



By Richard Lazarus

## Leaders in Clean Air Act Litigation

Sidley & Austin's Peter Keisler has quickly become the leading industry appellate and Supreme Court lawyer in Clean Air Act litigation. His advocacy skills, both written and oral, are as good as the best of the Supreme Court bar these days. And that places Keisler in exceedingly impressive company.

What distinguishes Keisler from others is his instinct for the sensible, rather than the jugular. All too often, those environmental law experts representing industry bury their own lede. They insist on loading down their briefs and arguments with every possible argument in displaying their extraordinary knowledge of environmental law's many technical intricacies.

Keisler, by contrast, displays a knack for identifying the best argument and the discipline to walk away from other, less promising arguments that clients may like to hear, but will do little to garner a majority vote. He shies away from intricacies that are too elusive to be persuasive. And he consistently finds clear words to explain even the most convoluted of statutory provisions. All of these skills were on display in Keisler's oral argument before the justices this past December in *EPA v. EME Homer City Generation*.

Yet, it was Deputy Solicitor General Malcolm Stewart, representing EPA, who stole the show. Stewart had the heavier lifting. EPA had lost on two independent grounds below, and walking

into the Court for argument Stewart lacked the clear fifth vote necessary to win on either, let alone both, grounds.

The first was that EPA had failed to provide upwind states with an adequate opportunity to develop their own plans for eliminating their emissions that interfered with downwind state air quality, before imposing EPA's own plan on the states. The second was that the agency had improperly considered economic efficiency in determining emissions reductions, requiring those upwind states with cheaper emissions reduction costs to reduce more than those with higher costs. According to the court below, the statute's plain meaning required emissions reductions to be based instead on a straightforward numerical quantification of how much each state "contribute[d] significantly" to downwind nonattainment, with each state accordingly reducing emissions no less than that amount.

Stewart wisely tackled the second issue first because it was the hardest. And he did a masterful job of arguing that the word "significantly" in its statutory context could lawfully extend to considerations such as cost efficiency. Borrowing from the chief justice's playbook from his own days as a leading Supreme Court advocate, Stewart relied on entertaining analogies to support his argument that the term "significantly" could fairly consider the level of difficulty (like cost) in achieving a particular result.

"In common parlance, we might say that dunking a basketball is a more significant achievement for someone who is 5 feet 10 than for somebody who is 6 feet 10." And "if you had a basketball team that lost a game by one point, and the coach was asked to pinpoint the plays that contributed significantly to the defeat, the coach would be much more likely to identify a missed layup or a turnover than the missed half court shot at the buzzer." Accounting for emission reduction costs was also equitable, Stewart added, because it effec-

tively credited states whose costs were higher now because they had reduced emissions in the past.

On the second issue, without missing a beat, Stewart insisted on the plain, unforgiving meaning of the statutory language. Pursuant to that language, upwind states had the obligation to determine in the first instance the emissions reductions required without any guidance from EPA. And, here having first failed to quantify their own obligations, upwind states were not entitled to a second chance after the agency made its own calculations especially where, as here, further delay would be at the expense of downwind state air quality.

On each issue, Stewart made clear headway with the bench and especially with Chief Justice John Roberts and Justice Anthony Kennedy, two possible fifth votes. The chief described the basketball hypothetical as "pretty good" and appeared to endorse Stewart's view that it demonstrated "significantly" could fairly account for degree of difficulty. Kennedy likewise seemed to accept the threshold plausibility that "significantly" could "import a judgmental component" "based on feasibility." The

chief also seemed closer to accepting EPA's view that it had not treated upwind states unfairly, by not giving them a second chance to determine their own emissions reductions:

"It is what the statute says; and it seems to me that, if EPA had taken a different view, it would have been contrary to the statute."

Even the best oral argument, of course, provides no assurance of victory. And *EME Homer* may prove no exception. Certainly both Keisler and Stewart were excellent advocates. Stewart's performance, however, was truly exceptional and may well prove the difference in a challenging case for EPA.

**Richard Lazarus** is the Howard J. and Katherine W. Aibel Professor of Law at Harvard University and can be reached at [lazarus@law.harvard.edu](mailto:lazarus@law.harvard.edu).

*Two excellent lawyers  
face off in oral  
arguments before the  
Supreme Court*