

Before I even get to the majority opinion in *Center for Biological Diversity v. EPA*, a quick word about the concurring opinion by [Judge Brett Kavanaugh](#). Kavanaugh may be the most outspoken conservative on a court composed almost entirely of Republican appointees. So what he has to say about climate change is really noteworthy:

In saying that [EPA's action in the case was invalid], I do not want to diminish EPA's vital public objectives in addressing global warming. The task of dealing with global warming is urgent and important at the national and international level.

Now, onward to the facts of last Friday's decision.

EPA issued a rule postponing for three years the application of certain permitting requirements to emission sources that use biofuels. The reason was that it was unsure how many of the sources actually contribute anything significant to climate change, given that the biofuels are derived from plants that actually remove carbon from the atmosphere. EPA wanted more time to study the issue before jumping in with new regulations, especially since permit authorities were already stretched thin given the need to consider other sources of greenhouse gases. Dissenting Judge Karen LeCraft Henderson (a Bush appointee) thought EPA's view was very reasonable.

Writing for himself and Judge Kavanaugh, however, Judge David Tatel (a Clinton appointee) rejected EPA's position for two main reasons. First, EPA had said it was taking "one step at a time" in dealing with the problem, but EPA had never articulated its interpretation of the statute or how the new information it was seeking would be relevant. Second, EPA had rejected without sufficient explanation an alternative — requiring sources simply to take *some* steps toward measuring their net CO<sub>2</sub> emissions and reducing them, while the issue was being thrashed out. Since EPA is often faced with some degree of uncertainty in dealing with a new problem, this decision gives some important guidance about what EPA can and cannot do in the meantime.

EPA apparently wanted to encourage the use of biofuels, while the environmental plaintiffs seem to view biofuels as a cheap cop-out in terms of combating climate change. Neither side really won on that issue because the court didn't decide the big issue raised by the challengers: whether EPA can offset the emissions from burning the fuel against the carbon removed from the air when the feedstock was grown. Judge Henderson thought this was consistent with the statute, while Kavanaugh opined in dictum that it was not — but the

majority opinion carefully avoids taking a position.

Finally, there's an interesting omission from the opinion. The Court never explains why the challengers have standing — is it because of the impact of a few biofuel plants on climate change (if there is any), or non-greenhouse emissions from the plants, or something else altogether (like the ecological impact of growing and processing the feedstock)? We don't know, and it seems odd that the opinion didn't mention that. Maybe Tatel and Kavanaugh both thought there was standing but didn't agree on why. or maybe the existence of standing was obvious on the basis of other facts in the record (so no need to discuss it), or maybe they just overlooked the issue (not likely these days).