Texas has lost another round of its battle to halt EPA regulation of greenhouse gases — this time involving its effort to drag its feet on implementation of the regulations even if it could not undo them. The effect of Texas's action is that it lost the ability to help shape how the rules apply to Texas industry, instead handing additional power to EPA. In the Wild West, this was called shooting yourself in the foot.

The issue related to rules for permits for greenhouse gas sources. When EPA issued regulations limiting greenhouse gases from new vehicles, it also announced that this action automatically triggered an important requirement for stationary sources such as power plants. Under EPA's view, major new stationary sources were now covered by the law's PSD permitting requirements in terms of greenhouse gases. EPA informed the states of this new requirement and gave them the options of amending their permitting rules or letting EPA issue the permits. Although all of the other states were willing to work with EPA to implement new rules, Texas refused. On August 2, 2010, the state environmental board and its attorney general sent a defiant joint letter to EPA. "On behalf of the State of Texas," they said, "we write to inform you that Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gases." EPA then declared Texas environmental law out of compliance and took over the permitting itself.

In an opinion issued Friday, Texas lost its legal bid to overturn EPA's actions. The two-judge majority ruled that the plain language of the Clean Air Act directly created the permitting requirement, with or without further EPA action, the moment EPA issued the vehicle emissions rule. Thus, Texas sources immediately became subject to the permit requirement. The state lacked standing to complain about EPA's decision to step in and issue new permits, since otherwise the state's industries would have no way to get a permit. The dissenting judge (Kavanaugh) argued that an EPA regulation about permitting entitled the states to more time to set up their programs — but he was never able to explain how this regulation could possibly trump the requirements of the statute itself.

The majority opinion, by Reagan appointee Judith Rogers, was especially scornful about Texas's efforts to invoke the Clean Air Act's scheme of "cooperative federalism." She pointed out that:

> [*All the other states] worked cooperatively with EPA to revise their SIPs and to ensure permitting continuity promptly and as needed. Texas alone did not, informing EPA that it had "no intention" of revising its SIP because of its disagreement with EPA's regulation of greenhouse gases under the Act. Invoking "cooperative federalism" in these circumstances has a hollow ring.*

Indeed, although the name of the state derives from an Indian word meaning “friendship,” its attitude in this case was pointlessly confrontational. Along with other states, it had filed a separate lawsuit challenging EPA’s decision to regulate vehicle emissions of greenhouse gases. If that lawsuit was successful, it would automatically void the permitting requirement. But if the other lawsuit failed — as it did in another recent D.C. Circuit decision — there was no point to foot-dragging on the permit requirement. Apparently, unlike their equally conservative colleagues in other states, Texas officials preferred to grandstand rather than in engage in practical policy making.

The result of all this is that EPA now gets to decide on its own what control measures are required for Texas industry, and the State of Texas has dealt itself out of the game.