

In a number of areas, including climate change regulations, a key question is EPA's power to control compliance costs. A particularly important method is the use of cap-and-trade systems. For instance, there has been considerable discussion of whether EPA could authorize states to use cap-and-trade to control greenhouse gas emissions from power plants, as opposed to imposing uniform standards on all power plants. Although it did not rule directly with emissions trading, the Supreme Court's decision last week in *EME Homer* contains encouraging signs of support for such efforts. This may be particularly relevant to EPA's efforts to establish a regulatory framework under section 111(d) of the Clean Air Act to control CO<sub>2</sub> from existing power plants.

In general, the Court's opinion is a ringing endorsement of the common sense idea that, once we have set our environmental goals, we should try to achieve them as cheaply as possible. That's a principle that the lower court opinion (and the Supreme Court dissent) didn't grasp. This principle is also fundamental to cap-and-trade. The Court made its approval of this principle abundantly clear:

*Using costs in the Transport Rule calculus, we agree with EPA, also makes good sense.* Eliminating those amounts that can cost-effectively be reduced is an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address. Efficient because EPA can achieve the levels of attainment, i.e., of emission reductions, the proportional approach aims to achieve, but at a much lower overall cost. [emphasis added]

Elsewhere, the Court observed that " [t]he Agency has chosen, *sensibly in our view*, to reduce the amount easier, i.e., less costly, to eradicate." That's the key argument for cap-and-trade, after all.

The Court was quite aware that this argument supports the use of emissions trading. In issuing Federal Implementation Plans (FIPs) to implement its policy, EPA used cap-and-trade. The Court went out of its way to take note of the trading scheme and clearly thought this was a good idea. In footnote 10, the Court observed that:

These FIPs specified the maximum amount of pollution each in state pollution source could emit. Sources below this ceiling could sell unused "allocations" to sources that could not reduce emissions to the necessary level as cheaply. This type of "cap and-trade" system cuts costs while still reducing pollution to

target levels.

The statutory provision in question, like section 111(d), requires states plans and speaks in terms of emissions from individual sources. The Court apparently did not see this as a barrier to the use of a trading mechanism between sources. Apparently, this didn't trouble the Court, though admittedly it wasn't the focus of the case.

More generally, the Court's opinion reflects strong appreciation of the difficulty of the task confronting EPA in devising workable ways to achieve statutory goals. The Court commended EPA for its "permissible, workable, and equitable interpretation" of the statute." The Court also quoted language from a previous opinion stating that "'a full understanding of the force of the statutory policy . . . depend[s] upon more than ordinary knowledge'" of the situation, the administering agency's construction is to be accorded 'controlling weight unless. . . arbitrary, capricious, or manifestly contrary to the statute.'" This judicial attitude should make the Court more receptive to EPA's efforts to use innovative methods such as emissions trading to achieve statutory goals.

*EME Homer* is not a green light to use emissions trading in all circumstances. There may be situations where its use would be "manifestly contrary to the statute." But the opinion does put the burden of proof on challengers to show that EPA has crossed the line. That's only reasonable. Once Congress has set a goal, we should not lightly assume that it meant to rule out the use of the most economical method of getting there. It's fortunate that the Court is giving EPA more leeway to incorporate this principle into its regulations.