



On Monday, the Supreme Court will hear oral arguments in the biggest environmental law case of its current Term, *Utility Air Regulatory Group v. EPA*. Legal Planet colleagues Ann Carlson and Dan Farber have already posted their thoughts on the case. Let me add mine.

*Utility Air Regulatory Group* involves EPA's authority to regulate stationary sources of greenhouse gas emissions (factories, refineries and the like) under the federal Clean Air Act. A broad coalition of industry groups, supported by 12 red states led by Texas, is challenging those efforts, claiming that EPA is misreading and exceeding its authority under the Act. The D.C. Circuit Court of Appeals rejected their claims in a 2012 decision that provided a sweeping victory for EPA.

I agree with Dan and Ann that if the justices follow their traditional precedents interpreting the Clean Air Act and longstanding principles of administrative law, EPA should similarly prevail in the Supreme Court. But at least a couple of countervailing principles counsel caution. The first is the old adage that the Supreme Court seldom grants review in order to affirm—one that's especially apt in cases (like here) where there is no split of authority among the lower courts for the justices to resolve. Second, the Roberts Court has handed the regulated community a largely unbroken string of Supreme Court victories over government regulators in environmental law cases over the past few years.

Monday's arguments promise to be great spectator sport. The Court will hear fully 90 minutes of argument, rather than the one hour normally allocated to cases coming before the justices. That only happens in one or two high-profile cases a Term, and is likely a reflection of both the complex issues and multiple parties involved in *Utility Air*. (The "case" actually involves six separate petitions for certiorari that have been consolidated before the Court.)

Petitioners will be represented by two veteran advocates who argued these cases, albeit unsuccessfully, in the D.C. Circuit: Peter Keisler will argue on behalf of the industry groups, while Texas Solicitor General Jonathan Mitchell will do so on behalf of the 12 states that are similarly asking the Court to invalidate EPA's GHG emission regulations. Expect them to adopt the lawyers' version of the "good cop-bad cop" strategy, with Keisler taking a relatively measured position opposing EPA's regulatory initiative and Mitchell pursuing the more extreme stance reflected in his written arguments. (For example, Texas continues to assert that greenhouse gases

are not “air pollutants” subject to regulation under the Clean Air Act, despite the Court’s order directing the parties to limit their arguments to a narrower statutory issue. And in its brief on the merits Texas and its allied states harshly criticize EPA’s proposed rules limiting GHG emissions from stationary sources as imposing “near-ridiculous regulatory burdens” on industry.)

The government’s oral arguments on Monday should be equally memorable. They’ll reportedly be presented by U.S. Solicitor General Donald Verrilli himself, a decision that signals the legal, policy and political importance of the *Utility Air* case to the Obama Administration. It will be interesting to see if Verrilli’s oral argument tracks that of the government’s brief, in which it devoted the initial two-thirds of its written advocacy to a more narrow, compromise legal theory in support of the challenged EPA regulations than the broader position it advanced successfully in the D.C. Circuit.

Finally, the red states challenging the EPA GHG rules in *Utility Air* are counterbalanced by 15 respondent blue states—led by New York and California—allied with the federal government in defending EPA’s efforts to regulate stationary sources of GHG emissions under the Clean Air Act. That alliance is significant, inasmuch as it is the states, rather than the feds, who generally are on the front lines regulating air pollution from the nation’s stationary sources under delegated authority in the Clean Air Act. And the feds must especially welcome those states’ support in light of the rather surprising absence of amici support in this case for EPA from major environmental organizations.

All in all, Monday’s Supreme Court session should be fascinating legal and political theater, for all sorts of reasons. It’s unfortunate that Supreme Court arguments in momentous cases like *Utility Air* are not televised, but the justices steadfastly refuse to make their proceedings public in the same way that state and lower federal courts are increasingly doing. But that’s another story, and blog post...

One of my Legal Planet colleagues and I will be at the Supreme Court on Monday for the oral arguments. We’ll share our observations and predictions from Washington, D.C. shortly after the Court session adjourns.