

WHO'S REALLY BLOWING SMOKE?

Scalia needs a new dictionary

By Norman A. Dupont

In one of the most notable environmental cases of this term, the U.S. Supreme Court held in a 5-4 opinion that under the plain meaning of the Clean Air Act, the EPA was simply not justified in refusing to regulate various “greenhouse gases.”

Much has already been written about the potential impact of this case, and the potential implications for Congress, the states and municipalities in regulating carbon dioxide and other gases that contribute to what a consensus of scientists agree is a warming trend caused, in significant part, by human activity.

But what's especially notable here is Justice Antonin Scalia's dissenting opinion on the merits of the Clean Air Act. In it, he reaches a new level of linguistic contortion in order to reach a result supporting the Bush administration and its EPA bureaucrats.

This case presents one of the most unusual procedural postures

Norman A. Dupont is Of Counsel at Richards, Watson & Gershon and a member of the firm's Environmental and Energy Department and Water Rights and Water Law Practice Group. Mr. Dupont represents both private and public sector clients in a wide variety of environmental litigation matters and specializes in the complexities of CERCLA, RCRA and other environmental statutes and regulations. Mr. Dupont has published articles about environmental law issues including the chapter “Abandoned Hazardous Waste Liability” for the Environmental Law Practice Guide.

of a Washington bureaucracy — one in which the bureaucracy claims not just that it should defer regulating something, but that it lacks statutory authority to do so.

Massachusetts and 11 other states, two cities, the District of Columbia, American Samoa and a host of public interest groups petitioned the EPA in 1999 to regulate the so-called greenhouse gases: carbon dioxide and three other gases that purportedly contribute to an atmospheric “greenhouse” effect of trapping hot air within the earth's surface.

EPA duly — but slowly — responded to the petition, inviting public comments and soliciting the opinion of a scientific body, the National Research Council, on the question of whether greenhouse gases contributed to the observed trend of global warming. In 2001 the NRC concluded that “[g]reenhouse gases are accumulating in [the] Earth's atmosphere as a result of human activities,

causing surface air temperatures and subsurface ocean temperatures to rise.”

Two years after the NRC report — and almost four full years after the filing of the original petition — the EPA issued its final denial. Although the EPA asserted that it declined to regulate greenhouse gases for a variety of political reasons, the agency also justified its denial of the states' petition based upon that rarest of regulatory conclusions — that it lacked statutory authority to regulate such gases as “air pollutants” under the Clean Air Act.

EPA's curious regulatory position caused a three-way split among three judges in the D.C. Circuit and quickly arrived on the



JASON DOY

Supreme Court's docket.

The court held that EPA "got it wrong" on both reasons it offered for not regulating greenhouse gases.

Justice John Paul Stevens quickly dispatched EPA's argument that greenhouse gases were not "air pollutants," finding that the agency's position was foreclosed by the "statutory text" which was "unambiguous." The CAA defined "air pollutant" to include "any physical, chemical ... substance or matter which is emitted into ... the ambient air ..." For Justice Stevens and four other members of the court, the word "any" meant "any."

After disposing with the rest of the EPA's argument, the D.C. Circuit was reversed and the case remanded.

The dissenting opinions included all of the traditionally described conservative justices — Chief Justice John Roberts and Justices Scalia, Clarence Thomas and Samuel Alito. The chief justice authored a dissent that contested the "standing" of Massachusetts (or any other plaintiff) to litigate the case.

Far more provocative, however, was Justice Scalia's separate dissent (joined by Roberts, Thomas and Alito) supporting the merits of EPA's decision not to regulate greenhouse gases.

Just last term, in another landmark environmental case involving the Clean Water Act — *Rapanos v. U.S.*, 126 S. Ct. 2208, 2220-21 (2006) — Justice Scalia authored an opinion (joined by the other three "conservative" justices) that found the "plain meaning" of the Clean Water Act in Webster's New International Dictionary (Second Edition) and held that this "plain meaning" required rejection of Army Corps of Engineers wetlands regulations that were inconsistent with the plain meaning of the term "waters."

Now, however, confronted with a statutory definition that would strike some (including a majority of his own colleagues) as relatively "plain" — i.e., defining air pollutant as including "any" physical or chemical substance emitted into the air — Justice Scalia did a two-step dance to argue that the statute was in fact "ambigu-

ous" and therefore "discretion" should be left to EPA to interpret this term.

To do this, Scalia employed verbal prestidigitation of the first order: The phrase "including any physical or chemical emitted into the air" is ambiguous, according to Scalia, because it is preceded by the phrase "air pollution agent." This phrase is ambiguous, because the term "air pollution" (as opposed to "air pollutant") is not defined by the statute. Therefore, according to Scalia, deference must be given to EPA's definition of the term.

Not content, however, with doing the two-step dance to distinguish between a term defined by the statute ("air pollutant") and an undefined term ("air pollution"), Justice Scalia then indicates that the term "air" — as defined by his favorite Webster's New International Dictionary (Second Edition, 1949) — actually favors EPA's view that Congress only intended to regulate emissions into the "lower levels" of the air, not the higher rarified air levels that a scientist might label the stratosphere.

In a verbal distinction that even a medieval scholastic would envy, carbon dioxide is an "air pollutant" if emitted into what Justice Scalia deems the "traditional ambient air" and it causes immediate harm (e.g., suffocation). But carbon dioxide that is emitted into the traditional air and migrates into the stratosphere where it causes harm by reflecting back onto the earth's surface other off-gassed warm air is, for Justice Scalia, then not an "air pollutant."

In explaining this exceedingly recondite distinction, Justice Scalia writes: "In other words, regulating the buildup of CO2 and other greenhouse gases in the upper reaches of the atmosphere, which is alleged to be causing global climate change, is not akin to regulating the concentration of some substance that is *polluting the air.*" (emphasis in original)

Aside from the small point that nowhere does the statute make this distinction between "lower" air and "upper" air, Justice Scalia also conveniently relies upon a 1949 dictionary definition of "air." He cites Webster's, now with a slightly earlier publication date than the one he cited in

Rapanos of 1949. But, if Justice Scalia consulted the same dictionary in its third edition in 1961, he would have found the word "air" defined in the first definition as:

"1.b.: a mixture of invisible odorless tasteless compressible elastic sound-transmitting and liquefiable gases ... *that surrounds the earth, half its mass being within four miles of the earth's surface ...*"

It is, of course, the first layer of air in scientific terms, the troposphere, that starts at the earth's surface and continues upward for the first six miles above the surface, that impacts all human weather.

This 1961 definition, which might have been consulted by a curious congressman in 1970 when the Clean Air Act was originally enacted, would fully support a very expansive definition of the term "air" and "air pollutant." Justice Scalia simply picks an earlier dictionary from 1949 to find a definition of "air" that suits his purpose. Justice Scalia's sharp rhetorical flourish against a more expansive definition of the Clean Air Act is to argue that the expanded definition espoused in the majority opinion would mean that "everything airborne, from Frisbees to flatulence, qualifies as an 'air pollutant.' This reading of the statute defies common sense."

Thus, Justice Scalia and his conservative colleagues, who generally espouse the "plain meaning" doctrine, contort the word "air" based upon a dictionary definition that was outdated well before the 1970 enactment of the CAA in order to reach their own "common sense" definition of the term. This apparently temporary abandonment of the "literal interpretation" doctrine is almost as curious as a government agency's position that it lacks authority to regulate something under its governing statute.

Alternatively, there may be those who conclude that Justice Scalia's dissent — which creates ultra-fine distinctions between "air pollutant" and "air pollution" to find ambiguity, and rests upon a 1949 dictionary to define the word "air" — is itself filled with everything, from Frisbees to flatulence.

