 The venerable pastime of U.S. Supreme Court-watching always involves divergent opinions that, as Rick Frank noted, all should be taken with a grain (or even a pound) of salt. The outcome of *Utility Air Regulatory Group v. EPA* is decidedly uncertain, but I left the oral argument yesterday more optimistic than my Legal Planet colleague. (For those who are new to the discussion, note that we have described *UARG v. EPA* on this blog here, here, here, and here.)

Below, I share an overview of the oral argument and my analysis, as well as some thoughts from Sean Donahue (Donahue & Goldberg, LLP), Lead Counsel for environmental organization Respondents. Full disclosure: I co-authored an amicus brief in support of EPA in this case.

Bottom line upfront: the Justices have not yet staked out their positions, and the oral argument more resembled a climate policy roundtable than a statutory inquiry, but a decision that mostly favors EPA by Justices Kagan, Sotomayor, Breyer, Ginsburg, and Chief Justice Roberts seems most probable. (Justice Kennedy is a black box.)

Bubble Gum, Football, and Lightbulbs: The Oral Argument Play-By-Play

Private Petitioners. Peter Keisler, Partner at Sidley Austin and former Acting Attorney General of the United States, opened the oral argument on behalf of private Petitioners. Although the Court initially allotted Keisler 30 minutes, it ultimately allowed him 35 minutes to lay out the alternative statutory interpretations advanced by numerous industry groups. Overall, Keisler was natural and masterful at the podium, while skillfully fielding the most aggressive questioning of the morning. Indeed, Keisler was barely into his opening sentences when Justices Kagan, Sotomayor, and Ginsburg laid into him with fierce rounds of

questioning that seemed designed to rattle him and expose weaknesses in Petitioners' positions.

In contrast to the more limited and nuanced statutory interpretation argument Keisler argued below in the D.C. Ciruit, Keisler began yesterday's argument with the harder-line position that greenhouse gases (GHGs) are inherently incompatible with the Clean Air Act's (CAA) Prevention of Significant Deterioration (PSD) provisions because GHG emissions are globally undifferentiated and do not have localized impacts.

Justice Kagan immediately asked Keisler to clarify which of the Petitioners' many alternative interpretations of the term "any air pollutant" he was advancing. She laid out the five main alterative interpretations, and thus demonstrated—as she would continue to do throughout the morning—her singular command of the legal questions at issue in the case. Later on, her follow-up questions indicated she understood that there was no easy answer to the statutory interpretation questions in this case, even pressing Keisler to admit that Petitioners' interpretation does greater violence to the statute than EPA's interpretation, and suggesting that where, as here, there are two irreconcilable statutory elements, the Court has an obligation to defer to EPA's reasonable, long-standing interpretation. Throughout the argument, Kagan demonstrated that she has put considerable thought into the issues.

In response to Justice Kagan, Keisler stated that the Petitioners were now united in the "focused" interpretation that PSD is inherently incompatible with GHGs. As Sean Donahue describes, this change of course could benefit EPA:

> The petitioners claimed to have a unified position, after having previously cited their plural and sometimes inconsistent positions as the basis to obtain a very extraordinary number of opening briefs. But as Justice Kagan's first question pointed out, the briefs on file contain a bewildering variety of different legal theories, which made the case all the more complicated to disentangle, even despite the relative narrowness of the question presented.

(The pressure on Keisler was evidenced by another exchange with Justice Kagan later on in the argument, when Kagan pressed Keisler on why Petitioners have "left Judge Kavanaugh's opinion by the wayside" and why they have elected not to defend it? Keisler answered, "It's been hard enough to make two alternative arguments here!")

Keisler focused on three main points in support of Petitioners' favored interpretation:

1. CAA § 7471 clarifies that the purpose of PSD is to protect regional—not global—air quality;
2. CAA § 7475(e) requires an analysis of local conditions at the regulated facility site; and
3. Over 90 state and local permitting agencies must administer the PSD program, which makes PSD an inappropriate tool to address a global/national problem like climate change.

His third prong of argument, which emphasizes the "burden" PSD puts on state and local permitting agencies, was clearly designed to appeal to Justice Kennedy, a supporter of states' rights; however, one could also see this argument backfiring, as it insinuates that states and localities lack the competence to deal with permitting and would fare better under nationalized standards that do not take into account local considerations.

Providing additional cause for optimism, Justice Sotomayor chimed in to suggest that Petitioners' many interpretations evidence statutory ambiguity, and therefore the Court should give deference to EPA's reasonable interpretation. Overall, although Sotomayor expressed sympathy for the agency, she also displayed a bit of confusion about the mechanics of the Clean Air Act and the precise nature of the legal questions at issue. It is notable, however, that Sotomayor did specifically opine, in accord with Respondents' arguments (and the UCLA Emmett Center's amicus brief arguments), that the problem in this case stemmed from the immediate application of the Clean Air Act in 2010 to stationary sources at statutory thresholds and in the absence of streamlining.

Justice Ginsburg joined in the fire of questions to inquire how Petitioners' argument could be harmonized with EPA's Endangerment Finding, which discusses the localized impacts of climate change. This exchange and a few similar exchanges evidenced clearly, I think, that the Court is not willing to overturn its precedent. Indeed, the Chief Justice drew hearty laughs when he jocularly confirmed that even though he wrote a (scathing) dissent in *Massachusetts v. EPA*, the Court cannot simply set aside its precedent. Sean Donahue also feels confident here, noting "It was clear, and petitioners' lawyers quickly recognized, that the Court had no desire to revisit its two recent decisions affirming EPA's authority to regulate greenhouse gases under the Act, *Massachusetts v. EPA* and *American Electric Power v. Connecticut*."

As I will expand upon a bit later, I was encouraged throughout the argument by indications from Chief Justice Roberts that he would be willing to join a compromise opinion that could largely favor EPA, or perhaps even rule in favor of EPA.

Justice Breyer clarified that he thinks EPA and the Court should read an implicit exception/limitation into the Clean Air Act, as Courts and agencies routinely do in many other situations. Breyer would continue to return to this position throughout the morning, sometimes even remarking incredulously that he could not understand why everyone else on the Court and at EPA does not see this as the obvious solution. He offered his first hypothetical of the day in support of this position: *If a statute says retailers must dispose of all bubble gum that has not been sold within thirty days, shouldn't a Court read into that statutory mandate an implicit exception for gum in display cases, which retailers never intend to sell?*

I agree with Sean that, despite some softball feeder questions from Justices Scalia and Alito, it fairly quickly became clear to everyone in the courtroom that Keisler was losing on Petitioners' *Chevron* Step One argument. Nonetheless, questioning had so waylaid Keisler that he was left with only three minutes to advance Petitioners' alternative argument: that the PSD program should be read to apply only to sources that emit major quantities of a NAAQS pollutant in an area in attainment for that pollutant. Keisler was very lucky that the Court granted him five extra minutes for argument, or he may not have reached the alternative textual interpretation.

Justice Kennedy asked strikingly few questions yesterday, providing little insight to his thinking about the case. Indeed, everyone I spoke to following the argument agreed that it is impossible to know what Justice Kennedy is thinking. The one hint he offered during Keisler's argument was a question asking Keisler to clarify what force *Mass. v. EPA* and *AEP v. Connecticut* have in the instant case. Keisler responded unsurprisingly that *Massachusetts v. EPA* does not apply "mechanistically" to every instance of the term "any air pollutant" in the Clean Air Act, and cited *Duke Energy* to argue that the term has been interpreted to have different meaning in the context of CAA tit. II, which relates to motor vehicle emissions. Kennedy followed up with a limited rebuttal, into which it is really not possible to read anything significant.

Justice Thomas predictably said nothing—although there was one moment when he leaned forward and opened his mouth, and the courtroom buzzed with anticipation that he might break his long silence. (One of the environmental organization attorneys I spoke with later hypothesized that he was about to declare, "Climate change is the defining problem of our generation." I guess we will never know.) Alas, we can assume Thomas will join Justice Scalia, as is his longstanding routine.

The argument also included a somewhat disturbing discussion of the relationship between the Clean Air Act's NAAQS, NSPS, and PSD programs—disturbing because the Justices'

questioning revealed widespread misunderstanding (and perhaps even apathy?) about the mechanics and interrelationship of the complex Act's various programs. Keisler argued that even though developing NAAQS for GHGs would be contrary to the statute, EPA could still regulate GHG sources under the NSPS program, versus, in Keisler's words, a "command-and-control" PSD permitting program happening at over ninety different permitting agencies. (Again, I don't see how a decentralized, cooperative-federalist permitting scheme is "command-and-control" regulation.) The Justices—including Justice Breyer, in particular—proceeded to demonstrate general confusion about the relationship between NSPS and PSD. Later in the argument, Breyer even went so far as to suggest that EPA could adopt a rule under the NSPS program that would constitute the functional equivalent of PSD, and wondered aloud about why the agency even needs PSD if it already has NSPS?

State Petitioners. Jonathan Mitchell, the Texas Solicitor General, argued on behalf of state Petitioners for 15 minutes. He reemphasized Keisler's arguments that "any air pollutant" should not have uniform construction throughout the Clean Air Act and that GHGs are incompatible with the Act. He then dove into state Petitioners' *FDA v. Brown & Williamson* argument: Congress did not intend to delegate to EPA the "novel" power to regulate stationary GHG sources, as evidenced by the incompatibility of the CAA's numeric statutory thresholds to GHGs.

Justice Kagan drilled into Mitchell's reasoning, proposing that the statutory 100/250 tpy thresholds are a strange hook for such a strong statutory interpretation argument, since the statutory thresholds distinguish *major* from *minor* sources—not *global* from *local* pollutants. She further emphasized EPA's longstanding interpretation and the general silliness of Petitioners' contorted textual arguments. She stated that the complexities of the Clean Air Act make this a prime example of a case where agency deference is appropriate. Again, Kagan demonstrated her keen attention to the details of the case, and to Respondents' and amici's briefs, in particular.

Justice Sotomayor followed up with a question about whether state Petitioners' preferred remedy is remand or vacature. She also inquired about why it would be overly burdensome for sources to obtain a Title V permit, since Title V is only a recordkeeping provision – importantly, demonstrating that she understands the distinction between PSD and Title V.

Justice Breyer continued in his crusade to convince his fellow justices and counsel that EPA should read an implicit exception into the statutory term "any air pollutant." He also asked some troubling questions regarding whether groups of people, such as large families or

football teams, might need to obtain PSD permits, once again suggesting that he may not fully grasp the application or purpose of the PSD program, or the nature of GHG emissions. He also suggested, however, that the language and history of the Clean Air Act favor EPA's interpretation—again, signaling that the Court was not responding favorably to Petitioners' textual arguments.

Overall, Mitchell's argument did not seem to add significant value, as the Justices did not appear receptive to the *Brown & Williamson* line of argument.

Respondents. Solicitor General Donald B. Verrilli, Jr. argued for 50 minutes on behalf of EPA, state, and environmental organization respondents. Overall, Verrilli's manner was not conversational—a bit dry or academic, even—and he seemed attached to his talking points during the first portion of his argument. He loosened up as the argument went on, though, and it seemed that his stature as Solicitor General allowed him to "straight-talk" the Justices. Although Verrilli is obviously a very quick study of the Clean Air Act, having prepared for this case for only a few weeks, and showed impressive mastery of this complex statute, he may have been a bit confused about details at times during the argument. He also may have missed some small, but significant opportunities to provide important nuance to the Justices.

As a general matter, rather than responding to the interests of the Justices (as Keisler was able to do), Verrilli justifiably was more constrained by the need to represent EPA's preferred arguments and interests within the context of a large and complex regulatory program. It was clear from Verrilli's argument style that EPA recognized the Court could potentially rule in ways that might have sweeping impact by, e.g., upsetting regulation of other pollutants or other longstanding interpretations of the Clean Air Act. Accordingly, Verrilli's answers to the Justices' questions were careful and calculated, implicitly revealing EPA's paramount priorities should EPA not win on all issues. At times, however, Verrilli's strategy seemed excessively defensive, and perhaps his attempts to preserve what is most important to the agency above all else were at the expense of making a winning case. (This strategy calls to mind the D.C. Circuit arguments below, where EPA put all of its big guns into defending the Endangerment Finding, and the Trigger and Tailoring Rules seemed like afterthoughts.)

Verrilli chose to begin with a fairly technical argument that *AEP v. Connecticut* clarifies EPA has authority to regulate GHGs from stationary sources under the PSD program. In response to a question from Justice Scalia about why it would be unreasonable to interpret

the phrase "any air pollutant" differently in different parts of the statute, Verrilli argued that NSPS and PSD/BACT are inherently related provisions aimed at addressing the same general problem. Congress intended the PSD program to work in tandem with the NSPS program and to fill gaps left by the NSPS program's slow, category-by-category structure. This discussion gave Verrilli an opportunity to clear up the previously muddled discussion of PSD vs. NSPS.

Troublingly, Chief Justice Roberts inquired about what BACT looks like for GHG sources, and expressed outrage that BACT for GHG emissions could take the form of efficiency improvements like energy-efficient light bulbs. Notably, Roberts' concerns may resurface in the context of near-inevitable challenges to EPA's forthcoming guidance for regulation of existing GHG sources under CAA § 111(d).

The Chief Justice also seemed sympathetic to the Petitioners' alternative NAAQS-only situs interpretation of the statute or similar compromises, and seemed to favor ruling in a way that would leave the majority of large GHG sources subject to BACT for GHG emissions. For example, Roberts wondered why the parties are fighting about a 3% difference in the scope of regulation, when both parties advance interpretations that would still render the majority of GHG emissions subject to regulation?

Alito asked how EPA could reconcile its acknowledgement of absurdity with its stated intention to apply the Clean Air Act down to the statutory thresholds in time. In response, Verrilli noted that the agency has discretion to redefine potential to emit (PTE) for certain types of stationary sources. Unfortunately, Verrilli was interrupted before he could fully explain the concept of PTE. He attempted to return to the concept of PTE again later in the argument, but was again distracted. Roberts later asked Verrilli what emissions threshold EPA would select for GHG regulation (other than 100/250 tpy) if the agency had unlimited resources? Verrilli tried to explain the concept of PTE and streamlining, and noted that the class of major GHG emitters will not necessarily be the same class as emitters of other pollutants, but I do not think Verrilli had enough time to adequately answer Robert's question or effectively dispel the notion that the Tailoring Rule is arbitrary and GHGs are inherently incompatible with the CAA.

Kagan, Alito, and Roberts wondered about the limits of EPA's interpretation and authority—e.g., whether EPA could "alter" the numeric thresholds for pollutants other than GHGs? Verrilli responded that yes, EPA could act the same way in the context of regulating another hypothetical pollutant that raised the same administrative issues as GHGs. Importantly, Justice Kagan followed up with a statement that there is no plausible alternative to EPA's statutory interpretation that would conform to the history and goals of

the PSD program, as well as *Massachusetts v. EPA*.

Justice Scalia's questioning suggested that he favors the legal reasoning of the Administrative Law Professors' amicus brief in support of Petitioners—i.e., that EPA had a duty to interpret the statute in a way to avoid absurdity in the first instance. He also focused again on the same ambient air quality arguments he made in *Massachusetts v. EPA*, and irreverently asked Verrilli if the sea levels are rising anywhere but in Massachusetts?

Alito inquired about precedent for EPA's Tailoring Rule, and any other instances where the agency has effectively rewritten numeric statutory thresholds. Verrilli could offer only one case not cited in the Respondents' briefs, some general rationale for the Tailoring Rule as a reasonable response to a lack of agency resources, and emphasis that EPA is doing the best it can to respond to the pressing problem of climate change.

Verrilli also cited regulation of ozone-depleting substances (such as CFCs) as an analog for GHG regulation, as ozone depletion is a global problem with localized impacts, and ozone-depleting substances are subject to regulation under the CAA. He emphasized that Congress ratified CFC regulation in the 1990 CAA Amendments. The Chief Justice then made an erroneous comment that CFC emissions cause local smog in Los Angeles, thereby confusing the problem of depleted stratospheric ozone (good ozone in the atmosphere) with the problem of tropospheric ozone (bad ozone on the ground). Verrilli did not correct Roberts, leaving the Court watchers wondering whether Verrilli was similarly confused, or whether he deliberately opted not to correct the Chief Justice? On the whole, Verrilli succeeded in making the Justices aware of other regulated pollutants such as ozone-depleting substances and sulfuric acid mist that could be upset by a decision that PSD only applies to NAAQS pollutants, thereby contextualizing GHG regulation and taking some of the fire out of Petitioners' textual arguments.

Sotomayor then asked Verrilli the dreaded question of, if you were to lose, how would you want to lose? Some Court watchers have read negatively into this question, but I think it was a reasonable inquiry in a case where Petitioners advance multiple alternative interpretations, and where the Court may care to know EPA's regulatory priorities. Additionally, Sotomayor's questioning favored Respondents overall; in particular, I was encouraged that she joined wholeheartedly in the early, feisty questioning of Keisler.

Verrilli gave the careful answer that the best way to lose would be for the Court to determine that the trigger does not apply to carbon dioxide (vs. other GHGs), and GHG BACT still applies to sources already subject to PSD permitting. While this outcome would preserve the majority EPA's GHG regulatory program, I disagree with Verrilli's concession

from a strategic perspective. By conceding that the Justices could ultimately adopt a reading of the CAA that is not textually based and is essentially made up out of thin air, Verrilli gave new life to Petitioner's strained textual arguments and took some of the wind out of the sails of what I consider to be EPA's best argument: that the text of the CAA compels EPA's interpretation. Abandoning the strictures of statutory construction opened the door for Petitioners to make policy arguments and for the Court to legislate from the bench instead of engaging in legal analysis. Also, it was odd that Verrilli singled out carbon dioxide, as Respondents' briefs did not contemplate this (although, I understand that EPA has been batting this idea around for a while). Justice Ginsburg suggested that the appropriate remedy would be a remand to EPA to make a reasonable interpretation—indicting that she might be hesitant to offer an activist opinion about the scope of the CAA.

Again, Justice Kennedy offered few clues into his reasoning. He asked Verrilli what other caselaw he could cite in support of EPA's position, but otherwise was silent.

After Verrilli gave a nice summary to tie up his argument, the Chief Justice announced at last that Verrilli could have five extra minutes, like Keisler. This threw Verrilli off of his game a bit, and nothing too remarkable occurred in the final five minutes of argument

Take Away Points

The Court watchers I spoke to following the argument agreed that the Justices have not yet staked out their positions in this case. We likely cannot expect a decision until June 2014 at least, and there may be dissenting opinions or perhaps even a plurality. Given that Justice Kagan expressed the greatest interest in this case, perhaps she will write a majority opinion that mostly/wholly favors EPA, with stern dicta language admonishing the agency for stretching the boundaries of administrative authority? It is impossible to know for sure, but it seems like Justices Kagan, Sotomayor, Ginsburg, and Breyer are on the side of the agency, and that Chief Justice Roberts would join an opinion that at least preserves GHG BACT for sources already subject to PSD, if not more. Justice Kennedy is a black box, although he seemed concerned about stare decisis. Justices Alito and Scalia unsurprisingly seem to favor Petitioners.

Overall, it was striking how little the oral argument focused on the law. As I stated above, the oral argument was more like a policy discussion about the best ways to regulate GHGs—thus serving perhaps as an example of how the Executive and Judicial branches are

left to determine national policy in this age of Congressional paralysis. Although I am optimistic in general about the argument, I did leave a bit concerned that the Justices seem loosey-goosey about the law of statutory construction. It is almost as if all levelheaded legal analysis goes out the window when climate change is involved. As I alluded to earlier, should the Court abandon the strictures of statutory construction and not feel bound by the universe of Petitioners' and Respondents' positions, any outcome is possible. Nonetheless, I am comforted that Supreme Court clerks are much more likely to draft opinions that are bound by the law—and hope also that the clerks clear up some of the Justices' misconceptions about facts and law after reading the briefs.

Sean Donahue is also optimistic about the outcome:

> While there was lots of discussion this morning about various ways in which the PSD and Title V programs might be narrowed to cover fewer sources of greenhouse gases, or to eliminate coverage of GHGs entirely, I heard little support from any justice (with the possible exception of Justice Scalia) for any of the textual theories offered by the petitioners. That is a problem, because in a statutory construction case, a rule of decision has to be grounded in the statutory text, and it is hard to overemphasize how emphatic the relevant provisions of the statute are on the question whether greenhouse gases are covered. The key substantive provision of the PSD program – the one that calls for sources to adopt pollution control measures – applies to "each air pollutant subject to regulation under this Act." The Supreme Court has twice, and recently, confirmed that greenhouse gases are Clean Air Act air pollutants – and the Court at the cert stage this very case declined to review the rulemaking in which these pollutants became "subject to regulation." If words have meaning, these words encompass greenhouse gases (as the D.C. Circuit below, and even Judge Kavanaugh's en banc dissent, specifically emphasized).
>
> I do not think it likely that the Court, when it sits down to decide the case, will conclude that this phrase can reasonably be read to mean "each pollutant subject to regulation under this Act, except greenhouse gases." EPA's solution here, although concededly complex, awkward, and imperfect, represented a serious effort to honor the text of the statute. Exempting greenhouse gases from the "each" and "any" air pollutants that Congress has commanded EPA to regulate though PSD would be a serious breach of basic norms of statutory construction – even if it were not also the case, as the Solicitor General pointed out, that these pollutants happen to pose an unusually grave threat to public health and

> welfare. To get around those obstacles, the petitioners at least had to offer a contending theory that honors the text. I didn't hear it in the 100 minutes of argument.

There you have it, folks. Now, we await the decision. I welcome others to share their reactions, offer contrasting opinions, and add observations I may have missed in the comments.