About ten days ago, the D.C. Circuit struck down EPA's effort to establish a cap-and-trade system for pollutants that cross state lines. Now that I've had a chance to read the lengthy opinion in *EMR Homer City Generation v. EPA*, I'm struck by the aggressiveness of the court's intervention, which goes well beyond the customary degree of judicial oversight over agencies. The court comes perilously close to writing the rule itself (not to mention rewriting the statute).

Some background: The Clean Air Act requires states to establish plans to achieve air quality standards. The standards are set by EPA, which also has to approve the plans. Some states export pollution to downwind states. In what is often called the "good neighbor" provision of the statute, the – states' plans are required to contain provisions to prevent them from "significantly contributing" to violations of the national standards by downwind states.

EPA has tried to implement this provision three times, once in a more limited way, once under Bush, and once under Obama. The D.C. Circuit shocked all parties by striking down the entire Bush plan rather than the limited portions that were challenged; after everyone protested, the court decided to leave the invalid Bush rule in effect until EPA issued a valid one.

The case involved two issues. One aggressive aspect of the court's opinion is that these issues may not have been properly before the court in the first place, as the dissent argues.

What is a significant contribution? EPA has consistently tried to allocate burdens among the up-wind states in a way that takes economic burdens in account. The D.C. Circuit's first opinion on the "good neighbor" provision seemed to say that "significance" could include cost as a factor. The current decision says no, significance has to be measured purely in terms of proportions of air pollutants. The court then provides several numerical examples to tell EPA how it has to measure significance. This degree of detailed direction from a court to an agency about how to do its job is extraordinary.

The court's current interpretation of the "significance" requirement also seems to violate the plain language of the statute. In order to reconcile its current decision with the first decision, the court says that EPA has to set a "significant" level of pollutants, but then can reduce that for a given state based on economic burden. But that violates the rights of the downwind state. The statute prohibits states from contributing significantly to violations of the national standards in downwind states. There's no hardship exemption from this, just as there is no hardship exemption from the other provisions of the same section of the law (section 110). Thus, there is no basis for reducing a state's obligation below its "mark" (the significance level).

Do the states get a chance to come up with voluntary plans? The court says yes, because the states had no obligation to take the first step until EPA gave them quantitative obligations. EPA had previously told the states that they did have to take the first step, and then had disapproved their efforts and introduced its own. There are two big problems with the court's ruling on this point. First, it's based entirely on the court's vision of what makes sense; the language of the statute says nothing about this. Congress knows how to condition state obligations on prior EPA action when it wants to do so; it didn't do that here. Second, a prior EPA rule required the states to submit their plans first. That rule was not challenged in this case, and could not be challenged because the time for doing so had run out. But the court in effect invalidated it anyway.

Admittedly, implementation of the "good neighbor" provision of the statute has been very complex and confusing. Nevertheless, it seems to me that the majority has gone beyond its limited role as a reviewing court in this case.

The history of this issue is ironic. Maybe it would have been easier for the agency to follow something along the lines that the court now dictates. EPA didn't do so because it wanted to reduce the cost of achieving the statute's goal of protecting downwind states. The complicated handling of "significance" and the use of cap-and-trade were the result of those efforts.

The D.C. Circuit has created a real mess. It has invalidated EPA's efforts to lower costs and distribute them fairly. Yet at the same time, it has left one of those efforts in effect until EPA manages to satisfy its demands (although the court now says its patience may be limited). The court is apparently trying to speed up the process by eliminating the goals of minimizing costs and spreading burdens fairly, and then drafting most of the rule itself.