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## U.S. Supreme Court Narrows Greenhouse Gas Rules: What It Means for the U.S. Climate Agenda

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Case commented on: [Utility Air Regulatory Group v. Environmental Protection Agency \(EPA\)](#), USSC No. 12–1146 (June 23, 2014)

On Monday, the U.S. Supreme Court struck down a portion of the United States’ first regulations for greenhouse gas emissions from industrial sources. The Court held that the Environmental Protection Agency (EPA) may not apply its “Prevention of Significant Deterioration” (PSD) program to new industrial sources on the basis of their greenhouse gas emissions. Instead, EPA can only regulate greenhouse gas emissions from new sources that are already subject to the PSD program because they emit other pollutants.

This is the first Supreme Court decision on EPA’s authority to regulate greenhouse gases from industrial sources, so it has important implications for EPA’s future climate agenda—[including its recently proposed rule for the electricity sector](#). And the varied opinions offered by the Supreme Court justices offer hints about how courts will approach the inevitable legal challenges to those regulations.

EPA’s PSD program has two basic requirements:

- 1) You need a permit before you build a new major industrial source of air pollution.
- 2) And to get a PSD permit, you must show that you are using the “best available control technology” for the air pollutants that you emit.

In this case, the Supreme Court held:

- 1) EPA may not require new sources to get a PSD permit simply because they will emit large amounts of greenhouse gases. The Court held that it would be unreasonable for greenhouse gases to trigger the permit requirement, because the PSD permit program is only meant to apply to the thousands of industrial sources that emit conventional pollutants, not the millions of sources that emit significant amounts of greenhouse gases.

- 2) But if a source needs a PSD permit anyway, because it emits other pollutants, then EPA may require it to adopt the “best available control technology” for greenhouse gases, along with other air pollutants.

I will not say anything more about the complexities of the decision, because [I described them extensively in a previous post](#), which read the tea-leaves of oral argument in the case, and suggested the Supreme Court would reach exactly this compromise. So you can [read that post](#) both for a description of the statutory interpretation question and an explanation of the reasoning that the court eventually followed.

The most pressing question raised by the case today may be its implications for the United States’ future climate agenda, including EPA’s recently proposed rule for [existing power plants](#). There are three important implications, and each could spell trouble for EPA’s climate agenda.

First, the Court suggested that one reason for rejecting EPA’s rule is that “it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization” because millions of sources would be subject to a greenhouse gas permit requirement. EPA, it is true, had suggested it would only regulate a reasonable number of them, but the court was not willing to leave that decision in the agency’s hands. The court noted: “When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.”

This passage will trouble EPA. In the agency’s recent proposal to cap greenhouse gas emissions from state power sectors, which the agency calls the “[Clean Power Plan](#),” the agency is using a long-ignored statutory provision, Clean Air Act §111(d), to overhaul the nation’s electricity sector. As noted in a [previous post](#), §111(d) has rarely been used, and it is so obscure that when Congress passed the Clean Air Act amendments in 1990, no one even noticed that the House and Senate had passed two different versions. Talk about unheralded.

Second, the Court expressed some skepticism about controlling greenhouse gas emissions through energy efficiency, which is an important part of EPA’s climate agenda. Carbon dioxide, the most common greenhouse gas, is the inevitable result of burning fossil fuels. Clean combustion of clean fossil fuels emits carbon dioxide and water. And once carbon dioxide is emitted, it is hard to pull out of the air. So most attempts to limit carbon dioxide emissions are really attempts to limit fossil fuel combustion. The only other option is carbon capture and storage, which is usually too costly to be feasible. EPA’s Clean Power Plan and its guidance on what is the “best available control technology” under the PSD program both rely on encouraging energy efficiency.

But the Supreme Court was not willing to endorse this approach. First, it stated that it didn’t need to decide whether energy efficiency could be the “best available control technology” because EPA also said states could consider carbon capture and storage. Second, it said that even if EPA could mandate energy efficiency at new sources, it could not redesign the source, require it to consume less electricity, or otherwise micromanage industrial source proposals. In doing so, the Supreme Court handed industry arguments to use against regulators in permit proceedings.

A third important takeaway from the case is that Justice Scalia, the conservative justice that authored the Supreme Court’s opinion, was able to convince Justice Kennedy to join his opinion limiting EPA’s authority to regulate greenhouse gases. Justice Kennedy is generally considered

the Court's swing vote and he was a deciding vote on the Court's 5-4 decision in [Massachusetts v. EPA](#), 127 S.Ct. 1438 (2007), which required EPA to consider the climate consequences of greenhouse gases from cars and trucks.

Justice Kennedy has seemed very supportive of EPA's efforts to regulate greenhouse gases. At oral argument, he admonished industry's lawyers that he would continue to follow "both the result and the reasoning" of *Massachusetts v. EPA*—and the reasoning of *Massachusetts v. EPA* stressed the possible benefits of greenhouse gas regulation. Until now, EPA may have been justified in believing that the Court's swing justice would sympathize with the challenges they face in adapting the Clean Air Act to address global warming and give them the benefit of the doubt. But Monday's decision shows that Justice Kennedy's sympathy only goes so far: he is quite willing to strike down overly broad climate regulations. That may have much longer-term implications for EPA's climate agenda—only the coming years will tell.

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Full disclosure: Before entering my academic career in 2011, I represented some of the petitioners in their challenge to EPA's regulations.

*This post originally appeared on James Coleman's blog [Energy Law Prof](#).*

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