

The Supreme Court's 6-2 [decision](#) issued this morning in *EPA v. EME Homer*, upholding the agency's rule to control air pollution that crosses state boundaries, gives plenty of reason for optimism that the Court will also uphold EPA's greenhouse gas rules at issue in a different case, [Utility Air Regulator Group v. EPA](#). Both cases involve very complex regulatory schemes EPA developed under separate provisions of the Clean Air Act. At stake in today's case is how to tackle air pollution that is emitted in one state but blows into other states. As Justice Ginsburg noted in writing the majority opinion upholding EPA's rule:

... curtailing interstate air pollution poses a complex challenge for environmental regulators. First, identifying the upwind origin of downwind air pollution is no easy endeavor. Most upwind States propel pollutants to more than one downwind State, many downwind States receive pollution from multiple upwind States, and some States qualify as both upwind and downwind. The overlapping and interwoven linkages between upwind and downwind States with which EPA had to contend number in the thousands.

Further complicating the problem, pollutants do not emerge from the smokestacks of an upwind State and uniformly migrate downwind. Some pollutants stay within upwind States' borders, the wind carries others to downwind States, and some subset of that group drifts to States without air quality problems. "The wind bloweth where it listeth, and thou hearest the sound thereof, but canst not tell whence it cometh, and whither it goeth." The Holy Bible, John 3:8 (King James Version). In crafting a solution to the problem of interstate air pollution, regulators must account for the vagaries of the wind.

Finally, upwind pollutants that find their way downwind are not left unaltered by the journey. Rather, as the gases emitted by upwind polluters are carried downwind, they are transformed, through various chemical processes, into altogether different pollutants. The offending gases at issue in these cases—nitrogen oxide (NOX) and sulfur dioxide (SO<sub>2</sub>)—often develop into ozone and fine particulate matter (PM<sub>2.5</sub>) by the time they reach the atmospheres of downwind States. Downwind air quality must therefore be measured for ozone and PM<sub>2.5</sub> concentrations. EPA's chore is to quantify the amount of upwind gases (NOX and SO<sub>2</sub>) that must be reduced to enable downwind States to keep their levels of ozone and PM<sub>2.5</sub> in check. (citations omitted, except to the King James Bible).

The greenhouse gas case is of similar complexity. As I explained in a [previous post](#):

The [Prevention of Significant Deterioration] section [of the Clean Air Act] 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. [Greenhouse gases are regulated pollutants and are therefore subject to the Prevention of Significant Deterioration provision.] The problem for 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. [The agency left for another day, and hence “tailored” its rule, the question of how it would regulate smaller sources that are below the 100,000/75,000 ton thresholds]. 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.

So why be optimistic that the *Homer* case bodes well for EPA in the greenhouse gas emissions case? Here are a few reasons.

First, one of the principal arguments that challengers to the greenhouse gas rules make is that despite the plain language of the Clean Air Act requiring EPA to issue regulations to regulate new sources of “any pollutant” under the Prevention of Significant Deterioration section, doing so for greenhouse gases is inconsistent with the structure of the Act and would lead to “absurd results.” You can read more about these arguments [here](#) and [here](#). Today’s decision addresses a different “plain language” argument about whether EPA, in issuing a Federal Implementation Plan for cross-border air pollution, should have let states issue their own plans to deal with their own sources before forcing them into a federal plan. Here’s what the Court had to say about the state plan argument:

The practical difficulties [in forcing states into federal plans] cited by the Court

of Appeals do not justify departure from the Act's plain text. See *Barnhart v. Sigmon Coal Co.*, 534 U. S. 438, 461-462 (2002) (We "must presume that a legislature says in a statute what it means and means in a statute what it says there.")

It's easy to imagine the Supreme Court citing to this very language in any opinion it issues about the greenhouse gas rules: "the practical difficulties" [of regulating a huge number of sources that emit greenhouse gases] do not justify departure from the Act's plain text [requiring that major sources of greenhouse gases be subject to the PSD provisions]."

Second, today's opinion also heartily embraces deference to agency expertise, not only as required by [Chevron v. NRDC](#) but also because agencies like EPA spend an enormous amount of time and expertise trying to solve thorny regulatory problems. The *Homer* decision is basically an ode to EPA's efforts to craft a sensible, thoughtful rule that required it to make difficult choices given the complexities of measuring which sources and states contribute to cross-state air pollution and how to regulate them. As Justice Ginsburg put it:

The statute .... calls upon the Agency to address a thorny causation problem:  
How should EPA allocate among multiple contributing upwind States  
responsibility for a downwind State's excess pollution?

Ginsburg praised the allocation choices EPA made — after recognizing how difficult the choices were — as "sensible," "equitable," "efficient" and "making good sense." She then upheld the choices as "reasonable" under the statute, the standard the Court uses in assessing an agency's choices where a statute is ambiguous about how the agency should proceed.

The greenhouse gas emissions case will also require the Court to assess hard choices EPA made in deciding how to proceed to regulate a potentially huge number of sources of greenhouse gases given that the definition of "major source" sweeps in many previously unregulated sources (though as we argued in a brief we filed in support of EPA in the *Coalition* case, nowhere near as many as the most hyperbolic estimates). It is unclear what standard of review will apply to EPA's decision to put off for another day the regulation of sources under 100,000/75,000 tons but, again, it is not hard to imagine the Court praising EPA's approach as "sensible, "equitable, "efficient" and "making good sense."

Third, the Court's decision included Chief Justice Roberts in the majority along with the four liberals and Justice Kennedy. This is significant not only because the decision did not hinge only on persuading Justice Kennedy to side with EPA (as is typical in so many 5-4 decision) but also because Roberts did not join in Justice Scalia's dyspeptic diatribe against administrative agencies in his dissenting opinion (in which Justice Thomas joined; Justice Alito recused himself in the case). Here's the opening line of Scalia's dissent:

Too many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress.

He continues:

Today, the majority approves [a] undemocratic revision of the Clean Air Act. The Agency came forward with a textual justification for its action, relying on a farfetched meaning of the word "significantly" in the statutory text. That justification is so feeble that today's majority does not even recite it, much less defend it. The majority reaches its result ("Look Ma, no hands!") without benefit of text, claiming to have identified a remarkable "gap" in the statute, which it proceeds to fill (contrary to the plain logic of the statute) with cost-benefit analysis—and then, with no pretended textual justification at all, simply extends cost-benefit analysis beyond the scope of the alleged gap.

Roberts may not vote to uphold the greenhouses gas emissions rules since he dissented in [Massachusetts v. EPA](#), which among other things held that greenhouse gases are air pollutants under the Clean Air Act and subject to regulation. But the fact that he embraced deference to a complex EPA regulatory scheme (a position he set forth in a concurring opinion in another important environmental case, [Rapanos v. United States](#)) and broke from his conservative brethren in doing so at least makes his vote in the greenhouse gas case less predictable.

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