

The Supreme Court agreed this morning to review a D.C. Circuit opinion that had struck down EPA's effort to curb interstate pollution. This is welcome news. As I [wrote](#) when the lower court ruled:

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). . . .

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.