

DC Circuit's Unanimous Decision to Uphold Greenhouse Gas Rules  
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As Dan just noted, the U.S. Court of Appeals for the D.C. Circuit — in a unanimous decision — handed the U.S. EPA a sweeping victory in upholding across the board four separate components of the agency's rules to regulate greenhouse gas emissions. The opinion can be found [here](#).

A little background is in order here. The U.S. Supreme Court's decision in [Massachusetts v. EPA](#) directed the Environmental Protection Agency to decide whether greenhouse gases are pollutants that must be regulated under the federal Clean Air Act. The Bush Administration had refused to make such a finding despite petitions from states and environmental groups asking that emissions be regulated. The rules that are subject to today's ruling — the case is called *Coalition for Responsible Regulation v. EPA* — are the direct result of the Supreme Court's *Mass v. EPA* decision.

EPA's first decision was to find — as required under the Clean Air Act as interpreted in *Mass v EPA* — that greenhouse gases endanger public health and welfare. The D.C. Circuit found that the EPA did not act arbitrarily and capriciously when it made its endangerment finding.

EPA's next decision was to issue what is known as the "tailpipe rule." The tailpipe rule establishes greenhouse gas emissions standards for automobiles under Section 202 of the Clean Air Act. What is somewhat odd about the challenge to the tailpipe rule in the new *Coalition for Responsible Regulation* case is that the challengers to the rule are not auto companies but are instead largely made up of businesses that operate what are known as "stationary sources," — factories that emit pollutants. They argued that the EPA should not have issued the tailpipe rule regulating greenhouse gases from cars because if the agency did so, the next obvious step under separate provisions of the Clean Air Act would be that the agency would have to regulate greenhouse gas emissions from stationary sources.

That's because once pollutants are regulated under one provision of the act the new regulation triggers other provisions of the act. Industry argued that the cost implications of regulating greenhouse gas emissions from stationary sources were so large that the EPA should not have regulated tailpipe emissions. The court rejected this argument, holding instead that the EPA lacked any discretion at all in setting tailpipe emissions once it found that that greenhouse gases endanger public health and welfare. In other words, the Clean Air Act required the EPA to regulate greenhouse gas tailpipe emissions - the agency had no choice.

The third and fourth rules that are at issue in today's case are called the "timing" and "tailoring" rules. These rules together work roughly as follows: regulation of greenhouse gases for automobiles automatically triggers a different section of the Clean Air Act, what is

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known as the prevention of significant deterioration section (PSD). That section basically requires the EPA to regulate the emissions of any “major” source of a “regulated” pollutant. “Major” is defined in the Clean Air Act to regulate any source that emits 100 tons per year of a regulated pollutant. The problem for the EPA is that the 100 tons per year amount would subject very, very small sources (a single home, perhaps, certainly apartment buildings and small businesses) to the permitting provisions of the Clean Air Act, something that those small sources have never had to comply with and that would be extremely expensive and administratively burdensome. So in the “tailoring” rule, the EPA only subjected large sources — new sources emitting 100,000 tons per year or more and existing sources making modifications that would increase emissions by 75,000 tons per year or more — to its greenhouse gas rules. Industry challenged both the application of the Clean Air Act to stationary sources and the tailoring rule as an impermissive interpretation of the Clean Air Act. In today’s ruling, the court found that the EPA is legally justified — indeed required — to regulate greenhouse gas emissions from stationary sources under the PSD provisions of the act. But it also found that none of the plaintiffs in the case — which included industry groups and states like Texas that oppose the regulations — have standing to challenge the rules. That means that the plaintiffs do not meet constitutional requirements to bring a case in court. More specifically, the court found, the plaintiffs have not been injured by a rule that *exempts* small sources from regulation even if the larger businesses themselves will be subject to regulation. This finding is somewhat ironic because industry for years has challenged the standing of environmental plaintiffs to challenge various government rules and the Supreme Court has tightened standing rules over the years. Those tighter rules were used today to limit industry’s ability to challenge rules that don’t directly apply to them.

It seems safe to predict that the legal battles over the greenhouse gas rules are far from over. Expect plaintiffs to petition the U.S. Supreme Court for review. If the high court agrees to take the case, my bet is that the standing portion of the case is the most vulnerable: if the Supreme Court finds that industry and states have standing to sue, then the whole question of the legality of the timing and tailoring rules will be back in front of the D.C Circuit to decide on their merits. But for today, this is a huge victory for the Environmental Protection Agency.