As I described in my earlier post of today about the *Coalition for Responsible Regulation v. EPA* decision upholding the Environmental Protection Agency's greenhouse gas emissions rules, the D.C. Circuit Court of Appeals found that the plaintiffs — groups representing large industrial and manufacturing facilities and states that oppose any greenhouse gas regulations under the Clean Air Act, like Texas — lacked standing to challenge the so-called "tailoring rule." The tailoring rule exempts small stationary sources from regulation of their carbon emissions. The court held that neither the business groups nor the challenging states could establish injury from a rule that exempted small businesses from regulation. Businesses that are not being regulated under the rule are not injured, according to the court's reasoning. Business groups were in a bit of a condundrum in making their legal claims: on the one hand, they were arguing that the EPA should never have regulated climate change in the first instance because the science is uncertain; if the EPA were to regulate, however, they argued that it should regulate more, not fewer, businesses in order to comply with the Clean Air Act statutory language even though they don't believe regulation is necessary or lawful.

In the comments section of the earlier post, Professor Jim Salzman of Duke Law School, asked Dan Farber and I how a business group could have successfully established standing. Dan's reply is worth repeating here:

> It seems to me that the easiest standing claim in terms of the tailoring rule would be competitive injury — the plaintiff will be subject to regulation but not smaller competitors, who thereby gain a cost advantage. And, after all, the Chamber of Commerce and others do fundamentally represent big business, not small. But probably the political blow-back from this kind of claim would be too severe.

So a business that is regulated under the tailoring rule who is just above the regulatory threshold(100,000 tons per year) could argue that exempting its competitor who emits an amount just below the regulatory threshhold puts the regulated business at a competitive disadvantage, thus causing injury sufficient to establish injury. Such a business might be a good plaintiff to challenge the rule.

But business plaintiffs are only half of the puzzle. After all the state of Texas led a highly publicized attack on the EPA rules on grounds similar to the business groups.

Texas argued that the EPA should not regulate climate change at all under the Clean Air Act but that if the agency is going to regulate any stationary sources it should not exempt small sources from permitting requirements because such an exemption is inconsistent with the plain language of the CAA. The court found, however, that the exemption helps states like Texas, who will be involved in the administration of the permitting program, by lessening their administrative burden and therefore the state lacks standing to challenge the rule becasue the state isn't injured.

What kind of state, then, would make a good plaintiff that could establish standing? A state whose political leadership acknowledges that climate change is happening. A state that is willing to argue that it will be harmed by climate change — which Texas didn't acknowledge — could argue that exempting smaller sources from regulation under the tailoring rule will cause the state injury by failing to control greenhouse gas emissions that seem to be subject to regulation under the plain language of the Clean Air Act. Massachusetts made a similar argument in Massachusetts v. EPA — that it was injured by the EPA's failure to regulate greenhouse gases — and the Supreme Court found that Massachusetts had standing to sue. But states that are leaders on climate change — California, Massachusetts and other northeast states — are unlikely to be plaintiffs suing to throw out EPA rules that regulate greenhouse gases even if some sources are excluded from regulation. And states that *are* willing to sue — Texas, for example – are unlikely to want to acknowledge that they are harmed by climate change. It seems to me, then, that it will be easier to find a business willing to bring a challenge to the tailoring rule and who can establish standing than it will be to find a state who can be a successful plaintiff.