

UARG—NOT A CHEF D’OEUVRE OF OPINION WRITING

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INTRODUCTION

In his opinion for the Court in *Utility Air Regulatory Group v. EPA* (“UARG”),¹ Justice Antonin Scalia remarks that the Clean Air Act² is not a “chef d’oeuvre” of statutory drafting.³ He is correct, as even the most casual reader of the Act will agree.

But the same may be said of Justice Scalia’s opinion as an example of statutory interpretation. The decision mischaracterizes the lower court opinion and includes dicta that disregard the words of the statute. Contrary to Justice Scalia’s assertion that the decision gives the U.S. Environmental Protection Agency (“EPA”) virtually all it wanted,⁴ his opinion threatens grave damage to important agency programs. Yet paradoxically, Justice Scalia arrives at the right result. This Essay demonstrates how this can be.

The result⁵ represents on the surface a major win for EPA. But analysis shows that the victory is not as great as it seems, and actually does EPA harm. Justice Scalia’s opinion threatens EPA’s newly proposed rule regulating greenhouse gas emissions from existing electricity generating units—a rule that would significantly decrease these emissions.

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¹ 134 S. Ct. 2427 (2014).

² 42 U.S.C. §§ 7401–7671q (2012). All future statutory citations in this Essay are to the Clean Air Act.

³ UARG, 134 S. Ct. at 2441.

⁴ Adam Liptak, *Justices Uphold Emission Limits on Big Industry*, N.Y. TIMES (June 23, 2014), <http://perma.cc/YAL5-9354>.

⁵ For a more detailed description of the background to the case, see generally Cecilia Segal, *Climate Regulation Under the Clean Air Act in the Wake of Utility Air Regulatory Group v. EPA: Introduction*, 39 HARV. ENVTL. L. REV. 1 (2015).

I. THE APPLICABILITY HOLDING

In *UARG*, the Court first held that a stationary source's emissions of greenhouse gases may not be considered in deciding whether the source is a major emitting facility and thus must obtain a permit under the Prevention of Significant Deterioration ("PSD") program.⁶ The purpose of the PSD program is to protect air quality that is superior to the National Ambient Air Quality Standards ("NAAQS") established by EPA.⁷ (EPA has not set NAAQS for greenhouse gases because these gases are unsuitable for NAAQS.)⁸ PSD is a nationwide program that covers not only air pollutants regulated by NAAQS, but also all pollutants other than hazardous air pollutants (for which a separate program exists). The PSD provisions require that a "major emitting facility" obtain a permit prior to construction or modification.⁹ A "major emitting facility" is generally defined in section 169(1) of the Act as one with the potential to emit more than 250 tons per year of "any air pollutant," although a special 100-ton-per-year threshold applies to enumerated categories.¹⁰ In writing regulations in 1978 to carry out the then-newly codified PSD program, EPA decided that the term "any air pollutant" meant only any regulated air pollutant.¹¹ This interpretation was not challenged.

A. What is an "Air Pollutant" for Purposes of PSD?

In arguing for the applicability of PSD to greenhouse gases, EPA said its reading of the phrase "any air pollutant" was the only reading allowed by the first step of *Chevron*.¹² Hence, once greenhouse gases became regulated under the Act's motor vehicle provisions, the Agency was, under its reasoning, obliged to apply the PSD program to these gases.¹³ In the decision below, the

⁶ *UARG*, 134 S. Ct. at 2442. The Court also held that a source's greenhouse gas emissions are not considered in deciding whether it needs an operating permit under Title V. *Id.* Because the Court's Title V reasoning is the same as its PSD reasoning, this Essay omits mention of Title V for sake of brevity.

⁷ See 42 U.S.C. § 7470. NAAQS establish standards for concentrations of ambient air pollutants. See *id.* § 7409.

⁸ See Craig N. Oren, *Is the Clean Air Act at a Crossroads?*, 40 ENVTL. L. 1231, 1246–49 (2010) (noting the difficulties of setting or enforcing an ambient air quality standard).

⁹ See 42 U.S.C. § 7475(a).

¹⁰ *Id.* § 7479(1). The term "potential to emit" refers to what the source would emit if operated as designed, not to the emissions that would occur if the control equipment failed. *Ala. Power Co. v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1979) (rejecting EPA's argument to the contrary).

¹¹ Requirements for Preparation, Adoption, and Submittal of Implementation Plans: Prevention of Significant Air Quality Deterioration, 43 Fed. Reg. 26,380, 26,382 (June 19, 1978). As a result of the Clean Air Act Amendments of 1990, EPA's interpretation no longer applies to hazardous air pollutants. See Pub. L. No. 101-549, § 112(b)(6), 104 Stat. 2399 (1990) (codified at 42 U.S.C. § 7412(b)(6)). For ease of exposition, this Essay ignores this complication.

¹² *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 133 (D.C. Cir. 2012) (per curiam), *aff'd in part, rev'd in part sub nom. UARG*, 134 S. Ct. 2427 (2014); see also *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

¹³ See *Coal. for Responsible Regulation*, 684 F.3d at 133.

D.C. Circuit upheld the Agency’s position, saying there was no other possible interpretation of the statutory term “any air pollutant.”¹⁴

But Justice Scalia’s opinion ignores the D.C. Circuit’s reasoning. Instead, his opinion characterizes the D.C. Circuit as having first noted that *Massachusetts v. EPA*¹⁵ held that the general definition of the term “air pollutant”¹⁶ in the Clean Air Act encompassed greenhouse gases; that the PSD program covers “any air pollutant”; and concluding therefore that section 169(1)’s applicability threshold applies to greenhouse gases.¹⁷ Justice Scalia then rebuts this position by pointing out that not even EPA had asserted it, and that EPA had limited other Clean Air Act references to “any air pollutant” in other of the Act’s specific programs in the past.¹⁸

This reasoning destroys a straw man of Justice Scalia’s own invention. As discussed above, EPA’s theory was that greenhouse gases are covered not because they are air pollutants, but rather because they are *regulated* air pollutants. Thus, just as in other programs in which Congress referred to “any air pollutant,” EPA sought to define the term in a sensible and contextual way. Nor did the D.C. Circuit engage in the reasoning Justice Scalia describes; rather, the D.C. Circuit simply upheld the Agency’s position on the meaning of “regulated pollutant.”¹⁹

Thus the Court ignored the real issue: whether EPA was correct in believing that the Act required it to define the term “any air pollutant” in the PSD program as “any regulated pollutant,”²⁰ or, as the challengers to EPA’s rules suggested, the term was ambiguous. EPA was on firm legal ground in asserting that the “regulated air pollutant” interpretation was required by statute. Congress required that sources subject to PSD cap their emissions at a level represented by the Best Available Control Technology (“BACT”) for any pollutant regulated under the Act.²¹ EPA’s interpretation thus harmonized the BACT requirement with the coverage of PSD. Besides BACT, the main substantive requirement of PSD is that sources of several NAAQS pollutants show that their construction would not violate the caps on air pollution growth known as increments²²—but this does not apply to non-NAAQS pollutants, much less non-regulated air pollutants. Thus, covering any more than regulated pollutants would be a nullity. Moreover, the general definition of the term “air pollutant” in the Act—essentially, any substance that “enters the ambient air”²³—is so sweeping that regulating “any air pollutant” under PSD would mean that the Agency would be regulating emissions—say, of steam—that the Agency had

¹⁴ *Id.* at 143.

¹⁵ 549 U.S. 497 (2007).

¹⁶ 42 U.S.C. § 7602(g) (2012).

¹⁷ *UARG*, 134 S. Ct. 2427, 2439 (2014).

¹⁸ *Id.* at 2439–40.

¹⁹ *Coal. for Responsible Regulation*, 684 F.3d at 138.

²⁰ *Id.* at 143.

²¹ 42 U.S.C. § 7475(a)(4).

²² *See id.* § 7475(a)(3), (8).

²³ *Id.* § 7602(g).

not found to endanger public health or the environment. This would be absurd. Thus EPA's view seems sound.

Yet that does not resolve the issue facing the Court in *UARG*. There the question was not whether the term "air pollutant" reached more than regulated air pollutants, but whether the term might mean fewer than all of the regulated pollutants, e.g., whether only pollutants covered by NAAQS were subject to PSD. In effect, Justice Scalia adopted the view that, whatever else the term "air pollutant" encompassed in the PSD program, it could not include greenhouse gases.²⁴

The Clean Air Act's legislative history—which is not discussed by either the D.C. Circuit or the Supreme Court majority—sheds some light on whether EPA or the Court is correct. The House-passed version of the PSD provisions would have applied the PSD program to sources that emit, or have the design capacity to emit, more than 100 tons per year of any air pollutant for which there is a NAAQS—thus excluding other pollutants, even if regulated.²⁵ The Senate's provision, by contrast, applied the PSD program only to large sources in twenty-eight specific categories.²⁶

But neither approach was enacted. Instead, in conference, the two Houses agreed that sources in the twenty-eight categories would be covered so long as their potential to emit was greater than 100 tons per year of any air pollutant.²⁷ All other sources would be covered only if their potential to emit any air pollutant was over 250 tons per year.²⁸ The conferees noted this agreement in the conference report,²⁹ but did not explain why they had arrived at a provision that was more expansive than either the House or Senate bill. Nor did the conference report explain the same provision the previous year,³⁰ when the proposed amendments to the Act died in a Senate filibuster.³¹

This rather uncertain history implies that EPA may have been correct in claiming that the term "air pollutant" means all regulated air pollutants. But it would help matters if we knew precisely why EPA took this approach to the term "air pollutant." We do not know whether EPA had rationales other than or in addition to those suggested above.³² There was no explanation in the rulemaking's preamble for the Agency's 1978 decision to define "air pollutant"

²⁴ See *UARG*, 134 S. Ct. 2427, 2442 (2014).

²⁵ H.R. 6161, 95th Cong. § 103(f) (as received by Senate, June 6, 1977), available at 1977 WL 174473 (proposing to add section 302(o)(1) to the Clean Air Act).

²⁶ S. 252, 95th Cong. § 39(a) (as reported by Senator Muskie, with amendments, May 9, 1977), available at S. REP. NO. 95-127, at 110-11 (1977) (proposing to add section 302(k) to the Clean Air Act).

²⁷ H.R. REP. NO. 95-564, at 152 (1977) (Conf. Rep.) (summarizing the House provision, *id.* at 149, and the Senate provision, *id.* at 150).

²⁸ *Id.*

²⁹ *Id.*

³⁰ See H.R. REP. NO. 94-1742, at 46, 115 (1976) (Conf. Rep.) (proposing adoption of new section 160(g)(1)). The relevant provisions of the House and Senate bills were the same as in 1977. See *id.* at 115.

³¹ *Clean Air Amendments Die at Session's Close*, in CQ ALMANAC 1976, at 128 (32d ed. 1977), <http://perma.cc/E2DG-EFT9>.

³² See *supra* text accompanying notes 21-23.

as any regulated air pollutant. Nor did the Agency add an explanation in its massive rewrite of these regulations in 1980.³³ In fact, when the greenhouse gas applicability issue arose in the present case, EPA argued before the D.C. Circuit that if there was ambiguity in the statute, the matter should be remanded to EPA so that it could justify its approach.³⁴

EPA's lack of a stated rationale is important because opposing parties argued that the term "air pollutant" meant fewer than all regulated pollutants throughout the *UARG* litigation. For instance, industry claimed that the term "any air pollutant" meant only those pollutants with localized effects.³⁵ This argument, though, is too much the argument rejected in *Massachusetts*, that the Act's general definition of "air pollutant" could be read as limited to localized pollutants.³⁶ An explanation by EPA could potentially have explained why the Agency did not define the term more narrowly than all regulated air pollutants.

Judge Kavanaugh of the D.C. Circuit suggested another argument for defining "any air pollutant" as encompassing less than all regulated air pollutants: that Congress meant to confine the term to NAAQS pollutants.³⁷ In support of this, he noted that the references to "air pollutant" in the PSD provisions often mean in context only pollutants for which there are NAAQS.³⁸ But almost all of these references are in the part of the PSD program establishing increments that control growth in air pollution—provisions that apply only to two pollutants for which there are NAAQS: sulfur dioxide and particulate matter.³⁹ Taken to its logical extreme, Judge Kavanaugh's argument would seem to suggest that only those two pollutants count for applicability purposes. But that would be contrary to the D.C. Circuit's longstanding reading—and EPA's longstanding interpretation—of the PSD provisions.⁴⁰ And while Judge Kavanaugh cites a few other places where "air pollutant" seems to mean only NAAQS pollutants, these can be explained as a consequence of the last-minute insertion of non-NAAQS pollutants into the statute's definition of major emitting facility.⁴¹

B. *The Absurdity Problem*

To this point, EPA's contention that greenhouse gases are regulated air pollutants and are therefore covered by PSD seems strong. Judge Kavanaugh, though, had a final argument: that it would be absurd to apply PSD to green-

³³ See Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676 (Aug. 7, 1980) (amending PSD regulations in response to *Ala. Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979)).

³⁴ Transcript of Oral Argument at 74–76, *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (No. 10-1073).

³⁵ *Coal. for Responsible Regulation*, 684 F.3d at 136–38.

³⁶ See *Massachusetts v. EPA*, 549 U.S. 497, 512, 528–29 & n.26 (2007).

³⁷ *Coal. for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *14–18 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc).

³⁸ *Id.* at *16.

³⁹ See 42 U.S.C. § 7473 (2012).

⁴⁰ See *Ala. Power Co. v. Costle*, 636 F.2d 323, 405–06 (D.C. Cir. 1979).

⁴¹ See *supra* text accompanying notes 25–26.

house gases when doing so would mean that tens of thousands of sources would need PSD permits.⁴² Even EPA conceded that such an interpretation would be absurd and violate Congress's intent.⁴³ The D.C. Circuit panel's response was that the arguable absurdity of EPA's reading was not relevant given the unambiguous command of the statute.⁴⁴

The D.C. Circuit's approach seems to treat absurdity as irrelevant to the *Chevron* Step One question of whether a statute is silent or ambiguous.⁴⁵ One can understand why the court took this approach. Step One involves law, while Step Two is concerned with policy,⁴⁶ and it might seem that whether an interpretation is absurd would come under the rubric of policy. Still, the D.C. Circuit's approach is questionable. Step One involves Congress's intent, and Congress can be presumed not to intend absurd results. And the D.C. Circuit panel seemed well aware that EPA's position was arguably absurd. For instance, Judge Tatel repeatedly pressed EPA's counsel on whether, assuming the term "air pollutant" for PSD purposes was ambiguous, an absurd construction should be upheld when a non-absurd construction is available—a question that counsel tried hard not to answer.⁴⁷

Justice Scalia's opinion is not as clear in this regard. His opinion states that the *Chevron* framework is applicable.⁴⁸ But, rather than discuss Steps One and Two as stated in *Chevron*, Justice Scalia divides the inquiry into, first, whether EPA was required to adopt its interpretation of the statute, and second, whether the statute permitted EPA to do so. This is not true to *Chevron*'s familiar two steps, and it makes analysis difficult. Justice Scalia discusses the absurdity of EPA's interpretation in analyzing whether the interpretation was permitted by the statute—an endeavor that he thought occurred at Step Two.⁴⁹ Thus both the D.C. Circuit and the Supreme Court failed to consider absurdity at Step One.

C. The Tailoring Rule

There may have been another reason why the D.C. Circuit did not discuss absurdity in its opinion. EPA, in moving to regulate greenhouse gases under PSD, recognized that immediately treating sources as "major" solely because of their greenhouse gas emissions would mean that tens of thousands of proposed sources would need PSD permits under the statute's 100/250-ton threshold.⁵⁰ This would burden both permit writers and sources, violate the will of

⁴² *Coal. for Responsible Regulation*, 2012 WL 6621785, at *18.

⁴³ *Id.*

⁴⁴ *Id.* at *2 (Sentelle, C.J., Rogers, J., & Tatel, J., concurring in denial of rehearing en banc).

⁴⁵ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

⁴⁶ Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 224 (1992) ("The distinction is between issues of law and policy, which is at the core of *Chevron*.").

⁴⁷ See Transcript of Oral Argument at 104–16, *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (No. 10-1073).

⁴⁸ *UARG*, 134 S. Ct. 2427, 2439 (2014).

⁴⁹ See *id.* at 2442–44.

⁵⁰ Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,533 (June 3, 2010) [hereinafter Tailoring Rule].

Congress, and result in little gain for environmental protection. So EPA devised the Tailoring Rule.⁵¹ Under this rule, a source would initially be considered “major” on account of greenhouse gases only if its potential to emit greenhouse gases exceeded 100,000 tons per year.⁵² This threshold would decrease over time, and eventually all sources above the normal 100/250-ton applicability limit might be covered—although evidently not in the near future.⁵³

Industry and its state allies challenged the Tailoring Rule, but the D.C. Circuit held that they had no standing to do so.⁵⁴ After all, the Tailoring Rule only helped industry and its state allies by lessening the number of regulated sources.⁵⁵ Thus, the D.C. Circuit could well have believed that the Tailoring Rule removed absurdity from EPA’s approach. The Supreme Court, by contrast, rejected the Tailoring Rule.⁵⁶ Since EPA conceded that the will of Congress would be violated by the use of the 100/250-ton threshold, it was then easy for Justice Scalia to reject EPA’s interpretation of the applicability issue.

Was the Court correct in rejecting the Tailoring Rule? The issue split the Court. Justice Scalia reasoned that the statute’s text prescribing the 100/250-ton test barred the use of any different threshold—that EPA could not depart from the clear words of the statute.⁵⁷ Justice Breyer, though, emphasized in his dissent the purposes of the statute.⁵⁸ He saw the 100/250-ton threshold as intended to balance the environmental advantages of covering sources with the burden on permit writers and sources.⁵⁹ Given that the 100/250-ton threshold did not adequately balance these considerations for greenhouse gases, Justice Breyer argued that the Agency should be regarded as having the discretion to draw a different line than that expressly provided by statute.⁶⁰

One problem with Justice Breyer’s approach relates to Congress’s intent. Justice Breyer argues that his approach would be consistent with “the flexible nature of the Clean Air Act.”⁶¹ Few who have ever read the Act would describe it that way. Congress did as much as possible to limit EPA’s discretion. Congress did not establish a classic delegation, leaving EPA to set the applicability threshold by weighing various factors. Instead Congress did the job itself, reflecting a desire that Congress make the tough decisions to protect the environment that no agency could possibly reach⁶²—for instance, its 1970 decision to

⁵¹ *Id.* at 31,514.

⁵² *Id.* at 31,516.

⁵³ See *UARG*, 134 S. Ct. at 2437–38 (citing Tailoring Rule, 75 Fed. Reg. at 31,524–25).

⁵⁴ *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 146–48 (D.C. Cir. 2012).

⁵⁵ See *id.* at 146.

⁵⁶ *UARG*, 134 S. Ct. at 2444–45.

⁵⁷ See *id.* at 2446.

⁵⁸ See *id.* at 2452–53 (Breyer, J., concurring in part and dissenting in part).

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ *Id.* at 2454.

⁶² For a discussion by the prime Senate sponsor of the 1970 and 1977 Amendments to the Clean Air Act of why the Clean Air Act should be specific, see Edmund S. Muskie & Eliot R. Cutler, *A National Environmental Policy: Now You See It, Now You Don't*, 25 ME. L. REV. 163, 166–69 (1973).

set emission standards for new cars that could not be met with then-current technology.⁶³

Justice Breyer's position seems rooted in his dissent in *FDA v. Brown & Williamson Tobacco Corp.*,⁶⁴ where he asserted that an agency's process provides as much opportunity for ventilation of important issues as does Congress's, and therefore agencies ought to be afforded broad discretion to choose what seems like the proper approach.⁶⁵ Clearly the congressional process is far from ideal. On the other hand, comments on agency proposals often predominantly come from industry,⁶⁶ and Congress is more accountable to the public than it is to appointed agency heads.

While Justice Breyer's position would aid the important goal of regulating greenhouse gases, environmentalists ought to be chary of his approach. EPA's senior management is not always pro-environment.⁶⁷ Under the Administration of George W. Bush, for instance, the Agency tried its best to limit the applicability of PSD to modifications at major emitting facilities.⁶⁸ The D.C. Circuit ultimately rebuffed EPA on a major change to the regulations, holding that the text of the Clean Air Act overrode the Agency's approach.⁶⁹ But if EPA could depart from the text, then anti-environmental changes like this would be allowed. Thus, vital safeguards in the Act could be overridden by Justice Breyer's approach.

Justice Scalia's opinion, admittedly, is far from perfection on this point. He cites an apparent rule of construction that the Court looks skeptically when "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy'"⁷⁰ and that "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"⁷¹ This dictum seems inconsistent with the protective philosophy behind the Act.⁷² A watchdog such as EPA should have its authority liberally interpreted to ensure that public health and the environment are protected.

All the same, Justice Scalia's approach is superior to Justice Breyer's. As discussed above, holding close to the language of a statute is an important way of assuring democratic accountability and of ensuring that statutory provisions

⁶³ See generally David Gerard & Lester B. Lave, *Implementing Technology-Forcing Policies: The 1970 Clean Air Act Amendments and the Introduction of Advanced Automotive Emissions Controls in the United States*, 72 *TECH. FORECASTING & SOC. CHANGE* 761 (2005).

⁶⁴ 529 U.S. 120 (2000).

⁶⁵ *Id.* at 190–91 (Breyer, J., dissenting).

⁶⁶ See Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 *ADMIN L. REV.* 99, 116 (2011).

⁶⁷ See generally JONATHAN LASH, *A SEASON OF SPOILS: THE REAGAN ADMINISTRATION'S ATTACK ON THE ENVIRONMENT* (1984).

⁶⁸ See Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 *NW. U. L. REV.* 1677, 1678 (2007).

⁶⁹ See *New York v. EPA*, 443 F.3d 880, 890 (D.C. Cir. 2006), *cert. denied*, 550 U.S. 928 (2007).

⁷⁰ *URG*, 134 S. Ct. 2427, 2444 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

⁷¹ *Id.* (quoting *Brown & Williamson*, 529 U.S. at 160).

⁷² See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 27–29 (D.C. Cir. 1976) (en banc).

that protect public health and the environment are shielded from agencies’ vulnerability to industry pressure. Thus we see that Justice Scalia’s holding is correct, but that his reasoning is questionable.

II. BEST AVAILABLE CONTROL TECHNOLOGY AND “ANYWAY” SOURCES

Six justices joined Justice Scalia’s opinion upholding EPA’s position that a source that needs a PSD permit for another air pollutant (a so-called “anyway” source) must then apply BACT to its greenhouse gas emissions. BACT requires a case-by-case evaluation of the proposed source to determine what emissions limit is achievable for the facility, taking into account costs and other factors.⁷³

A. *The Court Was Right in Holding that BACT Applies to All Major Emitting Facilities*

The PSD provisions mandate that proposed major emitting facilities comply with BACT for each air pollutant regulated under the Clean Air Act that the source would emit.⁷⁴ Thus, it is clear that an interpretation encompassing any regulated pollutant is permitted, if not required, by the Act. Justice Scalia acknowledged this in his opinion, and rejected the contention (pressed by Justice Alito⁷⁵) that disastrous consequences would pass from following the statute as written.⁷⁶ Justice Scalia is correct that his interpretation does not expand the universe of sources that need PSD permits and that this BACT requirement is not onerous, let alone disastrously so.⁷⁷

Justice Alito’s dissent asserts that it seems strange that a source can be subject to BACT for a pollutant that cannot trigger PSD applicability.⁷⁸ But there is nothing anomalous about this. EPA, with the approval of the D.C. Circuit, has long treated permitting and BACT requirements differently. A source is a major emitting facility—and thus needs a PSD permit—only if it would emit “major” amounts (i.e., 100/250 tons per year) of an air pollutant.⁷⁹ But the BACT requirement applies to a pollutant so long as the major emitting facility’s emissions of it are “significant,” and the significance thresholds established by EPA are typically less than the thresholds for being a major emitting facility.⁸⁰

⁷³ 42 U.S.C. § 7479(3) (2012).

⁷⁴ *Id.* § 7475(a)(4). The definition literally applies to all emissions of regulated pollutants, but the D.C. Circuit held in *Alabama Power* that BACT applies only to significant emissions. *Ala. Power Co. v. Costle*, 636 F.2d 323, 404, 405 (D.C. Cir. 1979). For EPA’s significance levels, see 40 C.F.R. § 51.166(b)(23)(i) (2014).

⁷⁵ *UARG*, 134 S. Ct. at 2456–58 (Alito, J., dissenting).

⁷⁶ *Id.* at 2448.

⁷⁷ *See id.* at 2448–49; *see generally* Steven D. Cook, *EPA Regulation of Greenhouse Gas Emissions Starts Smoothly, but Opponents Unconvinced*, 42 *Env’t Rep.* (BNA) 718 (Apr. 1, 2011) (finding that the PSD requirements for greenhouse gases have gotten off to a smooth start).

⁷⁸ *UARG*, 134 S. Ct. at 2456 (Alito, J., dissenting).

⁷⁹ 42 U.S.C. § 7479(1).

⁸⁰ 40 C.F.R. § 51.166(b)(23)(i) (2014) (defining “significant” for various air pollutants, such as 40 tons per year for nitrogen oxides, 10 tons per year for hydrogen sulfide, and 0.6 tons per year for lead).

In fact, the D.C. Circuit rejected EPA's attempt in the 1970s to require BACT only for pollutants emitted from a major emitting facility in "major" amounts.⁸¹

Justice Alito also argues that BACT is "fundamentally incompatible with the regulation of greenhouse gas emissions."⁸² To support this, he contends that the case-by-case nature of BACT determinations means that localized air conditions must be considered; since greenhouse gases do not have localized impacts, they therefore cannot be covered.⁸³ This does not logically follow. The case-by-case determination of BACT is of what the proposed plant can feasibly do to control its emissions. Ambient air pollution problems are taken into account, but they are only a subsidiary part of the BACT determination.⁸⁴

Justice Alito, though, asserts that BACT will not work for non-localized pollutants such as greenhouse gases because it will not be possible to estimate benefits as part of the balancing that is inherent in determining what is the "best."⁸⁵ Yet Congress did not require a cost-benefit analysis of a proposed BACT limit, but instead required only that the permit-writing authority take into account environmental as well as energy and economic impacts.⁸⁶ This language leaves permit writers broad discretion. Moreover, the BACT limit is ultimately based on what is achievable. Justice Alito forgets the teaching of *American Textile Manufacturers v. Donovan*,⁸⁷ that a standard based on compelling what is feasible is inconsistent with requiring a cost-benefit comparison.⁸⁸

Perhaps Justice Alito's prediction that BACT is unworkable will be proven correct. But that is not a reason to reject BACT as applicable to greenhouse gases. Precedent makes clear that the plain language of a statute should be disregarded as absurd only in the most extreme cases,⁸⁹ because otherwise courts would overrule legislatures too often on what are essentially policy grounds. Moreover, as mentioned above, the philosophy behind the Act is preventative: in case of doubt about whether regulation is appropriate, the Agency and courts should lean to the side of protection of health and environment.⁹⁰ Justice Alito's opinion disregards this approach, instead undercutting Congress's intent with a preference to resolve doubts in a way that obstructs regulation.

B. *The Flaws in the BACT Portion of the Opinion*

Thus Justice Scalia's approach is superior to Justice Alito's. But Justice Scalia's opinion largely takes with one hand what he gives with the other. Pres-

⁸¹ *Ala. Power Co. v. Costle*, 636 F.2d 323, 405 (D.C. Cir. 1979).

⁸² *UARG*, 134 S. Ct. at 2456–58 (Alito, J., dissenting).

⁸³ *Id.* at 2456–57.

⁸⁴ See 42 U.S.C. § 7469(3).

⁸⁵ *UARG*, 134 S. Ct. at 2457.

⁸⁶ See 42 U.S.C. § 7479(3).

⁸⁷ 452 U.S. 490 (1981).

⁸⁸ *Id.* at 506–10.

⁸⁹ See PETER L. STRAUSS, LEGISLATION: UNDERSTANDING AND USING STATUTES 429 (2006).

⁹⁰ See *Ethyl Corp. v. EPA*, 541 F.2d 1, 27–29 (1977) (en banc), cert. denied, 426 U.S. 971 (1977).

ently there is little that control technology can do to limit greenhouse gas emissions. Control measures mainly consist of increasing a plant's energy efficiency. To be sure, EPA believes that carbon capture and storage is available for new coal-burning electricity units⁹¹—but this is quite controversial.⁹²

Yet Justice Scalia's opinion casts doubt on whether BACT can be based on energy efficiency measures. He begins his BACT discussion by citing the fears expressed in one industry brief that subjecting greenhouse emissions to BACT would regulate energy use and thus cause across-the-board regulation, from a plant's light bulbs to basic industry processes.⁹³ Justice Scalia's opinion sympathizes with this argument because EPA's BACT guidance document for greenhouse gases states that energy efficiency improvements will be the foundation of BACT determinations.⁹⁴ But Justice Scalia notes that "more traditional end-of-stack controls" would also be considered.⁹⁵ His opinion then refrains from deciding whether BACT may be used to promote energy efficiency.⁹⁶ This language thus creates doubt as to whether a permit writer may consider energy efficiency measures when determining what is the lowest emission limit a source may consider.

Justice Scalia (and the industry brief writer) seem to be assuming that BACT can only encompass "end-of-stack controls," such as a particle collector. But the language of Clean Air Act section 169(3), which defines BACT, defies that assumption. The definition of BACT covers process changes and "available methods, systems and techniques, including fuel cleaning, clean fuels or treatment or innovative fuel combustion techniques."⁹⁷ While energy efficiency is not specifically mentioned, it would seem to be encompassed in "methods, systems and techniques." Justice Scalia's disregard of the statutory language is puzzling, to say the least, particularly for a Justice who is known for emphasizing the importance of statutory text.

CONCLUSION

Justice Scalia's dicta may have significance beyond BACT. Greenhouse gas emissions from stationary sources can be effectively reduced only through limiting emissions from existing sources, particularly existing coal-fired electricity generating units. Such units account for about forty percent of the United

⁹¹ Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1430, 1430 (Jan. 8, 2014).

⁹² See, e.g., Dean Scott, *House Panel Clears Measure to Prevent EPA from Curbing Power Plant Carbon Emissions*, 45 Env't Rep. (BNA) 142 (Jan. 14, 2014).

⁹³ *UARG*, 134 S. Ct. 2427, 2447 (2014) (citing Brief of Petitioners in No. 12-254, the Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation and the Glass Packaging Institute at 7, *UARG*, 134 S. Ct. 2427 (No. 12-1146)).

⁹⁴ *Id.* (citing EPA, PSD AND TITLE V PERMITTING GUIDANCE FOR GREENHOUSE GASES 29 (2011), <http://perma.cc/WPS9-3HHV>).

⁹⁵ *Id.* at 2447.

⁹⁶ *Id.* at 2447-48.

⁹⁷ 42 U.S.C. § 7479(3) (2012).

States' carbon dioxide emissions⁹⁸ and one-third of the United States' greenhouse gas emissions.⁹⁹ EPA has proposed a rule to cut these emissions by requiring states to apply the best system of emission reduction to existing electricity generating plants.¹⁰⁰ Each state would be assigned a reduction goal based on ways EPA believes are feasible for cutting emissions, including requiring energy efficiency measures on existing plants, increasing the use of natural gas and renewable energy instead of coal, and encouraging energy conservation by consumers.¹⁰¹ The aim is to achieve a thirty percent reduction in carbon dioxide emissions from power plants by 2030 from 2005 levels.¹⁰²

There is controversy about whether EPA can do this.¹⁰³ Justice Scalia's opinion throws fuel on the fire by casting doubt on whether energy efficiency and other controls, other than end-of-stack control technology, can be used either for existing or new sources. But his opinion does so only by ignoring the language of the Act. Other courts should reject his approach to the permissibility of these methods under the statute's BACT definition.¹⁰⁴

Thus we see again that while Justice Scalia's holding is correct, the language of Justice Scalia's opinion is not.

⁹⁸ See Megan Ceronsky et al., *Resolved: EPA and States Can Regulate Emissions Outside the Facility Fence Line Under Clean Air Act § 111*, 44 *Env'tl. L. Rep.* (Env'tl. Law Inst.) 10255, 10255 (Apr. 2014).

⁹⁹ See *National Greenhouse Gas Emissions Data*, EPA, <http://perma.cc/L26U-9A55>.

¹⁰⁰ See *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 *Fed. Reg.* 34,830, 34,836 (June 18, 2014) [hereinafter *Clean Power Plan Proposed Rule*].

¹⁰¹ For a readable and short summary, see Dave Hawkins, *Unpacking EPA's Carbon Pollution Proposal*, SWITCHBOARD (June 5, 2014), <http://perma.cc/8CTT-HUEY>.

¹⁰² *Clean Power Plan Proposed Rule*, 79 *Fed. Reg.* at 34,832.

¹⁰³ See, e.g., Andrew Childers, *Murray Energy Files Second Lawsuit to Block EPA Carbon Dioxide Standards*, 45 *Env't Rep.* (BNA) 2455 (Aug. 15, 2014).

¹⁰⁴ EPA's program would also be hindered by Justice Scalia's dictum against an agency finding a new power to regulate in an extant statute. See *supra* text accompanying notes 70–71.