation for its action, “including a rational connection between the facts found and the choice made.”<sup>153</sup> The court therefore, concluded that there was “nothing arbitrary, capricious, or abusive about the EPA’s discretion in imposing emissions reductions on a single source like Portland.”<sup>154</sup>

For the foregoing reasons, the Third Circuit upheld the Portland Rule and denied GenOn’s petition for review.<sup>155</sup> The court, in reaching its decision, held it was reasonable for the EPA to interpret Section 126(b) as an independent mechanism for enforcing interstate pollution control.<sup>156</sup> It further held that the EPA action was not arbitrary and capricious, thereby giving it authority to promulgate the Portland Rule.<sup>157</sup>

## V. CRITICAL ANALYSIS

The *GenOn REMA* decision, in upholding the second ever use of Section 126(b), marks a significant resurgence in the ability for downwind states to hold upwind states accountable.<sup>158</sup> In applying *Chevron* to review the EPA’s promulgation of the Portland Rule, the Third Circuit properly relied on judicial precedent and the tools of

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152. *GenOn REMA*, 722 F.3d at 525 (determining plain language of Section 126 allows regulation of single source).

153. *Id.* at 526 (citing *Prometheus Radio*, 373 F.3d at 389–90) (stating EPA articulated more than required amount of scientific data). For example, the *GenOn REMA* court stated:

The EPA examined the dispersion modeling results that New Jersey submitted with its Section 126(b) petition to show that emissions from Portland alone caused downwind violations of the 1-hour SO<sub>2</sub> NAAQS in [Portland Rule]. The EPA also conducted its own modeling results and, in doing so, considered various components such as model selection and meteorological data, which supported its conclusion that the imposition of emissions limits on Portland would address New Jersey’s nonattainment issues. The portions of the EPA’s Portland Rule that describe its methodology for the establishment of emissions limits and the increments of progress are extensive and well-documented. The EPA carefully calculated the emissions reductions that were needed to eliminate Portland’s contribution to nonattainment in New Jersey; the technical and economic feasibility of the emissions limits; and the appropriateness of imposing interim emissions limits towards achieving the final remedy.

*Id.* (footnotes omitted).

154. *See id.* (holding EPA acted within authority granted by CAA).

155. *Id.* at 526 (upholding Portland rule).

156. *Id.* (holding EPA was reasonable in its interpretation).

157. *GenOn REMA*, 722 F.3d at 526 (holding Portland rule not arbitrary or capricious).

158. For a discussion of *GenOn REMA* upholding 126(b) petitions, which was only the second time a 126(b) has ever been granted by the EPA and subsequently upheld by a court, see *supra* notes 77-95 and accompanying text.

statutory construction.<sup>159</sup> Further, in focusing on the interplay of Sections 110 and 126, the court astutely identified the legislative goals underlying the CAA and allowed the EPA to pursue its statutory mandate.<sup>160</sup>

#### A. Judicial Precedent and the First Step of *Chevron*

The Third Circuit's decision to apply the *Chevron* framework is inexorably the correct one.<sup>161</sup> Not only is *Chevron* the standard for an agency's statutory interpretation, but since its inception, all courts reviewing Section 126(b) petitions have employed it.<sup>162</sup> There is, however, one discrepancy; under step-one, the D.C. Circuit in *Appalachian* found 126(b) ambiguous, whereas *GenOn REMA* did not.<sup>163</sup> The discrepancy is likely due, however, to factual differences; *Appalachian* focused on multiple upwind and downwind states participating in NAAQS trading, while *GenOn REMA* only concerned two states and one power plant.<sup>164</sup>

In applying *Chevron* step-one, the Third Circuit convincingly found the language of 126(b) unambiguous by appropriately determining the issue to be a temporal one.<sup>165</sup> In interpreting the statute, there are only two possible readings: Both the sixty-day requirement in Section 126(b) and the three-month requirement in Section 126(c) operate independently of Section 110, or they are both subject to it.<sup>166</sup> The Third Circuit correctly chose the former by employing commonsense logic.<sup>167</sup>

159. For a discussion of why *GenOn REMA* was correct, see *infra* notes 158-190 and accompanying text.

160. For a discussion of the legislative history and the Third Circuit's interpretation of that history, see *infra* notes 180-186 and accompanying text.

161. For a discussion of why the *Chevron* framework was proper in this instance, see *infra* notes 161-164 and accompanying text.

162. See *Connecticut v. EPA*, 656 F.2d 902, 909 (2d Cir. 1981) (applying *Chevron* framework); *New York v. EPA*, 852 F.2d 574, 579 (D.C. Cir. 1988) (applying high level of deference); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1048 (D.C. Cir. 2001) (applying *Chevron* Framework).

163. Compare *GenOn REMA, LLC v. EPA*, 722 F.3d 513, 526 (3d Cir. 2013) (finding 126(b) unambiguous under *Chevron* step-one), with *Appalachian*, 249 F.3d at 1048 (finding 126(b) ambiguous under *Chevron* step-one).

164. Compare *GenOn REMA*, 722 F.3d at 513, 515-19 (stating factual background of case), with *Appalachian*, 249 F.3d at 1047, 1074 (providing facts and holding).

165. *GenOn REMA*, 722 F.3d at 520 (noting issue under step-one was temporal in nature).

166. For explanation of the temporal requirements of both Sections 110 and 116, see *supra* notes 126-129 and accompanying text.

167. See *GenOn REMA*, 722 F.3d at 522 (noting agreement with position of EPA).



Two aspects of section 126 support the Third Circuit's holding.<sup>168</sup> First, Section 126(b) requires a response by the EPA within sixty days and makes no mention of the time requirements in Section 110.<sup>169</sup> Second, 126(c) provides that it would be a violation of the provision as a whole for "any major existing source to operate more than three months after such finding has been made with respect to it."<sup>170</sup> Section 126 would be rendered ineffectual if the Third Circuit adopted GenOn's argument that the EPA must wait three years for a SIP revision before making a Section 126 finding.<sup>171</sup> Jurisprudence further supports the Third Circuit's conclusion that Section 126 is not a tandem action with Section 110.<sup>172</sup>

Although both sections reference one another, never before have courts treated them as a tandem action.<sup>173</sup> The two sections are, instead, separate functional provisions.<sup>174</sup> In *Connecticut*, for instance, the court held that although Section 126 is intertwined with Section 110, Section 126(b) cannot "rationally be incorporated" into Section 110 because "they are intended to be utilized in differing procedural settings."<sup>175</sup> The court in *New York* identified this dichotomy as well, stating that Section 126 "contain[ed] no language expressly directing the Administrator to reevaluate existing SIPs," and if "Congress ha[d] intended to establish a requirement for direct EPA action it [would have] said so."<sup>176</sup> The Third Circuit, in light of the statute's plain language and the context of its use,

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168. For a critical analysis of court's reasoning about *Chevron* step-one, see *supra* notes 165-167 and *infra* notes 169-172 and accompanying text.

169. See 42 U.S.C. § 7426(b) (2012) (providing language of statute). The only reference to Section 110 contained in Section 126 is the finding that a state can emit in "violation of the [Good Neighbor Provision]." *Id.*

170. *GenOn REMA*, 722 F.3d at 520 (stating time requirement in Section 126(c) only serves to further support proposition Section 126 as independent provision).

171. For a discussion of Section 126 and why it would be ineffectual due to the statute expediting the regulation of upwind states through more stringent times, see *supra* notes 132-134 and accompanying text.

172. For critical analysis of jurisprudence support Section 126 as a separate action, see *infra* notes 174-176 and accompanying text.

173. See *Reitze*, *supra* note 95, at 341-44 (noting courts consistently uphold Sections 110 and 126 as independent statutory tools).

174. See *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1046-47 (D.C. Cir. 2001) (stating Sections 110 and 126 are separate functional provisions); see also *Crider*, *supra* note 82, at 626 (indicating unwillingness of courts to treat them in tandem).

175. See *Connecticut v. EPA*, 656 F.2d 902, 907 (2d Cir. 1981) (reasoning no affirmative duty is present in Section 126).

176. See *New York v. EPA*, 852 F.2d 574, 579 (D.C. Cir. 1988) (noting congressional silence on issue relative to other sections of CAA).

was correct in holding Section 126(b) provides an independent means for the EPA to take action.<sup>177</sup>

### B. The Extra, but Unneeded Mile: *Chevron* Step-Two

If anything seems unusual about the Third Circuit's opinion in *GenOn REMA*, it is the court's application of *Chevron* step-two.<sup>178</sup> A court usually only employs *Chevron* step-two when it finds that the statute is ambiguous under step-one.<sup>179</sup> The Third Circuit, however, used step-two to address GenOn's contention that the Portland Rule contradicts the CAA's legislative history that emphasizes cooperative federalism.<sup>180</sup> The court correctly posited that while cooperative federalism is present throughout the CAA and Section 110, Section 126 is not part of the scheme.<sup>181</sup> The CAA's legislative history strongly supports the presupposition that Section 126 operates as an independent federal mechanism.<sup>182</sup> Regarding the court's argument, the CAA makes "the States and the Federal Government partners in the struggle against air pollution."<sup>183</sup>

The CAA's long history strongly indicates that Congress, aware of the problems posed by Section 110 and cooperative federalism, granted the EPA alternative and non-cooperative means to address interstate air pollution.<sup>184</sup> When contemplating the enactment of Section 126, Congress stated, "[A]n effective program must include a Federal mechanism for resolving disputes which cannot be decided through cooperation and consultation between the States or

177. For an analysis of the Third Circuit's correct holding of Section 126(b) as being an independent means for the EPA to take action, see *supra* notes 168-175 and accompanying text.

178. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (noting if Congress has spoken on an issue, that is end of it). Under the framework articulated by *Chevron*, the analysis ends if the statute is ambiguous. *Id.*

179. See, e.g., *Appalachian*, 249 F.3d at 1048 (applying second step of *Chevron* only after finding statute ambiguous under step-one).

180. See Section 126 Legislative History, *supra* note 141, at 522 (stating Section 126(b) serves to expedite interstate air pollution conflicts). *But see*, Pleune, *supra* note 47, at 537 (noting EPA's requirements for interstate air pollution rule contravene cooperative federalism).

181. *GenOn REMA*, 722 F.3d at 522 (concluding cooperative federalism is not present in Section 126(b) as Congress intended it to be separate mechanism).

182. See Section 126 Legislative History, *supra* note 141, at 522 (noting history surrounding addition of Section 126(b)).

183. *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990) (discussing relationship between states and federal government for implementation of NAAQS).

184. Section 126 Legislative History, *supra* note 141, at 522 (noting committee wanted entirely separate mechanism regulating interstate air pollution).

persons involved.”<sup>185</sup> The Third Circuit, therefore, rightly found the EPA’s interpretation of Section 126 was in line with congressional intent.<sup>186</sup>

### C. The Court Correctly Applied the Hard Look Doctrine

Although it may have been a forgone conclusion that the Third Circuit would find in the EPA’s favor following the *Chevron* Test, the court properly applied the hard look doctrine.<sup>187</sup> The EPA’s action merited this decision for two reasons: First, the statute’s plain language provides for the direct control of major emitting sources in upwind states.<sup>188</sup> Second, the EPA’s scientific findings were so strong that the court could hardly call them into question, especially concerning a complicated process like Air Dispersion Analysis.<sup>189</sup> Given the scientific nature of the action and the plain language of Section 126, the court properly applied the hard look doctrine.<sup>190</sup>

## VI. IMPACT

The Third Circuit’s ruling in *GenOn REMA* is likely to affect NAAQS and SIP regulations in at least one area: the ruling will likely increase the number of Section 126(b) petitions submitted by

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185. See H.R. REP. NO. 95-294, at 330 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1409 (discussing Senate Committee’s view of 1970 provisions). Congress believed that the 1970 provisions were inadequate, particularly in their failure to “specify any abatement procedure” if a source in one state emitted air pollutants that “adversely affected the air quality control efforts of another State.” *Id.*

186. For an explanation of why the Third Circuit’s interpretation comports with congressional intent, see *supra* notes 178-186 and accompanying text.

187. *N.J. Evtl. Fed. v. U.S. Nuclear Regulatory Comm’n*, 645 F.3d 220, 228 (3d Cir. 2011) (establishing hard look doctrine with regard to EPA’s scientific determinations).

188. 42 U.S.C. § 7426(c) (2012) (providing information for controls on specific sources). Specifically, the statute provides:

The Administrator may permit the continued operation of a source referred to in paragraph (2) beyond the expiration of such three-month period if such source complies with such emission limitations and compliance schedules (containing increments of progress) as may be provided by the Administrator to bring about compliance with the requirements contained in section 7410 (a)(2)(D)(ii) of this title or this section as expeditiously as practicable, but in no case later than three years after the date of such finding.

*Id.*

189. See *GenOn REMA, LLC v. EPA*, 722 F.3d 513, 526 (3d Cir. 2013) (discussing scientific complexity of action).

190. *Id.* (citing *Prometheus Radio Proj. v. FCC*, 373 F.3d 372, 389–90 (3d Cir. 2004)) (stating EPA articulated more than required amount of scientific data).

downwind states as they struggle to attain NAAQS standards.<sup>191</sup> However, how widespread Section 126(b) petitions may become is largely tied to CSAPR's fate in the Supreme Court.<sup>192</sup> Still, an increase in section 126(b) petitions does not mean the EPA will increase its use of direct federal controls, as *GenOn REMA* may potentially be an isolated incident.<sup>193</sup>

The decision in *GenOn REMA* may lead to an increase in OTC states pursuing 126(b) petitions, especially in lieu of a robust interstate transport rule such as CSAPR.<sup>194</sup> Currently, OTC states and other downwind states are resigned to submitting formal comments on upwind states' SIPs and are attempting to expand the OTC's size.<sup>195</sup> These methods, however, have been unsuccessful thus far.<sup>196</sup> Filing Section 126(b) petitions seems like an effective alternative avenue for OTC states to limit emissions from upwind states.<sup>197</sup> The ability for downwind states to do so, however, is not without limit.<sup>198</sup>

The decision in *GenOn REMA* was predicated on strong findings that Portland was the sole reason four counties in New Jersey would be in nonattainment.<sup>199</sup> As a result, states pursuing Section 126 petitions may struggle to persuade the EPA and the courts to make a finding in situations differing from *GenOn REMA*.<sup>200</sup> Where

191. For a discussion of states' potential to increase use of 126(b) petitions see, *infra* notes 194-215 and accompanying text.

192. For a discussion of the status of the Transport Rule at the time of this writing, see *supra* notes 61-76 and accompanying text.

193. For a discussion of why *GenOn REMA* may be an isolated incident, see *infra* notes 199-202 and accompanying text.

194. *Eastern States Weigh Legal, Regulatory Options to Curb Upwind Emissions*, INSIDE EPA (Apr. 12, 2013), <http://insideepa.com/Inside-EPA/Inside-EPA-04/12/2013/eastern-states-weigh-legal-regulatory-options-to-curb-upwind-emissions/menu-id-153.html> (proposing Section 126(b) petitions as option to combat interstate air pollution).

195. *See id.* (noting current efforts of states with lack of transport regulation).

196. *See id.* (explaining pushback from upwind states and lack of success from submitting formal comments).

197. For a discussion of why Section 126(b) may be a viable way for downwind states to address interstate air pollution, see *infra* notes 199-215 and accompanying text.

198. Chris Knight, *3rd Circuit Ruling Could Boost Petitions Asking EPA to Curb Air Transport*, INSIDE EPA (July 16, 2010), <http://insideepa.com/201307162440941/EPA-Daily-News/Daily-News/3rd-circuit-ruling-could-boost-petitions-asking-epa-to-curb-air-transport/menu-id-986.html> (stating downwind states' ability to combat air transport after *GenOn REMA* would be difficult in other situations).

199. *See* Portland Rule, *supra* note 32, at 69,057 (explaining results of air modeling analysis).

200. For a discussion of the deference given to strong scientific findings equating to a stronger chance of success for 126(b) petitions, see *supra* notes 107-122 and accompanying text.

states identify major sources of interstate air pollution using air dispersal modeling similar to NJ DEP's modeling, however, the EPA may grant 126(b) petitions.<sup>201</sup> *GenOn REMA* and prior jurisprudence further indicate that if the EPA grants a petition, courts will likely uphold it.<sup>202</sup> Such a trend is already occurring in other OTC states.<sup>203</sup>

A town in Maine recently filed a 126(b) petition under similar circumstances as in *GenOn REMA*.<sup>204</sup> The town of Eliot, supported by the Sierra Club, found "emissions from Schiller Station impact Eliot's ability to attain and maintain the 1-hour SO<sub>2</sub> NAAQS and that this impact would be mitigated by regulation of SO<sub>2</sub> emissions from the plant."<sup>205</sup> Such similarity is no coincidence, and, as a Sierra Club representative stated, "What Sierra Club did after seeing the Portland petition process play out, [was say] this is quite interesting, and start[ ] looking at power plants and doing the same modeling that [the] EPA and New Jersey did."<sup>206</sup> Eliot's petition employed the same air modeling analysis as the NJ DEP's and asked the EPA to force emission cuts in the same manner as the Portland facility.<sup>207</sup>

Whether the EPA will grant the petition is unknown; however, on November 8, 2013, the EPA issued a Federal Register notice indicating it required additional time to decide on the petition.<sup>208</sup> The EPA issued the extension, stating, "60 days is insufficient time to complete the technical and other analyses and public notice-and-comment process required for our review of a petition submitted by the Town of Eliot."<sup>209</sup> The power plant at issue in the Eliot petition is different from Portland in many respects.<sup>210</sup> Portland was a 400-

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201. See generally Portland Rule, *supra* note 32 (approving of DEP air modeling analysis).

202. For a discussion of why courts are likely to uphold EPA actions, see *supra* notes 100-122 and accompanying text.

203. See Knight, *supra* note 198 (indicating states are more willing to prepare 126(b) petitions following *GenOn REMA*).

204. See *id.* (discussing facts surrounding Schiller power plant).

205. Extension of Deadline for Action on the Section 126 Petition from Eliot, Maine, 78 Fed. Reg. 67,036, 67,036 (Oct. 15, 2013) (to be codified at 40 C.F.R. Pt. 52) [hereinafter *Deadline Extension*] (providing extension of deadline for EPA decision).

206. See Knight, *supra* note 198 (explaining Sierra Club's technique moving forward).

207. See *id.* (describing downwind states' effort to use modeling similar to NJ DEP's).

208. See *Deadline Extension*, *supra* note 205, at 67,036 (providing extension of deadline for EPA decision).

209. *Id.* (stating reason for extension).

210. *Id.* (describing power plant).

kilowatt power plant with almost no pollution controls installed, while Schiller is a 100-kilowatt power plant that also burns biomass for fuel.<sup>211</sup> Eliot's action, however, may be illustrative of a new strategy for groups interested in curbing interstate pollution transport.<sup>212</sup>

The *GenOn REMA* decision compelled large environmental groups, such as the Sierra Club, to seek large SO<sub>2</sub> emitters and offer modeling free of charge to the affected area.<sup>213</sup> The Sierra Club has expressed this type of advocacy may increase pending the Eliot petition's success.<sup>214</sup> While downwind states live without a multi-state transport rule, the source-by-source basis offered by 126(b) may be all that is available.<sup>215</sup>

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211. Compare *GenOn REMA, LLC v. EPA*, 722 F.3d 513, 515-16 (3d Cir. 2013) (stating capacity of Portland power plant), with Extension of Deadline for Action on the Section 126 Petition from Eliot, Maine, 78 Fed. Reg. 67,036, 67.036 (Oct. 15, 2013) (to be codified at 40 C.F.R. Pt. 52) (noting Schiller Power Plant's size).

212. For a discussion of Sierra Club's involvement in the Eliot petition, see *supra* notes 204-207 and accompanying text.

213. *Eliot Wants EPA Probe of Emissions from Plant*, PORTLAND HERALD PRESS (Nov. 23, 2013), [http://www.pressherald.com/news/Eliot\\_wants\\_EPA\\_probe\\_of\\_emissions\\_from\\_plant\\_.html?pagenum=full](http://www.pressherald.com/news/Eliot_wants_EPA_probe_of_emissions_from_plant_.html?pagenum=full) (noting Sierra Club offered funding for modeling analysis of Schiller emissions). The Sierra Club acted as part of its \$30 million beyond coal campaign. *Id.*

214. See Knight, *supra* note 198 (explaining possible future tactics of environmental groups to achieve compliance in downwind states).

215. For a discussion of multi-state transport rules and why 126(b) may be the only option to mitigate cross-state air pollution, see *supra* notes 61-95 and accompanying text.

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