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## It's a Beautiful Day in the Neighborhood: "Good Neighbor Provisions" versus Federalism in the Clean Air Act (/full-blog/2013/10/its-beautiful-day-in-neighborhood-good.html)



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By: Ellen Black, Staff Member

The Clean Air Act (CAA) authorizes the Environmental Protection Agency (EPA) to establish National Ambient Air Quality Standards (NAAQS) for "certain pervasive air pollutants."<sup>[1]</sup> ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn1](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn1)) A "defining feature" of the CAA is a "cooperative federalism" structure where states implement these federal NAAQS through State Implementation Plans (SIPs). <sup>[2]</sup> ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn2](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn2)) Another distinctive characteristic is its "good neighbor provision," prohibiting "sources...within a state from emitting air pollutants in amounts that will interfere" with another state's ability to maintain its own NAAQS.<sup>[3]</sup> ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn3](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn3)) Section 126(b) then offers a remedy for a state that is downwind of a violation by allowing a petition to the EPA for a finding of interference.<sup>[4]</sup> ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn4](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn4)) If a violation is found, the upwind "polluting source must cease operations."<sup>[5]</sup> ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn5](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn5))

In 2010, the EPA made the NAAQS for sulfur dioxide more stringent, and affected states were required to submit revised SIPs by 2013.<sup>[6]</sup> ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn6](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn6)) Shortly after this change, New Jersey filed a \$126(b)

petition against the GenOn REMA Portland plant in Pennsylvania, now newly in violation, claiming sulfur dioxide from Portland was interfering with New Jersey's NAAQS. [7] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn7](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn7)) The EPA investigated, found the plant to be in violation and thus issued "the Portland Rule," imposing "direct limits on...emissions" to reduce pollution by 2013.[8] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn8](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn8))

GenOn then sued, citing a federalism argument that they must have the full time until 2013 to submit their revised SIP before the federal government can enforce under §126(b).[9] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn9](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn9)) The Third Circuit rejected GenOn's argument, holding that the "EPA was permitted to make a finding in a downwind state's petition without regard for the SIP process." [10] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn10](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn10)) The court upheld the Portland Rule as a reasonable interpretation that §126(b), defined as "an independent mechanism for enforcing interstate pollution control." [11] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn11](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn11))

In upholding the EPA's novel construction of the CAA to separate the SIP process and the §126(b) mechanism, the Third Circuit followed an established three-step framework:[12] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn12](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn12)) the two-part Chevron [13] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn13](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn13)) test, which examines the language and then legislative history of an Act,[14] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn14](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn14)) followed by the application a narrow standard of review.[15] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn15](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn15))

First, the court must determine whether Congress has "unambiguously expressed [its] intent" by examining the "plain" and "literal" language of the statute through "the language itself, the specific context,...and the broader context....as a whole." [16] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn16](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn16)) The court found that the SIP and §126(b) processes were sufficiently and necessarily distinct in the language of the CAA to support the EPA's separation of them. [17] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn17](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn17)) Second, through the legislative history, the court determined cooperative federalism was not actually the rationale for enacting §126(b) in the CAA. [18] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn18](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn18)) Rather, the motivation for §126(b) was to ameliorate problems of interstate pollution not addressed in the Act by providing downwind states "an incentive and need to act," via a "separate and alternative method." [19] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn19](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn19)) Third, the court determined the §126(b) time frame in the "Portland Rule" was not "arbitrary, capricious, or an abuse of agency discretion" since the EPA's reasonably acted after confirming that New Jersey was being impaired.[20] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn20](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn20))

In upholding this distinction between SIPs and §126(b) petitions, the Third Circuit narrowed states' ability to construct their own plans through "cooperative federalism." However, this maintains an important safety net for downwind states to better rectify harmful interstate pollution without having to wait the completion of the SIP process. Furthermore, this decision provides the persuasive analytical framework for future courts in the proliferating "good neighbor provision" violation litigation that is emerging across the country.[21] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftn21](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftn21))

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[1] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftnf1](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftnf1)) GenOn REMA, LLC v. U.S. EPA, 722 F.3d 513, 516 (3d Cir. 2013) (citing 42 U.S.C. §§ 7408, 7409).

[2] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftnf2](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftnf2)) GenOn REMA, 722 F.3d at 516.

[3] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftnf3](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftnf3)) Id. at 516-17.

[4] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftnf4](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftnf4)) Id.

[5] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftnf5](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftnf5)) Id.

[6] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftnf6](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftnf6)) GenOn REMA, 722 F.3d at 517-518.

[7] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftnf7](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftnf7)) Id. at 518; see also Lorraine McCarthy, EPA Grants Petition to Limit Sulfur Dioxide From Coal-Fired Power Plant in Pennsylvania, Bloomberg RNA 42 ENR 2458, (Nov. 4, 2011).

[8] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_ftnf8](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_ftnf8)) GenOn REMA, 722 F.3d at 516, 518.

- [9] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_finref9](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_finref9)) Jessica Coomes, Appeals Court Upholds EPA Rule to Limit Emissions From Pennsylvania Power Plant, Bloomberg BNA 44 ENR 2117 (June 19, 2013).
- [10] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_finref10](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_finref10)) GenOn, REMA, 722 F.3d at 513.
- [11] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_finref11](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_finref11)) Id. at 526-27.
- [12] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_finref12](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_finref12)) Id. at 519, 525.
- [13] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_finref13](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_finref13)) Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).
- [14] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_finref14](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_finref14)) Id. at 519 (citing Hagens v. Comm'r of Soc. Sec., 694 F.3d 287, 294 (3d Cir.2012)).
- [15] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_finref15](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_finref15)) Id. at 525 (citing 42 U.S.C. § 7607(d)(9)(A); North Carolina v. EPA, 531 F.3d 896, 906 (D.C.Cir.2008)).
- [16] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_finref16](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_finref16)) GenOn, REMA, 722 F.3d at 519 (citing United States v. Geiter, 527 F.3d 288, 294 (3d Cir.2008)).
- [17] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_finref17](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_finref17)) Id. at 521.
- [18] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_finref18](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_finref18)) Id. at 522.
- [19] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_finref19](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_finref19)) Id. (citing H.R.Rep. No. 95-294, at 330 (1977), reprinted in 4 1977 Legislative History of the Clean Air Act Amendments of 1977, at 2797).
- [20] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_finref20](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_finref20)) Id. at 525-26.
- [21] ([http://www.blogger.com/blogger.g?blogID=8202935745006855383#\\_finref21](http://www.blogger.com/blogger.g?blogID=8202935745006855383#_finref21)) See Andrew Childers, Tennessee, Kentucky Ozone Plans Lack 'Good Neighbor' Provisions, Law360, Bloomberg BNA 44 ENR 1373 (May 10, 2013); Jessica Coomes, States, Cities Urge U.S. Supreme Court To Review EPA Cross-State Rule Case, Bloomberg BNA 28 TXLR 479 (Apr. 25, 2013).

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