



FOLEY  
HOAG LLP

*Recent Developments in Clean Air  
Act and Climate Change Litigation*

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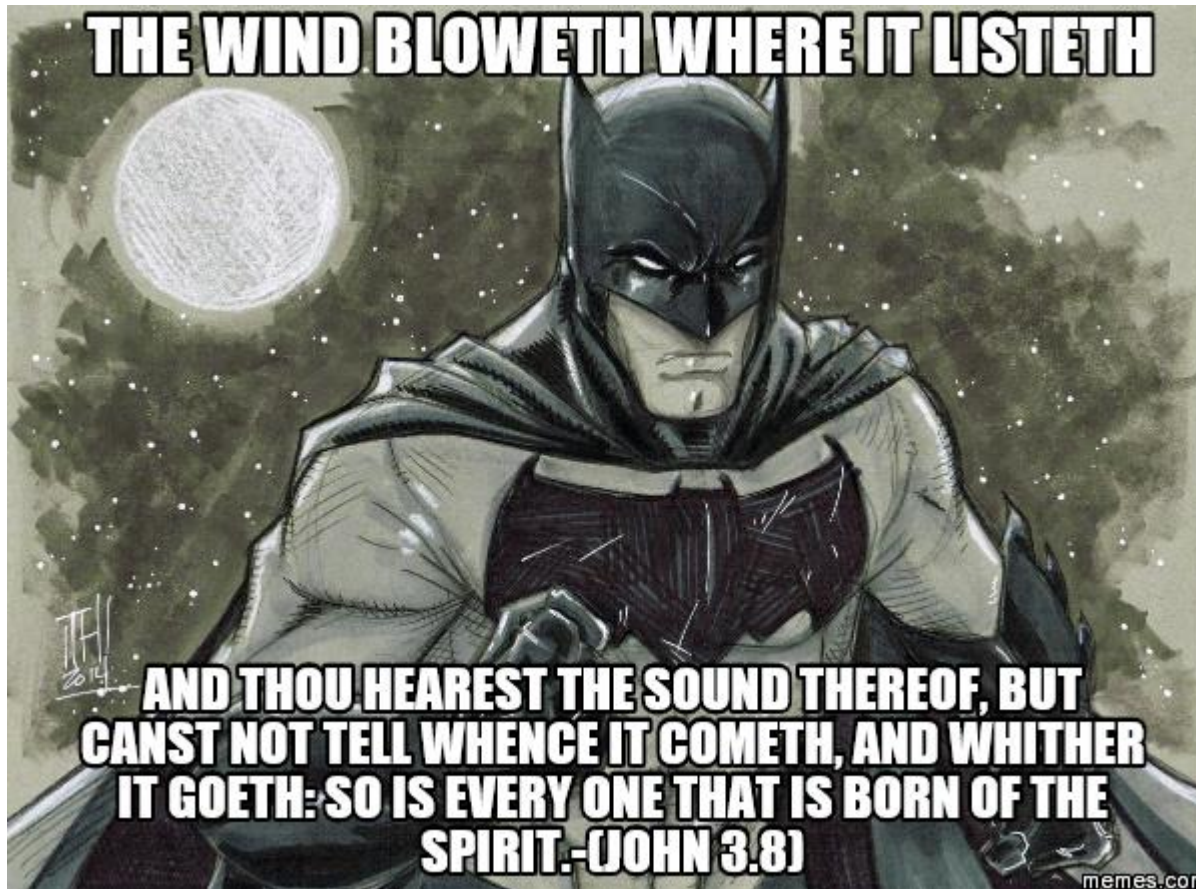
# A Short History of EPA's Efforts to Promulgate a Transport Rule

- The CAA Good Neighbor Provision – State SIPs must prohibit sources from emitting air pollutants “in amounts which will ... contribute significant to nonattainment in ... any other state”
- 2005 – Clean Air Interstate Rule
- Vacated by D.C. Circuit in 2008 (531 F.3d 896 (D.C. Cir. 2008))
- D.C. Circuit changed course and allowed CAIR to remain in place
- Transport Rule finalized in 2011  
(CASPR)



# The Supreme Court Decision in EME Homer City

- “The wind bloweth where it listeth, and thou hearest the sound thereof, but canst not tell whence it cometh, and whither it goeth.”



- EPA's authority over upwind states extends only to amounts of pollution that contribute significant to downwind nonattainment
- EPA's allocation method was reasonable under Chevron
- EPA had discretion to consider cost-effectiveness of control options
- Possibility of over-control doesn't invalidate entire regulation; plaintiffs retain as-applied challenges
- *EPA v. EME Homer City Generation*, 134 S.Ct. 158 (2014)



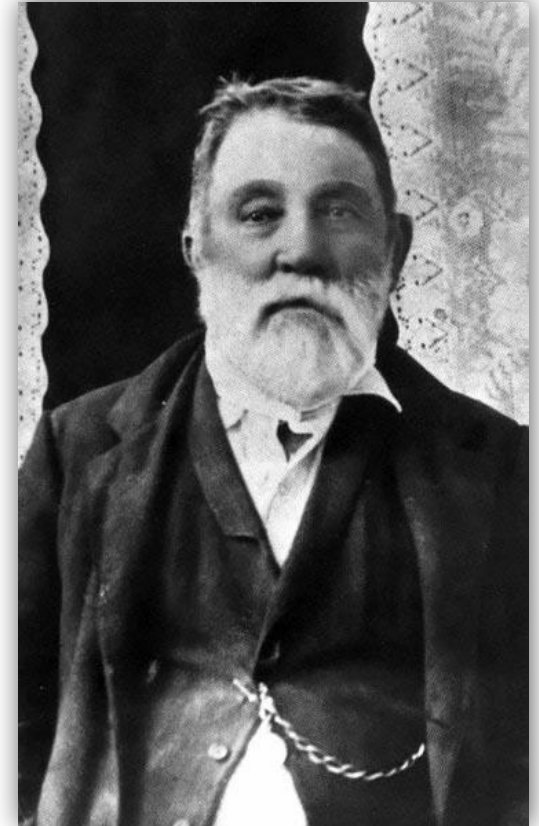
## National Good Neighbors Day



- The SC said that EPA may not require “an upwind State to reduce emissions by more than the amount necessary to achieve attainment in *every* downwind State to which it is linked”
- DC Circuit on remand evaluated as-applied challenges ([http://www.cadc.uscourts.gov/internet/opinions.nsf/655D7E495535B1FA85257E90005163D7/\\$file/11-1302-1564814.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/655D7E495535B1FA85257E90005163D7/$file/11-1302-1564814.pdf))
- EPA did not even try to defend the budgets by arguing that they were the minimum needed to assure attainment in all downwind states
- Court rejected EPA’s policy arguments in defense of the budgets
- Court remanded without vacatur, keeping the 2014 budgets in place

## EPA's NSR Enforcement Initiative

- 15-20 year effort by EPA to take enforcement action against large EGUs (and others) who failed to comply with NSR/PSD preconstruction requirements
- The most successful environmental program that shouldn't exist
- Many settlements with a total of billions of dollars of control projects as a result
- Initially, limited litigation and substantial success for EPA
- More recently, increasing judicial skepticism



- Complete defeat for EPA
- Confirmed that PSD is a **pre-construction** review program
- No continuing violations
- No penalties for violations more than 5 years prior to suit
- No injunctive relief
  - Because statute authorize pre-construction injunctive relief, it impliedly prohibits post-construction relief
  - The “concurrent remedy” doctrine bars injunctive relief where legal claims are barred by statute of limitations
- <http://www.lawandenvironment.com/wp-content/uploads/sites/5/2015/08/luminant-opinion.pdf>



- Basic theory – Atmosphere is public trust which sovereign has obligation to protect for future generations
- Many cases brought by Our Children's Trust  
<http://ourchildrenstrust.org/>



- Climate change significant risk to public trust resource
- Agencies have to do more to address the risk

- *Alec L. v. Jackson*  
([http://www.eenews.net/assets/2012/06/01/document\\_gw\\_03.pdf](http://www.eenews.net/assets/2012/06/01/document_gw_03.pdf))
  - No federal public trust doctrine (but recent new case filed)
  - If there ever had been, it was displaced by the CAA, citing *AEP*
- *Sanders-Reed v. Martinez*
  - Public trust claim under New Mexico law
  - Survived motion to dismiss – no comprehensive decision
  - Request for interlocutory appeal denied

- *Foster v. Washington Department of Ecology*  
([http://ourchildrenstrust.org/sites/default/files/Order\\_Fosterv.Ecology.pdf](http://ourchildrenstrust.org/sites/default/files/Order_Fosterv.Ecology.pdf))
  - Not technically a public trust case
  - Turns on Washington statutory requirement that DOE periodically inform legislature if more stringent climate legislation is required
  - Court ruled that DOE had not justified report stating that no changes to emissions limits are required at this time
- *Dutch Climate Litigation*
  - June 2015 decision requires Dutch government to reduce emissions by 25% within five years
  - Based on “human rights and tort law”